§ Law in Context

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Property Law

Commentary and Materials

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Acquiring title by possession

11.1. Introduction

When a person takes or retains possession of land or goods without the consent of the person entitled to them, three consequences follow. The first is that the person taking possession thereby acquires a title to an interest in the land or goods that is immediately effective against the whole world except those with a better right to possession. The second (modified but not removed altogether for registered land by the Land Registration Act 2002) is that the person who is dispossessed thereby acquires a right to recover possession (or, in the case of goods, a right to sue for damages and/or the return of the goods) which will be lost if not exercised within a limitation period. The third is that a title lost because not exercised within the limitation period is extinguished. It is not transferred to the usurper – the title the usurper acquired by taking possession in the first place simply becomes no longer subject to challenge from the person whose title is extinguished.

There are two distinct principles requiring justification here. We considered the justifications for the first principle – that possession, even if wrongfully taken, confers an entitlement protectable by law – in Chapter 7. In this chapter, we concentrate on the second principle – that those entitled to possession will be deprived of all entitlement without compensation merely as a result of neglecting to take action against usurpers in time. The justifications for this second principle deserve separate attention: what justifies the protection of possession against strangers may also, but need not necessarily, justify its protection against those with a better right. Before considering these justifications, however, it is necessary to appreciate how the system operates in this jurisdiction.

11.2. The operation of adverse possession rules

In both registered and unregistered land, the adverse possessor acquires title by taking possession. The process by which the paper owner's title is extinguished, however, now differs depending on whether the land is registered or unregistered.

11.2.1. Unregistered land

In *unregistered land* the paper owner's title is extinguished through the operation of the Limitation Act 1980. If the paper owner has taken no action to dispossess the adverse possessor within twelve years of the adverse possessor taking possession of the land, it loses its right to bring proceedings to evict the adverse possessor (section 15 of the Limitation Act 1980). The only action that will suffice is either evicting the adverse possessor or commencing proceeding against her. The twelve-year period runs from the moment that the adverse possessor takes possession, not from any earlier date (if any) when the paper owner moves out of possession (paragraph 1 of Schedule 1 to the Limitation Act 1980). Once the twelve year period has elapsed, the title of the paper owner is automatically extinguished (section 17 of the Limitation Act 1980). The twelve-year deadline is postponed if the paper owner can prove fraud, concealment or mistake, so that the twelve years do not start to run until the paper owner has discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake (section 32 of the Limitation Act 1980).

11.2.2. Registered land

In registered land the Limitation Act 1980 does not operate to extinguish either the paper owner's right to recover possession from the adverse possessor or the paper owner's title. Instead, the Land Registration Act 2002 has introduced a procedure whereby, after ten years of adverse possession, the adverse possessor may apply to become registered owner in place of the paper owner (paragraph 1 of Schedule 6 to the 2002 Act). The period of ten years was chosen in preference to twelve in anticipation of a general change in limitation periods recommended by the Law Commission in its report on limitation of actions (Law Commission, *Limitation of Actions* (Law Commission Report No. 270, 2001)). If the Land Registry is satisfied that the applicant does indeed have a *prima facie* case (paragraph 2 of Schedule 6) it must then notify the registered owner, who has sixty-five business days in which to object. If no objection is received by the end of that period, then the adverse possessor will be registered as owner and the paper owner will lose his title. If, however, the paper owner *does* object, he then has a further two years within which he can bring proceedings for possession to evict the adverse possessor. If he fails to do so within the two-year period, then the Land Registry will register the adverse possessor as owner and the paper owner will lose his title. Fuller details of the procedure, and an assessment of its likely effect, are given in Clarke, 'Use, Time and Entitlement' (Extract 11.4 below).

11.2.3. What counts as 'adverse' possession

In both registered and unregistered land, a claimant can only succeed if she can demonstrate that she has indeed been in possession for the requisite period. In the leading modern case on adverse possession, *J. A. Pye (Oxford) Ltd* v. *Graham* [2003] UKHL 30 (extracted at www.cambridge.org/propertylaw/), the House of Lords

made it clear that the adjective 'adverse' does not impose any additional requirement on a person who claims to have been in adverse possession for these purposes. In earlier cases, it had been said that the claimant had to prove not only that she had taken, and continued to be in, possession, but that the possession was in some sense 'adverse' to that of the paper owner. This involved questioning the intentions of both the adverse possessor (Had she intended to acquire ownership?) and the paper owner (Had the adverse possessor's actions interfered with his use of and intentions towards the land?). Slade J examined this approach in *Powell* v. *McFarlane*, discussed in Chapter 7, where an additional difficulty facing Mr Powell was that, however extensive his use of the field, it never interfered with McFarlane's present use of the property (because he had no present use for it) nor did it interfere with McFarlane's future plans for it. Slade J concluded that this prevented Mr Powell's possession from being 'adverse'. The effect of this decision on this particular point was reversed by paragraph 8(4) of Schedule 1, Part I, to the Limitation Act 1980, but nevertheless the argument resurfaced in a modified form. In this modified form attention was focused on the requirement of intention on the part of the intruder, and it was said that the intruder could not establish the requisite *animus possidendi* unless he could prove an intention to exclude the true owner *for all time*: it was not sufficient merely to show a continuing intention to exclude the paper owner for the time being. In practice, such a requirement is as insurmountable a hurdle for an adverse possessor as the implied licence doctrine. This is because of the court's insistence (emphasised by Slade J in *Powell* v. *McFarlane*) first that the intruder's intention must be inferred solely from what he did rather than from what he said, and, secondly, that the intention must be unequivocally manifested. If you look only at what the intruder does, even the most absolute assumption of physical control of land (such as locking it up and keeping the only key) is equally compatible with an intention to exclude the owner unless and until his future plans come to fruition as it is with an intention to exclude him for all time. The Court of Appeal faced up to this argument in *Buckinghamshire County Council* v. *Moran* [1990] Ch 623, and decisively rejected it, but not, however, without raising some other problems.

However, in *J. A. Pye (Oxford) Ltd* v. *Graham*, the House of Lords rejected all these arguments. Lord Browne-Wilkinson emphasised that the only question is whether the squatter has been in possession in the ordinary sense (paragraph 35). As he said:

> To be pedantic the problem [of definition] could be avoided by saying there are two elements necessary for legal possession:
>
> 1. A sufficient degree of physical custody and control ('factual possession');
> 2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess').
>
> What is crucial to understand is that, without the requisite intention, in law there can be no possession (paragraph 40).

He also emphasised (at paragraph 45) that the intention of the owner is irrelevant, and, while Lord Hope and Lord Hutton disagreed with this, both Lord Bingham and Lord Mackay expressed agreement with Lord Browne-Wilkinson, so this can be taken to be the decisive majority view.

It was also confirmed that the intention necessary on the part of the adverse possessor is the intention to *possess* not the intention to *own*: as Lord Browne-Wilkinson said, to suggest otherwise is 'heretical and wrong' (paragraph 45).

Consistently with this, it has been held that the paper owner's knowledge of the adverse possession is irrelevant – time begins to run as soon as adverse possession is taken, whether or not the paper owner is aware of it and even if he does not realise that he is entitled to object. So, for example, in the Court of Appeal decision in *Palfrey* v. *Palfrey* (1974) 229 EG 1593, the paper owner's title was extinguished even though he did not realise until long after the expiry of the limitation period that he had any interest whatsoever in the property (many years earlier, without telling him or anyone else, his grandfather had executed a deed transferring title to him). The position would, however, be different if fraud, concealment or mistake led to the paper owner being unaware of the adverse possession, as noted above.

It also follows that you can be in adverse possession even if you mistakenly believe you are the true owner. It had been accepted by the first-instance judge in *Hughes* v. *Cork* that in such a case you would never be in adverse possession because you never had an intention to exclude the paper owner, but this was firmly rejected by the Court of Appeal ([1994] EGCS 25) where Saville LJ exposed the fallacy in the argument:

> The learned Judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot, ex-hypothesi, have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say doing something illegal, could acquire such a title, while those who did not realise that they were doing anything wrong would acquire no rights at all. I can see no reason why, as a matter of justice or common sense, the former but not the latter should be able to acquire title in this way. What the law requires is factual possession i.e. an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else.
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> Obviously, if the possessor knows or believes someone else has the paper title to the land he must intend to exclude that person along with everyone else. But in the absence of such knowledge or belief it is in my judgment sufficient ... simply to establish a manifest intention to exclude everyone.

11.2.4. Effect on third party interests

When someone takes possession of land the interest they acquire title to is a fee simple estate in the land. At first sight, it might seem that, since the paper owner's title is never transferred to the adverse possessor, there is no reason why derivative

interests carved out of the paper owner's interest (for example, easements, covenants and mortgages) should be enforceable against the adverse possessor. However, this pushes the metaphor of property interests as bundles of rights too far. While in one sense third party rights in land are rights taken out of the grantor's bundle of rights, they are nevertheless rights in the *land* enforceable against the whole world (subject to rules about registration or *bona fide* purchasers). It therefore follows that, while an adverse possessor does not take over the paper owner's interest, nevertheless rights in the land enforceable against the paper owner will also be enforceable against the adverse possessor, just as they would be against anyone else who acquires an interest in the land without paying for it (i.e. other volunteers): see the decision of the Court of Appeal in *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, and also, for a modern application of the principle, *Carroll* v. *Manek* (2000) 79 P&CR 173 (person acquiring title to a hotel in Harrow-on-the Hill by adverse possession held to take subject to the mortgage over it granted to a bank by the paper owner before the paper owner's title was extinguished).

11.3. Why established possession should defeat the paper owner

Having sketched out how the system works, we can now return to the question of justification. In Chapter 4, we considered why possession should give rise to entitlement by looking at why the law protects the first person to take possession of a thing against all intruders. As we saw there, a variety of moral, social and economic arguments can be put in support of this basic principle that the law protects possessors against intruders. As long as we are considering only the rival claims of possessors and intruders, these arguments apply with equal force whether the possessor took possession lawfully or unlawfully. In this chapter, however, we want to consider how far these arguments take us when we are faced with the rival claims of the unlawful possessor and the 'true' owner who has failed to assert his entitlement over a long period of time.

In Extract 11.1 below, Richard Epstein sees the reconciliation of these rival claims as a balancing exercise, with the scales tipping over in favour of the possessor largely because of the practical problems of proof in adjudicating stale claims. He makes the point that it is not just that stale claims are difficult to adjudicate: if adjudicated, they are likely to be decided wrongly because poor evidence creates a bias in favour of the party with the weaker case, in much the same way as the weaker tennis player is favoured by a poor quality tennis court. John Stuart Mill points out another problem with stale claims: if long-dispossessed rightful owners can bring them, so too can spurious claimants, and their chances of succeeding or at least putting the rightful possessor to considerable trouble increase as the evidence grows scantier with time:

> According to the fundamental idea of property, indeed, nothing ought to be treated as such, which has been acquired by force or fraud, or appropriated in ignorance of a

> prior title vested in some other person; but it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transaction can no longer be cleared up. Possession which has not been legally questioned within a moderate number of years, ought to be, as by the laws of all nations it is, a complete title. Even when the acquisition was wrongful, the dispossession, after a generation has elapsed, of the probably *bona fide* possessors, by the revival of a claim which had been long dormant, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement. It may seem hard that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which (even looking at the individual case, and without regard to the general effect on the security of possessors), the balance of hardship turns the other way. With the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the aftergrowths which would have to be torn up or broken through. In no human transactions, not even in the simplest and clearest, does it follow that a thing is fit to be done now, because it was fit to be done sixty years ago. It is scarcely needful to remark, that these reasons for not disturbing acts of injustice of old date, cannot apply to unjust systems or institutions; since a bad law or usage is not one bad act, in the remote past, but a perpetual repetition of bad acts, as long as the law or usage lasts. (John Stuart Mill, *Principles of Political Economy*, Book II, Chapter II, section 2)

However, as Mill says, this is not just a question of practicalities. He and others argue that there comes a point when possession has been established for such a long period that it would be unjust to interfere with it, even in favour of someone who can prove that it was wrongly taken from them or their predecessors in the first place. For some commentators such as Radin, this is because of the importance of the bond between persons and possession that we looked at in Chapter 4. In her article, 'Time, Possession, and Alienation' (Extract 11.2 below), she argues that this justifies not only rewarding the first taker, but also protecting her against even the 'true' owner once the bond between true owner and possessions has been slackened by time to the point where it is now weaker than the bond that has been built up between the wrongful taker and the possessions. She also expresses doubts about the coherence of Epstein's stance, and tests Epstein's arguments, and the general justification for allowing acquisition of title by adverse possession, by viewing them from first Lockean, then utilitarian, and then Hegelian standpoints.

Radin points out the Lockean arguments (not necessarily put by or even acceptable to Locke himself) for favouring those who have made use of a thing for a long period over those who have allowed it to stand idle, and economic efficiency arguments can point the same way as well. In Extract 11.3 below, Carol Rose notes these arguments but suggests that the law might alternatively be interpreted as one that penalises those who fail to maintain clear communications of their entitlements, favouring instead those who are allowed, through the true owner's neglect, to put out signals of ownership to the rest of the world.

11.4. Adverse possession and registration

If titles to property interests are registered, is adverse possession still justifiable? As we see in Chapter 15, the process of registering all titles to land is now nearing completion in this country. Does this make adverse possession law redundant? As Rose points out, registration takes over the communication role from possession, and does so more clearly and unequivocally. It also takes over possession's role as title prover, and, as Dockray has demonstrated in his article, 'Why Do We Need Adverse Possession?', the early development of adverse possession in this jurisdiction was strongly influenced by its importance in the pre-registration conveyancing system.

However, this does not touch the other rationales for adverse possession put forward above, and, even in relation to its functions of proving title and communicating claims, it may be that possession can never be wholly replaced by registration: see the comment made by Merrill below in response to Epstein, and also the article by Clarke, 'Use, Time and Entitlement' (Extract 11.4 below). A joint Law Commission and Land Registry report on the reform of land registration, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001) expressed the strong view that it was wrong in principle that an owner should ever lose title to an adverse possessor, and that this was a necessary evil in an unregistered land system because it facilitated unregistered conveyancing, but was no longer justifiable in registered land. As a consequence of the recommendations made in the report, the Land Registration Act 2002 has made significant changes to the way adverse possession law operates in relation to registered land in this country, as we see below.

The arguments put forward in the Law Commission's report are set out in Clarke's article (Extract 11.4 below). In outline, it is asserted in the report that allowing the true owner's title to be extinguished as against an adverse possessor is 'at least in some cases, tantamount to theft' and has given rise to 'growing public disquiet'. The report gives as principal support for both assertions the *dictum* of Neuberger J in *J. A. Pye (Oxford) Ltd* v. *Graham* [2002] Ch 676, 710 quoted by Clarke, without, however, making any reference to the very different views expressed by the Court of Appeal in the same case. In the Court of Appeal it had been argued on behalf of the true owner that the English law which allows the title of the true owner to be extinguished in favour of an adverse possessor contravenes Article 1 of the First Protocol to the European Convention on Human Rights, by depriving the owner of his possessions or interfering with his peaceful enjoyment of them. This was rejected decisively by the Court of Appeal: as Mummery LJ said ([2001] EWCA Civ 117):

> [The provisions of the Limitation Act 1980 extinguishing the title of the paper owner] do not deprive a person of his possessions or interfere with his peaceful enjoyment of them. They deprive a person of his right of access to the courts for the purpose of

recovering property if he has delayed the institution of his legal proceedings for 12 years or more after he has been dispossessed of his land by another person who has been in adverse possession of it for at least that period. The extinction of the title of the claimant in those circumstances is not a deprivation of possessions or a confiscatory measure for which the payment of compensation would be appropriate: it is simply a logical and pragmatic consequence of the barring of his right to bring an action after the expiration of the limitation period.

Even if, contrary to my view, that Convention right potentially impinges on the relevant provisions of the 1980 Act, those provisions are conditions provided for by law and are 'in the public interest' within the meaning of article 1. Such conditions are reasonably required to avoid the real risk of injustice in the adjudication of stale claims, to ensure certainty of title and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims. The conditions provided in the 1980 Act are not disproportionate; the period allowed for the bringing of proceedings is reasonable; the conditions are not discriminatory; and they are not impossible or so excessively difficult to comply with as to render ineffective the exercise of the legal right of a person who is entitled to the peaceful enjoyment of his possessions to recover them from another person who is alleged to have wrongfully deprived him of them.'

The joint Law Commission and Land Registry report, however, demonstrates a fundamentally different approach. It categorises the typical adverse possessor as a 'landowner with an eye to the main chance who encroaches on his or her neighbour's land'. As pointed out by Clarke in Extract 11.4 below, this is not an accurate description of the adverse possessors we see in English reported decisions: as one might expect, they fall very much within the three categories that Radin identifies (see Extract 11.2 below concerning the role of good faith). However, the main thrust of the report is, first, that the stale claims justification is not applicable in registered land, and, secondly, that allowing adverse possessors to acquire registered title is incompatible with the principle of indefeasibility of title. For the reasons given by Clarke in Extract 11.4 below, neither of these arguments is wholly convincing.

11.5. Good faith and the adverse possessor

One of the innovations introduced by the Land Registration Act 2002 is an attempt to differentiate between 'good faith' and 'bad faith' adverse possessors. The way in which this is done, and the likely effect of the provisions, is considered by Clarke in Extract 11.4 below, but it should be noted that otherwise, as a matter of law, it is settled that 'bad faith' is not a bar to an adverse possession claim in English law. Whether 'bad faith' on the part of the adverse possessor *should* be relevant is a matter of controversy. Many of the justifications for adverse possession we look at below apply with equal force whether possession was taken in good faith or in bad faith, and it has been strongly argued that the adverse possessor's state of mind

ought to be irrelevant in this context: see in particular Goodman, 'Adverse Possession of Land – Morality and Motive'. However, as Radin points out in 'Time, Possession, and Alienation', pp. 746–50, it does rather depend on which rationale for adverse possession you consider predominant. After distinguishing three different paradigms of adverse possession case – the 'squatters' case, where aggressive trespassers take something they know does not belong to them, the 'color of title' case, where the possessor mistakenly believed she was entitled, and the 'boundaries' case, where the boundary line observed in practice by neighbours does not correspond with what their documents say, and eventually one of them litigates to correct the discrepancy – Radin considers the utilitarian, personhood and Lockean stances on the required state of mind of the adverse possessor:

> 1. UTILITARIANISM
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> The utilitarian argument is often stated as requiring simply that titles must be cleared to facilitate transactions now (i.e. for the immediate future). In this form, at least, the utilitarian argument seems to favor the objective standard making state of mind evidence irrelevant. State of mind evidence is one more cost of litigation, and presumably will result in fewer titles being cleared.
>
> Utilitarianism can countenance all three paradigms, and does not privilege the 'color of title' case over the case of the aggressive, productive trespasser. But the 'boundary' case seems unclear. Once the discrepancy between the record books and the lived boundaries is discovered, does it maximize the gain for the system as a whole to change the records to reflect the lived boundaries or to change the lived boundaries to correspond with the records? ...
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> 2. PERSONHOOD
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> ... Personality theory might seem to favor an explicit 'good faith' standard on the issue of the adverse possessor's state of mind, because it is unclear how one's personhood can become bound up with ownership of something unless she thinks she owns it. This may be its salient applicable intuition to modern law. If one of the things adverse possession does is protect developed expectations, in the sense of bonds between persons and things, it is hard to see how these bonds can be as strong in the case of people who know the object is not theirs. On the other hand, it seems Hegel contemplated that binding yourself to an object you know is not yours will ultimately make it yours. Still, it seems personality theory is more comfortable with the 'color of title' case than with 'squatters'. In the 'boundary' case, it would recommend, more clearly than would utilitarianism, that the boundaries as they are lived should after a while supersede the boundaries on paper ...
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> 3. LOCKEAN ENTITLEMENT
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> As already discussed, the pure Lockean theory does not countenance adverse possession. But perhaps it colors the theory of adverse possession anyway by lending some sympathy to 'squatters'. After all, if property is acquired from the common by a

> nonowner simply by taking it and using it, can we not sympathize with someone who does likewise with owned but unused property, especially if she does not know it is owned?

If 'bad faith' is to be taken into account, it might be desirable to do so in some way other than by making it an absolute bar to a claim. For example, Epstein, 'Past and Future: The Temporal Dimension in the Law of Property', pp. 685–9, has suggested that there could be a longer limitation period for bad faith takers. This, he argues, would both respect what he sees as the basic intuition that bad faith takers ought to be penalised, and promote finality, and it would remain justifiable on utilitarian grounds:

> Persons who engage in deliberate wrongs constitute a greater threat than those who make innocent errors or are simply negligent: there is a greater danger that intentional wrongdoers will do it all again. They are both bad people in the individual cases and a menace in the future, so in this context deterrence and retribution move hand in hand.

However, Radin has questioned the utilitarian good sense of this:

> But if the 'wrongdoers' are productive and the title holders are passive, are the 'wrongdoers' so wrong in the utilitarian sense? And, to carve out a subset of 'bad faith' cases makes evidence of 'bad faith' relevant in every case. This is a cost to the system and will fail to clear some titles where an accusation of 'bad faith' is wrongly made to stick. (Radin, 'Time, Possession, and Alienation', p. 747, n. 21)

Rather more promisingly, it has been suggested that those who lose their titles through a bad faith dispossession should be entitled to damages from the dispossessor, a suggestion that utilises Calabresi and Melamed's distinction (discussed in Chapter 6 above) between property rules and liability rules (Calabresi and Melamed, 'Property Rules, Liability Rules and Inalienability', Extract 6.8 above). This suggestion was made by Merrill in 'Property Rules, Liability Rules, and Adverse Possession', and summarised as follows:

> Helmholz's study totally convinced me that courts give extraordinary significance to their intuitions about whether or not the act of original entry was taken in good faith or bad faith. The legal doctrine, with the exception of a few states ... does not take this fact into account. What you have is a very unfortunate phenomenon of courts manipulating a doctrine that does not explicitly take good faith and bad faith into account to reach results that very much follow a pattern that the good faith possessor obtains title by adverse possession and the bad faith possessor does not. This situation creates immense amounts of tension and uncertainty because the doctrine says one thing and the courts come up with a different set of outcomes and results.
>
> What I would like to suggest ... is that you bifurcate the question of title and the question of treatment of the good faith and bad faith possessor. I suggest that we ignore the question of good faith and bad faith for adverse possession purposes – we would continue to transfer title to the bad faith possessor after the statute of limitations has run – but then grant an independent action for indemnification to the true

owner. If the true owner could show that the original entry was taken in bad faith, the true owner would obtain damages from the bad faith possessor equal to the fair market value of the property at the time of the original entry. Essentially, you would have a system of liability rules for bad faith possessors, and a system of property rules to adjudicate the question of title. Given my views about the important role adverse possession plays in facilitating real property transactions, I would not, absent this problem, advocate using liability rules here. But since we do have the problem of the bad faith possessor, and we see that the courts are overwhelmingly inclined to give that significance, it would be better as kind of a second best solution to let courts do justice at the stage of remedy by awarding damages against the bad faith possessor than struggling to ignore the issue for purposes of determining title.'

Extract 11.1 Richard A. Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667

The major cost associated with the passage of time is uncertainty. For risk-averse individuals, that uncertainty creates a cost that greater certainty could reduce. In addition, any increase of uncertainty increases the scope of the discretion lodged in both public and private hands. That discretion spurs private litigation that generates high administrative costs and high error rates. The passage of time therefore creates pressures, both public and private, to take steps to ensure that legal rights and duties do not depend on events that are remote from the present, either past or future. These practical demands often clash with the strict principles of corrective justice, where the passage of time is of no particular consequence in determining the relative rights and duties of all persons. As an abstract principle each violation of individual rights appears to require full redress on a case-by-case basis. The ungainly structure of legal doctrine is sometimes explained by the difficult task of reconciling these two inconsistent tendencies in a wide range of specific contexts ...

A. FIRST POSSESSION: PRIOR IN TIME IS HIGHER IN RIGHT

Temporal issues arise with evident urgency in the law of real property. Land itself lasts forever, and the improvements upon it can last for a very long time. The durability of the asset means that no one person can consume it in a lifetime, so that any legal relations with respect to land will of necessity involve a large number of persons over a long period of time. How then are these relationships to be sorted out?

[He then considers the reasons why the law protects first possessors: see Extract 4.1 above.]

At a normative level, the first possession rule precludes totally the acquisition of title by adverse possession. If no person is able to profit by his own wrong, then acts of adverse possession are by definition out of bounds, are flatly illegal, whether done by private parties or by the state.

Original acquisition starts the process by creating rights against the world. Within a framework of corrective justice, the passage of time, without more, has no influence upon the rights or duties of the parties to any dispute. Time is a wholly neutral factor,

as the system operates upon the assumption that individual rights and duties are a function solely of individual actions, to which personal credit or responsibility can be assigned. Thereafter, only voluntary acts of transfer (including transfer at death) can change the status of the legal title, while only acts of aggression (or deceit) by outsiders can give owners tort remedies against strangers.

In *Anarchy, State and Utopia*, Robert Nozick offers a historical account of justice, which is consistent with his theoretical perspective, but which is in no way sensitive to questions of temporal degree: rights are strictly determined by temporal priority. The older the title, the better the title – period. Sequence is everything; the magnitude of the interval is nothing.

Nozick's view of the first possession rule, like his view of entitlements generally, closely follows the pattern of common law rules of entitlements. Yet his analysis, as a species of ideal theory, fails to recognize that no system of justice works without frictions. These frictions generate a set of counterprinciples that are as important as the basic entitlements they limit. As a matter of high principle, what comes first is best; as a matter of evidence and proof, however, what comes last is more reliable and certain. As a result, any operating legal system responds to a powerful pressure to make everything turn on events that lie in or close to the present. Time dims recollections and allows people to forget or to suppress unpleasant evidence. It does not take a profound knowledge of human cognition or motivation to conclude that all evidence decays with time. One could quarrel over rate of decay. The decay function may or may not be linear, but it surely increases monotonically with time, and for many types of evidence it is probably steep. What should be done to counter the problem?

B. ADVERSE POSSESSION

1. Tension between principle and proof

The conflict between principle and proof manifests itself in the law of adverse possession. That body of law could scarcely arise in a world of zero transaction costs, for the true owner could always put the adverse possessor out instantly and regain possession of the land. When transaction costs are zero the wrongdoer will always be identified, and litigation will be error free. But practical frictions can dominate the system and shape its legal rules. Wrongs are not always instantly uncovered; it takes money to identify a wrongdoer, and more money to bring a suit, which could be erroneously decided. As time passes, it is more likely that the original or subsequent title will be split (by deed, and especially by will) among a large number of individuals, making management of a suit clumsy and awkward. With time, memories fade and witnesses die: no one can recall who did what to whom. Time forces a greater reliance upon documentary evidence, and even that may be forged, lost, altered or destroyed ...

What about the claim of the original owner against the adverse possessor? Here the pragmatic questions of proof are in systematic tension with the remorseless doctrines of original acquisition. In this situation, it is quite possible that the benefit of making the right determination decreases with time, given the way in which it disrupts present expectations of an adverse possessor who may well have improved or developed the land. Yet, even if the benefits of restoring the original owner remain roughly constant

over time, the basic point remains unchanged. The costs of making that determination continue to mount over time, so that at some point the lines cross, so that it ceases to be worthwhile to determine the facts on which an original and remote claim of right rests.

To be sure, one could try to compromise the difference by imposing new or heavier burdens of proof upon the plaintiff, or by making certain types of evidence (e.g. a purported deed to the property) necessary to establish the claim. Yet these intermediate solutions, taken by themselves, are defective. The passage of time does not work to the equal disadvantage of both sides. Indeed, to say that the change of timeframe has no effect at all on the outcome is a contradiction in terms. To the contrary, the passage of time, like any other reduction in the quality of evidence, produces a systematic bias for the weaker side.

To see the point, one can think of a tennis match between two professionals. Normally, one expects the better player to win. Yet, if the game is played on a rough surface, an element of randomness is introduced into the contest, shifting the odds back towards even, which thus works systematically in favor of the inferior player. In the extreme case (for instance, where the game is played in a junkyard or on the side of a cliff), the random elements completely dominate the skill elements; and the results of the game have little correlation to the players' skills. Litigation is like that. The passage of time tends to help the party with the weaker case by giving greater prominence to the random elements of the case. The moving party sues because there is some scrap of evidence that supports the claim, while all evidence on the other side is lost or misinterpreted. To avoid these situations, at some point it becomes necessary to end litigation, not to redefine its parameters. Hence the case for the statutes of limitations that lie at the core of the modern judicial doctrines of adverse possession.

The statute of limitations should be evaluated from the same institutional perspective that is brought to the first possession rule. The key value of the rule does not derive from the way it handles doubtful cases at the margin. It stems from the way in which the well-crafted statute of limitations shapes the primary conduct of private parties, thus preventing certain kinds of cases from being litigated at all. The point is not novel and was well brought out over sixty-five years ago by Ballantine [in his article, 'Title by Adverse Possession'] who in two brief paragraphs was able to articulate the tension between the search for perfect justice in a world of imperfect institutions:

> Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law. 'For true it is, that neither fraud nor might can make a title where there wanteth right.'
>
> The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: 'English lawyers regard not the merit of the possessor, but the demerit of the one out of possession.' It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object

> to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Ballantine is right to regard the choice between merit and demerit theories as a second order problem. He is also right on the institutional significance of statutes of limitations. The statute spares the rightful owner the costs of litigation that might otherwise be needed to establish title. The statute protects against claims that are most potent in principle, but most dubious in fact. It thus enhances the marketability of title by shortening the period during which prospective purchasers and lenders (both noted for their squeamishness) need examine the state of the title. That squeamishness arises from the enormous practical difference between a perfect title and a flawed one, however small the flaw. There is a real discontinuity at the origin, which is not replicated elsewhere in the distribution. *Any* doubt about the status of the title requires that everyone must shift from the deterministic to the probabilistic mode. Someone must estimate the extent of the risk, which is itself no trivial problem. Small risks are hard to measure, and they may provide telltale evidence of major weakness in the title. The minimum loss to uncertainty therefore is not the expected value of the defect in the title, but some threshold level of the legal and business expenses necessary to estimate it. These costs are greatest where the clouds on the title are oldest.

The statute of limitations generally avoids these title-clearing costs. Most critically it avoids them where title is in fact impeccable. The statute induces individuals to bring suit early, when it is more likely to be manageable, and the outcome correct. So viewed, protection of the guilty is not an end in itself, but the inevitable and necessary price paid in discharging the primary function of protecting those with proper title. [As Ballantine said, probably quoting Frederick Pollock]: 'It is better to favor some unjust than to vex many just occupiers.' What drives the statute is the need to control high administrative error and transactions costs. The statute's effectiveness would be wholly undermined if it were used to bar only invalid claims, for then the statute would bar claims only after they are litigated, when it is too late. The doctrine of adverse possession accepts the principle, prior in time is higher in right; but it marries this principle to a procedural system that makes it unnecessary to run the full course in order to establish the needed temporal priority. The contradiction between corrective justice and statutes of limitations is overcome because the error rate, when measured against the ideal of a rule of first possession, is lower with the statute of limitations than it is without it.

The theoretical justification for the general statute can, I think, be neatly explained by an analogy to the general principles of forced exchanges that dominate the law of eminent domain. The system of corrective justice provides all individuals with a framework of rights based upon the rules of first possession and voluntary subsequent transfer. The question is whether the removal of some of these rights through general rule can be justified on the ground that the shift in entitlement increases the overall utility of each individual, roughly in proportion to his original holdings. With statutes of limitations generally, it is difficult to think of any important component of

subjective value that would require distinguishing between wealth and utility in estimating the value in prior entitlements. While there are subjective values in the ownership of land, they can be fully protected by bringing timely suit. The question with statutes of limitations, as with other general rules, reduces therefore to this question: is the protection that each party is afforded *ex ante* by a statute of limitations worth more than the right of action that he might otherwise possess?

The argument in favor of statutes of limitations in the abstract is very simple. The reduction in error, administrative and transaction costs brings about a gain that can be shared by all parties to the system. In a world where everyone has an equal probability of being plaintiff or defendant, the shift in the laws should work to universal advantage. In a world in which some persons have a systematic bias to take the property of others, the question is less clear cut, for scoundrels may get (net) benefit from the limitations period. But, even here the overall gains from the statute seem so large that a substantial portion must inure to everyone subject to the rules in question. Everyone shares, for example, in the reduction in the administrative costs of operating the system; and they retain their full rights of suit where these have their greatest value. Those individuals who break the rules most frequently can be subject to additional sanctions, whether criminal penalties or punitive damages, within the limitation period to equalize the overall gains.

The real questions are not whether a statute of limitations in the round works some Pareto superior move. Instead, the harder question is one of fine tuning. What is the best way to structure the rules of adverse possession in order to maximize the general gain? Here in principle the usual caveats apply. One wants to consider this question, *ex ante*, both for the individual and for the aggregate. But as all players operate pretty much behind the veil of ignorance, with adverse possession it is possible to indulge a useful simplification not possible in many other contexts. The distributional question is not key. Any gain to the whole will maximize the gain to each of the parts.

Notes and Questions 11.1

1. Epstein seems to have land mainly in mind when he talks about the utilitarian benefits of adverse possession. Do his arguments apply with equal force to title to goods?

2. There are other utilitarian arguments for adverse possession, in addition to those given by Epstein. In response to Epstein's paper, Merrill (in 'Symposium', p. 813) lists some of them. In particular, he points out the importance of reliance, on the part of both the adverse possessor and third parties. In the case of the former, he says: 'We want at some point in time to be able to encourage people to invest and make improvements on their property even if they have questionable title to it. Adverse possession strengthens those expectation interests or gives some substance to them.' In the case of third party reliance, he makes the important point that we noted in Chapter 4: even when

there is a system of registration of titles to property interests in operation some third parties still have to rely on apparent ownership.

3. Ellickson, like Radin in the extract below, points out the incongruity of a libertarian – someone who believes that the law should allow individuals to pursue their own ends, as they individually define them, with a minimum of state interference – supporting adverse possession, which requires that the interest of the original owner should be sacrificed for the greater good of others: 'Libertarian principles make the expropriation of property without compensation highly suspect. Moreover, adverse possession in effect makes a landowner police against intruders. Libertarians usually bridle at the legal creation of affirmative obligations to act' (Ellickson, 'Adverse Possession and Perpetuities Law', p. 725). Would this criticism be met by a requirement that the adverse possessor (or perhaps the state?) should pay compensation to the owner whose title had been extinguished?

Extract 11.2 Margaret Jane Radin, 'Time, Possession, and Alienation' (1986) 64 *Washington University Law Quarterly* 739

I. TIME AND PROPERTY THEORY

A. Lockean entitlement

. . . [T]he temporal dimension is irrelevant to the Lockean theory of property [in that], at least in its classic form, it is only a theory of just acquisition, concerning itself only with the moment in which entitlements come into being. Entitlements come into being through mixing one's labor with an unowned object, or, in Epstein's version, through occupancy or first possession of an unowned object, and thereby are fixed forever. Thus, one moment in time is relevant to entitlement, the moment when non-property becomes property; but the temporal dimension of human affairs, our situation in an ongoing stream of time, is irrelevant.

The term 'just acquisition' belongs to the prominent neo-Lockean, Robert Nozick, who theorizes that justice in holdings ideally consists of whatever results from just acquisition and sequences of just transfers. This corresponds to saying that a holding is just if a valid chain of title and a valid root of title (in original acquisition out of the common) can both be shown. Here a temporal element enters in; the chain of title extends in time from original acquisition to today. Thus, in neo-Lockean theory, there is a temporal element connected with just transfer, but not with initial entitlement itself.

In a non-ideal world, there are sometimes rip-offs and frauds instead of just transfers. This makes necessary a third kind of theory in addition to a theory of just acquisition and a theory of just transfer; namely, a corrective justice theory, which Nozick calls a theory of rectification. Because Nozick is engaged mainly in ideal theory, he does not develop a theory of rectification. Whether a neo-Lockean theory of corrective justice would contain temporal elements is therefore unclear, but it seems, at least, that a Nozickian theory of corrective justice would not allow time to diminish the force of old

harms. In Neo-Lockean ideal libertarian justice there seems to be no statute of repose [i.e. statute of limitations]. Once the chain is tainted somewhere between original acquisition and today, corrective justice seems to require that titles be redistributed to undo the effect of the oppression or fraud, no matter how long ago. To say less than this would undermine the absolute nature of the Lockean rights of property acquisition and free contract.

B. Utilitarianism

Utilitarian theory is more directly time-bound. In act-utilitarianism the preferred or justified course of action is to maximize welfare (or utility, or whatever is the maximand) right now. But human interactions and our environment are dynamic, so as time moves on the preferred or justified course of action changes. Furthermore, in determining the preferred course of action the future is what governs. To judge an act by its consequences for utility is, from the standpoint of the time of making the decision, to rest rightness on prediction.

In rule-utilitarianism, the preferred or justified course of action is to maximize welfare (or whatever) in 'the long run' in contradistinction to right now. Hence, the dynamic nature of human affairs is more directly implicated in the preferred course of action. One consequence of this is that in rule-utilitarianism we are always cognizant of systemic concerns: How will any given choice affect the entire system of entitlements and expectations as it produces and maintains welfare over time? Thus, time is embedded at the heart of rule-utilitarianism. Indeed, its temporal heart harbors its deepest puzzles. How long is the long run? Does it include future generations? If so, how do we attribute utility (or whatever) to them, and how do we compare it with the utility of people alive today? Is the utility of people who are not alive today but were alive yesterday of any relevance? If so, at what point does the utility of the dead cease to count? In order to maximize utility, should we (in light of the principle of decreasing marginal utility) maximize population until everyone is at a bare subsistence level? And so forth.

C. Property and personhood

Time is also at the heart of the personality theory, but in a different way. In the Hegelian theory, ownership is accomplished by placing one's will into an object. A modern extrapolation of this idea suggests that the claim to an owned object grows stronger as, over time, the holder becomes bound up with the object. Conversely, the claim to an object grows weaker as the will (or personhood) is withdrawn. In other words, in personality theory the strength of property claims is itself dynamic because over time the bond between persons and objects can wax and wane.

Because personality theory concerns individual rights and not general welfare, it does not harbor the same temporal puzzles as rule-utilitarianism. Since it places entitlement in the present state of the relationship between person and object and not in some aboriginal appropriation, it also avoids the major problem of the Lockean individual rights theory. Personality theory must struggle instead with how to construe

the notion of personhood and the notion of relationships between persons and objects. In coherence and contextualist philosophical views, these central notions themselves are developing through history; that is, they have a temporal dimension.

II. ADVERSE POSSESSION

In this section, I shall comment on two aspects of Epstein's treatment of adverse possession, suggesting that his lack of clear focus on the varying role of the temporal element in the different theories of property results in some distortions. First, Epstein sees a tension between Lockean entitlement theory, which he refers to as 'principle', and what appears to be a form of rule-utilitarianism, which he refers to as 'pragmatic'. With respect to this opposition of principle and pragmatics, I suggest that Epstein himself is in tension with regard to the extent of his commitment to Lockean entitlement or rule-utilitarianism as his primary normative theory. Second, Epstein ignores personality theory. This might mean that he finds it wholly implausible as an explanatory/justificatory theory, and if so I differ with him. I think it sheds interesting light on some aspects of the problem of adverse possession.

A. Entitlement and utilitarianism: principle versus pragmatics?

First, let us consider the tension between Lockeanism and rule-utilitarianism with regard to adverse possession; that is, with regard to awarding title to present possession of sufficient length rather than seeking first possession. 'As a matter of high principle', Epstein says, 'what comes first is best; as a matter of evidence and proof, however, what comes last is more reliable and certain.' But why is it important to be reliable and certain, rather than simply pursuing what is best, letting the chips fall where they may? If entitlement is a matter of natural right, superior to all manipulations of the state in the interest of social welfare, why isn't this a matter of *Fiat justicia, ruat caelum*? For Epstein, at least, it is important to be reliable and certain because that will maximize the general gain. This is implicitly a species of rule-utilitarianism known as transactions-costs economics.

But now we are prompted to ask, if rule-utilitarianism governs entitlements now, why doesn't it govern entitlements then? That is, why doesn't Epstein simply argue that it is efficiency, suitably construed as 'long-run' or dynamic, that governs entitlements? If efficiency governs entitlements, then there is no tension between 'high principle' and the merely 'pragmatic', there is just the problem of what really is efficient, given the dynamic nature of the system. Certainly, the principle of first possession could be reconstrued in rule-utilitarian terms: It makes utilitarian sense to get things out of the common and into the control of a single decision-maker, and the principle of first possession is (the argument would run) cheaper to agree upon than others that might present themselves. The problem for a utilitarian who is trying to be a libertarian at the same time is rather that the thoroughgoing rule-utilitarian approach to entitlement seems not to be absolute; it seems, in fact, to require redistribution of entitlements under certain circumstances.

In other words, under thoroughgoing rule-utilitarianism, rearrangement of entitlements over time through means other than transfer by contract between individuals

cannot be confined to adverse possession. Whatever assumptions we choose about the long run and the role of the utility of future generations, etc., it is hard to construct a utilitarian argument concluding that an entitlement gained through first possession is fixed for all time. Utilitarianism is too empirical for such absolutes. For utilitarianism, 'pragmatics' *is* 'high principle'. All we have is some giant balance weighing the welfare gain from certainty of planning and transacting, and from not disturbing the 'subjective' value of developed expectations of continued control over resources, against the welfare losses from holdouts against land reform, or implementation of new technology, or the demoralization of the have-nots *vis-à-vis* the haves, etc. The advantage of Lockean (and Nozickian) natural rights theory is that it seems proof against non-contractual redistribution. The disadvantage is that it cannot account for adverse possession, which it appears the functioning legal system – the enforcer of those 'absolute' entitlements – cannot do without. Hence Epstein's tension. Does he intend to defend a pluralist meta-ethic? (Are absolute natural rights somehow involved in a paradoxical coexistence with utility maximization as the sole good?) Or does he intend to abandon natural rights theory and face the difficulties of utilitarian ethics? Epstein has not yet squarely faced this problem.

B. Property theory and adverse possession

Now let me complicate the question by throwing another 'ethic' into the hopper. For personality theory, adverse possession is easy, at least if one is envisioning possession by natural persons who successively occupy land. The title follows the will, or investment of personhood. If the old title holder has withdrawn her will, and the new possessor has entered, a new title follows. Title is temporal because the state of relations between wills and objects changes.

[She gives Hegel's own formulation of this in a footnote:]

'The form given to a possession and its mark are themselves externalities but for the subjective presence of the will which alone constitutes the meaning and value of externalities. This presence, however, which is use, employment, or some other mode in which the will expresses itself, is an event in time, and what is objective in time is the continuance of this expression of the will. Without this the thing becomes a *res nullius*, because it has been deprived of the actuality of the will and possession. Therefore, I gain or lose possession of property through prescription' (Hegel, *Philosophy of Right*, § 64 (T. Knox trans., 1952)). The result of this theory is to attach normative force, and not merely practical significance, to the bond developing between adverse possessor and object over time; and to attach normative force, as well, to the 'laches' of the title holder who allows this to happen.

Notes and Questions 11.2

1. Do you agree with Radin's argument that Epstein's utilitarian justification for adverse possession is incompatible with his general natural rights theory of property?

2. Compare Radin's personality theory argument for protecting adverse possessors with the arguments put forward by Hume and Bentham quoted in Chapter 4 above. Does the point made by Bentham argue for or against removing and conferring title by adverse possession?

3. Commenting on Radin's paper, Ellickson (in Merrill (ed.), 'Symposium', p. 814) points out that there is a utilitarian advantage in acknowledging the strength of the link between a person and a thing they have come to regard as their own, in relation to land at least:

> A utilitarian should see value in protecting people's territorial roots. The notion of territoriality is extremely important in biology. The sociobiologists who have ventured to apply biological theory to humans have understandably created controversy. Yet it is plausible that humans are to some degree territorial, and that this tendency has helped shape adverse possession law. Someone who resides or works on a particular piece of land has, in Peggy Radin's terms, invested his personhood in it, or, in my terms, is vulnerable to suffering demoralization costs upon being dispossessed from the property ... [In this paper] I therefore treat damage from uprooting as a demoralization cost. During the early stages of adverse possession, I assume demoralization considerations favor the original owners, but as time passes the adverse possessor can lay claim to deeper roots.

See further below, where he argues that this, together with other factors, can be utilised as a means of calculating an optimal length for limitation periods.

Extract 11.3 Carol M. Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73

[In adverse possession] we seem to have an example of a reward to the useful laborer at the expense of the sluggard. But the doctrine is susceptible to another interpretation as well; it might be designed, not to reward the useful laborer, but to require the owner to assert her right publicly. It requires her to make it clear that she, and not the trespasser, is the person to deal with if anyone should wish to buy the property or use some portion of it.

Courts have devoted much attention to the elements of a successful claim of adverse possession. [She then gives a number of examples from American cases.] No matter how much the doctrine of adverse possession seems to reward the one who performs useful labor on land at the expense of the lazy owner who does nothing, the crucial element in all these situations is, once again, communication ...

In Illinois, for example, an adverse possessor may establish his claim merely by paying taxes on the property, at least against an owner who is familiar with real estate practice and records. Why is this? Naturally, the community likes to have taxes paid and is favorably disposed towards one who pays them. But more important, payment of taxes is a matter of public record, and the owner whose taxes are paid by someone else should be aware that something peculiar is happening. Just as important, the *public* is very likely to view the taxpayer as the owner. If someone is paying taxes on my

vacant lot or empty house, any third person who wants to buy the house is very likely to think that the taxpayer is the owner because people do not ordinarily pay taxes on land they do not own. If I want to keep my land, the burden is upon me to correct the misimpression. The possibility of transferring titles through adverse possession once again serves to ensure that members of the public can rely upon their own reasonable perceptions, and an owner who fails to correct misleading appearances may find his title lost to one who speaks loudly and clearly, though erroneously ...

[She then considers why it is that property owners should make and keep their communications clear (see Extract 4.4 below) and argues that the communication must be in language that is understood. She illustrates this by reference to the American case, *Pierson* v. *Post*, 3 Cai R 175, 2 Am Dec 264 (1805), discussed in Chapter 4 above.]

The dissenting judge in *Pierson* v. *Post* may well have thought that fox hunters were the only relevant audience for a claim to the fox; they are the only ones who have regular contact with the subject-matter. By the same token, the mid-nineteenth-century California courts gave much deference to the mining-camp customs in adjudicating various Gold Rush claims; the Forty-Niners themselves, as those most closely involved with the subject, could best communicate and interpret the signs of property claims and would be particularly well served by a stable system of symbols that would enable them to avoid disputes.

The point, then, is that 'acts of possession' are, in the now fashionable term, a 'text', and that the common law rewards the author of that text. But, as students of hermeneutics know, the clearest text may have ambiguous subtexts. In connection with the text of first possession, there are several subtexts that are especially worthy of note. One is the implication that the text will be 'read' by the relevant audience at the appropriate time. It is not always easy to establish a symbolic structure in which the text of first possession can be 'published' at such a time as to be useful to anyone. Once again, *Pierson* v. *Post* illustrates the problem that occurs when a clear sign (killing the fox) comes only relatively late in the game, after the relevant parties may have already expended overlapping efforts and embroiled themselves in a dispute. Very similar problems occurred in the whaling industry in the nineteenth century: the courts expended a considerable amount of mental energy in finding signs of 'possession' that were comprehensible to whalers from their own customs and that at the same time came early enough in the chase to allow the parties to avoid wasted efforts and the ensuing mutual recriminations.

Some objects of property claims do seem inherently incapable of clear demarcation – ideas, for example. In order to establish ownership of such disembodied items we find it necessary to translate the property claims into sets of secondary symbols that our culture understands. In patent and copyright law, for example, one establishes an entitlement to the expression of an idea by translating it into a written document and going through a registration process – though the unending litigation over ownership of these expressions, and over which expressions can even be subject to patent or copyright, might lead us to conclude that these particular secondary symbolic systems do not always yield widely understood markings. We also make up secondary symbols

for physical objects that would seem to be much easier to mark out than ideas; even property claims in land, that most tangible of things, are now at their most authoritative in the form of written records.

It is expensive to establish and maintain these elaborate structures of secondary symbols, as indeed it may be expensive to establish a structure of primary symbols of possession. The economists have once again performed a useful service in pointing out that there are costs entailed in establishing any property system. These costs might prevent the development of any system at all for some objects, where our need for secure investment and trade is not as great as the cost of creating the necessary symbols of possession.

Notes and Questions 11.3

In Rose's rationale, adverse possession is justified by reference to acts of the owner, rather than by reference to what is done by the adverse possessor. In relation to land, does modern English law show a tendency to concentrate on what the owner did or on what the adverse possessor did? See section 11.4 below. Is the same balance apparent in the way English law treats goods? See section 11.5 below.

Extract 11.4 Alison Clarke, 'Use, Time and Entitlement' (2004) 57 *Current Legal Problems* 239

ADVERSE POSSESSION

In English law, title derives from possession. A person who takes *de facto* exclusionary physical control of land thereby acquires a right to possession of the land which the law protects against everyone except the true owner. The only right that a squatter ever acquires at common law is a title to the land based on its possession of the land, and it acquires this right immediately, simply *by* taking exclusionary physical control and at the point *when* exclusive physical control is taken. At common law lapse of time does nothing to mature or perfect this right – all it does is to eliminate the rival title of the true owner. Adverse possession is simply part of the law of limitation of actions, eliminating the right of the true owner to bring an action for possession if the right is not exercised within 12 years of it accruing. More importantly for present purposes, not only is the squatter not required to prove that she has positively used and enjoyed the land over a period of time, it is irrelevant whether or not she has *ever* made positive use of it. All she has to demonstrate is that she has excluded all others.[1] This is what robs a Lockean justification of adverse possession of much of its force in our legal

1 T. L. Anderson and P. J. Hill, 'The Evolution of Property Rights', in T. L. Anderson and F. S. McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton, 2003), pp. 135–6, note that, in the nineteenth-century American West under various homesteading laws ownership of frontier land was allocated to those who took first possession *and* took up occupancy (typically the acreage to which title could be claimed was limited) *and* made some specified use of (amounting to an investment in) the land, such as by building cabins, digging irrigation ditches, planting trees etc. Use does therefore appear to have been necessary for the claim to mature into a legal title. The adverse economic effects of this (premature settlement decisions, optimistically

system: the law does not award the land to the squatter rather than the 'true' owner because the former has demonstrated that she has made productive use of an unused or underused resource. The most one can say is that a 'true' owner who did not notice, or object to, being deprived of use of a resource for 12 years was making less productive use of it (in the short term, at any rate) than the squatter who at least bothered to take and keep control over it for a sustained period.

In other words, adverse possession simply rewards long *possession* by eliminating rival titles. If it also rewards long use and enjoyment, it does so only incidentally.

This absence of identity between possession and use is even more marked in the personal property equivalent of adverse possession. Although such questions are, oddly, located in personal property law under the heading of 'finding', it is now accepted that even a wrongful taker of possession of goods immediately acquires a title based on possession which is instantly enforceable against everyone but the person with a better right to possession, such as the true owner. It is the taking of physical control that does this, not long (or indeed any) use. The elimination of the title of the 'true' owner is a question of the disentangling of the complex limitation rules applicable to the tort of conversion, where the only relevant factor is the nature of the taker's act of taking. The question of what use was made of the thing since then is irrelevant.

ADVERSE POSSESSION AND THE LAND REGISTRATION ACT 2002

In the case of adverse possession, the Land Registration Act 2002 has made it dramatically more difficult for long use to ripen into unchallengeable title over time. Why has this been done? The 2002 Act implements recommendations made by the Land Registry and the Law Commission in their joint report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001, 'the 2001 Report') following publication of a joint consultation paper, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Commission Consultation Paper No. 252, 1998, 'the 1998 Consultative Document'). In the 1998 Consultative Document and the 2001 Report two justifications for the changes can be discerned, although they are not always clearly distinguished from each other.

The first is, in essence, that the law of adverse possession is a bad thing *per se*, capable of operating harshly and disproportionately in practice, justifiable in unregistered land because it facilitates unregistered conveyancing, but no longer justifiable when that rationale is removed by registration of title (the 'necessary evil' argument). The second is that the law of adverse possession is incompatible with the principle of indefeasibility underlying registration of title (the 'incompatibility' argument). Each of these is considered below.

mis-estimating the productivity of the land, resulting in up to 80 per cent relinquishment of claims in some areas) are also noted: *ibid*. See also D. Lueck in 'First Possession as the Basis of Property' in *Property Rights: Co-operation, Conflict, and Law*, *ibid*., 210, and also G. D. Libecap in 'Contracting for Property Rights' in the same volume at 150 and 156, noting similar respect given (by law and custom) to 'beneficial use' over and above physical control in Brazilian law.

THE NECESSARY EVIL ARGUMENT

As far as the first justification is concerned the basic premise – and for present purposes the most significant point – is that it is wrong in principle that a title should be defeated by a long-standing failure to take action to evict a squatter. Here, if anywhere, is the point at which one might expect a discussion of the fundamental question of whether long use should give rise to entitlement, and, if it should, whether the entitlement should trump that of the pre-existing title holder. However, the question is given no serious consideration in either the 1998 Consultative Document or the 2001 Report. Instead, the focus is on what is seen as the unfairness to the title holder of losing title through inaction.

So, for example, in paragraph 10.5 of the 1998 Consultative Document the law of adverse possession is described as 'at least in some cases, tantamount to sanctioning a theft of land'. This essentially hostile view appears again in the 2001 Report, most notably in paragraphs 2.70 and 2.71, the introductory explanation of why the drastic curtailment of the right of adverse possessors to acquire an unchallengeable title is being recommended.[2] These passages deserve detailed attention here.

Paragraph 2.70 starts by pointing to a perceived problem of public antagonism:

> . . . at the practical level, there is growing public disquiet about the present law. It is perceived to be too easy for squatters to acquire title . . .

Evidence given to substantiate this amounts to no more than a single *Daily Mail* headline:[3] 'Swat the squatters: Owners to be protected from home hijackers',[4] plus a *dictum* of Neuberger J, speaking at first instance in *J. A. Pye (Oxford) Ltd* v. *Graham* [2002] Ch 676, 710. Neuberger J's comments, as hostile to the institution of adverse possession as those of the Land Registry and the Law Commission, do not, however, purport to represent the views of anyone other than himself:

> A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, and that is a proposition to which at least in general nobody could take exception. However, if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate. Illogical because the only reason that the owner can be said to have sat on his rights is because of the existence of the 12-year limitation period in the first place; if no limitation period existed he would be

2 A fuller explanation appears in Part XIV of the 2001 Report, further reference to which is made below.

3 To be precise, the evidence provided is a reference forward to paras. 14.1 and 14.2 of the Report: these paras. refer to the *Daily Mail* headline and the Neuberger J *dictum* quoted here in this para., plus some paras. in Part X of the 1998 Consultative Document which are not in point here.

4 Appearing in the *Daily Mail* of 2 September 1988. Even this, however, turns out to be self-referential: the article concerned the Law Commission and Land Registry's own 1998 Consultative Document.

> entitled to claim possession whenever he actually wanted the land ... I believe that the result is disproportionate because, particularly in a climate of increasing awareness of human rights including the right to enjoy one's own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever.

Reliance on this *dictum* is all the more surprising because although it is quoted in full (not at this point in the 2001 Report but later on, at the opening of Part XIV which sets out the detailed recommendations on adverse possession, where it is said to 'encapsulate the concerns' that prompted the recommendations), at no point in the Report is it made clear that the Court of Appeal expressed the opposite view in the same case (at [2001] EWCA Civ 117, paragraph 52) reversing the decision of Neuberger J and also rejecting a submission that the law of adverse possession contravenes Article 1 of the First Protocol of the European Convention on Human Rights. In this context, Mummery LJ in the Court of Appeal said:

> 52. ... (2) [The provisions of the Limitation Act 1980 extinguishing the title of the paper owner] do not deprive a person of his possessions or interfere with his peaceful enjoyment of them. They deprive a person of his right of access to the courts for the purpose of recovering property if he has delayed the institution of his legal proceedings for 12 years or more after he has been dispossessed of his land by another person who has been in adverse possession of it for at least that period. The extinction of the title of the claimant in those circumstances is not a deprivation of possessions or a confiscatory measure for which the payment of compensation would be appropriate: it is simply a logical and pragmatic consequence of the barring of his right to bring an action after the expiration of the limitation period.
>
> (3) Even if, contrary to my view, that Convention right potentially impinges on the relevant provisions of the 1980 Act, those provisions are conditions provided for by law and are 'in the public interest' within the meaning of article 1. Such conditions are reasonably required to avoid the real risk of injustice in the adjudication of stale claims, to ensure certainty of title and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims. The conditions provided in the 1980 Act are not disproportionate; the period allowed for the bringing of proceedings is reasonable; the conditions are not discriminatory; and they are not impossible or so excessively difficult to comply with as to render ineffective the exercise of the legal right of a person who is entitled to the peaceful enjoyment of his possessions to recover them from another person who is alleged to have wrongfully deprived him of them.

This recognition by the Court of Appeal that there is a positive value in protecting 'established and peaceable possession of property from the resurrection of old claims' finds no echo in the Land Registry and Law Commission argument. Instead, the 2001 Report piles on the opprobrium by adding (still at paragraph 2.70):

> Precisely because it is so easy, adverse possession is also very common. Although the popular conception of a squatter is that of a homeless person who takes over an empty house (for whom there is understandable sympathy) the much more typical case in practice is the landowner with an eye to the main chance who encroaches on his or her neighbour's land.

Again, no statistical or even anecdotal evidence is provided to substantiate any of these assertions – i.e. that adverse possession is easy and very common, and that the typical squatter is a 'landowner with an eye to the main chance'. In fact, an acquaintance with recent case law – a poor substitute for empirical research – would suggest that, if anything, the popular conception of the typical squatter is probably nearer the mark than that of the Land Registry/Law Commission. An electronic database search (in Westlaw) reveals 44 adverse possession cases decided in the years 2000 and onwards. On a very rough categorisation, 6 of these concerned a 'landowner with an eye to the main chance' who encroached on to his neighbour's land. One could perhaps add to this group another two cases which appeared to involve casual trespass by strangers (as opposed to neighbours), taking over derelict land for their own use. 10 cases, on the other hand, concerned a 'homeless person taking over an empty house', and another 17 concerned occupiers whose possession either was or had been authorised at some stage (former tenants, prospective purchasers, relatives living in houses owned by a deceased whose estate had never been administered, directors or their relatives living in company owned property, a co-owner, and a former owner whose title had been divested by compulsory purchase). Four more appeared to arise out of genuine disagreement over boundaries, and another four arose where a parcel of land had been wrongly included in or excluded from a conveyance.[5] All of this of course proves nothing, in the absence of evidence of how often adverse possession in each category results in litigation (we know, for example that many local authorities have procedures for regularising squatting in empty residential property by granting licences or tenancies to established squatters), and evidence that this sample is representative. It does, however, perhaps leave the onus on the Land Registry and the Law Commission to explain how they arrived at their model of the typical squatter as the neighbouring landowner 'with an eye to the main chance'.

However, resting on this assumption, in paragraph 2.71 of the 2001 Report the Law Commission and Land Registry then question the soundness of the policy against allowing stale claims and allowing owners to sleep on their rights:

> ... it is possible for a squatter to acquire title by adverse possession without the owner realising it. This may be because the adverse possession is either clandestine or not readily apparent.[6] It may be because the owner has more land than he or she can realistically police. Many public bodies fall into this category. A local authority, for example, cannot in practice keep an eye on every single piece of land that it owns to ensure that no one is encroaching on it.

5 Another two arose out of reverter of titles under the School Sites Act 1841.

6 Here, a case *is* given to substantiate the proposition, albeit one reported 123 years ago: *Rains* v. *Buxton* (1880) 14 ChD 537, concerning adverse possession of a cellar.

Now one might think that, in popular opinion, this is precisely what local authorities should be doing. Even while keeping the focus wholly on the paper owner and ignoring the merits, if any, of the person who has meanwhile been making use of the land, land management practices that allow a public landowner not to notice that it has an adverse possessor for 12 years are difficult to justify, however great its unused land stock. The Law Commission and the Land Registry, however, take a different view. They cite in support of this proposition – i.e. as a case in which a local authority did not realise that a squatter was acquiring title to a piece of land because it could not in practice keep an eye on it – a well-known case, *Buckinghamshire County Council* v. *Moran* [1990] Ch 623 which they describe as involving 'a wealthy businessman who enclosed a piece of land that was owned by a County Council and was being kept by them as a "land bank" for future road-widening purposes'.

Leaving aside the trivial detail that the land appears to have been acquired in connection with a proposed bypass rather than for road-widening,[7] a reading of the reported Court of Appeal decision in *Buckinghamshire County Council* v. *Moran* [1990] Ch 623 reveals that what the case actually involved was a plot of land bought by the Council *thirty years* before they finally got round to bringing possession proceedings against Moran. The Council had done nothing to the land since acquiring it. They had not even fenced it off from Moran's adjoining garden. This was despite repeated requests from Moran's predecessor complaining about children trespassing on the land who were annoying him. So to call it a 'land bank' is perhaps slightly over-dignifying it. Moreover, far from failing to notice that someone was encroaching on the land, the Council had been in sporadic correspondence with Moran himself about it for more than 10 years before finally starting proceedings, and had known for at least five years before that that the land was being maintained by Moran's predecessor as part of his garden. Also, Moran did not enclose the land himself. This was done by the couple who sold him the house. It appears that Moran bought their possessory title to the land when he bought the house, which is not quite the same thing as clandestine land-stealing. The only thing the law report fails to reveal is whether or not he was a wealthy businessman.[8]

For present purposes, however, the significant point is that the Land Registry and Law Commission did not think it worth even considering whether those who had been making use of the land for thirty years thereby acquired any moral claim to it that might outweigh the claims of the title holder who had no use for it.

Instead, the Land Registry and Law Commission conclude paragraph 2.71 of the 2001 Report by giving other examples of what they perceive to be inappropriate losses of title through the doctrine of adverse possession, not justified by the principle that defendants should be protected from stale claims and claimants should not sleep on

7 The 1998 Consultative Document is more accurate: see fn 50 to para. 10.19 of the 1998 Consultative Document.

8 It *does* reveal that he originally moved into the house with his mother but later moved out (so presumably could afford to live separately from his mother), and that Conservative Party functions were held in the garden (so presumably one or both were Conservative Party members) – perhaps not conclusive evidence of wealth.

their rights. Again, the focus is entirely on the hazards of the title owner, rather than on any merits of the user of the land:

> ... the owner may not even realise that a person is encroaching on his or her land. He or she may think that someone is there with permission and it may take an expensive journey to the Court of Appeal to discover whether or not this is so. (For a striking recent illustration, see *J. A. Pye (Oxford) Ltd* v. *Graham* [2001] EWCA Civ 117; [2001] 2 WLR 1293, below, paragraph 14.1, where the issue was whether what had initially been possession under licence (in that case a grazing licence) had ceased to be so.) In none of these examples is a person in any true sense sleeping on his or her rights. Furthermore, even if a landowner does realise that someone – typically a neighbour – is encroaching on his or her land, he or she may be reluctant to take issue over the incursion, particularly if it is comparatively slight. He or she may not wish to sour relations with the neighbour and is, perhaps, afraid of the consequences of so doing. It may not only affect relations with the neighbour but may also bring opprobrium upon him or her in the neighbourhood. In any event, even if the policy against allowing stale claims is sound, the consequences of it under the present law – the loss for ever of a person's land – can be extremely harsh and have been judicially described as disproportionate.

It is difficult to see how the facts in the *J. A. Pye (Oxford)* case can be said to justify any of these observations, and again surprising to find the Court of Appeal's conclusion, in the same case, that the operation of the law is *not* harsh and disproportionate, passed over in silence in favour of Neuberger J's view that it is.

Stale claims in registered land

However, the kernel of the Law Commission and Land Registry necessary evil argument is that, even if – contrary to their apparent view – adverse possession is justifiable in relation to unregistered land because it furthers the policy of disallowing stale claims, the justification is removed in registered land. The implication is that claims never stale in registered land because we always know who the landowner is.

This claim is frequently made[9] but it is not immediately obvious why it should be true. In unregistered land, disputes about the identity of the paper title holder have not been particularly common, at least over the last century when unregistered conveyancing has been relatively efficient, if not swift. It is not usual for adverse possessors to claim that title was in fact transferred to them by deeds now lost, or that for some other reason they actually do hold the paper title. In most reported adverse possession cases the identity of the paper owner is not in issue. Registration of title ensures that a person who relies on her paper title as entitling her to evict a possessor, can never be defeated by a claim that at some time in the past title was transferred to the possessor or a predecessor by deeds that are now lost. However, it settles no questions of significance

9 See, for example, Martin Dockray, 'Why Do We Need Adverse Possession'? (1985) *Conveyancer* 272, where, however, the issue is fully explored.

in the common case of the opportunistic taker of vacant land, nor in cases where the adverse possession originated in possession which was or was thought to be lawful, nor even (since in our registration system boundaries are not guaranteed) in boundary dispute cases. In a perfect registration system it might be possible to eliminate cases arising because of parcels of land wrongly included or excluded from conveyances, but in the real registration world gaps and overlaps between adjoining registered titles do occur,[10] and will continue to do so unless we move to a system where all titles are surveyed. In all these typical adverse possession cases the decision turns not on the identity of the paper title holder but on what people might have done or intended, either at the time when possession first moved from paper owner to possessor, and/or at some subsequent time. Evidence of such matters stales quickly, and it is for this reason that there should be some limitation period during which displaced paper owners must bring their claims to recover possession. The stale claims problem, properly understood, is therefore not significantly ameliorated by registration of title.

Stale claims under the 2002 Act

Ironically, the changes made to adverse possession law by the LRA 2002 seem likely to make the stale claims problem worse, in at least two ways. Under the 2002 Act an adverse possessor may apply to become the registered owner of the land in place of the 'true' owner after 10 years of adverse possession (LRA 2002 paragraph 1 Schedule 6). Since this is two years less than the 12 years prescribed under the old law it looks superficially like a step in the right direction of bringing matters to court quicker. However, this is misleading. On receipt of such an application the Land Registry must notify the registered proprietor,[11] and may not register the applicant's title if the registered owner objects within 65 business days.[12] All stops will be pulled out to find the registered owner: the Land Registry must also notify any registered lessor, mortgagee or chargee[13] and any other person who can satisfy them that they could be adversely affected[14] so that the Land Registry can chase up the registered owner and spur him into action, and the Land Registry has itself said that it will usually arrange for its surveyor to inspect the land (at the squatter's cost) when the original application is made and then notify any other person 'known or suspected from other available information or our local knowledge to have become entitled to the estate affected'.[15] If after all this the registered proprietor is rounded up and objects, the registered proprietor is given a further two years in which to bring possession proceedings to evict the squatter. It is only if he fails to do so within

10 See, for example, *Johnson* v. *Shaw* [2003] EWCA Civ 894, *Prestige Properties Ltd* v. *Scottish Provident Institution* [2002] EWHC 330 (purchaser's search certificate wrongly showed strip between titles, believed to belong to vendor, as unregistered when it fact it was registered, partly under one of the vendor's titles but the rest under a neighbour's title), *Epps* v. *Esso Petroleum Co.* [1973] 1 WLR 1071, ChD, and *Chowood Ltd* v. *Lyall* [1930] 2 Ch 156.

11 LRA 2002 para. 2(1)(a) Sched. 6. There is a preliminary hurdle for the applicant – she must first satisfy the Land Registry that she has a *prima facie* case.

12 Land Registration Rules 2003, r. 189.

13 LRA 2002 para. 2(1)(b)–(e). 14 Land Registration Rules 2003, r. 194.

15 Land Registry Practice Guide 4 (March 2003) paras. 5.1 and 5.3.

the two year period that the squatter becomes entitled to be registered as proprietor in his place. There is therefore every incentive for the squatter to delay making an application for as long as possible – the longer she leaves it, the more likely it will be that the registered proprietor will prove to be untraceable. Equally, if the squatter does not make the first move to regularise her position, there is no incentive for the registered proprietor to bring matters to a head by bringing possession proceedings against her: however long the registered proprietor delays, he will never jeopardise his certainty of success.

Distinguishing the 'good' squatter from the 'bad' squatter

The second way in which the 2002 Act may well make the stale claims problems worse is by embarking on the brave but perhaps foolhardy enterprise of trying to distinguish the good squatter from the bad squatter. It has done this by providing exceptions to the general rule: in these exceptional cases the applicant will be entitled to become registered as proprietor after ten years notwithstanding objections by the paper owner. This will occur whenever one of the three 'conditions' set out in paragraph 5(2)–(4) of Schedule 6 to the 2002 Act applies:

(2) The first condition is that –
  (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and
  (b) the circumstances are such that the applicant ought to be registered as the proprietor.
(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.
(4) The third condition is that –
  (a) the land to which the application relates is adjacent to land belonging to the applicant,
  (b) the exact line of the boundary between the two has not been determined under rules under section 60,
  (c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and
  (d) the estate to which the application relates was registered more than one year prior to the date of the application.

It is at this point only that consideration of the merits of the squatter appears, but even at this point the issue of worth arising out of long user does not arise. Instead, the criterion is, essentially, reasonable belief in authenticity of title, which is quite a different matter. Distinguishing the good squatter from the bad squatter by reference to this criterion may or may not be a good idea in principle, and indeed we know that it can be done in practice. In 1983, Richard Helmholz reviewed the 850 appellate decisions on adverse possession in the United States reported since 1966 and demonstrated that, despite a law which made good faith on the part of the squatter irrelevant,

'good guy' squatters consistently won and 'bad guy' ones consistently lost[16] – which could be described as the courts making the distinction for themselves without any help from the law. There are certainly some English cases which illustrate a similar tendency.[17] More orthodoxly, other legal systems appear to achieve the same objective by having a specific good faith requirement, deriving from Roman law.[18]

However, there are two major objections to the way in which it has been done by the 2002 Act provisions. The first, not strictly relevant here, is that this is not a very good way of distinguishing the 'good guys' from the 'bad guys' even accepting the authenticity of title criterion. The first two conditions appear otiose (any applicant satisfying either of these conditions ought to be entitled to rectification of the register without having to rely on having been in adverse possession for a prolonged period) whereas the third is very narrowly confined, covering only the genuine boundary dispute and not extending to any other case in which the applicant acted in good faith in the sense of believing herself to be entitled to be there for reasons other than the mere fact of having actually been there for a prolonged period.

Problems of proof

However, the more important objection is that these conditions entitling long users to become registered owners – the first and third in particular – are almost certainly going to require proof of events and intentions of both parties going back much longer than the ten years specified, since the genuineness of a belief held for the last ten years will almost certainly require explanation of intentions and events occurring earlier, probably at the time when the applicant's possession first became adverse. For reasons already given, it seems likely that adverse possession cases will not come before the courts until very many years after the squatter first took possession – far more than ten. Are we really expecting the courts to be able to ascertain whether, decades ago, a person acquired a mistaken belief and then sustained it over the decade preceding the application?

It is no help to say that the burden of proof is on the squatter, and so only in the clearest and most meritorious of cases will a squatter be able to take advantage of these 'good faith' exceptions. We would do well to remember the tennis match analogy provided by Richard Epstein in support of his argument that lapse of time favours the person with the *least* meritorious case:

> To be sure, one could try to compromise the difference by imposing new or heavier burdens of proof upon the plaintiff ... Yet these intermediate solutions, taken by themselves, are defective. The passage of time does not work to the equal

16 R. Helmholz, 'Adverse Possession and Subjective Intent' (1983) 61 *Washington University Law Quarterly* 331, although see also R. A. Cunningham, 'More on Adverse Possession: A Rejoinder to Professor Helmholz' (1986) 64 *Washington University Law Quarterly* 1167.

17 For an example of articulated bias against the bad faith squatter see *Tecbild Ltd* v. *Chamberlain* (1969) 20 P&CR 633, 643, CA, where Sachs LJ described Mrs Chamberlain's claim to the field as an 'impudent attempt to gain £1,000-worth of property without having any right to it in law' and said that it 'rightly failed'.

18 See further Helmholz, 'Adverse Possession'.

> disadvantage of both sides. Indeed, to say that the change of time-frame has no effect at all on the outcome is a contradiction in terms. To the contrary, the passage of time, like any other reduction in the quality of evidence, produces a systematic bias for the weaker side.
>
> To see the point, one can think of a tennis match between two professionals. Normally, one expects the better player to win. Yet, if the game is played on a rough surface, an element of randomness is introduced into the contest, shifting the odds back towards even, which thus works systematically in favor of the inferior player. In the extreme case (for instance, where the game is played in a junkyard or on the side of a cliff), the random elements completely dominate the skill elements; and the results of the game have little correlation to the players' skills. Litigation is like that. The passage of time tends to help the party with the weaker case by giving greater prominence to the random elements of the case. The moving party sues because there is some scrap of evidence that supports the claim, while all evidence on the other side is lost or misinterpreted. To avoid these situations, at some point it becomes necessary to end litigation, not to redefine its parameters. Hence the case for the statutes of limitations that lie at the core of the modern judicial doctrines of adverse possession.[19]

Problems of proof of distant events in this context are exacerbated where corporate owners are involved, a significant factor given the steady increase in incorporation.[20] For a variety of reasons, corporate owners can make poor witnesses of events that happened in the past, and even worse witnesses of their own past intentions. Because corporations almost necessarily intend and act by individuals acting in concert and therefore presumably in communication with each other, they probably produce more contemporaneous written and oral evidence of their intentions and actions than most individuals acting in their personal capacity. However, there is a tendency for little of this to survive long, perhaps because efficient corporations have less pressing motives to bear the expense of archiving material than individuals have, or because most companies have much shorter lives than most individuals,[21] or because their lives

19 R. A. Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667.

20 The number of companies in England and Wales registered on the Companies Register increased from 1,250,300 at the start of 1998–9 (itself an increase of 7 per cent/8 per cent on the previous year) to 1,569,400 at the start of 2002–3: DTI Report for the year ended 31 March 2003, *Companies in 2002–2003* (July 2003) ('the 2003 DTI Report'), Table A1. Table A4 charts the steady rise in the annual number of new incorporations from 1862 (5,000) to 2003 (293,200).

21 The 2003 DTI Report gives the average age of companies on the register at 31 March 2003 as 9.5 years, with 90 per cent of all registered companies having been registered in the last 24.3 years: *ibid.*, Table A5. Listed companies (perhaps more likely to be significant property holders than small companies) show a similar age profile: of the 1,543 companies listed on the London Stock Exchange as at 27 February 2004 only 3 had attained the biblical life span for humans of three score and ten; the vast majority were under the age of 50 (1,414 out of 1,543), nearly two-thirds were under 14 years old (957 out of 1543) and 283 were under the age of 4: website of the London Stock Exchange.

are liable to be ended in dormancy or by liquidation or takeover[22] – events which are likely to lead to the destruction or dissipation of most records.[23]

If long use was *of itself* sufficient to confer entitlement these difficulties in proof would not much matter. Use tends to be an observable fact. But our adverse possession system depends on establishing possession, not use, and intention is an essential component of possession. Consequently, most adverse possessions are in some way or another dependent on establishing not only who did what, but also who intended what, at or since the inception of the requisite period.

Effect of the 2002 Act changes on the incidence of adverse possession

Those who do *not* agree that long use should give rise to entitlement – i.e. those who accept the necessary evil argument – may well consider that all these problems are a price worth paying if the consequence of the changes made by the 2002 Act is a decrease in the incidence of adverse possession. However, while it seems a fairly safe bet that the 2002 Act will result in a decrease in the number of adverse possessors who succeed in becoming registered proprietors, it seems unlikely that it will have any effect on the *incidence* of adverse possession. Indeed, there is every reason to think that there will be a significant *increase* in the number of long-term adverse possessors, i.e. in the incidence of 'established and peaceable possession of property' by people unauthorised by the registered proprietors.[24] Despite what the Law Commission and Land Registry say about landowners with an eye to the main chance, reported cases at least tend to suggest that many if not most adverse possessors take possession either mistakenly[25] or because they want the benefit of immediate use, rather than with an eye on the possibility of ultimately acquiring unchallengeable ownership ten or twelve years later.[26] They are therefore unlikely to be deterred by the prospect of their possession remaining technically challengeable for an indefinite period. The most likely effect of the new provisions is that adverse possessors will simply cease to

22 In 2002–3 15,756 companies in England and Wales went into insolvent liquidation, and another 2,738 were in some other form of insolvency procedure (Table C2 of the DTI 2003 Report). A survey carried out by Paul Dunne and Alan Hughes suggests that the proportion of company 'deaths' attributable to takeover by another company varies from about 41 per cent for small companies (assets under £1m) to about 72 per cent for the largest companies (assets over £64m): 'Age, Size, Growth and Survival: UK Companies in the 1980s' (1994) 42 *Journal of Industrial Economics* 115.

23 For recent examples of the critical importance of lost documentary evidence of the actions and intentions of corporate owners in this context see *R. (Beresford)* v. *Sunderland City Council* [2003] UKHL 60 (the problem is brought out most clearly in the first instance judgment reported at [2001] 1 WLR 1327 at para. 47) and *Johnson* v. *Shaw* [2003] EWCA Civ 894.

24 Mummery LJ in the Court of Appeal decision in *J. A. Pye (Oxford) Ltd* v. *Graham* [2001] EWCA Civ 117, in the passage quoted above.

25 I.e. because of a mistake over boundaries, or some other mistaken belief about entitlement or capacity.

26 In a number of reported decisions the squatter describes his state of mind as intending to stay until the paper owner takes steps to throw him out – a state of mind that the courts have sometimes found difficult to reconcile with the necessary intention to be in exclusive physical control, to the exclusion of the owner as well as the rest of the world: see, for example, *Powell* v. *McFarlane* (1979) 38 P&CR 452, *Buckinghamshire* v. *Moran* [1990] Ch 623 and *J. A. Pye (Oxford) Ltd* v. *Graham* [2001] EWCA Civ 117.

attempt to register their titles. Even those who dislike adverse possession cannot think this is a good thing. A land registrar's worst nightmare must be a land-holding system in which titles are regularly traded off the register, so that, eventually the register's record of property holding ceases to bear any relation to reality.[27] This is reported to have happened (in very different circumstances) in New Zealand earlier on in the twentieth century, when adverse possession was not permitted in relation to registered titles. In 1965, the New Zealand Land Registrar, D. J. Whalan, wrote:

> One of the claims of the supporters of the Torrens [registration] system is that it makes for certainty of title. However, paradoxically, in New Zealand, because Statutes of Limitation do not apply to land under the Land Transfer Act [i.e. land to which title is registered] a large number of titles are uncertain which would be quite secure, or would become secure with the passage of time, if they were not subject to the Act.
>
> In many cases, and in particular, in some of the mining areas, land has been purchased, title taken and then the purchaser either has abandoned the property or in some cases disposed of it by the simple process of handing over the certificate of title (sometimes with a crude form of transfer endorsed on it) on payment of the purchase money.
>
> In the latter case the chain of title can sometimes be established and the title cleared, but this is often a difficult and expensive matter. The expense often deters the current holder from clearing his title, which he hands on to his purchaser by means of an 'off the register' dealing. In the former case a person who takes possession of abandoned lands has a better title to it than anyone except the registered proprietor or his personal representatives, but his rights must always be postponed to his or theirs. Thus these titles are less than certain than those not under the Act [i.e. than those outside the registration system] because if they were not under the Act they would be subject to the Statute of Limitation and the defects would be cured when the limitation period had elapsed ...
>
> Unless there is a change in the law the number of defective Land Transfer titles must tend to increase, as it is submitted that there is at present no satisfactory way of clearing the defects.[28]

That, of course, is not remotely like the situation we are in here in this country now. But we could arrive at something like it over the next few decades if long-undisturbed adverse possession titles prove to be marketable. Would you buy a house, or a farm, or office premises if someone other than the seller was registered as owner of it but the seller and her predecessors in title indisputedly had been in undisturbed

27 This is recognised in the joint Law Commission and Land Registry Consultation Paper and Report, where it is acknowledged that one of the justifications for adverse possession that does apply to registered land is that 'if possession and ownership become wholly out of kilter, it renders land unmarketable': para. 10.7 of Law Commission 254 and paras. 14.54–14.55 of Law Commission 27.

28 D. J. Whalan, 'Title by Possession and the Land Transfer Act' (1963) 48 *New Zealand Law Journal* 524. He concludes that 'Strict adherence to the principle of excluding [the operation of the Limitation Acts] is not an essential feature of the Torrens system [i.e. of registration of title, based on indefeasibility of title]. Indeed, it [i.e. the exclusion of the Limitation Acts] has been described [by Harvey J in *Turner* v. *Myerson* (1918) 18 STR (NSW) 133, 136] as "one of the great flaws in the system"': *ibid*., at 528.

possession for decades? Until the LRA 2002 came into force the answer would probably have been no. Any well advised buyer would insist on the seller applying to the Land Registry to be registered as proprietor, because buyer and seller would know that if what the seller said was true – i.e. if she had indeed been in undisturbed possession – she would obtain registration with no difficulty. But now that both buyer and seller know that an application will be self-defeating because it will simply provoke an objection that otherwise might never be made, it is fairly certain that no one is going to go near the Land Registry. No doubt few buyers will pay the same price they would have paid for a perfect title, but it is equally likely that few buyers will simply walk away, particularly if (as will often be the case) the problem affects only part of the seller's title. If this is correct it means there will be a market for second rate titles, and if enough of them are traded often enough then title insurers may conceivably decide it is worth their while to step in. Once this happens, the market will be secured.

The incompatibility argument

The second justification given by the Law Commission and Land Registry for curtailing the entitlement of possessors to gain registered title is that it is incompatible with the principle of indefeasibility of title underlying land registration. This, however, is based on a misconception (no less so for being widely held).[29] This justification appears in (among other places in the Consultative Document and 2001 Report) paragraph 14.6(1) of the 2001 Report:

> Registration of title should of itself provide a means of protection against adverse possession ... Title to registered land is not possession-based as is title to unregistered land. It is registration that vests the legal estate in the owner and that person's ownership is apparent from the register.[30]

And, again, in paragraph 2 of the Land Registry Practice Guide 4 published after the 2002 Act came into force:

> [Under the pre-2002 Act law] the doctrine of adverse possession did not fit easily with the fundamental concept of indefeasibility of title which underlies the system of land registration. It is registration, not possession, that vests the legal estate in the owner and that person's ownership is apparent from the register.

But this is a false antithesis. In registered land, as in unregistered land, a person acquires a legal estate by taking adverse possession, and in any common law registration system it would be a very strange registration system that provided otherwise. In unregistered land there are three avenues through which a legal estate can become

29 Despite what was said by Whalan, quoted in the previous footnote, the conception is shared by some Law Commissions in some (but not all) other Commonwealth countries: a survey appears in the Law Commission Consultation Paper 'Limitation of Actions' Law Commission 151 (1998) paras. 10.59–10.123.

30 The omitted words make it clear that the intention is, however, to restrict the protection, not eliminate it altogether, for the reasons given in paras. 14.1–14.4. For further discussion of this justification see also paras. 10.5–10.17 Law Commission 254 and 2.73 in Law Commission 271.

vested in someone. The first is by it being conveyed or granted to him by a deed,[31] the second is by operation of law,[32] and the third is by him taking adverse possession. In registered land the first of these avenues is replaced by registration[33] but the other two remain precisely the same.[34]

The truth is that titles are no less relative in registered land than they are in unregistered land. Even in registered land a squatter acquires a title to the fee simple good against the whole world except a person with a better right to possession simply by taking adverse possession. The person who has a better right to possession might include not only the registered proprietor but also any prior squatter dispossessed by this squatter. In the situation in which registered owner O is dispossessed by squatter A, who is in turn dispossessed by squatter B, there are three titles here which the law will vindicate, and the outcome of a title dispute between any claimant and any defendant will depend not on who the registered owner is, but on the relative strengths of their respective titles (if any). This is true in registered land as well as in unregistered land, and as true under the 2002 Act scheme as it was under the 1925 Act scheme. Adverse possession gives rise to *a* legal title, in registered land as in unregistered land. The principle of indefeasibility of title simply ensures that the *best* title is always the registered title. A registered title system based on indefeasibility of title will then have to work out some system whereby the person who *should* have the best title becomes entitled to *become* registered title holder in place of the present registered title holder. For example, it might want to adopt a rule that a personal representative or trustee in bankruptcy is entitled to become registered in place of a deceased or bankrupt title holder, or that a person registered as title holder by mistake (a neighbour is registered as title holder of your house through an administrative slip) is removed. It may or may not want also to have a rule that persons who have held possessory titles for a certain period can become entitled to become the registered title holder, but it is hard to see how the adoption of such a rule could be said to undermine the principle of indefeasibility of title.

A registration system *could* – in theory at least – abolish *all* titles except registered titles. It could provide that title could never be acquired except by registration. But that would mean abolishing the basic common law principle that the law protects *de facto* possessors against strangers, and it is surely inconceivable that any mature legal system would want to do that.

It is certainly not done by the 2002 Act. Indeed, it is as a direct consequence of the continued existence of relativity of title that the 2002 Act introduced the new rule that the period of adverse possession on which a claimant can rely includes time during which a predecessor in title was in adverse possession but not time during which a prior squatter, dispossessed by this squatter, was in possession.[35]

31 LPA 1925 s. 52. 32 E.g. on death or bankruptcy or the dissolution of a company.
33 s 27(1) of the 2002 Act, replacing the similar provision of the 1925 Act.
34 The legal effect of a disposition by operation of law is preserved by s. 27(5) of the 2002 Act.
35 Para. 11 of Schedule 6 to the 2002 Act and para. 14.21 of Law Commission 271. It is clear from the Explanatory Notes published with the Land Registration Bill that para. 11 was intended to implement the recommendation to this effect made in para. 14.21 of Law Commission 271, but not so clear that it achieves it. Para. 1(1) of Sched. 6 restricts the right to apply to be registered as

So, neither the necessary evil argument nor the incompatibility argument take us far in a consideration of why long use should *not* give rise to entitlement in the case of adverse possession of registered land.

Notes and Questions 11.4

Read *J. A. Pye (Oxford) Ltd* v. *Graham* [2002] UKHL 30, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1. It is argued above that the good faith/bad faith distinction drawn in the Land Registration Act 2002 does not draw a satisfactory line between the morally reprehensible taker, the morally neutral taker, and the morally praiseworthy taker. Do you agree? Where on these two spectrums would you put the adverse possessors in *J. A. Pye (Oxford) Ltd* v. *Graham*?

2. If we were to introduce a more general good faith/bad faith distinction into our law, how would we deal with successive squatters? Would we consider only whether the original taker was in good faith, or would we want to look also (or instead) at the 'innocence' or 'guilt' of successor squatters?

3. As Radin pointed out, enquiries into states of mind are costly, and particularly unsatisfactory when they concern someone's state of mind more than twelve years ago. If we are to penalise those who know they are taking what does not belong to them, where should the burden of proof lie? Should we concern ourselves only with what they actually knew (actual notice) or should we also consider what they ought to have known (constructive notice)? If we were to adopt either Epstein's or Merrill's suggestions for dealing with bad faith takers, which would be the more costly?

4. If allocating blame by taking into account the good faith or bad faith of the taker, should we not also take into account the degrees of sympathy we feel for

proprietor to 'a person ... [who] has been in adverse possession ... for a period of ten years ...', and para. 11(1) then provides that a person is in adverse possession for these purposes if, but for s. 96 of the 2002 Act (which excludes the operation of s. 15 of the LA 1980), 'a period of limitation ... [under s. 15 of the 1980 Act] would run in his favour in relation to the estate'. Section 15 of the 1980 Act is neutral as to the person *in whose favour* a limitation period runs, but its effect is to make the limitation period run from the date of first dispossession (even if that dispossessor was dispossessed by the current squatter). The limitation period therefore 'runs in favour' of the current squatter under s. 15 of the 1980 Act during the period when the prior squatter was in adverse possession, as well as when she herself is. It could therefore be said that the current squatter is 'in adverse possession' within the meaning of para. 11 even before she got there – i.e. also during the period of adverse possession of the prior squatter she dispossessed. The express provision in para. 11(2) of two other situations where the claimant is 'to be regarded' as having been in adverse possession during periods when someone other than she herself is, is an indication that the prior possession of the dispossessed predecessor is not intended to count, but then para. 11(3) reintroduces the notion that, except where expressly provided to the contrary by the 2002 Act, it is the 1980 Act provisions which are to be used to determine when a person is or is not to be treated as being in adverse possession.

the paper owner? Consider how, if at all, the following factors relating to the paper owner could and should be taken into account:

(a) The paper owner is the middle-aged son of the adverse possessor. She is now aged 85, she was widowed during the First World War, and the property in question is the cottage where she has lived since 1915, and where she brought up her son and other children (*Palfrey* v. *Palfrey* (1974) 229 EG 1593, CA: inauspiciously for the son, the case was heard in the Court of Appeal by Lord Denning MR, and Cairns and Stephenson LJJ; he lost).

(b) The paper owner paid no consideration for the title, and did not realise he had it (*Palfrey* v. *Palfrey* again).

(c) The paper owner allowed potentially useful land to lie sterile, without making any attempt to let it to someone who could use it, or to prevent or licence the adverse possessor's use (*Buckinghamshire County Council* v. *Moran* [1990] Ch 623 and *Tecbild Ltd* v. *Chamberlain* (1969) 20 P&CR 633).

(d) The paper owner neglected the property, which would have deteriorated unless someone had moved in and taken over maintenance (any case in which there are buildings on the land).

(e) The paper owner abandoned the property (*Mount Carmel Investments Ltd* v. *Peter Thurloe Ltd* [1988] 1 WLR 1078).

(f) The building on the disputed land had always been accessible only from the adverse possessor's own land, the paper title holder had made no attempt to assert the title for nearly forty years, and the first action of the present holder of the paper title (a property developer) was to remove the tiles from the roof (*Fairweather* v. *St Marylebone Property Co. Ltd* [1963] AC 510).

(g) The paper owner's non-use of the land was more environmentally advantageous than the use made of it by the adverse possessor (for example, a squatter using as a rubbish dump land that the paper title holder is trying to preserve as a wilderness).

5. Compare the views expressed above as to the justifications for extinguishing the paper owner's title with those expressed by Lord Bingham and Lord Hope in *J. A. Pye (Oxford) Ltd* v. *Graham*. Do you agree with Lord Hope that the 'old regime' was unfair, first in not requiring compensation to be paid, and secondly 'in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor'?

11.6. Goods

All the arguments about allowing possessors to acquire titles by taking possession, and extinguishing paper titles after long adverse possession apply with more or less equal force in relation to goods. However, there are three differences between land and goods which are highly significant here, and which explain why the law operates in a rather different way in relation to goods.

11.6.1. Taking and theft

The first difference is that the law of theft applies to goods (and all other property) but not to land. 'Bad faith' takers of goods are therefore treated significantly differently from bad faith takers of land. First, they invariably commit a criminal offence, whereas, as we saw in Chapter 7 above, the same is not necessarily true of bad faith takers of land. Secondly, as we shall see in the following paragraphs, time will not run in their favour under the Limitation Act 1980.

11.6.2. Protection of title by tort

The second significant difference between goods and land in this context is that legal title to goods is protected by the law of tort rather than the law of property. The only actions available to owners seeking to recover goods from takers are tort actions: there is no property action equivalent to the action to recover land. As Bell explains:

> If I am in possession of your car without your permission, the law might logically allow you to bring an action to recover it simply on the basis of your ownership, without having to assert some species of wrongdoing on my part. Nevertheless, at least in relation to personal property, and essentially for historical reasons, the common law has no such action for vindicating property rights. To recover your property, you must allege the commission of a tort: conversion by a wrongful assumption of rights inconsistent with yours ... or trespass by wrongfully taking possession in the first place. (Bell, *Modern Law of Personal Property in England and Ireland*, p. 17)

We considered these torts and the way they operate in relation to possession of goods in Chapter 7. The important point here is that the relevant action which an owner must bring to vindicate his title against a taker is a tort action, not a property action, and therefore the relevant provisions of the Limitation Act 1980 are sections 2–4, which are significantly different from the provisions which relate to land.

11.6.3. The Limitation Act 1980 and title to goods

The most important difference between the tort provisions and the property provisions of the 1980 Act is that whereas in actions to recover land time in effect runs from the time when the taker takes possession, in the case of the equivalent actions in relation to goods time does not start to run unless and until the tort of conversion is committed. As we saw in section 7.4.1 above, this does not necessarily coincide with taking possession. So, for example, if I pick up someone else's bracelet from the floor, mistakenly believing it to be mine, I commit the tort of conversion (consider why) and time starts to run against the true owner of the bracelet. If, on the other hand, I pick it up realising it is not mine and, like Mr Parker in *Parker* v. *British Airways Board* [1982] QB 1004 (discussed in Notes and Questions 11.5 below), I hand it in to the lost property office, I do not commit conversion and time does not start to run (although consider what the position

would be if the lost property office cannot find the owner and returns the bracelet to me and I decide to keep it for myself).

A further complication is that time never runs in favour of a thief (although it will run in favour of a good faith purchaser from the thief: section 4). I will be guilty of theft of the bracelet if I take it with the intention of permanently depriving the owner of it, for example if I pick it up from the floor knowing it is not mine and take steps to ensure that the owner will not find it (perhaps by slipping it into my pocket and telling no one about it).

The combined effect of sections 3 and 4 is therefore that the question of whether time starts to run when, for example, I pick up a lost bracelet, depends on my state of mind then and on what I do next. This is a matter of public policy, enshrined in section 4. See *Gotha City* v. *Sotheby's (No. 2)*, *The Times*, 8 October 1998 (a case concerning a picture taken from Germany to Russia in 1946 and later reclaimed by the Federal Republic of Germany); and see also Byrne-Sutton, 'The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects'.

It should also be noted that the special provisions about theft discussed above are *additional* to the provision postponing the limitation period in cases of fraud, deliberate concealment on the part of the defendant and mistake (i.e. section 32 of the 1980 Act, already noted above in relation to land).

Once time has run against the owner of goods, he is in the same position as the owner of unregistered land – his title is extinguished (by virtue of section 3(2)) and therefore he will be unable to resist an action in conversion by the taker even if he manages to retake possession without the aid of the court.

11.6.4. Finders

Another important difference between takers of land and takers of goods is that the factual context tends to be different. Questions about possessory title to goods tend to arise when the true owner has lost the goods – something that cannot happen in the case of land. This gives rise to a particular kind of title dispute that cannot arise in the case of land: when goods have escaped from the custody of their owners, they will necessarily be in or on the land of someone (usually someone other than the owner). The law then has to decide who has a better possessory title – the finder of the goods or the person in or on whose land they were found. This was considered by the Court of Appeal in *Parker* v. *British Airways Board* [1982] QB 1004 (extracted at www.cambridge.org/propertylaw/).

Two different analyses of 'finding' are revealed in this case. That put forward by Eveleigh and Cairns LJJ is firmly centred on the basic principle that possession provides a root of title which will defeat all other titles other than that of the owner and that of a person with a better right of possession. Thus, a finder acquires title to goods by taking possession of them, and the occupier of the land (or chattel) on which the goods were found can assert a better title only if he can show that he himself was in possession of the goods when the finder took them. On this analysis

(although Eveleigh and Cairns LJJ are non-committal on these points) it is irrelevant whether the goods were lost, abandoned, hidden, or simply left in their right place, and it is equally irrelevant whether the 'finder' took possession by genuinely 'finding', or by stealing, or by absent-mindedly walking off with something he thought was his own. *A fortiori*, it is irrelevant whether the finder was a trespasser or lawfully on the occupier's land. All of this must follow from the Court of Appeal decision in *Costello* v. *Chief Constable of Derbyshire Constabulary* [2001] 3 All ER 150 (extracted at www.cambridge.org/propertylaw/). By the same token, attachment of the goods to the land is only relevant if the degree of attachment is sufficient to make them part of the realty – if it is, ownership (even as against the true owner) shifts to the owner of the land (subject to some refinements as between landowner and tenant of the land if they constitute tenant's fixtures).

The second analysis – that put forward by Donaldson LJ – assumes that finders are a special category of taker. This involves making three distinctions. The first, between innocent takers on the one hand and thieves and trespassers on the other, is clearly at odds with the basic principle that possession itself founds title, and that possession is acquired by a combination of intention and physical control, irrespective of whether it is acquired wrongfully or unlawfully. The second, between lost and abandoned goods on the one hand and those cached or in their right place on the other, is objectionable on the same ground. If I take your book with the intention of assuming possession of it, I acquire possession of it regardless of whether, at the time I took it, the book was lying in the street where you had lost it or thrown it away, or hidden by you under a cushion in a friend's house, or in its proper place on your bookshelf. The third distinction assumed by Donaldson LJ involves adopting detailed and illogical rules on attachment of goods to the land which are special to finding cases, seemingly with no justification for departing from established rules on annexation and fixtures.

Notes and Questions 11.5

Read *Parker* v. *British Airways Board* [1982] QB 1004, CA, and *Costello* v. *Chief Constable of Derbyshire Constabulary* [2001] 3 All ER 150, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1. In *Waverley Borough Council* v. *Fletcher* [1996] QB 334, the Court of Appeal had to consider the claims of Mr Fletcher, who found a medieval brooch in a public park, using his metal detector. The brooch was buried about nine inches below the surface of the ground. Mr Fletcher was lawfully in the park but, unknown to him, use of metal detectors in the park was forbidden. The council, owners of the park, brought an action against him claiming they were entitled to the brooch. The Court of Appeal found in the council's favour, on the basis that where, as here, an object is found *in, under or attached to* the land (as

opposed to lying on top of it), the owner of the land has a better title than a finder. The reasons given by the Court of Appeal were:

(a) intention to be in possession of the land can usually be taken to encompass also an intention to be in possession of everything in, under or attached to the land;
(b) an object in, under or attached to the land has become part of the land, as a fixture; and
(c) in removing the object, the finder will have damaged the land and committed trespass.

How convincing are these reasons? In particular, in the light of the decision in *Costello*, is (c) a relevant consideration?

2. If the object is found on (or in, under or attached to) land which is let by the owner to a lessee, who has a better title to the object: the owner or the lessee? See Köhler, 'Kentucky Fried Chicken'.

3. Explain what Lightman J means in *Costello* when he says that the title of a thief is fragile. In what ways, if at all, is it different from a title acquired by a good faith finder?

4. Examine the rights and duties of finders and occupiers that Donaldson LJ lists in *Parker* v. *British Airways Board*. To what extent are they simply a result of the liabilities you acquire as bailee when you knowingly take goods into your possession (see Chapter 17), and a restatement of what has to be done in order to avoid committing the tort of conversion and the criminal offence of theft?

5. If an item of historic or artistic or cultural importance is found and the owner is untraceable, other considerations come into play: see the Treasure Act 1996 (as amended by the Treasure (Designation) Order 2002, SI 2002 No. 2666) which replaces the old law of treasure trove.

6. For the difficult and interesting questions arising where the object is a shipwreck, see Dromgoole and Gaskell, 'Interests in Wrecks'.