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1

Meaning of possession

Introduction

It has been said, rightly, that there is no law of ownership of land in England and Wales, only a law of possession.[1] Yet 'difficult problems arise in English real property law on the concept of possession'.[2] The following chapters explore some of these problems, and suggest some solutions. But this chapter is concerned with the principal cause of those problems; the different meanings, and inconsistent usage, of the term 'possession' in English land law.

Different meanings

In English land law, we use the term 'possession' in three quite distinct and separate senses: first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land; and, thirdly, to refer to fictional 'constructive' possession, which is almost, but not entirely, of historical interest only.[3]

First meaning: a relationship with a corporeal estate

This is the proper, technical meaning of the word 'possession' in English land law.

[1] G. Cheshire and E. Burn, *Modern Law of Real Property* (15th edn, London, Butterworths, 1994), p. 26. Oliver Wendell Holmes, in *The Common Law* (ed. M. Howe, Boston, Little Brown & Co., 1963), p. 163 said: 'possession is a conception which is only less important than contract': and this is true, for 'throughout the history of English land law the operative concept has been possession rather than ownership'; K. Gray and S. Gray, 'The Idea of Property', in *Land Law Themes and Perspectives* (ed., S. Bright and J. Dewar, Oxford, Oxford University Press, 1998), p. 21.

[2] Per Harman J in *Stokes* v. *Costain Property Investments* [1983] 1 WLR 907, 910.

[3] For a different suggested nomenclature, see J. Hill, 'The Proprietary Character of Possession', *Modern Studies in Property Law* (ed. E. Cooke, Oxford, Hart, 2001), vol. 1, p. 25.

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The fundamental point about 'possession' in this sense is that it does not describe the relationship between a person and any tangible property, such as a field, or a building, or a road. The combined effect of the doctrines of tenures and of estates is that there is no absolute ownership of land; only ownership of greater or lesser rights in it.[4] Consequently, 'possession' in this sense describes a relationship between a person and a corporeal estate in land (a fee simple, a lease or, stretching the point, a profit à prendre) rather than the relationship between a person and any physical feature of the land.

There are two types of relationship described by the term 'possession' in this sense; a relationship of *right* and a relationship of *fact*.[5]

A relationship of right

A person has a *right to possess* an estate if he or she has acquired a title to it which is 'vested in possession'. If someone has a present fixed right only to begin enjoying[6] it at some point in the future, then it is vested only 'in interest'. It is 'vested in possession' when someone has a present fixed right to enjoy it now.[7]

The distinction between an estate that is vested in possession and one that is merely vested in interest is illustrated by the distinction between a concurrent (or 'overriding') lease and a reversionary lease.

A concurrent lease is a lease that takes effect immediately, but is granted in reversion upon and subject to a prior occupational lease. A concurrent lease is vested in possession because it grants an immediate fixed right to enjoy an estate in land. The estate is the concurrent lease itself, and it is

[4] There is one exception to this. Land held by the Crown as part of the residual royal demesne could be described as owned by the Crown absolutely. But no private individual or person can ever own land absolutely. Even an unencumbered freehold must technically be held as a tenant of the Crown, whether mediately or intermediately. See ch. 3.

[5] It is important to keep the two concepts distinct. The Court of Appeal failed to do so in *Kingsalton* v. *Thames Water Developments* ([2002] 1 P & CR 15) when deciding that the right of a new registered proprietor to take possession of the registered estate was sufficient to make that person 'the proprietor who is in possession' for the purpose of s.82(3) Land Registration Act 1925. If that had been correct, then any registered disposition during an incomplete period of adverse possession would have reset the clock to zero. See now s.131 Land Registration Act 2002.

[6] 'The word "enjoy" used in this connection is a translation of the latin word "fruor" and refers to the exercise and use of the right and having the full benefit of it, rather than deriving pleasure from it': per Pearson LJ in *Kenny* v. *Preen* [1963] 1 QB 499, 511.

[7] *Fearne's Contingent Remainders* (4th edn, London, Strahan & Woodfall, 1844), vol. 1, p. 2, cited with approval in *Pearson* v. *IRC* [1981] AC 753, 772.

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immediately enjoyed by receiving the rent reserved by, and enforcing the covenants contained in, the extant prior lease.

A reversionary lease is a lease which is granted to begin at some time in the future, usually after an existing lease has expired.[8] A reversionary lease is 'vested' as soon as it is granted,[9] but until the term begins it is vested only 'in interest', and not 'in possession', for, although it already exists, it gives no present right to enjoy any estate in land.[10] The right to enjoy the estate is postponed to some future date, when its term will start.

Consequently, whilst someone can have a 'right to possess' a concurrent lease, no one can have a 'right to possess' a lease that is still reversionary. The most he or she can have is a right to possess it at some point in the future.

A relationship of fact

In contrast to the relationship of right, the relationship of fact – being 'in' possession (or 'having' or 'entering into' possession) – exists when a person is, as a matter of observable fact, actually enjoying the rights and incidents of an estate in land.[11]

Whether a person is 'in' possession is a pure question of fact, for factual possession is not necessarily rightful possession. It is quite possible, common even, for the right to possess an estate to be vested in one person, but for someone else actually to be 'in' possession of it. That is what happens every time a squatter ousts the true owner from land. As we shall see in chapter 8, there is a mental element in this, in that the possessor must intend to possess, but that is itself ultimately a question of fact too.

8 A lease of a reversion granted to take effect immediately is a 'concurrent' lease (nowadays, often called an 'overriding' lease) and not a 'reversionary' lease. A reversionary lease is a lease, whether of a reversion or not, granted to begin at some date in the future. The two concepts are often confused, and lawyers frequently talk about a 'reversionary lease' when what they mean is a 'concurrent lease': see e.g. *Bell* v. *General Accident* [1998] 1 EGLR 69.

9 A reversionary lease cannot be granted so as to begin more than twenty-one years in the future: s.149(3) Law of Property Act 1925.

10 *Long* v. *Tower Hamlets LBC* [1996] 2 All ER 683.

11 Oliver Wendell Holmes said in *The Common Law* (ed. M. Howe, Boston, Little Brown & Co., 1963), p. 170: 'To gain possession, then, a man must stand in a certain physical relationship to the object and to the rest of the world, and must have a certain intent.' The intent, Holmes thought, was an intent to exclude all others from that relationship (p. 174). It is perhaps more accurate to say that the intent is to enjoy the incidents of a particular estate, which might or might not involve excluding all others from physical enjoyment of the thing, depending on the nature of the estate.

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But a person cannot 'have' or be 'in' or 'enter into' possession of an estate that is merely vested in interest, such as a reversionary lease, any more than he or she can have a right to possess it. By its very nature, an estate that is vested only in interest carries no right of present enjoyment of anything. There is nothing to enjoy, and therefore nothing to possess, until the right to the estate becomes vested in possession.

Possession of an estate: summary

The concept of 'possession', in this sense, can thus be summarised by four rules. First, what is possessed is a corporeal estate: a lease, a fee simple, or, stretching the point, a profit à prendre; rather than the physical land itself. Secondly, only estates capable of present enjoyment are capable of being possessed; an estate which carries only a right of future enjoyment is not capable of being possessed. Thirdly, a person has a right to possess such an estate when he or she has acquired a title to it. Fourthly, the person who is, as a matter of observable fact, enjoying the benefits of the estate, 'has' or is 'in' possession of it, irrespective of whether he or she has any externally verifiable title to it or not.

Orthodoxy

Although it is not often stated in these terms, this is entirely orthodox land law, as it has been understood by property lawyers since at least the seventeenth century. Before the Civil War, William Noy wrote *A Treatise on the Law of Tenures, Estates and Hereditaments.*[12] He is an unimportant figure now, because, as Charles I's attorney-general, he devised the writ for raising ship-monies, and was personally responsible for many other abuses of prerogative power, which made him unpopular, even with other lawyers.[13] His treatise, however, included a well-thought-out discussion of the concept of possession.

Noy made two points about it.

[12] The treatise is bound in with *Noy's Grounds and Maxims of the Law of England* (9th edn, reprinted Oxford, Professional Books Ltd, 1985).

[13] His contemporary, Sir Edward Coke, did not suffer the same fate. Coke was an equally difficult man, but had the good fortune (or political foresight) to switch from supporting the Crown to supporting Parliament – eventually becoming leader of the parliamentary opposition between 1620 and 1629 – instead of making the switch the other way, as Noy did. As a result, it is Coke's personality that is imprinted on every page of the common law; see S. Thorne, 'Sir Edward Coke', *Seldon Society Lectures* (New York, William S. Hein, 2003), pp. 1–18.

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His first point was 'all estates which have their being are in possession, reversion, remainder or in right; but to all these, possession is the principal, because it is the full fruition of the estate'. In essence, this is the same distinction as that drawn above between estates which are vested in possession, and which can therefore be enjoyed now, and estates which are merely vested in interest, which can only be enjoyed at some time in the future. The one point of divergence is that, unlike Noy, we would now treat an immediate reversion upon a lease as an estate capable of present enjoyment and therefore capable of being possessed.[14]

Noy's second point was that there is a distinction between 'possession in *fait*' and 'possession in law': the first meant actual enjoyment of an estate capable of being possessed; the second meant the right of actual enjoyment of an immediate estate. Although the terminology is different, Noy was again making the same basic point as one that has already been made above, namely, that there is a distinction between 'having' or being 'in' possession of an immediately enjoyable estate, and merely having a right to do so.[15]

The way property lawyers have understood the concept of 'possession' in its technical sense has, therefore, changed little in the last 300 years.

Second meaning: occupation

The second meaning of possession is its common or vulgar meaning, which is physical occupation of tangible land.[16]

[14] Noy was willing to accept that a reversioner might have seisin, but ruled out the possibility that the reversioner might be described as being possessed of the reversion: *Noy's Grounds and Maxims of the Law of England* (9th edn, reprinted Oxford, Professional Books Ltd, 1985), p. 64.

[15] Pollock and Maitland said of Bracton that he 'never tired of emphasising the contrast' between possession and the right to possession: *History of English Law* (2nd edn, Cambridge, Cambridge University Press, 1911), vol. 2, p. 33. *Cowel's Interpreter of Words and Terms* (3rd edn, London, Place, Churchill & Safe, 1701) makes much the same point: 'Possession is twofold, actual and in law: actual possession is when a man actually enters into lands and tenements to him descended. Possession in law is when lands or tenements are descended to a man, and he hath not yet actually entered into them.'

[16] This concept is sometimes referred to in the cases as 'actual' possession, so as to distinguish it from 'legal' possession; e.g. *Prasad* v. *Wolverhampton BC* [1983] 2 All ER 140, 153. But this is itself capable of causing confusion, because 'actual' possession is sometimes used to denote the state of being 'in' possession of an estate, rather than merely having a right to possess it or having constructive possession of it. The term 'natural' possession is also sometimes used instead of occupation.

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Occupation itself is not a legal term of art. It does not have a single and precise meaning.[17] The meaning varies according to the subject matter and context.[18] But the core concept is not in doubt. A person who is physically present on land is in occupation of it. The presence might be personal, or through goods and chattels or agents or employees. In exceptional cases, a person who does not have a present physical presence on land might, nonetheless, be treated as occupying it;[19] but cases on the edge do not change the core concept, and the core concept is physical presence.

Although occupation is the vulgar sense of the word 'possession', it is quite common even for property lawyers to use the word 'possession' in its 'broader popular' sense of 'use and occupation'[20] rather than its technical sense describing the relationship between a person and an estate. For instance, in *Anchor Brewhouse* v. *Berkeley House* ,[21] Scott J said:

> 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 air space above his land.

Plainly, what he meant by 'actual possession' was occupation.

In some ways it is quite natural even for property lawyers to use the word 'possession', when what they really mean is 'occupation', because a person in possession of an estate in land is also often in occupation of it. Indeed, if an estate carries with it a right of occupation, then a person's possession of the estate is frequently made manifest by occupation.

But, although a person in occupation of land is often also in possession of an estate in it too, there is no necessary connection between the two. A person in occupation of land is not necessarily in possession of any estate in it, and a person in possession of an estate is not necessarily occupying any tangible land in which that estate subsists.

[17] 'The difference between possession and occupation is rather technical and, even to those experienced in property law, often rather elusive and hard to grasp': per Neuberger LJ in *Akici* v. *LR Butlin Ltd* [2006] 1 WLR 201, 207.

[18] Per Lord Nicolls in *Graysim Holdings* v. *P & O Property Holdings* [1996] 1 WLR 109, 110. The same point was made by Lord Cooke in *Hunter* v. *Canary Wharf* [1997] AC 655, 712: '[O]ccupier is an expression of varying meanings.' See also *Paterson* v. *Gas Light and Coke Co.* [1896] 2 Ch 476, 482 and *R* v. *Tao* [1977] QB 141, cited by Lord Cooke in *Hunter* v. *Canary Wharf* [1997] AC 665, 712; cf. per Gorell Barnes P in *Malone* v. *Laskey* [1907] 2 KB 141, 151: 'right of occupation in the proper sense of the term'.

[19] *Bacchiochii* v. *Academic Agency Ltd* [1998] 1 WLR 1313; cf. *Esselte* v. *Pearl Assurance* [1997] 1 WLR 981, and *Barnett* v. *O'Sulivan* [1994] 1 WLR 1667.

[20] Per Sir Douglas Frank QC in *Tulapam Properies* v. *De Almeida* [1981] 2 EGLR 55, 56.

[21] [1987] 2 EGLR 173.

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Excerpt
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That there is no necessary connection between possession of an estate in the land and occupation of the physical land itself can be demonstrated by considering four different types of estate.

First, the estate might be of a type where there is no right to occupy any land, because the right to occupy it has been granted away to someone else. A good example is the reversion upon an occupational lease. The reversioner has no right to occupy the land until the lease falls in. The reversion is nonetheless an estate and the person who receives the rent is in possession of it.[22] A similar, if more exotic, example is a freehold seigniorial manor.[23] The owner of the manor has a freehold interest in the land, but so too does everyone who holds underneath, and the owner of the manor has no right to occupy the latter's lands unless and until their interests escheat.[24]

Secondly, the estate might be of a type which is incapable of being occupied now or at any time in the future. A profit à prendre (such as a right to fish) cannot be occupied. But it is sufficiently corporeal to be treated as if it were an estate in its own right for this purpose,[25] and may be possessed, in precisely the same way as a fee simple may be possessed. So, if the profit is a fishery and someone else fishes, the person in possession of the profit may bring an action for trespass to the fishery.[26]

Thirdly, even if the estate carries a right of occupation with it, the right may not relate to any certain land. Moveable fees, such as a tidal foreshore, may be held 'in fee simple' but, if the sea permanently recedes, the foreshore moves with it. Whilst there is no definite area which the person in possession may occupy, nonetheless he or she can possess the

[22] Section 205(1)(xix) Law of Property Act 1925.

[23] In theory, it has not been possible to create a new manor in England and Wales since the statute of Quia Emptores Terrarum, 1290. In practice, the title to most manors cannot be traced back before the eighteenth century; these are 'reputed manors'. In Scotland, it was possible to create a new manor by subinfeudation until 2004, when feudal tenure was entirely abolished by s.2 Abolition of Feudal Tenure (Scotland) Act 2000.

[24] Formerly, land escheated if the owner died without an heir or was convicted of a felony. Neither event causes an escheat now: s.45(1) Administration of Estates Act 1925, s.1 Forfeiture Act 1870. An escheat can still occur, however, where a liquidator or trustee in bankruptcy exercises the statutory right to disclaim freehold land: *Scmlla Properties Ltd* v. *Gesso Properties (BVI) Ltd* [1995] EGCS 52; [1995] BCC 793. See ch. 7.

[25] See ch. 8.

[26] *Bristow* v. *Cormican* (1878) 3 App Cas 641. If someone instead pollutes the water killing the fish, the action is in nuisance for interference with the fishery: *Fitzgerald* v. *Firbank* [1897] 2 Ch 96; *Paine & Co.* v. *S Neots Gas & Coke Co.* [1939] 3 All ER 812.

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fee simple by exercising the rights of the fee simple owner wherever the foreshore happens to be.[27]

Finally, even if the estate does carry with it a right to occupy particular land, the estate may be possessed without the person in possession being in occupation of any land. He or she might choose to enjoy the estate by leaving the property locked up and unoccupied,[28] or by putting a caretaker into occupation.[29]

Third meaning: constructive possession

There is yet a third sense in which the term 'possession' is used in English land law, namely, constructive possession.

The expression 'constructive possession' is sometimes used in contrast to 'actual possession', so as to mean possession of a thing otherwise than by actual occupation.[30] This is particularly common in cases about land taxes, because the taxation consequences sometimes depend upon whether a person in possession of an estate is also in occupation of the land. But otherwise the distinction is irrelevant, because occupation is neither necessary nor sufficient to be in possession of an estate.

There is, however, another more significant meaning to constructive possession, and that is possession which is entirely fictional. It describes the process by which the law deems a person presently to be 'in' possession of an estate, when, in fact, he or she is not; or which deems that person to have been 'in' possession of it in the past, when, in fact, he or she was not.

Historically, this deeming process was very important. In the past, rights and remedies often depended upon being able to establish who was currently, and who had recently been, 'in' possession of a particular estate.

Title to an estate often depended upon this because long after the Norman conquest it remained common for lifetime transfers of land to be made by a process called 'livery of seisin'. As the name suggests, the transfer was completed by delivering occupation of the land up to the transferee,

[27] *Baxendale* v. *Instow Parish Council* [1981] 2 All ER 620; *Jackson* v. *Simons* [1923] 1 Ch 373; s.61 Land Registration Act 2002.

[28] Per Lush J in *R* v. *St Pancras Assessment Committee* (1877) 2 QBD 581, 588; approved *Liverpool Corporation* v. *Chorley Union Assessment Committee* [1912] 1 KB 270.

[29] *Bertie* v. *Beaumont* (1812) 16 East 33.

[30] An attempt to introduce the concept of 'constructive-actual' possession was rejected in *New York–Kentucky Oil & Gas* v. *Miller* 187 Ky 742, 220 SW 535 (1920).

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so that he became physically seized of it.[31] So the transferor could take the transferee onto the land and leave him in occupation, sometimes symbolically handing him a rod or a sod of earth before departing,[32] or the transferor could point to the land and authorise the transferee to enter upon the land and take it. The result was that you could never know who had good title to the land unless you also knew who had recently been in possession of it, and also the circumstances in which possession had been given up.

In the medieval period evidence of recent possession was as important to procedural rights as it was to substantive rights. Henry II's great innovation, the assize of novel disseisin, depended on evidence of it. Novel disseisin was a summary remedy designed to discourage resort to self-help. The principle was that, if someone ousted another from possession of a freehold estate, without first obtaining a court order, then the court would make a summary ruling, requiring possession to be restored to the original possessor, without any investigation of the merits. The defendant could still bring a separate 'real' action to prove that the ouster had been lawful, but in the meantime the position on the ground would be restored to that which it had been before hostilities commenced.[33]

But, as society became more complicated, so relying on evidence of who had formerly been 'in' possession of an estate inevitably became more unsatisfactory for determining rights and remedies. Livery of seisin could not be used to convey a freehold if the land had already been let to a tenant, because a physical entry would not be possible without interfering with the rights of the tenant. Similarly, there was a problem with novel disseisin where someone had been wrongly dispossessed of land but had taken the matter into his own hands and retaken the land by self-help, instead of

[31] F. Sullivan, *Lectures on the Constitution and Laws of England* (2nd edn, London, Dilly & Johnson, 1776), pp. 59–60.

[32] When William landed at Pevensey in Sussex, he is supposed to have stumbled to the ground, and then turned a bad omen into a good one, by rising, holding a sod of earth in each hand, and explaining that he had seized England. His knights would all have understood the reference: he had tripped because God was anxious to deliver seisin to him immediately, using the traditional Norman form of lifetime conveyance.

[33] F. Sullivan, *Lectures on the Constitution and Laws of England* (2nd edn, London, Dilly & Johnson, 1776), p. 292. F. Maitland, *Forms of Action at Common Law* (Cambridge, Cambridge University Press, 1962), p. 22. Pollock and Maitland, in their *History of English law* (2nd edn, Cambridge, Cambridge University Press, 1911), p. 146, described the assize of novel disseisin as 'one of the most important laws ever issued in England', it having been created by a now lost ordinance of Henry II in 1166, perhaps modelled on an already extant practice in London; see H. Chew, *London Possessory Assizes* (London Record Society, 1965), p. xiv.

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bringing novel disseisin and recovering the land through the courts. Novel disseisin would then work the wrong way round: the squatter, having been physically dispossessed, would be able to recover the land from the original possessor.

In order to resolve these and other problems the courts developed disparate doctrines of constructive possession, but in each the basic concept was the same: someone would be treated as having taken possession, without ever having done so,[34] or someone would be treated as still retaining possession after having been dispossessed.[35] So a freehold, which was subject to a tenancy, could be transferred by constructive livery of seisin without evicting the tenant, provided that the tenant attorned to the new owner. The attornment stood in place of the physical entry. Similarly, with novel disseisin, the original possessor could retain constructive possession, even against the disseisor's heir, in the following manner:

> if he dare approach the land, then he ought to go to the land, or to a parcel of it, and make his claim; and if dare not approach the land for doubt or fear of beating, or maiming, or death, then ought he to go and approach as near as he dare toward the land, or a parcel of it, to make his claim.[36]

There ought to be little room for any of this sort of nonsense in land law today. In conveyancing, there is one faint echo of livery of seisin, which

[34] Statute could work the same trick. By the Statute of Merchants, 1285, a judgment creditor was deemed to have been in possession of the debtor's land, in order to bring novel disseisin for the purpose of evicting the debtor, selling the land with vacant possession, and satisfying the debt. The statute was not entirely popular. Andrew Horne, a fourteenth-century London fishmonger, who is traditionally credited with having written *The Mirror of Justice*, one of the first textbooks of English law, complained that the statute was contrary to law: A. Horne, *The Mirror of Justice* (trans. W. Hughes, Washington, John Byrne, 1903), p. 287. Coke and Blackstone both thought highly of *The Mirror*, but Sir Frederick Pollock thought that it might have been written as a joke, and the always reliable Maitland said: 'No doubt a well-read and circumspect historian may find valuable hints in this book; but the statements of law that are in it he will construe by "the rule to the contrary", and he will insert a "not" wherever the author is more than usually positive' ((1893) 7 Seldon Soc. p. li). Holdsworth thought it was 'incomprehensible', and, more kindly, 'a legal romance': W. Holdsworth, *Sources and Literature of English Law* (Oxford, Oxford University Press, 1925), p. 32.

[35] Until the doctrine was abolished by the Real Property Limitation Act 1833, a physical ouster was required to dispossess a paper title owner for limitation purposes, even though someone else might have been in possession for all other purposes: *Paradise Beach* v. *Price–Robinson* [1968] AC 1072, 1082; *Pye* v. *Graham* [2003] 1 AC 419, 433.

[36] Littleton's Tenures, sec. 419. See also B. Simpson, *Introduction to the History of Land Law* (2nd edn, Oxford, Oxford University Press, 1961), pp. 38–9.

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