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The importance of possession in the common law tradition

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*Cov. L.J. 1 Introduction

Commenting on the synonym of possession, Pollock and Maitland once wrote that 'in the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that the whole system of our land law was law about seisin and its consequences.'¹ Almost a century later, the words of Pollock and Maitland cannot be taken lightly in the study of modern property law. It is almost impossible to understand the modern law of ownership and title without understanding the nature and significance of possession. Holmes attributed possession as a 'conception which is only less important than contract.'² In the case of personal property, many of the proprietary interests that are capable of existing in chattels depend solely on the notion of possession. For example, the special property of bailees in general,³ and that of pledgees is dependent on it. Today, possession and ownership usually go hand in hand since possession is one of the fundamental incidents of ownership. In the early law the courts were not concerned with abstract notions of title and ownership, instead, possession or *seisin* was indicative of whether a person should remain as owner or should lose his ownership to another who had exercised better possession of that thing. The purpose of this article is to explore how the concept of possession has played an important role in the common law tradition and whether that importance has remained with the same degree of force in the twenty-first Century, particularly in light of recent land law legislation and the human rights perspective.

The Legal Idea of Possession

To mankind possession of things is an important aspect of life. Without any possession of things in the world it is questionable whether a person has any liberty or security.⁴ It is for this reason that Salmond wrote, 'possession is the most basic relationship between men and things.'⁵ It is also for this reason that early laws of **Cov. L.J. 2* property had one objective in mind, that is, the protection of lawful possession.⁶ Without such protection, not only would life be impracticable but also it would lead to a state of chaos and constant disorder. To the lay mind possession implies some form of control or detention of a thing. Sometimes the word possession is equated with ownership. Kocourek has described the nature of detention of a thing as involving the following elements:⁷ (i) a human being; (ii) a material thing or space which may be used by physical acting; (iii) with the requisite power for the act; (iv) by repeated acts; (v) with contact, or with such approximation of contact as to make the act immediately possible; (vi) without interference of others to prevent the act of use. The idea of possession as involving detention is taken by lawyers to suggest that, unlike ownership, which is essentially a *de jure* relationship between a person and a thing, possession is a *de facto* relationship between a person and a thing. This is no better explained than by Salmond who wrote, 'whether a person has ownership depends on rules of law; whether a person has possession is a question that could be answered as a matter of fact and without reference to law at all.'⁸ Inherent in this idea is that the concept of possession exists before legal society and is therefore independent of, and, prior to the

law.

Possession in the early law: seisin

In the early law, the concept of ownership and possession was not clearly divorced. This was evident from the fact that it was impossible to gain recognition of a right to possess which was good against the whole world or to vindicate any right to possess without reference to the concept of possession itself. In the early law possession was explained through the concept of 'seisin'; a concept described as lying 'at the root of the historical development of English land law.'⁹ The idea behind seisin lay in the actual or *de facto* possession of land which was determinate of whether a proprietary right in land was granted. There were no abstract ideas of title and right; instead possession decided whether a person had a right to land. As such seisin was not a question of right; but rather a question of fact, although fact might then lead to a right through the passage of time. Long sustained possession meant peace and order and seisin literally denoted quiet and peaceful enjoyment of land.¹⁰ From the Fifteenth Century onwards seisin became confined to persons who held an estate in freehold and seisin gave a presumption of ownership of land. A person who claimed land as a result of losing it to a wrongful possessor had to show his seisin, in other words his possession, in order to recover land back. However, given that seisin was a question of fact, even a person who wrongfully took possession of land could raise a presumption of ownership, which could only be defeated by a better showing of seisin in another person, that is the previous possessor pointing to a better seisin.¹¹

***Cov. L.J. 3** The concept of seisin was not particular to land and it was used to protect property interests in chattels as well as land.¹² However, it became to be employed predominantly in real property law and through the passage of time became to be understood as origin of title or right in land. Today the concept of seisin does not play the same degree of importance in real property law that it did in its early days. The means by which ownership in land is transferred to another no longer depends on mere delivery of seisin, or in the early language 'livery of seisin',¹³ but rather on a grant that does not require actual entry. The idea of actual possession reflecting seisin does, however, play a role in determining issues such as adverse possession of land. Although notions of ownership and title may have become more abstract, the English law of property has and to some extent will continue to recognize that ownership, even where based on clear legal ideas of right and title, is a relative concept. The idea of relativity of title and ownership holds that there is no such thing as absolute title to land and as such a claim to land, and for that matter other property such as chattels, depends on the non existence of a better claim to the same thing.

The significance of possession in modern law

The common law tradition regards ownership as a relative concept as opposed to an absolute one. This simply means that possession is a good title to a thing enforceable against anyone who cannot show a better title. Relativity of ownership, sometimes referred to as relativity of title, lies at the heart of property law in the common law tradition. Relativity of ownership originates from the force of possession in the common law.

The very first principle of possession is that it raises a presumption of ownership. A person in actual possession of a thing is presumed to be the owner of it, albeit, that this presumption, like any presumption, can be rebutted. In lay language this may be summarized by saying that 'possession is nine-tenths the law'. However, there are sound legal justifications behind the presumption. Firstly, possession in fact is *prima facie* evidence of legal possession and that the possessor has all the legal remedies to protect such possession.¹⁴ Possession is said to be the root of title in that it is only through possession that ownership is born or the chain of title begun. Thus, an equally important principle operating here is that a person may be presumed to be the owner of a thing even when that person has no ownership in it, as, for example, where such a thing is found or taken without the authority of the true owner. Suppose that B finds a gold watch which in law belongs to A. If B takes possession, B's possession raises a presumption of ownership, which is good against the whole world except the true owner who has a better title to it. The

true owner can of course rebut the presumption of ownership, however, until such time, B will be deemed to have a possessory title to the gold watch.

***Cov. L.J. 4** The concept of possessory title now calls for discussion. A possessory title is one that is good against everyone except the true owner.¹⁵ Lord Campbell once explained the rule by commenting that 'against a wrongdoer possession is title.'¹⁶ The origins for the rule of possessory title lie in the fact that English law never developed a sophisticated system of rules for the vindication of ownership rights. Instead, the right to ownership largely depended on the right to possession and it was possession that was accorded remedies. In the words of Pollock and Wright, 'the common law never had any adequate process in the case of land, or any process at all in the case of goods, for the vindication of ownership pure and simple. So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that possession largely usurped not only the substance but the name of property...'¹⁷

It is important to appreciate that many of the remedies that seek to protect property interests in both land and chattels depend on possession rather than on absolute notions of ownership. Property interests in land and chattels are protected by what are known as property torts.¹⁸ In the case of land, an action for trespass to land requires that the claimant had possession or a right to immediate possession. In the normal course of things the possessor will be the owner, however, it is quite clear that a squatter will have sufficient standing to sue in trespass.¹⁹ This is because the squatter has possession in fact and law when he has control in fact and intends to control. In the case of chattels there are two torts that seek to protect property interests, namely trespass to goods and the tort of conversion.²⁰ The success of both of these torts depends on whether the claimant has possession or an immediate right to possession. Trespass to goods is a wrongful physical interference with them. The tort of conversion amounts to a dealing with goods in a manner inconsistent with the right of the true owner.²¹ It is sometimes thought that, unlike trespass to goods, the tort of conversion is a truly proprietary remedy in that it protects ownership rather than mere possession. However, it is quite clear that a person in actual possession, such as a bailee of goods, can sue for conversion.²² What follows is that a person who has no possession or no immediate right to possession cannot sue for conversion. Thus, an owner who has no possession and neither an immediate right to possession cannot sue for conversion.²³ Finally, where damage is caused to a chattel through the negligence ***Cov. L.J. 5** of another person, the claimant must show that he either had ownership in the chattel or a possessory title.²⁴

Thus, possession plays an important role in the transfer and creation of property interests in personal property. Legal ownership generally cannot be transferred in a chattel until such time delivery of possession is made.²⁵ In so far as possessory security interests in chattels are concerned, possession is all-important. Both a lien and a pledge require delivery of possession in order for the interests to be effective.²⁶

Possession and Original Acquisition of Property Rights

The most basic way of acquiring a proprietary right such as that of ownership is by taking first possession of some object that has no owner. Most legal systems recognize that it is only through first occupation that a system of private property begins and the chain of ownership is created. It is for this reason that some of the early justifications for the existence of private property were based on first possession or occupation of a thing.²⁷ In the case of many objects of property, although most notably land, the rule of first possession moves society away from common property and towards enforceable private property rights. However, given the fact that most resources over time will and do become parceled into private ownership, how important in contemporary property law is original acquisition as a means of acquiring property rights in external objects? The underlying assumption appears to be that such a mode of acquisition requires the existence of un-owned resources. Despite its primitive origins, original acquisition remains a significant means by which the right of ownership can be acquired. What has in fact changed is the conditions under which original acquisition rules operate. In primitive society such modes of acquisition operated to resolve disputes resulting from the scarcity value arising from

the claims of individuals to common property. Such rules had as their function the provision of a system of allocation of resources which in turn could attain peace and order.²⁸

In contemporary property law, original acquisition rules operate under quite different circumstances and also seek to meet different objectives. Justifications for original acquisition rules today are not necessarily to preserve peace and order; instead such rules seek to promote more specific legal, social and economic objectives. So what are the circumstances under which original acquisition rules operate? Firstly, there have been claims in modern law based on original acquisition that is sought to be recognized as binding on the radical title acquired by the Crown through colonization. For example, in *Mabo v. Queensland (No.2)*,²⁹ the High Court of Australia had to consider whether the communal native title of the Meriam people to land on Murray Island was binding on the radical title acquired by the Crown on settlement. The case **Cov. L.J. 6* involved an action by a number of Murray Islanders seeking declaratory remedies in relation to their native title to land on the Island, one of a group of three islands in the Torres Strait Region. The Islands did not form part of the British Dominions until their annexation to Queensland in 1879; however, the occupants of the Islands, the Meriam people, had occupied these lands for tens of thousands of years well before 1870. The question was whether the Meriam People were vested with a communal title which burdened the radical title of the Crown on settlement. The matter fell to be determined by reference to the prevailing common law at around 1870. The High Court of Australia ruled that the Meriam people had acquired a communal title to land by reason of their possession and occupation of the land and as such was binding on the whole world except for those portions which had been surrendered to the Crown.

More frequently, however, are the claims to objects that have been lost or abandoned and here the law is equally problematic. A person who finds and takes control of a lost or abandoned object can enforce his right of ownership to it against everyone except the true owner. Moreover, he can also defeat the rights of the true owner and obtain a fully blooded ownership right to the object in question. Two of the most obvious examples of original acquisition are claims to lost and abandoned objects and claims to land through the principles of adverse possession and it is the claim to land through adverse possession which will be considered next.

Adverse Possession of Land

The basic idea behind adverse possession of land is that a person who takes possession of land, albeit wrongfully to begin with, acquires a possessory title to the land which, after the expiration of twelve years, is good against the whole world. The title of the paper owner is simply extinguished through lapse of time. It is often difficult to understand how wrongful possession of land can give birth to a full-blooded ownership right against the whole world. This is especially so in a context where ownership rights are dependent on the existence of elaborate title deeds and a system of registration of such rights.³⁰ However, once again we see that, even in the face of title deeds to land and registration of such ownership rights, possession retains an all-important function in deciding the relative strength of ownership. In this respect, leading conveyancers openly admit that '...misunderstanding have sometimes arisen from an unwarrantable belief that title deeds are sacrosanct documents, whereas the truth is that neither a conveyance nor a land certificate retains its value if the landowner is so indifferent as to lose physical control of his land.'³¹

The basic rules relating to acquisition of ownership in land through adverse possession are found in the Limitation Act 1980 and the relevant case law.³² The Limitation Act 1980 contains three important statutory principles relating to adverse possession. First, no action can be brought by a landowner to recover his land after **Cov. L.J. 7* the expiration of twelve years from the date on which the right of action accrued to him.³³ Secondly, the right of action to recover land is deemed to have accrued to the landowner when the landowner has either been dispossessed of his land or has discontinued use of his land.³⁴ Finally, no right of action is deemed to have accrued unless the land is in possession of some person in whose favour the limitation period can run and where any such right of action is deemed to have accrued on a certain date and no person is in adverse possession

on that date, the right of action is not deemed to have accrued unless and until the land is again taken in adverse possession.³⁵ These statutory principles can be explained in the following way. Whilst it is clear that no action to recover land after twelve years from the date upon which the right of action accrued to the landowner is allowed, time does not simply run because the land is unoccupied.³⁶ Time only begins to run when the landowner has been dispossessed of his land or where he has discontinued use of his land and the adverse possessor has taken possession of the land for the limitation period. If there is any break in the adverse possession, for example, where A takes adverse possession from B, but B recovers his land within, lets say, six years, time stops running. Any new claim based on adverse possession cannot rely on A's six years of adverse possession. However, the Act allows the limitation period to be built up by a series of adverse possessions by different possessors proving that at no time during the aggregate period of twelve years there has been a break in the adverse possession. The effect of a successful claim to adverse possession is that the paper owner's title is completely extinguished. In the case of a registered title to land, until such time as the squatter is registered as the new proprietor of the land, the existing registered proprietor holds the land on a statutory trust for the squatter.³⁷

Adverse Possession in the House of Lords and the Importance of Possession Reaffirmed

In addition to the statutory requirements needed for a successful claim to ownership to land by adverse possession, there are a number of common law requirements, which were examined in depth by the Court of Appeal in *Buckingham County Council v. Moran*,³⁸ and more recently by the House of Lords in *JA Pye (Oxford) Ltd v. Graham*.³⁹ The decision of the House of Lords confirms the supremacy of single and exclusive possession as the basis of a successful claim to ownership of land through adverse possession.

The facts of the case were as follows. The personal representative of the late Michael Graham along with Caroline Graham (hereafter, the Grahams) claimed rights to 25 hectares of agricultural land belonging to JA Pye (Oxford) Ltd (Pye). They based their argument on s.15 of the Limitation Act 1980, which provides that no action shall be brought by a landowner to recover his land after the expiration of twelve years from the date on which the right of action accrued to him. Schedule 1, paragraph 1 provides that the right of action to recover land is deemed to have accrued to the **Cov. L.J. 8* landowner when the land owner has been either dispossessed of his land or has discontinued use of his land. Dispossession usually refers to an ouster by the squatter, for example, where the squatter has fenced in land belonging to the paper owner and has since then not allowed the paper owner to enter on the land. The Grahams argued that since 1984 they had taken possession of the land belonging to Pye and as a result they had established a successful claim of adverse possession. Pye counter-argued that the land had at all time belonged to them and that they had an intention to build on the land. More importantly, however, they argued that the Grahams had at no time dispossessed them of the land. This is because firstly, in 1983 the Grahams had entered into an agreement with Pye to use the land until 31 December 1983 for the payment of a sum of £2000. Secondly, when that agreement expired the Grahams continued to use the land, their use of it was not inconsistent with the paper title of Pye because they were willing to pay for the use of land and as such were not acting as owners of it. After 1986 Pye did very little in so far as the disputed land. Pye brought proceedings to recover the land in 1998.

At first instance the judge held that the Grahams had established a successful possessory title to Pye's land and that time began to run against Pye since 1984 after the expiration of the licence agreement. The Court of Appeal reversed this finding and held that no successful adverse possession claim could be found simply because the Grahams had not dispossessed Pye from the land. One of the main arguments in the case was that, even though Pye had done very little in the period between 1986 and 1998, they were still within the limitation period to claim the land back. In so far as the period between 1984 and 1986, the Court of Appeal held that there could be no finding of dispossession simply because the Grahams were using the land in the hope that a new licence agreement might be

forthcoming. This subjective intention was held to be crucial by the Court of Appeal because it was indicative of a form of implied licence by Pye that the Grahams could use the land. The decision of the Court of Appeal begged the question whether a successful claim to adverse possession rested on the subjective intentions of both the squatter and the paper owner or rather on the objective intention to possess land for the requisite period of time required by the Limitation Act 1980? Furthermore, were subjective factors such as the willingness of the squatter to pay for the use of land and his subjective belief that he was not the owner relevant?

The decision of the House of Lords in *J A Pye (Oxford) Ltd v. Graham* has not only reaffirmed the importance of possession in the common law tradition as had been understood historically, but it has also explained that it is long-sustained possession that is the root of a successful claim to adverse possession. It does not matter that the adverse possessor does not have an actual subjective belief that he is acting as the owner.⁴⁰ Neither does it matter that the possessor is willing to pay for the occupation of the land, providing that there is possession which is inconsistent with the paper owner's title.⁴¹ Much of the confusion in *J A Pye (Oxford) Ltd v. Graham* arose from the decision of Bramwell LJ in *Leigh v. Jack*,⁴² where his Lordship explained that possession of the paper owner could not be disturbed by a squatter if the paper owner could show a future intention to use the land. This so-called 'implied licence theory' meant that the squatter's possession, no matter how strong and continuous, could not **Cov. L.J. 9* disturb the paper owner's title. However, this rule had been rejected by the Court of Appeal in *Buckingham County Council v. Moran*.⁴³

Lord Browne-Wilkinson explained that the matter was simply one of whether the adverse possessor had dispossessed the paper owner by going into ordinary possession of the land without his consent. In so far as the requisite acts needed for possession, his Lordship explained that this required two elements. Firstly, a sufficient degree of physical custody and control, this requires factual possession. Secondly, an intention to exercise such custody and control for his own benefit. In so far as a need to have an intention to own, his Lordship referred to the words of Slade LJ in *Buckingham County Council v. Moran*, where he stated that what was required was 'not an intention to own or even an intention to acquire ownership, but an intention to possess.'⁴⁴ On the basis of these principles, Lord Browne-Wilkinson explained that the Grahams had established a satisfactory possessory title to the land belonging to Pye. Furthermore, their willingness to pay for the occupation of the land did not matter providing that they had the necessary possession at all times. Their willingness to pay did not alter the fact that they had the necessary factual possession for the period of time prescribed by the Limitation Act 1980.

Adverse Possession and Human Rights

In the post-Human Rights Act era the question has arisen whether the deprivation of ownership of land through the principles of adverse possession is in violation of the European Convention on Human Rights. Put quite simply, is the cumulative effect of the Limitation Act 1980 in respect of claims for the recovery of land and the consequential denial of the right to claim land after twelve years a deprivation of a person's property contrary to Article 1, Protocol 1 of the Convention? Section 3(1) of the Human Rights Act 1998 imposes a duty on a domestic court to, wherever possible, read and give effect to primary and subordinate legislation in a manner which is compatible with the Convention. Article 1, Protocol 1 of the European Convention on Human Rights provides:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.'

The loss of ownership through adverse possession falls quite neatly into the second rule of Article 1, Protocol 1. In the words of one leading commentator, 'that an owner can be effectively deprived of his or her land without the payment of compensation and without due legal process raises the question as to the compatibility of s.15 of the Limitation Act 1980 with Article 1, Protocol 1.'⁴⁵ If it is incompatible, then the impact of possession as a means of extinguishing a former title in land and creating a new one as discussed in this

article is reduced to a meaningless concept.

The question of whether s.15 of the Limitation Act 1980 and the consequential denial of ownership through adverse possession is so incompatible was considered by the **Cov. L.J. 10* High Court and the Court of Appeal in *J.A. Pye (Oxford) Ltd v. Graham*.⁴⁶ In the High Court Neuberger J, although coming to the conclusion that the Grahams has established a successful claim to adverse possession of land, was nevertheless sympathetic to the human rights arguments presented on behalf of Pye. In the course of his judgment, his Lordship commented that 'the result is disproportionate, because, particularly in a climate of increasing awareness of human rights, including the right to enjoy one's own property, it does seem draconian to the owner, and a windfall for the squatter, that the owner should lose 57 acres of land to the squatter with no compensation whatsoever.'⁴⁷ The Court of Appeal, however, took a rather different approach to the compatibility of the Limitation Act 1980 with the protection of property guaranteed in the Convention. Mummery LJ was of the opinion that the Limitation Act 1980, in particular s.15, which provides that no right of action to recover land shall be brought after twelve years after the right of action accrued to the legal owner, was not incompatible with the protection afforded in Article 1, Protocol 1. His Lordship explained that the effect of s.15 was not to deprive the legal owner of land, his possessions or peaceful enjoyment of them, rather the effect of the Act was to deprive him of his right to access the courts for the purpose of recovering property if he has delayed the institution of legal proceedings for 12 years or more...'⁴⁸

It is not altogether clear whether the distinction between a deprivation of property and a deprivation of a right to bring an action for the recovery of property is a satisfactory one in the context of property rights. One of the crucial incidents of a person's ownership of a thing is the right to be put in possession of a thing and remain in possession if he so chooses.⁴⁹ An equally important incident of ownership is the right to security, which involves an expectation on behalf of the owner that he will remain owner indefinitely if he so chooses. This expectation amounts to immunity from expropriation except where just compensation is given to the legal owner. In this respect, the right to commence an action for the recovery of property is a central ingredient of a person's ownership. The deprivation of a person's right to commence an action to recover his property is a deprivation of one of the very basic ingredients of his ownership. The matter is explained by one commentator who writes, '...is the ability to commence court proceedings to recover property from a trespasser a fundamental characteristic of property ownership? If it is, the loss of the right to commence court action impinges upon the very nature of property ownership and cannot be artificially dissected from it and treated as separate from it.'⁵⁰

Most land lawyers expect that the human rights impact of adverse possession will in time reach Strasbourg and the European Court will have to decide whether s.15 of the Limitation Act is in violation of the Article 1, Protocol 1. In the meantime, the interference of property may be justified in the public interest. In Mummery LJ's opinion the provisions of the Limitation Act 1980 are '...provided for by law and are in the public interest within the meaning of Article 1. Such conditions are reasonably **Cov. L.J. 11* required to avoid the real risk of injustice in the adjudication of stale claims, to ensure certainty of title and to promote social stability by the protection of the established and peaceful possession of property from the resurrection of old claims.'⁵¹

Adverse Possession and the Land Registration Act 2002

The Land Registration Act 2002 will put to an end the supremacy of single and exclusive possession as the basis for a successful claim to ownership of land through the principles of adverse possession.⁵² The reforms in the Act have been described as 'even more far-reaching than the great reforms of property law that were made by the 1925 property legislation.'⁵³ The basic idea behind the rules of adverse possession in the new Act is that mere possession of land for the requisite limitation period will not in itself extinguish the title of the legal owner and give a new title to the squatter. The reason for this lies in the fact that the fundamental objective of the Act is to introduce a system of electronic conveyancing. The objective of on-line conveyancing requires a register of land titles which

is complete and accurate at any give time. The idea that long undisturbed possession can defeat a registered owner's title does not fit neatly into a system of registration of title that requires a true and accurate reflection of the ownership of land.

Under the Land Registration Act 2002, there is no concept of automatic extinguishment of a registered owner's title.⁵⁴ Instead, after ten years of adverse possession, a squatter will be entitled to apply for registration as the proprietor of the land. Once the squatter makes this application, the registered proprietor is informed of the application and is entitled to object to it. If the registered proprietor objects within two years from the date on which the application is made then normally that is the end of the matter provided that the registered proprietor takes the necessary steps to evict the squatter from the land. There are only three circumstances in which a squatter will be entitled to be registered as proprietor of the estate after the ten-year period.⁵⁵ The first is where it would be unconscionable for the registered proprietor to dispossess the squatter. The most obvious case here would be when there is an estoppel working in favour of the squatter. The second is where the applicant is for some other reason entitled to be registered as the proprietor of the land. An example of this second situation is when the squatter is entitled to the land by reason of a contract for sale of land and has paid the purchase price, but has not yet had a formal conveyance of the legal title to him. Finally, where the dispute is one relating to a boundary.

There is no doubt that the Land Registration Act 2002 significantly reduces the impact of possession of land as a means by which ownership can be acquired. Once commentator describes this development as one that has both a moral and legal justification.⁵⁶ The moral justification relates to the fact that it is objectionable that a **Cov. L.J. 12* squatter can acquire a title to land by mere factual possession of the land with the necessary intention to control the land. The legal justification relates to the fact that in a system of registration of title to land, title is acquired by the act of registration and not by possession of land.

Conclusions

It is questionable whether in the twenty first century the concept of possession has survived the significance it once occupied in the early law. Despite the importance of possession and its significance being re-affirmed by the House of Lords in the *J A Pye (Oxford) Ltd v. Graham*, in the context of land there are number of factors which have contributed to its demise. Firstly, the Land Registration Act 2002, which aims to create an accurate and complete register of land titles, does not and cannot accommodate for a system of rules which automatically defeat the title of the registered proprietor by long sustained possession of land. The objective of the Land Registration Act 2002 is to make title to land absolute. In this respect, the concept of adverse possession, which was justified in the context of unregistered titles to land relying on long sustained possession of the land, does not fit into a system of land registration where ownership is acquired by the act of registration and not possession. There are a number of consequences flowing from this development for English land lawyers. It is questionable how meaningful it is now for students of land law to engage into discourse relating to relativity of title and to distinguish the common law notions of ownership from Roman law notions of ownership. The very objective of making land titles indefeasible has the effect of moving the concept of ownership in English Law towards the absolute concept of ownership recognized in Roman law.⁵⁷ Furthermore, the very idea of property in land as seen to be based, *inter alia*, on fact, as explained by leading land lawyers, seems difficult to justify in this twenty-first Century of indefeasibility of land title. For example, how far is it possible to reconcile the following words of Kevin Gray and Susan Gray with the reforms made in the Land Registration Act 2002: '...there is a deeply anti-intellectual streak in the common law tradition which cares little for grand or abstract theories of ownership, preferring to fasten on the raw organic facts of human behaviour...Accordingly, the crude empiricism of this outlook leaves the recognition of property to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts *de facto* possessory control over land.'⁵⁸

The second factor that may further impact on the significance of possession is the human rights one. Although, the Court of Appeal in *J A Pye (Oxford) Ltd v. Graham* has taken the view that the concept of long sustained possession giving rise to adverse possession of land is not in violation of Article 1, Protocol 1 of the European Convention on Human Rights, it is only a matter of time when the matter will have to be decided in Europe or under the Human Rights Act. However, having said this, given the reforms made by the Land Registration Act 2002 in respect of adverse possession, it is unlikely that the deprivation of ownership in circumstances where the ***Cov. L.J. 13** owner of the land it given the opportunity to object to the adverse possession will be seen as violating the provision of Article 1, Protocol 1.

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[1.](#)

F. Pollock and F. W Maitland, *History of English Law* 2nd Ed. (Cambridge University Press 1968) at page 29.

[2.](#)

O. Holmes, *The Common Law* (Macmillan 1968) at page 206.

[3.](#)

See *Ashby v. Tolhurst* [1937] 2 KB 242.

[4.](#)

It is precisely for this reason that possession, which gives birth to ownership, has been described as a basic human right. For example C.B. Macpherson comments that '...property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right...', *Property: Mainstream and Critical Positions* (Blackwell 1977) at page 11.

[5.](#)

Salmond, *Jurisprudence* 12th ed. (Sweet & Maxwell 1966) at page 265.

[6.](#)

See Hugo Grotius, *On the Law of War and Peace* Book 2, Chap 2 (Bobbs Merrill 1925) Kelsey translation, and Samuel Pufendorf, *Of the Law of Nature and Nations* (Oxford 1703) J. Churchill *et al* (eds).

[7.](#)

A. Kocourek, *Jural Relations* 2nd ed, (Bobbs-Merrill 1927) page 361.

[8.](#)

Op.cit. page 266.

[9.](#)

K. Gray, *Elements of Land Law* 2nd ed. (Butterworths 1993) page 61.

[10.](#)

See, Pollock and Maitland *History of English Law* 2nd Ed. (Cambridge University Press 1898) vol II page 34.

[11.](#)

See *Minister of State for the Army v. Dalziel* (1944) 68 CLR 261 at 276.

[12.](#)

Pollock and Maitland, *op.cit.* at page 32. See also A.E.S. Tay 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1964) 4 Melbourne Law Review 467. For a detailed explanation, see Maitland, 'The Seisin of Chattels' (1885) 1 LQR 324.

[13.](#)

In the early law of seisin, a person seised could only transfer such seisin through the

common law livery of seisin, this was a ceremony in the presence of witnesses followed by ceremonial acts, see, Thorne, 'Livery of Seisin' (1938) 52 LQR 345.

[14.](#)

Pollock and Wright, *op. cit*, page 20.

[15.](#)

The Winkfield [1902] P 42.

[16.](#)

Jeffries v. Great Western Railway Company [1856] 5 E & B 802 at 805.

[17.](#)

Op.cit, page.5.

[18.](#)

See generally B.S.Markesinis & S.F. Deakin, *Tort Law* 4th ed. (Clarendon Press 1998).

[19.](#)

Ocean Estates Ltd v Pinder [1969] 2 AC 19.

[20.](#)

The modern law is governed by the Torts (Interference with Goods) Act 1977 which uses the collective term 'wrongful interference with goods to cover trespass, and conversion. A plaintiff will also have the right to sue for negligence if chattels are damaged in this way.

[21.](#)

Lancashire & Yorkshire Railway Co. v. MacNicoll [1918] 88 L.J.K.B. 901.

[22.](#)

Burton v. Hughes [1842] 2 Bing. 173.

[23.](#)

Gordon v. Harper [1796] 7 T.R. 9. An example of an owner who lacks possession is a landlord who lets out his land to the tenant with furnishings. The landlord, despite being owner, has no right to possession or any immediate right to possession so long as the tenancy continues. Other examples include a lien where the lienee is exercising the lien and the lienor therefore has no immediate right to possession. Such an owner has, however, a right to bring an action for damage caused to his reversionary interest in the chattel. See: *Mears v. London and South Western Railway Co.* [1862] 22 CB (NS) 850.

[24.](#)

Leigh and Sullivan Ltd v. Aliakmon Shipping Company Limited [1986] 1 AC 785 at 809, per Lord Brandon.

[25.](#)

However, a contract for the sale of goods may pass ownership in a chattel before delivery of possession, see Sale of Goods Act 1979 s.18, rule 1.

[26.](#)

See generally, M Bridge, *Personal Property Law* 2nd ed (Blackstone Press 1996)

[27.](#)

See, for example, C. Rose, 'Possession as the Origin of Property' (1985) 52 *The University of Chicago Law Review* page 73.

[28.](#)

See Sir William Blackstone, *Commentaries on the Laws of England* (London 1765-69), Vol II, para 1.

[29.](#)

[1992] 66 ALJR 408.

[30.](#)

The nature of adverse possession within the system of registration of title has recently been carefully explored by Sedley Jin *Central London Commercial Estates Ltd v. Kato*

Kagaku Co Ltd [1998] 4 All ER 948.

[31.](#)

Ruoff and Roper *On the Law and Practice of Registered Conveyancing* (Stevens & Sons 1979) page 531.

[32.](#)

For a detailed study of these principles and cases, see K. Gray, *Elements of Land Law* 2nd ed (Butterworths 1993).

[33.](#)

Limitation Act 1980 s.15(1).

[34.](#)

Ibid s.15(6); Sched. 1, para. 1

[35.](#)

Ibid s.15(6); Sched. 1, para. 8(1).

[36.](#)

McDonnell v. Mckinty [1847] 10 ILR 514.

[37.](#)

Land Registration Act 1925 s 75.

[38.](#)

(1990) Ch 623.

[39.](#)

(2002) 3 WLR 221.

[40.](#)

[2002] 3 WLR 221 at 234.

[41.](#)

Ibid at 237.

[42.](#)

(1879) 5 EX D 264.

[43.](#)

[1990] Ch 623.

[44.](#)

Ibid at 643.

[45.](#)

D. Rook, *Property Law and Human Rights*, (Blackstone Press 2001) page 205.

[46.](#)

(2000) Ch 676, (2001) Ch 804 (Court of Appeal).

[47.](#)

(2000) Ch 676 at 710.

[48.](#)

(2001) Ch 804 at 822.

[49.](#)

See A.M. Honoré, 'Ownership' in A.G. Guest (ed), *Oxford Essays In Jurisprudence*, (1961) page 129 where the author identifies the main incidents of ownership.

[50.](#)

D. Rook, *Property Law and Human Rights*, (Blackstone Press 2001) page 207. There may also be an argument that this rule violated the right to a fair trial under Article 6 of the Convention.

[51.](#)

(2001) Ch 804 at 823.

[52.](#)

The Act will come into force on 13 October 2003.

[53.](#)

Law Com No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* page 1.

[54.](#)

The rules relating to registration are to be found in Schedule 6 of the Land Registration Act 2002.

[55.](#)

See para 5 of Schedule 6.

[56.](#)

Barbara Boguz, 'Bringing Land Registration in to the Twenty-First Century- The Land Registration Act 2002'. (2002) 65 MLR 556 at page 562.

[57.](#)

For a detailed discussion of the distinction between the differences between Roman and common law notions of ownership, see J.H. Merryman, 'Ownership and Estate' (1974) 48 Tulane LR 916.

[58.](#)

Kevin Gray and Susan Gray, 'The Idea of Property in Land' in *Land Law: Themes and Perspectives* Bright and Dewar ed (Oxford University Press 1998) page 18.