POSSESSION AND THE MODERN LAW OF FINDING

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I

"The finder's right," as Sir Frederick Pollock remarked,[1] "starts from the absence of any *de facto* control at the moment of finding." It is the failure to consider possession from the point of view of *de facto* control—a control which may exist where there has not been an intentional delivery of possession—that sharply distinguishes the decision in *Bridges* v. *Hawkesworth*[2] from the subsequent English and Commonwealth cases on finding. In all these subsequent cases, possession is consciously considered as an issue of fact, fundamentally important in the dispute between finder and occupier, and capable of coming into being independently of intentional bailment, consent, or previous right.

Patteson, J., in *Bridges* v. *Hawkesworth* and the learned judge in *Armory* v. *Delamirie*,[3] which Patteson, J. cited as authority, agreed that there was a general principle of Common Law that the possession of the finder is good against the whole world except the true owner. This principle, by itself, has no value in a dispute between "finder" and occupier. It is torn, with some violence, out of the works of Coke, Hale and Blackstone, where the context makes it clear that the learned writers were thinking of the thing found as having previously been utterly out of anyone's possession, as having returned to a state of nature save for the continuing interest of the true owner. This dispute between "finder" and occupier has nothing to do with the rights of the finder: the whole dispute is whether there was a finding or whether the chattel, when taken, was already in someone's possession. Neither the civil nor the criminal law before *Bridges* v. *Hawkesworth* had thrown up any authorities for resolving such an issue.[4] *Armory* v. *Delamirie* is not a case on this issue; as many writers

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[1] Sir F. Pollock and Sir R. S. Wright, *Possession in the Common Law* (1888) 40.

[2] (1851) 21 L.J.Q.B. 75, 15 Jur. 1079. The facts are well-known: the plaintiff, a commercial traveller who had regular dealings with the defendant, the proprietor of a shop, picked up a parcel of banknotes on the floor of the shop in a portion open to customers and handed the notes to the proprietor who was to endeavour to trace the owner. When no owner came forward, the plaintiff sued for the value of the notes. Professor A. L. Goodhart has exposed the frequent falsifications of the grounds on which the Court held in favour of the finder in his "Three Cases on Possession", *Essays in Jurisprudence and the Common Law* 75-90, and (1928) 3 *Camb. L. J.* 195.

[3] (1722) 1 Str. 505, 93 E.R. 664.

[4] I have endeavoured to study the earlier history of finding and its relation to *Bridges* v. *Hawkesworth* in detail elsewhere. Suffice it to say here that both in the civil and the criminal context the authorities before 1851 are exclusively concerned with the dispute between the "finder" and the owner or a person with previous derivative right. Early law saw possession as passing in only one of two ways: by violence or by consent. The main issue discussed in the Year Books is whether taking by finding be trespass or not, and what duties or liabilities vis-à-vis the owner follow in either case. One line of decisions saw such taking as trespass (since there was no consent) but gradually made the taking excusable if the object found were in jeopardy ("the law of charity", which was also applied to other instances of trespass). Another line of decisions relied on the 14th century development of detinue on a *devenerunt ad manus*. Here, the owner, without alleging any bailment to or any unlawful taking by the finder, could simply sue him for having failed to comply with a demand for delivery based on a rightful claim. This second line of decisions grew into a special form of pleading, detinue *sur trover* which soon became the action of trover; but as trover became fictionalised, disputes between true finders and owners found their place in detinue *sur bailment* with its emphasis on (in this case implied) delivery and consent. In the criminal law, the question was whether the "finding" was a

have pointed out, it is not a case of finding at all. The facts before the Court were that a chimney-sweep who had found a ring with a stone took it to a jeweller to have it valued; the jeweller's apprentice who received the ring for this purpose prised out the stone and refused to return it. In finding for the chimney-sweep, the Court was not vindicating the rights of a "finder" but the rights of a *possessor* who could even have been a thief against anyone except a previous possessor with better right to have possession.

This is not to say that in *Bridges* v. *Hawkesworth* Patteson, J. simply failed to consider whether the occupier had possession of the banknotes on the floor of the shop. But he dealt with the question of possession not by considering the presence or absence of effective control, but in terms of the strict concept of bailment developed within the action of detinue—a concept of bailment prevalent at his time but treated with much greater suspicion since. Was there an "intentional deposit" of the banknotes, he asked, that is, was there a *delivering* by which possession passed to the shopkeeper? If not, was the shopkeeper in the position of an innkeeper, having a legal duty to his customers, that is, was there a bailment created by licence or authority of law? No; then there is no possession in the shopkeeper before the finding.

Counsel in the case, it is true, made some attempt to go beyond this technical approach toward a theory of possession. Significantly, they could not yet find it in the Common Law and had to look to the Continental jurisprudence. Counsel for the finder drew attention to Savigny's doctrine of prehension (that is, acquiring possession by taking);[5] counsel for the occupier very properly pointed out that prehension is not the only way of acquiring possession in Savigny and that "possession of a thing may be acquired simply by the fact of its having been delivered at one's residence, even though we are absent from the house at the time".[6] But the abolition of the forms of action, begun in 1833, was not yet complete and the search for unifying principles of law took time to get under way. Not till the 1880's did the new movement, partly also influenced by the 19th century flowering of jurisprudence in Germany, produce the first writings on possession in the Common Law world. These writings drew unequivocal attention to the factual basis of possession and to component factors of such possession that were not reducible to, or tied to, formal or procedural requirements. It is these writings and the climate they created that account for the conceptual leap between *Bridges* v. *Hawkesworth* on the one hand and *Elwes* v. *Brigg Gas Co.*[7] and *South Staffordshire Waterworks Co.* v. *Sharman*[8] on the other. Where Patteson, J. in his judgment simply brushed aside counsel's attempt to get some conceptual argument from Puffendorf and Savigny,[9] Lord Russell of Killowen in *Sharman's Case* cites

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felonious taking and this question was resolved by a specifically criminal principle that the taking was felonious if the "finder" had reason to believe, from the appearance of the object found and the circumstances of the finding, that there was an owner who could reasonably be traced. The concern with delivery and consent as essentials of bailment in the civil law of finding, coupled with this focusing of attention by the criminal law on the character in which the object is found, tended to support the distinction between "lost" and "misplaced" objects suggested by Patteson, J. in *Bridges* v. *Hawkesworth* and developed as the basic principle in the U.S. decisions on finding. For a fuller discussion of the development before *Bridges* v. *Hawkesworth* see my "*Bridges* v. *Hawkesworth* and the Early History of Finding" to appear shortly in the *American Journal of Legal History*, and for an examination of the U.S. development my "Problems in the Law of Finding: The U.S. Approach", (1964) 38 *A.L.J.* 350.

[5] F. C. von Savigny, *Possession in the Civil Law* (6 ed., trans. by Sir Erskine Perry) 170.

[6] *Op. cit.*, 169.

[7] (1886) 33 Ch. Div. 562.

[8] (1896) 2 Q.B. 44.

[9] "We were referred, in the course of the argument, to the learned works of von Savigny, edited by Chief Justice Perry; but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution to the present questions": (1851) 15 Jur. 1079 at 1082.

from Pollock and Wright "the principle on which this case must be decided".[10]

II

In *Elwes* v. *Brigg Gas Co.*, the plaintiff had leased to the defendants certain land for 99 years, reserving to himself all minerals, but authorising the defendants to erect a gasholder on the land. In the course of excavations for the foundations of this gasholder, the defendants discovered a prehistoric boat embedded in the soil four to six feet below the surface, and duly contested the plaintiff's claim to the boat. The facts of the case, in short, were such as to encourage a technical treatment of the problem. This, indeed, was the line taken at the Bar, counsel for the plaintiff arguing that the boat should be treated either "as something in the nature of a mineral" or as a thing "annexed to the land" to which the real property principle *Quicquid plantatur solo, solo cedit* applies. The defence saw the boat as being more like a "dotard", but essentially argued it to be simply part of the "spoil arising from the excavations". Chitty, J., however, insisted on treating the issue generally: "The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease."[11] If it were a mineral or attached to the land, it would have belonged to the plaintiff at that time by virtue of his title to the land. But if it were a chattel, the plaintiff would have to base his claim that the boat belonged to him when the lease was granted on his having actual possession and the absence of any other owner. Chitty, J., though prepared to hold that the boat was not a mineral, felt no need to decide what it was since he was able to find for the plaintiff even on the weakest of the three claims:

> But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. . . . The plaintiff, then, being thus in possession of the chattel, it follows that the property in the chattel vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff, then, had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference, in these circumstances, that the plaintiff was not aware of the existence of the boat.[12]

In support of his view, Chitty, J. cited *R.* v. *Rowe*[13] (where a canal company was held to have sufficient possession, for an indictment for larceny, of iron dropped by unknown persons and lying at the bottom of its canal) and—significantly—Holmes' lecture on Possession in *The Common Law*. The question that remained, if the boat were a chattel, was whether the lease passed the rights to it, and Chitty, J. held that an implied permission in the lease to cart away spoil from the excavations should not be interpreted to cover what was unknown and not contemplated by the parties.

The rule which *The Jurist* found in *Bridges* v. *Hawkesworth*—"The place in which a lost article is found does not constitute an exception to the general rule of law, that a finder is entitled to it as against all persons except the

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[10] (1896) 2 Q.B. 44, 46.
[11] (1886) 33 Ch. Div. 562, 568.
[12] *Ibid.* at 568-9.
[13] (1859) 28 L.J.M.C. 128, Bell, C.C. 93, 169 E.R. 1180.

owner"—fortunately had no influence on *Elwes* v. *Brigg Gas Co.* Chitty, J. had no hesitation in seeing that the fundamental issue was whether the "found" object had been in the possession of the lessor before "finding" by the lessees. The facts of the case, it is true, encourage one to think of the boat as being like an attachment or accretion to land and not like an article dropped on the highway; Chitty, J. makes no reference to finding or to the rights of the finder anywhere in the case. But Chitty, J., as we have seen, specifically considered the situation that would arise if the boat were a chattel, that is, if it were a lost or abandoned object found in the land.

It is impossible to read Chitty, J.'s judgment without feeling that the learned judge has approached the issue before him in terms of a general theory of possession. This does not mean that the theory is embodied in the judgment. Chitty, J. decided that the plaintiff was in possession of the boat because he was in possession of the land within which the boat was contained. In possessing land, Chitty, J. held, a man possesses not merely the surface of the land but everything beneath it down to the centre of the earth. Chitty, J.'s reasoning rests on the proposition that in possessing a volume a man possesses everything within that volume, whether he knows of its particular existence or not. In support of this (tacit) proposition, he noted that any interference with the boat (that is, with the thing contained in the volume) would necessarily be an interference with the possession of the land (that is, of the volume as a whole).

The proposition about volumes is limited in *Elwes' Case* in one very important way. Chitty, J. had occasion to consider only the volume which extends downward from the surface of the land; he says nothing of things resting on top of the land or contained in the volume extending upward. Some of his supporting argument—the necessary spoil and waste of the land in attempting to reach the boat—would not apply to the volume above.[14]

In *South Staffordshire Water Co.* v. *Sharman* this limitation is overcome and the issue of possession is put on a still broader conceptual basis. The defendant-respondent, under the orders of the plaintiffs-appellants, cleaned out a pool of water on their land and found two rings which he refused to surrender. When the true owner failed to come forward, the plaintiffs brought an unsuccessful action in detinue claiming the rings. Reversing the judgment on appeal, Lord Russell of Killowen, C.J., said:

> The plaintiffs are the freeholders of the locus in quo, and as such they have the right to forbid anybody coming on the land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must shew that they had actual control over the locus in quo and the things in it; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion, they were. The case is like the case, of which several illustrations were put in the course of argument, where an article is found on private property, although the owners of the property are ignorant that it is there . . . (T)he general principle seems to me to be that where a person had possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or

[14] Chitty, J.'s method of dealing with the case, in his tacit reliance on the proposition about volumes, strongly suggests that he was arguing on the analogy of the maxim relating to rights of owners of land: *Cuius est solum eius est usque ad coelum usque ad inferos.* But if so, he did not press the analogy the full way, and it is perhaps even more interesting to note that he made no attempt to apply the maxim directly as a way of finding simply that ownership of the boat lay in the owner of the land; on the contrary, he specifically brought the issue on to possession.

in it, then, if something is found on that land, whether by an employee or the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.[15]

In the process of reaching this principle, it is true, Lord Russell, C.J. gave himself some curious directions. He distinguished *Bridges* v. *Hawkesworth*, claiming that it rested on the ground that the notes had been dropped in a public part of the shop—a ground to which Patteson, J. made no reference whatever and which the principles on which he did reach his decision repudiate as irrelevant. Lord Russell, C.J. also quoted, as authority for the principle on which he decided *Sharman's Case*, a passage from Pollock and Wright which specifically limits this principle to things attached to or under land.[16] Nevertheless, the decision he reached is a fortunate one; it provides a coherent basis for possession in the concept of control and thus gives us a general principle on which disputes in the finding cases can be resolved.[17]

It should be noted that *Sharman's Case* does not provide direct warrant for the concept of "mediate" possession in terms of which Sir John Salmond preferred to justify the decision.[18] Lord Russell, C.J. treated the fact that the defendant-respondent was cleaning out the pool under the orders of the plaintiffs-appellants as evidence that the latter both intended to control the pool and actually controlled it through the defendant; this evidence seems to go toward refuting Salmond's claim that "the rings found at the bottom of the pond were not in the company's possession in fact; and (that) it seems contrary to other cases to hold that they were so in law". (The only direct case this would be contrary to is *Bridges* v. *Hawkesworth*, while Salmond is driven to reject the reasoning of both *Elwes'* and *Sharman's Case* by his narrow insistence on specific *animus* based on knowledge of the thing as a necessary element for ordinary possession.) This is not to say, however, that *Sharman's Case* could not also have been decided for the plaintiffs-appellants on the ground of "mediate" possession, that is, on the ground that the servant, in picking up the

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[15] (1896) 2 Q.B. 44, 46-7.

[16] Sir F. Pollock and Sir R. S. Wright, *op. cit.*, 41.

[17] The movement, even in *Elwes' Case*, away from a technical use of "attachment" toward the general question of control is recognised and developed in an interesting American case on trespass: *McKee* v. *Gratz* (1922) 67 L. Ed. 167, 23 A.L.R. 1393, 270 Fed. 713, 260 U.S. 127, 43 Sup. Ct. Rep. 16. The plaintiff-respondent was owner of land on both sides of non-navigable water in which mussels are found; trespassers had collected mussels, piled them up in a large heap on his land and later carted them away. The plaintiff, suing in trespass for the value of the 300 tons of mussels involved, had judgment against him in the court of first instance; the judgment was reversed on appeal and the reversal was upheld in the Supreme Court. Delivering the opinion of the Court, Mr. Justice Holmes said: "As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within the meaning of the Missouri Statutes, or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of landowner or state. Such birds and fishes are not even in the possession of man. . . . On the other hand, it seems not unreasonable to say that mussels, having a practically fixed habitat and little ability to move, are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered underground, or unknown property at the bottom of a canal. . . . This is even more obvious as to the shells, when left piled upon the bank, as they were, to await transportation" (169-70). At first sight, the last sentence seems somewhat curious: one might have thought that the learned judge found possession of the mussels to be in the plaintiff because they were "sunk" or virtually sunk (like rings in mud) in his land and it would then seem odd to think that a heap piled on top of land is even more obviously in his possession. The oddity disappears, however, if we take the learned judge to be concentrating—like Lord Russell, C.J., in *Sharman's Case*—on the control over an area that a man exercises by possessing and controlling land. Such a man does not merely control the land and its "attachments" in the technical sense; failing evidence to the contrary, he controls everything within that area save for such things as are by their nature not amenable to such control, as can pass in and out of the area at their will.

[18] Sir J. Salmond, *Jurisprudence* (7 ed., 1924) 307. Salmond's treatment of the case is also criticised in A. L. Goodhart, "Three Cases on Possession", in his *Essays in Jurisprudence and the Common Law* 75-90 at 87 and in (1928) 3 *Camb. L.J.* 195.

rings in the course of his duties of cleaning the pool, picked them up for the plaintiffs and rendered them into their possession. This, indeed, was the view taken some years later in an Irish case, *McDowell* v. *Ulster Bank*,[19] in which the Court awarded the Bank possession of a parcel of banknotes picked up by the plaintiff, a porter, on the floor under a table used by customers when writing cheques, after business hours when he was sweeping out the Bank. In this case, Palles, C.B. specifically said:

> I do not decide this case on the ground laid down by Lord Russell in *Sharman's Case*. I decide it 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 of this property.[20]

In an Australian case, *Willey* v. *Synan*,[21] one of the many issues involved was whether a bag of coins discovered in a ship by the boatswain during a search for stowaways ordered by the captain came into the possession of the boatswain. Dixon, J. (as he then was), referring with approval to the Irish decision, held it did not, saying:

> When the plaintiff, as the ship's boatswain, discovered the coins and handed them to the master, he was the instrument by which this opportunity for control and disposal was displaced (from the owner or agent who had hidden the coins) in favour of the master. It does not appear what passed between the boatswain and the master when the latter took the coins into his keeping. But it is not to be supposed that the plaintiff asserted any independent possession of his own. The concealment of goods on a ship for the purpose of clandestine carriage is a matter that concerns the master and owners. It would be inconsistent with the duties of a member of the ship's company to deal with goods so concealed on his own account. Although it may be taken that he found the coins, it does not appear that he took even manual custody of the bag of money. But if he did, it could amount only to custody and not to possession. The possession taken was that of the owners, unless it be still true that the ship is in the possession of the master.[22]

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[19] (1899) 33 Ir. L. Times 225.

[20] The terminology here, alas, is slovenly again. What Palles, C.B. was really deciding is that by reason of service *etc.* the plaintiff did *not* acquire possession, but only a custody.

[21] (1937) 57 C.L.R. 200.

[22] *Ibid.* at 216-7. In a very recent English case, *Corporation of London* v. *Appleyard* (1963) 2 All E.R. 834; (1963) 1 W.L.R. 982, to be discussed *infra*, one issue, which proved not germane to the decision, was whether the finders of money in a safe who were servants of W, an independent contractor hired by Y, found for themselves, for W or for Y. McNair, J., referring with approval to *McDowell* v. *Ulster Bank*, *supra*, and *Willey* v. *Synan*, *supra*, says that if called upon he would have held that they had found for W. Unfortunately, he expresses the principle upon which he bases this view as the servants' "legal obligation to hand the notes over to—as being their principals" (All E.R. at 838) and in the cases cited as authority confuses the servant receiving into the master's possession with the servant having to recognise the master's title.

The principles involved in finding by servants were grasped somewhat more accurately in an earlier Canadian case, *Haynen* v. *Mundle* (1902) 22 Ca. L.T. 152 (Ont.). The Court awarded possession of an unclaimed roll of banknotes lying on the floor of a shop to the shop's salesman who picked it up against the shopkeeper and distinguished *McDowell* v. *Ulster Bank* on the ground that picking up things from the floor was part of the bank porter's duties and not part of the salesman's. The test seems to me sound, though the Court perhaps failed to apply its mind to the question whether the salesman's duty was not generally that of looking after the shop and everything in it and not merely that of selling goods. At the same time, by recognising that *Bridges* v. *Hawkesworth* should not be treated as creating a sound general rule for finding in shops, the Court might have asked whether the notes were not already in the shopkeeper's possession through his being an occupier in effective control of the premises, in which case, any finder—servant or not—has a duty to surrender to him.

III

The principle on which *Sharman's Case* was decided represents the final freeing of the concept of possession and the law of finding from the fragmented, technical considerations of the past. In accepting the emphasis on control as primary, we do not need to pretend that control-situations can be exhaustively enumerated or rigidly defined. Control is a self-conscious relation: it requires both a certain amount of exercised physical power and a manifest intention to exercise this power, which may often be presumed from the exercise itself. Possession, thus, is not mere physical detention; it is the present physical power and the present manifest intention to use, enjoy or deal with land, premises or things on one's own behalf and to the exclusion of all others. I exercise such physical power and at the same time manifest my intention to control when I inspect my land, lock my front door, tell my servant where to put various things, arrange things in a pile or cover them with leaves for safe-keeping. Where there are gaps in my actual physical control (for no man can be in all places at once or turn his attention to everything in his house) my intention to control will bridge them. Thus I control some parts of my land; in doing so, I am presumed—unless there be evidence to the contrary—to intend to control all of it; my possession thus comes to pervade the whole of the land, extending to things in the area of my possession that I may not even know to exist. It is the force of this presumption which the principle enunciated by Lord Russell recognises; in setting aside the relevance of the claimant's specific knowledge of the thing on his land, Lord Russell cuts through the conception of a special "law of finding" governing the conflict between the claims of the "finder" and occupier and brings this conflict within the general law relating to possession. The setting aside of the relevance of knowledge at the same time helps to further the development of a subtler concept of possession out of the excessively concrete, visual notion of control found in the early history of seisin. In an unsettled society, it was important for a man to be there; in modern conditions, with an organised police force, registered titles and a much greater acceptance of legal rights, the actual exercise of bodily power plays less and less rôle as a means of control.[23]

The value of the principle in *Sharman's Case* and of Pollock's definition of *de facto* possession in enabling courts to cut through the tangled conception of a special "law of finding" comes out clearly in a recent Canadian case, *Grafstein v. Holme and Freeman*.[24] There, the Ontario Court of Appeal had before it the following facts: the respondent-plaintiff was the owner and occupier of certain premises and the employer of the two appellants-defendants, who worked for him in the capacity of general cleaners. In the course of clearing out a basement on the premises, Holme discovered a locked metal box among the rubbish and brought the box to his employer who told him to put it on a shelf, admitting that it was not his and saying it might be a carpenter's box of tools. The box lay on the shelf for two years during which the employer seemed to have forgotten all about it. Finally, Holme and Freeman, through curiosity, broke the lock and opened the box, whereupon they found rolls of banknotes amounting to about $38,000. They showed the money to the employer who handed it to the police, but no owner came forward. In an action brought by the employer to determine the right to the banknotes, the trial judge held in his favour. Upholding the original decision, LeBel, J.A. said:

But it does not follow that because the money was lost that the appellants

[23] For a fuller discussion of possession as a jurisprudencial concept and its general role in the Common Law, see A. E. S. Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach", to appear in the *University of Melbourne L.R.* for November, 1964, and the comment by Mr. D. R. Harris to appear in the same issue.

[24] (1958) 12 D.L.R. (2d Series) 727.

> are the "true finders", even though they first discovered that the box contained the small fortune it did. To be true finders it must be held that they came into *de facto* possession of the money at a time when no one else had possession of it. "The finder's right," as Sir Frederick Pollock put it, in Pollock and Wright's *Possession in the Common Law*, p. 40, "starts from the absence of any *de facto* control at the moment of finding." At p. 12 he says, "*De facto* possession, or Detention as it is currently named in Continental writings, may be paraphrased as effective occupation or control." He continued a little further on to say at p. 13: "We may say then that, in common understanding, that occupation at any rate is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment. Much less than this will often amount to possession in the absence of any more effectual act in an adverse interest. Indeed it seems correct to say that 'any power to use and exclude others, however small, will suffice, if accompanied by an *animus possidendi*, provided that no one else has the *animus possidendi* and an equal or greater power'. To determine what acts will be sufficient in a particular case we must attend to the circumstances, and especially to the nature of the thing dealt with, and the manner in which things of the same kind are habitually used and enjoyed. . . . Further, we must attend to the apparent intent with which the acts in question are done. An act which is not done or believed to be done in the exercise or assertion of dominion will not cause the person doing it to be regarded as the *de facto* exerciser of the powers of use and enjoyment."[25]

In considering whether the plaintiff-respondent had such *de facto* possession, LeBel, J.A. relied on the rule in *Sharman's Case* as supporting the "natural" presumption in favour of the occupier, noted that the occupier had in fact taken specific possession of the box and assumed control over it when Holme brought it to him and held that in taking possession of the box the occupier also took possession of the contents, since he assumed control of, and responsibility for both.

The application of Pollock's criteria of *de facto* possession has worked equally well in a very recent English case, *Corporation of London* v. *Appleyard*.[26] The somewhat involved facts were as follows: Two workmen employed by W. Ltd., building contractors, on a building operation on the site of a building being demolished, found in the course of their work an old wall safe built into the wall of the cellar; inside was a wooden box containing banknotes to the value of £5,728, the owner of which did not come forward. The freeholders of the site of the building were the Corporation of London; but before the building operation began V. Ltd. had purchased the residue of the lease with Y. Ltd. financing the purchase. V. Ltd. (as leaseholders) and Y. Ltd. (as contractors) then entered into an agreement with the Corporation (as freeholders) under which Y. Ltd. undertook to erect a new building on the site and the Corporation to grant a new lease. A clause of the agreement, immediately operative, provided that "Every relic or article of antiquity rarity or value which may be found in or under any part of the site" should belong to the Corporation. Y. Ltd. then entered into a building contract with W. Ltd., who were in law independent contractors. The question before the Court, as it recognised, was whether the banknotes were in the possession of any of the parties before the finding and whether the Corporation, if not the party in possession, had any derivative rights under the agreement in respect of such possession. The learned judge, McNair, J., held:

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[25] *Ibid.* at 732.
[26] (1963) 2 All E.R. 834; (1963) 1 W.L.R. 982.

> On the facts here, the notes were found in a wooden box within a safe built into the wall of the old building. It seems to me to be clear that the safe, in those circumstances, formed part of the demised premises. If so, Y. or V., being in lawful possession of the premises, were in *de facto* possession of the safe, even though they were ignorant of its existence.
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> It was argued, though I think rather faintly, that possession of the safe did not involve possession of the wooden box inside it, still less of the notes within the box. To accept this argument would be to introduce a wholly unnecessary and unreasonable refinement. If the prehistoric boat in *Elwes* v. *Brigg Gas Co.*, though its existence were unknown was in the possession of the person who as owner was in possession of the land under which the boat was found, so too would be the contents of a locker in the boat. If the rings embedded in the mud at the bottom of the Minster pool in the *South Staffordshire* case were in the possession of the person who as owner was in possession of the land on which the pool was situated, the result would, in my judgment, have been the same if the rings had been found in a purse or other container found in the mud.
> been found in a purse or other container found in the mud. . . .
>
> In my judgment, the notes having been found within the safe, which itself formed part of the demised premises, the party in possession of the premises, whether it be V. or Y., had, in the absence of any evidence as to the true ownership of the notes, a better title thereto than the finders.[27]

Since the learned judge found that possession of the notes lay in V. Ltd. or Y. Ltd., and since both of these had a duty under their agreement to surrender such notes, as valuable articles found on the site, to the Corporation, it was unnecessary for the learned judge to go any further. He did, as we have seen above, say that if it had been necessary for him to consider the situation as one in which there was a true finding, he would have regarded the workmen discovering the banknotes in the course of their employment as taking the banknotes into the possession of their master W. Ltd.

The clear line developed in the modern cases on possession that we have so far discussed has been somewhat obscured by some of the Court's argument in *Hannah* v. *Peel*.[28] In that case, the plaintiff, a soldier billeted in a house owned by the defendant and requisitioned under Defence Regulations, found in a crevice on top of a bedroom window frame a brooch, the owner of which was not known. The defendant had never occupied the house himself and had no knowledge of the existence of the brooch before it was found. The plaintiff passed the brooch to the police for them to ascertain its owner; later, the defendant claimed and received the brooch from the police as owner of the premises on which it was found.

Holding for the plaintiff, Birkett, J. purported to follow the rule in *Bridges* v. *Hawkesworth* that the finder is entitled to a lost article as against all persons except the true owner no matter where the article is found; he distinguished *Elwes' Case* and *Sharman's Case* on what we have argued to be an inadequate view of the decisions, to wit, that they dealt with things attached to or under land as such. But in the crux of the judgment, Birkett, J. does come down on the essential point that is consonant with the position argued in this section: "The defendant," he said, "was never physically in possession of these premises at any time. It is clear that the brooch was never his, in the ordinary acceptation of the term, in that he had prior possession."[29] True, the learned judge again

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[27] *Ibid.* at 838.
[28] (1945) 1 K.B. 509, (1945) 2 All E.R. 288.
[29] *Ibid.* at 521.

went on to obscure the issue by referring to the defendant's lack of knowledge of the brooch, but this is irrelevant and unnecessary. The defendant must fail because he cannot show any basis for the claim that he had prior *possession* of the brooch, a claim that must be based on possession, even if on possession of a wider area in which the thing was found, but which cannot be based on title.[30] *Bridges* v. *Hawkesworth* was not needed here, and *Elwes'* and *Sharman's Cases*, which provide the clearest basis for the principle that the claimant must have possession, should not have been distinguished. As McNair, J. put it in *Corporation of London* v. *Appleyard*, ". . . in *Hannah* v. *Peel* the contest was between the owner in fee simple of the premises and the finder, and this contest was decided in favour of the finder on the basis that the owner had never been in possession".[31]

It is the custom in general text-books to regard two cases decided in the first half of the 19th century—*Cartwright* v. *Green*[32] and *Merry* v. *Green*[33]—as having important bearing on one of the chief problems raised in our discussion here, to wit, whether a man in possessing a whole has possession of all its contents even of those he may not know to be there. In *Cartwright* v. *Green*, a bureau was delivered, for the purpose of repairs, to a person who discovered money in a secret drawer and converted the money to his own use. On an issue arising in the civil action for recovery of the money whether his taking and conversion would amount to felony, the Court held that it would and upon that ground allowed a demurrer to a bill of discovery. In delivering judgment, Lord Eldon said:

> To constitute felony there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered.[34]

The principle being applied here is the principle that a bailee commits felony in "breaking bulk". The precise conceptual basis of that ancient doctrine has never been examined by the courts. It is possible to take two views of it. One view is that a bailee who is given possession of a package or a bureau or other volume is not given possession of the contents of such package, bureau or volume unless this must have been the intention of the bailor and that the bailee therefore commits trespass in touching the contents and larceny in appropriating them. It is only this interpretation of breaking bulk which has any bearing on the question whether the possession of a volume carries with it the possession of its contents. The second view of the doctrine of breaking bulk is that the doctrine does not imply that the contents were not in the possession of the bailee, but that his dealing with the contents in a certain way constitutes

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[30] In advanced commercial societies with a strong concept of property, there may be a tendency to feel that the ownership of the premises should confer a right to the "fortune" of anything found on the premises. But so far, there is, at Common Law, simply no such thing as a "right to find" vested in and going with title to premises. Barring the creation of specific "right to findings" by contract or agreement, the claim of the finder or that of the occupier who claims prior possession must be based on possession. As Winfield argued in his Note supporting the decision in *Hannah* v. *Peel*, the rebuttable presumption at law is that the possessor of land possesses goods on, in or under that land, but "the cases indicate that this presumption is founded upon possession of the land itself"; (1945) 61 *L.Q.R.* 333 at 334 (by P.H.W.).

[31] (1963) 2 All E.R. 834, 838.

[32] (1802) 8 Ves. Jun. 405, 32 E.R. 412.

[33] (1841) 7 M. & W. 623, 151 E.R. 916.

[34] (1802) 8 Ves. Jun. 405, 410; 32 E.R. 412, 413.

a breach of the express or implied conditions of the bailment and thereby terminates that bailment. Such termination converts his lawful possession of the contents into an unlawful possession and the action that brings this about is regarded, for the purposes of larceny, as a "taking". It is true that until the second half of the 19th century, the bailee dealing with the entire volume in a way inconsistent with the conditions of the bailment did not commit larceny and this, together with a rather concrete emphasis on actual breaking to be found in the earlier cases lends some colour to the first of the two interpretations. But the emphasis on breaking has become less concrete and the distinction between converting the whole volume and converting the contents, long regarded with some unhappiness, has finally been swept away.[35] While the earlier decisions certainly did not make explicit the view that the contents were not in the possession of the bailee, the later decisions have moved more and more consciously to the view that breaking bulk is violating the conditions of bailment. This, indeed, is the view strongly suggested by the language of Lord Eldon with its emphasis on the purpose of the bailment.

On this view, *Cartwright* v. *Green* reinforces the line of decisions establishing that dealing with the contents of a thing bailed in a way inconsistent with the conditions of bailment constitutes a "taking" for the purposes of larceny, but the case has no bearing whatever on the question whether a man can or cannot possess things of which he does not know through their being contained in a volume he knows of and controls.

Merry v. *Green* is somewhat more involved. A person had purchased at a public auction a bureau in which he later discovered a secret drawer with a purse containing money and he appropriated this money to his own use. The defendant, the previous owner of the bureau, had unsuccessfully prosecuted the buyer for larceny and the buyer now appeared as plaintiff in an action for assault and false imprisonment. The Chief Justice at the trial of the action having said in his summing-up to the jury that he thought there was no felonious taking, the defendant obtained a rule to show cause. The Court was therefore now considering whether the facts could not in law support the charge of a felonious taking. It held that the buyer did not acquire possession of the purse at the time of the sale because the purse being unknown to both parties there was no delivery and no acceptance. The purse was a lost object which came into the buyer's possession by finding when he discovered the drawer. Such a finder could commit larceny by converting to his own use; whether he did so or not depended on whether he had reason to believe that there was a traceable owner. The question therefore became whether the buyer believed that title to the purse had been passed to him at the sale. Evidence at the trial conflicted on this point and the Court therefore directed a new trial in which the jury should be asked to consider as a matter of fact whether the auctioneer was selling the bureau or the bureau and its contents.

The language of the decision is surprisingly reminiscent of *Bridges* v. *Hawkesworth* and strikingly in contrast with the more modern cases that we have been considering. Possession is seen as passing by specific intentional delivery; since there was no such delivery the purse is a lost object and comes into the buyer's possession only by his finding. The possessor of a volume therefore is not held to possess those of its contents that he does not know to exist. But the decision contains a contradiction that destroys the whole case. The Court assumes that the seller had title to the purse which he may or may not have passed on sale; it neglects to notice that the seller's title cannot have any basis on the facts given but his *previous possession* of the purse. Since he

[35] By the statutory definition of larceny to include conversion by a bailee: 20 & 21 Vict. c. 54, s.4, substituted by 24 & 25 Vict. c. 96, s.3, now (U.K.) Larceny Act, 1916, s.1 and *c.f.* (N.S.W.) Crimes Act, 1900, s.125.

did not know of the purse, his whole claim is valid only if in possessing the bureau he possessed all its contents, known or unknown. What is sauce for the goose, is sauce for the gander. Either the seller had no claim, or the buyer comes into possession of the purse when he comes into possession of the bureau and, therefore, cannot commit larceny though he can be sued for return of the purse if the sale did not pass title to it. The latter, I submit, would be the better approach to the issue. *Merry* v. *Green*, I should argue, was wrongly decided in so far as it held that felony was in principle possible and Tindal, C.J. had been right in holding the contrary view at the trial. The parties should have joined issue on the question of title, where there was a genuine doubt and the Court was right in holding that this doubt might be resolved by looking at the conditions of the sale. If these should prove not to be explicit, we might argue that the seller in passing title to the volume passes title to all things that are normally part of the volume and to those things contained within it to which he has no other title or claim apart from his previous possession of the volume. In selling a car, a man does not sell the diamond ring which his wife dropped under the seat; on our view he does sell the roll of banknotes that some previous person who has not come forward had lost or hidden in the car and of which he had no knowledge whatever and to which he had no claim whatever save as long as the car was in his possession.[36] Selling in this respect is different from bailment; in bailing my car to someone I do not lose or pass all my rights stemming from the possession I had and intend to resume.

IV

Recent writers on the problem of finding have tended to approach the question in the spirit of Birkett, J., and not in that of Chitty, J., Lord Russell of Killowen, C.J., LeBel, J.A. and Dixon, J. (as he then was). The latter strove to approach the law of finding from the basis of a general theory of possession; the writers, like Birkett, J., embark on a mistaken search for "positive rules of law" governing each situation and thus end with a mass of distinctions. David Riesman[37] and O. R. Marshall[38] distinguish within and between two-party cases (finder v. owner, finder v. stranger, finder v. other finders—finder v. occupier) and three-party cases (finder v. occupier, where owner's possible interest is a factor in the case); Riesman also distinguishes things found in public places from things found in private places, things buried in land from things found on top of it, non-trespassing finders and trespassing finders, and treats as special rules capable of affecting all the other categories the U.S. distinction between "lost" and "misplaced" and the relationship of master and servant. Mr. D. R. Harris[39] puts similar emphasis on some of the same distinctions and attempts to link these with a number of factors "relevant to possession", some but not necessarily all of which will be prominent in particular cases.

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[36] In *Parman* v. *Cockcroft*, Case No. 110-223 of 1963, Wisconsin Circuit Court for Dane County (here cited from a certified transcript dated April 26, 1963), the plaintiff, daughter and heir-at-law of a furniture store proprietor, sued the defendant as owner and possessor of a house once owned and possessed by her father for money found in the house after the defendant had moved in. The Court had before it very full evidence that the money was money secreted by the father before his death; it found for the plaintiff and held as a matter of law that the heirs, by selling the house after the father's death, did not abandon their claim to the money, citing from 1 *American Jurisprudence* s.13, at 9-10: "to justify the conclusion that there had been an abandonment there must be some clear and unmistakeable affirmative act or series of acts indicating a purpose to repudiate ownership." But the plaintiff succeeded, it should be noted, on the basis of her inheritance of her father's estate, including the money he hid, and not on the basis of any right stemming solely from earlier possession of the house.

[37] D. Riesman, "Possession and the Law of Finders" (1939) 52 *Harv. L.R.* 1105.

[38] O. R. Marshall, "The Problem of Finding" (1949) 2 *Curr. Legal Problems* 68.

[39] D. R. Harris, "The Concept of Possession in the English Law" in *Oxford Essays in Jurisprudence* (ed. A. G. Guest) 69-106.

There is not, in law, any method of decisively refuting an alternative approach which is not too impossibly high-handed in its treatment of the relevant decisions. A piecemeal approach, it is true, can end by accommodating all the cases, no matter how badly decided; but it does so at the expense of accepting arbitrary distinctions and of obscuring, or even positively hindering, the predictable application of the law to new circumstances. If we were to accept the existence of specific "rules of liability" for children, for the care of turntables in railway stations, for the handling of lime or mortar and so on, we should be seriously hampering the concept of duty of reasonable care in the important role it plays in the law of negligence. The same, I should argue, applies to the concept of possession in finding. It is true that the concept of possession, like that of reasonable care, cannot be defined rigidly in the way that we can define a trustee or a contract, but this does not mean, as many modern writers think, that there is no concept of possession sufficiently precise to explain and replace the specific rules of possession allegedly applying to various finding situations. The finding cases treat a difficult issue of possession —the possible possession of things unknown; the best of the modern cases do so not by erecting limited rules but by bringing the issue back to the fundamental criteria of possession. It is in the finding cases, in fact, that some of these criteria are most fully discussed and developed. The cases, of course, emphasise only some of these criteria, since finding on premises normally draws attention to the question of knowledge and the pervasiveness of possession and not to such problems as acquisition and loss of possession, where knowledge is presumed but the degree or certainty of control is in question. Even within the finding cases, some criteria will have more prominence in certain situations than in others. But this is not to be explained by invoking specific rules governing these situations and falling back on policy when the explanation is too patently inadequate; it is to be explained by considering the specific situation in the light of the general criteria of control as the basis of possession and then seeing, as a matter of commonsense, which of the criteria have special relevance in the situation. Seen in these terms, the finding cases discussed above form part of a coherent body of law.