

THE CONCEPT OF POSSESSION

INTRODUCTIONS

As with most words in the English language, the word 'possession' has a variety of uses and a variety of meanings. Reference to any reasonably comprehensive English dictionary provides sufficient illustration. As a noun from the transitive verb to possess.' Possession' is given as: the action or fact of possessing something or of being possessed. Depending on the context, the lexicographer may be found to give meanings such as the following: the holding of something as one's own: actual occupancy as distinguished from ownership; a territory subject to a sovereign ruler or state; the fact of being possessed by a demon; the action of an idea or feeling possessing a person; the action of keeping oneself under control- as in self-possession¹. The lexicographer, in attempting to assign the meaning of the word as used in English law, may well find himself saying something like the following: 'The visible possibility of exercising over a thing such control as attaches to lawful ownership: the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing permits, to the exclusion of other persons².....

It should be clear at the outset, then, that different meanings may be ascribed to the word 'possession', depending upon context and use, and that the search for one 'proper' meaning for the word is likely to be a fruitless one. It may be objected, however, that it is the concept of possession in the law that is of interest here, and not the varied uses to which the word 'possession' may be put in the English language. It may be, and has been, urged that there is a unitary concept of possession so far as the law is concerned, and that the analysis and explanation of that concept is the proper function of jurisprudence. It is not difficult to demonstrate, however, that the search for a unitary concept of possession in the law is one doomed

To frustration, if it is assumed that every time the word 'possession' is used in legal reasoning it refers to or names that unitary concept. Further it is not difficult to demonstrate that the example of the lexicographer's delineation of possession in the law given above is inadequate, misleading, and that it produces confusion in legal reasoning. Before examining the use of the word or of the concept or concepts of possession in the law, it is proper to demonstrate that the word and concept are important in many aspects of the law as described or discovered in textbooks, statutes, or judicial pronouncements.

Possession, even without ownership, may have the utmost practical importance. Possession may create ownership, either by *occupatio* (the taking control of a *res nulli-is*) or by the expiration of a period of acquisitive prescription. Moreover, possession is *prima facie* evidence of ownership, and he who would disturb a possessor must show either title or a better possessory right. A chimney sweep who finds a ring may not be the owner of the ring, but his

¹ The Shorter Oxford English Dictionary (3rd ed.) vol. II, 1550.

² The Shorter Oxford English Dictionary. Loc. cit.

possessory right allows him to recover to the value of the stone set in the ring from a jeweler who refuses to return it after it is handed to him for examination¹. In technical language, the *ius terill* cannot be pleaded against a possessor. If Jones possesses a car and I, having no title, take it from him, it is no defence for me to prove that Jones is not the true owner. He may be a thief, but whatever the power of the owner to recover the car; Jones's possessory right is superior to mine.

In Roman law one who brought an action for *furtum* had to show that his interest had been honestly secured² but in English law there is no theoretical reason why a thief should not sue a second thief who takes from him the *res* in question, for even a wrongful possession is good against all but the true owner or one claiming through him or one claiming a prior possessory right. Some systems carry their theories so far that in a possessory action title is irrelevant. Thus, if I, as a dispossessed owner, retake a chattel, the previous possessor may recover it from me by a possessory action- my only remedy is a real action based on my title. But here the law must effect a delicate compromise, which rather confuses the theory of possession. It would be thought absurd in the English world if an owner had no

Right to retake the purse seized from him or to eject a trespasser who entered his house during his absence. Sometimes the solution is sought in the doctrine that possession seized by violence is not true possession, but this produces internal conflict with what is usually taken to be the central notion of possession, however convenient the result may be in allowing the owner to act effectively. The problem when self-help should be allowable is always a difficult one. English law allows title to chattels to be set up as a defence in a possessory action, if I retake my own chattel, I can defeat the previous holder's action of trespass by proof of my title.

In the light of such difficulties the question 'Why should the law protect possession as such, even though it may have been seized unlawfully?' became a favourite one

¹ *Armory v. Delamirle* (1721).

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Leased with the house is converted, the landlord cannot bring trover, for he has not a right to immediate possession; if they are stolen, he cannot describe the goods as his in an indictment for larceny.¹

Confusion of terminology may lead to genuine misunderstanding. Plaintiff agreed to sell the defendant an orchard, described as being in occupation of A, and promised that the purchaser should have 'possession' on the day appointed for completion. The defendant refused to complete unless the tenant was ejected, but the court found against him on the ground that there was a broad distinction between possession and occupation.²

Difficulties have already been noted, however, in the adoption of a theory the common law always regards possession as exclusive. The law sometimes allows possessory remedies to those admittedly not in possession.³ Thus where there is a simple bailment determinable at will, either the bailor or the bailee may maintain trespass against a stranger. The theory that the bailee does not help

² Dig, 47.2.12.1

¹ R.v.Belstead (1820), R.& R .411 ; R.v. Brunswick (1824), 1 Mood , 26.

² Lake v. Dean (1860), 28 Beav. 607. And see the awkward case of Fairweather v. St. Mary lebone Property Co. Ltd., (1962) 2 All E.R. 288.(H.L.)

³ We can hardly say that anyone with a right to immediate possession can bring trespass, for that conflicts with too many established rules. 'It is difficult to see how there can be a forcible and immediate injury vi et armis to a mere legal right ': Pollock and Wright, Possession , 145. If in general, a wrong to a mere right of possession were sufficient for trespass and theft, why is conversion by a bailee not trespass and theft ? (op.cit. 146).

by stating in one series of rules the facts that 'create possession' and in another series the legal consequences that 'possession' entails.¹

Some jurists, frustrated in the search for a conceptualized² group of facts which would take account of $F_1 \dots F_\infty$, which Holmes had assumed to exist, turned to look for some unifying similarity in the legal consequences to be discovered in $C \dots C_\infty$. If it were possible to generalize the totality of legal consequences and find perhaps the 'essence' of the notion of possession in that generalization, then such a search might succeed in satisfying the ordering mind of the jurist. But even this is not possible, for the systematic connection between $F_1 \dots F_\infty$, is not with the totality of $C \dots C_\infty$ but with some number C 's less than totality. That is, there is not merely a diversity of F 's defying the search for an essence, there is a diversity of C 's also and the question is open at both ends. Thus the remedies that are said to be open to possessors are sometimes open to persons who are not in mere custody of her master's mackintosh.

Further the systematic connection is circular in nature, because although the legal consequences are said to flow from the establishment of the conditioning facts, the characterization of the conditioning facts as constituting possession or not well vary with the legal consequences. That is sufficiently established by comparing the trends of the larceny cases summarized above, the finding cases, the cases which go to the establishment of title, and the landlord and tenant cases, one with another. Again a man may be held to be in possession for one purpose where, for another, he would not be held to be in possession although the facts proved were unchanged. Consider, for example, the situation of the defendant in *Moors v. Burke (supra)* if he had been, on the facts shown, suing, for trespass to chattels, someone who had damaged the goods in his locker, or the position of the defendant in *Wrightson v. McArthur & Hutchisons (supra)* had company had been proceeding against a person for trespass to the goods which had been contained in the locked room.

Some insight is gained by such a presentation as Roos outlines, but it does not go far enough. As Kocourek³ demonstrated, the F 's are conceptual in nature, and, lying behind them again, are extralegal facts- the facts seen from outside the legal system as it were. Which give rise to relations, which must be regulated by the legal system.

It is often said that: 'possession is a fact to which the law attaches certain consequences'.⁴ In the light of the preceding discussion it can be seen that such an assertion presented in the form of definition leads to confusion, for it invites definition of an Aristotelian kind by identifying the 'fact' by reference to essence and differentia, and the search for those is a fruitless one. At the same time, in priority of history and of logic, the fact comes before the law. A typical set of fact, which called for rules of law to regulate relations arising out of those facts, provided the core notion around which the various uses of the word 'possession' in rules of law tend to group themselves. Thus, when a res which has never been in the physical control of any person is first 'taken' into physical control by some person for himself⁵ in circumstances where resistance can be expected if others attempt to interfere with that physical control, we see something which in the ordinary use of English would be called 'possession' of the thing- and possession has been created. When, however, in a legal system rules are provided to protect such a possessor in his possession, very quickly something more is added than the mere attachment of legal consequences

¹ To adapt Ross's statement from ownership to possession.

² To use Ross's word.

³ Jural Relations

⁴ As in the second edition of this work at 453.

⁵ As with the wolves and the mutton mentioned at p. 504(supra).

to the 'fact' of possession. Legal relations, rights, duties, powers, immunities, & c, are established between the possessor and all other persons.

When legal relations are established, in general they continue are supported by the system, which established them unless and until some change occurs in the facts of the law, which is thought sufficient to disturb them .It is not surprising, therefore, to find that the facts which will be held to create possession for the first time¹ need not be shown to continue for possession to be shown to continue for possession to be held to continue- for once established it is the *right to possession* which becomes important so far as legal relations are concerned. If I leave my car unlocked outside my host's house while I dine.

THE STRUGGLE OF CONVENIENCE AND THEORY

Why should such a notion as possession be surrounded with complexity? One reason is that there is an inevitable and continuing conflict between the logic of the law and the demands of convenience in particular cases. Law in its early stages is fluid, and later a theory is invented as means of rationalizing decisions that have already been reached. Many of the fundamental problems of the law of possession are not clearly examined until the 'classical period' in a nation's legal history, when analytical genius, discontented with the law as a collection of rules, attempts to discover a logical structure around which the rules may be grouped. If such a theory is discovered in the law of possession and wins acceptance, then rules that cannot be reconciled with it are dubbed 'logical anomalies' or 'historical exceptions.' The law is not static, however, and the pressures of practice tend to create further exceptions, which sometimes eat away the theory itself. There may even be two or more theories of the law, each battling for supremacy.

In one sense possession began as a fact- the fact of physical control. Before there was law there was possession. That fact could produce consequences. Felix Cohen asked the question, to a student posing as a reasonable wolf in a society consisting of wolves and sheep,' Now, suppose you had to

¹ Sec, e.g. *Littledale v. Scaith*(1788), 1 Taunt, 243 n. 127 E.R. 826; *Hogarth v. Jackson*(1827), M. & m. 58, 173 E.R. 1080; *Ouersib v. Post*(1805), 3 Caines 175.

decide whether to kill a sheep yourself or to take mutton out of the jaws of other wolves are not concerned about law or ethics. What considerations might lead you to respect the first occupancy of your fellow wolves and to go out after your own mutton?'¹

Whatever it may be possible to say of the pre-law situation,² it is clear that, once law arises to protect possession by rules, then its primary concern is with the relations between persons (legal units³) in the legal system with respect to things; and not primarily with the relations between persons and things. If this is so then not merely the nature of the thing concerned, and what is done or may be done to it, are important, but also the nature of the person or persons concerned, their relationships *inter se*, and the consequences of the rules provided or of the remedies for their breach. This will be illustrated more fully in a later section.

Without doubt most legal systems have built upon the notion of physical control in developing rules which have the term 'possession' as a necessary part of their expression. The concentration upon the notion of physical control attracted special attention to the relations of persons to things. In the refinement of rules in the development of English law a number of terms came to be accepted, and some clarification of those terms is desirable.

Thus it is said we may have the following relations of a person to a thing:⁴

(a) Custody- Where the holder either lacks full control or else has no animus to exclude others, for example, a customer examining a ring in the presence of the jeweller.

(b) de

(b) Detention- full physical control in fact which for some reason is not regarded as possession in law.

(c) Possession- legal possession. In most cases the legal notion of possession is built on the popular notion of physical control, but each legal system 'anomalous' cases either where a person in full physical control in fact is denied possession in law, or where one who does not have physical control in fact at all is accorded the rights of possession.

(d) Ownership.¹

The table gives a more definite meaning to the terms 'custody' and 'detention' than is usual. Sometimes the two terms are used as synonyms. *Constructive possession* is a phrase that is often used in the

books, but there are so many different approaches that the term is best left unused²

At the praetor at Rome began to protect possession, it became necessary to refine the notion. Buckland thinks that in the classical or a possession was regarded primarily as matter of fact, however hard it might be to reconcile this with the artificial notions already springing up. As Paul said: 'The same possession cannot be in two persons any more than you can be considered to stand in the place in which I am standing, or to sit in the place in which I am sitting.'³ A *captivus* on his return to Roman soil automatically re-acquired the rights which he had lost by being taken prisoner, but, since possession was regarded as a matter of fact, it vested in him only when actual control was obtained.⁴

The theory of the nineteenth-century Romanists was mainly concerned with attempt to discover a logical method of distinguishing between detention and possession. At Rome the possessor had two practical advantages- he had a right to the protection of the praetor's interdict, and, if he could show good faith and *iusta causa* he could acquire ownership on the expiration of the necessary period of time.⁵

THE CONCEPT OF POSSESSION

Savigny maintained that distinction between detention and possession follows from a proper analysis of the latter concept and built his doctrine on Paul's text, '*apiscimur possessionem corpore et animo, neque per se animo but per se corpore*'.¹ The classical theory, therefore, is that possession is made up of two elements: firstly the *corpus* or element of physical control: secondly the *animus* or intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical relation to the *res*, the differences between them must be found in the mental element. The intent, which distinguishes a possessor, is the *animus domini*-the desire to hold for oneself and not on behalf of another. This theory explains why the tenant, the borrower, and the agent did not have possession in Roman law, for they did not intend to hold in

their own right. The compilers of the *Digest* seem to have emphasized the importance of the element of *animus*—indeed some of the text seems to go to extraordinary lengths.² On the other hand, Savigny's theory was faced with the difficulty that in certain cases Roman law gave a non-owner possessory rights;³ these examples Savigny explained away as anomalies which he termed instances of derivative possession.

Ihering adopts a more objective theory. 'A man possesses who is, in relation to the thing, in the position in which an owner of such things ordinarily is, *animus* being merely an intelligent consciousness of the fact.'⁴ Ihering's theory can explain exactly those cases which Savigny found difficult, but, on the other hand, it cannot account for those cases where the law refuses possessory rights to those who are in effective physical control. The anomaly on his view is that not every detentor is a possessor and he seeks to explain these 'exceptions'.⁵

Does Paul's analysis of *animus* and *corpus* satisfactorily explain the law? Holdsworth thought that, in addition, Roman law required

a cause or special reason why possession should be protected; the exact limits of possession varying with the needs of the moment;' but unfortunately for the interpretation of (Roman) texts, they have fallen into the hands of German legal philosophers, who have constructed from them logical theories which never wholly fit the actual rules, because those rules were, like the rules of English law, made to fit the illogical fact of life.¹ Some of these complicating factors are now discussed.

(a) First, in Roman law the notion that proprietary capacity was essential to possession became firmly established and this cut across the notion of possession as mere physical control. The rule that

those in the *potestas* of another could not possess led to a certain divorce between actual control and legal possession, this creating confusion in the texts.² A master possessed what was held by his slave, the theoretical solution being that the master had the *animus* and the slave provided the *corpus*. Since the slave was himself possessed by the master, it was not a very violent extension to say that the master possessed a *res* in the hands of a slave who was himself possessed.³ But as acquisition through a slave became more and more common, it was not a very inconvenient to require the master to have a specific *animus* directed to every *res*,⁴ and it was laid down that the master possessed whatever was acquired by the slave in connexion with the *peculium*. As acquisition through those not within the bonds of the family was gradually allowed, convenience dictated an even broader rule and so some texts boldly state that the agent provided both *animus* and *corpus*.⁵ This was a case where the classical rule was almost eaten away by exceptions.

(b) Secondly, we note the influence of the mode of acquisition of possession on the concept of possession itself. If it is assumed that the essence of possession is control, the question whether possession has been lawfully acquired or not may be relevant when the law considers whether it should protect that control, but, if we are determining whether the taker has in reality acquired possession, the lawfulness of its inception should be irrelevant. The thief acquires possession, although his taking is a crime. In practice, however, there is an

Inevitable tendency for 'the right to possession to acquire importance at the expense of possession itself'-----'possession borrows a great deal from right.... Possession is not merely a matter of physical fact but also of right'.² At Rome one of the most important practical results of

¹ Pollock and Wright, possession, 83

² Papinian, Dig 41,2,49, Pr, and 1.

possession was the protection afforded by the interdict of the praetor. The praetor laid down that he would not protect the possession of one who had acquired it *vi, clam out precario*. According to logical analysis one who takes by force or steals secretly acquires possession: but since the praetor would not protect such a holding, there was a tendency, instead of saying that the praetor would protect only certain forms of possession, to limit the definition of possession itself to control which had not commenced in certain unlawful ways. This was an illogical, though convenient, policy. Ulpian considered that one who has lost possession by violence should be considered as still in possession,¹ If my house is seized in my absence, I retain it until I know of the intrusion and have had a reasonable time in which to eject the trespasser². **Clearly** this doctrine cannot be carried too far or possession would mean only control that has been lawfully acquired. The strict doctrine is that of Gaius that any loss of corpus involved loss of possession. To reconcile the texts, we can only suppose that Gaius' doctrine was applied to movable and that, where immovables were concerned, the rules were broadly interpreted for the benefit of the owner. In the post-classical era, if a third party seized land held by a tenant the owner did not lose possession until he was aware of the intrusion and had failed within a reasonable time to assert his rights³. Just as the law weighs the dice against one who has seized secretly or by force, so it favours one who takes lawfully; even if we regard control as a pure matter of fact, one whose holding is lawful is less likely to be disturbed than one who has no title. Where one has a right to enter, entry into any part of the house gives possession of the whole, whereas the possession of a trespasser extends no further than it does in fact⁴. 'De facto as well as de iure there is much to be precluded by title, nothing for him who comes by wrong⁵.

(c) Thirdly, what may be called the legal concept of inertia plays its part. If possession is once proved to exist, it is assumed to continue until it is ended either by abandonment on the part of the owner, or by seizure by another. Saving considered that possession continued only so long as

¹ H.t. 17 pr.

² Ulpian, h.t. 6. Cf. *Browne v. Dawson* (1840), 12 A. & E. 624, where a school master after dismissal broke into, and held control of, his old rooms for eleven days, but it was held that nevertheless he had not acquired possession. Cf. Maitland, *Collected papers*, 1.456: 'practically for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in which

³ the classical view was that the owner supplied the animus and the tenant the corpus and therefore that loss of corpus entailed loss of possession: Africanus, Dig. 41. 2. 40. 1; Paul, h.t. 3.8; Pomponius, h.t. 25.1; Buckland, *Main Institutions of Roman Law*, 111.

⁴ Pollock and Wright, *possession*, 79. Cf. Paul, h.t. 3.1 and Celsus, h.t. 18.4.

⁵ Pollock and Wright, *op. cit.*, 62.

physical power to deal with the res could be reproduced at any moment. If all power to enjoy, now or in the future, is lost, possession ceases – e.g. if a ring is dropped into the sea. But a London citizen retains possession of his house even while he is absent in Paris, for he may return at will. Holmes suggest, however, that Savigny's statement is rather too absolutely phrased and gives the following example. The finder of a purse leaves it at his country house, while he languishes behind the bars of a prison. English law at least would treat him as in possession, even though he could not reproduce his physical power of enjoyment at the moment. If a burglar began to break in, the finder would be in possession until the thief had actually seized the purse.⁴

Roman law sometimes referred to these cases as being possession held *animo solo* during the winter, and the jurists went even further than Holmes in the example just cited, for they considered that seizure by a stranger did not end the possession of the previous holder until he was excluded on his return or acquiesced in the trespass⁵. Paul in one text writes that, since both *animus* and *corpus* are necessary for possession, both must disappear before possession is lost⁶. This, however, cannot be accepted as a general rule. If possession is lost merely by consent of the holder, then the notion of possession would not be that which we understand it to be. Apart from the exceptions introduced for convenience, the true rule is that loss of *corpus* involves loss of possession whether the owner is aware of it or not. But is mere change of animus enough? Do I cease to possess the forged banknote in my pocket, merely because I think

⁴ The Common law, 237-8

⁵ Pomponius, h.t. 25.2.

⁶ h.t. 8.

that I have thrown it away, when in reality I have thrown away a true note? Where the physical control is reduced to vanishing point, or exists only by a fiction of the law, a mere change of *animus* may be sufficient (e.g. a determination not to return to the summer pastures). But where there is real physical control, English law would normally require loss of that control before possession was regarded as ending¹.

The law is seeking a convenient solution of practical problems and does not make too sharp a separation of *corpus* and *animus*.

Just as the notion of *corpus* is modified for convenience, so is that of *animus*. The classical analysis would require a specific *animus* directed to the *res* in question and some Roman texts approve this doctrine—the possession of land does not possess the treasure buried in the land, unless he is aware of its existence².

124. ILLUSTRATIVE CASES AND RULES

To see how the common law stands, in the light of the theories influenced by the Roman law, it is necessary to review briefly some illustrative cases. These fall conveniently into separate groups.

Larceny Cases

Larceny, of course, requires—(a) a taking—‘without a claim of right made in good faith’, (b) and the carrying away of something capable of being stolen, (c) without the consent of the owner, (d) and with the intent, at the time of such taking, permanently to deprive the owner thereof (the owner here includes any ‘part-owner, or person having possession or control of, or a special property in, anything capable of being stolen’).³ The legislative form provided by the Larceny Act 1916 was not intended to change the common law of larceny, but merely to consolidate it. Traditionally larceny had turned upon a notion of taking possession unlawfully and at the time of such taking to intend permanently to deprive the person entitled to possession of the thing concerned.⁴

¹ There is some authority for the view that possession cannot be lost even by wilful abandonment. See Pollock and Wright, *Possession*, 124, and see *Johnstone & Wilmot Pty. Ltd. v. Kaine* (1928), *Tas. L.R.* 43.

² *Paul*, h.t. 3.3.

³ The Larceny Act 1916, 1; 6 & 7 *Geo. V*, c. 50.

⁴ A. Kocourek, *Jural Relations* (2nd ed.) at p. 374, states that view in the traditionally neat way as (1) trespass, (2) asportation and (3) *animus furandi*.

Reg. v. Riley¹

In this well-known case the accused drove off amongst his own lambs, but without knowing it, and then returned to the prosecutor. After he had discovered the error he sold the lamb with his own. He was convicted of larceny. The court rationalized the decision by on a notion of 'continuing trespass' based on the ground that the accused had undoubtedly made himself liable in trespass when he first drove off the lamb even though he did not know that he had the lamb at the time.

R. v. Ashwell²

In this case the accused had asked the prosecutor to lend him a shilling. In a poor light, the prosecutor

Pulled from his pocket what he thought was a shilling and handed it to the accused. Later the accused discovered that he had been given a sovereign by mistake, but he none the less spent the sovereign and thereby converted it. He was convicted of larceny of the sovereign. In the last resort the conviction was affirmed by an equally divided Court for Crown Cases Reserved consisting of fourteen judges. The conviction involved a decision that the accused did not take possession of the sovereign until he knew it was a sovereign, although the judges who so held gave different reasons for saying that he had not taken possession until that time-at which time he took it *animo furandi*.

R. v. Moore³

The prisoner had picked up and converted to his own use a bank note which had been dropped on the floor of his shop. He converted the bank note in spite of the fact that he knew the owner of it could be found. It was held that he was rightly convicted of larceny- that is, that he had not obtained possession of the note while it was lying on the floor of his shop before he had discovered it, and further that the owner's possession was in some way extended, at least fictionally, after he had lost the note in the accused's shop.

Merry v. Green⁴

An action for assault and false imprisonment- the defence was that the assault and imprisonment were justified because the plaintiff had committed larceny. The relevant facts were that the plaintiff had purchased a bureau at an auction and subsequently discovered a purse in a secret drawer. The purse contained money and other valuables. The plaintiff appropriated that property to his own use. At first instance the plaintiff obtained judgement in his favour. On appeal the matter was sent back for new trial because it was not clear from the evidence just what the terms

¹ (1853) Dears. 149.

² (1885) 16 Q.B.D. 190

³ (1861) Le. And Ca. 1.

⁴ (1841) 7 M. and W. 623.

Of sale of the bureau had been. In his judgement Baron Parke laid it down that if the auctioneer had sold the bureau with express notice that the purchaser was not gaining title to the contents of it, if there happened to be any, then the plaintiff's appropriation of the purse and other valuables could constitute larceny – that is to say that the mere delivery of the bureau did not necessarily carry with it delivery of possession of its contents, at least if it was made clear that the contents were not being sold with the bureau.

Cartwright v. Green¹

A bureau was delivered to a carpenter for repairs. The carpenter discovered money in a secret drawer which he appropriated to his own use. It was held that he committed larceny by feloniously taking the money into his possession. In this case of course the carpenter was merely a bailee of the bureau but none the less by the ordinary rules would be held to have possession of it. It follows from the decision that he did not obtain possession of it. It follows from the decision that he did not obtain possession of the money when he obtained possession of the bureau, but only at the time he discovered it and wrongfully formed the intention to convert it to his own use.

R. v. Rowe²

The accused had taken pieces of iron which he found on the bed of a canal when the canal was drained of water. The iron had fallen overboard from barges. The accused was convicted of larceny of the iron from the company which owned the canal - that is to say that the company had had possession of the iron merely because it was resting upon the company's land.

R. v. Hudson³

By mistake a department of the government posted the accused a letter in which was a cheque intended for someone else. The accused appropriated the cheque to his own use and it was held that he was guilty of larceny. Although the accused had received possession of the letter innocently, the view taken was that he could not have been said to have acquired possession of the cheque until he was aware of its existence and at the time he became aware of its existence he took it *animus furandi*.

Hibbert v. Mc Kiernan⁴

The appellant had been convicted for the larceny of golf balls, the property of the secretary and members of a golf club. He had taken the golf balls, which had been abandoned by their original owners, while he

¹ (1802), 8 Ves. 405.

² (1859), 1 Bell. 93.

³ (1943) K.B. 458.

⁴ (1948) 2 K.B. 142

Was trespassing on the golf links owned by the member of the golf club. It was held that the appellant had been rightly convicted – that is to say that the golf balls he had taken had been, at the time of his taking, in the possession of the secretary and members of the club although no one knew where they were or how many balls might be at any time lying abandoned on the various parts of the links.

Ruse v. Read¹

The respondent had been acquitted of larceny in the following circumstances. He had, while drunk, taken a bicycle from a public place, and it was accepted at first instance that at the time of taking he had no larcenous intent. When sober he found he had the bicycle and panicked. He consigned it by rail to a non-existent person at a railway station some distance away. The magistrates had held that he had no intention of permanently depriving the owner of his property and was incapable of forming such an intention at the time of taking the bicycle had been a trespass and, although not then felonious, the subsequent misappropriation of the machine on the following day amounted to larceny and the respondent should have been convicted, R.v. Riley (supra) was followed.

R, v, Harding²

The Court of Criminal Appeal upheld a conviction for larceny of a mackintosh from the servant of the person who would, for other purposes, have certainly been held to be not only the servant but also had a 'special property' in the mackintosh so that she could properly be named as the prosecutor in a case of larceny.

Rose v. Matt³

The respondent, when purchasing some goods, deposited a clock which he owned, with the vendor, as security for the price of the goods he was purchasing. It was agreed between them that the vendor would be entitled to sell the clock if the respondent did not pay for the goods within one month. The respondent later returned to the vendor's shop and took the clock without paying the price of the goods. On appeal it was held that the respondent should have been convicted of larceny.

The Finding Cases

In all these cases the issues are civil and not criminal ones, and are between two or more persons claiming to be entitled to the benefits of possessory enjoyment of a chattel—the assumption being that, if there is a true owner, he cannot be found.

¹ (1949) 1 K.B. 377.

² (1929), 21 Cr.App. R.166.

³ (1951) 1 K.B. 810.

*Bridges v. Hawkesworth*¹

The plaintiff, found a parcel of notes on the floor of the defendant's shop. It was held that the plaintiff had acquired a good title to them, as against the defendant, as he was the first to acquire possession of the notes. The defendant had not previously acquired possession because he had not known of the notes' existence until after they were found by the plaintiff.

*Elwes v. Brigg Gas Co.*²

The plaintiff, a tenant for life in possession, had leased an area of land to the defendant company for the purpose of erecting gas works. In the lease all mines and minerals were reserved to the lessor. The lessor retained certain supervisory rights over the gas holders and other structures to be built by the defendant company. In the course of the defendant company's excavation of the land a pre-historic boat was found some six feet below the surface. It was held that the plaintiff was entitled to the boat as against the tenant company. The judgment is an unsatisfactory one in that it does not make clear which of several possible grounds for the decision is the one to be relied on. It does, however, assert clearly enough that the plaintiff was in possession of the boat for one reason or another before it was found by the defendant company and that it made 'no difference' in these circumstances, that the plaintiff was not aware of the plaintiff was not aware of the existence of the boat.³

*South Staffordshire Water Company V. Sharman*⁴

Sharman was employed by the plaintiffs to clean out a pool on land owned and occupied by the plaintiffs. He found certain gold rings in the mud at the bottom of the pool. It was held that the plaintiff company was in first possession of the rings, and that Sharman therefore had acquired no possessory title to them as against the plaintiff.

*Willey v. Synan*⁵

The boatswain of a ship found some coins on board during the voyage. When the ship arrived at port the coins were delivered to the collector of customs. In an action against the collector by the boatswain who found the coins, it was held that the boatswain had not made out his claim. On appeal two members of the court were prepared to hold⁶ that the boatswain had never had possession of the coins because he had found them in

¹ (1851), 21 L.J. Q.B. 75

² (1886), 33 Ch. D. 562.

³ At pp. 568-9.

⁴ (1896), 2 Q. B. 44.

⁵ (1936), 57 C.L.R. 200.

⁶ Rich and Dixon JJ.

the course of his employment and his finding of them put them in the possession of his employers.¹

*Hannah v. Peel*²

The plaintiff, a soldier, found a brooch in house where he was billeted. The house had been requisitioned at the beginning of the 1939-45 War and, it may be supposed, both at the time of and for some time before the finding of the brooch the house was in the possession of the Crown. The Crown made no claim to the brooch. The defendant was the owner of the house but he had never gone into physical occupation of it before it was requisitioned for the army. It was held that the plaintiff was entitled to the brooch as against the defendant, the owner of the house – that is, the owner of the house had never been in possession of the brooch before it was found. In the course of the judgment stress was laid on the two points:

- (a) that the brooch was on the surface and was not embedded in the land, and
- (b) that the owner of the house had never at any stage gone into physical occupation of it before the brooch was found.

*Grafstein v. Holme & Freeman*³

An employee of a store-keeper found a locked box in the basement rubbish of the store premise. He brought the box to his employer who told him to put it aside on a shelf. Some two years later the employee opened the box and found that it contained some \$38,000 in bank notes. It was held that the employer was entitled to the money, as against the employee who had found it, on the basis that the employer had, when the finding of the box had been communicated to him, taken lawful possession not only of the box but also of its contents. His possession of the money therefore was prior to any claim to possession that the finder may have made arising out of his discovery of the contents after opening the box. It is significant that the court came to this conclusion expressly without relying on any arguments which turned upon the master-and-servant relationship involved.

*Armory v. Delamirie*⁴

The plaintiff, a chimney-sweep's boy, found a jewel and took it to a goldsmith to find out what it was. The goldsmith refused to return it to him. It was held that as against the goldsmith the plaintiff was entitled to the jewel and he could maintain an action trover against the defendant goldsmith.

¹ And see: *McDowell v. Ulster Bank* (1989), 33 Ir. L.T. 225

² [1945] 1 K.B. 509.

³ (1958), 12 D.L.R. (2nd) 727

⁴ (1722), 1 Strange 505.

It has already been noted that a person in possession is deemed to be the owner of the thing possessed save as against a person who can show a better title or who claims under a better title. Cases like *R.V.Rowe*, *Hibbert v. Mckierman*, *Ewes v. Brigg Gas Co.*, and *South Staffordshire Water Co. v. Sharman*,¹ show that a person may be held to be in possession of a chattel merely because it is on land owned and occupied (possessed) by him.² It is clear of course that those cases rest upon a presumption, for it is obvious that mere ownership and occupancy or possession of land does not necessarily carry with it the possession of chattels upon that land. If I drive my motorcar upon the land. All those cases attribute possession to the owner of the land merely on the presumed non-existence of anyone with a better claim who, depending upon the circumstances, may have had and retained possession of it. Just as title may be attributed on the basis of possession, so may possession be attributed on the basis of title, and the following cases illustrate the kinds of relationships which may be involved.

*In re Cohen*³

Cohen and his wife had lived in a flat which was owned by the wife. After they both had died, a large sum of money was discovered hidden in various parts of the flat. There was no evidence as to the origin of the money, or as to when, or by whom, or for what purpose the money had been secreted. It was held that the lawful possession of the premises on which it was found, and that as between the estate of the husband and the estate of the wife it must be treated, therefore, as having been the property not of the husband but of the wife.

*Ramsay v. Margrett*⁴

In this case a wife agreed to buy from her husband some furniture and other chattels which were in the house occupied by both of them. She paid the purchase price agreed upon and her husband signed a receipt acknowledging the sale. The chattels concerned were not in any way moved from the positions in the house which they had previously occupied. In an action between the wife and an execution creditor of her husband's it was held that the wife had possession of the goods (at least so far as the Bills of Sale Act 1878 was concerned), that the situation of the goods was consistent with their being in the possession of either the husband or the wife and the law attributed possession to the wife who had legal title to them.

¹ (All noted supra).

² Cf. *Hannah v. Peel* (supra)

³ [1953] Ch. 88.

⁴ [1884] 2.Q.B. 18.

*French v. Gething*¹

Furniture was given, by deed, by a husband to his wife, but remained in the matrimonial home undisturbed. A third person recovered judgment against the husband and seized the furniture on a writ of execution against the husband alone. Under the Bills of Sale Act 1878 a deed of gift, if the husband remained in possession of the furniture, was nothing more than an unregistered bill of sale and hence invalid. If the goods, on the other hand, were in possession of the wife then the judgment creditor would not be able to attach them. It was held that as the wife was the legal owner of the furniture, in the circumstances, she was the possessor of it also.

Landlord and Tenant

It is trite law that it is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises concerned.² A tenancy relationship between landlord and tenant may be brought to an end in a number of ways other than by the mere expiration of the term. If the tenant surrenders possession to the landlord and that surrender is accepted, then the tenancy is at an end.³ It should be noted it is not merely the right to possession but the delivery of possession itself that is comprehended by the rule and that only if the surrender of possession is accepted by the landlord does it work a surrender of the lease itself.⁴ The tests of just what would be held to constitute an actual change of possession from tenant to landlord were the subject of litigation on a number of occasions and, *inter alia*, it was held that if the tenant returns the keys of the intention of accepting and taking possession, then possession was effectively transferred.⁵ But it was held that the landlord's consent to the delivery of the keys was essential to enable such a method of transferring possession to be treated as effective in law.⁶ The central notion behind these cases was that the landlord had to be shown to be accepting and taking physical control over the premises once more to the exclusion of the tenant.

¹ [1922] 1 K.B. 236.

² H.A. Hill and J.H. Redman's *Law of Landlord and Tenant*, 13th ed., 11.

³ *Ibid* 473.

⁴ *Dodd v. Acklom* (1843), 6 Man. & G. 672; *Natchbolt v. Porter* (1689), 2 Vern. 112.

⁵ *Dodd v. Acklom* (1843), 6 Man. & G. 672; *Natchbolt v. Porter* (1689), 2 Vern. 112.

⁶ *Cannan v. Hartley* (supra) at 648; *Furnivall v. Grove* (1860), C.B. (N.S.) 496.

Under the early rent restrictions Act in England¹ rents were controlled and the rights landlords to evict tenants were restricted. If the landlord came into or legislation, then the controls no longer applied. It was provided that the expression 'possession' should be construed as meaning 'actual possession'. There are several reported cases concerned with the application of those provisions.²

*Thomas v. Metropolitan Housing Corporation Ltd.*³

It was held that the landlord had regained 'actual possession' when the tenant had dropped the key of the leased premises into the letter box at the office of the landlord's agent-even though the office was closed for the week.⁴

The case of *Wrightson v. Mc Arthur and Hutchisons(1919)Ltd.*⁵ provides an interesting comparison.

Certain goods, being set aside by the defendant as security for debt, were locked in a room in premises owned by and in the possession of the defendants and the key to that room was given to the plaintiff. It was held that on delivery of the key possession of the goods passed to the plaintiff and was subsequently retained by him although the goods remained upon the premises possessed by the defendants.⁶

Bailment

Bailment is a transaction that is *sui generis*. It often arises out of a contract, and in such a case the contractual terms may be all important-but analytically it falls under the heading of property. In the law of real property we distinguish between a contract which creates rights *in personam* and a conveyance which creates rights in *rem*. In the law of personal property, the distinction is rather blurred, as the contract itself may transfer title. Bailment is really a transfer of an interest in property-the extent of that interest will depend on the nature of the bailment.

¹ See the Rent and Mortgage Interest Restriction Act 1923; 13 & 14 Geo. V, .C.32.

² See e.g. *Jewish Maternity Society's Trustees v. Garfinkle*(1926), 42 T.L.R. 589; *Thomas v. Metropolitan Housing Corporation Ltd.*, (1936), 1 All E.R. 210; *Holt v. Dawson*, [1940] 1 K.B. 46; *Goodier v. Cooke*, [1940] 2 All E.R. 533. But note that the sections concerned were repealed by the *interest Restriction Act 1939*.

³ *Supra*.

⁴ See the full discussion of these in *Dias and Hughes*, *Jurisprudence*, 316-21.

⁵ [1921] 2 K.B. 807.

⁶ Cf. *Ancona v. Rogers*(1876), 1 Ex. D. 285.

In the gratuitous bailment revocable at will, the bailee's rights are subject to the pleasure of the bailor: in pledge, the pledgee has the right to the *res* till the debt is paid.¹

That the pledgee has a proprietary interest may be seen from the following considerations:

- (a) Historically the bailee exercised nearly all the rights of ownership and late as Blackstone it was thought that the bailor had only a chose in action.
- (b) The bailee has the remedies of trespass and trover against third parties, at least where the bailment is for a fixed term
- (c) The bailee cannot at common Law commit larceny of the *res* bailed,⁴ and in some circumstances the owner may be guilty of larceny by taking the *res* from the bailee with intent to defraud.
- (d) The bailee has an insurable interest.
- (e) Some bailees, such as the pledgee, have a common law (and in some cases statutory) right to sell on default.
- (f) The common carrier, the innkeeper, and the artificer have a common law lien-which is a proprietary right.

Subject to the rights of the bailee, the bailor retains his interest and the bailor may recover the *res*,

even though the contract of bailment was illegal, provided that the bailor 'does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.'⁶

In the last resort bailment rests on possession and upon the distinction between possession and title. Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to directions antecedent or

Future of the other person.¹ It is important to remember that the gratuitous bailee at will, being in possession, may avail himself of possessory remedies such as trespass but that the bailor may also avail himself of those remedies although he is not in possession but has merely a right to possession.

Miscellaneous Cases

*Ancona v. Rogers*²

Goods owned by A were put by her agent in rooms in the house of B-with B's permission. The rooms were locked by A's agent and he took away the key. It was held that A was in possession of the rooms.

*The Tubantia*³

A salvage Company had located and marked a wreck with buoys, and had spent large sums diving and cutting open the holds of the sunken ship. Works were suspended during the winter, to be resumed in the summer. The Company was held to be in possession of the wreck.

*Young v. Hichens*⁴

Plaintiff had drawn his seine and net around a large number of fish but had left an opening of about forty feet which he was about to close with a 'stop' net. He had two boats in the opening with men splashing the water to frighten the fish away from the opening. It was held that at that stage of the operation the plaintiff had not reduced the fish into his possession.

Moors v. Burke

Where legislation⁶ provided that if any person is in actual possession of goods suspected of being stolen that person may be.....etc, the facts were that Burke, who was employed on the wharves where he had the right to use a clothes locker, was employed on the wharves where he had the right to use a clothes locker, was found to have goods suspected of being stolen in his locker. He was held not to be in 'actual possession' of the goods because he shared the locker with another and so could not be said to have exclusive control of the goods concerned while they were in the locker.

*Sloan v. McGowan*⁷

Some trunks were deposited by the defendant in a warehouse for storage. The trunks contained goods which were suspected of being stolen. The trunks were locked and the defendant

had retained the keys. The storeroom where they were contained goods deposited by other persons as well. It was held that the defendant was not in actual possession of the trunks within the meaning of the section of the Police Offences Act referred to in the previous case.

*Johnson V. Kennedy*¹

Some wheat suspected of being stolen was found on premises jointly occupied by a husband and wife. The wife claimed that some of the wheat was hers and the husband claimed the remainder. It was not clear which wheat was claimed by either. It was held that neither husband nor wife was shown to be in 'actual possession' of the wheat, or any part of it, within the meaning of police offences Act section to above.

*M' Attee v. Hogg*²

Section 21 of the salmon fisheries (scotland) act, 1868, made any person who buys, or exposes for sale, or has 'possession'

*Johnson v. Kennedy*¹

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*M' Attee Hogg*²

Section 21 of the Salmon Fisheries (Scotland) Act, 1868, made any person who buys, sells, or exposes for sale, or has in his 'possession' salmon taken within a particular time, liable to a penalty. 'The allegationis that these men were in possession of certain fish at a time when it was illegal to have them in possession. Of that they were convicted.....Take this case: Suppose five men went down together to the river to take fish and caught two, and were met when on their way up with the flash, would not all five men be in possession of the fish although some of them may never have touched them? They certainly would.' Per the Lord Justice-Clerk (Lord Mac Donald), at p.69.3

*Collector of Customs (N.S.W.) V. Southern shipping Co.Ltd.*⁴

A consignment of tobacco was delivered to the defendant company for shipment out of the State of New South Wales. The defendant put the tobacco in a store, on the wharf from which shipment would be made, owned by the Maritime Services Board. The store was locked and the

keys were lodged in the customs office which was itself locked overnight so that the keys to the store were not available to the defendant except in an emergency. During the night (of Easter Saturday/Sunday) the store was broken open and the tobacco was stolen, Sec. 60(1) of the Excise Act 1901-52 (C'wealth casts certain liabilities upon persons who have 'the possession, custody or control of excisable goods'.....It was held (*inter alla*)that defendant did not lose possession of the tobacco when it was locked in the store and the keys locked in the customs office.

From those illustrative cases and rules, a surprising number of propositions about possession can be extracted-for example:

- (i) Possession of a chattel is not acquired when mere physical control is taken; such acquisition waits upon knowledge by the taker of the nature of the thing acquired: See e.g., *R.v. Ashwell* ; *R.V. Hudson*.
- (ii) The owner and possessor of land may be in possession of a chattel on his land in spite of fact that he does not know the nature of the thing or even that it exists: See e.g *Elwes v.Brigg Gas Co.*; *R.v.Rowe*; *south staffordshire Water Co.v.Sharman*.
- (iii) The owner and possessor a shop is not in possession of chattels on the floor his shop until he knows of their presence there; See e.g., *R.v. Moore*; *Bridges v. Hawkesworth*.
- (iv) The owner of a house, who may well have been in possession of the house for the purpose of taking action against a trespasser, may not be in possession of a chattel found on the premises if he has never physically occupied the house; *Hannah v. Peel*.
- (v) The owner and possessor land may not be in possession of chattels on his land even though he owns those chattels- another person, not on the land, may be in possession of them : *Ancona v.Rncona*; *Wrightson v. Mc Arthur & Hutchisons*.
- (vi) The finder of a lost chattel obtains possession of it, and hence title to it as against those who have no claim to it prior to his: *Armory v. Delamiri9e*.
- (vii) A finder of a chattel who finds in the course of his employment does not obtain possession of it –his master does; *Willey v. Synan*.
- (viii) As between two or more persons who are in apparent physical control and enjoyment of the use of chattels, the owner of the chattels is in possession of them: *Ramsay v. Margrett*; *French v. Gething*.
- (ix) As between two or more persons apparently in physical control and enjoyment of the use of the use of land (which is owned by one of them) and of chattels upon that land, where ownership of the chattels and hence is presumptively the owner of them: *Re Cohen*.

- (x) To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others; *The Tubontia*; *Young v. Hichens*.¹
- (xi) But possession may be acquired of a thing, by transfer from another in possession, without any change in the physical control of the thing concerned : *Ramsay v. Margrett*; *French v. Gething*.²

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Raises different questions form the creation of possession of a thing with respect to which there have been no pre- existing legal relation.³

Similarly the transfer of possession from one person with respect may be effected by changing the legal relations of persons with respect to the thing, by means permitted by the legal system, without in any way changing the physical conditions affecting the thing or the persons concerned.⁴

Just as with the concept of ownership⁵then, the way out of the confusion engendered by the struggle between convenience and theory already outlined is to recognize that possession in the law always involves legal relations between persons. Where those relations are in dispute there will be various values, sometimes competing, to be considered when establishing the precise relations to be recognized or enforced by the legal system, and when fixing the tests by which the relations concerned are to be recognized. No doubt, almost always, the basic values suggested by Felix Cohen⁶ Will be involved; simplicity, certainty, promotion of the community's economy, economy of effort in administration, acceptability as consonant with a general sense of fairness. But the precise rules, which include possession in their expression, developed in different parts of the legal system are affected by further complicating factors, for different purposes are pursued in

¹ And of. *Pierson v. post*(1805), 3 Caines 175, (Supreme Ct. of New York); *Littledale v. Scaith*(1788), 1 Taunt, 243 n.; 127 E.R. 826; *Hogarth v.Jackson*(1827(, M. M. 58, 173 E.R. 1080; *Hamps v. Darby*, [1948] 2 k.B. 311.

² Cf. *In re Stoneham*. [1919] 1 Ch, 149; *In re Ridgway* (1885) 15 Q.B.D. 447; *Cochrane v. Moore*(1890), 25 Q.B.D. 57.

³ If, as seems obvious, possession once gained can be lost or abandoned absolutely (i.e. not to another person). Then there can be a series of 'creations' of possession with respect to the one thing, but each 'creation' involves the establishment of fresh possessory relations where there were none immediately before the establishment of fresh possessory relations where there were none immediately before the act of 'creation'- see *The Tubantia*, [1924] P. 78 BUIT EF. *Johnstone & Wilmot Pty. Ltd v. Kaine* (1928), 23 Tas. L.R. 43.

⁴ See *Ramsey v. Margrett*(*supra*), *French v. Gething*(*Supra*).

⁵ *Supra*, 115.

⁶ *Dialogue on Private Property*{1954), IX Rutgers L.R. 357.

the development of different rules and those purposes affect the development of the rules themselves.

A mere glance at the cases and rules summarized in the preceding section reveals that the tests for recognizing possession vary in response (*inter alia*) to the pressures of different purposes being pursued in different parts of the law. Thus in the larceny cases there is the desire to see that people who take things to which they have no justifiable claim (who have the minds of thieves)¹ shall not escape retribution.² In cases like *Moors v. Burke*,³ there is the desire to limit the harsh application a statutory rule which cuts across traditional notions affecting administration of justice in the criminal law.

¹ *Hibbert v. McKiernan* (supra) per Goddard C.J.

² In contrast with a 'system-made pressure' of not so long ago when there was a tendency to find some technical ground to prevent very harsh punishment being inflicted for a minor transgression: see Kenny's *Outlines of Criminal Law* (17th ed.) 221, pp. 238-9.

³ *Supra* p. 520, n.5.

¹In the landlord and tenant cases there are varying pressures from times when there is a special need to protect the interests of tenants to other times when it is felt that landlords have been too restrictively treated by the law.

In the finding cases the task facing the courts is really to allocate rights to physical control and enjoyment of things where no such control existed before in the parties concerned. The real nature of the task is obscured by the search for a pre-existing 'possessory title', and the assumption that the thing must belong to one or another of the parties prohibits a solution which may in some cases be the most desirable:- an allocation of the future rights among those parties in shares.²

To the objective observer there is a further complicating factor. In most cases the court does not have all the facts before it, but only those facts which are known to the litigating parties and are thought by them to be relevant to their claims in the light of the legal authorities. Thus a variety of persons in different proceedings could be held to be in possession of a thing, without actual extra-legal facts being changed at all, depending upon the nature of the litigation, and upon the information disclosed to the court about the relevant physical facts and about the legal relations affecting the persons concerned.

¹ And further complicated by awareness of the special interests of persons in a position of near helplessness - e.g the wives of tenants. See *Middieton v. Baldock*[1950]

1 K.B. 657; *Errington v. Errington*, [1952] 1 K.B. 290; *Bendall v. McWhirter*, [1952]

2 Q.B. 466; R.E. Megarry, 'The Deserted Wife's Right to Occupy the Matrimonial Home' (1952), 68 L.Q.R. 337, 379.

² See *Kocourek*, loc. Cit.

This can be demonstrated by supposing any number of possible sets of facts under any one of which different persons could be held to be possessors, For example, suppose A is in lawful possession of a large purse which he has in his pocket. The purse and contents are owned by B but B is not at the relevant time entitled to possession of them. B is married to C one evening, because the purse is bulky and puts his clothes out of shape, hides the purse under his hat in C's cloakroom. On this information is there any doubt that in an issue as to possession, between a finder of the purse and A, A would be held to have been all the time in possession of it? As between C and a stranger who finds the purse, if information about A and B is not disclosed, C will be held to be in possession of it. If all suddenly die and the purse is found, then, if the only information disclosed is that C owned the flat, C will be held to have had possession of the purse. If in those circumstances the only information disclosed is that B owned the purse, then B will be held to have been in possession of the purse- and so on.

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In the light of the preceding discussion, the discovery that the word 'possession' wears varying shades of meaning in different legal contexts should not surprise not greatly disturb the student of law. The compulsive search for one unitary concept' of possession¹ or for one proper meaning of the word 'possession' is a profitless one.² The elucidation of he precise meanings conveyed by the word 'possession' may well be best pursued by the method urged by Professor Hart.³ Thus given a

¹ Except perhaps as a move for sweeping law reform in the interest of tiddiness and simplicity alone.

² Preoccupation with the search for some common feature is apt in either case to divert us from the important inquiries which are(1) what for any given legal system are the conditions under which possessory rights are acquired and lost; (2) what general features of the given system and what practical reasons lead to diverse cases being treated alike in this respect., *H.L. A. Hart, Definition and Theory in Jurisprudence (1954), 70 L.Q.R. 37, iv, 9 at p.44.*

³ loc cir.; and see D.R. Harris, *The Concept of Possession in English Law, Oxford Essays in Jurisprudence*, ch.iv.

rule that : 'Delivery' means 'voluntary transfer of possession from one person to another'¹, to elucidate the term 'possession' or the expression 'transfer of possession' one should identify the conditions under which such a statement as : 'A *transferred possession* to B and so effected delivery', is a true or valid statement in the light of the rules and authorities applicable within a given legal system.²

There are very many rules which use the word 'possession', however, and an account of the law of possession which limited itself to a series of precise statements as to the conditions under which all the possible uses of the word would be valid or invalid, would be so detailed and unwieldy as to be useless to all but practitioners faced with particular cases and searching for precise authority in a wilderness of single instances.³ It is the task of legal thinking to conceptualise the legal rules in such a way that they are reduced to systematic order and by this means to give an account of the law in force as plain and convenient as possible." Where the law of possession is concerned, this task still awaits its master.

Even if, at any one point of time, the only completely accurate way to elucidate all the different uses of the word 'possession' in the law were to provide the unwieldy account indicated above, to do so and to deny the value of any more general statement would be to throw the baby out with the bath water. The living law involves process of change and development. At few points are those processes irrational or arbitrary. They turn upon general ideas, however vague, which provide direction for thought in the absence of more precise and authoritative directions provided by the legal system.

With perhaps only one general exception, the idea, however vaguer and imprecise, which colours and gives a family relationship to all the uses of the word 'possession' in the law, is the recognition of a relation between persons where one has taken or has control of a thing and is to be protected in his enjoyment of it out of the family relationship. This is frequently done and for a variety of purposes: e.g., it may be desired to give to certain persons not in any then accepted sense 'in possession' legal benefits which are ordinarily afforded possessors only. Usually, however, the warning signal of a fiction will be given and the legislator will say that the persons concerned are to be *deemed* to be in possession.

MEDIATE AND IMMEDIATE POSSESSION

*plures eandem rem insolidum possidere non possunt.*² Must this well-worn adage be modified by a recognition of mediate and immediate possession? Salmond writes: 'One person may possess a thing for or on account of someone else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as *immediate* or direct.'³ Salmond instances three types of mediate possession: firstly, that acquired through an agent or servant; secondly, that held through a borrower, hirer, or tenant where the *res* can be demanded at will; thirdly, where the chattel is lent for a fixed time or delivered as security for the repayment of a debt.

The distinction between mediate and immediate possession is in many ways a useful one and is explicitly recognized by German law.⁴ In English law, however, in all the cases mentioned,

¹ Sale of Goods Act, 1893, Sec. 62- repeated in many Acts throughout the common law world, e.g, sec.3(1) of the Goods Act, 1958(Victoria, Act No. 6265).

² And see 4 and 18 supra.

³ And then only if superbly indexed.

² Dig. 41. 2.3.5.

³ Jurisprudence (11th ed.), 332.

⁴ BGB, 868,Cf. C.C., Art. 2228 : 'Possession is the retention or enjoyment of thing or of a right which we have or which we make use of, either ourselves or through another persons who holds it or makes use of it in our name.'

THE STRUGGLE OF CONVENIENCE AND THEORY

Why should such a notion as possession be surrounded with complexity? One reason is that there is an inevitable and continuing conflict between the logic of the law and the demands of convenience in particular cases. Law in its early stages is fluid, and later a theory is invented as means of rationalizing decisions that have already been reached. Many of the fundamental problems of the law of possession are not clearly examined until the 'classical period' in a nation's legal history, when analytical genius, discontented with the law as a collection of rules, attempts to discover a logical structure around which the rules may be grouped. If such a theory is discovered in the law of possession and wins acceptance, then rules that cannot be reconciled with it are dubbed 'logical anomalies' or 'historical exceptions.' The law is not static, however, and the pressures of practice tend to create further exceptions, which sometimes eat away the theory itself. There may even be two or more theories of the law, each battling for supremacy.

In one sense possession began as a fact - the fact of physical control. Before there was law there was possession. That fact could produce consequences. Felix Cohen asked the question, to a student posing as a reasonable wolf in a society consisting of wolves and sheep, 'Now, suppose you had to decide whether to kill a sheep yourself or to take mutton out of the jaws of other wolves are not concerned about law or ethics. What considerations might lead you to respect the first occupancy of your fellow wolves and to go out after your own mutton?'¹

Whatever it may be possible to say of the pre-law situation,² it is clear that, once law arises to protect possession by rules, then its primary concern is with the relations between persons (legal units³) in the legal system with respect to things; and not primarily with the relations between persons and things. If this is so then not merely the nature of the thing concerned, and what is done or may be done to it, are important, but also the nature of the person or persons concerned, their relationships *inter se*, and the consequences of the rules provided or of the remedies for their breach. This will be illustrated more fully in a later section.

Without doubt most legal systems have built upon the notion of physical control in developing rules which have the term 'possession' as a necessary part of their expression. The concentration upon the notion of physical control attracted special attention to the relations of persons to things. In the refinement of rules in the development of English law a number of terms came to be accepted, and some clarification of those terms is desirable.

- Thus it is said we may have the following relations of a person to a thing: ⁴
- (a) Custody- Where the holder either lacks full control or else has no animus to exclude others, for example, a customer examining a ring in the presence of the jeweller.
 - (b) de

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- (b) Detention- full physical controls in fact which for some reason is not regarded as possession in law.
- (c) Possession- legal possession. In most cases the legal notion of possession is built on the popular notion of physical control, but each legal system' anomalous' cases either where a person in full physical control in fact is denied possession in law, or where one who does not have physical control in fact at all is accorded the rights of possession.
- (d) Ownership.¹

The table gives a more definite meaning to the terms 'custody' and 'detention' than is usual. Sometimes the two terms are used as synonyms. *Constructive possession* is a phrase that is often used in the books, but there are so many different approaches that the term is best left unused²

At the praetor at Rome began to protect possession, it became necessary to refine the notion. Buckland thinks that in the classical or a possession was regarded primarily as matter of fact, however hard it might be to reconcile this with the artificial notions already springing up. As Paulus said: 'The same possession cannot be in two persons any more than you can be considered to stand in the place in which I am standing, or to sit in the place in which I am sitting.'³ A *captivus* on his return to Roman soil automatically re-acquired the rights which he had lost by being taken prisoner, but, since possession was regarded as a matter of fact, it vested in him only when actual control was obtained.⁴

The theory of the nineteenth-century Romanists was mainly concerned with attempt to discover a logical method of distinguishing between detention and possession. At Rome the possessor had two practical advantages- he had a right to the protection of the praetor's interdict, and, if he could show good faith and *iusta causa* he could acquire ownership on the expiration of the necessary period of time.⁵

THE CONCEPT OF POSSESSION

Savigny maintained that distinction between detention and possession follows from a proper analysis of the latter concept and built his doctrine on Paul's text, '*apiscimur possessionem corpore et animo, neque per se animo but per se corpore*'.¹ The classical theory, therefore, is that possession is made up of two elements: firstly the *corpus* or element of physical control: secondly the *animus* or intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical relation to the *res*, the differences between them must be found in the mental element. The intent, which distinguishes a possessor, is the *animus domini*-the desire to hold for oneself and not on behalf of another. This theory explains why the tenant, the borrower, and the agent did not have possession in Roman law, for they did not intend to hold in their own right. The compilers of the *Digest* seem to have emphasized the importance of the element of *animus*-indeed some of the text seem to go to extraordinary lengths.² On the other hand, Savigny's theory was faced with the difficulty that in certain cases Roman law gave a non-owner possessory rights;³ these examples Savigny explained away as anomalies which he termed instances of derivative possession.

Ihering adopts a more objective theory. 'A man possesses who is, in relation to the thing, in the position in which an owner of such things ordinarily is, *animus* being merely an intelligent consciousness of the fact.'⁴ Ihering's theory can explain exactly those cases which Savigny found difficult, but, on the other hand, it cannot account for those cases where the law refuses possessory rights to those who are in effective physical control. The anomaly on his view is that not every detentor is a possessor and he seeks to explain these 'exceptions'.⁵

Does Paul's analysis of *animus* and *corpus* satisfactorily explain the law? Holdsworth thought that, in addition, Roman law required

a cause or special reason why possession should be protected; the exact limits of possession varying with the needs of the moment;’ but unfortunately for the interpretation of (Roman) texts, they have fallen into the hands of German legal philosophers, who have constructed from them logical theories which never wholly fit the actual rules, because those rules were, like the rules of English law, made to fit the illogical fact of life.¹ Some of these complicating factors are now diseussed.

(a) Firstly, in Roman law the notion that proprietary capacity was essential to possession became firmly established and this cut across the notion of possession as more physical control. The rule that those in the *potestas* of another could not possess led to a certain divorce between actual control and legal possession, this creating confusion in the texts.² A master possessed what was held by his slave, the theoretical solution being that the master had the *animus* and the slave provided the corpus. Since the slave was himself possessed by the master, it was not a very violent extension to say that the master possessed a *res* in the hands of a slave who was himself possessed.³ But as acquisition through a slave became more and more common, it was not a very inconvenient to require the master to have a specific *animus* directed to every *res*,⁴ and it was laid down that the master possessed whatever was acquired by the slave in connexion with the *peculium*. As acquisition through those not within the bonds of the family was gradually allowed, convenience dictated an even broader rule and so some texts boldly state that the agent provided both *animus* and *corpus*.⁵ This was a case where the classical rule was almost eaten away by exceptions.

(b) Secondly, we note the influence of the mode of acquisition of possession on the concept of possession itself. If it is assumed that the essence of possession is control, the question whether possession has been lawfully acquired or not may be relevant when the law considers whether it should protect that control, but, if we are determining whether the taker has in reality acquired possession, the lawfulness of its inception should be irrelevant. The thief acquires possession, although his taking is a crime. In practice, however, there is an

Inevitable tendency for 'the right to possession to acquire importance at the expense of possession itself'-----'possession borrows a great deal from right.... Possession is not merely a matter of physical fact but also of right'.⁴ At Rome one of the most important practical results of possession was the protection afforded by the interdict of the praetor. The praetor laid down that he would not protect the possession of one who had acquired it *vi, clam out precario*. According to logical analysis one who takes by force or steals secretly acquires possession: but since the praetor would not protect such a holding, there was a tendency, instead of saying that the praetor would protect only certain forms of possession, to limit the definition of possession itself to control which had not commenced in certain unlawful ways. This was an illogical, though convenient, policy. Ulpian considered that one who has lost possession by violence should be considered as still in possession,⁴ If my house is seized in my absence, I retain⁴ until I know of the intrusion and have had a reasonable time in which to eject the trespasser⁴. **Clearly** this doctrine cannot be carried too far or possession would mean only control that has been lawfully acquired. The strict doctrine is that of Gaius that any loss of corpus involved loss of possession. To reconcile the texts, we can only suppose that Gaius' doctrine was applied to movable and that, where immovables were concerned, the rules were broadly interpreted for the benefit of the owner. In the post-classical era, if a third party seized land held by a tenant the owner did not lose possession until he was aware of the intrusion and had failed within a reasonable time to assert his rights⁴. Just as the law weighs the dice against one who has seized secretly or by force, so it favours one who takes lawfully; even if we regard control as a pure matter of fact, one whose holding is lawful is less likely to be disturbed than one who has no title. Where one has a right to enter, entry into any part of the house gives possession of the whole, whereas the possession of a trespasser extends no further than it does in fact⁴. 'De facto as well as de iure there is much to be preferred by title, nothing for him who comes by wrong'⁴.

(c) Thirdly, what may be called the legal concept of inertia plays its part. If possession is once proved to exist, it is assumed to continue until it is ended either by abandonment on the part of the owner, or by seizure by another. It is considered that possession continues only so long as physical power to deal with the res could be reproduced at any moment¹. If all power to enjoy, now or in the future, is lost, possession ceases – e.g. if a ring is dropped into the sea. But a London citizen retains possession of his house even while he is absent in Paris, for he may return at will. Holmes suggests, however, that Savigny's statement is rather too absolutely phrased and gives the following example. The finder of a purse leaves it at his country house, while he languishes behind the bars of a prison. English law at least would treat him as in possession, even though he could not reproduce his physical power of enjoyment at the moment. If a burglar began to break in, the finder would be in possession until the thief had actually seized the purse.

mediate and immediate possession. In the master and servant relationship the servant does possess goods given to him by a stranger, until by some act he has appropriated them to his master. In the case of landlord and tenant the