POSSESSION

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IT is not the purpose of this essay to enter into the lists made famous by such doughty champions as Savigny, Ihering, Holmes, Pollock and Wright, Holdsworth and Goodhart. The technical law of possession has frequently been discussed, although it must be confessed that even the brilliance of the legal luminaries mentioned has failed to cast light into certain dark places of the law—but this is, perhaps, the fault of the law rather than of the quality of the beam of light. At this point, one is tempted to ask, "Why should a notion such as possession, which the man in the St. Kilda tram deems himself perfectly capable of understanding, be surrounded with such complexity?" Some of the answers to this question will be discussed in this paper, which approaches the question from the angle of Jurisprudence rather than of exposition of the technical requirements of any one system. What, then, are the factors that have complicated the notion of possession?

First, there is the inevitable clash between the abstract logic of the law and convenience. It is easy to say that law in its very early stages is fluid, and is based merely on custom and the demands of practical considerations; that a theory is invented later as a means of justifying decisions rather than as a reason for making them.[1] But in truth the reality is more complex than that, for "the fundamental conceptions which a legal system embodies are seldom grasped or understood when their influence is greatest. They are abstract ideas usually arrived at by generalization and developed by analysis. But it is a mistake to regard such ideas as no more than philosophic theories supplied *ex post facto* to explain a legal structure which has already been brought into existence by causes of some other or more practical nature. On the contrary, these conceptions, though never analysed and completely understood, obsess the minds of men who act on them. Sometimes, indeed, they are but instructive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action."[2] It is usually true, however, that many of the most fundamental notions are not consciously analysed until the "classical period" in a nation's legal history arises when analytical genius, discontented with the law as a collection of rules, attempts to lay bare the logical theories which will explain the rules in force. If such a theory can be discovered, say for the law of possession, then it will be accepted, and any rules that cannot be thus explained will be dubbed "logical anomalies" or "historical accidents." But law never becomes static, and the demands of convenience create yet further exceptions—

1. "The law student of to-day recognizes that many of the most intimate and subtle of legal theories are merely a particular form of legal rationalization or fiction designed to make the circle of the assumption of an immutable body of law square with the necessity that the administration of law must accomplish what are regarded as desirable social ends." Bohlen, *Legal Essays in Tribute to McMurray*, 44.

2. Dixon J., *The Law and the Constitution*, 51 L.Q.R. 590.

while there is naturally a tendency to adopt, if possible, the logic of the classical period, new conditions may demand new rules. Sometimes a classical theory becomes so overloaded with exceptions that it gradually disappears in favour of a new view; sometimes the law becomes so confused that no one theory can explain the various views. Sometimes a "classical theory" will attain such popularity that it may remain a ground for decision even when the facts which once justified its operation have disappeared. This "time lag" is very important in understanding the relationship between law and the needs of the community, for such theories are made tolerable only by creating a list of exceptions.

So far we have over-simplified the issue merely for purposes of exposition. It is frequently the case that there are rival theories in the law, and that in the classical period there are contesting schools of thought.[3] This means that the abstract logic of law speaks with two voices, sometimes one finding favour with the courts, sometimes the other. Moreover, we cannot regard law merely as a resultant of the fusion of the demands of logic and of convenience. There are rules which neither serve nor have served the popular need, which are quite illogical. Sometimes due to ignorance, sometimes to a misunderstanding of a classical theory, sometimes to a misconceived idea of convenience, such rules frequently fail to maintain themselves, but ever and anon they persist to beset the path of those who march into the forest of legal decisions. Hence Jurisprudence, if it is to understand the real nature of social institutions, must not only use the logic of analysis and the light of history, but must also consider the varying pressure of social needs.

It is exceedingly dangerous to speculate as to the origins of possession, but the theory which seems most plausible is that primitive possession is founded on the root fact of physical control. English law, says Sir William Holdsworth, began with the notion that a person in *de facto* control was normally to be regarded as an owner, and the concept of ownership as an absolute right was finally reached by developments in the law of possession.[4] Roman law began with the conception of dominium as an abstract right, possession being regarded as a mere fact. But with the development of possessory remedies, the law was forced to define clearly the circumstances in which it would regard possession as existing. Professor Buckland suggests that even in the classical period it was primarily regarded as a matter of fact, however hard it may have been to reconcile this with the artificial rules already in force.[5] Paul's famous words bring this out clearly.[6]

3. For example, the many disputes between the Proculians and Sabinians.
4. H.E.L. VII, 458-9.
5. *Main Institutions of Roman Law*, 108.
6. *Digest*, 41, 2, 3, 5: "Several persons cannot possess the same thing as a whole: it is indeed contrary to fact to hold that you should be considered to possess what I also hold. Sabinus, however, writes that both he who grants at will has possession and also he who so takes. Trebatius used to approve the same view, thinking that one may possess lawfully and another unlawfully, but that two cannot possess both lawfully and unlawfully. Labeo disapproves Trebatius, since in the essence of possession it makes little difference whether a man possesses lawfully or unlawfully, and this is the truer view. For the same possession cannot be in two persons any more than you can be considered to stand in the place where I am standing or to sit in the place where I am sitting." (The translation, as in other cases in this paper, is taken from Professor de Zulueta's edition of this title.)

A captivus would regain his legal *rights* on return to Roman soil, but possession being regarded as a matter of fact would not arise till actual control was taken; the heir, on accepting the inheritance, was endowed with all legal rights connected with it, but "possession does not belong to him unless it be actually taken."[7]

Terminology.—If possession is to be protected, then it must be clearly defined: hence we gradually notice a divergence between the popular and the legal notion. Some writers speak of legal possession when the concept as defined by the law is meant: and of lawful possession when it is desired to intimate that control will be protected by the law. We thus have a contrast in certain cases between legal and lawful possession—possession of the thief is legal, but not lawful. There are two objections to this terminology: firstly it tends to confuse, for if we say Smith has legal possession it is easy to think that this means that it has been lawfully acquired; secondly, even the possession of the thief is lawful as against all but the true owner and those claiming under him. In the law of torts it is not considered necessary to talk of legal negligence—when the term negligence is used simpliciter it is assumed that the legal definition of that term is meant—and it seems simpler to use possession in the same way. In the rarer number of cases where possession in the popular sense is meant, it is easy to use some such term as physical control.

The Classical Analysis.—Paul's analysis of possession into the two elements of animus and corpus is well known, but here we notice a fundamental difference in approach between English and Roman law. English law regards physical control as *prima facie* evidence of possession, and hence there is a presumption that possessory remedies should be granted to those in physical control in the absence of reasons to the contrary;[8] thus, holders such as the bailee and the tenant have possession, and when the servant is refused possession in certain cases immediately there is a desire to find the reason for this attitude. In Roman law the general tendency was to refuse possessory rights to those who were not owners, or did not intend to hold as owners. Hence it is that for Roman law the animus domini seems necessary, while for English law the intent to exclude others seems sufficient. The element of corpus is more akin in the two systems, but this factor cannot be rigidly defined, for it will vary with the nature of the object and the general customs of a particular locality.

Is the classical theory adequate? Holdsworth suggests that Roman lawyers not only required corpus and animus, but also a causa or special reason why custody should be protected. The determination of what control should be protected was determined by rules of convenience: "but unfortunately for the interpretation of Roman texts, they have falled into the hands of German legal philosophers, who have constructed from them logical theories which never wholly fit the actual rules, because these rules were, like the rules of English law, made to fit the illogical facts of life."[9] We shall now discuss as

7. *Javolenus*, h.t., 23 pr. and 1. Cf. the position of the ward h.t., 1, 3.
8. See Holdsworth, H.E.L., VII, 459.
9. H.E.L., VII, 467.

shortly as possible some of the complicating factors that have rendered it impossible for any one theory to explain the rules of law.

(A) Proprietary Capacity

In English law there are few cases of this influence (unless we regard the rules that refuse a servant possession in certain cases as an instance),[10] but in Roman law the notion that proprietary capacity is essential became firmly established, and cuts across Paul's notion of possession as a matter of actual control. Those who were in the power of another could not possess a res, "since possession is not merely a matter of physical fact, but also of right."[11] We see here a divorce between possession and actual control, and the Roman jurists worried over this point; in some cases they explained away the difficulty, but there is much confusion in the texts due to conflict of the two notions.[12] Where master and slave was concerned, the reconciliation was established by saying that since the master possessed the slave he also possessed what was under the slave's control; to carry the analysis further, the master had the animus to possess whatever was held by the slave, and the master had corpus in the sense that he controlled the slave. The slave was thus treated as a physical extension of the powers of the master. But the slave, although not a legal persona, was a human person, and the theory soon was shortly expressed by saying that the master supplied the animus and the slave the corpus.[13] The intent of the slave, however, was important, for one does not have full control over a res which a slave takes in the name of another. It was, therefore, quite logical for the Romans to treat the animus of the slave as an element in the corpus of the master.[14]

But this very useful example of classical skill in reconciling the needs of convenience with logical theory was subjected to further strain. Logically the master could acquire possession through the slave only when he had a specific animus with regard to the res concerned, that is, he must have authorized the transaction beforehand, or else possession did not commence till the negotium had been ratified. But an exception on practical grounds was recognized: the master was deemed to have given an implied authorization to deal with what would normally fall within the scope of the peculium which was within the actual control of the slave.[15] But certain texts go

10. Holmes regards these rules as a relic of slavery, but this opinion has not been generally accepted. Indeed, in earlier days the law regarded the servant as being in possession of his master's goods whenever he was away from the area of his master's control.

11. *Papinian*, h.t., 49, 1.

12. Cf. *Paul*: "If a husband gives his wife possession by way of gift, the general opinion is that she possesses, since a *matter of fact cannot be invalidated by civil law*: indeed, what is the point of saying that the woman does not possess, seeing that the husband has lost possession as soon as he decided not to possess." h.t., 1, 4. A text of *Ulpian's* illustrates the two views. A ward may lose the corpus, and therefore, possession, even without his tutor's authority, for control is a mere matter of fact: but the ward has no capacity to change his animus, and hence he cannot lose possession by change of intention—h.t., 29. This shows that in loss of possession both views had their influence.

13. *Paul*, h.t., 3, 12.

14. A full discussion of this point is impossible here. See Buckland, *Main Institutions of Roman Law*, 107; also h.t., 1, 7; and 1, 9.

15. The peculium was the capital given to the slave in order to set him up in business for the benefit of the master. The master had the legal title to the peculium and to additions made to it, but the slave had actual control within the limits set down.

further. Both an infant and a lunatic acquired possession through a slave peculiari nomine,[16] although neither an infant or a lunatic could acquire possession directly for himself, because he lacked capacity to have the necessary animus. Thus, for convenience, the slave's acquisition in connection with the peculium was held to vest possession in the master, not only where the latter lacked a specific intent, but also where there was a lack of capacity. Theoretically this may seem anomalous, but a contrary theory would mean either that the possession would be in the stranger who had alienated to the slave (which would be awkward, since the alienor had lost both animus and corpus), or that the res was not possessed by anyone. This is an example where convenience conquered the logical theory.

The acquisition of possession through a slave was usually justified by the doctrine that since the slave himself was possessed by his master, it was not unreasonable that what was in the slave's control was in the master's possession; but one does not possess a slave in whom one has a usufruct, or a son, and yet convenience demanded that possession could be acquired through both. In classical times the rule stopped at the bounds of the familia—through a stranger possession could not be acquired. Here again the rules were gradually modified, and acquisition through the procurator or general agent was recognized. At first probably the same rules were applied as with regard to slaves.[17] Paul, however, makes the general statement, without any qualification, that possession may be acquired through a procurator.[18] This text is usually regarded with suspicion, but by the time of Justinian the employment of procurators omnium bonorum had increased. and the requirement of a specific animus on the part of the principal with regard to each chattel had become unworkable. Hence some texts follow the convenient rule that the procurator can supply both animus and corpus. Thus, in this instance the classical rule is almost eaten away by the exceptions.

A recent illustration of an Australian decision dealing with the law of master and servant is *Willey v. Collector of Customs for Victoria*.[19] A boatswain found certain coins concealed in a ship, and handed them over to the master. The coins were not lost, but the real owner was too embarrassed to claim them, as they had been smuggled out of New Zealand in defiance of the law. The coins were seized by the Collector of Customs, acting under statutory authority. Could the boatswain, relying on his title as finder, recover them, or must his finding be held to give mere custody? A reasonable principle may be that if the goods are found while carrying out duties imposed by the master, any advantages of possession should accrue to the master and not the servant. This was the view of Dixon J. in a learned judgment which repays careful study. "It has been pointed out repeatedly that *Sharman's* case[20] *might* have been decided on the ground that

16. *Paul*, h.t., 1, 5.
17. *Ulpian*, h.t., 42, 1.
18. h.t., 1, 20.
19. Not yet reported. Many points arise in this case which are not discussed in this paper.
20. *South Staffordshire v. Sharman* [1896] 2 Q.B. 44.

the employment of the plaintiff to clean out the defendant's pool involved the consequence that what he found he obtained for the defendant and not for himself." If this doctrine be correct, it is an interesting analogy to the doctrine of Roman law that the master supplies the animus and the slave the corpus. Moreover, it was probable, or at least possible, that the boatswain found the goods after searching the ship on the order of the master—on any view it was during his course of employment. Again, there was no evidence that the boatswain intended to exclude the master of the ship from possession—the coins were handed over without qualification. This doctrine, however, has the result that yet another refinement is introduced. A cashier in a bank, who receives money from a stranger across the counter, acquires possession of the coins, and remains in possession till he by some act appropriates the money to his master; yet a servant who finds money does not necessarily have possession at all—that is, receipt from a stranger with directions to hand to the master gives possession, whereas finding (which *prima facie* we might consider a stronger case) may not.

(B) The Influence of the Mode of Acquisition of Possession on the Concept of Possession Itself

The essence of possession being control, the question whether possession has been lawfully acquired or not may be relevant when the law considers whether it should protect that control, but the lawfulness of its inception should logically be irrelevant when we are determining whether or not possession exists. When a thief has stolen my car, I have, of course, a right to recover possession—the *ius possidendi*, but the thief has possession, which, presumably, the law will protect if the rogue be bold enough to claim its aid, as against all but myself or those claiming through me. How easy is the descent to Avernus: "The owner has a right to recover possession," "right to possession," "rightful possession." Yet, to use the last phrase is hopelessly confusing, for both in fact and in law the thief has possession and the owner a mere right of recovery. In practice, however, there is a constant tendency "of the right to possession to acquire importance at the expense of possession itself,"[21] for, as Papinian puts it, "possession borrows a great deal from right . . . possession is not merely a matter of physical fact, but also of right."[22] It is not proposed to attempt to solve the eternal controversy as to whether possession is a fact or a right,[23] but merely to pick out certain elements that have influenced legal evolution.

The practical importance of possession at Rome was its relationship to the protection of the interdict and the operation of prescription. Neither of these advantages was open to all who had physical control, but whereas procedure by interdict left its mark on the definition of possession, usucapio did not have such direct influence. For

21. Pollock and Wright, *Possession*, p. 83.
22. h.t., 49 pr.
23. See Holmes' analysis, *The Common Law*, p. 215.

while there was a tendency to equate possession with a holding that would be protected by the praetor's interdict, usucapio was regarded as depending on possession plus certain other factors, such as good faith and justa causa—it was thus clearly recognized that possession as such was not a sufficient basis for prescription. There was a tendency, however, to regard possessio ad interdicta as the essential conception which must be analysed, and hence the rules of the interdict naturally affected the definition of possession.

The interdict was not available for all who had physical control. The formula of uti possidetis was: "I forbid force to be used by either of you whereby one of you is prevented from enjoying the land as he now does, not vi clam aut precario." According to the logical analysis, one who takes by force or steals secretly, nevertheless obtains possession. But since the praetor would not protect the holding of one who had acquired a res by force or stealth, there was a natural tendency to limit the definition of possession to a holding that was not commenced in certain unlawful ways. It would have been more accurate to distinguish possession in the broad sense from possessio ad interdicta, but there was a natural tendency to bring the two conceptions as closely together as possible. Thus Ulpian writes: "If a man is ejected from possession by violence, he ought to be considered as though still in possession, since he has the power of recovering possession by the interdict unde vi."[24] No legal system, however, actually identifies possession and legally justifiable possession: the thief is recognized as a possessor, and the refusal of the praetor to protect a holding acquired vi clam aut precario operated only to the advantage of one from whom control had been obtained in these ways. Presumably even a vicious possession was, in general, good as against strangers.[25]

English law is not without traces of the same doctrine. The plaintiff, a schoolmaster, was dismissed and gave up possession of a room at the school, but he returned the next day, broke open the room, and held it for eleven days, at the end of which he was forcibly ejected. He claimed that he had regained possession of the room, and, therefore, brought an action for trespass. According to what Lord Denman C.J. called "the elementary principles" of possession, the plaintiff seemed to have regained possession; his whole conduct showed a definite animus, and the fact that it was necessary to eject him forcibly showed that his control was not illusory. But Lord Denman said that these elementary principles must be understood reasonably—which in the context seems to mean not to work too great an inconvenience for the rightful possessor. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects and drive him to produce his title." The person ejected is entitled to reinstate himself in his former possession. As the plaintiff

24. h.t., 17 pr.
25. h.t., 53.

could have been ejected on the day of entry, Lord Denman held that the lapse of eleven days made no difference to the legal position.[26]

Thus we see the notion that clandestine possession is not real possession as against the previous holder. "If a man goes to market, leaving no one behind, and if whilst he is returning from market another seizes possession, Labeo writes that the other's possession appears to be clandestine; therefore he who has gone to market retains possession."[27] The contrary view of Gaius, that any loss of corpus entailed a loss of possession, is more logical.[28] Probably Gaius' doctrine was applied to movables, while the theories which protected the owner were developed mainly with regard to immovables. But as between the previous holder and the person who had secretly seized the res, the point as to where possession should be placed was an academic one—the practical issue was settled, for the praetor would not protect one who had seized possession secretly as against the previous possessor. This desire to protect the possession of the owner frequently led the jurists to deny that the owner had lost possession, when, according to first principles (if such there be in this thorny branch of learning), he clearly had. Thus, with regard to land held by a tenant, the owner was still regarded as being in possession, and the question arose as to the legal effect of abandonment by the tenant. On principle the analogy of the slave should be applied, the owner supplying the animus and the tenant the corpus. From this it logically follows that, if the tenant loses his control, the owner should lose possession. There was, however, a gradual evolution which increasingly sacrificed the logic of possession for the benefit of the owner. Africanus holds that mere death of the tenant does not end possession—but if a third party enters he considers possession is lost at once.[29] Paul writes that possession is retained by the owner even if the tenant die or go away; but intrusion by a third party is not specifically considered.[30] Pomponius holds that even if the tenant dies or goes mad, or lets to third parties, the owner retains possession.[31] This text does not deal with adverse possession, for one who hired would hold by the will of the tenant. Probably the classical view did not stray very far from the logical theory, but Buckland points out that in Justinian's time, "even where a third person has taken possession through the fault of the detentor, possession is not lost."[32] On this view the owner did not lose possession until he was aware of the intrusion, and a reasonable time in which he could assert his rights had elapsed.

Just as the law weights the dice against the forcible or secret possessor, so it favours one who takes lawfully. Even where possession

26. *Brown v. Dawson*, 12 A. & E. 624.
27. *Ulpian*, h.t., 6, 1.
28. h.t., 15: "You are considered to cease to possess a thing secretly taken from you exactly as a thing wrested by force." See also *Papinian*, h.t., 47.
29. h.t., 40, 1.
30. h.t., 3, 8.
31. h.t., 25, 1.
32. Buckland, *Main Institutions of R.L.*, III: "This purports to apply the principle that a slave cannot make his master's position worse, but it applies to other than slaves, and it treats possession as a right for a slave can make his master's position worse in matters of fact."

is regarded purely as a matter of fact, the question as to the measure of actual control that is necessary is one that depends partly on the legal rules in force, partly on what is usually sufficient in that community to indicate a possession that others will respect. "Hence follows a seeming paradox. Occupation or control is a matter of fact, and cannot of itself be dependent on matter of law. But it may depend on the opinion of certain persons for the time being, or the current opinion of a multitude or a neighbourhood concerning that which is ultimately matter of law. Though law cannot alter facts, or directly confer physical power, the reputation of legal right may make a great difference to the extent of a man's power in fact.[33]

Where one has a right to enter, "entry into any part of the house even with one's body suffices, as in the oft-cited case . . . where the plaintiff, because he could not enter by the door, entered by the window, and when the one half of his body was inside the house and the other out, he was pulled out," which pulling out was the disseisin complained of.[34] Here the law assumes that the control of a rightful possessor extends further, perhaps, than it does in actual fact; but the assumption has reason in its favour, for one with a lawful title is less likely to be interfered with, and a small modicum of actual control is usually sufficient. One who enters without title gains possession only of that which is actually in his control. The same principle is applied in Roman law: if a man lawfully wished to take possession of an estate he need not visit every parcel of it, for it is enough to enter any part of it, provided one has the intention of taking possession of the whole estate up to its boundary. But where an army has entered in great force, it holds only the part which it has entered.[35]

Pollock, in discussing the cases where delivery of a key has been held to be an effective transfer of possession, asks whether it can, therefore, be assumed that a stranger who picks up the lost key of a safe or warehouse acquires possession of the goods to which the key gives access.[36] Here there is no presumption that the finder is entering as of right, and Pollock points out that even the factual basis of control may well be different. "The loser of the key may already have missed it; if he has missed it, he will have taken his precautions. Instead of undisturbed access, and perhaps an obsequious assistant, there will as likely as not be a new lock and a police officer. *De facto* as well as *de iure* there is much to be presumed in favour of him who comes by title, nothing for him who comes by wrong."[37]

(C) Possession "Animo Solo"

The doctrine that a person may remain in possession animo solo is illustrated by many of the cases discussed under the previous head. In certain cases one was held to possess where there was no corpus at all, e.g., summer pastures were still held to be possessed in the winter

33. Pollock and Wright, *Possession*, pp. 14-15.
34. Pollock and Wright, *Possession*, p. 79.
35. *Paul*, h.t., 3, 1, and *Celsus*, h.t., 18, 4.
36. *Possession*. p. 61.
37. Op. cit., pp. 61-2.

even if they were unvisited. Here again, to protect the possessor, mere intrusion by an adverse possessor was not held sufficient. Pomponius holds that the more accurate view is that the previous possessor retains possession animo solo, until he is excluded on his return or until he loses his animus because he suspects that he will be excluded.[38] Here again the previous holder has in reality no actual possession in fact, but the authority of the praetor would enable actual control to be easily recovered.

Thus what may be called the legal concept of inertia is not without its influence. If a possession is once proved to exist, it is assumed that it continues, unless it has been either abandoned by the owner, or seized by a third party. Savigny holds that possession continues provided there be the same animus and that the physical power to deal with the chattel can be reproduced at will.[39] Holmes' criticism of this passage is well founded,[40] for law does not always treat possession as ceasing when there is no present power of enjoyment. The line seems to be drawn, not according to the dictates of logic, but the demands of convenience. If all power to enjoy is lost, e.g., if a ring is dropped into the sea, presumably possession is lost. But a Melbourne citizen on a visit to London retains possession of his land; theoretically he can return to it at will, but there is no present power of enjoyment. The example given by Holmes demonstrates how the common law, like Nature, abhors a vacuum, and regards possession as continuing until there is a clear manifestation of a fact inconsistent with its continuance. A finder of a purse leaves it in his lonely country house, while he languishes behind the bars of a prison. "The only person within twenty miles is a thoroughly equipped burglar at his front door, who has seen the purse through the window, and who enters forthwith to take it." The finder has no present power of enjoyment, no ability to reproduce the physical power of exclusion, yet the law would regard the finder's possession as continuing until the burglar had actually seized the purse. Compare the text by Paul, "though one can retain possession by intention, one cannot so obtain it."[41]

(D) Specific Animus

Just as the notion of corpus is modified for convenience, so is that of animus. Logically there can be no possession of an object unless there is a specific animus directed to it. But for convenience the law frequently pre-supposes animus where there is the overt act of physical control. English law seems to go rather further in this regard than Roman law. It is probably the rule in English law that a man possesses everything which is attached to, or under, the land he possesses,[42] and Goodhart suggests further that the convenient rule is

38. h.t., 25, 2.
39. Savigny, on Possession (tr. Perry, 1848), pp. 253-4. Savigny cites *Paul*, h.t., 3, 13: "Movables are possessed only in so far as they are in one's keeping, that is, so far as one has the power to take actual possession if one chooses."
40. *Common Law*, pp. 236-7.
41. h.t., 30, 5.
42. See discussion of these cases by Goodhart, *Essays*, 75, at 88 *et seq.*

that an occupier possesses those things on his land which are not possessed by anyone else.[43] Of course there can be no animus with regard to a res of which the occupier is unaware, but it is clearly more convenient to regard an occupation of land as *prima facie* evidence of possession of things attached to, on or under the land. In Roman law specified animus is required by many texts which lay down the rule that the possessor of land does not possess the hidden hoard, unless he is aware of it.[44] English law apparently follows the Roman rule with regard to things attached to or concealed in personal property, for if the bureau cases are rightly decided, one who possesses the bureau does not possess the money in the secret drawer the existence of which is unknown.

The abstract theory of possession is that both animus and corpus are necessary; logically, therefore, if one of the two constituent factors should disappear, possession should cease. Some Roman texts suggest that a mere change of animus is sufficient.[45] Ulpian makes a distinction between possession and ownership on the ground that a change of animus ends possession, but not ownership.[46] Elsewhere Paul suggests that, since both animus and corpus are necessary for the acquisition of possession, both must disappear before it can be lost. The better view seems to be that for convenience the law requires an overt act for the abandonment of possession. Clearly I do not cease to possess an incriminating pistol merely because I think I have thrown it away; the most conclusive proof of change of animus would surely not be sufficient. Where the physical control is reduced to vanishing point, mere change of animus may be enough; *a fortiori* when the corpus is retained only by a fiction of the law. Thus the Romans, for obvious reasons of convenience, held that possession of winter pastures remained even if the farmer exercised no control over them in the summer; but if at any moment he decided never to return then possession was lost animo solo. The law is usually forced to infer subjective facts from the actual circumstances, and even where a subjective intent is conclusively proved, the law may, for convenience, decide that a mere change of animus is not, *per se,* sufficient to free the possessor from his responsibilities.

(E) The Influence of the Law of Larceny

It is not the purpose of this paper to analyse the concept of possession in the criminal law. It is relevant, however, to emphasize the influence of criminal law on the theory of possession. The early forms of larceny required a taking from the possession of the owner as the man in the street would understand it. Larceny by a trick introduced complications, and the line between larceny and false pretences became harder to draw. These cases, however, concern the element of invito

43. That is, adopting the view that *Bridges v. Hawksworth,* 21 L.J. Q.B. 75, was wrongly decided.

44. E.g., *Paul,* h.t., 3, 3.

45. *Paul,* h.t., 3, 6: "If you are holding land and nevertheless intend not to possess it, you will at once lose possession."

46. *Ulpian,* h.t., 17, 1. See discussion by de Zulueta. These texts are usually taken as referring to winter pastures, or the doctrine of constitutum possessorium.

domino rather than the notion of possession itself, for it is agreed that the thief obtains possession, the argument being whether the master has in reality consented to the transfer of ownership or possession in view of the fraud that was practised. But the famous case[47] of *breaking bulk* is important as modifying the notion of possession itself. A carrier was hired to carry certain bales to Southampton, but instead carried them elsewhere, broke them open, and appropriated the contents. As the bailee had possession, it seemed at first sight as if he could not commit trespass, but it was finally decided that breaking bulk terminated the carrier's possession; modern explanation of the case is founded on the dictum of Choke J. that the contents of the bales were not in the possession of the carrier. "The bailor has the power and intent to exclude the bailee from the goods, and therefore may be said to be in possession of them as against the bailee."[48] One of the most interesting discussions of this case is that of Hall,[49] who puts forward the thesis that the decision was based, not on pure law, but on the needs of the moment—to secure for diplomatic reasons protection for the goods of foreign traders and of Englishmen in one of the most important industries. "A powerful mercantile class cannot be imagined to have permitted conversion of their property by carriers to remain unpunished." Such a thesis, of course, cannot be proved or disproved, and to some it will seem more plausible than to others.

What of *Ashwell*[50] and the sovereign that was thought to be a shilling by both the prosecutor and the prisoner at the moment of transfer? Does the prisoner's possession begin immediately he received the coin, or does the mistake as to the identity of the res prevent the prisoner from acquiring possession until he learns that it is a sovereign? Roman law in such circumstances held that the mistake prevented possession from passing, but Kenny still leaves it an open question for English law.[51] What is relevant to this paper is to note that a most important element of the law of possession was argued in a case where liberty depended on the answer. Let us merely suggest a problem. If the prisoner does not acquire possession until he discovers the coin is a sovereign, is the owner still regarded as being in possession till that moment, or is there no possession in either?

(F) Fictitious and Symbolical Deliveries

A tenant and bailee did not at Rome have possession: if a tenant buys logically he should hand over the res to the landlord, and receive it back again, possession being transferred to him by the latter delivery. The converse case is where goods are bought from X, who agrees to hold them till they are required. These cases are usually described as traditio brevi manu and constitutum possessorium. Here the party acquires possession without any actual delivery. These

47. 1473 Y.B., 13 Ed., IV, f. 9, Pasch., pl. 5.
48. See Holmes, *Common Law*, 224.
49. Jerome Hall, *Theft, Law and Society*, 315.
50. 16 Q.B.D. 190.
51. *Outlines of Criminal Law* (1933), 220.

rules raise no difficulty, as the double transfer is clearly intended by the parties, and for convenience it is not carried out. Difficulties arise, however, if the real nature of this transaction is not understood through a faulty analysis.[52]

Many have said that delivery of the key of a warehouse is a symbolical delivery of the contents, but the better view is that the key is delivered not as a symbol, but because it gives the power to use the contents.

Conclusion.—Even this bare survey illustrates some of the conflicting tendencies. Holdsworth's dictum as to the defects of abstract theorizing should be remembered, and the common law requires a more realistic analysis. To advance an adequate theory is not the purpose now served, but a few conclusions may be suggested. Firstly, with a few brilliant exceptions, English jurists have not made to this subject the contributions that one would expect. In the absence of proper analysis English law has tended to develop rules for possession in each of the separate pigeon-holes of the law, and save for the classic treatise of Pollock and Wright, there has been little attempt to treat the whole subject critically. Moreover, this classic work came rather late to rationalize the subject; had the attempt been made a century earlier, English law would probably have been simplified. Secondly, to attain any sort of consistency, the cases and books must be pruned of much inconsistent language. Where convenience demands an anomalous rule, the basis of the rule should be clearly expressed instead of hiding the facts by a misuse of fundamental terms. If for special reasons possessory remedies are given to bailors, that should not justify the use of language which places possession now in the bailor and now in the bailee. We teach our students that possession is exclusive, and is vested in the bailee, and then in the next breath talk of the bailor's possession. This confuses even the most acute minds, but this subject of "mediate and immediate possession" demands an essay to itself.[53]

Thirdly, the distinction between animus and corpus has in the past been carried too far. For English law, physical control seems to be the most important factor, and Ihering's theory seems to be justified that all the animus that is necessary is intelligent cognizance of the relationship. The attempt to separate the elements of animus and corpus is useful for purposes of analysis, but if they are regarded as two entirely separate elements difficulties at once arise. This, however, raises a problem which cannot be dealt with here.

52. There is loose terminology in *Marvin v. Wallace*, 6 El. & Bl. 726, and *Elmore v. Stone*, 1 Taunt. 458.

53. It is submitted that for *English* law there is no need to talk of mediate and immediate possession. The bailee and the tenant clearly have full possession: Salmond's analysis may be necessary for some other systems of law, but it is not needed in English law.