THE NATURE AND JUSTIFICATION OF POSSESSORY TITLE

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Abstract—Possession of a chattel is sufficient to create a title to it. This article considers the nature and justification of these titles. It argues that popular justifications of possessory title fall short and offers a more appealing justification. The article then seeks to resolve, in light of that justification, three ongoing doctrinal controversies about a possessory title's nature: whether it continues to exist after possession of the chattel is lost; whether it is transferable; and whether it includes a right that others not interfere with a possessor's use of the chattel.

I. INTRODUCTION

As a matter of English law, it is well established that the possessor of an already-owned chattel acquires a title to that chattel in virtue of their possession of it.[1] Lord Browne-Wilkinson set out the definition of "possession" for the purposes of this rule in *JA Pye (Oxford) Ltd. v Graham*: a person has possession of a chattel when they have both (1) "a sufficient degree of physical custody and control" over it, and (2) "an intention to exercise such custody and control on [their] own behalf and for [their] own benefit".[2] Where those two facts are made out, a title follows.

This article examines the justification for and nature of these titles. In Section II, I set out the title's uncontroversial core: a right to exclude others from the possessed chattel, which places all people—except those who hold a better title—under duties not to interfere with it. That Section also introduces three doctrinal controversies about the title's nature: whether it continues to exist even after possession is lost; whether it is transferable; and whether it encompasses, in addition to a right that others not physically interfere with the chattel, a right that others not interfere with the uses to which a possessor is putting the chattel.

Section III then asks what might justify a possessory title's core. It considers and rejects the two most popular justifications of that title in the case law and academic literature. The first holds

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[1] In this article, my concern is with those titles which arise solely in virtue of possession of a chattel being taken. I am not concerned with the legal interests of those who have been granted some derivative interest in the chattel by its owner, such as a pledgee or a consensual bailee. In those cases, one can always argue that the source of the legal interest is the owner's consent rather than the possession itself.

[2] *JA Pye (Oxford) Ltd. v Graham* [2002] UKHL 30, [2003] 1 A.C. 419, at [40]. Although a case concerning land, Lord Browne-Wilkinson made clear (at [42]) that the same rule governs the taking possession of chattels. For an endorsement of this rule in respect of chattels in the Court of Appeal, see e.g. *Parker v British Airways Board* [1982] Q.B. 1004, 1019 (Eveleigh L.J.).

that these titles exist to prevent violence, the second that they reduce administrative costs. Instead of these accounts, I argue, we ought to endorse a justification that places a person's (non-legal) interest in making valuable use of chattels at its heart. Possessory titles are best justified on the grounds that they imperfectly track moral reasons to which all people are subject, which tell us that we ought not interfere with another person's pursuit of valuable projects.

Section IV resolves, in light of that justification, the doctrinal controversies mentioned earlier. Each part of that Section deals with one controversy from a doctrinal and a normative perspective. Doctrinally, I argue that there is insufficient evidence to conclude that these controversies have authoritatively been settled by English courts. In doing so, I take issue with the arguments of a number of scholars who claim otherwise. This exercise is particularly useful in regard to the first and second controversies—the persistence and transferability of title—because an orthodoxy is emerging within academia which holds that the case law determines that possessors' titles do persist and are transferable.[3] Normatively, I argue that these titles should persist after possession is lost, should be transferable and should include a (limited) right that others not interfere with a possessor's uses for the possessed chattel. The emerging orthodoxy can therefore be defended in normative terms, even though it is not conclusively supported by the authorities.

The arguments considered below are significant for several reasons. First, an important class of legal rights are subjected to normative scrutiny: those created by taking possession. These rights are notoriously difficult to justify, primarily because they entail duties that are unilaterally imposed on citizens without their knowledge or consent.[4] Secondly, our doctrinal controversies may have consequences for the outcomes of legal disputes. In Sections II and IV, I discuss many hypothetical cases to which existing authorities give no solution. Thirdly, the implications of my arguments are important. In particular, it is only a matter of time before courts are asked to apply the concepts of possession and title to assets less familiar to us than chattels and land. Academics have recently called for courts to do precisely this in relation to digital assets[5] and intellectual property.[6] But

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[3] A thorough defence of this view is set out in L. Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford 2021), ch. 5. See too L. Rostill, "Terminology and Title to Chattels: A Case against 'Possessory Title'" (2018) 134 L.Q.R. 407. For other endorsements of this view, see B. McFarlane, *The Structure of Property Law* (Oxford 2008), 144-46; R. Hickey, *Property and the Law of Finders* (Oxford 2010), ch. 5; S. Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford 2011), 24-26, 30-33; W.J. Swadling, "Property: General Principles" in A.S. Burrows (ed.), *English Private Law*, 3rd ed (Oxford 2013), para. 4.131 and para. 4.422; M.J.R. Crawford, *An Expressive Theory of Possession* (Oxford 2020), 54-55.

[4] Some scholars consider accounting for the existence of unilaterally imposed duties to be a central challenge for a theory of private law: e.g. E.J. Weinrib, *Reciprocal Freedom* (Oxford 2022). Indeed, the concern that such duties are morally illegitimate has motivated an all-out attack on the mainstream understanding of the law of unjust enrichment: see R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574, 581-82.

[5] S. Green and F. Snagg, "Intermediated Securities and Distributed Ledger Technology" in L. Gullifer and J. Payne (eds.), *Intermediation and Beyond* (Oxford 2019).

[6] P. Mysoor, "Possession in Copyright by Analogy" (2024) 140 L.Q.R. 277.

before we can assess the merits of applying these old concepts to new problems, we need an understanding of those concepts and their justification.

II. THE TITLE'S CORE AND THREE CONTROVERSIES

The core of a possessor's title can usefully be described as a right to exclude the world at large—except those with a stronger title—from interference with the chattel. The truth of this proposition can be demonstrated through an analysis of the ways in which that title is protected by the torts of trespass, conversion and negligence.

First, a possessor has a right that others not dispossess them. If a defendant were to do so, they would commit either or both of the torts of trespass and conversion. This is confirmed by *Carter v Johnson*.[7] The defendants had entered the claimant's home, from where they took a number of chattels. They argued that because those chattels did not belong to the claimant, they could not be liable to him. Dismissing this argument, Lord Abinger C.B. explained that "mere possession" in the claimant was enough.[8]

However, a possessor's title goes beyond a right to maintain possession, because the tort of trespass can be committed in more limited ways. Scratching the panel of a carriage amounts to a trespass.[9] So too does stabbing a horse,[10] or tearing fish nets.[11] None of these acts are sufficient to divest the wronged party of their possession of the carriage, horse, or nets, but all are nonetheless legal wrongs. The tort of trespass thus demonstrates a possessor's right that others not deliberately make physical contact with the possessed chattel.

A possessor is also able to sue in negligence.[12] Again, there is no need to establish that they have been dispossessed in order to bring a claim in this tort.[13] Rather, what needs to be shown is that the chattel has been carelessly damaged. So, a possessor of a chattel also has a right that others not carelessly damage the possessed chattel.

In what follows, I shall refer to the amalgam of these more specific rights as the possessor's *erga omnes* right to exclude others from interfering with the chattel.

However, that statement masks three important issues. The first is that there is a debate about whether a possessor's title persists after they lose possession. According to what we can call the

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[7] (1839) 174 E.R. 283.

[8] Ibid., 284.

[9] *Fouldes v Willoughby* (1841) 151 E.R. 1153, 1157 (Alderson B.).

[10] *Sheldrick v Abery* (1793) 170 E.R. 278.

[11] *Fish & Fish Ltd. v Sea Shepherd UK* [2013] EWCA Civ. 544, [2013] 1 W.L.R. 3700.

[12] *Leigh & Sillivan Ltd. v Aliakmon Shipping Co. Ltd.* [1986] A.C. 785, 809 (H.L.) (Lord Brandon).

[13] See e.g. *Spartan Steel & Alloys Ltd. v Martin & Co. Ltd.* [1973] Q.B. 27 (C.A.).

pro-persistence view, that title does persist, and is capable of lasting "forever". This view has the support of a number of leading scholars.[14] An alternative view—the *anti-persistence view*—holds instead that a possessor's *erga omnes* right to exclude is extinguished if and when possession is lost. Proponents of this view include the authors of the influential textbook *Goode and McKendrick on Commercial Law*,[15] and it has been most clearly set out and defended by David Fox.[16] A simple example highlights one difference between the two views:

> *Lost Chattel*. P takes possession of a chattel to which X has the best title. P then loses that chattel in the street, where it is later found by P2.

According to the *pro-persistence view*, P2 owes duties in relation to the chattel both to X and to P. According to the *anti-persistence view*, P2 owes no such duties to P and so would not commit a legal wrong against P by, say, deliberately destroying the chattel.

Importantly however, supporters of the *anti-persistence view* include an exception: P will, they claim, have a right to exclude from the chattel those whose own possession of it "derives from" P's actual dispossessor.[17] The exception is said to catch those to whom possession is transferred by P's dispossessor, such as by way of gift or sale. The most plausible explanation for the exception is that it is a perceived application of the *nemo dat* principle.[18] Since P's immediate dispossessor was under a duty owed to P after dispossessing P, they were in a sense "bound" by P's prior title. A recipient of the dispossessor's title, one might think, takes that title subject to P's—otherwise, they would receive a more extensive bundle of rights over the chattel than the bundle which P's dispossessor had to give away.

The following example shows the operation of the exception. Suppose that P takes possession of an umbrella to which X has the best title. Another person, A, then dispossesses P and takes the umbrella into their own possession. On any view, A commits a legal wrong against P. Similarly, all agree that B, a person who is transferred possession by A, will owe P a duty not to interfere with the umbrella. Thus, B will commit the tort of conversion against P if they refuse to return possession of the umbrella to P after P demands it.[19] According to the *anti-persistence view*, this

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[14] See the works cited above, at note 3.

[15] E. McKendrick, *Goode and McKendrick on Commercial Law*, 6th ed (London 2020), para 2.22.

[16] D. Fox, "Relativity of Title at Law and in Equity" [2006] C.L.J. 330.

[17] Ibid., 345-46. Fox relies here on *Field v Sullivan* [1923] V.L.R. 70, 84: "As against the person who unlawfully deprived him of his possession (B), or those claiming through him (C), A's possession (even if wrongful) up to the time of the seizure, is sufficient evidence to establish his right to possession" (Macfarlan J.). See too J. Gordley and U. Mattei, "Protecting Possession" (1996) 44 Am. J. Comp. Law 293, 327.

[18] G. Battersby, "Acquiring Title by Theft" (2002) 62 M.L.R. 603, 604-05.

[19] This can amount to a converting act: *Clayton v Le Roy* [1911] 2 K.B. 1031 (C.A.).

is an application of the exception; B owes this duty to P because B's possession "derives from" A's in the relevant sense. According to the *pro-persistence view*, B owes this duty to P because P retains an *erga omnes* right to the umbrella.

These alternative rationalisations of that example lead to opposite conclusions on some sets of facts. For example:

> *Later Interference 1.* P takes possession of a chattel to which X has the best title. P is then dispossessed by A. Sometime later, A is then dispossessed by B.

Here, P is not able to invoke the *anti-persistence view*'s exception; B has not derived possession from A.[20] Applying that view, P's *erga omnes* right that others not interfere with the chattel was extinguished upon A's dispossessing P. From that time, P had a right against A to damages, arising from A's breach of duty, but no right against B. If B interferes with the chattel while it is in A's possession, they might wrong A or X, but not P.

Similarly:

> *Later Interference 2*. P takes possession of a chattel to which X has the best title. P is then dispossessed by C, who transfers possession of the chattel to D. E then carelessly destroys the chattel.

If the *anti-persistence view* is correct, E commits no legal wrong against P, because P's *erga omnes* right was extinguished by their dispossession by C. In contrast, the *pro-persistence view* holds that E may here commit a legal wrong against P.

The second and third controversies about the nature of a possessory title can be more briefly explained. The second is whether that title is transferable.[21] Consider:

> *Transfer*. P takes possession of a chattel to which X has the best title. P purports to sell their title to F, who provides good consideration. Before P can hand possession of the chattel to F, G carelessly destroys the chattel.

If P's title is transferable, then it follows that G can commit a legal wrong against F, even though F has never had possession of the chattel.

The final controversy is whether P's title includes a right that others not interfere with uses to which P intends to put the chattel, as well as a right that others not interfere with the chattel itself

[20] Fox, "Relativity of Title", 345.

[21] See Rostill, *Possession*, 27-31.

by retaining, touching, or damaging it. In an important paper, Simon Douglas and Ben McFarlane argue that the better view is that there is no such right,[22] although they do admit that there is "some slight evidence" in favour of a right that others not impair one's ability to use a chattel in one's possession.[23] This contrasts with earlier (sole-authored) work by Douglas, in which he argued that a title to a chattel does encompass a right that others not "totally" impair a title-holder's ability to use the chattel.[24] On this view, a defendant commits no wrong if they only partially impair a title-holder's ability to use the chattel.

III. JUSTIFYING POSSESSORY TITLE

To resolve these controversies, we need some grasp of the reasons to which the law responds when recognising a possessory title. This Section aims to clarify those reasons. Its first two parts consider and doubt the two most popular justifications of a possessor's title in the literature.[25] Its third part offers a different justification and defends it from a number of possible objections.

A. Violence

One popular justification of a possessor's title is that it prevents violence. This thought has actually motivated judges when developing the law,[26] and scholars regularly endorse it as an explanation of leading cases.[27] Despite this, it is not often made clear what "violence" P's title is supposed to

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[22] B. McFarlane and S. Douglas, "Defining Property Rights" in J.E. Penner and H.E. Smith (eds.), *Philosophical Foundations of Property Law* (Oxford 2013).

[23] Ibid., 228.

[24] Douglas, *Liability*, 66-68, 117-18, 157.

[25] Several other accounts do exist, but I focus on the two most widely endorsed. A third account, set out by Robin Hickey, holds that a possessor's title is justified because it helps the possessor to keep the chattel safe for its owner: R. Hickey, "Possession as a Source of Property at Common Law" in E. Descheemaeker (ed.), *The Consequences of Possession* (Edinburgh 2014). For convincing criticisms, see Rostill, *Possession,* 131-42. A fourth account, that of Michael Crawford, holds that a possessor's title can be justified because (i) the title gives effect to a social convention that has emerged as a solution to avoid conflict over scarce resources and (ii) that convention is "tolerably fair", because no person is "systematically excluded" from benefitting from it: M.J.R Crawford, "Justifying Possession (or How We Get from Here to There)" in S. Degeling, M.J.R. Crawford and N. Tiverios (eds.), *Justifying Private Rights* (Oxford 2021). The crucial difficulty with this account is that some people *are* excluded from the convention's benefit because it requires them to perform physical acts: A. Waghorn, Book Review (2021) 84 M.L.R. 923, 924-25.

[26] See e.g. *Jeffries v Great Western Railway* (1856) 119 E.R. 680, 681 (Lord Campbell C.J.) and *Parker v British Airways* [1982] Q.B. 1004, 1009 (Donaldson L.J.).

[27] See e.g. Gordley and Mattei, "Protecting Possession", 294-95; Battersby, "Acquiring Title", 603, fn.1; Fox, "Relativity of Title", 339.

prevent; there are many formulations of the argument in the literature. I shall take each in turn and argue that none of them has much to recommend it.

(1) "Violence" may mean actual or threatened interferences with P's body.[28] However, there is no need for an *erga omnes* right to the chattel to address this concern; it is regardless a legal wrong to interfere with P's body. Some of the argument's plausibility may come from the thought that a dispossession must involve infringement of P's bodily rights; we might think of D prising a chattel from P's grasp. But this thought is incorrect: there can be breaches of duties not to interfere with chattels which do not involve interference with a person's body. For example, if P has possession of a bowl of soup and D drinks it with a straw, D dispossesses P of the soup even though there need be no physical contact between D and P.[29]

Perhaps instead the claim is that P's title will lead to fewer interferences with P's body than would occur in an alternative world in which that title did not exist. However, as an empirical matter, I find this claim implausible for two reasons. First, interfering with P's body may be a criminal or a tortious act. I doubt that an added risk of liability in the chattel torts would have any additional deterrent effect to that created by other possible sanctions. Second, the argument is only plausible in the (presumably relatively rare) case where D knows that P is not the owner of the chattel in P's possession. Otherwise, D will see that P is in possession of it, draw from this fact the (incorrect) inference that P is its owner,[30] and draw from that the further (incorrect) inference that they owe legal duties to P to keep off the chattel.

(2) "Violence" may refer to the very act of interfering with the chattel. Recall the example of D drinking soup through a straw. Perhaps we could say that D's act is violent, and so ought to be prohibited.[31] However, this seems to say no more than that D's act is wrongful. And so, this argument is really a statement that P's title exists; it is not a justification of that title.

(3) "Violence" may mean interferences with chattels which are possessed by their true owners. On this version of the argument, the fear to which the law should respond is that—without a title

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[28] See e.g. N. Palmer (ed.), *Palmer on Bailment*, 3rd ed (London 2009), para. 4.122; L. Katz, "The Relativity of Title and *Causa Possessionis*" in J.E. Penner and H.E. Smith (eds.), *Philosophical Foundations of Property Law* (Oxford 2013), 210; Rostill, *Possession*, 29-30.

[29] A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge MA 2009), 94.

[30] Psychological studies have demonstrated that people do in fact assume that possessed chattels are owned and that they are owned by whoever was first seen to possess them: O. Friedman, "First Possession: An Assumption Guiding Inferences about Who Owns What" (2008) 15 Psychonomic Bulletin & Review 290.

[31] R.A. Epstein, *Simple Rules for a Complex World* (Cambridge MA 1995), 66. See too Hickey, "Possession as a Source of Property", 82.

vested in a mere possessor—citizens may mistakenly consider themselves able to interfere with chattels which they come across. If so, the security of true owners' rights will be reduced.[32]

However, this argument also fails because P's title surely has no deterrent effect. Would-be interferers will generally assume a possessor of a chattel to be its owner, and they would risk criminal sanction or tortious liability if they were to interfere with owned chattels.

(4) "Violence" may refer to the violent acts which P might inflict on D in retaliation against D's interfering with the possessed chattel.[33] On this view, P's legal right should exist so that P can have a peaceful avenue of recourse against D in substitute for a violent one.

For this argument to succeed, it must be the case that possessors would in fact commit acts of violence against would-be wrongdoers if those possessors had no legal recourse open to them. But this claim is surely implausible, for several reasons. First, these retaliatory acts are prohibited by other rules of tort and criminal law. If those potential negative consequences are insufficient to deter P from retaliation, then it is unlikely that giving them a title will do so. Second, P's title renders legally wrongful actions of D that could not plausibly lead to such a reaction from P. D will, for example, wrong P if they innocently destroy the chattel or if they physically interfere with it in some minor way.

More fundamentally, whatever reasons this argument gives us in support of P's title are weak unless we have some further reason to suppose that, independently of P's urge for retaliation, the law ought to treat P as having suffered a wrong. It is implausible to argue that unjust rules, such as rules that unfairly discriminate against a minority, ought to be retained because those who benefit from those rules sometimes take it upon themselves to enforce them through acts of violence. This is because the urge to retaliate in such a case is itself unjustified. To determine the strength of the reasons that this argument generates in favour of P's title, we must ask not whether P *feels* wronged, but whether P *was* wronged and so whether P has good reason to feel wronged. If they do, then it is whatever reasons justify P's desire for retaliation that do the work to justify P's title; it is not P's desire itself.

B. Efficiency

Thomas Merrill has offered a defence of the rule that a possessor of a chattel acquires a title to it on the grounds that the rule is easier to administer than any alternatives.[34] To see this benefit,

[32] S. Green and J. Randall, *The Tort of Conversion* (Oxford 2009), 83.

[33] O.W. Holmes, *The Common Law* (1881, Cambridge MA 2009), 192-93; Katz, "Relativity of Title", 210; N.J. McBride and R. Bagshaw, *Tort Law*, 6th ed (Harlow 2018), 470.

[34] T.W. Merrill, "Ownership and Possession" in Y. Chang (ed.), *Law and Economics of Possession* (Cambridge 2015).

consider, in contrast to a system that protects possessors, one that protects owners. That system would place substantial costs on claimants and courts to resolve disputes, because they would need to prove the negative proposition that no one has a better title to the chattel than the claimant.[35] In contrast, if claimants could rely on earlier possession to establish a right against the defendant, things are much easier (and, therefore, cheaper).

This argument suffers from two flaws. First, it assumes that in a world with perfect information only owners ought to have a right to exclude others from chattels. P's ability to bring claims against third parties is not justified on the grounds that it is a good thing itself, but rather because it furthers other values by saving administrative cost. It is therefore difficult to see how Merrill's argument could plausibly justify the law set out in Section II, rather than an alternative system in which non-owner possessors are presumed to be owners. His argument gives us no reason to confer a title on a possessor whom we know not to own the chattel in their possession. Secondly, it is difficult to accept that a legal system protecting possession is truly cheaper than alternatives to it. For example, that system allows possessors to successfully bring claims against interferers with a chattel that would not otherwise be successful. Those claims must increase the administrative burdens put on courts. Richard Posner has also pointed out that generous protection of possession may incentivise people to take possession of chattels that they do not own, which, in turn, will lead owners to take costly steps to safeguard their chattels that would not otherwise be necessary.[36]

Merrill further argues that the law's focus on possession minimises the informational burden it places on citizens.[37] This brings the benefit that litigation is minimised, because the law is self-applied and followed. Again, compare two norms: one protecting possessors and one protecting owners. The former only requires citizens to see that a chattel is possessed to know not to interfere with it, whereas the latter, Merrill argues, would require them to investigate the provenance of that chattel to determine its owner.

However, this argument is unconvincing: to comply with the latter norm, all you need to know is that you do not own the chattel. The real difficulty with a legal norm that protects only ownership is instead where we cannot know whether a given chattel is unowned, such as when one comes across an unattended chattel which may have been abandoned. To argue that this difficulty justifies the rejection of any norm as a general rule of law surely goes too far, given the relative infrequency of this problem.

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[35] Ibid., 23. See similarly Fox, "Relativity of Title", 338-39.

[36] R.A. Posner, "Savigny, Holmes, and the Law and Economics of Possession" (2000) 86 Virginia L.R. 535, 555-57. See similarly Gordley and Mattei, "Protecting Possession", 303.

[37] Merrill, "Ownership and Possession", 30.

C. Use

As explained in Section II, the right that P acquires through possession is an *erga omnes* right, binding on all persons except those with a better pre-existing title, which grounds duties owed to P that others not interfere with the possessed chattel. To justify that right, we should focus on reasons that track the right's content—reasons that all people have to keep off the chattel, grounded in an interest of P's.[38] One plausible source for such reasons comes from the insight that rights to exclude others from chattels create a space for the right-holder in which they can use chattels in the pursuit of projects. The relevance of this insight to possessory title is made clear by James Penner:

> Imagine coming out of the woods and finding some fish neatly piled on the riverbank, or a basket of apples… [Y]ou would understand that to grab the fish or the apples would be to interfere with some other human agent's purposive activity and that, understanding the interest people have in the success of their purposive activity, you would understand it to be wrong to take the fish or the apples, i.e. you would understand yourself to have a duty not to interfere with them… [R]espect for the interest that others have in the fulfilment of their purposes and the fish's and apples' contribution to that in this case could be cognitively assimilated, that is, understood by you, as a reason not to interfere which would prevail over your current, personal, goals, such that it would be both rational and reasonable to regard yourself to be under a duty not to interfere.[39]

As this example illustrates, we have good reason not to interfere with the projects which others are pursuing, at least if those projects are themselves valuable. These reasons, in turn, lead to reasons not to interfere with a chattel, if interfering with it risks interference with the success of a project for which it is being used. Those reasons simply fall out of an application of the broader principle that one has reason not to interfere with another's projects; where those projects require the use of a chattel for their success, one should refrain from interfering with the chattel in order to comply with that broader, background principle. Because these reasons are grounded by an interest of the possessor in their own flourishing, and because they apply to all persons who may interact with a possessor, they map onto the shape of a possessory title—these reasons are capable of justifying *erga omnes* duties owed to a possessor which demand that we keep off a particular chattel. In sum,

[38] See similarly A. Waghorn, "*Specificatio*'s Raw Materials" (2024) 140 L.Q.R. 85, 98.

[39] J.E. Penner, "On the Very Idea of Transmissible Rights" in J.E. Penner and H.E. Smith (eds.), *Philosophical Foundations of Property Law* (Oxford 2013), 265.

my preferred justification of a possessor's title is that it roughly tracks moral reasons of this sort which arise whenever a person makes valuable use of a chattel.

The simplicity of this justification leads to a number of important objections to it. In order to flesh it out, it is easiest simply to anticipate those objections. They can all be overcome when it is remembered that my claim is that English law *imperfectly* tracks underlying moral reasons which bear on the actions of citizens. There are good reasons for those imperfections.

(1) One might object that the law is under- and over-inclusive in what it renders wrongful, given the reasons that (purportedly) justify P's title: reasons not to interfere with P's projects. That title is under-inclusive because one can interfere with those projects without committing a legal wrong against P.[40] For example, if P possesses a car, I do not legally wrong P by blocking access to their intended destination, or by making it more difficult for P to reach that destination. This is so even though I have thwarted, at least to some extent, P's ability to pursue their projects, and even though the same effect on those projects could be achieved by, say, carelessly damaging the car's engine by dropping a heavy weight onto it. As flagged in Section II, there is some debate about the precise contours of P's title: there is some evidence to suggest that P has some sort of right that others not interfere with their uses of a chattel in their possession. I return to that evidence in Part IV.C. For now however, it is sufficient to note that it is not a plausible interpretation of English law that any interference with another's projects whatsoever amounts to a tort, and, to my knowledge, no court or commentator has ever claimed that it is. This is so despite the fact that my justificatory account of P's title suggests that there is at least a *pro tanto* reason for the law to hold those actions to be wrongful. For my account to be convincing, it must have some answer to this objection.

Similarly, P's title appears over-inclusive because it contains a right that others not physically interfere with a chattel, regardless of that interference's consequences.[41] So, I will commit a tort against P if I touch a car in their possession without P's permission, even if that has no effect on P's projects. For example, P might be able to drive off to their destination, leaving me behind.

We can, however, point to instrumental reasons which suggest that the law has good reason to grant P a right whose content focuses primarily on physical interference. In particular, the law's simplicity makes it easy for citizens to follow its rules and for courts to apply them. If P had only a legal right that others not interfere with their uses for a possessed chattel, then the net of liability would be cast very wide. For instance, such a right could render the act of moving wrongful. By occupying previously vacant space, I render that space unoccupiable by P, which might thwart some project which P had in relation to it. And for me—or for a court—to know that this act was

[40] See McFarlane and Douglas, "Defining Property Rights", 226-30.

[41] For a case against explanations of property law which are rooted in the value of using chattels and land, which raises this objection, see A. Ripstein, "Possession and Use" in J.E. Penner and H.E. Smith (eds.), *Philosophical Foundations of Property Law* (Oxford 2013).

wrongful would require knowledge of P's intentions for the time during which I was occupying the space. That knowledge would be extraordinarily difficult to acquire. It is considerably easier and cheaper for the law to latch onto physical interference as a proxy. In doing so, we create legal duties whose content roughly tracks the underlying moral reasons at play, but which are responsive to the limitations of courts and citizens who must apply and adhere to those duties.

(2) My defence of P's title makes the law's focus on possession look arbitrary. Why should P's title not arise at an earlier time, such as when they first formulate a plan in respect of a chattel? Consider two people in a supermarket, planning to purchase its last bottle of wine. According to my account, both have reason to refrain from taking the bottle because to do so would thwart a project which the other has set for themselves. But neither has any legal right to exclude the other from the bottle, because neither has yet taken possession of it.

There are two compelling reasons in support of the law's focus on possession. The first is that courts and citizens require some physical manifestation of P's projects in order to know of them. As has been emphasised by many writers,[42] possession has a "communicative" aspect. Because it requires physical activity, it necessarily involves the doing of some action that can be seen and understood; the same cannot be said of a person formulating a plan in their head. The communicative aspect of possession allows courts to resolve disputes more easily and ensures that those who owe duties in relation to a chattel are given the chance to understand that they are subject to those duties. Obviously, cost-saving benefits follow: the administrative burden on courts would be increased if they had to make findings about the time at which a person formulated plans for a chattel and if citizens were subject to duties that they could not know about. The possibility that claimants could bring, or threaten to bring, false claims would also loom large in a system that did not require any manifestation of an intention. It is difficult for people to prove that others did not have plans in relation to a chattel prior to their own taking and using it.

The second reason to require possession is simply that, as a matter of fact, people generally cannot actually make use of a chattel until they have physical control over it. Although there is a fear that P's title comes too late, there is an equally concerning risk that their title comes too early, leaving us with chattels which are not being used by anyone but in relation to which people owe duties of non-interference. As an example, consider *Young v Hichens*, in which it was held that a claimant who was in pursuit of fish had no claim against the defendant who caught the fish before him.[43] Although it is true to say, on my account, that the defendant had a *pro tanto* reason not to catch the fish, we cannot be certain that the claimant would himself have caught the fish and used them in pursuit of his projects. For the world at large to be subject to duties not to interfere with

[42] For a review of the literature, see Crawford, *Expressive Theory*, ch. 4.

[43] (1844) 115 E.R. 228.

the fish in those circumstances would further no value and would serve only to deny another person the freedom to use the fish to pursue their own projects at a later time. This is why the law ought to reject a rule awarding a title to whomsoever points at a chattel while loudly declaring that they intend to make use of it and so have rights over it.

For these reasons, it is sensible that the law should respond to the underlying moral reasons at play in a rough and ready fashion. It does so by latching onto the concept of possession, which requires actual control of a chattel before a right over it is created. In doing so, the law can strike a practical balance between competing values: the value of protecting a person's interest in making valuable use of things, on the one hand, and the value of having a system of understandable and workable rules, on the other.

(3) Another plausible objection to my justificatory account may be that the law does not require P to put a possessed chattel towards any particular valuable project in order that P acquires title. It is helpful to split this possible objection into two, separate, arguments.

The first is that it may seem that a possessor is not required to pursue any particular project at all in relation to a possessed chattel in order to acquire their title. Rather, one might think that all one need do is exercise control over it, which can be done absentmindedly or without any particular plan in mind for the chattel in question. Statements about title by possession in the context of land likewise often imply that what is required is something akin to enclosure. The textbook example of a fenced-off piece of land makes the point: there appears to be no need to use the land, which one could leave to lie fallow behind the fence. Although the rules regarding land are beyond this paper's scope, the popularity of this view leads to the temptation of thinking that a similar point holds in relation to chattels. Much like leaving an enclosed field to lie fallow, P might lock a chattel away in a safe to gather dust. If they have a title to that chattel, then it appears implausible that the law is concerned to protect their use of it.

There are two points to note in response. First, this objection assumes that the *pro-persistence view*, which holds that a title will persist after a loss of possession, is true. Recall that possession has two elements: factual control and an intention to possess.[44] If P loses an intention to exercise their control for their own benefit, then they lose possession. So if the *anti-persistence view* is true, it must in fact be false to say that P will continue to have a title without any purposes in mind in relation to the chattel. Second, the objection risks an overly narrow interpretation of what amounts to "use" of a chattel. By "use", I do not mean physical engagement with the chattel; rather, what counts is purposeful engagement with it.[45] If I leave my clothes unattended with the intention of wearing them later, or if I leave a stone on my shelf as an ornament, I am using those things in that

[44] See above, at note 2.

[45] See J.E. Penner, *The Idea of Property in Law* (Oxford 1997) 68-71.

I am setting a purpose for them. If you damage or take them, you interfere with my use because you prevent the fulfilment of the purposes that I intend for them to serve. Admittedly, "use" is a slippery concept with vagueness at its margins,[46] but central examples of use are clear. This is, of course, yet another reason why the law should latch onto the much more straightforward ideas of *physical* control and interference as its primary tools for resolving disputes. Although there is no conceptual reason why the law could not demand of courts that they assess whether a given person is making use of a given chattel, difficulties that flow from the nature of legal adjudication suggest that the law is sensible to avoid doing so.

The second version of this objection to a use-based justificatory account of possessory title is that the law does not require P's use to be *valuable* for a title to arise. They might take possession of coal hoping to paint it white, or they might take possession of a chattel as a thief. In both cases, a title is recognised despite the implausibility of the claim that the use is valuable.

Again however, there is an obvious argument that shows that the law has good reason to adopt a blanket rule awarding title to possessors without asking courts to make deeper determinations as to the worth of the specific projects that lie behind that title. A rule that asks courts to determine a possessor's plans for a particular chattel would place a burden on the legal system in the form of increased litigation, greater costs and time once litigation begins, and avoidable uncertainty over the obligations that particular citizens are under at a given time.[47] Each of these concerns would bite in relation to a rule that required courts to make determinations as to whether a possessor's uses for a chattel are valuable.

Of course, this concern could be mitigated to some extent with a bright line rule designed to split possessors into two camps—those the law will protect and those it will not—which roughly captures "valuable" and "not-valuable" possessors. For instance, we could have an exception to a general rule of title-by-possession denying title to thieves. Although that exception would increase costs by increasing the law's complexity—and so the complexity of dispute resolution—it may be that the trade-off would be one worth making. However, we must be aware that a rule of this sort will prove to be over- and under-inclusive. Although thieves' projects are no doubt generally of less value than those of innocent possessors, it goes too far to say that they are of no value in all cases. If a person steals a loaf of bread to feed their starving children, for example, I surely do have reason not to interfere with their use of the bread. Ultimately, the law simply needs to adopt a rule that is workable and that trades-off competing values at play in an acceptable way. In doing so, we must accept that justice can sometimes only be done imperfectly and that it is a mistake to think there is only one acceptable solution to a legal problem. In saying that all thieves acquire title, the

[46] For consideration of the "irresolvable ambiguity" of the concept of use, see C. Essert, *Property Law in the Society of Equals* (Oxford 2024) 58-59.

[47] On the consequences of "good faith" rules in property law, see S.E. Sterk, "Property Rules, Liability Rules, and Uncertainty about Property Rights" (2008) 106 Michigan L.R. 1285. Similar concerns would arise in this context.

law has adopted a rule that is defensible in these terms, albeit one that is probably over-inclusive and which places citizens under legal duties to which they would not, ideally, be subject.

The foregoing presents a rather messy picture. There are, on my account, many competing values and many good reasons underlying the general shape of the law. However, there is, I argue, a core concern underlying possessory title: to see that possessors are secure to use chattels in the pursuit of their projects. That underlying concern is capable of justifying the uncontroversial aspects of a possessory title, grounding it in a normative framework constituted by genuinely salient reasons that bear on the actions of citizens and the decision-making of courts.

IV. THE CONTROVERSIES

In Section II, I explained that there are three controversies about a possessor's title in the literature: whether it persists after a loss of possession; whether it is transferable; and whether it includes an *erga omnes* right that others not interfere with a possessor's uses. I dedicate a part of this Section to each controversy. Each part begins with a doctrinal analysis, which shows that no controversy has yet been resolved by the courts. I then move on to a prescriptive analysis, and suggest, in light of the arguments of Section III, how each controversy should be resolved.

A. Persistence

The first controversy is that of persistence. Recall the three test cases mentioned earlier, where the *pro-* and *anti-persistence views* come apart:

> *Lost Chattel*. P takes possession of a chattel to which X has the best title. P then loses that chattel in the street, where it is later found by P2.
>
> *Later Interference 1.* P takes possession of a chattel to which X has the best title. P is then dispossessed by A. Sometime later, A is then dispossessed by B.
>
> *Later Interference 2*. P takes possession of a chattel to which X has the best title. P is then dispossessed by C, who transfers possession of the chattel to D. E then carelessly destroys the chattel.

Whether P2, B and E may commit legal wrongs against P depends on which view a court adopts. To my knowledge, no decided case is materially identical to any of these three test cases. However, in recent work, Luke Rostill has argued that, as a matter of precedent, the *pro-persistence view* has

been authoritatively determined to be correct because the outcomes of two classes of case do not fit with the *anti-persistence view*.[48] In this part, I argue that this claim is too quick but that the *pro-persistence view* is nonetheless normatively superior to the *anti-persistence view*.

1. The doctrine

Rostill relies on two classes of case. The first is where P voluntarily relinquishes possession to another. An example is *Armory v Delamirie*.[49] The claimant found a ring and handed it over to the defendant so that he could value it. The defendant later refused to return possession of the stones which had been attached to the ring. The claimant's claim in trover was successful; the defendant committed a legal wrong in refusing to return the stones. Thus, the claimant's title to the stones seems to have existed at least until the moment when the defendant refused to return them, even though at that point the claimant no longer had possession.

Similar support for the *pro-persistence view* can be derived from *Bridges v Hawkesworth*,[50] and from *Hannah v Peel*.[51] In *Bridges*, the claimant found a parcel of cash on the defendant's shop floor and handed it over for safekeeping until its true owner could be found. The claimant later returned and demanded that the defendant restore possession. The defendant refused; he was held liable even though the claimant was not in possession of the cash. In *Hannah*, the claimant found a brooch hidden in a crevice above a window in the defendant's house. The claimant handed the brooch over to the police, who later gave it to the defendant after they had failed to find its true owner. The claimant successfully sued, even though they had relinquished possession of the brooch when they had handed it over to the police.

These three cases demonstrate that P will not always lose any and all legal rights in relation to a chattel when they lose their possession of it. But the *pro-persistence view* goes further than is necessary to explain them. The outcomes of *Armory* and *Bridges* can be explained on the grounds that the defendants owed a personal obligation to P, from whom they received the chattel, that they not act inconsistently with the conditions attached to the transfer of possession to them. Given that the defendants owed duties not to dispossess the claimants, it is no surprise that they should come under duties to adhere to the conditions that made their possession lawful. In *Armory*, we are told only that the claimant handed over the ring to the defendant "to know what it was",[52] but it is clear from the context that this came with a condition that the ring be returned; one does not ordinarily

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[48] See Rostill, "Terminology", 410-18 and Rostill, *Possession*, 104-09.

[49] (1721) 93 E.R. 664.

[50] [1851] 1 W.L.U.K. 1.

[51] [1945] K.B. 509.

[52] (1721) 93 E.R. 664, 664.

hand chattels over to valuers with no intention of having them back. In *Bridges*, the claimant gave the defendant the instruction only to dispose of the notes to their true owner; he did not, Patteson J. tells us, "waive" his right to the notes.[53]

So, neither case demonstrates that the claimants retained an *erga omnes* right. But we can now add another test case which could disprove the *anti-persistence view*:

> *Voluntary Relinquishment*. P takes possession of a chattel to which X has the best title. P then hands possession of that chattel over to H, agreeing that H should return the chattel to P if X cannot be found. I then dispossesses H.

According to the *pro-persistence view*, I may commit a legal wrong against P on these facts. In contrast, the *anti-persistence view* denies that I can do so.

As far I am aware, no case is indistinguishable from *Voluntary Relinquishment*. *Hannah* is the closest example, but it can be explained in accordance with my analysis. Recall that P's claim was not against the police—to whom P had given possession—but was rather against the recipient of the brooch from the police. *Hannah* can be taken to be an example of the exception noted above:[54] the defendant derived their possession from the police, who—like the defendants in *Armory* and *Bridges*—can be treated in a similar fashion to a dispossessor of P because of the qualified nature of a voluntary transfer from P to them. Thus, we could say that P had a right against the defendant in relation to the brooch, but not an *erga omnes* right to the brooch. On this view, P would have been unable to bring a claim against, say, a person who stole the brooch from the police.

Rostill's second class of case is compatible with the same analysis. These are cases in which P's possession is taken from them by the police in accordance with a limited statutory authority to do so. P may be able to bring a claim in tort against the police if they fail to return the chattel once that authority has expired.[55] Again, P loses possession before a wrong is committed. These cases are easily explained by the *pro-persistence view*.

However, an alternative analysis of the law, which coheres with the *anti-persistence view*, is possible.[56] When the police divest P of possession on the basis of limited statutory authority, the police may come under a personal duty owed to P to return possession when that authority expires. That duty is one way courts could respond to an apparent public or political concern that the police

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[53] [1851] 1 W.L.U.K. 1.

[54] See text at note 17 above.

[55] e.g. *Webb v Chief Constable of Merseyside* [2000] Q.B. 427; *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ. 381, [2001] 1 W.L.R. 1437.

[56] See D. Fox, "Enforcing a Possessory Title to a Stolen Car" [2002] C.L.J. 27. For Fox, the concerns I outline explain an evidential presumption that P is the chattel's owner. In contrast, I claim that they can explain the police coming under a legal duty owed to P.

ought not use limited statutory powers to divest citizens of all of their legal rights in relation to chattels.[57] Moreover, it would be odd for the law to grant P a right to maintain possession against Z but to deny P a right that Z adhere to the qualifications that permitted Z to take possession from P without committing a legal wrong.

If this analysis is correct, P's *erga omnes* right in relation to the chattel is lost when the police take possession of it. So, we can add a further test case to our list:

> *Lawful Seizure*. P takes possession of a chattel to which X has the best title. The police take possession of that chattel from P on the basis of a temporary statutory authority to do so. J then dispossesses the police.

On the *pro-persistence view*, *Lawful Seizure* is straightforward: J owes legal duties to P in relation to the chattel. In contrast, the *anti-persistence view* denies that J owes any such duties to P. Given that there is no decided case materially identical to *Lawful Seizure*, both views can be made to fit with the outcomes of the cases.

At this point, one may object that my analysis has focussed too heavily on the outcomes of the decided cases, at the expense of their reasoning. This has been deliberate: the leading advocates of the *pro-persistence view* claim that it is correct on the grounds that the *anti-persistence view* cannot make sense of the outcomes of the decided cases, not on the grounds that judges have thoroughly considered and endorsed the *pro-persistence view*.[58] The aim of this part of this paper has been to show that they are too quick to make this claim.

If, however, one does place a premium on judicial reasoning, that concern gives us no reason to favour one view over the other. This is so because no judge has considered, in obiter dicta, how they should decide a case identical to any of the above test cases. Without explicit consideration of this sort, it is difficult to show clear support for either view. This is so for two reasons. First, the language used by the judges in this area is slippery. Judges are usually only ever asked to determine the rights of parties before them as against each other.[59] So, if a judge says that P has a "title to" or a "right to possess" a chattel not in their possession, those statements can be read to mean only

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[57] *Webb v Chief Constable of Merseyside* [2000] Q.B. 427, 446 (May L.J.). See too R. Hickey, "Possession Taken by Theft and the Original Acquisition of Personal Property Rights" in N. Hopkins (ed.), *Modern Studies in Property Law: Volume 7* (Oxford 2013), 407-09.

[58] Most clearly, see the comments in McFarlane, *Structure*, v. ("This book does not merely repeat what the legislature and judges have said; instead, it aims to explain what they have *done*… [S]ometimes you have to look a legislator or judge in the eye and have the courage to tell him exactly why he is right".)

[59] Or they may be called on to interpret the meaning of a statute. For example, in *R. v Seed* [2021] EWCA Crim. 1198, [2021] 1 W.L.R. 6033, the Court of Appeal determined that a thief who had had a chattel confiscated from them by the police had "property" in it for the purposes of the Proceeds of Crime Act 2002, s. 76(4).

a "title good against *this* defendant" or a "right to possess held against *this* defendant".[60] Indeed, seemingly clear support for the *pro-persistence view* often turns out, on closer inspection, to be ambiguous. In *Armory*, for example, the report says that the claimant was said to have "such a property as will enable him to keep [the chattel] against all but the rightful owner".[61] The reference to "property" may indicate support for the *pro-persistence view*. On the other hand, it may refer to no more than that the right related to a physical thing and was *erga omnes*. The word "property" simply has no single, stable meaning. Secondly, arguments can be constructed in support of either view on the back of existing dicta. Even if one accepts that *Armory* provides support for the *pro-persistence view*, a critic could equally point to the reasoning of Lord Campbell C.J. in *Jeffries v Great Western Railway*, in which he justified possessory title on the grounds that "peaceable possession should not be disturbed by wrongdoers".[62] That justification has no bite in our test cases—where P does not have peaceable possession—and therefore plausibly indicates, as Robin Hickey has suggested,[63] some judicial support for the *anti-persistence view*.

2. The theory

With Section III's justificatory argument in place, we are in a position to understand the relative merits of the *pro-* and *anti-persistence views*. The key strength of the latter is that it minimises a flaw which afflicts the *pro-persistence view*: if the *anti-persistence view* is true, then the law avoids the situation where citizens owe duties to former possessors of a chattel who have long since ceased to have any uses in mind for it. Those duties cannot be justified by reference to the core underlying concern which my account has identified. Nonetheless, in the rest of this part I argue that, overall, we ought to prefer the *pro-persistence view*. This is so for two reasons.

First, possession is not important for its own sake. What matters is that it comes as part of a project for which the chattel is being used. But use is not equivalent to possession; P might have projects in relation to a chattel without possession of it. P might, for example, relinquish possession of the chattel for a short period of time with the intention of coming back to it. In such a case, the reasons we have not to interfere with P's projects remain. It follows that there are good reasons for the law to recognise that P has a right to exclude others from a chattel in at least some instances where they do not have possession of it. Of course, it may be that ideally P's title should be exactly co-extensive with whatever uses they have for the chattel. But we do not live in an ideal world. Rather, we live in one where the legal system must adopt workable rules so that courts can resolve

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[60] For an example of this qualification being made, see the statement of Macfarlan J. in *Field v Sullivan* [1923] V.L.R. 70, quoted at note 17 above.

[61] *Armory v Delamirie* (1721) 93 E.R. 664, 664.

[62] (1856) 119 E.R. 680, 681.

[63] See Hickey, "Possession Taken by Theft", 414-16 and Hickey, "Possession as a Source of Property", 82-83.

disputes. A rule that extinguishes P's title whenever their uses for the chattel cease would require courts to make determinations as to P's intentions in relation to the chattel.

Looked at in this way, the law is yet again faced with a choice between rules that imperfectly track the underling moral reasons at play. The *anti-persistence view* is under-inclusive, because it fails to protect projects that we have reason to respect; the *pro-persistence view* is over-inclusive, because it allows for titles that, ideally, ought not exist. However, it does not follow that the two views are equally justifiable: there are good reasons to think that the under-inclusiveness of the *anti-persistence view* should be of more concern to us. In particular, that view would rule out legal protection for many valuable projects. We often need to lose control over one chattel and control another to successfully pursue a project. Because we are beings with limited physical capacities, it is difficult to remain in possession of chattels over an extended period of time. In affording legal protection to project-pursuers only while in possession, the *anti-persistence view* is extraordinarily demanding of them.

In contrast, the over-inclusiveness of the *pro-persistence view* is not so worrying. Although applying that view would mean that citizens are subject to unjustified legal duties, those duties are not overly demanding, for two reasons. First, their breach is unlikely to have consequences for wrongdoers because it is unlikely that holders of the correlative rights will know about the breach. Secondly, citizens will, on either view, owe duties not to interfere with a chattel to its owner. So, while the number of people to whom such a duty is owed would increase under the *pro-persistence view*, the conduct which the law would actually prohibit would be similar on both views.

The second, and more tentative, argument for the *pro-persistence view* is that it may see that like cases are treated alike, because it will mean that possessors of owned chattels will acquire a legal interest that has the same content as that acquired by first possessors of unowned chattels. Those possessors acquire ownership, an *erga omnes* right to exclude that is not dependent on possession.[64] Although there may be other concerns which could justify that rule, my account of possessory title applies with equal force regardless of whether a chattel is owned or unowned. It may, therefore, form the basis of the best justification of the rule governing first possession. For the law to be consistent, two legal interests that arise for the same reasons should have the same substantive content. So, one could argue that because the law has decided that a first possessor's title can last indefinitely, it ought to do the same for the titles of subsequent possessors. Of course, there is at least one crucial difference between first and later possessors—the latter owe legal duties to the chattel's owner, whereas the former do not. However, when it comes to determining the reasons that bear on the actions of the world at large, that difference does not seem to be significant. Plausibly, one could argue that the fact that a later possessor owes a legal duty not to interfere with

[64] Rostill states that it is a proposition which "everyone accepts" to be true: Rostill, *Possession*, 2, fn.13. Most cite Blackstone as authority in favour of this rule: 2 Bl. Comm. 4.

the chattel which they possess shows that whatever project they use that chattel towards is not a valuable one. However, as noted earlier in relation to a thief's title, this argument is far too crude to be acceptable. In the same way that it is obviously mistaken to suppose that the projects of first possessors are valuable solely on the grounds that they breach no legal duties in respect of the possessed chattel in the pursuit of those projects, it is mistaken to suppose that the projects of later possessors have no value on the grounds that they could lead to legal wrongs. If we were to adopt my justificatory account in both contexts, then the world at large would owe legal duties to both kinds of possessor for the same reasons: so that they do not interfere with the possessor's pursuit of valuable projects.

B. Transferability

The second controversy present in the literature concerns whether a possessor's title is transferable, for example by way of gift, sale, or by will. Again, a hypothetical case helps us to understand what is at stake in this debate:

> *Transfer*. P takes possession of a chattel to which X has the best title. P purports to sell their title to F, who provides good consideration. Before P can hand possession of the chattel to F, G carelessly destroys the chattel.

Whether G may commit a wrong against F by destroying the chattel depends on whether P's title was successfully transferred to F. Again, Rostill has argued that existing legal materials determine that P's title is transferable.[65] Below, I argue that those materials provide only a flimsy basis for this conclusion, but that we can quite easily draw out its normative appeal.

1. The doctrine

Two pieces of evidence support the claim that a possessory title is transferable. First, as Battersby and Preston have argued,[66] the Sale of Goods Act 1979 appears to assume so. The Act defines a "contract of sale" as "a contract by which the seller transfers or agrees to transfer *the property in the goods* to the buyer for a money consideration".[67] For a number of reasons, it appears that the term "the property" includes inferior titles. First, s. 5 states that a contract of sale's subject matter can consist of goods "owned or possessed" by the seller. If one can only transfer ownership by

[65] Rostill, "Terminology", 418-20 and Rostill, *Possession*, 109-11.

[66] G. Battersby and A.D. Preston, "The Concepts of 'Property', 'Title', and 'Owner' Used in the Sale of Goods Act 1893" (1972) 35 M.L.R. 268, 272-74. See too McKendrick, *Commercial Law*, para 7.27.

[67] s. 2(1) (emphasis added).

sale, the words "or possessed" are superfluous. Secondly, s. 12 expressly contemplates contracts of sale under which the seller is to "transfer only such title as he or a third party may have". Thirdly, ss. 24 and 25 allow a person to pass a title better than their own "under any sale" of goods. These provisions make sense only if there can be a "sale" of a title that is not the best title to the goods.

A second reason to suppose that a possessor's title can be transferred is that it was implicit in the House of Lords' decision in *National Employers' Mutual General Insurance Association Ltd. v Jones*.[68] Jones acquired possession of a car under a purported sale, but the car had in fact been stolen and transferred between many parties before reaching him. Jones argued that legislation had created an exception to the *nemo dat* principle and that an earlier "sale" of the car had extinguished the true owner's title. The court rejected this argument and held that, properly interpreted, s. 25 of the Act created no such exception. As Rostill explains, their Lordships "implicitly accepted" that the car's thief had obtained a transferable title, for otherwise the Act "would *not have applied at all*" because there would have been no "contract of sale" as defined by the Act.[69]

Taken together, these arguments do support the view that a possessor's title is transferable. However, it is worth noting how weak that support is. Battersby and Preston's argument requires us to accept the transferability of title even though legislation makes no unequivocal provision for this. It is doubtful that a fear of some statutory provisions becoming superfluous or meaningless is sufficient reason to accept that a title can be transferred.[70] *Jones* is also weak authority on the point. Its outcome—that Jones committed a wrong in not giving possession to the car's true owner after their demand—would have been reached even if the Act had not been thought to apply. That an assumption lay behind the court's reasoning and counsel's arguments provides only a relatively weak reason to think that a possessor's title can be transferred.

2. The theory

The thin doctrinal evidence in support of a power to transfer a possessory title can be shored up by three points. First, a possessor is able to bring about circumstances that effectively amount to a transfer of title to a person of their choosing, by allowing that person to take possession of the chattel. By doing so, the new possessor will acquire a title to the chattel which binds all except those with better titles. There is no reason why the two parties to this transaction could not enter a contract placing a possessor under an obligation to ensure that this state of affairs occurs. Indeed, if we accept the *pro-persistence view*, it will be possible for the earlier possessor to retain their

[68] [1990] 1 A.C. 24.

[69] Rostill, "Terminology", 420 (emphasis in original). See similarly Battersby, "Acquiring Title by Theft", 605.

[70] For example, the "principle of effectiveness", which holds that legislation should so far as possible be interpreted so that each provision has some effect, is not a rigid rule but rather an "aid" or "pointer" for a court, as is true of all principles of interpretation: *Maunsell v Olins* [1975] A.C. 373, 382 (Lord Reid).

title to the chattel as well. From the perspective of the world at large, there is no distinction between this scenario and a transfer of title that takes place without a transfer of possession. After the latter sort of transfer, the world at large will owe duties to both parties to the transfer—to the transferee because of the transfer of title and to the transferor because of their continued possession. It is, therefore, difficult to see the point in denying the transferability of a possessory title.

Secondly, a transfer of title would not change the demands that the law makes of citizens, when one considers their overall position. Before that transfer, citizens are subject to duties not to interfere with the chattel. After the transfer, the law would make the same demand of them: do not interfere with the chattel. That these duties are owed to different people does not change their content, nor does it necessarily make it more difficult for citizens to adhere to them. Admittedly, a transfer of title may change the consequences that flow from a breach of duty—and so, perhaps, the prima facie quantum of damages that a wrongdoer must pay to a title-holder—but that issue is properly dealt with by those rules that determine the extent of liability after a breach of duty, such as the remoteness rules, and not by those rules determining whether a duty exists.

Thirdly, the transfer's taking place is, presumptively at least, in the interests of transferor and transferee. Both must agree to the transfer for it be effective,[71] so it is reasonable to presume that both parties consider it to be in their interests. Of course, this might not be true. But we should rely on rules governing the validity of a party's consent to a transaction—such as the doctrines of undue influence and duress—to respond to this concern. There is nothing about a transfer of possessory title that suggests that we should be unusually concerned about the welfare of the parties involved such that the law should rule out the possibility of these transfers.

C. Interference with Use

The final controversy about possessory title concerns the activities that amount to wrongs against a possessor. Clearly, they have a right that others not *physically* interfere with the chattel, but do they have a right that others not deliberately or carelessly interfere with their use of it? The key authorities on this question concern the scope of the torts of trespass, negligence and conversion.[72] In this part, I analyse those authorities and suggest how courts ought to deal with them.

1. The doctrine

[71] This is obviously the case in the context of a transfer under a contract, but it is equally true under a gift, where the transferee must either accept the gift or fail to take the opportunity to reject it: J. Hill, "The Role of the Donee's Consent in the Law of Gift" (2001) 117 L.Q.R. 127.

[72] For this reason, the authorities and academic commentary considered in this part concern both inferior and best titles to chattels. Although my focus is only on the role of the property torts in protecting inferior titles created by possession, the arguments below could easily be adapted into ones concerning the proper content of any title.

The literature contains numerous interpretations of the law, but none of those interpretations can be made to fit all the relevant cases. The first view is advocated by Douglas and McFarlane,[73] who argue that a possessor has a right only that others not physically interfere with the chattel and has no right that others not interfere with their use of it. Two cases, they claim, demonstrate this. The first is *Club Cruise v Department for Transport*.[74] The defendant issued a detention notice under the Merchant Shipping Act 1995 in respect of the claimant's ship. The claimants therefore risked criminal sanction if they were to sail the ship from port and could not use it for a planned cruise. However, the notice had been issued improperly, and so the claimants argued that the defendants had converted the ship. Their claim was dismissed. The second case of note is *D. Pride & Partners v Institute for Animal Health*.[75] The claimants sued, again unsuccessfully, after an outbreak of foot and mouth disease in the area surrounding their farmland meant that their livestock could not be sold or moved.

However, there are other cases that simply do not align with Douglas and McFarlane's view. For example, in *Burroughes v Bayne* the defendant was held liable after locking the room in which the claimant's billiards table was located.[76] Similarly, in *Oakley v Lyster* the defendant converted tarmac by warning its owner that he would sue if the owner took possession of the tarmac.[77] Lastly, in *Douglas Valley Finance Co. v S. Hughes (Hirers) Ltd*. the defendant fraudulently transferred to themselves the claimant's commercial haulage licences, leaving the claimants unable to use two lorries for commercial haulage.[78] They were held to have converted the lorries. For Douglas and McFarlane, these three cases are wrongly decided, because none concerned physical interference with the chattels in issue.

An alternative view is that all of the cases discussed so far can be reconciled with each other. There seem to be two plausible ways of doing so. First, one could say that there are "degrees" of interference with use and that wrongs may be committed only if a defendant interferes sufficiently seriously with use. The problem with this view is that it is impossible to see how the interferences with the claimants' use in *Club Cruise* and *D. Pride* were not extremely serious. Secondly, one

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[73] Douglas and McFarlane, "Defining Property Rights", 228-29.

[74] [2008] EWHC 2794 (Comm), [2009] 1 All E.R. (Comm) 955.

[75] [2009] EWHC 685 (Q.B.), [2009] 3 W.L.U.K. 786.

[76] (1860) 157 E.R. 1196.

[77] [1931] 1 K.B. 148 (C.A.).

[78] [1969] 1 Q.B. 738. In more recent sole-authored work, Douglas argues that the High Court in *Club Cruise* has "confirmed" that *Douglas Valley* is no longer good law: S. Douglas, "*Kuwait Airways Corporation v Iraqi Airways Company* [2002]" in S. Douglas, R. Hickey and E. Waring (eds.), *Landmark Cases in Property Law* (Oxford 2015) 222. However, the High Court in fact clearly endorsed the decision in *Douglas Valley* and even stated that it is a "good example" of conversion: *Club Cruise* [2008] EWHC 2794, [52] (Flaux J.).

could say, as Douglas did in earlier work,[79] that possessors have rights that others not "totally" impair their ability to put a chattel to any use at all. On this view, *Club Cruise* and *D. Pride* can be explained on the grounds that the claimants remained able to put their chattels to some kind of use, albeit not the uses that they actually had in mind for the ship and livestock. But this analysis cannot make sense of *Douglas Valley*, in which the transfer of haulage licenses meant only that the lorries could not be used to carry goods on the road. This was, no doubt, a serious interference with the claimant's plans for the lorries, but it did not lead to a "total" impairment of their use.

2. The theory

The upshot of the foregoing discussion is that the case law is irreconcilable. A fresh start is needed, which places the justificatory framework that lies behind title at its centre. Applying the account set out in Part III.C makes it obvious why these "interference with use" cases are so difficult: courts must trade-off different values against one another in making their decisions as to liability. On the one hand, there are genuine *pro tanto* reasons for citizens not to interfere with the uses to which a possessor is putting a chattel. Those reasons, in turn, mean that there are genuine *pro tanto* reasons to hold those who interfere with use—such as the defendants in *Club Cruise* and *D. Pride*—to have wronged title-holders. On the other hand, the rules that courts create through their decisions must be workable. Citizens must be able to understand and apply those rules, and courts must be able to employ them without being overly burdened. There is no single answer to the question of how this trade-off is to be made.

That said, there are obvious reasons, touched on earlier, that explain why it is not plausible that any interference with use should be the touchstone for the law: to determine whether such an interference has occurred would require citizens and courts to have insight into the intentions of the claimant. Although this would be a conceptually possible rule to adopt, it would be expensive, difficult to apply and could incentivise the making of false claims. These reasons would also bite against a rule that renders only sufficiently serious interferences with use wrongful. Whether any given interference is over the threshold of "sufficiently serious" must depend entirely on the plans and uses for the chattel that a particular claimant had in mind for it. For instance, if the claimants in *Club Cruise* wished only to relax and dine on their ship, rather than sail it, the detention notice would not have seriously interfered with their use of it. The uncertainty entailed by a rule requiring courts to assess the seriousness of interferences with use would also be undesirable.

These points bring out the strength of a "total" impairment of use rule. If a defendant has made a given chattel entirely unusable—for instance, by preventing any access to it—then it follows that any particular use of that chattel must have been prevented. A total impairment standard, therefore, would not require courts or citizens to acquire any insight into the specific plans of a claimant in

[79] Douglas, *Liability*, 66-68, 117-18, 157.

order that they could follow or apply the standard. They need only ask whether a given action renders a title-holder unable to put the chattel to any use at all. Although this rule would be more burdensome than one focussing purely on physical interference, its application would not be as overwhelmingly difficult as one focussed on serious interference with use. If one accepts my justificatory account of a possessor's title, the argument in favour of the "total" impairment rule is compelling because it closely tracks the reasons for title—to protect possessors in their use of a given chattel—while avoiding almost all of the problems that afflict the other candidate rules that protect use, considered above.

V. CONCLUSION

This article examined the justification of possessory title. It criticised two popular accounts of that title, showing that they fall short. In their place, we should adopt a justification that places people's interest in using things at its core. Valuable insights follow from doing so. This article considered three such insights, arguing that the justification gives us tools to consider three controversies in the doctrinal literature: whether a possessor's title persists after possession is lost; whether that title is transferable; and whether that title includes a right that others not interfere with the uses to which a chattel is being put. Importantly, one implication of my arguments is that there is no magic in possession—its significance comes from its role in furthering other values. Courts and scholars need to be alive to those values when considering how personal property law should develop.