

The Fiction of Adverse Possession:
an alternative conceptualisation of the right to control land.

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Abstract

Occupation of land by a squatter in England is seen as a wrong, and the squatter a trespasser. This is recognised as adverse possession and this doctrine has been established by iteration and reiteration over the long history of English land law with the sole intention of protecting the real property of the landed classes. The enduring nature of land law can also be used to demonstrate that the doctrine by which control of property is understood has changed little throughout this history.

The purpose of this thesis is to explore and demonstrate that adverse possession does not exist and this is done by using an alternative exploration of the facts.

This is by an extended literature review, analysis of common and case law, reappraisal of the historical background, and a review of property theorists. Consideration of judicial discourse and authoritative speech, the power of the landed classes and how these influenced the law of land are also evaluated. Finally scrutiny of trespass and the Limitation Act 1833 and Land Registration Act 2002, bring the arguments up to date.

Crucial to this thesis is the assumption that occupation of land with the necessary intent creates a title to that land. This can be, and is, traced back through the history of English land law where it has been demonstrated that the doctrine by which property is understood has changed little over this long history. It has been established that the doctrine of adverse possession is a

fiction developed by the courts to protect the most important possession of the English landed class – their land. It has also been demonstrated that the squatter is not a trespasser, a land thief or possessor of wrong. This is significant when the effectiveness of the Land Registration Act 2002 and Legal Aid, Sentencing and Punishment of Offenders Act 2012 are considered.

Declaration

I declare that this thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

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Introduction

The essence of the mechanism known as adverse possession is relatively straightforward. A squatter takes possession of real property that has been abandoned by the original owner and uses that property as if it were their own. It is a process that rationalises that which is happening on the ground, it recognises and ratifies the status quo. The *first in possession* has gone out of possession and the squatter has entered into possession. The squatter is not a trespasser or a possessor of wrong, and certainly not a land thief: they were on the land by dint of their own title, gained when they took possession. It is therefore, submitted that the squatter's possession was not adverse to the first in possession, but rather in place of the first in possession; they no longer used the land, the squatter did.

Accordingly, the question to be asked is why such possession is referred to as adverse. There's no logical reason for it to occur, a fact recognised in the Limitation Act 1833 when all reference to possession being adverse was excluded. Adverse possession was developed and refined over centuries with one intention: to protect the property of the propertied. Its questionable nature has led to confusion and illogicality entering the law, with feats of construction necessary to maintain its coherence and increase its effectiveness. The story behind adverse possession is a story; it is a narration, not just of the doctrine itself, but also of a version of history that has made adverse possession true and sacrosanct. However, this account of history is open to different narratives and different truths, and this thesis will set out one of those alternatives.

Today's ideas appear to be fixed by yesterday's events, so to understand the present day it is necessary to explore the past. Accordingly, it could be said that the history of an idea gives a person the ability to understand it. However, as Michel Foucault explains, power and knowledge are inextricably linked and the truth is that which a powerful group of people tells us it is.¹ Consequently, history does not reveal certain ideas to be correct, it is a narrative that gives credence to present day interpretations and provides a version of the truth that satisfies that powerful circle. Therefore, rather than present day ideas being informed by a fixed version of history, those contemporary ideas change history.

If history is a narrative and historians merely storytellers, it is perfectly possible for another account – that construes history in a different way – to change the past and provide an alternative version of the truth. Naturally this version of the truth will not, at least in the short term, change the presently accepted knowledge, yet it has the potential to be as legitimate as that accepted view. In this work it is intended to re-narrate the story of adverse possession and demonstrate that the ideas it is constructed upon can be interpreted in a way that changes the fundamental nature of what it actually is. It will be demonstrated that adverse possession exists as a legal fiction; a fiction designed to ensure the most important asset of the elite, their land, is safe from the claims of others.

¹ Foucault's understanding of knowledge and power are discussed in more detail in chapter four.

This re-narration will introduce a number of controversial ideas, which question the notion of ownership, trespass, and the very nature of land itself, and will suggest alternative ways of looking at them. These alternative ways of viewing the development of law are not fantastical ideas of how things should have been, but are rather based on a history that appears to have been forgotten by modern lawyers. It is suggested that this narration has a more logical approach to squatting, and will demonstrate that the needs and wants of the landed classes skewed our understanding of possession, and the titles such possession created. Rather than accepting that relativity of title allowed for more than one fee simple owner, those two potential possessors were accorded binary opposite identities, the 'owner's' positive, the squatters negative.

Before going on to reinterpret the standard understanding of ownership, possession, trespass and title, the elements that construct a contemporary understanding of adverse possession, and the alternative terms used in the work will be explained. Expressions such as ownership and owner, adverse possessor and trespasser are regularly used as labels that set two protagonists as binary opposites. They designate the parties as either a possessor of right or a possessor of wrong; a possessor whose occupation must be protected by the law and an interloper whose occupation is barely tolerated; an owner and an adverse possessor. Therefore, to use the language which, by convention, is used to describe these binaries automatically introduces into the narrative a bias; this results in any alternative theory being seen as preposterous or untenable. Hence by introducing

terminology that is neutral in its application, an increased level of integrity is automatically introduced. The terms used are not whimsical inventions, but rather are words ordinarily used to describe various interactions with land.

Ownership is a problematic word, with its use seeming to suggest an absolute right to possess and control a resource. This introduces a binary bias that automatically negates any argument that suggests squatting is not a wrong. The use of the term owner also introduce a hierarchical relationship into any analysis of squatting; again suggesting a binary bias. For this reason the term *first in possession* will be used to indicate a person who has objective and subjective control of land.

This however introduces a potential problem; the first is only the first because they are in *de facto possession* with the necessary intent. If they discontinue possession and a second takes control, then the first will relinquish the top spot as it were, and the second will become the new first. This however, is an unnecessary theoretical point which adds little or nothing to the overall narrative of this work; for this reason the designation first in possession will be reserved for the initial possessor, with the term squatter being reserved for the person embodying the vacancy left by the first.

The term squatter has already been used in this introduction, but could be seen as contentious. However, it is suggested that there is no better word to describe a person who occupies the land as a second in possession. Firstly it is a short and pithy word that is intentionally provocative; its use is intended to

challenge preconceived ideas about squatting and the squatter. However, it also takes the notion of squatting back to its medieval roots. Pollock and Maitland describe the possessor as a person who sits, settles, or squats on land,² the 'seated man is in quiet enjoyment'.³ They continue: 'we call the person who takes possession of land without having a title 'a mere squatter'; we speak of the 'sitting tenant', and such a phrase as 'country seat' puts us at the right point of view'.⁴ A squatter therefore, sits on the land; they occupy it as any such other tenant might do. It would accordingly seem an appropriate time to rehabilitate the word, to bring it back into non-pejorative use. Therefore in this thesis squatter and squatting will replace the phrases adverse possessor and adverse possession, wherever possible.

The work divides naturally into two parts; the first part describes the development of the black letter law that guides the contemporary understanding of squatting. Within this description alternative ideas and points of view will be introduced; these distinct opinions are reached by using the same actuality, yet will embrace alternative conclusions. However, for a 'correct' alternative narrative to be introduced, a solid foundation of historical 'fact' is required. Be that as it may, this is not a historical thesis; it is a work with relevance today. This is a fact which will be demonstrated when a comparison between the work of the Real Property Commission, which instigated land law reform in the 1830s, and the Land Registration Act 2002 is considered in the final chapter.

² Frederick Pollock & Frederic William Maitland, *The History of English Law: Before the Time of Edward I'* (2 edn, Cambridge University Press 1898) 32

³ *ibid* 32

⁴ *ibid* 31

The thesis commences by explaining the development of early English land law. This post Conquest evolution was the start of the narrative progression that introduced a common legal system into a land controlled by a customary law, adjudicated by local Barons. The expansion of the common law, the establishment of forms of action, and the augmentation of the Royal Courts' role to ensure the universal application of justice, allowed land law to flourish. It became the basis for everything that was to follow including the formulation of concepts that were to lead to adverse possession.

In this medieval world control of land was indicated by simple possession, with this simple possession creating a title. However, as society became more complex, multiple rights to land had to be accommodated into a system that appeared to recognise just one right. It is suggested that land became cerebral and its progression from that point needed a concept that indicated a right of control and the scope of that right. The solution was found in the entities of the estate and title and it is from this point that the divergence in narratives can be traced. In this work land is seen as not existing in any physical form, it is simply a cerebral perception onto which rights, defined by an estate and controlled by title, are projected. In this narrative, possession of a title and control of land are two separate abstractions. A title can be propertied and controlled by a single legal entity, whereas land cannot be propertied, or at least potentially it cannot be, and is controlled by multiple persons.

In this hypothesis title can be seen as a personal right and perhaps almost definable as owned. Whereas the land can be controlled by one who possesses a title, it can never be owned. It is the fundamental dichotomy between title to land and control of that land which forms the basis of the alternative narrative proposed by this work. Without ownership there is no absolute right to occupation and control and with title being created by a person's possession of that land, the existence of the same title in two different people cannot be precluded. This may at first sight seem a rather circular argument, title indicates the right of control and that right of control creating a title, a classic chicken and egg situation. However, land law has an autopoietic structure; it is a dynamic system and the application of dialectic reasoning will help to solve this conundrum.

The alternative narrative set out in the first part of the thesis takes its approach from these foundational ideas. The control of land via the right created by title rather than by some absolutist idea of ownership, the creation of this title by demonstrating possession and the dialectic theory, all contribute to the conclusion that the first in possession and the squatter have an equal right to occupation. This results in an equality of right and therefore the logical outcome that the squatter's possession is non-tortious. By reason of this analysis it is possible to arrive at a point where there ceases to exist the binary opposites of 'owner' and squatter; both parties operate on a parity of position, the differentiating factor between the titles of the two is the relative age. The older title, most usually, having the superior right of control.

Yet simply producing an alternative narrative is insufficient: it must be demonstrated why it is superior to the one that has informed and shaped the present day doctrinal view of squatting. The second part of the thesis does that by explaining the historical importance of the aristocracy and other landed classes to society. It will demonstrate how this section of the population were considered to be fundamentally different from the rest of the community; with this fundamental difference being essential if the orderly affairs of the nation were to be maintained. Without the landed there would be riots, levelling and chaos.⁵ This position at the apex of society required a different application of the law, particularly when their most fundamental asset, land, was concerned. It was land that gave the landed their power, wealth, and status, it defined who they were and set them apart from the rest of the population. This place at the apex of society and the land that placed them there required a narrative version of history that explained and cemented their position and protected their principle asset.

These discursive acts frame all we know but importantly do not simply express ideas but rather, as Judith Butler clarifies, make what they say true. Butler sees discourse as more than just words and actions, she see it as a performative; for instance a person does not become an aristocratic because they act like one, acting like an aristocrat makes them one.⁶ In this way identities are fixed not by a genetic predisposition, rather an identity is established by repeating the appropriate acts, acts that are learnt by subconsciously copying the performances of their peers. For example

⁵ This will be discussed in more detail in chapter five.

⁶ Butler's notion of discourse and performativity will be discussed in chapter four.

because a man performs like a man he becomes one, a woman's performance makes her a woman, a judge's actions make them a judge. These performatives are learnt by iterating and reiterating past performances, making the performative fixed and almost unchangeable. These performatives have strength and are unquestioned because they are self-perpetuating. Accordingly, the landed position is not maintained by coercion but rather by the acts of society as a whole.

This is significant because treating the landed classes differently is acceptable, or even necessary; they are, after all, at the zenith of English society and therefore the law of the land (common law) and the law of land must reflect this status. This narrative approach sees the judiciary undertaking two functions, firstly a historical confirmation of the importance of the landed to English society, and secondly a land law fixed and immutable; the culmination of land law's evolution to a system so perfect that change is unnecessary.

William Blackstone is a perfect and influential example of a legal narrator, both through his Commentaries and judgements from the bench. A short foray into Blackstone's approach, with a discussion of his confrontation with a reforming William Mansfield, will demonstrate Blackstone's, and to an extent Mansfield's, use of history to reinforce their own particular view of the law. This was a confrontation Blackstone was to win and by so doing confirm his history and narrative as the legitimate commentary on land law and with it the edification of the landed.

The penultimate chapter of the thesis will consider another period in English land law history, but one with a clear and important connection with the present day. The end of the 1820s and the start of the 1830s marked an influential period for the squatting and the squatter. Real property needed rehabilitation and the Real Property Commission was formed with a remit to propose the necessary reform. It has been suggested that by the time of the Commission the landed had lost much of their power, with the result that their ability to influence and set the agenda for subsequent reform was substantially curtailed. However, as will be demonstrated, this was far from the truth.

The eighteenth and nineteenth century was the time of the 'old corruption'; an exercise in bribery that disproportionately increased Crown influence and decreased aristocratic domination. The application of Royal patronage and huge sums of public money enabled placemen, who were mostly drawn from the professional ranks, the military, Anglican clerics, judges, lawyers, etc., to dictate public affairs. They were middle class Tories rather than the upper class Whigs and they flourished in this period, sustained by the benefaction of the monarchy. Yet it was agitation for the abolishment of the old corruption and interestingly, the reform of parliament, which was to see the renaissance of aristocratic governance. It was the performativity of the landed classes that was to see their pre-eminent position reasserted. They had a new narrator in Edmund Burke, one who supported aristocratic advancement, recognising they and their lands were needed for social harmony and to keep the sovereign in check. The reassertion of landed dominance and their use of pocket and rotten boroughs resulted in the Commons as well as the Lords,

coming under aristocratic control. Thus when agitation for the revision, or even codification, of land law arose it could be contained, controlled and landed influence could be used to prevent any radical outcome.

This influence resulted in a Commission that was tightly controlled by the landed, yet this did not mean that the suggested revisions put forward by the Commissioners were without merit. The first significant proposal led to the Limitation Act of 1833, which removed the requirement that possession by the squatter needed to be in some way adverse. The second significant proposition, and one which formed the basis of the entire second report, was the introduction of a system of general registration of deeds. The Commission considered that the rationalisation of land law that their reforms provided, particularly the changes to the nature of squatting afforded by the Limitation Act, could only be successful if a register of deeds was introduced. This was a proposal that was to be thwarted by the self-interest of the landed.

It will be suggested that if the Commission's proposal for a Registration Act had been accepted, its importance would have been momentous. Whether the Commissioners were aware of the potential magnitude of their proposals or not, it is considered they would have set in train events which would have resulted in the same protection to the first in possession as the Land Registration Act 2002 provided to the registered proprietor. However, this was with one important difference; it would have retained the recognition that the first could go out of possession and leave room for another to take possession. It would have overtly retained the dialectic process and

demonstrated that this process was not an apology for squatting, but rather a sensible way to deal with a first who was absent, in mind and body; with the added advantage, for the landed, that their security of tenure would have gained increased protection.

The last chapter will deal with trespass, an almost unquestioned, yet hugely significant, element of squatting. The conventional view, as will be explained below, sees squatting as trespass and morally dubious, leading to the conclusion that any occupation of land is wrongful and by implication adverse. However, it is intended in this final chapter to set out why such a view is incorrect. It is suggested that if the action of squatting is accepted without question to be trespass then it is difficult to substantiate the narrative expounded in the initial chapters. Yet if the obverse is correct the narrative ceases to be a speculative attempt to justify squatting and becomes a coherent argument for the existence of it.

At the conclusion of this work it will have been established that, rather than the alternative narrative being a flight of fancy attempting to legitimise all occupation via the fictions of adverse possession, it will explain that the doctrine of adverse possession is unnecessary and divisive. The Land Registration Act 2002 has been introduced into a system still attempting to rationalise the need for adequate stewardship of land, with the requirement that the title of the first in possession is protected at all costs. It appears to be introducing a concept of absoluteness into a system which requires dynamic change to function effectively; it is an Act which contains an illogical duality, on

the one hand preserving the notion that the right to control land remains based on possession – see, for instance, sch. 6, s.5(4) – yet attempts to make title absolute. It is an Act that requires the strange and obtuse law reimagined by the courts over the last 170 years to be accommodated, although there remains a part of the Act that suggests that dialectic theories still operate. This part will require, at some stage in the future, the courts to grapple with two questions; when circumstances are such that the applicant ought to be registered as the proprietor, and what unconscionability needs to be demonstrated for estoppel to operate against that proprietor? It is this requirement that a Land Registration Act of the 1830s would have dealt with admirably. The Real Property Commissioners accepted squatting and saw it as creating legitimate possession. Their registration Act would have offered greater protection for the first, but would have also sanctioned the use of a dialectic process when necessary, in the name of conscionability.

The ability of the squatter to demonstrate legitimate title has changed and developed over the centuries as society and technology changed. Yet the doctrines that operated in the evolutionary period of common law development should still be recognised today. The dynamic nature of the common law has not changed; judges still develop and 'improve' the law, so therefore anything which fetters that change cannot exist. It was the landed and their need to protect their major asset that resulted in the adverse possession doctrine existing today. The following chapters will validate these claims and illustrate how this narrative establishes an alternative and logical truth. However, before doing so the wrongness of adverse possession, an essential element of this

work, needs to be discussed.

Adverse Possession as a Wrong

In this introduction, and throughout the thesis, mention is made of adverse possession as being generally seen as a wrong. This is in direct contrast to the theme of this work, which sees the title of a squatter and of the first in possession as identical. If, as will be argued, a squatter has a title then logically they cannot be a possessor of wrong, and equally if that title is identical to that of the first, then both have a right to occupy the land. Whose right is the best will normally be decided by the age of the title. The affirmation that adverse possession is generally seen as a wrong is an important assertion that contrasts with the theme of the thesis. For this reason the truth of the statement needs to be demonstrated.

As this work is about the power of discourse, and it will be demonstrated that views put forward by those with knowledge become compelling statements of fact, the attestation that adverse possession is seen as a wrong is significant. If it cannot be demonstrated that it is a generally held view that squatting is unacceptable, then much of the argument that is to follow loses its power. It is the intention of this short section to discuss the various opinions advanced by the knowledgeable and the powerful, with the intention of demonstrating that it is a generally held view that squatting is wrongful.

This idea of squatting as a wrong, as land theft, as the squatter and the first in possession being binary opposites, are views espoused by both the legal

profession and legal academics. According to Lord Denning a squatter 'is one who, without colour of right, enters an unoccupied house or land, intending to stay there as long as he can'.⁷ Squatters are outsiders intruding onto a protected space,⁸ invaders,⁹ 'itinerants, drifters and the antitheses of the stable, homogenous, identifiable community Lord Denning idealises'.¹⁰ Lord Denning explains that squatters are guilty of both 'a criminal offence',¹¹ although his evidence for their criminal activity is based on the Forcible Entry Act 1381,¹² 'and a civil wrong';¹³ that is they are 'trespassers when they entered, and they continue to be trespassers so long as they remain there'.¹⁴ This notion of squatters as trespassers runs through most discussions of adverse possession; with the law not only condoning, but positively requiring 'a successful adverse possession claimant to have committed the tort of trespass over the true owner's land'.¹⁵

Lord Denning is not a lone judicial voice in the condemnation of squatting. For instance in *Buckinghamshire County Council v Moran*¹⁶ Nourse LJ defined adverse possession as 'possession of wrong',¹⁷ a definition the Law Commission were happy to concur with in their 1998 consultative document,¹⁸ adding that it was 'tantamount to sanctioning a theft of land'.¹⁹

⁷ *McPhail v Persons Unknown* [1975] Ch 447, 456B

⁸ Denis R Klick 'This Other Eden: Lord Denning's Pastoral Vision' (1994) 14 Oxford J Legal Stud, 46

⁹ *Lamb v Camden Borough Council* [1981] QB 625, 633C

¹⁰ Klick (n 9) 47

¹¹ *McPhail* (n 8) 5456F

¹² 5 Ric 2 St 1 c 7

¹³ *McPhail* (n 8) 456F

¹⁴ *ibid*

¹⁵ Amy Goymour 'Squatters and the criminal law: can two wrongs make a right?' (2014) CLJ 484, 484

¹⁶ [1990] Ch 623,

¹⁷ *ibid* 644

¹⁸ Law Commission, Land Registration for the Twenty First Century: A Consultative Document (Law Com No 254, 1998)

¹⁹ *ibid* 10.5

Neuberger J, in *Pye v Graham*,²⁰ had particularly trenchant views. Although finding for the defendants, this was a conclusion he reached ‘with no enthusiasm’.²¹ He added that it was ‘a result which does not accord with justice and cannot be justified by practical considerations’.²² He considered that just because an owner had no immediate plans and was ‘content to let another trespass on their land for the time being, it is hard to see what principle of justice entitles a trespasser to acquire the land for nothing’.²³

It is suggested that this last comment from Neuberger J has a hint of the implied licence doctrine about it; this, as will be discussed more fully in chapter one, is the idea that almost all occupation of land by a squatter is with the consent of the ‘owner’; whether the ‘owner’ knew about the occupation or not. This idea was introduced by Lord Denning in *Wallis Cayton*²⁴ and, although many attempts were made to expunge it from legal consideration, it has continued to rear its head ever since. Although *Beaulane Properties*²⁵ was considered to be its last hoorah of the implied licence, a recent case may well have sought to reintroduce it. In *Smith v Molyneaux*,²⁶ there are features of the decision that Oliver Radley-Gardner finds problematic; suggesting that the Privy Council ‘appear to disinter and reinvigorate parts of the law of adverse possession that had long been thought to have been put to rest’.²⁷

²⁰ [2000] 3 WLR 242

²¹ *ibid* 709

²² *ibid* 709

²³ *ibid* 710

²⁴ *Wallis’s Cayton Holiday Camp v Shell-Mex & BP Ltd* [1975] QB 94

²⁵ *Beaulane Properties Ltd V Palmer* [2005] EWHC 817(Ch)

²⁶ [2016] UKPC 35

²⁷ Oliver Radley-Gardner ‘Foisted permission and adverse possession (United Kingdom) (2017) 133 LQR 214, 215

As well as accepting the notion that squatters are trespassers, there is also an inclination to divide them in to those who occupy land in good faith, and those whose occupation is in bad faith. The latter is 'almost universally regarded as a scoundrel',²⁸ occupying land they know not to be theirs. 'Meanwhile, judicial and scholarly approval is lavished on her good faith counterpart who labours under the misimpression that she occupies as her own land'.²⁹ Fennell takes an interesting view of these two binaries, regarding the bad faith squatter as the only one of the two who 'should be able to take title to land through adverse possession'. 'Adverse possession's hostility requirement'³⁰ indicates a squatter values the land in a way the unknowing encroacher cannot. Although Fennell considers the bad faith squatter has a right to claim adverse possession, there still exists a dubious moral dimension to her description of that squatter. They are still seen as a cheat or even a thief, as opposed to the good faith squatter's moral worthiness.

This moral dimension is a fundamental factor when adverse possession is discussed. Kate Green, for instance, considers there is 'no difference between the terms 'adverse possessor', 'squatter', and trespasser: all adverse possessors are squatters and all squatters are trespassers'.³¹ However, she does go on to differentiate between them, and in so doing demonstrates the heretical nature of the different terms. An adverse possessor, according to Green, is 'fairly respectable: 'squatters' may have some lingering charm but their status, especially in an urban context, is somewhat ambivalent in the

²⁸ Lee Anne Fennell, 'Efficient Trespass: The Case for Bad Faith Adverse Possession' (2006) 100 Nw U L Rev 1037, 1046

²⁹ *ibid* 1038

³⁰ *ibid* 1039

³¹ Kate Green 'Citizens and Squatters: under the surface of land Law' in Susan Bright and John Dewar (eds) *Land Law Themes and Perspectives* (OUP 1998) 239

modern world; ‘trespassers – sinners’ after all – pose a direct threat to a modern civilised society’.³² For Green there is moral justification for the adverse possessor’s actions. ‘He may be ‘stealing’ land from his neighbour, but in practice he can do so only if the neighbour is a bad owner, a waster of the nation’s natural resources’.³³ A squatter, on the other hand is (mainly) depicted as a mass occupier of urban property, a person who is here for the moment but will be moving on,³⁴ perhaps not an adverse possessor at all. This is a problem with Green’s classification. Although she does explain that a squatter is an adverse possessor, she appears to predispose the squatter as not just a bad faith occupier, more like a trespasser, a sinner and occupier of wrong. However, according to Green, these categories are not fixed and the different labels vary ‘over time and place’.³⁵

So it would seem a sinner can, progressively, become fairly respectable; an ideal English landowner. Green explains that one of the ‘important roles of adverse possession, even today, is to maintain within the law the mythic character of the ideal English landowner’.³⁶ ‘This ideal landowner is, settled and stable, hard working and committed, rational, self interested, progressive and individualist’,³⁷ a far cry from his urban squatting counterpart. There is a moral superiority here, good faith and bad faith; an occupier of ‘imagined idealised land’,³⁸ or a stealer of unoccupied housing stock; an ideal landowner or Lord Denning’s itinerant and feckless drifter. The ideal occupier may know

³² *ibid* 240

³³ *ibid* 241

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid* 230

³⁷ Lorna Fox O’Mahony & David O’Mahony, *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons?* (2015 Routledge) 54

³⁸ *ibid*

the land is not theirs, yet their wish to use the land in a productive and efficient way entitles them to be seen as acting in good faith, rather than bad.

The moral dimension of squatting can also be seen when Margaret Radin's personhood arguments are considered. Radin sees adverse possession as a natural result of her theory; however, as will be discussed in chapter three, her concept can only be successfully applied when boundaries are disputed, or when a person occupies land mistakenly. They cannot be applied to a person occupying land that they know not to be theirs. Radin labels this occupier an aggressive trespasser. So the binary enters the equation again, although in this case not between the first and the squatter, but rather between different types of squatter. Much as the line Green draws between the squatter and the 'ideal English landowner'. However, it would appear that Radin is edging closer to the idea that certain types of adverse possessors are neither good or bad faith occupiers; a categorisation echoed in the Land Registration Act 2002.

The Law Commission, in their 1998 consultative document,³⁹ certainly saw the adverse possessor as a possessor of wrong and a land thief; a departure from the position adopted in an earlier report,⁴⁰ where it was acknowledged that any rights acquired by adverse possession 'should be undertaken separately and ought not to be considered purely by registered conveyancing'.⁴¹ However the 1998 report disagreed, explaining the policy considerations that justified a system of adverse possession with regard to unregistered land

³⁹ Law Commission, 254 (n 19)

⁴⁰ Law Commission, Third Report on Land Registration (Law Com No 158, 1987)

⁴¹ *ibid* 2.36

'have far less weight in relation to register title',⁴² because 'the basis of registered title is in fact registration'.⁴³ Yet the Act itself contained three exceptions to the strict rules that were adopted, one of which mirrors the boundary exception seen in Radin's earlier theory.⁴⁴ However, even though these stated exceptions exist they still refer to the possession exercised as adverse. The binary division still remains to differentiate this possessor from the first in possession.

Conclusion

This short discussion has demonstrated that there are many different descriptions of adverse possessors or squatters. Bad faith can be seen as a prerequisite of adverse possession, (Fennell), or the same action can be seen as acting in good faith, (Green). There can be a significant moral questions either supporting the rights of the first, or of the squatter. There can exist a subdivision, the adverse possessor and the squatter, although the definition of this subdivision is not fixed. However, it is suggested that the good and bad faith or the morality of adverse possession is unimportant. What is important is that the squatter and the first in possession are still seen as binary opposites. One does not exist without the other. In reality both the first in possession and the squatter enjoy a fee simple title, and accordingly an equal right to be in possession. Possession, therefore, is relative and gives the one in occupation the right to control the land, with this right only challengeable by one whose

⁴² *ibid* 10.3

⁴³ *ibid*

⁴⁴ The first two of the three exceptions 'are cases in which the claimant to adverse possession is in fact entitled to legal title for some other reason'. See Law Commission, Consultative Paper (Law Comm No 227, 2016) 17.14

title is the older. If a title is seen in this way it can be recognised as the property of its owner, so it is not title that moves between the first and the squatter just the right of occupancy. One of the titles, usually the oldest, is seen as best not because it is superior, there is no superiority of title and not because some moral blamelessness, rather each title is a fee simple absolute and gives the same right to occupy the land.

The evidence put forward in this section demonstrates that the wrongfulness of squatting, although accepted by most writers and the judiciary, is often contradictory.⁴⁵ There are many extreme descriptions of a squatter, bad faith occupier, land thief, invader, itinerant, drifter, etc. If these are put to one side there continues to be one characterisation that appears to be almost universally accepted, i.e., the squatter is regarded as a trespasser.⁴⁶ This is significant as far as this work is concerned; if the squatter remains a trespasser then there still exists a binary difference between the first in possession and that squatter. If this binary endures then the wrongfulness of squatting endures, and all of the epithets listed above can be applied in an attempt to demonise. This is regarded as incorrect and the final chapter will seek to explain why this is so.

⁴⁵ There is certainly little discussion of any possible bad faith on the first in possession's part.

⁴⁶ There is little or no literature that supports the squatter's position as a non-trespasser.

Chapter 1

The Distortion of Land Law

Introduction

Although much of this work is anchored in the past it is not intended to be a historical thesis, however the historical distortion of the basic tenets of land law still remain to infect contemporary views of squatting. It is therefore crucial for an understanding of adverse possession to set squatting firmly in its historical framework. In so doing an understanding of present day attitudes can be uncovered.

Possession was, in fact had to be, the basis of the right to control land; much of the property of the great feudal barons and their descendants had been acquired via the generosity of the monarch, yet none of this monarchical largesse was evidenced by paper title deeds. Without documentary evidence, the right to control land had to be demonstrated by possession. Possession therefore, became the most significant factor in determining whose presence on the land was to be protected; with protection of this possession being vital to safeguard the resource that was the most important asset and indicator of a person's power, wealth and status.

The notion of squatting developed organically from this basic right of possession; the great barons were after all the first squatters. Yet this way of gaining possession had to be protected. As customary control of the lord's

estate and the tenants in occupation gave way to a more centralised approach that put protection of land under the control of the Royal Courts, the inbuilt insurance policy protecting the lord's resources was lost. The replacement of the lord's court by a form of external adjudication required alternative ways of protecting the land of the country's elite. Ideas of possession, control, and the notion of estates had to stand; it was how the landed controlled their resources. However, acceptance of this possessory doctrine meant control could be exercised by other less 'deserving' members of society. It was to protect the land of this elite from usurpation that the basic tenets of land law were manipulated, with this distortion given credence by judicial narration.

Definitions of control and possession of land underwent changes and all occupation of land by the wrong person became seen as a trespass. The idea of peaceful enjoyment became land theft and gradually a binary difference between the squatter and the first in possession was introduced. These changes were subtle, occurred over time, and were iterated and reiterated until they became the accepted norm. The courts would not have seen that their explanation of the present would change the past and what they saw as the norm was only so because of their revision of history. This has been so throughout the evolution of squatting, with each alteration in the judicial narrative rebooting history and therefore supporting the truth of this ever changing and maturing story. Without an understanding of the history of squatting an understanding of the present is impossible and this chapter will set out to do this. The transformation of squatting from the days of customary law, adjudicated by the lord, to the present day where title is protected by

registration and is adjudicated by Registrar will be discussed. In doing so an understanding of how judicial narration was used to distort land law to the advantage of the landed and so present a platform for the alternative ideas, as explained in the following chapters.

1.1 Customary Law

Roman land law was based on the idea of ownership and although it could be argued, and will be later in this thesis,¹ that it is a concept with little or 'no rational basis',² it was an idea held together by rules and, therefore, could be relied upon to support the function of law. English medieval law however, had no such underlying basis and considered a pragmatic approach to land stewardship the most appropriate. 'Rules were not teased out in luxurious centuries of litigation: order was essential from the beginning, and started not as a matter of what we would call rules of law but as the criteria of a management and control'.³ For this reason, although in the period immediately following the conquest it was the duty of the feudal lords to hold courts to adjudicate disputes that arose between their tenants, the law dispensed was customary; that is law that suited the manor and the lord himself. It was the law of those in power. Although customs would normally be followed, for instance the customary allocation of land to the heir of a dead tenant, it was not beyond the lord's power to take another course of action if he deemed it necessary in the interests of his manor. For the Royal Courts to interfere with

¹ The concept of ownership will be discussed in the next two chapters.

² SFC Milsom, *A Natural History of the Common Law* (Columbia University Press 2003) 52

³ *ibid* 53

the lord's profitable business of administering local justice would have been seen as usurping 'a property right he would not wish to lose'.⁴

1.2 The Emergence of Royal Control

The earliest inroads into this monopoly of local law administration were noted by Glanville.⁵ In his text *Tractates de Legibus et Consuetudinibus Regni Angliae*,⁶ he explains that there existed a customary rule and 'principle that no man need answer in any court for his freehold land unless commanded to by the King's writ'.⁷ The idea that freemen owed their allegiance first to the King was an intervention intended to stop the great barons using their position, between the King and that baron's tenants, and turning it to their political advantage. It was instigated by William I to 'prevent the feudal anarchy and private wars against which he struggled for so many years in Normandy',⁸ and promulgated in one of the last acts in his *Sarum* oath.⁹ This oath was delivered in Salisbury and stated that 'all of the land owning men of property that there were all over England, whosoever men they were, and all bowed down to him and became his men, and swore oaths of fealty to him',¹⁰ even against their own lord, thus consolidating the idea that all freemen were, first and foremost, the King's tenants.

⁴ AWB Simpson, *An Introduction to the History of the Land Law* (OUP 1961) 24

⁵ cited in *ibid* 24

⁶ *Treatise on the Laws and Customs of the Kingdom of England*

⁷ Simpson (n 4) 25

⁸ Theodore Plucknett, *A Concise History of the Common Law* (5th ed, Liberty Fund, 2010) 13

⁹ 1086

¹⁰ William Stubbs, *Selected Charters and Other Illustrations of English Constitutional History* (Clarendon Press, 1913) 82

Of William's successor William II (Rufus), there is little of note apart from the strengthening of local justice by the deployment justiciars¹¹ to aid the often-overworked sheriffs. He also introduced various ruthless practices in an attempt to extort money by 'converting the incidents of feudal tenure into engines of financial oppression'.¹² It fell to Henry I and, after the interregnum of Steven's reign, Henry II to instigate the more important and significant developments of the common law. Henry I reintroduced efficient government to the country and sent itinerant justiciars on circuits to hear the pleas of the Crown. Plunknett explains that much of the local law at this time was still customary Anglo-Saxon law, which was certainly not the same all over the country; there was as yet 'very little that could be called 'common law''.¹³ However, one of the functions of the justiciars was to greatly expand the scope of the pleas they heard and thus instigate, or at least start the instigation, of a system of law that was common.

The Anarchy of Steven's reign was brought to an end by the compromise of 1153, which led to Henry II assuming the crown on Steven's death in 1154. The compromise, and the Treaty of Winchester which emerged from it, are central to an understanding of the legal changes brought about by Henry II. The express conditions of the treaty assured peace between Steven and Henry but left 'the problem of their respective barons'¹⁴ unresolved. Although possibly not part of the express conditions of the treaty, there is evidence to suggest that there were provisions which saw that those disinherited during

¹¹ An officer of the King's Court.

¹² Plucknett (n 8) 15

¹³ *ibid*

¹⁴ RHC Davis, *King Stephen* (Longman 1977) 123

the Anarchy would 'be restored rights they had under Henry I'.¹⁵ To this end a Royal writ was made available commanding the feudal lord to do right by those dispossessed. This, it is suggested, was the genesis of the writ of right, the writ that was the foundation of all proprietary action. Palmer also considered the writ had another important function, as it 'created a distinction between seisin and right and that distinction created a title other than mere acceptance of the lord and thus a world not entirely feudal'.¹⁶

During his reign, not only did Henry II make available a writ commanding the feudal court to do right by those dispossessed, he also took freeholders under his wing. By declaring that 'no man shall answer for his free tenement without royal writ',¹⁷ he managed to take authority for actions regarding control of land, or perhaps more accurately control of title to land. Although the action would, initially at least, still take place in the feudal court, the King was able to exert some control over the adjudication of law via the type of writ issued. The protection afforded to freemen was complimented by the bold step of introducing the option of a form of trial known as the grand assize.

In the period directly after the conquest the form of trial would be by battle, however, 'probably in 1179 came the most striking extension of inquest trial when it was allowed as a matter of course (at the option of the defendant) to replace battle with the most solemn of all actions, the writ of right'.¹⁸ By introducing the option of the grand assize, the defendant could choose to have

¹⁵ SFC Milsom, *The Legal Framework of English Feudalism* (CUP 1976) 178

¹⁶ Robert C Palmer, 'The Feudal Framework of English Law' (1981) 79 Mich L Rev 1130, 1141

¹⁷ Frederick Pollock and Frederic William Maitland *The History of English Law; Before the Time of Edward I* vol 1 (2nd edn, Cambridge University Press 1898) 147

¹⁸ Plucknett (n 8) 111

a trial by a jury of twelve knights of the neighbourhood, and in doing so remove the action from the lords' court and place it under the supervision of the Royal justices.

The grand assize was a portentous affair which enquired into questions of proprietorship, it was prone to interminable delays and imposed on the demandant the burden of proving his superior seisin, and thus gave the tenant a marked advantage. However, by introducing possibly his most important innovation, the petty assize of novel disseisin,¹⁹ Henry II was able to provide a solution to this problem; at least the problem of the protracted delays, the advantage enjoyed by the person in possession was to remain.

Novel disseisin was an action controlled solely by the Royal Courts and designed to protect the seisin²⁰ of the possessor. Its principle was that 'one man, even though he claims and actually has a title of the land in question, is not to turn another man out of possession without first obtaining a judgement'.²¹ As well as introducing a writ which protected possession and was only actionable in the King's court, novel disseisin introduced a significant concept into English land law. This was the 'fact that it allows a claimant to rely on his own seisin as title and the introduction of the action gives rise to the doctrine that any person who acquires seisin acquires thereby a title,

¹⁹ Novel disseisin is significant as it protected possession rather than title and, therefore, as will be expanded upon in the last chapter, introduced the idea that possession itself was not wrong. This, it is suggested, is a compelling argument against squatting and trespass being synonymous.

²⁰ Seisin was a term that denotes, in its earliest form, possession. However, it was to develop into a concept which described more than just simple possession and it is suggested came to represent *de facto* possession with the necessary mental element; the earliest form of *animus possidendi*. Seisin will be discussed in greater detail in chapter six.

²¹ Pollock & Maitland (n 17) 148

though a poor title; it matters nothing by what roguery he acquired seisin'.²² Therefore, seisin or possession, for at this time they were basically the same thing, became the root of title, and remains so today; although some might argue that since the Land Registration Act 2002 this is no longer the case.

1.3 Forms of Action

'The system of Forms of Action or the Writ System is the most important characteristic of English medieval law',²³ and it was from this system that the substantive law developed. In the writ system a wronged man could not simply compel the alleged wrongdoer to appear in court and answer for his actions; a wrong did not necessarily afford a right of redress. The structure of the writ system required the demandant to bring his case within a certain form of action, with each 'methods of procedure adapted to cases of different kinds'.²⁴ If the demandant could not bring his case within the certain formula of one of these writs then he had either, no action available, or had to take a writ whether it fitted the facts of the case or not.

The writs however directed procedure not law, this was developed organically by the courts, 'secreted from the interstices of procedure'.²⁵ In fact the early writs did not, strictly speaking, directly instigate litigation, they were 'forms of administrative commands to an alleged wrongdoer or some other inferior jurisdiction to do justice in a particular manner'.²⁶ With the option of the grand assize, alongside another early innovation, the writ of right *prescipe quod*

²² Simpson (n 4) 35

²³ Frederic William Maitland, *Equity; also The forms of Action at Common Law* (CUP 1909) 295

²⁴ *ibid* 296

²⁵ Henry Sumner Maine, *Dissertation on Early Law and Customs* (Murray 1901) 389

²⁶ Plucknett (n 8) 355

reddat,²⁷ which commanded the action was removed from the jurisdiction of the feudal court completely, it can be seen that the Royal Courts were beginning to exert a monopoly on litigation.

Certainly by the reign of Henry III there may have been 'as many forms of action as there were causes of action',²⁸ and if a new wrong was committed then a new writ could be created to remedy it. Writs were available for such things as recovery of personal property, or damages for breach of a simple contract, yet perhaps the one that had the most influence on real property rights was trespass. Although an action that was personal in nature, the writ of trespass was to become significantly, if erroneously, linked to adverse possession.²⁹ It was initially intended to deal with violations of the King's peace, yet by using the appropriate pleadings it became a way of settling questions of title. Notwithstanding the array of personal actions developed by Chancery, who had a certain amount of freedom to invent new writs, the most important actions were real actions and these concerned seisin of land.

1.4 Real Actions

'Reasons of state demanded that the Crown through its court should have a firm control of the land; the common law, therefore, was first the law of land before it became the law of *the* land'.³⁰ This gave actions for the recovery of land the most prominent position in the development of the common law. As stated earlier, the writ of right was the first and the foundation of all proprietary actions. These real actions, and for that matter the writ of novel disseisin,

²⁷ Command that he render. Historically, it was a writ that directs a defendant to return certain property.

²⁸ Maitland (n 23) 300

²⁹ It will be explained in the final chapter that a squatter, because of the title gained by possession, cannot be a trespasser.

³⁰ Plucknett (n 8) 355

were utilised not to recover 'ownership of the land, nor possession of the land, but the seisin of the land'.³¹ While novel disseisin was a simple action which claimed the demandant himself was seised of the land, the writ of right sought to demonstrate that the title of the land was derived for some person other than the demandant. Although both of these actions sought to demonstrate the same thing, that the demandant was seised, their difference was significant. In the writ of right the demandant had to prove some ancestral claim to the land, which was certainly a more difficult undertaking than simply establishing a title gained by possession.

Writs of right were a group of actions that developed as remedies available to someone who claimed they were seised of land through another, and were named 'from the principle point stated in the writ, or the nature of the wrong to be redressed'.³² Writs of right were slow and became more so as the law applied became increasingly complex; as the law became more convoluted, expectations diminished. Many of the forms of action soon became obsolete and were never used beyond the late thirteenth and early fourteenth century, and by the time of the eighteenth century the law was full of 'fictions contrived to get modern results out of [these] medieval premises'.³³ By the early nineteenth century 'the whole mass of fictitious law',³⁴ and perplexity associated with real property, led to calls for reform. The resultant Real Property Limitation Act of 1833 swept aside 60 different real actions leaving

³¹ Simpson (n 4) 35

³² Asahel Stearns, *A Summary of the Law and Practice of Real Actions* (Glazier, Masters & Co 1831) 83

³³ Maitland (n 23) 301

³⁴ University of London Bentham Collection. vol xi. 29

just two, writs relating to dower, as well as the writ *quare impedit*³⁵ and the action of ejectment.

1.5 Petty Assizes

Writs of right had always been slow and solemn affairs, and for that reason the action of novel disseisin and mort d'ancestor were introduced as a fast and effective way of tackling a right of possession. Originally intended 'to initiate proceedings in the King's court in which a jury of the neighbourhood would appear to answer a single question: had the defendant(s) unjustly and without a judgement disseised the plaintiff of his free tenement'.³⁶ In its earliest form novel disseisin was subsidiary and preliminary to the writ of right, intended to prevent procedural advantage accruing to the party who had disseised another. However, in many cases parties were 'content with its verdict, and therefore the petty assize became a complete form of action'. It was not necessary for the disseisee, the person in possession, to prove title beyond the one generated by possession, only that they had been turned out of quiet enjoyment of the property. This turning out was 'in fact was usually brought about by acts of violence'.³⁷ Although designed to be fast and effective these petty assizes were to become just as dilatory as the writ of right. The petty assizes will be discussed in greater detail in chapter six.

³⁵ A writ commencing an action to decide a disputed right of presentation to a benefice.

³⁶ Paul Brand, 'The Origin of English land law: Milsom and After' in P. Brand (ed) *The Making of the Common Law* (Hambledon Press 1992) 212

³⁷ Plucknett (n 8) 358

1.6 Limitation of Actions

Much of the reason for questions of disseisin becoming far from novel was due to the limitation period that operated prior to the sixteenth century. Although there is some ambiguity concerning the origins of limitation, indeed *Megarry & Wade* assert that limitation is 'unknown at common law',³⁸ and indeed most academic texts recognise the Limitation Act of 1623 as the commencement of this concept. However, whilst a common law foundation to the principle of limitation may not have existed, the Limitation Act 1623 does not appear to be the first.

1.7 Early Periods of Limitation

Although Anglo-Saxon law does not appear to apply any fixed periods beyond which actions could not be commenced, this was remedied in the early thirteenth century when, among the statutes passed at Merton in 1235, the Limitation of Writs Act³⁹ was introduced. This stated that for a writ of right, the ancestor must have been alive during the reign of Henry I;⁴⁰ for mort d'ancestor the date was fixed at the time of the return of King John from Ireland to England,⁴¹ and for novel disseisin it was the Henry II's last voyage to Normandy, which was in 1184. These limitation periods, at least by more modern standards, were long with a minimum of 25 years for novel disseisin, a supposedly speedy action, and a minimum of 50 years required for real actions. The periods of limitation continued to increase year by year until the

³⁸ Charles Harpum, Stuart Bridge & Martin Dixon, (eds), *Megarry & Wade; The Law of Real Property*, (8th edn, Sweet & Maxwell 2012) 35.001

³⁹ Limitation of Writs Act 1235 (20 Hen 3 c 8)

⁴⁰ 1100-1185

⁴¹ 1210

Statute of Westminster 1,⁴² however this statute was to do little to simplify the law. By again using a fixed date the limitation period for an action of novel disseisin, for instance, grew from 58 years to over 300 years by the time of the Limitation Act of 1540.⁴³

1.8 Fixed Periods of Limitation

The 1540 Act, rather than limiting actions to the date of a particular event 'which in process of years had grown more absurd, took another more direct course',⁴⁴ and introduced fixed periods. These periods of limitation were 60 years for real actions and 50 for one based on the seisin of an ancestor.⁴⁵ However, any action:

Grounded on the possession of the demandant had to be commenced within 30 years of the disseisin complained of; for if it be an older date it can with no propriety be called fresh, recent, or novel disseisin.⁴⁶

This would seem sensible, if the cause of the action was based on the demandant's own possession a relatively short period would be necessary, however by 1540 it was too late; a whole host of defences to the actions had been introduced,⁴⁷ and novel disseisin, the supposedly speedy action, had become as dilatory as the rest.

⁴² Statute of Westminster (3 Edw 1) 1275

⁴³ Limitation Act 1540 (32 Hen 7 c 2)

⁴⁴ 3 Bl Comm 189

⁴⁵ Mort d'ancestor

⁴⁶ Bl Comm (n 44) 189

⁴⁷ Simpson (n 4) 41

To overcome these problems considerable use was made of legal fictions, developed from personal actions, to reach a judicial decision as to who had the best right to possession. The action of trespass *quare clausum fregit* for instance, became used extensively in the fifteenth century to settle questions of title. With the Statutes of Forced Entry, although criminal in its conception, being allowed by the courts to be used as a civil action. By the sixteenth century the action of ejectment, a personal action developed with the intention of protecting the termor,⁴⁸ was being made to stand in, with the appropriate legal fictions, for almost all of the real actions. This use of personal actions had an added advantage for the demandant; up until the seventeenth century there was no limitation period for such personal actions. It was down to the Limitation Act of 1623⁴⁹ to rectify this anomaly, although it did not change the periods of limitation for actions relating to the recovery of land, it did impose a period of 20 years for rights of entry such as ejectment.

The Limitation Act 1623 continued in operation until 1833 when the Real Property Limitation Act was introduced; it applied a fixed limitation period of 20 years for all actions relating to land. The 1833 Act was significant in the way it addressed the limitation period and had the potential to introduce far-reaching changes to the doctrine of adverse possession, if the mooted Land Registration Act had been introduced.

⁴⁸ A tenant for a term of years

⁴⁹ Limitation Act 1623 (21 James c 16)

The 1833 Act's 20 year limitation period was reduced to 12 years in 1874,⁵⁰ and the Act of 1939 consolidated the previous enactments. Yet perhaps of greater symbolic importance was the reintroduction, by the 1939 Act, of the term 'adverse possession', a phrase jettisoned by the 1833 Act. Although it was supposedly not used with the 'meaning it had before 1833'.⁵¹ it was an action described as 'unfortunate'⁵² by Lord Brown-Wilkinson. The current law of limitation is governed by the 1980 Act.⁵³ This consolidated a number of statutes, including the 1939 Act, however as far as adverse possession was concerned there was no significant changes.

1.9 The Limitation Act 1833

The complexity of land law and the inconveniences caused by conveyancing methods led to, by the 1830s, the conclusion that it was an 'incomprehensible mystery'.⁵⁴ Only those who practiced had any chance of understanding the law and 'even amongst those practitioners only a few possessed an extensive grasp of the law, which was essential to any intelligent proposals for reform'.⁵⁵ Although few legal practitioners truly understood the law they had a vested interest in it remaining complex. Any simplification, let alone codification of the law, would result in less complex conveyancing and more certainty of title. Both of which would have an unfortunate effect on the conveyancers' income.

⁵⁰ Real Property Limitation Act 1874 (37 & 38 Vic c 57)

⁵¹ Stephen Jourdan & Oliver Radley-Gardner *Adverse Possession* (2nd edn, Bloomsbury Professional 2011) 2-62

⁵² *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL); 35

⁵³ Limitation Act 1980 (LA 1980) (c 58)

⁵⁴ Simpson (n 4) 252

⁵⁵ *ibid*

1.10 The Real Property Commission

In spite of this vested interest there was a groundswell of opinion advocating 'reforming measures designed to bring the land law into line with the needs of a commercialised, industrial nation'.⁵⁶ This revising sentiment was shared by some legal practitioners and those 'influential lawyers allied themselves to the movement for reform'.⁵⁷ This pressure ultimately resulted in the formation of the Real Property Commission, which despite the opinions of the reformists concluded, at least publicly, that 'the law of England, except in a few comparatively unimportant particulars, appears to come almost as near perfection as can be expected in any human institution'.⁵⁸ Yet they did consider the mechanisms by which estates and other interests in real property were created, transferred and secured were, 'exceedingly defective, and require many important alterations'.⁵⁹ These problems arose because title was based on possession and notwithstanding long enjoyment, could be 'found unmarketable; and if, after tedious delays, the transaction is completed, the law expenses inevitably incurred sometimes amount to no inconsistent proportion of the value of the property'.⁶⁰

Although the Commissioners for Real Property considered they had tidied up rather than radically changed the law,⁶¹ the changes introduced by the Real Property Limitation Act 1833 did result in significant adaptations of the law relating to the transfer of land. It did this by the abolition of almost all real

⁵⁶ *ibid*

⁵⁷ *ibid* 253

⁵⁸ House of Commons, *The First Report of the Commissioners of Inquiry into the Law of England Respecting Real Property* (Cmd 263 1829) 6

⁵⁹ *ibid* 7

⁶⁰ *ibid* 41

⁶¹ Simpson (n 4) 254

actions and the imposition of a fixed 20 year limitation period. Yet the most important and potentially far reaching reform was the abolition of the term adverse; all that was required of the squatter was demonstration of *de facto* possession of the land for a term of 20 years or more. This however, did not mean that simple entry on to the land was sufficient. As will be explained later in the work, any entry on to land that created a title, had to be evidenced by the necessary intent to possess. The term *animus possidendi*, coined by Lord Lindley ⁶² in 1900, was simply an acceptance of this fundamental prerequisite.⁶³

If these changes are considered it can be seen that the intent of the Real Property Commissioners was significant, even if history sees it differently. It was not the wholesale reform or codification which had been advocated by the reformers such as Bentham and Humphreys, which was effectively avoided by ensuring the make up of the Commission was amenable to the aristocratic opinion.⁶⁴ Yet, the introduction of land registration, which the Commissioners considered necessary if the full extent of their recommendations were to be realised, would have resulted in an overt and compelling alteration to hitherto held views of ownership, possession and title. Nevertheless, even without the introduction of registration, the full impact of which will be examined later,⁶⁵ there was still significant reform, some of it welcome, and some of which the courts had to 'deal' with.

⁶² *Littledale v Liverpool College* [1900] 1 Ch 19 (CA)

⁶³ See chapter 2 for a fully explanation of *animus possidendi*.

⁶⁴ How and why the Commission was amenable to aristocratic opinion is important to the development of the law and also to this thesis. It will be explained in chapter five.

⁶⁵ See chapter 5

1.11 Dispensing with the Requirement of Adverse Possession

The Commissioners, despite not attempting a complete codification, did produce a patchwork of legislation that had an important effect in simplifying the law.⁶⁶ The Limitation Act 1833 expunged any reference to adverse possession from the law, at least for a short period, along with the requirement that there had to be something in the nature of an ouster for the squatter's possession to be proven. The elimination of the terms adverse and non-adverse possession removed the perceived confrontational aspect from the law. Denman CJ held, in *Neapean v Doe d. Knight*, that the Act had 'done away with the doctrine of non adverse possession' and added 'the question is whether 20 years have elapsed *since the right accrued*, whatever the nature of possession'.⁶⁷ He expanded on this in *Culley v Doe d. Taylorson*:

The effect of this section [No 2] is to put an end to all questions and discussions, whether the possession of lands etc., be adverse or not; and if one party has been in the actual possession for 20 years, whether adversely or not, the claimant, whose original right of entry accrued above 20 years before bringing the ejectment, is barred by this section.⁶⁸

It was unfortunate, or perhaps intentional, that Lord St Leonard was to reintroduce the term in the case of the *Dean of Ely v Bliss*,⁶⁹ although he claimed that it should not be used in its former sense. He did however consider that 'no better expression than adverse possession can be used'.⁷⁰

⁶⁶ As well as the Real Property Limitation Act 1833, there was also the Prescriptions Act 1832, the Inheritance Act 1833, the Wills Act 1837. All of which went toward simplifying the law. See Simpson (n 3) 252-261

⁶⁷ (1837) 2 M & W 894, 911; 150 ER 1021

⁶⁸ (1840) 11 Ad & El 1008, 1015; 113 ER 697

⁶⁹ (1852) 2 De GM & G 460, 42 ER

⁷⁰ Ely (n 66) 477

He reaffirmed this opinion in *Scott v Scott*,⁷¹ although again holding that it was used in a different sense to that which was used before the Real Property Limitation Act 1833.

1.12 Non-Adverse Possession

As touched on above, almost all actions for the recovery of land were based on fictions developed from the action of ejectment, however, there was no limitation period for this type of action until, that is, one was introduced by the Limitation Act 1623. The introduction of this was something of a catch 22 situation; it gave the first in possession protection from stale claims, although it did encourage the use of outmoded real actions, yet it also protected the possession of a squatter. 'All' such a person needed to do was demonstrate possession that was adverse to the first's for the requisite limitation period. To counter the effect of this and protect the first in possession from having their land usurped, the courts developed a distinction between adverse and non-adverse possession. If it could be shown that the squatter's occupation of the land was not adverse, i.e. not done in such a way as to challenge the first's intended use of the resources, then the limitation period would not begin to run and the first's right to possession would be recognised. The exclusion of the terms adverse and non-adverse by the Limitation Act 1833, without the introduction of a registration act, made this problematic. The solution, advanced by the courts, was the re-establishment of the term adverse, which allowed the re-introduction of the binary distinction between adverse and

⁷¹ (1854) 4 HL & Cas 1065, 1085; 10 ER 779

ordinary possession. All of this inextricably led to the concept of non-adverse possession being reintroduced, although under various other guises.

1.13 The Requirement of Ouster

Lord Upjohn put forward a succinct explanation of the distinction between adverse and non-adverse possession. In *Paradise Beach and Transportation Co Ltd v Price-Robinson*,⁷² he described how the doctrine of non-adverse possession was used to ensure that the title of the first in possession was not endangered until 'there was possession clearly inconsistent with its due recognition'.⁷³ Unless possession was demonstrated to be adverse, i.e. the requirement that there be some action which amounted to the ousting of the first, then the limitation period would not begin to run. In fact without 'an actual ouster, the Statute of Limitations [was] no bar'.⁷⁴

However, historically there was always some confusion as to what the term 'actual ouster' meant; it would appear to be an act which required real force, 'as if turning out by the shoulders were necessary',⁷⁵ although in reality this was not the case. What ouster appears to be conveying is possession by the squatter must be in some way adverse to the first. Yet, it is 'not easy to define what will constitute an adverse holding of this nature',⁷⁶ and if the term adverse cannot be defined, it leads to the assumption that all possession must be non-adverse, until, that is, it is proven otherwise. This is apparently a rather

⁷² [1968] AC 1072 (PC) 1082

⁷³ *ibid* 1082

⁷⁴ *Doe d. Fishar & Taylor v Prossor* (1774) 98 ER 1052, 1052

⁷⁵ *ibid* 1053

⁷⁶ John Adams, *A Treatise on the Principle and Practice of the Action of Ejectment and the Resulting Action for Mesne Profits* (London, 1830) 46

circular argument and one that favours the first. It is this circularity that gave the courts the ability to re-introduce non-adverse possession, albeit by not actually calling it thus.

1.14 The Reintroduction Of Ouster: the Implied Licence

The judiciary's continuing desire for there to be 'something in the nature of an ouster of the first by the wrongful possessor',⁷⁷ before limitation can be applied is demonstrated by their use of the implied licence. The Limitation Act 1939 introduced the principle that land use by a squatter should not be assumed to be with the implied license of the paper owner.⁷⁸ This section was intended to counter the mischief, introduced in *Leigh v Jacks*,⁷⁹ however this did not prevent its reintroduction in such cases as *Wallis's Cayton Holiday Camp Ltd v Shell-Mex and BP Ltd*,⁸⁰ and under the guise of Human Rights, in *Beaulane Properties v Palmer*.⁸¹ Both of which were interesting exercises in judicial inventiveness.⁸²

It would seem the intention of the courts, both before the Limitation Act 1833 and since, is to require the squatter to prove that his possession is adverse; any idea that the title of the first in possession was automatically extinguished at the expiration of the limitation period was not supported by the case law. The courts remained 'reluctant to find adverse possession in cases where a

⁷⁷ *Wallis's Cayton Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94 (CA); 103 C (Denning MR)

⁷⁸ Limitation Act 1939 (LA 1939) s10(4)

⁷⁹ (1879) 5 Ex D 264 (CA)

⁸⁰ *Wallis's* (n 76)

⁸¹ [2005] EWHC 817

⁸² The implied licence and its genesis will be discussed later in the chapter.

squatter made use of land in a way consistent with the true owner's plans for it',⁸³ and in doing so re-impose restrictions on those who could make use of the Acts of Limitation. Without some proof that the squatter had effectively taken the place of the first, possession could not be found; effectively, even though the descriptor non-adverse had been abandoned, its ghost remained, re-enforcing the pejorative view of the squatter.

1.15 Extinguishing the First's Title

Until 1833 the expiration of the limitation period barred an action for recovery of the land, yet it did not divest the first in possession of their title. 'The remedy was barred but not the right to the estate'.⁸⁴ This had the consequences that a squatter in possession for the required limitation period would bar the first from taking action to reclaim occupation. However, this action did not divest the original first, or someone who could claim through the original first, of their right to reclaim possession. Reacquiring land via some inadvertency on the squatter's part would reconstitute their right of occupation. This occupation was not dependent on possessing the land for the requisite limitation period; their reoccupation automatically rekindled their superior right of control.

1.16 The Rationale For Extinguishing the First's Title

The preservation of the first's title even after discontinuance of their possession has a certain logic about it.⁸⁵ A title gives the holder the potential to exercise dominium over land, it simply sets out what rights may be enjoyed,

⁸³ Jourdan and Radley-Gardner (n 51) 9-134

⁸⁴ *ibid* 2-13

⁸⁵ See page 55 for a further explanation.

although it does not necessarily guarantee the possession to exercise those rights. In this way although two or more titles may exist which give similar rights over the same land, only one title holder can be in possession to exercise those rights. If expiration of the limitation period bars the original first from taking action to regain possession their title does not cease to exist; a title is personal, it is simply no longer the best. Although logical, it was seen to be problematic and The Real Property Limitation Act 1833, sought to deal with this.

Sections 2 and 3 of that Act stated on the expiration of any period to recover land, the title of the first in possession should be extinguished. In the early cases decided after the introduction of the 1833 Act, it was thought that the title of the land was transferred to the squatter; Parke B explained that the 'effect of the Act was to make a parliamentary conveyance to the person in possession after the period of twenty years has elapsed'.⁸⁶ However the Court of Appeal in *Tichborne v Weir*⁸⁷ corrected this assumption. The court held that the effect of the statute was 'not that the right of one person is conveyed to another, but the right is extinguished and destroyed'.⁸⁸ In the more modern case of *Fairweather v Marylebone Property Co Ltd* Lord Radcliffe explains:

It is necessary to start, I think, by recalling the principle that defines a squatter's rights. He is not at any stage of his possession a successor to the title of the man he dispossessed. He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time exhausts the one or more periods allowed by statute

⁸⁶ *Doe d. Jukes v Sumner* (1845) 153 ER 380, 381

⁸⁷ [1894] All ER 449 (CA)

⁸⁸ *ibid* 451

for successful intervention. His title therefore is never derived through but arises always in spite of the dispossessed owner.⁸⁹

Therefore, the intended effect of sections 2 and 3 of the 1833 Act was to extinguish the dispossessed first's title. This countered the inequity that legitimised the deposed first's right on regaining possession, to revive their principle control of the land. In *Hounslow London Borough Council v MInchinton*,⁹⁰ Millett LJ explained that it was 'sufficient for a claim to title by adverse possession that the property should have been in adverse possession for 12 years, whereupon the title of the true owner [was] extinguished,' he clarified that it was not 'necessary for possession to continue right until the commencement of the proceedings'.⁹¹ This resolved any lingering issue regarding the squatter situation; they had become the new first and any action to eject them from the land was barred. It is clear that until the squatter has maintained dominium over the land for the requisite limitation period his title cannot be the best when compared to the first. However, when the requisite 12 years have elapsed, possession having continued unbroken throughout the period, the plaintiff's title is extinguished,⁹² and the squatter's becomes the best.

1.17 The Logic of a Perpetual Title

Although *London Borough Council* and *Mount Carmel* made plain the respective positions of the original first and the squatter, it can be argued that

⁸⁹ [1963] AC 510 (HL) 535

⁹⁰ (1997) 74 P & CR 221 (CA)

⁹¹ *ibid*, 226

⁹² *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078 (CA)

possession of the land for the limitation period by the squatter does not actually extinguish the original first's title. As will be discussed in chapters two and three, a title is a personal 'thing' and one that the holder embodies rather than owns. It relates to the land but is not an indicator of a right to control that land; it is the best title that does this. Although this might seem no more than a point of debate, it is actually of significant importance when the theory of ownership is discussed. The dialectic process by which the right to control land is gained or lost requires title and land to be seen as two separate entities; in fact it is suggested that any theory of ownership requires title and control to be seen as disparate.

1.18 Land Registration

As was alluded to earlier in the chapter, the Real Property Commission, in its second report, suggested that a General Registry of Deeds and Instruments relating to land should be introduced. The Commission saw registration as an essential part of their plan to overhaul conveyancing and simplify land law, with registration of land intended to build on the foundations of their first report. The Commissioners appeared to consider that the abolition of adverse possession, suggested in their first report, and registration of title, which took up all of their second report, were mutually dependant. For registration to function land needed to be free from other claims of ownership; this would be achieved with the abolition of almost all actions to recover land, along with the recognition of the title of one who could demonstrate possession for at least 20 years. It could be speculated that the removal of any reference in the 1833 Act to adverse possession, was founded on the knowledge that it was

unnecessary in a system that had land registration at its heart. Unfortunately it was the opposition of the landed elite, who would be the most affected by a freely available register, which scuppered the Commission's plans.⁹³

The reports of the Real Property Commission, particularly the first two, may well have led to an entirely different system of law related to squatting developing. It would have been a system that clearly recognised that adverse possession was unnecessary; with protection of occupation by the first being more effectively achieved by registration. It would have been a system of title protection with similarities to the Land Registration Act 2002, but as will be expanded upon in chapter five, would have been superior to it.

1.19 Early Land Registration Acts

After the abortive attempt to introduce registration in the early 1830s, Lord Westbury's Act introduced a scheme of land registration⁹⁴ in 1862. This was a system of voluntary registration that was little used, as it required the demonstration of 'precisely defined boundaries' and registration of 'partial interests'.⁹⁵ It proved to be so strict in its application that, as Simpson commented, it 'soon proved to be a dead letter'.⁹⁶ A second attempt was made by the Land Transfer Act 1875. This system was also little used, and consequently a 'recently registered possessory title was valueless for conveyancing purposes'.⁹⁷ A third effort was made with the Land Transfer Act 1897, this time making registration compulsory, albeit only in the County of

⁹³ This will be discussed in more detail in chapter five.

⁹⁴ Land Registration Act (LRA) 1862

⁹⁵ Beaulane (n 81) [84]

⁹⁶ Simpson (n 4) 254

⁹⁷ *ibid*

London in the first instance. The 1897 Act does mark the beginning of a successful system of registration, but unfortunately it contained a number of problems.

Firstly, the effectiveness of registration was minimal as its unpopularity meant most land remained unregistered. This was perhaps of little significance compared to its principle problem, the statutory disregard of a basic tenet of English land law, relativity of title. Section 21 of the 1875 Act held that 'no title to land adverse to or in derogation of the title of the registered proprietor is to be acquired by any length of possession',⁹⁸ appearing to confirm that no new title could be acquired once it had been registered. There was a slight alteration to this absolute position made by the Land Transfer Act 1897,⁹⁹ although this was of little significance with regard to adverse possession.

The anomalous position introduced by the 1875 Act, which treated squatting on registered and unregistered land differently, was remedied by the Law of Property Act 1922.¹⁰⁰ It considered that Limitation Acts should apply to registered land in the same manner and to the same extent as land not registered. A final development in this saga, until that is the Land Registration Act 2002, was made by the Land Registration Act 1925. This Act altered the way the first in possession's title was dealt with. In land that was registered, the first's title would not be extinguished after 12 years adverse possession; rather the land would be held on trust for the squatter. This appears to be an acknowledgement that title was an adjunct to the control of land. However title

⁹⁸ Beaulane (n 81) [86]

⁹⁹ Land Transfer Act 1897(LTA 1897)

¹⁰⁰ Law of Property Act 1922 (LPA 1922) s.173

to unregistered would be extinguished, at least at law, after a period of 12 years adverse possession.¹⁰¹

1.20 Land Registration Act 2002

The Land Registration Act 2002 (LRA) has had the most significant effect on the doctrine of adverse possession since the Limitation Act 1833. Although it is suggested that rather than vitiate adverse possession it had the effect, or at least could have the effect, of freeing it from the complex rules and regulations that have intentionally obstructed its operation. This was just as the proposed Registration Act of the early 1830s intended to do.¹⁰²

The 2002 Act resolved to move the law away from a 'system in which the 'use value' of property was dominant' to that in which the right to control land was determined by 'formal rules concerning registration'.¹⁰³ One of the avowed intentions of the Act was to offer 'much greater security of title for a registered proprietor' than existed and 'would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure the land remained saleable'.¹⁰⁴ This has been called the 'emasculatation of adverse possession in relation to registered land',¹⁰⁵ and the 'closest thing in 900 years to absolute ownership'.¹⁰⁶ Yet it would be wrong to suggest that the Act has engineered a 'new conceptualism of *ownership* or

¹⁰¹ Land Registration Act 1925 (LRA1925) s.75 (1)

¹⁰² See chapter five

¹⁰³ Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford, 2007) 288

¹⁰⁴ Law Commission, *Land Registration for the Twenty First Century: A Consultative Document* (Law Com No 254, 1998) para 10.2

¹⁰⁵ Martin Dixon, 'The reform of property law and the Land Registration Act 2002: a risk assessment' (2003) Conv 136,142

¹⁰⁶ Martin Dixon, *Modern Land Law*, (7th edn, Routledge 2010) 428

dominium'.¹⁰⁷ It is true the Act has marginalised adverse possession of registered land; notwithstanding this, registration does not impose an absolute title. Although the register 'offers a new degree of security for those estates which are brought to the land Register',¹⁰⁸ and for all practical purposes that title is indefeasible. It still 'lacks that characteristic of unitary absoluteness which necessarily excludes the possibility of another person having the equivalent interest at the same time'.¹⁰⁹

An adverse possessor can still take possession of land and establish a fee simple title, this is implicitly acknowledged in the LRA itself. It states that where a 'person is registered as a proprietor of an estate in land in pursuance of an application under this schedule, the title by virtue of adverse possession which he had at the time of the application is extinguished'.¹¹⁰ The logical conclusion of this was expressed in *Baxter v Mannion*¹¹¹ where Jacob LJ commented

Para 1(1) of Schedule 6 says: 'A person may apply to the registrar to be registered if he has been in adverse possession of the estate.' That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply'.¹¹²

It would seem that unlike the 1875 and 1897 Acts the present LRA recognises, or at least appears to recognise, that relativity of title still prevails at the heart of English land law.

¹⁰⁷ Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 2.2.7

¹⁰⁸ *Ibid* 2.2.7

¹⁰⁹ David Fox, 'Relativity of Title at Law and in Equity', (2006) CLJ 330, 336

¹¹⁰ Land Registration Act 2002 (LRA 2002) Sch 6, para 9(1)

¹¹¹ *Baxter v Mannion* [2011] EWCA Civ 120

¹¹² *ibid* [24]

The Act itself is silent as to how adverse possession is to be proven, as are the Land Registration Rules 2003 (LRR), simply stating that it is necessary to 'provide evidence of adverse possession'.¹¹³ Therefore, although the LRA ushered in a new regime for asserting the best title to land, without any statutory definition of adverse possession, the common law rules must be used to inform this decision. Although the Act makes dispute over relative strengths and weaknesses of the titles easy to resolve, the fact remains that a squatter, upon taking possession of registered or unregistered land, still establishes a fee simple title. This of course requires the squatter to demonstrate *de facto* possession and the mental element of intent.

1.21 Adverse Possession

On the expiration of the limitation period the first in possession of unregistered land can be prevented from asserting their title. This exclusion of the first requires the squatter to demonstrate *de facto* possession of the land, whilst manifesting the necessary mental element, the *animus possidendi*. If the squatter is unable to establish both elements their occupation will be trespassory,¹¹⁴ and the limitation period will not have started to run against the first. If the land is registered however, the law requires a different approach. The first's title is not extinguished on the expiration of the limitation period, which has become 10 years,¹¹⁵ however the squatter can apply to be registered in their place. On receipt of such an application the registrar is

¹¹³ Land Registration Rules 2003 (LRR 2003) s. 188 (1)(a)

¹¹⁴ It will be asserted later in this thesis that a squatter who can demonstrate the necessary mental and physical control is not a trespasser.

¹¹⁵ LRA 2002 (n 110) Sch 6 s 1(1)

required to give notice to anyone with a registered interest;¹¹⁶ this notice gives those persons the chance to object to and prevent the squatter's registration. It would seem, on the face of it, squatters on unregistered and registered land are treated in significantly different ways; in the former the first's title, if not extinguished, loses its premier position and the squatter's title is elevated, as it were, to the best title. However, when the land is registered the first's title becomes almost indefeasible.¹¹⁷ Be that as it may, there is a common theme which underpins both registered and unregistered land, that is the necessity to demonstrate, that which the law considers as possession adverse to the first. Without this, no successful claim can arise in either situation.

1.22 Discontinuance or Dispossession

The fundamental requirement of adverse possession is the first must be dispossessed, or they must discontinue possession, before a right of action can accrue. The date of this dispossession or discontinuance of possession signaling the start of the limitation period.¹¹⁸ The use of the terms dispossession and discontinuance of possession understandably causes confusion; indeed Fry J viewed them as having distinct and different meanings. He explained 'the difference between dispossession and discontinuance of possession might be expressed in this way – the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in to

¹¹⁶ *ibid*

¹¹⁷ *ibid* Sch 6 s 6(5) includes three conditions when the squatter is preferred to the first's and entitled the squatter to gain registered as proprietor of the estate.

¹¹⁸ LA 1980 (n 53) sch. 1 s. 1

possession by other persons'.¹¹⁹ Fry J's definition of the dispossession appears to require some sort of ouster, a requirement that had apparently been expunged for the law in 1833. His interpretation of discontinuance appears to require knowing abandonment of possession by the first. This recognition of dispossession and discontinuance as distinctly different has caused illogicality to be introduced into the law.

Fry J does not elaborate as to what constitutes ousting; however, it would be reasonable to assume under such circumstances the first would have knowledge of their forceful eviction. He does however explain discontinuance of possession. This requires the first to voluntarily leave, effectively abandoning the land and allowing the squatter to take possession of what is apparently an uncontrolled resource. Yet according to Slade J the first in possession is deemed to be in possession until there is evidence to the contrary; thus the law will without reluctance, 'ascribe possession either to the paper owner or to a person who can establish a title claiming through the paper owner'.¹²⁰ Slade J's evidence to the contrary is not explained; leading to the assumption that the first, or one claiming through the first, is regarded as having constructive possession, even though there is no occupation or use made of the resource. It would seem that neither dispossession nor discontinuance of possession is a state that can be evidenced, at least according to the case law. Dispossession requires ouster and discontinuance of possession can only occur in combination with some unspecified condition. This illogical state benefits the accepted doctrine of squatting; without

¹¹⁹ *Rains v Buxton* (1988) 14 Ch D 537 (Ch); 539

¹²⁰ *Powell v McFarlane* (1977) 38 P & CR 452 (Ch); 470

dispossession or discontinuance of possession by the first, the squatter can never assume possession and will remain a trespasser.

1.23 Trespassing

Without doubt the law is happy to regard someone entering the land of another as a trespasser, with that person remaining so until such time as the limitation period has passed. However, it is difficult to see how a trespasser can gain a title to land if they are trespassing on it; if title is created by possession and possession is never ceded from the first, then the squatter has no title and the limitation period cannot start to run. The law has sidestepped this rather problematic argument by considering a squatter 'dispossess the paper owner by going into ordinary possession of the land for the requisite period without the permission of the owner'.¹²¹ Dispossession is simply a result of possession being taken by another. It could be said that there might be some artificiality about this, along with the ambiguity caused by a trespassing squatter having possession protected against anyone but the first. However, it is possible to circumvent ambiguity by applying a dialectic theory of ownership; and it is suggested under such a theory the squatter, on gaining possession, ceases to be a trespasser.¹²²

¹²¹ *Pye* (n 52) [36]

¹²² The challenge to the doctrine view that a squatter remains a trespasser until the limitation period expires will be considered in more detail later in the last chapter.

1.24 The Dialectic of 'Ownership'

Dialectic theory holds that nothing is 'ultimately and completely real except the whole';¹²³ therefore 'ownership' cannot exist without both the subjective and objective elements. To say that control of land can be manifested by either physical possession or mental intent cannot be the whole truth, there must be a synthesis of both ingredients. Accordingly, the whole consists of both the subjective idea of possession and the objective demonstration of that idea. If both of these aspects are not exhibited in the same person, then their control cannot be complete and there is space for another.

This dialectic process has always existed. The pragmatic approach to control and possession has always implicitly acknowledged the existence of a mental element. Seisin may well have been the first observable implementation of this dialectic; the notion that it came to represent more than just possession would seem to indicate this. The existence of this implicit mental element meant that Lindley M.R.'s introduction of *animus possidendi*, in *Littledale v Liverpool College*,¹²⁴ was not a concept plucked out of thin air, but rather the overt acknowledgement of this enduring requirement.

It is by acknowledgement of this dialectic theory that problematic argument surrounding discontinuance of possession can be rationalised. If either, or both, aspects of the duality of subjective possession and observable control cease, there is space for another to take control. Naturally, the necessity for the first's embodiment will to leave before another's takes its place should

¹²³ Bertrand Russell, *History of Western Philosophy* (Routledge 1996) 662

¹²⁴ *Littledale* (n 62)

have, in reality, caused a subtle shift of emphasis. Rather than the squatter needing to demonstrate their intent to possession via a complex and confusing fictional process, it would be for the first to establish their continuing subjective and physical dominium; a process which would no doubt favour the squatter's ability to create their own title, yet not necessarily favour their capacity to gain long term control of the resource.

1.25 Possession Must be Adverse and Continuous

The conventional doctrine of adverse possession considers that once discontinuance of possession by the first has occurred, the squatter's possession needs to be adverse, continuous, and endure for the whole limitation period. Yet using the term adverse is dubious, not only does it raise an ambiguity when it comes to interpretation it also, as was explained in the introduction, sets the first in possession and squatter as binary opposites, one good and one bad. This pejorative binary classification gives the courts an opportunity to translate the law in a way that suits their view of squatting. As Lord Browne-Wilkinson explained in *Pye v Graham*,¹²⁵ 'due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said he has to 'oust' the true owner in order to dispossess him'.¹²⁶ This, as he goes on to explain, gives adverse possession 'overtones of confrontational, knowing removal of the true owner from possession'.¹²⁷ Lord Hope in the same case endorsed this view, explaining that 'at first sight, it might be thought that the word adverse

¹²⁵ *Pye* (n 52) [38]

¹²⁶ *ibid* [36]

¹²⁷ *ibid* [38]

describes the nature of possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required; but an examination of the context makes it clear that this is not the case'.¹²⁸ Albeit Lords Browne-Wilkinson and Hope considered the term adverse should not be thought of as hostile, aggressive, or underhand but there is little doubt that is how it is viewed by the public and other courts.

The requirement that possession needed to be adverse before the limitation clock begin to tick, was officially reintroduced by the Limitation Act 1939, and retained in the 1980 Act. Although it is suggested the words of the statute simply reflected the attitudes the courts had readopted soon after 1833. Lord Browne-Wilkinson's argument that the term adverse, as used in the 1939 Act, was not intended 'to reintroduce by a side wind after over a hundred years the old notions of adverse possession in force before 1833',¹²⁹ is not manifest in the courts attitude, either before or since. Accordingly, the supposed 'requirement that possession be 'adverse' refers to the fact that the paper title holder is entitled to bring an action for the recovery of the land',¹³⁰ is not the actuality of the situation. The continual use of adverse enhances the sense of wrongfulness the squatter's actions supposedly exhibits; this is evidenced by judicial comments which describe the squatter's 'possession as of wrong',¹³¹ or 'inconsistent with and in denial of the title of the true owner'.¹³² Reinforcing the existence of binary opposites, possession which is acceptable and possession which is unacceptable, it is use of these binaries which gave the

¹²⁸ *ibid* [69]

¹²⁹ *ibid* [35]

¹³⁰ Jourdan and Radley-Gardner (n 51) 6-07

¹³¹ *Buckinghamshire County Council v Moran* [1990] Ch 623 (CA); 644 [D] (Nourse LJ)

¹³² *Ramnarace v Lutchman* [2001] 1 WLR 1651 (PC); [10] (Lord Millett)

courts the latitude to deal with the squatter as a land thief, rather than one who has a title as of right. Albeit a title without paper evidence and usually not the best, which is normally reserved for the original first's title.

It must be acknowledged that an argument that seeks to exclude the notion of binary opposites can be countered by the contention that a squatter is trespassing and therefore, possession must be of wrong. Yet, as briefly mentioned above, a squatter whose possession results from a synthesis of the subjective and objective elements of control, cannot be a trespasser. It will be explained in the final chapter, that rather than the concept of non-trespassory occupation being introduced to make the whole of this thesis 'work', trespass was in fact introduced by the courts to allow their narrative to function. If this argument is accepted as correct and the first's embodied will has 'gone' from the land and the squatter's has taken its place, then there can be nobody in possession except the squatter. If possession is seen as singular and exclusive, which it is, then if the squatter is in possession they cannot be trespassing. Although legal orthodoxy might regard this view to be heretical, it is considered that to label the squatter as a trespasser is both a misinterpretation of legal history and a convenient way of demonstrating the 'true' owner's title as normal and the squatter's as abnormal.

1.26 Squatting By Consecutive Squatters

To satisfy the Limitation Act not only should there be possession by one who is not the original first, but this possession must be continuous for the full limitation period. The Limitation Act 1980 provides:

Where a right of action to recover land accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless or until the land is again taken into adverse possession.¹³³

It is clear from the Act that if a squatter takes possession of land, then abandons it before the limitation period expires, a second squatter cannot enter into possession and take advantage of the first squatter's period of possession. When the second squatter takes possession the limitation clock restarts from zero. Whilst this is the case for land abandoned by a squatter, if the first squatter's title is transferred to the second by conveyance, will, intestacy, or perhaps orally, then the period of adverse possession runs from when the first squatter went into occupation. As Nicholls LJ explained, the first squatter may permit the second to take over land in circumstances which, on ordinary principles of law, would preclude the first from subsequently ousting second.¹³⁴ The lack of a formal conveyance of the possessory title is unimportant, according to Neuberger LJ What actually 'bars the paper owner from claiming possession is a continuous period of 12 years of dispossession'.¹³⁵

Neuberger LJ made this clear in *Tower Hamlets London Borough Council v Barrett*, when he commented:

¹³³ LA 1980 (n 53) Sch. 1, para 8(2)

¹³⁴ *Mount Carmel Investments* (n 92) 1086 F

¹³⁵ *Tower Hamlets London Borough Council v Barrett* [2006] 1 P & CR 9, (CA); [36]

Unless there is a hiatus between the periods of possession of successive squatters (in which case para 8(2) of the Schedule would prevent the second squatter being able to rely on the period of adverse possession by the first) the second squatter, whether he has purchased from the first squatter or dispossessed him in some other way, can rely on the first squatter's period of adverse possession.¹³⁶

However, Jourdan and Radley-Gardner add a caveat to Neuberger LJ's judgement.¹³⁷ They agree with Neuberger LJ when title to the land in question was conveyed from the first squatter to the second by some form of transfer. However, when there had been no such conveyance and the second came into possession after discontinuance, then there can be no reliance on the first squatter's period of possession.¹³⁸

This would seem a highly satisfactory conclusion and in keeping with the alternative version of adverse possession expounded in this work. The first in possession and the initial squatter both have titles to the land in question, with each title capable of being alienated. Their respective titles are graded, with the first in possession as the best, and so on. It is only by operation of law that the first in possession ceases to be the best, with the law requiring a period of 12 years possession by the squatter before it will operate to strip the first of their pre-eminent title. The period of 12 years is arbitrary, it is the one the law considered reasonable to ensure land is not burdened with historical titles that make conveyancing difficult or almost impossibly complicated. Accordingly, it

¹³⁶ *ibid* [36]

¹³⁷ Jourdan and Radley-Gardner (n 51) 6-53

¹³⁸ *ibid* 6-54

could be argued that the law should allow any period of discontinuance by the first, whether caused by one person's occupation or several, to trigger the operation of this 12 year period. Yet without a single 12 year period of occupation by one squatter, which would have the effect of promoting their title to the best and render the first's as unenforceable, the first's must remain pre-eminent.

The position of successive squatters under the Land Registration Act 2002, is slightly different to that of unregistered land. There appear to be only two circumstances when periods of adverse possession can be aggregated. In the first a successor in title to the squatter may add the first's period of adverse possession to his own.¹³⁹ Although it must be noted that the terms successor and predecessor used in this section are not defined. In the second situation a squatter who has been dispossessed by another but goes on to recover the land may add the re-dispossessing squatter's period of adverse possession to their own.¹⁴⁰

1.27 Occupation By Licence

The Limitation Act 1980 provides:

For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the

¹³⁹ LRA 2002 (n 110) Sch. 6, para 11(2)(a)

¹⁴⁰ *ibid* Sch. 6, para 11(2)(b)

land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.¹⁴¹

This does not mean that a license cannot be implied under any circumstances but it certainly cannot be found based on the squatter's use of land being consistent with the first in possession's present or future enjoyment of that land. It was this very concept the Court of Appeal laid down in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*.¹⁴² *Wallis's Cayton* was at the end of a line of cases, starting with *Leigh v Jacks*,¹⁴³ which introduced the notion of implied licence.

There were two possible interpretations arising from the judgement in *Leigh v Jacks*, the first being that the acts of possession were too trivial to amount to adverse possession; the second, that the court handed down a special rule which stated that a squatter's use of the land had to be inconsistent with the owner's intention. It was this second interpretation that the courts chose to adopt. Starting in the 1950s,¹⁴⁴ the courts 'began to develop the idea of a non-contractual licence',¹⁴⁵ seemingly to undermine 'the basic policy of the Limitation Acts'.¹⁴⁶

¹⁴¹ LA 1980 (n 53) Sch 1 para 8(4)

¹⁴² *Wallis's* (n 77)

¹⁴³ *Leigh* (n 79)

¹⁴⁴ *William Bros Direct Supply V Raftery* [1958] 1 QB 159 (CA), *Tecbild v Chamberlain* (1969) 20 P & R CR 633 (CA)

¹⁴⁵ Jourdan and Radley-Gardner (n 51) 9-138

¹⁴⁶ *ibid*

In *Wallis's* the majority decision of the court¹⁴⁷ interpreted *Leigh v Jacks* as laying down the second rule quoted above. However, Lord Denning went much further than this and attempted, it seems, to drive a coach and horses through the doctrine of adverse possession. He stated that a squatter, by using the land, knowing that it does not belong to him, 'impliedly assumes that the owner will permit it: the owner by not turning him off impliedly gives permission'.¹⁴⁸ Doubts were raised as to the efficacy of this decision by Slade J in *Powell v McFarlane*,¹⁴⁹ finding it difficult to 'justify the imputation of an implied or hypothetical licence for the purposes of applying or defeating the provisions of that [1939 Limitation] Act'.¹⁵⁰ Although he admitted that he would have been constrained to follow the decision if he had found the plaintiff had gained possession.

Although Lord Denning's interpretation of *Leigh v Jacks* was effectively abolished by the Limitation Act 1980, there still remained an argument that the special rule introduced in that case prevailed. Thus the need for the squatter's use to be inconsistent with the first's intended use could still be evoked. However, in *Buckinghamshire County Council v Moran*,¹⁵¹ this argument appears to have been rejected. Slade LJ considered that the *ratio* in *Leigh* was either that the necessary *animus possidendi* had not been demonstrated, or the acts of possession were so trivial that they could not be relied upon.¹⁵² Although he did consider that if the squatter had knowledge of some future use the 'true' owner had for the land, then there needed to be clear evidence

¹⁴⁷ *Wallis's* (n 77) Lord Denning MR and Ormrod LJ; Stamp LJ dissenting

¹⁴⁸ *ibid* 103 [F]

¹⁴⁹ *Powell* (n 120)

¹⁵⁰ *ibid* 484

¹⁵¹ *Buckinghamshire* (n 131)

¹⁵² *ibid* 639 [D]

that the squatter had the necessary possession and intent. Otherwise 'the court is likely to infer that the squatter neither had nor had claimed any intention of asserting a right to the possession of the land'.¹⁵³ Nourse LJ concurred with this judgement stating that 'the intention of the true owner, although it may have some influence in theory, is irrelevant in practice'.¹⁵⁴ However, he also added an exception, considering that if the future intention of the first is known to the squatter, 'this may affect the quality'¹⁵⁵ of the squatter's possession. Indeed there is a certain logic to this; if the first has a future intention it could be a sign that the first's subjective and objective possession remained, leaving no space for the squatter's.

Despite the apparent abolition of the implied licence doctrine there remains situations when this rule can still be recognised. For instance, the occupier of the land who makes payments to the first is clearly using the land under licence. However, when no such payment has been made such a licence can be implied. The test to be employed is that derived from the speech made by Lord Walker in *R (on the application of Beresford) v Sunderland City Council*.¹⁵⁶ Jourdan and Radley-Gardener explain that:

In order to establish a licence, there must be a communication in writing, by spoken word or by overt and unequivocal conduct, that was intended to be understood, and was understood, as a permission to do something that would otherwise be an act of trespass.¹⁵⁷

¹⁵³ *ibid* 640 A

¹⁵⁴ *ibid* 645 B

¹⁵⁵ *ibid*

¹⁵⁶ [2004] 1 AC 889 (HL)

¹⁵⁷ Jourdan and Radley- Gardner (n 51) 35-20

Beresford is of course a town and village green case which hinged on the notion that the use of the land as an area for recreation was done so as of right, that is without force, without secrecy and without permission, rather than by right which would imply the use was by licence. Although the use of these terms is contentious,¹⁵⁸ this has not prevented the decisions reached in *Beresford* being applied to subsequent cases of adverse possession; first the one given by Smith J in the High Court hearing of *Beresford*,¹⁵⁹ and the subsequent House of Lords decision in the same case,¹⁶⁰ which overruled Smith J.

As Lord Browne-Wilkinson confirmed in *Pye v Graham*,¹⁶¹ 'the taking or continuation of possession by a squatter with actual consent of the paper title holder does not constitute dispossession or possession by the squatter for the purposes of the Act'.¹⁶² The action of the first can be interpreted as exhibiting a clear sign they intend to maintain constructive possession of the resource. It would seem simpler and perhaps more helpful to the understanding of squatting, if the idea of an implied licence were disposed of altogether. A licence, whether confirmed by some sort of overt agreement or unequivocal conduct, is merely a term used for demonstrating the will of the first remains in the resource; this intent being confirmed by some sort of open, continuing control.

¹⁵⁸ See for instance Richard Austen-Baker and Ben Mayfield, 'Uncommon confusion: parallel jurisprudence in town and village green applications (2012) 76 Conv 55, Leslie Blohm, 'The "by right" test doctrine and village green applications – a response (2014) 78 Conv 40

¹⁵⁹ [2001] WLR 1327 (HC)

¹⁶⁰ *Beresford* (n 154)

¹⁶¹ *Pye* (n 52) [38]

¹⁶² *ibid* [37]

This interpretation was confirmed by Slade LJ when he indicated that ‘the various judgements in cases such as *Leigh v Jack*, the *Williams* case and *Tecbild Ltd v Chamberlain* were decided, either because ‘(a) the necessary animus possidendi had not been shown or (b) that the acts relied on had been too trivial to amount to the taking of actual possession’.¹⁶³ By concluding that a person who enters land under the auspices of a licence remains under its control thereafter, results in another clog or fetter being grafted on to squatting. In the Court of Appeal, Neuberger J attempted to alleviate this problem by differentiating between licenced occupation and that which could be termed squatting. He gave the example of a first allowing another onto land ‘for the sole purpose of grazing cows’, if he then ‘used the land for the purpose of grazing sheep, no question of his enjoying adverse possession could arise’.¹⁶⁴ On the other hand if there was a limited licence, granted simply to recapture escaped sheep, the subsequent use of the land for arable farming would ‘give raise to a claim for adverse possession’. This ‘even though the very limited licence granted by the owner may have been current during the whole of the 12 year period’.¹⁶⁵ A similar approach was taken in *Allen v Mathews*,¹⁶⁶ where it was considered that ‘a persons with limited permission to use or occupy land might rely on more extensive activity to claim adverse possession’.¹⁶⁷ Whether the squatter could claim a right on control was a question of fact turning on the circumstances of the case, it was ‘not enough simply to increase use beyond what is permitted or contemplated’.¹⁶⁸

¹⁶³ Buckinghamshire (n 131) 639 [E]

¹⁶⁴ *Pye v Graham* [2000] Ch 676 (Ch) 697 [G]

¹⁶⁵ *ibid* 697 [H]

¹⁶⁶ [2007] 2 P & CR 21 (CA)

¹⁶⁷ *ibid* [86]

¹⁶⁸ *ibid* [87]

This approach could be interpreted differently. Rather than a limited licence being breached by activity of a more extensive nature, the first, by allowing or not intervening in the squatter's use, has ceased in their own intent to occupy the land. If the squatter then continues to occupy the land under the terms laid down by the first, without any sign to indicate their own intent to possess, then they cannot be said to control the resource. This is even if the first has discontinued their possession. Without any sign to indicate who has control of the resource the law will conclude that the first possesses the best and only title.

Albeit, this might be seen as an attempt to split hairs, if the right of occupation is controlled by the licence theory or the sign theory, the outcome remains the same. However, the use of the term licence gives the courts dispensation to construe decisions differently. This is illustrated by the *Trustees of the Grantham Christian Association Fellowship v Scout Association Corporation*,¹⁶⁹ Blackburn J held that, although the scouts activities appeared to go far beyond the scope of their licence, he did not see that this meant their licence was brought to an end and their possession became adverse. In *Brazil v Brazil*,¹⁷⁰ David Donaldson QC, sitting as a deputy High Court Judge, appeared to agree with this line of reasoning. He considered that when there was an occupier on the land by virtue of a licence, then a 'breach of its terms may give rise to a claim for damages: it could not determine the licence or change the licencees' occupation into that of a trespasser'.¹⁷¹ However, Jourdan and Radley-Gardner considered the view taken in *Allen*, and for that

¹⁶⁹ [2005] EWHC 209

¹⁷⁰ [2005] All ER (D) 311

¹⁷¹ *ibid* [40]

matter *Pye*, were the correct ones, holding the cases establish that ‘when the licensee uses the land for a purpose not permitted by the licence, that amounts to trespass’.¹⁷² This indicating that occupation falling outside the terms of a licence is ‘capable of constituting possession, notwithstanding the continuing existence of the licence’.¹⁷³

There is perhaps one area of agreement common to both interpretations, the need for the possession to be trespassory. Therefore, although one clog has potentially been removed, another remains; in fact it becomes absolutely necessary to any ‘successful’ squatting claim. If the occupation is with the permission of the first in possession then it cannot create a title, even if it is outside the terms of any agreement. For a title to exist in the squatter, there has to be discontinuance of possession by the first and recognisable control demonstrated by the squatter. That is, they must occupy the resource with some sign to indicate the necessary intent. To consider this occupation as trespass would seem heretical. If occupation of the resource is by colour of title then it cannot be trespass.

The preceding discussion of licences has illustrated two points of great significance to any narrative of squatting. The first point is the compelling part trespass plays in any discussion of land occupation; the second is the need to demonstrate intent. Conventional wisdom sees occupation of land by a squatter as trespass, until that is, the limitation period has elapsed; within the case of registered land, the squatter’s possession remains trespass, until they

¹⁷² Jourdan and Radley-Gardner (n 51) 6-28

¹⁷³ *ibid* 6-28

are duly registered as the proprietor. This cannot be correct; if the squatter is trespassing they are not a squatter and therefore cannot create a title. If the trespasser is to become a squatter there needs to be, in addition to the physical manifestation of possession, intent to possess. Both trespass and intent to possess have been touched on throughout the first chapter and will be considered in more detail later. However, how intent metamorphosed from an implicit to an overt term is significant to any black letter discourse on squatting and will accordingly be discussed in the following section.

1.28 Intention to Possess (*animus possidendi*)

In *Pye v Graham*¹⁷⁴ the House of Lords confirmed that the doctrine of adverse possession required not just a demonstration of *de facto* possession but also a mental element, the *animus possidendi*. Without physical possession and the mental intention to possess there can be no adverse possession. In fact Lord Browne-Wilkinson commented that there has always been, in common law, 'a requirement to show an intention to possess in addition to the objective acts of physical possession'.¹⁷⁵ Throughout this chapter there has been reference made to this dialectic of possession and although, as has also been explained, this dialectic has functioned effectively since medieval times, it was Lindley MR in *Littledale v Liverpool College*¹⁷⁶ who made this requirement overt.

¹⁷⁴ *Pye* (n 52)

¹⁷⁵ *ibid* [40]

¹⁷⁶ *Littledale* (n 62)

1.29 Lindley's Introduction of *Animus*

It fell to Lindley MR to introduce a definitive expression for intent, *animus possidendi*. Lindley explicitly stated that the first could not be regarded as discontinuing occupation unless and until the squatter demonstrated 'an *animus possidendi*, that is occupation with the intention of excluding the owner as well as other people'.¹⁷⁷ There was no obvious precedent before *Littledale*, except the implied intent Lord Browne-Wilkinson acknowledged. *Animus* appeared to emerge from thin air, or Lindley MR's imagination, and his radical departure from the accepted norm was not met with universal agreement. His fellow judges, although hesitant to disagree with a judgement of such 'unshakeable certainty'¹⁷⁸ from a judge viewed as 'perhaps the soundest lawyer of his time',¹⁷⁹ approached their conclusions with more trepidation. Yet, as will be discussed later in this work,¹⁸⁰ the idea of *animus* may well have been transplanted from a 'foreign' jurisdiction; Lindley having seen it as a perfect way to categorise the implied intent which always existed at the heart of the common law.

As for the judgement itself, there appears to be an element of illogicality in requiring the first in possession, and the rest of the world, be excluded from the property; compelling, it would seem, a squatter to do 'something he cannot lawfully do and to have a right which is greater than any which is recognised by common law'.¹⁸¹ Slade J found this concept to be artificial rather than illogical, and considered the exclusion of the first should be 'so far as is

¹⁷⁷ *ibid* 23

¹⁷⁸ Oliver Radley-Gardener 'Civilised Squatting' (2005) 25 *Oxford Journal of Legal Studies* 727, 729

¹⁷⁹ Martin Dockray 'Savigny and the Squatter' (1985) 6 *The Journal of Legal History* 109, 110

¹⁸⁰ See chapter 2

¹⁸¹ Martin Dockray 'Adverse Possession and Intention' (1982) *Conv* 256, 257

reasonably practical and so far as the process of law will allow'.¹⁸² It could be that Lindley understood the first's exclusion as cognitive rather than physical. Thus if an individual's will was manifest via control of a resource then that person was entitled to absolute respect from every other individual, including the first. This will 'can only be overcome or set aside by the universal will, that is, by the state, acting through its organs, the courts'.¹⁸³ Therefore if the first had discontinued possession and the property was drawn into the sphere of another will, then that should be protected from interference by anyone, except the universal will.

1.30 Emerging Case Law

The first case of note after *Littledale* to mention *animus possidendi*, was the Privy Council case of *Ocean Estates Ltd v Pinder*.¹⁸⁴ Although the significance of this case can be questioned; the learned judge having correctly found for the first on two other grounds, the defendant *animus possidendi*, or possible lack thereof, was not considered in any great detail. It could be concluded that the squatter's willingness to pay rent, if asked to do so, indicate a lack of *animus*; unfortunately this was not acknowledged or expanded upon. Yet on the face of it, an acknowledgement by the squatter that they would pay for the privilege of using land would seem to indicate lack of intent to exclude the first. It fell to Slade J, in *Powell v Macfarlane*,¹⁸⁵ which he confirmed in *Buckinghamshire CC v Moran*,¹⁸⁶ to define *animus* as the intention to exclude

¹⁸² Powell (n 120) 472

¹⁸³ Oliver Wendell Holmes, *The Common Law* (Harvard University Press 1967)

¹⁸⁴ [1969] 2 AC 19 (PC)

¹⁸⁵ Powell (n 120)

¹⁸⁶ Buckinghamshire (n 131)

the world at large, including the first;¹⁸⁷ a formulation in keeping with Lindley MR's. Slade J's considered *animus* should be interpreted strictly; only certain acts 'which by their nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to the intention on the part of the doer to appropriate the land concerned'.¹⁸⁸ It was this definition that was endorsed by Lord Browne-Wilkinson in *Pye*.

1.31 Conclusion

It would seem that Lindley MR's requirement that *animus* had become a recognised part of English common law. *De facto* possession, without the necessary intent, was insufficient to create a title. However, the obverse of this sees factual possession with the necessary intent as evidence of a title. This is of course simplifying the doctrine to its basic component parts, yet that is what this whole chapter has led to. The complicating factor surrounding squatting is not the basic definition of what constitutes a right to occupy land, it is the perplexing rules which have grown up to protect the land of the influential and wealthy; with, to make things as difficult as possible for the squatter, the strict application of those rules. The law has developed a doctrinal view that sees squatting and the squatter as wrong, with this view persisting no matter what circumstances exist. The law has made it difficult for the squatter to manifest the necessary possession and intent even in the face of obvious discontinuance of possession by the first. Yet even when both physical and mental possession is demonstrated, the squatter is still seen as a wrong doer by virtue of their supposed trespass.

¹⁸⁷ *ibid* 640

¹⁸⁸ Powell (n 120) 477

It has been the intention of the opening chapter to set the scene for the various theoretical discussions that are to follow, and to illustrate the significance history has played in the evolution of land law, common law and the creation of adverse possession. The chapter has set out a chronological explanation of how the law of squatting has developed, in doing so it has demonstrated why its present understanding relies on a distorted view of that evolution. Along side this chronological description, an alternative view of squatting has been set out; this alternative interpretation does not see the squatter as a trespasser, a possessor of wrong, a land thief and therefore the binary opposite of the first in possession. This alternative analysis sees the squatter and the first in possession as equals, they both possess fee simple titles, although one of them, usually the oldest, gives the primary right of control. It is a view that understands the control of land and the common law as dialectic processes, which can only operate in a symbiotic relationship; without one the other cannot function. This dialectic process is accordingly of central importance to the operation of this divergent view of squatting; it is a process which requires, if it going to function effectively, different interpretation of control, possession and trespass.

These different interpretations have been touched on in this first chapter; the idea that land cannot be owned, the major significance possession plays in an understanding of land law and the fact that fact that a squatter cannot be a trespasser, have all been explained, but rather briefly. The following two chapters will seek to justify these alternative versions of the truth, with the final

chapter explaining why a squatter cannot be a trespasser, even after the enactment of the Land Registration Act 2002.

However, before going on to consider these important concepts, a comment on the historical aspect of this opening chapter, and for that matter the histories that will crop up throughout the work. The histories of land law and common law, for both are intertwined, are important to an understanding of its subsequent development. History is great significance because it provides the building blocks for any narrative that seeks to explain why the law, expounded by the courts, is correct. However, as was explained in the introduction, history is not a fixed record of events but rather a contemporary understanding of those events, or more accurately a contemporary distortion of them, a distortion that makes the pronouncements of the courts true. Yet, just as the courts can use an historical narrative to justify its version of the truth, so another can be used to justify an alternative interpretation. It is therefore by an understanding history that the accepted and alternative versions can be understood. The following two chapters will expand on an alternative understanding of the basic building blocks of land law, supported by a different view of its history

Ownership is an ambiguous term to describe a person's affinity with a resource, and that possession is a superior way of categorise this. If, as will be demonstrated, possession is the most important relationship a person has with a resource, then the discussion of adverse possession introduced in the first chapter makes sense. If absolute ownership does not exist then it is free

to see that a control of a resource can be unstable and it is possible for it to move from one person to another if the first discontinues their possession.

Chapter 2

The Historical Development of Property Theory

Introduction

The previous chapter sought to explain the historical development of adverse possession; the next two chapters will undertake a similar historical analysis, but this time of property theory. In so doing it will seek to illustrate how such a theory has evolved alongside that of adverse possession.

The premise expounded previously demonstrated that English common law knew no such thing as absolute ownership; in fact, as was described in the previous chapter, its historical development precluded such a state of affairs. Accordingly there could be multiple titles to the same resource, each relative to the other. This relativity of title posed a problem; if each potential possessor enjoyed a title, and this title was evidenced by possession, it is questionable how one titleholder could protect the use of 'their' land by another. This was done by developing a fiction of adverse possession. However, without an explanation of what property actually is and how it can be controlled there can be little understanding of how the law explained in the first chapter actually functions.

There is a need to explain how a resource can be removed from the common stock to the control of a single individual, and in so doing give that person power and a degree of control over their environment. Yet, having removed this resource from a state of nature the control a person demonstrates cannot

be termed ownership. What is described as ownership is in fact a common and everyday term used to describe or label an exclusive right to control a resource. A lawyer would promptly disavow the layman's idea of property as things, 'this common usage is at variance with the meaning which property has in all legal systems and in all serious treatments of the subject by philosophers, jurists and political and social theorists'.¹ Lawyers would in fact more usually view property as, 'a collection of individual rights people have as against one another with respect to owned resources'.² Property is 'simply an abbreviated reference to a quantum of socially permissible power exercised in respect of a socially valued resource'.³ This socially permissible concentration of power gives the holder the right to possess, exclude, use, manage, alienate, consume, waste, destroy or transmit to future generations. This is along with certain burdens such as the liability to not harm others and execute debts.⁴

Yet, because of the multiple factors that contribute to its construction, any definition of control cannot be static or endure in one absolute form. 'Thus, although the idea of property in 'things' commands great cultural and rhetorical power, it fails to reflect the rich meaning in social discourse and law'.⁵ Ownership describes multifaceted legal relationships, yet as a 'term does not convey any determinate idea of what these legal relations are. In

¹ C. B. Macpherson, 'The meaning of Property' in *Property: Mainstream and Critical Positions* (C. B. Macpherson ed, University of Toronto Press 1978) 2

² Gregory S. Alexander & Eduardo M. Penalver, *An Introduction to Property Theory* (Cambridge University Press 2012) 2

³ Kevin Gray & Susan Francis Gray, 'The idea of Property in Land' in *Land Law; Themes and Perspectives* (Susan Francis & John Dewar eds, Oxford University Press 1998) 15

⁴ Anthony M. Honoré, 'Ownership' in *Readings in the Philosophy of Law* (Jules L. Coleman ed, Yale 1999) 562-74

⁵ Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (University of Oxford Press 1970) 12

every case, we have to push the words ownership and private property aside and look at the details of any real relations',⁶ in any given situation. Ownership is a dynamic concept that is incapable of definition and must be seen as variable depending on the circumstances and type of resource; it is in reality simply a 'hook on which to hang various combinations of legal relations'.⁷

It is the social nature of this power relationship that is important. The last man or women on earth might have all of the remaining resources at their disposal, but these resources cannot be said to be property. There would be no need to exclude others, no necessity to manage, no ability to alienate, in fact any of the benefits and liabilities described in the property theorist's metaphorical bundle of sticks would be meaningless. However, if another survivor of this supposed apocalypse were to appear then property again becomes a reality or a thing.

However, these survivors would not see property in this way, for them property would be a fact. Their possession would indicate to them, and anyone else, their right to have it; therefore, at the heart of any definition of 'ownership' is the notion of possession. As Underkuffler explains, from the 'moment of childhood we feel the urge to attest oneself through the language of possession';⁸ the exclamation 'it's mine' can be heard reverberating around many a playground.⁹ It is this crude empiricism that is at the centre of the English common law system. However this simple *de facto* way of describing

⁶ Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1990) 29

⁷ *ibid*

⁸ Underkuffler (n 5) 1

⁹ Kevin Gray, 'Equity and Property' (1994) 47 (2) *Current Legal Problems* 157, 158

possession, although perhaps intuitive, does not have the intellectual capacity to describe the dynamic process that allows the nature of control to change, as circumstances change.

Perhaps, extrapolating from our apocalyptic scenario, if our survivors were to see all things left on earth as held in common, there would still be no property. A person 'might possess artifacts in the sense of having physical contact with or control over. But they would have no right to exclude others and no normative power to transfer artifacts to others'.¹⁰ It was the problem of property held in common which was to tax the early property theorists. In order to place the research question into the correct context these property theorists will need to be considered. These will included the Fathers of the Church, Aristotle and Aquinas, Grotius, Hobbes, Locke etc..

2.1 Early Theories of Possession

Early Christian thought did not produce a ready made theory of property control, however there existed a 'quasi-theological notion that there were 'laws of nature'; rules ordained by God, to be observed by all his human creations on the peril of divine punishment'.¹¹ Resources were considered to come from God and were put on earth by Him for the common use of man, and not to be used for personal advancement. 'Throughout the New Testament there is a distrust of riches and an emphasis on the advantages of poverty'.¹² These beliefs suited the crowned heads, not just of England, but also of the whole of

¹⁰ Stephen R Munzer, *A Theory of Property* (Cambridge University Press 1990) 15

¹¹ Geoffrey Robinson, *Crimes Against Humanity* (4th ed, Penguin Books 2012) 2

¹² Richard Schlatter, *Private Property* (George Allen & Unwin Ltd 1951) 33

Europe; the 'Divine Right of Kings was part of the natural order of things'¹³ and was not questioned. They were God's representatives on earth, at least within their own realm, and therefore for them, ownership of property was not excluded. This created a dilemma: how to reconcile these early Christian sentiments with a desire for personal wealth.

A solution was formulated when the Fathers of the Church 'began to work out a rational doctrine'.¹⁴ By using the Fall of Man, when Adam and Eve were ejected from the Garden of Eden, these early theorists were able to construct a subtle argument that allowed the inequality of property control to exist alongside the Christian idea of all men being equal. It was suggested that since the Fall the depraved nature of man made 'necessary instruments of social domination'.¹⁵ These instruments included the ability to control property and therefore have the power to repress others. In this way the depraved man could be controlled and there became in effect two states. The first state was 'natural society which existed before Adam sinned',¹⁶ where resources were held in common; the second was the conventional sphere in which the private control of things, and therefore property, could exist. In time this division disappeared, with Alexander of Hales¹⁷ writing that 'the distinction between institutions which are necessary, but conventional and evil, and those which are impractical, but natural and good, has almost disappeared'.¹⁸ Although he agreed with earlier philosophers that there were two systems of law; natural for those men without sin and conventional for those after the Fall, he held

¹³ Robinson (n 11) 2

¹⁴ Schlatter (n 12) 34

¹⁵ *ibid* 35

¹⁶ *ibid* 36

¹⁷ 1185AD-1245AD

¹⁸ Schlatter (n 12) 44

that this polarity of law should be adapted to reflect changing circumstances; with it being prudent for natural law to govern both common and private ownership. Thus this allowed man to live under God's natural law, yet still possess property.

2.2 Aristotle and Aquinas

The rediscovery of Aristotle in the thirteenth century 'helped to complete the revolution in the theory of property'.¹⁹ Aristotle considered that 'it was good for men to own things privately',²⁰ with Thomas Aquinas adopting this idea to explain that 'man is a naturally social being and social life requires rulers'.²¹ This idea resonated with the Fathers of the Church's earlier conclusions and the confluence of ideas would allow St Thomas to take Aristotle's work and develop it further.

Earlier medieval theories of property were 'no longer appropriate for the all embracing and powerful Church of the thirteenth century',²² with it becoming clear that adaptation was necessary. St Thomas's work contained little discussion of law but what he did say was 'full and clear'.²³ He accepted the divisions of the law into natural, for those who had not sinned, and conventional for those who had, and accordingly agreed with the theories that had gone before. Yet this resulted in him encountering the same problem, the law of nature allowed just common control. His solution was to adapt Alexander of Hales theories into a hypothesis that explained the right to hold

¹⁹ *ibid* 47

²⁰ *ibid* 47

²¹ St Thomas Aquinas, '*Summa Theologica*' I, Q.96, Art 4.

²² Schlatter (n 12) 47

²³ *ibid* 48

private property in a way more suitable to the times. The simple solution was to accept the law of nature held supreme, but in addition laws were devised by 'human reason for the benefit of human life'.²⁴ Thus, he reasoned that 'for man to be naked is of the natural law, because nature did not give him clothes, but art invented them'.²⁵ So ownership of property, according to St Thomas, was not against God's natural law, but simply a method devised by man to make life easier. He illustrated this by considering the cultivation of land. He explained that there is no reason for it to belong to one individual yet there were certain commensurations to it being the property of one person rather than held as common stock.²⁶ This led St Thomas to a convenient conclusion. Land should be held in common, according to God's law; yet its efficient and effective use required it to be under the exclusive control of a single person. This privatisation of common resources, in St Thomas's view, was not against the natural law; it was 'according to the natural law in the Aristotelian sense'.²⁷

This relatively simple theory of property fitted with the pyramidal hierarchical nature of feudal England. The King could exert authority by allowing the aristocracy to possess and control their own property, with this possession cascading through society, each layer exerting control over the next. Without any identifiable owner, except perhaps the monarch, seisin had to stand as testimony to a person's right to control a resource. With right to property being evidenced by seisin a convoluted theory of property was unnecessary;

²⁴ Aquinas, (n 21) Art 5

²⁵ *ibid*

²⁶ *ibid* Art 3

²⁷ Schlatter (n 12) 50

however, as society moved away from feudalism a more complex concept was needed.

2.3 The Natural Right to Property

The seventeenth century saw the commencement of a movement to separate natural law from its narrow theological foundations and with it saw the instigation of a more liberal theory of property control. This liberalism was developed to value 'commerce and industry, and favour the rising middle class rather than the monarchy and the aristocracy';²⁸ bestowing 'immense respect for the rights of property, especially when accumulated by the labours of the individual possessor'.²⁹ The first in this line, and a contractarian property theorist, was Hugo Grotius, a Dutch statesman and jurist.

2.4 Hugo Grotius

Grotius initiated the transition to a more secular understanding of natural law, producing some extremely influential 'books expounding the theory of natural rights'.³⁰ Grotius's arguments were based on the Greek classical doctrine of Reason and Aristotle's views that men are reasonable animals. His natural law principles were therefore derived not from divine authority but from the nature of the human intellect. As these principles were acquired from humankind and were regarded as a compromise between independent and superior beings, Grotius deduced 'that the laws of God and the laws of nature

²⁸ Bertrand Russell, *History of Western Philosophy* (Routledge 2004) 545

²⁹ *ibid* 545

³⁰ Schlatter (n 12)126

were none other than the laws of human reason'.³¹ Unfortunately Grotius was unable to advance his theory and give a logical answer to the question of how resources that were held in common came to be owned by individuals. He concluded, rather unsatisfactorily, that the rights to property were 'derived from an agreement subscribed to by all men. This agreement [was] guaranteed by the law of nature which requires men to keep the covenant they [had] made'.³²

Thomas Hobbes, a contemporary of Grotius, and a 'Royalist in the extreme',³³ considered property could not be held by individuals and the only way to preserve a person's liberty was for it to be held in common. In effect to cease being property at all.³⁴

2.5 Thomas Hobbes

'Unlike most defenders of despotic government Hobbes held that all men were naturally equal'.³⁵ In this state of nature, 'before there is any government, every man desired to preserve his own liberty, but acquire domination over others; both these desires are dictated by the impulse to self-preservation'.³⁶ For this reason Hobbes considered that the 'condition of man is a condition of war everyone against everyone'.³⁷ Resources, in this state of nature, were available to all rather than distributed in the contractarian way Grotius described. Hobbes considered the only way to 'escape from this unhappy

³¹ Schlatter (n 12)126

³² *ibid* 136

³³ Russell (n 28) 502

³⁴ In the next chapter it will be explained that property held in common could not be property.

³⁵ *ibid* 505

³⁶ *ibid*

³⁷ Thomas Hobbes, *Leviathan* (first published 1651, Basil Blackwell 1946) 85

state of nature',³⁸ was for all men to form into communities and subject themselves to the control of a central authority. This control included the ruler's right to distribute property, thus removing it from private hands and making it the property of the state. This assimilation of property and the control the state exhibited over it led to Hobbes's work being described as 'in support of tyranny'.³⁹

'It is easy to write off Hobbes as one of the last supporters of autocratic monarchy in England',⁴⁰ there is little argument that Hobbes was by conviction an absolutist, and by reputation 'an atheist',⁴¹ recognising that such a 'system was the best protection for private property'.⁴² The theories put forward by Hobbes were significant and had a compelling influence on subsequent thought. In *Leviathan* he was able to break 'the nexus between God and the state; he identified the true source of political power in the consent of the people'.⁴³ Much of Hobbes's writing was 'forward-looking and foreshadowed the social and political ideals of bourgeois economic liberalism'.⁴⁴ It would seem that he was willing to 'surrender almost all rights for the benefits of political order';⁴⁵ therefore accepting that the absolute power of the sovereign provided the best system for the protection of society. This paved the way for

³⁸ Schlatter (n 12) 139

³⁹ Robinson (n 11) 10

⁴⁰ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 2003) 42

⁴¹ Russell (n 28) 569

⁴² Schlatter (n 12) 141

⁴³ Robinson (n 11) 10

⁴⁴ Atiyah (n 40) 42

⁴⁵ T. P. Pearson, introduction to John Locke, *The Second Treatise of Government* (T. P. Pearson (ed) Bobbs-Merrill 1952) ix

much of the liberalism that was to follow. As Macpherson observed 'he dug the channel in which the main stream subsequently flowed'.⁴⁶

2.6 Samuel von Pufendorf

It fell to Pufendorf to advance the theory that 'made it possible to dispense with one part of the agreement which previous theorists had assumed was necessary for the institution of private ownership'.⁴⁷ He considered that rather than having reached an agreement on the division of property held in common by everyone, at some time in the dim and distant past, Pufendorf considered property was nobody's. His doctrine was negative rather than positive; he regarded property as 'not yet assigned to a particular person',⁴⁸ which resulted in a theory that was at odds with Grotius and Hobbes. The acquisition of proprietary rights under the Pufendorf regime had the advantage of dispensing with any explanation of how resources were successfully divided up; a person could simply seize whatever they wanted. However, there was also an obvious problem with this type of property procurement; if resources were controlled by none and a person could seize what they wanted, what was to prevent another seizing it in turn? Pufendorf's solution envisaged some sort of agreement, 'an antecedent pact',⁴⁹ which would prevent the sort of war, 'everyone against everyone', which Hobbes foresaw.

⁴⁶ C. D. Macpherson, Introduction to Thomas Hobbes *Leviathan* (C. D. Macpherson (ed) first published 1651, Penguin Books 1968) 24

⁴⁷ Schlatter (n 12) 146

⁴⁸ Samuel von Pufendorf, *De Jure Naturae et Gentium* by C. H. and W. A. Oldfather (C. H. and W. A. Oldfather (tr) first published 1688, Oxford University Press 1964) 532

⁴⁹ *ibid* 547

Pufendorf's doctrine, and for that matter Hobbes's, would seem to explain how resources are retained and controlled. A pact existed which allows a person to have peaceful enjoyment of their resources, and this pact had the power of the state to enforce it. However, what their theories do not explain was how resources could be gained in the face of competing claims from other equally deserving people with perhaps more importantly, how once gained they could be lost. However, John Locke was able, with the use of Pufendorf's negative theory, to demonstrate 'that the laws of nature imposed an obligation on men to respect the property rights of anyone who, by his own labour, had appropriated things from their state of negative community'.⁵⁰ John Locke's theory thus became the classic doctrine of property acquisition. Yet, it may never have become so without the intervention into the debate of Robert Filmer.

2.7 Robert Filmer

Whilst Filmer's political philosophy at first sight was 'patently absurd',⁵¹ it played a significant role in developing a theory of property. As will be discussed in the next section, Locke's *Two Treatises*, and to a lesser extent Sydney's *Discourses*,⁵² a text that was ultimately to cost him his head, were written as point by point refutations of Filmer's views, and without Filmer's book it is doubtful whether Locke's or Sidney's books 'would have been written',⁵³ or at least not written in the form they were.

⁵⁰ Schlatter (n 12) 150

⁵¹ J P Kenyon, *Revolution Principles: the Politics of Party* (Cambridge University Press 1977) 62

⁵² Algernon Sydney *Discourses on Government* (first published 1698)

⁵³ Kenyon (n 51) 63

Filmer's *Patriarcha*,⁵⁴ was written in the 1620s but not published in his lifetime. It was, however, desperately needed by the late 1680s; the Crown was in peril and a theory supporting the absolutist point of view was earnestly required. *Patriarcha*, which was first published at some time between the 1640s and 50s to little obvious contemporary acclaim, was 'based on the *Old Testament* history from *Genesis* onwards'.⁵⁵ The central argument attempted to establish that the absolute power of the monarch could be traced back to Adam and the kingly power bestowed on him by God. This kingly power passed from Adam to Noah and from him to his three sons and so on, ultimately passing through all subsequent monarchs. This absolute power was completely free of human control resulting in society being physically neutral to men. As it had not grown out of men's conscious thinking, (as Grotius and Pufendorf had argued) it could not be altered by further thinking, it was simply a part of human nature'.⁵⁶ Filmer saw the family as the model for the organisation of the state; providing a thread to his argument which Bentham considered Locke's did not answer.

As Bentham commented a hundred years later in an unpublished manuscript, in 'every family there is government, in every family there is subjection, and subjection of the most absolute kind: the father, sovereign, the mother and the young, subjects'.⁵⁷ Although Bentham considered that Filmer had failed to prove his divine right theory he did prove 'the physical impossibility of the system of absolute equality and independence, by showing that subjection

⁵⁴ Peter Laslett (ed), *Patriarcha and Other Works of Robert Filmer* (Basil Blackwell 1948)

⁵⁵ Christopher Hill, *The English Bible and the Seventeenth Century Revolution* (Penguin 1993) 20

⁵⁶ Laslett (n 54)

⁵⁷ J C D Clark, *English Society, 1660-1832: Religion, Ideology, and Politics During the Ancient Regime* (Cambridge University Press 1985) 75

and not independence is the natural state of man'.⁵⁸ Bentham explained, with a certain logic, that Locke had 'speculated so deeply, and reasoned so ingeniously, as to have forgot that [man] was not of age when he came into the world'.⁵⁹ An infant was subjected to control by his father, the monarch and his mother, the prime minister, allowed Bentham to conclude that 'Filmer's origin of government is exemplified everywhere: Locke's scheme of government has not ever, to the knowledge of any body, been exemplified anywhere'.⁶⁰

There is more than a grain of truth in Filmer's argument and problems of logic in Locke's; the 'liberal theory of politics is an attempt to demonstrate that political society is a human artifact, and that in obeying political authority men are obeying themselves'.⁶¹ Locke's theory fails to take into account the obvious hierarchical nature of society, whereas Filmer's thesis, when stripped of its theological trappings, demonstrates that subjugation exists at the basis of human interactions. It may be the existence of this thread of logic running through Filmer's thought, which led Kenyon to consider that any unbiased study of the various positions on this question demonstrated that 'it was Filmer, not Hobbes, Locke or Sydney, who was the most influential thinker of the age'.⁶²

The fact that *Two Treatises* was written as a refutation of Filmer's theories does not lessen its influence, yet it does lead to questions of its completeness

⁵⁸ *ibid* 76

⁵⁹ *ibid* 75

⁶⁰ Jeremy Bentham in an unpublished manuscript quoted in J C D Clark, *English Society, 1660-1832: Religion, Ideology, and Politics During the Ancien Régime* (Cambridge University Press 1985) 75

⁶¹ Laslett *Patriarcha* (n 54) 42

⁶² Kenyon (n 51) 63

as an explanation of a person's right to property. Property for 'Locke seems to symbolise rights in their concrete form, or perhaps rather to provide the tangible subject of an individual's power and attitude'.⁶³ Without the ability to possess property at the expense of another, political freedom would be impossible to demonstrate. For reasons that will be discussed in the next section, although Locke's thesis has great political importance its use as an explanation of adverse possession is somewhat limited.

2.8 John Locke

Locke's thesis was the 'standard bourgeois theory' ⁶⁴ of property 'ownership', and according to him it was, along with life and liberty, one of the trinity of natural rights. His theories have been used to support the doctrine of adverse possession and whilst elegant, they cannot satisfactorily answer the question posed by this thesis.

Locke was a social contractarian and like Hobbes believed that primitive man in his state of nature made an agreement to divide up the common stock. Crucially, unlike Hobbes, Locke did not consider absolute monarchy as the only way to control the populous; he was not disturbed 'by the fear that the fabric of society would be torn asunder',⁶⁵ or that man lived in a constant state of war. He was however, 'anxious that the royal government of Stuart England – and indeed any government – had a duty to respect the existing property rights'.⁶⁶

⁶³ Peter Laslett, Introduction to J. Locke, *Two Treatise of Government* (Peter Laslett (ed), Cambridge University Press 2004) 102

⁶⁴ Schlatter (n 12) 151

⁶⁵ Pearson (n 45) ix

⁶⁶ Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1990) 137

2.9 Locke the Philosopher

Russell argued that Locke was ‘the most fortunate of philosophers’;⁶⁷ his work on theoretical and political philosophy was completed at the moment ‘when the Government of his country fell into the hands of men who shared his political views’.⁶⁸ His liberalism was to become enormously influential, particularly in France and America, and for this reason eclipsed his theoretical philosophy and his important position as the founder of modern empiricism.

Locke’s empiricism was seen as ‘realistic and rationalistic’,⁶⁹ it was a rejection of scepticism with reason being seen as the ‘last Judge and Guide in everything’.⁷⁰ To this end he was ‘always willing to sacrifice logic’,⁷¹ and not allow problematic theoretical consequences thrown up by his thought to lead him down a logical black hole. Theorists may have found this irritating, but Locke was a practical man and it was obvious to him that ‘clear and valid reasoning from sound principle cannot lead to error’.⁷² It was this common sense approach that Russell considered was the merit of Locke’s philosophy, and if general principles lead to strange consequences, he ‘blandly refrains from drawing them’.⁷³ It appears that Locke considered that theoretical or logical problems should not get in the way of common sense and observable fact.

⁶⁷ Russell (n 28) 552

⁶⁸ *ibid*

⁶⁹ Peter N Nidditch (ed) Introduction to John’s *An Essay Concerning Human Understanding* (first published 1689, Peter H Nidditch (ed) Oxford University Press 1975) ix

⁷⁰ John Locke, *Two Treatises of Government* (first published 1689, Peter H Nidditch (ed) Cambridge 2004) Book IV, chap. XIX, sec. 14

⁷¹ Russell (n 28) 553

⁷² *ibid*

⁷³ *ibid*

However, Locke's influence on politics 'was so great and so lasting that he must be treated as the founder of philosophical liberalism as much as of empiricism'.⁷⁴ However, as Russell argues 'there is little that is original'⁷⁵ in Locke's theory of government and in fact he won fame for his ideas because the world, at that point in time, was ready to receive them. Notwithstanding this, Locke's work remains of central importance to political liberalism. It is through the control of property 'that man can progress from the abstract world of liberty and equality based on their relationship with God and natural law, to the concrete world of political liberty guaranteed by political arrangements'.⁷⁶ Yet, as will be argued, his philosophy as a basis for the theory of property may be lacking.

At first glance Locke's political philosophy, expounded in *Two Treatises*, although dubious,⁷⁷ might explain how the possession with intent by a squatters is adverse to the 'owner', but it does not explain the actuality of the situation. It postulates that the right of property control is practically absolute, and its protection is only lessened for reasons of expediency. However, his theory does not explain how a second person can gain title, not at the expense of the first, but rather concurrently with the first. Locke's theory might well explain possession that is adverse, trespassory, land theft etc., but it does not explain relativity of title.

⁷⁴ *ibid*

⁷⁵ *ibid* 569

⁷⁶ Laslett *Patriarcha* (n 54) 103

⁷⁷ It will be explained below that if Locke's theory is stripped of its religious trappings it ceases to make coherent sense.

2.10 Two Treatises

Locke's *Two Treatises* was his most important work of political philosophy, with his theories providing ammunition for the subsequent political revolutions in America and France. His thought exercised a profound influence on the rise of modern republicanism, with the political theories expounded seen as revolutionary at a time when England was a markedly hierarchical state. The *Two Treatises* set out to challenge the prevailing order that accepted the monarch at the apex of this hierarchy, with power and privilege diminishing as it cascaded downwards. It was this challenge to the status quo that made the work so significant, and even though it found international fame, it could not disguise the fact that it was written for domestic consumption.

It was a work that was directed at the supporters of Robert Filmer and was intended as a refutation of the divine right of King's thesis. For this reason it could be concluded that it was in fact Filmer, 'not Locke himself, and decidedly not Hobbes who set the terms of the argument'.⁷⁸ In truth, as Laslett comments, Locke's arguments would have never been developed if it were not for Filmer. Before *Two Treatise* there was little sign that Locke had shown any interest in the theory of property. However, Filmer's argument in favour of primitive communism 'was very difficult to refute unless a new justification of ownership was devised'.⁷⁹

If, as Filmer maintained, the authority of the monarch was absolute, giving complete control over everyone and everything, an argument was needed to

⁷⁸ Laslett *Patriarcha* (n 54) 68

⁷⁹ *ibid*

discredit this. Locke put property, and the right to own it, at the centre of this argument. Property for Locke 'seems to symbolise rights in their concrete form, or perhaps rather to provide the tangible subject of an individual's power and attributes'.⁸⁰ If a person owned property then the monarch could not, this made the monarch's role conditional on his protection of a individual rights. It was the 'ownership' of property which allowed Locke to assert that 'it is a mistake to think that the Supreme or *Legislative Power* of any commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure'.⁸¹ Any attempt to interfere with the property of a freeman would put government 'in a state of War with the People'.⁸²

The subversive nature of Locke's treatise was 'sweet music in the ears of the successful rebels of 1688'.⁸³ However, Locke himself was a moderate revolutionary, although seemingly his explanation of the true origin of political power led to 'the most successful of all revolutions'.⁸⁴ He demonstrated 'that property is acquired by natural right',⁸⁵ with the Government's role to 'provide impartial judges and penalties to deal with disputes over property'⁸⁶ not to control it. With his arguments Locke was able to establish that power was in the hands of the people and without property as the central plank of Locke's democratic construction, this argument would be impossible to make. It can be seen that with his use of property Locke was able to refute Filmer, as well as producing a work of significant political power. However, this refutation of

⁸⁰ *ibid* 103

⁸¹ Locke, *Two Treatise* (n 70) s.138

⁸² *ibid* s.222

⁸³ Atiyah (n 40) 48

⁸⁴ Russell 551 (n 28) This was the revolution of 1688, the Glorious Revolution, which saw the overthrow of James II and the ascension to the throne of William of Orange.

⁸⁵ S. Buckle, 'Tully, Locke and America' (2001) 9 *British Journal for the History of Philosophy* 245, 274

⁸⁶ Atiyah (n 40) 47

Filmer's divine rights ideology lacked a clear logical foundation to explain how property's dynamic nature could be explained.

2.11 The State of Nature

Locke explained that to 'understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is a *State of Perfect Freedom*'.⁸⁷ He interpreted this as a state of equality 'wherein all the Power and Jurisdiction is reciprocal, no one having more than another'.⁸⁸ This, according to Locke, results in men 'living according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*'.⁸⁹ The law of nature, a law that remained 'exclusively in the hands of individuals',⁹⁰ governed this state of nature. Locke expanded little on what this law actually was, however, it could be speculated that Locke's state of nature exists wherever there is no political authority or state of war, where people live equally under 'the law of reason'.⁹¹

On the above description Locke's state of nature would seem to exist, if not as a physical place, at least a defined period through which social communities pass on their way to political society overseen by legitimate governmental rule. Strauss considered it 'must be a social state';⁹² a factual description of the world as it existed for the earliest societies. Russell acknowledged that the state might be an illustrative hypothesis, but feared that Locke 'tended to think

⁸⁷ Locke, *Two Treatise* (n 70) 2. 4

⁸⁸ *ibid*

⁸⁹ *ibid* 2.19

⁹⁰ Laslett *Patriarcha* (n 54 98

⁹¹ A. John Simmons, *The Lockean Theory of Rights* (Princeton University Press 1992) 17

⁹² Leo Strauss, *Natural Right and History* (University of Chicago Press 1959) 224

of it as a stage that had actually occurred'.⁹³ However, this point of view has been challenged. Dunn, for instance, considered Locke's state of nature is 'an ahistorical condition',⁹⁴ Simmons envisaged that people could live 'under effective, highly organised government and still be in a state of nature'⁹⁵ if those governments are arbitrary and tyrannical. The state of nature could, therefore, be defined as 'the condition of men living together without legitimate government'.⁹⁶ However, this is not the complete definition. Locke also considered that there can be certain people living in a state of nature and under a legitimate government; these would include visiting aliens,⁹⁷ minors,⁹⁸ and those with a defect of reasoning.⁹⁹ Leaving the state of nature would appear to be not just living under a legitimate government, but agreeing to live under such control.

Locke's theory, if interpreted this way, leads to interrelationships occurring between those who occupy the same geographical territory but live in different states. That is, it would be perfectly possible for a person to engage in relationships with others both in the state of nature and under legitimate government, contemporaneously. If this idea is extrapolated, rather than being a place or even a time, the state of nature is an agreement between people to live in harmony with others. Part of this agreement required the participants to have chosen or consented to not having their disputes adjudicated by others. Locke's state of nature is accordingly, a set of principled rights and

⁹³ Russell (n 28) 568

⁹⁴ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises* (Cambridge University Press 1995) 97

⁹⁵ A. John Simmons, Locke's State of Nature (1989) 17 *Political Theory* 449, 450

⁹⁶ *ibid* 451

⁹⁷ Locke *Two Treatise* (n 70) 2. 9

⁹⁸ *ibid* 2. 15

⁹⁹ *ibid* 2. 60

responsibilities that exist between people who have elected to live without governmental adjudgment.

Locke's explanation of the state of nature, although appearing to originate from reasoned argument, was actually the produce of 'a mind so saturated in Christian revelation'¹⁰⁰ that it influenced the whole of his thesis perhaps without his realisation. Dunn explained that the 'state of nature is a topic for theological reflection, not for anthropological research',¹⁰¹ man was put there by God and a legitimate government created by man to further God's purpose. Russell even considered Locke's theories were 'in the main, not original, but a repetition of medieval scholastic doctrines'.¹⁰² This leads to an assumption that Locke's political philosophy is based on 'a particular set of protestant Christian assumptions',¹⁰³ and the equality he champions exists because of this. Yet Strauss considered Locke was 'an atheist in the mold of Hobbes and Spinoza who succeeded by his mastery of the art of esoteric writing in concealing this unbelief'.¹⁰⁴ This interesting but abstruse argument has sadly been consigned to the 'memory hole reserved for old and best forgotten scholarly contests';¹⁰⁵ its place being taken by the more mundane, but generally accepted assumption, that Locke's theories were built on a deeply religious foundation.

¹⁰⁰ Dunn (n 94) 98

¹⁰¹ *ibid* 97

¹⁰² Russell (n 28) 568

¹⁰³ Jeremy Waldron, *God, Locke, and Equality; Christian Foundations in Locke's Political Thought* (Cambridge University Press 2002) 13

¹⁰⁴ James R. Stoner Jr. 'Was Leo Strauss Wrong about John Locke' (2004) 66 *The Review of Politics* 553, 554

¹⁰⁵ Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (University Press of Kansas 2002) 2

Dunn explained that 'Jesus Christ (and Saint Paul) may not appear in person in the text of the *Two Treatises* but their presence can hardly be missed when we come upon the normative creaturely equality of all men in virtue of their shared species membership'.¹⁰⁶ This presents a problem that perhaps goes to the heart of Locke's thesis. Waldron considered 'the Christian underpinning of Locke's thought is not an anachronistic feature that can be discarded by later readers, leaving a fully operational secular theory behind'.¹⁰⁷ Without the theology it is difficult to accept Locke's state of nature and the notion of property that emerges from it.

Hobbes's 'state of nature can be defined as the state men are (or would be) in living together without effective government',¹⁰⁸ and natural rights are 'not law but liberty a 'right of everyman to everything even to another body', while for Locke natural rights was 'property' and the way of characterising these rights entails an obligation in others to respect them'.¹⁰⁹ Locke's theory seems to be predicated on the natural equality of persons because, as Dunn expounded, they share a 'species membership'. However, it is difficult to rationalise Locke's approach except by applying a theological lens. Hobbes identified people as out to get what they can get, even at the expense of others, Filmer considered society as hierarchical, a society in which leaders lead. Both of these views appear to be a more recognisable view of human nature than Locke's. This does not mean to say his theory of property acquisition is wrong, but it does put a question mark over the robustness of his arguments. Locke,

¹⁰⁶ Dunn (n 94) 99

¹⁰⁷ Naomi M. Stolzenberg & Gideon Yaffe 'Waldron's Locke and Locke's Waldron: A review of Jeremy Waldron's *God, Locke, and Equality* (2006) *Inquiry* 186,186

¹⁰⁸ Simmons Locke's State (n 95) 450

¹⁰⁹ Stoner (n 109) 556

in the *Two Treatise*, does not seem to be presenting a thought exercise, but rather a factual description of a state people have had to, and still are, passing through. This would seem to be in tune with his empirical approach to philosophy, and provides an explanation of why and how people come to possess property, but it perhaps lacks the theoretical underpinnings to be fully supported. However, these points do not necessarily diminish the power of Locke's property theory and this will be discussed in more detail in the next section.

2.12 Locke's Theory of Appropriation

Locke, like Grotius and Pufendorf, considered God had given the earth to mankind in common, and this communism meant that he had to explain how property could be subsumed into private control. He concluded that if the products of the earth were given to all, then there must be a way to appropriate them 'before they can be of any use, or at all beneficial, to any particular men'.¹¹⁰ Rejecting the idea put forward by Grotius and Pufendorf, that there had been some sort of agreement for the introduction of private rights to property, he argued that the self-ownership was the foundation of property control. Locke explained that 'every Man has a *Property* in his own *Person*',¹¹¹ and this property is his own, no one else has any right to it. By expanding one's owned self outwards, into the world, marks of this selfhood can be imposed upon free property. This extroversive model of possession considers that by imposing the self upon resources, and mixing one's labour with them, they can be appropriated to the self. It is a physical manifestation of

¹¹⁰ Locke, *Two Treatise* (n 70) ii. 26

¹¹¹ *ibid* ii. 27

self-freedom; by controlling property a person can demonstrate their independence from the world and relate to others through that control.

Locke developed his arguments in an era when a middle class identity was establishing itself, and his philosophy allowed this emerging bourgeoisie to secure the fruits of their own accomplishments. Prior to '1690 no one understood that a man had a right to property created by his own labour; after 1690 the idea came to be an axiom of social science'.¹¹² Lock set out a coherent argument to explain the inequities of property ownership and provided the 'moral justification needed to satisfy the consciences of the new propertied classes of the eighteenth century',¹¹³ and to prevent the state assuming the rights to all property.

Locke's view of property rights as natural rights, allowed them to be 'acquired as a result of actions and transactions that men undertake on their own initiative'.¹¹⁴ By removing anything from the state of nature with the '*Labour of his Body, and the Work of his Hands*',¹¹⁵ he thereby 'joyned to it something that is his own, and thereby makes it his *Property*'.¹¹⁶ People had the right to appropriate from the common stock all that they needed; however, what could be called unjust enrichment was not permitted. Accordingly resources could not be removed from the state of nature and allowed to perish 'for he had *no*

¹¹² Schlatter (n 12) 156

¹¹³ Atiyah (n 40) 45

¹¹⁴ Waldron, *Private Property* (n 66) 138

¹¹⁵ Lock, *Two Treatise* (n 70) 27

¹¹⁶ *ibid*

Right, further than his Use'.¹¹⁷ Consequently, spoilage became a significant problem, one that had to be overcome in order to allow capitalism to flourish.

This problem was circumvented by the introduction of 'a little piece of yellow metal'.¹¹⁸ It was the invention of money that enabled the inequalities of wealth and land holding to exist. His doctrinal assertion that hoarded property, which was allowed to putrefy or perish, was an insult to God, yet this insult could be countered if the excess was stored in the form of money. The storage of money 'enabled people to store wealth without it perishing and it therefore became possible for great inequalities of wealth to grow up'.¹¹⁹ Moreover since money was an artificial contrivance 'invented by men, it followed that they had, in effect, agreed to the possibility of this new, and greater inequality of property'.¹²⁰

2.13 Preservation of Acquired Property

Having presented his economic theories Locke's next task was to clarify the Government's role in relation to those rights. In the state of nature man had the power to 'not only to preserve his Property, that is, his Life, Liberty, and estate, against the Injuries and Attempts of other Men; but to be judge of, and punish the breaches of that Law in others'.¹²¹ Locke considered that man could pursue his own remedies in protecting his property, 'even with Death it self, in Crimes where the heinousness of the Fact, in his Opinion, requires

¹¹⁷ *ibid* 2. 37

¹¹⁸ *ibid*

¹¹⁹ Atiyah (n 40) 46

¹²⁰ *ibid*

¹²¹ Locke, *Two Treatise* (n 70) 2. 87

it'.¹²² Such protection of property could only take place in a state of nature and within civil societies this right had been given up to the Government; thus it becomes the primary purpose of government 'to protect rights of property whose existence predates government itself'.¹²³ It could be argued that Locke's primary purpose in writing his treatise was to define the place of government. His political message was that property was acquired by natural right, and was not freely disposable by political authorities.¹²⁴ It was government's role to 'provide impartial judges and penalties to deal with disputes over property',¹²⁵ it was also their role to provide a legislature to define the scope of offences and the severity of penalties; this was as well as an executive to enforce these remedies.

Notwithstanding this, 'it is a mistake to think that the Supreme or *Legislative Power* of any commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take part any part of them at pleasure'.¹²⁶ It is here that the revolutionary nature of Locke's work becomes evident. If the Government failed in its duty to preserve and endeavoured '*to take away and destroy the Property of the people*, or to reduce them to Slavery under Arbitrary Power, they put themselves in a state of War with the People'.¹²⁷ Once in a state of war the people owe no further obedience to the Government, and the rebellion would be an act of self-defence. The revolutionary nature of Locke's ideas helped his treatise to gain acceptance, and it was Locke who the American colonists turned to when they argued that

¹²² *ibid*

¹²³ Atiyah (n 40) 47

¹²⁴ Buckle (n 85) 274

¹²⁵ Atiyah (n 40) 47

¹²⁶ Locke *Two Treatise* (n 70) 2.138

¹²⁷ *ibid* 2. 222

to tax them without representation was to deprive them of their property without consent. Yet whilst permission to kill in defence of one's property might well have been music to the ears of the American colonists, it does not necessarily provide a sound basis on which to construct an acceptable theory of possession.

Although Locke's theory of property ownership is perhaps the most familiar, it is not without its problems. Its popularity rests on the fact that it appears to reward labour; i.e. it is based on desert, the idea that if a person is deserving of some sort of benefit, it must, necessarily, be so by 'virtue of some possessed characteristic or prior activity'.¹²⁸ There is a moral dimension to desert if, without being required, a person adds value to something then they deserve some benefit for that. Desert therefore appears to be a morally permissible way of adding value and therefore deserving benefit. There is however a significant problem if Locke's arguments are applied to English common law. As will be explained later in this chapter, common law is a dialectic process, and therefore needs a dynamic theory of 'ownership' for it to function. It is the lack of a dynamic element in Locke's philosophy that ultimately disqualifies it as a rational theory on which to base legal possession.

If Locke's theories are accepted then property cannot be alienated, unless this is done willingly. Property would remain the 'owner's' and the squatter's possession would be adverse until the law operated to transfer the property to

¹²⁸ J. Feinberg, *Doing and Deserving*, (Princeton University Press 1970) 58

the squatter. If, however, property control, and the common law, are dialectic processes,¹²⁹ then Locke's theories will not operate successfully and the Hegelian concept of property needs to be considered.

2.14 Georg W. F. Hegel

As with Locke, the foundation of Hegel's theory of property is the ownership of self, both of them agreeing that if 'a person claims a property by infusing their will into the thing, the person has full use and beneficial rights of that property'.¹³⁰ There is however a fundamental and compelling difference at the very heart of their arguments. Locke sees self-ownership as the start of a process of property control; Hegel sees self-ownership as a 'result' of property control. Locke recognised 'that the individual owns himself as his own property and derives property in a thing from property in self'.¹³¹ The self or will projected in to the object is therefore internalised, the object comes to contain something of the person. Although there is only one passage in the *Two Treatises* explaining that property taken from the common stock contains part of the person who has removed it,¹³² that statement is 'made with great emphasis, and Locke undoubtedly means exactly what he says'.¹³³ This leads to the conclusion that if something of a person is invested into an object then the object contains something of that person and nobody else can have any right to it; to do so 'would imply that he had a right over another free individual.

¹²⁹ It is suggested that common law is a dialectic process and needs a dynamic theory of 'ownership' to function. This argument will be expanded below.

¹³⁰ Peter G. Stillman, 'Property, Contract, and Ethical Life in Hegel's *Philosophy of Right*' in Drucilla Cornell, Michael Rosenfeld & David Gray Carlson (eds) *Hegel and Legal Theory* (Routledge 1991) 211, 205

¹³¹ *ibid*, 210

¹³² Locke, *Two Treatise* (n 70) s. 26

¹³³ Karl Olivecrona, 'Locke's Theory of Appropriation', (1974) 24 *The Philosophical Quarterly* 220, 222

This would be out of the question'.¹³⁴ Property for Locke is accordingly a given, it is immutable and continuing and 'political society has a constant and changeless goal: the protection of the natural right of each citizen'.¹³⁵

Hegel, on the other hand arrived at a different conclusion. Although property has 'signal importance in *Philosophy of Right*',¹³⁶ he did not agree with Locke that it was a monological concept. Hegel considered there was more than one type of property; there are external objects which can be infused by a person's will and in so doing give that person control over them, and this would seem at first glance to be similar to Locke's view. However, Hegel considered that such:

Property remains 'external' not personal. So for Hegel, one kind of property – property in one's self, one's body and mind – must be treated somewhat differently from the paradigmatic case of property as simply the will in the thing. For Hegel the difference in treatment arises because a person's body and mind are special kinds of things and thus special kinds of property.¹³⁷

Because of this externality property remains, rather than fixed and inviolable, subject to modification and limitation. Property in Hegel's theory is a dynamic concept, it can be freely alienated, as Locke's can, yet it can also be abandoned as ownerless. It is the dynamic of property that makes Hegel's theory applicable if adverse possession is to be demonstrated a fiction. If the

¹³⁴ *ibid* 224

¹³⁵ Stillman (n 130) 210

¹³⁶ *ibid* 205

¹³⁷ *ibid* 211

property a person has in a resource is not fixed but subject to change and adaptation, then it can be argued that a person's possession does not need to be adverse for them to have an interest in land.

In Hegel's theory the function of private property, as a device for establishing personality, takes precedence over the acquisition of property as a vehicle to gratify material needs, or provide wealth and power. The continuing possession of things is fundamental to the existence of the person, yet this possession is not an end in itself; it is simply the means of satisfying the ethical development of the individual. For this reason possession cannot be absolute or final, but is simply a 'stage in a process of individual and social development'.¹³⁸ From the standpoint of Hegel's theory, the possession of private property does not arise accidentally, but is a rational necessity. Certainly, if Hegel's ideas are to be comprehensible, this rationality is the 'only standpoint from which evaluation makes sense'.¹³⁹

Hegel considers that property belongs to the first person in time to take possession. Any other consideration is superfluous because 'a second person cannot take possession of what is already the property of another'.¹⁴⁰ From this it can be deduced that the 'first taker does not have to justify his taking; the question we ask is negative, not positive, namely whether the thing is already occupied by a will which demands respect'.¹⁴¹ This universal right to appropriate natural objects that are not occupied by the will of another, and

¹³⁸ Waldron *Private Property* (n 66) 348

¹³⁹ *ibid* 345

¹⁴⁰ Georg Wilhelm Hegel *Elements of Philosophy of Right* (Allen Wood (ed) N B Nisbet (tr) Oxford University Press 1991) s. 50

¹⁴¹ Alan Ryan, *Property and Political Theory* (Oxford University Press 1984) 122

without any thought for the needs of others, explains inequality of ownership. Hegel, unlike Locke, does not consider enough resources should be left for others. He appears to champion the use of 'physical strength, cunning, dexterity, the means of one kind or another',¹⁴² whereby physical possession of things can be taken, perhaps by the strongest, brightest or most powerful.

The apparent inviolability of the first's occupation of land would appear to be problematic when attempting to legitimise the right of control by a squatter. However, Hegel's theory 'depends on the ongoing embodiment of one's will in an object':¹⁴³ he considers that control of a resource is temporal, and the subjective presence of a person's will is needed to constitute such control. Without the continuing presence of some expression of that will, such as use or employment or some other sign indicating control, the first's proprietorship ceases to have any relevance, 'because the actuality of will and possession has abandoned it'.¹⁴⁴ Consequently, Hegel considers that property can be gained or lost via prescription. From this it can be extrapolated that property ownership is not static but moves from one person to another. This would certainly fit with Hegel's dialectic theory, with each whole merely becoming a new thesis and the dynamic nature of triadic process will allow for correction to previous situations. Although this aspect of Hegel's theory may be difficult to reconcile with his notion of first occupancy, the dilemma can be resolved.

¹⁴² Hegel (n 40) s. 52

¹⁴³ Malcolm Lavoie, 'Locke, Hegel, and the Right to Property: Examining the Unstable Ideological Architecture of the Canadian Law of Aboriginal Title' (2011) 69 U Toronto Fac L Rev 25, 30

¹⁴⁴ Hegel (n 140) s. 64

The impasse between these two contradictory statements can be rectified if the correlation between the first and second occupier is examined. When Hegel considers that a second person cannot take possession of what is already the property of someone else, he appears to clarify the statement by describing the relationship of who can be considered first. The first, he explains, is not the rightful controller 'because he is first but because he is a free will',¹⁴⁵ which has taken possession of a vacant resource. The first is only first because another has come along. Hegel concludes that alienation of property is possible because it is a person's, only so far as they embody their will in it.¹⁴⁶ This alienation can take two different forms. True alienation, as Hegel characterises it, requires a 'declaration by the will that I no longer wish to regard the thing as mine'.¹⁴⁷ Notwithstanding, that true alienation is the most complete way of transferring property; control can also be achieved via prescription, which is 'alienation of property without a direct declaration on the part of the will'.¹⁴⁸ Withdrawing one's will can be intended and is achieved, either by making it over to the will of another, or deciding to withdraw one's will and abandoning possession of the thing. However, it must be recognised that there is a tension between subjective and objective control that is inherent in all dialectics. Neither subjective or objective control is completely correct or completely incorrect, they are only complete as a whole, which would seem to indicate that if one aspect is withdrawn, e.g. the first ceases to demonstrate objective possession, then the existing tension allows the dialectic to re-conform.

¹⁴⁵ *ibid* s. 50

¹⁴⁶ *ibid* s. 65

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

It must be accepted that in an act of what Hegel defines as true alienation, the designation of first must pass with the property. If the ongoing embodiment of the will has voluntarily ended then the property is free to accept the embodiment of another will. This will result in the designation first moving with the property. It could be concluded, therefore, that when property transfer is achieved via prescription, i.e. without the direct declaration on the part of the will, a new person might express their existence in what appears to be an uncontrolled thing. Unlike Locke's premise where use of things appropriated from a state of nature has a permanent legitimacy, Hegel requires continuous use to maintain a property relationship between a person and a thing. Not only should there be a will to possess, this 'will to possess something must express itself'.¹⁴⁹ If this expression of will is lacking and the first ceases control, it would seem logical that the person who infuses his free will into that empty property becomes the new first.

'Hegel's political thought is founded on property only so that it can transcend property',¹⁵⁰ it is used to reach a state, of what Hegel terms *Sittlichkeit*; an ethical life and moral order that is marked by family life, civil society, and the state. Although what might be termed pure Hegelian theory has seemingly fallen out of favour and relationships between property and personhood 'has commonly been both ignored and taken for granted in legal thought',¹⁵¹ Radin considers that almost 'any theory of private property rights can be referred to

¹⁴⁹ *ibid* s. 64

¹⁵⁰ *ibid* 208

¹⁵¹ Mary Jane Radin, *Reinterpreting Property* (University of Chicago Press 1996) 2

some notion of personhood'.¹⁵² However, before going on to consider Radin's interpretation of personhood in the next chapter, an examination of the practical application of the dialectic theory of property control will be undertaken. The dialectic has a significant part to play in property theory, particularly the 'ownership' of land. It explains how possession can leave the control of one person and come under the control of another and yet not be adversarial.

2.15 Embodiment as a Normative Process

The satisfaction of basic human needs, food, land, clothing etc., requires the ability to take those forms of property and make them one's own. By placing one's will into an object, in the sense of having it become bound up with one's personality, a relationship with the property has developed. For the thing to have purpose or existence it must be embodied by a person's will, i.e. it cannot exist as an entity, or be recognised without that embodied will. Hegel states that by 'thinking of an object, I make it into thought and deprive it of its sensuous aspect; I make it into something which is directly and essentially mine'.¹⁵³ Yet this relationship, by the very nature of its development, cannot be absolute, the nature of the embodied aspect of possession means that if the will is removed the property must become free of control.

The law could therefore, recognise the relationship between the embodied will and land as normative. Rather than seeing squatting as a necessary evil, guided by a judicial narrative that appears to support the first in possession,

¹⁵² *ibid* 35

¹⁵³ Hegel (n 140) S. 4

the law should accept that control has a psychological element. This must be overtly demonstrated; simply describing someone as the 'owner' is insufficient in itself to describe a relationship that exists between a person and a thing. Without both a physical and mental interaction with property that demonstrates possession to the external world, it is questionable how a person can still control a resource. If a person's subjective will leaves, then so too must possession.

Personhood theory is persuasive in demonstrating how possession and use of property must have a mental element. Whereas Locke considers that the initial interaction of a person's will with a thing gives rise to permanent possession or control, Hegel, and for that matter Radin, recognises that the will must be continuously embodied; for continuing 'occupancy is necessary to maintain a property relationship between a person and any particular external thing'.¹⁵⁴ Without the continuing subjective presence of the will 'the thing becomes ownerless because, the actuality of the will and possession has abandoned it'.¹⁵⁵

However, as has been touched on briefly in chapter one and earlier in this chapter, it is not just the control of a resource that is a dialectic. The common law itself is also such a process, resulting in a relationship of mutual inclusivity. The common law can only work if the elements that create and sustain it are themselves dynamic; it is a system that must, by its very nature,

¹⁵⁴ Radin (n 151) 974

¹⁵⁵ Hegel n 140) s. 64

accept nothing is fixed and a concept which is unable to change cannot sit in a structure which sees judge made law as vital for its development.

2.16 The Common Law as a Dialectic Process

It would seem at the time of *Littledale v Liverpool College*,¹⁵⁶ there was an acknowledgement, at least in some quarters, that the philosophical foundation of the common law was as important as its practice. The introduction by Lindley MR of *animus possidendi* appears to acknowledge this. There is little doubt that *Littledale* and the introduction of *animus*, was an important milestone in the development of adverse possession, but whether it introduced German jurisprudence into the common law is open to debate. It could have been an overt act by someone who had been introduced to Hegel's theories whilst studying in Germany, or inherent understanding of the philosophical foundations of common law.

Perhaps common law lawyers tended to see the law as a practical exercise, more common sense than theory. Law was 'done' by practitioners who understood how but not why, therefore it had by necessity a 'pragmatic tradition to which highfaluting philosophical speculation [was] unnecessary and useless'.¹⁵⁷ However, hidden below the surface of this pragmatic tradition was a system that was 'dramatised in the platonic dialogues and discussed in Aristotle's *Ethics*',¹⁵⁸ this was dialectic reasoning and it was this form of

¹⁵⁶ [1900] 1 Ch 19 (CA)

¹⁵⁷ Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the legal Profession is Transforming American Society* (Farrar Straus & Giroux 1995) 231

¹⁵⁸ *ibid* 237

reasoning that is embodied in the incremental development of the common law.

2.17 Dialectic Reasoning

Edgar Bodenheimer, an émigré legal philosopher who fled Hitler's Germany, recognised that Hegel's dialectic theories provided a perfect explanation of the philosophy of the Anglo-American legal tradition. Hegel, explained Bodenheimer, recognised that evolution was 'of far reaching importance in the history of legal philosophy',¹⁵⁹ and the various manifestation of the law 'are the products of an evolutionary dynamic process'.¹⁶⁰ This evolutionary dynamic process starts with a presumption that is doubtful or disputed and ends, not in certainty, but with a determination of which of the opposing positions are 'supported by stronger evidence and more convincing reasons'.¹⁶¹ It is therefore, a self-correcting system that builds on 'common sense, but subjects common sense to continuous critical evaluation'.¹⁶² It is a system which identifies flaws and attempts to perfect them, but never actually does so; the 'perfected' flaw merely becomes another doubtful or disputed presumption. The strength of this system lies in the ability of the judiciary to experiment; 'it combines certainty within reasonable limits with the power of growth'.¹⁶³ Principles are 'never fixed authoritatively once and for all but are discovered and tested gradually through judicial experimentation and experience'.¹⁶⁴

¹⁵⁹ Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Harvard University Press 1962) 66

¹⁶⁰ *ibid*

¹⁶¹ Glendon, *Under Lawyers* (n 157) 238

¹⁶² Mary Ann Glendon, *The Forum and the Tower; How Scholars and Politicians Have Imagined the World* (Oxford University Press 2011) 42

¹⁶³ Neil Hamilton & Mathias Alfred Jaren, introduction to Roco Pound, *The Spirit of the Common Law* (Routledge 1999) xli

¹⁶⁴ *ibid*

This dialectic is not a single macro event, but is rather composed of many smaller syntheses of thesis and antithesis, each forming and reforming in an attempt to reach the perfect state, a state that can never be reached. The dialectic is therefore, a pyramidal process; starting from the idea it grows exponentially and dynamically continually correcting errors as it progresses. This fluid operation cannot be restrained by a principle that is absolute and unchanging; everything that leads to the resolution of a disputed presumption must itself be capable of change and adaptation. If not, the whole system will be in danger of stagnating. For this reason the central idea of common law, the concept of 'ownership', must itself be a dialectic, a continuing dynamic self-correcting process, a system of practical reason, involving two partial realities; the subjective belief that the self has the right to possession, and the objective demonstration of that belief. Both partial realities are irrational unless each is treated as part of the whole.

Thus, although common law and 'ownership' appeared to operate without a philosophical basis, under a pragmatic system of common sense, there has always existed a philosophical foundation. It is not out of the question that Lindley MR naturally recognised this theory, after all he spent time studying in Germany and may have been influenced by the German transcendental idealism in the way Bodenheimer was. There was also at that time a ground swell of legal opinion that recognised the philosophical heart of common law. In 1897 Oliver Wendell Holmes wrote of the importance of theory to aid the understanding of the common law. He considered that 'it was not to be feared

as impractical, for, to the competent it is simply a means of going to the bottom of the subject'.¹⁶⁵

2.18 Lindley and the Founding of *Animus Possidendi*

There is perhaps no need to demonstrate how, or even if, Hegel's dialectic reasoning became incorporated into common law. As explained in the previous section, common law is itself a dialectic process and therefore needs a dynamic and responsive theory of ownership in order to allow for the appropriate and necessary adaptation and change. Although historically land law approached questions of possession and control in a practical fashion it does not mean that a theory cannot be teased from the interstice of this pragmatic process. A system of law does not start from a fully constructed theory, rather the theory is produced by study of the system itself, and Hegel's personhood theory can certainly be used to explain the lack of a concept of absolute ownership. In the case of common law, any theory of ownership has to allow for the dialectic reasoning which was, and still is, essential to the development of the law.

2.19 The Restrictive Effect of *Animus*

It has been argued that the introduction of *animus possidendi* reintroduced, by the back door, that which had been excluded by the Limitation Act 1833. The requirement in *Littledale*, that there had to be an occupation that intended to exclude the first as well as the rest of the world, appeared to reintroduce ouster, that is the first had to be dispossessed or inconvenienced in some

¹⁶⁵ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv L R 457, 477

way. Dockray argues that the *Littledale* rule is 'an artificial obstacle; it appears to require little more than a private intention to do something which a squatter is not actually required to attempt and which in most cases, he could not in fact lawfully or practically do'.¹⁶⁶ Lord Lindley's requirement that intent had to be demonstrated rather than just implied, could be seen as introducing, as Dockray proposes, an obstacle to the squatter's attempt to acquire possession. Alternatively it could be seen as introducing or acknowledging a personhood approach.

The Hegelian theory of control although dynamic did not consider that it could be invested in another lightly. As discussed earlier in the chapter, Hegel explained that 'a second person cannot take possession of what is already the property of another'.¹⁶⁷ If the first has abandoned a resource by ceasing to demonstrate some continuing expression of their will in it, then they discontinue their control over it. There comes into existence a vacancy which can be filled by another. This other, who is more usually termed a squatter, in effect becomes the new first with a right to protect that possession. They have excluded the original first, if not physically, at least intellectually. As Kant postulates 'the will of any individual thus manifested is entitled to absolute respect from every other individual, and can only be overcome or set aside by the universal will, that is, by the state, acting through its organs, the courts'.¹⁶⁸ Therefore if the original first has discontinued possession and the resource has been brought into the sphere of another's will, then that should be protected from interference by anyone, except the universal will.

¹⁶⁶ Martin Dockray 'Adverse Possession and Intention' (1982) Conv 256, 261

¹⁶⁷ Hegel (n 140) s.50

¹⁶⁸ Cited in Holmes (n 165) 164

Conclusion

This chapter has introduced a historical discussion of property theory, and attempted to demonstrate how it has developed, alongside the evolution of property law discussed in the first chapter. Its intention is to place adverse possession in the context of this historical narrative. Early incarnations of property theory sought to justify the acquisition of resources from the common stock, to enable people and institutions to gain wealth, and with it influence. This theory developed over time as the more complex approaches espoused by Grotius, Hobbes, etc., sought to explain how resources were distributed in a fair and communitarian way. However, these theories were problematic as they relied on a contractarian approach to distribution, which failed to demonstrate how any available resources were assigned.

It fell to Locke, and later to Hegel, to espouse a more personal approach to property acquisition, and to explain how resources could be appropriated from a state of nature without having to enter into some sort of agreement or antecedent pact; or for that matter, consent to control from some sort of central authority. In fact it was Locke's avowed intention to explain the source of property entitlement was due to labour, and government had a duty to protect that property rather than control it.

Hegel took a personhood approach and saw the will as the source of entitlement to resources. He considered the function of private property was a device for establishing personality and this took precedent over the

gratification of material needs. Hegel saw no need for a person to directly labour to acquire property; rather for him property belonged to the first person to infuse their will into it. Unlike Locke, whose theories may have a certain credence, particularly when intellectual property is considered,¹⁶⁹ Hegel's theories have generally fallen out of favour. However, as will be discussed at the start of the next chapter, in which it is intended to examine more contemporary theories of property, Hegel's thinking provided the basis of Margaret Radin's theory of personhood. In fact, as mentioned earlier in the chapter, Radin considers that there is a measure of personhood in all theories of property, so perhaps Hegel still maintains some influence.

¹⁶⁹ See for instance chapter three of Peter Drahos, *A Philosophy of Intellectual Property* (Routledge 2016)

Chapter 3

Contemporary Theories of Property

Introduction

In this chapter the more contemporary theories of property will be considered. It is intended to build on the previous chapter's historical discussion and in doing so explain how a resource can be identified as property and how it comes under the exclusive control of one person. It is this idea of exclusive control that enables a propertied resource to be differentiated from unpropertied ones. However, whilst most resources can be seen as excludable this chapter will explain that real property falls into the non-excludable, or at least quasi-non-excludable category. This results in the possibility that identical titles can exist in the same property at the same time.

If, as will be argued, land is a non-exclusive resource, there is space for an alternative view of adverse possession; one that sees both the first in possession and the squatter having titles which are identical. It is this equality of title that enables an alternative conceptualisation of adverse possession to be understood. However, before going on to discuss the idea of excludability and as a continuation of the previous chapter's consideration of Hegel's theories, Radin's interpretation of personhood will be discussed.

3.1 Personhood

The essence of Radin's personhood theory, much as Hegel's theories discussed in the previous chapter, is that a relationship exists between property and self-development. Her primary premise is that some goods constitute a person's identity in the sense that a 'person's property is bound up with an individual's personhood in a constitutive sense'.¹ Property can therefore promote healthy self-development, which Radin was to later term 'human flourishing'.² For this reason greater legal protection can be granted to those goods which are personal to an individual, as opposed to those goods which represent wealth. Radin classified the latter as fungible property.

Examples of personal goods might include 'a wedding ring, a portrait, an heirloom, or a house'.³ These are items that are closely bound up with the person, resources that money cannot replace. Other items can be seen as simply wealth, such as the house belonging to a landlord. Although, it should be noted, personal and fungible items do not fall into neat and tidy categories. For instance identical resources can be both personal and fungible depending on who possesses them. A house for instance can be fungible for the landlord, personal for the tenant. A wedding ring might be fungible to a jeweller, who could rely on insurance money as recompense if the item went missing, yet be personal to an individual who would not see a replacement as any sort of compensation. From this insight it can be seen 'that there are types of

¹ Gregory S. Alexander & Eduardo M. Penalver, *An Introduction to Property Theory* (Cambridge University Press 2012) 67

² *ibid*

³ Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press 1993) 36

property which ought to enjoy special protection'⁴ thus drawing upon the Hegelian vision.

However, this simple division between fungible property and personal property is not as easy to make as it first appears. Although, for instance, a wedding ring might more usually fall into the personal category, a person might well have no attachment or even loathe the symbol the ring represents. Body parts lead to what Radin labels as an interesting paradox; although seemingly personal they can become fungible. Blood for transfusion, organs for transplantation, hair for wig making are all commodities exchangeable, if not for money, at least for the donor's self-satisfaction or self-worth.⁵ Yet a person's body can be seen as a special type of property; to remove a part of it would seem to be removing a part of the person's self. Radin's solution to this problem is to only 'call parts of the body property when they have been removed from the system'.⁶ These examples of the shifting nature of property leads to the conclusion that the division between what is fungible and what is personal are subjective. And in 'all probability, for each person who does define their personhood in relation to property there will be a unique mix of significant things'.⁷

As well as the division between fungible and personal property being subjective, there is also a social dimension that Radin refers to as the problem of fetishism. There is a 'limit to what law can and should protect in terms of

⁴ Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge-Cavandish 2007) 101

⁵ Radin (n 3) 41

⁶ *ibid*

⁷ (Davies (n 4) 101

people's subjective self-worth'.⁸ She concludes that to recognise the difference between what is healthy for a person's self-constitution and what is fetishistic revolves around the concept of health itself. In the same way that the difference between a sick person and a healthy person, or a sane person and an insane person is obvious to 'us', the difference between personal property and fetishism is equally as obvious. This seems to suggest that there is a neat dichotomy between health and illness and sanity and insanity; a dichotomy that can be realised by applying an 'objective moral criteria'⁹ which allows a consensus to be reached as to what is abnormal. Accordingly in the:

Context of property for personhood then a 'thing' that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is a moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy constitution.¹⁰

This of course brings up the question of what is health and what is sanity. It is relatively easy to identify the two end points of each continuum, but it is questionable as to which point health tips over to illness, or sanity over to insanity, that is if insanity actually exists. The same can be said about personhood, whose moral conception is sufficiently expert to decide when personhood becomes a fetish.¹¹

⁸ *ibid*

⁹ (Radin (n 3) 43

¹⁰ *ibid*

¹¹ The morality of adverse possession is a frequent discussion point, see the introduction to this work, but there is no strict definition of whose behaviour is morally questionable, the squatter or the first in possession. It is suggested that a subjective moral argument, or any moral argument, has no place in discussions of adverse possession.

There is a wider argument at work here and one that could undermine Radin's thesis; the 'appeal to social convention or normality in determining the nature of property for personhood raises issues about who determines the normal'.¹² Schnably questions 'to what degree is there really consensus over issues pertaining to property and personhood'.¹³ He explains that if we 'examine any particular area of 'consensus' closely we will find deep disputes as well. Indeed, it is precisely with respect to those values that are most obviously uncontroversial that we should be most skeptical'.¹⁴

In many ways Radin's theory appears to be a middle class theory bound up in the private sphere of the home. If the nature of this home is investigated it can be seen that it exists in communities that 'should be comprised of people of the same race and economic status'.¹⁵ The home therefore becomes property that fosters both racial and class divisions.¹⁶ In such disparate groups and communities who is to say whether it is a house or 10 pairs of shoes that constitute a person's personhood.¹⁷ These above points need further exploration in terms of Radin's view of adverse possession.

3.2 Radin and Adverse Possession

There is also a problem with Radin's arguments in favour of adverse possession, at least with regard to English common law. She explains that a

¹² Davies (n 4) 103

¹³ Stephen Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 *Stanford Law Review* 347, 363

¹⁴ *ibid* 362

¹⁵ *ibid* 366

¹⁶ Davies (n 4) 103

¹⁷ For a reply to Schably criticism see Margaret Jane Radin, *Property and Pragmatism*, in *Reinterpreting Property* (University of Chicago Press 1993)

modern extrapolation of personhood suggests that 'a claim to own something 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'.¹⁸ For Radin therefore, the process does not take place overnight, as it does in Hegelian theory, rather the 'possessor's interest, initially fungible becomes more and more personal as time passes. At the same time, the titleholder's interest fades from personal to fungible and finally to nothing'.¹⁹

There are two problems related to this explanation, both of which concern title. Firstly Radin does not see the squatter as having a title as a result of their own possession; secondly, due to this the title is required to move from the first in possession to the squatter at the end of the migration from personal to fungible and vice versa. As was explained in the first chapter both of these are impossible under English law. The Law Commission stated quite clearly that a squatter has a fee simple interest from the very commencement of their possession;²⁰ it is therefore unnecessary for the title to move from the first in possession to the squatter. There is no conveyance, parliamentary or otherwise, needed.²¹

Radin also introduces the socially acceptable or morally correct argument into adverse possession, and in so doing explains that it would be questionable if personhood can be applied to it unless a person believes the land to be

¹⁸ Radin (n 3) 107

¹⁹ *ibid* 111

²⁰ Law Commission, *Land Registration for the Twenty First Century: A Consultative Document* (Law Com No 254, 1998) 10.22

²¹ *Tichborne v Weir* [1894] All ER 449 (CA)

theirs.²² To this end, and to fulfill her contention that for 'personality theory adverse possession is easy',²³ she divided it into three paradigms. The first two are colour of title and boundaries, the third – and the morally questionable one – is squatting; this is squatting in the sense of occupying land that a person knows is not theirs. This throws up a problem; how does a person decide what form of squatting is morally correct. Whilst it may be relatively straightforward to conclude that colour of title and boundary issues are morally neutral, this is not necessarily always so. Similarly issues of what Radin refers to as aggressive trespass are not necessarily morally problematic; there are multiple reasons for a person to be on the land of the first in possession. It is suggested, therefore, that taking a moral stand one way or the other is difficult and not necessarily correct.

Radin also finds a fixed period of limitation dubious, seeming to suggest that decisions would be better made on a case-by-case or, if a fixed period of limitation is necessary, it should be based on an approximated blanket rule.²⁴ The duration would be 'based upon the socially acceptable or 'right' time it takes to become attached/detached'.²⁵ This is only a problem if the time it takes personhood to move from the first in possession to the squatter is not overnight. If a squatter gains possession and therefore a title with such speed and efficiency as Hegel contends, then the case-by-case argument becomes unnecessary. Limitation is based on utility and to a certain extent fairness; land brought back into use by the squatter benefits society as a whole, and it

²² Radin (n 3) 112

²³ *ibid* 109

²⁴ *ibid* 111

²⁵ *ibid*

must be queried if it is be fair to the squatter, who has used and maintained the land for a significant period, to reinstall the tardy first in possession.

As can be seen, Radin and by implication Hegel, see property as a complex and variable concept. However, 'its structure can nevertheless be placed within an identifiable framework which reveals the particular values it represents'.²⁶ This is in contrast to bundle theories that see private property as either a disintegrated or integrated bundle of rights. The disintegrated bundle 'must be disaggregated and traded (separately) by individual traders'.²⁷ The integrated bundle 'must be held together in a single owner's hands if individual ownership is to be recognised'.²⁸ The next sections will discuss the evolution of bundle theory and its implications for the adverse possession question posed by this work.

3.3 Disintegrated Bundle Theory

Disintegrated Bundle theory is not so much a concept of property, but rather it is the notion that property is not a well-defined and integrated concept at all. At its simplest it can be seen as a way of describing the various property relationships a person has in a 'thing'. It is the power to control rather than the entitlement to have. Gray and Gray explain that the use of property in this context 'reflects a semantically correct root by identifying the condition of a particular resource as being proper to a particular person'.²⁹ Much of the 'false thinking about property (and by implication how control is defined) stems from

²⁶ John Christman, Review of Mary Jane Radin's *Reinterpreting Property* (1996) 106(3) *Ethics* 648

²⁷ *ibid*

²⁸ *ibid*

²⁹ Kevin Gray & Susan Francis Gray, 'The idea of Property in Land' in Susan Bright & John K Dewar (eds) *Land Law: Themes and Perspectives* (OUP 1998) 16

the residual perception that property is itself a thing or resource rather than a legally endorsed concentration of power'.³⁰

Because the power to control exists in the thing rather than arising due to entitlement to the thing, 'the power relationship implicit in the property is not absolute but relative: there may well be graduations of property in a resource'.³¹ The graduations, that it is proper for a person to have, can be calibrated and a person's 'propertyness' can be marked on a scale from minimum to maximum, with of course the person at the minimum end of the scale lacking any real proprietor interest at all. By assigning a particular quantum of 'propertyness' to a physical resource it can be seen that a complex interchange of rights can exist over it, rights which include space for others to be 'propertied'.

Bundle theory is implicit in this concept; it is the 'lawyer's view of property'³² and can be seen as 'certain relations, usually legal relations, among persons or other entities with respect to things'.³³ The law sees no pre-existing, or well-defined concepts behind the term property: there is no integrated notion of what exactly property is. It does however consider that specific rights attach themselves to the property one has in a thing, and accordingly, property consist of the number of sticks the law grants or protects the person with.

³⁰ Kevin Gray 'Property in Thin Air' (1991) CLJ 252, 299

³¹ Gray & Gray (n 29) 15

³² Gregory & Penalver (n 1) 2

³³ Stephen R. Munzer, *A Theory of Property* (Cambridge University Press 1990) 16

These metaphorical sticks will 'vary according to context';³⁴ consequently different types of property will have different combinations of sticks.

The sticks a person controls identifies the particular power that a person holds in the property concerned. This makes it possible for multiple people to have property in a resource; the sticks are simply spread among them. However, this multiplicity of rights, and liabilities, tend to make any sort of integrated theory of property difficult. Each stick in the bundle is 'distinct and separate, the component relations can be taken apart and reconstituted in different combinations, so that we may get smaller bundles of the rights that were involved originally in this large bundle we call ownership'.³⁵ Therefore the disintegration of property that results from adherence to the bundle of sticks theory means there is no fixed, known or prior concept of property. Property becomes merely the sticks a person has in a resource.

It can be seen that the disintegration theory may be more difficult to apply to simple chattels. Whilst the theory can work well with more complex and flexible resources such as land, simple resources such as clothes, a comb, or a walking stick display a homogeneous constitution, one that multiple people are unlikely to have property in. In an attempt to overcome this problem Anthony Honoré sought to modify the bundle of sticks regime and introduced a specific standard; these were 'incidents of ownership common to western legal systems'.³⁶ However, before exploring Honoré's theory the ability of

³⁴ Davis (n 4) 19

³⁵ Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1990) 28

³⁶ Munzer (n 33) 22

adverse possession to function under a system of disintegration will be considered.

It is the flexibility of disintegrated bundle theory that makes it applicable to the form of right-based adverse possession described in this thesis. A squatter will gain the appropriate 'sticks' when they take possession of the land, therefore giving them the right to occupy it. It is the very fact that disintegration theory allows the amount of 'sticks' that constitute a resource to vary depending on the circumstance, which allows squatting to function. Although it must be conceded that there would need to be identical 'sticks' within the bundle, so that the corresponding rights enjoyed by the first and the squatter can be accommodated, there would appear to be nothing within the theory to prevent this from happening. In fact, if the law recognises which particular sticks a person can hold, then the law can allow for the adaptations to the particular bundle of sticks a person holds.

3.4 Honoré's Integrated Theory

Honoré's approach was inspired by, but not identical to, that proposed by Wesley Newcomb Hohfeld. Hohfeld's theory can be seen as an analytical vocabulary and this 'vocabulary treats certain legal concepts as basic and explains their interrelations'.³⁷ Hohfeld proposed four fundamental legal elements and four correlatives; these elements are claim-rights, privileges/liberty, powers, and immunities with the correlatives being duties, no-rights, liabilities and disabilities. So for instance if A has a claim-right

³⁷ *ibid* 18

against B, B can be required to do a certain thing, e.g. pay A the £100 he had been promised. A privilege, on the other hand, occurs when A has the liberty to do X, but has no duty to do it; it is the absence of any other's right to interfere. A power, the correlative of which is a liability, gives A the right to do something, e.g. transfer a house giving B the liability of receiving it. Last in Hohfeld's fundamental legal elements is an immunity. In this situation A has an immunity against B in respect of something, i.e. B cannot compel A to sell their house.

Honoré's 'list of incidents, slightly modified, includes the claim-rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgement'.³⁸ These incidents can be regarded as necessary for control, 'in the sense that if a system did not provide for them to be united in a single person, we would conclude that they did not know the liberal concept of ownership'.³⁹ Interestingly, although Honoré considered that all the elements he listed should be united, he did allow for ownership to be qualified in certain situations, e.g. the right of a mortgagee to call themselves an owner. So it would seem that a full liberal theory could not be accommodated in every situation, and there had to be a little blurring around the edges in order for it to function.

³⁸ *ibid* 22

³⁹ Anthony M. Honoré, 'Ownership' in *Readings in the Philosophy of Law* (Jules L. Coleman ed, Yale 1999) 565

Honoré's incidents also have room for what might be termed lesser property interests; these are incidents that do not rise to the level of ownership. For instance '[e]asements, bailments, franchises, and some licences are examples of *limited property*',⁴⁰ which can be accommodated under the banner of Honoré's definition. There are, however, problems with the system as a whole and its place within the bundle of sticks theory.

Honoré's incidents demonstrated the possible existence of a standard definition of property, compared to disintegrated theory's absence of any strict essence of property. Although in itself this was not necessarily a bad thing, there were nonetheless unresolved problems. In many ways Honoré's system resembles Blackstone's famous explanation of property. If all of Honoré's incidents are present in one person they then possess full liberal ownership, i.e. 'that sole and despotic dominium which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.⁴¹ Albeit Honoré's system could be easily applicable to many chattels, there were also many instances where it was difficult to accommodate it within a system of social justice and environmental sustainability.

In the first instance it would seem, unlike the disintegrated bundle theory, Honoré's integrated theory would be a problem as far as adverse possession being a fictitious concept is concerned. If there are standard incidents of ownership and one person possesses those incidents then there is no room

⁴⁰ Munzer (n 33) 23

⁴¹ 2 BI Comm 2

for another to take property in the same resource. It could be argued that the social justice and environmental issues mentioned above allow for adverse possession to take place, however in such a situation the squatter's possession *would* be adverse to the first's. However, this also leads to a problematical situation, and one that has been discussed throughout this work, if the squatter has a title then they must possess some sticks, perhaps the same sticks as the first.

The same argument can be considered when excludability is discussed in the next section, if a person can exclude all others from a resource there is little doubt they possess it at the other's expense. If however land is not property at all, in fact does not exist in a physical form, then control will be via title. Honoré's incidents will exist in the title, which is singular and exclusive, yet not in the land itself. These theories will be discussed in the rest of this chapter, starting with excludability.

3.5 Excludability

The dilemmas caused by Honoré's integrated theory led to broader three-part conception of property. If, under this system, a person has the right to exclude others, the right to use, and the right to freely manage and alienate resources, then it could be said that they have property in that resource. Of these three the right to exclude could be seen as the most important incident of property. As Merrell explains, excludability:

Is more than just one of the most essential constituents of property – it is the sine qua non. Give someone the right to exclude others from a

valued resource, i.e. a resource that is scarce relative to human demand for it, and you give them property. Deny someone that exclusion right and they do not have property.⁴²

Penner clarifies excludability by demonstrating that 'property rights can be fully explained using the concepts of exclusion and use'.⁴³ He interpreted a right to property as 'a right to exclude others from things that is grounded by an interest we have in the use of things'.⁴⁴ However, this right to exclude is ancillary to the right to use, therefore a resource may be available to use but it is only when this use is exclusive does a person gain property in it. From this it can be concluded that if it is 'physically unrealistic to control, consistently over a prolonged period, the access of a stranger',⁴⁵ then a resource can be termed usable but not excludable; with its benefits becoming available to anyone who wishes to take advantage of them. For instance, there cannot be property, or even quasi-property, in a spectacle,⁴⁶ even if it is a spectacle that is of value to an individual. So to watch a professional football match for free, by sitting on a hill overlooking the ground, cannot be prevented by the owner of the club. Similarly, it is often impossible for a controller of benefits to reasonably restrict the use of them to the intended recipients. Waldron gives the example of a lighthouse built privately to warn certain ships of a dangerous reef; the beam of light emitted cannot reasonably be restricted to those certain ships, it must, therefore, be available to all.⁴⁷

⁴² Thomas Merrell, Property and the Right to Exclude (1998) 77 *Neb L Rev* 730, 730

⁴³ J E Penner, *The Idea of Property in Law* (Clarendon Press 1997) 68

⁴⁴ *ibid* 71

⁴⁵ Gray (n 30) 270

⁴⁶ *ibid* 268

⁴⁷ Jeremy Waldron 'Can Communal Goods be Human Rights' (1987) 28 *European Journal of Sociology*, 296, 304

Yet, Penner, and Harris for that matter, regard a tidy division of resources in to excludable and non-excludable categories as not always possible. Consequently the right to exclusive use 'is not a denial of the fact that an owner's use of property may be circumscribed in some way'.⁴⁸ Accordingly the curtailment of certain rights the controller has over a resource does not mean that their use is not exclusive. The set of rights that excludability bestows is both open-ended 'since its present content could never be exhaustively listed', and fluctuating, 'because cultural assumptions about what an owner may do vary'.⁴⁹ Therefore, to possess an excludable resource gives that possessor the right to do anything they wish with it, unless that is society's cultural assumptions prevent certain actions. However, this argument is open to question.

Penner considers there is nothing in the world that 'is naturally of exclusive interest only to the one most closely associated with it'.⁵⁰ It could be implied from this argument that a resource can be excludable even when there are aspects of it that are non-excludable. So to take pleasure from looking at a person's body, or enjoy overhearing their conversation, or appreciate someone's garden statue,⁵¹ are all actions a person may wish to prevent but cannot. From these examples it can be extrapolated that a person's body etc. is an excludable resource even when suffering certain unwanted actions. However, rather than the actions of looking or hearing being related to the

⁴⁸ Penner (n 43) 72

⁴⁹ James W Harris, 'Ownership of Land in England', in Neil MacCormick and Peter Birks, *The Legal Mind: Essays in Honour of Tony Honoré* (Clarendon Press 1986) 160

⁵⁰ Penner (n 43) 72

⁵¹ *ibid* 74

physical essence of the body, they are actions of their own. There is a need therefore to differentiate between various actions; a person's body for instance, may be their own, but the action of looking at it is open to all; it is an action that society might frown upon but it is one which society cannot prevent. A person might take steps to forestall another from enjoying these visual or auditory pleasures; building a garden wall, whispering a conversation, or covering one's body, all make the actions of looking or overhearing difficult, but not impossible. It can be seen therefore that the action of touching a person's body and looking at it are different, one is excludable the other is not, the first can be propertyed the second cannot. The first is restricted to a defined group; the second is available to all.

It is important to understand that just because a resource is non-excludable it does not mean that it cannot be controlled in some way. If Waldron's lighthouse example is considered it can be seen that the lighthouse keeper cannot confine its benefits to a single legal personality or a proscribed group; accordingly the beam of light is non-excludable. This non-excludability does not mean a level of control cannot be exercised over the resource. The keeper can switch the light off and so deprive everyone of its benefits, yet it must be recognised that such a power does not give property in the resource. The property exists in the system that produces the light; the beam itself is no more than the projection of energy. This evident truth is of significance when control of land is considered. Just as light is a projection of electromagnetic radiation, land exists as a potential space waiting to be controlled; it has no more physical reality than the electromagnetic wave that produces visible

light.⁵² Therefore it can be controlled just as the lighthouse keeper controls the apparatus for producing light, yet others cannot necessarily be excluded from its benefits.

3.6 Excludability of Land

At first sight land must fall into the excludable category; Penner certainly considers this is so, as does Harris who explains that the person in possession 'has the prima facie privilege to do anything in relation to his land';⁵³ with Gray being the most emphatic, regarding land as 'the most readily excludable resource known to man'.⁵⁴

Yet as argued above, it is not the resource which should be considered when deciding if it is excludable or not, it is whether the resource can be propertied; if it can then it is excludable, if it cannot then it is not. Hence a person's body is excludable, but not the vision of their body. As Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*, explained, that for a resource to be capable of 'propertyness' it must be permanent and stable;⁵⁵ a body is permanent and stable, it has an easily identifiable shape and can be recognised for what it is. The sensual undertaking of looking at the body has no permanence or stability and according to Lord Wilberforce's definition cannot be propertied.

This lack of permanence or stability can be applied to real property, land itself being simply a conduit for rights to be asserted. Its physical reality simply

⁵² The physical reality of land will be outlined in more detail below.

⁵³ Harris (n 49) 144

⁵⁴ Gray (n30) 286

⁵⁵ [1965] AC 1175 (HL) 1247 [G]

exists as the *solum* that may, or for that matter, may not form its inferior border. However, this real property can be seen as almost completely thin air, it does not exist as a physical reality. It is a potential space waiting to be populated by movable resources, a space onto which are projected rights that give a person a certain level of control. Such a space, which exists as a non-physical resource, cannot be propertied.

3.7 Property as a Non-Physical Resource

So far property has been seen as a thing that a person can have in a physical resource. However, there exists an argument that sees property as a cerebral concept. In this concept property is divorced from its physical essence and becomes merely an intellectual exercise. Property in this incarnation is, according to Gray:

A fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept — oddly enough rather like thin air.⁵⁶

Common law appears to shun this intellectual basis for a theory of property, yet this does not mean that such a basis cannot exist behind the practical approach taken, with both approaches arriving at the same conclusion. Whilst the pragmatic approach accepts that various rights in property co-exist it does not seek to explain how they do so, this needs a more conceptual

⁵⁶ Gray (n 30)

understanding of the constructs of property theory. This understanding emerges out of a 'world of pure ideas from which everything physical or material is entirely excluded'.⁵⁷ It is a world of abstract but logical theory and from it appears a more intellectual understanding of control. In this theory any relationship with land is mediated through the intangible entity of the estate, and a person cannot claim to own the physical *solum*, merely a 'time related segment of the bundle of rights and powers exercisable over land'.⁵⁸ It would therefore be correct to say that 'several different persons may simultaneously, control distinct and separate estates in the same piece of land',⁵⁹ or perhaps more importantly for this work, control identical and separate estates in the same piece of land. This abstract theory considers that it is impossible for anyone to own the land; all that can be owned is a 'bundle of rights with respect to the land'.⁶⁰

It can be seen that both the abstract theory and common law approach have a strong tendency to detach the incorporeal right to exercise control of land, from the physical reality of the land. For the abstract theorist land lacks a physical identity and is simply an intangible reality that mediates relationships through the abstruse idea of the estate. For the common lawyer the practical solution is founded on the concept of seisin which lies at the root of property law, and sees every incidence of possession, with the necessary intent, as

⁵⁷ F H Lawson, *The Rational Strength of English Law* (Stevens & Sons, 1951) 79

⁵⁸ Gray and Gray (n 29) 27

⁵⁹ *ibid* 31

⁶⁰ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285

creating a title 'which against all subsequent intruders, has the incidents and advantages of a true title'.⁶¹

3.8 Land as Thin Air

It is self-evident that the third dimension of land gives volume to a person's fee and without it land would be unusable. However, it is because of this cubic quantity of air that real property has the ability to expand and contract; this ability is possible because land does not have to be attached to the physical *solum* for it to exist. It is the capacity to separate this lower stratum of fresh air from the physical *solum* which gives rise to the 'seemingly improbable idea that a fee simple estate (or even a term of years) can exist literally in thin air'.⁶²

As explained earlier, according to Lord Wilberforce, in *National Provincial Bank Ltd v Ainsworth*, before 'a right or an interest can be admitted into the category of property, or a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree or permanence or stability'.⁶³ If a resource does not fulfill all of these criteria then it cannot be propertied. Although land as 'the ultimate immovable'⁶⁴ would appear to conform to all of Lord Wilberforce's criteria, it is the ability for a fee to expand and contract that makes it indefinable, impermanent and unstable. It could also be argued that the lack of identifiable physical boundaries makes its identification by third parties

⁶¹ Fredrick Pollock & Robert S Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888) 95

⁶² Gray (n 30) 259

⁶³ *National Provincial* (n 55) 1247 [G]

⁶⁴ Gray (n 30) 253

difficult, and in certain cases impossible. Therefore, as discussed at the start of this chapter, any ownership of this ethereal concept is difficult or almost impossible to pin down.

3.9 Third Dimension of Land

It is self-evident that the third dimension of land gives volume to a person's fee and without it land would be unusable. This concept leads in turn to the conclusion that immovable resources do not have to be tangible. They are potential spaces capable of almost infinite divisions that can be horizontal, vertical or made in another way,⁶⁵ yet does not necessarily have physical boundaries to delineate it from a superior, inferior or adjacent space. The physical *solum* exists simply to mark the lowest possible extent of the ethereal space, and no physical association with this *solum* is necessary for this space to exist as an independent entity. If this is the case, and the fee can exist without a physical boundary, then any such boundary must be immaterial when defining what exactly constitutes a fee.

3.10 Trespass to Thin Air

Early case law appears to consider the air space as a continuation of the physical *solum*, or as Lord Ellenborough in *Pickering v Rudd*,⁶⁶ called it, the 'superincumbent air on the close';⁶⁷ although paradoxically, he considered any interference with this fresh air alone would not be trespass. Lord Ellenborough hypothesised in *Pickering*, that someone firing a bullet across a field would not

⁶⁵ Law of Property Act 1925 (LPA 1925) s.205 (1)(ix)

⁶⁶ (1815) 4 Camp 219; 171ER 70

⁶⁷ 70

be trespass unless, that is, the bullet fell to earth. However, subsequent case law took a different and more cogent view, considering interference with the air space alone could be trespass. So, for instance, in *Ellis v The Loftus Iron Company*, a horse with its head over a boundary fence was committing a trespass, albeit 'a very small trespass'.⁶⁸ Or wires strung above a street as in *Wadsworth District Board of Works v United Telephone Company*,⁶⁹ constituted trespass against the local authority. In that case Fry LJ was in 'no doubt that an ordinary proprietor of land can cut and remove wire placed at any height above his freehold'.⁷⁰ Similarly Bowen LJ held that the fee simple proprietor of land 'had the right to object to anyone putting anything over his land at any height in the sky'.⁷¹ Both these cases seemingly consider that the delineation of the upper limit of a proprietor's freehold was not strictly necessary. It was the line of authority starting with *Wadsworth District Board of Works* which allowed McNair J in *Kelsen*,⁷² to conclude that an overhanging sign constituted 'trespass and not a mere nuisance'⁷³ holding that 'the lease of a single-storey ground floor premise would include the lease of the airspace above'.⁷⁴ This is a debatable point and will be explored next.

It is not just this column of superincumbent air, used for the reasonable enjoyment of the proprietor, which demonstrates fresh air can be held in fee

⁶⁸ *Ellis v The Loftus Iron Company* (1874) LR 10 CP 10, 12

⁶⁹ *Wadsworth Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904 (CA)

⁷⁰ *ibid* 927

⁷¹ *ibid* 919

⁷² *Kelsen v Imperial Tobacco Co (Of Great Britain & Ireland) Ltd*, (1957) 2 QB 334

⁷³ *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments Ltd* [1988] 4 Const LJ 29 (Ch) 2

⁷⁴ *Kelsen* (n 72) 339

simple. The ability of a cubic quantity of fresh air to be detached from the physical *solum* is well demonstrated in *Reilly v Booth*.⁷⁵

In this case a 'gateway' or passage existed which led from the street to premises at the rear, which was granted for the construction of stables. Above this passage were rooms that remained under the control of the grantor; below was a shooting gallery, again controlled by the grantor. There were houses to either side, neither of which the grantee had any interest. The court had to decide whether the right granted to exclusive use of the passageway amounted to a fee simple. The Court of Appeal decided that when granting the use of the passage, the grantor was 'reserving to himself that which was above it, and he was reserving to himself that which was below it'.⁷⁶ He had, however, passed to the grantee the fee simple in the fresh air of the passage itself. The only restrictions on the rights of the proprietor of the passage were that he must use what may be called 'the floor of the passage, or the ceiling of the passage, or the walls of the passage, in every reasonable way'.⁷⁷

Reilly v Booth demonstrates that a cubic area of fresh air can exist as a fee simple. It would seem that the walls, ceiling and floor of the passageway were simply there to support the structures above below and to the sides of the passage, not to delineate the 'fresh air fee simple', and it fell to the proprietor of the passage to use structures reasonably, so as not to interfere with the rights of these adjacent properties. It would seem, therefore, that although the proprietor of the passageway could not remove these structures, the

⁷⁵ *Reilly v Booth* (1890) 44 Ch D 12 (CA)

⁷⁶ *ibid* 25

⁷⁷ *ibid* 27

proprietor of the surrounding structures could, as long as means of support for adjacent structures remained. If this were the case it would be interesting to speculate on the outcome if the proprietor of the rooms above the passageway decided to remove them, perhaps due their structure becoming dangerous. Would the proprietor of the demolished rooms retain the fee simple in the empty space, or would the passageway proprietor suddenly control everything to the heavens above? It is suggested that in this scenario the control of the space vacated by the demolished rooms would not fall to the passageway proprietor but remain with the original fee simple holder. His fee simple would not cease to exist due to the removal of a physical boundary; it would remain a cubic quantity of fresh air, floating on thin air.

3.11 The Upper Extent of Fresh Air

When it comes to considering the extent of the airspace that it is reasonable to control, there are no fixed rules. Lord Wilberforce recognised that up to the heavens was a doctrine that was so sweeping, unscientific and impractical that it was 'unlikely to appeal to the common law mind'.⁷⁸ Nevertheless, although the statement accepts that this airspace cannot be limitless, it does not delineate exactly what it is the possessor controls. However, as Griffiths J commented in *Bernstein of Leigh (Baron) v Skyviews & General Ltd*,⁷⁹ in the case law since *Pickering v Rudd* the courts have only concerned themselves with 'the rights of the owner in the airspace immediately adjacent to the surface of the land'.⁸⁰ In a changing world with the advent of aeroplanes,

⁷⁸ *Commissioner for Railways v Valuer General* [1974] AC 328 (PC) 351

⁷⁹ *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1975] 1 QB 479

⁸⁰ *ibid* 485 [E]

satellites, etc., a more thoroughgoing consideration of where the lower stratum of airspace controlled by the first ended, and what could be called common airspace, free for all to use, commenced. It was in *Bernstein* that the intersecting rights between the individual first in possession and the wider public was considered.

Griffiths J introduced the idea that a balanced view between the proprietor of land and members of the public had to be taken. He declared that the upper limit of the proprietor's fee had to be that which was, 'necessary for the ordinary use and enjoyment of his land and the structures upon it'; above this height 'he has no greater rights in the airspace than any other member of the public'.⁸¹ Whilst Griffiths J had still failed to define the full extent of the lower stratum the idea that it should be no wider-reaching than was strictly necessary⁸² had been introduced. In *Anchor Brewhouse* Scott J appears to consider that a 'landowner is entitled, as an attribute of his ownership of the land, to place structures on his land and thereby to reduce into actual possession the airspace above his land'.⁸³ This makes the point that for a proprietor to take control of the airspace above, they have to in some manner, project themselves into it, with the resulting subsumption into their possession being terminated when that projection is discontinued. Accordingly a reading of Scott J's judgment, and for that matter Griffiths J's, leads to the conclusion that rather than there being a fixed limit to an individual's fee, the extent of the superjacent airspace will vary depending on the structures placed upon the

⁸¹ *ibid* 488 [B]

⁸² The Civil Aviation Authority states an aircraft must fly no less than 150 metres (500 feet) above the highest obstacle within a radius of 150 metres (500 feet) from the aircraft.

⁸³ *Anchor Brewhouse Developments* (n 73) 3

physical *solum* beneath; or for that matter somehow floating on the fee that is superjacent to the *solum*. Consequently as structures are erected more of the lower stratum of airspace is subsumed into an individual's possession and conversely, as structures are removed this subsumed fee simple is reduced. Yet it must be remembered that subsumption in this way will be arrested if there is air space control by another above.

3.12 The Physical *Solum*

This section will briefly explain that visible and palpable boundaries, such as the ground a person walks upon, are of no more significance than the invisible ones that delineate the cubic area of nothing described above. All boundaries, whether visible or invisible, have the same function, to chart the extent of a person's fee. Arguably to identify the physical *solum* as real property, which exists as part of the superincumbent air space is illogical; it makes the mistake of ignoring the reality of its function due to the physicality of its nature.

The visible boundary that marks the inferior aspect of a fee is in reality no more than an undetached chattel. For instance if this physical *solum* is excavated, such as a gravel pit might be, then what is removed will have certainly taken on the classification of chattel; with in fact the cubic area of nothing enlarging as the excavation becomes deeper. In many ways this is analogous with the variable superincumbent space as was described above. As was explained, the encroachment into this space of structures thrusting ever upwards requires the enlargement of the cubic area of air they project into. The volume of the fee by necessity increases the taller the structures

become. Similarly as the excavation of the *solum* deepens, so again the volume of the fee simple increases, the deeper the excavation then the larger the fee. Conversely the introduction of extra material on to the physical *solum* will reduce the extent of the fee. By piling externally introduced material on to the lower boundary of the cubic area of fresh air that makes up the fee, its dimensions will be reduced and accordingly, so will its usable capacity. The ground, as this physical *solum* is named, is simply an impermanent boundary to the cubic area of nothing that actually makes up real property.

Of course, just as with the airspace above can be divided horizontally so that one cubic area of 'land' can float on another, with this upper floating space delineating the lower's upper boundary, the physical *solum* can be equally divided. Continuing with the gravel pit analogy, the controller of such a hole in the physical *solum* must stop excavating and increasing the extent of their fee, when they arrive at the property of another. For instance if there is a mine shaft belonging to a second person running through the physical *solum*, the gravel pit controller must stop their excavations at this point. The mineshaft will mark the lower limit of the possible fee.

Although it is human nature to require real property to be visible and to give the controller of that property something solid to point to as being theirs, in truth all they have is a title that gives an incorporeal right to exercise control, mediated through the intangible reality of the estate. The boundaries of this fee, whether visible or invisible, merely delineate the area of nothing on to which the cerebral rights of control are projected. Although in providing

something to walk and build structures upon the inferior border is an extremely useful feature, in reality it has no permanence, it is just the movable lower boundary of a cubic area of real property.

The arguments presented in this section have demonstrated that land, as a physical reality, does not exist. It is a potential space that can endure without any attachment to the physical *solum*. Its dimensions and boundaries are not fixed but subject to expansion and contraction, and would appear to not conform to Lord Wilberforce's definition of a resource that is capable of having property in it. Yet even though the cubic area of nothing cannot be propertied, the title which gives a right of control through the intangible reality of the estate can be. This would seem to indicate that although land as such cannot be propertied it does not mean it is automatically a non-excludable resource. A titleholder should, by the nature of the control a title gives, be able to exclude others, yet it is the potential non-exclusivity of control that makes this problematic. To be an excludable resource the controller needs to have exclusive control, without that level of control there will be room for others to occupy the same cubic space. The argument that real property is non-excludable, or at least potentially non-excludable, is important when squatting is considered, and will be explored in the following section.

3.13 Non-Excludability of Land

There are two main arguments that can be put forward in support of non-excludability of land, that is the inability for an estate holder to exhibit exclusive control over the cubic area of space that estate refers to. The first is

an historical approach that sees non-excludability as a direct result of land law's pragmatic, possession based control. The second is the conceptual argument described above which sees land as nothing more than an intellectual resource on to which time related rights are projected. These two arguments will be considered in more detail in this section.

3.14 Historical Rights To Use Land

The pragmatic approach to possession and control which flowed from the medieval courts and which saw the disseisor, from the first day of his possession, gaining full beneficial rights over the land had, by the eighteen century, been replaced by a more 'traditional' and absolutist view. This view was espoused by Lord Camden in *Entick v Carrington*,⁸⁴ where he stated that 'no man can set foot upon my ground without my licence',⁸⁵ asserting an unqualified right for a landowner to exclude anyone from their land. This absolutism perhaps reached its zenith in *Pickles v Bradford Corporation*,⁸⁶ where 'the great judges of the Victorian era acknowledged no overriding duty on the part of a private landowner to safeguard wider interest in the exploitation of his land'.^{87 88}

However, the views put forward in these cases did not necessarily go unchallenged at the time. In the mid-nineteenth century John Stuart Mill wrote that:

⁸⁴ *Entick v Carrington* (1765) 19 Howell's State Trials 1029; 95 ER 807

⁸⁵ *ibid* 1066

⁸⁶ *Pickles v Bradford Corporation* [1895] AC 587 (CA)

⁸⁷ Gray & Gray, *Elements* (n 44) 11-002

⁸⁸ For an alternative views of *Pickles v Bradford Corporation* see David Campbell, 'Gathering the Water: abuse of rights after recognition of government failure' (2010) 7 *The Journal of Jurisprudence* 487 or Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (OUP 2002)

The exclusive right to land for the purposes of cultivation does not imply an exclusive right to it for the purposes of access; and no such right ought to be recognised, except to the extent necessary to protect the produce against damage and the owners privacy against invasion.⁸⁹

Even if the views of Mill seem to have left the courts unpersuaded at the time, the expectation of unconditional control they championed has been in retreat ever since. The courts and the legislature recognised that the scope of the first in possession's control, 'even in such resources as land, must be curtailed by limitations of a broadly moral character'.⁹⁰ Gray explains that:

Moral non-excludability derives from the fact that there are certain resources which are simply perceived to be so central or intrinsic to constructive human coexistence that it would be severely anti-social that these resources should be removed from the commons.⁹¹

Whether this definition can be applied to land is a matter of debate. However, there is certainly an argument to say it can. Even Gray, who champions the excludable nature of land, concedes that there 'is now considerable force behind the assertion that the power of arbitrary exclusion are no longer an inevitable or necessary incident of 'property' in land'.⁹²

The absolutism demonstrated in *Pickles* is very unlikely to be supported today. For instance, the planning laws prevent, often quite onerously, the right of the

⁸⁹ John Stuart Mill *Principles of Political Economy* (first published 1849, Longmans, Green & Co 1909) BK.2 Ch.2 S.6

⁹⁰ Gray (n 30) 286

⁹¹ *ibid* 280

⁹² *ibid* 290

first to develop 'their' land as they wish. The right to exercise an easement or covenant can be imposed against the first, sometimes detrimentally. Utility companies are permitted to enter land and the fact that certain mineral rights are vested in the Crown, all contribute to the first being unable to exclude everyone from 'their' land. However, perhaps the most far-reaching intervention in the rights of control over land were first initiated just 30 years after *Pickles*. This was the first of what was to become a series of legislative Acts, giving the public at large certain rights of access to land under the control of others.

3.15 Freedom of Access to Land

The Law of Property Act 1925 'gave people the right of access for air and exercise to metropolitan and urban district commons, including large areas of the Lake District and South Wales'.⁹³ This freedom of public access was increased by the National Parks and Access to the Countryside Act 1949, where 'by agreement or order; some 50,000 hectares of access were thought to have been secured'.⁹⁴ However, it was estimated that despite the Law of Property and the National Parks and Access to the Countryside Acts there were still 500,000 hectares of open countryside in England and Wales where access was not permitted, and 600,00 hectares where access was permitted on an informal or *de facto* basis.⁹⁵ To attempt to remedy this the Countryside

⁹³ Countryside and Rights of Way Act 2000 (CRoW 2000) Explanatory Notes, 6

⁹⁴ *ibid* 6

⁹⁵ Department of the Environment, Transport and the Regions, *Appraisal of Options on Access to the Open Countryside of England and Wales* (Dep 99/498, 1999)

and Rights of Way Act 2000⁹⁶ was introduced to 'give greater freedom to people to explore the open countryside'.⁹⁷

It could be said that these Acts curtailed the absolutism which had found its way into English land law. Their intent to restrict the right of the first in possession to exclude another from their land, by doing so, introduce a moral and human rights aspect into proprietorship. The nature of freedom to roam, introduced by the 2000 Act, was restricted to Mountain, Moor, Heath and Down, which was more restrictive than similar measures enacted in Scotland.⁹⁸ However, the important aspect from a moral point of view was that freedom of movement had been introduced and those in control of land could no longer exclude others. Land, or at least some land, had become non-excludable. Yet, even the remaining land cannot be described as completely excludable, it falls into what could be described as a hybrid category, land that is quasi, or potentially non-excludable. This is land that might be controlled by a single entity but, as with all land, has the potential for another to also assert some kind of right over it. A squatter may enter and create a title, an easement obtained by the fiction of a lost modern grant, or the decision by a utility company to run a power line or sewer pipe through someone's back garden, are all examples of the first in possession being unable to exclude others from their land. This category of land could be termed quasi-non-excludable; i.e. land that has the potential to become non-excludable even without the first's consent.

⁹⁶ n 93 (CRoW 2000)

⁹⁷ *ibid* 5

⁹⁸ Scottish legislation provides for access to most land and water within the country. The intention is to exclude the land, such as houses, gardens, military bases and airfields, to which the legislation does not apply, rather than attempting to define land to which it does.

3.16 The Legal Right to Non-Excludability

As was explained when Waldron's lighthouse analogy was considered earlier in the chapter, a lack of excludability does not mean control cannot be exercised over a resource. The theory of 'ownership' of land considered earlier demonstrated that both the abstract theory and the common law approach detached the right of control from the physical reality of the land. Control is exercised by means of the estate, an abstract and intangible entity through which an individual's relationship with the land is mediated. This intangible presence floats above the physical *solum* and allows a legal personality to project rights of control upon it. Because the estate is a resource controlled by an individual and it is not 'physically unrealistic to control, consistently over a prolonged period, the access of a stranger',⁹⁹ it must be regarded as excludable. This means the rights of control it gives the estate holder are theirs alone to exercise. However, as this right of control is derived from their property in the estate rather in the land, it is quite possible, or even typical, for another estate propertied by another individual to exist contemporaneously with it. The land therefore must be non-excludable, at least to certain individuals or groups; with a requirement that the first must not interfere with the rights of another or which others have over the same land.

It can be seen that without the concept of non-excludability it would be difficult for the notion of estates to function. Accordingly, the non-excludable nature of land, at least to certain categories of persons, if not generally, results in the

⁹⁹ Gray (n 30) 270

possibility that multiple titles can exist in the same resource; even if these titles are detrimental or opposed to each other. Taken to its logical conclusion the concept of property existing in the title or estate rather than in the land must allow identical estates to exist contemporaneously.

If Gray's assertion considered earlier is re-examined it can be seen that rather than land being 'the most readily excludable resource known to man',¹⁰⁰ that definition is more appropriate to the notion of title. It can be asserted with some conviction that a title may be the only thing that can be owned absolutely. An individual might not be able to assert their title, either because there is another in possession of the resource, or the law prevents it.¹⁰¹ However, it can be argued that the title still persists; it is after all merely an entitlement to exert control over a resource, and as such there is no absolute right to exercise it. The right to exercise a title and the right to own it are different conditions, the law controls the first and the individual the second. A title is a personal right which can be alienated yet not extinguished, no matter what the law says; it will continue to exist in an individual until such time as their will no longer embodies it. It is the difference between the non-excludable nature of land and the completely excludable nature of a title that lies at the heart of that process which the law considers to be adverse possession.

3.17 Non-Excludability and Adverse Possession

If it is accepted that possession is the bedrock of English law and any non-trespassory possessor holds a fee simple interest, then it must be the case

¹⁰⁰ *ibid* 286

¹⁰¹ For instance by the operation of a limitation period.

that the squatter owns such a title. This title is not at odds with the first's but exists alongside it; there is not a single title over which both must compete, rather they both have property in their own estate, giving each of them the potential control of the resource. Legal orthodoxy suggests that these titles are not equal, one is a title of 'right' while the other is a title of 'wrong', presumably because the law regards the squatter as a trespasser. However, as was argued in the introduction and will be discussed in the final chapter, the squatter should not be regarded as an occupier of wrong, but rather as a person with a fee simple title, a title identical to that of the first. It is the law's place to adjudicate between these competing titles and to confirm whose is the best; if this is the squatter's, then the first will relinquish their position as having the best title, and this will go to the squatter. Yet the original first, the one the squatter has replaced, will retain their title; it will not be extinguished, at least theoretically, it will simply enter a state in which it is non-exercisable.

3.18 Conclusion

This chapter and the previous one have demonstrated that ownership is a complex concept that is difficult to pin down. It is a term that signifies a collection or bundle of individual rights. This bundle can be disintegrated i.e. there is no pre-existing or well-defined unified concept of property, it is simply the sum total of the particular entitlements the law grants to a person in any given situation. In such a setting there is no identifiable 'owner', each person merely possesses the particular sticks that correspond with their appropriate rights in the resource. Conversely, as Honoré explained, the bundle can be restricted to its essential parts or standard incidents of ownership. In such a

situation an 'owner' can be identified if they possess these standard incidents. Penner, among others, identified three of these incidents as the most important, considering that a person must possess, at some level, all three of these 'sticks' as an essential feature of property. Although not disputing the idea of bundle theory, Hegel and Radin considered ownership to be a dynamic process, a synthesis of intent and possession, and as such is unstable, making any notion of absolute control impossible.

Gray describes property as a cerebral resource in which it is divorced from its physical essence and becomes merely a logical intellectual exercise. In this cerebral perception a relationship with land is mediated through the intangible entity of the estate. Therefore a person cannot own land, just a time related segment of a bundle of rights and power exercisable over land.

Thus control of land can be thought of as an autopoietic system where possession of property, with intent, creates a title, which indicates ownership, which gives a right to possession and so on. In a system such as this titles, however created, are identical; they give a potential right of control, yet do not guarantee a right to possession. Hence the law will need to adjudge one against the other, with the titleholder in possession usually seen as the best until it can be demonstrated otherwise. It is this fluid nature of best title that requires the concept of squatting to be introduced; if one title could be demonstrated as better than another, a notion of quasi-absolute ownership could be introduced and land protected.

As will be discussed in the next chapter, it was important to protect the land of the landed. As Milsom explained land 'was wealth, livelihood, family provision, and the principle subject matter of the law'.¹⁰² Not only was land wealth, livelihood, etc., it was power, it 'was government and the structure of society',¹⁰³ and this power that was proportionate to the amount of land a person possessed. Accordingly, land had to be conserved, and much as the equity of redemption¹⁰⁴ was developed to protect mortgaged land, adverse possession was established to insulate tardy landowners from the inevitable result of their dilatory ways. If the judiciary could control the right of the landed to continue dominium over land, then the carefully constructed fabric of English life could continue. By constructing a doctrine of adverse possession they were able to control and protect the access of others to the land of England's elite, even land that that elite had discontinued possession of.

¹⁰² SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 99

¹⁰³ *ibid*

¹⁰⁴ From roughly the beginning of the seventeenth century to the end of the nineteenth century the courts of chancery did everything in their power to re-write loan contracts secured on land in order to protect landed wealth. See Ronald Alan Warrington, 'Law And Property: The Equity Of Redemption Re-Examined' (PhD, University College London 1982)

Chapter 4

Property, Power and Society

Introduction

The preceding chapters have set out an alternate theoretical view attempting to justify a different understanding of the law surrounding adverse possession. This, it is ventured, is coherent, logical, and based on evidence rather than speculation, yet it is unlikely to be accepted as 'true'. What makes it untrue is not some underlying falsity in its construction; rather it is the power of the judiciary and the knowledge they possess which enables them to construct a fiction of adverse possession. The established doctrinal view which sees squatting as possession of wrong, trespass, land theft, etc., is no more correct than the theory advanced in the preceding chapters. Yet it has become true due to the power conferred upon it by an influential judicial elite. This elite has shaped and reshaped it until it became an unassailable doctrine that supports the truth they seek to advance.

This raises two questions. Firstly, by what process does any narrative becomes established as the truth and secondly, why this particular truth? In order to answer these questions this chapter will explain the notion of judicial narrative, a concept that will re-occur in the final chapter, and how the standing of the judiciary bestowed upon it a position of enormous power, resulting in any discursive utterances being accepted without question. These utterances had the power to create what they said; their words did not just describe and enforce the judicial understanding of the law, but actually

changed the social reality being described. Judicial discourse, therefore, with its narrative approach to legal interpretation, had not only the power 'to enforce certain ideologies but also to silence alternative perspectives'.¹ The result being that a legal institution or prescription could not have existed 'apart from the narratives that locate it and give it meaning'.²

By using the history of common law and locating their narratives 'as the instrument of dramatic legal improvement',³ legislation could also be controlled, and the 'inherent superiority of the courts over parliament as vehicles for developing legal rules',⁴ could be asserted. This type of judicial creativity was not overt; the constitutional restraints imposed meant it could not be. However, by using the appropriate historical narrative parliamentary law could be rendered superfluous. This had enormous influence on the way land and the landed were treated by the courts, and the nexus between the judges and the landed ensured the 'correct' narrative was reproduced.

Historically, almost 'without exception, the most successful lawyers came from a titled and genteel background or, if from more humble beginnings, were eventually assimilated into it'.⁵ The House of Lords was the supreme court of appeal and the great law offices were drawn from its ranks. This resulted in the law remaining closely linked to the landed establishment and placed the senior members of the judiciary in a position to present common law as a

¹ Sara Beresford, 'The control and determination of gender and sexual identity in law' (PhD theses, University of Lancaster 2000) 4

² Robert M Cover, 'Nomos and Narrative' (1983-1984) 97 Harv L Rev 4, 4

³ David Lieberman, *The Province of Legislation Determined* (Cambridge University Press 1989) 3

⁴ *ibid* 71

⁵ David Cannadine, *The Decline and Fall of the British Aristocracy* (Yale University Press 1990) 250

'pseudo-history',⁶ which recognised the 'central importance of the landed aristocracy and gentry to English society'.⁷ Common law was used to shape and consolidate the special status of the landed and in doing so demonstrated that 'legal discourse was inherently ideological, hierarchical and selective'.⁸

4.1 Knowledge, Power and Discourse

In the opening part of this chapter the notion of the power enjoyed by the judiciary and the aristocracy was introduced. However, it is important to understand the power described here is not coercive, but rather it is the power produced by knowledge, knowledge that is accepted by almost everyone as unquestionably correct. It is this belief in its correctness that makes the discourse producing this knowledge unassailable and sets the subject of the discourse apart from the rest of society. An understanding of the concept of knowledge and power and the theory that there is no notion of absolute truth can be appreciated if the work of Michel Foucault is studied. However, whilst Foucault's theories are briefly examined, in the main to set the scene for discussions of performativity and judicial discourse, this thesis is not intended to be an in-depth analysis of his work. So by necessity a broad-brush approach has been adopted, and only the basic themes have been introduced.

⁶ Carol M Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2 Yale J L & Human 37, 38

⁷ David Sugarman and Ronnie Warrington, 'Land law, citizenship, and the invention of "Englishness". The strange world of the equity of redemption' in John Brewer and Susan Staves (eds) *Early Modern Concepts of Property* (Routledge 1995) 126

⁸ Beresford (n 1) 5

If the notion of absolute truth is removed, knowledge becomes what a group of people decides is the truth. However, the power wielded by groups or individuals when evoking their truth is not coercive: for Foucault power was 'everywhere: not because it embraces everything but because it comes from everywhere'.⁹ This makes his work a radical departure from the hitherto idea of power. The deviation from the more normal centralised sovereign or nation-state definition results in power being seen as 'diffuse rather than concentrated, embodied and enacted rather than possessed, discursive rather than purely coercive, and it constitutes agents rather than being deployed by them'.¹⁰ It can therefore be understood that power is not necessarily repressive. Foucault was keen to emphasise that people should:

Cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth.¹¹

4.2 Bio-Power

Foucault coined the phrase bio-power, literally having control over bodies, to describe this type of power. Bio-power differs from disciplinary power in that the latter relates to power over individuals to make them behave in a required way, e.g. to be efficient and productive workers. Bio-power is deployed to manage populations: it is dispersed throughout society and 'operates through techniques of disciplining, ordering, ranking, making visible, and subjecting to

⁹ Michel Foucault, *The History of Sexuality* vol1 (Penguin 1990) 93

¹⁰ Jonathon Gaventa, *Power after Lukes; a review of the literature* (Brighton: Institute of Development Studies 2003) 1

¹¹ Michel Foucault, *Discipline and Punish: the birth of a prison* (Penguin, 1991) 194

knowledge'.¹² In bio-power these notions of disciplining, ordering, ranking etc. are self-imposed by the social group at which they are directed; society, in effect, disciplines itself. This results in the power Foucault describes as being elusive, difficult to perceive, a power that can embed itself imperceptibly into society, becoming a norm that is not questioned.

4.3 Discourse

Essential to the operation of bio-power is discourse, it 'transmits and produces power, it reinforces it'.¹³ Power is a source of social discipline and conformity, and discourse is essential to the operation of this power. Through this power knowledge is constituted and what is true and what is false is determined. For instance, psychiatry will determine who is sane and who is insane. The person labelled insane will have no voice in this, it is the knowledge possessed by the psychiatric profession that determines their insanity. Similarly the judge who pronounces the law gives it credence, makes it true, whereas in reality their narrative was just one of a number of alternative versions. In this way discourse, particularly learned discourse, determines what is true and what is false.

Power also transcends politics, it is present in all human relations and this makes it unstable and in constant flux. Where there is power there is resistance and a chance of change; power is not simply repressive, it can be positive. Discourse can transmit and produces power. It reinforces it, but importantly it 'also undermines and exposes it, renders it fragile and makes it

¹² Gvavta (n 10) 2

¹³ Foucault, *Sexuality* (n 9) 101

possible to thwart'.¹⁴ Yet there are sections of society in which knowledge is highly specialised and held by a small select band. This is knowledge which is more difficult, if not impossible, to thwart from the outside. When this truth is constructed and exercised by a powerful minority, particularly a minority who have the power to sanction those who try to oppose and undermine it, then truth appears to gain an absolute quality.

4.4 Performativity

England, according to Sugarman and Warrington, had a unique heritage:

Liberty, private property, stability, continuity, and its common law were intricately woven together like the fabric of a garment. The landed elite were entitled to their privileged status because they were part of an elaborate structure that held the nation together, significant tinkering with the law of real property and the rights of the landed threatened to distort English society.¹⁵

This landed elite self-imposed obligation to hold society together, their designation of 'themselves as God's elect',¹⁶ existed not because of privileged status acquired by a some sort of superior gene pool, but rather as a result of social construction. It was a 'performative accomplishment compelled by social sanction and taboo'.¹⁷ This inherent superiority was not in fact inherent, it was an aspect of the landed's identity which was acquired over time. The

¹⁴ *ibid*

¹⁵ Sugarman and Warrington (n 7) 126

¹⁶ Cannadine, *The Decline & Fall* (n 5) 2

¹⁷ Judith Butler, 'Performing Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' in Katie Conboy, Nadia Medina and Sarah Stanbury (eds) *Writing on the Body: Female Embodiment and Feminist Theory* (Columbia University Press 1997) 402

importance of their position and their role in protecting 'England's unique heritage' would have been installed in the landed classes from birth. Discourse in the form of performative utterances,¹⁸ which 'bring into being what they name',¹⁹ would be reinforced by performativity, the concept that gestures and actions also help to construct and perform an identity. The 'reiterative power of discourse to produce the phenomena that it regulates and constrains',²⁰ would mean there was little room for original thought and no more chance for the landed to free themselves from the social performative than existed for the lower classes.

4.5 Gender

Although a discussion of gender would seem to be out of place when considering the aristocracy's social superiority, the two are inextricably linked. Just as gender is socially constructed so are the landed elite. If the position of men, at least up until the twentieth century, is considered, their unquestioned superiority to women was accepted by almost all in society. The two genders inhabited different spheres, the public for men and the private for women, and this separation rested on the natural characteristics of the two. Women were considered weaker than men and best suited to the domestic sphere. They might work alongside men, as well as attending to their domestic duties, however their main task was to bear and bring up the next generation. Women could not vote, were more emotional and less intelligent than men, who were

¹⁸ See J L Austin, *How to do Things With Words* (2nd Edition Oxford, University Press, 1976) 6

¹⁹ Judith Butler, 'Gender as a Performance' in Peter Osborne (ed) *A Critical Sense; Interviews With Intellectuals* (Routledge 1996) 112

²⁰ Judith Butler *Bodies That Matter* (Routledge, 1993) 2

required due to their innate superiority to make all of the important decisions in life.

Although there might have been some opposition to this generally held view, it was marginalised and repressed; almost all in society considered the differences between men and women to be unquestionable. There was undoubted oppression of women but no coercion to adopt the gendered role nature had assigned. Yet it can be argued that gender does not exist, rather it is a binary difference that is socially constructed. This social construction starts at birth and continues throughout a person's life, manufacturing and reinforcing the appropriate role. The characteristics this social construction produces are more powerful and less likely to be challenged because everyone contributes to their enduring composition. As Foucault explained, truth is what discourse, in all its myriad forms, declares it to be, rather than being some inalienable fact of nature.

4.6 Performatives, Performativity, Embodiment and the Law

When considering the gendered roles of society Simone de Beauvoir famously stated, 'one is not born, but rather becomes a woman'.²¹ This is a statement that can be applied with equal truth to the landed classes. The division of society into landed and others, was not essential in character. They were merely cultural and social constructions, rather than existing in reality. They relied on discourse to divide society into safe and recognisable categories; enforcing on these categories the appropriate social conduct. These cultural

²¹ Simone de Beauvoir, *The Second Sex* (Vintage Books 1973) 301

constructions were not just 'imposed upon identity',²² but were in some sense a process of self-assemblage. Without conscious thought the cultural creation of the landed and non-landed were performatives which the 'subjects reiterate[d] and cite[d]'²³ themselves, embedding in them their appropriate place in society.

Perception also plays a fundamental role in understanding the world as well as engaging with it. The primary site of subjectivity, according to Maurice Merleau-Ponty, is located, 'not in the mind or consciousness',²⁴ but in the body. The nature of being is not attributed to the conscious alone. Rather, like the mind, the body takes in and enacts cultural and historic possibilities. Accordingly, the body is not an inert vessel waiting to be controlled by the conscious, but can take on meaning and actions of its own. Just as 'the significance of the body as a medium through which the discursive signs of gender are given corporeal significances',²⁵ the corporeal discursive signs of social status are similarly displayed. The way someone walks, holds their body, speaks etc., are attributes that can immediately denote their landed/non-landed status, and are learnt through this process of embodiment. This embodiment is in effect a perceptual gestalt: it possesses qualities as a whole that cannot be described merely as the sum of its parts. Without overt instruction or conscious effort the body will take on the history of the landed as God's elite, reinforcing their patrician and patriarchal status, and with it their right to control land. There was no need for the aristocracy to overtly

²² Judith Butler, *Gender Trouble: feminism and the subversion of gender* (Routledge 1990) 137

²³ *ibid* 36

²⁴ Iris Marion Young, *On Female Body Experience: Throwing Like a Girl and Other Essays* (Oxford University Press 2005) 35

²⁵ Anoop Nayak and Mary Jane Kehily, 'Gender Undone: Subversion, Regulation and Embodiment in the Work of Judith Butler' (2006) 27 *British Journal of Sociology of Education* 459, 468

subjugate and control the other classes; rather their place at the pinnacle of society was due to the natural order of things, reinforced by performativity.

Austin²⁶ and his ideas of performative utterances, or performatives were central to the theory of performativity. These performatives, according to Austin, are words that not only describe a passive act, they also change the reality of the act they described. So the phrase 'I now pronounce you man and wife,' when uttered by the correct person are not only words, they change the social position of the people they are directed at. Similarly words uttered by the judiciary are not just passive words describing their thoughts, in itself a powerful phenomenon, they are words which change the reality they are describing. Their words reinforce the law, make it real and exclude other interpretations. But it is not just their utterances that have this powerful function. Their membership of, or association with, the elite of society confers them not only a way to think and act, but also legitimises these thoughts and actions, making their utterances more real and more truthful.

The reiteration and citation of 'acts which are renewed, revised and consolidated through time',²⁷ allow the historical notion of their class to be absorbed and to shape the landed identity. Just as the truth and validity of a judge's statements comes from their use of prior authorities, located in preceding narratives, it is the reiteration of historical narratives which reinforce the landed's position as God's elect. The landed do not act the way they do because they are in this category; rather the way they act constructs the

²⁶ Austin (n 18) 6

²⁷ Butler, *Performing Acts* (n 17) 405

category. There is no landed identity behind the expression 'the landed'. That 'identity is performatively constituted by the very expression that are said to be its results'.²⁸ Butler gives an example of this in *Gender Trouble*; when a girl puts on lipstick, an action described as 'girlling', and can be seen in two different ways. It can be produced by the subject, or the action can be seen as producing the subject. For Butler the latter is the correct conclusion. She considers there 'is no gender behind the expression of gender',²⁹ just as there is no landed behind the expression landed.

This position of prominence created by performativity could not be challenged. The landed classes did not create it just by themselves: the whole of society contributed to its construction. This made it a non-coercive pyramid of power. Just like pre-modern women, the non-landed might be oppressed by the landed but accept their position in society as a God given natural division. Even as late as the nineteenth century, when agitation for change was starting to be heard, the authority of the landed appeared to become even stronger as the influence of the Crown grew weaker. Cannadine asserts that even as 'late as the 1870s, these patricians were still the most wealthy, the most powerful, and the most glamorous people in the country, corporately – and understandably – conscious of themselves as God's elect'.³⁰ Their position in society, circumscribed by history and self-perpetuating, was not simply about monetary wealth, their ownership of great tracts of land assured wealth, position and political influence. There were many extremely rich individuals standing outside the ranks of the gentry, yet they could not attain the position

²⁸ Butler, *Gender Trouble* (n 22) 25

²⁹ *ibid*

³⁰ Cannadine, *The Decline & Fall* (n 5) 2

of superiority, embodied over centuries of discourse, the landed so effortlessly demonstrated.

4.7 Status, Power and Wealth

To talk of the landed gentry, patricians, the grandees of Britain, would seem to classify them as a distinct group of people, set apart from the rest of society, which was just what they were. Yet even in this defined and upper class circle there were diverse and distinct sub-groups. As Burn stated 'the Duke of Omnium and the small squire were half a world apart'.³¹ However, what divided them, their landed holdings, also united them. Status, power and wealth increased as the acreage of land expanded, yet the difference in social status land signified within this elite was of less importance than their shared characteristics. What set them apart from the rest of society was their shared values, the most significant of which, and the one treated 'with particular devotion',³² was land.

4.8 The Landed Classes

By the 1870s there were thought to be close to just 7,000 families who owned 80% of the land of the British Isles.³³ This 'relatively homogenous and monolithic group'³⁴ could be divided into three sub-groups. The largest being made up of around 6,000 families who owned relatively small estates of between 1,000 and 10,000 acres. Counted amongst their numbers were the

³¹ W L Burn *The Age of Equipoise: a study of the mid-Victorian generation* (George Allan & Unwin 1964) 316

³² Sugarman and Warrington (n 7) 111

³³ Arnold Arnold '*Free Trade in Land*' (C. Kegan Paul & Co 1880) 7

³⁴ Cannadine, *The Decline & Fall* (n 5) 9

local village squire or a country parsonage, with incomes ranging from between £1,000 to £10,000 per annum. The next sub-group numbered around 750 families, who had estates of between 10,000 and 30,000 acres, with incomes ranging from £10,000 to £30,000. This group would be able to run a London home as well as their country estates. The last, and at the apex, were about 250 families who owned more than 30,000 acres, and had incomes of more than £30,000 a year. The majority would own at least two great mansions in the country, as well a grand house in the most select parts of London. Many of these were involved in non-agricultural forms of estate exploitation and ‘cashed in on mineral rights, either in partnership with companies or else by leasing land out to exploiters’.³⁵ So it would be wrong to consider that the landed elite were mere agrarians. While a ‘distain for trade remained’,³⁶ interests in industry, manufacturing and investment in the railways and canals were all undertaken. It was by this diversification in the period between 1780 and 1830 that the aristocracy ‘renewed, re-created, reinvented, and re-legitimated itself’.³⁷

4.9 Preservation of Family Wealth

As well as enjoying landed estates of various sizes, a leisured life style and a pre-eminent social status, there were perhaps two main characteristics that set the landed apart from the rest of society. The first was a discursive embodiment of their elite status, making obvious to everyone that they were a people apart. The second characteristic was the fulfillment of certain

³⁵ Boyd Hilton, *A Mad, Bad, and Dangerous People?* (Clarendon Press 2006) 136

³⁶ *ibid*

³⁷ David Cannadine ‘The Making of the British Upper Classes’, in David Cannadine *Aspects of Aristocracy: Grandeur and Decline in Modern Britain* (Yale University Press 1994) 155

arrangements and rules that were intended to protect and, if possible, enhance their congenial, leisured and 'quintessentially patrician'³⁸ lifestyle.

The most important of this second characteristic was primogeniture, the right of the first born legitimate son to inherit absolutely, which 'was accepted as almost a fundamental law of nature'.³⁹ Primogeniture, along with the use of strict settlement and entail, ensured that their estates, houses, heirlooms, titles etc. descended intact along the male line. 'The combination of primogeniture and entail meant that family holdings usually passed intact from one generation to another'.⁴⁰ This was in stark contrast to the aristocracy in most of the rest of Europe, who tended to divide their property and titles equally between family members on death. This, along with the existence of a service nobility comprised of bureaucrats and military personnel who had honours bestowed upon them for services to the state, meant the aristocracy in continental Europe were so numerous that their prestige was diminished. In comparison, the 'British peerage was a very small and very exclusive class indeed, and even if the baronetage and the landed gentry were also included, it remained an astonishingly tight and tiny status elite'.⁴¹

4.10 Amateur Aristocrats

Although usually educated at the best schools and Oxford or Cambridge, these patriarchs did not work. This was not due to a surfeit of money: while many families had great monetary wealth, others were pecuniary challenged.

³⁸ Cannadine, *The decline & Fall* (n 5) 250

³⁹ George C Brodrick, *English Land and English Landlords* (Cassell, Petter, Gilpin & Co, 1881) 99

⁴⁰ Cannadine, *The Decline & Fall* (n 5) 19

⁴¹ *ibid* 20

Rather, the landed considered their role be that of natural leaders, both locally and nationally. This natural leadership arose not through education or training but was an innate quality due to their breeding. Moreover, this view rested on popular sanction. 'For the first three-quarters of the nineteenth century the majority of the population unquestionably accepted the patricians right to rule'.⁴² Their natural air of superiority and breeding were thought to be the only qualifications necessary to undertake any leadership roles. Accordingly, any commitment they undertook, whether as civilians or in the army, was undertaken in what can only be described as a leisured and amateur way. Yet there is no doubt that up until the 1880s, or even the early twentieth century, the landed were very much the governing elite of Britain.

4.11 The Landed's Role in Life

Until the 1880s the patricians provided most of the positions of power within Britain.⁴³ Peers dominated the Lords and so commanded the political agenda. Before the first Parliament Act of 1911, the Lords could throw out any measures initiated in the Commons, with the exception of money bills that by convention they recognised 'as falling under the authority of the elected Lower House'.⁴⁴ (Though this convention did not prevent the House of Lords from rejecting outright Lloyd George's 1909 budget). Although opposition to the earlier Reform Act⁴⁵ and the passing of the Parliament Act 1911 weakened the peers' position, for most of the nineteenth century they dominated every cabinet either directly or through their relatives. The major offices of state

⁴² *ibid* 15

⁴³ *ibid* 14

⁴⁴ Hilaire Barnett, *Constitutional Law* (8th edn, Routledge 2011) 443

⁴⁵ The Representation of the People Act 1832

were filled by members of the Lords, and the Prime Minister 'sat in the Lords for a longer span of time than in the Commons'.⁴⁶

The domination of the Lords was enhanced by the 75% of the MPs who made up the Commons also being landed:⁴⁷ 'the lower house of parliament was essentially a land owners' club'.⁴⁸ As well as dominating parliament the 'judiciary, the army, the church, the law and the civil service were the favourite occupations of younger sons who wanted a high status job'.⁴⁹ The landed classes dominated all sections of society, and this domination meant they could restrict the agenda of political discussion, largely to their own advantage.⁵⁰ The privileged position of the landed elite was one that was fostered and sustained by the law. Legal rhetoric helped to normalise this favoured position 'by signifying the central importance of the landed aristocracy and gentry to English society',⁵¹ and protect land which was essential to this group.

4.12 The Landed and Land

The dominion over land gave its custodians status in society, provided wealth and was a basis of power locally and nationally. The gentry might not have funds readily at hand, but land provided the means to acquire them. Mortgages were readily available and during the eighteenth century 'Chancery refinements of mortgage law encouraged many land owners to borrow to the

⁴⁶ Cannadine, *The Decline & Fall* (n 5) 14

⁴⁷ D C Moore, 'The Landed Aristocracy' in G E Mingay (ed) *The Victorian Countryside* (Routledge & Kegan Paul 1981) vol 2, 372

⁴⁸ Cannadine, *The Decline & Fall* (n 5) 14

⁴⁹ *ibid*

⁵⁰ Steven Lukes, *Power: A Radical View* (Pelgrave 1974) 20

⁵¹ Sugarman and Warrington (n 7) 126

limits of their security'.⁵² This Chancery refinement was part of a 'wider trend within land law concerned with the preservation and consolidation of landed wealth'.⁵³ Anderson explains how Chancery developed the equity of redemption, enabling it to intervene on behalf of the landed and prevent forfeiture.⁵⁴ By establishing this concept courts quickly established that the mortgagor could not be prevented from redeeming either before or after the contracted redemption date. Put another way 'the date was fully effective against the lender, but rather less effective against the borrower'.⁵⁵ Chancery's interference with mortgage transactions demonstrated a 'complete indifference to the terms agreed between the parties and 'in no branch of law was the sanctity of agreement less regarded'.⁵⁶ Mortgages became a new species of property; land might be pledged as security for a loan, nevertheless the mortgagor remained the owner of the land in equity. Lord Hardwick described it thus: 'an equity of redemption is considered as an estate in land; it will descend, may be granted, devised, entailed, and that equitable estate may be barred by common recovery'.⁵⁷

The court appeared to regard its function as protecting the 'rightful' owner, even if the terms of the contract unequivocally pointed to an agreement to the contrary. It did this by indulging in a narrative that considered it was 'inconceivable that an English gentleman would give up his land'.⁵⁸ To this end the court explained that the mortgagee's right was to the money, not the

⁵² *ibid* 125

⁵³ *ibid* 112

⁵⁴ B L Anderson, 'Provincial Aspects of the Financial Revolution of the Eighteenth Century' (1969) 9 *Business History* 11, 13

⁵⁵ Sugarman and Warrington (n 7) 115

⁵⁶ A W B Simpson, *An Introduction to the History of the Land Law* (Oxford University Press 1961) 229

⁵⁷ *Casborne v Scarfe* (1738) 2 J & W 194, 26 ER 377, 606

⁵⁸ Sugarman and Warrington (n 7) 120

land and Chancery's duty was to protect 'the superior position of the landed oligarchy'.⁵⁹ However, this idea of judicial narration was not new. It was, and still is, a way of explaining the 'truth'.

4.13 Judicial Narration

Narrative theory considers that although there are many valid ideas, the most plausible narrative comes from the dominant storyteller, leaving other cogent ideas to be ignored. Land law exists in its present form only due to the narrative in which it is located, and as with any legal right it will make little sense unless it is located in discourse, with a beginning, end, explanation and purpose, all set in an historic narrative. This coming at the expense of 'scientific or predictive analytical approaches'.⁶⁰ The outcome of this narrative approach allowed the judiciary to use common law to arrive at the 'correct' conclusion. A conclusion endorsed by a historical account that was cited and re-cited, refined and polished until it becomes the complete truth. The notion of judicial authoritative speech will be discussed in greater detail in chapter six

'Land was not just the most valuable form of property; to its owners and to non-owners it was a social-political nexus, a way of life'.⁶¹ The landed's performativity of their quintessentially English way of life was part of the 'structure that held the nation together'⁶² and land was essential to this arrangement. It not only consolidated the landed's wealth and privileged status, it gave them power. Any measure that sought to free land from the

⁵⁹ *ibid*

⁶⁰ Rose (n 6) 39

⁶¹ Sugarman and Warrington (n 7) 111

⁶² *ibid* 129

stranglehold of aristocratic influence had to be resisted and it was the court's and judiciary's task to ensure this happened. This endeavour was assisted by the especially privileged and sanctified position of land law, which was derived from an authority situated in time immemorial. It was 'the epitome of rational achievement',⁶³ bolstering its narrative and making it unquestionable and especially powerful.

4.14 Coke

The judiciary had a history of using the common law as a way of mitigating the effects of statute, or adapting it to reflect changes in society. Coke, explaining this practice stated:

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void.⁶⁴

There is disagreement as to what exactly Coke was claiming here. He may have based his contention on the existence of some higher order law, a *grundnorm*, which limited Crown and parliament. This 'fundamental law is the assertion of the paramount law of 'reason'',⁶⁵ although exactly what reason is undefined by Coke. It could also be questioned whether the voidness Coke espouses possess its contemporary meaning. Void could be 'an imprecise

⁶³ Kate Green 'Thinking Land Law Differently: Section 70(1) (g) and the giving of meanings' (1995) 3 *Feminist Legal Studies* 131, 131

⁶⁴ *Bonham v College of Physicians* (Bonham's Case) (1610) 8 Co Rep 107, 77 ER 638

⁶⁵ Theodore F T Plucknett, 'Bonham's Case and Judicial Review' (1926) 40 *Harv L Rev* 30, 31

synonym for 'of no effect'.⁶⁶ Whether it is the *grundnorm*, the synonym for 'of no effect' or perhaps another explanation, Coke's use of the word void seems to leave little doubt that he was advocating significant scope for 'judicial interpretation'.

However, judicial activism did not always seek to change and adapt law, it could also be used to counter any revision, particularly in the law of land. William Blackstone, who could be described as the archetypal legal narrator, sought to preserve land law as 'a fine artificial system, full of unseen connexions and nice dependencies',⁶⁷ and in preventing change he was in fact using judicial activism to preserve the landed elite's quintessentially English way of life. Blackstone used storytelling to position land in a context that protected it from the change that should have naturally occurred as society developed. For him the favoured position of the landed elite was fundamentally important to the preservation of a harmonious society.

4.15 Blackstone

William Blackstone had a judicial career that 'was as undistinguished and uninteresting as his progress at the Bar.'⁶⁸ However, notwithstanding these faults he did possess two important characteristics that made him a significant figure, not just in the contemporary society of the time, but also thereafter.

⁶⁶ Ian Williams 'Dr Bonham's Case and 'Void' Statutes' (2006) 27 J Leg Hist 111, 125

⁶⁷ Francis Hargrave (ed) A Collection of Tracts Relating to the Law of England: From Manuscripts vol1 (Dublin 1777) 498

⁶⁸ Stanley N Katz, introduction to 3 BI Comm, v

The first was his acquaintance with the aristocracy. Blackstone's father Charles was a prosperous silk merchant though not a member of the landed classes. This did not prevent Blackstone becoming exceedingly well connected. His grandfather, Lovelace Brigg, was a squire of the County and his grandmother was 'a member of a distinguished country family in Wiltshire'.⁶⁹ When Blackstone's father died before William's birth it was the Briggs' son Thomas who provided for Blackstone and ensured he had a good education. It could be said that Blackstone by being 'early left an orphan' was 'saved from passing through life as a prosperous tradesman'.⁷⁰ It also gave him connections which were to serve him well in life. This was particularly so when his uncle Thomas subsequently inherited the family estate. These connections gave Blackstone an intimate understanding of the landed's importance to England. He observed at close hand and lived the performativity that ensured and protected the landed position as the country's elite. His second important characteristic, which was to place the landed classes at the centre of the legal narrative of the time, was his ability to tell a story.

4.16 Blackstone's History

Whilst the above potted history of Blackstone's upbringing makes an interesting, if not an apparently relevant, diversion from the main topic of this chapter, its pertinence lies in explaining – at least to some extent – Blackstone's subsequent evocation of an almost spiritual nature of land. His devotion was based on 'an intense reverence for the constitution and the law

⁶⁹ William Blake Odgers, 'Sir William Blackstone' (1918) 27 Yale L J 599, 599

⁷⁰ Leslie Stevens (ed) *Dictionary of National Biography: vol v* (MacMillan 1886) 133

which had gradually been evolved through the centuries'.⁷¹ This itself was based on his belief that English law was 'a body of legal practices which had originated in the Saxon era and had been preserved without a break through the vicissitudes of the kingdom's history'.⁷² This allowed Blackstone to cultivate the 'old Whig myth that William conquered Harold, not the nation',⁷³ and the diversion into a system of feudal tenure was simply seen as a 'military necessity'.⁷⁴ A necessity consented to by 'the great council of the nation',⁷⁵ rather than being imposed 'by the mere arbitrary will and power of the conqueror'.⁷⁶

It was the introduction of the Magna Carta, Blackstone considered, that allowed the re-establishment of the Anglo-Saxon constitution and the idea that the English 'owed everything they had to the bounty of the sovereign lord'.⁷⁷ The great charter of King John was for the most part 'compiled from the ancient customs of the realm';⁷⁸ this was agreed, or so he wrote, by all historians. The charter reintroduced the laws of King Edward the Confessor; by which Blackstone meant 'the old common law, which was established under the Saxon princes, before the rigours of feudal tenure and the other hardships were imported from the continent by the kings of the Norman line'.⁷⁹

⁷¹ W S Holdsworth, 'Gibbons, Blackstone and Bentham' (1936) 46 L Q R, 53

⁷² Lieberman, *Province of Legislation* (n 3) 41

⁷³ Duncan Forbes, *Hume's Philosophical Politics* (Cambridge University Press 1975) 25

⁷⁴ *ibid* 252

⁷⁵ 2 Blackstone BI Comm 48

⁷⁶ *Ibid*

⁷⁷ *ibid* 51

⁷⁸ William Blackstone, *Law Tracts in Two Volumes*, vol 1 (Clarendon Press 1762) xii

⁷⁹ *ibid*

This inaccurate 'pseudo-history',⁸⁰ coined 'vulgar whiggism'⁸¹ by Forbes, allowed Blackstone to present the law as an historical and cultural phenomenon, with 'legal legitimacy centred on his appreciation of the law's status as an historically refined body of rules particularly adapted to English society'.⁸² What is of particular relevance here is the 'language of precedent and the ancient constitution: the idea of English law as immemorial custom, rooted in the distant past'.⁸³ This was an aristocratic version of history and therefore an aristocratic version of the law, with the English barons as the common ruling class through the progression of history from the Anglo-Saxon period to Blackstone's day with of course a short diversion into Norman feudalism. In fact, to Blackstone, the common law was 'essentially the law of the aristocratic landed classes'.⁸⁴ In giving land law a narrative secure in this past, and therefore secured in an aristocratic heritage, Blackstone gave it and the aristocracy legitimacy. He made them real, and in so doing excluded from recognition anything that did not correspond with this 'law'.

Although Blackstone did not 'believe the common law required major improvement',⁸⁵ he nonetheless did support gradual change brought about by the common law judge. The law had to be modernised to purge it of 'a more or less feudal tincture'.⁸⁶ Although the Magna Carta, purportedly, swept away ideas of Norman absolute monarchism their ideas of land law, arising from feudalism, remained. The courts had to adapt and improve this law until they

⁸⁰ Rose (n 6) 38

⁸¹ Forbes (n 74) 140

⁸² Lieberman, *Province of Legislation* (n 3) 40

⁸³ Sugarman and Warrington (n 7) 127

⁸⁴ 2 *Bl Comm* xii

⁸⁵ Lieberman, *Province of Legislation* (n 3) 159

⁸⁶ Hargrave (n 68) 498

succeeded in bringing about the restoration of what Blackstone regarded as Saxon simplicity. It was this narrative which defined and altered the law for those who were in power. The definitions and narratives were first applied by the courts, and then in turn reiterated by society, giving them substance. However, Blackstone's view of the sanctity of common law was to be challenged.

4.17 Mansfield

'The period during which Lord Mansfield presided in the Court of King's Bench, will ever be regarded as an important era in the annals of English jurisprudence'.⁸⁷ To him the essence of the law was principle not precedent. In *Jones v Randall*⁸⁸ Mansfield commented that the law would be a 'strange science if it rested solely upon cases', and it would be remarkable if 'we must go to the time of Richard I to find a case and see what is the law'. He added 'precedent, though it might be evidence of the law, is not the law itself, much less the whole law'.⁸⁹

For Mansfield the social developments that were occurring 'demanded an advancement of the common law itself'.⁹⁰ To do this he adopted, in the King's Bench, practices which were developed in Chancery and in so doing 'provide remedies previously available only in equity'.⁹¹ While this judicial activism was restricted to developing a commercial code, it was accepted by the legal community as an ingenious advancement needed to reflect a changing, more

⁸⁷ W D Evans, *A General View of the Decisions of Lord Mansfield* vol 1 (Butterfield 1803) iii

⁸⁸ (1774) Lofft 383, 98 ER 706

⁸⁹ *ibid* 385

⁹⁰ Lieberman, *Province of Legislation* (n 3) 127

⁹¹ *ibid* 131

mercantile society. However, if for Mansfield there was no great distinction between moveable and real property to others, such as Blackstone, Mansfield's innovative approach, when applied to land law, had to be stopped. England's unique heritage represented and protected by the common law was in danger, moreover in danger from a man 'stigmatised as Scottish, Romanist, and alien'.⁹² More importantly, England's landed elite, whose privileged status was protected by that law, were in danger. It was *Perrin v Blake*,⁹³ a seemingly unprepossessing case, which provided 'the setting for one of Mansfield's most celebrated failures at legal improvement',⁹⁴ and succeeded in putting an end to any further legal innovation.

4.18 Perrin v Blake

Perrin v Blake involved the legal interpretation of a technically flawed will, a not uncommon occurrence as many of those who drafted wills and conveyances did not understand the complexity of law themselves. However, it was a legal principle that the courts enjoyed considerable flexibility when it came to interpreting a will or device; with the result that the testator's intent would normally be followed. This was the case even though the instrument had been inaccurately or imprecisely drawn. Notwithstanding this principle there was a proviso and if the testator's intention was illegal it would not be supported. So, if the testator attempted to 'create a perpetuity, or limit a fee upon a fee, or make a chattel descend to heirs, or land to executors',⁹⁵ it

⁹² Sugarman and Warrington (n 7) 129

⁹³ *Perrin v Blake* (1774) Burrow 2579, 98 ER 355

⁹⁴ David Lieberman, 'Property, Commerce, and the Common Law: Attitudes to Legal Change in the Eighteenth Century' in John Brewer & Susan Staves (eds) *Early Modern Concepts of Property* (Routledge, 1995) 152

⁹⁵ *Long v Laming* (1760) 2 Burrow 1100, 97 ER 731; 1108

would be contrary to the rules of law and void. Importantly for *Perrin v Blake*, there was included under the term contrary to the rules of law, certain standard rules of construction needed 'to preserve the certainty of property law'.⁹⁶ These were rules which had to be preserved because 'half the titles in the kingdom [were] by this time built upon this doctrine',⁹⁷ or so Blackstone noted. The problem with *Perrin v Blake* was whether the standard rules of construction and therefore, the rule in *Shelley's Case* should be applied. Mansfield was of the opinion that it should not. Blackstone however, took a different tack.

There was a generally accepted rule, which had been in existence for at least 150 years before *Shelley's Case*,⁹⁸ that the courts should construe settlements benevolently. However, by the time *Shelley* was heard the courts had become 'very worried about settlements which restricted the freedom of alienation'.⁹⁹ The reconfigured rule that emerged established that a tenant could, even if it was contrary to the testator's intent, deal freely with their land. It was just a matter that 'the intention itself was perfectly legal'.¹⁰⁰ The testator's aim in *Perrin v Blake* appeared to be very clear. He stated in his will that it was his 'intent and meaning that none of my children shall sell or dispose my estate for a longer time than his life'.¹⁰¹ When the case came before Mansfield in the Court of King's Bench in 1769, he agreed that the *Rule in Shelley's Case* was clear law, however, he considered he had given

⁹⁶ Lieberman, *Province of Legislation* (n 3) 133

⁹⁷ Hargrave (n 68) 508

⁹⁸ *Shelley's Case* (1579) 3 Dyer 373, 73 ER 838

⁹⁹ Simpson (n 57) 94

¹⁰⁰ Lieberman, *Property, Commerce* (n 95) 153

¹⁰¹ *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England* vol 1 (London 1840) 285

sufficient reasons in previous cases as to why it should not be considered an uncontrollable rule.¹⁰² If the testator had expressed his intentions clearly then it was proper to exempt the device from the *Rule*. He considered that because ‘a certain expression of art’,¹⁰³ had not been used, it would be wrong to cross out the intention and give the ‘will a different construction’.¹⁰⁴

In order to circumvent what was generally agreed to be clear law, and demonstrate that the rule ‘did ‘not constitute a decisive uncontrollable rule’; equivalent to a ‘general proposition’ of law’,¹⁰⁵ Mansfield and his supporters chose to demonstrate its archaic nature with an historical analysis. Edward Willes stated that it was a ‘universal notion that in a commercial country all property should be freed from every clog which may hinder its circulation’.¹⁰⁶ Sir Richard Ashton considered it to be ‘an old rule of feudal policy, the reason for which is long since antiquated’.¹⁰⁷ These arguments were intended to echo Mansfield’s comments in *Long v Laming*; which held the *Rule* to be ‘an ancient maxim of law’,¹⁰⁸ the reason for which had long ceased to be relevant.

Blackstone’s response in reversing the Mansfield’s King’s Bench decision in *Perrin v Blake*, was to employ his own historical analysis. He clearly understood that the logic of Mansfield’s argument ‘threatened the entire structure of common law’, and with it the central importance of the landed to English society; opening ‘the floodgates to radical reform, leveling and

¹⁰² See *Coulson v Coulson* (1739) 2 Str 1125, 93 ER 1074; *Bagshaw v Spencer* (1741) 2 Atk 246, 26 ER 741; *Robinson v Robinson* (1756) 1 Burr 38, 97 ER 177; *Long v Laming* (1760) 2 Burr 100, 97 ER 731

¹⁰³ *Collectanae Jurdica* (n 102) 318

¹⁰⁴ *ibid*

¹⁰⁵ Lieberman, *Province of Legislation* (n 3) 138

¹⁰⁶ *Collectanae Jurdica* (n 102) 297

¹⁰⁷ *ibid* 305

¹⁰⁸ *Long* (n 96) 1106

anarchy'.¹⁰⁹ Blackstone's judgement in the Exchequer Chamber acknowledged the feudal nature of the *Rule* but explained that there was hardly an ancient rule of real property which was not, the:

Common law maxims of decent, the conveyance of livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feudal system: but whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the power or (I trust) the *inclination* to disturb them.¹¹⁰

This reasoning was also reflected by Mr Justice Yates who commented: 'I admit that the original reason of it has long since ceased, but I deny that for that reason it must be discontinued'.¹¹¹

4.19 Blackstone's Triumph

It would seem that Mansfield's attempts to develop land law by the use of principle rather than precedent, and the application of practices more normally seen in Chancery, had come up against an unyielding impediment. To Blackstone and his supporters, as well as the elite conveyancers such as Charles Fearn,¹¹² this principle had been settled by *Coulson v Coulson*,¹¹³ and when *Perrin v Blake* was reheard in the Exchequer Chamber the decision

¹⁰⁹ Sugarman and Warrington (n 7) 129

¹¹⁰ Hargrave (n 68) 398

¹¹¹ *Collectanae Jurdica* (n 102) 312

¹¹² See Charles Fearn, *Copies of opinions ascribed to eminent council, on the will, which was the subject of the case of Perrin v. Blake, before the Court of King's Bench in 1769* (London 1780)

¹¹³ (1739) 2 Strange 1125, 93 ER 1074

was overturned. Although appearing to acknowledge that *Coulson v Coulson* may 'have been decided on dubious ground',¹¹⁴ Blackstone considered it still stood as good law. This decision in the Exchequer Chamber proved conclusive and Mansfield accepted defeat. The 'rule never again underwent judicial examination'.¹¹⁵ The law of real property had reached a point of perfection and the decision in *Perrin v Blake* indicated that further judicial adaptation was undesirable and unnecessary. Law by this time, wherever it gathered its materials, was 'now formed into a fine artificial system, full of unseen connexions and nice dependencies: and he that breaks one link of the chain, endangers the dissolution of the whole'.¹¹⁶ Blackstone's 'old gothic castle'¹¹⁷ had stood up to and repelled Mansfield's reformist siege.

4.20 Blackstone's Arcadia

In his *Commentaries* Blackstone paints a picture of bucolic simplicity where ownership of property developed 'by the law of nature and reason'.¹¹⁸ Land was seen to be owned by everyone and no one, but as society developed the occupancy of the land gave the possessor the 'permanent property in the substance of the earth itself', which 'excluded everyone else but the owner from the use of it'.¹¹⁹ 'Blackstone had demonstrated that property was an absolute right vested in the individual by the immutable law of nature, a law which coincided exactly with the will of God'.¹²⁰ Thus social or civil institutions

¹¹⁴ Hargrave (n 68) 508

¹¹⁵ Lieberman, *Province of Legislation* (n 3) 140

¹¹⁶ Hargreaves (n 68) 498

¹¹⁷ 3 BI Comm 267

¹¹⁸ 2 BI Comm 3

¹¹⁹ *ibid* 8

¹²⁰ Robert P Burns, 'Blackstone's Theory of the Absolute Rights in Property' (1985) 54 U Cinn L Rev 67, 67

played no part in the development of law: it was, according to Blackstone, a 'science, which distinguishes the criterion of wrong and right'.¹²¹ He described his system of law as 'a rule of action, which is prescribed by some superior, and which the inferior is bound to obey'.¹²² Tellingly, Blackstone's narrative also describes how 'a part of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science'.¹²³ Effectively by presenting law as a rational and coherent system based on scientific study Blackstone perpetuated the 'process by which the dominant representatives of society [were] created and justified'.¹²⁴

Yet as a theorist Blackstone is supremely unconvincing, although 'he made many contributions to the utopian enterprise of legality, his *Commentaries* as a whole quite patently attempted to 'naturalise' purely social phenomena',¹²⁵ and legitimate the social and legal superiority of the aristocracy. To this end his narrative made the landed's views on property seem the most natural. It was a narrative that had the 'ability to convey truths',¹²⁶ that dominated and excluded all other narratives and allowed Blackstone to successfully position law in such a way as to support aristocratic dominance and stifle any alternative points of view. Blackstone's words were not just statements of the facts they described, they had the power to change the reality of those facts. In effect, instead of being a description of the law, they become the law. By using this historical narrative Blackstone's judgements are not singular acts,

¹²¹ 1 BI Comm 27

¹²² *ibid* 39

¹²³ 2 BI Comm 8

¹²⁴ Sugarman and Warrington (n 7) 126

¹²⁵ Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buff L Rev 205, 211

¹²⁶ Kim Lane Scheppele, 'Telling Stories' (1989) 87 Mich L Rev 2073, 2073

but a reiteration and citation of previous statements, giving more power and conferring more truth in them. They were a performative; a 'discursive practice that enacts or produces that which it names'.¹²⁷ By referring to and reciting the law, this discursive practice gives it legitimacy and in doing so is able to 'selectively admit, refuse to recognise or render silent other voices, interpretations and constructions'.¹²⁸ The discursive practice is secured in the narrative which produces it and by continual iteration and reiteration the performative is 'given its binding or conferring power'.¹²⁹

This performative aspect of land law is objective: it is how society, influenced by the courts, sees land law. It is also subjective, in that every person who repeats the court's decision do themselves reinforce that social interpretation, and in so doing preventing alternative narratives being pursued. It is this subjective discourse that makes Blackstone's history so powerful. He describes landed ownership of being 'nothing which so generally strikes the imagination, and enjoys the affections of mankind, as the right to property; or the sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe'.¹³⁰ However, it is not just Blackstone's iteration of this fact that makes it 'correct'; its real power came from its subjective reiteration by the rest of society.

¹²⁷ Butler, *Bodies* (n 20) 13

¹²⁸ Beresford (n 1) 4

¹²⁹ Butler, *Bodies* (n 20) 225

¹³⁰ 2 *BI Comm* 1

4.21 Conclusion

There seems little doubt that Blackstone was writing his *Commentaries* 'for the aristocracy and gentry rather than the law student',¹³¹ and in doing so enforcing the general view that 'the 'pleasures' that the holding of land'¹³² gave were enshrined in law. His was a successful narrative which enforced legal conservatism and preserved the status quo by asserting that law was an 'essentially historical and cultural phenomenon'.¹³³ Its legal legitimacy was centred 'on his appreciation of the law's status as an historical refined body of rules particularly adapted to English society'.¹³⁴ The dominant status of real property, established in feudal times, had to remain as the 'most important and intellectually developed branch of the common law',¹³⁵ understood by no one except the expert few. Blackstone wanted to install the fear that any 'tinkering with so venerable and ramshackle an edifice could collapse the structure and throw all property into confusion'.¹³⁶ However, this narrative could only remain cogent if another more powerful one was prevented from emerging. If Mansfield had been permitted to continue with his principle rather than precedent approach, his adaptation of the law to suit the changing social needs of the day, his recourse to 'equity, reason and good sense',¹³⁷ then another way of seeing the world might have been introduced and another

¹³¹ Ronnie A Warrington, 'Law and Property: The Equity of Redemption Re-Examined - An Essay in Social Legal History' (PhD Thesis, University College London 1982) 403

¹³² *ibid*

¹³³ Lieberman, *Province of Legislation* (n 3) 40

¹³⁴ *ibid*

¹³⁵ A. W. B. Simpson, *Introduction to 4 BI Comm* (University of Chicago Press 2002) v

¹³⁶ *ibid* (vi)

¹³⁷ *James v Price* (1773) Lofft 219, 98 ER 619; 221 (Lord Mansfield)

narrative may have gained a foothold and the status quo Blackstone stood for changed completely.

Blackstone's narrative was a vivid and compelling way of understanding how law and the truth is controlled, not by some overbearing dominant power but by the simple iteration and re-iteration of prevailing interpretations. These interpretations were in tune with the needs of the powerful in society, with their correctness validated by the use of history as a source material. Blackstone's assertion that possession of land gave the possessor 'sole and despotic dominion'¹³⁸ over it, with the right to totally exclude 'any other individual in the universe',¹³⁹ continues today. Ownership continues to be inviolable and the law supports and legitimates this view; any other right to control land is seen inferior, or even tantamount to a criminal act. Alternative narratives are excluded, drowned out, by the prevailing stories; the narrative may have adapted itself yet its intent remains the same.

Attempts to change the perception of adverse possession, effectively to alter the prevailing narrative were met with resistance. This can be illustrated if the Limitation Act 1833 is examined. The Act made significant and necessary changes to the law of real property, changes which were necessary to ensure the landed classes could deal with their land in a more efficient and economic way. However, the constitution of the Real Property Commission and their more radical ideas were controlled and contained. The concept that effectively gave possession by long use would be adequately contained by the courts.

¹³⁸ 2 Bl Comm 1

¹³⁹ *ibid*

However, the intention to introduce a system of land registration had to be resisted. It could be argued that if such a system had been introduced, the significant changes to the role of adverse possession that were implemented by the Commission would have been uncontrollable. In fact, if the Commission had been allowed to get their way, a radically different system would have prevailed, a system that may well have seen the end of adverse possession. The work of the Real Property Commission, the Limitation Act 1833, and the purported Land Registration Act will be discussed in more detail in the next chapter.

Chapter 5

Property, Power and Parliament

Introduction

The previous chapter described the unique position the landed classes held within society and how the courts succeeded in protecting it. The positioning of land law in a pseudo-historical setting re-enforced the performative construction of the landed's social superiority, allowing their unquestionable pre-eminence to endure. This chapter will go explain how Burke and the reform of Parliament increased the political influence of the aristocracy, with this influence ensuring the correct application of the law would ensue. This was particularly relevant when calls for reform of land law had to eventually be acknowledged and pursued.

The land law reforms that were instigated in the early and middle 1830s were significant both for what they did and what they did not do. The powerful clique of the landed classes controlled both the positive and negative aspects of the reforms. Although Simpson considered that by 1832 the political influence of the landed classes had diminished,¹ this was not the case. But there is no doubt that by the 1880s the significance of the landed classes had diminished and 'aristocracies everywhere were in decline'.² Agricultural prices had contracted and fortunes were 'being made around the world in business, in industry, and in finance which equaled and soon surpassed the wealth of all

¹ A. W. B. Simpson *An Introduction to the History of the Land Law* (Oxford University Press 1961) 253

² Norman Stone, *Europe Transformed, 1878-1919* (Fontana 1983) 20

but the greatest of the super-rich magnates'.³ This was the beginning of the end for the landed, as over the next hundred years 'the lords of the earth would become strangers in their own lands'.⁴

However, during the early reform of the real property laws, the power and influence of the nobility was used to ensure that any changes to the law would be beneficial to them and their land. It was the turbulent period of the latter part of the eighteenth century and the start of the nineteenth that allowed the aristocracy the space to retain and enhance their elite status. At the same time as Blackstone was writing his narrative in support of the landed classes Edmund Burke started a different, but equally important, process of aristocratic advancement. By the time of the Land Law reforms of the 1830s, this had resulted in the influence of the landed classes being a significant factor in the development of the law. Burke espoused the view that property was essential to human life and its control allowed for the management of society, with the domination of manifestly large tracts of land necessary for social harmony and to keep the power of the monarchy in check. Accordingly, rather than the political influence of the country's landowning classes diminishing, it was strengthened by the political changes that occurred.

In the first chapter brief mention was made to the Limitation Act 1833 and the effect it was intended to have on the doctrine of adverse possession. The consequences of the Act were significant but its ramifications could be effectively controlled by judicial narration. The Act removed the necessity that

³ David Cannadine, *The Decline and Fall of the British Aristocracy* (Yale University Press 1990) 27

⁴ Cannadine *ibid* 31

a squatter's occupation be adverse, yet within less than 20 years the courts had reintroduced the term,⁵ and thereafter it was little work for the judiciary to re-establish the whole concept. There was, however, a more significant problem that the judiciary would struggle to control: the registration of land. This is where the influence of the country's elite over the composition of the Commission and the aftermath of its more problematic considerations could most usefully be exerted.

The Commission explained that 'the nature and improvements to be proposed by us, must greatly depend on the question whether all deeds and onstruments affecting the title to land shall be registered'.⁶ It would seem that the Commission regarded the success of their recommendations as relying on a system of land registration being introduced. The protection offered by such a scheme may have been the Commission's reason, when recommending the introduction of a new Limitation Act, that all reference to adverse possession could be removed. Title would be protected by registration, unless a 20 year period of possession could be demonstrated, and a whole new way of demonstrating the right to control land would have been introduced.

It would seem the aristocratic classes did not recognise the advantages such a scheme would have brought in protecting their land holdings, the reasons for which can only be speculated upon. It is suggested they did not understand the convenience such a scheme would bring in protecting their land (these advantages will be explained later in the chapter). They wanted to safeguard a

⁵ *Dean of Ely v Bliss* (1852) 2 D M & G 460, 42 ER 950; 478 (Lord St Leonard)

⁶ HC, *The Second Report of the Commissioners of Inquiry into the Law of England Respecting Real Property* (Cmd 595, 1830) 3

system of law that was, according to Blackstone, perfect in every degree. It might open the floodgates to radical reform, levelling and anarchy, but perhaps more realistically it would expose the extent of a person's land holdings and their level of indebtedness. This is certainly something the Commission understood, and will be discussed in more detail later in the chapter when the subject of the purported Registration Act is considered.

There are interesting parallels between the proposed Registration Act and the one introduced almost 170 years later; both wanted to protect land holdings by introducing a scheme which saw title proven by registration, rather than by the complex system already in place. However, it is suggested that an 1830s Act could well have been superior as the Commission saw no problem with squatting, recognising that it was important to a common law system that did not recognise any form of absolute title. They did, however, want to ensure that land holdings were protected, but protected in a way that removed the confusion and fictions that surrounded the doctrine of adverse possession. Indeed, they may well have recognised that adverse possession was no more than a narrative introduced by the courts as a necessary protection for the landed classes. Their scheme would have protected the right to control of land, yet recognised that equitable principles still had a place in such an arrangement. Perhaps it would have made the introduction of a Land Registration Act in the 21st century unnecessary, and almost 170 years of judicial turmoil could have been averted.⁷

⁷ This argument will be expanded upon later in the chapter.

5.1 The Unreformed Parliament

Simpson does not give any indication as to why the date 1832 was important, but it can be inferred that he was referring to the enactment of the Representation of the People Act 1832. The Reform Act, or Great Reform Act as it is more popularly known, introduced wide-ranging changes to the electoral system of England and Wales and was designed to 'take effective measures for correcting divers abuses that have prevailed in the choice of Members to serve in the Commons House of Parliament'.⁸ To do so the Act granted new seats in the cities that had sprung up during the Industrial Revolution, reduced the number of rotten boroughs, and widened the electoral franchise. On the face of it the Act appeared to introduce significant change to the way Great Britain was to be governed,⁹ and should have reduced the influence of the aristocratic and landed classes. However, this was not to be the case.

5.2 Parliamentary 'Democracy'

In the latter half of the eighteenth century, although it was considered that 'Britain did not possess the prerequisites for popular or democratic government',¹⁰ the system was considered as 'balanced'. There was a ruler who embodied 'the monarchical principle, the Lords that of aristocracy, and the Commons that of democracy'.¹¹ However, the influence of the Crown could be described as disproportionate. By working with the executive the independence of Parliament could be undermined by the 'offer of lucrative

⁸ Preamble to Representation of the People Act 1832.

⁹ Similar reform Acts affecting Scotland and Ireland were also introduced.

¹⁰ Michael Brock, *The Great Reform Act* (Hutchinson & Co 1973) 16

¹¹ Thomas Ertman, 'The Great Reform Act of 1832' (2010) 43 *Comparative Political Studies* 1000, 1001

offices, contracts, and other rewards to MPs'.¹² Christie estimated that towards the end of the eighteenth century, these so called placemen numbered 'a little under 200'.¹³ Hilton put the figure of those 'on the court and government payrolls'¹⁴ at nearer 300.

These placemen, and the influence which the Crown and executive could operate through them, was part of a form of control, termed the 'Old Corruption' by the radicals of the second half of the eighteenth century. It was not one, but rather a 'wide variety of practices which was held to be at the heart of much that was wrong with Britain's unreformed government'.¹⁵ George III was thought to have personally 'subordinated Parliament to his will, by bribing MPs with offers and favours'.¹⁶ The rewards which could be bestowed by those in power included, excessive salaries for positions within the judiciary, state administration or the Church, sinecures with high incomes, an ability to pass on an office to a chosen successor, high pensions which were often heritable, and the granting of government contracts.

Not all considered these practices to be corrupt; rather they were a necessary means of getting the work of government done. David Hume, for instance, considered these corruptions to be 'inseparable from the very nature of the constitution, and necessary to preservation of our mixed government'.¹⁷ William Knox held 'that there was an absolute necessity in vesting in the

¹² *ibid* 1005

¹³ Ian Christie, 'Economical Reform and 'The Influence of the Crown', 1780' (1956) 12, *Cambridge Historical Journal* 144, 147

¹⁴ Boyd Hilton 'A Mad, Bad, and Dangerous People?' (Clarendon Press 2006) 53

¹⁵ W D Rubinstein, 'The End of "Old Corruption" in Britain: 1780-1860' (1983) 101 *Past and Present* 55, 57

¹⁶ Hilton (n 14) 40

¹⁷ David Hume, *Essays Moral, Political and Literary* vol 1 (T.H. Green & T.H. Grose eds 1889) 20

executive a certain degree of influence',¹⁸ with the only question being, what was a reasonable sum? Even those parliamentarians who wished to implement change considered, 'the influence of the Crown 'ought to be diminished' not destroyed'.¹⁹ To this end Walpole explained that 'the Crown could always outspend the gentry in elections',²⁰ implying that the use of the Crown influence was necessary to counteract the influence of the aristocratic and landed classes. This was an influence which was to come to the fore as the Crown's patronage diminished.

5.3 The Rise of Rockingham

Agitation by radicals, the fact that 'the national debt [was] rising sharply to finance the American war',²¹ and the waste of public money meant that the Old Corruption could no longer be tolerated, at least not to the scale it had once been. Perhaps more significantly there was a faction within Parliament that actively sought to diminish royal power, the so-called Rockingham Whigs. Led by Lord Rockingham²² and heavily dominated by wealthy aristocrats, they, along with more radical factions, were strenuously opposed to the patronage George III used as influence on Parliament. Whilst prime minister,²³ Rockingham had attempted to carry on government without royal patronage; however, on the fall of his government's the monarch reasserted a 'far more vigorous influence'.²⁴ As well as their hostility to royal power the

¹⁸ William Knox, *Considerations on the present State of the Nation* (London 1789) x

¹⁹ Archibald S Foord, 'The Waning of 'The Influence of the Crown' (1947) *English Historical Review* 484, 484

²⁰ *ibid* 504

²¹ Ertman (n 11) 1003

²² Charles Watson-Wentworth, 2nd Marquess of Rockingham, 1730-1782

²³ 1765-1766

²⁴ Edward Burke *Thoughts on the Cause of the Present Discontent* (London 1770) 1.1.52
<http://www.econlib.org/library/LFBooks/Burke/brkSWv1c1.html#>

Rockinghamites were emphatically opposed to the position Britain adopted towards America, a position that eventually led to the American Revolution. Both Rockingham in the Lords, and Charles Fox in the Commons, vigorously denounced the government's stance. Hence in March 1782 when 'the 12 year old government of Lord North ended ignominiously following the disasters in America',²⁵ they 'took the opportunity to storm the closet',²⁶ and forced themselves into office against the wishes of the King.

5.4 The Restraint of Royal Patronage

Lord North, before being forced from office, had established a commission to examine the public accounts. Although this commission was intended to be 'merely a face saver',²⁷ the wide powers it was given to access documents and interrogate officials and ministers proved significant. When the North government failed, there was already a series of reports available that were eagerly seized upon by Edmund Burke on behalf of the Rockingham government.

Burke had already written on the problems associated with unrestrained royal power, explaining that discontent stemmed from the secret influence 'of King's men, or the King's friends, [and] by an invidious exclusion of the rest of his Majesty's most loyal and affectionate subjects'.²⁸ Yet Burke was not a radical; although keen to rid the country of an imbalance of influence 'caused by the

²⁵ Hilton (n 14) 39

²⁶ *ibid*

²⁷ *ibid* 119

²⁸ Burke (n 24) 1.1.50

disproportionate acquisition of power by the Crown',²⁹ he did not want to erode aristocratic land rights; he considered this might 'open the flood gates to radical reform, levelling and anarchy'.³⁰ Having witnessed the effects of the French revolution 'Burke argued having large tracts of landed wealth in the hands of a few was both necessary and desirable',³¹ as it was 'a natural rampart about the lesser properties in all graduations'.³² Burke, and the other Rockinghamites for that matter, appeared not to see any contradiction between their views on royal patronage and their support for the privileged position of the landed classes. They considered that royal patronage was corruption and the privileged position of the aristocracy was in the best interests of the nation.

Armed with the information Lord North's Commission had handily gathered, Burke set about the task of reducing royal power. Although Rockingham died after only four months in power Burke, who had undertaken the task with gusto, had been able to pass two Acts.³³ The intention of the first was to abolish the practice by which the heads of subordinate treasuries kept large sums of public money for long periods and used it for their own profit. The second transferred the power of expenditure on the King's household to the Treasury and in the process abolished over 130 useless offices. The King's stipend was also frozen, thus limiting his 'powers of patronage'.³⁴ It was also

²⁹ John Brewer 'Party and the Double Cabinet: Two Facets of Burke's Thoughts' (1971) 14 *The History Journal* 479, 480

³⁰ David Sugarman and Ronnie Warrington 'Land law, citizenship, and the invention of "Englishness". The strange world of the equity of redemption' in J. B. Brewer & S. Staves *Early Modern Concepts of Property* (London: Routledge, 1995) 129

³¹ *ibid*

³² Edmund Burke, *Reflections on the Revolution in France* (C C O'Brien (ed) Penguin 1968) 140

³³ The Paymaster Generals Act 1782, and The Civil List and Secret Service Money Act 1782

³⁴ Hilton (n 14) 41

stipulated that the salaries of the King's advisors would have last call on payments from the Civil List.³⁵ After the death of Rockingham and a short interregnum that saw Shelburne become prime minister, Burke was reinstated as Paymaster of the Forces in a coalition government headed by the Duke of Portland and continued his reformist work.

George III loathed this coalition and 'took the first opportunity to destroy it';³⁶ his chance coming when a scandal involving a government bill, the East India Company, and Charles Fox, provided the ammunition. The Bill was intended to transfer control of British India to 'seven named commissioners, all friends of ministers',³⁷ and was described by William Pitt, who was in opposition at the time, as the 'most unconstitutional measure ever attempted'.³⁸ It would have effectively transferred 'the immense patronage and influence of the East to Charles Fox, in or out of office'.³⁹ The King let it be known that anyone who supported the Bill in the Lords 'would be considered as an enemy'.⁴⁰ As a consequence of this the Bill was defeated by the Lords and the King took the opportunity to dismiss the government and install William Pitt as Prime Minister. Burke, who had been a supporter of Fox and North, remained in opposition for the rest of his political career.

³⁵ J Steven Watson, *The Reign of George III, 1760-1815* (Clarendon Press 1960) 247

³⁶ Hilton (n 14) 40

³⁷ *ibid*

³⁸ William Pitt, *Correspondence between William Pitt and Charles Duke of Rutland 1781-1787* (Edinburgh 1890) 4

³⁹ *ibid*

⁴⁰ Hilton (n14) 40

5.5 The Continuing Assault on the Old Corruption

From this point until 1827, although the assault on the Old Corruption continued, it was in a more episodic fashion. The Commission continued to undertake its role and 'repeatedly urged good husbandry in all branches of public service'.⁴¹ They envisaged public servants should receive a wage, superannuation and work regular hours, and be open to dismissal if their performance was unsatisfactory. This could be taken to mean a more bureaucratic professional breed of public servant. At this time when the popular interest in politics was expanding, due to the increase in 'circulation of broadsheet newspapers, politicians found that image and rhetoric counted for more than reality'.⁴² The appearance of doing something counted for as much as actually doing it. Pitt for instance, although appearing to share the concerns of the Commissioners, responded 'to their reports in a piecemeal and undramatic fashion that was at variance with the boldness and urgency of their pronouncements'.⁴³

Although the Commission's progress appears to have been thwarted at times, there is little doubt that over the years from 1783-1827 huge achievements were made, although many of these achievements were driven by necessity rather than political leadership. The wars with America and France, popular agitation, and the frightening example of the French Revolution, all contributed to this political necessity. It appears that by the time of the Reform Act, 'the

⁴¹ Hilton (n 14)120

⁴² *ibid* 121

⁴³ Philip Harding, *The Waning of "Old Corruption": The Politics of Economical reform in Britain 1779-1846* (Clarendon Press 1996) 61

effect of the power of royal influence had passed'.⁴⁴ When Wellington became prime minister 'he was forcibly struck by the lack of patronage at his disposal'.⁴⁵ He wrote 'I must say that no government can go on without some means of rewarding services. I have absolutely none'.⁴⁶

5.6 The Rise of the Old Aristocracy

It should be noted that there were two main factions within parliament at this time, although they did not divide themselves into parties as such. These were the Whigs and Tories. The former, who derived large incomes from land, could be termed the old landed classes. The latter were more middle class, their wealth tending to come from 'professional, public administration and defence occupational categories, including especially Anglican clerics, soldiers, lawyers and judges, government bureaucrats and placemen'.⁴⁷ There was certainly an aristocratic element to the Tories but not what could be termed old money. It was the Tories who flourished in the eighteenth and early nineteenth century and enriched themselves through the 'fruits of office',⁴⁸ prospering with the aid of the Old Corruption. Indeed, the great Whig families had been excluded from many of the privileges of office and 'did not benefit from place and sinecure in the same sense as the Tories'.⁴⁹

However, by the first quarter of the nineteenth century it was obvious that the Old Corruption was becoming increasingly intolerable, even to those who

⁴⁴ Foord (n 19) 488

⁴⁵ *ibid*

⁴⁶ Arthur Duke of Wellington, *Despatches, Correspondence, and Memoranda of Field Marshal Arthur, Duke of Wellington* Vol 7, Duke of Wellington (son) (ed) London 1880) 286-287

⁴⁷ Rubinstein (n 15) 55

⁴⁸ *ibid* 76

⁴⁹ *ibid*

gained from it. For this reason the Tories themselves took the lead in reform, but this did not result in the conclusion they had hoped for. The rhetoric of Burke on behalf of the Rockingham Whigs had championed an 'independent aristocracy mindful of all the people';⁵⁰ a landed elite born to rule, and it was this old elite who emerged emboldened from this passage of history. As the influence of the Crown decreased and placemen within Parliament disappeared the 'support of landowners who could still control boroughs'⁵¹ became of great importance. These were predominantly the 'wealthy magnates with vast rent-rolls and urban and mineral properties. Disproportionately they were the Whig-liberals rather than the Tories'.⁵² The others, the smaller land owners, identified with the old middle class Tories and the non-landowning elite either adapted to their changed circumstances or underwent a marked decline. In 1832, and for the next 50 years, these 'Whig grandees dominated British politics'.⁵³

5.7 The Reform Act 1832

The decline in the Old Corruption helped the old aristocratic families regain their influence over the political administration of Britain. Operating alongside this was another reform that was to boost this domination even further. This was the expansion of electoral enfranchisement.

⁵⁰ Sugarman and Warrington (n30) 129

⁵¹ Brock (n 10) 46

⁵² Rubinstein (n 15) 79

⁵³ *ibid* 80

5.8 County and Borough Seats

After the union with Ireland in 1801, there were 658 seats in the House of Commons. Of these, 558 sat in English constituencies. These English seats consisted of 82 that represented the 40 English counties, plus 403 MPs who represented English boroughs. The contests in the counties were, at least on the surface, relatively open; however, as there was no secret ballot and voters had to declare their preference openly, they were 'subject to pressure from those on whom they depended for their living'.⁵⁴ Albeit there were some problems with the county vote, this was insignificant compared to the problems in the boroughs. Many of these were pocket or rotten, that is they had an electorate that was so small (such as Old Sarum in Winchester that had a total of seven voters) that a single powerful patron could control them. 'Aristocratic magnates spent large sums in gaining and retaining control of constituencies'.⁵⁵ There can be no doubt that the individual who controlled a borough could acquire parliamentary weight. If this individual was a person of consequence they might control more than one borough and have a retinue of several MPs.

5.9 Attempts at Reform

There were many attempts to reform parliament in the late eighteenth and early nineteenth century, but these were inevitably defeated. The rhetoric of Pitt and Fox for instance, seemed to support increased enfranchisement. They were, however, 'committed to aristocratic governance and neither had any real

⁵⁴ Brock (n 10) 17

⁵⁵ *ibid* 16

enthusiasm for reform'.⁵⁶ This was even though their rhetoric at the time seemed to indicate an opposite view point.

Most Whig politicians, although committed to change, did not contemplate that all people capable of using a vote intelligently should have one. They planned to continue with aristocratic government but make it acceptable 'by purging away its most corrupt and expensive features'.⁵⁷ These Whigs regarded reform of the Old Corruption as enough; this had largely occurred by the 1820s when the 'old system of making and controlling majorities had been broken'.⁵⁸ They 'did not relish putting governments under the control of an enlarged and illiberal electorate'.⁵⁹ For them the system of rotten boroughs, now that they were shorn of Crown influence, was a 'necessary facility for the executive'.⁶⁰

After this, between '1824 and 1829 not a single petition for parliamentary reform was presented to the Commons from anywhere in the country'.⁶¹ In May of 1824 the nominal Whig leader in the Commons, George Tierney, 'insisted that the Whig party was not pledged to parliamentary reform, and indeed disagreed with it'.⁶² In the 1826 general election coverage in *The Times*, Whig MP John Christian Curwen commented that the days of fearing to oppose the ministers because it could result in being branded an enemy of the state had gone. He praised Lord Liverpool's administration for its

⁵⁶ Hilton (n14) 52

⁵⁷ Brock (n 10) 44

⁵⁸ Foord (19) 486

⁵⁹ Brock (n 10) 45

⁶⁰ *ibid* 47

⁶¹ Jonathan Parry *The Rise and Fall of Liberal Government in Victorian Britain* (Yale University Press 1993) 44

⁶² *ibid*

openness in conducting government. Even Lord Russell had abandoned the question of reform 'because of the lukewarmness on the subject throughout the country [owing to] the improvement which had taken place in the manner of conducting the government'.⁶³ Much of this was due to George Canning a 'charismatic but controversial'⁶⁴ politician who dominated British politics at that time.

5.10 Canning

Canning was a noted orator and speechwriter and although coming from a relatively impoverished background that made success in politics unlikely, his intellect allowed him to rise quickly within parliament. Raised in the home of his uncle Stratford Canning, a noted Whig, Canning 'was a warm Republican from sympathy and conviction'.⁶⁵ However, his personal and political reaction to the violent excesses which followed the French Revolution 'swept the young man to the opposite extreme; and his vehemence for monarchy and the Tories gave point to a Whig sarcasm, that men had often turned their coats, but this was the first time a boy had turned his jacket'.⁶⁶ His conversion to the Tories resulted in Pitt bringing him into Parliament in 1793, and into office in 1796.

Canning came to dominate British politics. He 'marginalised Whig opposition: he had flattered the middle classes; and saved the regime from imputation of

⁶³ *ibid*

⁶⁴ Ertman (n 11) 1005

⁶⁵ Henry Adams, *History of the United States of America during the Administration of Thomas Jefferson* (Literary Classics of the United States 1986) 58

⁶⁶ *ibid*

oligarchy'.⁶⁷ He could appeal to all sides: 'the opposition had no option but to applaud Canning's genius and hope to bask in his fame'.⁶⁸ Coleridge later commented that Canning 'flashed such a light around the constitution that it was difficult to see the ruins of the fabric through it'.⁶⁹ When Liverpool suffered a serious stroke the monarch asked Canning to become prime minister, in preference to Wellington and Peel.

Unfortunately, while Canning was seen as a dominating figure in Parliament, he was also divisive and this resulted in problems forming an administration. As well as Wellington and Peel refusing to serve under him, five other members of Liverpool's cabinet refused, along with 40 junior members of the government. However, Canning was able to enter into a coalition with the Liberals by exploiting their concerns over parliamentary reform. The great issue for Liberals of the time was the cause of Catholic emancipation; if there was reform of the Commons, before emancipation was achieved it was thought that the cause would become more difficult. 'No-popery sentiments was so strong in all parts of the United Kingdom except Ireland that increasing the number of popular seats would almost certainly entail increasing anti-Catholic strength in the Commons'.⁷⁰ Notwithstanding his anti-reform views, Canning had one attribute that appealed to the Whig liberals: he was a supporter of Catholic emancipation.

⁶⁷ Parry (n 61) 44

⁶⁸ *ibid*

⁶⁹ Samuel Taylor Coleridge, *Specimens of the Table Talk of Samuel Taylor Coleridge* (Henry Nelson Coleridge, 2nd ed, John Murray 1851) 70

⁷⁰ Brock (n 10) 46

Canning's duplicity can be illustrated by an example of his conduct when he became prime minister. He appeared to rebuke Croker who stated that it was impossible to do 'anything satisfactory towards a government in this country without the help of the aristocracy'.⁷¹ Canning's reply suggests that his support rested 'in the body of the people'⁷² rather than with the Tory aristocracy. However, Canning's identification 'with the people' was the strategy to stave off political upheaval. Canning appeared to believe that the nation was on the brink of a 'great struggle between property and population',⁷³ and being an astute politician sought to calm this struggle with liberal policies. In fact for him, as for most Tories, 'the unreformed election system played a key part in securing property rights and he had no more intention of undermining it than Wellington or Sidmouth'.⁷⁴ It would appear that reform of the parliamentary election system was as far away as ever at this point. This begs the question as to why the issue returned in 1830 and why, in a period of just two years thereafter, one of the greatest turning points in British history was reached.

5.11 Parliamentary Reform

It was Canning's own actions, in part at least, that caused the reformers to be successful. Not only was Canning from an impoverished background, his mother was also a stage actress, a profession not seen as respectable at that time. Canning was therefore an interloper and his origin outside 'the circle of

⁷¹ Louis J Jennings (ed), *The Croker Papers* (London 1885) 365

⁷² *ibid* 368

⁷³ Augustus Granville Stapleton, *George Canning and His Time* (London 1859) 350

⁷⁴ Parry (n 61) 44

wealth and power exposed him to the distrust of many aristocratic Tories'.⁷⁵ His concessions to the Whig opposition increased his party's distrust, as did his attempts at cementing an allegiance with the middle classes. These were the very people who needed to be kept contented, lest they commence agitation for political reform. It was Canning's ability to keep the balance of these conflicting interests that made him indispensable to his party. However, this was something they did not seem to realise when they decided to indulge in a split; they, the defenders of the unreformed system, became disorganised and allowed others to take the issue forward. Granville wrote in his diary, at the height of the reform crisis, that there had 'been but one man for many years past able to arrest this torrent, and that was Canning: and him the Tories – idiots that they were, never discovering that he was their best friend – hunted him to death with their besotted and ignorant hostility'.⁷⁶

It seems unlikely that Canning's methods of preventing reform would have worked in the long run. However, on his death after a little under five months in office, with the Whigs split and sidelined, and the Tories split and in disarray, there seemed little coherent defence remaining. The time after Canning's death was a shambolic period. His successor Goderich 'succumbed to the incessant bullying of his sovereign, his colleagues, and his wife, and resigned tearfully in January 1828 without waiting to meet Parliament'.⁷⁷ Wellington, a staunch anti-reformer, was then able to form a government with the intention of encouraging Tory reunion. Unfortunately, instead of Tory reunion, it led to the complete disintegration of the party. Wellington's

⁷⁵ Brock (n 10) 48

⁷⁶ Granville's Diary, 11 August 1831, National Archives, Kew

⁷⁷ Brock (n 10) 49

government was successful to some extent; it did have a reputation for economy and efficiency managing to reduce public expenditure. This, however, did not conceal the 'Duke's defeats as a prime minister',⁷⁸ he lacked experience in the Commons and found judging public opinion beyond him. With the disintegration of the Tory party in the Commons, this meant that there was nothing to hold the pro-Catholics back.

5.12 Catholic Emancipation

Peel led the Government in the Commons and was finding the task difficult, 'being in a minority on the most important of domestic questions'.⁷⁹ This difficulty was being utilised by factions within the Commons to push their own reformist measures. In 1827, and again in 1828, proposals to allow emancipation of Catholics were lost in the Commons by very small margins. The successor of a campaign, organised by Dissenters, which resulted in the repeal of the Test Acts,⁸⁰ 'only served to emphasise the continuing exclusion of Roman Catholics from the polity, a state of affairs inextricably linked to the sensitive issue of British-Irish relations'.⁸¹ Although Wellington and Peel were both opponents, 'they decided in 1828 that their government must itself impose emancipation'.⁸² Peel particularly 'was worried about the damage done generally to government authority by leaving the question open'.⁸³ There was a hope that passing the Roman Catholic Relief Act 1829 would

⁷⁸ Brock (n 10) 50

⁷⁹ Philip Henry Stanhope & Edward Cardwell (eds) *Memoirs by the Right Hon Robert Peel* (London 1856) 103

⁸⁰ The Test Act 1673 and Corporation Act 1661 were a series of acts passed in the seventeenth century, which made holding public office in Britain conditional upon being a practicing member of the Church of England.

⁸¹ Ertman (n 11)

⁸² Parry (n 61) 54

⁸³ *ibid* 53

demonstrate effective leadership and accordingly, control of Parliament would be regained.

In fact the opposite happened, the passing of the Bill damaged Wellington and led to a further split in the Tory party, the nature of the Bill being irreconcilable to the hardened ultra-Tories. These ultra-Tories attributed the government's ability to pass such unpopular legislation 'to the nominative or 'rotten' borough system'.⁸⁴ In this there was an unusual meeting of minds between these ultra-Tories and some Whigs and liberals who sought to 'capitalise on the double victories of 1828 and 1829 over religious discrimination'.⁸⁵ Lord Russell introduced an actual reform bill in early 1830 and, notwithstanding the fact it was defeated in the Commons, electoral reform was certainly back on the political agenda.

5.13 The Last Push for Reform

Wellington suffered losses in the elections that followed in 1830, but was able to form a government. However, extra-parliamentary changes that affected the dynamic of reform appeared to pass him by. In November 1830 Wellington made a speech 'which has gone down as one of the greatest parliamentary blunders of all time'.⁸⁶ He not only declared his opposition to reform, but stated 'Britain possessed a legislature which answered all the good purposes of legislation, and this to a greater degree than any legislature ever had

⁸⁴ Ertman (n 11) 1006

⁸⁵ *ibid*

⁸⁶ Hilton (n 14) 418

answered in any country whatever'.⁸⁷ When Wellington sat down, a fellow Tory remarked, he had 'just announced the fall of his government'.⁸⁸ This may have been premature, but it undoubtedly galvanised parts of the nation and brought crowds into the street. Wellington was forced to resign following a defeat on a budget measure and the King chose Lord Grey, a Whig, to become prime minister. The government he formed was not a predominantly Whig government, but an 'odd coalition of Whigs, ultra Tories, and Canningites (liberal Tories) and, as has often been pointed out, was the most aristocratic of the nineteenth century'.⁸⁹ With this government in place the '15 month struggle for reform'⁹⁰ began. The Whigs who took up the issue of reform 'tentatively, even reluctantly, suddenly found themselves in the unaccustomed position of being popular'.⁹¹ There appeared to be a tidal wave of popular opinion for reform, which nobody could stop, although there was an attempt.

Over the next 15 months started Lord Russell introduced a bill that proposed sweeping reforms. It passed its second reading by one vote. However, an opposition motion against the Bill was carried by eight votes. Grey asked for a dissolution of Parliament, which was granted, and new elections took place. Grey won handsomely with 35 gains in the counties and twice as many in the boroughs. The newly elected House of Commons approved a modified bill by 136 votes, but this rejected in the Lords, a step which resulted in 'riots

⁸⁷ HL Deb 2 November 1830, vol 1, cols 11-53

⁸⁸ Hilton (n 14) 419

⁸⁹ Ertman (n 11) 1007

⁹⁰ Hilton (n 14) 421

⁹¹ *ibid* 420

throughout the country'.⁹² Attempts were made to find a compromise and Grey extracted a promise from the King that he would create enough extra peers to enable the Bill to pass through the Lords, should they prove intransigent. When the King reneged on this promise more violence ensued and Grey resigned. Wellington was unable to form a government and Grey returned, the King ended his opposition to creating more peers, and to prevent this happening the Lords agreed to pass the Bill. The Representation of the People Act was passed and received royal assent on 7th June 1832. Perhaps the most important aspect of the Act becoming law, was not what it contained, but the fact that the Commons had defeated the Lords.

5.14 The Victorious Aristocracy

A paradoxical situation had seemingly developed with an Act, apparently intended to democratise Parliament, leading to the influence of the landed classes increasing. Whigs had set in motion a course of action that could not fail. Historians are cautious, but there is evidence that the country was close to revolution. A Canningite MP thought the country was 'in a state little short of insurrection',⁹³ whilst another spoke of a 'hand-shaking, bowel-disturbing passion of fear',⁹⁴ a fear engineered by a 'propaganda campaign'⁹⁵ entered into by certain middle class newspapers. Whigs were not keen on a universal franchise yet they had to see through what they had started. Their intention was to continue with a type of autocratic aristocratic government, yet make it

⁹² Ertman (n 11) 1007

⁹³ E J Littleton, *Diary*, 14 May 1832, cited in Boyd Hilton, *A Mad, Bad, and Dangerous People?* (Clarendon Press 2006) 426

⁹⁴ Nowell C Smith (ed) *The Letters of Sydney Smith*, vol 2 (Oxford University Press 1953) 709

⁹⁵ Hilton (n 14) 426

acceptable 'by purging away its most corrupt and expensive features',⁹⁶ thus appearing, at least, to instigate reform.

The Representation of the People's Act 1832 defeat of the Lords by the Commons could be seen as problematic. If all the power now resided in the Commons, there was fear that the landed interest would cease to be an influence. This was not what the Whigs wanted and ways of counteracting this had to be found. For instance, when Lord Althorp suggested that the 'House of Commons should represent the property, the wealth, the intelligence, and the industry of the country'.⁹⁷ Boyd considers this to mean 'they were keen to uphold 'legitimate' influence, based on genuine deference, while eliminating that which was based on a 'cash nexus''.⁹⁸ Palmerston thought it necessary to restore the landed interest, their influence he 'thought indispensable to the safety and prosperity of the country'.⁹⁹ Russell even suggested that 'it would be better to put Peers in the Commons, since they had a real stake in the country and never damaged its true interest'.¹⁰⁰ It would seem that 'the main effect of the Act was to increase the power of the landed interest, at least in the short term'.¹⁰¹

In benefitting the landed interest there had to be victims, and these were the 'upper middle class types that had given such substance to the Pittite regime'.¹⁰² These were the placemen who had done so well out of the

⁹⁶ M. Brock (n 10) 44

⁹⁷ HC deb 21 September 1831 vol 7 cols 378-464, 424

⁹⁸ Hilton (n 14) 434.

⁹⁹ HC deb 03 March 1831, vol 2, cols 1273-1356, 1329

¹⁰⁰ Hilton (n 14) 435

¹⁰¹ *ibid*

¹⁰² *ibid* 436

unreformed Parliament and the Old Corruption. With the success that the Whigs had in removing the upper-middle class influence and reinstating the landed interest, they could not be blamed for thinking that they had broken the long-standing alliance between the Tories and certain landed interest. However, in reality this elite of society had little loyalty for anyone except others of their own class with the same interests. This loyalty was put to good use when the reform of real property came to be considered.

5.15 Land Law Reforms and the Limitation Act 1833

There was certainly agreement in the early part of the nineteenth century that land law was a complex subject, but disagreement as to how rehabilitation should be undertaken. There were those who believed that no alteration to the substantive law was needed, although the mechanisms for creating and transferring land would benefit from revision. There were others who considered that nothing short of 'radical reform that redefined the nature of property law',¹⁰³ was needed, even going as far as suggesting the introduction of a French inspired code. It could be argued that Henry Brougham and James Humphreys represented these two ends of the law reform spectrum. The former had an incrementalist's vision of how the law should be transformed, proposing in a six hour speech that a range of *ad hoc* statutes be introduced to right individual nonsenses. A case of 'laws reform, not law reform'.¹⁰⁴ The latter introduced a visionary proposal for codification of land law,¹⁰⁵ an organisational approach to law reform.

¹⁰³ Mary Sokol, 'Jeremy Bentham and the Real Property Commission of 1828' (1992) 4 *Utilitas* 225, 226

¹⁰⁴ J Stuart Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford University Press 1992) 3

¹⁰⁵ *ibid*

5.16 Codification of Land Law?

Jeremy Bentham, who could be described as the father of systematic law reform, contributed enthusiastically to the debate, considering that partial legislation would not be enough to eradicate 'a whole mass of fictitious law':¹⁰⁶ the only way to do this would be with a code. Bentham's vision of reform did not start with the existing state of the law, but rather with an investigation into the current needs of society, before going on to construct new concepts and a new vocabulary to satisfy those needs.¹⁰⁷ For him change should be systematic, and perhaps 'judge and co could not be trusted with the task themselves';¹⁰⁸ the vested interests of lawyers and the judiciary being unwilling to simplify the dense thicket of land law, with the consequential reduction of their income. However, Bentham 'shrank from the magnitude of the task',¹⁰⁹ and instead lent his influence and enthusiasm to Humphrey's code. But even with Bentham's support Humphreys' book, when published in 1826, produced a 'furore among lawyers most of whom deplored the idea of substituting a French-inspired Code of Law for the Common Law'.¹¹⁰

5.17 General Registration

Humphreys had included in his Code a scheme for the general registration of deeds and assurances. This was not a new idea, having been first proposed by Mathew Hale during the Commonwealth. The idea was revived from time to time, with small local schemes introduced. However, nothing on a nation wide

¹⁰⁶ Catherine Fuller (ed) *Correspondence of Jeremy Bentham January 1822 to June 1824*, vol 11 (University of London Bentham collection, Clarendon press 2000) 29

¹⁰⁷ Anderson (n 104) 5

¹⁰⁸ *ibid*

¹⁰⁹ Avner Offer, *Property and Politics 1870-1914* (Cambridge University Press 1981) 27

¹¹⁰ Sokol (n 103) 229

scale was ever installed. Bentham was an enthusiastic supporter of this idea as, more importantly, was John Campbell who was soon to become the chairman the Real Property Commission. It may well be that Campbell and the other members of the Real Property Commission saw registration as an essential part of their plan to overhaul conveyancing, and without such a scheme their proposals would prove to be less effective.

For a scheme of registration to be successful all interests in land would have to be recorded, with the consequence that they would be generally available to all. This was something the landed elite did not want. A freely available register would demonstrate the extent of their land holdings to anyone who cared to look, with the added disadvantage that their level of indebtedness also being visible. This might have undermined the advantages that the Court of Chancery had given the landed elite in its interpretation of mortgage law. There were accordingly, 'two classes of sinister interests'¹¹¹ who opposed registration 'to the greatest happiness in this part of the law'.¹¹² These were the aristocrats and the lawyers. The former managed to influence the make up of the committee and to effectively bribe Campbell, in order to prevent the idea of registration becoming a reality. The latter ensured any legislation that was produced would be suitably contained.

5.18 The Necessity of Reform

Although any 'suggestion that land law might fall short of perfection was bound to provoke indignation among conveyancers and sympathy among

¹¹¹ University of London Bentham collection vol lxxvi 28

¹¹² *ibid*

landowners',¹¹³ there was little doubt law reform was clearly overdue. Title to real property could not be established positively, it could only be inferred by the absence of any separate claims that might be found in the documentation that accompanied previous transactions. This documentation was extensive and probably inconclusive, but had to be prepared by the vendor's solicitor and perused by the purchaser's solicitor. For a title to be technically marketable it had to be clear of any conflicting claims for a period of 60 years. In difficult cases an elite group of conveyancers, specialist barristers from the Temple or Lincoln's Inn, were consulted. These were barristers for whom promotion was not an option; the drawing up of documents and taking of pupils were activities which Bar etiquette prohibited Silks undertaking, yet these were the mainstay of the conveyancers' work. However, even though they remained juniors and the Bench was closed to them 'in their own sphere they were tantamount to judges'.¹¹⁴ An opinion on the validity of title from one of these elite conveyancers, 'was as near to final as makes no difference'.¹¹⁵

As lawyers' fees were determined by the length of the documents perused and drawn up it was to their benefit that deeds and abstracts 'were excessively padded with verbiage'.¹¹⁶ The whole process was slow, costly and, as the Real Property Commission was to later note, 'many titles notwithstanding long enjoyment, are found unmarketable; and if, after tedious delays, the transaction is complete, the law expenses inevitably incurred sometimes amount to no inconsiderable proportion of the value of the

¹¹³ Offer (n 109) 26

¹¹⁴ Anderson (n 103) 6

¹¹⁵ *ibid*

¹¹⁶ Offer (n 104) 24

property'.¹¹⁷ It was accepted, even by those opposed to wholesale systematic reform, that in an increasingly commercialised country it was necessary. The ensuing agitation 'to bring the land law into greater harmony with market rationality',¹¹⁸ resulted in the government considering it politically expedient to form a committee of enquiry to consider how this might be best done. This no doubt it also had the effect of taking pressure off politicians over the issue.

5.19 The Real Property Commission

The Real Property Commission was constituted in 1829 surely 'in response to Brougham's speech',¹¹⁹ however Bentham's wish regarding the make up of the Commission was not to be realised. It was, with the exception of the Chairman, drawn from the ranks of the elite conveyancing barristers. The Chairman, John Campbell, was an eminent Scottish common lawyer rather than an English property lawyer and perhaps did not have an implicit understanding of the English conveyancers' needs and wants. He certainly was not the first choice as Chairman: that honour fell to Edward Sugden, 'a noted and successful conveyancer who had publicly fallen out with James Humphreys on the subject of the reform of land law'.¹²⁰ Sugden, who was vehemently opposed to the introduction of the registration of deeds, chose not to accept the chairmanship, perhaps not wishing to take part in a venture of which he was so hostile too.

¹¹⁷ HC, *The First Report of the Commissioners of Inquiry into the Law of England Respecting Real Property* (263 1829) 41

¹¹⁸ Offer (N 109) 23

¹¹⁹ Simpson (N 1) 274

¹²⁰ Sokol (N 103) 235

That is not to say that the duties undertaken by the Commission under the chairmanship of Campbell were not diligent. Between February 1828 and April 1833 the Commission produced four comprehensive and comprehensible reports, in an undertaking incomparable with anything 'produced before, or, for that matter, since'.¹²¹ Many of the measures introduced by the 1925 legislation 'were anticipated in recommendations made by the Real Property Commission between 1829 and 1833, and some were enacted piecemeal in the years that followed the Commission's last report'.¹²²

Although there was influential hostility towards reform there was undoubtedly a need to resolve many of the 'the confusing, cumbersome and slow conveyancing procedures of the time'.¹²³ These 'did not meet the increased demands for quick and efficient alienation of land'.¹²⁴ Yet those influential figures opposed to change would not accept a wholesale systematic reform. There seems little doubt that the government influenced the make up of the Commission; the Home Secretary of the time, Robert Peel, had 'carefully chosen a lawyer whom he thought unlikely to want to introduce any drastic changes in the law, such as a Code'.¹²⁵ He also instructed Campbell that the King wished the Commission, 'to enquire into the state of the laws regarding the Transfer of Real Property',¹²⁶ rather than undertaking a sweeping revision of the law. Yet Campbell did not see himself or the Commission constrained to work within these narrow parameters. Once Campbell was 'appointed to the

¹²¹ Simpson (N 1) 274

¹²² Sokol (N 103) 227

¹²³ *ibid* 230

¹²⁴ *ibid*

¹²⁵ *ibid* 236

¹²⁶ Letter from Robert Peel to John Campbell, cited in Mary Sokol, 'Jeremy Bentham and the Real Property Commission of 1828' (1992) 4 *Utilitas* 225, 236

Commission he took up the task with energy and enthusiasm'.¹²⁷ Notwithstanding this approach to the work of the Commission, Campbell cannot be seen as a radical with the intention of introducing drastic changes to the law of Real Property. When offered the post Solicitor General in 1833 by Earl Gray, who was personally hostile to Registration, considering it 'odious to a large and powerful class',¹²⁸ he had no qualms in accepting the one condition Gray made; there was to be no Registration Bill. It would seem Campbell's enthusiasm for land law reform was politically flexible when advancement was offered.

The other seven members of the Committee were William Henry Tinney, John Hodgson, Peter Bellinger Brodie, Francis Sanders, Lewis Duval, and John Tyrrell; all elite conveyancing barristers, all members of Lincoln's Inn, and all with a common view of the law. Their concern was:

How things could be done, rather than what it was to be achieved. The wonderful flexibility of the doctrine of estates, of trusts, of powers, made everything possible that anyone could want; it was just a question of finding a way. The Real Property Commissioners wanted the substantive law left quite alone, it was well suited to the temper of the times, allowing everything sensible to be done and prohibiting nothing important.¹²⁹

John Humphreys did not fit with this ethos, although it seemed he expected to be included and he had delayed 'accepting an offer to lecture on real property

¹²⁷ Sokol (n 103) 236

¹²⁸ Hon Mrs Hardcastle (ed) *'Life of John, Lord Campbell, Lord High Chancellor of England'* vol 2 (London 1881) 19

¹²⁹ Anderson (n 104) 6

at the new University of London until the Commission was announced in Parliament',¹³⁰ and even with the support of Brougham he was ignored.

Although Humphreys would have been an excellent choice for the Commission it would seem that Peel was opposed to his inclusion.¹³¹ In a Commons sitting Peel was asked why Humphreys was not included on the Commission.¹³² Sir James Mackintosh stating that the 'merits of Mr. Humphreys were so great and so well known, that no name would have sooner occurred than his, to any person who was zealous for reform in this branch of the law'.¹³³ In the same sitting Brougham commended Humphreys and thought his exclusion 'would diminish the confidence of the public in this Commission. Albeit Peel claimed that he had no personal feelings in the selection he made',¹³⁴ this doesn't mean he had no personal feelings in the selection he did not make. He considered that Humphreys 'had written a work which had provoked controversy',¹³⁵ and it would be better if persons not committed to a particular point of view made up the Commission. This of course excluded those of the Commission who had a particular point of view that suited Peel and the landed establishment. Conservative law reform was required and 'any man of talent and information, who ventured to give their opinions on subjects of importance, were less likely to be employed than men whose minds were a blank sheet of paper'.¹³⁶

¹³⁰ Sokol (n 103) 239

¹³¹ Offer (n 109) 28

¹³² HC Deb 26 June 1828, vol 19, col 1524-6

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ *ibid* (Joseph Hume)

5.20 The Reports

The Commission presented a Blackstonian view of real property law, or at least appeared to do so. Their complacency over the state of English land law is well demonstrated by comments made early in the report when it was considered that, 'except in a few comparatively unimportant particulars', the law was 'as near to perfection as can be expected in any human institution'.¹³⁷ There was praise for settlements and primogeniture, with the expectation that the introduction of equal partibility would result, within a few generations, in the 'break down of the aristocracy of the country'.¹³⁸ There were a few, 'chiefly modal',¹³⁹ alterations necessary, although the law respecting the transfer of Real Property did come for some stronger criticism, particularly the 'roundabout way in which many transactions had to be conducted'.¹⁴⁰ However, this was not a radical re-interpretation of the law, just a reflection of the views of most conveyancers and an area of reform likely to gain support from the aristocracy.

The reports produced by the Commission resulted in little actual legislation being passed. The Inheritance Act 1833, the Fines and Recoveries Act 1833 that is 'still in force today',¹⁴¹ and the Dower Act 1833 were the main legislative instruments to emerge from the reports. All of this was as a result of the first report, and the Wills Act 1837 'broadly followed the recommendations of the fourth report'.¹⁴² Also emerging from the first report, and perhaps the

¹³⁷ The First Report (n 117) 6

¹³⁸ *ibid* 7

¹³⁹ *ibid* 6

¹⁴⁰ Anderson (n 104) 7

¹⁴¹ Charles Harpum, Stuart Bridge and Martin Dixon '*Megarry & Wade: The Law of Real Property*' (8th ed, Sweet & Maxwell 2012) 3-076

¹⁴² Simpson (n 1) 278

most important legislative act as far as this thesis is concerned, was the Real Property Limitation Act 1833. The paucity of legislative action produced as a result of the Commission's work did not mean that their efforts went completely unappreciated. Maitland commented that it was daring work,¹⁴³ although Anderson's assessment was a little less enthusiastic, labelling it as 'characteristic',¹⁴⁴ and concluding that it had been 'a pruning and grafting of ancient stock'.¹⁴⁵ Simpson continued with the gardening metaphor maintaining the work to be 'essentially a pruning job',¹⁴⁶ although more positively, he considered that the Commission did 'establish a system of private conveyancing of a simple kind, its simplicity resting upon a scheme of registration deeds and instruments'.¹⁴⁷ Notwithstanding the divergence of opinion on the general work of the Commission, it is suggested that the changes to limitation and the abolition of almost all real actions initiated by the Commission and enacted in the Limitation Act were significant. It wasn't just the simplification of conveyancing that made it important, it was the potential it had to change the whole characteristic of adverse possession, but this required the recommendations of the second report being followed.

5.21 The Limitation Act 1833

In the first paragraph of the Commissioner's review of prescriptions and limitation of actions they noted that it 'might at first sight be considered that the duration of a wrong ought not to give it a sanction, and that the long suffering

¹⁴³ Frederic William Maitland, *The Collected Papers*, vol 1 (H. A. L Fisher (ed) Cambridge University Press 1911) 199

¹⁴⁴ Anderson (n 107) 7

¹⁴⁵ *ibid*

¹⁴⁶ Simpson (n 1) 275

¹⁴⁷ *ibid*

of injury should not be a bar to obtaining right where demanded'.¹⁴⁸ This introductory paragraph appears to demonstrate the Commissioners concurred with the commonplace view of the time, and one propounded by the courts, that to squat on another's land was a wrong and should in general not be protected. Albeit this was qualified later in the paragraph when it was explained that the 'disturbance of property after long enjoyment [would be] mischievous'.¹⁴⁹ There was also, in the Commission's view, no consistency or uniformity in the remedies that afforded protection to real property, and the security offered was either insufficient or too restrictive for the purpose. Their solution was a uniform 20 year period of limitation, with the additional recommendation that all forms of recovery of land should be abolished with the exception of ejectment.

With these simple amendments the Commission concluded that there would be a reduction in litigation and save the first in possession the 'vexation and expense to which they' were 'exposed, sometimes in defeating their possession, and still more frequently when they attempted to alienate'.¹⁵⁰ Even though the Commission considered it 'contrary to all principles, that a party interested should have it in his power to relax the law in his own favour',¹⁵¹ the landed needed such a power. Their holdings had for the most part been granted by the monarch at some long past date, with possession the only indicator of their right of control. Accordingly, the fundamental

¹⁴⁸ The First Report (n 117) 39

¹⁴⁹ *ibid*

¹⁵⁰ *ibid*

¹⁵¹ *ibid* 43

approach that '[e]very law ought to be a fixed positive rule',¹⁵² had to be tempered by the ability for it to be relaxed 'on the principle of equity'.¹⁵³ The Commission's solution was two fold; a fixed and relatively short period of limitation, and of perhaps greater significance, the abolition of almost all real actions leaving ejectment in almost every case, as the sole method of regaining possession. The former would protect their land from ancient claims, the latter preventing the use of archaic real actions if ejectment failed. The imposition of these two responses would simplify conveyancing, whilst protecting possession. This, it is ventured, was an aristocratic view of limitations, and an aristocratic view of the remedies that needed to be imposed if the landed classes were to have the ability to deal freely with their land.

The simplification of conveyancing not only made alienation of land more convenient, it also increased its susceptibility to the claims of others. This could be controlled by the courts use of the appropriate legal narrative, a practice that the speedy regrafting of 'adverse' possession and the periodic reappearance of concepts such as ouster, can attest. Inevitably, this approach led to the law becoming more complex, a state of affairs that the Commission appeared to consider would be inevitable unless a register of deeds and instruments be introduced. The Commission observed that objections to their proposal to:

Abridge the longer period of limitation, as well as abolishing fine and non-claim, will be materially lessened if a general registry shall be

¹⁵² *ibid*

¹⁵³ *ibid*

established. The means of knowing the state of the title to any property will then be afforded to every claimant, and long delay in prosecuting a claim will be both less likely to happen and less entitled to indulgence.¹⁵⁴

The Commission did acknowledge that the introduction of such a register might disclose private affairs and be 'dangerous to commercial credit'.¹⁵⁵ As noted earlier this is perhaps the principle reason behind the landed opposition to a register. Giving every person who might have occasion to deal with the land the right to be aware of every encumbrance on it could have a disastrous effect on the ability of the landed to secure credit. Yet it was not realised, or perhaps considered to be a price worth paying, that under a system of registration the title of the first would be clear-cut and obviously better than any other title created in the preceding 20 years. There is an argument to say that the courts, by using an appropriate narrative, could have made a registered title almost unimpeachable, much as it has become under the Land Registration Act 2002.

5.22 The Intended Operation of the Proposed Land Registration Act

The central point of the Commission's first report was that law 'ought to be a fixed positive rule to be relaxed only on principle of equity';¹⁵⁶ for this reason the Limitation statute rejected 'equally with the old law, the popular notion, that uninterrupted possession for 20 years constituted, under all circumstances, a

¹⁵⁴ *ibid* 48

¹⁵⁵ *ibid* 60

¹⁵⁶ *ibid* 43

perfect title'.¹⁵⁷ There had to be exceptions made to acknowledge 'the negligence of the owner, the diligence of the possessor, and the peace of society'.¹⁵⁸ Yet it would seem the Limitation statute was intended to protect the first's control for 20 years and beyond, if registration had been introduced.

The abolition of non-adverse possession and the substitution of the simple requirement that 20 years must have elapsed since the accrual of possession, would seem to be clear-cut. If objective and subjective possession for 20 years could be demonstrated then any right to eject the possessor would have passed. Despite this apparently straightforward requirement, there still needed to be a demonstration of 'some species of enjoyment inconsistent'¹⁵⁹ with the first's title. What exactly Hayes means by enjoyment inconsistent with the first's title is unclear, but it is suggested that possession with intent by a squatter would be sufficiently inconsistent. Such possession would not in any way alter the first's title, or remove it from its position as the best, but it would allow the squatter to control the resource, at least until the first in possession chose to have them ejected.

It must be re-emphasised that the law sees no problem with multiple titles, even identical titles, controlling the same area of land. As discussed in chapter two, real property is essentially a cerebral concept and as such is non-excludable, or at least potentially non-excludable. Titles are projected on to the resource but are not in conflict with each other. They exist, not as binary

¹⁵⁷ William Hayes *An Introduction to Conveyancing and the new Statute Concerning Real Property; With Precedents and Practical Notes* (4th edn, 1939 Sweet & Maxwell 1939) 239

¹⁵⁸ *ibid*

¹⁵⁹ *ibid* 246

opposites, but rather as titles in their own right and as such each has the potential to be the best. Yet the best is not the best because it is superior: it is the best because it is the oldest. As Hegel explains, a title is created by the embodiment of the resource concerned, an embodiment that can only take place if there is a vacancy. However, the title a person has is their own and it persists even when other titles give better rights, or potentially better rights, over the resource. Even though the law sees the person with the oldest title as having the best right of control, this is tempered by a pragmatic understanding that at some point the oldest title no longer has any currency. It must cease to be enforceable.

The purported Registration Act would have demonstrated whose title was the oldest, with the Limitation Act operating to ensure that the person with the oldest, and therefore best title, could continue to assert their rights unhindered by any other claim. However, there had to be a point beyond which the oldest title became too old to be reasonably affirmed; accordingly, 'desertion or non-occupation of 20 years, or upward, wholly unexplained, may be held to bar recovery against a present adverse possessor',¹⁶⁰ or once the Limitation Act termed it a possessor. The original first in possession's title would not be destroyed, it would simply lose its premier position in the hierarchy of rights.

If the Limitation Act had operated in this way it would have allowed the courts to consider the character of possession rather than having to make 'strained presumptions in favour of the rightful title'.¹⁶¹ The existence of a register would

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

have allowed the courts to construct possession in one who was not overtly controlling the resource, as long as there was no obvious abandonment. This was something the courts were happy and capable of doing; as Slade J indicated in *Powell*, if there is no 'evidence to the contrary the owner of the land with the paper title is deemed to be in possession'.¹⁶² The law would thus, without reluctance, ascribe 'possession either to the paper owner or to persons who can establish a title as claiming through the paper owner'.¹⁶³

This statement by Slade J is completely in line with the intent of the Limitation Act 1833 and the purported Registration Act. Under the acts the first in possession, or the registrant, would have had to continually demonstrate their intent to possess. Hegel explained that there had to be some sort of continuing interaction with the resource for a person to remain the first in possession. This, on the face of it, requires a person to demonstrate some overt and sustaining connection with the resource; however, this relationship needs only the 'slightest acts done by or on behalf of the owner',¹⁶⁴ to establish its continuance and negate any question of 'discontinuance of possession'.¹⁶⁵ If the registrant fails to exhibit this slightest sign and therefore be construed as in possession, the squatter could fill that space vacated. But this was only if they could demonstrate their own intent to possess, with a sign to indicate their continuing embodiment of the resource.

¹⁶² *Powell v McFarlane* (1979) 38 P & CR 452 (Ch), 470

¹⁶³ *ibid*

¹⁶⁴ *ibid* 472

¹⁶⁵ *ibid*

However, discontinuation of possession would not automatically start the limitation clock; if there were no other to take their place then the courts would continue to construct possession in the first. Slade J's clarification in *Powell* holds true with the intentions of the Commissions. Without a squatter any discontinuance of possession by the first would be of little or no consequence. English law does not recognise the concept of *terra nullius*,¹⁶⁶ at least domestically, and possession would therefore have had to remain with the registrant. Accordingly, the requirement that any possession by a squatter needed to be manifest and indicated by an intent to treat the resource as a first in possession, still needed to be satisfied if a title was to be created. If it were not, possession would remain with the registrant, however they treated the resource.

The acceptance that a squatter could acquire a title unhindered by the need to demonstrate their occupation was in some way adverse, did not mean the Commission intended to make the acquisition of land to be easier. Dispensing with the doctrine adverse possession was intended to simplify the law, yet not at the expense of the original first in possession; registration's role was to protect the first by indicating the best right to control land, much as the present Land Registration Act does. Yet there was to be one important difference between the Commissioners intended reform and the one introduced in 2002. The Commission's Registration Act would have recognised squatting and the potential need for equitable interventions, whereas the present Act sees registration as trumping all other titles. The 1830s Registration Act would have

¹⁶⁶ Nobody's land

accepted that abandonment of possession could be indicated by a first's inactions, whereas the present Act ignores any such tardiness.

5.23 Subsequent Development of the Purported Legal System?

It can only be speculated as to how the courts would have treated the alternative legal regime introduced by a combined Limitation Act and Registration Act. It is suggested that discontinuance of possession by the first, and subsequent embodiment by the squatter, for a period lasting more than 20 years would be sufficient in most cases, to promote the squatter's title to the best, the result being that the ejection of the squatter could not be pursued. Yet the courts developing this new narrative were the courts that had demonstrated up to this point the avowed intention to protect the land-owning classes. The courts could well have seen the fact of registration as being a sufficient sign, in the Hegelian sense, to indicate a continuing intention by the first to possess the resource. There need be, after all, only the slightest act done by or on behalf of the first to indicate their continuing intent to possess. This, it is suggested, could be interpreted as a form of absolute control in which it would have been impossible for a squatter to create a title, there never being any discontinuance of possession by the first. It would have been a form of possession that would have allowed titles to become stale, and land to become unused and unusable. The acts, if narrated in this way, would have protected the first's title to a degree seemingly never imagined by the landed of the time; in fact, they would have brought about a state of affairs that could almost be acknowledged as ownership. In doing so they perpetuated the insanely complex law the Commission was attempting to eradicate.

The suggested outcomes from the introduction of the purported Registration Act are only two of the possible narratives that may have resulted. The intention of the Real Property Commissioners would appear to be in line with the first. Their aim was to simplify conveyancing and aid the commercial exploitation of land. For this to be achieved the Limitation Act 1833 was designed, like all previous statutes, for the limitation of actions, 'for the purposes of quieting possession'.¹⁶⁷ Reform of the complex law of adverse possession, the abolition of esoteric doctrines such as descent cast, and the elimination of almost all real actions, or as Blackstone would have it the 'most ancient and highly venerable collection of legal forms',¹⁶⁸ were set to attain this. Yet for all of these measures to be as effective as the Commissioners intended, a register of deeds and interests was required; without such an archive, the courts were required to re-adapt the law and reintroduce the concept of adverse possession with all its arcane doctrines.

The second suggested narrative is no more than a hypothesis as to what the courts might have done if the Limitation Act had been supported by a Land Registration Act; although it is a hypothesis in line with their previous actions. The aristocratic political power base of the time allowed the recommendations of the Commission to be ignored, even though they might have instigated a protection that was almost absolute. The elimination of the fiction of adverse possession was less important than preserving their secret dealings with land. It took until 2002 for an effective system of land registration to be introduced,

¹⁶⁷ Hayes (n 157) 198

¹⁶⁸ 3 Bl Comm 10

although unfortunately the fiction of adverse possession was still not dealt with. Instead of acknowledging that a squatter occupied the land by colour of title, it was decided that adverse possession and the impenetrable law that went with it, should still exist.

5.24 Conclusion

This thesis has put forward a reasoned and reasonable narrative as to why adverse possession can be seen as a legal fiction, however it is a narrative that is open to challenge if the squatter is viewed as a possessor of wrong. As was explained in the introduction it does not matter if the possession was in good faith or morally right, the squatter is inevitably seen as a trespasser. This is a problem if adverse possession is to exist as a legal fiction. However, without trespass the binary difference between the first in possession and the squatter disappears and the alternative narrative set out in this thesis makes complete sense.

Trespass is a condition of groupthink no one wants to challenge. Nobody really speaks about it or rationalises it, it is just there justifying the law's present approach and its arcane narrative. If the squatter is seen as a trespasser, then there exists a fundamental obstacle to the credibility of this alternative narrative. However, the acceptance that squatting and trespass are two intrinsically different states allows the last obstacle to this linear narrative, connecting medieval law and the present day, to be removed.

If registration allowed the courts to compose a narrative which saw it as a persisting sign of the first's intent, and in light of the court's previous decisions which was a distinct possibility, there could be no discontinuance of possession, and consequently no room for another to take the first's place. In such a situation any entry by an embryonic squatter would have had to be construed as trespass, trespass that would be continuing. In such a situation the would-be squatter, could not be a squatter, and a title could not be created, and the first in possession not be replaced. There is a certain similarity to the 2002 Act here.

However, the Commissioners in the Limitation Act 1833 overtly excluded any concept of absoluteness, considering 20 years of possession by a squatter would be enough to make their title the best; accepting it would seem, that relativity of title persisted and possession was still the basis of control. Indeed, if this were not so titles would become stale and stewardship of land would become problematic. The conclusion to this work will explain that the 2002 Act has not emasculated squatting, not introduced a concept of ownership, and not fundamentally changed the basis of possession and with it land law. The conclusion reached is equally appropriate to the situation that might have occurred in 1833. However, before going on to this final explanation it is necessary to set out why squatting and trespass are two distinct concepts. In fact they must be distinct concepts if relativity of title is to exist. Like most of this thesis the answer to this question starts in the past, yet it also brings together the other concepts outlined in the rest of this work.

Chapter 6

The (Un)reality of Trespass

Introduction

It is acknowledged in legal theory that every entry on to land creates a title to that land. It is therefore perfectly possible for there to exist more than one fee simple interest in any given parcel of land. This principle provides the philosophical basis on which adverse possession is founded. Yet, as was explained in this introduction, it is a generally accepted fact that to be in possession as a squatter is a wrong. If Lord Denning's dubious statement that squatting is a criminal offence under the Forcible Entry Act 1381 is put to one side, then the only possible criminal offence is squatting in a residential building.¹ However, this offence is also open to question. The Act states that if 'a person is in a residential building as a trespasser having entered as a trespasser'² they commit an offence under the Act. However if, as the chapter will argue, a squatter is not a trespasser logically they cannot be an offender.

If a squatter is not an offender – and even if the last point is questioned, residential squatting accounts for a small proportion of adverse possession claims – the morally equivocal aspect of squatting would seem to be due to the idea that a squatter is still a trespasser. Indeed trespass is 'inherent in the

¹ Legal Aid Sentencing and Punishment of Offenders Act (LASPOA 2012) s.144

² LASPOA (2012) s.144 (1)

requirement that the squatters possession be adverse'.³ This statement appears to support the requirement that the squatter's control must in some way conflict or be detrimental to the first in possession; it could be said that it perpetuates the requirements that ouster be demonstrated. However, as Lord Browne-Wilkinson stated in *Pye*, although 'it is convenient to refer to possession by a squatter without the consent of the true owner as being 'adverse possession' the convenience of this must not allow to be reintroduced by the back door that which for so long has not formed part of the law'.⁴ Squatting should simply refer to 'possession of a person in whose favour time 'can run'. It is not directed to the nature of possession but to the capacity of the squatter'.⁵ Yet by viewing any entry on to land by a squatter as a tort ensures that such occupation must be adverse.

This chapter will advance the idea that a squatter is not, and in fact cannot be, trespassing. The theories discussed in the previous chapters demonstrate that titled occupation is a dynamic process changing to accommodate an unstable perception. Accordingly, trespass is an abstraction that cannot be applied to the squatter. Historically the law recognised this and differentiated between the trespasser and the squatter, the binary disjunction seen between the first in possession and the squatter was not recognised. What the law required was a clarification of the nature of the occupation, i.e. was there subjective and objective possession? If this were the case, when the squatter's possession was challenged, all that was necessary was the undertaking of a simple exercise: which of the two has the superior and therefore better title?

³ Amy Gaymour, 'Squatters and the criminal law: can two wrongs make a right' (2014) 73 C L J 484, 484

⁴ *J. A. Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) [35]

⁵ *ibid*

However, the law fettered the squatter's ability to gain continuing control by seeing every occupation as trespass and therefore, constituted some sort of offending behaviour; if that wrongful behaviour was not criminal then it must be a tort. Wrongful behaviour had to be labeled as such; otherwise it might not be seen as wrongful.

As this work has discussed, a wrong is only wrong if the narrative of the law tells us it is. There is no need for this legal narrative to be correct; correct does not exist, it simply needs continual legitimisation by a knowledgeable group for it to prosper. This narrative's power also increases proportionally with its historical iteration and reiteration, until it becomes unchallengeable, or rather almost unchallengeable. Yet, any story is susceptible to another, more compelling one, and this chapter will set out to narrate that opposing iteration. Naturally this alternative narrative is low on the power knowledge matrix, yet this does not make it less 'true' than the established story, just subscribed to by fewer people. However, this is a state that can change, it just needs enough people to believe it and reiterate it.

6.1 The Creation of Title

When the concept of ownership was discussed in chapter two it was concluded that it was difficult to pin down. Rights to land had to be mediated through the intangible entity of the estate, with this estate defining the nature and scope of a person's title. Land itself is not necessarily property, but a person's title is; with the property a person had in that title being near the maximum end of the propertyness scale. It is only through voluntary

alienation, that is the subjective will evidenced by objective possession, for termination of the title to occur. However, this title, whilst it remains embodied by the person's will, only gives a potential right of control over a resource. As explained earlier, the control of a resource and control of a title are two separate processes; they exist to complement each other, with the possession of the latter being a prerequisite for the ability to perform the former. But similarly, if there is no title there cannot be any control of a resource.

6.2 Title by Occupation

If this is accepted and title gives a potential right to occupation and therefore control land, then the obverse must also be true; occupation gives a potential to create a title. However, this potential can only be satisfied if there is a vacancy in control. As Hegel explains, if the first person withdraws their embodied will from a resource then another will can take its place and assimilate control, thus creating their own title. However, this assimilation of control and with it the constitution of a title by the squatter, does not extinguish the first's title, just their right of control. This fact is confirmed by the Law Commission, which considers that the first in possession and the squatter both have titles which are 'absolute in the correct technical meaning of that word because they may endure in perpetuity'.⁶

However, it must be emphasised that every entry onto land does not create a title, this understanding is heretical; it confuses the concept of trespass with that of a willed occupation commenced after disengagement of the resource

⁶ Law Commission, *Land Registration for the Twenty First Century: A Consultative Document* (Law Com No 254, 1998) 10.23

by the first. It is only the latter that creates a right of control. Yet this confusion has not always existed, as has been explained in the previous chapters; although the courts appeared to steer a pragmatic path through the vicissitudes of the common law, there always existed a philosophical basis that guided them. As Pound pointed out, the strength of the common law lay in its ability to provide certainty and the power of growth. Certainty was ensured by the application of rules and doctrines, but only within reasonable limits; growth was safeguarded by never fixing a principle authoritatively once and for all.⁷ Therefore, as was explained previously, the law has always followed a dialectic path, even if it was not acknowledged. It was this path that allowed the calculus that produces control to function.

This dialectic reasoning is no doubt responsible for the law constructing the requirement that trespass be inherent in the occupation by the squatter. It is questionable why and how the courts did so. It might have been constructed from the introduction of an action that enabled the termor⁸ to have the remedy of ejectment; legal fictions were developed from this that were used to paper over the deficiencies of real actions. As was explained in chapter five this allowed the powerful landed class to have better control of their land, with the added advantage of allowing the creation of a binary difference between the 'mere' squatter and the first in possession. Yet, the same dialectic reasoning can be used to explain why this conclusion could be incorrect; thereby instigating an alternative, and perhaps a more historically correct narrative of the law.

⁷ Roscoe Pound, *The Spirit of the Common Law* (Routledge 1999) 182

⁸ Tenant for a term of years rather than life. Such a tenant was not a freeman.

6.3 The Historical Approach to Possession

The common law approach that detached the incorporeal right to exercise control of land from the physical reality of the land, was founded on the concept of seisin, which lies at the root of property law. So, if control is admitted to be the root of title, and control with necessary intent creates a title, 'which against all subsequent intruders, has the incidents and advantages of a true title',⁹ it would be difficult to hold that such an occupier is also a trespasser. The view that there can only be one legal fee simple title at any given time is fallacious; 'it confuses the weakness of a person's title with the potential duration of that person's estate'.¹⁰

6.4 Relativity of Title

The idea of relativity of title was central to the pragmatic approach of English land law, it allowed the 'possibility that an estate in land can at one time be valid and void, depending on which other claimant's title it is compared with';¹¹ or perhaps more accurately enforceable or unenforceable, depending on whose title it is compared with. The multiplicity of titles, and the singularity and exclusivity of possession mean that the one in actual occupation does not automatically have the right to control the resource. As the calculus of control indicates if the first in possession has not withdrawn their will from the resource then another cannot replace it. As common law developed this

⁹ Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford University Press 1888) 95

¹⁰ Law Commission No 254 (n 6) 10.23

¹¹ David Fox 'Relativity of Title at Law and in Equity' (2006) 65 *Cambridge Law Journal* 330, 335

possible paradox was recognised and entry onto land by one who was not the first was treated in two different ways.

The displacement of a *de facto* controller, i.e. disseisin, usually with violence or at least subterfuge, was always treated as a breach of the peace and a tort whereas to enjoy quiet occupation, even without a paper title, was not only regarded as non-tortious, but was also protected by the courts. Although appearing relatively simple, the fact that English law did not recognise the concept of ownership and saw control as indicative of right, resulted in the single descriptor of possession becoming problematic. To counter this the concept of possession evolved to develop two different meanings, the first to denote a fact, the second to describe a legal relationship. When used to describe legal relationship it was often qualified by some other term such as legal, constructive, civil, or possibly possession in the eyes of the law; ostensibly describing possession in the Hegelian sense. By fostering this dual meaning the courts were able to differentiate possession in the eyes of the law, from the *de facto* possessor; that is possession that manifested an embodied will and that which did not.

By establishing what could be viewed as a dynamic process, the courts were able to expand or contract legal or embodied possession as they saw fit, and by so doing could construct control in the 'correct' person. This continuing development of a more complex understanding of possession was necessary to reflect the establishment of a more sophisticated society, where land represented power and wealth. However, even in an increasingly modern

society there still remained the need to prove a right of control evidenced by occupation. The growing complexity of this developing duality of possession can be seen if the forms of action used to protect occupation and control are studied.

6.5 Assize of Novel Disseisin

In the thirteenth century there was certainly seen to be a difference between a disseisor and someone who was seised of land without a paper title. Disseisin was wrongful ejection and was regarded as a crime, a breach of the peace, as well as a tort; whereas quiet squatting over the land was seen as evidence of occupation and control, until the contrary could be proven. The possessory assizes of novel disseisin and mort d'ancestor were designed with the protection of seisin in mind. It was not necessary for the disseisee to prove title, only that they had been turned out of quiet enjoyment of the property 'which in fact was usually brought about by acts of violence'.¹² At this point in legal history seisin was effectively possession and Pollock and Maitland¹³ argue, 'the object of protecting seisin was to protect those who have a right to seisin. In order to do this all seisin had to be protected, and if this resulted in protection of wrongful possession it was an unfortunate but unavoidable consequence'.¹⁴

¹² Theodore F T Plucknett, *A Concise History of the Common Law* (5th ed, Liberty Fund 2010) 358

¹³ Frederick Pollock and Frederic William Maitland *The History of English Law; Before the Time of Edward I* vol 2 (2nd edn, Cambridge University Press 1898)

¹⁴ *ibid* vol 2 42

The assize of novel disseisin was developed under 'the influence of Roman law, acting either immediately, or through the medium of canon law'.¹⁵ It was based upon, 'either consciously or otherwise, the *actio spolii* of the canonists, which was itself an adaptation of the Roman law interdict *unde vi*',¹⁶ which was granted to anyone violently dispossessed in order that they may recover possession. According to *actio spolii* 'a bishop whom secular authorities had deprived of his property or bishopric' would be protected 'from any criminal prosecution until these had been returned to him'.¹⁷ This 'requirement that a *spoliator* should be restored at once to his possession, and should not be called on to defend his title while out of possession',¹⁸ can be seen to be directly influential on novel disseisin. Albeit the assize was heavily influenced by Roman and canon law, 'once adopted, English law very speedily made it her own',¹⁹ and 'the sharp distinction between property and possession made in Roman law did not obtain in English law; seisin is not Roman possession, and right is not Roman ownership'.²⁰ Both of these concepts are represented, in English law by seisin.

The intention of the assize was to stop the disseisor from acquiring procedural advantage from their own misdeed. In an action brought under a writ of right a person who was seised of the land could gain marked advantage over the demandant. He could institute interminable delays and impose on the demandant, the burden of proving his superior seisin. However, by providing a

¹⁵ *ibid* vol 2 48

¹⁶ G E Woodbine, 'The Origin of the Action of Trespass' (1923-1924) 33 Yale L J 799, 807

¹⁷ Eric Descheemaeker, 'The Consequences of Possession' in Descheemaeker E (ed), *The Consequences of Possession* (Edinburgh University Press 2014) 21

¹⁸ Plucknett (n 12) 358

¹⁹ Pollock & Maitland vol 2 (n 13) 48

²⁰ Plucknett (n 12) 358

personal action as opposed to a proprietary one, the protection of seisin was possible, not because of any right owing to the one seised but solely to protect his right of control. To do otherwise would have invited violence and land grabbing.

It can be seen from this that novel disseisin could protect the one seised of land, even against pleas of a better, older seisin. Indeed if a rightful owner had been disseised, once the four days which were allowed for self-help had passed, any attempt by him to eject the newly seised could result in an action in the assize. Although it should be noted that this four-day period was not strictly applied; the intent behind the assize clearly demonstrates that to occupy land with or without title was not trespass. Trespass was the grabbing of land with violence or subterfuge, the ejection of one who was seised; with their seisin being protected whether or not their title was the oldest and best.

However, novel disseisin was very much of its time, it was intended to protect the King's peace and ensure order throughout the land. Maitland argues that it was designed to 'strike a heavy blow at feudalism',²¹ and to 'make every possessor feel that he owed his blessedness of possession to royal ordinance, to the action of the Royal Court'.²² Others disagreed and considered the royal policy 'was no more than to compel lords and their courts to follow their own customs'.²³ Whether it was the design of a Machiavellian monarch or a 'king who presumed the morality and necessity of feudal

²¹ Frederic William Maitland, 'The Beatitude of Seisin' (1888) 4 L Q Rev 24, 27

²² *ibid*

²³ Paul Brand, 'The Origin of English Land Law: Milsom and After' in P. Brand (ed) *The Making of the Common Law* (Hambledon Press 1992) 214

relations',²⁴ it was intended to protect seisin and for this purpose it worked well. 'The plea rolls of Richard's reign and John's are covered with assizes of novel disseisin, many of which are brought by very humble persons and deal with minute parcels of land'.²⁵ The assize was an effective way for those seised of land to protect that seisin: paper title was not important only quiet enjoyment was necessary. The action of trespass developed to protect seisin and it could be used by the one seised, even if their only title was one generated by occupation.

6.6 Trespass

Novel disseisin was not just a means to recover occupation; an unsuccessful attempt to seize the land of another could constitute an actionable disseisin. Even the mere troubling of one seised with no attempt to eject, could be disseisin if that possessor chose to treat it as such. The reason for this can be found in the fact that after 1198 'damages are regularly noted in novel disseisin cases'.²⁶ Before this date Glanvill's notebook, although not showing the awarding of damages, displays the embryo of this idea.²⁷ Not only was the disseisee to be returned to his tenement but he could also expect to 'obtain the 'fruits' of the tenement from the disseisor'.²⁸ It would be impossible, or next to impossible, to return these 'fruits' which could include such things as crops grown on the land or hay cut etc.; therefore another way had to be found. Woodbine considers that early cases 'strongly suggest that originally payment

²⁴ R C Palmer, 'The Feudal Framework of English Law' (1981) 79 Mich L R 1, 2

²⁵ Pollock & Maitland vol 2 (n 13) 48

²⁶ Woodbine (n 16) 807

²⁷ Frederick Pollock and Frederic William Maitland *The History of English Law; Before the Time of Edward I* vol 1 (2nd edn, Cambridge University Press 1898) 523

²⁸ *ibid* 524

of damages was an alternative to restoring the chattels'.²⁹ After this early attempt to compensate for the loss of the fruits of the land it soon became the norm for juries to award damages without reference to the compensatory nature of them.

6.7 The Singular and Exclusive Nature of Trespass

Trespass, being 'singular and exclusive',³⁰ could only be relied on by one in possession. It was not intended to 'protect property rights in things, but one's factual possession'.³¹ Blackstone defined trespass as any 'unjustifiable intrusion by one party upon the land which is in possession of another'.³² Martin B agreed with this statement, holding that it is 'common learning that to maintain trespass to real property the plaintiff must have been in possession at the time the trespass was committed. The gist of the action is the injury to possession, and plaintiff having the title will not enable him to maintain trespass.'³³

Although it has been contended that there is 'much to suggest that the courts have abolished'³⁴ the requirement that control is necessary for an action in trespass, recent authority does not appear to agree with this. Lord Browne-Wilkinson makes the point that 'if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter'.³⁵ Lord

²⁹ Woodbine (n 16) 808

³⁰ Pollock & Wright, (n 9) 20

³¹ Simon Douglas, 'Is Possession Factual or Legal' in Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press 2014)73

³² 3 Bl Comm 209

³³ *Hodson v Walker* (1872) L R 7, Ex 55, 69

³⁴ Douglas (n 31) 74

³⁵ *Pye* (HL) (n 4) [42]

Hope has confirmed that it is 'common ground that a trespass occurs when there is unjustified intrusion by one party upon the land which is in possession of another'.³⁶ It would seem that modern law still regards trespass as an action to protect possession, yet the question that needs to be determined is how law defines possession, or perhaps more accurately, the possessor.

6.8 Factual and legal possession

As stated previously common law is 'very much a part of a wider European tradition',³⁷ and built on three pillars; Roman law, canon law, and feudalism. This fact is amply demonstrated by the development of assizes intended to protect seisin. Notwithstanding this, the common law and Roman traditions treated possession differently. 'English possession, despite some discrepancies, is control'. Roman law however is 'mostly conceived of possession in relation to ownership'.³⁸ It was a 'matter of principle in Roman law to differentiate ownership from possession'.³⁹ It can be seen therefore that the real division between the civil and common law systems were the consequences attached to possession. This contradiction between possession conceived in relation to ownership and the orthodoxy in common law that possession immediately creates a title, is a 'proposition, entirely baffling'⁴⁰ to civilian lawyers. This common law title was of course relative and could be defeated by someone with a better, older, title. However, the idea that occupation generated a title that was good against anyone except the original

³⁶ *Star Energy Weald Basin Ltd v Bocardo SA* (2010) UKSC 35, [6]

³⁷ Descheemaeker (n 17) 13

³⁸ *ibid* 15

³⁹ W W Buckland & Arnold D McNair, *Roman Law and Common Law; A Comparison in Outline* (F. H. Lawson ed. 2nd edn Cambridge University Press 1965) 75

⁴⁰ Descheemaeker (n 17) 24

first in possession has been criticised as illogical. It would result in 'anyone who had been in possession, even for a day',⁴¹ having the right to claim from anybody who could not demonstrate a prior right of control.

However, this argument fails to consider the important distinctions between unsanctioned occupation of land under control of another, which would be trespass, and occupation in which the occupier has ceased their embodiment of the resource. If the original first in possession abandoned the land, that is they had ceased to overtly display their intent to control, then they were no longer seised. This discontinuance of possession indicated that the resource was free to be embodied by another's will, i.e. another person gained the right to be seised of the land.

6.9 Seisin

Seisin, 'a multifaceted concept that lawyers left undefined',⁴² was itself very much a part of the pan European tradition of law. It lay at the root of title and although certainly not exactly possession 'the further back we trace our legal history the more perfectly equivalent the two words *seisin* and *possession* become'.⁴³ Early ideas of it 'were closely connected with the idea of enjoyment',⁴⁴ however as life became more sophisticated and new ways of holding land were needed, this simple concept had to evolve. There was developing, in the late twelfth and early thirteenth century, the idea that seisin could be withheld from certain types of tenant. For instance a termor, who

⁴¹ James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 Am J Comp L 293, 303

⁴² Descheemaeker (n 17) 14

⁴³ Frederic William Maitland, 'The Mystery of Seisin' (1986) 2 L Q Rev 481, 481

⁴⁴ Pollock and Maitland vol 1 (n 27) 34

unlike a tenant for life was not considered a freeholder, had a personal rather than proprietary right over their land. For this reason the termor was not seised in the sense that his occupation could be protected by the possessory assize.⁴⁵ Thus whilst the termor could be seen to have factual occupation, their lessor would maintain a continuing intent to control the land, which would have manifested itself in a number of ways. For instance the payment of rent by the termor, which would acknowledge the lessor's enduring control.

Once this point in the evolution of law was reached and the legal system recognised that someone could be deemed to be the controller of land they did not actually occupy, control could 'no longer be said to be a simple matter of observable reality'.⁴⁶ It became recognised that a first in possession had to demonstrate 'that he came to the land by title, for example, by a feoffment, or else that he had been in possession for some little time'.⁴⁷ Pollock and Maitland note this trend in the thirteenth century where Bracton is seen to distinguish between control and simple occupation. He 'seems inclined to make light'⁴⁸ of the old rule that the ejected tenant has four days for self-help. In describing disseisin Bracton explains that as soon as the tenant is ejected he has 'ceased to possess *corpore*, but he has not ceased to possess *animo*, he has lost the *possessio naturalis*, but not the *possessio civilis*'.⁴⁹ This legal control is not lost until 'he has acquiesced in the fact of his disseisin'.⁵⁰ This

⁴⁵ The action of ejectment was developed to protect the termor's rights. As the proprietary actions used by life tenants, became slower and more complex ejectment, adapted by the use of legal fictions, was adopted as a speedier method to protect their proprietary interests. The adoption of ejectment by freeholders may well have contributed to the belief that one who embodied land in place of the first in possession was a trespasser. This will be discussed more fully later in the chapter.

⁴⁶ Descheemaeker (n 17) 25

⁴⁷ *ibid* 50

⁴⁸ Pollock and Maitland, vol 2 (n 13) 50

⁴⁹ *ibid*

⁵⁰ *ibid*

quote raises two interesting points. Firstly the implicit recognition that control of a resource is a dialectic process, requiring both mental and physical manifestations of the right to control; acknowledging that these elements cannot be static. Secondly the need to replace seisin with terms that could reflect the developing understanding of peoples interaction with land.

By replacing seisin with terms that recognised dominium over land and occupation of land were different states, possession came to be used in a technical legal sense, *possessio civilis*, and a non legal sense, *possessio naturalis*. Thus implicitly the courts were recognising the dialectic requirement of acquiescence of control by the first in possession, before another's embodied will could take its place. However, using the identical word to describe trespass and occupation protected by the assize, led to possession obscuring the exact nature of a person's dominium. Possession was being used interchangeably in its ordinary everyday sense and as a technical shorthand term to describe legal control.

When possession is used in connection with land, the identical word describes control exerted by the first, even when not in physical possession, and simple occupation by one, with or without the permission of the first. However the seemingly straightforward difference in what could be termed factual and legal possession becomes troublesome due to the technical interpretation used by lawyers. As previously explained and illustrated by Parke J interpretation of possession, in *Dunwich (Bailliffs) v Sterry*,⁵¹ the courts can expand or narrow

⁵¹ *Dunwich (Bailliffs) v Sterry* (1831) 1 B & Ad 831, 109 ER 995, 842

the definition of possession as they see fit. By narrowing their interpretation, someone with an apparent high degree of physical and mental control can be defined as a simple factual possessor. Conversely, the definition can be expanded so that in cases where there is patently no physical possession the courts will construe a fictitious control.

6.10 Right and Wrong Possession

The dual nature of possession meant the courts could fix the first in possession and the squatter as opposed to each other. By describing someone as being the rightful possessor, the necessity for someone to be the wrongful possessor became, not just possible, but mandatory. Ordinarily, if the first retains the intent to possess and demonstrates that intent in some way, their continual right of control will prevail and any other entry on to the land without their permission is likely to be a trespass. The law is quite comfortable with this, seeing the first as the rightful possessor and the trespasser as an unlicensed interloper. This is relatively straight forward, or at least it seems so. If a person is encroaching onto land under the control of another, without permission or reasonable excuse, then that encroachment must be wrong.

Yet, as dialectic theory illustrates, if the first desists from demonstrating their intent and in effect disengages from the land, it leaves space for another to take possession, to essentially become the new first. In this way the relationship with the land demonstrated by the original first in possession and the new first in possession, the squatter, is of a different tenor. Possession for the squatter becomes possible; indeed it is the only possible description of the

state of affairs that now exists. However, this is a problem for the law that still wishes the original first as the rightful controller; thus maintaining the binary division between the two. By describing the new first's possession as adverse permits the binary to be maintained.

Notwithstanding the law's insistence on the binary, land is that cubic area of fresh air described in chapter three and control is only possible through the operation of a title, with this title conferring only a potential right of dominium. Without the necessary intent demonstrated by an overt sign of continuing control, that dominium will not prevail. It matters not that there are multiple titles; control only exists in the one who demonstrates possession *corpore* and *animo*. Therefore, only the first in possession has the right of control over a resource. To consider that one who is trespassing can also acquire a title is nonsense, trespass can only end and title begin, when the first has withdrawn their will from the land. The original first isn't evicted, driven out, or dispossessed, they have left a vacancy which another can take advantage of. When taking advantage of this vacancy the squatter does not do so under some lesser form of title, they simply become the new first. Any other interpretation is a fallacy 'which confuses the weakness of a person's title with the potential duration of that person's estate'.⁵²

The law finds adverse possession a useful term to differentiate the first from the squatter, but in so doing it diminishes the latter. If the squatter simply becomes the new first they control the land on exactly the same terms as the

⁵² Law Commission No 254 (n 6) 10.23

original, even if their title is, what might be called, second-string. However, it is useful for society to separate the original first in possession from the person who takes their place, by doing so the status quo is preserved and with it the wealth and power that 'ownership' of land provides. By applying the hierarchy of title to the nature of control that title engenders, the courts are able to adopt a legal narrative which sets the first in possession and the squatter as binary opposites. One is a possessor of right and the other of wrong. This makes room for the courts to expand or contract possession to suit the absentee first; i.e. the possessor of right as against the possessor of wrong. It is authoritative speech uttered by the judiciary, which gives this legal narrative its power.

6.11 Judicial Authoritative Speech: Discourse and Performativity

Authoritative speech is not the language, discourse or a deliberate act of a single judge; rather the performativity of a judge's statements comes from the use of prior authorities, authorities that are located in preceding narratives. The judge does not derive his power from the words he utters, but rather the iteration and reiteration of previous statements. 'Hence, the judge who authorises and installs the situation he names invariably cites the law',⁵³ or the version of the law which reflects the narrative that suits the social necessity he is pursuing. By using the citation of existing law he gives 'the performative its binding or conferral power'.⁵⁴ As Foucault⁵⁵ explained, judicial statements are not truth wielded by a coercive power; rather the judge's power comes from his position within a group and the history behind that group. Accordingly, the

⁵³ Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 1993) 225

⁵⁴ *ibid*

⁵⁵ Please see chapter four, for a more detailed discussion of Foucault's theories of knowledge, power, and discourse, alongside Butler's explanation of performativity.

'judge's judgement is not a singular act; instead the judgement repeats or mimics the discursive gesture of power'.⁵⁶ Then by iteration and citation, which in turn is reiterated and re-cited, the statement gains more power and confers more 'truth' and greater legitimacy. This greater truth and legitimacy enables the judiciary to be 'selective, admit, refuse to recognise or render silent other voices, interpretations and constructions'.⁵⁷

Therefore, this discursive practice, although not making statements 'true', nevertheless makes them real and will exclude from recognition anything that does not correspond with this 'truth'. To be in control of a resource a squatter must demonstrate their embodiment; in so doing they must have replaced the first in possession and created a fee simple title which is 'absolute in the correct technical meaning of that word'.⁵⁸ However, this is not the narrative the courts choose to follow. Despite the equality of occupation the courts choose to term the squatter's control as not just adverse to the first's but also trespass. It is the power of judicial voices and the iteration and re-iteration of the same dogma that have made this situation true. Judicial opinions that appear to be a variance with the binding narrative, no matter how senior the judge, can be selectively overlooked or not recognised or simply interpreted in line with previous decisions.

Contemporary decisions that appear to take a more rational approach when explaining adverse possession still retain the binary differences that pervaded

⁵⁶ Sarah Beresford, 'The control and determination of gender and sexual identity in law' (PhD thesis, University of Lancaster 2000) 6

⁵⁷ *ibid*

⁵⁸ Law Commission No 254 (n 6) 10.23

the historical narratives. The language used by Slade J and Lord Browne-Wilkinson remains equivocal and although, as will be argued below, their judgments can be seen as taking a more balanced approach to the doctrine, their judgements continue the historical story. Their reasoning could be read as advocating a less binary approach, incorporating comments that would appear to see trespass and adverse possession as two different acts. In addition to this Lord Browne-Wilkinson favoured an approach that described the squatting occupation as simple possession. However, even though their judgements can be read as incorporating a more reasoned approach, there does not appear to be any real belief that the power of historical narrative could be challenged. This is particularly so in the case of *Pye*, where the comments of the other Law Lords reinforce the accepted doctrine. However, there are seeds in Slade J's and Lord Browne-Wilkinson's approach which allow a more radical view of this to be argued.

6.12 *Powell, Pye, and Trespass*

In *Powell v McFarlane*⁵⁹ and *J A Pye (Oxford) Ltd v Graham*⁶⁰ both Slade J and Lord Browne-Wilkinson appear to describe trespass and adverse possession as two different states. Whilst not overtly commenting that the squatter is not a trespasser, their judgments could be interpreted in such a way. In *Powell* Slade J appears to describe trespass and adverse possession as two different states. His observation that 'a person who originally enters another's land as a trespasser, but later seeks to show that he has

⁵⁹ *Powell v McFarlane* (1977) 38 P & CR 452 (Ch)

⁶⁰ *Pye* (n 24)

dispossessed the owner',⁶¹ appears to confirm this. He explained that during the first's occupation there exists the right to 'exercise the remedy of self help',⁶² however once that person acquiesced in their control this remedy is no longer available. Therefore, dispossession of the first confers on the squatter 'valuable privileges *vis-a-vis* not only the world at large, but also the owner of the land concerned. It entitles him to maintain an action of trespass against anyone who enters the land without his consent',⁶³ although Slade J considers that this privilege is not available against the original first in possession.

This is an interpretation that is in accordance with the doctrinal norm that requires the original first possessor's right of control to be superior to any other. However, this assumption is open to reinterpretation. There is a certain illogicality in holding that, despite the original first's inability to exercise self-help, they retain sufficient control over the resource to instigate an action of trespass. As has been argued, a title gives the holder a potential right of control and it is this, not the title, which is protected by trespass. Accordingly, the squatter must be able to exercise the right to protect their occupation against anyone in the whole world, including the original first in possession. To proceed otherwise would surely be inequitable. It would in effect be judging the strength of one title before the relative strength of the other is considered. However, there is little doubt that, although an action of trespass could theoretically be initiated by the squatter against the original first in possession, any such action is likely to have little more than pyrrhic success.

⁶¹ *Powell* (n 59) 476

⁶² *ibid*

⁶³ *ibid*

Lord Browne-Wilkinson in *Pye v Graham* also appears to consider squatting and trespassing as two different acts. He gives the example of a person being found in occupation of a locked house, explaining that he ‘may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday’.⁶⁴ Emphasising it is not the nature of the acts ‘but the intention with which he does them which determines whether or not he is in possession’.⁶⁵ For Lord Browne-Wilkinson it is intention to control, which demonstrates the difference between what he regards as legal occupation and trespass. By accentuating this important difference he appears to be establishing that one cannot be the other, a person is either trespassing or on the land under the protection of the law.

6.13 Trespass and the Limitation Act 1833

For Lord Browne-Wilkinson the Limitation Act 1833 was significant; it removed the adverse element and introduced the simple requirement that the squatter needed to be in ‘possession in the ordinary sense of the word’.⁶⁶ However, this simplicity of language disguises the problem of deciding exactly what ‘possession in the ordinary sense of the word’ is. This dilemma was recognised by both Counsel in *Pye*, who criticised the definition of possession given by Slade J in *Powell*, as ‘being unhelpful since it used the word being defined – possession – in the definition itself’.⁶⁷ Lord Browne-Wilkinson regarded this argument to be pedantic as the definition was one ‘used by all

⁶⁴ *Pye* (n 4) [40]

⁶⁵ *ibid*

⁶⁶ *ibid* [36]

⁶⁷ *ibid* [40]

judges and writers in the past'.⁶⁸ Yet simply because the definition has been so used does not mean the complications arising from ascribing two meanings to one word do not exist.

It is difficult to know what possession in the 'ordinary sense of the word' means. The technical 'ordinary sense' of possession would appear to describe control of land protected by title. The non-technical 'ordinary sense' of possession indicates simple factual occupation. If it is used in its technical sense then it must apply with equal force to the original first in possession and the squatter. If it is used in its ordinary sense it would describe either simple occupation with the permission of the first, or unsanctioned entry on to land that remains under the control of another, in which case it is trespassory. It is evident that the use of possession to define these different ways of occupying land simply leads to confusion, as the Counsel in *Pye* commented.

If possession was only used in its technical legal sense to describe a person who had a legal right to be in occupation, and trespass used to portray one who has no such right, then the problem of defining possession in law would not exist, or would be less problematic. It would simply have a single technical meaning, which would be characterised as occupation of land by one under the protection of a legal title. This would be with the title expressing the rights and limitation determined by their particular estate. It may well be what the authors of the Real Property Limitation Act 1833 sought to achieve. By removing the need for possession to be adverse the Commission were in

⁶⁸ *ibid*

effect removing a complicating factor, with the intention of instigating a regime that required possession to be used solely in its technical sense.

The adoption of such a characterisation does not mean that acquisition of land by the demonstration of technical possession becomes easier to prove. Dialectic theory saw the first in possession protected whilst they continued to demonstrate their intent to possess. It was not until their embodied will was withdrawn from the resource, effectively abandoning the land or discontinuing their possession, was it free for another to embody the resource. The bar for demonstrating this intent has always been difficult to clear; as Slade J stated in *Powell*, acts which demonstrated possession had to unequivocally manifest the squatter's intent. This requirement would not alter if the designation of trespasser was removed from one who occupied by right of title, even if this right was unlikely to be seen as first-string. It would, however, remove the notion that a squatter was a wrongful possessor and the confusion and complication caused by the use of the term adverse possession.

The idea that a squatter's occupation is trespass, wrong and adverse, has allowed the courts to regulate that occupation and in so doing protect what they regarded as legitimate control, whilst ignoring the legitimacy of the squatter's title. Yet recognition that control of land by the squatter was 'real' and protected by a title, would allow decisions on who had the right to control with both parties on an equal footing. Yet this whole hypothesis could be regarded as immaterial or theoretical since the introduction of the Land Registration Act (LRA) 2002. However, the next section will argue that rather

than the 'emasculatation of adverse possession in relation to registered land',⁶⁹ the Act could be seen as freeing the underlying dialectic concept and given the courts the ability to adjudicate, with both parties seen as equal. This is as well as reinforcing, ultimately, that the right to control land is based on possession. However, this is an argument that will be seen as controversial as the LRA is seen as protecting the registrants right almost absolutely.

6.14 Adverse Possession Under the Land Registration Act 2002

The intent of the LRA was to move the law away from a 'system in which the use value of property was dominant',⁷⁰ to that in which control is determined by 'formal rules concerning registration'.⁷¹ One of its avowed intentions was to offer 'much greater security of title for a registered proprietor than exists under the present law',⁷² by engineering a 'new conceptualism of *ownership* or *dominium*'.⁷³ This has resulted in control of land being considered as the 'closest thing in 900 years to absolute ownership',⁷⁴

6.15 Land Registration and Title

Land registration does not impose an absolute title, in fact it could be said that the Act doesn't concern itself with title at all. Simply to register land bestows on the registrant the right of possession with, for all intents and purposes, registration giving almost absolute protection to that right. However, any title

⁶⁹ Martin Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A risk assessment' (2003) Mar/Apr Conv 136,142

⁷⁰ Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford University Press 2007) 288

⁷¹ *ibid*

⁷² Law Commission No 254 (n 6) 10.2

⁷³ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press 2009) 2.2.7

⁷⁴ Martin Dixon, *Modern Land Law, (7th edn, Routledge 2010)* 428

still 'lacks that characteristic of unitary absoluteness which necessarily excludes the possibility of another person having the equivalent interest at the same time'.⁷⁵ The Act explicitly states this, holding that a squatter has an estate in the land concerned by virtue of their unregistered occupation; with, on a successful application for registration, this unregistered title⁷⁶ being extinguished and replaced by a registered title.⁷⁷ This section could be taken to confirm that a squatter has a title by virtue of their demonstrable intent, without which registration would be impossible. As Jacob LJ stated in *Baxter v Mannion*:

Para 1(1) of Schedule 6 says: 'A person may apply to the registrar to be registered if he has been in adverse possession of the estate.' That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply.⁷⁸

However, the Act itself gives no definition of adverse possession and is silent on how it is to be proven, as are the Land Registration Rules 2003 (LRR), simply stating that it is necessary to 'provide evidence of adverse possession'.⁷⁹

⁷⁵ Fox (n 11) 336

⁷⁶ The statute does not explicitly state that the squatter has a title to the land on which they are squatting, but it does explicitly acknowledge that the squatter has an interest in the property via their occupation. This may have been a deliberate action, and by excluding the signifier 'title' it was intended to demonstrate that a binary difference between the registrant and the squatter remains. However, this thesis chooses to see an estate as a right over the land in question and as such is controlled by the occupier's title. The notion that a title is a personal will be explored later in this section. However, this means that if the unregistered estate is identical to the registered estate then the title both parties have is identical, only one is by registration the other by possession.

⁷⁷ Land Registration Act 2002 (LRA 2002) Sch 6, para 9(1)

⁷⁸ [2011] EWCA Civ 120 [24]

⁷⁹ Land Registration Rules 2003, s 188(1)(a)

The LRA ushered in a new regime for affirming the best title to land, yet without any statutory definition of adverse possession it must be accepted that the common law rules still prevail. The Act gives the original first in possession a considerable degree of protection and a chance to assert their superior title, however it does not prevent the creation of another title by the squatter. In fact as Jacob LJ explained, the statute insists upon it. The first's registration makes disputes over the relative strengths and weaknesses of the titles easy to resolve; yet, the fact remains that a squatter has established a title upon entering the land, and therefore a fee simple interest.

It must be remembered that it is the title that gives the potential right to control the resource, and although the Act gives the original first the chance to demonstrate their title is the best, the squatter must have assumed the role of the new first for this to be necessary. The safety net the Act has given the registered proprietor, could have released the law from the necessity of applying mechanisms put in place to try to restrain squatting. This includes the need to construct possession in the first and accordingly make the squatter a trespasser.

6.16 Registered Land and Adverse Possession

When the Law Commission produced its third report on land registration in 1987, it considered that any substantial reform to adverse possession 'should be undertaken separately and ought not to be conditioned purely by registered conveyancing conditions'.⁸⁰ They concluded that any rights gained through

⁸⁰ Law Commission, *Third Report on Land Registration* (Law Com No 158 1987) [2.36]

adverse possession 'can continue to be accommodated acceptably in the registration of title system as overriding interests'.⁸¹ However, by the time the Law Commission published its consultative document in 2001, there had been a marked change in its views and squatting was described as 'tantamount to the sanctioning of theft of land'.⁸² It would seem that the effect of LRA in severely curtailing 'the role of adverse possession in unregistered land',⁸³ was a decision made on policy grounds. Perhaps this was due to the 'moral indignation among the public at large'⁸⁴ which squatting tended to provoke, rather than the inability to accommodate it in the new system. It would appear that the recognition of the right to control land had become a purely administrative function and a far cry from 'the quaintly medieval notion that factual possession connotes a presumptive ownership in fee'.⁸⁵ Yet it is this 'quaintly medieval notion' that allowed the common law to be 'shaped to take into account and facilitate change'.⁸⁶ However, the replacement of this dialectic by the idea that 'ownership is constituted only by administrative recordation',⁸⁷ is open to challenge.

6.17 Indefeasibility of Title

Although the LRA has been credited with introducing the concept of indefeasibility of title, this perhaps has less significance than it at first appears.

⁸¹ *ibid*

⁸² Law Commission No 158 (n 80) [10.5]

⁸³ Kevin Gray and Susan Francis Gray, 'The Rhetoric of Reality' in Joshua Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003) 204, 250

⁸⁴ Lorna Fox & Neil Cobb, 'Living Outside the System? The (Im)morality of Urban Squatting After the Land Registration Act 2002' (2007) 27 *Legal Studies* 236, 238

⁸⁵ Gray and Gray, Rhetoric (n 83) 248

⁸⁶ Alice Erh-Soon Tay, 'Law, the Citizen and the State' in Eugene Kamenka, Robert Brown and Alice Erh-Soon Tay (eds) *Law and Society: The Crisis of Ideas* (E Arnold 1978) 3

⁸⁷ Gray and Gray, Rhetoric (n 83) 248

Title has always been to some extent indefeasible. As was explained in the first chapter, before 1833 if the first in possession was dispossessed for the term of the limitation period an action for recovery was barred, yet the original first was not divested of their title. The Real Property Limitation Act 1833 sought to change this, not by means of a 'parliamentary conveyance' as Parke B speculated,⁸⁸ rather it was destroyed by operation of law.⁸⁹ However, land is not 'a thing it is a conceptual entitlement. It is no longer physical, but cerebral.'⁹⁰ Accordingly the title exists in the person rather than the land. The fact that one person gains a title does not automatically exclude another from possessing one. The superiority of one title does not destroy the other; it endures but cannot be asserted. This much has already been discussed. This explanation of the common-law theory of possession suggests that the idea of the law destroying a title is heretical; unless the person willingly divests themselves, or discontinues their intent to 'own' a title, then it will remain. Their title exists but is unenforceable, just like the squatter's.

The LRA states that 'adverse possession of a registered estate has no effect upon the title of the registered proprietor however long that period of adverse possession may have been'.⁹¹ The register therefore provides conclusive proof of the right of dominium over the registered land, yet it does not prevent the squatter's title enduring. On an application by a squatter to be registered, the registrar cannot simply refuse the request; he must give notice to those

⁸⁸ *Doe d. Jukes v Sumner* (1845) 153 ER 380, 381

⁸⁹ *Tichborne v Weir* [1894] All ER 449 (CA)

⁹⁰ Gray and Gray, *Rhetoric* (n 83) 248

⁹¹ Charles Harpum, Stuart Bridge and Martin Dixon (eds) *Megarry & Wade, The Law of Real Property* (8th ed Sweet and Maxwell 2012) 35-070

persons listed.⁹² If no counter-notice or objection is served 'the registrar must enter the applicant as the new proprietor of the estate'.⁹³ However, these actions by the registrar will only be undertaken if the squatter can demonstrate not only control, but also the necessary intent for a period of more than ten years. They must demonstrate adverse possession.

To determine whether the squatter has complied with the necessary conditions to demonstrate their legal title the common law is consulted. In *Mannion v Baxter*,⁹⁴ for instance, the Deputy Adjudicator used the principles stated by Lord Browne-Wilkinson in *Pye*, particularly those expressed in paragraphs 40-42 of that case.⁹⁵ The Deputy Adjudicator considered the use Mr Baxter made of the land was 'discontinuous and infrequent', there was no 'factual possession during the relevant period', nor the 'necessary intention to exclude the world at large'.⁹⁶ The fact that the registered title was vested in another did not contribute to the Deputy Adjudicator's decision; it was the absence of the necessary actions required to create a title.

6.18 The 'Non-Emasculation' of Adverse Possession

It could be said that rather than emasculating the squatter's right to gain a title by simple possession, the LRA has provided conditions in which it could flourish. Due to the protection which registration provides for the original first in possession, unnecessary obstacles do not need to be introduced to insulate them from the squatter. Rather than portraying original first as a possessor of

⁹² LRA 2002 (n 77) Sch 6 para 2(1)(a-d)

⁹³ *ibid* Sch 6 para 2(2) 4

⁹⁴ *Baxter* (n 78)

⁹⁵ *ibid* [64]

⁹⁶ *ibid* [70]

right in order to differentiate them from the squatter, it can be accepted that they both possess their own titles, with naturally the registered one being generally the best. In this way public policy consideration that require the use value and saleability of land to be protected, can function in a regime which preserves the registered title holder's interest. By acknowledging the squatter has a fee simple title and a right to occupation, best use can be made of a limited resource.

After ten years as the new first in possession the squatter, if they wish to have their title registered, must apply to the registrar, whence the protection offered by the LRA may come to the aid of the original first. Upon receiving the registrar's notice that another has applied to be registered, the registered original first can reassert their control. They simply use their registered title to demonstrate their superior right to exercise control over the resource. At this point if the squatter did not relinquish their occupation they would, usually, become a trespasser.

Although it would seem antithetical to regard the original first in possession's registered title as just giving a potential right of dominium, philosophically it can only be seen in this way. There is nothing in the LRA to indicate that registration of title constructs continuing possession in the registered person. Therefore, if the registrant fails to exhibit a sign indicating their continuing possession, that is their subjective intent to control the resource, then possession cannot be said to be viable. Consequently if the registrant has discontinued their possession, and the squatter enters with the necessary

intent, then the right of control is with the squatter. Their title, although inferior, still protects their possession, that is until the registered titleholder reappears. Naturally with a system of land registration, the ability to demonstrate the best title is relatively straightforward, an entry on the register does this and unless the squatter's control falls into one of the listed exceptions,⁹⁷ this registration will indicate conclusive proof of right.

Yet this is not how the law operates. The courts, and for that matter the public at large, consider the squatter to be a trespasser and to have no title to the land they are squatting upon. Any claim to that land appears to have no legal basis and any success in their attempts to be seen as the legitimate occupier rests on nothing but a whim of the court. This raises some interesting issues that make more sense when a comparison between the proposed registration act of the Real Property Commissioners and the actual Registration Act of 2002 is made

6.19 The Property Commissioners' Proposed Act and the Act of 2002

This brief discussion of the LRA has unearthed the interesting parallels that exist between it and the intended Real Property Commissioners' Registration Act. Both attempt to make the demonstration of the best title to land straightforward and in doing so protect that person's right to control the resource. However, when discussing the earlier purported Act there were described two possible narratives for its operation. The first one saw the Act simplifying this whole area of law by removing the fiction of adverse

⁹⁷ LRA (2002) (n 77) Sch 6 para 5

possession, without however dispensing with the concept of squatting. The second approach saw the courts using registration as a way of finding an almost absolute right in the registered proprietor. Thus the first attempted to simplify the law with the second maintaining its absurdly complex historical approach. Whereas the first approach would have explicitly acknowledged the existence of the squatter the second approach tried to ignore any claims a squatter might have, or even perhaps their very existence. This was with this second approach seeing any entry on to the land of a registrant as trespass, and as such prevent the trespasser from obtaining a legally acknowledged possessionary title.

It would seem that the LRA has decided to take the second narrative approach. As discussed in section 6.14, title could be said to have adopted an absolutist quality, and as such designates any occupation by another as trespass; with it seems, since 2014 designating them as criminals,⁹⁸ at least in certain situations.⁹⁹ However, as the previous section explained philosophically this cannot be so. For squatting to function as a logical system within the common law dialectic process, it has to be recognised that the occupation of the land of another, with the intent to treat it as their own, must create a title. Unless this occurs, the law must accept the absolute quality of title and the fact of ownership, or at least a character of possession that equates to absolute control. If the law does not accept that possession equals title it would appear that to be sanctioning the acquisition of a registered title to land of the first, can only come about if the tort of trespass or a criminal act is

⁹⁸ LASPOA (n1) s 144

⁹⁹ S.144 of LASPOA criminalises trespass in a residential building.

performed. Thus title created by possession is impossible and therefore squatting is impossible. It is only if trespass and squatting are regarded as two mutually exclusive states does the doctrine of 'adverse possession' work.

6.20 Conclusion

Fundamental to this thesis is the presumption that possession of land with the required intent creates a title, and accordingly trespass and squatting are essentially different. If squatting is seen as trespass and therefore wrong it cannot create a title, consequently as a way of transferring the primary right of control from the first in possession to the squatter cannot function. Control of land will as a result, take on a static quality that will be difficult to accommodate within the common law. If occupation by a squatter is in conflict with the first in possession and therefore adverse, the logical conclusion is there has been no discontinuance of the first occupation; therefore there is simply no room for another to take the first's place.

The law seems to consider that a form of absolute title must exist, and any right gained by possession is impossible. To prevent stagnation of land and to allow the necessary dynamic nature of the common law to function, the courts have retained, and to a certain extent expanded, the absurdly complex fictions of adverse possession. The law accepts that identical titles can exist, but will not accept there is sufficient protection conferred by the LRA¹⁰⁰ for the first's title, and it is only through the tardiness of the registrant can a squatter gain exclusive possession.

¹⁰⁰ LRA 2002 (n 77)

However, the LRA can be read in the same way as the first option of the Real Property Commission's proposed Registration Act, described above; the Act has not introduced an absolute title but has increased the protection offered to the first by providing a simple way of proving their title is the best. The squatter and squatting could still be recognised, not as adversely possessing the land of another, but as a legitimate titleholder in their own right. The Act itself has recognised the need for equitable solutions to be applied to squatting, but has not explicitly explained what they are and in what circumstances they can be enforced. The courts have followed a similar path, seemingly unable or unwilling to develop the law in this direction. It would seem that the courts, the legal profession, legal academics and the public at large are happy to accept that ownership exists, possession does not create a title and the LRA has introduced an absolutist definition of occupation.

Chapter Seven

Thesis Conclusion

Central to this thesis is the presumption that possession of land with the necessary intent creates a title; this being a doctrine that has altered little in the long history of English land law. However, throughout this long history judicial discourse has shaped and adapted the law to suit the prevailing climate. This adaptation of the law has resulted in the creation of the fiction of adverse possession and the notion that squatting, when compared to the 'ownership' is a wrong. It has been argued that the title created by the squatter's possession results in them having a title that is identical in every aspect to the first in possession. This is apart from its duration. The result of this combination of key elements is that a squatter is not a trespasser.

Although the thesis appears to be a historical in nature this does not mean it is without significance today. The historical essence is important to demonstrate how control of land remains evidenced by possession; it is possession which demonstrates a person's right to be in occupation of land and in so doing gives that particular person a title to the resource. Historically this has always been the case; title gives the holder the potential to control land, but it does not indicate the absolute right to exert that control, this prerogative is in the hands of the actual occupier. Each occupation of land creates a title for that occupier, with this title remaining their property, even when that person discontinues possession and ceases being the first. Naturally when more than one fee simple title exists they need to be ranked in some way, i.e. one title

must be better than the other. This does not presuppose that one title is superior to another, rather one title, usually the oldest, will indicate which of the potential occupiers has the best right of control. It could be said that the Land Registration Act 2002 has fundamentally changed the way the law recognises the right of a person to possess and control land. The Act is said to have emasculated the doctrine of adverse possession, because *de facto* possession no longer indicates that the occupier controls land by right of title. It would seem that since the Act registration rather than title is now the indicator of right.

It could be extrapolated from this that title no longer exists for estates that are registered, it is simply an entry on the register which demonstrates a person's entitlement to control. There is evidence for this hypothesis in Schedule 6 of the Act itself, stating that 'a person may apply to the registrar to be registered as the proprietor of a registered estate'.¹ There is no mention of acquiring a title, the process simply registers that applicant as a proprietor. Although, it must be recognised that Sections 9 and 10 of the statute refer to estates that can be registered as having an absolute, qualified or a possessory title, yet this would seem to ascribe the quality of the registration, rather than the fact that it is a title. This argument could be regarded as hypothetical or perhaps just a semantic exercise; it has little or no practical benefit when the right to control land is considered. However, if it is an entry on the register that bestows the right of control, then any notion of possession creating a title to land would seem to be difficult to contemplate. If a possessory title does

¹ Land Registration Act 2002 (LRA 2002), sch 6(1) (1)

not automatically extinguish the right of registration after the appropriate limitation period, then it could be concluded that the concept of absolute control, or something approaching absolute control, must exist.

If registration has this effect, it can be assumed that the narrative put forward in this thesis has no contemporary value; it is just an interesting theory that relates to the past but has little or no modern day application. However, as briefly explained in the introduction, the LRA retains the concept of possession as the basis for control, For this reason any land law act must either acknowledge that possession rather than absolute dominium is at the heart of control, or the act must be read in such a way as to exclude any notion of absoluteness.

Affirmation of the above statement can be discerned from certain obligations and provisions set out in the LRA itself. Firstly there is the necessity that any applicant must demonstrate their occupation and control of the property before they can be considered for registration. That is, they must not just occupy the land or simply enter it periodically; their occupation must demonstrate the necessary intent. It is the display of this requisite behaviour that creates a title, and without such a title there can be no viable application for registration. This is even if the registered individual cannot be contacted. Accordingly the LRA still requires a squatter to occupy the land under colour of title, and by so doing acknowledges that more than one title can exist, the registered one and the possessory one; the only difference between the two being that one is registered the other is not. There is no binary division; they just describe

disparate ways of labelling legal occupation of land.

The provisions set out in Schedule 6 (5) of the LRA reinforces the claim that ultimately possession remains essential to English land law. These are the provisions that maintain the doctrine of 'adverse' possession more usually applied to unregistered land; that is the recognition of an automatic right to registration on the proof of at least ten years of uninterrupted possession. The first two provisions are more nebulous in nature than the third, with the first provision acknowledging that unconscionability may be a factor which influences the right to be registered. The second recognises there are instances when the applicant ought to be registered as the proprietor; although neither of these provisions receive any definition within the Act, they may have the potential to significantly affect rights of registration or the prevention of deregistration

The third provision, that concerns boundary disputes, neatly undermines the concept of absoluteness and reinforces possession as the basis of control. It also has the consequence of affecting, or potentially affecting a significant area of the landmass of England, yet perhaps at first sight this might be seen as an exaggerated claim. However, the red line used on Land Registry maps to delineate a person's registered holding might, when transferred to the land, equate to a strip ten metres wide, or more depending on the size of the land holding and the scale of the map. Accordingly, unless the exact boundary has been identified and indexed, it will be possession which establishes who has the right to control this strip. Naturally the dialectic nature of possession would

have resulted in control of the disputed land changing over time, so that at some periods in the past both protagonists or their predecessor in title, may have exerted control over it. However, the Act is clear that historical evidence of control will not favour a non-possessor; ten years possession by one person (or their predecessor in title) who reasonably believe they are the proprietor, will confirm their right to control the disputed strip. They will have embodied their will into the land and by doing so become the first.

Hence, if possession remains the ultimate signifier of the right to control land this must be so in all circumstances. Yet this seemingly logical abstraction leads to a problem; the assumption that registration, except in the limited situations detailed above, emasculates adverse possession and appears to give the registrant an almost absolute right to control and dictate land use. However, this cannot be accepted as correct for three main reasons. The first is the preposition, discussed earlier in the thesis, which maintains that land does not exist in a physical form, it is just a non-excludable space onto which rights over it are projected. In this understanding of land a title exists as the personal property of a single legal entity, remaining so until that entity chooses to alienate it. Although this theory explains how more than one title can exist and also explains how a person possessing such a title must have a potential right to assert it, it is susceptible to the absolutist nature of the LRA. Even if land does not exist in any physical sense an absolutist definition would hold that both *de facto* possession and intent remain in the registrant, whether they acknowledged its existence or not. The mere fact of it being registered would be a sign of their continuing intent to control the resource, resulting in the

registrant never relinquishing possession no matter what. Therefore, gaining a title by possession is impossible; as long as there is a sign indicating continuing control by the first, there is no space for a potential squatter to fill.

This in itself does not destroy the dialectic process; there will be always be situations when control of the resource will change hands. When there is free alienation, the first dies, or in situations where the first cannot be contacted or is disinterested in the land, there will be a dialectic synthesis. Having said that, without the free and uncontrolled application of the dialectic, the process is no longer free, it exists but has been dealt a mortal blow. Extrapolating from the argument leads to the conclusion that the squatter cannot become a squatter and will always remain a trespasser. For the fiction of adverse possession to function, as the standard doctrine requires, the squatter must have created a title, they must have become the new first. In fact, without the squatter being differentiated by dint of title from the rest of the population, the logical conclusion is that anyone would be able to successfully apply for registration of abandoned land, as long as it has been unused for ten years or more.

This state of affairs cannot exist, the common law must be free to synthesise new thesis and antithesis, to change ideas and doctrines, and in so doing permit law to adapt to new and unimagined situations. If one part of the law is absolute and unyielding, it would be a fetter to the necessary dynamic. It would obstruct the pragmatic approach of common law that sees nothing as fixed; it would prevent the judicial narratives by which the law is controlled, expanded, and changed. Without the unfettered dialectic, land would be left to

stagnate, a state of affairs that has always been seen as heretical and repugnant. Therefore, if ultimately the right of control is based on possession, it must to be recognised that any absoluteness of registration cannot be, as it were, absolute. The necessary dialectic must be allowed to operate; the Act itself acknowledges this. The courts, by using a contemporary narrative and developing sch 6 para. 5, could reintroduce the concept of fairness that seems to be missing from the 2002 Act. The boundary issue has demonstrated that possession, not registration, still operates as the ultimate arbiter of land control. It is the application of possession that will allow the courts to dictate in which situations the solutions contained in the afore mentioned section can be applied; either to prevent the registrant from objecting to the applicant request to be registered, or to order mitigation of the perceived unfairness by ordering other equitable solutions.

The Real Property Commissions' proposed Registration Act would not have allowed this complication to occur, not by maintaining the doctrine of adverse possession, rather it would be done so by the overt acceptance of possession as the basis of control. The application of a 20 year limitation period, and the acknowledgement that any disturbance after long enjoyment should be prevented, would have achieved the same end. Not to accept these conditions, as the First Report recognised, would have been mischievous and unconscionable. A similar narrative could be, in fact should be, expounded around the LRA. If this were done it would demonstrate that the Real Property Commissioners were attempting to achieve what the LRA did achieve, that is increased protection of a person's land, yet without the problematic fiction of

adverse possession. In fact, it could have been an Act that was far superior to the present one.

When the Limitation Act 1833 was drafted a 20 year limitation period was introduced, this being the length of time the Commission thought reasonable to protect the first in possession's potential right of occupancy, after which it would have been inequitable to evict the squatter. It is now 14 years since the LRA was promulgated, well on the way to the 20 year period that the Commission thought necessary to protect potential possession. It is suggested that soon it will be inequitable to exclude a squatter who has sat quietly on the land for such a long period. For this reason the courts need to consider what route to take out of this unconscionable cul-de-sac. The Limitation Act 1833 considered that simple possession for 20 years would be sufficient. The LRA has hamstrung itself from taking this straightforward solution, however there remains the equitable remedies contained within the Act. Estoppel could be engaged to prevent a registrant from enforcing their registration after a certain period of time, perhaps the 20 years suggested by the Limitation Act 1833 would be suitable, after which equity might intervene. It would need estoppel to be developed in such a way as to satisfy this intention, that's the function of legal narratives.

The Real Property Commission intended to remove the fiction of adverse possession and instead impose a system that recognised possession as creating a title; this would be a title that gave the squatter the same potential to control land as the first. This was to be a system that, on the face of it at

least, would be more transparent and less complicated than that which had gone before. However, it would not have been a system that made the acquisition of incontestable occupation of land easy. In fact it may well have made it more difficult, for central to the Commission's scheme is personhood theory. For Hegel the will of the possessor had to be placed into the object if it were to exist as an entity, by thinking of an object the thinker makes it in to something which is directly and essentially theirs. This continual cognitive expression must be demonstrated to those in the outside world; if there is a discontinuation of his mental cognition, the object will regress back to its sensual aspect. It ceases to exist, at least in relation to that person, and becomes free for another's will to be embodied within it.

However, the smallest indication of the first's continuing mental recognition of an object as theirs is enough to demonstrate their intent to maintain embodiment of it. This intent can be demonstrated by some continuing sign; the changes wrought to the land by its continual occupation or some other manifestation of the person's enduring intent. Yet as has been discussed earlier, without this lasting and overt indication of intent the object will cease to be visible, the first will no longer be the first. The sign indicating continuing intent can be modest, perhaps entering the land on a register would be sufficient to demonstrate the first's resolve to continuing control. Notwithstanding this, if the first stops thinking about the land, withdraws their intent from it, it will again cease to be visible as theirs. It will be free to be embodied by another will. This could be a squatter's will.

Yet, rather than instigating this rather elegant solution, the vested interests of the time decided, to excluded any sort of land registration from the ongoing reforms. As was suggested, the landed classes found the whole idea of registering an anathema; any deeds and encumbrances would be available for anyone to view, a situation few of those in power wanted. For this reason rather than increase protection of their land via a combination of limitation and registration, the landed had to rely on the courts to reintroduce the fiction of adverse possession. The narrative actions of the courts refined and complicated this fiction over the many years, polarising the first in possession and the squatter to ensure the latter was seen as a land thief rather than a person with a legitimate title. This was until 2002 when the Land Registration Act was introduced in an attempt to simplify the law and increase the protect offered to the first, much as the Commissioners had suggested 170 years earlier. Unfortunately the solution arrived at retained the fiction of adverse possession and the complications which had become part of the law over the preceding years. By seeming to ignore legitimacy of possession as a way of creating a title and introducing an absoluteness of dominium, the resulting in an Act is less functional than the act proposed by the Real Property Commissioners.

The proposed act and the Limitation Act 1833 certainly, from the theorisation in the preceding section, appear to significantly simplify the law; yet this does not take into account the narrative the courts might have chosen to introduce. As was suggested in chapter six, the courts could have seen registration as a continuing sign that the registrant's will remained embodied in the land, much

as discussed when the absolutism of the LRA was considered above. By doing so this narrative could well have imported a system more akin to the absoluteness introduced by the LRA, rather than the less encumbered solution it might well have been. However, similar arguments to those expressed when this problem was discussed earlier, would have also held true. By imputing registration as a continuing sign, the courts may well have maintained the binary differentiation between the first in possession and the squatter; continuing to see the squatter as a trespasser, with all the negative connotations attached to that description, including an inferior title. Having said that, any Registration Act would have still recognised possession as the foundation of control, therefore the courts would have had to accept that the dialectic process would have still operated. By maintaining this dialectic a trespasser must remain as an incorrect label for a squatter. Yet as this thesis maintains, this negative conclusion should not be reached, the squatter would still have created a title that has the potential to last absolutely. The title would not be inferior but rather identical to the first's, although it would only have the potential to be the best. However, the protection offered to the first would in all likelihood be superior to that which the Limitation Act 1833, without the Registration Act, offered.

As this thesis has demonstrated the doctrine by which control of real property is understood has changed little over English land law's long history. The narratives which explained it have varied, as those in power have molded and adapted it so as to reflect and produce the required outcome. Technology and the needs of a developing society have refined and modified how possession,

right, and control are proven. However, the central concept has remained constant, even though this is hard to detect at times, and this constancy can be traced right back to the post feudal period of English history.

Dynamism has always been the guiding force behind the pragmatic nature of English law, keeping it functional as well as adaptable. It has almost a thousand years of history that has allowed the court's narrative to shape and change it to satisfy the zeitgeist of each particular period of history. However, the theory that it is constructed on, considers that ultimately the only way to demonstrate an intent to possess was by continual occupation and it was this occupation which created a title. Without a title there could be no legal right of control, but with a title, protection against the rest of the world would be ensured. This was particularly important as there was little in the way of documents or deeds to provide evidence of a right to dominium. As has been discussed there were various real actions that could be used to protect the right to possession or regain lost possession. These were unfortunately slow and solemn affairs, which could be delayed almost interminably by the person in possession, giving them a distinct advantage over the demandant. In an attempt to counter this problem various assizes were instigated by the monarch, both to take the adjudication of land law disputes under royal control, and in an attempt to remedy the endless delays encountered by these real actions. Yet importantly it was possession that was always protected until such time as the courts could decide who had the best title. This protection could even be used by one in possession, against the person with the best title, if that person used force or subterfuge to eject the occupier.

However, this did not mean that any occupation indicated a right to possession; occupation achieved by violence or subterfuge was seen as trespass, even it would seem, if this violent entry was by one holding the older and therefore better title. The obverse of this was that peaceful occupation of the land, squatting over it in quiet enjoyment, was protected by the law. This was even if another appeared to have a better right to the land. An indication of the possessor's continuing embodiment of the land was needed, they had to be seised to demonstrate their right of control, without such intent they were effectively invisible. With such possession and intent they became visible to the rest of the community, for all intents they were the first in possession. It could be said that a violent invasion of property was an effective way of the first in possession being made visible, if violence was used in an attempt to evict the first it would be evidence of their right. The violent trespasser would not be made visible by any attachment to the land, but rather by their violent behaviour.

With this 'simple' explanation it can be seen that trespass is related to possession rather than title; it is an action to protect that possession and therefore, protect the first's occupation. As was explained in the introduction, the designation first in possession relates to any person with the necessary embodiment of the resource, it is relevant to a position rather than a person, therefore trespass is against the first, whoever they might be. Hence, if a squatter fills a space vacated by the first, that is if the first discontinues their possession, then the squatter cannot be a trespasser, they are in occupation

under the protection of a title. It would be illogical for one who can use the trespass to protect their occupation, could also be a trespasser.

It must be conceded that on the initial entry to the land a squatter won't be a squatter, but rather a trespasser, a designation which must change before a title can be created, with this change occurring when there is discontinuance of possession by the first. Once the original first ceases to signal their embodiment, the trespasser can occupy the space left by the first, the squatter effectively becomes visible as the new first. However, the potential squatter's time as a trespasser may vary. For instance if a person enters land they know to be abandoned, the transition from trespasser will be almost instantaneous, or even completely unnecessary, as intent may have already been formed; all that is necessary is a sign of possession. In turn the potential squatter's time as a trespasser may endure for a significant period or never undergo the necessary transformation. If the first continues to demonstrate with some sort of effective sign, the metamorphosis from trespasser to squatter will never occur.

This thesis has demonstrated that the recognised doctrine of adverse possession was created by a narrative; a legal fiction developed by the courts to protect the powerful and wealthy landed classes most important asset, land. Possession had to be the ultimate indicator of control, for the aristocratic and more humble landed classes possessed their land without any effective title deeds. Huge estates had been granted by the monarch, to what were the Saxon princes and who became the all powerful Barons, to control as mini

sovereign states. These Barons in turn subinfeuded smaller parcels of land to other, more minor aristocrats, with the land continuing to cascade down to the lesser and lesser members of the landed classes. Yet none of these had any proof of their land holdings, or even any certain knowledge of the boundaries to those holdings. Consequently, possession as proof of right to control land was essential, however this could also work against the landed classes.

If possession was proof of a right to control land and sufficient to create a title, then the oldest demonstrable proof of possessionary title must be the best. Naturally if a system such as this were allowed to function then land would become unmarketable; there would be no surety that the title alienated was the best. This was to become a significant problem as land became more and more useful as a commercial entity. Limitation periods could be imposed, yet this made land vulnerable to exploitation by others and accordingly something had to be done. Adverse possession became the useful controller of land rights; it could be manipulated by the courts, the squatter could be vilified, and arbitrary rules imposed to control the right of such an upstart. Having said that, what was conveniently forgotten was the fact that adverse possession was often the way the landed acquired land. Long use was sufficient to create a title and older titleholders were unable to assert their better title due to limitation. Yet these land 'owners' were not referred to as squatters, land thieves or trespassers; these epithets were reserved for those less noticeable, or the invisible in society.

As this thesis has determined, the squatter can be seen in a different light, a

light more in keeping with the narrative reserved for the landed classes. It has been established that the nature of land, ownership, possession and trespass can be viewed using an alternative perspective; after all law is just a narrative and narratives can alter, adapt and change that law. Law is for the powerful, the poor do not have lawyers; be that as it may, as Foucault explains, power exists everywhere and comes from everyone, it is not coercive, yet has the capacity to change peoples' perspectives. This thesis has established an alternative narrative, one that does not favour the wealthy and powerful, and therefore is an anathema to that group. Yet it is a complete and credible interpretation of the right of a squatter to occupy and control land without being vilified as a land thief. If enough people believe and reiterate this narrative, it is perfectly possible for it to become the truth, and the fiction-laden law that is now in operation could be consigned to the memory bank of history.

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