§ Law in Context

ALISON CLARKE & PAUL KOHLER

Property Law

Commentary and Materials

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Allocating property rights

4.1. Introduction

In Chapter 3 we dealt with the question of whether it is justifiable to have exclusionary property rights at all. If we accept that the answer is yes, it then becomes necessary to consider who should have such rights, which amounts to Lawrence Becker's question of specific justification outlined in section 3.2 above: 'What sorts of people should own what sorts of things and under what sorts of conditions?' This is the subject of this chapter.

Just as when considering the general justification for property rights, it is helpful to start with original acquisition. Most legal systems adopt the first occupancy or first taker rule, i.e. that the law will protect the first taker of a thing. In the case of tangible things, this usually means taking physical control of the thing (technically, possession). Intangible things can also be allocated by a first taking rule, however. For example, an inventor of a process gets exclusive rights to exploit it for a limited period by being the first person to patent it. The patent system is essentially a notice filing system, and such systems can also be used to allocate property to the first taker of tangible assets, where the taking of physical control is not feasible, or disproportionately expensive or exclusionary. Mining rights in the developing American West, for example, were sometimes allocated to the first person to file a claim rather than to the first person to enclose the land containing the mine.

We consider the justifications for this first occupancy rule as it operates in the context of original acquisition of things in section 2. However, it is important to appreciate that the spread of the rule goes beyond original acquisition. One of the justifications of the first occupancy rule is that it is simply an aspect of the way in which the law protects holdings generally against strangers, even when unlawfully acquired. In other words, our legal system, in common with others, confers property rights on those who take control of things not only when the thing was previously unowned, but also when there is a pre-existing owner. In the latter case the protection the law gives is more precarious: the taker acquires rights enforceable against everyone *except* the pre-existing owner (or another person who has a prior claim to possession, such as a tenant), whereas in the former case (where the thing was previously unowned) the rights acquired by first taking are enforceable

against the whole world. The effect of this wider rule (that all takings give rise to property rights enforceable against strangers) is that, if I lose my necklace and you find it and take possession of it, you acquire ownership of it enforceable against everyone except me. But the rule goes further than this. If you *steal* the necklace from me, you acquire precisely the same rights in it, so that, if your friend snatches it away from you, you will be entitled to recover it from her. In section 4.2 below, we concentrate on the first occupancy rule as it applies to unowned things, and then return to look at the wider rule in Chapter 7. However, it is important to appreciate that many of the factors that justify the first occupancy rule as it applies to unowned things also justify the conferring of property rights on finders and thieves, as we see in Chapter 7.

In sections 4.3 and 4.4 below, we look in more detail at two particular ways in which original acquisition might occur, in both of which pragmatic considerations have had a significant effect on the development of allocation rules. The first is where things are newly created. We deal with this in section 4.3, concentrating on the problem of the allocation of new things that are the income or product of pre-existing things. The second is through capture of resources. This is considered in section 4.4.

The problem of the allocation of resources arises in a different and acute form when one property system becomes superimposed upon another, characteristically when one state assumes control over another through colonisation. Do all inhabitants become subject to the coloniser's property system? If so, this is likely to involve the obliteration of the indigenous population's pre-existing property entitlements (which may well not take the same form as property rights recognisable in the coloniser's system), leaving them with nothing but the right to 'buy into' the new system. Alternatively, if pre-existing property entitlements are to be respected, how are the indigenous entitlements to be assimilated into the coloniser's property system? These are the problems that had to be considered by the courts and then by the legislature in Australia when indigenous Australians sought to reassert their traditional land rights. We look at these issues in section 4.5 below.

4.2. The first occupancy rule

In our legal system, as in many others, the primary rule is that property rights in a previously unowned resource will be allocated to the first person to take that thing into his control, or, as explained in the Introduction, to the first person to stake a claim in an authorised way, for example by filing for a patent. Why do we use this principle for allocating property rights in unowned resources?

4.2.1. Intuitive ordering

One explanation is that it accords with our intuitive ordering of things. We queue at bus stops and for cinema seats. Lueck points out that this is a characteristic way of sharing out temporary use of open access or limited access communal resources:

> The use of customary first possession rules in businesses, families, and social settings is universal. In business, first possession is used to establish rights to customer service and to claim merchandise for later purchase. Thus, people claim service by standing in line, putting coats over chairs, depositing earnest money, making reservations, and putting holds on goods. In families, first possession is used to allocate household goods such as books, chairs, and tools. In schools, children claim first dibs on books, seats, and tasks. First possession is well known in labor contracts where it manifests itself as seniority privileges for layoffs, overtime, and other perquisites. At ski resorts, fresh powder is allocated among paying customers by first possession.
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> ... Nearly all of these cases have a clear asset owner (e.g. cafe tables, ski hill), so first possession does not grant the victorious claimant perpetual ownership. Instead, the claimant gets a temporary right under the rule of capture ... Within families, first possession can be viewed as an internal rule of capture associated with common property ownership of family resources and is simply a cheap way to allocate temporary use of an asset. In many cases, the assets are durable (e.g. chairs, parking spaces) ... [and] the temporary rights of the claimants are not transferable.
>
> (Lueck, 'First Possession as the Basis of Property', p. 218)

Is there, however, a rational basis for this intuitive ordering, and are there disadvantages in adopting it as a basis for legal allocation of unowned resources?

4.2.2. Preservation of public order

Once you have taken physical control of a thing, the law is faced with the choice of either protecting your possession against strangers or standing by while it is snatched away from you. One of the reasons why the law confers rights on the first taker is to prevent a disorderly free-for-all: generally speaking, it is easier and cheaper to preserve the peace by protecting those in possession from intruders than by allowing them to fight it out between themselves. John Stuart Mill goes so far as to say that the jurisdiction of tribunals to protect possessors against intruders may well have pre-dated their jurisdiction to determine rights:

> Private property, as an institution, did not owe its origin to any of those considerations of utility, which plead for the maintenance of it when established. Enough is known of rude ages, both from history and from analogous states of society in our own time, to show that tribunals (which always precede laws) were originally established, not to determine rights, but to repress violence and terminate quarrels. With this object chiefly in view, they naturally enough gave legal effect to first occupancy, by treating as the aggressor the person who first commenced violence, by turning, or attempting to turn, another out of possession. The preservation of the peace, which was the original object of civil government, was thus attained; while by confirming, to those who already possessed it, even what was not the fruit of personal exertion, a guarantee was incidentally given to them and others that they would be protected in what was so.
>
> (Mill, *Principles of Political Economy*, Book II, Chapter I, section 2)

There is also the question of proof. Law enforcers seeking to avert public disorder between rival claimants to land or goods need to be able to identify quickly the person to be protected. Physical control is relatively easy to identify on the ground, and so a general direction to law enforcers to protect possessors against intruders will be workable in practice – infinitely more so than, for example, a direction that they should ascertain who is the more deserving, or who first mixed their labour with the thing, or who is capable of using the thing more productively.

4.2.3. Simplicity

The simplicity and certainty of the first occupancy rule is one of its main attractions for Richard Epstein, as he explains in Extract 4.1 below. The first occupancy rule enables property rights to be allocated by a single, simple rule understandable by all without recourse to litigation and according to most people's intuitive feeling of fairness. In order to assess the validity of rival claims to a previously unowned resource, all one need do is ask the simple question: who got there first? As Epstein says, except in the improbable case of a tie, all can be made to depend on the single variable of time, and 'getting a lot of results out of a little bit of information surely enhances the overall efficiency of the system'. However, as David Haddock says in Extract 4.2 in response to Epstein, first occupancy is not the only allocation rule that has the virtue of simplicity. Equally simple would be what he calls a 'mightiest possession' rule, which allocates the whole stock of the resource in question to the strongest (usually the state), who then parcels it out either by auction or in any other way it considers appropriate. As he points out, this is the way modern societies have actually allocated property rights in previously unowned resources such as radio frequencies and oil fields, and will no doubt allocate property rights in the surface of the moon at some stage. Also, in the case of some resources, the advantages of simplicity are outweighed by the economic inefficiencies in allocation to the first taker. Intellectual property rights, for example, do indeed go to the first taker in one sense, but what the first taker gets is property rights strictly limited in time, for reasons Haddock explains. And, in the case of other resources such as uncultivated land, societies have thought it advisable to require settlers to demonstrate not only enclosure but also cultivation or substantial use as a condition of allocation of property rights (see Notes and Questions 4.1 after the extracts).

4.2.4. Signalling

There are other pragmatic justifications put forward for the first occupancy rule. If those who have taken physical control of a thing automatically acquire property rights in it simply by virtue of being there, occupancy can operate as a useful signalling device, allowing outsiders to assume that occupancy more or less guarantees entitlement. Robert Merrill has suggested this:

> Not everyone can do a title search before they act towards apparent property owners as if they, in fact, own the property. For example, all sorts of contractors do work on

> property on the assumption that the person living there actually owns it, and it would be very burdensome to force them to do a title search before they extend those types of services. You have people who lend money on the strength of apparent ownership. You have renters that rent from people whom they think are landlords, and so forth. Adverse possession gives some substance to those kinds of third-party reliance interests by suggesting that the appearance of ownership asserted over a period of time is, in fact, going to be actual ownership.
>
> (Merrill, 'Time, Property Rights and the Common Law', p. 681)

Merrill is talking here about wrongful takers (adverse possessors), but much the same point can be made in relation to first occupiers. If entitlement does not go to the first occupier, outsiders have no quick, easy way of ascertaining whether the present occupier has yet done whatever is required to gain entitlement.

4.2.5. The bond between person and possessions

However, there is clearly more to it than pragmatism. It has often been argued that an emotional bond grows between people and the things they regard as theirs, and that this is a tie that ought to be respected by the law. This is essentially the reason David Hume gives in Extract 4.3 for saying that, in an initial allocation of property rights, it would be 'the most natural expedient' to allocate property in things to those already in possession of them. Similar points about the bond between person and thing possessed have been made by others. So, for example, Jeremy Bentham said:

> Everything which I possess, or to which I have a title, I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection ... Everything about it represents to my eye that part of myself which I have put into it – those cares, that industry, that economy which denied itself pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us without rending us to the quick.
>
> (Bentham, *The Theory of Legislation*, Part 1, Chapter 10)

The point is made even more strongly in defence of the adverse possession rule we look at in Chapter 11, where it is argued that over time this bond grows so strong that it justifies allowing the claim of the occupier to defeat even that of the pre-existing owner (see in particular Extract 11.2 below).

4.2.6. The libertarian justification

For Epstein, however, the central principled (as opposed to pragmatic) justification for the first occupancy rule is that it means that the state can be excluded from decisions about property allocation. For Epstein, and for other libertarians, this is a matter of fundamental political importance: 'The rule thus allows one to organise a system of rights that is not dependent on the will of a sovereign, and makes it possible to oppose on normative grounds the all too frequent historical truth that

ownership rights rest upon successful conquest' (Epstein, 'Past and Future', p. 669; also reproduced in Extract 4.1 below). The corresponding disadvantage, of course, is that, if the whole stock of an unowned resource is allocated by the first occupancy rule, important decisions about distribution of the resource, and the best way and pace of using it and exploiting it, will never consciously be made: all of this will have to be settled by the market. As Haddock points out in Extract 4.2, this is not necessarily what a society might want.

4.2.7. The communitarian objection

One strong political objection to the first occupancy rule is that it favours private ownership of resources over the more complex relationships that can evolve under communal use and ownership. Carol Rose makes this point in Extract 4.4. Nomadic land use and other forms of hunter-gatherer resource use do not involve any one person taking exclusive physical control of the resource as a whole. First occupancy might well dictate which individual person within the community takes each individual item, but the resource as a whole (the land itself, or a species of animal being hunted, or a well providing water) might be used by a number of different individuals and communities, often with a highly formalised but unwritten pattern of usage. If this is not recognised as a 'taking' or 'occupancy' of the resources, and rights are treated as originating only through the first occupancy rule, then people living in this kind of way never acquire rights enforceable against intruders in the land and natural resources they live on. Carol Rose explains the consequences of this for American Indians, and in section 4.5 we look more closely at the similar problems that arose in Australia. Elsewhere in Extract 4.1 below, Epstein argues that it is not the first occupancy rule itself that is causing the problem here, but the failure to recognise the native population's resource use as occupation. Indeed, as he points out, the native population's own claim is firmly based on having got there first. However, as we see in section 4.5, ordering the priority of claims by time is not quite so straightforward where the rival patterns of resource usage are so very different from each other.

4.2.8. Economic efficiency

This brings us to the difficult question of whether the first occupancy rule is economically efficient. The efficiency advantages that Locke claims for his labour theory of original acquisition can be claimed with more or less equal force for the first occupancy rule. If takers are awarded property rights, this provides an incentive for seeking out, working on and developing resources and making them more productive. However, this does not always work efficiently with all kinds of resource. In some cases, it can lead to premature capture of resources. This is a complex argument which we cannot do full justice to here, but Robert Cooter provides a simple illustration of the problem:

> Suppose there is a piece of land, and in order to establish title to it you have to fence it. Suppose the only reason to fence it would be to keep cows on it. Suppose also that it wouldn't pay to keep cows on it unless there were a railroad to get them out to market.

> Suppose the year is 1820, and you have reason to believe that the railroad is going to arrive in 1830. What do you do? You may have to fence the land now to get title and let the fences rot for a decade until the railroad arrives. In this example the main effect of the investment is redistributive rather than productive. The investment is made solely to establish your title against others. We all know that investments motivated by redistribution rather than production are inefficient. So I think that using the principle of first possession as a judicial principle rather than a metaphysical tale is quite inefficient. When you go outside the land area and look at something like fishing rights, this is even clearer. There is just a great deal of pre-emptive investment.
>
> (Cooter, 'Time, Property Rights, and the Common Law')

Also, as David Haddock points out in Extract 4.2, the first occupancy rule does not necessarily rule out costly competition. It is worth noting, however, that his conclusion that the rule has little to recommend it, is not shared by all economists: see in particular Lueck, who gives a detailed analysis of the economic effects of the rule in varying contexts, and concludes that 'people have tenaciously adopted and retained rules of first possession because they work to establish property rights necessary for wealth creation' (Lueck, 'First Possession as the Basis of Property', p. 222).

Extract 4.1 Richard A. Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 65 *Washington University Law Quarterly* 667

Everyone knows and follows the rule of ordinary life that applies to such prosaic matters as waiting in line for theatre tickets or in a cafeteria: 'first come, first served.' The rule of first possession at common law converts that intuition into the analytical foundation for the entire system of private property: the party who takes first possession of a thing is entitled to exclude the rest of the world from it, forever. The element of time is part of the priority rule and of the definition of the property interest acquired.

The rationales for this rule are many and complex. Often the rule has been regarded as something akin to a self-evident truth. But the rule also has clear political and utilitarian virtues that account for its lofty status. These deserve to be mentioned briefly. The first possession rule promotes a system of decentralized ownership: private actions by private parties shape the individual entitlements in ways that do not involve the active role of the state, whose job, as umpire, is neatly restricted to protecting entitlements previously acquired by private means. The rule thus allows one to organize a system of rights that is not dependent upon the whim of the sovereign, and makes it possible to oppose on normative grounds the all too frequent historical truth that ownership rights rest upon successful conquest, nothing more and nothing less. It is not surprising therefore that a variant of the first possession rule exerted so large an influence in the writing of John Locke, whose political mission was to defend a theory of representative government against the power of the Crown.

The first possession rule also has more direct economic virtues for it yields a consistent and exhaustive set of property rights, whereby everything has in principle

one, and only one, owner. Vesting ownership in the first possessor makes it highly likely that a person who owns the land will use it efficiently and protect it diligently. At every stage the rule reduces transaction costs. There is no need for a routine lawsuit for the true owner, however identified, to pry property away from the party in wrongful possession. The uniqueness of owners means that development and sale can take place at relatively low cost. The first possession rule does give rise to serious problems in the case of common-pool assets, such as oil, gas and fish. Yet, even here it furnishes a baseline of entitlements which permits the state to organize forced exchanges that, on average work to the long-term advantage of persons with interests in the pool.

. . . The first possession rule represents an ingenious, if intuitive, recognition that time provides the best one-dimensional ruler for making the needed mapping. Time offers a unique measuring rod, sufficient in principle to resolve two or two thousand competing claims for priority. Whoever got there first, wins. Except in the improbable case of ties, an enormous decision-making capability is contained in a single variable. Getting a lot of results out of a little bit of information surely enhances the overall efficiency of the system.

Consider an alternative rule that requires someone to map from *n* different dimensions to a single answer. The balancing of factors requires tradeoffs among incommensurates that breed uncertainty and, with it, litigation: there is no way to map a plane into a line, while preserving a one-to-one correspondence between the points in the plan and those in the line. Yet making a clear decision one way or the other is of enormous importance. The relatively automatic quality of the first possession rule helps private parties organize their affairs without resorting to litigation. The point should not be overstated, for the first possession rule will not eliminate every factual dispute over who took possession of the land first. Land has a large physical dimension. One person may enter land first, while (with or without knowledge of this entry) another stakes out a claim to the same parcel or part thereof. The problem can be especially acute with mining claims. No legal rule can solve all borderline cases where individuals act in ignorance or disregard of what others have done. As the enormous nineteenth-century debates on possession indicate, once 'possession' becomes the source of rights and duties, it becomes subject to heavy verbal stress.

But so what? The mark of a good legal rule is not whether it resolves all doubtful cases at the margin. No rule can fully capture the distinction between the occasional use of unowned land and its occupation, between the acquisition of full ownership and the claim of limited (e.g. hunting) rights. Yet all of these complications are manageable if the rule generates enough clear cases in routine situations . . . [The first possession rule] provides a marked degree of decisional stability, which is all that can be asked. Any more complicated rule would doubtless have a temporal component to it: for example, a rule that awards ownership to the party who, after enclosure, first makes substantial use of unowned land, unless the prior party in possession had been there a long time.

Who needs it? How much of a temporal priority is needed to offset a substantial use? The rule could only survive because the two features of original acquisition and substantial use are positively correlated, which is itself an argument for making the

earlier fact decisive on the question of ownership. The demands for 'substantial use' could only induce a proliferation of borderline cases that place ownership (and hence the right to use and dispose) in limbo until the question of substantial use is resolved. Delay has its costs. A sound system of rights resolves the claims of ownership early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption. Any system of ownership (including state grants) requires that some positive costs be incurred to establish claims. These costs should be minimized in order to reserve the bulk of resources for the productive use of assets. The first possession rule itself can encourage the premature acquisition of interests, but that cost is tolerable in light of the alternatives. Any system of state grants transfers the cost of land acquisition from the open field to the legislature; while any alternative rule of private acquisition, such as first substantial use, only increases the fraction of resources that must be devoted to the acquisition of claims.

Extract 4.2 David Haddock, 'First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value' (1986) 64 *Washington University Law Quarterly* 775

As Epstein remarks, priority appears to have the appealing property of uni-dimensionality; it anoints a unique owner for each entitlement according to who got to it first, setting aside the relatively rare tied races. But any uni-dimensional rule will facilitate uniquely defined ownership, and as a positive, predictive matter other candidates seem stronger than the doctrine of first possession. For example, a rule of mightiest possession is uni-dimensional; empirically it is much more important than first possession, considering all regions and epochs of this world. When the Normans invaded England they knew but did not care that the Saxons were there first. Nor did the Saxons care that the Britons had been there even earlier, and so on into the mists of prehistory. True, naked might requires resources to threaten, if not actually to assault, competitors. But first possession also requires coercion to prevent violations; it is in effect a civilized form of mightiest possession.

Moreover, first possession is flawed even as a normative (efficiency) construct when the assumptions of the model are relaxed a bit. Even if violence is suppressed, costly competition will occur in more subtle ways whenever first possession yields economic rents. Consider patent and copyright, where profitable first possession encourages encroachment; or successful new medications followed closely by other medications, 'innovated' at some cost, that differ in arguably trivial ways from the original; or successful new themes in film, literature, or music that raise a plethora of imitators. In a model that I discuss below, the cost of the these other forms of competition will match the cost of the competitive threats of violence that has been replaced.

Occasionally, the simplest versions of either first possession or mightiest possession will be appropriate for a society interested in its own welfare. In the vast majority of instances, however, some other model will be preferable. The interesting issues as they

relate to Epstein's paper involve sorting out the instances when a doctrine of first possession makes sense, and when it does not, asking what modifications may be appropriate. Barzel [Barzel, 'Optimal Timing'] has discussed very plausible instances in which first possession not only fails to be the best, but will, in fact, lead to the total dissipation of the value of newly useful resources. Mortensen [Mortensen, 'Property Rights and Efficiency'] and Dasgupta and Stiglitz [Dasgupta and Stiglitz, 'Uncertainty'] have furnished more general models, but in their models first possession also seems rarely to be best, even in the face of the information and transactions costs with which the real world must cope.

I rely heavily on the Barzel model in rejecting Epstein's strong presumption in favor of first possession. I do not try to outline a fully general argument, but instead offer what I believe is sufficient evidence to cause one to doubt Epstein's position. I also mention one particularly important complication of the real world, partial information, that does support the modified version of first possession implicit in patents, copyrights, and related branches of law. But, even here, the doctrine is severely, and appropriately, constrained by time limits during which rights can be enforced . . .

I. THE PROBLEM OF PREMATURE OCCUPATION

Securing possession of an entitlement is costly, and the resources expended in this process have alternative uses, so premature possession is undesirable. Awarding entitlements by first possession leads to just such premature expenditures. It does not matter whether the entitlement is a 'free' student ticket to a college football game, which (if the team is popular) induces wasteful pre-dawn occupation of places in line at the ticket office; a patent or copyright; a 'free' farm on the frontier; a legal monopoly over the provision of cable television services; or lobsters taken from the sea. The anticipation of capturing property of future value induces abandonment of alternative pursuits of positive current productivity.

There are policies that curtail premature occupation, although it is not obvious how often they are used with such a purpose explicitly in mind. For example, the sovereign can claim title to all unoccupied lands (mightiest possession), and then sell plots to 'speculators'. Neglecting the international competition for the sovereign's title, such a policy assures that the plots reach their highest valued uses. This policy was in fact utilized in the United States to distribute much of its interior land, although 'squatters' sometimes were able to obtain *ex post* political awards based on first possession. Legally, the interior was unowned simply because earlier first possessors, the American Indians, were not recognized as legal owners. First possession presupposes standing to call on the enforcement powers of the law, so again, as a practical matter, an effective coercive legal authority (mightiest possession) is a prerequisite for a rule of first possession. The Indians did not have mightiest possession, so *ipso facto* they could not support their claims by first possession either. Because we must have coercive legal authority, the issue is when do we also want to rely on a doctrine of first possession. There is a choice of doctrine available once mightiest possession is established.

A benevolent legal authority that was powerful enough to police its assignments of entitlements, and one that also knew everything that ultimately would have positive

value, could today assign title to each asset and later avoid the resource drain that comes from individuals trying to establish title. But comprehensive benevolence, power and knowledge do not characterize human institutions. Unowned and formerly worthless items (the deep-sea floor) or previously unknown ones (the electromagnetic spectrum) later become attractive assets. If there are no restraints, a rent-seeking race to establish title ensues. At the margin, expenditures to capture title will equal the value of the asset whose title is sought, so marginal rents are completely dissipated. Those rules of the race that lead to marginal rent exhaustion with the smallest total expenditure on the race itself are the rules that will maximize the inframarginal rents.

Epstein does not ignore such problems, but rather underestimates them. The first possession rule does give rise to serious problems in the case of common-pool assets, such as oil, gas and fish. Yet, even here it furnishes a baseline of entitlements which permits the state to organize forced exchanges that on average work to the long-term advantage of persons with interests in the pool. But whenever any asset is (1) valuable, (2) unclaimed, and (3) available to the first possessor, then it is a common-pool asset – that is the definition. The more narrowly defined subset Epstein seems to have in mind, so-called 'migratory resources', is only one part of a larger and more general common-pool problem.

The lynchpin is a measurement problem – the definability of a resource before it is ready to be exploited. Some resources have insufficient value today to tempt anyone to bear the present costs of establishing and enforcing title, but are recognized to be of increasing value in a growing economy. At the end of World War II nobody owned the floor of the North Sea, but today it is one of the world's most active oil fields. No one owns the Moon's surface today, but it will not surprise me if commercial mining occurs there within my lifetime. Such resources are definable, and for them first possession is a particularly wasteful means of establishing title when compared to alternatives. Not surprisingly, title by first possession is rarely recognized in such instances.

However, other resources cannot even be described at present, for example, many of the next decade's most significant patentable inventions, and as to these resources some of the alternatives to first possession may be unworkable. But two points are crucial: First, before first possession is judged to be an appropriate rule, the sort of informational failing that I have described must be present. Second, even when first possession is an appropriate rule, it will generally be constrained, often by legal limitations on the life of the entitlement ...

... First possession, in the guise of the law of capture, can damage the source of migratory assets and reduce its present value. For example, fractionated ownership of a geological dome containing petroleum creates private incentives to drill wells too closely and to pump too rapidly, for only capture establishes title to the petroleum itself. Drilling fewer wells would increase the discounted stream of gross recovery from the field, as would operating each well more leisurely.

Overly avid fishing or trapping also reduces the long-run value of the pool, both by disrupting breeding patterns and by prematurely interrupting the growth of individual

animals. Such losses sometimes induce societies that we consider primitive to establish fairly sophisticated property-rights systems that override a tradition of first possession . . .

. . . I have argued that a prospective rule of first possession has little to recommend it, at least as a rule providing that new entitlements henceforth run in perpetuity to the first party to occupy a property, broadly defined. There are two distinct circumstances in which valuable assets are unowned. First, items previously known, but of no value, acquire value when the economy changes. A rule of first possession in this context induces premature occupation, with returns foregone elsewhere that equal the discounted present value of the returns from the newly acquired asset. In effect, the rule of first possession dissipates the asset's entire net worth.

This accords with the circumstances during the period of occupation of the American continents by European immigrants. Alternatives superior to first possession existed and were used. Commonly, the sovereign claimed title prior to settlement, then sold or bartered the land to settlers or intermediaries.* That technique had long been used to expand the European homelands whenever the sovereign was strong enough to enforce such claims. Abuses can arise when such authority is seized by a sovereign, but usually that dissipates only part of an asset's value – legislators and kings have a private incentive to maximize the net value of the realm they govern; it is their tax base.

A second circumstance where one finds valuable unowned assets concerns innovation, which compounds the difficulty of efficiently establishing entitlements. The asset cannot be well-defined soon enough to avoid all capture costs while still retaining individual incentives to finance research. In these circumstances, a modified rule of first possession is sometimes adopted because alternatives are unworkable. Although such circumstances occasionally apply to unoccupied land, this is the exception rather than the rule.

Finally, regardless of any efficiency aspects it may or may not have, a rule of first possession is an inadequate positive basis for a theory of law. Mightiest possession explains more that has happened and more that has become law than does first possession. Mightiest possession may well be efficient (though not necessarily equitable) due to the sovereign's incentive to maximize the value of his realm and thus his tax base. In contrast, an unconstrained rule of first possession is a rule of stagnation.

Now that mankind is contemplating mining Antarctica and the deepsea floor, the prospective aspects of a doctrine of first possession are very modern issues.

Extract 4.3 David Hume, *A Treatise of Human Nature*, Book III, Part II, pp. 503–5

The general rule, that possession must be stable, is not applied by particular judgments, but by other general rules, which must extend to the whole society, and be inflexible

* For example, the United States government bartered a great deal of western land to railroad companies in exchange for new rail construction. The new trackage would not have been profitable without the land grants, and much of the land was worthless without a source of transportation. Due to the new construction, both the railroad companies and the government were able to sell off land that otherwise would have lain idle for some time. There were occasional aberrations, but little of the land was given away through a rule of first possession. Although the prices charged for the government land may strike modern scholars as a ridiculously low token fee, deflating those prices by a price index or contrasting them with other land prices of the day makes them seem more reasonable.

either by spite or favour. To illustrate this, I propose the following instance. I first consider men in their savage and solitary condition; and suppose, that being sensible of the misery of that state, and foreseeing the advantages that would result from society, they seek each other's company, and make an offer of mutual protection and assistance. I also suppose, that they are endowed with such sagacity as immediately to perceive, that the chief impediment to this project of society and partnership lies in the avidity and selfishness of their natural temper; to remedy which, they enter into a convention for the stability of possession, and for mutual restraint and forbearance ...

It is evident, then, that their first difficulty, in this situation, after the general convention for the establishment of society, and for the constancy of possession, is, how to separate their possessions, and assign to each his particular portion, which he must for the future inalterably enjoy. This difficulty will not detain them long; but it must immediately occur to them, as the most natural expedient, that every one continue to enjoy what he is at present master of, and that property or constant possession be conjoined to the immediate possession. Such is the effect of custom, that it not only reconciles us to any thing we have long enjoyed, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us. What has long lain under our eye, and has often been employed to our advantage, that we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoyed, and are not accustomed to. It is evident, therefore, that men would easily acquiesce in this expedient, that every one continue to enjoy what he is at present possessed of; and this is the reason, why they would so naturally agree in preferring it.

[He then adds the following as a footnote]

... It is a quality, which I have already observed in human nature, that, when two objects appear in a close relation to each other, the mind is apt to ascribe to them any additional relation, in order to complete the union; and this inclination is so strong, as often to make us run into errors (such as that of the conjunction of thought and matter) if we find that they can serve to that purpose ... Since, therefore, we can feign a new relation, and even an absurd one, in order to complete any union it will easily be imagined, that, if there be any relations, which depend on the mind, it will readily conjoin them to any preceding relation, and unite, by a new bond, such objects as have already a union in the fancy ... the same love of order and uniformity, which arranges the books in a library, and the chairs in a parlour, contribute to the formation of society, and to the well-being of mankind, by modifying the general rule concerning the stability of possession. And, as property forms a relation betwixt a person and an object, it is natural to found it on some preceding relation; and as property is nothing but a constant possession, secured by the laws of society, it is natural to add it to the present possession, which is a relation that resembles it.

Extract 4.4 Carol M. Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73 at 84

There is a ... subtext to the 'text' of first possession: the tacit supposition that there is such a thing as a 'clear act', unequivocally proclaiming to the universe one's

appropriation – that there are in fact unequivocal acts of possession, which any relevant audience will naturally and easily interpret as property claims. Literary theorists have recently written a great deal about the relativity of texts. They have written too much for us to accept uncritically the idea that a 'text' about property has a natural meaning independent of some audience constituting an 'interpretive community' or independent of a range of other 'texts' and cultural artifacts that together form a symbolic system in which a given text must be read. It is not enough, then, for the property claimant to say simply, 'It's mine' through some act or gesture; in order for the 'statement' to have any force, some relevant world must understand the claim it makes and take that claim seriously.

Thus, in defining the acts of possession that make up a claim to property, the law not only rewards the author of the 'text'; it also puts an imprimatur on a particular symbolic system and on the audience that uses this system. Audiences that do not understand or accept the symbols are out of luck ...

In the history of American territorial expansion, a pointed example of the choice among audiences made by the common law occurred when one group did not play the approved language game and refused to get into the business of publishing or reading the accepted texts about property. The result was one of the most arresting decisions of the early American republic: *Johnson* v. *McIntosh* (1823) 21 US (8 Wheat.) 543, a John Marshall opinion concerning the validity of opposing claims to land in what is now a large part of Illinois and Indiana. The plaintiffs in this case claimed through Indian tribes, on the basis of deeds made out in the 1770s; the defendants claimed under titles that came from the United States. The Court found for the defendants, holding that the claims through the Indians were invalid, for reasons derived largely from international law rather than from the law of first possession. But tucked away in the case was a first-possession argument that Marshall passed over. The Indians, according to an argument of the claimants from the United States, could not have passed title to the opposing side's predecessors because, '[b]y the law of nature', the Indians themselves had never done acts on the land sufficient to establish property in it. That is to say, the Indians had never really undertaken those acts of possession that give rise to a property right.

Although Marshall based his decision on other grounds, there was indeed something to the argument from the point of view of the common law of first possession. Insofar as the Indian tribes moved from place to place, they left few traces to indicate that they claimed the land (if indeed they did make such claims). From an eighteenth-century political economist's point of view, the results were horrifying. What seemed to be the absence of distinct claims to land among the Indians merely invited disputes, which in turn meant constant disruption of productive activity and dissipation of energy in warfare. Uncertainty as to claims also meant that no one would make any productive use of the land because there is little incentive to plant when there is no reasonable assurance that one will be in possession of the land at harvest time. From this classical economic perspective, the Indians' alleged indifference to well-defined property lines in land was part and parcel of what seemed to be their relatively unproductive use of the earth.

Now it may well be that North American Indian tribes were not so indifferent to marking out landed property as eighteenth-century European commentators supposed. Or it may be that at least some tribes found landed property less important to their security than other forms of property and thus felt no need to assert claims to property in land. But, however anachronistic the *Johnson* parties' (ultimately mooted) argument may now seem, it is a particularly striking example of the relativity of the 'text' of possession to the interpretative community for that text. It is doubtful whether the claims of any nomadic population could ever meet the common law requirements for establishing property in land. Thus, the audience presupposed by the common law of first possession is an agrarian or a commercial people – a people whose activities with respect to the objects around them require an unequivocal delineation of lasting control so that those objects can be managed and traded.

But perhaps the deepest aspect of the common law text of possession lies in the attitude that this text strikes with respect to the relationship between human beings and nature. At least some Indians professed bewilderment at the concept of owning the land. Indeed, they prided themselves on not marking the land but rather on moving lightly through it, living with the land and with its creatures as members of the same family rather than as strangers who visited only to conquer the objects of nature. The doctrine of first possession, quite to the contrary, reflects the attitude that human beings are outsiders to nature. It gives the earth and its creatures over to those who mark them so clearly as to transform them, so that no one else will mistake them for unsubdued nature.

We may admire nature and enjoy wildness, but those sentiments find little resonance in the doctrine of first possession. Its texts are those of cultivation, manufacture, and development. We cannot have our fish both loose and fast, as Melville might have said [Herman Melville, *Moby-Dick*, Chapter 89] and the common law of first possession makes a choice. The common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by 'possession', separated for oneself property from the great commons of unopened things.

Notes and Questions 4.1

1 How does the first occupancy rule differ from Locke's theory of original acquisition? See Waldron, *The Right to Private Property*, pp. 173–4.

2 Epstein later argues that for intangible assets first possession can operate through a 'filing office system' (i.e. property rights assigned to the first to register a claim) and that the same can be done for things like mining claims, where there are difficulties in deciding what in fact constitutes an assumption of possession (compare the similar problem noted by Nozick in Extract 3.6, in

deciding how much Locke's labour-desert theory would award to a private astronaut who clears a place on Mars). However, in response to this, Zerbe relates what actually happened to mining claims in the California gold rush. He referred to a classic study by Umbeck, 'A Theory of Contract Choice and the California Gold Rush', which revealed that mining rights were not assigned wholly according to who first filed claims, because original claims were too large to be enforced: 'What governed the size of claim was a sort of group meeting in which a majority of people were wearing guns, and the majority decided [how the rights should be allocated].' According to Umbeck, the size of claims allocated was the size that an individual person could efficiently control, but Zerbe treats this with some scepticism: 'it is unclear that the efficient size from the individual's point of view would also be the efficient size from the group's point of view' (Zerbe, 'Time, Property Rights, and the Common Law', pp. 804–5).

4.3. New things

New things can come into existence in a variety of ways. For example, they may come into being through an irreversible mixture of pre-existing things, or as the product of the labour of one or more people (a question we look at in more detail in Chapter 9). The situation we concentrate on here is where the new thing can be regarded as the income or product of a pre-existing thing. Pre-existing things can produce income or natural products in essentially two different ways. In the case of some types of thing, it is inherent in their nature that they will or may produce income or natural products: apple trees produce apples, cultivated fields produce crops, dividends are paid on shares, lottery tickets sometimes produce prizes. But an owner of a thing can also make a thing produce an income by forgoing beneficial use of it and instead granting the right to beneficial use of the thing to someone else for a period of time in exchange for a rent. So, for example, you might agree to lend your money to the bank if the bank pays interest on the loan until it is repaid, or you might agree to grant a lease of your house to students for a year if they pay you £500 a month rent. Whichever way the income or natural product arises, the basic rule is the obvious one: ownership of the income or product automatically accrues to the owner of the thing that produced it, the principal. In most cases, this seems too obvious to mention: of course you own the prize if your lottery ticket bears the winning number, just as you own the apples from your apple tree and the rent accruing if your house is let. Indeed, as we saw in Chapter 1, the right to the income and the natural product of a thing are usually both regarded as standard incidents of ownership of the thing itself.

Again, however, more complex situations may require more elaborate rules. Consider the case of animal progeny. Animals are the natural product of two parents, not of one. Felix Cohen points out in *Dialogue on Private Property*,

extracted below, that a legal system considering how to allocate ownership of animal offspring can choose between three possible rules: it can allocate ownership of the offspring to the owner of the mother, or it can allocate it to the owner of the father, or it can adopt a rule that, when an animal is born, it automatically falls within the same category as wild animals, i.e. it is unowned until captured. What factors would lead a system to adopt one rule rather than another?

To appreciate what he says, it is useful to return to the rationale for the obvious simple rule: *why* in the usual case does the owner of the principal automatically also own its income or product? The answer depends to some extent on the nature of the principal. There are some things whose value resides solely in the income or product they will or may produce. The lottery ticket is the obvious example, but the same would be true of the apple tree if owned by a commercial fruit grower. In both cases, there is no point in owning the principal unless you are also guaranteed ownership of its product. In the case of other things, the principal thing can only be made to yield income or natural products, or to produce a higher quality or higher value yield, by the expenditure of skill and labour and/or the addition of improving agents. So, for example, land can be made to yield crops by cultivation and by the investment of fertilisers and fencing. Ownership of the crop provides the incentive for the owner of the land to incur these expenditures, and since all the profit of increased production accrues to the landowner, he has the incentive to increase the productivity of the land whenever increased productivity is cost-effective in terms of the increased investment required to produce it. Further, a blanket rule that ownership of income and natural products automatically accrues to the owner of the principal (however the income or natural products accrue) will leave the owner of the principal free to put the principal to its most productive use – for example to stop growing crops on his land and instead hire it out for pop festivals. There are other reasons for adopting the simple basic rule. Allowing owners to swap beneficial use for rent ensures that beneficial use is put in the hands of those who value it most for the time being.

Cohen's third solution – allocating the ownership of income and natural products to no one – presents problems, both where the product has a negative value and where it has a positive value. To take the first, we need owners to take responsibility for the products yielded by the things they own if those products are harmful in themselves, or capable of causing harm or nuisance to others. This applies to leaves falling from trees as much as to polluting chemicals produced by a manufacturing process. The rule that ownership of the income or product automatically accrues to the owner of the principal provides a basis for the environmental law principle that the polluter pays. On the other hand, where the income or natural product has a positive value, the problem arises because of the first occupancy rule. If income and natural products are ownerless (for example, apples are owned by those who pick them, regardless of who owns the tree), the owner of the principal will have to incur costs excluding others to ensure that he is the first taker, and those who want to engage in trading in the product will have to incur

costs in ensuring that they are the first taker. An apple wholesaler would not, therefore, own an orchard but would employ a gang of pickers to lie in wait outside apple trees waiting for them to ripen and meanwhile repelling rival pickers. Allocating ownership of the apples to the owner of the tree therefore eliminates these costs and makes apples cheaper. This is not to say that it is *never* the answer to allocate ownership of natural products to the first taker. There are some natural products that are of value to some people but not to others, and in these cases it may make sense to allot ownership to the first taker. Most societies making extensive use of horses have evolved such a rule about horse dung: the owner of the horse is in the best position to collect it to use as manure, but, if he does not want to do so, the first person to take it may keep it, and indeed anyone who wants horse manure may choose to follow the horse to ensure that he gets there first (see *Haslem* v. *Lockwood* (1871) 37 Conn 500, discussed by Lueck in 'First Possession as the Basis of Property').

Felix Cohen draws on a number of these factors to explain why most legal systems have chosen the rule that ownership of animal offspring accrues to the owner of the mother. However, even in the case of animal progeny, there may be differences in circumstances which justify a different rule. So, for example, as Lord Denning points out in *Tucker* v. *Farm and General Investment Trust Ltd* (extracted at www.cambridge.org/propertylaw/), this rule is replaced by a co-ownership rule in the case of swans, and even in the case of other animals, the right rule for allocating ownership as between the owner of the mother and the owner of the father will not necessarily be the right rule for allocating ownership as between the owner of the mother and the person in possession of the mother. In *Tucker*, the owner of ewes (a hire purchase company) had leased them to a farmer under a hire purchase agreement. Consistently with the reasoning of Felix Cohen, the Court of Appeal held that lambs born to the ewes during the hire period belonged to the farmer, not to the hire purchase company.

Extract 4.5 Felix S. Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Journal* 357 at 359

THE CASE OF THE MONTANA MULE

C: Mr F, there's a big cottonwood tree at the southeast corner of Wright Hagerty's ranch, about 30 miles north of Browning, Montana, and under that tree this morning a mule was born. Who owns the mule?

F: I don't know.

C: Do you own the mule?

F: No.

C: How do you know you don't own the mule? You just said you didn't know who owns the mule. Might it not be you?

F: Well, I suppose that it is possible that I might own a mule I never saw, but I don't think I do.

C: You don't plan to declare this mule on your personal property tax returns?
F: No.
C: Why not, if you really don't know whether you own it? Or do you know?
F: Well, I never had any relation to any mules in Montana.
C: Suppose you did have a relation to this mule. Suppose it turns out that the mule's father was your jackass. Would that make you the owner of the mule?
F: I don't think it would.
C: Suppose you owned the land on which the mule was born. Would that make you the owner of the mule?
F: No.
C: Suppose you owned a piece of unfenced prairie in Montana and the mule's mother during her pregnancy ate some of your grass. Would that make you the owner of the mule?
F: No, I don't think it would.
C: Well, then you seem to know more about the ownership of this Montana mule than you admitted a few moments ago. Now tell us who really owns the mule.
F: I suppose the owner of the mare owns the mule.
C: Exactly. But tell us how you come to that conclusion.
F: Well, I think that is the law of Montana.
C: Yes, and of all other states and countries, as far as I know. For example, the Laws of Manu, which are supposed to be the oldest legal code in the world, declare:

> 50. Should a bull beget a hundred calves on cows not owned by his master, those calves belong solely to the proprietors of the cows; and the strength of the bull was wasted.
>
> (*Institutes of Hindu Law or the Ordinances of Manu* [translated and edited by S. G. Grady, Chapter 10])

Now how does it happen, do you suppose, that the law of Montana in the twentieth century AD corresponds to the law of India of 4,000 years or so ago? Is this an example of what Aristotle calls 'natural justice', which is everywhere the same, as distinguished from conventional justice which varies from place to place and from time to time?

F: Well, it does seem to be in accordance with the laws of nature that the progeny of the mother belong to the owner of the mother.
C: Wouldn't it be just as much in accordance with the laws of nature to say that the progeny of the father belong to the owner of the father?
F: I suppose that might be so, as a matter of simple biology, but as a practical matter it might be pretty hard to determine just which jackass was the mule's father.
C: Then, as a practical matter we are dealing with something more than biology. We are dealing with the human need for certainty in property distribution. If you plant seed in your neighbor's field the biological connection between your seed and the resulting plants is perfectly natural, but under the laws of Montana and all other states the crop belongs to the landowner. And the Laws of Manu say the same thing:

> 49. They, who have no property in the field, but having grain in their possession, sow it in soil owned by another, can receive no advantage whatever from the corn, which may be produced.
>
> (*Institutes of Hindu Law or the Ordinances of Manu* [translated and edited by S. G. Grady, Chapter 10])

Would you say here that, as a matter of certainty it is generally easier to say who owns a field than to say who owned the seeds that were planted in it?

F: Yes, as a general rule I think that would be the case.

C: Then whether we call our rule of property in livestock an example of natural law or not, its naturalness has some relation to the social need for certainty, which seems to exist in 48 different states and 48 different centuries. Do you think that property law reflects some such human demand for certainty?

F: I think it does in the cases we have been discussing.

C: Couldn't we have some other equally certain and definite rule, say that the mule belongs to the owner of the land where it was born.

F: It might be a hard thing to do to locate the mule's birth-place, but the young mule will show us its own mother when it's hungry.

C: Suppose we decided that the mule should belong to the first roper. Wouldn't that be a simple and definite rule?

F: Yes, but it wouldn't be fair to the owner of the mare who was responsible for its care during pregnancy if a perfect stranger could come along and pick up the offspring.

C: Now, you are assuming that something more than certainty is involved in rules of property law, and that somehow such rules have something to do with ideas of fairness, and you could make out a good case for that proposition in this case. But suppose you are trying to explain this to a cowboy who has just roped this mule and doesn't see the fairness of this rule that makes it the property of the mare's owner. Are there any more objective standards that you could point to in support of this rule? What would be the economic consequences of a rule that made the mule the property of the first roper instead of the mare's owner?

F: I think that livestock owners wouldn't be so likely to breed their mares or cows if anybody else could come along and take title to the offspring.

C: You think then that the rule that the owner of the mare owns the mule contributes to economic productivity?

F: Yes.

C: But tell me, is there any reason to suppose that the owner of the mare will be able to raise the mule more economically than, say, the first roper or the owner of the ground on which the mule was born?

F: Well, so long as the mule depends upon its mother's milk, it will be less expensive to raise it if the owner of the mother owns the offspring. And presumably the owner of the mother has physical control over his animals, and no extra effort is involved in his controlling the offspring as long as they are dependent upon their mother.

C: So, in effect, the rule we are talking about takes advantage of the natural dependency of the offspring on the mother animal. By enlisting the force of habit or

inertia, this rule economizes on the human efforts that might otherwise be expended in establishing control over the new animal. The owner of the mare has achieved the object of all military strategy – he has gotten there 'fustest with the mostest'. We don't need to pay a troop of Texas Rangers to seize the mule and deliver it to the owner of the jackass father who may be many miles away. But why should we have a simple definite rule in all these cases? Wouldn't it be better to have a more flexible standard so that we might consider in each case what the owner of the mare contributed, what the owner of the jackass contributed, what was contributed by the grass owner who paid for the mare's dinners, and then on the basis of all the facts we might reach a result that would do justice to all the circumstances of each individual case?

F: The trouble with that is that the expense of holding such investigations might exceed the value of the mule.

C: And would it be easier or harder to borrow from the bank to run a livestock business if the owner of a mare or a cow didn't know in advance that it would own the offspring?

F: If I were a banker I'd certainly hesitate to make a livestock loan to a herd owner without such a simple definite rule.

C: Could we sum up this situation, then, by saying that this particular rule of property law that the owner of the mare owns the offspring has appealed to many different societies across hundreds of generations because this rule contributes to the economy by attaching a reward to planned production; is simple, certain, and economical to administer; fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations?

F: I think that summarizes the relevant factors.

C: And would you expect that similar social considerations might lead to the development of other rules of property law, and that, where these various considerations of productivity, certainty, enforceability, and fairness point in divergent directions instead of converging on a single solution, we might find more controversial problems of private ownership?

F: That would seem to be a reasonable reference.

Notes and Questions 4.2

1 Examine the reasons Cohen gives for the progeny rule he says applies to the mule. How convincing are they?

2 Read *Tucker* v. *Farm and General Investment Trust Ltd* [1966] 2 QB 421, CA, either in full or as extracted at www.cambridge.org/propertylaw/. Cohen does not consider the issue raised in *Tucker*. If he had done so, do you think he would have come to the same conclusion as the Court of Appeal?

3 What was the purpose of the hiring in *Tucker*? Suppose I own a valuable and rare female giant panda, and I agree to lend it to London Zoo for two years.

While there, it unexpectedly gives birth to a baby panda. Who owns the baby panda?

4 Why did Tucker get no title to the *ewes*? (See Chapter 10 on the *nemo dat* rule.)

4.4. Capture

Historically, the first occupancy rule has generally been used to establish ownership in what David Haddock described above as 'migratory resources', (sometimes referred to as 'fugitive resources'), although for reasons he touches on increasingly less so in modern societies. We concentrate here on capture of wild animals, which illustrates the basic problem about applying the first occupancy rule to fugitive resources: at what point in the pursuit and capture of the resource will the hunter be taken to have acquired a sufficient hold over the resource to be awarded ownership of it? The first occupancy rule traditionally demands that the claimant gains full control of the resource before he becomes entitled to property rights in it. There are at least three problems with this. The first two we have already noted above: such a rule encourages premature capture of the resource, and also it is not appropriate for some types of resource use such as nomadic land use. The third is that there are some fugitive resources, wild animals being a prime example, where the hunter must make a considerable investment of money and labour in the pursuit before gaining full control of the capture. If an interloper is free to come in and snatch the prey from him before he has gained full control, that investment will be wasted. The social and economic implications of this become apparent in the following extracts.

In the English case of *Young* v. *Hitchens* (1844) 6 QB 606, 115 ER 228 (extracted at www.cambridge.org/propertylaw/), the Court of Queen's Bench treated it as a simple matter of physical control, and refused to give redress to a Cornish pilchard fisherman whose rivals rowed up to his partially closed pilchard nets and drove out the fish already caught in but not yet fully enclosed by the nets. In the classic American fox-hunting case, *Pierson* v. *Post*, 3 Cai R 175, 2 Am Dec 264 (1805), also extracted at www.cambridge.org/propertylaw/, the majority came to the same conclusion (the fox-hunter was held not to have acquired property in the fox before it was taken by the interloper) but not for the same reasons, while in a strong minority judgment Livingston J advocated either awarding the fox to the first hunter or, better still, submitting the matter 'to the arbitration of sportsmen'.

As Robert Ellickson points out in Extract 4.6 below, this is, in effect, what was done in the whaling industry. The whaling community (and he establishes that such a thing did indeed exist in the eighteenth and nineteenth centuries, despite the different nationalities and geographical dispersal of its members) established different norms for different types of whale hunted in different types of environment, and on the whole the courts were prepared to accept these norms on the relatively rare occasions when disputes were brought to court, rejecting the strict control test which the court in *Young* v. *Hitchens* treated as inviolable.

Ellickson also points out that, both in the *Pierson* case and within the whaling trade at the time when the whaling rules evolved, it was axiomatic that efficiency in hunting consisted in achieving the maximum number of kills at the least cost. If this is the proper test for efficiency, then, as he says, it is probably correct that the hunting community can be left to identify the most efficient point of capture, as Livingston J suggested in *Pierson*. However, the norms they develop may not give sufficient weight to wider concerns about overall stock management and conservation.

Notes and Questions 4.3

1 Read *Young* v. *Hitchens* (1844) 6 QB 606, 115 ER 228 and *Pierson* v. *Post*, 3 Cai R 175, 2 Am Dec 264 (1805), either in full or as abstracted at www.cambridge.org/propertylaw/. How does the approach of the courts in the two cases differ?

2 Compare the reason given by the majority for coming to their decision in *Pierson* v. *Post* with the reasons given by Livingston J in the minority. Which do you find more persuasive? If Livingston J was correct, at what point in the hunt would the fox become the huntsman's?

3 In his dissenting judgment in *Pierson* v. *Post*, Livingston J said that 'the decision should have in view the greatest possible encouragement to the destruction of an animal so cunning and ruthless in his career'. If we assume for these purposes that this is correct, and that the aim should be to kill as many foxes as possible, which rule of capture is more likely to achieve this aim – the majority rule (the huntsman acquires no property in the fox until he has captured or killed it, and so the interloper who comes in just before the end of the hunt and kills the fox is entitled to keep it) or Livingston's minority rule (the huntsman had already acquired ownership in the fox before the interloper cut in)? In 'An Economic Analysis of "Riding to Hounds"', Dharmapala and Pitchford attempt to provide an answer to this question. Other commentators have assumed or argued that the majority rule is most likely to have that effect. In particular, as Dharmapala and Pitchford note, Cooter and Ulen argue that the encouragement that the majority rule gives to the killing of foxes in the stealthy manner used by Pierson, counterbalances the discouragement it gives to killing them by the more elaborate means of hunting:

> The majority's rule might lessen the fun of riding to hounds, but it does not necessarily lessen the incentive to kill foxes in less sporting ways. In fact, the rules seem equally efficient at contributing to the objective of killing foxes in order to reduce the damage they do to farms.
>
> (Cooter and Ulen, *Law and Economics*, p. 451)

However, Dharmapala and Pitchford point out that the investment of the two is unequal, and that, to some extent at least, the stealthy killing is parasitic on the huntsman's investment:

> The central contention of Justice Livingston's dissent is that assigning property rights to the person who kills the fox would encourage opportunistic behaviour by individuals not participating in the chase. Implicit in his argument is that an initial investment in hounds is an essential pre-condition for flushing out ('starting') foxes; however, once this investment has been made, non-participants may reap the benefits of the investment by killing and capturing the foxes thus discovered. Not only does such behaviour deprive the huntsman who undertook the investment of the value of the fox pelt; more importantly, it also greatly diminishes the participants' enjoyment of the hunt. The prospect of such opportunism thus discourages investment in hounds, and thereby reduces the number of foxes killed ... [Livingston also assumes] a fundamental asymmetry between the activities of the huntsman and the 'saucy intruder' ... It is assumed that an individual who merely wanders around the countryside, with no assistance from foxhounds, has virtually no chance of encountering and pursuing a fox. Thus the productivity (in terms of the number of foxes killed) of both the huntsman and the intruder depends on the former's prior investment in hounds. If such an assumption accurately reflects the practical realities of fox hunting, then it would appear that the two kinds of activities cannot properly be regarded as substitutes: any disincentive effects of the majority's rule on investment in hounds not only lowers the number of foxes killed by huntsmen while riding to hounds, but also reduces the productivity of the intruders.
>
> (Dharmapala and Pitchford, 'An Economic Analysis of "Riding to Hounds"', pp. 42–3)

They then construct a model of the interaction between a person in Post's position (the huntsman) and a person in Pierson's position (the interloper) to test the implications of this. They conclude that, if all foxes flushed out by huntsmen would have been killed by the huntsmen anyway if the interloper had not intervened, then the minority rule will lead to the greater number of foxes killed. If, on the other hand, the interloper increases the total number of foxes killed (he kills some that would have escaped the huntsmen) then there is something to be said for the majority rule.

4 Dharmapala and Pitchford then apply this analysis to what they argue is an analogous problem that arose over Internet domain names when commercial organisations first started to develop online operations – the problem of cybersquatting. As they explain:

> The central problem in this area is that the registration of domain names is undertaken 'on a first-come, first-served basis, irrespective of intellectual property rights in the name' [Golinveaux, 'What's in a Domain Name', p. 641]. This registration process has allowed 'cybersquatters' to register the names of prominent companies as domain names in the hope of selling the rights to these names to the companies when the latter wish to undertake online operations. This basic scenario is closely analogous to the *Pierson* situation analyzed in this article. In stylized form,

there are two players, a company A and a cybersquatter B. In the first period, A undertakes an investment (for instance, in product development) that determines the value of its domain name. Simultaneously, B chooses whether or not to register (at a small cost) A's name as a domain name. In the second period (presuming that B's property rights in the domain name are recognized), A and B negotiate over the transfer of rights to the domain name. If the size of the payment from A to B is determined by the relative bargaining power of the two parties, then it will act as a tax on A's return from the investment. Thus A will face a disincentive to invest at the margin, as a fraction of the value created by its investment is appropriated by B. (Dharmapala and Pitchford, 'An Economic Analysis of "Riding to Hounds"', p. 58)

More precisely, the analogy can be stated in the following terms. A's investment is analogous to h, and the resulting value of A's name resembles $f(h)$ (the number of foxes flushed out). The shares of $f(h)$ received by A and B, respectively, in the bargaining outcome are then akin to a and b, where (abstracting from the transaction costs of bargaining) $f(h) = a + b$. Clearly, this situation is analogous to the 'no escape' case analyzed above (in the sense that A would capture the entire value of the investment in the absence of B's activity). It was concluded earlier that, in these circumstances, rule L (assigning property rights to the investor) is optimal. It follows straightforwardly that, in line with this analysis, property rights in the domain name should be assigned to A.

When deciding legal disputes concerning domain names, courts have relied on a 'trademark dilution' theory [see Golinveaux, 'What's in a Domain Name' for a discussion].

However, in a range of cases involving what might be termed 'pure cybersquatting', the outcomes have been consistent with the analysis above. For example, in *Panavision* v. *Toeppen* [945 F Supp 1296 (CD Cal 1996)], the defendant had registered the trademarks of a large number of well-known companies (including Panavision) as domain names, purely for the purpose of subsequently selling the names to these companies. The court granted summary judgment for Panavision, in effect granting property rights in the domain name to the company.

However, there is another category of situations in which the ownership of domain names comes into dispute. These involve a small company or individual conducting a *bona fide* business registering its name as a domain name, where this name is identical to, or closely resembles, the trademark of a large, well-known company. In such instances, the use to which B would put the domain name in the absence of a bargaining solution has some social value (e.g. B could use the site to advertise its products). This situation closely resembles the case analyzed above where the foxes can escape after being flushed out. Essentially, if B registers A's name, then the level of A's investment helps determine the value of the name to B; if B uses the site to advertise products, then the number of people who type in A's name and are inadvertently exposed to B's advertising will depend on the extent of A's reputation, and thus on A's investment in product development. However, as B's activities have some social value, it may not always be optimal to assign property rights in the name to A.

An example of such a scenario is provided by the recent case of *Hasbro* v. *Clue Computing* [66 F Supp 2d 117 (D Mass 1999)]. Hasbro is the company that owns the trademark corresponding to the game 'Clue', while Clue Computing is a less well-known computer consulting firm based in Colorado. Hasbro alleged that Clue Computing's use of the address 'clue.com' diluted the former's trademark. The court, however, held that Clue Computing's behavior did not constitute trademark dilution, and granted rights in the name to Clue Computing. The court argued that:

> while use of a trademark as a domain name to extort money from the mark-holder ... may be *per se* dilution, a legitimate competing use of the domain name is not. Holders of a famous mark are not automatically entitled to use that mark as their domain name ... If another Internet user has an innocent and legitimate reason for using the famous mark as a domain name and is the first to register it, that user should be able to use the domain name.
>
> [*Hasbro* v. *Clue Computing*, 66 F Supp 2d 117 at 133 (D Mass 1999)]

There are also intermediate cases, in which the legitimacy or value of B's commercial activity may be subject to question.

Extract 4.6 Robert Ellickson, 'A Hypothesis of Wealth-Maximising Norms: Evidence from the Whaling Industry' (1989) 5 *Journal of Law, Economics, and Organization* 83

1. THE PROBLEM OF CONTESTED WHALES

Especially during the period from 1750 to 1870, whales were an extraordinarily valuable source of oil, bone, and other products. Whalers therefore had powerful incentives to develop rules for peaceably resolving rival claims to the ownership of a whale. In *Moby-Dick*, Melville explained why these norms were needed:

> It frequently happens that, when several ships are cruising in company, a whale may be struck by one vessel, then escape, and be finally killed and captured by another vessel ... [Or] after a weary and perilous chase and capture of a whale, the body may get loose from the ship by reason of a violent storm; and drifting far away to leeward, be retaken by a second whaler, who, in a calm, snugly tows it alongside, without risk of life or line. Thus the most vexatious and violent disputes would often arise between the fishermen, were there not some written, universal, undisputed law applicable to all cases ... The American fishermen have been their own legislators and lawyers in this matter.

Melville's last sentence might prompt the inference that whalers had some sort of formal trade association that established rules governing the ownership of contested whales. There is no evidence, however, that this was so. Anglo-American whaling norms seem to have emerged spontaneously, not from decrees handed down by either organizational or governmental authorities. In fact, whalers' norms not only did not

mimic law, they created law. In the dozen reported Anglo-American cases in which ownership of a whale carcass was contested, judges invariably held proven whalers' usages to be reasonable and deferred to those rules.

2. THE WHALING INDUSTRY

At first blush it might be thought that whalers would be too dispersed to constitute the membership of a close-knit social group. During the industry's peak in the nineteenth century, for example, whaling ships from ports in several nations were hunting their prey in remote seas of every ocean. In fact, however, the entire international whaling community was a tight one, primarily because whaling ships commonly encountered one another at sea, and because whalers' home and layover ports were few, intimate, and socially interlinked. The scant evidence available suggests that whalers' norms of capture were internationally binding . . .

3. THE CALCULUS OF WEALTH MAXIMIZATION

Wealth-maximizing norms are those that minimize the sum of transaction costs and deadweight losses that the members of a group objectively incur. By hypothesis, whalers would implicitly follow this calculus when developing norms to resolve the ownership of contested whales. As a first cut, this calculus would call for a whaling ship's fraction of ownership to equal its fractional contribution to a capture. For example, a ship that had objectively contributed one-half the total value of work would be entitled to a one-half share. In the absence of this rule, opportunistic ships might decline to contribute cost-justified but underrewarded work, leading to deadweight losses.

This first cut is too simple, however, because utilitarian whalers would be concerned with the transaction costs associated with their rules. They would tend to prefer, for example, bright-line rules that would eliminate arguments to fuzzy rules that would prolong disputes. Finding a cost-minimizing solution to whaling disputes is vexing because there is no ready measure of the relative value of separate contributions to a joint harvest. Any fine-tuning of incentives aimed at reducing deadweight losses is therefore certain to increase transaction costs.

4. HYPOTHETICAL WHALING NORMS

In no fishery did whalers adopt as norms any of a variety of rules that are transparently poor candidates for minimizing the sum of deadweight losses and transaction costs. An easily administered rule would be one that made the possession of a whale carcass normatively decisive. According to this rule, if ship A had a wounded or dead whale on a line, ship B would be entitled to attach a stronger line and pull the whale away. A possession-decides rule of this sort would threaten severe deadweight losses, however, because it would encourage a ship to sit back like a vulture and free-load on others' efforts in the early stages of a hunt. Whalers never used this norm.

Equally perverse would be a rule that a whale should belong entirely to the ship whose crew had killed it. Besides risking ambiguities about the cause of a whale's demise, this rule would create inadequate incentives for whalers both to inflict

nonmortal wounds and to harvest dead whales that had been lost or abandoned by the ships that had slain them.

To reward early participation in a hunt, whalers might have developed a norm that the first ship to lower a boat to pursue a whale had an exclusive right to capture so long as it remained in fresh pursuit. This particular rule would create numerous other difficulties, however. Besides being ambiguous in some contexts, it would create strong incentives for the premature launch of boats and might work to bestow an exclusive opportunity to capture on a party less able than others to exploit that opportunity.

Somewhat more responsive to incentive issues would be a rule that a whale belonged to a ship whose crew had first obtained a 'reasonable prospect' of capturing it and thereafter remained in fresh pursuit. This rule would reward good performance during the early stages of a hunt and would also free up lost or abandoned whales to later takers. A reasonable-prospect standard, however, is by far the most ambiguous of those yet mentioned, invites transaction costs, and, like the other rules so far discussed, was not employed by whalers.

5. ACTUAL WHALING NORMS

Whalers developed an array of norms more utilitarian than any of these hypothetical ones ... Whaling norms were not tidy, certainly less tidy than Melville asserted in *Moby-Dick*. Whalers developed three basic norms, each of which was adapted to its particular context. As will be evident, each of the three norms was sensitive to the need to avoid deadweight losses because each not only rewarded the ship that had sunk the first harpoon, but also enabled others to harvest dead or wounded whales that had seemingly been abandoned by their prior assailants. All three norms were also sensitive to the problem of transaction costs. In particular, norms that bestowed an exclusive temporary right to capture on a whaling ship tended to be shaped so as to provide relatively clear starting and ending points for the time period of that entitlement.

5.1. Fast-fish, loose-fish

Prior to 1800, the British whalers operating in the Greenland fishery established the usage that a claimant owned a whale, dead or alive, so long as the whale was fastened by line or otherwise to the claimant's boat or ship. This fast-fish rule was well suited to this fishery. The prey hunted off Greenland was the right whale. Right whales, compared to the sperm whales that later became American whalers' preferred prey, are both slow swimmers and mild antagonists. The British hunted them from heavy and sturdy whaling boats. Upon nearing one, a harpooner would throw a harpoon with line attached; the trailing end of the line was tied to the boat. So long as the harpoon held fast to the whale and remained connected by the line to the boat, the fast-fish norm entitled the harpooning boat to an exclusive claim of ownership as against subsequent harpooners. If the whale happened to break free, either dead or alive, it was then regarded as a loose-fish and was again up for grabs. Although whalers might occasionally dispute whether a whale had indeed been fast, the fast-fish rule usually provided sharp beginning and ending points for a whaler's exclusive entitlement to

capture and thus promised to limit the transaction costs involved in dispute resolution.

The fast-fish rule created incentives well adapted to the Britishers' situation in Greenland. Because right whales are relatively slow and docile, a whale on a line was not likely to capsize the harpooning boat, break the line, or sound to such a depth that the boatsmen had to relinquish the line. Thus the fast-fish rule was in practice likely to reward the first harpooner, who had performed the hardest part of the hunt, as opposed to free-riders waiting in the wings. Not uncommonly, however, a right whale sinks shortly after death, an event that requires the boatsmen to cut their lines. After a few days a sunken whale bloats and resurfaces. At that point the fast-fish rule entitled a subsequent finder to seize the carcass as a loose-fish, a utilitarian result because the ship that had killed the whale might then be far distant. In sum, the fast-fish rule was a bright-line rule that created incentives for both first pursuers of live whales and final takers of lost dead whales.

5.2. Iron-holds-the-whale

Especially in fisheries where the more vigorous sperm whales predominated, whalers tended to shift away from the fast-fish rule ... The fast-fish rule's main alternative – the rule that iron-holds-the-whale – also provided incentives to perform the hardest part of the hunt. Stated in its broadest form, this norm conferred an exclusive right to capture upon the whaler who had first affixed a harpoon or other whaling craft to the body of the whale. The iron-holds-the-whale rule differed from the fast-fish rule in that the iron did not have to be connected by a line or otherwise to the claimant. The normmakers had to create a termination point for the exclusive right to capture, however, because it would be foolish for a Moby-Dick to belong to an Ahab who had sunk an ineffectual harpoon days or years before. Whalers therefore allowed an iron to hold a whale for only so long as the claimant remained in fresh pursuit of the iron-bearing animal. In some contexts, the iron-affixing claimant also had to assert the claim before a subsequent taker had begun to 'cut in' (strip the blubber from) the carcass.

American whalers tended to adopt the iron-holds-the-whale rule wherever it was a utilitarian response to how and what they hunted. Following Native American practices, some early New England seamen employed devices called drogues to catch whales. A drogue was a float, perhaps two feet square, to which the trailing end of a harpoon line was attached. The drogue was thrown overboard from a whaling boat after the harpoon had been cast into the whale. This device served both to tire the animal and also to mark its location, thus setting up the final kill. Because a whale towing a drogue was not connected to the harpooning boat, the fast-fish rule provided no protection to the crew that had attached the drogue. By contrast, the iron-holds-the-whale rule, coupled with a fresh-pursuit requirement, created incentives suitable for drogue fishing.

This rule had particular advantages to whalers hunting sperm whales. Because sperm whales swim faster, dive deeper, and fight more viciously than right whales do, they were more suitable targets for drogue-fishing. New Englanders eventually did

learn how to hunt sperm whales with harpoons attached by lines to boats ... The vigor of the sperm whale compared to the right whale, however, increased the chance that a line would not hold or would have to be cut to save the boat. A 'fastness' requirement would thus materially reduce the incentives of competing boatsmen to make the first strike. The iron-holds-the-whale rule, in contrast, was a relatively bright-line way of rewarding whoever won the race to accomplish the major feat of sinking the first harpoon into a sperm whale. It also rewarded only the persistent and skillful because it conferred its benefits only so long as fresh pursuit was being maintained.

Most important, unlike right whales, sperm whales are social animals that tend to swim in schools ... To maximize the total catch, when whalers discovered a school their norms had to encourage boatsmen to kill or mortally wound as many animals as quickly as possible, without pausing to secure the stricken whales to the mother ship. Fettering whales with drogues was an adaptive technology in these situations. The haste that the schooling of whales prompted among hunters also encouraged the related usage that a waif holds a whale. A waif is a pole with a small flag atop. Planting a waif into a dead whale came to signify that the whaler who had planted the waif claimed the whale, was nearby, and intended soon to return. When those conditions were met, the usages of American whalers in the Pacific allowed a waif to hold a whale.

Because a ship might lose track of a whale it had harpooned or waifed, whaling norms could not allow a whaling iron to hold a whale forever. When a mere harpoon (or lance) had been attached, and thus it was not certain that the harpooning party had ever fully controlled the whale, the harpooning party had to be in fresh pursuit and also had to assert the claim before a subsequent taker had begun to cut in. On the other hand, when a waif, anchor, or other evidence of certain prior control had been planted, the planting party had to be given a reasonable period of time to retake the whale and hence might prevail even after the subsequent taker had completed cutting in.

Because the iron-holds-the-whale usage required determinations of the freshness of pursuit and sometimes of the reasonableness of the elapsed time period, it was inherently more ambiguous than the fast-fish norm was. By hypothesis, this is why the whalers who pursued right whales off Greenland preferred the fast-fish rule. The rule that iron-holds-the-whale, however, provided better-tailored incentives in situations where drogues were the best whaling technology and where whales tended to swim in schools. In these contexts, according to the theory, whalers switched to iron-holds-the-whale because they saw that its potential for reducing deadweight losses outweighed its transaction-cost disadvantages.

5.3. Split ownership

In a few contexts whaling usages called for the value of the carcass to be split between the first harpooner and the ultimate seizer. According to an English decision, in the fishery around the Galapagos Islands a whaler who had fettered a sperm whale with a drogue shared the carcass fifty–fifty with the ultimate taker. The court offered no explanation for why a different norm had emerged in this context, although it seemed

aware that sperm whales were often found in large schools in that fishery. The utilitarian division of labor in harvesting a school of whales is different than for a single whale. The first whaling ship to come upon a large school should fetter as many animals as possible with drogues and relegate to later-arriving ships the task of capturing and killing the encumbered animals. The Galapagos norm enabled this division of labor. It also showed sensitivity to transaction costs because it adopted the simplest focal point for a split: fifty–fifty.

Better documented is the New England coastal tradition of splitting a beached or floating dead whale between its killer and the person who finally found it. The best known of the American judicial decisions on whales, *Ghen* v. *Rich*, involved a dispute over the ownership of a dead finback whale beached in eastern Cape Cod. Because finback whales are exceptionally fast swimmers, whalers of the late nineteenth century slew them from afar with bomb-lances. A finback whale killed in this way immediately sank to the bottom and typically washed up on shore some days later. The plaintiff in *Ghen* had killed a finback whale with a bomb-lance. When the whale later washed up on the beach, a stranger found it and sold it to the defendant tryworks. The trial judge held a hearing that convinced him that there existed a usage on the far reaches of Cape Cod that entitled the bomb-lancer to have the carcass of the dead animal, provided in the usual case that the lancer pay a small amount (a 'reasonable salvage') to the stranger who had found the carcass on the beach ...

The norm enforced in *Ghen* divided ownership of a beached finback whale roughly according to the opportunity costs of the labor that the whaler and finder had expended. It thus ingeniously enabled distant and unsupervised specialized laborers with complementary skills to co-ordinate with one another by implicit social contract.

6. CONCLUDING REMARKS

... [A] critic could assert that the whalers' norms described were too short-sighted to be wealth-maximizing. By abetting co-operation among small clusters of competing hunters, the norms aggravated the risk of overwhaling.

The nineteenth-century whalers in fact depleted their fisheries so rapidly that they were impelled to seek whales in ever more remote seas. Had they developed norms that set quotas on catches, or that protected young or female whales, they might have been able to keep whaling stocks at levels that would support sustainable yields.

The arguments that respond to this ... criticism point up some shortcomings of the informal system of social control, as compared to other methods of human co-ordination. Establishment of an accurate quota system for whale fishing requires both a sophisticated scientific understanding of whale breeding and an international system for monitoring worldwide catches. For a technically difficult and administratively complicated task such as this, a hierarchical organization, such as a formal trade association or a legal system, would likely outperform the diffuse social forces that make norms. Whalers who recognized the risk of overfishing thus could rationally ignore that risk when making norms on the ground that normmakers could make no cost-justified contribution to its solution.

Whalers might rationally have risked overwhaling for another reason. Even if overwhaling was not wealth-maximizing from a global perspective, the rapid depletion of whaling stocks may well have been in the interests of the club of whalers centered in southern New England. From their parochial perspective, grabbing as many of the world's whales as quickly as possible was a plausibly wealth-maximizing strategy. These New Englanders might have feared entry into whaling by mariners based in the southern United States, Japan, or other ports that could prove to be beyond their control. Given this risk of hostile entry, even if the New Englanders could have created norms to stem their own depletion of world whaling stocks, they might have concluded that a quick kill was more to their advantage. The whaling saga is thus a reminder that norms that enrich one group's members may impoverish, to a greater extent, those outside the group.

4.5. Colonisation and property rights

4.5.1. Introduction

When Britain colonised Australia in the eighteenth and nineteenth centuries, the continent was already inhabited by native Australians, and had been for thousands of years. The effect of British colonisation was that English law, including English property law, became the law of Australia (subsequently modified first by the Crown to meet the special requirements of colonial administration and then by the Australian Government). Up until that time native Australians had of course had relationships between themselves in respect of their personal possessions, the land on which they lived, the natural resources of the land that they used, and the tangible and intangible things they manufactured. What happened to these pre-existing relationships when English property law became the law of Australia? To take a simple (if not wholly typical) example, consider the position of a native Australian living in his own house at the time when that part of Australia was annexed by the Crown. Was he treated under the new Australian law imposed by the Crown as having the same rights and other entitlements in the house (both as against fellow native Australians and as against the new settlers and the new government) as he would have had if he had had full ownership of the house under English law? Or did the law treat his occupation of his house as subject to the same rules, and giving rise to the same entitlements, as existed before colonisation (so that if, for example, there was a pre-existing native Australian rule that all rights in houses automatically pass to the eldest son on the death of the 'owner', this rule would continue to apply here, though not of course to settlers who later built and occupied houses)? Or was he treated under the new law as having no entitlements at all in his own house, or at least none enforceable against new settlers and the new government?

This example concerns a use of resources that would have been very familiar to eighteenth- and nineteenth-century British settlers, as indeed it is to us. However,

the issues raised are made more complicated by the fact that this was not always the case. The pattern of relationships that Aboriginal Australians had developed with each other in respect of things was in many respects quite different from that which had developed in England by that time, giving rise to entitlements and obligations that had no counterpart in English law. Also, there were (and are) wide regional differences: quite different patterns had developed in different parts of the country. For example, many native Australian tribes were nomadic, a pattern of land use that does not fall within any recognised category of English property right, and the entitlements and obligations that this entailed differed from tribe to tribe. This complicates the question of the effect of the reception of English law. At the time when English property law became the law of Australia, did the new law recognise these 'alien' use patterns as new species of property rights which would then become an integral part of Australian law? If so, would these new property rights be available to all Australians (new settlers who wanted to live nomadically – perhaps a sensible option in many parts of Australia – or native Australians from a different tribe) or would they be restricted to those who had previously enjoyed them (and what about their descendants)? Or were these varying use patterns simply regarded as giving rise to no entitlements or obligations enforceable by Australian law?

These questions are of course not special to the British colonisation of Australia. They would also have arisen when the Normans colonised Britain in 1066, when Western European countries colonised parts of Africa, the Americas, the Indian sub-continent and other parts of Australasia in the eighteenth, nineteenth and twentieth centuries, and on all colonisations that have taken place before and since.

Historically, such questions have sometimes been settled at the time of colonisation by treaties made between the settlers and the native inhabitants, or by explicit formal expropriation by the colonising state acting within its own legal powers, or simply by the settlers wiping out the native population. In many other cases, however, the settlers neither formally recognised nor expressly abrogated indigenous rights. This is essentially what happened in Australia. On the whole, as a matter of fact rather than law (the legal position is what was in issue in the cases we consider below), native Australian patterns of usage of resources appear to have been tolerated and even recognised to a certain extent. For example, the colonial administration probably regarded the Aboriginal population as having rights and obligations as against each other, and sometimes may even have created or given support to local tribunals or other mechanisms for settling disputes in accordance with local rules (some instances are recounted in Brennan J's judgment in *Mabo (No. 2)*). Also, there is some suggestion that the administration regarded itself as responsible for protecting the Aboriginal population's property against intruders (settlers not authorised by the Crown, or marauders from outside the indigenous group: again, instances are recorded in *Mabo (No. 2)* of the colonial administration expelling 'trespassers and intruders' from the Murray Islands so that 'the Murray Islanders will have Murray Island to themselves' (§§ 13 and 14 of Brennan J's

judgment)). However, as a matter of historical fact, the colonial government did not appear to regard native Australians as having patterns of usage of resources that gave rise to legal entitlements as against the state. In other words, the colonial administration did not appear to regard itself as under a legal obligation to respect the occupation and resource usage of the Aboriginals, or to compensate them for any deprivation or infringement of it.

This of course gives rise to immensely important political and ethical questions, both as to the legitimacy of what was done in the past and as to what, if anything, should and could now be done to redress past wrongs. In the cases we consider below, the Australian courts had to consider the *legal* question – was the colonial government legally entitled to treat native resource use patterns in the way that it did, and do surviving or recently extinguished native patterns of resource use now give rise to entitlements enforceable in modern Australian law? This legal question is notionally separate from the political and ethical questions, but as is apparent from the judgments given in the cases extracted here, it is not easily separable from the political and moral context.

In this section, we look at two pivotal Australian decisions. In *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141, a decision of Blackburn J in the Supreme Court of the Northern Territory, the Aboriginal people who brought the case lost, and it was held that, although their tribes had lived in parts of the Northern Territory for generations before it was annexed in 1863, they had no rights in the land they inhabited, or at least none that had survived annexation. In *Mabo* v. *Queensland (No. 2)* (1992) 175 CLR 1, however, the tide was turned. The High Court of Australia reversed the effect of *Milirrpum* and established for the first time that Aboriginal Australian people did have rights in the land they inhabited before annexation of Australia by the Crown, that these rights did survive annexation, and that they continue to be enforceable in modern Australian law except in so far as they have been abandoned or extinguished by the Australian government since annexation.

These two cases mark the end of one era and the beginning of another. The *Mabo (No. 2)* decision laid the foundations for a process of recognition of Aboriginal rights in resources that has proved to be fast-moving, complex and politically highly controversial. We sketch out very briefly at the end of this section the developments that have taken place since *Mabo (No. 2)*, but our main concern here is in the basic principles it established. We come back to both *Milirrpum* and *Mabo (No. 2)* later on in the book, in particular in Chapter 5 in the context of a consideration of the nature of property rights, where we look in more detail at the nature of the aboriginal rights and interests now recognised in Australia and Canada, and contrast them with common law private property and communal property rights and interests.

4.5.2. The *Milirrpum* decision and the doctrine of *terra nullius*

In 1968, the Government of Australia granted Nabalco Pty Ltd a forty-two-year mineral lease of land in the Gove Peninsula in the Northern Territory of Australia

to enable it to mine the rich fields of bauxite that had been discovered in the area, and to establish a township there. Representatives from several different Aboriginal clans brought this action against Nabalco and the government, claiming that they had property rights in the land in question that would be infringed by Nabalco's activities. They argued that these rights had been in existence before the land became vested in the Crown in 1788, that they were property rights that survived that event and continued in existence unless and until validly terminated by the Crown, that they never had been terminated, and that, consequently, they were still in existence and enforceable against Nabalco.

In order for this argument to succeed, the Aboriginals had to establish two things. First, they had to establish that, as a matter of law, when territory in Australia was acquired by the Crown, property rights of the native inhabitants were legally binding on the Crown unless and until validly terminated by the Crown. If they succeeded in establishing that principle, they then had to establish that, at the time when the territory was acquired by the Crown, their ancestors had indeed had a relationship with the land they inhabited which would be recognisable as a property relationship by English common law.

The action was heard by Blackburn J in the Supreme Court of the Northern Territory. He held that, as a matter of law, any rights of native inhabitants were automatically extinguished when land in Australia was acquired by the Crown. Consequently, the second question – whether these particular clans had had property rights in the land at that time – did not arise. He did nevertheless go on to give that second question detailed consideration (he decided they did not have property rights), and we look at what he said in Chapter 5, but the question we are interested in here is the first question.

The issues and the arguments Blackburn J had to consider in relation to the first question were complex, and so, necessarily, was the reasoning which led him to the conclusion that aboriginal land rights had not survived annexation, but two important strands in his reasoning can be highlighted here.

The first was his view that the question of the effect of colonisation of this part of Australia (New South Wales) had already been established as a matter of law, and that he was bound by authority to accept that conclusion. There had long been a principle of international law that the law in force in a newly acquired territory depended on the circumstances of its acquisition. If it was acquired by *conquest* or *cession* (i.e. the inhabitants of the territory had either been conquered by or had ceded sovereignty to the invading state) then the inhabitants continued to be governed by their own private laws unless and until these laws were positively abrogated by the invading sovereign. However, a sovereign state could acquire new territory by *occupation* (sometimes called *settlement*) if the territory was *terra nullius* – a territory belonging to no one. In a territory acquired by occupation or settlement, the law of the settler became the law of the newly acquired territory and all property vested in the occupying state. Moreover, it had become accepted by the nineteenth century that *terra nullius* extended beyond territory that was

genuinely uninhabited to territory that was 'practically uninhabited, without settled inhabitants or settled law' (Lord Watson in *Cooper* v. *Stuart* (1889) LR 14 App Cas 286 at 291). In other words, if a territory was occupied only by 'backward' people who could not be regarded as settled inhabitants or having a settled law, then their territory was regarded as *terra nullius* and so capable of being acquired by settlement or occupation rather than by conquest or cession. When a sovereign state, such as the British Crown or another European colonial nation, acquired territory which was in this condition (i.e. occupied only by people who were taken to be 'backward' or 'barbarian') this was treated in international law as an occupation or settlement of the territory, with the consequence that all indigenous inhabitants were not only treated as subject to the sovereignty of the acquiring state but also became governed solely by its laws – they were treated as having no pre-existing rights arising out of their own system of law.

The justification for this was put by Lord Sumner in the Privy Council in *Re Southern Rhodesia* [1919] AC 211 at 233–4:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

The difficulty faced by Blackburn J in *Milirrpum* was that, although he heard overwhelming evidence that, as a matter of fact, aboriginal tribes in the Gove Peninsula had always lived in highly sophisticated and stable communities, it had been widely accepted, in particular by the Privy Council in *Cooper* v. *Stuart*, that this part of Australia (New South Wales) was at the time of annexation 'without settled inhabitants or settled law', and that, consequently, it came within the category of a settled or occupied colony in which all resources had vested in the Crown, leaving the Aboriginals with no rights to occupy their ancestral lands. Blackburn J took the view that this categorisation of New South Wales as a settled or occupied colony, whether based on ignorance or on what Brennan J was later to describe in *Mabo (No. 2)* as 'a discriminatory denigration of indigenous inhabitants, their social organisation and customs' (at paragraph 39) was nevertheless a matter of law which he was bound to accept:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me ... [Nevertheless] ... [w]hether or not the Australian Aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court

> to decide otherwise than that New South Wales came into the category of a settled or occupied colony. (*Milirrpum*, pp. 267 and 244)

Consequently, he thought he had no alternative but to dismiss the claimants' case.

A second factor which influenced Blackburn J in coming to this conclusion was something that also troubled Dawson J in his dissenting judgment in *Mabo (No. 2)*. It is generally accepted that it is within the power of a sovereign state to extinguish pre-existing property rights, provided that, in doing so, it is acting lawfully according to the rules of its own system (or according to the rules of international law if it is taking over new territory). It is also generally (although not so universally) accepted that, when colonising a new territory, whether inhabited or not, the Crown could lawfully extinguish pre-existing rights without specific legislation provided it made its intentions plain. It seems clear that this is what the Crown thought it had done in Australia. From the outset, the Crown assumed that the land was its own, to use or dispose of absolutely as it saw fit, with no legal constraints imposed by any pre-existing rights of indigenous inhabitants, and it acted on this basis. If the law *as it was perceived to be at the time* was that the Crown was legally entitled to absolute beneficial ownership of Australia, and that any claims of Aboriginal tribes had been extinguished by colonisation, is it now open to the courts to say that this was wrong in law? As Dawson J says in *Mabo (No. 2)*:

> There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account ... The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime, it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided. (*Mabo (No. 2)*, paragraph 48)

4.5.3. Mabo (No. 2)

4.5.3.1. Terra nullius

The Aboriginals who brought the claims in *Mabo (No. 2)*, the Meriam Indians who inhabited the Murray Islands, used their land in a very different way from the Gove Peninsula Indians. They lived mostly in settled villages rather than nomadically, and lived primarily by cultivating gardens rather than by hunting and gathering. Also, they inhabited a part of Australia that had been annexed to the Crown at a different time and by a different process. The High Court of Australia could therefore technically have allowed the Aboriginals' claim in *Mabo (No. 2)* without

overruling *Milirrpum*, confining the effect of *Milirrpum* to the claims of Aboriginal tribes of a culturally similar type who inhabited that locality. As Brennan J said:

> This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the scale of social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not.
>
> (*Mabo (No. 2)*, paragraph 39)

The court decided by a majority of six to one (Dawson J dissenting) to follow the latter course. Brennan J described the extended doctrine of *terra nullius* (i.e. treating inhabited territories as if they were uninhabited if the inhabitants were 'so low in the scale of social organisation' that it would be 'idle to impute to such people some shadow of the rights known to our law') as 'an unjust and discriminatory doctrine of the kind that can no longer be accepted':

> 37. It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. When it was sought to apply Lord Watson's assumption in *Cooper* v. *Stuart* that the colony of New South Wales was 'without settled inhabitants or settled law' to Aboriginal society in the Northern Territory [in *Milirrpum*] the assumption proved false ...
>
> 38. The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands ...
>
> 39. ... The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. [T]he basis of the theory is false in fact and unacceptable in our society ...
>
> 41. If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' (*Re Southern Rhodesia* [1919] AC at pp. 233–4) can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

> 42. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people ... The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Consequently, the Court held that, as a matter of law, the rights of Aboriginal Australians survived colonisation and continue to survive unless, and except to the extent that, they have since been extinguished.

This raises two questions that have proved to be crucially important. What counts as a right for these purposes? And precisely what can extinguish Aboriginal rights? We look at the first question in the next chapter. In order to appreciate the importance of the second question, on extinguishment, we need to say something more about what the court decided was the effect of transporting English common law to Australia.

4.5.3.2. Property, sovereignty and the doctrine of radical title

When a sovereign state acquires new territory (inhabited or uninhabited), it acquires sovereignty over the new territory, which includes the power to create and extinguish property rights. However, as Brennan J explains in paragraphs 44–6, sovereignty is not the same as ownership: in general the fact that a state acquires sovereignty over new territory does not mean that it automatically acquires ownership of all resources in it, even previously unowned ones. All it acquires by assuming sovereignty is power to make the laws to give ownership to itself or to others. In a passage cited with approval by Toohey J (in paragraph 15 of his judgment in *Mabo (No. 2)*), McNeil explains the difference between sovereignty and title to land:

> The former is mainly a matter of jurisdiction involving questions of jurisdiction and constitutional law, whereas the latter is a matter of proprietary rights, which depend for the most part on the municipal law of property. Moreover, acquisition of one by the Crown does not necessarily involve acquisition of the other.
>
> (McNeil, *Common Law Aboriginal Title*, p. 108)

However, when a state acquires new territory, it also brings its own system of law to the new territory, so if, for example, it is an established principle of law in the colonising state that all swans belong to the state, all swans in the new territory will also automatically belong to the state (unless already subject to rights of indigenous people which are binding on the state). In English common law, as a matter of law, all land in this country is ultimately 'owned' by the Crown. This is a principle of law that has been taken to apply in Australia and other colonised territories as well as in England, and in *Mabo (No. 2)* it was used as an argument in support of the Government of Queensland's contention that the annexation of Australia to the Crown vested ownership of all land in Australia.

However, this 'ownership' of land by the Crown is a peculiar vestigial type of ownership, a relic of the feudal system of land ownership that used to operate in this country (as Brennan J explains in paragraphs 48–52 in *Mabo (No. 2)*, and Deane and Gaudron JJ in paragraphs 7 and 8). It is still integral to the technical structure of land ownership in this country, as we see later in Chapter 6, but it has long ceased to have any practical significance here. All that it means is that it is the Crown that has the residual power to grant perpetual private holdings of land (called fee simple or freehold estates, but corresponding in all respects to ownership as described by Honoré), and that, when a fee simple estate is extinguished, the land reverts to the Crown – there can never be any unowned land in England. The extinction of a fee simple estate is a very rare event, and even when it does occur the Crown probably has no power to do anything with the reversionary interest apart from grant a new fee simple estate out of it to someone else. In England, therefore, the Crown's ownership of land has very little content.

In the case of colonised territories, however, it had been argued that the effect of the doctrine of Crown ownership of land was that the Crown automatically became full beneficial owner of all land in the colonised territory, whether previously owned or unowned. This argument was rejected by the majority in *Mabo (No. 2)*. They accepted that the technical feudal common law structure of land ownership was imported into Australia, but they took the view that all this meant was that the Crown acquired what they called 'radical title' to the land, not full ownership. This radical title gave the Crown title to grant beneficial property interests, like fee simple estates and leases, over tracts of land to itself and to others, but it did not of itself give the Crown any rights that overrode pre-existing Aboriginal rights. In other words, the Crown's radical title to the land was held by the Crown subject to Aboriginal rights.

What actually happened in Australia was that the government kept control over the development of resources by granting what were called pastoral leases to settlers to enable them to farm land, and mining and other leases to those, like Nabalco Pty Ltd, who were engaged in extracting and exploiting natural resources. Land taken by settlers under these leases was almost invariably inhabited to some extent by Aboriginal tribes. Sometimes this led to the displacement of the tribes concerned and the disintegration of their way of life, other times not. One of the

most important questions faced by the court in *Mabo (No. 2)* was whether these events had had the effect of extinguishing Aboriginal rights.

4.5.3.3. Extinguishment

The court was divided on this issue. They all agreed that those rights that survived annexation continued to be enforceable unless and until extinguished by one of four events.

Express extinguishment

They all agreed that the rights could have been taken away by the state on or just after annexation by the state expressly declaring them to be extinguished, but equally all agreed that this had not happened.

Implied extinguishment by inconsistent grant

They also all (apart from Toohey J) agreed that Aboriginal rights were extinguished by the Crown either granting inconsistent property rights to others, or taking inconsistent property rights for itself. However, while a bare majority took the view that this was a lawful (if not morally justifiable) extinguishment of Aboriginal rights (Brennan J at paragraphs 81–2; Mason CJ and McHugh J agreeing at paragraph 2; and Dawson J, who dissented on the main point but agreed that, if he was wrong and Aboriginal rights had survived annexation, they would have been extinguished by inconsistent grant), the minority disagreed (Deane and Gaudron JJ at paragraphs 23–4, 29–30 and 60). They took the view that, although the government had the *power* to extinguish Aboriginal rights in this way, they did not have the *right* to do so. In other words, Aboriginal rights were effectively extinguished by the government making inconsistent grants, but the government committed a legal wrong in doing so, and consequently any such extinguishments gave rise to a claim in compensation. This consequence flowed from the view taken by these judges that Aboriginal rights are personal rights only and not property rights (this is a point we return to in the next chapter). Toohey J agreed that extinguishment by the government was unlawful unless proper compensation was paid, but also considered that it was ineffective – so that past inconsistent grants made without compensation did not extinguish the rights, and gave rise to an entitlement to compensation in so far as they interfered with the exercise of the rights (Toohey J at paragraphs 121–7 and his conclusion at paragraph 128(3)).

Abandonment

In Brennan J's view, the nature and content of each Aboriginal tribe's rights in the land they used was to be determined 'according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land' (paragraph 83(6)) (we consider further what this might mean in

Chapter 5). It followed from this, in his view, that those rights would be extinguished 'if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan' (paragraph 83(7); and see also paragraph 66). Mason CJ and McHugh J can be taken to agree with this (paragraph 1), but Deane and Gaudron JJ had reservations. While they agreed that the rights would be extinguished if the tribe abandoned its connection with the land, or if the tribe itself or the relevant group became extinct, they did not think the rights would be lost by an abandonment of traditional customs and ways 'at least where the relevant tribe or group continues to occupy or use the land' (paragraph 59).

Surrender but not alienation

However, they did all agree that, while Aboriginal rights could be surrendered back to the government, they could not be alienated to anyone outside the relevant tribe or group who did not treat themselves as bound by the relevant laws and customs, except by an alienation that was authorised by those laws and customs (Brennan J at paragraph 83(8), and see also 65 and 67; and Deane and Gaudron JJ at paragraphs 21 and 59). So, the Aboriginal tribes could not realise the exchange value of their rights, except in what appear to be the rare cases where some form of alienation of land and/or rights in it was traditionally authorised.

The result of all this, as far as the case of *Mabo (No. 2)* itself was concerned, was that the Meriam Indians were held to have still-subsisting rights in the Murray Islands. It was held as a matter of fact that their rights had not been extinguished by any of the methods that the majority considered to be effective. However, as the majority acknowledged, their conclusion that Aboriginal rights had been extinguished by the government granting inconsistent property rights to others or taking inconsistent property rights for itself could make the judgment of only limited help to other Aboriginal groups. Unsurprisingly, therefore, this particular point proved to be the focus of subsequent case law and legislative developments, briefly noted in section 4.5.4 below.

Notes and Questions 4.4

Read *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141 and *Mabo* v. *Queensland (No. 2)* (1992) 175 CLR 1, either in full or as extracted at www.cambridge.org/propertylaw/, and then consider the following:

1 What are the justifications for recognising Australian Aboriginal rights and treating them as fully enforceable property rights within the present Australian property law system? Consider the following possible justifications:

(1) *First occupancy*. The Aboriginals got there first. What difficulties would the Aboriginals face if relying only on first occupation arguments? Consider the following possible objections:
   (a) their resource use could not be said to amount to occupancy (for a convincing response see Toohey J at paragraphs 18 and 117–18);
   (b) resource use such as theirs that does not permit the right holders (or anyone else) to exploit natural resources, or to alienate their rights so that others can do so, is economically inefficient and will inhibit development of the national economy;
   (c) any first occupancy entitlement that they may have acquired has long been extinguished by adverse possession of European settlers (see further Chapter 11 on extinguishing rights by adverse possession); and
   (d) why should an individual alive now be entitled to rights in resources solely because an ancestor of his exercised such rights in the eighteenth century?

(2) *A Lockean labour theory of acquisition of property rights*. Can the Aboriginal resource use described in *Milirrpum* be categorised as mixing labour in any sense that Locke would have accepted?

(3) *Preservation of indigenous cultures*. Such cultures would otherwise be wiped out by the enforced superimposition of the alien culture of more powerful and more numerous colonisers. It is consistent with this rationale for protecting Aboriginal land rights that the rights should be inalienable and should continue only for so long as their traditional way of life continues (see the points made about extinguishment above), but this must necessarily prevent or inhibit Aboriginal communities from adapting their way of life to suit changing conditions and aspirations. How far is this justifiable?

For an analysis of these and other justifications, see Lokan, 'From Recognition to Reconciliation'.

2 The Native Title Act 1993, which gave legislative form to the *Mabo (No. 2)* decision, provides for Aboriginal rights to be extinguished by surrender to the government but not by alienation, confirming the majority view of the position at common law. Surrender can be on any terms (including in exchange for common law rights in any land). The *Independent* reported on 23 October 1998 that an Aboriginal group from the Northern Territory, the Jawoyn, had given up their claim to about 2,500 acres of horticultural land in the Katherine region in exchange for a renal dialysis facility from the Northern Territory Health Services and an alcohol rehabilitation centre to be provided by the Department of Lands. A Jawoyn spokesman explained that they did this when they discovered that there were no government plans to provide a dialysis unit in the region in the next five years. The report continues:

> At present, Aborigines in the Katherine region have to travel more than 100 miles to Darwin for dialysis. Mr Lee [the Jawoyn spokesman] says this is

> taking a high toll on family life and removing people from their traditional lands.
>
> On average, life expectancy for Aborigines is 15–20 years below that of other Australians, with alcohol and drug abuse playing a significant role in poor health. The problem is particularly acute in the Northern Territory where the level of renal disease is 50 times higher than the national average ...
>
> Proving Native Title [under a procedure provided by the Native Titles Act] is an expensive and lengthy process which has angered rural communities, farmers and mineowners who feel their livelihoods are threatened by the claims.
>
> Farmers operating in the Katherine region have already expressed relief that the Jawoyn claim has been settled in exchange for health services. However, Mr Lee says he hopes this agreement will not become a blueprint for further land-rights settlements: 'I think it would be a tragedy if this were repeated. I think it is a moral reminder to the government that they shouldn't be waiting for Aboriginal people to trade their country. They should be providing services as of right for all citizens', he said.

Consider whether arguments that might justify allowing Aboriginal groups to surrender their land rights in such circumstances might also justify allowing them to alienate their rights, for example by sale in the open market.

3 Examine the reasons Dawson J gives in *Mabo (No. 2)* for dissenting from the majority decision that Aboriginal rights were not extinguished by colonisation. Are they convincing?

4 Read the preamble to the Native Title Act 1993, and also sections 3, 10, 11, 223 and 225, either in full or as extracted at www.cambridge.org/propertylaw/. To what extent does it enact the principles established by the High Court of Australia in *Mabo (No. 2)*?

4.5.4. Developments since *Mabo (No. 2)*

The decision in *Mabo (No. 2)* was confirmed and put on a legislative footing by the federal Native Title Act 1993 but this was not the end of the story. The Act expressly stated its objective of providing for the recognition and preservation of native title (adopting what it referred to as 'the common law definition of native title' and defining it in the words used by Brennan J in *Mabo (No. 2)*), and it set up machinery for settling native title claims. This machinery proved to be slow and cumbersome. There were problems settling appropriate and workable rules of evidence to ensure that Aboriginal groups with oral rather than written traditions were not disadvantaged. Evidence to establish criteria set out in *Mabo (No. 2)* and enacted in the 1993 Act proved difficult and costly to provide. For example, immense research, time and financial resources were needed to establish whether a particular group had, and had maintained, a continuing connection with the

land in question in accordance with its law and custom, as was required in order to establish that a group had originally had native title and that it had not subsequently been extinguished. There were provisions for mediation, which again proved difficult to operate for a variety of reasons, including the number of different interested parties involved. The history of the Yorta Yorta claim illustrates the difficulties. There were reported to be 470 parties involved at the mediation stage. The claim was the first to reach trial stage (in 1996) after the 1993 Act came into force, and it was finally disposed of in the High Court of Australia in December 2002. The trial at first instance involved oral evidence from 201 witnesses plus 48 written witness statements, the hearing took 114 days and the transcript of the proceedings ran to 11,600 pages. The claimants lost. By a majority of five to two, the court upheld the trial judge's decision that the Yorta Yorta Aboriginal community had failed to establish the necessary continuing connection in accordance with its law and custom (*Yorta Yorta Aboriginal Community* v. *Victoria* [2002] HCA 58).

The first post-*Mabo (No. 2)* decisions of the High Court of Australia took an expansive view of the scope of native title. In particular, in *Wik Peoples* v. *Queensland* (1996) 187 CLR 1, it was held by a bare majority that the grant by the Crown of pastoral leases in Queensland in the decades leading up to *Mabo (No. 2)* had *not* wholly extinguished native title rights and interests in the areas of land they covered, and that, to the extent that the specific rights of the lessees and the native title holders did not conflict, they co-existed. This decision was highly controversial, its critics claiming that it put in doubt the extent and legitimacy of the land rights of farmers across the whole of Australia. It proved to be the high point for native title. The Native Title Amendment Act was passed in 1998 restricting the effect of *Wik* and making significant changes to the procedures for settling claims, and also cutting back the right to be consulted on future developments which had been given to Aboriginal groups by the 1993 Act. Subsequent High Court of Australia decisions (in particular, *Western Australia* v. *Ward* [2002] HCA 28, *Wilson* v. *Anderson* [2002] HCA and *Yorta Yorta Aboriginal Community* v. *Victoria* [2002] HCA 58) also revealed a more restrictive approach, interpreting the statutory provisions strictly and so as to require detailed proof of the precise traditions and customs of the group claiming title and the way in which they were connected with the land claimed, and putting the burden of proof of continuing connection on the claimants. Commentators have criticised this approach as inconsistent with the broad approach that the majority in *Mabo (No. 2)* appeared to envisage. Toohey J, for example, at paragraph 187 of his judgment in *Mabo (No. 2)*, had said that '[I]t is inconceivable that indigenous inhabitants in occupation of land did not have a system by which land was utilised in a way determined by that society'; and similar views are expressed or implicit in the other majority judgments. The present position, however, is that claimants are required to prove what Toohey J thought could be assumed. In the words of one commentator, this 'renders proof of native title inappropriately difficult' (Bartlett,

'Humpies Not Houses', comparing developments in Australia with those in the United States and Canada).

For fuller details, see also Sackville, 'The Emerging Australian Law of Native Title'; Brennan, *The Wik Debate* (Brennan was one of the judges in the majority in *Mabo (No. 2)* and in the minority in *Wik*); and Tehan, 'A Hope Disillusioned'.

Part 2

The nature of proprietary interests