



Introduction

YUN-CHIEN CHANG

Possession is a two-thousand-year-old institution, and scholars have debated the concept of possession since the mid-nineteenth century, but modern scholars lack consensus on the definition of possession. Although common-law countries appear to avoid exactly defining possession, civil codes in the European Continent and East Asia take on the challenge. They differ, however, over how possession is and should be delineated. Some countries, such as France and the Netherlands, distinguish possession from detention, whereas others, for example Germany and Taiwan, use the terms “possessors” and “agents in possession.” A few jurisdictions, such as Japan and Korea, consider possession to be a right while others, for instance China, treat it as a fact. Some civil codes, such as those of Germany and Taiwan, simply define possession as actual control, but others, for instance France’s and the Netherlands’, also require specific intents. In short, the concept of possession is either ambiguous or messy.

Law and economics has been the dominant legal analytical approach for the past half-century, yet rarely have scholars applied economic analysis to various possession issues. This timely book fills the gap. Leading economic lawyers from both common law and civil law jurisdictions offer their insightful treatment of possession, some at the abstract level, and others toward a specific issue.

The book begins with Thomas Merrill’s “Ownership and Possession.” Merrill analyzes the concepts and relations of possession and ownership from the perspective of information costs. Possession imposes low information costs in the world of “strangers,” whereas ownership, harder to prove, requires more information costs in order to conduct impersonal exchange. In the modern world where recording or registration of titles is cheaply available, the reason to continue protecting possession independently of ownership is to expand access to law as a means to enforce property rights.

Carol Rose, in Chapter 2, analyzes the proverb “possession is nine-tenths of the law,” inquiring what the other point of the law is (one regular

candidate being provenance) and whether this proverb is an accurate description of the world. Rose argues that possession is not just about physical control (compare Chapter 4), or the right to exclude, but about acting like an owner. Generally, using makes one act like an owner. She finds support for such a claim from the case law of first possession and adverse possession. Rose also emphasizes the importance of community support and recognition of possession. Her takeaway point is that when the law is weak, possession is nine-tenths of the law. By contrast, when the law is settled, the law is nine-tenths of possession.

Henry Smith offers a modular theory of possession. Like Rose, Smith emphasizes salience in identifying and delineating possession. For Smith, along the same lines with longtime coauthor Merrill, possession is very much based on social norms and is the default in property law because it is low-cost and intuitive for the public. More formalized legal tools, such as ownership, will be used only when stakes become high. Note that possession itself is a formalized version of the possessory custom, the ultimate default regime for assigning things to persons. Possession thus exhibits what Smith calls the “elsewhere pattern,” meaning that “possession is defined by not being anything else.” More specifically, possession is the most basic rule in many scenarios, and possession applies when nothing else does. Smith also observes that although civil law treats property as the law of things, common law eschews this notion. However, the function that the concept of things served in civil law is captured by the concept of possession in the common law. Possession (with close ties to customs and informal norms) and accession work in tandem to determine thinghood.

In a sense, my chapter, “The Economy of Concept and Possession,” serves as the book’s point of departure. Drawing on Henry Smith’s economy of concept theory, Chapter 4 argues that a simpler concept of possession (with actual control as the necessary and sufficient condition) economizes on information costs and makes the possession law much more comprehensive. The confusion in the civil codes and the scholarly literature arises from conflation of three different concepts: possession as a fact; possession as a (subsidiary) right that is one stick in the ownership bundle; and possession as a basis for acquiring and relinquishing titles, as in adverse possession, first possession, and abandonment. Actual control is the least common denominator in all possession-related issues; thus, possession qua actual control is a fact. The subsidiary possessory right is implied in the property structure, but it is never spelled out. It can be transferred from owners to, for example, holders of *usufruct*. Finally,

intents only matter when possessors gain or lose titles, and the required intents differ across contexts; thus, a specific intent should not be embedded in the baseline definition of possession, but left to specific doctrines.

Several chapters in this volume contrast, if not challenge, my simplified definition of possession with their own. For example, Merrill argues that actual control carries more weight than intent to possess, though the latter alone might be honored, at least in the “social possession” context. My chapter, which is concerned more with “legal possession,” dismisses the role of intent to possess when no title change is involved. In addition, Daphna Lewinsohn-Zamir makes a case for “the new possession,” that is, broadening the domain of possession to intangible entitlements, while Chapter 4 argues that the concept of possession, at least in the civil law system, should be simplified. These two views are not in direct conflict with each other, as I prefer not to describe “holding intangible entitlements” as possession – otherwise the concept of possession becomes overly complex again. In Chapter 9, Richard Epstein contends that actual control, the critical element in my concept, is not always easy to ascertain.

Lewinsohn-Zamir, in Chapter 5, draws on the findings of behavioral-law-and-economists. She takes these researchers to task for failing to distinguish possession from ownership (not to mention lawful from unlawful possession), but notes that the few studies that attend to the difference suggest that possession itself looms large in creating the “endowment effect.”

Like Lewinsohn-Zamir, James Krier and Christopher Serkin, in Chapter 6, draw on the psychological literature, most notably the System 1 versus System 2 theory popularized by Daniel Kahnemann. Krier and Serkin point out that the scholarship of Thomas Merrill and Henry Smith (both contributors to this volume) focuses on information costs and the right to exclude; thus, their views can be characterized as emphasizing the quick but error-prone role of System 1. Other scholars, by contrast, stress the importance of making complex arrangements in property law to promote normative goals, such as human flourishing. It takes the sharp but energy-consuming System 2 to perform this trick. As their chapter title suggests, Krier and Serkin focus on possession as a heuristic, echoing Merrill, in Chapter 1. They powerfully apply their possession heuristics thesis to criticize the theoretical literature and court decisions in the realm of relativity of title, first possession (capture) of wild and domesticated animals and natural resources, finders of lost versus mislaid

movables, shared possession in concurrent ownership, and adverse possession, several of which are also discussed in other chapters of this book.

Daniel Kelly, in Chapter 7, critically reviews the (scant) literature on whether an owner's private incentive to divide possessory rights will exceed the socially optimal level. Kelly contends that most costs and benefits of such division are internalized, and thus fragmentation is unlikely, particularly for tangible objects. As in the two preceding chapters, Kelly draws on the psychology literature, observing that individuals are inclined to hold full rights (rather than partial rights) in a resource. Contributing to the debate on the efficiency of the *numerus clausus* principle, Kelly points out that property forms, as compared to contracts, better deter strategic behaviors, implying that in areas where owners' incentives to divide possessory rights are suboptimal, adding new property forms could improve efficiency, as new property forms facilitate division.

Focusing on information costs, as the Merrill, Smith, and Chang chapters do, Benito Arruñada, in Chapter 8, examines how possession gives notice to facilitate impersonal exchange. Drawing examples from the Roman law and medieval English law to modern German and US law, Arruñada demonstrates that "exercise" of possession is effective as a titling mechanism when it is observable by third parties and "delivery" of possession (for example, livery of seisin) is public knowledge. In addition, as possession is only effective to inform one single in rem right, relying on possession for titling requires that all other rights be either reduced to in personam status or be burdened by the possessory in rem right. Arruñada also analyzes documentary possession (such as possession of negotiable instruments), and argues that documentary possession is effective as a titling mechanism only in the absence of multiple in rem rights.

Part II of this volume comprises four chapters that deal with more specific possession issues. Richard Epstein, in Chapter 9, focuses on spectrum rights, particularly the so-called LightSquared Debacle. He begins with a restatement of possession versus ownership law in Roman and English law (also discussed in Chapter 8), tracing the concept of possession. After a detailed description of the LightSquared controversy, Epstein points out that the weak property rights given to spectrum licensees are due to the FCC's ill-advised regulatory policy. He argues that the same system of possession and property rights used in the common law is also applicable to spectrum, which more resembles trade names and trademarks than copyrights and patents. The nuisance law, in particular, can be carried over to protect holders of broadband interests.

Daniel Klerman, in Chapter 10, analyzes choice of law and jurisdiction issues in property, with appropriation of water, adverse possession of stolen arts, and first possession of wild animals as the prominent examples. Klerman argues that the situs rule is mostly correct, in terms of giving individuals, legislators, and judges the right incentives to behave efficiently (such as making efficient laws or making best use of the land and attendant water). In the context of adverse possession of stolen arts, however, a choice of law rule that applies the law of the last place of undisputed ownership gives the relevant parties the best incentives. Regarding jurisdictional issues, although Klerman points out that there is no clear-cut best rule in stolen arts issues, he contends that the courts of the place where the art was last undisputedly owned are good candidates.

Shitong Qiao, in Chapter 11, focuses on a unique adverse possession problem: “small property” in Shenzhen, the fourth largest city in China. In China, rural land is collectively owned, whereas urban land is state-owned. Only urban land can be commercially developed, and the only way to convert rural land to urban land is through eminent domain. The economic development in Shenzhen in the past few decades was faster than the pace of providing enough (affordable) housing by the government. As a result, farmers/villagers in Shenzhen started to build illegal houses and condominiums despite the legal ban. That is, they adversely possessed and developed public land. Without an adverse possession law, developers could not acquire formal title to the buildings and only had “small property rights.” Using the optional law framework that Calabresi and Melamed initiated in 1972 and Ian Ayres systematized in recent years, Qiao demonstrates that Rules 1, 2, 3, 4, and 6 have all been used by the Shenzhen government to deal with the illegal buildings that fly in the face of land use regulations. With first-hand materials (such as interviews with government officials, developers, and villagers and on-site observations) from his yearlong fieldwork in Shenzhen, Qiao argues that Rule 2 (a call-option liability rule) is the most efficient in dealing with the small-property conundrum, because of information asymmetry between the government and the numerous holders of small-property rights.

In the final chapter, Abraham Bell leads us to one of the most famous possession doctrines, the first possession rule, and reexamines the normative impulse for property law’s use of possession as a key to acquiring greater property rights. Bell challenges Richard Epstein’s classic view in his seminal article, “Possession as the Root of Title.” Epstein posits that first possession is an essential rule in property law primarily because it

long has been used, and it provides for rapid dissemination of private property rights. Bell argues that in some cases property law recognizes first possession as a source of title for an entirely different reason: it is essential to recognize rights *de jure* that already exist *de facto*, lest the legal system of property lose its salience. Put differently, if the law did not recognize legal rights as a result of possession, many first possessors would find it advantageous to eschew legal rights and protect their possessory rights extra legally. Indeed, in cases where the law denies property rights notwithstanding possession, robust extralegal asset markets have developed, undermining the goals that led lawmakers to split property rights from possession. Examples of this phenomenon can be found, for instance, in the markets for illegal antiquities and natural resources. However, first possession is often a problematic way to allocate title; salvage rules can often provide an alternative that both rewards *de facto* possession and reduces wasteful overexploitation.

This book grows out of the 5th Law and Economic Analysis conference held in Institutum Iurisprudentiae, Academia Sinica, Taiwan, organized by the editor Yun-chien Chang. Several contributors presented their draft chapters at the conference. More chapters were solicited after the conference. I deeply appreciate the financial support of my home institution. Chiehhan Wang, Han-shin Lin, Apple Ching-fang Hsu, Ivan Chiang, and many others helped at the conference. Charline Jao and Christine Yuan provided valuable research assistance as I compiled this volume.

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Ownership and possession

THOMAS W. MERRILL

1. Introduction

One of the enduring mysteries about property is why the law protects both ownership and possession. In a pre-modern world, with low rates of literacy and no formal method of registering titles, one can understand why the law would protect possession. In such a world, there may be no concept of property beyond the understanding that persons should respect possessory rights established by others. It is less clear why possession should be protected once property comes to be understood as ownership. Ownership and possession will commonly overlap, and protecting ownership will protect possession. Nevertheless, even in the most sophisticated legal systems, where digital records and title registries protect ownership, possession continues to be legally protected independently of ownership. The objective of this chapter is to explain the persistence of this dual nature of property law, whereby the law protects both ownership and possession.

The thesis advanced is that information costs explain why possession persists as a distinct subject of legal protection in a world that has otherwise fully embraced the concept of ownership. The great advantage of possession is low information costs. The cultural knowledge that communicates when others possess tangible objects is easily assimilated without formal instruction by virtually everyone in the relevant community. Armed with this knowledge, individuals can tell at a glance based on physical cues what things others possess, and their ability to draw these rapid inferences makes possession a low-cost tool well suited to processing information about large numbers of persons and objects. Respect for possession established by others is also a nearly universally shared norm – one

Charles Evans Hughes Professor, Columbia Law School. An earlier version of this chapter was given as the keynote address at the 5th Law and Economic Analysis Conference at the Institutum Iurisprudentiae, Academic Sinica, Taiwan. I thank the conference participants and especially Yun-chien Chang for their many helpful responses and suggestions.

that operates both in informal social settings and with respect to conduct regulated by law. Not surprisingly then, possession continues to be relied upon in a wide range of activities in establishing who is entitled to what, ranging from assignment of work stations in offices, to retrieval of suitcases from luggage carousels, to low-valued commercial transactions.

Ownership is a more secure basis for determining rights to things, in the sense that it identifies those who have a legally enforceable right to things to the exclusion of all other potential claimants. Establishing ownership entails an investigation into the history of the object in question in order to ascertain whether those who purport to have legally enforceable rights came to acquire those rights in a legitimate fashion. Ordinarily, this means that the rights must have been acquired through a series of consensual transfers, although occasionally questions of original acquisition arise. Although establishing ownership provides much greater security of rights than establishing possession, it is clearly much more information-intensive. It entails investigating the chain of title or provenance of the object, which entails consulting deeds, previous contracts of sale, or registries of rights.

The information-cost differential between establishing possession and ownership explains why the concept of possession continues to perform critical functions even in a society that has a legal system that protects ownership. Establishing ownership is cost-effective for the relatively small audience of persons interested in engaging in exchange of particular high valued rights to things. Establishing ownership is much too costly, however, for everyday purposes of determining who is entitled to what. For those whose interest in valuable things is simply to avoid interfering with the rights of others, ascertaining possession and respecting possession established by others is far cheaper, indeed, it operates virtually automatically without conscious thought. Possession also works well in numerous settings where ownership is legally relevant, but making a formal determination of ownership would represent an excessive information-cost burden. Possession in these contexts serves as a low-cost proxy for ownership.

The information-cost differential explains why possession performs critical functions in society, but it does not explain why the law continues to protect possession as opposed to relying solely on the social norm of respect for possession established by others. Part of the answer is that the law itself seeks in many ways to capitalize on the information-cost conserving features of possession. The classic example is conferring standing on persons in possession to bring actions against those who interfere with property rights. Since proving possession is much cheaper in information-cost terms than proving ownership, this greatly expands access to law as a means of enforcing property rights. More generally, given the widespread