

## COMMENT

By D. R. HARRIS\*

Miss Tay has put forward a definition of possession in an interesting article, in which I am assigned to 'an intellectual Ice Age' as an adherent of 'nihilism'. However, it is not correct to imply that my essay<sup>1</sup> on the subject insisted '*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' (p. 479). I said that I had read the cases with an open mind to discover how the judges used the concept of possession; I approached the evidence without assuming either that there must be a single, consistent concept, or that it was, in principle, impossible for such a concept to exist. My conclusion was that we cannot find in the English cases sufficient common factors to justify any definition of possession which could be adopted by lawyers as a consistent concept. Miss Tay, on the other hand, seems to have approached the problem with the tacit assumption that there must be a unitary concept to explain the various uses of the same verbal symbol, 'possession.'

In legal usage, 'possession' cannot be a single 'fact', as some passages in the article assume.<sup>2</sup> It is a relationship between a person and a thing with respect to another person, and, being a relationship, it depends on a complex of facts. Furthermore, it is a legal relationship,<sup>3</sup> a conclusion of law drawn after the concrete facts of the situation have been appraised or evaluated in the light of the abstract rule of law in question. In other words, when we speak of 'possession' in a particular situation, we are interpreting the facts in the light of a legal rule, or classifying the facts by reference to the rule. Borrowing a phrase from the conflict of laws, we may say that possession is a connecting factor<sup>4</sup> used in many rules of law to indicate that the rules operate only if the facts can be classified as falling within a general legal pattern; the pattern may be sufficiently vague to give some discretion to the court in marginal cases. The lawyer's use of the term 'possession' is always in the context

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<sup>1</sup> *Oxford Essays in Jurisprudence* (1961), 69.

<sup>2</sup> But in one place the writer says that the legal sanctions against trespass become 'part of the factual basis of my control' (p. 493).

<sup>3</sup> Cf. the 'duty of care' concept in the tort of negligence, which is a relationship between the parties depending on various factors varying from one situation to another. In *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465, 482 and 509, two of the Law Lords used an almost identical phrase: 'a sufficiently close relationship to give rise to a duty of care.' (*per* Lord Hodson).

<sup>4</sup> Cheshire, *Private International Law* (6th ed. 1961) 44-45, 51-52.

of these rules and we cannot take the layman's notion of 'having' or 'holding' as our guide to determine the legal meaning of the connecting factor. Thus, I do not accept those statements in which Miss Tay speaks of possession as if it enjoyed an independent existence apart from the rules in which it is used.

In my essay, I accepted the view<sup>5</sup> that lawyers need investigate only the rules concerning the acquisition and loss of possession: once a person 'acquires' possession in the sense that he becomes entitled to the benefit of a possessory rule, we need not ask what is necessary to *retain* that benefit, but only when he 'loses' that benefit. 'There is no need to think of possession as a continuing physical relationship between a man and an object, or as depending on a continuing, conscious intention.'<sup>6</sup> Miss Tay makes no allowance for this in her article; she speaks of possession as a continuing fact: 'possession is the *present* control of a thing' seems to suggest, by the adjective 'present' that the 'conscious and deliberate relation' of control must exist throughout the time that possession continues. In my submission, if the person claiming possession has any knowledge and intention relating to the object, the law need take account of these factors only at the moment of acquisition of possession. The knowledge may later turn into forgetfulness or physical control may be lacking for a time, but possession is not necessarily lost.

Miss Tay makes no allowance for possession as a relative concept.<sup>7</sup> If I send a bureau to a cabinet-maker for repair, he possesses the bureau as against me; but I possess the contents of a secret drawer in the bureau as against him if he finds and takes them with intent permanently to deprive me of them;<sup>8</sup> yet he would surely possess the same contents as against a third person who steals or takes them tortiously while the cabinet-maker possesses the bureau. Similarly, a servant may possess as against a stranger, but have custody as against his master; and a person may be held to have acquired possession without knowledge if he claims to be the victim of a theft or tort, when, in similar circumstances, if the question was whether he had stolen the thing, he would not be held to have acquired possession until he subsequently knew what he had.

Miss Tay formulates her definition as follows: 'Possession is the present control of a thing, on one's own behalf and to the exclusion of all others'; 'control' should be 'interpreted as a conscious, deliberate relation' (p. 490); it is '*per se* self-conscious and willed' (p. 494).

<sup>5</sup> *Oxford Essays in Jurisprudence*, 73. See also Pollock and Wright, *Possession in the Common Law* 21-22, 119; Holmes, *The Common Law* 235-238; Kocourek, *Jural Relations* (2nd ed.) 398-402, 410.

<sup>6</sup> *Oxford Essays in Jurisprudence*, 73.

<sup>7</sup> Paton, *A Textbook of Jurisprudence* (3rd ed. 1964) 527-528.

<sup>8</sup> *Cartwright v. Green* (1802) 8 Ves. 405.

But at a later point she accepts the proposition that 'control of an object not specifically known is possible, through its entering a wider sphere that is known and controlled' (p. 496). In my submission this latter proposition dilutes 'control' so far that the consciousness of the relation between the possessor and the thing possessed becomes largely fictitious. If a friend unexpectedly leaves a case of apples in my garden shed during my absence on three weeks' holiday, my 'control' of them is so far outside my knowledge and intention that we should admit that my knowledge is not required for the acquisition of possession as against strangers.<sup>9</sup> The crucial factors are the clear intention of my friend to transfer possession to me and the fact that he had left them in my shed; 'present control' is extremely artificial in these circumstances. But apart from knowledge and intention, 'control' in any genuine sense is absent in some cases where we want the plaintiff to be able to rely on a possessory rule. Thus, if a week-old baby were abandoned on the steps of a hospital with a pearl necklace around her neck (the obvious inference being that it was a parting gift from her mother), we should say that the baby possesses the necklace as against anyone who tortiously or criminally takes it from her. So, too, with the cripple, the unconscious or mentally defective person, or the person whose chattel is deliberately placed on the land of another person.<sup>10</sup> Miss Tay does not argue the justification for her phrases 'on one's own behalf' and 'to the exclusion of all others', which are inconsistent with the rules that a servant has mere custody of goods belonging to his master, whereas the bailee at will has possession. The suggested definition cannot explain the distinction between these rules.

If Miss Tay puts forward her concept of control as only *the background against which* all uses of possession can be understood, this does not differ from the section in my essay<sup>11</sup> in which I argued that the process of weighing-up the factors relevant to possession has been carried out by the judges against a subconscious 'ideal' concept of possession, 'a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the object, full knowledge of its existence, attributes and location, and a manifest intention to "act as its owner" and to exclude all other persons from it'<sup>11</sup> (*i.e.* all the factors are clearly present and all point to the possessor and to no one else). However, the facts of concrete situations, I submitted, force the judges to permit variations and modifications of the ideal pattern. Hence in my essay I was not primarily concerned

<sup>9</sup> Cf. *Hibbert v. McKiernan* [1948] 2 K.B. 142, 150.

<sup>10</sup> *Ashby v. Tolhurst* [1937] 2 K.B. 242.

<sup>11</sup> *Oxford Essays in Jurisprudence*, 79.

to describe the central 'core of meaning' of the concept, but rather the way in which English judges approach the marginal or borderline cases where the facts do not fall obviously within the central core of meaning. It is the marginal cases which lead to disputes in practice, and which come before the courts; the lawyer is mainly concerned with 'problems of the penumbra,'<sup>12</sup> the area of uncertainty surrounding the standard illustration of a rule.

Nor can I accept the argument that a consideration of the policy behind the possessory rule in question is out of place in the finding cases. Judges do not work in a vacuum, but try to solve the concrete problems presented to them, and it is impossible to ignore the normative element in a decision that the plaintiff possesses, *viz* the view that the plaintiff ought to have the remedy which he seeks against the defendant because his relationship with the object is sufficiently close for the purpose of this remedy. But I have acknowledged that such considerations of policy should tip the balance in the plaintiff's favour only in marginal cases, when the ordinary factors (physical control, knowledge, intention, possession of premises, *etc.*) appear to be evenly balanced.<sup>13</sup> No one argues that possession is *primarily* a matter of judicial discretion in the light of social policy.

<sup>12</sup> Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* 593, 607.

<sup>13</sup> *Oxford Essays in Jurisprudence*, 78.