

# THE CONCEPT OF POSSESSION IN THE COMMON LAW: FOUNDATIONS FOR A NEW APPROACH

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## I

'A complete theory of possession,' Sir John Salmond wrote optimistically,<sup>1</sup> 'falls into two parts: first an analysis of the conception itself, and secondly an exposition of the manner in which it is recognized and applied in the actual legal system.' There is no doubt that Salmond thought such a complete theory possible. Yet the judges and legal writers to whom we look for an analysis of the concept of possession in the common law—including Salmond himself—prove surprisingly disappointing. Conscious that they will later have to wed the concepts they formulate to the complexities of the common law, trained to make distinctions rather than to see connexions, they smother analysis and prevent clarification by a welter of conceptual terms. In the law made or interpreted by judges we meet one possessory term after another: 'physical possession', 'actual possession', '*de facto* possession' and 'possession'; 'right to possession', 'right of possession', 'constructive possession' and 'possession'; 'possession in law', 'legal possession' and 'rightful possession'; 'property', 'special property' and 'limited property'. To make confusion worse confounded, the distinctions are not rigidly observed, in the course of their judgments, by the very men who have drawn attention to them.<sup>2</sup>

Legal writers, far from cutting through this tangle of special terms and distinctions to a primary concept or logical 'cluster' of concepts, add or superimpose their own subdivisions. Bentham distinguishes physical possession from legal possession, exclusive possession from possession in common, possession of things moveable

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<sup>1</sup> Salmond, *Jurisprudence* (10th ed., 1947) 287.

<sup>2</sup> Earl Jowitt has drawn attention to a typical example: 'Under English law where there is a simple contract of bailment the possession of the goods bailed passes to the bailee. The bailor has in such a case the right to immediate possession and by reason of this right can exercise those possessory remedies which are available to the possessor. The person having the right to immediate possession is, however, frequently referred to in English law as being the possessor.' His Lordship goes on to add, quite correctly: 'In truth English law has never worked out a completely logical and exhaustive definition of possession.'—*United States of America & Republic of France v. Dollfus Mieg et Cie. S.A. & Bank of England* [1952] A.C. 582, 605. We shall see below how judges who have distinguished 'custody' from 'possession' and 'possession' from 'property' will go on in their judgments to use one term when they mean the other.

from possession of things immoveable, possession of services and possession of fictitious entities.<sup>3</sup> Continental Romanists and Civilians bring out allegedly fundamental contrasts between *possessio* and *detentio* and between possession with *animus domini* and possession with *animus possidendi*, as well as the distinction between *possessio naturalis*, *possessio civilis* and *possessio ad interdicta*.<sup>4</sup> Traditional common law writers stress the importance of keeping apart 'possession as a law concept', 'de facto possession' and 'possession in law' or (alternatively) 'actual possession', 'civil possession' and 'constructive possession'; some of them counterpose 'corporeal possession' to 'incorporeal possession', 'immediate possession' to 'mediate possession'.<sup>5</sup>

The unsatisfactory state of conceptual analysis and juristic formulation in the field of possession is now widely recognized. Some ascribe it to the difficulties inherent in whatever basic concept of possession there may be; others to confusions of terminology, *a priori* imposition of theory and a misguided endeavour to reduce decisions that have developed in the context of specific branches of law and of separate remedies to smooth components of a coherent system. 'In the whole range of legal theory there is no conception more difficult than that of possession,' Sir John Salmond writes at the beginning of his discussion of possession.<sup>6</sup> 'Possession', we read in the cases, 'is a word of ambiguous meaning'<sup>7</sup>—'there is, perhaps, no legal conception more open to a variety of meanings than "possession"'.<sup>8</sup> Winfield, characteristically optimistic, puts the main weight on confusions of terminology: 'Our law has a fairly good working scheme of possession although it has not indulged in much scientific dissection of the idea. Its weakest spot is its slovenly terminology.'<sup>9</sup> Dias and Hughes, all too ready to resolve the problem into matters of convenience and policy, prefer to blame their less

<sup>3</sup> Bentham, *General View of a Complete Code of Laws*, in *Collected Works*, iii, 188.

<sup>4</sup> These distinctions form the crux of Savigny's influential *Treatise on Possession*.

<sup>5</sup> This is the barrage of distinctions with which one emerges after reading the main older works on possession: Pollock and Wright, *Possession in the Common Law* (1888), Lightwood, *A Treatise on Possession of Land* (1894), Salmond, *Jurisprudence* (1902), ch. 13, 14 and Terry, 'Possession' (1918-1919) 13 *Illinois Law Review* 312, *Wigmore Celebration Legal Essays*, 170. Keeton's *The Elementary Principles of Jurisprudence* (1st ed., 1930), somewhat surprisingly for a book by a modern writer, accepts most of Salmond's distinctions.

<sup>6</sup> Salmond, *Jurisprudence* (10th ed., 1947) 285.

<sup>7</sup> *Per Erle C.J.*, in *Bourne v. Fosbrooke* (1865) 18 C.B. (N.S.) 515, 526; 144 E.R. 545, 549.

<sup>8</sup> *Per Fry L.J.*, in *Lyell v. Kennedy* (1887) 18 Q.B.D. 796, 813.

<sup>9</sup> Winfield, *Law of Tort* (4th ed., 1948) 306. Note that Winfield's editor is less optimistic and has changed the passage to: 'Our law has not worked out a consistent theory of possession in any of its branches and it has not indulged in much scientific dissection of the idea. Its weakest spot is its slovenly terminology.' 6th ed. (edited by T. Ellis Lewis) 364. For similar criticisms of judicial terminology see Pollock and Wright, *op cit.* 2, Kocourek, *Jural Relations* (2nd ed., 1951) 365 and Paton, *A Text-Book of Jurisprudence* (2nd ed.) 454.

'empirical' forerunners. 'If a topic has ever suffered from too much theorising,' they write,<sup>10</sup> 'it is that of possession, and nowhere else is the danger of an *a priori* approach to jurisprudence better illustrated. The actual working of the law has not only been obscured by a fog of speculation, but, what is worse, decisions have been falsified so as to fit them into some preconceived theory.'

The period since the First World War has seen a marked decline in the confidence that men have in universal intellectual systems and in the pervasive application of fundamental 'rational' principles. The Western world, and especially the English-speaking world, has moved into an age of *ad hoc* adjustment and manipulation, of piecemeal social engineering, of the utilitarian subordination of principles, systems and traditions to the requirements of men living in specific circumstances at a specific time. The most 'modern' legal writers put less and less weight on the conception of law as a systematic development of principles striving toward the highest possible degree of coherence and more and more emphasis upon law as an instrument in the service of competing masters. For rational coherence with its alleged rigidity they prefer a substitute *ad hoc* flexibility, for 'principles of law' attitudes, presumptions and policies, for concepts specific rules established for specific situations. The worst of the 'moderns' seek, where at all plausible, to reduce law to disparate rules resulting solely from judicial policy and social requirements; the best of them argue that the rationality of the legal system lies in its formulation of open-ended principles and defeasible concepts. Thus Dias and Hughes, on the one hand, assure us that 'the idea of possession is no longer tied to fact, and it has become a concept of the utmost technicality',<sup>11</sup> which, to them, means that each branch of the law has made up its own rules. Mr D. R. Harris, on the other hand, after referring with approval to Professor H. L. A. Hart's view that legal concepts cannot be defined, but only described,<sup>12</sup> argues that there are a number of 'factors relevant to possession' recognized by the courts which nevertheless cannot serve to define possession because no single factor is decisive and because not all factors are always relevant.<sup>13</sup> Their relevance or irrelevance, like the defences to Professor Hart's defeasible principles,<sup>14</sup> cannot be subsumed under a general rule.

<sup>10</sup> Dias and Hughes, *Jurisprudence*, 308.

<sup>11</sup> *Ibid.* 317.

<sup>12</sup> Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review*, 37.

<sup>13</sup> Harris, 'The Concept of Possession in English Law' in *Oxford Essays in Jurisprudence*, 69-106.

<sup>14</sup> Hart, 'The Ascription of Responsibility and Rights' (1948-1949) 49 *Proceedings of the Aristotelian Society*, 171. Professor Hart's view has been effectively criticized by J. L. Mackie, 'Responsibility and Language' (1955) 33 *Australasian Journal of Philosophy* 143.

A living body of law cannot be tied into the strait-jacket of an *a priori* conceptual system: but to insist, as a matter of principle, that we should not ask for general conceptions underlying what appear to be specific rules separating one possession from another, is to live in the intellectual Ice Age in which the first forms of action were born. The rigid procedural requirements of the early law, by their very emphasis on certain common aspects of recurring situations, introduce conceptual distinctions into the law and force it to develop them. It is the recognition of intellectual connexion that distinguishes the *Leges Henrici Primi* from the Laws of Aethelred; it is the presence of conceptual development and continuity that distinguishes the *history* of law from a mere *chronicle* of Acts. In law, we have to recognize unity as well as separation, the historical development of a system struggling to accommodate new requirements and competing demands. Litigants, in the first place, look not to contract, or tort, or agency, or sale, but to the law: it is as aspects of the law that its distinct branches have developed; even if we were to put aside, for the moment, the extent to which judges handing down decisions in one field are influenced by concepts and decisions that they and other judges have laid down in another, we can gain full understanding of what remain as the specific requirements of specific fields only by contrast and comparison with other legal requirements and other legal remedies.

The defect of the traditional writings on possession is not their search for a rational understanding of the law as a whole. Neither were they necessarily wrong, simply because their search for such understanding forced them to make a plethora of distinctions. The point is rather that these distinctions did not arise convincingly out of the course of their argument, but confront us as *ad hoc* distinctions, as saving devices, forced upon them in the process of fitting their scheme to the law. In Salmond, the process of matching his conceptual scheme and the law leads to vicious falsification of legal developments and decisions;<sup>15</sup> in Pollock, a similar process leads to so many modifications and to so many contrasts between conceptual and 'legal' possession that we virtually come to forget the hesitant conceptual analysis with which Pollock began. From Pollock, as from the consciously 'modern' writers, we end by knowing the rules without understanding possession.

The fault, I should argue, lies not in the aim of reaching a com-

<sup>15</sup> Dias and Hughes find their natural butt in *Salmond* and expose his falsifications in some detail, *op. cit.* 316 *et seq.* See also Williams, 'Language and the Law—IV' (1945) 61 *Law Quarterly Review* 384, 390-391 and (for the distortion of decisions on finding by Salmond as well as other writers) Goodhart, 'Three Cases on Possession' (1928) 3 *Cambridge Law Journal* 195, *Essays in Jurisprudence and the Common Law* 75-90.

plete theory of possession that Sir John Salmond had set himself. The fault lies in his separation of the analysis of the concept from the study of its working in the legal system. Concepts are concepts in use, 'possession' is a term with a certain role. To understand possession, we must look, not at the word, but at the way in which possession entered our legal system, the parts it was called upon to play in it, the character and problems of its development. If we do this, we do emerge with a general concept of possession implicitly recognized and applied in our law. Only in terms of such a general concept, I shall argue, can we understand the special problems that have arisen in specific fields.

One word about the doctrine of *stare decisis*. In any *study* of the law, as opposed to a mere catalogue of decisions, some judgments will be held by the author better than others, some cases will appear to him wrongly decided. It is one thing to falsify the law; it is another to refuse to treat it as a sequence of sacred and immutable fiats. In tracing the *development* of the common law, over a period of nearly 900 years, one is concerned with a chain of legal reasoning extending over time; the importance of cases is as links in that chain. It is as links that I have striven to understand them. The loose ends that need to be severed from the chain do not occur (at least in my field) as often as one might expect.

## II

Writers with a logical or sociological bent have frequently sought to gain a preliminary understanding of the concept of possession by contrasting it with, or relating it to, the concept of ownership. Neither concept, it is clear, can be divorced from social or legal sanctions and/or physical powers that establish or protect ownership and possession and thus give the terms meaning and force. In a society in which no one had or claimed the control of anything to the exclusion of others, the terms 'ownership' and 'possession' would not be part of the language. But in societies where such control is found, the two terms will tend to establish themselves and to display certain general features that transcend the specific arrangements and definitions of any one particular legal system. One such general contrast suggested by the drawing of a distinction between ownership and possession is the contrast between an ultimate, non-contingent right and a limited, temporary and derivative one. This contrast, often based on an untechnical view of Roman Law, has occasionally intruded upon the common law and has acquired a certain importance in such modern arrangements as the registration of title and hire-purchase agreements; it does not play, and has not played, any fundamental role in the development of

the common law. It is also a legally sophisticated contrast, moving into the forefront in those societies that have economic and legal arrangements by which ownership and possession frequently part company. In early Western societies, as law developed, this was not so. There, ownership and possession were normally fused in a single person, the owner-possessor who came before the law demanding protection or restitution of something he had held by virtue of unchallenged right and of uncontested physical use and control. The contrast here is the more primitive one between ownership as the assertion of a right against others and possession as a physical fact, as a relation to the thing. That the concepts of ownership and possession, in this second sense, arise in law as two *aspects* of a single situation has been emphasized by Rudolf von Ihering in a brilliant passage:

Possession is the objective realization of ownership. It is in *fact* what ownership is in *right*. Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when my claim to it is maintained by the will of the State as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts. It is well to have both forms of security if possible; and indeed they normally co-exist. But where there is no law, or where the law is against a man, he must content himself with the precarious security of the facts. Even when the law is in one's favour, it is well to have the facts on one's side also. *Beati possidentes*. Possession, therefore, is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong, or the special nature of the claim in question. Possession without ownership is the body of fact, uniformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realizes itself. The two things tend mutually to coincide. Ownership strives to realize itself in possession, and possession endeavours to justify itself as ownership. The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies.<sup>16</sup>

To the common lawyer, Ihering's analysis seems particularly apt, for it is amply confirmed by the earlier concept of seisin in the English law. Seisin, says F. Joüon des Longrais in a great work,<sup>17</sup> 'is an enjoyment pervaded by the elements of right, fused with right in all its forms and by nature indistinguishable from it.' Such

<sup>16</sup> *Ueber den Grund des Besitzschutzes* 179. (I cite the translation by Salmond, *op. cit.* 311-312).

<sup>17</sup> *La conception anglaise de la saisine du XII<sup>e</sup> au XIV<sup>e</sup> siècle* i, 45: 'C'est une jouissance toute pénétrée d'éléments de droit, elle se fond avec le droit sous toutes des formes, et n'en distingue pas sa nature.'

fusion of right and enjoyment, expressed in the paradigm case of the owner-possessor (as Ihering suggests), is natural to early law: the situation where enjoyment and right to enjoy coincide in a single situation is least disturbing to social order and crude conceptions of justice. But disturbances do occur: men lose and acquire possession through violence, accident, fraud and other wrong. If society is to vindicate any conception of justice above the mere ratification of right, it must recognize and concede that enjoyment and the right to enjoy can part company.

The problems that arise from the possible disjunction of enjoyment and the right to enjoy, of possession and the right to possess, permit of marked differences in legal approach. Ancient Rome, with its tight and authoritarian familial and social structure, placed primary emphasis on the conception of right. Historically, rights may have stemmed from possession as right stems from might; Roman law is concerned with this only to the extent of permitting the severely restricted procedure of usucapion and even then it treats the very candidate under such procedure not as a possessor but as a candidate for title.<sup>18</sup> For the Roman legislator and juriconsult, the paradigm right to enjoy is absolute title, good against the whole world, in principle capable of proof and vindication in court without any reference to possession whatever.<sup>19</sup> There are rights based on physical possession as well. On the one hand, they are sharply marked off from rights based on title and are to be established by recourse to quite separate remedies, the interdicts; on the other hand, such possessory rights do not follow from mere physical control but depend on a view of possession that confines it to those who in principle could become owners and behave as though they were.<sup>20</sup>

<sup>18</sup> Thus it was essential for possession intended to ripen into ownership by usucapion to begin with a *iusta causa* or *iustus titulus* and for the possessor to have done everything in his power to become owner, requirements that sharply separate such possession from the possession recognized by the interdicts (*infra*). Again, the remedy of one who was only in the process of acquiring title *in via usucapiendi* was nevertheless not confined to the interdicts but included a special action, the *actio Publiciana*, which must be classed as proprietary: see Buckland and McNair, *Roman Law and Common Law* (2nd ed.) esp. 63, 74.

<sup>19</sup> This, of course, is the paradigm; in practice, the plaintiff in a *vindicatio* would normally be justifying a title open to doubt and might seek to rely on usucapion as well as the reputation of ownership. But usucapion here is a technical mode of proving title, not a general claim to rights in virtue of possession and it is significant that Roman jurists consider that success or failure in a possessory action is no bar to success or failure in a proprietary one and *vice versa*. See Buckland and McNair, *op. cit.* 75-76.

<sup>20</sup> Thus, 'no one who has a thing in virtue of a contract recognizing the ownership of another person can possess, and the same is true even of a person who has a real right of limited extent, such as usufruct, though such persons have quasi-possession, protected by a special interdict. There are, it is true, four types of persons who are regarded as possessors, even though they hold under a contract, namely the pledge creditor, the tenant for a perpetual or very long term of years, the tenant at will, and the stake-holder. But these cases can all be explained away

In ancient Germanic and early English law, formulated in conditions of a far looser social structure and amid the far greater prevalence of self-help, might and right were and remained more closely linked. Ownership did not become clearly divorced from possession; in ancient Germanic and English law it was not possible either to gain recognition of a right of ultimate possession good against the whole world or to vindicate any right to possess without reference to possession itself. The primary concept—indeed, the only concept available—was the concept of *seisin*, a concept which emphasizes that all proprietary rights stem from physical possession but also insists that these rights cannot be destroyed merely by destroying possession. In an authoritarian society, especially one welded together by the primacy of *potestas*, the tendency is to derive right from authority; in the looser, more makeshift and hence more democratic society of central and north-western Europe the tendency is to derive rights from the facts. The man who is seised has both possession and right; a right not simply conferred by authority, but deriving from the facts and therefore seen as part of his *seisin*.

The original nature of *seisin* was obscured from view for several centuries by the fifteenth-century developments that made 'seisin' a technical term of the law of real property, divorced and distinguished from possession of chattels. Thus, in 1757, Lord Mansfield gave this well-known and long-accepted definition of *seisin*:<sup>21</sup> 'Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass.' But this is true, as the subsequent work of Maitland has taught us to see, only of *seisin* in and after the fifteenth century. Before that century, *seisin* was not a term confined to freehold land, but was the only term used in law for virtually all instances of possession.<sup>22</sup>

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on practical or historical grounds. In the classical or later laws they must be treated as exceptions. Conversely, the bailor or lessor usually retains possession of the thing he has bailed or let.' Buckland and McNair, *op. cit.* 73.

<sup>21</sup> *Taylor dem. Atkyns v. Horde* (1757) 1 Burr. 60, 107; 97 E.R. 190, 216; 2 *Smith's Leading Cases* (9th ed.) 633, 700.

<sup>22</sup> Joshua Williams, *Law of Real Property* (23rd ed.) (1920) 154: 'Seisin . . . originally meant any kind of possession, but was not afterwards used to denote any but freehold possession.' Pollock and Maitland, *History of English Law*, ii, 31-32: 'In the first place, it would seem that for at least three centuries after the Norman Conquest our lawyers had no other word whereby to describe possession. In their theoretical discussions, they, or such of them as looked to the Roman books as models of jurisprudence, could use the words *possessio* and *possidere*; but these words are rarely employed in the formal records of litigation, save in one particular context. The parson of a church is 'in possession' of the church:—but then this is no matter for our English law or our temporal courts; it is matter for the canon law and the courts Christian; and it is all the more expedient to find some other term than 'seised' for the parson, since it may be necessary to contrast the rights of the parson who is possessed of the church with those of the patron who is seised of the advowson.' Maitland notes that 'for a somewhat similar reason it is not uncommon to speak of a guardian as having possession of the wardship, while the ward is seised of the land.'

Throughout the thirteenth century and in the most technical documents men were seised of chattels and in seisin of them, of a fleece of wool, of a gammon of bacon, of a penny. People were possessed of these things; law had to recognize and protect their possession; it had no other word than 'seisin' and therefore used it freely.<sup>23</sup>

In the *Leges Henrici Primi*, in Glanvill, Bracton, Fleta and Britton, in statutes and rolls from the times of Richard I, Henry III, the three Edwards, Richard II and Henry IV, even to the opening years of the reign of Henry VI, we find consistent reference to the seisin of chattels.<sup>24</sup> From about 1443, when *uncore detient* comes to supplant the phrase *uncore seisi* in respect of chattels, we enter a transitional period. In Littleton's *Tenures*, written between 1474 and 1481, the distinction between 'seisin' and 'possession' familiar to later English lawyers was decisively proclaimed:

Also, when a man [in pleading] will show a feoffment made to him, or a gift in tail, or a lease for life, of any lands or tenements, then he shall say, by force of which feoffment, gift, or lease, he was seised, *etc.*, but where one will plead a lease or grant made to him of a chattel, real or personal, then he shall say, by force of which he was possessed, *etc.*<sup>25</sup>

From the latter half of the fifteenth century seisin becomes an increasingly technical term in the law of real property. It is sharply distinguished, as we have seen, from 'possession' in the law of personal property; as its uses become more technical it is also distinguished, not only from the possession of a leasehold but also from the 'mere' possession of land. The later conception of seisin thus moves away from the early concept of seisin toward a notion of title or right; the connexion between the early concept of seisin and the later technical use of the word is therefore far less intimate than the connexion between the early concept of seisin and the English law on possession which came to replace it.

### III

The social and juridical function of the concept of seisin in its original form is to serve as a basis for resolving the problems that arise when enjoyment and the right to enjoyment appear to have parted company. The concept of seisin attempts such resolution without conceding in principle that rights to enjoy can be established independently of enjoyment or can long last without it.<sup>26</sup> The Roman lawyer, forced to recognize the possible bifurcation of enjoyment and the right to enjoy, was satisfied to look to the question

<sup>23</sup> Pollock and Maitland, *op. cit.* ii, 32.

<sup>24</sup> Maitland has presented the detailed evidence in his 'The Seisin of Chattels', (1885) 1 *Law Quarterly Review* 324; *Collected Papers*, i, 330.

<sup>25</sup> S. 324; *Coke on Littleton*, 200. b.

<sup>26</sup> Thus the right to enjoy (expressed in the form of a right of entry) of a person who has been ejected from his land lasts only as long as he makes 'con-

of right, to derive title from previous title and to recognize rights flowing from physical possession or enjoyment only in so far as such possession or enjoyment could be treated as a (deficient) form of ownership, of the assertion of a right. The early English lawyer looks primarily to the possession or enjoyment itself and sees rights as flowing from it. The assize of novel disseisin, the assize of mort d'ancestor and the other special assizes that followed all recognize only one ultimate way of establishing a right to enjoy—that is to show that you or your ancestor had enjoyed before the defendant or his ancestor and that your enjoyment was taken away unlawfully and without your consent, or before you had time to take seisin as heir. The extent to which rights were independent of title (in the sense of rightful claim to the enjoyment) and seen as flowing from the fact of enjoyment alone may be judged from the rights, powers and benefits that automatically accrue to the disseisor.<sup>27</sup> He may make a feoffment and convey an estate in fee simple even though he has disseised a tenant for life; the rights appendant to the estate go to him and he forms a stock of descent; his heir will inherit the property and his widow be entitled to dower, while if the disseisor be a woman, her husband is entitled to curtesy. The ordinary incidents of tenure affect the disseisor as though he had been a lawful tenant, and if the disseisor die without heir, the land will not escheat as long as the disseisor or his stock are seised. Bereft of their foundation in enjoyment, rights wither and die away.<sup>28</sup> The disseisee can neither make feoffment nor alienate the estate; he cannot assign and his heirs cannot inherit his right of action or his right of entry under continual claim; his widow cannot claim dower, and, if the disseisee be a woman, her husband is not entitled to curtesy.<sup>29</sup> So strong was the refusal to treat a right as something

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tinual claim', *i.e.* agitates on or about the land. The period for which he could do so was always limited, and as soon as it or his agitation had expired, he lost any direct right to enjoyment and was left only a *right to an action*.

<sup>27</sup> (1313) Y.B. 6, 7 Edw. 2 (S.S.) 189, *per* Scrope J.: 'the disseisor claimeth fee and right and freehold till his tort be proven.'

<sup>28</sup> *Partridge v. Strange* (1553) Plowden 78, 88; 75 E.R. 123, 140. Mountague C.J. said: 'At common law, he who was out of possession might not bargain, grant, or let his right or title, and if he had done it, it should have been void.'

<sup>29</sup> Thus, in 1218, a plaintiff who was seised under a tortious feoffment succeeded in novel disseisin against a true owner who had disseised the plaintiff; the owner, the Court held, may pursue in another way if he wants to: *Eyre Rolls* (S.S., vol. 53), no. 38. For detailed discussion of the nature of disseisin and its effects on the rights of the parties see Maitland, 'The Mystery of Seisin' (1886) 2 *Law Quarterly Review* 481, *Coll. Pap.* 1, 358 *et seq.* and 'The Beatitude of Seisin' (1888) 4 *Law Quarterly Review* 24, 286, *Coll. Pap.* 1, 407 *et seq.*; Ames, 'The Disseisin of Chattels' (1890) 3 *Harvard Law Review* 23, 313, 337, *Select Essays in Anglo-American Legal History*, III, 541, *Lectures on Legal History*, 172; Bordwell, 'Property in Chattels' (1915-1916) 29 *Harvard Law Review* 374, 501, 731; and Lightwood, *A Treatise on Possession of Land*, 42, 56. The assize of mort d'ancestor, in order to fill the lacuna by which any man might with impunity enter on land still vacant after a death,

abstract, incorporeal and detachable from physical fact, that even rights other than the right to enjoy could be established at law only by showing that they had been exercised and enjoyed. As Maitland puts it:<sup>30</sup>

A man is in seisin of land when he is enjoying it or in a position to enjoy it; he is seised of an advowson (for of 'incorporeal things' there may be seisin) when he presents a parson who is admitted to the church; he is seised of freedom from toll when he successfully resists demand for payment.

The conception that a man may be 'in possession' of a right is not part of our modern law; it was part of medieval law precisely because medieval law saw such rights as forms of enjoyment and therefore in physical terms.

The intimate fusion of right and enjoyment, with enjoyment forming the primary ground, comes out in the prescribed form of the transfer of land in ancient Germanic law. The transferor of land made a public but oral declaration of intention to transfer, known as the *sala*. To become effective in any way, the *sala* had to be followed by the *gewerida*: a ritualistic and actual transfer of the land, including the solemn handing over of material representing the land and of material symbolizing *dominium* over the land, followed by a formal abjuration on the part of the transferor and an actual entry on to the land and carrying out of acts indicative of ownership on the part of the transferee.<sup>31</sup> The English counterpart of these ceremonies, the feoffment and livery of seisin, brings out the same point; one cannot transfer a right to enjoy without transferring with it the actual physical enjoyment on which it is based. The transfer of the enjoyment may, when the law permits, be symbolic, but what is symbolized is the transfer of actual enjoyment and not the transfer of a right to enjoy. For it is not only that early

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had to recognize the passing of a *right* to seisin to the heir and to make this independent of the actual passing of seisin to him. But the heir's right was still grounded in his ancestor's seisin and was itself only the right to an action. The same is true of the later writs of entry: the demandant's right was grounded in his own previous seisin or that of his ancestor (or person through whom he claims).

<sup>30</sup> Pollock and Maitland, *op. cit.* ii, 34.

<sup>31</sup> See Thorne, 'Livery of Seisin' (1936) 52 *Law Quarterly Review* 345, 348, 352, for a fuller account of the early *sala* and *gewerida* and for reference to Continental and English research; also Pollock and Maitland, *op. cit.* ii, 84-86. Finch in his article 'Seisin' (1919) 4 *Cornell Law Quarterly* 1, in accounting for the concreteness of the ritual emphasizes the need in early law for 'some visible and suggestive ceremony which the transaction witnesses can see, which they can accurately and readily remember and which supplies the want of record and of writings' (at p. 2), and traces the effects of this requirement of visibility on all branches of law, dominated as they were, by the doctrine of seisin. But, as I suggest below, the valuable point that rights had to be visibly expressed must be supplemented by the recognition that rights stemmed from enjoyment.

Germanic and medieval English man cannot conceive of disembodied right; it is also that he insists that right cannot come into being or be transferred without the enjoyment on which it rests.

Seisin, then, for all its incorporation of a concept of right, is enjoyment. In asking whether a man has seisin, we ask whether he has actual physical enjoyment; in transferring seisin we transfer actual physical enjoyment. Logically, seisin incorporates right only because in English law enjoyment immediately and directly gives rise to right, at the least to the right of peaceful and quiet enjoyment against the trespasser and the thief. It is precisely because the concept of seisin is *not* founded on right that the thief himself can have seisin; it is because all proprietary and possessory rights ultimately stem from enjoyment that seisin lies at the very root of the development of the English law of property.

The logical implication of even fundamental concepts used in the law can be obscured or distorted by the social climate in which the law operates. In the twelfth century this might almost have occurred. The writ of right was in form a 'droitural' writ in which the demandant's pleading alleged a claim *in domico suo ut de feodo et jure*; as *Breve de Recto* it was brought in the Court Baron of the lord under whom the land was held, where the right could presumably be traced to its source in feudal authority and not simply in actual possession. The assize of novel disseisin, on the other hand, specifically focused attention on the fact of possession, and was tried in the Royal Courts. For a space of years this distinction may well have carried within it the seeds from which a distinction between proprietary and possessory actions in the Roman sense might arise. But the comparative lack and unreliability of records, the effect of the statutes of limitation in confining the tracing of rights within a certain period, and the fact that the tenant to a writ of right could not plead a *jus tertii*, all combined, even within this writ, to bring the claim back to evidence that the demandant or his ancestors had enjoyed seisin, collected rents and profits and had been wrongfully deprived by the tenant or his ancestors. At the same time, further assizes and writs of entry were being created—assizes and writs that invaded more and more of the ground covered by the writ of right while insisting even more firmly that the only basis of right was seisin, recent or remote. The writ of right, being the most technical and cumbersome of the real actions, full of essoins and liable to interminable delays through vouchers to warranty—fell into disuse and the doctrine that seisin was the basis of right was thus even more firmly established.<sup>32</sup>

<sup>32</sup> There must naturally have been some tension between what one might call the politically democratic concept of seisin and the importance in feudal society

The fact that seisin was fundamentally enjoyment and that right could arise only from enjoyment is fully confirmed by all the best-known rules of the law of real property,<sup>33</sup> as it is by the nature of the protection given to chattels in early English law. The ancient remedy by self-help, the raising of hue and cry, could only be used by him who had been in possession; trespass lay only for him who was in possession, and even the bailor-at-will could only sue under the fiction that he had possession. When the nineteenth century reformed the law of real property to allow rights to exist and to pass independently of possession<sup>34</sup> it thereby revolutionized the fundamental part of that law.

The early history of seisin is based upon maintaining an intimate connexion between the fact of possession and the rights that stem from it, but it treats the former as primary and this invites us to begin the study of possession in the common law by concentrating our initial attention firmly on the *legally recognized fact of possession*. Logically, one must be very careful indeed to keep this fact of possession clearly distinct from the various rights of or to possession. Rights may hold good against one person and not against another; they may stem from the present fact of possession, from a past fact of possession, or from title or previous right. *Prima facie*, this is not true of the fact of possession: initially, it enters the law *as a fact*, independent of any circumstances outside itself, true or

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of acquiring grants or enfeoffments from feudal superiors. There is little doubt that the charter of a great baron and the charter, word or deed of the King successfully put an end to rival claims. But the interesting point is that such feudal acts do not seem to become part of the law as a system; they rather suspend legal process, putting an end to litigation by the authority of power. Even later, when the law of real property had come to recognize rights existing independently of enjoyment, the inferiority of 'seisin in deed' to 'seisin in fact' shows the continuing weakness of right sans enjoyment within the law. Thus Bracton, who recognized a very high degree of royal power, but strove to bring as much of this power as possible *within* the law, wrote that royal charters may be questioned by no justice or private person, and that questionable interpretation and alleged falsifications and erasures must be brought *coram ipso rege*: see Bracton, 34, II, 109-110, and for a general discussion. Miller, 'The Position of the King in Bracton and Beaumanoir' (1956) 31 *Speculum* 263.

<sup>33</sup> This is the very theme of Joshua Williams' *Seisin of the Freehold* (1878) and of Lightwood's *Treatise on Possession of Land*, where ample confirmation may be found.

<sup>34</sup> The fifteenth century device of conveying land to X to the use of Y (in order to avoid feudal disabilities, dues and other incidents of tenure) created a situation in which equity but not common law came to recognize a right to seisin independently of having been put in seisin. The sixteenth century Statute of Uses, permitting greater freedom of open conveyance at the price of registration and payment of dues, sought to reunite seisin and right by giving the seisin to Y, but in doing so was in fact conceding a certain primacy of right. The involved history of its effect on the law, and its failure in the long run to maintain the union of seisin and right is traced in Plucknett, *A Concise History of the Common Law* (5th ed.), ch. 7, 575 and Holdsworth, *Historical Introduction to the Land Law* (1927) 151-166.

false against the whole world. It is something the law takes from life and does not simply impose on life; it is what Kocourek aptly calls an 'infra-jural relation'.<sup>35</sup> Though particular judges have failed to keep the logical distinction between the fact of possession and the rights of possession clearly before their minds, at least for the whole length of the case before them, early and modern cases nevertheless leave no doubt that English law does recognize such a fact of possession as logically distinct from the right or rights to possess,<sup>36</sup> and that it treats this fact of possession as having, by itself, a fundamental importance in the common law.<sup>37</sup>

The fact of possession on which we are placing such emphasis is in essence that state of affairs which Pollock calls '*de facto* possession' and which judges frequently refer to as 'mere' or 'actual possession'. Pollock defines this *de facto* possession as 'effective occupation or control',<sup>38</sup> a definition accepted but given some necessary elaboration by Holmes in his discussion of possession. 'To gain possession,' he writes,<sup>39</sup> 'a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent.' There must be a degree of power over the object,<sup>40</sup>

<sup>35</sup> Kocourek, *Jural Relations*, esp. 410-413, 419-420. Cf. Holmes, writing on possession in *The Common Law* at p. 214: 'Every right is a consequence attached by the law to one or more facts which the law defines. . . . When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights. . . . The word 'possession' denotes such a group of facts. Hence, when we say a man has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation.'

<sup>36</sup> See, among numerous cases, *Coverdale v. Charlton* (1878) 4 Q.B. D. 104, 127 (C.A.) *per* Cotton L.J.: 'The plaintiff in this case [an action for trespass] cannot rely upon any question of right independent of enjoyment by mere possession.' In *The Jupiter* (No. 3) [1927] 122, 135-136, the distinction is recognized and insisted upon as one of logical and not merely technical importance (*per* Hill J.). In fact, one has only to read some of the decisions in cases arising under the British Bills of Sale Acts, Rent and Mortgage Interest Restriction Act 1923, and other Acts where legislative provisions require the court to focus its attention on the question whether there is 'apparent' or 'actual possession', to see the immediate gain in clarity and logical consistency that results from the separation of possession from the right to possess. See, for example, *Ancona v. Rogers* (1876) L.R. 1 Ex. Div. 285, *Ex parte Fletcher* (1877) 5 Ch. D. 809, *Hall v. Rogers* (1925) 133 L.T. 44 and *Holt v. Dawson* [1939] 3 All E.R. 635 [1940] 1 K.B. 46.

<sup>37</sup> The term, 'right to possess', like the identification of seisin with enjoyment, suggests that possession normally appears in the law as an advantage and not as a burden. Holmes, in the citation above, also tends to treat it as such. But possession is equally important in the law relating to duties. In the relevant tortious actions, the plaintiff finds it necessary to prove a nexus between the defendant and the object causing harm: normally, this is possession. Thus, in cases of liability for damage done by animals where the *scienter* rule applies, only those who have possession-control of the animal can be liable: *North v. Wood* [1914] 1 K.B. 629; *Knott v. London County Council* [1934] 1 K.B. 126; Salmond, *Law of Torts* (12th ed.), 591 and Williams, *Liability for Animals* (1938) 324-326.

<sup>38</sup> Pollock and Wright, *Possession in the Common Law* 12.

<sup>39</sup> Holmes, *op. cit.* 216.

<sup>40</sup> *Ibid.* 216, 220. The power is the power to enjoy or use the thing and a man cannot have possession of things over which he has no such power, e.g. of wild animals roaming his land. But the degree of power is to be considered in the

an intent to exclude others from it<sup>41</sup> and a 'relation of manifested power to exclude others co-extensive with the intent' to do so.<sup>42</sup> The crucial thing here is the emphasis on power and control. Possession is not mere physical detention—such detention in pristine form rarely confronts the law (people do not keep their belongings chained to their wrists); such detention readily shades off into forms of control ('detaining' in one's house or one's office, for instance) and is practically useless as a fundamental concept on which to build a structure of rights and duties. Possession, one might say, is the present physical power to use, enjoy or deal with a thing, on one's own behalf and to the exclusion of all others. This definition, subject to the interpretative qualifications stressed in the preceding footnotes, comes close to accuracy, but misses one vital element: the requirement that a man should not only have the power, but should also will and intend it. The addition of the element of will and intent converts power into control, interpreted as a conscious, deliberate relation—a relation that requires us to know what we are doing in the same way as truly counting or speaking a language requires us to know what we are doing; a parrot can do neither. Our definition of possession, as a fundamental and general concept in the law, thus becomes: *Possession is the present control of a thing, on one's own behalf and to the exclusion of all others.*

Attempts to define 'possession' in general terms, and in terms of its factual content, tend not to command the respect of contemporary common lawyers. 'The idea of possession,' we read in Dias and Hughes,<sup>43</sup> 'is no longer tied to fact, and it has become a concept of the utmost technicality'. Mr D. R. Harris makes it the general thesis of his essay on 'The Concept of Possession in English Law'<sup>44</sup> 'that the English decisions preclude us from laying down any conditions, such as physical control or a certain kind of intention, as absolutely essential for a judicial ruling that a man possesses something.' The former statement, I submit, is false; the latter is true, but taken, as it is intended to be taken, as a platform and programme

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light of the control that can be exercised over the thing in question. Thus in *The Tubantia* [1924] P. 78, the limited control possible over a wreck at the bottom of the sea was recognized as sufficient for possession. As Lord Fitzgerald put it in another case—*Lord Advocate v. Young* (1887) 12 App. Cas. 544, 556: 'By possession is meant possession of that character of which the thing is capable.'

<sup>41</sup> *Ibid.* 220.

<sup>42</sup> *Ibid.* 216, 234, 235. The words 'manifested power' are meant to emphasize that secret power, future power or present intention to exercise future power are not sufficient to give possession. The law, however, does not use the term 'power' to mean 'capacity to deal with any possible or foreseeable eventuality.' A man's power may be very precarious indeed; as long as it has not been effectively challenged the law ignores its precariousness and recognizes his control as possession. This is the point of Holmes' example of the child gaining possession of a pocket-book under the nose of a powerful ruffian.

<sup>43</sup> Dias and Hughes, *op. cit.* 317.

<sup>44</sup> *Oxford Essays in Jurisprudence*, 69.

for legal inquiry, it is dangerously limiting and misleading. For the concept of possession that I have attempted to define above is, I shall argue, a concept of fundamental importance to the common law—a concept in terms of which, or against the background of which, all uses of the term ‘possession’ in the common law are to be explained and understood. Our emphasis on ‘control’, no doubt, simply transfers many of the problems arising in the definition of ‘possession’ to a different context: but it is precisely in this context of control, I should argue, that the problems can best be understood and the decisions best be made.

The general—factual—concept of possession, I have argued, is that in terms of which or *against the background of which* all uses of the term ‘possession’ in the common law are best understood. This is not to say that all uses of the term can simply be reduced to the general concept of possession with its emphasis on the fact of control. Firstly, there will be ‘constructive’ or simply confused uses of the term ‘possession’ where judges wish to award certain rights normally stemming from possession even though such possession does not exist.<sup>45</sup> Secondly, there will be areas in which technical rules have been established that modify, distort or make unusually rigid the criteria of possession used in the general concept—for example, the rules applied to the bailee breaking bulk or to the servant receiving from a stranger and in the modern development of larceny to cover cases where the initial receipt was not a ‘taking’.<sup>46</sup> Thirdly, the term ‘possession’ has often been used, unhappily, in the growing number of commercial cases where indicia of title and power to assume control over the disposition of the goods are far more important than the actual possession of the goods.<sup>47</sup> Fourthly, in a number of (normally penal) statutes, the term ‘possession’ will quite

<sup>45</sup> The confusion is especially evident in Hotham B., delivering the opinion of the Twelve Judges that a coach driver has possession of goods in the coach vis-à-vis thieves but not vis-à-vis the coachmasters: *R. v. Deakin & Smith* (1800) 2 Leach 862; 168 E.R. 530. Needless complication and confusion could be avoided by granting the right to prosecute for larceny to one who, through his charge, has a responsibility to keep the goods. In effect, this is what the Court did in *R. v. Harding* (1929) 46 T.L.R. 106, 21 Cr. App. Rep. 166.

<sup>46</sup> The modern developments in larceny, however, are best understood as part of a slow but definite movement away from treating offences against possession as the paradigm of reprehensible violence toward treating offences against title as the paradigm of reprehensible dishonesty. The distortions of the term ‘possession’ in larceny thus become temporary ways of masking the fact that larceny is becoming essentially an offence against title where it was once essentially an offence against possession.

<sup>47</sup> The use of ‘possession’ here masks the fact that the courts are concerned not with ‘possession’ but with ‘rights to possess or dispose’: the passing of indicia of title to goods in warehouses, ships, etc. makes the recipient not a bailee, but a bailor. It should be noted, despite common misinterpretations, that the important judgments in *Hiort v. Bott* (1874) L.R. 9 Ex. 86 specifically avoid imputing ‘possession’ of the goods in question to the recipient of the indicia of title, though they make him responsible for wrongful disposition as amounting, in the circumstances, to a type of conversion (which does not seem to require possession).

properly be construed by the courts in the context of the statute and its purpose, so that only certain *types* of control will come under the term. But we will illuminate or even understand none of these special situations if we treat them as no more than examples of arbitrary and disparate technical rules: illumination comes, I should argue, only when we match the decisions or rules against the general concept of possession and seek to explain why or how a departure has come about.

Keeping in mind our emphasis that 'possession' is an infra-jural relation, that it centres on the factual concept of control and that it has bred certain special concepts for limited circumstances, we are now in a position to account for the implausibility of earlier writers and the nihilism of modern ones, and to suggest the lines along which a systematic account of possession in the common law, which overcomes their difficulties and their criticisms and resolves the needless complexities of their terminology, can still be given.

Possession is an infra-jural relation. The common tendency to distinguish a 'lay' sense of possession from the 'legal' sense of possession, or *de facto* possession from *de jure* possession—in so far as it is not merely an attempt to distinguish the general concept of possession in law from the special, limited concepts—is therefore mistaken. One can no more distinguish *de facto* possession from the legally recognized fact of possession that makes up our general concept than one can distinguish the animal in nature from the animal recognized by zoology. The problem, rather, is that of the relation of a technical term to a fact—a specific case of the general problem of the relation between words and the facts they describe. Language is a classificatory system; it picks out and isolates those common features of things that men regard as important for some purpose or other. The things themselves having these features are infinitely complex, they fall into an infinite variety of other classes as well, they shade off into border-line areas which no system of classification can convert into sharp demarcations. The lawyer, like the zoologist, will want to draw the line somewhere: to that extent, he will need to make a decision and the decision will be influenced by the purposes for which his classification is made. But the line he draws will still be a line between objectively different facts or situations: the lawyer no more invents the characteristics of possession or control than the zoologist invents the characteristics of animals. In seeking to classify, both are no doubt forced to recognize complexities which few laymen have recognized—to that extent their use of terms like 'possession' or 'animal' displays a degree of sophistication not found in the layman's use and may diverge from it in a significant way. But there is not a lay animal and a zoolo-

gical animal, just as there is not a lay possession and a legal possession in the common law.<sup>48</sup>

The fact that possession is an infra-jural relation accounts for some of the difficulties that have accompanied the attempt to define it. The problems of describing and ultimately confining its nature are like those that arise in determining what is or constitutes consent and what amounts to a tenement, they are not like telling a man how to become a trustee or how to contract a marriage. Precisely for this reason we need a definition that is open-textured, that uses another infra-jural term like 'control' which gives a court guidance on the criteria to emphasize without tying it in a strait-jacket of formal definitions and concepts. This open-texturedness is to be found in other basic concepts in the law, such as that of 'reasonable care' in the law of negligence. A great deal of harm is done to the deliberate flexibility of the law when judges and lawyers begin to seek rigid rules of law as substitutes for the commonsense discretion deliberately left them, when they begin to erect 'the law' relating to liability in the handling of lime and mortar, or to the liability for children playing on a turntable. It must be said, that in the civil law judges have resisted this temptation in relation to the general concept of possession; one of the positive harms that could result from jurisprudential treatment of possession as a set of highly technical terms would be the gradual undermining of this resistance.

Possession, we have said, is a fact and not a right; it is an infra-jural and not a jural relation. When Earl Jowitt says that<sup>49</sup> 'English law has never worked out a completely logical and exhaustive definition of possession' he is rightly drawing attention to the indeterminacy or 'ambiguity' of the term; but this indeterminacy or 'ambiguity' is the normal indeterminacy and ambiguity of life, not the vicious indeterminacy and systematic ambiguity of an incoherent system or an inadequate principle.

To say that possession is a fact, not a right, is not to say that the existence of other rights, of the legal system and of the sanctions it imposes, cannot be part of the factual situation the law is considering. When I keep things in my house or on my land, even though it be unlocked or unguarded, I am taking advantage of the sanctions against trespass and the general respect for them; the existence of legal rights and duties and the moral respect for them thus become part, or at times even all, of the factual basis of my

<sup>48</sup> I have benefited, in this paragraph and the one that follows, from Dr. Eugene Kamenka's series of lectures on 'Logic, Ethics and the Law', delivered in the Faculty of Law, University of Singapore, during 1958-1959.

<sup>49</sup> *United States of America & Republic of France v. Dollfus Mieg et Cie S.A. & Bank of England* [1952] A.C. 582, 605.

control. On the other hand, when I place my goods on another's land, unbeknown to the occupier, or when I place them on a public highway, I place my control in jeopardy by neutralising, or turning against me, the sanctions applied against trespass. I do not thus automatically lose possession, but I do raise serious doubts about whether I have it.

Where the facts are uncertain or finely balanced in favour of either party, decisions still need to be made. Here, one must then look to normally extraneous considerations, to rights and even to policy, *i.e.* to the normative functions of law. Thus, where neither party has exclusive possession, possession goes to him who has better title.<sup>50</sup>

Possession, we have said, is control. Since there is no logical or legal reason why control cannot be exercised from a distance, there is no warrant for drawing a distinction, as though it were fundamental or logically necessary, between 'actual' and 'constructive' possession. Since there is no logical or legal reason why control cannot be exercised through another as an instrument, there is no warrant for distinguishing, as two separate types of possession with separate principles, 'mediate' and 'immediate' possession. Since 'control' is *per se* self-conscious and willed, there is no warrant for treating as odd or exceptional those cases in which intent is not singled out as a separate element, or in which the intent to control a thing is presumed from its attachment to or incorporation in something else that the possessor clearly controls and intends to control.

On our statement of control, it is clear that a servant acting *qua* servant has no possession.<sup>51</sup> This, indeed, is the general line taken by the courts; the tendency, in earlier law, to ascribe possession to a servant carrying goods for his master abroad, is to be understood as the courts' recognition of the weakening of the master's control, of the fact that the servant will now have to meet situations independently and thus become more like a bailee.<sup>52</sup> The common law

<sup>50</sup> Littleton, s. 701, and Maule J.'s well-known dictum in *Jones v. Chapman* (1847) 2 Ex. 803, 821. In *Wuta-Ofei v. Danquah* [1961] 3 All E.R. 596, a Privy Council appeal from Ghana, their Lordships accepted tenuous evidence for possession on the basis that there was very full evidence of title, though here title was taken as creating a factual presumption in favour of intention to control.

<sup>51</sup> As Coke puts it the servant has no possession but only a 'charge': *Third Institutes*, 108; the courts have accepted this principle, but have frequently obscured its force, by saying, in the course of finding possession for the master, that 'the servant's possession is the master's possession': *Gordon v. Harper* (1796) 7 T.R. 10, 12, 101 E.R. 828, 829, *per* Grose J.; *Ward v. Macauley* (1791) 4 T.R. 489, 490, 100 E.R. 1135, *per* Buller J.; *Ward v. Turner* (1752) 2 Ves. Sen. 431, 28 E.R. 275; *Anonymous* 1 Salk. 289, 91 E.R. 256, *per* Holt C.J.

<sup>52</sup> The fluctuations in the law on this point directly reflect the relevance of communications and commercial practice (*e.g.*, suing on uninsured goods) to the central issue of control. In earlier times, the comparative factual independence of

principle that a servant receiving on behalf of his master from a third person has 'original, exclusive and lawful possession' till he brings the thing to his master or puts it in 'the place of ultimate deposit', is less easy, to understand. The 'place of ultimate deposit', it is true, suggests our own emphasis on control: its importance is not that the *place* is in the control of the master (it may be a wheelbarrow in the hands of the servant) but that the servant's act in placing it there is visible confirmation that he is acting *qua* servant and submitting to the master's control. Would it not be more consistent to say—admittedly in the face of precedent—that in receiving the goods *qua* servant to deal with 'in the course of his employment' the servant has already made such submission and brought the goods within his master's possession.<sup>53</sup>

The distinction drawn by the courts between receipt from the master and receipt from a third person no doubt partly also rests on the initial difficulty they felt in ascribing to the master control over goods of the existence of which he may not be aware. This difficulty has been felt in other areas of possession as well. Its intricacies can hardly be dealt with in this paper, but I should like to submit that the general approach to the question, least disturbing to the general concept of possession, can best be based on the proposition that

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the servant abroad was reinforced by the desirability, in the master's own interest, of allowing the servant to sue the trespasser and prosecute the thief without the delaying resort to the master's instructions; in modern times, even the master of the ship in radio communication with the owners becomes a servant and not a bailee. In *The Jupiter* [1927] P. 122—not following *Pitt v. Gaince* (1700) 1 Salk. 10, 91 E.R. 10 and *Moore v. Robinson* (1831) 2 B. and Ad. 817, 109 E.R. 1346—Hill J. specifically refers to the greater control exercisable in modern conditions as reason for rejecting the authority of previous cases and finding that the master of the ship has only the *custody* of the ship and cargo. The distinction between the servant and the bailee, and a crucial test of the existence of bailment, is the bailee's power to exclude the whole world, including the bailor, until the bailment be determined, while the servant has no power to exclude the master at any time. See Tay 'Bailment and the Deposit for Safe-Keeping' (1964) 6 *Malaya Law Review* (December).

<sup>53</sup> The view that a servant finding 'in the course of his employment' brings the thing found directly into the possession of his master has indeed entered the law. In *McDowell v. Ulster Bank* (1899) 33 Ir. L. Times 223, where the Court awarded the Bank possession of a parcel of banknotes found by the porter-plaintiff when sweeping out the Bank after business hours, Palles C.B., said: 'I decide [this case] on the ground of the relation of master and servant, and that it was by reason of the existence of that relationship and in the performance of the duties of that service, that the plaintiff acquired possession.' (Judges, alas, will be loose in describing the decision which they have reached with great care: what Palles C.B., had decided, as he himself makes clear, is that the plaintiff did *not* acquire possession.) The Irish decision is quoted with respect and approval by Dixon J. (as he then was) in the Australian case *Willey v. Synan* (1937) 57 C.L.R. 200, esp. 216-217, and both cases are approved in an *obiter dictum* of McNair J. in *Corporation of London v. Appleyard* [1963] 2 All E.R. 834, 838, [1963] 1 W.L.R. 982. See Tay 'Possession, Larceny and Servants: Towards Tidying Up an Historical Muddle', to be published in the *University of Toronto Law Journal*, January 1965.

control of an object not specifically known is possible, through its entering a wider sphere that is known and controlled.<sup>54</sup>

The departure from the factual conception of control can be seen in the 'special' concept of possession created in the developed law of larceny. Here, the criminal requirement of *mens rea*—formulated strongly as 'intent permanently to deprive'—is conjoined with the requirement of taking from the victims possession, and since the law holds (with some exceptions) that there is no larceny when the guilty intention is formed *after* the taking, judges have distorted the general concept of possession in order to be able to postpone the moment of 'taking' to the moment when the guilty intent is formed and thus convict. They have been able to do so by going beyond the intent implied in control to the new requirement of intention permanently to hold (or, in the case of carriers, by drawing a wholly unreal distinction between possessing a package and possessing its contents).

Here, then, we have a true special concept arising from the distorting influences of criminal policy. Another important special concept arises more directly out of the nature of social life. Precisely because the law ascribes rights on the basis of the *fact* of possession, no matter how acquired, it is anxious not to recognize non-consensual acquisition of possession (*i.e.* the force of might) too quickly. Hence the concept of 'adverse' possession and the special, stricter, criteria applied in favour of the original possessor—his benefits of continual claim, right to re-entry, *etc.*—all amounting to the proposition that 'possession' or 'control' in the case of non-consensual possession requires not only domination but also submission.<sup>55</sup>

<sup>54</sup> This proposition is established in *Elwes v. Brigg Gas Co.* (1886) 33 Ch. 562 and *South Staffordshire Water Co. v. Sharman* [1896] 2 Q.B. 44. Precisely because the finding cases are concerned with difficult decisions relating to possession and control—cases where there is absence of specific knowledge and doubt relating to intention—it is in these cases, since *Bridges v. Hawkesworth*, that the concept of possession has been most coherently developed. This process of conceptual development comes out very clearly in a recent Canadian case, *Grafstein v. Holme and Freeman* (1958) 12 D.L.R. (2d) 727, where the Court reviews the earlier development as the development of criteria of possession and insists that there is no special law of finding. *Bridges v. Hawkesworth* (1851) 21 L.J.Q.B. 75, 15 Jur. 1079, I have argued elsewhere, fails to concentrate on the issue of possession because it fails to break loose from formal requirements arising from the early action of detinue; the learned judge was concerned not with the question of the occupier's control, but with the absence or presence of a *delivery*, by which the possession could pass. As far as the modern English law of finding is concerned, a careful study of the relevant cases makes it clear that the decisions do form part of the working-out of a concept of possession, and that those writers who think that these decisions are to be explained in terms of a 'judicial policy' for or against the finder on grounds that are not primarily legal simply fail to grasp the character of the development and the nature of the problem that the judges were in fact tackling. See Tay, "Bridges v. Hawkesworth" and the Early Law of Finding' in (1964) 8 *American Journal of Legal History* and Tay, 'Possession and the Modern Law of Finding', (1964) 5 *Sydney Law Review*.

<sup>55</sup> This requirement is discussed in detail by Thayer, 'Possession and Ownership' (1907) 23 *Law Quarterly Review* 175, 314.

Other special concepts of possession arise from the special requirements of special areas of social life, particularly from protections required for commercial arrangements. But in each case, I submit, the resultant criteria cannot be understood unless we take into account both the distorting requirements and policies and that general concept of possession as the fact of control which the law treats as fundamental and primary.