FINDERS, OCCUPIERS AND POSSESSION

PARKER v. *BRITISH AIRWAYS BOARD*[1]

The Facts and Decision

British Airways Board ("British Airways") occupied as lessees an "executive" lounge, access to which they restricted to expressly invited passengers and visitors who produced the appropriate documentation to gain entry. While British Airways did not systematically search for lost items, they had instructed employees (though not users of the lounge) as to procedure to be followed on the finding of any articles lost in the lounge. Plaintiff, a passenger admitted to the lounge, discovered there a gold bracelet and surrendered it to an employee of British Airways on terms that it be restored to its owner or, if he could not be located, returned to the plaintiff whose name and address he gave. When the bracelet remained unclaimed British Airways sold it for £850 which it retained despite plaintiff's requests that it be returned to him. Plaintiff succeeded in the county court in suit for conversion, damages being assessed in the amount of the proceeds plus £50 interest. On appeal to the Court of Appeal this decision was affirmed.

The leading judgment was delivered by Donaldson, L.J. who, after an extended analysis of the authorities, dismissed the appeal on the grounds that "plaintiff's *prima facie* entitlement to a finder's rights"[2] had not been "displaced" by any relevant trespass committed by him, by any dishonesty in dealing with the bracelet after he found it, or by any relevant obligations of the plaintiff to an employer or principal.[3] Again, as the bracelet was not "attached to a building" but lying loose on the floor, British Airways could not "acquire rights superior to those of a finder" unless it proved that it had evinced "a manifest intention to exercise control over the lounge and all the things which might be in it".[4] As this was not proved, plaintiff's "*prima facie* entitlement" remained undisturbed.

Eveleigh, L.J. relied principally on a more direct route: the party first in possession would succeed (if plaintiff, because he could maintain suit in conversion and detinue; if defendant, because plaintiff would lack the requisite "title" to sue[5]). In the eyes of the law possession comprises both actual control and *animus possidendi*, although the emphasis placed on

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[1] *Parker* v. *British Airways Board* [1982] 2 W.L.R. 503.
[2] *Id.* 515D.
[3] *Id.* 515E.
[4] *Id.* 515F.
[5] J. G. Fleming, *The Law of Torts* (5th ed. 1977) at 52, 61-2.

each of these ingredients will vary with the circumstances.[6] Applying this test, "there is nothing so special in the place" where the bracelet was found as necessarily to imply intention to possess; neither did the occupier prove manifest intention to possess articles lost within the lounge so as (together with such control as did exist) to constitute possession of the bracelet prior to the moment plaintiff picked it up.[7]

Sir David Cairns reasoned[8] that *Bridges* v. *Hawkesworth*[9] must be either applied (so that plaintiff finder would prevail) or distinguished. The only possible discrimen was that in *Bridges* access to the (shop) premises where the bank notes were found was open to all the public,[10] whereas in the instant case the occupier admitted "only a fraction of the public to [the] particular lounge". However nothing turned on this difference, so plaintiff must succeed.

Even on this cursory account it is clear that the members of the Court reached their common conclusion by disparate reasoning.

The Concept of Possession

In analysing *Parker's Case* it may first be noted that the facts follow the usual pattern for contests between finders and occupiers: a finder has surrendered the thing found to the occupier for its return to the owner or, failing that, to the finder; when the owner is not discovered the occupier purports to retain the article or the proceeds of its sale; the finder sues the occupier in conversion or detinue or both, relying on alleged prior possession.[11] Clearly the finder acquired possession when he took the thing up; the question is whether the occupier can assert possession of the article by virtue of its having been lost or abandoned on the premises he occupies. This raises the proper concept of possession — the subject of continuous debate for many years, primarily amongst academics seeking to unravel the infrequent decisions in this area.[12] The finder/occupier contest has been something of an "acid test" of such a concept, given the typically attenuated but real nature of the occupier's *de facto* control of things lost upon his premises, and the fact that, whatever else he may intend, he does not (and cannot) specifically intend to possess particular articles lost or abandoned upon his premises without his knowledge.

It is necessary, therefore, before more closely scrutinising the judgments in the Court of Appeal, to survey the various formulations advanced for the concept of possession.

It is unfortunate that *Bridges,* decided in 1851, is so frequently thought to mark the beginning of the modern view of possession, rather than, "a

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[6] *Op. cit.* n. 1 at 516D, 516H-517A.
[7] *Id.* 517E.
[8] *Id.* 517G-518C.
[9] (1851) 21 L.J. Q.B. 75, 15 Jur. 1079 hereafter *"Bridges"*; the facts of this and the other two cases dealt with by Goodhart, *infra* n. 20 will not be set out at length.
[10] Note that such a distinction was not made in *Bridges* itself, *infra* n. 20 and text following.
[11] Fleming, *op. cit.* n. 5 at 64-6.
[12] The decisions are not so infrequent if one includes the U.S. decisions, see A. E.-S. Tay, "Problems in the Law of Finding: the U.S. Approach", (1964) 38 *A.L.J.* 350.

culmination of the development moulded by the forms of action, bound by technical considerations and failing to arrive at conceptual understanding of the issues involved".[13]

The early common law considered that a chattel, once in a man's possession, could only leave it with his consent or by violence;[14] as an owner who lost a chattel clearly had not expressed consent to its being taken up, even for the purpose of returning it, a finder must be a trespasser. Later such consent was said to be implied by the fact that the article was in jeopardy, or simply to be imputed by law.[15] Still later it emerged[16] that a loser must sue not in trespass (the loser being deemed to have consented to the finer's taking) but in detinue *sur trover*. But at all times the law strictly insisted that the chattel be in fact lost. When, in the mid-nineteenth century the common law was confronted by a contest between an occupier and a finder, it had no apposite legal theory on which to rely. Patteson, J. in *Bridges* invoked instead the law concerning the rights of a finder as against a subsequent possessor expounded in *Armory* v. *Delamire*,[17] neglecting that the issue confronting him was rather the *earlier* question whether the alleged finder could have been such at all, or whether (the article being already in the possession of the occupier) the article was not "lost" and could not be "found".[18] The finder was said to have possession unless the bank notes had been deliberately put into the shopkeeper's possession as bailee; a shopkeeper (unlike an innkeeper) did not owe all his customers the legal duties under an imputed bailment; neither had the owner/loser intentionally deposited the notes there so as to pass possession to the shopkeeper. Therefore the notes *were* found by the travelling salesman, and the rights of a finder attached.

As Sir David Cairns noted, "[t]hough *Bridges* v. *Hawkesworth* has been the subject of much academic discussion, it has been either applied or distinguished in all the reported cases on disputes between finders and occupiers for 130 years".[19] At the same time the *ratio* of that case has been constructively re-written since at least 1896.[20] One can only hope that the tortured judgement of Patteson, J. will eventually be recognised by the courts as anachronistic, and be laid to rest.

The evolution of the concept of possession may then conveniently be traced through Professor Goodhart's seminal article[21] which identified various misrepresentations of *Bridges* and confirmed the law in its incipient move towards a concept of possession. Each of the four interpretations

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[13] A. E.-S. Tay, "'*Bridges* v. *Hawkesworth*' and the Early History of Finding" (1964) 8 *Am. Jnl. of Legal History* 224 at 225.

[14] *Id.* 226.

[15] *Supra* n. 13 at 227.

[16] *Id.* 229-30.

[17] (1722) 1 Stra. 505.

[18] A. E.-S. Tay, "Possession and the Modern Law of Finding" (1964) 4 *Syd. L. R.* 383 at 383-4.

[19] *Supra* n. 1 at 517G.

[20] A. L. Goodhart, "Three Cases on Possession", *Essays in Jurisprudence and the Common Law* (1931); (1929) 3 Camb. L.J. 195.

[21] *Ibid.*

discussed by Goodhart and reproduced below purported to be supported by the outcome, if not the stated *ratio decidendi,* of *Bridges.*

Lord Russell of Killowen, C.J. in *South Staffordshire Water Co.* v. *Sharman*[22] said that the decision in *Bridges* turned on the fact that the notes were dropped in the public part of the shop (and, apparently, therefore beyond the shopkeeper's control[23]). It may be interpolated here that the defence of Lord Russell by Eveleigh, L.J.[24] is, with respect, misconceived. Lord Russell is not criticised for positing a test of possession which regards as relevant the nature of the place of finding; rather he is said to have upheld as *ratio* a point that was not argued[25] and that Patteson, J. expressly rejected from the Court below. Further, Goodhart argued,[26] the shop was *not* open to the public but to intending customers (and travelling salesmen) only — and, by implication, that the shopkeeper had the control necessary to have succeeded on Lord Russell's test.[27] The relevance of such a restriction on access will be returned to.[28]

Justice Holmes put *Bridges* on the absence of *animus domini* in the shopkeeper.[29] Such intention may be specific to the article or general to the place where it rests. Hawkesworth had neither: he did not know of the specific thing, nor did he intend to exclude the public from his shop. Goodhart argues,[30] again, that intention to exclude (potential customers) from what is in the shop must be distinguished from intention to exclude from the shop itself. Goodhart considered the shopkeeper to have the former (relevant) intention; if this is so Justice Holmes' analysis not only differs from the *ratio* given by Patteson, J., it gives the opposite outcome.

The third view of the case, that of Pollock and Wright,[31] emphasises the absence of *de facto* control in the shopkeeper (irrespective of his intention).

Finally Sir John Salmond[32] dismissed the case on an absence of *animus,* the shopkeeper being unaware of the presence of the notes. As Goodhart observed,[33] this narrow view is inconsistent with the cases beginning with *Elwes* v. *Brigg Gas Co.*[34] which (by necessary implication where not expressly) recognised possession of a thing by virtue of possession of the volume in which it is present.[35] Again, this reasoning was not expressed by Patteson, J.

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[22] (1896) 2 Q.B. 44.

[23] Although the analysis of *Bridges* is also consistent with the U.S. public place/private place distinction Lord Russell clearly embraces instead the analysis at nn. 31, 36, 46-55, 77-8.

[24] *Supra* n. 1 at 517c.

[25] *Supra* n. 20 at 196-7.

[26] *Id.* 198.

[27] *Cf.* the attitude of the Court of Appeal, the members of which regarded this question as one of fact only.

[28] *Infra* at nn. 93-97.

[29] *The Common Law* (1909) at 221 *et seq.*

[30] *Supra* n. 20 at 198.

[31] *Possession in the Common Law* (1888) at 37 *et seq.*

[32] *Jurisprudence* (7th ed. 1924) at 305.

[33] *Supra* n. 20 at 202, 204-5.

[34] (1886) 33 Ch. D. 562.

[35] Salmond did admit the possibility of possession by this means, *supra* n. 35 at 304.

Haing thus corrected a number of misconceptions about *Bridges,* Goodhart applied his preferred concept of possession, which proceeds from the focus on *de facto* control suggested by Pollock and Wright; however Goodhart dilated such *direct* physical control as the occupier enjoyed by reference to the further effective control bestowed upon him by the recognition in the "average customer" (and so, in the average finder) that the shopkeeper has some duty (to the owner) and of a commensurate (moral) claim to receive into his safekeeping things found on his premises. So viewed *Bridges* was, once again, wrongly decided.[36]

The important thing about these theories on *Bridges* is not that they put the case on grounds which did not appear, but that they recognised the need to do so. It is well also to note the similarities between the concepts surveyed: Justice Holmes and Sir John Salmond both concentrated on intention to control, and both considered that possession of a volume may bring possession of its contents; Pollock and Wright, Lord Russell and Professor Goodhart all posited a test of possession based on control and intention to possess.

The most radical revulsion from the rigidity of Patteson, J.'s reasoning is the view of the "modern lawyers" represented by Dias and Hughes[37] who consider the law to be a matter of solving specific problems by the most direct path and who decry *a priori* reasoning not just as unhelpful but as imposing restrictions to which the judges will tend to react by falsifying previous decisions so as to reach the outcomes they prefer on the merits of the case before them. Judges, they believe, will be guided by convenience and policy and should do so overtly. Given the evident inability of judges and commentators to agree what "convenience and policy" require in any given case[38] this view not only disregards the doctrines of precedent and comity on which the common law is founded, it renders virtually or entirely impossible the prediction of the application of the law where "possession" is an issue. Of course, if the modern lawyers are right any guiding principle will be illustory anyway, but this remains to be proved. Again, while neither occupiers nor prospective finders are likely to require certain principles governing possession so as to order their affairs accordingly, the proper concept of possession affects also the law of sale of realty and goods, bailment, larceny, employment and agency, and the torts of trespass, conversion and detinue.[39] Inherent uncertainty of approach in these areas would be disasterous.

A more conventional analysis is that of D. R. Harris[40] who begins by approving Professor Hart's statement that legal concepts cannot be defined, only described. Harris then extracts from the authorities a number of potentially relevant indicia of possession, none of which alone or in

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[36] *Supra* n. 20 at 202-3.

[37] *Jurisprudence* (1957) at 308 *et seq.*; discussed by A. E.-S. Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach" (1964) 4 *Melb. U.L.R.* 476 at 477-8.

[38] *Infra* at nn. 99-100.

[39] "The Concept of Possession in English Law", A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961) 69 at 70-1.

[40] *Ibid.*

combination are necessary or sufficient to constitute possession, but any of which may be selected by the judge as decisive in the circumstances to hand.

Briefly, the nine factors set out are:[41]

(i)-(ii) the degree of physical control (actual or immediately potential) relative to the highest degree of physical control of which the object admits, exercised by the plaintiff, the defendant, and any other person;

(iii)-(iv) the knowledge of the plaintiff, defendant, and any other person, of the existence, attributes and location of the lost chattel, and the intention regarding the chattel formed by each such person as a result of that knowledge;

(vii) possession of the premises on which the chattel is present;

(viii) special legal relationships such as bailment, agency or employment, buyer and seller; and,

(ix) policy considerations — the "social purpose of the particular rule of law relied on by the plaintiff".

Clearly "possession" thus described is not a concept drawn from reality but a legal *conclusion*[42] from which further consequences flow. This methodology inherently explains all the decided cases but cannot predict the outcome of any: it is based on a collection of rules that have been considered relevant and persuasive in some cases but not in others, without any means of anticipating whether they will be thought pertinent to any given set of facts. One may well ask (as did Mr. Harris[43]) why *Sharman's Case* was decided by application of his first, rather than his eighth factor?[44]

Moreover, with respect, the framework produced by Mr. Harris is a sensible reconciliation of the cases only if the various judgments on which it draws were in truth consciously or sub-consciously motivated by it.[45] If they were not (as the analysis below suggests), it seeks to stand together decisions which were never intended to be complementary and to suspend or override the operation of one or more of them in circumstances which the judges concerned intended to be governed by them.

Finally, as illustrative of a "unitary concept of possession" Professor Tay has argued[46] that possession is an infra-jural relationship:[47] one which exists in fact independently of its recognition by law and which the law can only adopt as a fact (to which it *then* ascribes certain legal consequences). Such possession is constituted by the conjunction of control and intention to control: in the absence of control intention is mere desire; in the absence

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[41] *Supra* n. 39 at 74-80.
[42] *Id.* 70.
[43] *Id.* 79.
[44] As per Salmond, *op. cit.* n. 32 at 307, discussed by Goodhart, *op. cit.* n. 20 at 205; the same may be asked of *Grafstein* v. *Holme* (1958) 12 D.L.R. (2d) 727; discussed by Donaldson, L.J. *op. cit.* n. 1 at 512A-F.
[45] *Supra* n. 39 at 79.
[46] *Supra* nn. 13, 18 and 37.
[47] *Id.* 492-3.

of intention control is a vulnerable and transient relationship.[48] This definition contains an "open-textured concept"[49] (not a rule[50]) which, like the "reasonable man" test of negligence, acquires substance only in the context of its application.

This view draws on the line of cases heralded by *Elwes* v. *Brigg Gas Co.*[51] in which, as Professor Goodhart shows,[52] Chitty, J. decided the case on the ground that:

> [being] . . . in lawful possession . . . not merely of the surface, but of everything that lay beneath the surface [the lessor/occupier was] consequently in possession of the boat. . . . It makes no difference, in the circumstances, that the plaintiff was not aware of the existence of the boat.[53]

With *Sharman's Case,*[54] in particular, this decision establishes that an unknown article in or upon land can, in certain circumstances, be possessed by the occupier of the land. As virtually all the academics discussed above have argued,[55] the additional requisite is *animus possidendi* which, like control, is a question of fact. (Indeed control may, as illustrated by *Sharman's Case* further discussed below, itself irresistibly imply the necessary *animus.*)

It is against this backdrop that the judgments in the Court of Appeal must be considered.

The Judgments

Donaldson, L.J. expounds the case and the authorities on an isolation and categorisation of various sets of circumstances, with independent rules governing each segment. Even within the finder against occupier subset of the law of possession his Lordship identifies six categories: the "finder" who becomes aware of a lost chattel but does no more, finders who trespass, dishonest finders, lost chattels in or attached to land, lost chattels upon land, and cases intruded upon by an employment or agency relationship.[56] This methodology is a development of the "potentially relevant factors" scheme formulated by Harris, except that Donaldson, L.J. appears to envisage a fixed regime which admits of less flexibility (and uncertainty) than does Mr. Harris' view.

The first three of his Lordship's categories focus on the alleged finder and the question whether he has been disqualified from obtaining any rights by his own inaction or misdeeds. The fourth and fifth categories focus on the position of the thing found so as to determine whether the

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[48] *Id,* 490-1.

[49] *Id.* 491.

[50] *Semble* Professor Hart meant only to deny that rules — not principles — were incapable of definition.

[51] *Supra* n. 34.

[52] *Supra* n. 20 at 204.

[53] *Supra* n. 34 at 568.

[54] *Supra* n. 22, see discussion *infra* at nn. 75 to 78.

[55] *Supra* at nn. 22 *et seq.*

[56] This corresponds with Harris' eighth factor; *cf.* A. E.-S. Tay, "Possession, Larceny and Servants: Towards Tidying Up an Historical Muddle" (1965) XVI *Uni. of Toronto L.J.* 145.

occupier acquired any rights thereby. With respect, this is a reversal of conventional analysis, which looks to the earliest possession and, logically therefore, tests first the claim of the occupier.[57] Further, it appears that his Lordship recognised that no concept of possession would remain identifiable as such within his fragmented regime; thus, although orthodox analysis regards the key question as being the existence of possession,[58] Donaldson, L.J. speaks only in terms of "rights" and "title".

A "finder" who becomes aware of a lost chattel but does no more (the first category) does not "acquire any rights" as finder.[59] Although it is difficult to see, with respect, how this may be derived (as it is said to be) from anything said by Pratt, C.J. in *Armory* v. *Delamirie,* [60] or from the facts of that case (the only finder, the chimney-sweep's boy, took up the thing; the other protagonist, the jeweller, merely took the chattel on a bailment — he was not a "finder" in any accepted use of that word), the proposition has never been doubted.

The second category[61] concerns trespassing finders who, on public policy grounds, cannot benefit from their wrongdoing;[62] but, to prevent a *lacuna* in title and a resultant "free-for-all", "rights" are said to vest in the occupier by default. Clearly such "rights" are an abstract legal concept rather than flowing from recognition of the fact of possession. (Presumably where the chattel is attached to land, or is on land the occupier of which satisfies the further requirement posited by the Court of Appeal,[63] the occupier acquires rights not just by default but by virtue of the satisfaction of one of these requirements; that is, the occupier's rights only arise "by default" where the case does not overlap with his Lordship's fourth or fifth categories.) This category is said to be "reflected" in the judgment of Chitty, J. in *Elwes Case* although, Donaldson, L.J. considered, the case itself centred on another point.[64] With respect, Chitty, J.'s judgment has nothing to say about a trespassing finder. His Honour said only:

> . . . the boat was imbedded in the land. A mere trespasser could not have taken possession of it; he could only have come at it by further acts of trespass involving spoil and waste of the inheritance.[65]

Even viewed in isolation these words merely emphasise the high degree of control exercised over the boat by the occupier: it could only be reached by excavation. As Goodhart observed,[66] when the judgment is read as a whole, the *ratio decidendi* of the case is clearly seen to be that outlined above.[67]

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[57] *Supra* text at n. 11.
[58] *Ibid.*
[59] *Supra* n. 1 at 506H.
[60] *Supra* n. 17.
[61] *Supra* n. 1 at 506H-507D.
[62] Also *supra* n. 32 at 307, *cf.* Harris' seventh factor, see *supra* n. 39 at 77.
[63] *Infra,* text at nn. 85-86.
[64] *Infra,* text at n. 80.
[65] *Supra* n. 34 at 568.
[66] *Supra* n. 20 at 206.
[67] *Supra* text at nn. 51-54.

Hibbert v. *McKiernan,* also cited by Donaldson, L.J.,[68] is distinguishable as rather turning on the special requirements of the criminal law of larceny.[69]

His Lordship's third category[70] is that of the "dishonest finder" (that is, he who determines to abscond with his find, rather than to return it) who obtains a "frail title" (by default, to avoid a "free-for-all") which is defeated by that of even a *subsequent* honest taker. This view *encourages* a "free-for-all" between the dishonest finder and ostensibly honest finders wishing to see justice done even at the risk that the owner will not appear to relieve them of their "burden". Furthermore, his Lordship again turns the finder against occupier law on its head: the law recognises as superior *prior* possession, not more meritorious possession.[71] (Indeed, it is this very approach, arbitrary but comparatively simple, which *does* minimise contention.) There is no mention, in *Armory* v. *Delamirie,* of an attempt by the chimney-sweep's boy to find the owner of the ring.

Having considered the standing of the "finder" his Lordship's fourth category deals with the consequences of the state in which the thing was found.[72] Where the thing found is "attached to realty" the occupier of that land will have a "better title" than the finder who can aspire to "some rights" at best and nothing if he is a trespasser (query the position of a dishonest finder of such a chattel). The "rationale for this rule" is said probably to be either: that the chattel is "an integral part of the realty as against all but the true owner", or that the finder, in detaching the chattel, is likely to become a trespasser or, if he acts under licence, is probably bound by the terms of that licence to surrender the chattel up.[73]

A number of observations on the compartmentalisation technique are suggested by this (admittedly tentative) reasoning. Firstly, the second alternative rationale is unsatisfactory, as, apart from anything else, it does not support the rule in all facets of its application — that is, where the finder neither trespasses nor breaches a licence in securing a chattel. The segmentation methodology must always stand ready to discover a new segment with its concomitant rules.

Secondly, the "title" of the occupier, while not expressed to be possession, clearly accrues from possession of the *locus in quo*. It is difficult to see why such occupation should always suffice where the thing is attached to land but never suffices *simpliciter* where it is unattached upon land: if the root of title is possession surely the sufficiency of occupation is a question of fact in both cases. The real property cases[74] preclude this arbitrary distinction being supported on grounds of simplicity.

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[68] [1948] 2 K.B. 142, cited by Donaldson, L.J. *supra* n. 1 at 507B.
[69] *Supra* n. 37 at 496.
[70] *Supra* n. 1 at 507E-F.
[71] *Supra* text at n. 11.
[72] *Supra* n. 1 at 507G-508F.
[73] *Id.* at 507G.
[74] Contrast, by way of example, *Leigh* v. *Taylor* [1902] A.C. 157 and, on the other side of the line, *Re Whaley* [1908] 1 Ch. 615 and *Norton* v. *Dashwood* [1896] 2 Ch. 497.

Under this category his Lordship subsumes *Sharman's Case,* relying on Lord Russell's comment that occupation gives "possession of everything which is attached to or under that land".[75] Donaldson, L.J., by ignoring the overlap and conflict between that statement and the observation by Lord Russell that possession requires "manifest intention to exercise control over [land] and the things which may be upon or in it" (things "in" land are also "under" it) derives support for his fourth and fifth categories (respectively, things in or attached to land, and things upon land or in buildings) and the rules assigned to each. Clearly Lord Russell was ambiguous on this point, and the phrases cited will support such an interpretation. However Lord Russell, in approving the words of Pollock and Wright, also endorsed the statement:

> . . . it seems preferable to say that the legal position [of things attached to or under land] rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorised interference. . . .[76]

Several pertinent propositions plainly appear from that statement:[77] the relevant "right" in the occupier derives from his prior possession; possession is "real *de facto* possession" not a legal abstraction; and, that possession is constituted by the occupier's general power and intention to possess exclusively (that is, the concept of possession of that which is in a volume by possession of that volume).[78] While Lord Russell's judgment is self-contradictory as to the requirements of possession by an occupier of a chattel *in* his land it is contended that his judgment as a whole probably means as follows: where a chattel is attached to or under land it is an easy and (normally) irresistible inference from possession of the land, that the chattel itself is similarly possessed despite the absence of specific knowledge of its presence: where the chattel is merely upon land, common experience indicates that other inferences are plausible and that, as the question is one of fact, some further demonstration of intention is required.

His Lordship next distinguished *Elwes Case* as a contest between an owner and lessee, and *Johnson* v. *Pickering*[79] as similarly irrelevant to the instant case. As has been shown,[80] *Elwes Case* cannot be so confined and does govern the circumstances under consideration. *Johnson* v. *Pickering,* while not a finding case, does concern the concept of possession of a volume and is relevant on that basis.

It is in his Lordship's fifth category (chattels loose *upon* land)[81] that *Bridges* is analysed. His Lordship gives as its *ratio,* "that the *unknown* presence of the notes on the premises occupied by Mr. Hawkesworth could not, without more, give him any rights or impose any duty upon him in relation to the notes".[82] *Semble,* with respect, this view must be added to

[75] *Supra* n. 22 at 46, cited *supra* n. 1 at 507H-508A and 510C-511D.
[76] *Supra* n. 31 at 41 quoted *supra* n. 22 at 46.
[77] *Supra* text at n. 54.
[78] *Supra* n. 18 at 386.
[79] [1907] 2 K.B. 437, cited *supra* n. 1 at 508D.
[80] *Supra* text at nn. 51-54.
[81] *Supra* n. 1 at 508F-513H.
[82] *Id.* 510B, italics mine.

Professor Goodhart's list of misreadings. The lack of knowledge of the presence of the notes referred to by Donaldson, L.J. is that of Hawkesworth.[83] Yet Patteson, J. only referred to the knowledge (or lack thereof) of the occupier at one point in his judgment:

> If the discovery had never been communicated to the defendant, could the real owner have any cause of action against him because they were found in his house? Certainly not. The notes were never in the custody of the defendant . . . before they were found, as they would have been had they been intentionally deposited there.[84]

It thus appears that the only relevant intention was thought to be that of the owner, which was relevant to establish whether or not the notes had been bailed to the occupier or were really lost so that Bridges could find them. The reference to lack of knowledge in the occupier is made only to show the injustice of holding him to be a bailee of the notes (with a bailee's duties) given that he was unaware of their presence.

Finally Donaldson, L.J. adopted[85] Lord Russell's test of possession by an occupier of chattel's lose on the premises (as to which see above), "provided that the occupier's intention to exercise control over anything which might be on the premises was manifest".[86]

Turning to the decision of Eveleigh, L.J., it was seen above that his Lordship looked to the question whether the occupier had such intention to possess and such control as together to constitute him a prior possessor.[87] The emphasis to be placed on each of these factors varies with the circumstances, creating a spectrum that may be analysed into two main types:

(a) cases where the control of premises is so strong (as in a bank vault or a private dwelling) that the requisite *animus* can be inferred without further evidence thereof;

(b) cases (as on the instant facts) where the occupier's control of the premises is not so potent as to bespeak the requisite *animus*, and the occupier must prove a "manifest intention to exercise exclusive control over lost property".

Thus far, the judgment of Eveleigh, J. is consistent with Tay's unitary concept of possession. However, in seeking to justify Lord Russell's requirement of manifest intention his Lordship argues:

> A person permitted upon the property of another must respect the lawful claims of the occupier as the terms upon which he is allowed to enter, but it is only right that those claims or terms should be made clear.[88]

These words are consistent with a *contractual* basis for the claims of the occupier. Again, in concluding, his Lordship posits as an alternative

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[83] See also *supra* n. 1 at 511C.
[84] *Supra* n. 9 at 76.
[85] *Supra* n. 1 at 511D.
[86] *Ibid.*
[87] *Id.* 516C-517B.
[88] *Supra* n. 1 at 516H.

requirement to manifest intention, "that the permission to enter . . . be upon the terms that the commonly understood maxim 'finders-keepers' would not apply".[89] This may be contrasted with Tay's view that possession is a matter of the relationship between a person and a thing — not of a relationship between two or more people.[90]

Sir David Cairns notes the existence of "much academic discussion"[91] but he is apparently unmoved by it as he then decides the case on an application of *Bridges*. Sir David Cairns clearly, also, adopts Donaldson, L.J.'s compartmentalisation technique[92] but not the rules relating to "thieves and trespassers . . . since the plaintiff was not in either of those categories".

The Test Applied

It has been contended that while no unitary concept of possession will explain all the authorities, Professor Tay's concept does find clear support within them and is preferable apart from authority. What, then, can be gleaned from *Parker's Case* on the application of such a theory?

Eveleigh, L.J., whose reasoning is closest to endorsement of Professor Tay's unitary concept regards the executive lounge as being of the second "type" wherein the degree of control does not necessarily imply the requisite intention (with respect, this must be right); restriction of access to the lounge to those who paid the necessary price did not manifest that intention but was irrelevant.[93]

Donaldson, L.J. regarded as irrelevant to the necessary display of intention restrictions on access based on classes of user, the need to clean and maintain the lounge, or the exclusion of drunks, guns or bombs. Apparently of greater weight would be searches for lost articles, especially if regular.[94] Instructions issued to staff were irrelevant because they were not published to users of the lounge and because they were "intended to do no more than instruct the staff on how they were to act in the course of their employment".[95] The first of these objections implies the contractual basis discussed above; arguably it is enough if the court can ascertain an intention to exclude users from lost items, whether or not this intention was advertised. The relevance of the second objection is obscure, given that British Airways could only ever act through employees and agents.

Sir David Cairns suggests that restricting access to a place to "a fraction of the public . . . (but a fraction which includes all first class passengers and some others)"[96] is not materially different from "a shopkeeper [518] who imposes no restriction on entry to his shop while it is

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[89] *Id.* 517F.
[90] Holmes, *op. cit.* n. 29 at 216 quoted by Tay, *op. cit.* n. 37 at 489.
[91] *Supra* n. 1 at 517G.
[92] *Id.* 518B-C.
[93] *Supra* n. 1 at 517F.
[94] *Id.* 515G, *cf. supra* n. 68 where the occupier maintained a police watch to deter intending "finders".
[95] *Id.* 515H.
[96] *Id.* 517H.

open (but who would be entitled to refuse entry to anybody if he thought fit)".[97] *Semble* a purely quantitative restriction is neutral on the requisite intention, although at the extreme of "a private house or . . . a room to which access is very strictly controlled" such restriction does manifest the necessary intention (query whether the restriction remains purely quantitative).

Conclusion

It has been argued that cases hinging on the proper concept of possession should be decided, not on any *a priori* concept of possession, but in line with policy and the merits of the case.[98] It has become evident that no concensus, even on broad outlines, can emerge from such an approach: contrast the argument of D. R. Harris that, "in most circumstances the owner would be more likely to recover the chattel if possession was awarded to the occupier"[99] with that of Donaldson, L.J. that, "if. . . finders had no prospect of any reward, they would be tempted to pass by without taking any action or to become concealed keepers of articles which they found".[100] The unpredictability of such an approach is, as was argued above,[101] intolerable.

At the other extreme Donaldson, L.J. and Sir David Cairns in the Court of Appeal favoured a segmentation of finder/occupier contests so that each segment could be dealt with in isolation. Perhaps the greatest peril in this approach is that one forgets the relationship between the pieces and, over time, develops rules inconsonant with each other and alien to the central thesis of the law.

By contrast, Eveleigh, L.J. tended to support a unitary concept of possession which governs not just all finding cases but all cases in which the concept is implicated.

With respect, it is regrettable that the remainder of the Court did not concur in this view. It is still true, as Earl Jowitt said in 1952, that "in truth, the English law has never worked out a completely logical and exhaustive definition of 'possession' ".[102] Perhaps, however, the position is not as bleak now as then.

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[97] *Id.* 518A.

[98] *Supra* n. 37.

[99] *Supra* n. 39 at 82; admittedly Harris qualified this view; *cf.* counsel for British Airways who did not, see *supra* n. at 514A.

[100] *Supra* n. 1 at 514B.

[101] *Supra* text at nn. 37-39.

[102] *U.S.A.* v. *Dolfuss Miegg* [1952] A.C. 582 at 605.