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MEANINGS OF POSSESSION†

BY BURKE SHARTEL ‡

MR. JUSTICE ERLE said not so many years ago, "'Possession' is one of the vaguest of all vague terms;" and other judges and writers have spoken in similar vein.¹ We must admit that they have not overstated the matter. Possession is and always has been a vague concept despite the fact that almost every legal theorist who wrote in the last century essayed at some time in his career to rescue this lorn concept from the mystery and confusion in which it was enveloped. As we look back over the results of all these efforts we do not find ourselves one whit closer to the clear-cut notion of possession which they were seeking than we were before their work began. What is the reason for their failure? Why is our notion of possession still vague? The answer, it seems to me, is that they hoped for the impossible. They did not appreciate either the nature of our concepts, or the purposes for which we generalize, or the natural limitations on our processes of generalization.

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†This paper was read at Chicago on December 29, 1931 before the round table on Jurisprudence and Legal History at the annual meeting of the Association of American Law Schools.
‡In Reg. v. Smith, (1855) 6 Co. C. C. 554, 556; cf. Bourne v. Fosbrooke, (1865) 18 C. B. N. S. 515, 526, 34 L. J. C. P. 164, 11 Jur. N. S. 202, 13 W. R. 497; Lyell v. Kennedy, (1887) 18 Q. B. Div. 796, 813, 56 L. J. Q. B. 303; Pollock and Wright, Possession; Words and Phrases—title Possession. The passage quoted in the text continues: "... and [the term "possession"] shifts its meaning according to the subject matter to which it is applied,—varying much in its sense, as it is introduced either into civil or into criminal proceedings." This last part of the learned justice's remark expresses exactly the theme of this paper; it is unfortunate that the force and effect of his remark has not been more generally appreciated.
I do not, therefore, propose to add one more to the already imposing array of suggested definitions of possession. On the contrary, I want to turn attention in the opposite direction. Instead of trying to build up a single neat formula which will embrace all the instances in which we speak of possession, I want to make the point that there are many meanings of the word "possession;" that possession can only be usefully defined with reference to the purpose in hand; and that possession may have one meaning in one connection and another meaning in another. In short, where the older writers, in line with the logic of their day, have brought as many cases as possible together, on the basis of some feature of similarity among them, and have united them all under one conceptual head, I want to break up this concept and to emphasize instead differences between cases and the fact that the differences are, for legal purposes, far more significant than the likenesses which constitute the basis of unification under one concept.2

At the outset I believe all will concede that the word "possession" has several radically different meanings. It is found in several combinations such as de facto possession, legal possession, physical possession, actual possession, and constructive possession. Each of these combinations refers to a concept which careful writers are generally at pains to distinguish from the others. To this extent there is agreement on the proposition that possession does have different conceptual references or meanings.3 And the

2More than six years ago I completed a rather extended essay entitled "Taking Possession of Chattels." Since then I have always intended, largely on the advice of friends at Columbia and Michigan who went over the manuscript, to widen the scope of the essay and make of it a book dealing generally with the subject of possession. But the opportunity to return to this task has thus far not presented itself. I have decided, instead, to publish portions of the work already done in the form of separate papers; of these the present paper is to be the first to appear in print.

3On this point the reader is referred to the discussions of possession by the writers cited in note 4. However, these writers, as the reader will notice, do not agree in their use of terms; for example, compare the definition of constructive possession by Salmond (Jurisprudence, 7th ed., sec. 94) with that of Pollock (Pollock and Wright, Possession, 25, 27). But most of them agree (and properly it seems to me) as to the need to distinguish three general meanings from one another:

(1) Possession as the facts which initiate legal control. Usually the name given to this meaning is "de facto possession," "physical possession," or "actual possession," but sometimes, as in the case of Holmes, the word "possession" alone is used. This meaning is considered in the first half of the present article.

(2) Possession as the facts which must accompany a continuing legal control as, for example, in the statement that an adverse possessor must continue in open, notorious, etc., possession. Here writers are inclined to
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program which I have outlined above would, if fully carried out, require that each of these meanings be separately considered and analyzed. But we shall not be able to cover so much ground. It will suffice for our present purpose to take up two of these meanings of possession and to examine the definitions thereof which have been attempted. The two meanings to be examined are de facto possession and legal possession.

I

DE FACTO POSSESSION

First, de facto possession, or possession as the facts which initiate legal control over things (and perhaps result in liability for larceny, for tortious taking, conversion, etc.). The characteristic method of defining possession in this sense has been to state certain essential constituent elements thereof. This general method is, of course, one of the usual ways to define any concept. To analyze it into constituents does help us to grasp more clearly the nature of the concept. But writers of the last century, in their endeavors to define possession by this method, started with two false assumptions. They started with the assumption that it is possible to discover certain universal and necessary elements of de facto possession, and they started with the assumption that it is possible to state these essential factual elements in the form of a typical or necessary act. They defined possession in terms of an essential unilateral act of the possessor. This act had for them two sides: the mental and the physical. They spent an infinite amount of labor in the endeavor to state the nature and characteristics of these two sides of the possessory act. Each writer produced his own definition of possession cast in terms of an essential animus possidendi and an essential corpus possessionis.  

(3) Possession as the legal control, legal relations or other legal significance of certain facts. To designate this meaning and distinguish it from the other two meanings writers frequently use such adjectives as “legal,” “juristic,” etc., in connection with the word “possession.” This meaning is also sometimes intended by the statement that a person is “in possession” or “has possession.” This meaning must also be distinguished from ownership, custody, and other legal relations to things. It is to be discussed in the last half of this paper, and to avoid further repetition the reader is referred to what is there said.

4See, for example, Markby, Elements of Law, 2d ed., sec. 334; Holmes, Common Law, 216, et seq.; Terry, Leading Principles of Anglo-American
Definitions in Terms of Intent and Act.—Most of us today would be ready to repudiate forthwith the suggestion that any such universals or essentials are to be found anywhere in the law, and we would be prepared to reject both the discussion and the results of these writers who pursued the vain quest for this essential possessory act. Anyone who does not already accept the view that the quest for universals is futile would almost certainly not be influenced by anything further which we might say here. We shall therefore turn our attention to the other assumption already mentioned, to wit, the assumption that possession can be successfully defined in terms of the possessor’s act and intent. Holmes, for example, seems to me to reject clearly enough the notion that there are any universal elements of possession. He first calls attention to the weaknesses in theories and definitions previously advanced. He notices that no single generalization of the animus and corpus of possession will hold alike for our modern common law system and for the modern civil law systems. Particularly, he calls attention to the fact that many bailees, uniformly classed as possessors in our law, are not so classed in the civil law. He also observes that the existence of three different rules in different common law jurisdictions as to when whalers acquire legal control of a whale “tends to shake an a priori theory of the matter.” And other writers have made

Holmes wrote his celebrated treatise more than fifty years ago. I shall have occasion to refer to it frequently in critical terms in the course of the following discussion. While I share wholeheartedly the respect of all serious students for this greatest of our legal thinkers, I would not do justice to my subject if I did not point out the weaknesses in his work. Holmes’ very prestige may easily lead to the acceptance by the uncritical of notions which I hardly imagine he himself would entertain today.

The nature and elements of possession have received extensive consideration at the hands of the Continental legal theorists. See Windscheid, Pandekten, 9th ed., by Kipp, secs. 148-150 and notes citing the civil law authorities. Their discussions have followed the same lines as the discussions of our own writers. Indeed our writers borrowed both theories and dogmas largely from the civilian writers who wrote before 1880. But for our purpose, little would be gained by tracing current common law doctrines to civilian sources which also employed a priori methods such as we mean utterly to reject.
similar observations; but almost without exception, each of these writers concludes by working out an a priori theory of his own. Holmes, and these other writers, purport to find certain essential respects in which the possessory intent and the possessory act are fixed and constant in our common law system. Definitions of possession in terms of act and intent have so long been in vogue that they must be squarely met; the worth of such definitions needs to be considered.

What should, first of all, make us question the utility of this form of definition is the fact that all the definitions of animus and corpus ever suggested have been vague and almost meaningless. One writer says the possessor must have the intent to control the thing, another that he must intend to use the thing, another that he must intend to exclude others from the use of the thing. And the characterizations of the possessory act have been equally vague. An examination of the cases shows the reason for this.

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7Holmes, Common Law, 212-213. Bingham, in his article entitled The Nature and Importance of Legal Possession, (1915) 13 Mich. L. Rev. 535, 623, repudiates the notion that any uniform essentials of possession can be found, and says inter alia, (at 638)—

"Legal possession of a physical object of property may exist in favor of X by virtue of any of various sorts of titles; and none of these various sorts of titles is determined by linguistic definition or by a priori, abstract reasoning, but by practical juridical considerations of justice and policy including custom, precedents, etc., etc., such as have produced a large proportion of our law."

But compare what is said infra p. 634 regarding Bingham's conclusions in other respects.

8Holmes, Common Law 215 et seq. This limitation is, doubtless, to be understood where it is not expressed in the definitions of all the common law writers.

9Holmes: "If what the law does is to exclude others from interfering with the object, it would seem that the intent which the law should require is an intent to exclude others. I believe that such an intent is all that the common law deems needful..." Common Law 220; Salmond: "... the intent to appropriate to oneself the exclusive use of the thing..." Jurisprudence, 7th ed., sec. 97; Terry: "... the will to be in a position to use if he chose..." [sic] Leading Principles of Anglo-American Law, sec. 281; Pollock and Wright: "A manifest intent, not merely to exclude the world at large from interfering with the thing in question, but to do so on one's own account and in one's own name." Possession 17, see also 37. And see Holland, Jurisprudence, 13th ed., 197 et seq.

10Holmes: "To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world. The physical relation to others is simply a relation of manifested power co-extensive with the intent. But, besides our power and intent as towards our fellow-men, there must be a certain degree of power over the object. But the difference between the power over the object which is sufficient for possession, and that which is not, is clearly one of degree only, and the line may be drawn at different places at different times on grounds just referred to." Common Law 216, 217. The statements of others are equally vague and indefinite. See Terry, Leading Principles of Anglo-American
vagueness of characterization; it shows that the vagueness is a necessary result of the wide range of varying intentions and acts which are sought to be brought under these definitions. Consider, for example, the duration of the control intended by various possessors. Some possessors, like the thief, or the adverse possessor, intend to hold without limit as to time, while others, like the bailee for hire, the honest finder and the gratuitous depositary, hold the thing with only the most temporary control in mind. Moreover, possessory intentions or purposes range in scope from a purpose to control in every way down to a purpose to control which is almost nil. And possessory purposes may vary in kind from the claim to use beneficially, and without restriction, down to the mere claim to hold as depositary for another. About all one can accurately say of the group of cases which the writers of the last century have brought together under the caption "Possession" is that the possessor does, in every case, entertain some purpose to control the thing. Such a statement seems to be hardly worth making. Of what possible service to us, whether in deciding cases or in trying to classify decided cases, is a definition of possessory intent, which leaves out (as this one must to be accurate) all reference to the extent, to the kind, and to the duration of the control intended?

Another point which should make us dubious about these definitions of the possessory act and intent is the fact that no writer has ever been able to frame a definition which fitted all the cases. Holmes, for example, who defines the possessory intent, as the intent to exclude others, must admit that the servant in control of his master's chattel has this intent, as well as the close physical relation to the chattel which would make him a possessor, but that the servant is not, in our law, regarded as possessed. Holmes explains this case away as a historical accident. It seems obvious that he lays himself open here to exactly the criticism which he makes of certain other writers in his chapter on possession; he says: "The first call of a theory of law is that it should fit the facts." Holmes' own definition of possessory intent does not, by his own admission, fit the common law decisions.

Law, secs. 279, 281, 284; Salmond, Jurisprudence. 7th ed., secs. 96-100; Holland, Jurisprudence, 13th ed., 194-197; Pollock and Wright, Possession 11-16.

11 Holmes, Common Law 227.

12 Holmes, Common Law 211. When one considers the insufficiency of all statements of the elements of possession from the point of view mentioned in the text, and considers also how the states of fact which have been embraced by the term de facto possession have varied in the course of
Another striking fact is that Holmes and other writers who undertake to define the possessory act have never been able to agree among themselves as to what the essentials of that act are. Each man's effort to state the essentials has failed to stand the test of even a short period of time. Each new writer has felt compelled to state the essentials in a different way, so that each effort at statement has been like writing on the sand, washed out by the next wave of possessory definitions.13

And from a modern viewpoint the effort to define the act and intent of possession appears as an arbitrary logical exercise. There are many possession problems in which an act is significant. But there are other situations in which no act whatever is involved, and to which the same legal significance is attached as is attached to so-called possessory acts.14 Taking and delivery, or, as we

history, one is left with little hope of finding a fixed and final meaning for this term.

13See for example the definitions of intent and act cited supra notes 9 and 10, and the criticisms of one another's efforts by the authors there cited. Anent variation in theories of possession, the following amusing remarks of Gray about the civilian writers are pertinent:

"Take, for instance, the leading topic of possession. Before 1803, when Savigny first published his treatise, not including the glossators, nor the other commentators down to the end of the fifteenth century, and excluding also a great number of writings to which Savigny says it would be paying far too high honor to say of each separately that it was good for nothing, thirty-three authors had written on the subject. In the following sixty-two years, down to 1865, when the seventh and last edition of Savigny's book was published, one hundred and twenty more books and articles had been added to the list; and before the beginning of this century there had been published over thirty more separate treatises on the subject, not including the discussions in the general works or the articles in the legal periodicals. More than forty years ago, Ihering was able to enumerate eight different theories on the reason for the protection of possession, to which eight theories he proceeded to add a ninth. Whether it is better to protect possession with nine inconsistent theories, or without any theory at all, is a question not to be answered offhand in favor of the civilian position." Gray, Nature and Sources of Law, sec. 592. And cf. Holmes, Common Law 206-211.

14This is conceded by all our writers on possession. Holmes, Common Law 215; Salmond, Jurisprudence, 7th ed., sec. 94; Pollock and Wright, Possession 27, 39-42, 127-128; see also Bingham, The Nature and Importance of Legal Possession, (1915) 13 Mich. L. Rev. 535, 623, at 631-635, (cf. 549-551). Thus Wright says: "Property and right to possession, and it seems also the possession, may be shifted by operation of the common or statute law from one person to another. . . ." As examples he recites forfeiture, intestate succession, bankruptcy, succession of churchwardens, of corporations, of official trustees, and claims to wreck, waifs, etc. Pollock and Wright, Possession 127-128. In this connection it is also interesting to consider the following passage from Ames, in support of which he cites Year Book cases from the time of Edward II to Edward III,— "On the death of an owner in possession of a charter the heir was constructively in possession, and could maintain trespass against one who anticipated him in taking physical possession of the charter." Ames, Lec-
might say, unilateral and bilateral possessory acts, are not the only legally significant factual relations to things. They are not the only fact bases on which legal possession and other legal consequences are predicated. Indeed, there are many cases in which ownership or legal possession of a thing is obtained by one who is quite unaware of the thing's existence. The presence of this group of cases makes either of two courses logically necessary: either one has got to split one's notion of de facto possession into two notions, which one might designate respectively "possessory acts" and "possessory events," or else one has to abandon the effort to define de facto possession in terms of acts, and seek for other characteristic facts common to all of the cases of so-called de facto possession. This latter method obviously rules out the work of all those who have attempted to define de facto possession exclusively in terms of the act and the intent. They must then, so far as they do continue to conjure with possessory acts, admit that acts stand alongside of another category, possessory events. When they do thus separate possessory acts from possessory events, they should appreciate that they have made an arbitrary selection of material for treatment.

In other words, intention is assumed in the very material which they have selected for analysis and discussion. The presence of intent in this group is the very basis on which the cases are chosen and on which a division is made between this group of cases and possessory events. But there is no reason to assume that the division is a necessary one, or that possessory acts are entitled to emphasis and attention, while possessory events are to be cast out like "poor, but troublesome, relations." All the writers of the last century did ignore or markedly belittle possessory events. They tried, as far as they could, to bring the whole field of de facto possession under their concept of possessory act. The reason for their attitude is to be found in the thinking of the age in which they lived. In their

It ought perhaps to be called to the reader's attention that I have used the term "possessory act" in this part of the text to mean the act as a whole, including both the intent and the act in the narrower sense.

But this is what none of the older writers did appreciate. They did not perceive that their insistence on defining de facto possession in terms of intent and act was merely an arbitrary choice of a meaning for de facto possession, such as anyone would be free to make, and that it was not an expression of something established in the natural order of things. See for example, Salmond, Jurisprudence, 7th ed., sec. 94, and compare Pollock and Wright, Possession, 11-16, with the passages cited in the next preceding note.
day all legal interests were thought to be reducible to acts and desires of free-willing individuals. In their day it was not clearly perceived that the will of individuals is not legally significant per se; that acts and events alike are significant only because, and only to the extent that, our legal order makes them significant. These older writers were so steeped in individualism that the importance of intention seemed to them both natural and unquestionable; to us this assumption seems artificial.

The reason why these writers did not have better success in their efforts at definition was that they tried to state the essentials of all the possession cases in too simple a form; they tried, characteristically emphasizing human will, to reduce the essentials of possession to the form of a unilateral act. For them the type case was the act of taking—occupation. They adopted what might fairly be called a taker-centric point of view; they failed to perceive the complexity of the problems with which they were dealing. Possession problems are not the simple problems which these writers assumed them to be. The distribution of the world’s goods is not a simple process, and the maintenance of any distribution when made is not a simple matter either. Our law cannot say without more—“Take and whatever you take should be yours,” or “Take and you shall be liable for theft,” or “Take and you shall be liable for damages.” There are always many other factors to consider besides the mere taking. And this is true when it is to be decided whether the taker has acquired a proprietary interest, or whether he has made himself liable criminally, or whether he has made himself liable in tort. In any particular problem it may be necessary to consider the competing claims of other capable individuals, the competing interests of others who are not capable of asserting their own claims, and the public peace, the public welfare, and perhaps many other ends or interests of society. In short, the problem of deciding whether the taker has or has not acquired possession is a complex and difficult problem; it is a problem into the solution of which a great variety of factors enter. This explains why, as we have already seen, it is not possible to work out the elements of possession exclusively in terms of a taker’s act and intent. Even where act and intention are significant (which is not always the case), they do not tell the whole story; they give us only part of it. The rest of the story has to be told in terms of the claims and interests of other individuals and in terms of considerations of social policy.
Some of the writers who undertake to define possession in terms of the taker's act and intent do perceive rather vaguely that there are other factors to consider; they are aware of the significance of certain "circumstances," which attend the act of taking. But they look upon these circumstances as merely incidental, or even accidental. So they also fail to get a correct perspective of the

This is well illustrated by a group of cases in which competing claims of finders are adjudicated. Where several persons are present when money or other article is found, the courts are prone to declare all persons present joint finders, rather than to hold that the first person to discover the article or to lay his hand upon it is a sole finder. See Weeks v. Hackett, (1908) 104 Me. 264, 71 Atl. 858; Keron v. Cashman, (N.J. Eq. 1896) 33 Atl. 1055; Cummings v. Stone, (1864) 13 Mich. 70. This attitude is very well expressed in the following language from the first case above cited: "... In these decisions the courts appear to have been governed by those practical considerations of fairness and conceptions of common right which influence just and thoughtful men in the ordinary affairs of life and which are in harmony with the principles of equity and not discountenanced by the rules of law."

A case put by Holmes seems to be best explained on the grounds stated in the text: "Where two parties, (plaintiff and defendant), neither having title, claimed a crop of corn adversely to each other, and cultivated it alternately, and the plaintiff gathered and threw it on small piles in the same field, where it lay for a week, and then each party simultaneously began to carry it away, it was held the plaintiff had not gained possession. But if the first interference of the defendant had been after the gathering into piles, the plaintiff would probably have recovered." Common Law 235. Because of the prior continuous assertion of a competing claim the court demanded a more complete and clear-cut assertion of dominion than would ordinarily be required. Thus in Haslem v. Lockwood, (1871) 37 Conn. 500, the court held that a plaintiff who had swept up manure on the street into piles, intending to haul it away on the following day, had taken control thereof in a sense sufficient to be able to recover the value of the manure from the defendant who hauled it away before the plaintiff returned to get it.

The whaling cases cited in note 25 illustrate the same point; we find courts adopting three different rules in common law jurisdictions as to when a whaler has obtained possession of a whale. The variation is to be explained on grounds of policy; it is desirable to recognize and support established customs in this regard. See also the discussion of the different policies involved in property problems and in larceny problems, in Part II of this paper.

The following passage from Williams, Personal Property, 17th ed., 51 is typical,—

"The requisites of every original taking possession of goods, whether as occupant, finder, or trespasser, are the same. In each case, the sole physical control of the thing must be effectively gained, with the intent to exclude the world at large: otherwise possession will not have been acquired. And neither an intending occupant, nor a finder or trespasser has any title to sue for the recovery of goods, of which he has not actually taken possession. Whether, in any particular case of alleged taking possession of goods, there has been the required physical control coupled with the necessary intent, is a question of fact to be determined with regard to all the circumstances." See also Pollock and Wright, Possession, 13-14.

Indeed the act of the taker can not even be described without referring to other factors in the problem. This is apparent from a very casual scrutiny of the discussions of Salmond, Pollock, Holmes, Holland and
legal problems involved; they have a one-sided, over-simplified view of possession problems. They, like the earlier writers, stress the taker's act and intent and neglect everything else.

The regrettable results of this mistaken emphasis are apparent in several respects. This one-sided view of possession problems accounts for a tendency of the theoretical writers and of some judges to treat the act and intent of the taker as alone controlling and to overlook important considerations of policy and the legitimate expectations of other persons. Take, for example, certain finding cases, like *Bridges v. Hawkesworth*;¹⁹ the court there held the finder of a purse was entitled thereto, rather than the shopkeeper on whose premises the purse was found. The limelight on the finder's appropriatory act threw everything else into the shadow. The court did not stop to consider whether losers' interests would in general be better secured by attributing legal control to landowners or to finders, nor did it consider the natural expectations of landowners in such cases. The court regarded a taking as the normal method of acquiring legal control over chattels, and thought the shopkeeper's claim was conclusively answered by stating that he had not done any conscious act by way of assuming control of the purse.

Again, the emphasis on the taker's or possessor's act explains Terry. (See citations supra, note 4.) In the course of their remarks on the essential act and the essential intent, they refer repeatedly but indirectly to other factors. Thus they speak of the intent to exclude others, or the intent to use the thing, or they declare that the essential act depends on the nature of the thing, or that the taker must obtain a certain degree of control over the thing, or have the power to exclude others, etc. All of these references to matters outside the act itself represent a swing in the right direction. Other matters besides the taker's act are thus brought into the picture. But this method of recognizing important factors is obviously incomplete and backhanded, and is not attended by a full consciousness of what is being done.

¹⁹(1851) 21 L. J. Q. B. (N.S.) 75, 15 Jur. 1079, 18 L. T. O. S. 154. This case must be regarded as seriously qualified in its operation, if not actually overruled, by the later English cases. See South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. 761, 44 W. R. 653, 12 T. L. R. 402, 40 Sol. J. 532; Elwes v. Brigg Gas Co., (1886) L. R. 33, Ch. Div. 562, 55 L. J. 734, 55 L. T. 831, 35 W. R. 192, 2 T. L. R. 782. American cases which are open to the same objection as Bridges v. Hawkesworth, are Bowen v. Sullivan, (1878) 62 Ind. 281; Durfee v. Jones, (1877) 11 R. I. 588; Danielson v. Roberts, (1904) 44 Or. 108, 74 Pac. 913; Roberson v. Ellis, (1911) 58 Or. 219, 114 Pac. 100. There are also frequent statements in the American cases to the effect that the place of finding does not matter, which by implication seems to mean that the only thing which does matter is the taking or finding. See for example, Tatum v. Sharpless, (1865) 6 Phila. 18; Hamaker v. Blanchard, (1879) 90 Pa. 377. For a general discussion of rights in lost, mislaid, and abandoned goods, see Aigler, Rights of Finders, (1923) 21 Mich. L. Rev. 664.
the inclination of the writers mentioned to deny or ignore the existence of cases where possession arises by operation of law, or at best, to regard these cases as quite abnormal. These writers give the taker's act and intent an altogether fictitious and exaggerated breadth, so as to bring within his conscious act all, or almost all, cases where possession is obtained, and leave no cases, or almost none, where possession is obtained "by operation of law." Thus, where Pollock states that the possession of land includes or involves also the possession of certain chattels of which the owner has no knowledge, he feels it necessary to bring in a sort of fictitious intention to justify this result. He says:

"The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. *And it makes no difference that the possessor is not aware of the thing's existence.* . . . It is free to any one who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorized interference."²¹

Only a writer who was held in the grip of the old assumptions of the importance of act and intent could have found it "preferable" to explain these cases in terms of the occupier's general power and intent to exclude unauthorized interference.

The taker-centric viewpoint of the older writers accounts also for their tacit assumption that taking possession has the same meaning and is the same act, whether we are dealing with a problem of theft, or a problem of tort liability, or are trying to decide whether a particular taker has obtained possession in a proprietary sense.²² How different are the considerations of policy involved in these different cases hardly needs to be stated. Only a narrow view of the mere taking, detached from everything else, could ever have made the larcenous, the tortious, and the proprietary takings appear to be identical. In short, their one-sided emphasis makes the studies of these writers quite as misleading as helpful, and robs their conclusions of a great part of their practical value to us today.


²¹Pollock and Wright, Possession 41.

²²See the discussion in Part II of this paper of the unfortunate effects of failing to distinguish property problems from larceny problems. Cf. also the material cited in notes 16, 25, and 26. And it is no less important
A Modern Approach—Definitions For Use.—In criticizing concepts and definitions of possession, and particularly concepts of possession cast exclusively in terms of the taker's act and intent, it has not been the aim to take a general negative attitude toward the use of concepts and definitions. The aim has been rather to point out that the concepts suggested in this field by theoretical writers of the last century are one-sided, inadequate and useless. What is wanted, rather, are definitions for use—definitions which have utility for legal discussion.23

We have heard much in recent years about "a jurisprudence of conceptions."24 We have all, perhaps, fallen into the way of speaking disapprovingly of conceptual or definitional methods of solving legal problems. But this way of speaking tends to belittle or disparage the function of concepts and definitions; it does not indicate accurately what it is we want to criticize; it is apt to be misunderstood. The fact is that we cannot think at all without concepts. It is quite out of the question to carry on any legal discussion without standard meanings—concepts. When we have a legal problem to solve, we must have an organized body of legal ideas with which to connect our problem situation; we must have a system of concepts by reference to which we check and test the validity of our tentative solutions. Indeed, concepts are essential to thinking of any kind, and the processes of definition, classification, and division, by which we build up and clarify our concepts and organize our knowledge, are also essential to any clear thinking; so that to speak disparagingly of the conceptual factor in our legal thinking is simply to fail to appreciate our essential tools.

When we speak of a jurisprudence of conceptions we really mean to refer to legal reasoning which is carried on with antiquated or maladjusted concepts. Like so many other things of which we are hardly aware until they get out of order, we scarcely appreciate the function which our concepts are serving until they become maladjusted to our needs. But what is necessary is not to distinguish between meanings of bailment or delivery (of possession) in different connections. See notes 34, 47.

23 The substance of the argument in the next few paragraphs remains as it was originally written. I have, however, adopted several phrases such as "definitions for use," and "definitions with reference to the purpose in hand" which are consistently employed by Schiller, in his Logic for Use.

24 This form of expression apparently originates with Ihering—"Begriffsjurisprudenz." Dean Pound, who made Ihering's ideas familiar to the legal profession in America, used the preferable expression "mechanical jurisprudence"; but he also frequently uses Ihering's expression. Pound, Mechanical Jurisprudence, (1908) 8 Col. L. Rev. 605, 610 et seq.
to disparage our concepts or their use; rather, it is necessary to appreciate most clearly, then of all times, that they are the tools of our thinking and are governed by the purposes which govern us in our thinking; that they need to be reshaped from time to time to suit our needs. The hammer is shaped for pounding, the spade for digging, and, to use an analogy somewhat closer to our field of discussion, the foot is a standard length adapted to the function of measuring. But different measures are needed for different purposes. We would not measure eggs by the foot; a different standard measure would be there used which was better suited to the purpose in hand. Similarly, our legal measures, concepts, meanings must be shaped to fit their uses in legal thinking. Ihering and, in this country, Pound helped awaken us to the importance of considering the interests or ends behind legal rights and remedies. They showed us that a notion of rights and remedies as ends in themselves was quite inadequate. In the same way, it seems to me that the corrective which needs to be applied to the tools of our thinking is to re-shape them so that they reflect or correspond to modern conceptions of legal ends. What we need is concepts for use in legal discussion. What we need is concepts framed with reference to the purposes of our legal order. Our legal material must have logical organization, but the organization must be built with reference to legal purposes if it is to serve us adequately in our thinking.

What do all these propositions mean as far as the process of defining possession is concerned? They mean just this,—we must define significant legal situations (legal acts and events) with reference to the purposes in hand. The facts which give rise to proprietary relations vary from one case to another. The same is true of larceny cases. If possession is the name for the significant facts in all these varying cases, the meaning of possession must also vary. In other words, instead of attempting to develop a standard act or a standard event to cover all the cases in which proprietary relations arise, or liabilities are imposed, on the basis of dealings with things, instead of trying to define the act of taking or the act of delivery for all legally significant situations, let us try to frame standard statements more particular in type and narrower in application. Why can we not learn something here from the law of tort? Tort law also involves act, and in some measure, events, but it is my impression that the discussion of tortious intent and tortious act has been replaced by discussion
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of particular torts or of particular types of tort problems. In any case, this seems to me to be the sound method of dealing with the problems of possession in which we are interested. And along with the particularization of problems, particularized form must also be given to our concepts and terms. Just how far we should carry the process of developing particularized meanings, I am not prepared to say. Perhaps, for example, we might need to develop a particularized concept of the act or facts which suffice to confer proprietary control of a whale. Whether the same standard act or facts would serve for other purposes, such as the appropriation of fish, or the capture of wild game on land, would depend on the adequacy of the concept for those purposes; it would depend on whether the concept served to characterize the facts which were important in view of the social ends or values involved in those specific problems.

25 But note that even for this simple situation three different acts have, for reasons of policy, received judicial recognition in different common law jurisdictions. "In the Greenland whale-fishery, by the English custom, if the first striker lost his hold on the fish, and it was then killed by another, the first had no claim; but he had the whole if he kept fast to the whale until it was struck by the other, although it then broke from the first harpoon. By the custom in the Gallipagos, on the other hand, the first striker had half the whale, although control of the line was lost. Each of these customs has been sustained and acted on by the English courts, and Judge Lowell has decided in accordance with still a third, which gives the whale to the vessel whose iron first remains in it, provided claim be made before cutting in. The ground as put by Lord Mansfield is simply that, were it not for such customs, there must be a sort of warfare perpetually subsisting between the adventurers. If courts adopt different rules on similar facts, according to the point at which men will fight in the several cases, it tends, so far as it goes, to shake all a priori theory of the matter." Holmes, Common Law 212-213 (1881).

26 In Young v. Hichens, (1844) 6 Q. B. 606, 1 Day. & Mer. 592, 2 L. T. O. S. 420, where fish were almost enclosed by a seine, and persons were stationed at the open side to frighten them so they would not escape, it was held the fish were not reduced to possession as against a stranger who passed through the opening and helped himself. This decision must be regarded as somewhat arbitrary; it seems to depend on a rather mechanical test of the sufficiency of the act; it leaves out of consideration the reasons for the requirement of an act (notice to others of the claim made), and it neglects the danger of private warfare involved in ignoring the natural claim of fishermen to receive legal protection in a lawful activity. (Cf. Holmes, Common Law 216-218.)

Somewhat similar doubts may be expressed as to the correctness of the rule usually assumed to be in force as to the capture of game on land. Thus in Pierson v. Post, (1805) 3 Caines (N.Y.) 175 a fox pursued by the plaintiff and his dogs was killed and taken by the defendant in the sight of the plaintiff; it was held that the pursuing plaintiff had no legal claim to the fox. It is by no means clear that this rule will always work satisfactorily in practice. The pursuer is apt to feel himself seriously wronged when the game is captured by another in this manner, and it is very doubtful whether ordinary notions of fairness and sportsmanship should be ignored in determining this point.
Indeed, I venture the suggestion that we have usually referred to narrower, more particular concepts of this sort in our practical thinking. We have probably always used more particular meanings of possession than we have assumed we were using. The possessory act in its actual application to concrete cases always has had, so far as it has been useful at all, a great variety of meanings, and a half-conscious selection of the appropriate meaning for the purpose in hand has probably always occurred. All that has resulted from framing wide and inclusive categories like possession, possessory act and possessory intent has been to cover up the variety of actual meanings. Any broad and all-inclusive concept is almost empty of meaning; it "combines a minimum of sense with a maximum of pretense."\(^7\) It probably does express some small element common to the class which it embraces, but its effect all too often is to overemphasize a relatively unimportant element of likeness, and thus obscure more significant elements of difference and lead the unwary into one-sided views of vital problems.

II

Legal Possession

We are now prepared to deal somewhat more briefly with the second meaning of possession: Possession as the legal significance of certain facts or acts. In this sense, as has already been indicated, we are accustomed to speak of legal possession.\(^2\) At the outset it should be noted that de facto possession and legal possession do not exactly correspond with one another. Not all of the legal significance of de facto possession is embraced in the term "legal possession," as the term is commonly used. Legal possession is not the only form of control which arises by de facto possession. De facto possession may give rise to ownership in many cases, as well as to legal possession.

\(^7\)What Stephen has said of maxims, applies to all broad generalizations: "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information." 2 History of the Criminal Law in England, 94 note.

\(^2\) Pollock and Wright, Possession 16-17, 26-42, 118-119; Holmes, Common Law 214 et seq.; Salmond, Jurisprudence, 7th ed., sec. 94; Holland, Jurisprudence, 13th ed., 194-208. All these writers make the distinction of meaning suggested; but their terminology is not uniform. Pollock and Wright adopt the terminology of the text, but use the word "possession" alone as meaning legal possession. The other authors use the terms "possession" and "de facto possession" as equivalent; and always use the adjective legal when they mean to refer to the legal effects of de facto
Also in another respect legal possession is narrower in scope than de facto possession. According to common usage, legal possession refers only to beneficial legal relations to things—relations which we might call proprietary. It does not include, usually, liabilities for theft or tort, or liabilities as bailee or quasi-bailee, or any other burdensome consequences, which may have arisen out of the same fact situation as gave rise to proprietary control. So in this respect also, legal possession does not cover all the legal significance attached to de facto possession. When we want to bring liabilities into the legal picture, along with possession, we either mention them specifically; or else we bring liabilities into the picture by the use of certain adjectives; we characterize the taker’s possession as wrongful, tortious, or larcenous. In such case, the adjectival addition serves to place before us the liability side of the taker’s legal position along with the possessory or beneficial side.

But we have been far from consistent in this usage and certainly not entirely successful in avoiding confusion of meaning. It has been easy to overlook basic differences, for example, between property problems and larceny problems, just because the term “possession” has been used in solving both kinds of problems. It has been easy to assume that possession, whether used with or without an adjective, means the same thing for every purpose and in every connection.

(1) Instances of Failure to Distinguish Meanings of Legal Possession.—A few concrete instances will make clearer the logical dangers and difficulties involved in a failure to distinguish different legal significances of possession, and particularly the failure to differentiate possession as meaning proprietary control, possession as meaning or implying liability of some sort, and possession as meaning immunity from liability for larceny. Take the case where “S,” a servant, is sent by his master to get a watch left with the jeweler for repair. If “S” decides to abscond and does abscond with the watch after it has been delivered to him by the jeweler, we shall hold, in line with the decisions, that “S” is not liable for theft; we shall then be apt to express this result in terms of possession; we shall say that “S” already has possession of the watch when he appropriates it and can not, therefore, steal it. The legal significance of the statement that “S” has possession in this case is simply that “S” is immune from control, or else employ some other expression such as “possession in law,” “de jure possession,” or “possessory rights.”
prosecution for larceny under the circumstances. It need hardly be said that "S" does not, under these circumstances, have possession in the ordinary proprietary sense.

On the other hand, if "S" had received the watch directly from the hand of his master, he would not have been said to have possession in either a proprietary or a larceny immunity sense. But in a federal prohibition case, an employee was prosecuted for the unlawful possession of liquor which he was delivering to customers on his master's premises. The conviction was sustained on appeal. This employee could hardly be said to have proprietary control of his employer's chattel which he was using on his employer's premises under similar circumstances. Nor would he have been held to be immune from larceny liability if he stole this liquor, instead of delivering it to the customers. The point is that possession was ascribed to him for the purpose of the liquor statute and only for that purpose.

29As Wright says: "In whom then is the possession? It was held not to be in the alienee [master], for he has not yet received the thing, and delivery to his servant for him was not held to vest the possession in him as against the servant (though it would be enough to entitle the master to sue or prosecute a stranger for trespass to the servant's possession); and as the possession must be in some one, it must be in the servant until he does some act amounting to a submission, attornment or delivery to the master. Since he was thus in possession acquired without trespass it followed that a misappropriation by him during such possession was not theft, and the statutory felony of embezzlement was created to meet this case." Pollock and Wright, Possession 130.

30In regard to the propositions of law stated in this paragraph, see Pollock and Wright, Possession 18, 58-60, 121-122, 191, 198, cf. 164; 2 Bishop, Criminal Law, 9th ed., secs. 823-832, 854-866.

31See authorities cited supra note 30.


33See authorities cited supra, note 30.

34How the meaning of possession varies with reference to the purposes of different statutes is obvious from a reading of Words and Phrases, title, Possession. See also the interesting case of Reg. v. McDonald in which the Court for the Consideration of Crown Cases Reserved had before it the questions whether larceny by a bailee "depends on the existence of a contract of bailment," and whether a prisoner whose con-
The "hi-jacking" cases also enable us to see the differences in meanings of possession in different connections, as well as the differences in matters of policy which may need to be considered. Suppose Smith steals liquor of which Jones is unlawfully possessed. Larceny liability is frequently said to require that the thing stolen be in the possession of someone. But the prohibition statutes expressly abolish all property rights in illicit liquor and make the possession thereof unlawful. These statutes mean, if they mean anything, that Jones, the owner of this liquor, cannot have any of the ordinary tort actions against the taker to vindicate his proprietary interest. But can Jones' liquor be stolen? Can the ownership or possession thereof be laid in Jones although the law refuses to recognize his proprietary control? In *People v. Spencer* it was held that the thief of illicit liquor could not be prosecuted for larceny, because the prohibition law abolished all property rights therein, and this view has frequently been urged.

tracts are void can be guilty of this offense. An infant who was close to the age of majority fraudulently converted to his own use goods which had been delivered to him under an agreement for the hire of the same. The court held that such infant was rightly convicted of larceny by a bailee under the statute. The court clearly distinguished the meaning of bailment for the purpose of criminal liability from bailment for the purpose of contractual liability. *Queen v. McDonald*, (1885) *L. R.* 15 Q. B. D. 323, 52 L. T. 583, 49 J. P. 695, 33 W. R. 735, 1 T. L. R. 465, 561, 15 Cox C. C. 757. Compare with this decision the earlier case of *Reg. v. Denmour*, (1861) 8 Cox C. C. 440, which must be regarded as overruled by it. Martin, B., is reported to have said, "The indictment was for larceny as bailees. The prisoners were husband and wife. A wife could not be a bailee, and the husband was not proved to have taken any part in the alleged conversion;" he accordingly directed an acquittal of the wife. Wright says: "The ordinary conception of theft is that it is a violation of a person's ownership of things; but the proper conception of it is that it is a violation of a person's possession of a thing accompanied with an intention to misappropriate the thing. The possession which is violated may be that of a person who has no right of ownership and no right to possession." Pollock and Wright, *Possession* 118. Likewise, 2 Bishop, *Criminal Law*, sec. 823.

People v. Spencer, (1921) 54 Cal. App. 54, 201 Pac. 130, in which the court cites and relies on an earlier California case in which it was held that a lottery ticket could not be stolen. *People v. Caridis*, (1915) 29 Cal. App. 166, 154 Pac. 1061.

The similar statements that property, in order to be stolen, "must have an owner" or must be "capable of being owned" (2 Bishop, *Criminal Law* sec. 788; Kenny, *Outlines of Criminal Law*, 182-186; Clark, *Criminal Law*, 3rd ed., 307; 36 *Corpus Juris* 736) also lead to confusion. Thus in *State v. McCulloch*, (reported and discussed in two interesting articles by Prof. Sears, (1921) 21 U. of Mo. Bull. (Law Series) 3, and 22 U. of Mo. Bull. 3) a trial judge in St. Louis held that the stealing of certain referendum petitions from the possession of the circulators was not larceny because (inter alia) the petitions were "not the subject of private ownership." Prof. Sears criticizes this decision on the ground that the referendum petitions were private property while they remained in the hands of the circulators and were therefore larcenable. Perhaps his view is
in other cases, but, fortunately, without success. The courts have refused, except in the Spencer Case, to be misled by word juggling. They have rejected the notion that liquor cannot be stolen simply because it cannot be possessed in a proprietary sense. In reaching their conclusions they have gone into the purposes behind the law of theft and behind the prohibition acts. They have seen, in effect, that the question whether the holder of liquor has possession in the proprietary sense is quite a different question from the question whether he bears such a relation to the liquor as should be protected, in the name of the state, against unlawful aggression.

The mislaid goods cases furnish another example of the logical difficulties which may result from a failure to observe the difference in meaning just referred to. Take the case of a pocketbook, inadvertently left on a table in a barber shop by a customer. Here it would ordinarily be said in a property case that the barber has constructive possession of the purse, even before he discovers it. He is entitled to its control as against the finder and all third parties. On the other hand, it seems to be held with equal uniformity that the barber himself would be liable for theft, if he misappropriated the contents of the purse with felonious intent. But it seems preferable to say simply that ownership as used in these statements has not the ordinary proprietary significance, and that goods, in order to be stolen, do not need to be "owned" in the full proprietary sense. And as regards the liquor statutes, it should be noticed that they explicitly declare the possession of liquor to be unlawful, even though they also declare that there shall be no proprietary rights in liquor.


Lawrence v. State, (1930) 1 Humph. (Tenn.) 228.


Bishop, Criminal Law, 9th ed., secs. 879, 882; (1920) 5 Corn. L. Q.
Some courts have been troubled by the difficulty of reconciling these two lines of authority with one another and with the cardinal doctrine of the law of theft that one cannot steal chattels of which one is already possessed. The simple explanation, it seems to me, is that the property problem, to wit, whether the landowner has legal control of the mislaid chattel as against the world generally, and the theft problem, to wit, whether he wrongfully deals with the chattel in disregard of the mislayer's interest, are quite different legal problems. Legal control must be defined in each case with reference to the purpose in hand. The two problems can not be treated as identical. And if we solve both in terms of possession, we must recognize that the word possession is not used in the two problems for the same purpose and with the same significance.

_Merry v. Green_ is another case to consider in this connection. The plaintiff bought at public auction a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale, no person knew that the bureau contained anything whatever. The defendant seller initiated a prosecution for larceny against the plaintiff. The prosecution was later dropped, and the plaintiff sued for false imprisonment. Defendant's case depended on whether the plaintiff had been guilty of larceny in appropriating the money. The court had to pass on two questions which are related to our present discussion. First, whether the ownership of the money had passed to the plaintiff by the delivery. This the court denied for the reason that the intention to transfer money had not existed. Second, the court had to decide whether the money had passed to the plaintiff by the delivery. This the court denied for the reason that the intention to transfer money had not existed. Second, the court had to decide whether the money had passed to the plaintiff by the delivery.

It seems that the person who misappropriates mislaid goods is liable even though he does not know who the owner is, or though there is nothing about the goods which makes it appear that he can discover the owner. As to this doctrine see generally 2 Bishop, Criminal Law 9th ed., secs. 799-803, 882; Kenny, Outlines of Criminal Law, 181-186 (a modern English text). In State v. Courtsol, (1915) 89 Conn. 564, 94 Atl. 973 the difficulty of reconciling the property cases with the criminal law cases was mentioned. See also (1920) 5 Corn. L. Q. 455. The court in the Courtsol case explains away the difficulty by declaring that the mislayer still has constructive possession and that the landowner has custody but not possession. This explanation, however, does not accord with the ordinary use of terms, nor explain the legal control which the landowner enjoys as against third persons and which would ordinarily be called legal possession or constructive possession.

A third question, namely—whether the plaintiff had acted in good faith, was important to the decision, but obviously has no relation to our present purpose.
delivery of the bureau containing the money constituted a delivery of possession in such sense as to prevent the plaintiff from becoming liable for larceny by a later conversion. The court denied that the mere delivery of the bureau would give possession of the money in this sense. The case seems to be well decided on both points. Of course, the ownership of the money did not pass from the seller to the buyer of the bureau. But what if the question of legal control had come up between the plaintiff and the boy who first discovered the money while he was repairing the bureau in the plaintiff's home? Which of these two should have had the superior claim? Merry v. Green does not even touch this point. It deals only with the question of the buyer's claim to the money as against the former owner of the bureau and the question of his non-liability for larceny by reason of the delivery of the bureau to him. But I venture to think that the owner of the bureau should have the better claim as against the casual finder in this case, and I have no reason to think that the court which decided Merry v. Green would have decided otherwise on these facts. Yet, in many later property cases, as for instance, Durfee v. Jones,44 and Bowen v. Sullivan,45 Merry v. Green has been used to show that one can not acquire possession of a chattel in a proprietary sense, except if he knows that he is acquiring it; the case has been cited as authority for the proposition that the finder rather than the owner of the bureau would have the better right. This, it seems to me, is a radical misunderstanding and misuse of the decision.

Bridges v. Hawkesworth is another interesting case.46 This case seems to rest largely on a mistaken identification of possession as signifying proprietary control and possession as signifying accountability for safekeeping. The court assumes that if the shopkeeper in whose shop the purse was lost were to be regarded as possessed thereof in a proprietary sense, he must also be accountable for its safekeeping. The court stresses the fact that the shopkeeper could not fairly be held accountable for the safekeeping of a purse of whose existence he did not know, and argues from this assumption that he could not have a proprietary control of the purse. It may be true, and quite properly, that the law does not make one liable for the safekeeping of another's goods until

45 (1878) 62 Ind. 281.
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one has consciously assumed the control of them. But, it does not follow from this that the landowner may not have a superior proprietary claim to things on his land, even though he is unaware of their presence there. In fact, in some cases the modern authorities do recognize the landowner’s superior claim.

Other cases might be cited where the failure to distinguish different meanings of possession and the nature of different so-called possession problems has made difficulty for courts and writers. But these suffice to make the point intended. It should only be added that the confusion of different meanings of legal possession has not been peculiar to theoretical writers, nor to judges in a few decisions. Modern text-books and case-books show amply the confusion of meaning which we have been criticizing. Standard criminal law texts cite property cases, as well as larceny cases, in the discussion of the sufficiency of the act of taking in theft. And certain larceny cases are cited as authorities in works on personal property. In fact, in one modern case-book on personal property all of the cases included which deal with the necessary intent in taking possession are criminal cases. The dangers of confusion which are courted by such uses of material are too obvious to call for further comment.


See Aigler, Rights of Finders, (1923) 21 Mich. L. Rev. 664; Silcott v. Louisville Trust Co., (1924) 205 Ky. 234, 265 S. W. 612; McDowell v. Ulster Bank, (1899) 33 Ir. L. T. 225; Commercial Bank v. Pleasants, (1841) 6 Whart. (Pa.) 375; South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. 761, 44 W. R. 653, 12 T. L. R. 402, 40 Sol. J. 532; and compare the passage from Pollock and Wright, quoted supra, note 21. On the other hand, Weeks v. Hackett, (1908) 104 Me. 264, 71 Atl. 858, Danielson v. Roberts, (1904) 44 Or. 108, 74 Pac. 913, and other decisions which seem to recognize the claim of the finder as superior to that of the landowner are perhaps explainable on the ground that these jurisdictions have statutes dealing specifically with the disposition of lost goods.


(2) Legal Possession as Proprietary Control.—Now let us turn to our last point—the definition of legal possession, that is to say, legal possession limited in meaning to proprietary control over things. The discouraging results of efforts to define de facto possession, as well as the lessons we learn from a consideration of those efforts, might justify us in refraining from further discussion of definitions of possession, but there is one aspect of the definitions of legal possession which does seem to me to deserve further notice. It has been commonly assumed that legal possession is a concept of fixed and invariant meaning, that it has the same legal import in every place where it is used. Even Bingham, who almost twenty years ago wrote an excellent article regarding legal possession, in which he repudiated vigorously the notion that there is an essential animus or corpus which must exist at the beginning of legal possession, concludes by asserting that the meaning of legal possession itself is constant. He finds that legal possession is composed of a standard set of possessory rights. Insofar as he reaches this conclusion he seems to me to fall, like his predecessors, into a priori methods. Logically, his result is hardly different from theirs. He simply discovers the constant feature in a different place. Instead of a supposedly constant act (facts) which constitutes for the older writers de facto possession, Bingham discovers a supposedly uniform set of legal consequences.

The common constant feature of legal possession has been taken to be either the availability of certain forms of action for the vindication of the possessory interest, or else the existence of a certain group of "possessory" rights, such as Bingham assumes. I submit that the effort to state the essentials of legal possession in terms of a certain number of remedies or rights is just as inadequate and one-sided as the attempt to analyze de facto poss-

53Bingham, Nature and Importance of Legal Possession, (1915) 13 Mich. L. Rev. 535, 623; at page 635 this author says, "What then do we mean by legal possession? What is the legal hold on the land or chattel to which this term refers? Search as we will, we shall find no element or set of elements which is universally present in situations to which the term is applied, and universally absent when legal possession is denied, except those possessory legal rights, etc., which make the term of technical importance. Whenever it is held that legal possession of certain land exists in X, it is held that X has legal rights and liberties in the land of the sort which I have hitherto indicated roughly by the term possessory rights, etc. Whenever it is held that Y has not legal possession of certain land, it is held that he has not possessory rights of this sort."
session in terms of a taker’s act and intent. Indeed, legal possession does not appear to be constant or to have the same meaning in all the cases where it is assumed to be constant. Legal possessors do not all have exactly the same number of rights or remedies, even if we take the number of rights or remedies as the criterion of possession. To start with, some possessors, like bailees or pledgees, have rights and remedies available against the reversioner or owner; wrongful possessors (and perhaps others) do not have any such rights or remedies. And as to the availability of replevin, trover, and ejectment, there appear to exist today wide discrepancies as among various possessors. In spite of sweeping statements in *Amory v. Delamirie*, 54 *Asher v. Whitlock*, 55 and *The Winkfield*, 56 it must be seriously questioned whether every possessor has a special property good as against all the world except the owner or a prior possessor. In this country, at least, there is authority to the effect that a wilful trespasser is not entitled to recover in ejectment 57 or replevin 58 from a later holder who has entered in good faith and under color of title. This view, if accepted, means that the interest of such a wrongful possessor is a narrower one than the interests of bailees and bona fide finders. His interest is not available against as many people and it does not involve all the remedies which would be available to bailees. While the action of trespass is theoretically available to all possessors, as against all third parties who interfere with their legal control, this remedy, common to all possessors, can not be re-

54(1722) 1 Strange 505.
58At least this seems to me to be the effect of the cases, although the proposition as stated in the text is not always accepted in the words there used. It should, however, be said that most of the cases in which the broad principle is stated that a prior possessor can recover as against any later possessor were in fact cases of bailment and were in fact cases in which a bailee was claiming as against a later wrongdoer in an action of trespass or trover; in such cases the courts have very properly held the prior claim to be superior to the later. But there is room to doubt (despite the usual affirmative assumption) whether the wrongful taker should recover the full value of the chattel in a suit against a later claimant who takes or otherwise obtains possession of the chattel. Barwick v. Barwick et al., (1850) 33 N. C. 80. See also 27 Mich. L. Rev. 936.
arded as highly significant; especially as the damages which a possessor will recover in trespass will frequently be inconsequential. Certainly, it is hard to see why the availability of this one narrow remedy should serve in this day and age as the sole criterion for constructing as wide and supposedly important a concept as legal possession.

But it is not my purpose to pick technical or petty flaws in the definitions of legal possession which have been offered. The substantial objection to them is that they all emphasize features of the cases which today seem relatively unimportant, and neglect other highly important aspects of legal situations which they bring together under the one caption, "legal possession." We might fairly ask, what does it matter if all legal possessors do have exactly the same number of rights or exactly the same number of remedies? Under definitions built on these lines, there is no substantial distinction between the legal possession of a bailee for a week, the legal control of the seller who has passed title but retains possession as security for the price, the possession of the pledgee with whom a chattel has been left as security for a loan, the possession of the gratuitous depositary, and the possession of the thief. On the real property side, there is no distinction to be made between the possession of a long-term lessee, the possession of one who is acquiring title by adverse holding, and the possession of the tenant at will. All these instances may be taken for the sake of the argument to involve the same number of rights and remedies. But can we afford to ignore all the elements of social and legal value which are behind these rights and remedies? We bring things together under one concept in accordance with some principle or purpose. The concept itself represents a principle of selection. The principle of selection of those who have built our conventional concepts of legal possession has been simply, equality in the number of rights or remedies. That fact ought to be clearly appreciated in order to understand by contrast how much of legal significance and legal difference their concept fails to take account of,—all such matters as variation in scope, duration, and certainty of control are left out of the reckon-

59 We would not assert that concepts such as de facto possession or possessory act have no meaning whatever; we would not say that legal possession, although predicated on a narrow likeness in the number of remedies or rights, may not have some utility. The very fact that we have used these concepts in our discussion shows that they serve some purpose. But their utility is narrow, just as the basis or principle on which they are built is narrow. A concept built on a mere count of remedies will be significant only to the extent that such a count will be.
The likeness between legal possession cases is merely a conceptual likeness—a likeness in our legal material when we look at it from one particular point of view; it is a man-made, logical concept. Like all concepts it is built to emphasize a certain likeness. And we may well doubt whether this procedural likeness is of primary importance from a modern viewpoint. To me, it seems much more important today to stress the scope, duration, and other features expressive of the values of legal interests. To this end we ought either to abandon the use of the concept legal possession entirely, or what is probably more practical, to use it with various explanatory phrases which take care of the manifold differences of meaning.

That one can save the face of the initial assumption that possession is a constant quantity by a bit of logical juggling is, of course, true. One can say that the depositary has bare possession, just as the pledgee has, but that the pledgee has something in addition. This is the very kind of thing that is said in reference to the larcenous act, by those who want to save the face of the doctrine that all acts of taking are alike. The larcenous act is said to be the same act as the proprietary act, plus a few other characteristics and qualities. By this method one can make virtually any concept appear to be constant and invariant. One can drag in another concept, such as the pledgee's interest, or, in reference to land, the possessor's estate, in order to absorb the real differences between different cases of possession and allow the concept of possession itself to remain fixed and immutable. But this method of saving the stability of our concepts is vicious; it only induces bad thinking; it is calculated to maintain concepts intact after they have gotten badly out of adjustment. Instead of exerting one's effort to preserve concepts in seemingly constant and unchanged form, one ought rather to spend that effort usefully, in the endeavor to revamp one's concepts with reference to constantly changing legal purposes.