verbal contract, or has been modified by subsequent verbal negotiations. Since proof that the legal relationship is broader than the written documents indicate is not prevented merely because the only evidence that this is the case is parol, it would seem both illogical and unjust that such an integration clause should be treated as anything more than presumptive evidence to the contrary. The parol evidence rule so far as the exceptions outlined above are concerned, cannot be a strict rule of law, but a rule, the effect of which is merely to raise a rebuttable presumption as to the intention of the parties. This intention is to be concluded from a consideration of all the circumstances.[19]

19. See per Lord Russell in *Gillespie Bros.* v. *Cheney, Eggar & Co.* [1896] 2 Q.B. 59 at p. 62.

POLICE OFFENCES ACT

Unlawful Possession

The recent decision of the South Australian Supreme Court in *Beard* v. *Brebner*[1] demonstrates once again a recurrent difficulty that has perplexed the minds of many of our jurists: attempting to define the concept of possession in the common law.

The problem arose in *Beard* v. *Brebner* in the context of s. 41 of the Police Offences Act, 1953-60 which creates the offence of unlawful possession of personal property.[2] This offence contains several inherent difficulties: first, it is constituted not by the commission of an act or pursuit of a course of conduct but by the existence of a certain state of affairs. That criminal liability should arise in such circumstances is of course far from exceptional. For example, s. 172 of the Criminal Law Consolidation Act 1935-57, enacts the crime of being found by night in certain circumstances. Legislation relating to aliens is a further illustration.[3]

Secondly, the prosecution is by the phrasing of the section absolved from the onus of establishing *mens rea* on the part of the defendant.[4] This departure from principle is again far from novel and in this case might be considered as a statutory formulation of the doctrine

1. 1962 Law Society Judgment Scheme reports 516.
2. s. 41: (1) Any person who has in his possession any personal property which either at the time of such possession, or at any subsequent time before the making of a complaint under this section in respect of such possession, is reasonably suspected of having been stolen or unlawfully obtained shall be guilty of an offence. Penalty: One hundred pounds or imprisonment for two years.
   (2) It shall be a defence to a charge of an offence against this section to prove that the defendant obtained possession of the property honestly.
   (3) If any personal property is proved to have been in the possession of a person, whether in a building or otherwise, and whether the possession had been parted with before the hearing or not, it shall for the purpose of this section be deemed to have been in the possession of that person.
3. See e.g., *R.* v. *Larsonneur* (1933) 97 J.P. 206 which demonstrates the injustice of which this type of offence is capable.
4. *Wallace* v. *Hansberry* [1959] S.A.S.R. 20; unless the mere knowledge of possession (*animus possidendi*) is to be construed as constituting this element: *Palumbo* v. *O'Sullivan* [1955] S.A.S.R. 315.

of recent possession[5] with the significant and startling modification that the defendant is not merely obliged to adduce sufficient evidence to rebut the presumption of dishonesty, but to do so by establishing the affirmative defence of honest acquisition.[6] Whether this onus involves proof beyond reasonable doubt or merely on the balance of probabilities is far from clear. *Harrison* v. *Trotter*[7] is authority for the former view, *Wallace* v. *Hansberry*[8] for the latter. The trend of authority suggests the latter view to be correct.[9]

Thirdly, the section imports into the offence the unruly notion of "reasonableness" in the form of a test whether the suspicion of unlawful possession is entertained upon reasonable grounds. Finally, the foundation of the offence is a concept as complex and contentious as any in English Jurisprudence: the concept of possession. That an offence which contains on the one hand no *actus reus* as commonly conceived, and no *mens rea* (other than as relevant to the statutory defence) but which contains on the other hand the notion of reasonableness, and further, a judicial concept of such complexity as possession, has resulted in much litigation occasions no astonishment.

It was principally with the final element adverted to that *Beard* v. *Brebner* was concerned. The facts of the case were unexceptional: the charge arose out of the appellant's possession of a theatre speaker which had been stored in premises to which several persons had access, but deposited there in such a way as to give no indication to them of its presence. The submissions made by the appellant were chiefly directed to the issue of possession. Mr. Justice Hogarth, following a line of South Australian decisions, adopted the meaning attributed to the term by the High Court of Australia in *Moors* v. *Burke*[10] in interpreting the corresponding section of the Victorian statute. "Having actual possession" was defined by the court in that case as meaning simply:

> . . . having at the time, in actual fact and without necessity of taking any further step, the complete present physical control of the property to the exclusion of others not acting in concert with the accused and whether he had that control by having the property in his present manual custody or by having it where he alone has the exclusive right or power to place his hands on it and so have manual custody when he wishes.[11]

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5. Cross and Jones: *An Introduction to Criminal Law* (4th ed.) at p. 233.
6. sub. sect. 2.
7. [1937] S.A.S.R. 7.
8. *supra.*
9. Per Humphreys C.J. in *R.* v. *Carr-Briant* [1943] K.B. 607 (C.C.A.), 612. "In our judgment, in any case where either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish"; see also *Sodeman* v. *R.* [1936] 2 A.E.R. 1138 (P.C.).
10. (1919) 26 C.L.R. 265.
11. *Ibid.*, at p. 520.

The question then arose on the facts of the instant case whether, in applying this test, the power of control in the appellant was sufficiently "exclusive". His Honour, in dismissing the appeal, felt compelled to elaborate on this test, which as he acknowledged, on its face appeared very strict:

> . . . it operates to deny possession where a person having placed property out of his present manual custody had deposited it in a place where any other person independently of him has an equal right and power of getting it.[12]

His Honour proceeded to explain this proposition, saying that where such interference by a third party is "likely" (as distinct from possible), then it may in an appropriate case be inferred that there is an equal right and power in that third party to get the property in question. This issue is of course relative and gives rise to difficult decisions of fact.[13]

His Honour adverted to the further point raised by the appellant that at the times material to the alleged unlawful possession he was detained in custody in connection with another matter. Since there was sufficient evidence that the appellant was present on the premises on which the speaker was stored during part of the material day, it is a matter of speculation whether the introduction of this element, had it been proved, would have made any legal difference. It was suggested in the judgment that the requisite degree of exclusiveness might be difficult to establish in such circumstances.[14] It seems, however, that the fact of custody would only be evidence of the appellant's extent of control and could not as a matter of law preclude a finding that he had possession during such time.

The possibility that the appellant might have been in custody at all material times indicates the inadequacy of the "exclusion" test, which may well place the concept of possession on too narrow and unsatisfactory a footing. The "finding" cases[15] demonstrate that this test in fact tends to be arbitrary and unpredictable in its operation and often imports or embraces considerations not articulate. An approach suggested by the analysis of possession by D. R. Harris in *Oxford Essays in Jurisprudence*[16] seems the most satisfactory method yet advanced for contending with this type of difficulty. He demonstrates convincingly that no general formulation of the concept of possession can be made to fit all the fact situations

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12. *Ibid.*, at p. 522.
13. Compare e.g., *Wilby* v. *Gilder* [1942] V.L.R. 28 and *Williams* v. *Douglas* (1949) 78 C.L.R. 52.
14. "If it could be shown that throughout the day in respect of which the offence is charged, the appellant had been in custody at the City Watch-house then it is at least arguable that he did not have either sufficient control over the property, or power to control it, to constitute the factum necessary to amount to possession" (at p. 521).
15. e.g., *Armory* v. *Delamirie* (1722) 1 *Str.* 505; *Bridges* v. *Hawkesworth* (1851) 21 L.J. Q.B. 75; *South Staffordshire Water Company* v. *Sharman* [1896] 2 Q.B. 44. See also *Wilby* v. *Gilder* and *Williams* v. *Douglas* *supra*, n. 13.
16. "The Concept of Possession in English Law", p. 69.

found in the cases: "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."[17] Rather, the concept of possession can be analysed into a number of more meaningful "factors" which the cases indicate as relevant to possession. These factors he enumerates;[18] some relate to physical control, both of the propositus and of third parties, some to the knowledge and intention of these two classes, some to considerations such as the occupation of premises, and some are concerned with special legal relationships. The importance of the study lies in its demonstration that the common law concept of possession is not explicable on the assumption that there is an identifiable factor common to all those cases where possession has been judicially found. The notion is rather one of "family resemblance": in some cases the coincidence of certain factors might be sufficient, in other cases a different combination would suffice.

This analysis is consistent with the fact that "possession" like similar conceptual terms which by nature seem incapable of precise definition, has a history in the common law of considerable perplexity and confusion. Decisions relating to the determination of possessory titles, particularly the "finding"[19] cases, afford examples of the difficulties under which both court and commentator have laboured in the attempt to reconcile what is often irreconcilable. As Glanville Williams has said,

> The only intelligent way to deal with the "definition" of a word of multiple meaning . . . is to recognise that the definition to be of the ordinary meaning must itself be multiple.[20]

Without suggesting that the conclusion reached in *Beard* v. *Brebner* was anything but just or satisfactory it nevertheless seems fair to comment that the decision as relevant to the question of possession has added little of value to a subject of some confusion. One cannot resist the conclusion that many of the difficulties to which s. 41 of the Police Offences Act has given rise are the result of the sweeping terms in which it is framed. A residual offence of this nature, clearly intended to provide for situations outside the ambit of specific offences involving dishonesty, is peculiarly susceptible to such difficulties. It is submitted that a more exactly drawn section defining the offence by reference to factors of the kind referred to above (which for the purposes of the section could be taken as constituting possession), would not only prove more satisfactory in practice, but would accord with principle in ensuring that responsibility for defining statutory crimes rests primarily on the legislature rather than the courts.

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17. at p. 69.
18. at p. 72.
19. *Supra*, n. 15.
20. Glanville Williams: "International Law and the Controversy Concerning the Word Law", (1945) 22 B.Y. B.I.L. 146.

RIPARIAN RIGHTS AND DUTIES

Prevention of Surface Flow from Higher Land

Many aspects of the law relating to riparian rights and the closely allied problem of the natural flow of surface waters are far from settled. Authorities often conflict and there is a paucity of academic comment on the principles involved. The judgment of the High Court in *Gartner* v. *Kidman*[1] is therefore welcomed as an important and authoritative decision in this area of the law. In particular the potential usefulness of the judgment of Windeyer J., in which Dixon C.J. concurred, must be acknowledged. By considering the general principles involved in rights relating to the flow of water his Honour not only brought the issues involved in the case before the court into perspective but also provided a useful instrument for future general reference.

Litigation arose in the following manner. The appellant Gartner's parcel of land was adjacent to that of the respondent Kidman, the plaintiff in the Supreme Court action. A large swamp was situated on Kidman's land and extended into Gartner's land. At times the water overflowed at a point on Gartner's land, flowed for about three hundred yards to a sandpit on his property, and there escaped into the ground. Predecessors in title to Gartner had allowed Kidman's predecessors in title to facilitate this flow by digging a drain along the same route. This substantially reduced the area of the swamp, and provided what is now Kidman's property with more grazing land. In 1958 Gartner discovered that the sand into which the water drained was of commercial value, and erected barriers to block the canal, with consequential effects on Kidman's land. Kidman brought an action in the Supreme Court of South Australia for an injunction against Gartner requiring him to remove the barriers and restraining him from obstructing the free passage of water along the canal.

The first argument put up by Kidman was that as the upper riparian owner he was entitled to the free flow of water from his land along a natural watercourse, and that the passage obstructed by Gartner was a natural watercourse. In the Supreme Court Chamberlain J. held that a natural watercourse had existed before the drain was made. In the High Court, McTiernan J. agreed with this finding but held that the work done on the channel was of a major character and that riparian rights therefore no longer attached to it. He held that Kidman was relegated to such rights as he had enjoyed before the extension operations commenced. Dixon C.J. and Windeyer J. refused to find that a natural watercourse existed at any point of time.

What in law constitutes a natural watercourse? In *Lyons* v. *Winter*[2] Hood J. said that there must be more than a mere depression in the ground which sometimes receives rain water. To constitute a natural watercourse there must be,

> a stream of water flowing in a defined channel or between something in the nature of banks. The stream may be very small and

1. (1962) 36 A.L.J.R. 43.
2. (1899) 25 V.L.R. 464.