§3.13 Possession

We can bring together a number of the points discussed in this chapter by focusing more systematically on the fundamental concept of possession as a source of property rights, already touched on in several places, for example with reference to wild animals, treasure, and adverse possession.¹

Two polar systems of property rights can be imagined: ownership only in accordance with a system of paper titles, and ownership only by physical possession. Either would involve serious inefficiencies. A universal system of paper titles assumes that everything is already owned² and permits transfers only by formal conveyance (for example, the delivery of a deed), and so is helpless to deal with acquisition of property that is unowned, whether because it was never owned or because it has been abandoned. Such a system would also leave undefined the status of nonowners who nevertheless have the exclusive use of property, such as tenants. And it would be helpless to deal with the inevitable mistakes to which a system of paper rights gives rise. The other polar regime, in which rights to the exclusive use of property are made to depend on physical control, entails heavy investments in the maintenance of such control. As we know, it also makes no provision for rights to future as distinct from present use.

Thus an efficient legal regime of property rights is likely to be a mixed system, combining paper rights with possessory rights. Suppose a new, uninhabited continent were discovered. To give the discoverer title to the entire continent before he had taken possession of it in the sense of occupying all or at least most of it would incite an excessive investment in exploration, since the explorer who discovered the continent just one day before his rivals would obtain the continent’s entire value. An even more extreme case, one that was common in the early period of European exploration of other continents, was the effort by monarchs (including the Pope) to create property rights in undiscovered lands by grant.

The alternative of basing ownership of previously unowned property on physical occupation reduces the net reward to being-first, and so alleviates the problem of excessive investment, by forcing the would-be owner to incur costs of occupation. It also tends to allocate resources to those persons best able to use them productively, for they are the ones most likely to be willing to incur the costs involved in possession. A discoverer who could obtain title to the entire continent just by declaration or filing would promptly turn around and sell off most or all of the land because he would not be the most efficient developer of all of it. It is more efficient to give the


² An exception—the acquisition of title by a grant—is discussed below.
people who are actually going to possess the land the ownership right in the first place.

But what exactly does "possession" mean in this context? Suppose the discoverer and first possessor of a previously unowned, unclaimed, and unoccupied tract of land is not continuously present on the land? If someone now occupies the land, is he the possessor? If so, owners would make wasteful expenditures on fencing and patrolling their land. It is one thing to condition acquisition of title to newly found property on possession; but once title is acquired by this route, it should be enough for the maintenance of that title to record it in a public registry of deeds in order to warn away accidental trespassers. That is a cheaper method of notice than elaborate signage and fencing, let alone the kind of present, pervasive use that might reasonably be required to obtain title to a newly discovered continent.

Consider the following, at first glance unrelated, case: The plaintiff entrusts a safe to the defendant to sell for him. The defendant finds some money, evidently the plaintiff's, in a crevice in the safe. The plaintiff demands the money back. Should he get it back? Finding lost property is a valuable service and should be encouraged. But as with the discovery of new continents, giving the finder the entire value of the property could lead to overinvestment in exploration. It could also lead owners to overinvest in safeguarding their property. Better to give the finder a reward, the domain of the law of restitution (see §§4.9, 6.9 infra), for finding mislaid property, rather than giving him ownership of the property.

Suppose a person leaves his wallet, containing money, at a supermarket checkout counter. Another customer picks up the wallet. The owner never claims it. Should the customer be entitled to retain possession of the wallet and money, or is the supermarket (the "locus in quo," as the cases say) entitled to it? In other words, whose "possession" shall determine ownership? The argument for the customer is that since it was he who found it, he deserves a reward; the supermarket did nothing. But if, knowing that he'll be able to keep the wallet unless the owner claims it, the customer walks off with it, it is less likely to be returned to the owner than if it were left to be found by a supermarket employee. For when the owner discovers his loss he will check in the places that he has been, and the search will quickly lead him back to the supermarket.

The common law deals with such cases by distinguishing between lost and mislaid items, "lost" meaning the owner doesn't realize the property is missing. Not realizing that, he is unlikely to search for the property and so the law makes the finder the lawful possessor rather than, as in the case of mislaid property, the owner of the place where it is found. (How should the safe and the wallet cases be decided under this rule?) But there is an economic objection to allowing the customer-finder to keep (if the real owner never wises up and goes looking for his property, or does but never finds it) even lost as distinct from mislaid property: His reward may greatly exceed his cost, and we have seen that excessive rewards for finding tend to attract excessive resources into the activities that generate such rewards. True, it is only ex post that the customer-finder obtains this reward; that is, it is only if the owner did not claim his property. And this means that the finder's expected reward may have been small, since most people who lose valuable property make an effort to recover it. But since an employee of the supermarket would probably have found the wallet shortly after the customer did, the value of the customer's finding it may have been slight—in fact negative, for the owner will have more difficulty reclaiming it from a customer than from the supermarket even if the customer is required to leave his name and address with the supermarket.
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Suppose the rule is, therefore, that the supermarket has lawful possession, but the customer-finder doesn't know or doesn't care what the law is and walks off with the wallet—and then he forgets it in the next supermarket he goes into. This time an employee of the supermarket finds it and the customer returns to the supermarket and claims it. Should the customer prevail over the subsequent finder, the supermarket?

The case of the safe raises the question whether physical control should be required for the maintenance as well as acquisition of legal possession. The answer given by economics is, in general, no. Such a requirement would lead to wasteful expenditures and also discourage specialization. Imagine if a tenant were deemed the owner of the leased premises because the landlord, by virtue of the lease, lost physical control over them (that is, the landlord cannot barge into the premises during the term of the lease). It would be more sensible to recognize the joint possession of landlord and tenant and to parcel out the right to take legal action to protect their possessory interests between them in accordance with comparative advantage in particular circumstances. These will vary. Compare the following cases: (1) the tenant has not yet taken possession; (2) dispossession by an intruder takes place so late in the term of the lease that the tenant has little incentive to sue; (3) the infringement is more harmful to the landlord than to the tenant (for example, if the tenant is dispossessed by a dealer in illegal drugs, who proceeds to frighten away the other tenants); and (4) the tenant simply lacks the resources to litigate against the infringer.

When should property be deemed not lost or mislaid but abandoned, that is, returned to the common pool of unowned resources and so made available for appropriation by someone else? (When intellectual property is abandoned, however, it cannot be reappropriated; it enters the public domain, where it remains—forever—freely usable by anyone. What economic sense does this make?) From an economic standpoint, the clearest case of abandonment is when the owner deliberately "throws away" the property, in effect voluntarily returning it to the common pool. His act signifies that the property has no value to him, and so by deeming the property abandoned and therefore available for reappropriation by someone else the law encourages the reallocation of the property to a higher-valued use without burdening the system with negotiation costs. For given that the (former) owner values it at zero dollars or less, anyone who bothers to take the property is certain to value it more. Moreover, transaction costs can be high even in the case of parcels of land. The owner may be unknown. More commonly, the exact boundaries of his property are unknown, so that the adverse possessor doesn't know that he's encroaching or the owner that his property is being encroached upon. By the time the owner wakes up and asserts his rights, evidence may have faded and the adverse possessor may have relied on a reasonable belief that he is the true owner. Thinking the property his, he may have made an investment in it that will be worthless if he loses the property to the original owner, to whom, however, the property may be worthless, as indicated by his having "slept" on his rights. When there is a gross disparity in the value that the only competitors for a good attach to it, transaction costs are likely to be high, because each competitor will vie to obtain the largest possible share of that value. Adverse possession is thus a method of correcting

3. Suppose the land is worth $1 million to the adverse possessor (perhaps because he is aware of mineral deposits on it) and only $10,000 to the original owner (who is unaware of the deposits). Then at any price between $10,000 and $1 million both parties will be made better off by a sale. But each will be
paper titles in settings in which market-transaction costs are high; it improves rather than challenges the system of property rights.

Just like a deed of title recorded in a public registry, possession, provided it is "open and notorious," as the cases on adverse possession say, is a way of notifying the world of the existence of a claim. Probably the only feasible way in the earliest stages of society; the fence is prior to the paper title as a method of announcing a property right. Requiring an exercise of physical power to obtain or maintain a possessory right trades off the costs of particular physical acts that communicate a claim against the benefits of clear communication. The more elaborate the required acts, the more unmistakable the communication (which is good because the clear public definition of property rights lowers transaction costs and tends to optimize investment); but also the more costly this form of notice becomes. The costs of the most elaborate acts of notice by possession — acts of complete, continuous, and conspicuous occupation — will often outweigh the benefits. That is why a lesser degree of active possession will suffice to maintain a property right than would be necessary to acquire it.

Consider the colorful old case of Haslem v. Lockwood. The plaintiff had raked horse manure dropped on the public streets into heaps that he intended to cart away the next day, that being the earliest he could procure the necessary transportation. The defendant beat him to the punch. The plaintiff sued for the return of the manure and won. The original owners of the manure, who were the owners of the horses that had dropped it, had abandoned the manure; the plaintiff had found it. He took possession of it by raking it into heaps, and the heaps were adequate notice to third parties, such as the defendant, that the manure was (no longer) abandoned. To have required the plaintiff, in order to protect his property right, to go beyond the heaping of the manure — to fence it, or watch continuously over it, or arrange in advance to have a cart in place to remove the manure as soon as it was heaped — would have increased the cost of the transaction by which manure worthless to the original owner became a valuable commodity, without generating offsetting benefits.