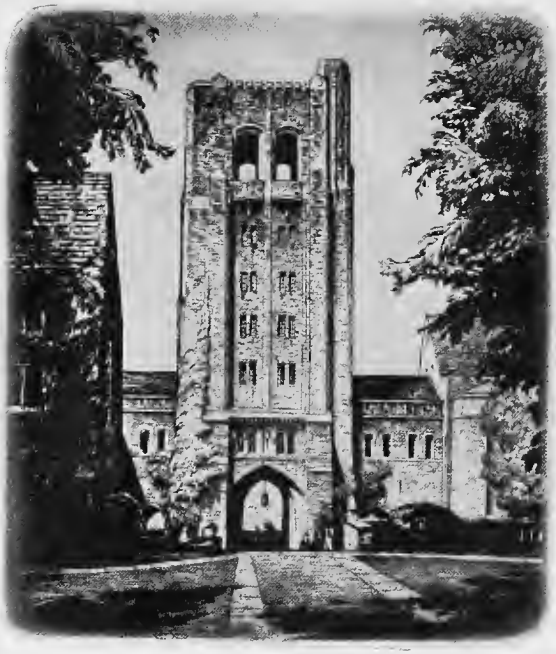

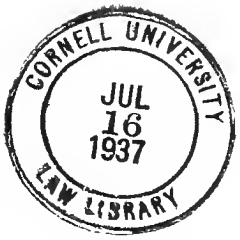

POSSESSION

POLLOCK AND WRIGHT

London

HENRY FROWDE

New York

MACMILLAN AND CO.

AN ESSAY

ON

POSSESSION

IN THE COMMON LAW

PARTS I AND II

BY

FREDERICK POLLOCK, M.A., Hon. LL.D. Edin.
OF LINCOLN'S INN, BARRISTER-AT-LAW
CORPUS CHRISTI PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD
PROFESSOR OF COMMON LAW IN THE INNS OF COURT

PART III

BY

ROBERT SAMUEL WRIGHT, B.C.L.
OF THE INNER TEMPLE, BARRISTER-AT-LAW

Oxford
AT THE CLARENDON PRESS
1888

PREFACE.

THE want of any systematic account of Possession in English law-books has often been remarked upon. A few years ago, in the course of my work on the law of Torts, I had to consider the learning of Trespass, Conversion, and other wrongs to property; for which purpose it became necessary to face the question whether a doctrine of Possession did not exist in an implicit form in our authorities, and if so, what kind of doctrine it was. I then learnt that, several years earlier, Mr. R. S. Wright had been confronted with a like problem in a survey of our criminal law, and had made a full study of the subject in that connexion. Upon communication with Mr. Wright it appeared that he had collected his materials in a form nearly ready for publication; and, in the result, the present work was undertaken.

It is a composite, not a joint work. We should have preferred for many reasons to combine our researches in a single and uniform exposition, but we found that such a plan would require an amount not only of continuous but of simultaneous leisure beyond what we could command. Accordingly we have been content to divide the work as it now stands; and, although we have discussed many parts of the subject together, and seen one another's contributions in every stage, each of us is alone answerable for that which is ascribed to him on the title-page. Whatever defects are the necessary consequence of this arrangement may be taken as confessed, with the excuse that the substance, be its value more or less, could not have been produced on any other terms.

This being so, we have not thought it needful to reduce the mechanical details of citation, abbreviation, and the like, to a complete uniformity throughout the book.

Our purpose has been to show that a fairly consistent body of principles is contained in the English authorities, not to exhibit all the applications of those principles, nor to enter on the comparison of the Common Law with any other system. Speaking for myself, I feel that I owe much both to the classical Roman texts on Possession and to the ingenuity of their modern expounders in Germany. But I have also felt that if there is, as I believe there is, a native doctrine of Possession in our law, the only way to make it manifest is to state it on its own independent footing and verify it in its own light. Comparison is profitable after the several things to be compared have been ascertained; if attempted earlier, it is hazardous at best.

Each of us has been compelled to form and express his own opinions on difficult and unsettled points. We cannot expect those opinions to be always accepted by the reader, but in any case they are not unconsidered.

F. P.

Lincoln's Inn, *Michaelmas*, 1888.

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PART I.

INTRODUCTION.

§ 1. *First Notions.*

POSSESSION is a term of common occurrence and no mean significance in the law. It imports something which at an earlier time constantly made the difference between having the benefit of prompt and effectual remedies, or being left with cumbrous and doubtful ones; which in modern times has constantly determined and often may still determine the existence or non-existence of a right to restrain acts of interference with property,[1] the relative priority of the claims of competing creditors,[2] or the incidence of public burdens;[3] and which for centuries has been, and is still capable of being,[4] of critical importance in defining the boundary between civil wrongs and crimes. Yet, as the name of Possession is in these and other ways one of the most important in our books, so it is one of the most ambiguous.[5] Its legal senses (for they are several) overlap the popular sense, and even the popular sense includes the assumption of matters of fact which are not always easy to verify. In common speech a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others. We shall

[1] Coverdale *v.* Charlton, 1878, 4 Q. B. Div. 104; Eardley *v.* Granville, 1876, 3 Ch. D. 826.

[2] Ancona *v.* Rogers, 1876, 1 Ex. Div. 285.

[3] Allan *v.* Liverpool, &c., 1874, L. R. 9 Q. B. 180, 191. Cp. the Public Health Act, 1875, s. 257.

[4] R. *v.* Ashwell, 1885, 16 Q. B. D. 190.

[5] Erle C.J. in Bourne *v.* Fosbrooke (1865), 15 C. B. N. S. 515; 34 L. J. C. P. 164, 167; Fry L.J. in Lyell *v.* Kennedy (1887), 18 Q. B. Div. 796, 813.

have to consider hereafter whether the measure of apparent power depends merely on physical facts, or is liable to be affected by the appearance or reputation of right. For the present we start with this, that any of the usual outward marks of ownership may suffice, in the absence of manifest power in some one else, to denote as having possession the person to whom they attach. Law takes this popular conception as a provisional groundwork, and builds up on it the notion of possession in a technical sense, as a definite legal relation to something capable of having an owner, which relation is distinct and separable both from real and from apparent ownership, though often concurrent with one or both of them. Possession, again, whether in the popular or in the legal sense, does not necessarily concur with title. No plain man would hesitate to say that a squatter or a thief possesses himself of the land occupied or the goods carried away; and the law says so too. But the true owner, or some one claiming through him, ought to have the physical control of whatever has been wrongfully occupied, and will recover it if the law be fulfilled. In other words, the true owner or his delegate is entitled to possession; he is not possessor, but he ought to be. The temptation is great to speak of him as the rightful possessor, or to slide from the idea of right *to* possession into that of right *of* possession; and even the language of lawyers has not escaped it. Again, a man who has possession with the true owner's consent may be bound to restore it on demand; here too the right of resuming possession is apt to be confounded with possession itself, or with that right to possession which the possessor at the will of another has until that other's will is determined. On the other hand, since the person entitled to possess is generally (though not always) the owner, and in any case is he whom wrongful possessors have most to fear, a right to possess, even a limited, conditional, or deferred right, is no less apt to be confounded with that more general right to deal with the possession which coincides

with ownership. The various and complex combinations of these elements make it exceedingly difficult to obtain a consistent doctrine, and almost impossible to preserve a consistent terminology. And, as if the inherent difficulties were not enough, others have been added in the course of modern legislation by making various effects and incidents of possession depend, for particular purposes, on the presence or absence of further particular conditions; and this without declaring (except in some cases by the addition of epithets having no settled meaning in law, and themselves requiring interpretation) in which or in how many of its more or less authenticated senses the word Possession was used.

Why the law should ascribe possession to wrongdoers may be difficult to explain completely. It is one thing to recognize the fact that physical control of things of value is often wrongfully acquired, another thing to attach definite legal incidents, nay rights which ultimately may ripen into indisputable ownership, to such facts when ascertained. In many cases the law does take the latter course, and has done so always and everywhere since law has been a science. The truth is that many reasons of convenience concur to outweigh the apparent anomaly, and of these sometimes one and sometimes another may have in fact been the decisive reason in virtue of historical conditions, or may be regarded as decisive according to the individual genius of this or that philosophic student. The most obvious of them, from the point of view of our own time, is perhaps that in a settled and industrial state some amount of genuine doubt as to ownership and title must unavoidably follow upon the complexity of men's affairs; that protection must in some measure be given to persons dealing in good faith on the strength of apparently lawful title, and to those who may afterwards deal with and claim through such persons; and that such protection cannot be given effectually to the innocent without also protecting some who are not innocent. Further, it can be and has been maintained that on attentive examination the

seeming anomaly will be found indispensable for the adequate protection of true ownership itself. Another element which no doubt has been important in the earlier historical development of the law, and to which some great authorities have attached exclusive or all but exclusive importance in modern times, is the interest of public peace and order. Men will defend that which they deem their own even if the law purports to forbid them; and the wholesale allowance of redress by private force, or exposure of wrongful possessors to dispossession by newcomers having no better right, would create more and greater evils than any that could be thus remedied or prevented. But in forbidding existing relations of persons to things to be disturbed by private violence, or acts likely to provoke violence, the law must needs, at that stage, protect the unjust with the just. If the ultimate justice of the matter were always manifest at first sight, there would be no call for provisional protection. It is also said that possession is in a normal state of things the outward sign of ownership or title, and therefore the possessor is presumed to be or to represent the true owner; some have gone so far as to say that, apart from this, the mere will of a possessor to hold the object for himself is in the eye of the law relatively meritorious as against any one not showing a better title. However, the comparative worth of the philosophical or semi-philosophical theories of Possession cannot be weighed to much purpose until one has mastered in some detail the actual contents of the law.[1]

§ 2. *Terminology.*

It need not give occasion for surprise that we fail to find in our books any title of Possession *eo nomine*. First, the historical categories of the Common Law have oftener been

[1] The speculative literature of the subject, which for modern readers may be said to date from Savigny, shows no sign of coming to an end. The best way of getting on the track of it, if desired, is to consult the latest current edition of a good German book of 'Pandektenrecht,' such as Arndts. And see Holmes, The Common Law, Lect. vi.

determined by procedure and remedies than by rights. Our old authors looked mainly to the forms of action, and thought less, for example, of the essential differences between breach of contract and defamation than of the formal similarity of the remedy as being for either an action on the case. A doctrine of possession exists, but it was developed by means of various remedies for wrongs to possessory rights, and was long thought of wholly or mainly as determining the conditions of those remedies. *Trespass*, a wrong to possessors[1] of land or goods; *Conversion*, a wrong affecting possessory rights in goods only, and best known under the catch-word of *Trover*, the specialized action on the case which was its appropriate remedy; *Theft* or *Larceny*, a particular kind of trespass to goods which by virtue of the trespasser's intent becomes criminally punishable; these and such as these, not the terms of general analysis, are the clues to English authority. For the special applications of the doctrine to land we may add the titles of Ejectment, Landlord and Tenant, and the Statutes of Limitation; and there is much that cannot be rightly understood without going back to the all but forgotten learning of Disseisin. Secondly, the learning of possession disguised itself by its very importance. The Common Law never had any adequate process in the case of land, or any process at all in the case of goods, for the vindication of ownership pure and simple. So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that Possession largely usurped not only the substance but the name of Property;[2] and when distinction became necessary in modern times, the clumsy term 'special property' was employed to denote the rights of a possessor not being owner.

Thirdly, there are many things material to be known with reference to what may be called the physical basis of the law of Possession—things of which the law takes notice,

[1] See 15 H. VII. 3 *a*.

[2] In Brooke's Abridgment, 'Propertie et proprietate probanda,' the two conceptions are not in any way discriminated.

and which to a certain extent are defined by authority—which yet do not come within the legal definitions of particular estates and interests, and are relegated in our rough working classification to the head of Evidence, that general refuge of things otherwise unclassified; and they have to be sought out, rather by the practising lawyer's instinct than by any certain method, in the various places where they lurk—*latitant et discurrunt*—among the miscellaneous information of Nisi Prius and Crown Law treatises. The material being thus scattered, and the subject by no means free from real intrinsic perplexity, it is not surprising that the perplexity should have been regarded as almost hopeless.

Sir E. Perry, by way of introduction to his translation of Savigny on Possession, cites the following passage from Bentham as to physical possession:—

'What is it to possess? This appears a very simple question:—there is none more difficult of resolution, and it is in vain that its solution is sought for in books of law: the difficulty has not even been perceived. It is not, however, a vain speculation of metaphysics. Every thing which is most precious to a man may depend upon this question:—his property, his liberty, his honour, and even his life. Indeed, in defence of my possession, I may lawfully strike, wound, and even kill if necessary. But was the thing in my possession? If the law trace no line of demarcation, if it decide not what is possession and what is not, I may, whilst acting with the best intentions, find myself guilty of the greatest crime, and what I thought was legitimate defence may, in the opinion of the judge, be robbery and murder.

'This, then, is a matter which ought to be investigated in every code, but it has not been done in any.

'To prevent perpetual equivocation, it is necessary carefully to distinguish between physical and legal possession. We here refer to the former: it does not suppose any law, it existed before there were laws; it is the possession of the subject itself, whether a thing or the service of man. Legal possession is altogether the work of the law; it is the possession of the right over a thing or over the services of man. To have physical possession of a thing is to have a certain relation with that thing, of which, if it please the legislator,

the existence may hold the place of an investitive event, for the purpose of giving commencement to certain rights over that thing. To have legal possession of a thing is already to have certain rights over that thing, whether by reason of physical possession or otherwise.

'I have said, that to have physical possession of a thing, is to have a certain relation with that thing. This was all that I have said, this is all that I could say at first. What is that relation? It is here that the difficulty begins.

'To define possession is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image be different with different men, if many do not form any such image, or if they form a different one or different occasions, how shall a definition be found to fix an image so uncertain and variable?

'The idea of possession will be different according to the nature of the subject, according as it respects things or the services of man, or fictitious entities, as parentage, privilege, exemption from services, &c.

'The idea will be different according as it refers to things moveable or immoveable. How many questions are necessary for determining what constitutes a building, a lodging. Must it be factitious? but a natural cavern may serve for a dwelling,—must it be immoveable? but a coach, in which one dwells in journeying, a ship, are not immoveables? But this land, this building,—what is to be done that it may be possessed? Is it actual occupation?—is it the habit of possessing it? is it facility of possessing without opposition, and in spite of opposition itself?

'Other difficulties: In reference to exclusive possession, or possession in common—in reference to possession by an individual, or by everybody.

'Ulterior difficulties: In reference to possession by one's self, or possession by another. You are in the habit of occupying this manufactory, you alone occupy it at this hour: I say you are only my manager, you pretend to be my lessee: A creditor contends that you are my partner. This being the case, are you, or I, or are both, in possession of the manufactory?

'A street porter enters an inn, puts down his bundle upon the table, and goes out. One person puts his hand upon the bundle to examine it; and another puts his to carry it away, saying It is mine.

The innkeeper runs to claim it, in opposition to them both; the porter returns or does not return. Of these four men, which is in possession of the bundle?

'In the house in which I dwell with my family is an escritoire, usually occupied by my clerk, and what belongs to him: in this escritoire there is placed a locked box belonging to my son; in this box he has deposited a purse entrusted to him by a friend. In whose possession is the bag,[1]—in mine, in my clerk's, in my son's, or his friend's? It is possible to double or triple the number of these degrees; the question may be complicated at pleasure.

'How shall these problems be resolved?

'Consult firstly primitive utility, and if it be found neuter, indifferent, then follow the popular ideas; collect them when they have decided, fix them when they are wavering, supply them when they are wanting; but by one method or another resolve these subtilties, or, what is better, prevent the necessity of recurring to them. Instead of the thorny question of possession, substitute that of honest intention, which is more simple.'—(General View of a Complete Code, p. 188 of vol. iii. of the collected works.)

On this it is firstly to be observed that although Bentham proposes to ask these questions with reference to physical possession as distinguished from legal possession, the questions have no significance and are incapable of being answered for any purpose of law except with reference to possession in the legal sense, and that the rules of law for the purposes of which he seeks an answer do refer to possession in the legal sense. In fact, Bentham lets himself slide from the 'natural' into the 'civil' meaning of possession. Secondly, it may be worth while to suggest the answers which the English common law would give in each of Bentham's instances. The case of the manufactory is one of an immoveable thing, and happens to be a much simpler one than many that might be put. The occupier, if he is my tenant, has the possession. If he is merely my servant, I have the possession, but he may defend it on my behalf. If he is my partner, we are in joint possession, unless I have given him a separate tenancy. It is a previous question of fact whether he is tenant, servant, or partner.

[1] *Sic* in the English edition. The French text, in Traités de Législation, ed. Dumont, iii. 338, has 'Dans ce secrétaire se trouve pour le moment une cassette à serrure, occupée habituellement par mon fils; dans cette cassette, une bague confiée à sa garde par un ami. Lequel de nous est en possession de la bague, moi, mon clerc, mon fils, ou son ami?'

In the case of the inn, the innkeeper has the possession of the bundle in the first instance as the bailee of his guest. The strangers do not, so long as they merely touch it, acquire any possession, but if one of them lifted it with an intention to exclude the owner, or all persons but himself, he would acquire the possession. The innkeeper's running to claim it would make no difference unless he re-took it or the taker relinquished it. The porter's return while the possession is with the innkeeper will, if the innkeeper consents, determine the innkeeper's possession; but the porter's return when the bundle has been lifted and is retained by the stranger will make no difference unless he retakes or the taker relinquishes the possession of the bundle. In the case of the escritoire more information is required. If it is moveable furniture, in a room let to the clerk, it is in his possession (Meeres' Case, 1669; 1 Show. 50), and so are all the things in it. If it is in a part of the house which is in my occupation, it is in my possession and he has merely a licence to use it; the things in it are bailed to me and in my possession when the clerk is absent; but when he is present they are in his possession unless I prevent his access to them. (Cp. however Bourne *v.* Fosbrooke, 1865, 18 C. B. N. S. 515; 34 L. J. C. P. 164, where 'possession' is used by Erle C.J. in the sense assigned below to 'right to possession,' and the clerk even in his absence is said to have possession).

The definition of possession has varied even in this country at different times. At one time the supposed rules of the Roman law as to 'possession' seem to have been applied, and a depositary, a mandatary, and other kinds of bailees (see in 1 Hawk. 33. 10) have been treated as having no possession as against the bailor; and on the other hand, in Staundford's time (P. C. c. 15, fo. 25 *a*, ed. 1567) a servant entrusted by his master with money for delivery was held to have the possession at common law: cp. the statute 21 Hen. VIII. c. 7. It was thought that the master retained possession only so long as the servant was in his house or accompanying him. The contrary rule, though settled in the modern authorities, is certainly somewhat of an anomaly in the Common Law. It is worth notice that Staundford cites the Roman Law as to theft by bailees by way of contrast, with the remark that 'in les cases avant dites le ley de cest realme est plus favorable que nest le ley civil.' Among the apocryphal feats of justice ascribed to King Alfred in the 'Mirror of Justices' is that 'he hanged Wolmer because he judged Graunt to death by colour of

a larcine of a thing which he had received by title of baylement' (p. 242, ed. 1646).

It has constantly been asked: Is Possession a matter of fact or of right? Bentham and others have made the want of a plain answer a reproach to the law. But in truth no simple answer can be given to such a question, for all its terms are complex and need to be analysed. Every legal relation is or may be an affair both of facts and of right: there are not two separate and incommunicable spheres, the one of fact and the other of right. Facts have no importance for the lawyer unless and until they appear to be, directly or indirectly, the conditions of legal results, of rights which can be claimed and of duties which can be enforced. Rights cannot be established or enforced unless and until the existence of the requisite facts is recognized. Again, the recognition of those facts is not always a direct or simple matter. To some extent their existence must be inferred rather than observed, and this independently of all grounds of dispute in relation to the credibility or accuracy of human testimony. The lines and limits of permissible inference have to be considered, and in time become subjects of authoritative definition. Apply these general notions to the matter in hand, and it will be seen that, even after we have fixed the meaning of the term Possession, we cannot completely separate, though we may and must distinguish, the elements of fact and of law in a given case. Whether legal possession shall follow physical possession or not is a point of law. Whether there exists, at the date in question, between a given person and a given thing, the relation of physical possession or occupation, is wholly or mainly a matter of fact. But this in turn may be disputed, and then it must be settled whether the specific facts admitted or proved will suffice to establish the existence of the *de facto* relation of control or apparent dominion required as the foundation of the alleged right: and here we get the kind of questions said expressively if not with dialectic exactness to be of mixed law and fact.

§ 3. *Physical and mental elements in* de facto *possession.*

At first sight it may seem that the relation of occupation or control on which the legal conception of Possession is normally based, and which is the commencement of ownership in those things which the law regards as ownerless until captured or otherwise physically appropriated, is a merely corporeal one, or at all events determined wholly by position in space. I hold my pen in my hand and can deal with it at will: I sit on my chair: I cannot grasp my table, and I do not want to sit on it, but in various ways I manifest active dominion over it. I handle the books on and about the table: there are other books in the room which I am not using, but I can lay hands on them whenever I want them. Here the physical element of possession is simple enough. But it becomes less simple when we consider the passage between my chamber and the outer door. In it there may be portable objects of which I am the owner—a hat, a stick, an umbrella—and no one would think of denying that they are in my possession. But they are not within my sight or instant reach, and, so far as my personal ability goes, they might peradventure be carried away without my knowing it. The relation is still less direct between the master of a house containing many rooms and his goods distributed among those rooms, or between the keeper of a magazine or warehouse and the various goods or stores therein deposited. When we come to immoveable property, it is clear that absolute physical control is in most cases impracticable. If the occupier of a set of chambers cannot certainly prevent things in the entrance passage from being meddled with against his will, much less can one man, or ten men, in a field bounded by an ordinary bank or fence guard every point of that boundary so as to prevent intrusion. Yet every one will say that if the owner or tenant of the field is there, and if there is nothing apparently inconsistent with his using any part of the field at will, he is in possession of the whole.

Again, I go to a friend's chamber; he is not there; I sit down at his table and write a note to him. Here the physical relations cannot be distinguished from those observable when I am writing in my own chamber. But, although I may be said to be in possession of the pen, if not of the chair and the table, no one will think of saying that I am in possession of the other books and furniture in the room. The master of a house, whenever he enters it, is in possession of at least everything belonging to him that is within sight and reach; if a thief makes his way in and carries off what he can lay hands on, no one will say that he is in possession, even for a moment, of anything he has not actually laid hands on. 'If a man walks into my house without any legal right, he does not thereby get possession of any piece of furniture in my house; and if he walks into my manufactory he does not thereby acquire any right to the goods there'[1]—nor any apparent right or power to dispose of them. We have no difficulty in saying that the tenant of a farm containing many score acres is in possession of the whole; but a person who enters on part of an occupied farm and claims title to the whole is not said or thought to be in possession of any of the land making up that farm, save so far as he may succeed in effectually and continuously excluding the former tenant from it.

All this time, be it noted, we have said nothing of possession in law. We have sought only to fix attention on the preliminary conception of possession or control in fact.

It appears, then, that even at the earliest stage we have many things to distinguish. *De facto* possession, or Detention as it is currently named in Continental writings, may be paraphrased as effective occupation or control. Now it is evident that exclusive occupation or control, in the sense of a real unqualified power to exclude others, is nowhere to be found. All physical security is finite and qualified. A strong man is worse to meddle with than a weak man or a child, but the strong man also may be overpowered. It is harder to break

[1] James L.J., Ex parte Fletcher, 1877, 5 Ch. Div. 809, 814.

into a safe than a cupboard, a house than a field, a prison or a fortress than a house; but locks may be picked, bolts forced, walls broken. External security means only making intrusion so troublesome, and successful intrusion so little to be hoped for, that under ordinary conditions the risk of the attempt will be out of proportion to the contingent gain of success. And the amount of material difficulty which it is necessary or worth while to set up is found by experience to vary with the circumstances. A dwelling-house is not built or guarded like a prison, and we do not lock up tea and candles in a safe; we should call a banker imprudent who used only the same cautions as a private householder. We may say then that, in common understanding, that occupation at any rate is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment. Much less than this will often amount to possession in the absence of any more effectual act in an adverse interest. Indeed it seems correct to say that 'any power to use and exclude others, however small, will suffice, if accompanied by the *animus possidendi*, provided that no one else has the *animus possidendi* and an equal or greater power.'[1] To determine what acts will be sufficient in a particular case we must attend to the circumstances, and especially to the nature of the thing dealt with, and the manner in which things of the same kind are habitually used and enjoyed. We must distinguish between moveable and immoveable property, between portable objects and those which exceed the limits of portable mass or bulk. Further, we must attend to the apparent intent with which the acts in question are done. An act which is not done or believed to be done in the exercise or assertion of dominion will not cause the person doing it to be regarded as the *de facto* exerciser of the powers of use and enjoyment. Still further, it will often not suffice to regard the intent of the actor alone. I may intend to assert dominion over a given subject of property, and I may do an

[1] Terry, Principles of Anglo-American Law, p. 268.

act, or a series of acts, fitted to manifest that intention. But there may be some other person who appears to be in a position, of right or in fact, to object to my claim; and whether my action be taken with or without the consent or acquiescence of any such person will make a great difference to the practical result. If I act with the consent of the former holder (as a purchaser does when he receives delivery of goods or is let into possession of land), whoever respected his will to exclude others may be expected in like manner to respect mine: I get, if one may so use the word, the goodwill of his occupation. But if consent be wanting, and I am confronted by resistance, or even under apprehension of it, other people cannot be expected to assume anything in my favour, and will not give me credit for the powers of an owner until my exclusive power of control is manifest in actual experience. Thus it happens that acts which if opposed would be insignificant are accepted as a sufficient and actual entering on possession when they are fortified by the concurrence of the last possessor, while hostile or ambiguous occupation must make itself good at every step. Delivery is favourably construed, taking is put to strict proof; and this not by calling in aid any presumption of right, but on the ground that the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition. And, in order to ascertain whether acts of alleged occupation, control, or use and enjoyment, are effective as regards a given thing we may have to consider—

(*a*) of what kinds of physical control and use the thing in question is practically capable:

(*b*) with what intention the acts in question were done:

(*c*) whether the knowledge or intention of any other person was material to their effect, and if so, what that person did know and intend.[1]

Hence follows a seeming paradox. Occupation or control is a matter of fact, and cannot of itself be dependent on matter of law. But it may depend on the opinion of certain persons for

[1] See Cook *v.* Rider, 1834, 16 Pick. (Mass.) 186.

the time being, or the current opinion of a multitude or a neighbourhood, concerning that which is ultimately matter of law. Though law cannot alter facts, or directly confer physical power, the reputation of legal right may make a great difference to the extent of a man's power in fact. Ownership does not make one an occupier, nor necessarily confer any right to occupy; but occupation is easier and more effective (in a settled country at any rate) when armed with the real or supposed authority of the owner. Physical or *de facto* possession readily follows the reputation of title; we shall see that possession in law is ordinarily adjudged to follow the true title, in cases where physical possession is contested or ambiguous; and in this the law does not cross, but rather develops and confirms, the practical instinct of mankind.

At the same time it must be remembered that when physical possession or control is once gained, it may be or become precarious, but it is none the less real while it lasts. As Mr. Justice Holmes says, 'A powerful ruffian may be within equal reach and sight when a child picks up a pocket-book; but if he does nothing, the child has manifested the needful power as well as if it had been backed by a hundred policemen.' In this case the child's dominion is a very real one for the time being. The ruffian may attempt to seize the pocket-book, but before he can execute his intention the child may tear the book, or throw it into a river, or over a cliff, with the result of its ceasing to exist as the same object, or passing out of human control. So, in the case of the banker above mentioned, let us make the extreme supposition that he not only does not use the regular precaution of a banker, but leaves the bank open and unguarded; still he will have possession of the cash and securities in the bank until some one takes them.

It is needless to point out further that physical possession may be lost in various ways without any other person gaining it; but we must carefully guard ourselves against hastily applying the same idea to legal possession. The law does not

always or necessarily attach the rights of possession to physical control; and in like manner, when physical and legal possession coincide, it does not necessarily follow that the loss of control in fact shall involve the loss of possession in law. The continuance or discontinuance of physical control is a fact, though not always an obvious fact; the continuity or interruption of legal possession cannot be affirmed without applying to the facts, when ascertained, positive rules of law. Indeed, the rules are quite different in the Roman law and the Common Law, so that the detailed comparison of them is profitable, here as elsewhere, only when we bear in mind that each stands on its own ground.

There is nothing irrational in a determination of the law to limit the range of disputes in matter of fact by holding that legal possession, once established, can be changed only in certain defined ways, and shall persist until so changed.

§ 4. *Possession in Law.*

To have the actual apparent power of preventing interference with a thing is different, and has to be distinguished, from having the power of such prevention attributed to one by law, so that the intermeddler may be rightfully resisted at the time, or may afterwards be compelled by legal process to make reparation in some form.

When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, we have possession in law as well as in fact. We say as against the world at large, not as against all men without exception. For a perfectly exclusive right to the control of anything can belong only to the owner, or to some one invested with such right by the will of the owner or some authority ultimately derived therefrom, or, exceptionally, by an act of the law superseding the owner's will and his normal rights. Such a right is matter of title; the person bearing it has a definite estate or interest known to the law, an estate

of freehold or copyhold or for years if it be in land, a general or special property if it be in goods. If he has not the actual control, the law will help him to it; in other words, he is entitled or has the right to possess the thing in question. When he has obtained control, he will be the actual and rightful possessor. But meanwhile some one else may have possession in fact, and may likewise have actual possession in law, that is, he may be entitled for the time being to repel and to claim redress for all and any acts of interference done otherwise than on behalf of the true owner.

Possession in law is most easily understood as associated with possession in fact. This is the normal aspect of the right. It exists, broadly speaking, for the benefit of possessors in fact and in good faith, even if we hold that the ulterior object is the benefit of those who, as being or claiming through true owners, are really entitled to possess. The law would be much simpler than it is if it were held that actual control or custody invariably gives actual legal possession, whether the custodian exercises control on his own account or as the servant or otherwise on behalf of another. But no system of law, so far as we know, has gone that length. 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, is required in different degrees both by the Roman law and by the Common Law. One who holds a thing with the owner's consent must do so on the terms consented to; when we have once conceived legal possession as a definite right or interest, there is no difficulty in conceiving it to be one of the terms on which a thing is handed over that legal possession shall remain with the owner, or in presuming it so to be in certain common cases, or even in making a fixed rule of law that possession shall follow the transfer of physical control (which we may call manual delivery in all cases, though the term is more proper to moveables) only when specified kinds of interest in the property itself are concerned. Accordingly we find in the

Roman law that possession is not easily separated from ownership by voluntary manual delivery; whereas the Common Law seems averse to separating possession in law from physical custody, where the thing is in an ascertained custody, and does so only in special cases, as where a servant holds on behalf of his master, and where property taken in distress or execution is said to be 'in the custody of the law.' These cases have been thought anomalous in our modern system, and indeed the authorities are not wholly clear. It may be observed however that a servant's custody is often so manifestly exercised not on his own account but on his master's that it has no colour of apparent ownership. If we regard acts according to their apparent intent and effect, as measured by the common knowledge of mankind, we can hardly say that a groom exercising his master's horse is even in *de facto* possession of the horse. He is in appearance as much as in fact, in fact as much as in law, the master's instrument for exercising the master's power. There is no appearance of acting on his own behalf which could mislead a man of ordinary judgment. The same may be said of a gardener at a country house when the house is left empty, of a tradesman's messenger driving a cart with the tradesman's name on it, of a porter in the service of a railway company or other carrier handling goods in transit, and the like. We have already noted that before we can safely describe a given act as an act of dominion, even in the region of pure matter of fact, we must take account of its apparent intent and probable effect. It is however convenient and almost inevitable, when once we are in presence of an apparent *de facto* possessor, to ascribe to him possession in law so far and so long as nothing appears to the contrary.

Again, there is another and quite different way in which possession in law may be independent of *de facto* possession. We may find it convenient that a possessor shall not lose his rights merely by losing physical control, and we may so mould the legal incidents of possession once acquired

that possession in law shall continue though there be but a shadow of real or apparent physical power, or no such power at all. This the Common Law has boldly and fully done. It is not merely that things continue in a man's possession though they be out of his immediate control, so long as his active control is, as some say, capable of being reproduced, or, as others say, his relation to them is consistent with the usual dealing of an owner of such things: as where implements of husbandry are left lying out in the field where they are used, or a purse or a jewel is mislaid in the house where it is kept. Legal possession, in our law, may continue even though the object be to common apprehension really lost or abandoned.

Again, we must have some positive rule to meet the case of a thing which is the object of dispute, and so evenly disputed that no claimant can be said to have *de facto* possession rather than another. It might conceivably be held that legal possession is in suspense as well as the physical possession. But the Common Law does not so hold; it prefers, in the absence of a decisive state of fact, to make legal possession follow the better right.

Further, possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law, whether necessary or not, that a possessor should be able to deal with his apparent interest in the fashion of an owner not only by physical acts but by acts in the law, and that as regards every one not having a better title those acts should be valid.

It may now be convenient to state certain rules which are believed to represent, in a general way, the working method of the Common Law with regard to Possession.

They do not profess to be exhibited in any order of systematic development, or to be logically independent, or to be strictly co-ordinate in character or importance. The word

Possession, if not expressly qualified, will be used now and afterwards with the meaning of possession in law.

It would be convenient, if it were possible, to restore 'seisin' to its ancient meaning of possession in law whether of corporeal or incorporeal hereditaments, chattel interests in land, or personal chattels, and appropriate 'possession' to detention or *de facto* possession. But the violence to modern usage would be excessive.

§ 5. *Rules.*

1. Possession in fact is *prima facie* evidence of possession in law.

This might be expressed still more shortly, but at the cost of using a terminology not familiar in our authorities, by saying *Possession is presumed from Detention.*

2. Possession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in law.

It is not material whether physical control or apparent dominion be acquired with or without a good title, or, if without a good title, whether innocently under colour of a supposed title, or with wrongful knowledge and intent. A possessor may be a mere wrongdoer against the true owner, and a wrongdoer for the very reason that he has got possession; while yet his possession is not only legal but, as against all third persons not claiming under the true owner, fully protected by the law. But we shall see that wrongful possession is by no means an unmixed advantage to the possessor, in the case of goods at any rate.

Possession in fact without the manifestation of intent to act as owner may or may not be accompanied by possession in law according to the manner and character in which it is acquired.

3. Possession is single and exclusive. As the Romans said, 'plures eandem rem in solidum possidere non possunt.' This follows from the fact of possession being taken as the basis

of a legal right. Physical possession is exclusive, or it is nothing. If two men have laid hands on the same horse or the same sheep, each meaning to use it for his own purposes and exclude the other, there is not any *de facto* possession until one of them has gotten the mastery. 'Contra naturam quippe est, ut cum ego aliquid teneam, tu quoque id tenere videaris.'[1] This is no reason against ascribing legal possession to one person in preference to another when physical possession is in suspense (see rule 7 below), but it is a reason against ascribing it to more than one.

The rule is fundamental in English as well as in Roman law.[2] Such apparent exceptions as may be found consist in the remedies of a possessor being granted, for certain purposes and in certain cases, to an owner out of possession. The phrase of Roman law in such cases is 'perinde haberi debet ac si possideret.'[3] It must be admitted that the language of our authorities is anything but clear or uniform, and sometimes a bailor and bailee are spoken of as both having possession.[4] In such passages the word is used in a double sense.

Joint tenants or tenants in common, when they have not parted with possession, possess in law, and may possess in fact, according to their interest as owners. If a servant holds the property on their behalf, the *de facto* possession is exercised in the name and for the use of all of them. If one of them alone holds or occupies, his physical possession is that of an owner for his own interest and that of an agent as to the others. If there is a personal joint occupation, the physical and legal possession exactly coincide. In every case there is not a plural possession, but a single possession exercised by or on behalf of several persons.[5]

4. Possession is acquired and lost in certain specific ways.

[1] Paulus, D. 41. 2. de acq. vel amitt. poss. 3. § 5.

[2] Co. Litt. 368 *a*; Vaughan, 189.

[3] See note 49 by Rudorff to Savigny's Recht des Besitzes, 7th ed. (1865) at p. 630.

[4] E. g. Ancona *v.* Rogers, 1 Ex. Div. at p. 292.

[5] See Litt. ss. 314, 319, 321, 323.

An existing possession can be determined only in one of those ways.

This rule is another necessary consequence of recognizing Possession as a definite legal right. When the law defines rights, it must also define the ways in which they can be acquired and lost.

The second part of the rule might be called the law of persistence in relation to this subject: it is in truth a corollary from the first, but it is of such importance that it needs to be distinctly stated. In approaching the subject as a whole, and in working out various particular problems, there is nothing easier or more misleading than to assume that when a thing is not in any one's physical control it is not, or on principle ought not to be, in any one's legal possession.

5. As against a mere wrongdoer possession is conclusive proof of right to possess.

Not only is existing possession protected against interference at the hands of a mere intruder, but in an action for wrong to the possession the intruder cannot be heard to say that any third person to whose title he is himself a stranger has a better title than the actual possessor. An alleged paramount claim of some third person, however probable or even obvious, is irrelevant unless one can justify under the authority of that person.[1] This protection however does not extend to a right to possess when separated from actual possession.

6. As against strangers, the right founded on possession has the incidents of ownership and is transmissible according to the nature of the subject-matter: we may say compendiously that *Possession is a root of title.*

It might be held that the right to possess as against the world at large is attached only to actual possession, and that where a person is in possession without acknowledgment of

[1] Nevertheless a plaintiff in an action founded on right to possess, whose case would be good if he relied on his own possession, may spoil it if he shows the badness of his own title by setting out the previous history: Doe *v.* Barnard, 1849, 13 Q. B. 945; 18 L. J. Q. B. 306; see per Mellor J. in Asher *v.* Whitlock, L. R. 1 Q. B. at p. 6.

the true title, and acting as owner, his apparent title cannot be continued by transfer or devolution, but, unless and until the true owner intervenes, there can be only successive occupations under which no one who has not actually obtained possession can acquire any right. But when possession is conceived as a substantive right in the nature of property, valid against all merely extraneous intrusion, there is no reason for not holding it to be capable of the same kinds of transfer and devolution as property itself. And it would be manifestly inconvenient to leave property to be scrambled for in the absence or indifference of the true owner. Accordingly it is held that a possessor acting as owner has not only a personal interest, but a title which is effective against all outsiders, and enures to the benefit of all who may hereafter be able to show a title derived from it by any form of bequest, devolution, or conveyance, appropriate to the nature of the subject-matter.[1]

Moreover, as possession originally without right may be converted into full ownership by lapse of time, so a continuous title derived from such possession will become absolute whenever the time has elapsed which is required in the particular case for the final extinguishment of the former owner's claim. In other words, the final operation of statutory or other prescription is not necessarily for the benefit of the actual possessor for the time being. If B., having occupied Whiteacre without title for ten years, dies intestate leaving N. his heir, and C. then enters and occupies for other ten years, it seems that when the right of A. the true owner is extinguished by force of the Statute of Limitation the person who becomes entitled will be, not C. the actual possessor, but N. For B., though he had no title as against A., had from the commencement of his occupation a good title against any one not

[1] Asher *v.* Whitlock, 1865, L. R. 1 Q. B. 1; Doe *d.* Smith *v.* Webber, 1834, 1 A. & E. 119. Note that Dixon *v.* Gayfere (1853), 17 Beav. 421, is quite consistent with these decisions; only a dictum at p. 430 is otherwise. The account of it given in argument, L. R. 1 Q. B. at p. 4, is inaccurate. Cp. O. W. Holmes, The Common Law, p. 238.

claiming through A. If C. had been turned out by D., C. would in the same way have a relatively good title as against D. The effects of possession in itself, prior to and apart from the transfer of ownership by prescription, must be carefully distinguished from the conditions and incidents of such transfer, though the provisional guarding of possession and the final change of property are instruments of the same policy of the law.

7. Where possession in fact is undetermined, possession in law follows the right to possess.

We may also say more shortly, when the limited scope of the proposition is rightly understood, that *Possession follows title*. The rule was enunciated forty years ago by Maule J. in the following dictum :—

'It seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser.'[1]

It had already been said by Littleton that 'where two be in one house or other tenements together to claim the said lands and tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements.'[2]

This rule does not often occur in a simple application such as that which Maule J. put for illustration's sake; at least not

[1] Jones *v.* Chapman (1847), 2 Ex. at p. 821. And see Lord Blackburn's remarks in Bristow *v.* Cormican (1878), 3 App. Ca. at p. 661.

[2] Litt. s. 701, and to the same effect Newton, 19 H. VI. 28 *b*, and Perkins, § 218.

in modern times; still it is a material element in the doctrine of possession as a whole. It seems to be applicable not only where one of the contending parties has an absolutely good right to possess, but wherever he has a relatively better right to possess than the other;[1] in other words, possession would follow at need a title duly derived from a prior though merely possessory right as against any inferior title. Otherwise the last preceding rule could not have its full effect.

8. An owner is *prima facie* entitled to possession, and possession is *prima facie* evidence of ownership.

De facto possession is the sum of acts of ownership, and when the owner of a thing is ascertained he is entitled to act as owner in every lawful way unless it appears that he has divested himself of some part of his general powers. And, as the first condition of exercising full dominion, he is entitled to the undisturbed control of the thing. Conversely, for the very reason that possession in fact is the visible exercise of ownership, the fact of possession, so long as it is not otherwise explained, tends to show that the possessor is owner: though it may appear by further inquiry that he is exercising either a limited right derived from the owner and consistent with his title, or a wrongful power assumed adversely to the true owner, or derived from some one wrongfully assuming to be owner, or possibly, again, an adverse but justified power.

We have to add that the right to possess, though distinct from possession, is treated as equivalent to possession itself for certain purposes, more important with regard to procedure than to the substance of the law, and under the modern English practice of only historical importance, but still needful to be understood. It is then called *constructive possession*. Want of attention to the somewhat minute distinctions arising from this extension of the rights of a possessor to one who is not an actual possessor has led to much confusion.

[1] It might formerly, and perhaps still may sometimes, even be applied against a true owner who had lost the immediate right to possess. See the continuation of the passage cited from Perkins.

PART II.

OF POSSESSION GENERALLY.

CHAPTER I.

The Nature of Possession.

THROUGHOUT our inquiry we have to bear in mind that the following elements are quite distinct in conception, and, though very often found in combination, are also separable and often separated in practice. They are

i. Physical control, detention, or *de facto* possession. This, as an actual relation between a person and a thing, is matter of fact. Nevertheless questions which the Court must decide as matter of law arise as to the proof of the facts.

ii. Legal possession, the state of being a possessor in the eye of the law.

This is a definite legal relation of the possessor to the thing possessed. In its most normal and obvious form, it coexists with the fact of physical control, and with other facts making the exercise of that control rightful. But it may exist either with or without detention, and either with or without a rightful origin.

A tailor sends to J. S.'s house a coat which J. S. has ordered. J. S. puts on the coat, and then has both physical control and rightful possession in law.

J. S. takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical control (in this connexion generally called 'custody' by our authorities) and J. S. still has the possession in law.

While the servant is going on his errand, Z. assaults him and robs him of the coat. Z. is not only physically master of the coat, but, so soon as he has complete control of it, he has

possession in law, though a wrongful possession. To see what is left to J. S. we must look to the next head.

iii. Right to possess or to have legal possession. This includes the right to physical possession. It can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed. It is a normal incident of ownership or property, and the name of 'property' is often given to it. Unlike Possession itself, it is not necessarily exclusive. A. may have the right to possess a thing as against B. and every one else, while B. has at the same time a right to possess it as against every one except A. So joint tenants have both single possession and a single joint right to possess, but tenants in common have a single possession with several rights to possess.[1] When a person having right to possess a thing acquires the physical control of it, he necessarily acquires legal possession also.

Right to possess, when separated from possession, is often called 'constructive possession.' The correct use of the term would seem to be coextensive with and limited to those cases where a person entitled to possess is (or was) allowed the same remedies as if he had really been in possession. But it is also sometimes specially applied to the cases where the legal possession is with one person and the custody with his servant, or some other person for the time being in a like position; and sometimes it is extended to other cases where legal possession is separated from detention.

'Actual possession' as opposed to 'constructive possession' is in the same way an ambiguous term. It is most commonly[2] used to signify physical control, with or without possession in law. 'Bare possession' is sometimes used

[1] Litt. ss. 311, 314; cf. s. 315, where if we interpreted Littleton in Coke's manner we might hold the *&c.* to signify the additional reason that trespass is a wrong to the Possession itself.

[2] But in statutes it has been held to include purely legal possession conferred by a grant operating under the Statute of Uses: Hadfield's ca., 1873, L. R. 8 C. P. 306.

with the same meaning. 'Lawful possession' means a legal possession which is also rightful or at least excusable; this may be consistent with a superior right to possess in some other person.

The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context.

In the procedure of the Common Law (which no longer exists in England, but must be understood in order to understand the substance of the law) an action of Trespass is the appropriate remedy for a wrong done to existing legal possession.

Wrongs affecting the right to possess are remediable by other forms of action, mainly Ejectment (superseding the assizes and other possessory real actions) as to land, and Trover (largely superseding Detinue) as to personal chattels.

All actual legal possessors can maintain Trespass (and control in fact is evidence of possession in law); but they may use the other remedies at their option in so far as they can show a right to possess. An owner who has parted with possession but may resume it at will can also maintain Trespass. The right to sue in trespass is therefore not a sufficient test of Possession, though it is a necessary one.

We shall now consider by what kinds of evidence the fact of possession is established with regard to different kinds of things capable of ownership, and in what ways possession in law can be acquired and lost; something must also be said of the relations of Possession to the right to possess, and the ways in which it affects and is affected by Title.

§ 1. *Evidence of Possession: Land.*

Inasmuch as Possession, a legal state of things importing definite and valuable rights, is established by certain kinds of facts of which the law takes notice, it concerns us to know what those facts are. The rights of a possessor belong to him

who is in possession, but one who relies on *de facto* possession as investing him with those rights and entitling him to the appropriate remedies has to satisfy the Court that he rather than any other person was, at the time of the wrong he complains of, in a certain relation to the thing of which the use or enjoyment is in question. He must prove a state of facts which will be sufficient in law to support his claim.

The subject-matter of Possession is either capable or incapable of comprehension, that is, of a complete physical control applied to the thing as a whole. A book may be carried away in the hand, or in the pocket. Chairs and tables may be carried away in a cart or a railway truck. The cart or truck is not so easily moved as a book or a chair, but it is moveable and can be sent about the country at will under the single control of some one who guides it. A sporting gun is moveable and portable; the great guns of a man-of-war are not portable in the common meaning of the word, but they are still moveable; they are capable, through appropriate mechanical means, of single-handed control, and are not capable of a permanently divided control. The ship itself, however large, and though capable as to its parts of separate occupation, is still moveable and under command as a whole. Ten acres of land in a field, on the other hand, or the farm buildings thereon, are not moveable,[1] and though the control of either of them existing at a given time may be single, it may at any time be divided or subdivided. Part of the house may be let off for the exclusive occupation of a tenant, or part of the field may be sold, or acquired under compulsory powers by some local authority. Even within the same visible boundary there may be, and under the old common-field tillage there constantly were, diversities of both ownership and possession.[2] Or the surface may be in one person's occupation while a mine beneath it is occupied and worked by another.

[1] Houses have been moved, for exceptional purposes, by severing them as a whole from the soil for a limited time. We are not concerned here with this abnormal state of things.

[2] Cf. per Parke B., Jones *v.* Williams (1837), 2 M. & W. 326, 331.

Hence it is not possible, as matter of fact, to possess a house, a wood, or a field in the same manner as we possess the money in our pockets, or the owner of a cart and horse possesses them when he is driving the horse in the cart. There can only be a more or less discontinuous series of acts of dominion. What kind of acts, and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used. When the object is as a whole incapable of manual control, and the question is merely who has *de facto* possession, all that a claimant can do is to show that he or some one through whom he claims has been dealing with that object as an occupying owner might be expected to deal with it, and that no one else has done so. *Omnia ut dominum gessisse*[1] is, for English as well for Roman lawyers, a good working synonym of *in possessione esse*. Such conduct is evidence of possession, and the possession is evidence of ownership, subject to any other evidence which may explain the matter otherwise. And the importance of this as regards land is greater than it seems at first sight. A fairly good title can be shown to the freehold of most of the land in England; but if we want to know exactly to what land a given title applies, we have oftener than not to rely on actual usage to determine the boundaries. Few title-deeds are so precise in their description of the property dealt with as to leave nothing uncertain. Where particular circumstances make the difference of a few feet material, there may be serious dispute about the ownership, for example, of a boundary ditch, with maps and documents in excellent order on both sides. It is quite exceptional for documents to throw any light on facts of this kind. They may guide us to a certain bank and double ditch between Blackacre and Whiteacre, but if the owner of Blackacre claims the bank and both ditches, and the owner of Whiteacre claims one ditch and half or the whole of the bank, the documents will probably cease to help us, and

[1] C. 7. 32, de poss. 2.

we must fall back on evidence of acts of ownership and of the local custom as to boundary ditches.[1] Again, acts of dominion over land are often isolated in space. A bank or a fence is mended here and there as it needs mending, and the like. And then it has to be considered to what extent in space acts of this kind assume dominion, and against whom.

First, as to the quality of acts of dominion, they will be esteemed according to their subject-matter. Conduct which would be almost evidence of abandonment with regard to one kind of land may with regard to another be as good evidence of use and occupation as can be expected. 'By possession is meant possession of that character of which the thing is capable.'[2] 'What acts amount to a sufficient occupation must depend upon the nature of the soil and the uses to which it is to be applied.'[3] Where land is uncultivated and of little immediate use except for sport, shooting over it during some months of the shooting season may be enough to constitute *de facto* possession.[4] In British India boundary disputes are exceedingly common, and one point to which evidence is commonly directed is who sowed the last crop; but the evidence is often conflicting and untrustworthy, even collusive litigation being got up beforehand in order to make evidence on special points in such suits.[5] The nature of the soil, on the alluvial lands of Bengal at any rate, also makes a conflict of genuine claims quite possible and intelligible. Thus an Anglo-Indian magistrate may give very little weight to testimony which an English jury or judge would act upon in England without hesitation.

Acts of dominion over part of the thing in dispute may be evidence of *de facto* possession of the whole. The principles

[1] See Y. B. 4 H. VI. 10, pl. 4.

[2] Lord FitzGerald in Lord Advocate *v.* Young, 1887, 12 App. Ca. at p. 556.

[3] Cook *v.* Rider, 16 Pick. (Mass.) 186, 187.

[4] Harper *v.* Charlesworth, 1825, 4 B. & C. 574, 584. Grass had also been taken under a licence from the plaintiff.

[5] See Mr. H. A. D. Phillips in L. Q. R. iii. 197–200.

and conditions on which this depends were thus explained by Parke B. half a century ago :—

'Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person: though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury. So I apprehend the same rule is applicable to a wood which is not inclosed by any fence. If you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; and the case of Stanley *v.* White[1] I conceive is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person by showing acts of ownership on his part along the same fence. It has been said, in the course of the argument, that the defendant had no interest to dispute acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.'[2]

Baron Parke's exposition has since received the highest

[1] 14 East, 332; see below.
[2] Jones *v.* Williams, 1837, 2 M. & W. 326, 331.

judicial confirmation, and may be regarded as classical. In a Scottish case where a claim of title to foreshore was founded on continued acts of possession Lord Blackburn said:[1]—

'Every act shown to have been done on any part of that tract by the barons [of Erskine] or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances: one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was. That is what is very clearly explained by Lord Wensleydale (then Baron Parke) in Jones *v.* Williams.[2] And as the weight of evidence depends on rules of common sense, I apprehend that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.'

In a later Scottish case of the same character Lord Watson said:—

'It is, in my opinion, practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances . . . In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be in the strict sense of the term exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on

[1] Lord Advocate *v.* Lord Blantyre, 4 App. Ca. 770 at p. 791. As to the nature and extent of the acts relied on, see at p. 774.

[2] 2 M. & W. 326 at p. 331.

his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.'[1]

It has long been settled by English authorities that acts of dominion such as taking seaweed, sand, and stones on the foreshore, done without interruption by an owner of the adjacent land down to high-water mark who deduces title from the Crown, are sufficient proof of *de facto* possession to be evidence of legal possession under the same title, and therefore evidence that the foreshore was comprised in the grant by the Crown.[2] And it has been judicially recognized that the physical occupation of a mine is necessarily partial until the mine is exhausted; for it can be occupied only by removing the ore.[3]

In a case which Parke B. mentions in the passage above quoted[4] the disputed ground was a belt of wooded land fifteen feet wide outside the plaintiff's enclosure. The land beyond this belt was owned and occupied by various persons, of whom the defendant was one. In an action against the defendant for trespass by cutting trees in the part adjacent to his own land, evidence was given of the conduct of owners and occupiers of other land similarly situated, besides the defendant's own predecessors in title; they had not attempted to take the trees within the fifteen-foot belt, but on the contrary had both forborne from claiming them in any way, and had acquiesced in the trees being cut from time to time by the plaintiff or his predecessors. This was held admissible and sufficient evidence of the plaintiff's title to the trees throughout the delt. If there had been the same positive evidence of trees being cut by the plaintiff, but no evidence of his exclusive right to do so being admitted by persons interested

[1] Lord Advocate *v.* Young, 1887, 12 App. Ca. 544, 553.

[2] Calmady *v.* Rowe, 1848, 6 C. B. 861, and see the note, probably by Serjeant Manning, at p. 893; Healy *v.* Thorne, 1870, 4 Ir. Rep. Ch. 495. See also the references in Elphinstone, Clark, and Norton on Interpretation, 69–72.

[3] Taylor *v.* Parry, 1840, 1 M. & Gr. 604, 615, 1 Scott, N. R. 576.

[4] Stanley *v.* White, 1811, 14 East, 332.

in disputing it if they could, the positive evidence would still have been admissible, but it may be doubted whether it would have been sufficient. For it would not have been inconsistent with a concurrent use and enjoyment by other persons. The Scottish cases above cited illustrate, in their facts and several of the remarks made in the House of Lords, the importance of showing acquiescence or non-interference on the part of those who might be expected to interfere if they rightfully could.

Generally an occupation or use which is not on the face of it exclusive is not evidence of *de facto* possession; unless indeed the nature of the subject-matter be such that exclusive use is not possible or practicable.[1] 'If there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned [out] one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common.'[2]

Where incorporeal rights over real estate consist in or admit of exclusive enjoyment, the *de facto* exercise of them is analogous to possession, and is protected by the same remedies. 'Trespass lies for breaking and entering a several fishery, though no fish are taken;' the like of a free warren.[3] It does not lie for disturbing a right of common, as the commoner has not an exclusive right to any part of the herbage;[4] but in respect of a several right of *herbage* it may.[5] And as regards the bearing of acts of use and enjoyment done upon or over parts of a continuous whole, such as a lake or a river, on a claim to exclusive rights over the whole, the same kind of considerations apply as in the case where

[1] Lord Advocate *v.* Young, *supra*.

[2] Bramwell L.J., Coverdale *v.* Charlton, 1878, 4 Q. B. Div. 104, 118. Cp. Lord Hatherley, 4 App. Ca. at p. 798.

[3] Holford *v.* Bailey, Ex. Ch. 1849, 13 Q. B. 426, 444, 18 L. J. Q. B. 109, 112 And see 19 H. VI. 8. pl. 19, 5 H. VII. 10. pl. 2, F. N. B. 87 G., and other authorities collected in S. C. in the Court below, 8 Q. B. at pp. 1007-1010.

[4] 22 Ass. pl. 48.

[5] Co. Litt. 4 *b*.

possession of the land itself is asserted.[1] Some little difficulty may be found in cases of this kind in distinguishing the question of title from that of *de facto* possession. It must be remembered that partial acts of dominion, done in exercise of a more extensive claim of title, tend to support that claim only so far as they are admissible evidence of *de facto* possession of the whole subject-matter to which the claim extends. Doubt has also existed at various times as to what things are really the subject of corporeal possession—'things whereof a man may have a manual occupation possession or receipt,' or 'things manurable'—and what are not.[2]

It is well established in our books that the rent and services incident to freehold tenure are the subject of Possession, and that before legal possession or seisin is complete there must be such *de facto* possession as the thing admits of in the shape of an actual receipt of some part of the rent.[3]

The King is not unfrequently spoken of as being seised or possessed of the crown. This conception may have had some influence in ultimately securing protection from the penalties of treason for the adherents of a *de facto* sovereign. It was also applied to offices held by subjects, insomuch that an assize of novel disseisin might be brought in several cases.[4] In the letters patent creating a peerage a Lord of Parliament is said to possess his seat, place, and voice.

The term is even applied to the exercise and enjoyment of customary rights: in this sense Coke says that 'Possession must have three qualities: it must be long, continual, and peaceable,' and speaks of acts adverse to the right claimed as an 'interruption of the possession.'[5]

[1] See Bristow *v.* Cormican, 1878, 3 App. Ca. 641, 661, 670; Neill *v.* Duke of Devonshire, 1882, 8 App. Ca. 135, 166.

[2] Litt. s. 10, and Coke thereon, 17 *a*. See Elphinstone, Norton, and Clark on Interpretation of Deeds, 571–2; Rochester *v.* Rochester, Noy 37. As to seisin of a villein, Litt. s. 541.

[3] Litt. ss. 233, 235, 565. Co. Litt. 160 *a*, 315 *a*. As to seisin of services, and the effect of seisin of fealty with regard to other services, Bevil's ca. 4 Co. Rep. 8 *a*.

[4] See 16 Vin. Abr. 134.

[5] Co. Litt. 113 *b*, 114 *a*.

§ 2. *Evidence of Possession: Goods.*

The *de facto* possession of personal chattels is up to a certain point obvious. No doubt is possible concerning the pen one is writing with, or the paper one is writing on. But, as we pointed out in the Introduction, complications arise as soon as we have to consider the case of a chattel which is not in any one's present manual control. Often it is hard to say whether legal possession is the normal result of *de facto* possession or is conferred by a special rule of law. The possible combinations of facts offer infinite gradation from manifest power and will to hold the thing for oneself to cases where one of these elements, if not both, is so weak and obscure that it can only just be said to exist.

One kind of real doubt in the matter of fact may arise with regard to the capture of wild animals. And though the case is not common in English practice, it is not without importance, for possession in law follows invariably upon a complete taking, whether rightful or not. At what point in the process of capture is the taker's control complete enough to make him a possessor? This is in its nature as much a question of fact as anything can be, yet it is one upon which the law cannot escape from having an opinion. A jury is not free to hold that having nearly taken fish will do as well as taking them. As a chain is no stronger than its weakest link, a seine net is not a closed net conferring possession of the fish inside it until it is actually stopped. So long as an opening is left, disturbance of the fish is not a trespass against an existing possession.[1] The general

[1] Young *v.* Hichens (1844), 6 Q. B. 606. It must be taken that there was not evidence to support the declaration on the point of trespass to the plaintiff's nets. Cf. Reg. *v.* Revu Pothadu, 1882, I. L. R. 5 Mad. 390, holding that fish in 'the ordinary open irrigation tanks of Southern India' were not reduced into possession so as to be capable of being stolen. It seems that medieval pleaders avoided saying *pisces suos* even of fish in enclosed ponds: they rather treated the loss of fish as damage consequential to a trespass on the soil. See the precedents in F. N. B. *Trespass*.

principle being that pursuit short of capture will not do,[1] this was a necessary though at first sight an extreme application of it. In the whale fishery, custom has been allowed to settle, one way in the Galapagos Islands and another way in Greenland, the interests of concurrent captors.[2] What is governed by the custom is primarily the right to possess; and the custom evidently cannot alter the physical relations of the whale to its pursuers. But among people who recognize the custom, a *de facto* possession which would otherwise be ambiguous may be made certain, or at least acts which otherwise would place it in dispute may be deprived of any such effect.[3] They will be construed in support and not in derogation of the customary title, so far as there is any room for doubt.

A much more usual case is that of goods in a building, or on land, which are not in any apparent specific custody. Here it is easy to fall back on a positive rule of law; but it is worth while to consider first what is the inference of fact from the situation of such goods. It will hardly be denied that a man is in possession in fact, as well as possessor in law, of his own goods in the house which he occupies, whether he be in the room at a given moment, or even in the house, or not. And outside the house the same thing seems to be true. There is no magic in four walls. A chair on the lawn, a table in a summer-house, are perhaps easier to meddle with than the tables and chairs inside the house, but they remain under the master's control in fact unless and until some other person exercises a more effective control. The probability of such things being meddled with is practically not greater, in a general way, than the probability of the land or building being entered by a trespasser. There are degrees and differences, no doubt; some things are much less safe

[1] See Kent, Comm. ii. 349.

[2] Fennings *v.* Lord Grenville (1808), 1 Taunt. 241; Littledale *v.* Scaith (1788), *ib.* 243 *n.*, and see *at* p. 248. The Greenland custom is misstated in the head-note.

[3] See p. 14, above.

than others. But a man will often, for example, take a book to a friend's room and, finding the room empty, leave the book on a table or desk without any practical fear for its safe keeping. He trusts to the general forbearance from trespassing which the world at large may be expected to observe with regard to the room and its contents. And though an occupier may have no conscious specific intention concerning all the chattels in his house, or on his land, it is certainly his general intention that unauthorized persons shall not meddle with them. As regards things of such kinds as are habitually left out of doors, or are not under personal control and observation except when in actual use, one may say that there is as much *de facto* control as the nature of the case admits. On the other hand, there may be circumstances excluding the occupier from *de facto* control. In such a case as Bridges *v.* Hawkesworth,[1] where a parcel of bank-notes was dropped on the floor in the part of a shop frequented by customers, it is impossible to say that the shopkeeper has any possession in fact. He does not expect objects of that kind to be on the floor of his shop, and some customer is more likely than the shopkeeper or his servant to see and take them up if they do come there. In that case the order of events, with their legal results, was as follows :—

Some person unknown dropped a parcel of bank-notes in the shop. Being dropped in such a place and in business hours, they were, it seems, not in any one's custody or control at all.

The plaintiff in the cause noticed the parcel, picked it up, and thereby acquired possession both in fact and in law, and a limited right to possession, good against every one not having a better title.

The plaintiff then delivered the parcel to the shopkeeper (the defendant) for the purpose of ascertaining the true owner, if possible, and restoring the notes to him, but (it was found

[1] 1851, 21 L. J. Q. B. 75, 15 Jur. 1079.

as matter of fact) without any purpose of affecting the relative rights of the plaintiff and the defendant, failing the true owner. Thus the defendant had possession, but only as a bailee from the plaintiff for a limited purpose.

Advertisement failed to discover the true owner; after three years the plaintiff reclaimed the notes, but the defendant refused to deliver them.

It was held that as between the plaintiff and the defendant the plaintiff was the actual finder, and as such had the better right. 'The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there.' There might conceivably be a positive rule of law that things left in any part of a building pass at once into the legal possession of the occupier; but the Court found neither authority nor reason for any such rule.

A case like this illustrates the importance both of grasping the preliminary conception of facts, and of keeping it clear from the supervening questions of right. The finder's right starts from the absence of any *de facto* control at the moment of finding. And decisions which seem contradictory must not be pronounced to be really so before we have attended to the possibility of differences of fact, which though minute in themselves may be material in their consequences. Thus in Bridges *v.* Hawkesworth the Court did not say that an object dropped by a guest in a private dwelling-house would not be in the custody of the master—'within the protection of his house'—and therefore in his possession; and Patteson J. did say that an innkeeper would have possession[1] in the like case. In Massachusetts it has been held that where a customer voluntarily lays down his pocket-book on a table in a shop, or a desk in a counting-house, and forgets to take it up as he goes away, possession and a qualified right to possess are acquired by the shopkeeper or the banker, and

[1] 21 L. J. Q. B. at p. 76. 'A special property,' i.e. right to possess, which is founded on possession and custody.

the first person who takes up the pocket-book is not a real finder at all.[1] The open voluntary act of placing the object there has the effect of placing it within the same general protection as other things in the same room, and the owner's forgetting to take it away when he goes out does not undo that effect. Cases may doubtless occur, or may be suggested by way of exercise, in which the question of fact would be a really delicate one.

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. So it was lately held concerning a prehistoric boat imbedded in the soil.[2] It is free to any one who requires a specific intention as part of *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. In the case of the prehistoric boat the freeholder, being in possession, made a lease for ninety-nine years to a gas company, reserving mines, minerals, and watercourses. The company's servants, in excavating for foundations, discovered this boat or rather 'dug-out' canoe, which had been under the earth for many centuries. Actual possession, it would seem, had passed to the company by the lease, and at all events it was acquired when their servants removed the canoe from the soil. But the company had no right, it was held, to retain the canoe against the freeholder; for he had the prior right to possession and had not divested himself of it by granting the pos-

[1] M'Avoy *v.* Medina, 1866, 11 Allen 548; Kincaid *v.* Eaton, 1867, 98 Mass 139. These cases involve the opinion that there may be a bailment without a contract, an opinion not without judicial support in England. See Cave J. in R. *v.* McDonald, 1885, 15 Q. B. D. at p. 327; this seems right notwithstanding what is said by Lord Coleridge C.J. in R. *v.* Ashwell, 16 Q. B. D. at p. 223.

[2] Elwes *v.* Brigg Gas Co., 1886, 33 Ch. D. 562.

session and use of the soil for a special purpose.[1] The Roman lawyers, who required a 'possidendi affectus' directed to the specific thing, would have dealt with this case differently.[2] The Common Law pays more regard to the fact that an occupier's general power to exclude strangers from any part of that which he occupies is independent of his knowledge or ignorance as to the specific contents of that part. Possibly the traditional dignity of the freehold may have something to do with this view, but it would seem that a lessee for years would have had the same right as against a sub-lessee.

It seems that things washed or cast up on a man's land adjacent to the sea do not come into his possession without some further act on his part, but he is entitled to possess them as against every one not having a better title, and therefore has a right of action against a stranger who takes such things, or he can retake them from him, though the first taking is not a trespass in the strict sense.[3]

[1] Among other points, it was argued for him that the canoe was a *quasi* fossil and within the reservation of minerals. This was hardly tenable, but the reservation was perhaps material as showing that it was not the lessor's intention to part with more of his interest than was requisite for the purposes of the lease.

[2] D. 41. 2. de poss. 3. § 3, 44 pr. It seems to have been the better opinion that even *naturalis possessio* requires a certain specific *affectio tenendi*; cf. h. t. 1. § 3.

[3] It has been held in Ireland that drift-weed left by the tide on foreshore (where the foreshore is vested in a subject) cannot be stolen, i. e. trespass *de bonis asportatis* would not lie for taking it before it has been specifically appropriated by the landowner: R. *v.* Clinton, 1869, 4 Ir. Rep. C. L. 6; but that trover does lie for taking it, i. e. the landlord has the immediate right to possession: Brew *v.* Haren, 1877, 11 Ir. Rep. C. L. 198, Ex. Ch.; to same effect in New York, Emans *v.* Turnbull, 1807, 2 Johns. 313, 322, per Kent C.J., deciding that the landowner might retake weed so taken.

CHAPTER II.

The Transfer of Possession.

§ 3. *Acquisition and Loss of Possession.*

THUS far we have considered the relations between a person and a thing of which he claims to be possessor, without regard to their origin. We have taken apparent facts as they stand at a given moment, and have endeavoured to see what kind of conclusions could be drawn from them if we were debarred from further inquiry. But such inquiry is oftentimes both possible and necessary. The existing possession of anything has a history in the vast majority of cases; those in which a thing has been for the first time appropriated by the possessor, or has been caused to exist in its present form by the same act or series of acts which appropriated it, are relatively few and form a limited number of groups. Now the change of an existing possession is not fully determined by the same tests to which we look, in the absence of any known previous history, to tell us who is *prima facie* possessor. They will serve well enough when they must, in the case of original appropriation; they may serve well enough in other cases when it is superfluous, or may even be undesirable, to inquire when and how the existing possession began. But we shall find them for many purposes inadequate or superseded.

There is one fundamental division of the ways in which an existing possession can be changed. As the newcomer gains possession, the outgoing possessor must lose it: and this loss must be either with or without his own will. Voluntary dispossession in favour of another is commonly regarded from

the side of the former possessor, and called delivery. In the case of a person quitting possession without any specific intention of putting another person in his place (a case naturally exceptional with things of value), it is called abandonment. Involuntary change of possession is commonly regarded from the side of the new possessor, and spoken of as occupation or taking. Correlative terms are, as regards voluntary transfer, acceptance or receipt; as regards involuntary transfer, dispossession, ouster, and the like. For land there is a neutral term, entry.

According to this division there is a great difference in the legal treatment of the facts, and it is natural and just that the difference should be made. The lawful intention of parties is favoured, and moreover the consent of the outgoing possessor is, as was mentioned before,[1] a real element in the incomer's *de facto* power of enjoyment and control. Hence the voluntary transfer of possession is made easy in many ways. Indeed it constantly takes place without any physical transfer at all, or by means of physical acts which in themselves would be manifestly not enough. Much is presumed, and much has been established by positive rules and enactments, in favour of delivery. When possession is changed without consent, the presumption is reversed. Not only must the newcomer have at least as much actual control as would be evidence of possession if there were nothiug to the contrary, but he must effectually exclude the former possessor. There is a seeming exception which really illustrates the principle: where a person entitled to possess a thing seeks to resume the possession of which he has been deprived, the presumption is in favour of his right, and possession in law follows the right though *de facto* possession be in suspense.[2]

There are great differences of detail, as might be expected, in the application of these principles to immoveable and to moveable property. With regard to land the doctrine of

[1] P. 14.

[2] P. 24, above.

possession has been exceedingly perplexed by the peculiar history of our law. With regard to goods its importance in the definition of theft and cognate offences has caused it to be worked out with extreme minuteness, but at the cost of some distortion and a good deal of obscurity, the mutual bearings and common grounds of the civil and criminal portions of the common law having been, like those of common law and equity, too generally neglected.

Accordingly we shall have chiefly to do with change of possession by delivery or taking, both terms being now used in their largest sense. But it will be convenient first to mention the ways in which an original acquisition of possession may take place; that is, an acquisition such that there is not a simultaneous loss of possession of the same thing by a previous possessor.

Original occupation of land is not now[1] practically possible in England. One can enter on land either under a lawful title to possess it, or in some public or particular right, such as the use of a highway or exercise of an easement, which is consistent with the rightful possession, or under the authority or licence, express or implied, of the person entitled to possess, or by authority of law. There is no other kind of lawful entry, and whoever enters otherwise is a trespasser. Legal theory has nothing to do with the fact that a great deal of trespassing is tolerated by reasonable owners and occupiers as being substantially harmless, or with the difficulty that may sometimes be found in drawing the line between such toleration and a tacit but real licence. We shall have something to say hereafter of the relation of seisin to possession. For the present it is enough to say that (subject to one exceptional state of things to be mentioned) the whole soil of England is in law possessed by occupying owners or other occupiers for various estates and interests, or by the Crown if there is no estate of freehold or possessory interest in any subject. Even

[1] As to the old law of occupancy in an estate *pur auter vie*, see Co. Litt. 41 *b*, Blackst. ii. 258.

the unauthorized appropriation of new foreshore created by a permanent receding of the low-water mark at any part of the coast would in modern law be a trespass against the Crown.

The exceptional case above indicated is when the freehold is in abeyance[1] and no tenant in possession. It seems that a person entering without title during such abeyance would acquire a wrongful possession without disseising or dispossessing any one. He would not even infringe any existing right to possession. And it seems that he could not be made liable in an action founded on the actual possession as distinct from the title of the plantiff, such as trespass *qu. cl. fr.*

With regard to goods, a moveable thing is acquired originally if immediately before its acquisition the thing was not in point of law in the legal possession of any person. This may happen in several ways, but some of them are of little practical importance, and others, though important, are so almost exclusively in criminal law, and therefore are best reserved for discussion in a later part of this Essay. The details and authorities are given in that part accordingly.[2]

Difficulties which often appear to be and sometimes really are formidable arise in dealing with delivery of possession. They will be found to turn more on the estimation of matters of fact than on any uncertainty of legal principle. In all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before that act. What particular acts are necessary or sufficient as regards this or that thing may depend on positive rules of law, but in general depends on the nature of the thing and the relation

[1] See Challis on Real Property, p. 78. It should seem that s. 30 of the Conveyancing Act, 1881, has *per incuriam* introduced a new occasion of abeyance, viz. when a sole trustee dies intestate. See per Pearson J. Pilling's tr. (1884), 26 Ch. D. at p. 433.

[2] See Part III. chap. i. § 4, below.

of the parties to it at the time. The statement now made intentionally excludes all cases in which, by operation of law, possession is transferred without any delivery at all.

§ 4. *Delivery: as to Land.*

Some preliminary explanation is needful in this place. We shall give it as briefly as possible.

Possession of land is of two kinds. Seisin signifies in the common law possession,[1] but one cannot be seised, in the language of modern lawyers, as of any interest less than freehold.

Where a tenant occupies a close under a lease for years, the tenant has possession of the close, so that not only a stranger but the freeholder himself may be guilty of a trespass against him, but the freeholder is still seised, or, as the judges could say as late as 1490, possessed, of the freehold.[2] The fundamental maxim that there can not be two possessions of the same thing at the same time is evaded, successfully or not, by treating the land itself and the reversion as different things. Mr. F. W. Maitland's research[3] has thrown much light on this curious compromise between incompatible ideas. He has shown by abundant examples that in the thirteenth century seisin and possession were absolutely synonymous terms, and that as late as the fifteenth century seisin of chattels was commonly spoken of in pleading.[4] But as early as the thirteenth century the introduction of tenant-farming raised for thinking English lawyers the question who had possession, the landlord or the tenant. Bracton, following Roman authority and the Roman distinction between *possidere*, i. e. possession in law, and *in possessione esse*, i. e. physical possession, in one passage boldly said of the tenant-farmer

[1] Co. Litt. 153 *a*.

[2] 5 H. VII. 10. pl. 2: 'il n'ad le possession del clos mes del frank tenement.'

[3] The Seisin of Chattels, L. Q. R. i. 324. The Mystery of Seisin, *ib.* ii. 481. The Beatitude of Seisin, *ib.* iv. 24.

[4] Add to Mr. Maitland's examples 19 H. VI. 34. pl. 71.

'talis non possidet licet fuerit in seisina:'[1] he is like a bailiff or servant. But in another passage, which is followed by Fleta, we find the theory of a double seisin: 'poterit enim quilibet illorum sine praeiudicio alterius in seisina esse eiusdem tenementi, unus ut de termino et alius ut de feodo vel libero tenemento.'[2] Some words which follow this sentence in Fleta, and are absurdly thrust into it in the printed text of Bracton, try to represent the tenant's interest as of the nature of usufruct, so that 'non dominii pars est.' They may be an early gloss of some clerk still clinging to the Roman theory. But in the early part of the chapter the farmer's interest has been described as *usus fructus vel usus et habitatio*; and the theory of a concurrent seisin 'unius quantum ad liberum tenementum et alterius quantum ad usum fructum' is found in the notes of a collector of cases who, if not Bracton himself, was in some way closely connected with his work and opinions.[3] In the present state of Bracton's text it is hardly possible to decide whether the statement which occurs earlier or that which occurs later in the book represents Bracton's deliberate opinion. In any case, practical need carried the day. It would not do to say that the freeholder had parted with his seisin, for that would have cut him off from using in support of his title the convenient possessory remedies given by the assize of novel disseisin and other actions of the same class. According to the later authorities, though a man who has made a lease for years 'cannot of right meddle with the demesne nor the fruits thereof,' he may have an assize if the termor is ejected, and may plead that he was seised in his demesne as of fee.[4] It would not do to say that the farmer had no possession, for he too must have an effectual remedy against intruders; if he is not

[1] fo. 165 *a*. Cf. 192 *a*, 'villanus non habet actionem non magis quam firmarius qui alieno nomine tenet.'

[2] Bract. 220 *b*; Fleta l. 4, c. 31 *ad fin.*

[3] See F. W. Maitland in L. Q. R. i. 340, and in his Introduction to 'Bracton's Note Book,' vol. i. pp. 91, 92.

[4] Wrotesley *v.* Adams, 1559, Plowd. 187, 191. See to the same effect 15 H. VII. 4 *a*.

exactly disseised when he is disturbed without right, it is something very like it: 'si quis firmarium a firma eiecerit seisinam restituet cum dampnis, quia talis spoliatio non multum differt a disseisina, domino tamen proprietatis' (note the Romanizing language) 'competit assisa novae disseisinae versus extraneum eiectorem, et firmario competit remedium per hoc breve'[1]— that is, the writ of ejectment. Thus it was settled that the lessee had a kind of seisin and yet the lessor did not lose the seisin which he had before. It must be remembered that gradations of freehold tenure had already made men familiar with the conception of the lord being seised of rent and service while the tenant was seised of the land itself.[2] Not before Littleton's time (if so early) it became the usage to confine the term seisin to estates of freehold: and accordingly we have a double terminology, corresponding to a double set of rights, and (so long as the real actions were in practical use) also of remedies.

An occupying freeholder is both seised and possessed.[3]

A freeholder who has let his land for years is seised, or possessed, of the freehold, but not possessed of the land.

A lessee for years possesses the land even as against the freeholder.

The like rule is established as to copyholds. The lord is seised of the freehold, but the copyholder is said to be seised of his tenement 'as of freehold' at the will of the lord, according to the custom of the manor.[4] The copyholder alone has possession of the soil, and though the lord generally has the property of trees and minerals, he cannot enter the land to take them without the copyholder's assent.[5]

A trespasser who has acquired *de facto* possession without title is (subject to some minute variations of terminology in

[1] Fleta, l. c.

[2] Litt. ss. 233, 235.

[3] Littleton sometimes uses seisin and possession together as synonymous: ss. 417, 418, 419.

[4] 1 Co. Rep. 117 *a*, 1 Saund. 147.

[5] Eardley *v.* Granville, 1876, 3 Ch. D. 826, 832, per Jessel M.R.

particular cases) a disseisor, and has a real though wrongful seisin.

An heir, remainderman, or reversioner, who by descent, or by the determination of a precedent particular estate of freehold, has become entitled to the freehold in possession, but has not actually entered, is said to have 'seisin in law,' provided that no one else has taken possession.[1]

A disseised freeholder had by the old law a right of entry,[2] i. e. the right to enter and resume seisin peaceably if he could: but this was in constant danger of being further reduced to a right of action. A right of entry must be carefully distinguished from the right of physically manifesting an actual seisin or legal possession. There was a still further distinction as to the forms of action available for a claimant who was 'put to his action.'[3]

It will be seen that seisin of land answers to possession of goods, 'seisin in law' to the immediate right to possess goods which are neither in one's own possession nor in the possession of any one holding them adversely, and a right of entry to the position of an owner of goods entitled to possess them when they are in some one else's hostile possession; while a disseisee put to his action under the old law may be likened to the owner of chattels whose only remedy, for want of right to the immediate possession, is, or was, a special action on the case.[4] But these latter distinctions are not exactly parallel in the case of land and of goods, neither are their consequences the same.

The ancient and regular manner of transferring the seisin of land *inter vivos* was by livery, which may be called a formal entry by the purchaser with the concurrence of the grantor. It is needless to repeat here the descriptions of it to be found

[1] Challis on Real Property, 181.

[2] In modern practice a right of entry or re-entry, even where given by express contract, is hardly ever exercised without process of law.

[3] Challis, R. P. 330; Butler on Co. Litt. 239 *a*.

[4] See Donald *v.* Suckling, L. R. 1 Q. B. 585.

in our classical books and elsewhere.[1] But it is to be observed that the leading idea is the manifestation of an intent to transfer the *de facto* possession with as much particularity and notoriety as the nature of the case requires or admits. Entry into every part of the land, or perambulation, is needless: the grantor's description and consent sufficiently shows the extent of what he means to part with; but entry into some part in the name of the whole is dispensed with only where hostile possession makes it practically impossible. The only fiction admitted in the common law is that which allows livery of one parcel to suffice for all other parcels in the same county which are comprised in the same feoffment.[2]

'Livery in deed' was when the feoffor delivered seisin on the land, 'livery in law' when he pointed out the house or land and authorized the feoffee to enter. A livery in law may be perfected by entry at any time during the joint lives of the feoffor and feoffee.[3] A deed or writing was not necessary at common law:[4] but it seems to have been usual at all times since the twelfth century.

If the separation of seisin of the freehold from possession for a chattel interest had been logically carried out, it might have been held that the possession of a tenant for years was indifferent to dealings with the seisin, and that the freeholder might enter at reasonable times for the purpose of delivering seisin to a purchaser, or completing his own seisin as heir. Such a view does indeed appear in a writing which is

[1] Bracton's accustomed methods are 'per ostium et per haspam vel annulum,' fo. 40 *a*, cf. 398 *a*. Co. Litt. 48. Blackst. ii. 311, 315, 316. But Blackstone's language about 'feodal investiture' is misleading. And see Challis, R. P. ch. 28. The King, for special reasons, can neither give nor take livery of seisin. A grant by him is effected by letters patent, one to him by deed enrolled or other matter of record: Plowd. 213 *b*.

[2] Litt. s. 61.

[3] Co. Litt. 48 *b*. The Roman lawyers went a step farther, allowing possession to pass by 'livery within the view' without any entry at all: D. 41. 2. de poss. 18, § 2.

[4] Co. Litt. 9 *a*, 121 *b*; Litt. ss. 61, 418. In the 'Extenta Manerii' and elsewhere, free tenants are divided into those who hold 'per cartam' and those who do not.

probably from Bracton's hand.[1] But this was not accepted. It was held that on the one hand the possession of a tenant for years made it impossible for seisin to be given without his concurrence while he was on the land, and on the other hand his acceptance of a purchaser from the freeholder as his landlord (or, as it is properly called, attornment) would complete the purchaser's seisin without any livery, and in the case of the freehold passing by descent his possession at once, by operation of law, conferred 'seisin in deed' on the heir. 'Where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor': and it makes no difference in this point though the tenant afterwards, under a mistake as to the true title or otherwise, pay rent to a person not entitled.[2] This is a survival of the former conception of a tenant for years as possessing *alieno nomine*, when 'it was considered that the tenant was in the nature of a bailiff or servant, and therefore that he took the esplees for the benefit of the owner of the freehold.'[3] With regard to attornment, it must be observed that the doctrine had been worked out in the case of freehold tenure. A lord's grant of services due from his freehold tenant requires attornment, in fact the attornment of the tenant is needful to put the new lord in seisin of the services; though, by a fine distinction, he has not seisin in deed of a rent until a payment has been made not merely in the name of attornment, but in the name and as parcel of the rent itself; before that, he has only seisin in law.[4] It is only after several sections on attornment by freeholders that Littleton says:

[1] Bracton's Note Book, pl. 1290, vol. iii. p. 298.

[2] Bushby *v.* Dixon, 1824, 3 B. & C. 298, 305, per Bayley J.

[3] Littledale J., 3 B. & C. at p. 307.

[4] Litt. s. 565; Coke thereon, 315 *a*; the modern conveyancer must not overlook Butler's note. See Heelis *v.* Blain, 1864, 18 C. B. N. S. 90, 34 L. J. C. P. 88; Hadfield's ca., 1873, L. R. 8 C. P. 306; Lowcock *v.* Broughton, 1883, 12 Q. B. D. 369.

'Also, if a man letteth tenements for term of years, by force of which lease the lessee is seised'—Littleton could still call his possession seisin—'and after the lessor by his deed grant the reversion to another for term of life, or in tail, or in fee; it behoveth in such case that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment without any livery of seisin, &c. because if any livery of seisin should be or were needful to be made, *then the tenant for years should be at the time of the livery of seisin ousted of his possession*, which should be against reason.'[1]

There is no reason, in our opinion, to see anything symbolic or fictitious in the rules and observances of the common law. We find everywhere the same dominant idea, that seisin is the legal result of *de facto* possession; we have only to remember that the way in which *de facto* possession need be or can be exhibited is variable according to the subject-matter and circumstances. In the ordinary case of livery in deed the solemn and open transfer of the feoffor's right to the feoffee did really, under the conditions of medieval society, give the feoffee all the *de facto* power which the feoffor had. Those who respected the feoffor as owner would thenceforth respect the feoffee in turn. If there be any doubt as to the physical contents of that which is described or indicated by the feoffor as being conveyed by him, that is a question of fact which must be settled, in so far as the description is insufficient, by appropriate evidence of acts of ownership or exclusive enjoyment.[2] But the common law, as a working scheme, assumes throughout that *de facto* possession is notorious and capable of easy proof.

These considerations are of no present importance in the law of real property, but they are not without bearing on corresponding parts of the law relating to goods which are still in full practical operation.

[1] Litt. s. 567.

[2] See p. 31, above.

With regard to incorporeal hereditaments, such as a reversion, a remainder, an advowson, the established theory of our authorities is that, although one may have seisin of them by receiving the rent and services, or presenting a clerk to the church, they are not the subjects of livery of seisin; they lie in grant, that is, they can be alienated only by deed. But this doctrine was not always established. In 1369 Thorpe, Chief Justice of the Common Pleas, is reported as saying: 'I deny your statement that a man cannot grant an advowson without deed, for I say it is well enough to go to the door of the church, and say, I grant you this advowson, and deliver seisin of the door: and the grant is good enough without a deed'; and to this all the Justices agreed.[1] This opinion was still current in the fifteenth century, and survived even longer; but it was repudiated by Brian, whose judgment was decisive on many things which he found unsettled.[2] It also appears by cases in the newly published Year Book of 14 Ed. III. that rent was dealt with by way of feoffment, though it does not appear what ceremony was used, or how an entry on the land was dispensed with, or, if there was an entry for the purpose of the feoffment, whether it was then held that an entry on the land merely in the name of seisin of the rent or services was consistent with the tenant's seisin of the land itself.[3] As this kind of livery is not recognized by Littleton or in the modern law founded on his text,[4] it is hardly worth while to discuss whether it should be regarded as symbolic, or as a last protest of archaic materialism against the new-fangled conception of incorporeal hereditaments. If it was symbolic, its final disallowance goes to show that the doctrine of symbolic delivery was tried and rejected by the common

[1] 43 Ed. III. 1. pl. 4.

[2] 11 H. VI. 4 *a*, 6 H. VII. 3. pl. 5; in Pannell *v.* Hodgson, 1579, Cary 74, it is suggested that such livery may be good when the church is not full.

[3] Y. B. 14 Ed. III. (Rolls ed.), references collected in Mr. Pike's Introduction, p. xlvii. We are also indebted to Mr. Pike for calling our attention to the case of the advowson.

[4] Litt. ss. 617, 628.

law more than four centuries ago, and therefore ought not to be introduced into our modern law without evident necessity.

In modern times, that is to say, since the Restoration, the seisin and possession of land are hardly ever transferred by livery. The Statute of Uses destroyed, not by its principal design but by its collateral results, the consistency of the common law, and indeed went far to make the whole system unintelligible. Before the Statute there was seisin and possession, and also persons who had not seisin or possession might have rights of personal use and enjoyment which were protected by the equity of the Chancellor's jurisdiction. Seisin rested on manifest facts, and could be transferred in certain definite ways. The use, trust, or confidence which was enforced in the Chancery was a matter in the conscience of the feoffee to uses, and the Chancellors dealt with it in ways which were not, and were not intended to be, appropriate for the creation or manifestation of titles good against all the world. But the Statute of Uses expressly said that persons having 'any such use confidence or trust in fee simple fee tail for term of life or for years or otherwise' should be 'deemed and adjudged in lawful seisin estate and possession.' It also expressly extended to the limitation of rents by way of use.[1] The statutory seisin thus created could be dealt with just like the various and flexible interests, formerly having a merely equitable existence, to which it was thenceforth attached. Early in the eighteenth century the attornment of the tenant (freeholder or termor) was dispensed with in grants of manors, rents, and estates in reversion or remainder.[2] On the whole the result (omitting intermediate steps in the history and details which are not to our purpose) is that in modern practice both the seisin of freeholders and the possession of termors is almost always statutory. Of the various ways in which livery of seisin has been and can be dispensed with, the only one now commonly practised and found in operation

[1] 27 H. VIII. c. 10. ss. 1, 3. [2] 4 & 5 Ann. c. 3 [al. 16]. s. 9.

is a grant under 8 & 9 Vict. c. 109,[1] a statute which, by a stroke of bold simplicity, assimilated corporeal to incorporeal hereditaments, and made explicit the implicit abrogation of older ideas and practice which had been going on for three centuries. A lessee for years or for any chattel interest acquires possession without entry by the terms of the Statute of Uses, unless the lease be made without any consideration sufficient to raise a use.

Nevertheless the possession created or 'executed' by the Statute of Uses was not allowed to have the same effect in all respects as the possession recognized by the old law. Herein the divergence between seisin of the freehold and possession for a less interest was marked by a further and logically inexplicable distinction. 'It has been held that the statute did not give such a possession as to enable the grantee to maintain trespass at the common law: Geary *v.* Bearcroft,[2] but it has been held that he might maintain an assize: Anonymous[3].'[4] The action of trespass was dealt with as founded on possession in fact as well as in law, so that actual entry was still required before it was available for the tenant.[5]

It sometimes happens that waste land allotted under inclosure Acts is not in fact inclosed or otherwise occupied in pursuance of the Act or award. In such cases it would seem that a trespasser who did not claim possession could not be sued.

A servant or bailiff, or any person occupying land or buildings in a merely ministerial character, does not acquire possession. And it makes no difference that he may carry on a business of his own at the same place.[6]

[1] By the same statute a feoffment must be evidenced by deed. Writing was first required by the Statute of Frauds.

[2] Carter, 57, 66.

[3] Cro. Eliz. 46. But this note of 'the opinion of divers justices' makes no distinction: it says, 'Nota, that *cestuy que use*, at this day, is immediately and actually seised and in possession of the land; so as he may have an assise or trespass before entry against any stranger who enters without title.'

[4] Hadfield's ca., 1873, L. R. 8 C. P. 306, 317.

[5] Wheeler *v.* Montefiore, 1841, 2 Q. B. 133, 142; Harrison *v.* Blackburn, 1864, 17 C. B. N. S. 678, 691.

[6] White *v.* Bailey, 1861, 10 C. B. N. S. 227, 30 L. J. C. P. 253.

In copyholds it is familiar law that the copyholder has both possession and a right to possess according to the customary title. He is said indeed to have seisin 'as of freehold,' though only in a qualified sense consistent with the lord remaining seised of the freehold itself.[1] Thus in the same parcel of land there may be, and often are, the common-law seisin of the lord, the customary seisin of the copyholder, and the possession of a tenant for years to whom the copyholder has demised. We find in copyholds customary modes of transfer which are evidently of great antiquity, and represent bodies of usage from which the livery of seisin known in our classical authorities, and by them confined to the transfer of estates of freehold, is almost certainly descended.

On the other hand, there are local customs of conveying even freehold lands of burgage tenure without livery, by bargain and sale enrolled by a local officer, or sometimes, it has been alleged, merely by deed.[2] The general historical or theoretical conclusions, if any, to be drawn from the occurrence of such customs could be settled only by minute investigation.

§ 5. *Delivery: as to Goods.*

Possession of goods may be delivered in several ways according to the circumstances. Delivery may be made either to the person who is to acquire possession, or to a servant on his behalf. And it may be made in either case either by an actual and apparent change in the custody of the goods, or by a change in the character of a continuing custody. In the case of objects, or an aggregate of objects, not capable of manual transfer by a single act, it has to be considered what acts are a sufficient transfer in fact. It has further to be considered when a transfer of custody in fact does or does not amount to delivery of possession in law. We have in short conditions and consequences analogous to those presented, in

[1] P. 49, above.

[2] Busher, *app.*, Thompson, *resp.*, 1846, 4 C. B. 48. The validity of the custom was not in issue, but see per Maule J. at p. 56, and cp. his judgment.

the case of land, by livery of seisin, by a grant with attornment by the tenant, by a lease to a tenant who acquires possession, and by the occupation of a bailiff or caretaker who is not possessed.

The simplest case is the handing over of a moveable object with intent to transfer ownership or a more limited right, including the right to use or have control of that object. Such a delivery, whether the transaction be gift, sale, or bailment,[1] always transfers possession to the deliveree.

There is a converse question, how far the ownership and right to possession of personal chattels can in the absence of valuable consideration pass by parol declarations of intention without delivery. Except in the case where the donee is already in possession, the law cannot be said to be clear. We mention the point only to explain that we shall not discuss it in this place.[2]

On the other hand, a servant in charge of his master's property, or a person having the use of anything by the mere licence of the owner, as a guest has the use of the furniture and plate at an inn, generally has not possession.

There may be cases of handing over for a limited purpose which are on the face of them not obviously within either of these classes. It must then depend on the true intent of the transaction, as ascertained from all the circumstances, whether there is a bailment or a mere authority or licence to deal with the thing in a certain way.

The authorities, in so far as they consist of decisions in criminal cases, will be fully produced in the subsequent part of this work.

One of the very few writers who have yet seriously and profitably discussed the English doctrine of Possession has thought the distinction between the custody of a servant and the possession of a bailee anomalous,[3] and would find in it a survival of the ancient rule that a slave was incapable of

[1] Even a gratuitous bailment, see Rooth *v.* Wilson, 1817, 1 B. & A. 59.

[2] The learned reader is referred to a series of articles on 'Gifts *inter vivos*' in 31 Sol. J., especially at p. 725.

[3] O. W. Holmes, The Common Law, 226.

acquiring or possessing anything unless as his master's instrument. It may be doubted whether personal servants were generally unfree men at the time when the common law of trespass was in course of active formation: and something is to be said for the reasonableness of the existing rule apart from its history. We have pointed out in the Introduction that in a great number of common cases the servant may be said not even to have possession in fact, for he would not be supposed by any ordinary observer to have the physical custody of the thing otherwise than on his master's behalf and at his master's disposal. There has certainly been a good deal of fluctuation in the language of our books, and a servant has sometimes been allowed to sue in his own name for trespass to the goods of which he was in charge.[1]

On the other hand, a bailee has been likened to a servant for some purposes, as when delivery of goods to a carrier by a seller for transmission to the buyer is said to be delivery to the buyer and to constitute an 'actual receipt' by him within the Statute of Frauds; though it has never been said that the bailee has not possession.

This variable use of terms is partly explained when we remember that against a mere wrongdoer custody is always *prima facie* evidence of possession.

It was at one time a current opinion that a servant had not possession of his master's goods while he was in the master's house or accompanying him, but that a delivery to him of the master's horse to ride to market, or of goods to carry to another town, or of money to buy goods there, did change the possession.[2] In these last cases it might be said that the master's act has made the servant an apparent owner of the thing delivered

[1] Moore *v.* Robinson, 1831, 2 B. & Ad. 817.

[2] 21 H. VII. 14. pl. 21. Other cases purport to be cited in Heydon and Smith's ca., 13 Co. Rep. 69, but the references seem wrong. Bulstrode, in a note prefixed to the first volume of his own Reports, says of the twelfth part of Coke, as he saw it in type, 'I did . . . peruse it, but found therein so many gross mistakes, omissions, misprintings, and imperfections, that I told the party that brought it, that it was not fit for public view, with so many defects in it.'

to him, and therefore there is as much reason for ascribing possession to him as for ascribing it to a carrier, who is notoriously dealing with other people's goods. This distinction, however, did not maintain itself, and the rule is settled in our modern law that a servant does not possess by virtue of his custody, except in one case, namely when he receives a thing from the possession of a third person to hold for the master: and then he is held to possess as a bailee until he has done some act by which the thing is appropriated to the master's use. As regards land the rule (as we have seen) has always been the same, and this may have had some influence in fixing it as to custody of goods. We are not aware of anything analogous to the exception.

We do not know of any case in which a delivery by the master to the servant with intent to deliver possession besides custody has been proved as matter of fact. The holder of goods may make his servant a bailee if he think fit, and the holder of land may make his bailiff a tenant at will; but the law does not regard this as a normal state of things, and probably rather strict proof would be required. There is no reason however to doubt that such an intent, if sufficiently proved in a particular case, would be effectual in law.

It has been mentioned that delivery to a servant on his master's behalf does not immediately confer possession on the master. This peculiar rule belongs, for practical purposes, exclusively to the criminal law, and will be dealt with hereafter.

§ 6. *Of partial delivery and so-called symbolic delivery.*

In the case of bulky goods or collections of goods transfer of possession cannot be made obvious to the senses with the same readiness as in the case of a single object which can be passed from hand to hand. But it may be effected without physical translation of the whole of the goods, or without any physical translation at all. There may be an indirect dealing with the custody of the goods through some instrument of

access to them; or a part may be delivered on account and in the name of the whole; or there may, without any change of custody, be a holding on behalf of a new possessor.

We will speak first of symbolical delivery, as it is sometimes, but in our opinion not exactly, called. There is some show of authority for saying that goods under lock and key, for example, may be delivered by delivering the key as a symbol of possession. We hold, notwithstanding the occasional use of such language, that the transaction, like livery of seisin with regard to land, is not symbolical, but consists in such a transfer of control in fact as the nature of the case admits, and as will practically suffice for causing the new possessor to be recognized as such. It may be asked whether, on this view, a stranger who picks up the lost key of a safe or of a warehouse acquires possession of the goods to which the key gives access. Assuming, to simplify the question, that the finder is acquainted with the particular safe or warehouse, and intends to make a dishonest use of the key, the answer is that the facts are essentially different from those of a delivery. Where the key of a receptacle or place of custody is acquired with the consent of the owner and in the name of his intent to give possession of the contents of that place or receptacle, there is every reason to think that the acquirer can and will in fact have those contents at his disposal. If the action or assent of any other person be needful for his access to the lock in the first instance, there is no reason why it should be refused or withheld. But even so, the Roman lawyers seem to have thought that, in a direct transaction between the vendor and the vendee of goods in a warehouse, delivery by the key must be 'within the view.'[1] Nor has anything in our books really gone farther, if so far. In the case of a wrongful acquirer the bent of expectation is the other way. The loser of the key may have already missed it; if he has missed it, he will have taken his precautions. Instead of undisturbed

[1] 'Si claves apud horrea traditae sint;' Papinian, D. 18. 1. de cont. empt. 74.

access, and perhaps an obsequious assistant, there will, as likely as not, be a new lock and a police officer. *De facto* as well as *de jure*, there is much to be presumed in favour of him who comes by title, nothing for him who comes by wrong.

This key may indeed be called symbolic in another sense, for it is not understood that Englishmen of business commonly deliver a key in the name of goods contained in the warehouse which it opens. Dealings with bills of lading and other documents of title are much more common, and these cases differ from that of the key in the material fact that the custody of the goods is with a skipper, wharfinger, or other third person. It is a question, in the first instance, of transferring right to possess. There have been a few actually decided cases, as we shall see, on the delivery of keys. But the true explanation was long ago given by Lord Hardwicke. We shall now notice the principal cases and dicta in order.

1751. Ward *v.* Turner (2 Ves. sen^r. 431; 1 Dick. 170). This is the case which settled that a delivery is necessary to a *donatio mortis causa*, and one question was whether South Sea annuities could be delivered by delivery of certain receipts.[1] Lord Hardwicke, being pressed with the theory that there may be a 'symbolic' delivery of things, thus declared his opinion:—

'It is argued, that though some delivery is necessary yet delivery of the thing is not necessary, but delivery of anything by way of symbol is sufficient: but I cannot agree to that, nor do I find any authority for that in the civil law. . . . The only case in which such a symbol seems to be held good is Jones *v.* Selby' [Chan. Pre. 300, in which case the question was discussed whether A had made to B a good *mortis causa* gift of an exchequer tally, the key of a trunk in which the tally was having been handed by A to B], 'but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the cases upon 21 Jac. I, Ryal *v.* Rowles

[1] We are not concerned here with the peculiar applications of the notion of delivery to cases of gifts *mortis causa*, nor with the question how far Lord Hardwicke's reasoning, in any of those applications, has been superseded by the later authorities on that subject.

and others [cases of reputed ownership]. It never was imagined on that statute, that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute; yet notwithstanding, delivery of the key of bulky goods, where wines etc. are, has been allowed as delivery of the possession, *because it is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do.*'

Another report of what Lord Hardwicke said (1 Dick. 172) is worth citing for the words here italicized :—

'Then I come to the question, whether the delivery of the receipts is a delivery of the thing: I am of opinion it is not, and find no authority for it; the only case where a symbol was held good, was in Jones *v.* Selby; the key of the trunk wherein the thing was kept (exchequer tallies), but I am of opinion that amounted to a possession in the donee of the tallies, *for the donor was restrained from making use of them, without the consent of the donee, and the donor cannot rightfully come at them without the key.* I think in like manner as to a key of a warehouse for goods, or of a wine cellar.'

Lord Hardwicke was therefore clearly of opinion that a man may be possessed, actually possessed, of goods in another's warehouse because having right to possess them, and having received the key of the warehouse from the owner of the warehouse, he has the means of getting at the goods whenever he wishes so to do, and the former possessor, by lawful means at any rate, has not. 'It is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do.' The delivery of a symbol would not do, either as a delivery capable of perfecting a *donatio mortis causa,* or as sufficient to take the goods out of the order and disposition of the transferor.

The later dicta as to cases of sale shall now be mentioned.

1789. Ellis *v.* Hunt, 3 T. R. 464. The question being as to that actual possession by a buyer of goods which is sufficient to bring to an end the vendor's power of stopping them *in transitu,* it was said by Kenyon C.J. :—

'As to the necessity of the goods coming to the "corporal touch"

of the bankrupt [the buyer], that is a more figurative expression, and has never been literally adhered to. For there may be a delivery of the goods, without the bankrupt's seeing them; as a delivery of the key of the vendor's warehouse to the purchaser.'

1800. Chaplin *v.* Rogers, 1 East 192. The question is as to the acceptance which is sufficient to validate a sale under the 17th section of the Statute of Frauds, and it is now said by Kenyon C.J.:—

'Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which goods are lodged, or by a delivery of other indicia of property.'

1809. Elmore *v.* Stone, 1 Taunt. 458. Mansfield (Sir James) C.J.:—

'There are many cases of constructive delivery, where the price of the goods may be recovered on a count for goods sold and delivered instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is, that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place.'

These dicta are occasionally cited to prove that our law knows some such thing as 'symbolic delivery.' Really however they show no retrogression from the intelligible position taken up by Lord Hardwicke. There is no virtue, as Lord Kenyon says, in 'corporal touch' or in sight. It is possible that a person may have perfectly real possession (both legal and physical) of things which are in a building that does not belong to him. If the goods are his and the owner of the building has delivered to him the key with the intention that he shall take the goods when he likes, then he may have sufficient power over the goods to allow of our saying that he has possession of them, that they have been delivered to him, and that within the meaning of the Statute of

Frauds he has actually received them. This doctrine is brought out by the case next to be noticed.

1863. Gough *v.* Everard, 2 H. & C. 1, 32 L. J. Ex. 210. In this case the question was whether certain chattels were in the possession or apparent possession of a bankrupt within the meaning of the Bills of Sale Act of 1854 then in force. E. sold to G. certain timber which was lying upon a private wharf belonging to E.; there was a written agreement concerning the sale which perhaps was a bill of sale within the Act; E. became bankrupt, and thus the question as to possession arose. After the sale G. had obtained and kept the key of the wharf on his own behalf, having previously had the custody of it as E.'s agent. In argument it was urged that the timber had always remained in E.'s possession or apparent possession. 'The key' it was said 'was a mere symbol of possession which gave to the plaintiff that formal possession to which the Act refers.' To this it was answered by Pollock C.B.: 'The whole of the timber lying at the private wharf was sold to the plaintiff and the key gave him the *actual* possession of it.' The C.B. seems to have thought that even 'actual possession' was too feeble a phrase. 'As to the timber on the private wharf the plaintiff [G.] had actually sold part of it; the key of the wharf had been delivered to him and he had *manual control* over the timber.' There runs through the whole of the judgments the leading idea that the buyer had as much possession as he could have with regard to the nature of the subject-matter, and this was a real *de facto* possession. The delivery of a key then may give us not only 'actual possession' in law as distinct from that 'formal possession' which was useless against the Bills of Sale Acts,[1] it may give us *manual control,* which is really a matter not of law but of fact. Of course all depends on the intention of the parties as manifested in other acts; the delivery of a key may be a wretched bit of pantomime as ineffectual as the delivery of a peppercorn, but it may be a substantial transaction which gives the

[1] This question does not arise under the Bills of Sale Act, 1882, now in force.

deliveree that power over the thing which goes to constitute possession.

1876. Ancona *v.* Rogers, 1 Ex. Div. 285. The question was whether certain furniture was in the possession or apparent possession of the grantor of an unregistered bill of sale at the time when she petitioned for liquidation. Mrs. Hewitt mortgaged the furniture in her house in Sussex to the plaintiff in the cause. Having given up this house she arranged to live with Horlock in his house in Cornwall called Ogbeare Hall in a portion of the house to be thereafter determined. She delivered the furniture to one Bishop to take to Horlock's house. This Bishop did; Horlock was not at home, but his wife allowed the furniture to be placed in four rooms, and Bishop without any objection on the part of anybody locked the four rooms and took away the key. The Court of Appeal held that after this the goods were in the possession not of Horlock but of Mrs. Hewitt. In the judgment of the Court, delivered by Mellish L.J., there is the following most valuable passage:—

'We will next consider whether the goods came into the possession of Mr. Horlock, and this depends upon the question, whether what took place at Ogbeare Hall amounted to a delivery of the possession of the goods by Mrs. Hewitt to Mr. Horlock as bailee to hold for her, or to a delivery of the possession of the rooms by Mr. Horlock to Mrs. Hewitt. This is a question of considerable nicety, but we are of opinion that what took place had the effect of a delivery of the possession of the rooms to Mrs. Hewitt for the purpose of keeping her goods in them. The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives means of entrance. The possession [i. e. legal possession] of premises cannot be changed solely by the delivery of a key, but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession of the premises to which the key gives the means of entrance should be changed. It is true that in this case the key was not delivered to Bishop, but taken by him. But the rooms were appropriated by Mrs. Horlock to the reception

and custody of the goods, and no objection was made, then or afterwards, to the key being taken by Bishop, who was acting in the matter as the agent of Mrs. Hewitt. On the contrary, Mr. Horlock, on returning home, assented entirely to what had been done in his absence. Mr. Horlock was under no obligation to give Mrs. Hewitt possession of these rooms, and if he had dissented from what was done in his absence, and had opened the doors of the rooms, either forcibly or by another key, we think he would have re-obtained possession of his own rooms, and at the same time have obtained possession of Mrs. Hewitt's goods as bailee. There is however no evidence that he never did open the doors prior to [the date of the liquidation]. . . . We are of opinion, therefore, that Mrs. Hewitt was the only person who was in possession of the goods while they remained locked up in the rooms at Ogbeare Hall.'

On this, two things may be noticed. First, there was in the case much more than delivery of a key, there was effective use of it on the deliveree's behalf. Next, it is just because the delivery of a key has no intrinsic efficacy that it is possible to raise, as has sometimes been done, the question what would happen if he who delivered the key intended all along to get at the goods by force or by means of another key, or did in fact so get at them. Thus in Meyerstein *v.* Barber, 1866 (L. R. 2 C. P. 52), Willes J., speaking of the delivery sufficient to constitute a valid pledge, said :—

'In many cases a symbolical delivery is held to be sufficient,—a symbolical delivery being equivalent to such a constructive delivery as will complete a pledge. If it were necessary that I should lay down as in a code all the series of circumstances which might be held to constitute a symbolical delivery, I should have desired more time to consider the matter. I should have liked to consider, amongst other cases, whether the delivery of the key of the warehouse in which goods are stored was or was not a sufficient symbolical delivery of the goods, and whether the claim of the person to whom it was given could be defeated by the fabrication of another key in order to deceive a second lender.'

And again in Sanders *v.* Maclean, 1883 (11 Q. B. D. 343), Bowen L.J. said :—

'Can a person who has contracted to pay on delivery of the keys of the warehouse refuse to accept the keys tendered to him on the ground that there is still a third key in the hands of the vendor which, if fraudulently used, might defeat the vendee's power of taking possession? I think business could not be and is not carried on upon any such principle.'

It seems by the decisions as to bills of lading drawn in sets of three (and these were the subject of the judgments just cited), and by the judgment in Ancona *v.* Rogers,[1] that if a vendor has delivered the key to the purchaser with the expressed intent that the purchaser may at any time get at the goods, the purchaser will have possession although the vendor really intends himself to get at the goods by means of another key. The vendor would clearly be estopped from denying that he intended the possession to pass; and the effect of his overt act as regards third parties cannot be altered by his secret intent. But this effect, as we have throughout maintained, is what we mainly have to look to in a question of *de facto* possession.

On the whole, we have indeed the authority of Willes J. and Mellish L.J. for speaking of delivery by a warehouse key or the like as a symbolic delivery; but there is no real contradiction between this and what Lord Hardwicke said, 'the key is not a symbol, which would not do.' The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods. It therefore excludes doubt as to the intent and effect of other acts which, standing alone, might be ambiguous.

In the converse case of the owner of a locked box delivering the box but reserving the key, it has been held in modern

[1] Above, p. 66.

times that the contents of the box were not thereby delivered.[1] This does not need any further explanation.

It is true that there remain apparently contrary dicta in decisions touching the 'order and disposition clauses' of the several Bankruptcy Acts.[2] Decisions on these clauses, however, are not necessarily applicable to the doctrine of possession in general. It has never been law that goods which are in the possession of the bankrupt at the time of his bankruptcy are part of the assets distributable among his creditors. Much more than mere possession by the bankrupt has been required by every statute from the Act of 1623 downwards. The original Act[3] required that the bankrupt should by the consent and permission of the true owner and proprietary have in his possession, order and disposition goods whereof he should be reputed owner. The last Act, that of 1883,[4] requires that the goods shall be in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that the bankrupt is the reputed owner thereof.

Hence decisions[5] upon these clauses have given rise to phrases which seem to imply that an owner may obtain possession of goods by merely doing all he can to obtain possession. Now it is perfectly true that if B.'s goods are in C.'s possession, B. can prevent their becoming assets in C.'s bankruptcy by doing all he can to obtain possession, or indeed by doing very much less. They will not be assets in C.'s bankruptcy unless they are in C.'s possession by B.'s consent and permission, and B. can prevent their becoming assets by showing in any unequivocal way that he no longer consents to C.'s possessing them.[6] But apart from this it cannot be

[1] Reddel *v.* Dobree (1839), 10 Sim. 244.

[2] As the leading case of Ryall *v.* Rowles (1749), 1 Ves. Sen. 348, 1 Atk. 165, in judgments of Burnet J., 1 Ves. Sen. 362, and Parker C.B., ib. 336, 1 Atk. 176.

[3] 21 Jac. I. c. 19. s. 10, 11.

[4] 46 & 47 Vic. c. 52. s. 44.

[5] West *v.* Skip, 1 Ves. Sen. 239, is an early instance ; see p. 244.

[6] See e. g. Ex parte Harris, 8 Ch. 48 ; Ex parte Ward, 8 Ch. 144.

said that one gains possession by doing all one can to gain it. Certainly an unsuccessful effort made by the grantee of a bill of sale will not prevent the goods from being still in the grantor's possession and liable to be treated as assets in his bankruptcy under the Bills of Sale Acts, for those Acts do not, like the Bankruptcy Act, say anything about the consent of the true owner.[1] The true principle is not that a man is deemed to be in possession as a reward of diligence in endeavouring to get possession, but that, where possession in law is founded on *de facto* possession, the necessary and sufficient *de facto* possession is that which the nature of the thing dealt with admits of.

As concerning delivery of part in the name of the whole, it may take place and have effect as a delivery of the whole if such is the mind of the parties. There is not any rule or presumption of law that a partial delivery shall have such an effect. 'It is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole,'[2] i. e. possession by the hands of some one who now begins to hold as his agent. 'The delivery of a part may be a delivery of the whole if it is so intended,' but not otherwise, and it seems that the burden of proof is on the party asserting such an intention.[3]

When part of a bulk of goods is delivered in the name of the whole, this is, as to the remaining bulk, a particular case of the change of possession by a change of the character in which they are held by the actual custodian. This branch of the subject is of such importance as to demand a separate section for its treatment.

[1] See e. g. Ex parte Jay, 9 Ch. 697, 705; Ancona *v.* Rogers, 1 Ex. Div. 285, 293.

[2] Willes J., Bolton *v.* L. & Y. R. Co., 1866, L. R. 1 C. P. 431, 440.

[3] Lord Blackburn, Kemp *v.* Falk, 1882, 7 App. Ca. 573, 586.

§ 7. *Delivery of goods by attornment.*

The transfer of possession in goods, as distinguished from property, is an incident in the performance of the contract of sale which is of special importance in two ways; by reason of the Statute of Frauds, as regards the proof of the contract in certain cases; and under the rules of the common law derived from the law merchant as regards an unpaid vendor's rights. By the Statute of Frauds one of the alternative conditions on which a contract for the sale of more than 10*l.* worth of goods is 'allowed to be good' is the acceptance and actual receipt of some part of the goods. As Lord Blackburn has said, 'the receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them.'[1] The modern decisions have settled that there is acceptance as well as receipt when the buyer begins to possess the part of the goods in question with reference to the contract of sale and as part of the goods designated by or appropriated to it, whether he intends to accept them absolutely or to reserve whatever rights the contract may give him of rejecting them as not according to sample, or the like.[2] It is also held that there may be actual receipt by delivery to a common carrier for conveyance to the buyer, or to a warehouseman to hold subject to his direction; the carrier is said to be the buyer's agent to receive though not to accept. This is at first sight anomalous. The Courts have looked more to the seller's parting with possession than to the buyer's acquisition of it. In fact the test is whether he has lost his lien.[3] Thus, on the whole, acceptance and actual receipt mean a delivery of possession under the contract of sale; not necessarily, however, delivery to the buyer or his servant. Again, an unpaid vendor's lien is a

[1] Blackburn on Sale, Part I, ch. 2, *init.*

[2] Page *v.* Morgan (1885), 15 Q. B. Div. 228.

[3] Cusack *v.* Robinson, 1861, 1 B. & S. 299, 30 L. J. Q. B. 261.

right to possess founded on the possession which he has not yet parted with, while the kindred but distinct right of stoppage *in transitu* can be exercised 'only whilst the goods are in an intermediate state—out of the possession of the vendor, and not yet in that of the purchaser.'[1] That is, the necessary condition of the vendor's lien is that the goods have not ceased to be in his possession; that of stoppage *in transitu* is that the goods are in the possession of some one who holds them neither at the will of the vendor nor at the will of the purchaser, but has possession for the purpose of transmitting them from the vendor to the purchaser. So long as the goods are held on behalf of the unpaid vendor, he still has his lien, and the right of stoppage *in transitu* with its peculiar incidents and qualifications has not arisen. So soon as they are held on behalf of the purchaser, the right to stop *in transitu* is gone. It is therefore of capital importance to establish whether possession has been delivered, and if so in what character it has been received.

The authorities both on acceptance and actual receipt within the Statute of Frauds and on the rights of unpaid vendors show that in several ways there may be a change of possession without any change of the actual custody. Such a change of possession is commonly spoken of as constructive delivery.

1. A seller in possession may assent to hold the thing sold on account of the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer or his servant, and is an actual receipt by the buyer;[2] and this whether the vendor's custody is in the character of a bailee for reward or of a borrower.[3] The important thing is his recognition of the purchaser's right to possess as owner, and his continuing to hold the goods either as the purchaser's servant or as his bailee with a possession derived from that

[1] Blackburn on Sale, Part III, ch. 2, *init.*

[2] Elmore *v.* Stone, 1808, 1 Taunt. 458.

[3] Marvin *v.* Wallace, 1856, 6 Ex. B. 726, 25 L. J. Q. B. 369.

right. On the other hand, acts of the buyer which treat the seller as his agent or bailee are evidence of receipt and acceptance as against the buyer:[1] though payment of warehouse rent, for example, to an unpaid vendor retaining the custody of the goods is far from conclusive to show that he has lost possession and his lien.[2] According as the seller holds as servant or bailee, the transaction amounts to simple delivery, or to delivery to the buyer immediately followed by redelivery to the seller as bailee.

2. Possession may be delivered, while the goods are in the custody of a third person, by the agreement of the seller and buyer, with the assent of that person, that they shall be held in the name or on account of the buyer. This is described by the modern authorities as an 'agreement of attornment.'[3]

There must be a complete assent of all three parties to the appropriation of specific goods to the buyer under the contract, and it is to be noted, with reference to what has already been said of so-called symbolic delivery, that the transfer of indicia of title, such as delivery warrants, is not of itself sufficient.[4] 'When goods are in the hands of a warehouse-keeper for the seller, the mere giving a transfer order by the seller is not sufficient to change the possession, but when the delivery order is lodged with the warehouse-keeper and accepted by him, he then holds in future for the buyer, and any objection under the Statute of Frauds is then at an end.'[5] Where standing timber was sold by the owner of the land on the terms that the buyer was to remove it, the land being in the possession of a tenant, the buyer's entry and

[1] Castle *v.* Sworder, Ex. Ch. 1861, 6 H. & N. 828, 30 L. J. Ex. 310. There must of course be some positive act, see Evans *v.* Roberts, 1887, 36 Ch. D. 196.

[2] Grice *v.* Richardson, 1877, 3 App. Ca. (J. C.) 319. But as to some of the language used, see Blackburn on Sale, 2nd ed. 341.

[3] Godts *v.* Rose, 1855, 17 C.B. 229, 25 L. J. C. P. 61; cf. Parke B. in Farina *v.* Home, next note.

[4] Farina *v.* Home, 1846, 16 M. & W. 119, 16 L. J. Ex. 73.

[5] Crompton J. in Castle *v.* Sworder, 6 H. & N. 828, 30 L. J. Ex. 310, 313.

cutting down some of the trees was decided to be an actual receipt.[1]

In the same way goods may cease to be *in transitu* while they are still in the carrier's custody, if he attorns to the purchaser and holds no longer as carrier but as his agent. But such an agreement to hold the goods in a new capacity must, if relied on, be distinctly proved. It cannot be implied in or presumed from a contract of carriage made with the purchaser instead of the vendor. 'When goods are placed in the possession of a carrier to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end, so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee not as carrier but as his agent. Of course the same principle will apply to a warehouseman or a wharfinger.'[2] And 'the contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him, whether he be the vendor or the purchaser of the goods.'[3] 'The vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent.'[4]

3. Lastly, it is a possible though not very common case that the buyer is in possession of the goods as the seller's bailee. In this case there may be, upon an oral contract of sale, a sufficient acceptance and receipt of the goods by the attribution of the continuing custody to the holder's new character of owner.[5] It is a question of fact in every case whether such

[1] Marshall *v.* Green, 1875, 1 C. P. D. 35. There was another question as to which section of the Statute of Frauds governed the case.

[2] James L.J. (summing up the unanimous opinion of the Court), Ex parte Cooper, 1879, 11 Ch. Div. 68, 78.

[3] Cotton L.J., Ex parte Rosevear China Clay Company, 1879, 11 Ch. Div. 560, 571.

[4] James L.J. *ib.* at p. 568.

[5] Edan *v.* Dudfield, 1841, 1 Q. B. 302; Benjamin on Sale, § 173.

was the effect of the acts of the parties. Here there is no change of possession, only a change in the character of the possession. But if a servant having goods of his master's in his custody bought them from the master, there would be a change in the possession itself.

It will have been observed that the question whether a partial delivery of goods operates as a delivery of the whole does not arise under the Statute of Frauds, as acceptance and receipt of any part of the goods is by the words of the Statute sufficient; though it must of course be an acceptance and receipt with reference to the contract of sale as a whole.

§ 8. *Mistaken Delivery.*

We have seen that delivery is favourably construed in accordance with the intention of the parties. And we have assumed the delivery to be rightful and rightfully made in so far as we have not considered what might be the effect of want of title in the deliveror, or want of a true intention to give and take delivery as between the parties.

As regards the deliveror's title, any defect or absence of rightful interest or authority on his part will certainly not prevent the deliveree from acquiring possession. In certain cases it will not prevent him from acquiring property, or the immediate right to possess, even as against the true owner. But the deliveror must have possession to begin with; and this may be important in the case of land, where, as we shall see, an occupier without title by no means acquires possession by mere entry. He may acquire it by effective occupation, and then he has a wrongful estate in fee simple. But unless and until his wrongful seisin—wrongful as against the true title, but good as against all strangers—is by such occupation acquired and established, he has nothing to deliver. In this way it is possible for a trespasser who has entered without right, and has for the moment more physical power to exclude others than any one else, to be still incapable of giving even a possessory interest to a third person. Therefore

under the common law system of pleading it was not a good plea to say that when a man made an alleged feoffment he had nothing in the land. That was an argumentative general issue, and the only proper course was simply to deny the feoffment: 'sera chase a dire que il n'enfeoffa pas.'[1]

What it is that passes by a particular livery (or by any form of assurance equivalent by statute or otherwise to livery) as to parcels or as to the interest conveyed, depends in the first instance on the words used and on their true legal effect. In modern practice, therefore, questions of this kind have to be determined, when they arise, by the general rules applicable to the interpretation of deeds. There may also be questions of fact, as explained above,[2] as to the identity or extent of the subject-matter possessed by the grantor and comprised in a particular description.

The validity of a contract to sell land may be affected in various ways and degrees by mistake or misdescription, as is well known. This is a matter of personal rights, independent of the actual change of estate or possession, and does not concern us here.

Questions might be raised as to the effect of personation. Consider first the case of conveyance by grant, statutory or otherwise. John, by pretending to be William (with stolen or forged letters of introduction, or the like), induces Peter to make and deliver to him, in his false name of William, a grant of Blackacre for the life of William, or in fee simple. It is clear that by this deed nothing passes to John. And if under colour of it John enters, he therefore enters either as a trespasser, or at best as a tenant at will to Peter.

It would seem, further, that an actual livery of seisin by Peter to John (supposed to be William) would make no difference. Either John is a deforceor (for disseisor he cannot be called, see Co. Litt. 277 *a*, 331 *b*), or he has merely the

[1] 10 Ed. IV. 8, 9, per Littleton; Butler on Co. Litt. 330 *b*. Cf. Cooper *v.* Vesey, 1882, 20 Ch. Div. 611, 623, 627.

[2] P. 30.

possession of a tenant at will and no estate at all. Whether the true William could accept the grant so made is a further and distinct question. We are not aware, however, that such points have been resolved anywhere in our authorities, or recorded as arising in practice.

As regards the delivery or seeming delivery of goods under a mistake, induced or not induced by fraud on the part of him who receives them, more serious and practical difficulties arise. These must be considered apart: and as the real difficulty is to draw the line between delivery and taking, the discussion is postponed until the general doctrine of taking has been stated.

§ 9. *Change of possession without consent.*

In speaking of change of possession without consent, we mean to exclude only that present consent of the parties which is essential to delivery. An entry or taking without immediate consent may be justified, or may purport to be justified, under a title or authority created by the dispossessed party himself. But even so it is practically more akin to an exercise of paramount authority than to acceptance from a willing transferor.

In this sense, then, acquisition of possession without the consent of the former possessor may be of the following kinds:

1. Rightful: which may be by title,

(i) created by the former possessor, as when a mortgagee takes possession;

(ii) paramount, as when an abator has entered, and afterwards the heir enters, or when the true owner of goods retakes them.

2. Justified or excused,

(iii) by authority of law (distress, execution, and the like; and, in some cases, public necessity);

(iv) as being for the true owner's benefit, or presumed so to be.

3. Wrongful: by trespass amounting to disseisin, ouster, or asportation.

The difference between an assumption of possession which is fully rightful and one which is only justified or excused is that, according to the strict theory of the common law, a possession which has once begun rightfully cannot afterwards become wrongful, but a justified trespass has still the nature of trespass, and if the justification ceases or fails or is abused the possession not only becomes wrongful but is deemed to have been wrongful from the first; in the technical phrase the wrongdoer is a trespasser *ab initio*. It will however be convenient to speak of both possession by title and possession under a justification as rightful, except when it is necessary to advert to this difference. Both branches of the rule are subject (besides the effects of modern legislation) to exceptions which can be accounted for only by the peculiar history of our criminal law.

Wrongful asportation of personal chattels, when accompanied by the wrongful intent described as *animus furandi*, constitutes the criminal offence of Larceny.

The word 'taking' is commonly appropriated to personal chattels, but we shall find it convenient to use it now and then in a more general sense.

§ 10. *Entry or taking under title.*

The same physical relations to a thing, in kind and in degree, which suffice for the delivery of possession, seem to suffice for its assumption when the act is not wrongful. Thus where a man claiming land under the true title was out of seisin, but had a right of entry, his entry into any part of the land gave him seisin of all the land in the same county which, if put to his action, he could have recovered in the same action, provided that the entry was made in the name of the whole. And this rule is expressly stated by Littleton to follow *a multo fortiori* from the rule as to livery.[1] And where one has right to enter into

[1] Litt. ss. 417, 418, and Coke thereon (252 *b*, 253 *a*).

a house, entry into any part of the house even with part of one's body suffices, as in the often cited case in the Book of Assizes, where the plaintiff 'because he could not enter by the door, entered by the window, and when the one half of his body was inside the house, and the other out, he was pulled out'; which pulling out was the disseisin complained of.[1] In a much later case[2] a person entitled as mortgagee to possession of a building went there with two men and caused the lock of the outer door to be taken off; while one of the men was inside, the other putting on a new lock with the door half open, and the mortgagee on the doorstep, certain persons who till then had occupied under the mortgagor came and disputed the possession, and in time ejected the mortgagee. The House of Lords had no difficulty in holding that the mortgagee had gained possession, though 'in a rough and uncourteous way,'[2] and therefore could not be said to have no reasonable and probable cause for indicting his ejectors under the statute of forcible entry. As regards personal chattels it is clear that a mortgagee entitled to possession may acquire possession of them without any specific physical interference with their use and enjoyment; hence for many years the Bills of Sale Acts contained special definitions and provisions for the purpose of protecting other creditors and purchasers against the effects of a possession which, though complete as between the parties, was not apparent to other persons. The Act of 1882 has adopted a different principle, and the questions of 'actual,' 'apparent,' and 'formal' possession which exercised the Courts for nearly a generation cannot now arise under a bill of sale given to secure the payment of money.

It is on this principle now before us that possession in law follows the right to possess where physical possession is in dispute.[3] And an adverse entry or taking by the person really entitled is conclusively deemed to be in exercise of his

[1] 8 Ass. 17, pl. 25.

[2] Lows *v.* Telford, 1876, 1 App. Ca. 414, per Lord Cairns at p. 419.

[3] See the authorities quoted p. 24 above.

right, since otherwise he might be liable as a trespasser at the suit of a wrongful holder.[1]

On the other hand, a person who enters without title gains possession only so far as his actual control extends, nor does he acquire it as against the person entitled unless by actual ejection of that person or his servants, or by facts amounting to acquiescence on the part of that person. A dismissed schoolmaster who, after giving up possession of the schoolroom, went in again the next day and occupied for eleven days, has been held not to be in possession.[2]

Mortgagees attempting to take possession before any default, and having done acts which would be ample to complete a rightful entry, have equally been held not to obtain possession. 'A man who is not entitled to take possession can obtain possession only of that which he actually lays hold of.'[3]

Again, physical entry by the person entitled has no legal effect if it takes place for a temporary and special purpose with the licence of the actual occupier. A disseisee does not recover his seisin by going on the land at the disseisor's invitation,[4] any more than a tenant at will is ousted by his landlord paying him a visit. A case of this kind from the lately published Year Books of Edward III. is curious enough to deserve quotation on this point.

'And the tenant said, in evidence of the seisin, that the father of the plaintiff had leased to him the tenements for the term of his life, and so he was seised etc. without committing any tort or disseisin. The plaintiff said that his father died seised of the same tenements in his demesne as of fee, after whose death he entered as son and heir and was seised until by him disseised. And the Assise came and said that the father of the plaintiff gave the same

[1] Plowd. 92 *b*, Co. Litt. 245 *b*.

[2] Browne *v.* Dawson, 1840, 12 A. & E. 624, 13 L. J. Q. B. 7. It is not a necessary consequence that an intruder in this position could not maintain trespass against a mere stranger.

[3] Ex parte Fletcher, 1877, 5 Ch. Div. 809; Mellish L.J. at p. 813.

[4] Panel *v.* Moore (the Parson of Honeylane's case), Plowd. 91 *b*.

tenements which he had in the vill, of which he complains that he is disseised, to him who answers as tenant, to hold for the whole of his life, except a chamber in which he lay sick, and after seisin was delivered he gave him the chamber and removed into the hall and there died. The Assise was asked if when he entered the hall and there died he entered claiming a freehold to himself or if he entered by sufferance of the tenant: and the Assise said that he entered by sufferance of the tenant, without claiming anything to himself: wherefore it was adjudged that he [the plaintiff] should take nothing by his writ as to the land.'[1]

So if I have lent a book to a friend, and being in his house or his chambers take up the book without any intention of determining the loan, the borrower's possession is not thereby interrupted, but I am using my own goods, for the time being, as licensee of my own bailee.

Entry on land 'with strong hand or with multitude of people' is an offence under the Statutes of Forcible Entry, though the person so entering be entitled to possession. His entry however is in that case not a disseisin, and seems not to be in itself a trespass: though it would also seem that any the least force to the person used in the course of it is an assault, the breach of the peace being by force of the statute deprived of justification.[2]

There does not appear to be any rule of law, statutory or otherwise, to prevent the true owner of goods from using whatever amount of force is reasonably necessary for their recapture, even as against a third person who has acquired them innocently with colour of title.[3]

§ 11. *Entry or Taking under Authority of Law.*

Where anything corporeal is taken under authority of law by way of distress or execution, troublesome questions of conflicting title may arise in various ways, but there is seldom

[1] Y.B. 11 & 12 Ed. 3, ed. Horwood and Pike, 1883, pp. 46–47.

[2] Newton *v.* Harland, 1840, 1 M. & G. 644; Harvey *v.* Brydges, 1845, 14 M. & W. at pp. 442–3; Edwick *v.* Hawkes, 1881, 18 Ch. D. 199. See Pollock on Torts, 309–312.

[3] Blades *v.* Higgs, 1861, 10 C. B. N. S. 713.

much doubt as to the possession itself. There is a distinction however, formerly of importance, which still requires to be noted. When goods are taken in execution, the sheriff acquires a justified (but only justified) possession, and may therefore become a trespasser *ab initio* if he exceeds or abuses his authority even by detaining the goods after his justification has expired.[1] But in the case of distress the goods are said to be 'in the custody of the law,' and the distrainor cannot be a trespasser, i. e. a wrongdoer to the actual possession, without some active interference.[2]

The sheriff's possession is sometimes said to be the possession of the law,[3] but this is only a way of enforcing the point that it is not the execution creditor who acquires the possession lost by the debtor; the sheriff being the servant of the law, the figure of speech is harmless except when one has to attend to the particular distinction just mentioned. It is otherwise in the case of distress, where it has long been held that the owner, though deprived and rightfully deprived of the custody and use of the goods, retains the possession unless and until he finally loses the property. He is still the proper person to bring trespass against a stranger; the distrainor could only have a special action for rescue or pound breach. The pound is an 'indifferent place' as between the owner and the distrainor.[4] But it may still be doubted whether the modern doctrine that detaining goods after the justification for taking them has expired amounts to a new taking[5] be not as contrary to the old authorities in the case of execution as in that of distress.

A peculiar kind of favoured taking under authority of law occurs in the execution of judgments against interests in land.

[1] Ash *v.* Dawnay, 1852, 8 Ex. 237, 22 L. J. Ex. 59.

[2] West *v.* Nibbs, 1847, 4 C. B. 172, 17 L. J. C. P. 150; cp. 33 H. VI. 27, pl. 12.

[3] See per Lord Esher M.R., Richards *v.* Jenkins, 1887, 18 Q. B. Div. 451, 455.

[4] 20 H. VII. 1, pl. 1, per Frowike C.J. And see p. 202 *infra*.

[5] Ash *v.* Dawnay, *supra*. The earlier cases on trespass *ab initio* do not seem to have been there referred to.

Under a writ of *elegit* the sheriff is said to deliver the debtor's land to the judgment creditor. But there is no delivery, and nothing is done by the sheriff on the land itself. He holds an inquisition to ascertain the land and its value, and his return to the writ gives the creditor a right of entry and a peculiar chattel interest in the land, peculiar in being such and passing to executors, although by the Statute of Westminster the second, which created it, the remedy of the assize of novel disseisin was expressly attached to it.[1] As regards equitable interests in land an order of the Court appointing a receiver has a corresponding effect. In the former case it is difficult, in the latter impossible, to ascertain that 'delivery in execution' or its equivalent has or has not taken place. The resulting danger to even the most diligent purchasers has only of late been brought into notice.[2] We cannot go into details; but the broad result is that a purchaser may enter on the strength of a carefully examined and really good title, and without any fraud on the vendor's part, and be defeated by a paramount right created at the last moment before his purchase, and without any means of notoriety. We have here a good illustration of the way in which changes in procedure and legal machinery affect the substance of the law. Before the development of the modern action of ejectment the purchaser's actual entry under the vendor's conveyance would have signified much; at this day it signifies practically nothing. Such cases illustrate also the constant tendency of the right to possession to acquire importance at the expense of possession itself. As Sir H. Maine pointed out in the last work published by him in his lifetime, this tendency has in modern European systems fulfilled itself, or seems in a way to be fulfilled, by the thorough-going substitution of a publicly registered, and in that sense notorious, title, that is, right to possess, for the

[1] Co. 2 Inst. 396; Challis, R. P. 48; Elphinstone and Clark on Searches, 64.

[2] Re Pope, 1886, 17 Q. B. Div. 743; Elphinstone and Clark, *op. cit.*, 2, 65, 73.

notorious actual possession on which the earlier law of property was founded. It is true that title in the sense of English conveyancers means only evidence of right to possession, or rather that sum of such evidence which is deemed practically safe for prudent men to act upon. But a registered title under a system of State registration is more than evidence; it constitutes, and is the only measure of, the right itself (though not necessarily an absolute right) which is guaranteed by the State.

§ 12. *Taking for the true owner's benefit.*

Taking for the true owner's benefit may occur in the case of a person who finds goods apparently lost. 'It is the law of charity to lay up the goods which do thus come to his hands by Trover, and no Trespass shall lie for this; but where one takes goods where there is no such danger of being lost, or finds them before they are lost, otherwise it shall be.'[1]

The theory of a finder's possession has however been greatly complicated in the law of larceny, as we shall see in the third Part of this Essay.

Other cases of taking for the true owner's benefit (with or without the additional justification of the public safety) are depriving a madman of dangerous weapons, and the like.

§ 13. *Wrongful entry or taking.*

Under this head the first question seems to be what acts are sufficient to work the change of possession which might be called disseisin in all cases if we followed the language of the earlier authorities, but which we have to distinguish, according to more recent usage, as either ouster or disseisin (using the latter term in its larger sense) with regard to freehold or copyhold hereditaments, ouster with regard to chattels real, and asportation with regard to personal chattels.

With regard to land, however, this question has lost much of its practical importance. The old possessory actions

[1] Isaack *v.* Clark, 1615, 2 Bulstr. 306, per Coke C.J. at p. 312.

required actual proof of the disseisin complained of, or at least of an act which the plaintiff might treat as a disseisin if he pleased. But the action of ejectment in its modern form [1] tried the right to possession by means of the fiction that the nominal plaintiff, having entered under a lease made by the real plaintiff, was ousted by a mere stranger; and the real defendant was brought in by a rule of court upon the terms that he should 'confess lease, entry, and ouster, and insist upon his title only.' And when this form of action, from its greater convenience, became the general and accepted method of trying the title to the freehold as well as to chattel interests,[2] disseisin or ouster ceased to be a principal fact. Possession remained and remains material as evidence of right to possess; and in order to show that one man possessed at a given time it might and may be necessary to show that another man ceased to possess, and to fix the point of time at which his possession ceased. But this belongs, so to speak, to the accidents of fact and evidence that vary from case to case. The chief importance of such proof nowadays, if not the only importance, is in cases where long-continued possession is relied on as conferring a title under the Statute of Limitation.

With regard to chattels the question remains important in criminal law, but, we believe, not elsewhere. The reader is referred to the third Part of this Essay for details.

§ 14. *Ouster from land.*

To constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control. As between neighbours there are occasional acts of interference which, even if not strictly justified by necessity, are naturally explained by the desire of the person doing them to protect his own undoubted property.

[1] Blackst. Comm. iii. 202, 203.

[2] Blackst. Comm. iii. c. 10, *ad fin.*, and see the common forms given in the Appendix.

Boundary fences, hedges, and the like, are often mended in this way without any claim of right: it is less trouble to repair the breach and say nothing than to call on an absentee owner or trustees to do so. Such acts are not adverse to the existing title, or rather are not acts of possession at all.[1]

Again, a boundary wall may, under special circumstances, belong to one person and a house built against it to another; the owners and occupiers of the house can acquire a right to support for the house, but their occupation of the house will not of itself affect the possession of the wall.[2] Nay more, much stronger acts, leaving materials and refuse upon the land, and the like, are only evidence of possessory occupation; they may be deprived of any such effect by proof of even slight acts of ownership in assertion of the true title, or by showing that the land was not capable of being actively used and enjoyed by the true owner.[3] 'Acts of user are not enough to take the soil out of the plaintiff . . . and vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.'[4] 'In deciding whether there has been a discontinuance of possession the nature of the property must be looked at . . . there can be no discontinuance by absence of use and enjoyment where the land is not capable of any enjoyment'—as where it has been laid out for a road with a view to future dedication to the public as a highway.[5]

The same principles are applied as between occupiers of the surface and of mines beneath it. Where by grant or reservation the title and possession of mines and minerals has been separated from that of the surface (and we have seen that by the modern law since the Statute of Uses the possession is easily

[1] See Searby *v.* Tottenham Ry. Co., 1868, 5 Eq. 409.
[2] Phillipson *v.* Gibson, 1871, 6 Ch. 428.
[3] Leigh *v.* Jack, 1879, 5 Ex. Div. 264.
[4] Bramwell L.J., 5 Ex. Div. at p. 273.
[5] Cotton L.J., *ib.* at p. 274. Cp. Jacobs *v.* Seward, 1872, L. R. 5 H. L. 464, 474, 478.

transferred without entry or any other physical act on the spot) the mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a disseisin or dispossession of him in favour of the surface owner. Neither will his title be thereby affected. The Statute of Limitation 'applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of it, and another in possession for the prescribed time.'[1] A lease of mines and minerals to a tenant already in possession of the close puts him in effective possession of the mines, or rather couples his existing possession with a right of entry and use; and mere delay in exercising his right to take the minerals comprised in the lease cannot invalidate the title of himself or his assigns at any time during the term, so long as there has not been active occupation by some one claiming adversely.[2]

It is a peculiar incident of the estate of tenants in common that there cannot be a trespass as between themselves unless the act amounts to ouster; for each of them is alike entitled to use and enjoyment (subject, it may be, to a subsequent duty of accounting for profits), and all acts of use and enjoyment in an ordinary course and according to the nature of the subject-matter are presumed, in obedience to a well-known principle, to be done in exercise of that lawful right.[3]

§ 15. *Artificial extension of the idea of disseisin.*

We have seen above[4] that the notion of seisin or possession is freely applied by the Common Law to many kinds of incorporeal things, provided they be capable of exclusive enjoyment. Of such things rent and services incident to tenure are the most obvious examples, and rent is perhaps the most important.

[1] Parke B., Smith *v.* Lloyd, 1854, 9 Ex. 562, 23 L. J. Ex. 194. See now Trustees' Agency Company *v.* Short, in the Privy Council, Aug. 1, 1888, holding that where an adverse possession is abandoned before the time has run out the true owner's possession reverts. He need not do any act to restore it. There is no one whom he can sue, and he cannot enter upon himself.

[2] Keyse *v.* Powell, 1853, 2 E. & B. 132, 22 L. J. Q. B. 305.

[3] Jacobs *v.* Seward, 1872, L. R. 5 H. L. 464; Job *v.* Potton, 1875, 20 Eq. 84.

[4] pp. 36, 49.

At the point we have now reached the question occurs: Can one be disseised of a rent? We are not without an authentic answer, for Littleton has explained the matter with great clearness. One may be physically disseised of a manor when part of it is in demesne, and such disseisin is a disseisin of all services incident to the manor if and so far as the tenants attorn to the disseisor;[1] attornment, being required (at common law) to complete the seisin of even a rightful alienee, is *a fortiori* required to complete an estate gained by wrong.[2]

'But if one holdeth of me by rent service, which is a service in gross, and not by reason of my manor, and another that hath no right claimeth the rent, and receives and taketh the same rent of my tenant by coercion of distress or by other form, and disseiseth me by such taking of the rent: albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distrain the tenant for the rent which was behind before the decease of the disseisor, and also after his decease. And the cause is for that *such disseisor is not my disseisor but at my election and will.* For albeit he taketh the rent of my tenant etc., yet I may at all times distrain my tenant for the rent behind, so as it is to me but as if I will suffer the tenant to be so long behind in payment of the same rent unto me, etc.

'For the payment of my tenant to another to whom he ought not to pay is no disseisin to me, nor shall oust me of my rent without my will and election, etc. For although I may have an assize against such pernor, yet this is at my election, whether I will take him as my disseisor or no. . . . And in this case if after the distress of him which so wrongfully took the rent I grant by my deed the service to another, and the tenant attorn, this is good enough.'[3]

There is not a real disseisin because there is no specific thing of which one can be said to be dispossessed; and this, it will be seen, was as clear to Littleton as it can be to us. It

[1] Litt. s. 587. [2] Co. Litt. 322 *b*.
[3] Litt. ss. 588, 589. Cf. s. 541, and Coke thereon, 306 *b*.

is not the lord's money that the tenant has paid to the wrongful claimant, and his duty to the true lord is unaltered. But, in order that the person wronged might maintain his title by the convenient remedy of the assize of novel disseisin, he was allowed, if he thought fit, to consider himself disseised; much as at a later period in the history of the law plaintiffs were allowed to recover damages in the form of an action upon a fictitious promise for many causes of action which were in fact merely wrongful dealings with property. As the right owner may choose to admit himself out of possession by bringing an assize, so by making a grant over, on the other hand, he may make 'a demonstration of his election that he is in possession.'[1]

The doctrine of *disseisin at election*, here concisely stated by Littleton in what appears to be its original form, was in course of time extended to corporeal hereditaments, and, as so extended, introduced great confusion. Time might run against a true owner out of possession, for the purpose of barring him of his remedy by action, either from an absolute disseisin, or from some act which not only was capable of being made a disseisin, but had in fact been made so by the true owner's election. As such election, however, generally took the form of an active assertion of title within a short time, the question would hardly arise in this latter case. On the other hand, an act of 'disseisin at election,' if the right owner did not elect to be disseised, was no disseisin at all, and the *de facto* possession was said to be 'non-adverse.' This distinction was founded on a principle quite intelligible in itself, namely that a person who is lawfully in possession for a limited estate or interest cannot change the character of his own possession to the detriment of the true owner. A tenant for years could not make himself a disseisor for the same reason that a bailee could not make himself a trespasser by asportation in respect of the subject of the bailment. Even a person entitled to be on the land by reason of a right of common, and therefore

[1] Co. Litt. 323 *b*.

having neither exclusive possession nor right to possess, has been held not to become a disseisor by claiming title to the soil and forbidding the true freeholder to exercise acts of ownership.[1]

However, the working out of the distinction became, in the hands of lawyers who had forgotten much of the old law and of its reasons, exceedingly perplexed; and the doctrine of 'non-adverse possession' was abolished by the modern Statute of Limitation passed in 1833,[2] and, with certain modifications as to the length of time needful to bar the right owner's claim,[3] still in force. The result, and doubtless the intended result, is greatly to diminish the importance of the character in which and the intention with which acts of apparent ownership are done.[4]

In like manner it is unimportant, except in the case of concealed fraud, whether the right owner was or was not aware of the act of occupation from which time began to run against him.[5] There must of course be a positive act of occupation to found an adverse title; mere non-user, even occasional or more or less continuing trespasses, will not do, as we have already seen.

It would be outside the purpose of this work to discuss further the several provisions of these Statutes and the manner in which they have been judicially expounded.[6] This is a matter of special and minute interpretation, and does not admit of summary treatment.

[1] 26 Ass. pl. 17: apparently the doctrine of disseisin at election was not then recognised.

[2] 3 & 4 Wm. 4, c. 27.

[3] 37 & 38 Vict. c. 57.

[4] See Lyell *v.* Kennedy, 1887, 18 Q. B. Div. 796: and conversely, as to the insufficiency of merely formal acts of entry and the like against a continuing adverse possession, Doe *d.* Baker *v.* Coombes, 1850, 9 C. B. 714, 19 L. J. C. P. 306.

[5] Rains *v.* Buxton, 1880, 14 Ch. D. 537.

[6] See for detailed information and authorities the notes to Taylor *d.* Atkyns *v.* Horde, 2 Sm. L. C. 9th ed. 729 *sqq.*

CHAPTER III.

Possession and Title.

§ 16. *The Rights of Possessors.*

EXISTING possession, however acquired, is protected against any interference by a mere wrongdoer; and the wrongdoer cannot defend himself by showing a better title than the plaintiff's in some third person through or under whom he does not himself claim or justify. 'Any possession is a legal possession'—i. e. lawful and maintainable—'against a wrongdoer.'[1]

On the other hand, a plaintiff who seeks redress solely for wrong done to his right to possess is not favoured to the same extent. If his actual possession has not been disturbed by the act complained of, he may be defeated by showing that some one else, who need not be the defendant or any one through whom the defendant claims, had a better right to possess.

Under the old procedure an actual possessor who had been dispossessed might sue either in trespass for the wrong to his possession, or in a form of action founded on right to possess (ejectment[2] for land, trover for goods). In the latter alternative, his right, being derived from his own actual possession, was still not allowed to be disputed by a wrongdoer, and he had the same advantages as if he had sued in trespass. In other words, possession is equivalent to title as against a mere wrongdoer, and this is a substantive rule of law not affected by forms of action. For the purpose of considering and applying decisions under the common-law system of pleading, or the modified

[1] Lord Kenyon C.J., Graham *v.* Peat, 1801, 1 East, 244, 246.

[2] See p. 85, above.

but still formal system of the Common Law Procedure Act—that is, down to 1875—we must always examine whether the cause of action did or did not in fact include some act amounting to trespass if not justified. When it does not include any such act, and then only, the plaintiff must succeed on the merits of his right to possession, 'the strength of his own title,' as the phrase runs in the cases on ejectment; and he will fail if his own case discloses, or the defendant can prove, a better right elsewhere.

If this distinction be carefully attended to, it will be found that some apparent conflicts between judgments of equal authority will disappear. Thus at first sight the Court of Common Pleas appears to lay down generally in Leake *v.* Loveday[1] that the 'jus tertii' as it is called may be set up by the defendant in an action of trover, and the Court of Queen's Bench to lay down no less generally in the later case of Jeffries *v.* G. W. R. Co.[2] that it may no more be set up in trover than in trespass. But in the former case the plaintiff had never had possession of the goods in question; in the latter the defendants took them out of his possession, and the whole Court, as may be seen in their judgments, regarded this as the decisive fact. 'Possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action [trover] against a wrongdoer.'[3]

We are not concerned here to pursue the well-established doctrine that the plaintiff in trover, as in ejectment, must show an *immediate* right to possession, and that if he shows a title which is in any way conditional he must allege and prove that the condition has been satisfied.[4]

But it is material to observe that from an early time the action of trespass has been allowed not only to the person

[1] 1842, 4 M. & Gr. 972, 12 L. J. C. P. 65.
[2] 1856, 5 E. & B. 802, 25 L. J. Q. B. 107.
[3] 2 Wms. Saund. 96, approved in Jeffries *v.* G. W. R. Co.
[4] See authorities collected, 2 Wms. Saund. 93, 94.

whose actual possession is disturbed, but to the person, if such another person there is, who was entitled to resume possession at will. A lessor at will,[1] or a bailor where the bailment is not for a term or coupled with an interest,[2] could always maintain trespass against a wrongdoer as well as the lessee or bailee. In the case of goods both bailor and bailee could maintain trover, for the bailee has in virtue of his actual possession a right to possess the goods as against every one but the bailor.[3]

§ 17. *Title by Possession.*

We have seen that possession confers more than a personal right to be protected against wrongdoers; it confers a qualified right to possess, a right in the nature of property which is valid against every one who cannot show a prior and better right. Having reached this point, the law cannot stop at protecting and assisting the possessor himself. It must protect those who stand in his place by succession or purchase; the general reasons of policy are at least as strong in their favour as in his, their case at least as meritorious. And the merits of a purchaser for value, who perhaps had no means of knowing the imperfection of his vendor's title, are clearly greater than those of the vendor himself. The qualified right of property which arises from possession must therefore be a transmissible right, and whatever acts and events are capable of operating to confirm the first possessor in his tenure must be capable of the same operation for the benefit of those who claim through him by such a course of transfer as would be appropriate and adequate, if true ownership were present in the first instance, to pass the estate or interest which is claimed. Hence the rule that Possession is a root of Title is not only an actual but a necessary part of our system.

It is not enough to say that in the medieval law this principle was recognized; it was active and prominent. A

[1] 19 Hen. VI. 45, pl. 94.

[2] 48 E. III. 20, pl. 8.

[3] Per Parke B., Manders *v.* Williams, 1849, 4 Ex. 339, 18 L. J. Ex. 437, 439.

disseisee who did not promptly assert his right was under ever-increasing difficulties as against the disseisor, and still more as against other persons claiming through him. The wrongful seisin acquired by a disseisor gave him a real though wrongful estate, a 'tortious fee simple' valid against every one but the person truly entitled, and capable of being made rightful and perfect by a release from that person to the person in actual seisin.[1]

The heir of a disseisor who had maintained himself in seisin during his lifetime had not only seisin but an immediate right to seisin which he could enforce against the disseisee, the true owner himself, if ousted by him; the question of the true title could be raised only in other forms and by separate proceedings.[2] We must not be too swift to call such a state of things archaic or anomalous. It is expressly recognized in the modern legislation of British India.[3]

It must also be borne in mind that both the facts and the law of the Middle Ages in England must have made really doubtful titles far more common than they are now. Defects which otherwise would have led to intolerable complication and interminable family quarrels were mitigated by requiring claimants out of possession to assert their claims without delay, on pain of finding it more and more burdensome, or, in time, practically impossible, to assert them later.

But it is unnecessary to speak of the details of the old law. Readers who wish to know more of it may be referred to Mr. Maitland's exposition.[4] The standing proof that English law regards, and has always regarded, Possession as a substantive root of title, is the standing usage of English lawyers and landowners. With very few exceptions, there is only one way in which an apparent owner of English land who is minded to deal with it can show his right so to do; and that way is to show that he and those through whom he

[1] Litt. s. 473. [2] Litt. ss. 486–488.
[3] Specific Relief Act, I of 1877, s. 9.
[4] The Beatitude of Seisin, L. Q. R. iv. 24, 286.

claims have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim.

In the modern law the position of a dispossessed owner has been greatly improved. His rights and remedies are unaffected by the number or (unless his interest be a purely equitable one) the nature of the transfers or devolutions of the adverse possessory title. On the other hand, there comes a time, by force of the Statutes of Limitation, when he is deprived of the remedies and rights which he has omitted to use; and then he is deprived of them conclusively. The dispossessor or his assigns, if the adverse possession has been continuous, acquire from that time what has been called a parliamentary title. Not that any statute or rule of law has affirmatively made their estate indefeasible, but the negation of the true owner's right and title, which by the express terms of the Act[1] are 'extinguished' at the determination of the period limited for the exercise of his remedies, has for all practical purposes the same effect. But what if the adverse possession has not been continuous? There may be disseisin upon disseisin and dispute within dispute. It would be possible at first sight to suppose that, as between a succession of independent occupiers who were all wrongdoers as against the true owner, the law must be indifferent, with the result of conferring an absolute title upon the person who happens to be in possession when the time of limitation expires. Reflection, however, shows this to be contrary to the reason and principles of the law. Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title. William is the possessor and apparent owner of a house; in that house he dies; we will suppose him to die intestate. John, wrongly supposing himself to be entitled as the heir of William, enters and occupies the house. Peter is really William's heir, but ignorant of the facts; in course of time, having obtained

[1] 3 & 4 Wm. 4, c. 27, s. 34.

information and advice, he sues John. It turns out that William had disseised Giles the true owner, by mere encroachment or in some other way, and would have had no answer to an action brought by Giles or his assigns to recover the land. But since William's death the period of limitation has expired, and the right of Giles is extinguished. Can John use this as a defence against Peter? No, for the statute has nothing to say, for better or worse, about the person in actual possession, or the relative worth of the qualified rights to possess which may have arisen while time was running against the true owner. It says that Giles, and those who have or would have had his estate, shall not from henceforth sue any one, it does not say that Peter shall not sue John. Whether some one else has a higher title or not, Peter has a better title than John, as he would have had though the true owner's claim were still enforceable. In the language of the modern authorities, 'possession is good title' —nothing less—'against all but the true owner.'[1]

As to the substance of those authorities, it has been repeatedly held in cases of ejectment, an action where the right to possess is clearly and solely in issue, that possession even for a short time is a good title against all subsequent intruders. One year's possession under a lease has been held to be enough, though the lessor's title was not shown.[2] Ten years' possession has been decisive even against several years' subsequent possession under colour of title.[3] And it has been adjudged, expressly on the analogy of the old law, that when a man occupying without title purports by his will to settle the land so occupied, that settlement is effective as regards all persons not claiming under the true title, and governs the possessory title (which meanwhile may be perfected by lapse

[1] Asher *v.* Whitlock, 1865, L. R. 1 Q. B. 1, 6. Cf. Board *v.* Board, 1873, L. R. 9 Q. B. 48, decided on the ground of estoppel as between persons claiming under a common root of title.

[2] Doe *d.* Hughes *v.* Dyeball, 1829, Moo. & M. 346. Cf. Doe *d.* Pritchard *v.* Jauncey, 1837, 8 C. & P. 99.

[3] Doe *d.* Smith *v.* Webber, 1834, 1 A. & E. 119.

of time) exactly as it would govern a title good from the first.[1] 'A person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised, or conveyed.'[2]

In accordance with these principles, the possession relied on as evidence of title must be continuous in itself; a claimant cannot tack together successive occupations, however peaceable, which are not connected as of right. And the attempt to do this will even invalidate a claim which might have stood on the relative merits of the existing possession alone. A man occupied land for several years, but less than the period of limitation, and died leaving children, and without having disposed of his possessory interest; his widow entered and occupied for several years; she was ousted by a person claiming under a prior title, which however was barred by the statute. Thereupon she brought ejectment, but it was held that, as her title was bad on her own showing, she could not recover, though if she had merely shown her own possession she would have established her case.[3]

A possessor without title agreed with a railway company for the sale of land which he had occupied for a time short of the period of limitation. He failed, of course, to show a good title; the money was paid into Court under the Lands Clauses Consolidation Act, and the company executed a deed poll under the same Act to vest in themselves all the estate and interest of the vendor. After the expiration of the statutory period the representative of the true owner claimed the purchase-money. Hall V.C. held[4] that the money represented the actual right and interest of the vendor—'a

[1] Asher *v.* Whitlock, 1865, L. R. 1 Q. B. 1.

[2] Markby, *arg. ib.* at pp. 2, 3. It seems to me that there is not any real authority for allowing a mere wrongdoer to set up an extraneous title paramount against a possessory title prior to his own entry. The strongest case against the view here taken is Nagle *v.* Shea, 1874, Ir. Rep. 8 C. L. 224; but the decision was not unanimous, and anyhow it cannot in an English court outweigh Davison *v.* Gent, 1857, 1 H. & N. 744, 26 L. J. Ex. 122.

[3] Doe *d.* Carter *v.* Barnard, 1849, 13 Q. B. 945, 18 L. J. Q. B. 306; see observations of Mellor J. in Asher *v.* Whitlock, L. R. 1 Q. B. at p. 6.

[4] *Ex parte* Winder, 1877, 6 Ch. D. 696, 703.

most valuable right and interest which could have been sold in the market, although he had not yet the full statutory title;' and that accordingly he and his assigns were the only persons entitled to it. No question of the title to the land itself was before the Court. It is submitted that the Statute of Limitation operated to make the possessory title absolute in the railway company no less than it would have done in favour of the vendor, had he continued in possession. For it is the very case put by the Court in Doe *v.* Barnard, where they say:[1] 'Probably that would be so [i. e. the expiration of the statutory period would give a good title to the person in possession] if the same person, or several persons, claiming one from the other by descent, will or conveyance, had been in possession for the twenty years.'

Where there is no continuous possession 'either by the same person or several persons claiming one from the other,'[2] the result seems to be that the relative position and priority of inchoate titles acquired by any number of persons within the period of limitation remain unaffected by the extinguishment of the true owner's right, and the person who happens to be in possession derives no advantage from that extinguishment as against any one whose right is not specifically barred.

There is a decision of Lord Romilly's,[3] dealing with complicated facts, which offers some difficulty. Careful examination will show that it is quite consistent at any rate with Doe *v.* Barnard,[4] and proceeds, to a certain extent, on the same lines. That case, it is true, was not cited, and Lord Romilly seems to have supposed that the common law would be otherwise. But in fact he did exactly what the Court of Queen's Bench had done; he refused to allow the tacking together of two successive possessions not continuous in right. Then the legal estate was in a trustee who submitted to hold on behalf of the true equitable title, as it should be determined

[1] 13 Q. B. at p. 952. [2] *Ib.* at p. 953.
[3] Dixon *v.* Gayfere, 1853, 17 Beav. 421; see especially at pp. 429, 430.
[4] Note 3, last page.

by the Court, and the actual possession was in the Court by the hands of its receiver. Accordingly the Court, admitting that 'if the trustee had entered into possession, and had claimed to do so beneficially, it would probably have been very difficult to have dispossessed him,' pronounced in favour of the heir of the equitable owner, notwithstanding that the statutory period had long since run out against him. 'The statute which imposes a bar against the institution of a suit after twenty years to recover possession does not impose any bar upon the Court's declaring who is entitled to an estate which is in the possession of the Court itself.' It seems questionable whether the heirs of the first disseisor did not acquire an equitable right to the possession good against every one but the true owner, and good even as against him on the expiration of the statutory period. If they did, it does not appear how the supervening possession of the Court affected their rights. On this ground the correctness of the decision seems doubtful, and has been doubted.[1]

Before the modern Statute of Limitation it was correctly held that, where A. had occupied under a wrongful title for more than twenty years, and B. the person rightfully entitled had entered upon A.'s death, C., the remainderman under A.'s title, had not as plaintiff any right to the possession as against B. For B. had actual possession, and his legal right, though he might not have been able to assert it as plaintiff, was not extinguished.[2] And such, it would seem, is still the rule as to personal chattels.[3]

It must be remembered that the title conferred by possession is (apart from the statute) a title only against wrongdoers. A person who is lawfully dispossessed has no subsequent remedy against a third person not claiming through a wrongdoer.

In Buckley *v.* Gross[4] the plaintiff had made spoil of certain

[1] Darby & Bosanquet on Stat. of Lim. p. 392; Dart, V. & P. 6th ed. i. 465.

[2] Doe *v.* Reade, 1807, 8 East, 353. Observe that here, as in Doe *v.* Barnard, *supra*, the plaintiff showed the weakness of his own title. Other decisions, at first sight difficult to reconcile with general principles, may, in my opinion, be explained in the same manner.

[3] § 19, below.

[4] 1863, 3 B. & S. 566, 32 L. J. Q. B. 129.

tallow which ran down the sewers in the great fire in Tooley Street. He was charged (in the opinion of the Court, not unreasonably charged) with stealing it; the charge was dismissed, but the police magistrate, under statutory powers, ordered the tallow to be detained; afterwards, and before the expiration of the time named by the same statute in that behalf, it was sold by the Receiver of Police to the defendant. It was held that, the detention being lawful, the receiver and the purchaser claiming through him were accountable only to the true owner, if to any one. When the plaintiff was lawfully deprived of possession, his whole possessory right and title, such as it might be, was determined: and it was immaterial for that purpose whether the subsequent sale to the defendant were regular or not.

§ 18. *The Effect of Mistake on Delivery of Chattels.*

We may now return to the consideration of some points which were postponed for reasons above mentioned.[1]

Delivery of a chattel with consent, that is, a handing over of it by the possessor with intent on his side to give, and on the other side to receive, lawful possession of that chattel either as incident to an intended transfer of the property, or in some other right, works a lawful transfer of possession. And the character of the possession so transferred is not altered by any subsequent conduct or intention of the transferee.[2]

But a delivery which has all the outward marks of consent may fail of this result in divers ways, by reason of abnormal conditions which preclude the existence of true consent. These conditions are summed up under the general name of Mistake; they may or may not be complicated with Fraud. Not every fraud or mistake has such an effect, for a real though voidable consent (and consequently a real transfer of rights of property

[1] p. 77.

[2] The cases to which the doctrine of trespass *ab initio* applies are not really exceptions to this rule. Possession taken by authority of law without consent is trespassory at all times, but the trespass is justified so long and so long only as the authority is not abused.

or possession or both, which may become irrevocable as against innocent third parties) may be induced by these causes.

I. Mistake as the interest to be transferred.

The giver intends to pass possession for a limited purpose, or property on a specific trust. The receiver intends to receive possession for the purpose of exercising unlimited dominion. Here the question of honest mistake will hardly arise in practice. If the receiver reasonably believes the giver to intend to pass the property, it must be (unless in some very abnormal case) that the giver has entitled him so to believe, and therefore cannot be heard to say the contrary. If the receiver, knowing the giver's real intention, intends to obtain the thing in order to convert it to his own use, there is no real consent and no transfer of rightful possession. The intent with which the receiver apprehends the thing is repugnant to that with which the giver puts it in his power; he therefore takes as a trespasser, and may be a thief. As in every case of taking by trespass (*de bonis asportatis*) he acquires possession in law, though a wrongful possession, as distinguished from bare physical detention or custody.

This is the case of obtaining possession by a trick, as distinguished from obtaining property by false pretences. The rule is well established.[1]

Where the giver does intend to pass property to the receiver, being induced thereto by some false representation of the receiver not affecting the substance of the transaction itself, there is a real though not finally valid consent; the agreement is voidable on the ground of fraud, but not void, and third parties giving value in good faith may acquire irrevocable rights under it; and the offence committed, if any, is not theft but obtaining by false pretences. This also is well settled. The difficulties in particular cases are really difficulties of fact.

Conversely, it is possible that the giver intends to pass a

[1] E.g. R. *v.* Gumble, 1872, L. R. 2 C. C. 1 (obtaining a sovereign under pretence of getting change for a debt of sixpence; clearly larceny of the sovereign, not of 19*s.* 6*d.*, but error on this point in the indictment is amendable).

greater interest than the receiver intends to acquire; as if a specific chattel, say a horse or a book, were delivered with the purpose of gift, but accepted on the supposition of a bailment on loan (as might happen from the use of ambiguous words, such as, 'Keep it as long as you please'). Here it is certain that lawful possession passes, for to that extent there is real consent.[1] It seems that property does not pass unless and until the receiver knows and assents to the full intention of the giver. We are not here concerned to inquire what personal obligations between the parties may arise from facts of this kind.

II. Mistake as to the identity of the thing delivered.

1. Peter and John are collectors of ancient coins. Each has duplicates of a coin of which the other has no specimen. John proposes to Peter an exchange of duplicates, and Peter assents. Peter, intending to hand one of his duplicates to John, by mistake hands to him a coin of similar general appearance, but in fact a different and much more rare and valuable specimen.

If John at the moment perceives Peter's error, and takes the coin with the intention of appropriating it to his own use, he certainly does not acquire property. Much less, indeed, than a total mistake as to the identity of the object would prevent property from passing. 'Si aes pro auro veneat, non valet.'[2] It can make no difference whether the intended transaction were sale, barter, or gift. Again, he does not acquire possession by consent, for there is not any intention to give possession otherwise than as incident to property. This is a point easily overlooked, but one cannot see how an ineffectual intention of the owner to pass property should have a different effect which he did not intend. Either he transfers all the interest which he was capable and desirous of transferring, or he does not transfer any lawful interest at all.

[1] Cp. Hill *v.* Wilson, 8 Ch. at p. 896. That was the case of a money payment, so that property passed also.

[2] Ulpian, D. 18. 1. de cont. empt. 14.

Again, the principle would be the same if the intention were to pass not property but only possession, as if John had asked for the loan of a coin to compare with one in his own collection. Only the absence of active deception on the receiver's part distinguishes this from the case of obtaining by a trick. In every form in which these conditions can be varied there is equally no real delivery, for want of a concurrent intention of the giver to hand over and of the receiver to accept the same thing. Thus there is a merely trespassory taking, and a felonious one if the other elements of theft be present.

If John is not aware of the mistake, but receives the coin into his power believing with Peter that it is the coin which Peter intends to give him, the case is more difficult.

a. Some will say that John acquires lawful possession, founding their opinion on the general tendency of the Common Law to favour a physical possessor who is not in bad faith. But this is difficult to maintain, for there is still no intention to give or receive the thing actually given and received. It may be said that Peter means at all events to deliver the specific coin which passes from his hand into John's. But this, it is submitted, is not so; he means to hand it over, not at all events, but only in so far as he deems it (without doubt or suspicion of error, as we suppose) to be something which it is not. There might be circumstances showing an intention to take the risk of error, and therefore to hand over the thing at all events: as if the coin were in a box, and some one said to Peter, 'Are you sure the right coin is in that box?' But we conceive that any question so raised would be a question of pure fact. Mistake in any proper sense is excluded where there is a conscious doubt accompanied with an alternative intention or authority which is to be appropriated, so to speak, according to the event. Such is a possible and real case when a mass of unsorted documents is handed over for examination to a person who will be entitled to keep or use some of them and not others.

b. Others will say that John does not acquire possession at all, but a mere detention like the custody of a servant, or the temporary power of a guest or licensee over the things he is allowed to use. On this view the thing is in a manner lost to Peter, but still is in his legal possession; and when John discovers the truth, but not before, the possession is changed, John being in the position of the man who finds an object lost but not abandoned by the true owner. The character of the possession acquired by John will depend on the intention with which he keeps the coin. The nature of that intention is a matter of fact; his subsequent conduct may be evidence of it: but if it is once established that he took possession with a lawful intention, his possession is not only legal (i. e. true possession, not bare detention) but, for the purpose at least of excluding criminal liability, rightful, and no kind or amount of subsequent wrongful intention or conduct will make the taking trespassory.

This is a plausible view, and seems at first sight the only alternative to that first mentioned. But there are considerable difficulties in accepting it, or at any rate its logical consequences. If any mere wrongdoer takes the coin (or other thing as the case may be) from John before John has discovered what it really is, then John has not, on this theory, any remedy in his own name, for he has never had legal possession. Again, if John while still in ignorance mislays the thing, it would seem that a finder who supposed the thing to be John's would do no wrong to John by converting it to his own use. One can hardly doubt, notwithstanding, that in practice John would be put, if necessary, on the footing of a lawful possessor as against the supposed mere trespasser, whether by taking or by finding and appropriation. But then we should have to add this to the number of cases where possessory rights and remedies have been anomalously conceded to persons not in possession. And it is not convenient to multiply such anomalies. Again, I buy a hundred eggs for ready money. The seller thinks he delivers to me, and I think I receive,

a hundred eggs and no more; the seller has made a mistake in counting, which is not perceived by me, and in fact I get a hundred and one. Can it be said that I have lawful possession of a hundred eggs and a bare custody of one? And if so, of which one? And if a stranger without colour of right takes away the whole hundred and one, who is the proper person to sue or prosecute? Again, a solicitor at Liverpool sends the papers in a cause to counsel in London. A private letter unconnected with the cause is by accident put up with the papers. The counsel will forthwith return it after the least examination that is required to satisfy him that it was not meant for him. But can it be said that he never acquires possession of the letter?

c. There remains a view which is in appearance over-subtle, but which avoids most of the difficulties of the preceding ones. John acquires a possession like that of a person who takes without the consent of the previous possessor under justification of law. The possession, being without consent, is of a trespassory nature, but is excusable so long as it is exercised in good faith; that is, Peter having himself contributed to the mistake, is estopped from treating John as a wrongdoer, unless and until John with knowledge and of purpose disregards Peter's title. As regards third persons, John has all the rights of a possessor. As regards Peter, the ambiguous character of John's possession is defined for better or worse when he discovers the truth. If John elects to hold in Peter's interest (as by taking measures to restore the object to Peter), his possession becomes rightful; in fact he is in the position of an involuntary bailee, with the responsibility of that position, but free from any other. If he elects to convert the thing to his own use, he becomes a trespasser without qualification, and (as in the case of a justification by law being abused) his possession is deemed to have been trespassory throughout. The conversion, therefore, may be felonious.

It is submitted, on the whole, that this is the true view. It is not more subtle, at worst, than the analogous doctrine of

trespass *ab initio*. It is believed to be more nearly consistent with all the authorities than either of the other two, and less productive of inconvenient consequences. The application of it gives full protection to honest mistake, and does not protect dishonesty.

2. Cases may be put of a one-sided mistake without fraud, as where John expects from Peter delivery of a certain kind of thing, but has no means of verifying the correspondence of the thing actually delivered with Peter's intention or authority.[1] This does not appear to make any difference in John's position beyond one of fact, namely, strengthening the presumption of good faith on his part.

III. Mistake as to the person.

1. With regard to the person to whom a thing is delivered: Peter may deliver a thing to John by mistake:

a. in that he knows he is delivering to John, but erroneously supposes John to be entitled to delivery in his own right:

b. in that he supposes John to be another person, as William or Andrew (or a person whose name is unknown to Peter, but who is ascertained by some attribute which John has not), and intends to deliver only to that other person:

c. in that he knows he is delivering to John, but erroneously supposes John to be entitled to delivery in right of William or Andrew.

In all these cases John may receive the thing in good faith or not. In each case we shall first suppose him to receive in good faith, and then consider how the result is affected by bad faith on his part.

a. In the first case it seems that there is a real consent, though founded on a mistaken reason, and that lawful possession is transferred; but this is subject to the question whether Peter, if not acting in his own right, has power to transfer possession to any one but the person really designated or entitled. But if John is at the time aware of the mistake,

[1] See per Bramwell B., L. R. 2 C. C. at p. 56.

this will prevent any real consent from taking place, and the case is like that of obtaining property by a trick, that is, John acquires a merely trespassory possession.

b. In the second case it seems that there is an outward act without any real consent. With regard to the results, the same views may be held, and the same arguments used, as with regard to the delivery of a wrong thing to the right person under a common mistake: and we submit, for similar reasons, that John acquires a possession which is provisionally excusable, and becomes either rightful or merely trespassory according to the intent with which he acts on discovering the truth. If John receives the thing in bad faith, knowing and taking advantage of Peter's mistake, he takes as a trespasser without excuse.

c. In the third case it seems at first sight that there is a delivery to the person intended, though under a mistake as to his title, and that accordingly lawful possession is transferred. Something might be said for this; and it might also be said that an intention to deliver to the man John cannot be satisfactorily distinguished in point of fact from an intention to deliver to the person representing William or Andrew, and namely to John as being (in Peter's mistaken belief) that person, such a distinction being too fine for practical justice to take account of. But experience shows the distinction to be practicable for juries as well as judges. Taking it as ascertained that Peter's mind was to deliver to John as bearing and exercising the rights of William or Andrew, and not otherwise, we see that there is fundamental error as to the legal person though not the natural person of John. We can see this more clearly by supposing (as is not unlikely) that the name and person of John are previously unknown to Peter, and Peter deals with him simply and solely in the name and as having the authority of Andrew or William. It is not the case of an intentional delivery upon a mistaken reason, but is like that in which Peter mistakes John for Andrew or William in person. John therefore acquires a

possession of the same character as in the last case, and, if morally innocent in its inception, modifiable for better or worse in the same manner.

2. With regard to the person by whom a thing is delivered.

It is a rare but not impossible case that Peter delivers a thing to John, who means to accept delivery of such a thing, but only from some certain person who is not Peter. This may have embarrassing results as to the mutual personal rights of the parties, but it seems that the possession, or both possession and property, as the case may be, will not be prevented from passing according to the intention with which delivery was made.[1] The only alternative would be to say that the receiver holds the thing as a bailee, but is excusable for acting as owner until he discovers the mistake; but consent as to the giver's person on the part of the receiver has never been held material, and such a view would lead to grave complication where rights of third parties intervened.

We have purposely stated the questions and conclusions, thus far, as matters of principle and without reference to authorities in detail.

A. It is needless to recapitulate the familiar authorities as to obtaining possession by a trick on the one hand, and obtaining property by false pretences on the other: though it may be a question whether many cases where the facts amounted to theft have not been dealt with (and rightly, as a matter of practical caution) as cases of obtaining by false pretences.[2]

B. The authorities as to mistaken dealing with property

[1] Boulton *v.* Jones, 1857, 2 H. & N. 564, 27 L. J. Ex. 117 (goods supplied by a successor to the business of the person to whom the order was addressed, without notifying the change).

[2] Thus it seems to follow from the decision of the House of Lords in Cundy *v.* Lindsay, 3 App. Ca. 459, that Blenkarn never had either property or lawful possession in the goods obtained by him, and therefore might have been convicted of stealing them: he was tried and convicted for obtaining by false pretences, see 1 Q. B. D. 349.

have been only gradually developed, and it cannot be said that a final conclusion is reached.

It is settled that if A. delivers to B. a desk or bureau containing valuables the presence of which is not known either to A. or to B., this does not give a rightful possession of the valuables to B., even if the absolute property of the desk or bureau has passed, unless it was in fact the intention at the time of delivery that B. should acquire all the contents known or unknown.[1] It is also settled that if a man, without being aware of it at the time, takes another's goods which are mixed by accident with his own, that other not consenting or contributing to the mistake, he acquires a possession which is trespassory, and may become felonious by the subsequent addition of *animus furandi*.[2] Of course he is not guilty of theft without that addition, but it seems that, as the taking was by a voluntary though unintentional act, he is civilly a wrongdoer throughout; unless, perhaps, the accident of confusion could be shown to be inevitable. As to the application of the principle in criminal law, the older authorities certainly regard an ambiguous or merely excusable possession as equivalent to rightful possession for the purpose of excluding criminal liability: but the modern cases have no less certainly departed from this view.

The case of one object being given and received as and for another by the common mistake of both parties (the giver being the owner of both objects), was fully considered only in 1885, and produced an equal division of opinion among fourteen judges.[3] The following views appear in the judgments:

a. The receiver gets lawful possession,[4] and, it seems, property if the intention was to pass the property in the thing intended to be given.

[1] Cartwright *v*. Green, 8 Ves. 405; Merry *v*. Green, 7 M. & W. 623, 10 L. J. M. C. 154.

[2] Riley's ca., Dears. 149, 22 L. J. M. C. 48.

[3] R. *v*. Ashwell, 16 Q. B. D. 190 (sovereign delivered to the prisoner with intention of lending a shilling, received by the prisoner believing it a shilling, and converted by him to his own use on discovery of the truth).

[4] *Smith*, *Mathew*, *Stephen*, Day, Wills, *Manisty*, and Field JJ.

b. The receiver does not get possession but only a bare custody.[1]

c. There is no real delivery, and either the possession is not changed at all or a trespassory possession is acquired:[2] but this opinion is rather suggested than distinctly formulated.

The Court being equally divided, the conviction was affirmed.

It cannot be said that the discussion is conclusive.[3] One cause of complication is the reluctance felt by many judges to found new applications of the criminal law upon what seems highly artificial reasoning. Another and much slighter, but perhaps not an insensible one, arises from the chattels in question having been coin of the realm. We conceive the better opinion to be that the prisoner in the first instance acquired possession as an excusable trespasser. If this be so, and if it is too late (as we think it is) to argue that an excusable trespasser's possession cannot in any case become felonious, the conviction was right.

In a case decided not long afterwards[4] it appears to have been ruled by the Court below, as a general proposition, that if a man receives property 'innocently' and afterwards fraudulently appropriates it, he commits larceny. Such a ruling is clearly too wide. But it is extremely difficult to discover from the remarks made by the members of the Court which quashed the conviction what they thought the proper ruling would have been.

[1] *Cave* ('a man has not possession of that of the existence of which he is unaware,' p. 201), Hawkins, and *Denman* JJ.

[2] *Lord Coleridge* C.J., Grove, Pollock, and Huddleston JJ. In this and the two foregoing notes the names of the judges who delivered substantive separate judgments are italicized.

[3] One reported case directly against the conviction, R. *v.* Jacobs, 1872, 12 Cox, 151, appears to have been overlooked: but this was not the decision of a Superior Court.

[4] R. *v.* Flowers, 1886, 16 Q. B. D. 643. The facts of the case are, to the present writer, not distinguishable from those of Ashwell's. Indeed they are stronger for a conviction, for the handing over of a wrong sum of money (in a bag marked with the name of the person who ought to have got it) was the act, not of the owner, but of a clerk with presumably limited authority, cp. R. *v.* Middleton, *infra*.

C. In a weighty though not numerous series of modern decisions[1] it is laid down (and this against innocent third parties) that property does not pass where a person fraudulently gets delivery of chattels as in right of another person, either by pretending to be that person or by pretending to be authorised by him. The result is the same whether the impostor pretends in his assumed character to make a contract with an owner in possession, or pretends to a person holding the goods at the owner's disposal that he is authorised under a contract with the owner.

The case of a mistake of person being taken advantage of by a party who had not contrived or contributed to it occurred in R. *v.* Middleton.[2] A post-office clerk, on the application of the prisoner, a depositor in the post-office savings bank, to draw out ten shillings, referred by mistake to a letter of advice concerning some other depositor and naming a much larger sum. That sum he counted out and laid down, and the prisoner, with knowledge of the mistake and with intent to steal the money, took it and went away with it. This was decided to be theft by eleven judges against four, and by seven of those eleven on the broad ground that even if the clerk were deemed to be in the position of an owner, property or lawful possession did not pass by the apparent delivery, and the prisoner took as a trespasser.[3]

Others[4] upheld the conviction on the ground that the post-office clerk had not authority to pay this money to the prisoner, and that no property could pass by the mistaken exercise of a supposed authority which did not exist; one[5] concurred on the ground that there was not a complete

[1] Kingsford *v.* Merry, Ex. Ch. 1856, 1 H. & N. 503, 26 L. J. Ex. 83; Hardman *v.* Booth, 1863, 1 H. & C. 803, 32 L. J. Ex. 105; Cundy *v.* Lindsay, 1878, 3 App. Ca. 459; see too Higgons *v.* Burton, 1857, 26 L. J. Ex. 342, and *Ex parte* Barnett, 1876, 3 Ch. D. 123.

[2] 1873, L. R. 2 C. C. 38.

[3] Cockburn C.J. and Blackburn, Mellor, Lush, Grove, Denman, and Archibald JJ.

[4] Bovill C.J. and Keating J., Kelly C.B. [5] Pigott B.

manual delivery to the prisoner at all, but only a placing of the money within his reach, i.e. he was like a dishonest finder.

The dissenting minority,[1] for reasons which they expressed at length in separate judgments, held that there was no trespass, but a receipt by delivery, the act being within the clerk's general authority, and his consent real though erroneous.[2]

Here the true view seems to be that the clerk intended to part with the larger sum, but only to the person showing title under the warrant for that sum; he handed the money to the prisoner as being that person and not otherwise, and, as the prisoner was not that person, there was not and could not be any receipt according to his intention. Thus there was no transfer of property or of lawful possession.[3] And so far the knowledge or intention of the receiver is immaterial. Variations on this case may however occur of such a kind that the receiver accepts in good faith that which was intended for another person; and then it might have to be considered whether the true owner was not estopped as against the receiver, or, if not as against him, then as against innocent purchasers from him. At worst the receiver's possession would be excusable, as in the case of mistake in the identity of the thing delivered.

There are two reported cases on misdelivery of post letters which have been thought inconsistent with R. *v.* Middleton:[4] the letter was in each case delivered by a servant of the post-office to a person of equivocal or closely similar name to his

[1] Martin B., Bramwell B., Brett J., Cleasby B.

[2] The point was also taken (Cleasby B., at p. 72) that the prisoner was entitled to keep ten shillings out of the larger sum, and therefore did not steal any specific money. But it was found as a fact that he took the whole *animo furandi;* what he ought to have done would be, in law, a return of the whole with a re-delivery *brevi manu* of ten shillings in his proper right.

[3] Hardman *v.* Booth (note 1, last page) seems really conclusive. It was not cited.

[4] R. *v.* Mucklow, 1827, 1 Moo. 160; R. *v.* Davis, 1856, Dears. 640, 25 L.J. M. C. 91.

for whom the letter was really intended. It was held that in the absence of proof of felonious intent at the moment of the receipt, the receiver could not be convicted of theft for a subsequent fraudulent appropriation of the contents of the letter. These cases were apparently decided in a somewhat off-hand manner on grounds which since Middleton's case must be considered too wide. But it is not so clear that the result cannot consistently with that case be upheld. The intention of a letter-carrier and his official superiors is plainly to deliver, and the intention of the actual receiver is to receive, the letter and its contents, whatever the contents may be, so that the authority of Merry *v.* Green[1] is not applicable. Then, what is the postmaster's or letter-carrier's authority? Is it to deliver only to the person for whom the letter is really meant, or to deliver to whoever reasonably appears, without notice of any conflicting claim, to be that person? In the latter view a lawful possession may be held to pass to the wrong person, if the postmaster or carrier knows to whom he is in fact making delivery, and the receiver takes delivery in good faith. And this view seems favoured by the analogy of a shipmaster's position where a bill of lading is made out in parts: he is justified in delivering upon any one of the parts if he has not notice of an adverse title under some other part, i. e. he may act upon an uncontradicted *prima facie* title.[2] As the Postmaster-General cannot be sued, direct authority on the point can hardly be expected. But it may be answered that a delivery to the wrong person, even if justifiable, is not really authorized, and thus the receiver's possession is only excusable. If this be so the cases in question were wrongly decided.

It is obvious that many of the earlier cases in which convictions for larceny were sustained on the ground of want of specific intention or authority to pass the property in the

[1] 7 M. & W. 623, 10 L. J. M. C. 154, *supra* p. 109.
[2] Glyn Mills & Co. *v.* E. & W. India Dock Co., 1882, 7 App. Ca. 591.

goods[1] might have been rested on broader grounds if the doctrines of the leading majority in R. *v.* Middleton, and those who affirmed the conviction in R. *v.* Ashwell, are correct. This relation between earlier and later authorities is too common in our law to be made the foundation of any valid argument against the later generalization.

There are various dicta as to the effect of ignorance upon possession; it has been said and argued that a man cannot acquire legal possession without intention or knowledge;[2] but it is impossible to reconcile these dicta, as general propositions of law, with the judgment of Parke B. in Riley's case,[3] which has now been accepted as authoritative, though not always without reluctance, for more than thirty years. And the doctrine that possession can in no case be acquired without intention, though in many ways a tempting one, leads in some circumstances either to practical inconvenience or to theories of constructive intention not less artificial than the doctrine of continuous trespass or any other doctrine which would be superseded. Neither can the Roman law be called in aid, its theory of derivative possession being wholly different from that of the Common Law.

§ 19. *Title to Chattels by recapture.*

It would seem that a true owner who peaceably retakes his goods, after being out of possession for however long a time, may hold them as in his former right against all the world. The effect of a recapture by force after the expiration of the time limited for bringing an action seems open to doubt. It might be held that possession so taken was so wrongful as not to be capable of coalescing with the true title. On the other hand it might be held that the force was

[1] E. g. R. *v.* Longstreeth, 1826, 1 Moo. 137.

[2] See R. *v.* Woodrow, 1846, 16 L. J. M. C. at p. 128; The Killarney, 1861, 1 Lush. 427, 30 L. J. P. & M. at p. 42; cp. per Cave J., 16 Q. B. D. at p. 203. This doctrine has been even extended to the right to possess, Durfee *v.* Jones, 11 R. I. 588, ap. Holmes, The Common Law, 225. We agree with Mr. Justice Holmes that the decision is wrong.

[3] 1853, Dears. 149, 22 L. J. M. C. 48.

a personal wrong for which an action might be brought, but that this made no difference in the character of the possession once acquired, and did not prevent the combination of it with the right to possess—a right not extinguished, though no longer enforceable by action—from constituting a full revival of property in the true owner. It could not be held lawful, it is conceived, to retake one's goods by force after the right of action had been barred.[1] For the use of force could be justified only after demand of the goods and refusal to deliver them;[2] but where an action would not lie for the recovery of the goods or recompense in damages, the actual possessor would not be bound to redeliver them even on request, in other words there could not be any lawful demand of possession.

The right of recapture may be extinguished by a sale of goods in market overt, or, in the case of negotiable instruments, by transfer to a *bona fide* holder for value. In these cases the property is conclusively changed. But the original holder of a negotiable instrument may again become a holder for value, and so have a good title even against intermediate purchasers; and this although he does not know that it has been out of his possession, and it has been replaced in his possession by the contrivance of the original defrauder in order to prevent him from discovering the fraud. He is presumed to accept the restored documents (though at the time he cannot actually accept for want of knowledge) in or towards satisfaction of the defrauder's civil liability to him, and this is enough to constitute him a holder for value[3] under a new title.

[1] Cf. per Jessel M.R., *Ex parte* Drake, 1877, 5 Ch. Div. 866, 868.

[2] See Blades *v.* Higgs, 1861, 10 C. B. N. S. 713.

[3] London & County Bank *v.* London & River Plate Bank, C. A., Aug. 9, 1888. This must be carefully distinguished from the simpler cases of retaking and remitter.

PART III.

POSSESSION AND TRESPASS IN RELATION TO THE LAW OF THEFT.[1]

By R. S. Wright.

Chapter I.

Possession and Trespass generally, in relation to the law of Theft.

Chapter II.

Particular cases.

Chapter III.

The act and intention in theft.

Chapter IV.

Things not the subjects of theft.

[1] In this Part Crown cases are generally cited by the name of the prisoner or defendant only.

the possession as a sub-bailee of the customer. The servant has the physical possession and nothing else.

Or suppose an 'automatic box' belonging to a Company domiciled in London is permitted to be kept by them on the railway platform at Galway Station. Here the box and its contents at Galway are physically in the possession of the Railway Company, but in law are (unless affixed to the soil) in the possession of the London Company (who have also the property and right to possession), unless the Railway Company have agreed to become bailees of them, in which case they are in their possession. It is immaterial whether the London Company have or have not any agent or servant at Galway. And even if the box is affixed to the soil, the contents are in the possession of the London Company.[1]

Again, suppose a man with a watch in his pocket. His relations to it may include—

(*a*) the property or right of ownership. He has or may have the right to give away or sell or destroy it, to use or dispose of it in any way he thinks fit.

(*b*) the right to possession. This may or may not be part of the right of ownership, though it is in most cases derived from ownership. An owner may be temporarily without the right to possession of a watch which is his, as for instance by his own act if he has hired it out for a month. A person who is not the owner may temporarily have the right to possession (to the exclusion of the right of the real owner); as, for instance, the person who has hired the watch for the month.

(*c*) the possession. This may be without either ownership or right to possession, as for instance if the man has taken the watch away from the owner's house by mistake or by force or stealth (*inf.* § 7 and § 16).

(*d*) the physical possession. This may exist without any of the others, just as all or any of the others may exist without this. For instance, the man may hold the watch

[1] See 1887, Reg. *v.* Hands, 16 Cox, 188.

CHAPTER I.

Possession and Trespass generally, in relation to the law of Theft.

§ 1. *Preliminary.*

THE ordinary conception of theft is that it is a violation of a person's ownership of a thing: but the proper conception of it is that it is a violation of a person's possession of the 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 the possession.

1. There is reason to think that in the case of theft, as in the case of treason and of some if not all other crimes, the criminal intention was in ancient times regarded as the essential element of the crime, and that proof of an act done in execution of the intention was necessary and material only as evidence of the intention. Even at the present day this doctrine survives in a practical form in some cases of treason—Mulcahy *v.* Reg., L. R. 3 H. L. 306.

2. The ancient form of indictment for theft is—'that J. S. on &c., one, &c., of the goods and chattels of J. N., feloniously did steal, take and carry away against the peace,' &c.

It will be seen hereafter that in this form the words 'the goods and chattels of J. N.' ordinarily mean goods and chattels in the possession of J. N., and that it is ordinarily immaterial whether J. N. was owner of the thing taken or not.

§ 2. *General meaning of Possession.*

(i) The word 'possession' is used in relation to moveable things in three different senses.

Firstly, it is used to signify mere physical possession (compare the 'esse in possessione' or 'naturalis possessio' of Roman Law, the 'detention' of Savigny), which is rather a state of facts than a legal notion. The law does not define

modes or events in which it may commence or cease. It may perhaps be generally described by stating that when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him, or in some receptacle belonging to him and under his control, he is in physical possession of the thing.

Throughout the following pages possession in this sense is referred to as 'physical possession.'

Secondly, it is used to signify possession in a legal sense (compare the 'possessio' or 'civilis possessio' of the Roman law), and in this sense it describes a legal relation of a person to a thing with respect to other persons. It may exist without physical possession, as for instance when a man is away from home his household effects do not cease to be in his possession. It is defined by modes or events in which it commences or ceases, and by the legal incidents attached to it, the most important of which are those connected with trespass and theft. It is a notion of particular or municipal law, for these modes, events and incidents may vary in different systems of law, and they have even in this country varied at different times.

Throughout the following pages 'possession' is used in this sense unless a different sense is expressly indicated.

Thirdly, it is used, especially in the Year-books and ancient writers, to signify right to possession, which may be either of that general kind which is synonymous with ownership, or of a temporary or otherwise special character.

(ii) For an example of all these senses—the owner of a horse hires it out for a month to a customer, who lends it to a friend, who sends out his servant to exercise it in his park. Here the owner has the general right to possession, which however is suspended during the month. The customer has the right to possession during the month. The friend has

as the owner's servant for the purpose of taking it from one room to another.

A violation of the first or second of these relations is usually called a conversion or wrongful detention, and the remedy was an action of trover or detinue, as for instance in a case where the person to whom the watch is hired for the month sells it or fails to return it on demand when the month is expired.

A violation of the third of these relations is a particular form of trespass. Some trespasses do not affect the continuance of possession; as, for instance, a stranger may strike the watch with a stick and damage it without taking it away from the possessor. In that case an action of trespass for the injury to the ownership of the thing may be brought by the owner whether he was in possession at the time of the damage or not, and perhaps the temporary possessor cannot sue except for the disturbance of his possession and for such damage as he may have personally sustained. Or, the stranger may take the watch away without leave: and in this latter case the possession is wrongfully changed, and the former possessor, whether he is owner or not, can bring either trover or trespass *de bonis asportatis*; and if the trespass was committed *animo furandi*, the trespasser may be prosecuted for theft from the possessor. In such a case, where the watch is taken from the possession of a person other than its owner, the owner *prima facie* ought not to be able to maintain this action in his own name or to prosecute the trespasser as for a theft from him, inasmuch as it was not his possession which was violated. Whether in any case he can do so, and on what ground, will be separately considered (*inf.* § 8).

A violation of the fourth relation is not of itself a ground of action or prosecution at all, because this is a mere physical fact and not a legal relation. For instance, in the case put, if the watch is taken from the servant, the action ought to be brought by the master, and if the taker is prosecuted

for theft, the watch ought to be stated to have been taken from the master. But, as will be stated hereafter, it is one of the most important principles of the law of possession that a person who is in *de facto* or apparent possession of a thing has in general the remedies of a possessor as against strangers or wrongdoers (*inf.* § 9).

(iii) There is nothing in the law of trespass or theft which makes necessary an investigation of the general legal notion of property; but it is necessary to observe that there are numerous cases in the Year-books and old writers in which the word 'property' is used to signify possession, and property is attributed alike to the owner, the bailee, and the trespasser, and the owner is said to lose the property by a delivery or taking:[1] and that even at this day, when it is said that in an indictment for theft the property may or may not be laid in a particular person, this means no more than that the person had or had not the possession or such a right to it as against the taker as enables him to maintain trespass: and 'property' cannot be laid even in the general owner if at the time he had neither the possession nor a present right to it.

1. It has been said that the definition of possession has varied even in this country at different times. At one time the supposed rules of the Roman Law as to 'possession' seem to have been applied, and a depositary, a mandatary, and other kinds of bailees (see in 1 Hawk. 33. 10) have been treated as having no possession as against the bailor (and see per Chancellor Stillington in Year-b. 13 E. IV. f. 9, *inf.* § 6); and on the other hand, in Staundford's time (P. C. c. 15, fo. 25 *a*, ed. 1567) a servant entrusted by his master with money for delivery was held to have the possession at common law: cp. the statute 21 Hen. VIII, c. 7. It was thought that the master retained possession only so long as the servant was in his house or accompanying him. It is worth notice that Staundford cites the Roman Law as to theft by bailees by way of contrast, with the remark that 'in les cases avant dites le ley de cest realme est plus favorable (i. e. to the criminal) que nest le ley civil.'[2]

[1] See e.g. in Wilbraham *v.* Snow, 1678, in 1 Lev. 282.

[2] The substance of this paragraph, here repeated for convenience, has been given at p. 9 above.

2. The right of bailees and other persons not having the general property in a thing to complain of the disturbance of their possession by a stranger was formerly explained on the ground of their liability to account to the owner, which was considered to give them an interest and a special property, at least as against the wrongdoer. In a modern case[1] the remedies of trespass *quare clausum fregit* and *de bonis asportatis* were regarded as being independent of rights of property and as being 'an extension of that protection which the law throws around the person'; and the practical conclusion was deduced that a person's right to recover damages in trespass for a disturbance of his possession laid as a personal wrong did not (under the old law before 1869) upon his becoming bankrupt vest in the assignees of his proprietary rights.

§ 3. *Modes of Acquisition or Transfer of Possession.*

The meaning of possession, as a legal notion, is to be found by examining the modes or events by which it commences or ceases, and the rights, remedies and incidents belonging to it.

The possession of a thing is acquired by a person either (1) originally, by 'occupation,' in cases in which there was no previous possessor, or (2) from a previous possessor.

It may be acquired or transferred from a previous possessor, either—

(i) by effect of law, as upon the previous possessor's death or bankruptcy—§ 5.

(ii) by consent of the previous possessor either upon a transfer of property or by way of bailment—('delivery')—§ 6.

(iii) by a taking from the previous possessor without or irrespectively of his consent—(trespass)—§ 7.

It seems that there is hardly any case in which possession once vested can be absolutely extinguished, except by the destruction of the thing either in fact or in law, as in the case

[1] Rogers *v.* Spence, 1844, 13 M. & W. 571, in C. Sc. per Lord Denman. Savigny 1-6 takes a similar view with reference to Roman Law. And with this accord the ancient authorities as to trespass to land. Cp. 2 Rolle, 569, l. 20 and 553, l. 45; and Year-b. 42 Ed. III, p. 2.

of a plant which when planted in the soil ceases to be a chattel, or in the case of escape and return to wildness of a reclaimed animal *ferae naturae*, or of such things as gas escaping from control. A purse lost in the street, the owner knows not where, may in point of law still be in his possession (*inf.* §. 13 as to loss and finding). A shroud or coffin is said to remain in the possession of the deceased person's representatives or in that of the person (or his representatives) who buried him (Hayne's Case, 12 Rep. 113; 1 Hale, 515). In Reg. *v.* Edwards, 1877, 13 Cox, 384, diseased pigs buried three feet deep were held still to be in the possession of the person to whom they had belonged. Even *bona vacantia*, for which no owner or possessor can be found, are perhaps to be treated not as being in the possession of nobody, but as being in the possession of a person who cannot be ascertained. It is even doubted whether it is possible for a possessor to divest himself of his possession of a thing by wilful abandonment of it (see Vin. Abr. Waif. 409; Doct. & Stud. l. 2. c. 51); though even if this is not possible, it would not necessarily follow that after abandonment he continues subject as possessor to any obligation in respect of the thing or liable as possessor for any damage which it may occasion to other persons (see 1854, White *v.* Crisp, 10 Exch. 312).

§ 4. *Original Acquisition* ('*Occupation*').

The only instances of original acquisition of possession appear to be—

1. capture of wild animals:

2. appropriation of free natural elements, such as water:

3. the collection of matter, such as seaweed, from the sea or shore:

4. severance of a thing from the soil or from a tree or plant attached to the soil:

5. perhaps the finding of a thing which has been absolutely abandoned by or has become irrecoverably lost to its former possessor.

The case of *fructuum accessio*, for instance milk or wool or the young of animals, is not a case of original acquisition of possession, because the product is before its severance regarded as in the possession of the person who possesses the animal, and the act of severance is a taking from his possession (Martin, 1 Leach 171). In the case of severance from land, the possession of the person who severs the thing commences immediately after the severance. In the other cases, if the thing is alive or unstable, the possession begins when the thing is so secured that it cannot escape of its own power or nature, and can be removed by the taker at his pleasure. If the thing is lifeless and motionless, the possession probably begins when it is first removed from its place for the purpose of assuming control over it. In either case difficulties may arise from the interference of a second person, and if his interference is such that the taker never for a moment had undivided control of the thing, it would seem that either there is no possession or there is a possession in common. In some cases possession and property result from the same act.

1. 'In replevin for a sow and pigs, the defendant as to the sow avows damage feasant, and for the pigs pleads *non cepit*. The jury found for the defendant as to the sow; and for the pigs they found that the sow farrowed them after she was distrained and in the possession of the defendant. The plaintiff had damages for the pigs on this plea of *non cepit*, because the pigs were taken by the defendant as well as the sow, though they were not damage feasant, and therefore the defendant should have set forth the special matter as to the pigs.' (Gilbert on Distress, p. 140.)

2. Many authorities as to the capture of fish and other animals are cited in Young *v.* Hichens, 6 Q. B. 606, and Aberdeen Arctic Co. *v.* Sutter, 4 McQ. H. L. 355. In Littledale *v.* Scaith, 1 Taunt. 243 *n.*, the 'custom of Greenland' was found to be that 'while the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish: and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of

the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.'

In Young *v.* Hichens (*sup.*) the plaintiff had drawn his seine so as nearly to enclose a school of fish, and was proceeding to close the remaining opening with a stop-net, while his boats splashed the water to prevent the escape of the fish. The defendant disturbed his operations, and took some of the fish from within the seine, and others of them escaped. Held, that although it was almost certain that the plaintiff would have obtained possession of the fish but for the defendant's acts, yet he had not possession and could not maintain trespass.

3. A person who has a right *ratione soli tenurae* or *privilegii* of taking animals *ferae naturae* has not an actual property in any of them till taken, and still less a possession, but rather an exclusive right to acquire property in them (Blades *v.* Higgs, 1865, 11 H. L. Ca. 621). When they are both found and killed on his land his property vests (*ib.*), though possession may not vest in him until the taker has quitted his own wrongful possession. See 1878, Petch, 14 Cox, 116; Read, 14 Cox, 17. There seems to be an exception to the general rule in the cases of swans and of royal fish, but even these are probably not subjects of property or trespass till they are reclaimed or caught (see the case of Swans, 7 Rep. 15–6; 1 Hale, 511; 2 East, P. C. 607).

As to wreck, see below, § 8.

The possession of a thing may be acquired otherwise than originally in modes which may be reduced as above stated to three general heads, namely—

1. change of possession on death or otherwise by authority of law without either consent or taking:

2. change of possession by the consent of the previous possessor.—This in the old books is commonly referred to as delivery or bailment:

3. change of possession by taking without the consent of the previous possessor.—This is denominated a taking, and is always a trespass in fact, though justified or excusable if made by authority of law.

§ 5. *Acquisition of Possession by effect of Law.*

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, whether the second person is designated immediately by the law, as in cases of forfeiture, of intestate succession,[1] of bankruptcy, of successive churchwardens, of corporations and official trustees; or claims derivatively from a person immediately designated by the law, as in the case of persons claiming wreck, waif, &c. by grant or prescription; or is designated by the former owner, as in the case of an executor or devisee of a thing certain.[2]

In general it would seem that immediately upon the property vesting in the second person he is in the same position as a vendee who has acquired an immediate right to possession; and further that the possession itself vests in him unless it has been intercepted by the act of some other person who has adversely taken the possession. The same result appears to follow in the cases where a thing being part of or annexed to the land is severed from it by the tenant or by 'act of God' and thereby becomes the personal goods in possession of him who has the right to the first estate of inheritance.[3]

Further, in certain cases the person in whom the right to possession becomes vested by act of law acquires a right of action not only in respect of wrongs done after the time at which the property becomes in fact vested in him, but also by relation as from an earlier time. An administrator,[4] or an executor,[5] is entitled to complain of a trespass committed to the goods of the deceased before the grant of administration or probate, as the case may be. With regard to administrators,

[1] See Johnson, 1857, 27 L. J. M. C. 52.

[2] Fisher *v.* Young, 1615, 2 Bulst. 268; cp. Smith *v.* Milles, 1786, 1 T. R. at 480; Gordon *v.* Harper, 1796, 7 T. R. 13; Hudson *v.* Hudson, Latch, 1628, 214, 263; Vin. Tresp. 463, 455.

[3] See Farrant *v.* Thompson, 1822, 5 B. & A. 826; cp. Blades *v.* Higgs, 1865, 11 H. L. Ca. 621. As to windfalls and as to trees dead but not fallen, see Herlakenden's case, 4 Rep. 62; re Ainslie, 1885, 30 Ch. D. 485.

[4] Tharpe *v.* Stallwood, 1843, 5 M. & G. 760.

[5] 2 Bulst. 268. See Hale, P. C. 514.

it is indeed laid down by Hale that goods of an intestate if stolen before administration committed must be laid to be the property (i. e. in the possession) of the bishop as ordinary; and the usual practice has been in accordance with this view, and in R. *v.* Smith,[1] where executors had declined to prove, it was ruled on circuit that the 'property' could not be laid in an administrator whose letters were granted after the theft, on the ground that letters of administration only had their operation from the time when they were granted. But it is conceived that the law is otherwise settled by the case of Tharpe *v.* Stallwood,[2] and that the 'property' may be laid in the administrator in respect of a thing stolen before the grant, though probably it may also be laid in the ordinary, of whom the administrator seems to be merely the delegate or representative.[3] It seems doubtful whether this doctrine applies to any other cases than those of executors and administrators;[4] but, as the rule is explained in Tharpe *v.* Stallwood, there seems to be no reason why it should not apply in every case where the right vests by act of law; for the doctrine, as there explained, does not in any way affect the rights of the defendant or make him a trespasser or thief by relation who was not otherwise a trespasser or thief, but only enables the new owner (by virtue of his title by relation) to sue or prosecute for that which was a trespass or theft when it was done, though when it was done it was not a trespass or theft against him. The quality of the act and the defences of the accused upon the merits of his own rights, justifications, or intentions are not altered *ex post facto*, but only the title to sue or prosecute him is shifted. He wronged one person, and the right to the remedy is transferred to another person.[5] A similar

[1] 1835, 7 C. & P. 147.

[2] See note 4, p. 127.

[3] Cp. as to ordinary and executor, Johnson, 1857, 27 L. J. M. C. 52. The case of Tharpe *v.* Stallwood, *ubi sup.*, explains and considerably modifies the dicta in the cases cited in the next following note.

[4] See Smith *v.* Milles, 1786, 1 T. R. at 480; Balme *v.* Hutton, 1833, 9 Bing. 471; Cooper *v.* Chitty, 1756, 1 Burr. 31.

[5] This doctrine is wholly distinct from that of trespass *ab initio*, *inf.* § 15.

rule is applied in some cases in favour of a person having title to land with respect to trespasses committed before he enters—Barnett *v.* Earl of Guildford, 11 Exch. 19, and see Anderson *v.* Radcliffe, E. B. & E. 819, 29 L. J. Q. B. 128.

§ 6. *Acquisition by Consent ('Delivery').*

Possession is essentially indivisible. Two persons cannot at the same time have the possession of a thing except jointly or in common: *plures eandem rem in solidum possidere non possunt.*[1] No phrase is more usual for describing the ordinary test of possession than the question—'had he the separate undivided and exclusive control of the thing?'

When a person who has the possession of a thing delivers it to or permits it to be taken away by a second person, and the question arises whether the second person has thereby acquired the possession, the answer will depend principally on whether the first person intended to part with the possession and to transfer a separate and undivided and exclusive control for the time being to the second person.

There are three principal cases to be considered, namely—

(i) delivery on alienation,

(ii) delivery by way of bailment,

(iii) delivery to a servant or other person without intention of giving separate and exclusive control.

In this enumeration and hereafter the word 'delivery' is used to include both delivery and a taking by such consent as is equivalent to delivery.

(i) *Delivery on alienation.* A mere agreement to sell, give away or otherwise transfer the property in a thing has no effect on the possession of the alienor; but it may be accompanied or followed by an arrangement under which the alienor if he retains the possession may do so no longer in his own right but as if he were a bailee from the alienee.

[1] Co. Litt. 368 a: 'Duo non possunt in solido unam rem possidere.' Compare per Maule J. in Jones *v.* Chapman, 2 Exch. at p. 821, approved in 1876, Lows *v.* Telford, 1 App. Ca. at 426.

The complicated effects which may result with respect to other persons who have the possession of the thing by delivery from the alienor before or after the agreement or arrangement are reserved for separate consideration (*inf.* § 14). If the alienor delivers the thing directly to the alienee, the alienee thereby acquires the possession as well as the ownership and right to possession. If the alienor sends it to the alienee, important distinctions arise, which also are reserved for separate consideration (*inf.* § 14), but which may be provisionally summarised as follows. If the alienor sends it by his own servant, the possession of the alienor continues until the servant has made delivery (see below in this § (iii) *Delivery to a servant, &c.*). If the alienor hands it to a carrier employed by the alienor on his own behalf, the possession is transferred to the carrier as bailee of the alienor (see below, (ii) *Delivery by way of bailment*). If the alienor hands it to a carrier employed by the alienee or by the alienor as agent for the alienee, or to a common carrier, the possession is transferred to the carrier (ordinarily) as bailee of the alienee. If the alienor hands it to a servant of the alienee, a difficulty occurs which is the origin of the separate crime of embezzlement. In such a case the alienor has parted with the property, the right to possession, and also the possession, because he has parted finally with the control of the thing and has no control over the alienee's servant. In whom then is the possession? It was held not to be in the alienee, 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.

Another gap in the common law in these cases of delivery upon alienation, which results less from a difficulty as to possession than from a difficulty as to *animus furandi*, and which was filled by the creation of the statutory misdemeanor of obtaining by false pretences, is noticed below (§ 11 and § 19).

(ii) *Delivery by way of bailment.* A delivery of a thing by a possessor (otherwise than in case of alienation) with intent to transfer separate undivided and exclusive control for the time being upon a condition or trust (see Reg. *v.* McDonald, 15 Q. B. D. 323) is a bailment, and it transfers the possession to the bailee. Some of the difficulties and distinctions which arise with respect to bailments are separately considered below (§ 12).

By a general rule of law, several express statements of which are to be found in the extracts from the Year-books in the notes below, and which underlies the whole law of theft and is particularly exemplified by the decisions as to alleged theft by bailees, possession originally obtained by consent cannot ordinarily become trespassory. The doctrine of trespass *ab initio*, for which the Six Carpenters' Case is usually cited, namely, that when a person who has obtained possession by a general authority of law subsequently abuses that possession it will be inferred that he originally entered with a design to commit the abuse and therefore took the possession not under the authority of the law but of his own wrong, so that the mere original entry is made a trespass retrospectively, does not apply to possession acquired by delivery or license of the party. Accordingly the general rule of common law is that no dishonest or wrongful act whatever done by a bailee during the bailment can be a trespass or a theft. But this rule must be taken with two explanations. The first is that a person who obtains possession of a thing by deceit as upon a bailment but really meaning to steal it (as distinguished from a person who

really means to get and hold the thing by way of bailment and who merely uses deceit for this purpose), is held not to obtain a bailment at all but such a trespassory possession as is of itself a theft, and such intention of stealing may be inferred from subsequent acts (see below, § 19). The second is that in certain cases the bailment may become determined, and then the possession of the quondam bailee either ceases or becomes thenceforth trespassory. A bailment may be so determined either by re-delivery or by certain extreme acts which are held to destroy the identity of the very subject of the bailment and therefore also the bailment itself.

Actual re-delivery needs no comment, except that if the re-delivery is merely for a special purpose and is not intended by the bailee to determine the bailment, it will not determine it.[1] But there may also be a constructive re-delivery. For instance, if the bailee deposits the thing with a third person and agrees with him and the bailor that the third person shall hold it for the bailor, this amounts to a re-delivery, and the quondam bailee can then steal the thing.[2] Possibly, even a mere agreement between bailor and bailee that the bailee shall thenceforth hold the thing not as bailee but as a servant may have the same effect, either directly or by way of estoppel.

A tortious act, in order that it may determine the possession acquired by bailment, so as to make the quondam bailee liable for subsequent misappropriation as a theft, must be of a much more aggravated kind than the acts which are sufficient to make a bailee liable in trover as for a wrong to the bailor's right to possession. Any act or disposition which is wholly repugnant to[3] or as it were an absolute disclaimer of[4] the holding as bailee revests the bailor's right

[1] Roberts *v.* Wyatt, 1810, 2 Taunt. 268.

[2] Stear. 1848, 1 Den. 349.

[3] Donald *v.* Suckling, 1866, L. R. 1 Q. B. 585, 615.

[4] Fenn *v.* Bittleston, 1851, 7 Exch. at pp. 159–60, per Parke B. Cp. Cooper *v.* Willomatt, 1845, 1 C. B. 672, and Bryant *v.* Wardell, 1848, 2 Exch. 479.

to possession, and therefore also his immediate right to maintain trover or detinue even where the bailment is for a term or is otherwise not revocable at will, and so *à fortiori* in a bailment determinable at will. But in trespass and theft the wrong is not, as in trover, to the plaintiff's right to possession, and the bailment cannot be determined by any tortious act which does not destroy the very subject of the bailment; and the only extension which this doctrine ever received at common law was that a bailee of a package or bulk might by taking things out of the package or breaking the bulk so far alter the thing in point of law that it becomes no longer the same thing—the same package or bulk—which he received and thereupon his possession was held to become trespassory. If a carrier fraudulently sold the whole tun of wine unbroken, he committed no crime; if he drew a pint, it was felony; per Choke J., in note *inf.* The precise description of acts which might have this effect is immaterial since the statute (1861, c. 96. s. 3) against conversion by bailees, but some of the chief authorities are stated in the margin.[1]

It was once thought[2] that the mere efflux or completion of the term or purpose of a limited bailment of itself devested the bailee's possession. But this doctrine was opposed to earlier authorities,[3] and has been finally overturned.[4] His possession does not cease until he has redelivered the thing or transferred the possession to another person.

It is to be added that some cases in which no consent has in fact been given to a change of possession are treated as if they were cases of bailment, as for instance cases in which the thing is taken in good faith for the benefit of the owner,

[1] Vin. Tresp. 468, 503; Bac. Tresp. 558, 561; Madox, 1805, R. & R. 92; Brazier, 1817, R. & R. 337; Fletcher, 1831, 4 C. & P. 545; Jones, 1835, 7 C. & P. 151; Jenkins, 1839, 9 C. & P. 38; Poyser, 1851, 2 Den. 233; Cornish, 1854, Dears. 425.

[2] Tunnard, 1729, 1 Leach, 214 *n.*

[3] See in Meeres, 1689, 1 Show. 50.

[4] Banks, 1821, R. & R. 441.

as a watch from the person of a drunken owner, or a horse from the owner's drunken servant, or some cases of loss and finding. These cases are more fully considered below (§ 13).

A bailment may arise without any change of physical possession, as for instance where a person is bailee from one person, he may become the bailee of another by attornment, i. e. by agreeing to hold under him, and so it is conceived may a person who holds as a servant or even as a trespasser acquire possession as a bailee by subsequent agreement. Whether any act is necessary to be done to evidence or perfect the agreement in such a case seems not to have been decided.

There is little authority on the question of what kind or degree of consent or knowledge by the transferee is necessary for a bailment or "delivery." The cases are collected below (§ 16) as to the effect of mistake and ignorance of fact.

Year-b. 1473 (Easter), 13 Ed. IV. p. 9. pl. 5. 'In the Star Chamber before the King's Council such matter was shown and debated; where one has bargained with another to carry certain bales with &c. and other things to Southampton, he took them and carried them to another place and broke up (debrusa) the bales and took the goods contained therein feloniously, and converted them to his proper use and disposed of them suspiciously; if that may be called felony or not, that was the case.

Brian (*C.J.*). I think not, for where he has the possession from the party by a bailing and delivery lawfully, it cannot after be called felony nor trespass, for no felony can be but with violence and vi et armis, and what he himself has he cannot take with vi et armis nor against the peace: therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detinue.

Hussey, the King's Attorney. Felony is to claim feloniously the property without cause to the intent to defraud him in whom the property is, animo furandi, and here notwithstanding the bailment ut supra the property remained in him who bailed them, then this property can be feloniously claimed by him to whom they were bailed, as well as by a stranger, therefore it may be felony well enough.

The Chancellor. Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession.

Molineux ad idem. A matter lawfully done may be called felony or trespass according to the intent; sc. if he who did the act do not pursue the cause for which he took the goods, as if a man distrain for damage feasant or rent in arrear and then he sell the goods and kill the beasts, this is tort now where at the beginning it was good. So if a man come into a tavern to drink it is lawful, but if he carry away the piece or do other trespass then all is bad. So although the taking was lawful in the carrier ut supra &c., yet when he took the goods to another place ut supra he did not pursue his cause, and so by his act after it may be called felony or trespass according to the intent.

Brian (*C.J.*). Where a man does an act out of his own head, it may be a lawful act in one case and in another not, according to his act afterwards, as in the cases which you have put, for there his intent shall be judged according to his act; but where I have goods by your bailment, this taking cannot be made bad after by anything.

Vavisour. Sir, our case is better than a bailment, for here the things were not delivered to him, but a bargain that he should carry the goods to S. ut supra: and then if he took them to carry them thither, he took them warrantably; and the case put now upon the matter shows, that is, his demeanor after shows, that he took them as felon, and to another intent than to carry them ut supra, in which case he took them without warrant or cause, for that he did not pursue the cause, and so it is felony.

Choke (*J.*). I think that where a man has goods in his possession by reason of a bailment he cannot take them feloniously, being in possession; but still it seems here that it is felony, for here the things which were within the bales were not bailed to him, only the bales as an entire thing were bailed ut supra to carry; in which case if he had given the bales or sold them &c. it is not felony, but when he broke them and took out of them what was within he did that without warrant, as if one bailed a tun of wine to carry, if the bailee sell the tun it is not felony nor trespass, but if he took some out it is felony: and here the twenty pounds were not bailed to him, and peradventure he knew not of them at the time of the bailment. So is it if I bail the key of my chamber to one to guard my chamber, and he take my goods within this chamber, it is felony, for they were not bailed to him.

(It was then moved that the case ought to be determined

at common law; but the Chancellor seems to have thought otherwise, for the complainant was a merchant stranger, whose case ought to be judged by the law of nature in Chancery, and without the delay of trial by jury. However the matter was afterwards argued before the judges in the Exchequer Chamber, and there—)

It was holden by all but *Nedham* (*J.*) that where goods are bailed to a man he cannot take them feloniously; but *Nedham* held the contrary, for he might take them feloniously as well as another; and he said it had been held that a man can take his own goods feloniously, as if I bail goods to a man to keep, and I come privily intending to recover damages against him in detinue and I take the goods privily, it is felony. And it was holden that where a man has possession and that determines, he can then be felon of the things, as if I bail goods to one to carry to my house, and he bring them to my house and then take them thereout it is felony; for his possession is determined when they were in my house; but if a taverner serve a man with a piece, and he take it away, it is felony for he had not possession of this piece; for it was put on the table but to serve him to drink: and so is it of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony, for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants so that they are in possession of it.

Laicon (*J.*). I think there is a diversity between bailment of goods and a bargain to take and carry, for by the bailment he has delivery of possession, but by the bargain he has no possession till he take them, and this taking is lawful if he takes them to carry, but if he take them to another intent than to carry them, so that he do not pursue his cause, I think that shall be called felony well enough.

Brian (*C.J.*). I think that it is all one, a bargain to carry them, and a bailment, for in both cases he has authority of the same person in whom the property was, so that it cannot be called felony:—M. 2 E. III, in an indictment 'felonice abduxit unum equum' is bad, but it should be cepit:—so in eyre at Nott., 8 E. III: and in this case the taking cannot be feloniously, for that he had the lawful possession; so then the breaking the bales is not felony: vide 4 E. II in trespass, for that plaintiff had bought a tun of wine of defendant, and while it was in defendant's guard defendant came with force and arms and broke the tun and carried away parcel of the wine and filled up the tun with water.

And for that it appeared he had possession before, the writ being vi et armis was challenged, and yet it was held well and he pleaded not guilty, and then the justices reported to the Chancellor in Council that the opinion of the most of them was that it was felony.' (But the opinion of Choke J. was in later times adopted as to the effect of breaking bulk. See the cases in the margin above.)

Year-b. 1498, 16 H. VII. p. 3. pl. 7. 'Trespass de bonis asp. vi et arm. Plea that J. W. was possessed of the goods and sold them to the plaintiff, who left them in the possession of the said J. W. to the use of the plaintiff, and then J. W. delivered them to the defendant to carry to Grocers' Hall, wherefore the defendant took them accordingly, which is the trespass alleged.

'*Fineux.* If one buy goods of me and leave them in my possession, now is the property and possession in him, and for the detention after, action of trespass lies against me; (—*Quod fuit negatum per totam curiam*—) and for the like reason, and a fortiori, it lies against my bailee or vendee (*Quod fuit etiam negatum*, for it was said that where one comes to the goods by lawful means by delivery of the plaintiff immediately at the first, he shall not ever be punished as a trespasser but by writ of detinue; nor any more shall his donee, vendee or sub-bailee who comes to the plaintiff's goods by such means: but if one take them of his own wrong out of the possession of him who came lawfully to the goods at first, namely immediately (i. e. if he take them from the possessor), he shall be punished as a trespasser; and so a difference. *Quod nota.*)'

Year-b. 1505, 21 H. VII. p. 3. pl. 7. 'Nota per *Fineux C.J.* and *Tremayle J.* If I bail goods to one and he give them to a stranger or sell them, if the stranger take them without livery he is trespasser, and I shall have writ of trespass against him: for by that gift or sale the property is not changed, as it is by a taking: but if he makes delivery of them to the vendee or donee then I shall not have writ of trespass. And so if an infant make gift or sale of goods and make livery of them he shall not have writ of trespass: aliter if he do not make delivery.

Rede (*J.*). If my bailee give goods to another, if the donee take them without livery, I shall not have writ of trespass against him

for the taking, for that he comes to them lawfully, as well as if he had bailed them to him.

(But) *Fineux* and *Tremayle* said as above.'

(iii) *Delivery to a servant, &c.* Next, an owner in possession may deliver the thing to his servant to be by him kept, used, carried, or applied in the course of his employment as a servant. Here it was once thought[1] that the possession passed to the servant, at any rate when the charge was to be executed away from the master, and particularly when the thing was not to be kept, but to be delivered absolutely to a third person; but it has long been settled that in all such cases the master's possession continues.[2] The servant is said to have not the possession but a mere charge (*onus*) or custody.

The foregoing statement is however subject to the following limitations:—

The mere fact of service does not prevent the servant from playing a different part at the same time in respect of other relations. A servant who takes his master's things in a manner wholly outside the scope of his employment may be regarded as a mere stranger in this respect. Again, if the master gives money to the servant even for the purposes of his employment, still, if the master means to part with the property in the money wholly to him, and to treat him as a debtor or accountant, the master's possession is transferred together with the right of property to the servant.[3] So that which was originally a mere custody by the servant as a

[1] Staundf. P. C. 1. p. 25; Watson's case, 1788, 2 East, P. C. 562. Cp. the Stat. 21 Hen. VIII. c. 7.

[2] 3 Inst. 108; 1 Hale, 505, 686; 2 East, P. C. 565-6; 1778, Atkinson, 1 Leach, 302 *n.*; 1782, Bass, 1 Leach, 251; 1789, Wilkins, 1 Leach, 520; 1820, Hutchinson, R. & R. 412; 1838, Heath, 2 Moo. 33; 1842, Beaman, C. & M. 595; 1843, Ashley, 1 C. & K. 198; 1856, Green, D. & B. 113; Hopkinson *v.* Gibson, 1805, 2 Smith, 202. And cp. Bertie *v.* Beaumont, 1812, 16 East, 33, as to a servant's occupation of a house.

[3] 1850, Barnes, 2 Den. 59; 1862, Thompson, 9 Cox, 222, 32 L. J. M. C. 57, as explained in 1871, Cooke, L. R. 1 C. C. 295. Cp. Savage *v.* Walthew, 1708, 11 Mod. 135; Glosse *v.* Hayman, 1587, Leon. case 110.

servant may become changed into a possession by him as a bailee or as a trespasser. And it is said by East[1] that if a master send his servant with money and afterwards waylay and rob him with intent to charge the hundred, it is felony in the master, for though in general the servant has no property as against his master, yet here he has a special property as having a clear right to defend his possession against the master's unlawful demand. If this doctrine is correct, and if it is applicable (as East applies it) to simple theft, it would follow that in such a case the servant must have possession for this purpose as against the master, the master being treated as a mere stranger.[2]

In two comparatively modern cases the 'property' (i. e. possession) has been allowed to be laid in a servant who has a charge of a thing from his master.[3] But in Oliver's case the point was not noticed, and the servant may have been regarded as a bailee; and in the other case the decision of the judges seems to have been based on the argument *ab inconvenienti* in the particular case, the servant being a coach-driver and the masters a numerous partnership, and it being in those times necessary to join all persons sharing in the 'property' laid: and the judgment appears to be expressly limited to the case of a coach-driver.[4] In any view the language of this decision is a strong authority against holding that a servant's custody is in general sufficient to support an action or prosecution as for a taking of the thing from his possession, even as against a mere wrongdoer;[5] though it may be that it will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the

[1] pp. 654 and 558.

[2] See as to the supposed *animus furandi* in such a case, *inf.* III. § 20.

[3] Oliver, 1811, cited in Walsh, 1812, 2 Leach, at 1072; Deakins, 1800, 2 Leach, 862; cp. for old cases Heydon *v.* Smith, 13 Rep. 69.

[4] Cp. as to a civil action of trespass by the master of a ship against strangers, Moore *v.* Robinson, 1831, 2 B. & Ad. 817; and Pitts *v.* Gaince there cited from 1 Salk. 10; Mikes *v.* Caly, 12 Mod. 382.

[5] Cp. Hopkinson *v.* Gibson, 1805, 2 Smith, 202.

manner of the execution is necessarily left in a great degree to the discretion of the servant.

Next, the person may have had the thing not as a servant but to examine or use under the present control of the possessor, as in the case of a customer allowed merely to examine or try a watch or a horse under the eyes of the owner; or the use of the thing may have been permitted under an express or tacit condition that it is not to be taken away, as in the case of a guest: and in all such cases the possession continues unchanged in law, and the person will commit trespass or theft by carrying the thing away, and the master alone has any of the rights protected by the law of theft.[1] It would seem in such cases to make no difference whether the use of the thing is for the benefit of the owner or for that of the accused, so long as there is no bailment. On the other hand, if there is a sufficient intention to give separate and exclusive control for the time being, the mere condition that the thing is not to be carried from the owner's presence or premises does not necessarily exclude a bailment. In that case the owner's possession would be destroyed or interrupted by the bailment.

It remains to observe that if the mere servant, custodian or licensee assumes to wrongfully remove the thing or otherwise wrongfully assumes possession of it, he becomes a trespasser, and the situation of a third person who receives or takes the thing from him is in general the same as that of a person who receives or takes from any other trespasser. There seems however to be this distinction, that if the servant has authority to dispose of the thing, and he disposes of it in a manner within his authority, though with a fraudulent intent, he is himself a trespasser, but the person to whom he disposes of it will not be a trespasser against the master unless he knows of and assents to the trespass.[2]

[1] Chisser's case, T. Raym. 275; Pears., 1779, 2 East, 652, 682-3; 1 Hawk. 33, 15; Rodway, 1841, 9 C. & P. 784; Johnson, 1851, 2 Den. 310; Thompson, 1862, 9 Cox, 244; 32 L. J. M. C. 57.

[2] See below, § 10. Cp. Glosse *v.* Hayman, Leon. case 110.

§ 7. *Acquisition by a Taking* ('*Trespass*').

(i) The elements of an act of taking or trespass such as will constitute a charge of possession are—

(*a*) some particular kind of act done in relation to the thing by the trespasser;

(*b*) an absence of consent by the previous possessor;

(*c*) probably also some mental state or intention on the part of the trespasser.

With respect to (*a*), in cases where the trespasser is a mere stranger, not previously in physical possession of the thing, the necessary act of taking is precisely defined by the law for the purposes of theft. See below, § 19. Where he is already in physical possession, as in the case of a servant, it is conceived that any act which is the commencement of misappropriation suffices, but there is little or no authority on the subject (see further, § 19). Where a person is already in possession it has been seen that he cannot 'take' except in certain very exceptional cases.

With respect to (*b*), it needs only to be observed here that an obtaining by threat or other compulsion, or an obtaining on consent gained by fraud, or an obtaining by consent of a person who had no authority to give the consent, may be a taking or trespass. As to the difficult case of delivery of one thing by mistake for another see below, § 16, and as to consent gained by fraud see further, § 19. For a curious instance of fraud practised through a machine see Reg. *v.* Hands, 1887, 16 Cox, 188, where the prisoners obtained cigarettes from an automatic box by dropping in metal discs instead of pennies.

With respect to (*c*), there is the greatest doubt and difficulty. It would seem that the particular act done must be a voluntary act, but that there need not be any knowledge that the thing taken is the property or in the possession of another person (see Riley's case, *inf.*, and further *inf.*, § 16, as to mistake).

It is a general rule that a possession acquired by trespass is

a continuing trespass from moment to moment so long as the possession lasts. From this doctrine flow the most important consequences in the law of theft. Without this doctrine, and without the converse rule that a possession obtained without trespass continues non-trespassory, the cases on trespass and theft would be a chaos of particular decisions bearing no certain relation to each other.

NOTE.—The principal modern authority is Riley's case, 1853, Dears. 149. There the accused in driving his own tweuty-nine black-faced lambs out of a field early in a thick and rainy morning on the 1st October drove with them a white-faced lamb of the prosecutor, and when upon his offering his lambs for sale *as twenty-nine lambs* four days afterwards the purchaser observed that there were thirty, the accused sold the prosecutor's lamb with the rest. (He afterwards made false statements on several points.) The jury found that at the time of leaving the field prisoner did not know the lamb was in his flock, but that he was guilty of felony at the time it was pointed out to him. The case was first considered without argument by Jervis C.J., Coleridge J., Platt B., Williams J. and Martin B., who thought the conviction right. It was afterwards argued for the prisoner before the Judges (*Pollock C.B., Parke B., Williams J., Talfourd J., Crompton J.*), who did not call upon the counsel for the Crown.

Williams (*J.*). 'Suppose no *animus furandi* and that a civil action is brought for the trespass. The whole would form a continuous transaction. In the first instance take it that here there is no *animus furandi* when the lamb is taken from the field; but the trespass continues, and then there is the *animus furandi*; does it not then become felony?'

Pollock (*C.B.*). 'The difficulty in the case is, when can it be said that there is a taking'?

Parke (*B.*). 'The prisoner must have driven them away. In doing so he committed a trespass; which began when he left the field. The trespass continued all along, like a trespass begun in one county and continued in another. The technical words of the indictment for stealing cattle are *cepit, effugavit, abduxit.* When the thirty lambs left the field the prisoner must have driven them away; then he became a trespasser, though not a felonious trespasser; but when he afterwards sold the lamb the

trespass became a felony. . . . The taking being a trespass, when there is the *animus furandi* it becomes a felony.'

Pollock (*C.B.*). 'There is a great difference between the case of finding an article, and taking an article out of the possession of the true owner. In the case of taking an umbrella by mistake, if there be an *animus furandi* the taking becomes a felony. . . . When he sold it (the lamb), the act of selling was more than a mere movement of the mind. It was a felony.'

Pollock (*C.B.*). 'We are all of opinion that the conviction in this case is right. The distinction between this and the case of Reg. *v.* Thristle, 1849, 1 Den. 502, is this. If a man rightfully gets possession of an article without any intention at the time of stealing it, and afterwards misappropriates it, the law holds it not to be a felony. . . . In all these cases' (i. e. cases of 'pure finding' of a lost thing &c., *inf.* § 13) 'the original possession was not wrongful. But in the case now before the court, the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this: if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animo furandi*, it is larceny.'

Parke (*B.*). 'The original taking was not lawful. The prisoner being originally a trespasser he continued a trespasser all along, just as at common law, a trespass begun in one county continued in another, and, being a trespasser, the moment he took the lamb with a felonious intent he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a felonious trespass. Leigh's case (1800, 2 East, P. C. 694) was altogether a different case from the present. There the original possession was lawful, with the assent of the true owner, the prisoner rendering charitable assistance in preserving the goods from fire. When she first took the goods into her possession, she was not a trespasser.'

Williams J., *Talfourd J.*, and *Crompton J.* concurred.

(See further as to continuing trespass, 1809, Winterbourne *v.* Morgan, 11 East, 395; 1840, Ladd *v.* Thomas, 12 A. & E.

117; 1836, Evans *v.* Elliott, 5 A. & E. 142; 1852, Ash *v.* Dawnay, 8 Exch. 237.)

It will be seen that there is in this case some ambiguity as to whether the mere formation of an *animus furandi* by a person during possession acquired by an innocent trespass amounts to theft without some act of misappropriation. In theory it would seem that it does: but the question can hardly become one of practical importance, since in such a case the existence of the *animus furandi* could not be proved except by proving some act of misappropriation.

This case is cited in Reg. *v.* Ashwell, 1885, 16 Q. B. D. 190; 16 Cox, 1; by Lord Coleridge C.J. See *inf.* § 16.

A taking of possession under authority of law, as for instance by a Sheriff (as distinguished from possession vested by effect of law without any taking—*sup.* § 5), is a taking or trespass in fact though justified by the authority so long as the authority avails; and like a wrongful trespass it is treated as continuing from moment to moment. From these considerations two important consequences result. The first is that if the possession continues after the authority has ceased, it is thenceforth regarded as trespassory, with the result that a subsequent misappropriation *animo furandi* will be theft. The second is that if the authority is abused the authority may be treated as never having existed, and the possession as having been trespassory from the beginning (Six Carpenters' Case, 8 Rep. 146 *a*; 1 Sm. L. C. 144). This doctrine of trespass *ab initio* does not apply to abuse of a bailment or other private consent or authority. It must be distinguished from the acquisition by relation of a right to sue for an act which was a trespass when done but for which the party could not then sue (see above, § 5).

In some cases of taking by authority of law it is held that the possession is not changed. See below, § 15, as to distress.

§ 8. *Right to Possession.*

Right to possession (sometimes called constructive 'possession,' sometimes also called 'possession') is one of the constituent elements of the complete right of property; though it may be in a different person from the general owner, and though a person's right of property may continue during a temporary suspension of his right to possession, as in the case of a bailment for a term. Being a part of the right of property it is said not to be lost, even by a general abandonment of the thing.[1]

In some cases an owner of a thing who has never yet acquired the possession of it, or an owner who has parted with the possession, is nevertheless, in virtue of his right to possession, entitled to sue or prosecute a stranger who takes the thing; and it is of much practical and theoretical importance to discover in what cases a mere right to possession suffices for this purpose, and on what ground. There are expressions in some cases and in text-books[2] to the effect that a person with a right to possession of a thing, though without possession, can always maintain trespass, as (except where the right is suspended, e.g. in a bailment for a term—1796, Gordon *v.* Harper, 7 T. R. 9) he certainly can trover or detinue, against a stranger who takes the thing: and if this is correct the gist of the action of trespass must be the wrong to the right to possession. But it is difficult to see how there can be a forcible and immediate injury *vi et armis* to a mere legal right; and there are some parts of the law of trespass and theft which are inexplicable on such a view. It is submitted that the correct view is that right to possession, as a title for maintaining trespass, is merely a right in one person to sue for a trespass done to another's possession; that this right exists whenever the person whose actual possession was violated held as servant, agent, or bailee under a revocable bailment for or under or on behalf of the person having the right to possession; and that it does

[1] Vin. Abr. Waife, 409. [2] See Wms. S. 47 *b*.

not exist for the purposes of trespass and theft, as distinguished from trover and detinue, when the person whose possession was violated was not in any way a delegate or representative of the person having the right to possession, nor when the thing was not in any possession at all. This view explains some cases which are not otherwise explicable, and the cases which appear at first sight inconsistent with it are capable of explanation in a manner which confirms it.

Right to possession (unlike possession) is not exclusive, but may exist in different persons at the same time against a third, in virtue of different proprietary rights, though as between themselves one must be subordinate to the other: for instance, in an owner and his bailee at will; which shows that it is rather a proprietary right or interest, or an incident to property, than of the nature of possession.

A person who has a complete present right to the possession of a thing cannot of course commit trespass or theft in respect of it, but the fact that a person has a suspended right to possession of a thing does not necessarily render him incapable of committing trespass or theft in relation to it.

NOTE.—The rule which makes most strongly in favour of the view above suggested is that which is discussed (*inf.* § 10), as to the inability of an owner to maintain trespass or theft against a third person taking by delivery from a second person who acquired his possession by trespass from the owner;—a rule which is the foundation of the law of receiving.

Again, if a mere wrong to right to possession were sufficient for trespass and theft, it is difficult to see why a conversion by a bailee or an embezzlement by a servant should not have been a trespass and theft. The very substance of a conversion is a wrong to a right to possession, and if that were enough, the action of trover need never have been invented, and detinue would have become superfluous.

The cases which seem to make the other way are:—

1. The rights of the ordinary, and of executors and administrators (*sup.* § 5). But in fact these cases strongly support the view suggested, for it never was doubted that the executor or administrator had a right to possession by relation or that trover

lay, and the only question was whether trespass lay; and if a wrong to right to possession had been sufficient, that question could never have arisen. The effect of the decisions that not only trover but also trespass lies for the executor or administrator is that the possession of the deceased is continued to the executor or administrator; and so it is expressly laid down in Rolle (Tresp. T.): 'An administrator shall have action of trespass for trespass done to the goods of the testator after his death before the administration granted to him; for the relation may settle the possession *ab initio*, so that he may have the action': citing Year-b 36 Hen. VI. 8, set out in Tharpe *v.* Stallwood, 1843, 5 M. & G. at p. 770.

2. The case of an alienee of goods (*inf.* § 14) who may have trespass against strangers before possession acquired. But here the alienor or his agent holds the goods for the alienee, and therefore this is merely an instance of the suggested rule.

3. The case of wreck, for taking which trespass lies for the Crown (or holder of a franchise) before actual seizure (see Bailiffs of Dunwich *v.* Sterry, 1 B. & Ad. 831). But here again the apparent exception is really a strong instance of the rule, for trespass general *de bonis asportatis* did not lie for taking wreck, but only a special writ which is given in the register, and it now lies only because the special writs are merged in the general action of trespass. And so notice was taken in the earliest times that theft could not be committed of wreck, treasure trove, and waif, before seizure (Year-b. of 1348, 22 Ass. p. 107. pl. 99). In truth, if a wrong to right to possession had been of itself sufficient, the one simple rule would have embraced even at common law not only common theft but also embezzlement and misappropriation by bailees (except perhaps in cases of bailment for a term) and receiving.

§ 9. *Apparent Possession.*

Merely physical possession, as such, involves no rights, but it is one of the most general and long-settled rules of law that a person who is in apparent possession has all the rights remedies and immunities of a possessor as against strangers. He cannot be disturbed except by another person who is able to show a present right to the possession. More than this, he has as against a mere stranger and wrongdoer the same remedies as if he had the right to the possession, and he

can as against the stranger maintain trover or detinue as well as trespass or theft, and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title, or even by showing that it was wrongful, unless he further shows not only that a third person was entitled to the possession but that he the stranger acted with the authority of the third person. If however a mere actual possession of a thing acquired wrongfully or existing without right is once lawfully devested, and the thing comes lawfully into the possession of another person, the former possessor cannot recover it from him, for wherever a plaintiff has to rely on right to possession as distinguished from actual possession he must prove his right or the defendant may disprove it.

If a plaintiff whose possession has been violated seeks his remedy by an action of trespass, it seems to be settled that the defendant cannot set up the right of the third person without showing either an authority from the third person before or at the time of the trespass, or that the defendant at the time of the trespass intended to act on behalf of a third person who could himself have then lawfully done the act, and that the third person has ratified the act so done on his behalf—according to the ordinary rules of law as to ratification. And even if the plaintiff whose possession has been violated waived the trespass and brought an action of trover or detinue, it seems not to be clear whether it was sufficient for the defendant to show that a third person was entitled as against the plaintiff and authorised the detention or conversion, though the taking was without his authority and not done on his behalf. (See 1842, Leake *v.* Loveday, 4 M. & G. 972; 1851, Newnham *v.* Stevenson, 10 C. B. at 724, and Bourne *v.* Fosbrooke, in note *inf.*)

Note.—1646. Johnson *v.* Barret, Aleyn, 10 (approved in 1825. Harper *v.* Charlesworth, 4 B. & C. 574). 'In an action of trespass for carrying away soil and timber, &c. Upon trial at the bar the question arose upon a key (quay) that was erected in Yarmouth,

and destroyed by the Bailiffs and Burgesses of the town; and *Roll* said, that if it were erected between the high water mark and low water mark then it belonged to him that had the land adjoining. But *Hale* did earnestly affirm the contrary; viz. that it belonged to the King of common right. But it was clearly agreed, that if it were erected beneath the low water mark, then it belonged to the King. It was likewise agreed, that an intruder upon the King's possession might have an action of trespass against a stranger; but he could not make a lease whereupon the lessee might maintain an *ejectione firmæ*.'

1721. Armory *v.* Delamirie, 1 Strange, 505. 'The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled (by Pratt L.C.J.):—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.'

1740. Woadson *v.* Nawton, 2 Strange, 777. 'Trespass for taking and dispersing a load of fern ashes: the defendant pleaded, that he was an occupier of land in A. the tenants whereof had right of common and cutting fern on the *locus in quo*; and that the plaintiff wrongfully came and cut fern and burnt it, whereupon the defendant came and scattered it about, *prout ei bene licuit. Demurrer inde*; and *Strange pro def.* cited 1 Roll Abr. 405, pl. 5, that a commoner may justify taking the cattle of a stranger

damage feasant, or abate hedges; 9 Co. 112 b, 2 Mod. 65. And the difference is, where it is the act of the lord, and the act of a stranger; Lutw. 1240: Sti. 428.

'*Sed tota curia contra.* For if the plaintiff did him any damage, he has his action; but after the plaintiff had burnt the fern, and thereby converted it to his own use, the commoner has no right to come and disperse it. *Judicium pro quer.*'

1851. Bridges *v.* Hawkesworth, 21 L. J. Q. B. 75. Plaintiff went into defendant's shop to make a purchase and found on the floor a parcel which contained bank-notes and which had been dropped there by a person unknown. Plaintiff delivered the notes to defendant to keep for the owner. Defendant advertised without result. After three years plaintiff claimed the notes as his by the finding, and tendered the expenses of advertisement and an indemnity, and on refusal by defendant brought an action for the notes and recovered them. The Court (Patteson and Wightman JJ.) pointed out that the case might have been different if the notes had been left and found in a common inn, because an innkeeper has a 'special property' in the goods of his guests—i.e. becomes a bailee for the guest who leaves his things in the inn.

1856. Jeffries *v.* G. W. R. Co., 5 E. & B. 802; 25 L. J. Q. B. 107. J. bought wagons from a tradesman but allowed the tradesman to retain them and use them in his business. The tradesman committed an act of bankruptcy, and afterwards but before an adjudication J. got possession of the wagons. Afterwards the bankrupt assigned the wagons to the defendants. They seized the wagons and J. brought an action of trover against them. They set up that the wagons were at the time of the seizure the property of the assignees in the bankruptcy, but they showed no authority from those assignees to set up such right. *Held*, that such a defence could not be set up in justification of the taking from J.'s possession. Wightman J. said, 'The proposed defence . . . was that neither the plaintiff nor the defendants had any title to the goods. But the plaintiff was in possession; and as against a wrongdoer possession is title.'

1863. Buckley *v.* Gross, 3 B. & S. 566; 32 L. J. Q. B. 129. During a conflagration streams of melted tallow ran from several warehouses through sewers into the Thames, becoming indistinguishably mixed. Plaintiff got possession of some of the tallow, which was taken from him by the police (under 2 & 3 Vict. c. 71. s. 29), who sold it to the defendants, against whom the plaintiff brought trover. *Held*, that the plaintiff could not recover, because his possession had been

lawfully devested and therefore he had not the rights of a person in actual possession whose possession is violated. Some of the judges further thought that notwithstanding the *confusio* the possession of the warehousemen had never been devested, and that they had the possession in common.

1865. Bourne *v.* Fosbrooke, 18 C. B. N. S. 515; 34 L. J. C. P. 164. A married woman deserted by her husband and living as housekeeper in F.'s house with her infant daughter, gave the daughter a watch and other things. The daughter gave some of the things to F. to keep for her and placed the rest in her own boxes in F.'s house. The mother dying, her husband at once claimed her effects but was refused by F. and made no further claim. The daughter continued to live in F.'s house as her home and was by him sent to school, coming back to him for her holidays. F. died while she was absent at school. He had labelled some of her things with her name. She brought detinue and trover for the things against F.'s executor, who defended on the ground that the mother being married could not give any title to the things. The jury found that there had been a transfer of the possession of the things from the mother to the daughter. *Held*, that although the daughter could not have kept or claimed the things as against the father, she could claim them against the executor who took them from her possession without title in himself, and that the things were in her possession. (In strictness the things handed to F. to be taken care of were bailed to him at the will of the daughter, who was therefore in a position to treat his possession as hers; *sup.* § 8.)

§ 10. *Delivery by or taking from a Trespasser.*

Where the second person being a mere trespasser *delivers* the thing to a third, it seems that the third person's acquisition of the possession is not of itself even for civil purposes trespassory against the owner, because the owner's possession had already ceased to exist, though the third person may in some cases by knowing of and assenting to the second person's trespass make himself civilly liable in trespass to the owner:[1] and for the purposes of the criminal law of theft it

[1] See in Badkin *v.* Powell, 1776, Cowp. 476; and cp. Yorke *v.* Greenaugh, 1703, Ld. Ray. 866. And appeal and probably detinue and trover lay against the third person in such a case. See Year-b. 13 E. IV. p. 3. pl. 7, and 4 H. VII. p. 5. pl. 1.

is proved by the existence of the distinct crime of receiving that even such guilty knowledge and consent will not in any case make him liable as a trespasser.[1] This rule will not extend to protect a person who by mere licence of a person not authorised to give the licence takes a thing while it remains legally in the possession of the owner, as where a shop-servant not authorised to part with goods assents to the taking of a thing out of the shop.

It seems also on the old authorities (see note 1, *inf.*) that a third person who *takes* a thing from the second who was a mere trespasser is not thereby a trespasser against the original possessor,[2] and cannot either by the taking or by any subsequent appropriation be guilty of theft against him.

The only authority directly opposed to this view appears to be an expression of Gould J. in Wilkins' case,[3] that 'it is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such person for the theft and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the owner.' But as to this statement it is to be observed :—

1. That the statement is merely a dictum unnecessary for the decision of the case, which was a simple instance of stealing from a servant by deceit;

2. That no authority is given for the statement, though the other parts of the same judgment are fortified by a full citation of authorities;

3. That it seems to be merely a generalisation of an exception which is mentioned by Hale and which is considered below, note 2;

[1] See esp. King, 1817, R. & R. 332; M^cMakin, 1808, R. & R. 333 *n.*, Kelly, 1820, *ib.* 421; cp. Dyer, 1801, 2 East, P. C., 767, and Attwell, *ib.* 768.

[2] See esp. in the notes *inf.*; Year-b. 21 E. IV. p. 74. pl. 6, and 4 H. VII. p. 5. pl. 1, and 2 E. IV. p. 4 *sub fin.*, per Nedham J.; and see Day's case, Owen, 70.

[3] 1789, in 1 Leach at 522.

4. That this case occurred at a time when attention was beginning to be directed to the effect of fraud in obtaining a bailment, and when the ground on which a person obtaining a bailment *animo furandi* is guilty of theft had not yet been fully examined but was sometimes said to be (not, as now, that such obtaining is of itself a trespass; *inf.* § 19), but that the fraud prevented any devesting of the owner's possession.

And on the whole it is conceived that, subject perhaps to the exception next to be mentioned, the rule established by the early authorities has not been overturned, at least for the purposes of the criminal law, and indeed that no other rule would be consistent with the general legal conceptions of possession and trespass, for *ex hypothesi* the original possessor is out of possession, and it would be a strong fiction to hold that he has a right to treat a violation of an adverse taker's possession as if it were a wrong done to possession held on his own behalf.

The possible exception above referred to is suggested by Hale (i. 507): 'But if A. steals the horse of B. and after C. steals the same horse from A., in this case C. is a felon both as to A. and as to B., for by the theft by A., B. lost not the property, nor in law, the possession of his horse or other goods, and therefore in that case C. may be *appealed* of felony by B., or indicted of felony *quod cepit et asportavit* the horse of B.; 4 H.VII. 5 *b*, 13 E. IV. 3 *b*.' But even this exception seems not to be established by the authorities cited, for, as will be seen, they both refer not to indictment but to appeal, which depended, like detinue, on a proprietary right to possession, and in both of them the distinction is expressly made between appeal on the one hand and trespass or indictment on the other.

See as to delivery by or taking from a bailee, *inf.* § 12.

NOTE 1.—Year-b. 1462, 2 E. IV. p. 4. 'Trespass *de parco fracto* on statute. Plea that the parker requested the defendant to kill the two does for him, &c.

Nedham. The parker had no power to do this. How then could he give authority to another to do it?

Moile. The plea is good; for suppose a bailiff gives licence to a man to occupy the land with his beasts and the lord brings trespass against the man, may he not show his licence and justify well for this cause? As there, so here.

Choke to the contrary. There is great difference between these cases, for the bailiff by virtue of his office had power to let the land to others at his will, and for the same reason he could give licence or make request to others to put in their beasts, and moreover he is accountable to the lord so that the lord shall have his recourse against him; but here the parker had but the custody of the beasts to keep them, to wit from wrong-doers. But, Sir, I will put a case like the case here. If I have a shepherd that requests or licences one to kill him a sheep, shall I not have trespass? yes certes, and so therefore in the case at bar.

Laicon to the contrary. The plea is good, for if I come to a tavern and the taverner gives me a pot of wine, or if I come to the mercery here and the servant gives me a piece of linen, shall the masters have any action against me? No certes, nor here any more.

Choke to *Laicon.* There is difference between all your cases and the case at the bar, for in your case of mercery the servant had power to sell the cloth and to change or utter it to others at his discretion, but the parker had no interest by his office, only the bare custody of the park: but in your own case, if a servant in Chepe (not being a servant who has power given him by his master to sell) gives the cloth, I say the master shall have trespass against a taker by the gift of such servant, and, Sir, in the case at the bar the parker had no power to kill any beast; how then in any way can he give licence to others to do so? I say he cannot. And if the case were that I bail goods to F. to keep for my use, and F. gives them to G., I agree that I shall not have trespass against G., for he had lawful possession by reason of the bailment, and by his gift the property is vested in the donee, and so there I shall have good remedy against F. by writ of detinue.

Moile. So I think you have case against the parker.

Choke. No, Sir, that cannot be, for at common law I shall have no remedy for his killing the beasts but only generally a writ of trespass *qu. cl. fr.*, for breaking the close and entering on the soil, wherefore if I would have a remedy I must found on the statute, and that I cannot do against the parker.

Littleton. In my understanding the plea is not good, and, to prove that an action may lie against one where he comes at the first by lawful means to a man's goods or enters on his land, suppose I distrain lawfully for my rent and then wilfully kill a beast, I say the termor shall have writ of trespass general against me for the beast and also for the entry on the soil. Suppose I bail you my gown and you burn it, I shall have writ of trespass on the case against you; and in like manner of my bailiff who had custody of my beasts, I shall have trespass on my case.

Moile. That last case I deny, for he is charged to account to me, and so he had power to sell or give them to another, and the vendee may kill them, but if he had the custody of the ox but for drawing in the plough, then it will be otherwise; and if a bailiff make a lease for rent the lord shall have writ of debt: and if one chase in a park and kill no wild animal no action lies.

Nedham. There is a difference where a man who had guard of my goods gives them to another, and where a stranger takes them out of the possession of those who guard them and gives them to another, for in the first case the property was in me, and so he who took them by virtue of such gift of one who had no property in them shall be adjudged a trespasser to me, but in the other case the property (i. e. possession) was out of me at the time of the gift and in the donor.

Upon writ of trespass against the donee it was maintained by some apprentices that if livery were made by the vendor (qu. donor?) then no action, and if no livery, then action.'

(*Quære* whether any of these, unless Nedham, were judges at this time.)

Year-b. 1481, 21 E. IV. p. 74. pl. 6. *Brian* (*C.J.*) and his companions told a jury 'that if one take my horse with force and arms and give it to Suliard, or Suliard take with force from him who took it from me, that in this case Suliard is not a trespasser to me nor shall I have action of trespass against him for this horse, for that the possession was out of me by the same taking, therefore he was not trespasser to me, and if the verity be so, you will find the defendant not guilty.'

(See as to the high authority of Brian C.J. and 'his companions' Choke J. and Littleton J. in Blackburn on Sale, 2nd ed. p. 265.)

NOTE 2.—Hale's authorities are differently reported in the Year-b.

and in Fitzh., and it seems worth while to cite the material parts of each reporter (the most material variances are italicised).

13 E. IV. 3 *b* runs in the Year-book as follows:—

'Note: that on indictment of felony of A.'s goods feloniously taken, the defendant pleads not guilty, and the jury find that one John at Stile feloniously took the goods of the said A., and again the defendant here took my goods out of his possession, but not feloniously; and it was held if one take my goods *feloniously* and another take them *feloniously* from him I may have appeal of the second taking, for by the first taking *the property* was not out of me, for a felon does not claim (i.e. acquire) *property*. And it was moved if this verdict will serve for an indictment against John at Stile. And it was held that it would not, for here the jury is not charged to find who did the felony.'

But in Fitzh. Cor. pl. 39, the same case is thus stated:—

'Note: Littleton says that it was held for clear law if S. take my goods from me and another take them from him I may have appeal against the second person, for by the first taking the property was not out of me *nor the possession*, for felony does not claim property. Otherwise is it of trespass,' (&c. as in the Year-book.) (N.B.—Here 'possession' seems to mean right to possession.)

4 H. VII. 5 *b* is as follows in the Year-book:—

Hussey said and Fairfax agreed that 'appeal is for recovery of one's goods and affirms property continually in the party, but it is otherwise of trespass, for that is not for recovery of his goods but for damages for the goods. And I have learnt that if one take my goods and another take the goods from him I shall have appeal against the second felon; but it is otherwise of trespass,' (&c. to the same effect as below):—

But in Fitzh. Cor. 62, is as follows:—

Hussey said that 'he had learnt it for law if a man take my goods and another take them from him I shall have appeal against the two: which Fairfax conceded, but said it was otherwise of trespass; and notwithstanding that appeal lies in each county (i.e. the county where the goods were taken and that into which they were carried) still he cannot be indicted except where the taking was, for indictment is not for re-having the goods, and that made the difference between indictments and appeals.'

It seems that these cases are authorities rather for saying that trespass and theft do not lie against the third person than for saying that they lie; and that at any rate these cases are no authorities

for saying that trespass or theft lies against the third person unless where the second person took as a thief.

§ 11. *Summary.*

The following propositions with respect to possession of goods appear to be generally correct, subject to exceptions or qualifications in particular cases.

(*a*) When a person is once in possession of a thing, the possession cannot ordinarily pass from him during his life except in one of two modes, viz. (i) by an intentional transfer of it by him directly to another person (delivery or bailment), or (ii) by justifiable or wrongful trespass, i. e. by a taking without his consent to transfer the possession : and conversely a person cannot ordinarily acquire possession of a thing which is already in another's possession except by one of these two modes.

(*b*) If a person acquires possession without trespass in fact (i. e. by delivery or bailment), a misappropriation or misuse of the thing during that possession cannot ordinarily be or become a wrong either civil or criminal to the possession of the former possessor, for the simple reason that his possession no longer exists at the time when the alleged wrong is done. On the other hand, if a person acquires possession by trespass without authority of law, having at the time an *animus furandi*, the trespass is also a theft. If *animus furandi* be absent at the first, the taking, whether with or without knowledge that another person's possession is violated, is a trespass, and the possession thereby acquired is a continuing trespass against the possession of the former possessor and is actionable from moment to moment, and if an *animus furandi* supervenes and is manifested by an act of appropriation, there is an act of theft (*inf.* § 19).

If the trespass was under authority of law, it is protected so long as the authority is followed, but the protection ceases when the authority ceases or is not followed, and if the authority is actively abused (§§ 7 and 15) the trespasser's acts

from their commencement are regarded as if the authority had never existed.

(*c*) A person physically or apparently in possession is deemed to be in possession until it is shown that another person is in point of law in possession: and the apparent possession is deemed a rightful one as against strangers or wrongdoers.

(*d*) A third person obtaining possession by delivery from a second who has acquired by trespass from a first does not commit a trespass against the possession of the first person (§ 10), but in some cases the original possessor may sue or prosecute for the trespass as done to the possession of one who held it as his agent or representative (§ 8).

By reason of the proposition (*b*) misappropriation by a bailee was not theft:—and hence the necessity for the statutory enactments making it theft—now 24 & 25 Vict. c. 96. s. 3.

By reason of the propositions (*a*) and (*b*) combined, a servant who innocently received a thing for his master from a third party and misappropriated it before it had been in any way reduced into the master's possession was not guilty of theft from his master; nor, if the third party meant wholly to part with the possession, was the servant guilty of theft against him:—and hence the necessity for the statutory felony of embezzlement—now 24 & 25 Vict. c. 96. s. 68, &c.

By reason of proposition (*d*) receivers were not punishable at common law unless for harbouring and assisting the thief (3 Chitty, Cr. L. 951):—and hence the necessity for the statutory felony of receiving &c.—now 24 & 25 Vict. c. 96. s. 91, &c.

It may here be added that the necessity for the statutory misdemeanor of obtaining by false pretences (now 24 & 25 Vict. c. 96. s. 88, &c.) arose from a difficulty with respect to *animus furandi*. When a person is induced by false pretences to contract to part absolutely with the right of property in

the thing, and he afterwards in pursuance of that agreement gives up the possession, it was held that as the right of property had been changed by contract, though upon a fraud which made the agreement defeasible, there was not at the time of the change of possession an ownership in the former proprietor, and consequently there could not then be an intent wrongfully to deprive him of the benefit of ownership. As to this see further, *inf.* § 19.

1. Besides the legal remedies which are the subject of the text, the possessor is entitled to defend his possession by force against wrongdoers: but it seems not to have been considered whether if a thing is wrongfully taken from his possession he can justify the use of force for the purpose of re-taking it unless he can show that he had the property in the thing and the immediate right to the possession of it, in which case he may retake the thing by force even from an innocent third party into whose possession it has come (Blades *v.* Higgs, 1865, 11 H. L. Ca. 621).

The consideration of the limit of the force which may be used in such cases belongs to another division of the criminal law, but it may be stated generally that according to the old authorities the force must not, unless in case of necessity for preventing a felony or preventing the escape of a felon, extend to wounding or mayhem or death.

2. These chapters were prepared in 1873 as part of the work incident to the preparation of a Criminal Code for the Crown Colonies. Hence the illustrations are mostly drawn from cases decided before that date. The more important recent authorities have been added, especially Ashwell's case (*inf.* § 16). It has not been thought desirable to abandon the use of the expressions referring to actions of trespass, trover or detinue, notwithstanding that the separate forms of action no longer exist.

The principal object of the attempt to reduce the law of possession, trespass and theft into a systematic form was to discover whether it would be practicable to reduce to one the crimes of theft, embezzlement, larceny by bailees, embezzlement, receiving, and obtaining by false pretences, and so to get rid of the web of technicalities in which that which ought to be especially simple is now involved. The difficulties will more clearly appear in the following sections, but it is conceived that they are more apparent than real.

CHAPTER II.

Particular Cases.

§ 12. *Bailments.*

(i) *What is a Bailment.*

THERE seems to be no reason to doubt that in general the same thing is a bailment for the purposes of the criminal law, both common and statutory, as in civil matters.[1] There are however some cases which require special mention :—

It seems that those persons who are designated by Story 'quasi-bailees for hire,' viz. captors, revenue officers who have made a seizure, prize agents, officers of courts, and salvors, are not bailees for the purposes either of the common or of the statutory criminal law of England unless by virtue of some agreement.[2]

Although ordinarily a contract is an essential element of a bailment,[3] yet it was held on the statute of 1861 that a married woman, notwithstanding her then incapacity to contract, might be a bailee within the statute.[4] So an infant may commit the statutory offence of larceny as a bailee where the goods have been delivered to him under an agreement made void by the Infants Relief Act.[5]

A doubt may arise whether there can be a bailment when the thing is delivered to be used only in the immediate presence of the deliveror. In one case[6] it seems to have been thought that a possession might arise under such circum-

[1] Hassall, 1861 ; 30 L. J. M. C. 175 ; L. & C. 58.

[2] See as to such persons *inf.*, § 13, under the heads of loss and finding.

[3] See esp. Story, ed. 1870, § 2. n. 4 ; McDonald's case, *inf.*

[4] 24 & 25 Vict. c. 96. s. 3; Robson, 1861, 31 L. J. M. C. 22 ; 9 Cox, 29 ; L. & C. 93 ; overturning Denmour, 1861, 8 Cox, 440.

[5] McDonald, 1885, 15 Q. B. D. 323; a case which is remarkable as an instance of revival of the ancient practice of assembling the judges to consider criminal cases without statutory authority.

[6] Frampton, 1846, 2 C. & K. 47.

stances, though another ground for the judgment (viz. absence of value in the thing) is suggested in the report. But it would seem[1] that a bailment or possession ought not to be held to arise in such a case in the absence of evidence of an intention by the deliveror to part with possession by parting with control.

As a deposit of coins not to be returned or applied *in specie* is for civil purposes not a bailment but a trust or debt, so neither is it a bailment within the statute.[2] But it will be otherwise if the specific moneys are to be applied or re-delivered,[3] as when they are enclosed in a bag or letter.[4]

As in civil matters it is not essential for a bailment that the bailor should ever have had possession independently of the possession of the bailee, so in criminal law a man may become the bailee of another either by attorning to him, or by receiving a thing for him in pursuance of an undertaking to that effect.[5]

Chancellor Kent in his 'Commentaries'[6] questions Story's doctrine that a delivery of a thing not to be kept and returned but to be kept or conveyed and delivered for the purpose or by way of absolute alienation, as in the case of a factor for sale, can be a bailment (for civil purposes). But Story[7] has vindicated his doctrine; and it seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the

[1] See esp. Rodway, 1841, 9 C. & P. 784; Smith, 1852, 2 Den. 449; and cp. Hart, 1833, 6 C. & P. 106; and Phipoe, 1795, 2 Leach, 673; and Aickles, 1784, 2 East, P. C. 675.

[2] Hassall, 1861, *ubi sup.*; Hoare, 1859, 1 F. & F. 647; Garrett, 1860, 8 Cox, 368; cp. Pott *v.* Cleg, 1847, 16 M. & W. 321; and Tassell *v.* Cooper, 1850, 9 C. B. 509.

[3] Cp. Brown, 1856, Dears. 616.

[4] Jones, 1835, 7 C. & P. 151; Jenkins, 1839, 9 C. & P. 38; cp. Holliday *v.* Hicks, Cro. Eliz. 638, 746; and see below in this paragraph.

[5] Bunkall, 1864, 33 L. J. M. C. 75; and cp. Hoare, 1859, 1 F. & F. 647; and Garrett, 1860, 8 Cox, 368; Banks, 1884, 15 Cox, 450 (sed qu. this case). And cp. further as to constructive bailments generally:—Moore *v.* Wilson, 1787, 1. T. R. 659; Dawes *v.* Peck, 1799, 8 T. R. 330; Dutton *v.* Solomonson, 1803, 3 B. & P. 582; Sargent *v.* Morris, 1820, 3 B. & A. 277; Dunlop *v.* Lambert, 1838, 6 Cl. & F. 600.

[6] Vol. ii. sect. xl. p. 559, *n. a.*

[7] Bailments, ed. 1870, § 2.

thing which is bailed to him, any more than a servant ceases to hold as a servant merely because he is directed to deliver the thing to a vendee. And indeed this seems to be the very ground of the decision in Walsh's case and the motive of the Act as to criminal conversion by agents which was passed in consequence of that decision.[1] A contrary decision[2] proceeded on the particular language of one of the old acts against fraudulent bailees of a particular kind. It must indeed be admitted that the continued existence side by side in the present statute books of a general enactment against fraudulent bailees and of a particular enactment against fraudulent agents[3] affords a *prima facie* argument against the view here adopted. But it is conceived that this is only one illustration of a very general occasion of redundancy in our statutes, namely, that old acts against particular forms of a mischief are commonly allowed to stand by the side of later acts comprehending those particular forms under a general enactment.

A broker seems to differ from other agents only in so far as it may at any particular time be indeterminate for what principal he holds goods or documents of title, or, in particular cases, whether he has possession of them at all or whether he does not in fact hold them in his own right.

In two cases,[4] it seems to have been ruled that a person who not being nor acting as a servant receives money from its owner upon an undertaking to pay it to a third person according to the directions of the deliveror and subsequently appropriates it, is guilty of theft at common law (i.e. is not a bailee). But it must be taken that in those cases the undertaking was to pay over or apply the specific coins, since otherwise the accused persons (not being servants) were mere debtors and could not have been guilty of theft; and that being so, it would seem

[1] Compare also Williams *v.* Millington, 1788, I. H. Bl. at p. 85, where Heath J. says that an auctioneer who has goods to sell either on his own or on his principal's premises may maintain trespass and theft as a bailee.

[2] Prince, 1827, 2 C. & P. 517.

[3] Larceny Act, 1861, s. 75 &c.

[4] Goode, 1842, C. & M. 582, Patteson J., and Smith, 1844, 1 C. & K. 423, Coleridge J.

that they were bailees in the same way as any other agents or factors. And so it seems to have been ruled in the cases of Jones[1] and Jenkins[2] and held in that of Brown,[3] in the last two of which cases the question was whether bulk had been broken. The case of Goode is recognised by the C. C. C. R. in Cooke's case,[4] where however the Court seems to have thought it was decided on the ground that the accused was a servant. In the still later case of Christian[5] no difficulty seems to have been felt upon this point.

Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person. (See Reg. *v.* M^c^Donald, 1885, 15 Q. B. D. 323.)

Note.—See for further illustrations—Leigh's case, 1800, best reported in 1 Leach, 411, n. *a*, where a neighbour carried things from a fire with the knowledge of the owner and afterwards appropriated them, but the jury found that she did not originally intend to steal them, and she was held not guilty on the ground that she was in the position of a bailee (see in Riley's case, *sup.* § 7).

In Campbell's case, 1792, best reported in 2 Leach, 564, the prisoner was a lodger and he undertook to get change for a note for his landlady. He seems to have been a bailee of the note, but he was sentenced for simple theft. Probably it may have been thought that there was evidence of a constructive trespass by reason of an original *animus furandi*, or the bailment may not have been adverted to.

In Reeves' case, 5 Jur. 716, a person taking a watch from the pocket of a half-tipsy man who did not object, thinking the intention was friendly, was ruled to be in the position of a bailee.

[1] 1835, 7 C. & P. 151.
[2] 1839, 9 C. & P. 38.
[3] 1856, Dears. 616.
[4] 1871, L. R. 1 C. C. 295.
[5] 1873, L. R. 2 C. C. R. 94.

In Jones' case, 1835, 7 C. & P. 151, an acquaintance undertaking to post a letter was ruled to be a bailee.

In Jenkins' case, 1839, 9 C. and P. 38, a principal's servant receiving from the principal's agent a parcel of money to take to a carrier was ruled to be the agent's bailee of the parcel.

In Brown's case, 1856, Dears. 616, a stranger volunteered to carry money to pay a rate-collector. He was held guilty of larceny on the ground of constructive trespass by an original felonious intent (*inf.* § 19), but it seems to have been assumed that the moneys being to be specifically delivered, he was a bailee but for the fraud.

An officer of the Post Office seems not as such to be a bailee of letters or other things in his charge, but to be merely a custodian for (and in a position similar to that of a servant of) the sender.[1]

But a postman may, like any other servant, make himself a bailee in matters outside the proper course of his employment,[2] or by special agreement.

Even at common law it has been suggested that the crown may have a special property in letters on which the postage is unpaid (Howatt's case, 2 East, P. C. 604); and now by the Post Office Acts 'property' may be laid in the postmaster-general.

Questions were formerly common as to whether in particular circumstances a person who had received a thing from the owner held it as a servant or as a bailee. The point was one of importance until the passing of the statutes against fraudulent bailees, but now in the only cases in which the point can arise it is immaterial except for purposes of punishment, which may be more severe in the case of a servant.

Fraud may render possession obtained under colour of a bailment merely trespassory (*inf.* § 19).

[1] See Kay's case, 1857, 26 L. J. M. C. 119; Gardner, 1845, 1 C. & K. 628; Pearce, 1794, 2 East, P. C. 603. And see per Alderson B. in Watts' case in 2 Den. at p. 25.

[2] Glass's case, 1847, 1 Den. 215.

(ii) *Rights and duties as between bailor and bailee.*

It was once thought that in some forms of bailment the bailor's possession might continue even as against the bailee. But it has long been settled that as between the bailor and the bailee the bailee of a thing has such a distinct and exclusive possession, that he cannot by any appropriation however fraudulent be guilty at common law of theft of the thing from the bailor, but the bailor may, it is said, even be guilty of theft of his own goods from the bailee.[1] This rule was occasionally got over, firstly, by the doctrine that certain acts (severance, breaking bulk) done by a bailee determined his bailment and made his possession trespassory;[2] secondly, by the rule that subsequent misappropriation might be evidence of an original *animus furandi* such as to render the mere obtaining of the bailment an act of theft.[3]

But these evasions proved insufficient, and the legislature interfered after Walsh's case[4] to protect bailments of a certain class, and ultimately to render bailees generally liable to the penalties of theft in cases of fraudulent misappropriation; and now a bailor has against his bailee all the same protection (except as to severity of punishment) by the one remedy of a prosecution for theft which a master has against his servant by the combined laws of theft and embezzlement.

It may perhaps be doubted whether the old authorities to the effect that a bailor can steal from a bailee extend to cases where the bailee has not any special property for civil purposes as against the bailor, especially when the bailment is determinable at will. But the difficulty is not so much in finding a sufficient possession for the trespass as in finding a sufficient interest in the bailee to support an *animus furandi* in the bailor.

[1] See as to theft by a bailor from a bailee ancient authorities cited in 2 Russ. 283 *n.* and 13 Rep. 69, and Vin. Abr. Tresp. pp. 461, 455, 471; Bac. Abr. Tresp. p. 589; Trov. 685, 689; and *sup.* § 6, notes; and Webster, 1861, 31 L. J. M. C. 17; Wilkinson, 1821, R. & R. 470; Bramley, 1822, R. & R. 478.

[2] *Sup.* § 6, notes.

[3] See *inf.* § 19.

[4] 1812, R. & R. 215, 2 Leach, 1054; 4 Taunt. 258.

(iii) *Relation of bailee to strangers.*

A bailee has in general the same rights against strangers for the purposes of theft as a general owner. He has the possession, and (even in cases where he is not held to have a special property against the bailor for civil purposes) he has such an interest in his possession as constitutes a right to possession for criminal purposes, perhaps as against the bailor,[1] and certainly as against strangers.

(iv) *Relation of bailor to strangers.*

The remedies of the bailee are not always exclusive, for the bailor by reason of his right to possession may retain concurrently with him a sufficient right to maintain trespass and theft against strangers (*sup.* § 8). This seems to be the case wherever the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition which he may satisfy at will. But if the bailment is for a term certain (as in the case of goods let to the tenant of furnished lodgings) or determinable only after notice or after a default by the bailee or upon any other occurrence which does not depend on the will of the bailor, then until the term has expired or been determined or become determinable at will it seems that the bailor is excluded and cannot maintain either trespass or theft or trover even against a stranger.[2]

[1] See for old authorities as to the rights of bailees generally :—4 Inst. 293, 13 Rep. 69; 1 Hale, 513; 1 Hawk. 33, 47; 2 East, P. C., 652–3; Vin. Abr. Tresp. 454, 455, 471; Bac. Abr. Tresp. 644–5; Trov. 684.

[2] See as to this point, and especially as to the exception, Bac. Abr. Tresp. 654–5; Meeres, 1689, 1 Show. 50; Ward *v.* Macauley, 1791, 4 T. R. 489; Gordon *v.* Harper, 1796, 7 T. R. 9; Burton *v.* Hughes, 1824, 2 Bing. 173; Ferguson *v.* Cristall, 1829, 5 Bing. 305; Pain *v.* Whitaker, 1824, R. & M. 99; Bradley *v.* Copley, 1845, 1 C. B. 685; Bryant *v.* Wardell, 1848, 2 Exch. 479; Manders *v.* Williams, 1849, 4 Exch. 343 (where the effect of Bradley *v.* Copley seems not to be correctly stated); Fenn *v.* Bittleston, 1851, 7 Exch. 152; Brierly *v.* Kendall, 1852, 17 Q. B. 937; R. *v.* Belstead, 1820, R. & R. 411; R. *v.* Brunswick, 1824, 1 Moo. 26; Donald *v.* Suckling, 1866, L. R. 1 Q. B. 585. And observations by Bayley B. in 2 Russ. 289, which however require to be corrected by Bradley *v.* Copley, *ubi sup.*

(v) *Case where the thing is in transitu between owner and bailee.*

Thus far it has been assumed that the thing bailed has come to the possession of the bailee. But it may happen that instead of the thing being received by the bailee directly from the bailor or from the bailor's servant it has been received by the bailee's servant or some other intermediary for the bailee. Here all the difficulties occur which have to be considered hereafter (§ 14) in those cases as to alienation which have given rise to the special law of embezzlement, and those difficulties are here further enhanced by the complication that the bailor retains proprietary rights in respect of the thing. The questions are:—has the bailee's servant the possession as against his master, as in cases of alienation he has against the alienee his master? If yes, then do the statutes of embezzlement apply? Has the servant the possession as against the bailor? Is the intermediary, supposing him to be a carrier or other subordinate bailee, within the statute against conversion by bailees? Can the bailee maintain trespass and theft (as he can trover[1]) against a stranger who takes the thing from the servant or other intermediary? Can the servant maintain trespass and theft against a stranger who takes from him?

The questions as to the applicability of the statutes against conversion by bailees and embezzlement[2] must depend on their language, which in terms is wide enough to meet these cases, but was probably not adopted in contemplation of them.

On the other questions there seems to be no authority unless it be a case at assizes,[3] where (as the facts were assumed by the judge, Patteson J., in the absence of a

[1] Fowler *v.* Down, 1797, 1 B. & P. 44, per Eyre C.J., as to a factor. But see Bac. Tresp. p. 565.

[2] Larceny Act, 1861, ss. 3 and 68.

[3] Savage, 1831, 5 C. & P. 143.

material witness) a servant was sent by her mistress to a shop to get some shawls for the mistress to look at, and the servant obtained the shawls and on the way home appropriated them and was indicted for stealing them from the shopkeeper. The judge directed an acquittal, saying, 'At common law no indictment could have been maintained for larceny by the mistress against the prisoner if she had been her servant. *It must be assumed that she received the goods properly,* and that it afterwards entered into her mind to convert them to her own use. At that time, in whom was the possession of the goods?' Here it would seem that the mistress, and not the servant, was the bailee, for there was no contract with the servant, and the view taken by Patteson J. is that the servant had the possession just as much as if the transaction had been one of sale to the mistress, and for this reason could not steal the shawls. As between the servant and the mistress this view could hardly be questioned; and as between the servant and the bailor the servant could not commit trespass *vi et armis* or theft, for no one but herself had possession.

For the rest, there seems to be no reason to doubt that the servant (until the end of the transitus), or the intermediary, or the bailee, could maintain theft against strangers as in cases of alienation.

(vi) *Second, third or further removes from the owner through his bailee.*

In the cases above considered it has been assumed that the thing remains in the hands of the bailee. But the bailee may have aliened or sub-bailed or lost the thing or have been deprived of it by a third person, and again, the possession may have passed from the third person to another person in a fourth or any other degree of remoteness from the owner; and it remains to consider the distribution of rights and duties in respect of the thing in each of these cases.

If the bailee of a thing aliens it by authority, no special question arises, since the property in the thing duly passes to the alienee.

If the bailee of a thing sub-bails it by authority, there may be a difference according as it is intended that the bailee's bailment is to determine and the third person is to hold as the immediate bailee of the owner, in which case the third person really becomes a first bailee directly from the owner and the case passes back into a simple case of bailment, or that the first bailee is to retain (so to speak) a reversionary interest and there is no direct privity of contract between the third person and the owner,[1] in which case it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the sub-bailment.

If the bailee of a thing (on a revocable bailment) wrongfully aliens or sub-bails it to a third person, the possession of the third person may, as it seems, be trespassory or not as against the owner according to the somewhat fine distinction of whether he receives delivery of the thing from the bailee or takes the thing by license of the bailee; for a bailee has a sufficient proprietary right to give a third person the possession by delivery even as against the true owners,[2] whether or not the third person believes that the second has a right to deliver the thing; but it is said that he has no authority to consent to a third person's taking the thing. In this last case the bailee may be estopped by his own wrongful consent, but the bailor has his remedies unimpaired. If however the bailment was not revocable, it is doubtful whether the bailor can sue or prosecute at all (*sup.* § 8 and § 10).

NOTE.—(1) The principal authorities for the above distinction between a delivery by and a taking from a bailee are Year-b.

[1] Compare, as to the relation between a reversion, in the exact sense, in real property, and estates derived out of that reversion, Laird *v.* Briggs (1880), 16 Ch. D. 440, 447.

[2] Per Coke C.J. in Isaack *v.* Clark, 1615, *inf.* § 13, *note.*

21 H. VII. p. 3, *sup.* § 6, *note*,—where the correctness of the report is vouched by the dissent of Rede J.,—and 2 E. IV. p. 4, and cp. per Laicon J. in the Year-b. 1473, *sup.* § 6, *note*. The distinction is supported by the analogy of the rule as to connivance, stated *inf.* § 19.

For an instance where the sub-bailee to whom the first bailee had improperly delivered the thing was held not a trespasser, see Year-b. 16 H. VII. 2 *b.* 7. There the bailor was vendee and the bailee was vendor of the thing, which after sale was left with the vendor who sub-bailed it.

(2) In Mennie *v.* Blake, 1856, 6 E. & B. 842, 25 L. J. Q. B. 399, it was held that the possessory remedy of replevin did not lie for a bailor against a person who had obtained a thing without force or fraud by delivery from the first bailee.

(3) If the first bailee re-delivers the thing to the owner merely for a special purpose, the owner becomes the sub-bailee of his own bailee (Roberts *v.* Wyatt, 1810, 2 Taunt. 268, and cp. per Littleton J. in 33 H. VI. pp. 26–7, *inf.* § 13, *note*), and the rights and duties of the parties appear to be generally the same as if the first bailee were general owner and the general owner were his bailee; but it may be doubted whether such a bailment is within the meaning of the statute against fraudulent bailees.

(4) It may be doubted whether the capacity of a bailee to confer the lawful possession by delivery continues (unless where the first bailment was by way of pawn—see Donald *v.* Suckling, 1866, L. R. 1 Q. B. at 613) when the first bailment either being revocable has been revoked or in any case has been determined,—for then the first bailee's quasi-proprietary right to possession ceases,—or when by the terms of the first bailment the power of sub-bailment was expressly excluded. This distinction may be important, because it is possible that a sub-bailee upon a void or voidable sub-bailment is not within the meaning of the act against fraudulent bailees, and if so, he might convert the thing with impunity unless he can be treated as a trespasser (or unless he has attorned to the general owner).

Next as to the cases where the thing passes from a bailee to a third person by a taking or loss.

In cases of loss by the bailee and finding by the third person the rights and duties appear to be the same as if the bailee were general owner, except that the true general owner

may have concurrent rights with the bailee (§ 8). In cases of simple taking by the third person from the bailee upon a revocable bailment (as distinguished from delivery by the bailee), it seems a proper inference from the authorities cited as to the preceding class of cases that the possession of the taker (unless he is justified by authority of law or otherwise) will as against the true owner be trespassory throughout, unless the bailee not only consented to it but had a right to consent to it.

The distribution of rights and duties in respect of the thing when it has passed to a person in any degree of remoteness from the owner will depend primarily on whether or not his immediate predecessor acquired the possession by trespass. If that predecessor acquired the possession by trespass, then the person's situation will be the same as that of any other person who acquires from one who took by trespass from the owner (*sup.* § 10). If that predecessor acquired the possession without trespass, then the character of the person's possession will be determined by the same considerations which determine the character of the possession of a third person who acquires from the owner's immediate bailee.

§ 13. *Loss and Finding.*

(i) *Ancient authorities.*

It appears clear on the old authorities that every person who takes a thing upon a finding is civilly a trespasser, except in the one case of a person who finding a thing when it is really lost takes it 'in charity to save it for its owner.' Before proceeding to the modern decisions on theft by finders it will be convenient to consider in what cases a finder might be guilty of theft if the general rule that every trespassory taking and every appropriation by a person in a trespassory possession is a theft, provided *animus furandi* be present, applies to finders.

1. If the thing is in fact really lost (i.e. out of all custody and

likely to be finally lost to its owner unless taken and kept for him), the finder who takes it to save it for the owner is not a trespasser at all but is held to take lawfully and to be as it were a bailee by implied consent of the owner, and consequently he cannot at any subsequent time even after he knows the owner steal the thing by any misappropriation, except perhaps such breaking bulk or destruction as would at common law be a theft by a bailee.

2. If the thing is in fact really lost and the finder takes with an intent of appropriation, he is civilly a trespasser from the first, for the owner's consent to a taking with that intent cannot be implied, nor does the finder profess to act like a bailee, and although an appropriation before knowledge of a discoverable owner might not in such a case be a theft for want of a necessary ingredient of *animus furandi*, yet a subsequent appropriation after knowledge of the owner would be theft.

3. If the thing is apparently but not really lost, the taker upon the finding is in like manner civilly a trespasser, though he may be excusable so long and so long only as he acts for the owner. If he takes at the first for himself, this may not be theft, because *dominus non apparet*; but a subsequent appropriation after knowledge of the owner would be a theft.

In all these cases the presence or absence at the time of the finding of an immediate clue to an owner appears to be wholly immaterial according to the old law.

But although these would be the results of applying the doctrines of civil trespass, it seems that these results were not adopted for purposes of theft, and that, at least in Coke's time (see note *inf.*), any taking upon a finding of a thing really (or, perhaps, apparently) lost was held so far lawful for this purpose that neither the first taking nor any subsequent appropriation, with whatever intent, could be theft; and Hale writes to the same effect, 1 P. C. 506. It is however to be noticed that the authorities to which Coke and Hale refer do not really relate to loss and finding, but to wreck, trove, waif and

stray, which are distinguishable on the ground that in them (*ex vi terminorum*) *dominus non apparet*, and so an *animus furandi* was excluded, which is not necessarily the case in loss and finding. Also they were not subjects of trespass at common law (Year-b. 1348, in note): and the special and less punishment expressly provided by the stat. Westm. I. c. 4 for taking wreck excluded felony.

NOTE.—Year-b. 1348, 22 Ass. p. 107. pl. 99. 'Note that punishment of treasure-trove taken and carried away, of wreck and waife, is by imprisonment and fine, and not of life and of member.'

Year-b. 1372, 46 Ed. III. p. 15. pl. 1. 'Writ of trespass against several for gold, silver and other chattels to the value of &c. taken and carried away.'

Perle for the defendants, after taking nothing by some formal objections, answers that the plaintiff's goods were cast into the sea by tempests and the defendants took them and kept them till they came to land and then delivered them to the plaintiff's agent for the plaintiff's use.

Tanke for the plaintiff alleges that the answer is double, viz.

(*a*) that the goods were cast on shore and so out of the plaintiff's possession, which amounts to a denial of a taking from the plaintiff's possession; and

(*b*) that they were kept and delivered to the plaintiff's agent for him;

and he prays that the defendants be held to elect between the two answers.

Perle then elects to rest on the second answer.

Persay. But the answer shows no authority for the act.

Pole. They say they kept them when they were cast away (gettes) and delivered them to the plaintiff's agent for his profit.

Tanke. They never came to our profit.

Persay claims judgment against the plaintiff's writ, which supposes a taking against the peace: but *Tanke* maintains his writ, without this, that the goods were so kept and delivered to the plaintiff's use.'

(*Pole* and *Persay* seem not to have been judges at this time.

The effect of the case appears to be the same as that of Isaack *v.* Clarke, *inf.*: viz. that the taker of lost goods is a trespasser, unless he takes them to save them for the owner. But the expressions as to

keeping and delivering for the owner's use would have better suited an action for a conversion, had that form of action been then known.)

Year-b. 1429, 7 H. VI. p. 22. pl. 3. 'And it was said that if one find my goods I shall have either a general writ or a writ on the matter. *Quod nota.*'

Year-b. 1455, 33 H. VI. pp. 26–27. pl. 12. Detinue for charters, alleging a finding by the defendant, who pleaded in abatement that the declaration showed that another person had an interest in the land and ought to have been joined; and the question was whether the plaintiff could sue singly on a mere possession before the supposed loss.

Wangford for the plaintiff. 'If I lose a box of charters touching lands to which I have no title, still I shall have detinue.'

Prisot (*C.J.*). I think not; therefore in your case you shall give notice to the finder and request him to re-deliver them, and if he will not you shall have trespass against him; for by the finding he did no wrong, but now the wrong commences by the detention when the owner was known. But if one A. had charters of my land of which I was seised and he lose them and one B. find them, I shall have detinue against him without notice, for A. is answerable to me.

Littleton. Semble in the case put by *Wangford*, the loser of the charters shall have detinue without any other title. As if I distrain for rent and after the termor offer me the rent in arrear and I deny him the distress, still he shall not have action of trespass against me but detinue, for that it was lawful at first when I took the distress; but if I kill them or work them in my own work he shall have trespass. So here, when he found the charters it was lawful, and although he would not deliver them on the request I shall have no trespass but only detinue, for no trespass is yet done; no more than if one deliver me goods to guard and redeliver to him, and I detain them, he shall have trespass but only detinue; but peradventure if he burn them or break the seals or the like the action shall be maintained. *Ad quod non fuit responsum.* And afterwards *Littleton* said privately that this declaration *per inventionem* is 'a new found Haliday,' for the ancient declaration had always been 'ad manus et possessionem defendentis devenerunt' generally, without showing how; unless it had been on a bailment between plaintiff and defendant.' (This seems to be the first instance of an action of trover. *Littleton* seems not to have been yet a judge.)

Year-b. 1467, 7 E. IV. p. 3. pl. 9. Trespass of close broken and goods carried away. The defendant said that he was executor to a testator who was co-owner with the plaintiff, and that he found the plaintiff's goods amongst those of the testator and took them to guard them safely for the use of the plaintiff and so keeps them still, and therefore the plaintiff should have brought detinue and not trespass.

Catesby. It is no plea, for he has shown no cause for him to take these goods, for this is not like the case where I bail goods to you to guard and then I bring trespass: there I agree that you may compel me to bring detinue and not trespass, for that when I bailed the goods to you the possession was in me and you did no wrong in taking them upon my bailment: but in this case it is not so, for he had shown how his testator and the plaintiff were executors to R., and so the possession which the testator had amounts to the possession of the plaintiff, for the possession of one executor is the possession of both; then notwithstanding that A. (the testator) made the defendant her executor, still he shall have no cause to take them, and so of his own showing his taking was tortious.

Fairfax to the contrary, for where a man is made executor, if he find a stranger's goods among those of his testator it is allowable for him to take them to guard for the use of him who has the property, for if my father decease seised of land you know well that the evidence of this land concerns and belongs to me and to no other; still if the executors of my father find the evidence among my father's other goods and will take them, I shall have never trespass against them but only detinue.

Nedham (*J.*). This is a plea to the action, for it is a good justification, for it was lawful for him to take them when he found them among his testator's goods, for if a man lose a thing in the road and I come and find the thing in the road and take it to guard for the use of him who lost it, if he bring trespass against me of this thing I shall plead this to the action and not to the writ, for it was allowable for me to take it for the use of him who lost it.

Littleton (*J.*) to the same intent, for if two have goods in common and one appoint executors and decease, and they find his goods and take them to guard them, as they well may, the other shall not have trespass against them but detinue.

Choke (*J.*). The defendant should have shown more or otherwise he had not conveyed to him a title to take the goods, but if he

would have shown that his testator put the said goods and other goods of his own together in a chest, and so he found them, it would be good matter to justify the taking, for that he could not sever them; but if he died in one vill and the goods for which the plaintiff has conceived this action were in another vill, severed from his goods, in that case it was not allowable for him to take them.

And then *Fairfax* adopted *Choke's* words.

Catesby. He ought to say that he had always been and still is ready to deliver them, or otherwise it is no plea, for if we require him to deliver them and he will not, then semble the first taking was tortious. And the other serjeants said no, for if he could justify the taking at one time, that cannot be tortious after. And afterwards *Catesby* imparled.'

Year-b. 1485, 2 R. III. p. 15. pl. 39. 'Also it was said by some, if one lose his goods and another find them, the loser may have writ of trespass if he will, or writ of detinue; but if the goods so lost were in any jeopardy, then he may well justify for the sake of saving them; per Donington.'

Year-b. 1505, 21 H. VII. p. 27. pl. 5. 'In trespass, where the defendant justifies for that the corn, whereof action, was severed from the nine parts for tithes, and was there in jeopardy of perishing (perd') by the beasts going in the fields, and then the defendant took it and carried it and brought it to the barn of the plaintiff, parson of the same vill, and there put it within the barn; and on this plea the parson demurred in law.

Brudnel. The plea is not good, for when the corn was severed from the nine parts and left on the land where it had been growing, it was in a place apart and convenient for guarding it; in which case it is not lawful for any one to enter and take them; as where one takes my horse for fear that it will be taken away, it is not justifiable; and if his wife is out of her way so that she know not where she is, still one shall not take her to his house without that she is in jeopardy of perishing (perdu) by the night or being drowned with water; and so here, though the corn was in the middle of the field, still it was a place apart and convenient to keep them, and if one take them my action lies well against him; and so the bar is not good.

Palmes. We have alleged that it was in danger of perishing (estre perd'), and if we would not have taken them, certainly they would have perished, which is a sufficient and reasonable cause for us to justify the taking: as if I see my neighbour's chimney

burning, in order to save the things that are within I shall justify the entry into the house and the taking the goods which I find therein to save them: and here for that we have surmised that the goods were in danger of perishing, and that we took them to save them for the use of the plaintiff, it is good reason to excuse us; and so the bar is good.

Kingsmil (*J.*). Where one's goods are taken against his will, either it ought to be justified by matter necessary to the common-wealth or otherwise it ought to be justified by reason of a condition in law. First for matter which concerns the common-wealth, one shall justify goods taken out of a house when it is to safe-keep the goods, or breaking into a house for the safety of others. Also in time of war one shall justify the entry on another's land to make a bulwark in defence of the king and the realm, and these things are justifiable and lawful for maintenance of the common-wealth. And of the other part it is justifiable where one distrains my horse for his rent, and that is because the land was bound with such condition of distress, and so of other conditions. And so by these two ways one may justify the taking of a thing against the will of him who is owner. But we are not in such case here; for we are not in the case of the common-wealth, nor in that of the condition any more; for though it is pleaded that it was in peril of perishing, still it was not in such danger but that the party will have his remedy, &c.'

Isaack *v.* Clark, 1615, 2 Bulstr. at p. 312. *Coke* (*C.J.*). 'When a man doth finde goods, it hath been said, and so commonly held, that if he doth dis-possess himself of them, by this he shall be discharged, but this is not so, as appears by 12 E. IV. fol. 13, for he which findes goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely; if a man therefore which findes goods, if he be wise, he will search out the right owner of them, and so deliver them unto him; if the owner comes unto him, and demands them, and he answers him, that it is not known unto him whether he be the true owner of the goods, or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him, 2 R. III. fol. 15, a good case to this purpose. There may be a Trover and no Conversion, if he keep and lay up the goods, by him found,

for the owner. It is the Law of Charity, to lay up the goods which do thus come to his hands by trover, and no trespass shall lie for this; *but where one takes goods, where there is no such danger of being lost, or findes them before they are lost, otherwise it shall be*; and in such a case, every non-delivery of them is a refusal in Law, and the Issue to be upon the recusavit. He which findes goods, by his denyal to deliver them, hy this for him to be a trespassor, I utterly deny, for when possessio est vacua non fesans shall not make a man to be a trespassor; no trespass for this, vi and armis. In the Six Carpenters, 8 pars, fol. 146, ruled there by all, that non-fesans shall not make the party which hath *authority or license by the Law*, to be a Trespassor. If one doth bail goods to another to keep, and to deliver them upon request, if it be found that he required the delivery of them, and he to do this refused, no trespass, vi and armis, lieth for this, because it is but a non-fesans; and if a distress be taken, and a tender of amends made, and this refused, no Trespass, vi and armis, lieth for this, because this is only a non-fesans, which shall never make a man to be a Trespassor. If a man findes goods, an action upon the case lieth, for all ill and negligent keeping of them, but no Trover and Conversion, because this is but a non-fesans; and so in the Six Carpenters' case, he shall not be punished in trespass for not paying for his wine, being but non-fesans; but if a distress taken be abused he shall be then punished in trespass; and so the difference is, that mis-fesans, but not non-fesans, shall make one a trespassor; and so is 12 E. IV. fol. 8, 9, and 13. If one have goods by trover, in some case he may deliver them to one who is no true owner of them. If I baile goods to one, and he bails them to another, I cannot have an action against the second bailee, this is a Trover in Law: the ancient form of the count in detinue, is observable, where the same is upon a bailment, and where it is upon a devenerunt ad manus. A man bails goods to one, who bails them over to another, he may here have a Detinue upon the Bailment against the first Baylee, and also he may have an action of Detinue against the second Baylee upon a devenerunt ad manus, by 12 E. IV. fol. 11, 12, 13, and 33 H. VI. fol. 27, so that the action of trover is but an invention. A trover is in fait, and in law:—

1. When a man comes to them by Charity.
2. When by devenerunt ad manus.

And a man may count either upon a devenerunt ad manus generally, or especially, per inventionem, and one may at this day

declare upon a devenerunt ad manus, but the latter is the better, (sc.) to be per inventionem, 7 H. VI. fol. 22, for this, 9 H. VI. fol. 58, and the Old Book of Entries, fol. 209; this is the most certain, and the better count. If two bring an action of detinue for goods, and both of them declare upon a bailment, they shall not enterplead; if one of them doth charge him upon trover, and the other upon a bailment, here they shall enterplead; the difference will be between a trover in fait, and in Law. When the goods are bailed over, this is a trover in Law; but when a man hath goods per inventionem, this is a trover in fait. Upon several bailments, they are not to enter-plead, as appears by 19 H. VI. fol. 3; 9 H. VI. fol. 17; 7 H. VI. fol. 22; 4 E. IV. fol. 9; 12 E. IV. fol. 12. The next matter considerable, is the conversion, and what shall make a conversion; as to this, there ought to be an Act done, to convert one thing to another, and whether a denyer onely shall make a conversion, by this you will confound all form, for then, this way, every Action of detinue shall be an Action upon the case, upon a trover, because there is a denyer; if this should be so, there would be a double conversion, (sc.) a denyer and a request. In no case you shall have a man to be a trespassor upon the case, without some act done. If one doth pledge oxen, utensils, or deliver money; if he require them, and the other refuse to deliver them, an Action upon the case for trover lieth, to make him a trespassor. 33 H. VI. fol. 27, Malpaz' case: If one do finde goods, the owner demands them, he refuseth to deliver them, an Action of detinue lieth, and not an Action upon the case (*in usum suum proprium convertit, et disponit*), *these are the words that make a conversion.*'

1 Rolle, Rep. 130. 'If a man rightfully take goods upon a finding (droitallment trove) he cannot be charged in a trespass, for that he found them when they were in danger of perdition, but when a man takes goods upon a finding before they are in danger of perdition, sc. before they are lost (loste), trespass lies against him. If a man deny goods to the owner which he had found, no trespass vi et armis lies, for no non-feasance shall make a man a trespasser ab initio:—8 Rep.' (No authority is given for the earlier part of the statement.) . . . 'Trover in fact' (as distinguished from trover in law) 'is when a man finds goods being lost (perdes) and in charity saves them (conserve) for the owner.'

Comyns, Dig. Tresp. p. 502, says, 'Trespass does not lie against a man for taking goods which he found, unless after the finding he embezzles the goods,' citing R. 2 Rol. 555, l. 50; R. 2 Rol. 563, l. 45

(but the former of these references relates to wreck and the latter to executors, both of which are special law).

(ii) *Modern Law.*

The modern law of theft by finders does not altogether coincide with the application of the strict rule of civil trespass, and, on the other hand, it adopts limitations and explanations which are not to be found in Coke or Hale. The cases are not in all respects clear or easy to reconcile, and it is most convenient to consider them, not in the order appropriate in questions of civil trespass, but in an order determined by the elements which are brought into new prominence in recent times.

In this view all cases of so-called loss and finding may be divided into—

(*a*) Cases where the finder has at the first no clue to find the owner, and

(*b*) Cases where the finder has at the first a clue to find the owner.

(*c*) Cases of colorable but not real loss or finding.

(*a*) The first case may be described in the words of Parke B. as the case of a 'pure finding.' It is a case of pure finding if at the time when the thing is first found and examined by the finder neither the place nor the circumstances nor the thing itself nor the knowledge of the finder furnish either a reasonable clue to find the owner or a reasonable inference that the owner knows where to find the thing.

A pure finder does not commit theft by taking the thing at the first even with an intention of appropriating it. The only limitation of this statement to be found in the cases is a suggestion of Cockburn C.J. that if it were doubtful whether the property would be claimed and the finder nevertheless on the first finding resolved to keep it even though the owner should appear, this might be larceny (Glyde, 1868, in note *inf.*).

Secondly, in a case of pure finding it is now settled that the

finder cannot commit theft by any subsequent appropriation of the thing however dishonest even after discovery of the owner. This rule was established by Thurborn's case, which though occasionally impeached as to some of the reasons and dicta contained in it has been universally followed and for the most part approved.

NOTE 1.—The tests to be applied in order to discover whether a case is one of pure finding have been thus variously stated in different cases:—

1804. *Anon. in* 2 *Russ.* 169. Did the finder know the owner, or was there any mark upon the thing by which the owner could be ascertained?

1841. *Merry* v. *Green.* Did the finder know who the owner was, or from any mark upon it or from the circumstances under which it was found could the owner be ascertained? (7 M. & W. 623).

1844. *Mole.* 'This purse is found in a place where it might reasonably be presumed that the owner did not know it would be found. . . . . Was there a mark on the property by which the owner could be known?' (1 C. & K. 417).

1845. *Scully.* Had the prisoners sufficient means of discovering the owner, or did they wilfully abstain from taking any measures towards such discovery, or did they believe inquiry would be useless, or were no sufficient means of inquiry open to them? (1 Cox, 189).

1849. *Thurborn.* Were the things presumably lost, that is, were they taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them or at least not to know where to find them? Had the taker a right to presume that the owner did not know where to find them? Did the finder reasonably believe the thing to be lost? Had he a reason to know to whom it belonged? Was there any mark presumably known by the finder, by which the owner could be ascertained? Had he no pretence to consider the thing abandoned or derelict? 'The rule of law on this subject seems to be that if a man find goods that have been actually lost *or* are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny: but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the

owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it.' Was the thing really lost, *and* was there no mark on it or other circumstance to indicate then who was the owner or that he might be found, and was there no evidence to rebut the presumption that would arise from the finding of the thing as proved that the finder believed the owner could not be found? (1 Den. 387; 2 C. & K. 831).

1854. *West.* Whether the prisoner had reasonable means of finding the owner or reasonably believed that the owner could not be found? (Dears. 402: 6 Cox, 415).

1855. *Dixon,* per Parke B. 'If the prisoner had seen them drop from the prosecutor, or if the notes had had the owner's name upon them, or there had been any marks which enabled the prisoner to know at the moment when he found the notes who the owner was or that he could be discovered, it might have been,' &c. Per Jervis C.J.—The jury found that he 'did not know the owner but that it was probable that he could have traced him. He was not bound to do that' (Dears. 580; 7 Cox, 35).

1858. *Christopher,* per Hill J. 'To be guilty of felony, the finder of an article must know who the owner is, or have reasonable means at the time of finding it of knowing who he is' (8 Cox, 91).

1861. *Moore,* per Cockburn C.J. Was the 'finder warranted in believing that the goods are lost or that the owner could not be found?' (L. & C. 1; 8 Cox, 416).

1868. *Glyde,* per Cockburn C.J. 'Here we have no evidence to show that the prisoner had reason to believe the true owner could be found:' and per Blackburn J.—'There was no evidence to show that the prisoner believed he could find the true owner when he picked up the sovereign.' And see at large Cockburn C.J.'s direction to the jury in this case (L. R. 1 C. C. R. 139).

1871. *Knight.* The proper question is—had the prisoner reason to believe that the true owner could be found (12 Cox, 102).

In some of the above cases there are dicta as to the necessity of the owner appearing to have abandoned the thing, which were probably not intended to be of general application. If indeed there is in any case anything to raise a reasonable presumption of an intention to abandon, a taking knowingly, *invito domino*, would be excluded; and such an intent may fairly be presumed where the thing is of inappreciable or of no value: but questions will rarely arise upon such things; and in matters of value an intention of abandonment is too improbable to be made the foundation of a test. Again, in some cases expressions are attributed to judges which would make the mere absence at the first of a positive clue for the finder to find the owner or for the owner to find the finder more conclusive of innocence than sometimes it would really prove to be. If the thing is such that great inquiry is certain to be made for it and that the owner could have no difficulty in identifying it by its nature and by the place and time of the loss and finding, as if twenty great diamonds or a bar of gold in a piece of white paper are found even in a public street, there may be no present positive clue in either direction, but the finder would probably not be justified in determining to sell them immediately without some inquiry or at least not without waiting for inquiry by the owner. So, on the other hand, the mere existence of marks which might furnish a clue if they were examined by a person of education may not be necessarily conclusive that the finder had reason to believe that the owner could be found: thus, in Preston's case (1851, 2 Den. 353) a note was indorsed, but the judge took notice that there was no evidence that the prisoner could read. Again, if in truth there was no clue, it would seem that for criminal purposes the finder ought not to be prejudiced by evidence that he falsely imagined there was one; for the immunity accorded to the pure finder appears to rest upon the ground of reasonable and probable cause of belief: but there is a dictum in Thurborn's case which seems to be to a contrary effect.

It has been said to be the duty of the finder before assuming dominion over the thing to examine it in search of marks or clues by which the owner may be known (Scully, 1845; Thurborn, 1849; *sub fin.*), and if such marks or clues appear, to use reasonable means to find the owner; unless the worthlessness of the thing or other circumstances raise a reasonable presumption of abandonment (cp. Glyde, 1868). But if no reasonable clue appears on examination at

the time of the finding, he is not bound to go out of his way to seek for a clue (Dixon, 1855).

See further, *inf.* § 16, as to Mistake.

(*b*) The second case may be described as that of a finding with a clue to the owner. Its definition is to be gathered by negative inference from the definitions of pure finding collected in the first note to the preceding paragraph.

The finder with a clue commits theft of the thing if he takes it with an intention from the first of appropriating it;[1] for *dominus apparet*, though at the first *incertus*.

But, secondly, the finder with a clue may have taken the thing without any intention at first of improperly appropriating it, but may have afterwards appropriated it, the owner having appeared, or the apparent clue continuing, and the question is whether in such a case he is guilty of theft, or whether he is within the immunity accorded to the pure finder. On this subject there is a considered judgment of the Court of Exchequer (Lord Abinger, Parke, Alderson, Gurney and Rolfe BB. with the concurrence of Tindal C.J.) in Merry *v.* Green (7 M. & W. 623). The facts on which the case was held to be one of finding are set out below, § 16 (ii). After stating that conclusion the judgment proceeds:—

'The old rule, that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. Under this head fall the cases where the finder of a pocket-book with bank notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds, and applies to his own use, a pocket-book in a coat sent to him to repair by a

[1] Milburne, 1829, 1 Lewin, 251; Merry *v.* Green, 1841; Thurborn, 1849; Preston, 1851; Christopher, 1858; all in the preceding note.

customer, whom he must know: all these have been held to be cases of larceny; and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass: and it seems also from Wynne's case (Leach, 413), that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and *open* the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.'

In this case and in Wynne's case to which it refers the opening of the box or parcel appears to be relied on simply as an unequivocal act of misappropriation, and it is submitted that (the case not being one of bailment, in which alone the doctrine of breaking bulk seems material) any other unequivocal act of misappropriation, as for instance the spending or changing of money or notes found under like circumstances, would have the same effect. There is indeed a case (1873, Matthews, 12 Cox, 489), in which a finder with a clue who did not at first intend to steal was held not to have become guilty of larceny upon a subsequent misappropriation, but the case was not argued, and it was treated as governed by Thurborn's case, i. e. as if it had been a case of pure finding.

If the question is still open, it is submitted that there is no sufficient ground for extending to a person who had from the first a knowledge that the owner could be found the exceptional immunity accorded to the pure finder, and still less ground for extending it to a case in which the finder with a clue appropriates after actual knowledge of the owner.

(*c*) A third case is that in which there is a colourable but not a real loss and finding. In such cases it would seem that the taker is, except in one respect, like any other trespasser, excusable in so far as he acts *bona fide*, but guilty of theft if he either originally takes the thing *animo furandi* or subsequently

appropriates it, and that the only question is the one of fact, whether the case falls under this head or under one of the former heads.

There seem to be only two possible forms of this case distinguishable from common trespass, viz.

(1) That in which the thing has been left with or delivered to the so-called finder unknowingly but so as that the owner if he becomes aware of his loss is likely to be able to trace it or to remember where he left it, as in the instances of a box left in a cab or a purse left on a stall or in a shop.[1] Here there may be no bailment (unless in the case of an inn-keeper) for want of the necessary intention on the part of the owner,[2] and it would seem that the taker differs from an ordinary trespasser only in this, that by lapse of time, failure of inquiry, or other circumstances showing that the owner is lost, the case becomes assimilated to real loss and the finder may lawfully appropriate the thing.

(2) That in which the thing, although mislaid by the owner, remains under the protection of his personal vicinity or of his house or land, or under the protection of some other person with whom or on whose premises he left it unknowingly but under such circumstances that he is likely to remember where he left it. Such are the instances of the hat dropped in the inn, the jewels picked up in the garden, the dressing-case left in the railway carriage, the purse dropped in the theatre.[3] In these instances, if the so-called finder is the occupier or possessor of the inn, carriage, or theatre, the case passes back into the form just mentioned, but otherwise he is a trespasser, excusable in so far as he acts *bona fide*, and entitled to the thing if the case subsequently proves to be one of real

[1] Lamb, 1694, 2 East, P. C. 664; Wynne, 1786, 1 Leach, 413; Sears, 1789, *ib.* 415 *n.*; West, 1854, Dears. 402, 6 Cox, 415; Moore, 1861, *sup.*; Bridges *v.* Hawkesworth, 1851, 21 L. J. Q. B. 75.

[2] But the four earliest of the above cases were treated by the judges much as if they had been cases of bailment. See however per Parke B. in Thurborn, *sup.* [Cf. the American decisions cited pp. 40, 41 above.]

[3] e. g. Pope, 1834, 6 C. & P. 346; Peters, 1843, 1 C. & K. 245; Coffin, 1846, Pierce, 1852, 6 Cox, 117.

loss but otherwise subject like other trespassers *de facto* to the general law of theft. As between such a person and the occupier of the shop where the thing is picked up (not being an inn—*qu.* as to a private house), the person entitled to the benefit of the thing upon the case turning out to be one of real loss is the person who discovers the thing and not the occupier (Bridges *v.* Hawkesworth, 21 L. J. Q. B. 75).

If a finder has reason to believe that the thing is abandoned by its owner, then, whether or not it is so abandoned and whether or not a civil trespass is committed, there can be no theft at the first because there does not exist the belief that the appropriation will be *invito domino* which is essential for *animus furandi*. And a subsequent appropriation, even after discovery that the owner had no intention of abandonment, would seem to be within the principle of the immunity accorded by the modern decisions to the pure finder.

A taker upon a loss and finding may, like any other possessor, maintain trespass and theft and trover or detinue against a stranger. It would seem that the owner could not in any case be guilty of trespass or theft by taking the thing from the finder, for although in some cases and for some purposes the finder may be assimilated to a bailee, he is not a bailee and he has no right to possession against the owner. He has no lien for the expenses of preserving the thing (Nicholson *v.* Chapman, 1793, 2 H. Bl. 254).

§ 14. *Sale or other change of property.*

(i) *Alienation by sale.*

(i) A mere executory agreement to sell or otherwise alien has no effect on property, right to possession, or possession. Further, even when the property has passed by the terms of the bargain the right to the possession may still be deferred until some condition has been satisfied, and in such a case the vendee may have a right to obtain at will a right to possession by performing the necessary conditions; the thing may be *prima facie* at his risk; he may have personal remedies

against the vendor in case of wrongful re-sale or other breach of the contract; and possibly in certain cases he may have rights in respect of the thing itself even after a wrongful re-sale by the vendor; but he has no possessory right. For the purposes of trespass and theft the case is as if there had been no bargain and sale, for the vendor retains at least a 'special property' both as against the vendee and as against strangers.[1]

But from the moment when the vendee obtains a right to immediate possession of the thing (whether subject or not to the possibility of defeasance in case of insolvency before delivery) the distribution of rights and duties with respect to it for purposes of trespass and theft begins to be altered in the most important respects.

(ii) While the thing remains with the vendor without his having submitted to hold it as the vendee's bailee, it would seem clear that the vendor cannot steal it, for he is lawfully in possession in his own right; but if he submits to hold the thing as the vendee's bailee, then he may become like any other bailee, and he seems to be within the statute against conversion by bailees. But such a submission is not to be implied from his mere custody after the change of right to possession without some request or promise or unequivocal act or admission on the vendor's part, for the submission varies the rights of the parties.[2]

A stranger can steal from the vendor in such a case. It seems also that the taking by the stranger might further be complained of by the vendee in respect of his present right to possession, for the vendor may not unreasonably be thought to hold his possession as the agent or representative of the vendee.[3]

[1] See as to this case Blackburn on Sale, 2nd ed., 196 &c. and 256 &c.; Benjamin on Sales, 2nd ed., Books ii and v; Kent, Comm., vol. ii. p. 685.

[2] See Blackburn on Sale, 2nd ed., Book v.

[3] 2 Wms. s. 47*a*; Hudson *v.* Hudson, 1628, Latch, 214; Year-b. 2 Ed. IV. p. 25. pl. 26, cited in Bro. Tresp. 303; Year-b. 14 H. VIII. p. 23. In Adams' case, as stated in 2 Russ. 200 and 294, it seems to have been thought that the property could not be laid in the vendee; but this statement appears to be derived merely from an erroneous marginal note in R. & R. p. 225.

The vendee who has a right to the possession cannot, according to Bacon (Tresp. p. 577), commit trespass by taking from the vendor; but if the vendor has submitted to be a bailee it would seem that the vendee can commit a trespass against him as much as he can against any other bailee.

(iii) If the thing is with a person who before the change of right to possession acquired the thing by a trespass from the vendor, that person may, it seems, still be sued or prosecuted by the vendor.[1] In most other respects the vendee seems to succeed to the position of the vendor, and the possession which was trespassory against the vendor seems to become trespassory against the vendee as from the time of the change of right to possession; but the vendee does not in such a case become entitled to complain of the trespass as from its commencement,[2] for the alienation does not at common law transfer a mere right of action.

(iv) If a person who before the change of right to possession had acquired the possession of the thing as the vendor's bailee attorns to the vendee he becomes the vendee's bailee to all intents. But he will not by the mere fact of the sale become the vendee's bailee, for the sale cannot transfer the privity of contract. What then is his position if he has not attorned? It is absurd to suppose that his holding becomes a holding in his own right. He must therefore be considered to continue to hold as the vendor's bailee with reference to whatever special property or possibility of reversion the vendor retains; and he is in the same position towards the vendor as any bailee towards any bailor: but he cannot commit theft against the vendee;—not by the statute, for he is not his bailee, nor as a stranger, for he is lawfully in possession by delivery of an owner:[3] and it would seem that the vendee can steal from

[1] Vin. Tresp. 475.

[2] See in Smith *v.* Milles, 1786, 1 T. R. at 480; Balme *v.* Hutton, 1833, 9 Bing. 471; Cooper *v.* Chitty, 1756, 1 Burr. 31.

[3] Year-b. 2 E. IV. p. 25. pl. 26, seems at first sight to be an authority that civil trespass *de bon. asp.* will lie for the vendee against the vendor's bailee; but the argument turned on colour, and from the last line of the report it

him in respect of his special property. If the vendor submits to be the bailee of the vendee, the previous bailee would seem thenceforth to hold as a sub-bailee of the vendor.

(v) After the change of right to possession the vendor may pass the thing to another as his bailee, and in this case, whether the bailment is wrongful as against the vendee or is in execution of an agreement by the vendor to deliver the thing, it would seem that the bailee cannot commit trespass or theft at common law against the vendee (Year-b. 1498, *sup.* § 6, *note*), though under the statute he may be convicted of larceny as a bailee. In general, however, this case will pass into the case of a bailee employed by the vendee, since the vendor is in the absence of special circumstances the vendee's agent to employ the carrier.

(vi) Intermediate between this and the next case is that condition of things in which a vendor who has parted both with the property and with the right to possession is permitted to exercise the right of stoppage *in transitu* as against an insolvent vendee. See below, § 18.

(vii) Lastly, the thing may be with a person who has it for the vendee under a contract with or employment by him. The cases of a vendor who has submitted to hold as the vendee's bailee, and of a vendor's bailee who has attorned to the vendee, have already been considered, and the only remaining cases are those where the thing is with a carrier or other bailee employed by or for or holding for the vendee and those where it is with the vendee's servant.

Where a person has received and holds a thing as bailee for a vendee who has the present right to the possession, the vendee may in virtue of that right sue or prosecute a stranger who takes from the bailee;[1] or the bailee may sue or prosecute strangers; but as between the vendee and his bailee, the bailee has an exclusive possession and he cannot commit theft at

seems doubtful what was the ultimate decision and whether the defendant would not have succeeded on not guilty.

[1] Remnant, 1807, R. & R. 136; cp. 1 Hale, 668.

common law,[1] and the doctrine of breaking bulk seems never to have been applied to such a case.

But now the statute against fraudulent bailees applies to the bailee even where the bailor has never had possession.[2]

The last, and most difficult and once the most important, case is that where the thing is with the vendee's servant on its way to the vendee, the vendee never yet having had possession; and here occurs the chief difficulty in criminal law as to the commencement of possession.

If the servant obtained the thing nominally for his master, but in fact dishonestly and by his own mere wrong or fraud, his possession may be trespassory, as in Abrahat's case,[3] and he may thereby commit theft like any other stranger. But if he does not receive the thing in the course of his employment at all he is held to commit no crime (Cullum, 1873, 12 Cox, 469; Read, 1878, 14 Cox, 17); and if he rightfully receives the thing in the course of his employment he is held to acquire the lawful possession (*sup.* § 6), and therefore to be incapable at common law, by whatever wrong or fraud during that possession, of committing a theft of the thing.[4] Misappropriations under such circumstances have now long been made theft under the name of embezzlement (a name formerly common to all misappropriations by persons employed as servants but now confined to this case); but it was formerly of the utmost importance to know at what point the servant's possession ceased and that of the master attached, and the cases then decided are still important as illustrating the meaning and commencement of possession.

The following are the principal authorities :—

NOTE.—1687, *Dingley*, in 2 Leach at 841. A shopman or salesman sold goods for his master and received the money but did not place any of it in the till or otherwise under the master's imme-

[1] Walsh, 1812, R. & R. 215, 2 Leach, 1054, 4 Taunt. 258.

[2] Bunkall, 1864, L. & C. 371 ; 33 L. J. M. C. 75 ; cp. Hoare, 1859, 1 F. & F. 647; Jarrett, 1860, 8 Cox, 368.

[3] 1798, 2 Leach, 824.

[4] The doctrines of breaking bulk and severance or destruction seem never to have been applied to this case.

diate control, but put a part of it in his own box in his bedroom in the master's house, and afterwards having left his service broke into the master's house in the night and carried away the money in the box. This was held to be no burglary, 'for although it was the master's money in right, it was the servant's money in possession, and the first original act no felony.'

1743. *Waite*, 1 Leach, 28; 2 East, P. C. 570. A bank clerk received bonds from a customer and without placing them in the usual receptacle in the cellar appropriated them. *Held*, not a taking from the master's possession at common law.

1795. *Chipchase*, 2 Leach, 699. One clerk deposited a bill received from a customer on the master's desk and another clerk took it. *Ruled*, a taking from the master's possession by the second clerk. See Murray and Masters, *inf.*

1797. *Bull*, cited in 2 Leach at 841. A shopman appropriates cash received over the counter without having placed it in the till. *Held*, no taking from the master's possession, though the master had furnished and marked the coins and procured them to be paid to the servant for the purpose of detecting him (*Quære*, how it would have been here if the thing instead of being coin had been something the property in which does not pass by mere delivery? And cp. Headge, *inf.*, and Gill, *inf.*).

1798. *Spears*, 2 Leach, 825 (but more authoritatively in Reed's case; Dears. at p. 263. See also in Walsh, 4 Taunt. 276). A servant sent with the master's barge for oats takes some after they were placed in the barge. *Held*, a taking from the master's possession just as much as if they had been in the master's granary.

1799. *Bazely*, 2 Leach, 835; 2 East, P. C. 571. A bank clerk receiving notes from a customer and appropriating them without having placed them in the till. *Held*, not to take them from the master's possession. This case led to the passing of the 39 G. III. c. 85.

1807. *Headge*, R. & R. 160. Bull's case was followed, and an objection expressly over-ruled that the marked coin was previously in the master's possession and that his possession should be held to continue constructively as against the servant.

1826. *Sullens*, 1 Moo. 129. A servant sent with a note for change receives and appropriates the change. *Held*, not a taking from the master's possession. (Cp. Hawtin, 1836, 7 C. & P. 281.)

1830. *Murray*, 1 Moo. 276. One clerk hands another clerk 'the master's money' to pay a bill. An appropriation by the second

clerk. *Held*, a taking from the master's possession. See Masters, *inf.*

1844. *Norval*, 1 Cox, 95. A servant sent with his master's cart for goods receives the goods for his master into his master's cart and again takes them from there. *Ruled*, a taking from the master's possession. So in Harding, 1807, R. & R. 125.

1844. *Hayward*, 1 C. & K. 518. A deposit of hay by the servant in the master's stable yard ruled a reduction into the master's possession as against the servant. (But note that there were further circumstances beyond the mere deposit to show that the delivery to the master was complete, for the servant obtained the key of the loft and placed a part of the hay in the loft.)

1848. *Masters*, 1 Den. 332 (s. c. 2 C. & K. 930, somewhat differently stated). One clerk received moneys and handed them to another and he again to a third or check-clerk whose business it was to pass them on to the cashier and who was the prisoner. *Held*, to be a different case from Murray, *sup.*, and not to be a taking from the master's possession, for that in Murray's case 'the master had had possession of the money by the hands of another servant; and when it was given to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master: the fraudulent appropriation of it being thus a tortious taking in the first instance was not embezzlement but larceny. But here the money never reached the master at all: it was stopped by the prisoner on its way to him. The original taking was lawful, and therefore the fraudulent appropriation was embezzlement.'

This decision was recognised by the judges in Watts' case, *inf.*

See below as to the general result of the authorities of this class.

1850. *Watts*, 2 Den. 14. A company paid a customer by their own cheque on their bank and afterwards their messenger received the cheque, after it had been paid and cancelled, from the bank for the company, and delivered it to one of the company's clerks for the company, and the clerk fraudulently destroyed it. But it seems that the company's ownership of the paper of the cheque before issue and in the hands of the bankers was not sufficiently proved or found and that the case was decided as if the company were strangers to the cheque until its return. (See esp. per *Cresswell J.* at p. 27.) *Held*, that the taking by the clerk was a taking from the company's possession.

'By the course of business' (said *Wilde C.J.* in delivering the

opinion of the judges) 'between the company and its bankers, the paid cheques were returned to the directors, were part of the company's documents and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties was to receive and keep for his employers such returned cheques; any such paper, therefore, in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler who has the keeping of his master's plate would be guilty of larceny, if he should receive plate from the silversmith for his master, at his master's house, and afterwards fraudulently convert it to his own use, before it had in any other way than by his act of receiving come to the actual possession of the master.

'This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in R. *v.* Masters, 1 Den. C. C. 332, where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here, the paper found had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters, made his possession theirs.'

1853. Reed, Dears. 257 (see also 168). A servant sent with his master's cart for coals and appropriating them after they were received into the cart by him for his master held to have taken them from the master's possession. There could be no doubt, said Lord Campbell C.J., that for larceny 'the goods must have been in the actual or constructive possession of the master, and that if the master had not otherwise the possession of them than by the bare receipt of his servants, upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet, in respect of the servant himself this will not support a charge of larceny, because as to him, there was no tortious taking in the first instance, and consequently no trespass. Therefore if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having

been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards convert them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continued with the prisoner down to the time of conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny; Robinson's case, 2 East, P. C. 565. There seems considerable difficulty in contending that if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his orders for his use.'

1853. Goodenough, Dears. 210. A servant was entrusted with *cheques* to buy skins. He bought the skins on credit, cashed the cheques and appropriated part of the money. *Held*, that he did not take the money from the possession of the master. There was no argument and reasons were not given.

1854. Gill, Dears. 289. S. P. as in Headge, *supra*.

1858. Wright, 27 L. J. M. C. 65. The accused was managing clerk of a branch bank, and it was his duty to receive moneys and place them in a safe belonging to his employers, of which both he and his employers had keys, and to account weekly. The jury found that he had appropriated moneys which had been placed in the safe and which had been included in a weekly account, and the court of C. C. R., thinking there was evidence to support the finding, sustained a conviction for larceny. (*Note.* No stress seems to have been laid upon the accounting.)

The effect of these authorities appears to be as follows :—

1. The servant's possession will terminate and that of the

master will commence at the first moment when either the thing is delivered to the master, or when, although the thing continues in the apparent possession of a servant, the servant agrees with the master to hold it finally for the master in the master's right.

2. So long as the thing is with the servant merely *in transitu* towards the master the master has not yet the possession as against the servant, but the servant has the possession as against the master.

3. When the thing ceases to be *in transitu* and is held for the master, the master's possession commences even as against the servant.

The master's rights fully attach at the first moment when the mere motion of progress towards the master is changed into a holding subject to his orders or into a new direction by his orders, express or implied. It is conceived that a mere acknowledgment by the servant that he held for the master would be sufficient (compare the cases of attornment to a vendee by a vendor's bailee). A mere actual receipt for the master on the master's premises may or may not be sufficient, according to whether or not the servant's custody is the final destination of the thing. A deposit in the master's premises or cart, barge, or other receptacle, seems not of itself necessarily conclusive (see Cullum, 1873, 12 Cox, 469), but to be subject to the distinction that if on the one hand (as in almost all the reported cases of this kind) the servant was sent with the cart or barge to receive the thing, and did receive it into the cart or barge in pursuance of his employment, or if he was employed to receive and deposit the thing in his master's premises and did so deposit it in pursuance of his employment, the possession thereupon shifts to the master; but that if, on the other hand, the deposit in the master's receptacle or premises was casual and not made in the course of the employment nor for the master, the *transitus* has not necessarily ended and therefore the possession has not

necessarily passed. So again as to receipt by one servant from another servant, it may be that the *transitus* continues [1] in the hands of several successive servants, who are all for this purpose merely as if they were one servant, being (so to speak) merely successive vehicles or merely a multiplication of links in a chain which is not yet attached to the master, or it may happen [2] that the first or any other servant's receipt is a receipt to hold for the master and vests the master's possession. In every case the question is, what was the evidenced intention of the parties as to the character or capacity in which the servant held? But if the master's possession had once attached, though only in the hands of a servant, it thenceforward avails against that servant and also against any other servant to whom that servant may deliver the thing.

Next as between the master or servant in such cases and strangers during the transitus, it was thought in one case [3] that where a servant received a thing for his master and was robbed of it by a stranger before it had come to the master otherwise than by the servant's receipt, the servant could prosecute and the master could not.

This doctrine was based on the rule stated in the preceding paragraph; but in so far as it excludes the master it seems inconsistent with the general principles of the law of theft, and is not in accordance with the terms of the ruling in the previous case of Remnant [4] or with the undoubted law in a case where such a view would have been much more plausible, namely that of a bailee on a revocable bailment whose bailor never had actual possession but yet was held entitled to maintain theft against a stranger who took from the bailee.[5]

NOTE.—In the case of Hopkinson *v.* Gibson, 1805, 2 Smith, 202, it was held that a colonel who had bought horses for the army could not bring trover for them, on the ground that he was not a bailee

[1] As in Master's case, *sup.* [2] Compare esp. Watts' case, *sup.*
[3] Rudick, 1838, 8 C. & P. 237, Alderson B.
[4] 1807, R. & R. 136, Graham B.; and cp. 1 Hale, P. C. 668.
[5] Remnant, *ubi sup.*

but only an agent or servant. But *Lawrence J.* doubted whether the colonel might not have brought trespass against a stranger.

Grounds of the law as to embezzlement.

The true ground of the law as to embezzlement seems to be that which has been stated above as to the case of a third person who receives or takes a thing from a trespasser; viz. that a mere wrong to a right to possession is not sufficient for trespass or theft, and that a person who has merely a right to possession can complain of a taking as a trespass or theft only when there was a forcible or immediate taking from the actual possession of some person who holds as his delegate, representative, or agent. A vendee with right to possession can sue or prosecute a person who takes from the possession of the vendor before delivery because the vendor holds for him. Again, in the case of a servant who receives a thing for his master and has not yet surrendered the possession to his master, the master can sue or prosecute a stranger who takes from the possession of the servant because the servant holds in his right. But the master cannot sue or prosecute the servant himself because there is no forcible or immediate wrong to possession, for the servant alone has the possession and he cannot do forcible wrong to his own possession.

(ii) *Gifts and assignments.*

Of the class of cases in which the general property in a thing has passed by voluntary alienation from one owner to another, but the new owner has not yet had actual possession, there remain two modes to be considered, namely gifts, and assignments (by way of mortgage or otherwise).

And firstly, as to gifts, it seems clear that even if a parol gift without consideration and without delivery passes no rights in the thing but is merely *nudum pactum*,[1] still the donee has against strangers all the same rights as if the property passed

[1] In Roman law *nudum pactum* for want of delivery, in English for want of consideration.

by the gift. And whenever a gift without delivery may be supported either by reason that there is a sufficient consideration or by reason of estoppel to deny consideration as in the case of a gift by deed, the distribution of rights and duties becomes the same as upon a bargain and sale.

NOTE.—See Blackburn on Sale, 2nd ed., p. 259; Bourne *v.* Fosbrooke, *sup.* § 9; Irons *v.* Smallpiece, 1819, 2 B. & A. 551; Parke B. in Waud *v.* Audland, 16 M. & W. at p. 870; Winter *v.* Winter, 9 W. R. 747; Danby *v.* Tucker, 31 W. R. 578. In many old cases 'gift' or 'done' is used to signify a grant or bargain and sale. See as to an agreement that the donee who was previously in possession shall hold in his own right; Shower *v.* Pilck, 1849, 4 Ex. 478; Lunn *v.* Thornton, 1845, 1 C. B. 381; L. & B. R. Co. *v.* Fairclough, 1841, 2 M. & G. 691; cp. Bac. Abr. Tresp. 577; Trov. 683–4, 693. See as to a gift by a father to a child, Forsgate, 1787, 1 Leach, 463, and an anonymous case there cited; Hughes, 1842, C. & M. 593; Hayne's case, 12 Rep. 113; Re Ridgway, 1885, 15 Q. B. D. at p. 449.

Lastly, as to mortgages and other assignments, the only point which seems to require notice is that the assignor of goods who is permitted by the assignee to remain in possession seems in general to be considered as in the position of a bailee of the assignee,[1] if he has submitted to hold for the assignee, but otherwise is in lawful possession in his own right and cannot steal even under the statute.[2]

§ 15. *Taking by authority of law.*

The principal cases of a taking by authority of law are distress and execution.

See generally as to the different kinds of distress, and as to replevin, Gilbert (L.C.B.) on Distress, Impey's ed. 1823, and compare Sir H. S. Maine's Early History of Institutions, p. 263. The more important kinds of distress were distress by a lord for rent or other services and distress by an occupier of

[1] Fenn *v.* Bittleston, 1851, 7 Exch. 152; Brierly *v.* Kendall, 1852, 17 Q. B. 937.

[2] Pratt, 1854, Dears. 360.

land on cattle found *damage feasant*. In the case of rent the ancient procedure was in its simplest form in substance as follows. The lord's bailiff entered on the tenant's land and seized as many cattle as he pleased (without reference, until the Statute of Marlebridge, to the amount of his claim) as a pledge, and drove them to a pound and left them there in charge of the pound-keeper. It was the business of the tenant to feed them, and for that purpose the pound was required to be so constructed and situate that the tenant could get to the cattle to feed them (as it lay upon him to do, until 5 & 6 W. IV. c. 59) without trespass. Once in the pound the cattle could not by any means be got out except by replevin. The tenant wishing to replevy did so by writ or plaint, in which the complaint was stated to be of an unjust *taking and detaining* of the cattle, and the sheriff was required to restore the cattle to the tenant on the tenant giving counter-pledge by sureties to prosecute ('de standō juri et sistendo se foro'), and also (after 13 E. I.) for the value of the cattle. On this being done the lord was commanded and if necessary compelled by reprisals (withernam) to show the cattle to the sheriff, who restored them to the tenant, and the tenant was bound to proceed with the replevin. In his writ or plaint he had claimed the entire value of the cattle as damages for the alleged unlawful taking, because it was not yet certain whether he could get re-delivery, and if he should not get it he would be entitled (as in actions of trespass) to the value of the cattle as damages. But in his declaration after re-delivery he claimed only damages for the detention because by the re-delivery he already had his cattle back. The lord then pleaded. He might plead amongst other pleas that the cattle were his own 'property,' or that they were the 'property' of a third person, meaning by property in these cases the right to the possession (see Gilbert, p. 136)—or that he the lord did not take the goods, or he might avow good cause for the taking and detention, counterclaiming the cattle and damages. On the determination of the proceedings if the avowry was

sustained, i.e. if the distress was held good, the lord had judgment under which the cattle were (in ancient times) restored to the pound and remained there at the tenant's cost and risk unless he made satisfaction for the rent and for the damages and costs in the action. Substantially similar proceedings took place in cases of distress of animals or things *damage feasant*.

The tenant might tender the rent at any time before the impounding. If a sufficient tender was made before the cattle were driven off the tenant's land, the lord who nevertheless drove them away was guilty of trespass and liable for the whole value of the cattle. If the tender was made after distress but before impounding, the lord did not, as it seems, become a trespasser *ab initio* by impounding, but he was liable either to replevin, or in an action for damages, or in detinue. After the impounding the lord could not deliver, inasmuch as the things were in the exclusive custody of the law, and a tender of rent and expenses was of no avail, and the only remedy for either party was replevin. Nor was this rule even partially altered in practice until 1859, when it was for the first time decided (1859, Johnson *v.* Upham, 2 E. & E. 250) that the effect of the statute 2 W. & M. st. 1. c. 5. s. 12 was that a tender after impounding and before sale and within five days is good and entitles the tenant to have his cattle back, whether the impounding was in a pound or on the tenant's premises. And by the C. L. P. Act, 1860, s. 23, the tenant was for the first time enabled to pay money into Court in replevin. But it seems that detinue could not be brought on a tender made after impounding (1862, Singleton *v.* Williamson, 7 H. & N. 747).

A lord who distrains when nothing is due or who distrains things of such a kind that they are not distrainable, or who unlawfully breaks into a house to distrain, takes as a mere trespasser from the first, and is accordingly liable in trespass for the full value of the things (1863, Attack *v.* Bramwell, 3 B. & S. 520; 32 L. J. Q. B. 146), notwithstanding the protection given

by 11 G. II. c. 19. So if at any time before or during the impounding he does any positive act of misfeasance, his authority and protection are at common law taken away *ab initio*, as for instaunce if he work or kill the distrained cattle.[1] But he is not a trespasser at the first by distraining for an excessive claim, even though it be alleged to have been done maliciously (1853, Stevenson *v.* Newnham, 13 C. B. 285), for the tenant is supposed to know how much he owes and can tender the proper amount;—nor by distraining on an unfounded claim such as heriot service, if in fact he has a good one as for rent in arrear (1851, Tancred *v.* Leyland, 16 Q. B. 669). Nor if he distrains things which are not liable to distress is he thereby made a trespasser as to other things which are liable (1843, Harvey *v.* Pocock, 11 M. & W. 740). Nor does the mere refusal of a proper tender or any other mere non-feasance make him a trespasser even as to matters subsequent, but only subjects him to an action of detinue or for the actual damage (Six Carpenters' case, 8 Rep. 146 *a*; 1 Sm. L. C. 144). And by various statutes, such as 11 G. II. c. 19. § 19 as to distress for rent, 17 G. II. c. 38. § 8 as to distress for poor-rates, and 5 & 6 W. IV. c. 50. § 104 as to highways, protection is given in cases of irregularity and misfeasance except as regards damages actually sustained. It seems to be generally assumed, but apparently nowhere decided, that the mere completion of the distraint after tender, as by continuing to drive cattle to the pound and impounding them is a non-feasance and not a misfeasance within the meaning of the ancient rule.

Upon a lawful distraint the distrainor is held not to acquire possession at all. He cannot maintain trespass or trover even against strangers, but only an action for rescue or *de parco fracto* (R. *v.* Cotton, 1751, Parker's Rep. 121). The things seized are held to be in the custody of the law before as well as after impounding, but the possession remains in the owner of the things, who is merely restrained as to the

[1] Six Carpenters' case, 8 Rep. 146 *a*, 1 Sm. L. C. 144.

use of them and may maintain trespass or trover against a stranger who takes them out of the pound (R. *v.* Cotton, *sup.*; cp. 1832, Giles *v.* Grover, 9 Bing. 128).

In (1856) Mennie *v.* Blake, 6 E. & B. 842, it was doubted whether replevin lay in any case but that of distress (see however C. L. P. Act, 1860, s. 22). In the same case it was decided that at any rate replevin does not lie in any case either of distress or of other taking in which the defendant did not take the goods immediately from the plaintiff's possession,—in other words, that it is a remedy for the protection of possession, and not, as trover is, a remedy for the protection of right to possession.

Goods seized in execution are *in custodia legis* and cannot be distrained (1848, Wharton *v.* Naylor, 12 Q. B. 673), even though the sheriff has sold them; just as *ex converso* goods under distress cannot be taken in execution at the suit of a subject. The sheriff upon levying execution is (perhaps) entitled to maintain trespass and trover against a person who wrongfully takes or keeps them.

Whether in law the sheriff has the possession of goods which he has taken in execution, or whether until sale and delivery the possession remains in the debtor, seems not to have been settled. It has been held that the sheriff can maintain trespass or trover (Wilbraham *v.* Snow, 1681, 1 Wms. s. 47 *a*): but it has also been held that the possession may in an indictment be laid in the debtor (R. *v.* Eastall, 2 Russ. C. & M. p. 250, from MS. of Bayley J.). See generally as to the effect of an execution (1832), Giles *v.* Grover, 9 Bing. 128, 265–280, where Lord Tenterden C.J. says that the sheriff has the possession.

§ 16. *Fraud and Mistake.*

(i) *Fraud.*

If a person is induced by deceit to consent to part absolutely with his property in a thing to another upon a contract with him, the property passes, subject to certain common law rights

in the alienor to rescind or disaffirm, and subject to the statutory provision for restitution (24 & 25 Vict. c. 96. s. 100), for there was a concurrence of intentions on both sides that the property should pass, and accordingly the alienee cannot commit trespass or theft either by the obtaining the thing by such deceit or by a subsequent disposal of it.[1] It would seem that in such a case no disaffirmance by the alienor could so affect the fraudulent alienee's position as to make him punishable as a thief for any subsequent disposal of the thing.[2] This doctrine is the occasion of the statutory offence of obtaining by false pretences.

But if the one party means only to give a bailment of the thing and the other accepts the thing meaning not to hold it as upon a bailment but to appropriate it contrary to the known intention of the bailor, this may be of itself a theft and no further complication arises, for there is no concurrence of intention or contract *ad idem*. It is not that the contract is avoided by the fraud, but that there is no contract, and here the possession does not pass by contract but by wrong and is trespassory.

There may be a transfer intended by both parties as a bailment, but obtained by the transferee by a deceit. Here the question is, whether or not the bailment is void so as to neutralise the nominal consent and make the acquisition trespassory, and on this point there seem to be no authorities. Since the statute against fraudulent bailees the question is not material, except as it may affect the amount of the penalty, for if the bailment stands the statute will apply, and if it is void the common law will apply. Should it become necessary to determine the point on an indictment containing only a special count for larceny as a bailee, it would probably be held that as a transfer of a general property is not absolutely avoided by deceit, so neither is a transfer of a special property or possession.

[1] White *v.* Garden, 1851, 10 C. B. 927; Powell *v.* Hoyland, 1851, 6 Ex. 72; Clough *v.* London & N. W. R. Co., 1871, L. R. 7 Ex. 26.

[2] See more fully, *inf.* § 19, Middleton's case, 1873, L. R. 2 C. C. 38, and 1868, Prince, L. R. 1 C. C. 150.

Indeed if this were not so there would have been no occasion for the numerous ancient decisions that where a bailment has been obtained by deceit the jury may infer an original *animus furandi* from subsequent conduct; for if the bailments had in those cases been void, the possession of the accused would have been trespassory throughout and any conversion *animo furandi* would have been theft (as much as in the case of a servant) even though there was originally no *animus furandi*.

(ii) *Mistake.*

'Mistake' may affect a transfer or taking of a thing in divers ways. One or both of the parties may be unaware of the fact of the transfer or taking, or may have mistaken the character of the thing, or one may have mistaken the person or right of the other.

Generally speaking, if a person in and by reason of a mistake of an essential fact gives consent to a change of property or of right to possession, which consent he would not have given but for the mistake, the consent goes for nothing, and the property and right to possession are unchanged (1852, Vincent, 2 Den. 464, *inf.*; Middleton, 1873).

There seems to be no reason why the same result should not follow with respect to change of possession ('delivery'), but it will be seen that there has been a division of opinion on this point.

In Cartwright *v.* Green (1802, 8 Ves. 405, 2 Leach, 952) a bureau was bailed to a carpenter to repair. The bailor did not know that the bureau contained money in a secret drawer. The carpenter unnecessarily and improperly broke open the drawer and appropriated the money. Lord Eldon, after consulting the judges, held that if the carpenter broke the drawer not for the purpose for which the bureau was bailed to him but with an intention to appropriate what he should find, the taking was felonious. 'If a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the

notes out of the pocket-book, there is not the least doubt that it is felony.'

In Mucklow's case (1827, 1 Moo. 160) a post-letter containing a cheque was misdelivered to a person who opened it and fraudulently misappropriated the cheque. The judges held a conviction wrong 'on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter.'

In Merry *v.* Green (1841, 7 M. & W. 623) the plaintiff had bought at a sale a secretary or bureau with an unknown secret drawer containing money in a purse. There was conflicting evidence as to whether the auctioneer had expressly sold the bureau 'with its contents' or had expressly sold it 'but not its contents.' This had not been left to the jury, and a new trial (in an action for assault in arresting the plaintiff on a charge of theft) was ordered. Baron Parke in delivering the judgment of the Court said that assuming the plaintiff had notice that he was not to have the contents of the bureau, there was evidence to make out a case of larceny.

'It seems to us that though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money it was a simple case of finding, and the law applicable to all cases of finding applies to this. See the remainder of the judgment, *sup.* § 13 (ii) (*b*).'

In Davies' case (1856, Dears. 640, 25 L. J. M. C. 91) Mucklow's case was followed.

In Middleton's case (1873, L. R. 2 C. C. 38) the prisoner, a depositor in a post office savings bank, gave notice to withdraw 10*s.* and received a warrant for that sum and went to receive it. A clerk by mistake gave him £8 16*s.* 10*d.* which was waiting for another depositor. The prisoner knew of the

mistake and received the money (as the jury found) with *animus furandi* at the time of taking it off the counter. The case was twice argued. Seven judges held it a case of theft on the ground that, there being no contract to transfer the property, there was by reason of the mistake as to the person no operative intention to transfer the £8 16*s.* 10*d.* to the prisoner. Three judges concurred on the ground that the clerk had no authority to part with the property in the money. One concurred on the ground that possession was taken with an *animus furandi* conceived before the possession was acquired. Four held that there was no theft. The majority do not seem to have doubted that there was a sufficient taking or trespass.

In the judgment of the seven judges the following passage occurs:—

'We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*.'

(This passage seems to be treated in some of the judgments in Ashwell's case, *inf.*, as laying down that there cannot be larceny upon a receipt by mistake unless there was *animus furandi* at the time of the receipt, but it is submitted that the passage is not intended to lay down that limitation absolutely, and that the opinion may refer only to the case of the cabman having no clue to the person from whom he got the coin.)

In Ashwell's case, 1885 (16 Q. B. D. 190; 16 Cox, 1) the prosecutor intending to lend the prisoner a shilling, gave him a sovereign. The prisoner at the time supposed it to be a shilling, but some time afterwards he found out that it was

a sovereign, and he then *immediately* formed the intention of appropriating it and did appropriate it, although he knew that it had been given him by mistake and could easily have restored it. He afterwards denied the receipt of it.

After two arguments, fourteen judges were equally divided on the question whether theft had been committed.

Smith J. and Mathew J. held it not theft because in their view the prisoner acquired the possession by an intentional delivery and intentional receipt of a coin, although there was a mistake as to what it was, and the possession and property were obtained without trespass, and also without *animus furandi*.

Stephen J., in a judgment in which Day J., Wills J., Manisty J., and Field J. concurred, said that the cases on finding 'proceed upon the principle that in all larceny the actual physical taking must be felonious:'[1]— and he assimilated the case to one of finding, with a distinction of fact in the prisoner's favour.

Cave J., Hawkins J., Denman J., Lord Coleridge C.J., and Grove J., Pollock B., and Huddleston B. held it theft, on the ground, which (if it may be taken to be established) is of much importance for the theory of possession, trespass and theft, that intention is a necessary element in the acquisition of possession by taking; that for this reason he did not acquire possession of the sovereign until he held it with knowledge that it was a sovereign; that he then had an *animus furandi*; and therefore his possession was a trespass and felonious in its inception (and therefore either at that instant, or at some subsequent point of appropriation—the judgments do not say

[1] This must be understood as being subject to unexpressed qualifications, e. g. if understood as a general proposition it is directly opposed to Riley's case and many other cases and is inapplicable in the case of a servant or licensee or of a person who takes by authority of law.

As to some remarks at pp. 207–8 of 16 Q. B. D. on the Year-book of 13 E. IV, the date should apparently be 1473. The chancellor seems to have been not Booth but Bishop Stillington. His view that conversion by a bailee was theft seems to have been correct according to the civil law, which he proposed to apply to a foreign merchant (see *sup.* § 2. note 1).

which—amounted to stealing). Denman J. assimilated the case to that of a 'finder with a clue' who takes with *animus furandi* (*sup.* § 13). Cave J. said:—

'The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in Merry *v.* Green was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents.'

Lord Coleridge C.J. said:—

'I assume it to be now established law that where there has been no trespass, there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery—in the sense in which I will explain in a moment—of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute, with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences, must be acts of the mind.'

Lord Coleridge C.J. alone refers to Riley's case (*sup.* § 7).

All the judges hold that there was no bailment of the sovereign, as indeed there hardly could be of a coin which was

not intended to be returned to or kept or applied for the prosecutor.

It is certain that the decision in Riley's case did not proceed upon the ground that there was no taking of possession until the prisoner knew what it was that he was taking, but proceeded on the grounds that there was a taking and a complete change of possession and a complete trespass from the beginning by reason that the prisoner's act was voluntary and that he knew he was driving the lambs, although he did not know that he was driving one which was not his own; that the possession so acquired was on general principles of law (not on special grounds limited to a case of mistake) a continuing trespass afterwards; and that an *animus furandi* supervening at any later time (and not necessarily at the moment of discovering the mistake) completed the elements of theft, at any rate as from the time when some act of misappropriation occurred, notwithstanding that the 'actual physical taking' was not felonious, but was entirely innocent.

It is submitted that the view of Ashwell's case most consonant with the former authorities is that there was on the voluntary receipt of the coin by the prisoner a change of the possession of it; that this change of possession was not a change of possession by 'delivery' because there was no sufficient knowledge to constitute consent to a change of possession (as there certainly was not sufficient knowledge to constitute consent to change of property or of right to possession); that it was therefore a change of possession by a taking at the first, but innocent, as in Riley's case; that the possession thus acquired was trespassory, though innocent; and that when the *animus furandi* supervened upon the trespassory possession, or at any rate when an act towards misappropriation was done, theft was committed. And even if the case is assimilated to that of a taking upon a finding with a clue to the owner and a misappropriation afterwards, it was theft according to the considered judgment of the

Court of Exchequer with the assent of Tindal C.J. in Merry *v.* Green, because the prisoner formed the intention of misappropriation immediately upon the discovery of the mistake. If that intention had not supervened until a later time, the same question appears to arise (on the assumption that the prisoner in Ashwell's case was to be treated as a finder) as that which arises in the case of other finders with a clue who take innocently at first and afterwards misappropriate—*sup.* § 13 (ii) (*b*)—and which has been regarded as still open.

The chief doubt as regards Ashwell's case seems to be whether the doctrine established in Riley's case applies where there is in fact and physically a delivery. It is submitted that it does apply to all cases in which the essential element of delivery, namely consent to a change of possession, is absent, and that where that consent is absent the only question is whether there has been in law any change of possession at all, or at what moment of time it has taken place.

It may be asked, suppose a man coming home at night finds a sovereign too much amongst his money—is his possession of it trespassory in any sense? The answer is, that it is impossible to say without further information. If some one put it into his pocket without his knowledge, whether purposely or wholly unintentionally or by mistake for something else, there will have been no element of a taking at all, before the discovery of the coin. Probably in point of law the possession of the former possessor has up to that time continued (*sup.* § 3) and continues (just as it does in the case of a thing lost in the street) until the finder knowing of the thing assumes the possession, whether with or without knowledge or belief that it is or is not his own. If on the other hand the finder took it (in the popular sense of taking) however innocently, a distinction may arise. Suppose he took it entirely involuntarily, as by sweeping it off a counter unknowingly with his sleeve, it is conceived that the

case is the same as that last put, and that the possession is not in law changed at all until he knows of the coin and assumes possession. If he took it voluntarily, supposing it to be one of his own sovereigns, or mistaking it for a shilling, Riley's case applies, and the taking was a trespass though innocent at first. If it was handed to him by some one else who gave him six sovereigns by mistake for five, or the sovereign by mistake for a shilling, or who gave him the sovereign mistaking him for another person, then inasmuch as an essential element of change of possession by 'delivery'—namely consent to the change of possession—is wanting by reason of the mistake, the reception of the possession by a voluntary act is in law a taking and is trespassory, though innocent at first.

§ 17. *Co-ownership.*

In general at common law one of several co-owners or co-bailees of a thing cannot commit trespass or theft in respect of it against the others,[1] for all have possession and right to possession in common; and so a wife cannot at common law steal her husband's goods, nor goods of which he is a co-owner with others.[2] But to the general rule there are some limitations and exceptions at common law and others by statute.

Common law limitations are that, as it seems, a corporator can steal the effects of the corporation;[3] and that where the legal property in partnership effects is vested in trustees or a treasurer, a partner can steal from the trustees or treasurer;[4]

[1] 1 Hale, 513; Waite, 1847, 2 Cox, 245.

[2] Hawk. 1. 32, 33; Willis, 1833; 1 Moo. 375. At one time it was thought that adultery so far destroyed the status of a wife that although she could not herself be convicted of stealing her husband's goods, yet if she delivered them to her adulterer, he could be convicted of receiving. But this view has been overruled; Reg. *v.* Kenny, 1877, 13 Cox, 397. As to the liability of the adulterer, see *inf.* § 19.

[3] Roscoe's Criminal Ev., tit. Larceny. No share or participation either in property or in possession attaches to any corporator or even to all the existing individual corporators.

[4] Cain, 1841, 2 Moo. 204.

and that if co-owners bail a thing to one of themselves it can be stolen from the bailee by the others or any of them,[1] for they have parted with all their possession. Statutory exceptions have been made against partners in certain banks, and by the 'Recorder's Act'[2] against members of co-partnerships and joint or common beneficial owners generally.

NOTE.—1. The Recorder's Act, 31 & 32 Vict. c. 116, seems not to extend to joint trustees nor to the case of one co-bailee stealing from another, nor to the case of a wife stealing from her husband. But since one co-owner of goods can now under that act steal from another, it may possibly be held that his wife joining with him in the taking in such a manner that coercion is negatived is guilty of theft.

2. If co-owners bail to one of themselves, *quaere* whether the co-owning bailee can steal either under the Recorder's Act or under the statute against fraudulent bailees.

3. See as to co-ownership by 'confusio,' Spence *v.* Union Mar. Ins. Co., 1868, L. R. 3 C. P. 427, and Buckley *v.* Gross, 1863, 32 L. J. Q. B. 129; 3 B. & S. 566.

4. As to husband and wife, see now the Married Women's Property Act, 1882, ss. 12 & 16, which to some, but it is very difficult to say to what extent, render husband and wife capable of stealing from each other. It has been held that this statute does not make the husband a competent witness against the wife on a charge of stealing from him; Reg. *v.* Brittleton, 1884, 12 Q. B. D. 266.

§ 18. *Lien and Stoppage in transitu.*

The rules of law on these subjects cannot here be considered in detail, and it is only possible to point out their place in a systematic statement of the law of possession.

(i) *Lien.*

Lien is in English law a prolongation of possession and right to possession. A person who has parted either with possession or with right to possession cannot have a lien,

[1] Webster, 1861, 31 L. J. M. C. 17. They have parted with their possession to him.

[2] 31 & 32 Vict. c. 116.

and a person who has a lien loses it entirely if either the possession or the right to possession is interrupted.[1]

(ii) *Stoppage in transitu.*

When a vendor of goods has parted with the property and the right to possession and the possession, all his rights in respect of the thing are gone, subject to one exception, namely that in case of insolvency of the vendee, an unpaid vendor, although he has sold upon credit, at any time before the goods have reached the possession of the vendee, or of the vendee's servant, and whilst they are still in the possession of a carrier or other person as an intermediary, who has not yet by attornment, usage or otherwise agreed to hold exclusively for the vendee, is permitted to re-assert his right to possession and to put himself in the same position as if that right had never been parted with. (See Blackburn on Sale, 2nd ed. Part iii; Benjamin on Sales, 2nd ed. Bk. v. Part i. ch. 5.)

No exceptions to the general rules as to the rights and remedies dependent on possession or right to possession seem to have been established with respect either to lien or to stoppage *in transitu*.

[1] See Reeves *v.* Capper, 1838, 5 Bing. N. C. 136; Forth *v.* Simpson, 1849, 13 Q. B. 680; Jacobs *v.* Latour, 1828, 5 Bing. 130.

CHAPTER III.

The Act and Intention in Theft.

An act of theft consists in the coincidence at the same moment of—

(i) A wrongful taking—*cepit et asportavit invito domino*: and

(ii) An intention of wrongful appropriation—*animus furandi*.

§ 19. *The Act of Taking.*

Theft of a thing is ordinarily committed at common law either by the act of taking it *animo furandi* from a person's possession, or by appropriation of it *animo furandi* by one who was previously in a trespassory though unfelonious possession; and under the statute by conversion *animo furandi* by a person lawfully in possession as a bailee.

What is a direct taking from the owner's possession.

A taking from a person's possession has already been generally described. It consists in acquisition of possession without the consent of the previous possessor to part with the possession. It may be either direct or indirect. The point at which the possession is so acquired by a direct taking in the popular sense is exactly defined as being such a removal of the thing that no part of it occupies the same particular portion of space as before, and that any tie or fastening by which the thing is held or secured is severed.[1] It is not necessary that the thing should have been wholly removed from the premises or presence of the owner or out of the receptacle in which it was placed. Any severed portion of

[1] See the authorities collected in Russell on Crimes; and Lapier, 1784, 2 East, P. C. 557.

a thing is for the purposes of this rule regarded as a separate thing; for instance, the drawing a pint of beer from a cask is a removal of that pint.[1]

NOTE.—1. 'One cuts my girdle privily on which my purse hangs, whereby the girdle and the purse fall to the ground, but took it not from the ground by reason of a cry raised: this is not felony because of his not having possession of it in fact after it was severed from my body. But if he had taken the purse in his hand and then cut the girdle and then let it fall to the ground that is felony if there is over 12*d.* in it: for it was in his possession at one time severed from the other's person: but it is not robbery, for he neither assaulted nor put him in fear, and so it was ruled in B. R. circa 26 Eliz.' (Crompton, p. 35.)

2. In the case of a servant who has received the custody of the thing from his master there may be a difference according as it is the servant's business to move the thing or not. If not, then as the servant's possession is the master's, it would seem that an ordinary taking and asportation is requisite and sufficient, as in the case of a mere stranger. But if the servant is charged with the duty of moving or carrying the thing, an actual and unequivocal diversion of the thing from its proper destination seems to be requisite and sufficient, as where a postman pockets a letter. (Poynton, 1862, 32 L. J. M. C. 29, L. & C. 247; cp. Cheeseman, 1862, 31 L. J. M. C. 89, L. & C. 140.) *Quaere*, in such a case whether it would be sufficient if the postman moved his hand with the letter towards his pocket? It may be noticed that when the servant's custody has been determined, his assuming to sell the thing—i.e. unless he moves or delivers it—is no more a theft than if he had always been a stranger to it (Jones, 1842, C. & M. 613). It might be an obtaining of the price by false pretences from the vendee.

Indirect or constructive taking.

Indirect or constructive taking may be either (*a*) by compelling another person to deliver or quit a thing, or (*b*) by receiving a thing from a person who did not know that he was delivering it (*sup.* § 16), or (*c*) by receipt or removal upon delivery or consent of a person, servant, or similar person who

[1] Wallis, 1848, 3 Cox, 67.

had not power to consent to a change of possession, or (*d*) by receipt or removal *animo furandi* though upon delivery or consent of a person who had power to consent and did consent to a change of possession, but who did not consent or had not power to consent to a change of property. The two latter of these forms of indirect or constructive taking require particular consideration.

Taking by consent of a person unable to give consent. Servant. Wife. Adultery.

There seems to be no doubt in principle that a possession acquired by delivery or consent of a servant or other similar person not himself having [1] nor authorised to give the master's or owner's consent to a transfer of the possession is trespassory, for the possession of the master continues and he has not consented to its being transferred—see 1873, Middleton, L. R. 2 C. C. R. 38, and cases there cited. Peculiar considerations however occur where the accused person received or took the prosecutor's goods by delivery or consent of the prosecutor's wife.

The general doctrine is that a person cannot be guilty of theft by taking goods by the delivery or privity of the prosecutor's wife;—either on the ground of her apparent authority, or on the ground that she has in some sense an ownership.[2]

But the exemption does not in general apply if at the time the accused and the wife were in a condition or immediate contemplation of adultery;[3]—either because the adultery avoids the authority, or because it is notice to the accused that the authority cannot be properly executed. Nevertheless even where there is adultery the exemption seems to apply

[1] If however the servant's delivery is so wrongful as to amount to a trespass by him he may have acquired possession as a trespasser, and then different considerations arise (*sup.* § 10).

[2] Harrison, 1756, 1 Leach, 47; Tollett, 1841, C. & M. 112; Featherstone, 1854, Dears. 369; Avery, 1859, 28 L. J. M. C. 185.

[3] Tolfree, 1829, 1 Moo. 243; Tollett, *ubi sup.*; Thompson, 1850, 1 Den. 549; Featherstone, *ubi sup.*; Berry, 1859, 28 L. J. M. C. 70; Mutters, 1865, 34 L. J. M. C. 54.

if the only goods taken are the wife's wearing apparel, or if the accused never took any separate possession of the goods, but only (e. g.) carried them for the wife, for in such cases the accused does not really take anything, but only aids the wife; and as she cannot be a principal thief, he cannot be her accessory[1] (and see *sup.* § 17, *n.*)

It has further in one case been suggested that the exemption does not apply (even in the absence of actual or intended adultery) if though the prisoner took the goods with the assent of the wife, that assent in truth was, and was known to the accused to be, an unauthorised connivance at theft.[2]

Where there is a contemplation of adultery it does not excuse the prisoner that he was servant of the prosecutor and so under control of the wife.[3]

Consent neutralised by animus furandi.

If a person obtains possession of a thing under colour of a treaty for the transfer of possession but really meaning to assume the property in (i. e. to steal) the thing, the nominal consent goes for nothing and the acquisition of the possession is a taking and (*animus furandi* being present) a theft, for there is no agreement *ad idem* and the accused takes 'of his own head'[4] and not under the bailment.

Note 1.—There are expressions in some cases which seem to imply that there must be some particular or specific trick, deception, or misrepresentation, but it seems clear that it is sufficient if the accused meant to assume an entire and unconditional dominion over the thing, and the owner did not in fact intend to concede to him an entire and unconditional dominion over it. The *animus furandi* will supply the rest; as it is said in Sharpless (1772, 1 Leach, 92), a 'pretence to purchase, with intent to steal,' may suffice; see 1887, Buckmaster, 20 Q. B. D. 182.

[1] Fitch, 1857, 26 L. J. M. C. 169; Rosenberg, 1843, 1 C. & K. 233; Kenny, 1877, 13 Cox, 397.

[2] Avery, *ubi sup.*; cp. Thompson, 1850, 1 Den. 549.

[3] Mutters, 1865, 34 L. J. M. C. 54.

[4] Per Brian C.J. in Year-b. 13 E. IV. p. 9, pl. 5; *sup.* § 6.

Nor is it even necessary that the accused should have made any positive representation. It is enough if he receives the thing from the owner at his request, intending to appropriate it and knowing that the owner does not intend him to appropriate it (Stock, 1825, 1 Moo. 87; Campbell, 1792, 2 Leach, 564; cp. Mucklow, 1827, 1 Moo. 160; and cp. Thompson, 1862, 32 L. J. M. C. 53, and Thomas, 1841, 9 C. & P. 741; Semple, 1786, 1 Leach, 420; Aickles, 1 Leach, 294).

The marginal note to Walsh's case, 1812, in R. & R. 215, to the effect that some specific trick or contrivance is necessary is not supported by the body of the case, which seems only to mean that such a trick would have raised an irresistible presumption of an *animus furandi*.

2. The principle of the rule was once thought to be that the fraud prevented any devesting of the owner's possession (Semple, 1786, 1 Leach. 420; and cp. Brown, 1856, Dears. 616): but the more simple explanation is that given in the text, viz. that the owner's possession is devested and the accused does acquire the possession not by consent but by trespass; and so it has been decided (Janson, 1849, 4 Cox, 82, overruling Brooks, 1838, 8 C. & P. 295) that a subsequent conversion is unnecessary.

3. See generally as to this case—Bullock, 1856, Dears. 653 (attempt); Bramley, 1861, L. & C. 21; Thompson, 1862, 32 L. J. M. C. 57; McKale, 1868, L. R. 1 C. C. 125; Cooke, 1871, L. R. 1 C. C. 295.

The great number of early cases resulted from the absence until recent times of any means of punishing a conversion by a bailee. It was of the greatest importance to show that an accused person took originally as a trespasser. But since the statutes against frauds by bailees the doctrine is of less importance.

No theft where owner consents to part with property.

An important distinction—one which is the occasion of the law of false pretences—must here be observed. When the owner of the thing by himself or by some person having general or specific authority to act for him on that behalf contracts to part immediately and unconditionally with his rights of property in the thing, he thereby loses all title to complain of the mere taking or obtaining of the thing,

no matter by what fraud the consent was obtained, at least until the contract has been rescinded.

The ground of this distinction appears to be that even supposing that in these cases there is a constructive taking, yet the owner, having consented to surrender his proprietary rights, including the right to possession, retains no title to complain of the taking as a violation of his right of property. There was an agreement *ad idem*, and therefore the property passed subject only to the vendor's rights of disaffirmance or restitution.

Note.—It is not clear however that the distinction does not rather depend on a difficulty as to *animus furandi*, viz. the difficulty of holding that the accused knew that the appropriation would be *invito domino*.

The distinction arises if credit is given even for a moment. It does not apply in favour of a person to whom as a bailee of the owner the thing is delivered to be handed over to a third person, even though the owner intends to part with the property in the thing to the third person, for during the transitus he intends the thing to be held under himself (cp. Brown, 1856, Dears. 616). But it would possibly be otherwise if merely as agent for the new owner he employed the accused as a common carrier.

It seems doubtful how far the distinction applies where the whole transaction is a mere concoction of premeditated fraud. See for authorities that it does still apply—Parkes, 1794, 2 Leach, 614; Coleman, 1785, 2 East, P. C. 672; Harvey, 1787, 1 Leach, 467; Prince, 1868, L. R. 1 C. C. 150; Essex, 1857, 27 L. J. M. C. 20; Wilson, 1837, 8 C. & P. 111. See on the other hand—Reg. *v.* Middleton, 1873, L. R. 2 C. C. 38, 12 Cox, 417; Reg. *v.* Buckmaster, 1887, 20 Q. B. D. 182; Morgan, 1854, Dears. 395; Bramley, 1861, L. & C. 21; cp. White *v.* Garden, 1851, 10 C. B. 927; Powell *v.* Hoyland, 1851, 6 Ex. at p. 72.

The distinction seems to apply not only where the defrauded person is general owner of the thing but also where he is a bailee, though it may be doubtful whether it applies to the case of a bailee who has no 'special property.' (Cp. Jackson, 1826, 1 Moo. 11; Longstreeth, 1826, 1 Moo. 137.) In such cases the general owner might still prosecute for the theft unless he has given the bailee a general power of disposition or the bailment is such as to exclude for the time the owner's rights.

The distinction is subject to the important limitation that if the contract to part with the property is made for the owner by a person who had not authority to give such consent, it will not avail the deceiver. And for the purposes of this limitation a person has not authority to make such contract unless he has a general authority to act for the owner or a specific authority for the particular object. For instance, the authority of a carrier's servant to part with goods was held not to extend to parting with them to the wrong person, and the authority of a shopman to sell goods was held not to extend to parting with them for bad half-crowns; but the authority of a bank cashier was held to extend to parting with money for a forged order. See Middleton's case, *sup.*

In general it appears that the contract by a servant or agent must, in order to be within the distinction, be such as to pass the property for civil purposes. (See Prince, 1868, L. R. 1 C. C. 150; Longstreeth, 1826, 1 Moo. 137; Webb, 1850, 5 Cox, 154; Jackson, 1826, 1 Moo. 119; Sheppard, 1839, 9 C. & P. 121; Stewart, 1845, 1 Cox, 174; Sparrow, 1847, 2 Cox, 287; Simpson, 2 Cox, 235; Robins, 1854, Dears. 418; Campbell, 1792, 2 Leach, 564; Hench, 1810, R. & R. 163; Barnes, 1850, 2 Den. 59; Middleton, *sup.*)

The owner may be induced by deceit to consent to give a bare physical possession to another as his servant or licensee in his presence or on his premises. In such a case the deceit is unimportant for the purposes of the law of theft, since the owner's possession continues equally whether there is deceit or not, and a taking and carrying away is an act of theft, independently of the deceit. There is in effect a double theft (for prosecutions of servants for theft in this form see Barnes, 1850, 2 Den. 59; Thompson, 1862, 32 L. J. M. C. 57; Cooke, 1871, L. R. 1 C. C. 295).

Theft by a person during a possession acquired by trespass, but not originally felonious.

It is doubtful whether or not a person who is in a trespassory (though at first unfelonious) possession of a thing commits theft of it by the mere mental occurrence of *animus furandi* during that possession without some act of appropriation (see *sup.* § 7, on Riley's case). But the question is seldom material, for at all events some new act is in general

necessary to evidence the occurrence of the *animus furandi*, and any act which does this appears to be sufficient, as the marking or secreting or selling of a sheep accidentally driven away.[1]

Statutory theft by conversion by a bailee.

There remains the statutory theft by a bailee. The words of the present statute[2] are 'fraudulently take or convert to his own use or to the use of any person other than the owner.' It does not appear that there have been any express decisions on the meaning of these words, and it is an important and difficult question whether an actual conversion must be proved, or whether it is sufficient to show such conduct as for civil purposes is evidence of a conversion, such as an absolute refusal to deliver.[3] It seems that the intention of the act was to place the bailee who misappropriates in the same position as the bailee who has broken bulk; but nothing is gained by this explanation, for in the case of breaking bulk there is an unequivocal act, viz. the removal of the part from its place in the bulk.

Connivance by the prosecutor.

With regard to connivance, two distinctions are made in the cases. The first is, that if the owner procure or induce the accused to do the act, then although the owner does so for the purpose of detecting and punishing the accused, and although the accused does the act *animo furandi* and believing it to be *invito domino*, there is no theft; but that a mere knowledge assent or facilitation by the owner, if his intention is to detect and convict, will not avail the accused (Egginton, 1801, 2 Leach, 913; Dannelly, 1816, R. & R. 310; Williams, 1843, 1 C. & K. 195). The second distinction is analogous to or perhaps identical with that made between a

[1] Riley, 1853, Dears. 149, *sup.* § 7; Hale, 507. In one case (overruled on another point), Brooks, 1838, 8 C. & P. 295, an offer of a thing for sale was thought not to be evidence of a conversion at common law.

[2] Larceny Act, 1861, s. 3.

[3] In Henderson's case, 1871, 23 L. T. N. S. 628, jewels to be returned if not sold in ten days were fraudulently sold after the ten days, and the C. C. C. R. sustained a conviction. Here there was plainly an actual conversion.

delivery by a bailee or servant to a third person and a taking by the third person by license of the bailee or servant, and is that if the owner or a person authorised by him actually delivers the thing to the accused, though merely with intent to detect and convict him, there is no taking and therefore no theft (Bannen, 1844, 1 C. & K. 295; Lawrence, 1850, 4 Cox, 438).

§ 20. *Elements of animus furandi.*

The *animus furandi*, or felonious or fraudulent intent, may be analysed as follows:—

Firstly, there must be an intention as to the disposal of the thing taken, which may be called the intention of deprival and appropriation, and which seems to be identical in character (though it may differ as to finality) with the actual or implied intention which enters into a civil conversion.

Secondly, this intention must be wrongful in the sense that there must be a knowledge that the deprival and appropriation will be a deprival of the owner against his will, and in the sense that there must not be a real claim of right. It has sometimes been thought that there must further be a motive or at least an intention of gain or advantage to the accused (*lucri causa*), but this appears now to be unnecessary except in so far as it may be involved in the other ingredients of the *animus furandi*.

The following paragraphs examine these elements in further detail, firstly as to ordinary cases of theft by a stranger from a general owner, and next as to the more special cases of theft from bailees and others.

It may be noted that the words 'fraud' and 'fraudulent,' as they are commonly applied to theft and the cognate offences, include a portion of each of the above elements; for neither on the one hand is a deprival and appropriation thought fraudulent unless it is made with a knowledge that it is *invito domino* and without claim of right, nor on the other hand is a taking, without claim of right and known to be *invito domino*, thought fraudulent unless there is an intention of appropriation or of something akin to appropriation.

Intention of deprival and appropriation.

The intent of deprival and appropriation requires to be explained in two respects, firstly as to the character or quality of the intended deprival and appropriation, and secondly as to its intended finality; but in many cases these are hardly to be distinguished.

1. *As to the character or quality.* There need not be any intention physically to deprive the owner of the thing, or even to take it for so much as a moment out of his presence or premises.

Thus it suffices if a servant remove his master's goods merely from one part of his shop to another, intending to offer them to him for sale,[1] or wrongfully put the master's axle into the master's own furnace in order to melt it;[2] for it is as effective a deprivation of him to make him pay the value of his own goods or to destroy the character of his axle as to run away with them.[3]

So on the other hand there need not be any intention to keep or use the thing even for a moment for the accused's own use, unless in the most technical sense of use. Thus it may suffice if his intention is merely to give the thing away[4] or instantly to destroy it,[5] or even to apply it wrongfully to the master's own use,[6] as in the case of a groom giving too much corn to his master's horses before the Statute 26 & 27 Vict. c. 103.

It seems somewhat doubtful whether an intention to exact a reward from an owner as the condition of restoring to him a thing which he has lost is sufficient.[7] It would seem that an

[1] Hall, 1848, 1 Den. 381; Manning, 1852, Dears. 21.

[2] Richards, 1844, 1 C. & K. 532; cp. Webb, 1835, 1 Moo. 431; Pool, 1857, Dears. 345.

[3] Cp. as to a civil conversion, Fouldes *v.* Willoughby, 1841, 8 M. & W. 540; Fenn *v.* Bittleston, 1851, 7 Exch. 152.

[4] White, 1840, 9 C. & P. 344.

[5] Cabbage, 1815, R. & R. 292.

[6] Morfit, 1816, R. & R. 307; Privett, 1846, 1 Den. 193; Handley, 1842, C. & M. 547.

[7] Wynne, 1786, 1 Leach, 413; Peters, 1843, 1 C. & K. 245; York, 1848, 1 Den. 335; Gardner, 1862, 9 Cox, 253.

original intention to keep the thing in all events unless a reward shall be given would comprise every technical requirement for this part of an *animus furandi*, but that a mere intention to detain it for a greater or less time in the hope of a reward being offered would not be sufficient, especially if there were no proof of an intention to require an exorbitant reward.[1]

2. *As to the intended finality of the deprival and appropriation.* The English law does not follow the rule found in Gaius and the Institutes and adopted in some modern systems of law, that an intention of mere misuse or of temporary deprival is sufficient for theft; but it requires an intent of final deprival and appropriation. Thus, if the jury believe that the accused took a horse with the intention of using it for a time and then returning it, they cannot in general find him guilty of theft by that taking; and there seems to be no limit in English law to the length or extent of use or misuse which a man may mean and carry out in such a case without being guilty of theft, so long as he intended to return the thing, except the difficulty of convincing the jury of that intention.[2] There are, however, some dicta[3] on which an argument might be founded to the effect that if the accused took the horse for such use or even used it in such a manner as would probably result in its destruction or loss to the owner, an intention to cause such destruction or loss might be inferred. And where the purpose to which the thing is intended to be applied is of itself an exercise of complete ownership and will, when effected, put it out of the power of the accused to return the thing except upon the happening of some contingency, as where a person improperly takes plate and pawns it, intending at some future time to redeem and restore it, the conclusion of an intent of final deprival and appropriation can hardly be negatived except by proof of ability, or at least of reasonable

[1] Cp. Watts, 1844, 1 Cox, 349, where the question was suggested but not decided whether it would be sufficient to obliterate marks on wreck with intent to obtain salvage under the old law.

[2] 1801, Philipps, 2 East, P. C. 662; Dickinson, 1820, R. & R. 420.

[3] 1801, Philipps, *sup.*

belief of ability as well as intent, to redeem and restore.[1] And where a person took a railway ticket, he was convicted of theft, notwithstanding its return to the company at the end of the journey, for its value was then exhausted.[2]

The general conclusion as to this part of the subject seems to be that the required intention of deprival and appropriation is an intention to assume the exercise of dominion or general property over the thing, as distinguished from an intention to assume the exercise of such rights as might be exercised by a bailee or servant, or as might be given by the owner to another person without extinguishing his own general property.[3] Nor does there seem to be any considerable danger in adopting such a rule, for if the accused assumed an apparent dominion over the thing, it will be for him to establish an original limitation of the intended dominion against the strong presumption arising from apparent assumption of general dominion.

Note.—A question may arise where money has been taken, and there is clear proof of an intention to restore it in a short time.

If a shilling is taken and the intention was to restore a different shilling in five minutes, it would seem that the theft is technically complete (cp. Wells, 1858, 1 F. & F. 109); and that if it were otherwise, no consistent definition of theft would be possible unless by treating such cases as exceptional.

Wrongfulness of the intention.

Next as to the second element, or wrongfulness of intention.

(1) *As to the knowledge or belief that the proposed disposal of the thing will be against the owner's will.* This part of the *animus furandi* seems not to require further explanation, beyond the mere distinction of it from the fact of the owner not consenting. If the owner did not in fact consent, there is yet

[1] Phetheon, 1840, 9 C. & P. 552; Medland, 1854, 5 Cox, 292; Trebilcock, 1858, 7 Cox, 408.

[2] Beecham, 1851, 5 Cox, 181.

[3] E. g. a right of partial destruction or *abusus*. See *sup.*; Trebilcock, 1858; Pool, 1857; Hall, 1848; Holloway, 1848.

no theft if the accused *bona fide* believed on reasonable grounds that he did consent; and on the other hand, if the owner did consent to the change of property, there is no theft though the accused believed that he did not consent.

(2) *As to the absence of a claim of right.* It is not easy to determine what claim of right will exclude theft. It seems that a conviction for theft was in one case[1] obtained against gleaners; but there may have been circumstances of aggravation which are not stated. On the other hand, in the case of a poacher taking back wires and a pheasant which had been seized by a keeper, an acquittal was directed;[2] and in Holloway's case[3] a poacher was allowed to be acquitted on a charge of stealing a keeper's gun in a scuffle, on the ground that he might have taken it merely in the apprehension of personal danger. East[4] says, 'if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy.'[5] Mere necessity is not a sufficient claim of right.[6] It would seem that a mere *bona fide* claim of right to the thing itself might not be held to exclude theft if there is no such claim of right to do the act by which it is obtained.

NOTE.—Cp. as to forgery, Hoatson, 1847, 2 C. & K. 777: 'The prisoner's was a wrongful act whereby others might be damnified. In one respect the case may be said to be one of misfortune, inasmuch as perhaps the prisoner considered himself entitled to the transfer; he had most likely contemplated helping himself by wrong to what he thought his right. I can, however, perceive no reason for doubting that the act involved a fraud':—per Rolfe, B.; cp. also Hamilton, 1845, 1 Cox, 244, commenting on Williams, 1836, 7 C. & P. 354, where a servant's acquittal was directed who by false pretences had obtained goods from his master's debtor in order to reimburse the master.

[1] 2 Russ. 165.
[2] Hall, 1828, 3 C. & P. 409.
[3] 1833, 5 C. & P. 524.
[4] 2 P. C. 659.
[5] Cp. 1 Hale, 508.
[6] Hawkins, 1, 33, 33. See Reg. *v.* Dudley, 1884, 14 Q. B. D. 273.

(3) *As to lucri causa.* There remains the question whether the *animus furandi* is not incomplete unless gain or advantage was an object of the accused. It is conceived that, at least in the case of theft against a general owner, the modern cases[1] have settled that *lucri causa* is immaterial and that motive does not form any ingredient of the definition of theft.

Special cases. Theft from bailee. Theft by owner. Theft from stranger.

There remain the less common cases,—

(1) Where a thing is alleged to have been stolen by a stranger from a bailee or other person having a limited interest.

(2) Where a thing is alleged to have been stolen from a bailee by the general owner (or bailor).

(3) Where a thing is alleged to have been stolen from a person who had no proprietary right but only the title of actual possession as against wrong-doers.

(1) In a theft by a stranger from a bailee or other person having a limited interest, the required *animus furandi* appears to have reference to the right of property of the general owner, and not to the limited right of the bailee. If the bailee has the thing to use for a month for his own benefit, and a stranger takes it from him intending to withhold it for the rest of that month, and then to restore it, it would seem that this temporary appropriation is not constituted a theft even against the bailee by the fact that it is a final deprival and appropriation as against him; for it is not meant to be final or complete as regards the taker, or as against the general owner.

There is also some difficulty as to the ingredient of knowledge that the appropriation will be *invito domino.* Apparently it must here be construed to mean a knowledge

[1] *Sup.*; Cabbage, 1815, R. & R. 292; Morfit, 1816, R. & R. 307; White, 1840, 9 C. & P. 344; Wynn, 1848, 1 Den. 365.

not, as in ordinary cases, that the person against whom the theft is alleged to have been committed and in whom therefore the possession is laid, dissents, but merely a knowledge that some *dominus*, either general or limited, dissents; for if it were essential that the bailee should dissent, then a stranger might in collusion with the bailee steal the thing without being liable to the general owner.

(2) The case of a theft by a general owner from a person who is his bailee or who otherwise has a possession coupled with an interest, or from his servant, is still more obscure. The possibility of such a theft seems not free from doubt.

In the case of a master charged with stealing his own goods from his servant, there seems to be no room for an *animus furandi* at all similar to that which is required in ordinary cases, and East[1] endeavours to supply its place partly by a fiction of special property (apparently by way of estoppel) and partly by an intent to charge the hundred.

So where the owner is charged with stealing from his bailee[2] or from the sheriff, some of the old authorities supply the *animus furandi* by finding an intent to charge the bailee *in detinue*[3] or to render him liable at the suit of the crown,[4] or by other special intents of damage to the bailee or gain to the accused.[5] The bailee or sheriff has a limited property, and the general owner assumes to exercise an absolute dominion which he is not at the time entitled to exercise, knowingly against the will of the temporary *dominus* and without claim of right; but whether this is suffiicent, *quære*.

(3) In theft by a wrong-doer against a person who has merely the possession, *animus furandi* seems to be the same as in ordinary thefts, for as against the wrong-doer the possession of the prosecutor is equivalent to a general property.

[1] 2 P. C. 654. [2] Webster, 1861, 31 L. J. M. C. 17.
[3] 1 Hale, 513, not supported by any of the references.
[4] Cp. Wilkinson, 1821, R. & R. 470. [5] See Bramley, 1822, R. & R. 478.

CHAPTER IV.

Things not the subjects of Theft.

§ 21. *Of what things trespass or theft cannot be committed.*

INCAPACITY of a thing for being a subject of theft results not in general from any special or arbitrary rule of law, but from the exclusion (by the nature or situation of the thing) of some one or more of the general and necessary ingredients or conditions of trespass or felonious intention. Accordingly the principal instances of such incapacity are not exceptions from the general principles, but rather negative illustrations of them. But as in some cases doubt exists as to the true ground of incapacity, and in other cases there are several grounds for the incapacity, and in one case at least the incapacity rests on a special or arbitrary rule, it is necessary to indicate the cases in which one or other of the essential ingredients or conditions of trespass is wanting, and those in which theft is excluded by a special rule.

1. Inasmuch as trespass to goods involves a taking from another's possession, it cannot be committed by severing and carrying away part of the soil or a fixture or growing crop;[1] for such things are not moveable or in possession till they are severed, and the taking cannot be a wrong to possession which did not exist. Nor is it a wrong to a right to possession, for such a right cannot exist until the thing is in a state in which possession may be exercised over it, and in this case no such state precedes the taking.[2] Accordingly the

[1] The remedy was by special writ qu. cl. fr. and alleging the particular wrong and now is by action of trespass to land. Crops may be personal goods and chattels in the sense that they pass to the executor. Qu. as to taking a tree in a pot or the fruit growing on it.

[2] See Townley, 1870, L. R. 1 C. C. 315, where the rule was applied in the case of rabbits.

possession of the taker is not trespassory, and he cannot commit trespass or theft either by the first taking or by a subsequent conversion or misappropriation. If however he abandons or is deprived of his possession, he becomes like any other stranger, and a resumption of it may be a trespass. And now by various statutes the rule has been abrogated or modified in nearly all important cases of the kinds above mentioned.

It was formerly supposed that the mere leaving of the thing by the taker on the owner's premises for a time[1] of itself vested a possession in the owner so as to make a re-occupation by the taker a trespass and (*animus furandi* being present) a theft. But it seems clear that such a relinquishment is merely evidence of an abandonment general or to the owner, more or less conclusive according to the circumstances.[2]

On the same ground trespass or theft cannot at common law be committed of living animals *ferae naturae* unless they are tame or confined. They may be in the park or pond of a person who has the exclusive right to take them, but they are not in his possession unless they are either so confined or so powerless by reason of immaturity that they can be taken at pleasure with certainty.

An animal once tamed or reclaimed may continue in a man's possession although it fly or run abroad at its will, if it is in the habit of returning regularly to a place where it is under his complete control. Such habit is commonly called *animus revertendi.*

It is to be noted that the taking of an animal *ferae naturae* found at large, though in fact having an *animus revertendi,* will not be theft if the taker had not the means of knowing that it was reclaimed, not because there is no trespass, but because an essential ingredient of *animus furandi* is excluded by his ignorance that there was an owner. In some cases

[1] Hale, p. 510, instances 'an hour's time or so.'

[2] See Townley's case, *ubi sup.*; esp. per Blackburn J.

also theft is excluded by reason that the taking is constituted a lesser offence by statute.[1] The exclusion of wreck, treasure-trove and waif[2] may be ascribed either to this rule or to the want, through the non-appearance of any owner, of that knowledge that the appropriation will be *invito domino*, which is essential for *animus furandi*.

2. Again, theft involves an intention of wrong to some person's right of property, and therefore it cannot be committed of things which are incapable in law of being subjects of property; viz. the human body, alive or dead;[3] nor of such animals as are not only *ferae naturae* but also unfit for the food of man and incapable of domestic or other practical service;[4] nor of things which are capable of being subjects of property but are not actually reduced into property.[5] In a country where most things capable of being subjects of property are appropriated, probably the only examples of this class are *animalia vagantia*, fishes and wild birds, and beasts of such kinds as may become subjects of property.

On the same ground, thirdly, are excluded things which have once been reduced into property but the property in which has been lost. Probably the only examples of this class are wild animals which have been reclaimed or confined but have again become wild, and gases or other similar matters which have escaped.[6]

[1] See generally Staundf. 1 16; 3 Inst. 108–9; 2 East, P. C. 607; 2 Russ. 278–82; R. *v.* Shickle, 1868, L. R. 1 C. C. 158; R. *v.* Roe, 1870, 22 L. T. N. S. 414; R. *v.* Cory, 1864, 10 Cox, 23.

[2] Year-b. 1348, 22 Ap. p. 107. pl. 99. See generally as to these cases, 1 Hawk. 33, 38; 2 East, P. C. 606, 650; 3 Inst. 108; 5 Rep. 107–8; 7 Rep. 15–6; Vin. Tresp. p. 475; Wreck. p. 539–42; Waife, p. 409; Prerog. p. 576–7; Bac. Tresp. p. 564–577; Trover, 683, 695, 706; Biddulph *v.* Ather, 1755, 2 Wils. 23; Dunwich (Bailiffs) *v.* Sterry, 1831, 1 B. & Ad. 831; Smith *v.* Milles, 1786, 1 T. R. at 480. And as to sea-weed, R. *v.* Clinton, 1869, 4 Ir. L. R., C. L. 6; and as to treasure-trove, R. *v.* Thomas, 1863, 33 L. J. M. C. 22, L. & C. 313.

[3] See however 3 Inst. 108, where Lord Coke makes the incapacity of a ward or villein for being stolen depend on their being 'in the realty.' *Quaere* as to surgical or other preparations, and as to mummies or bones imported from abroad.

[4] Singing-birds may be subjects of property on the ground of their use for pleasure. Year-b. 12 Hen. VIII. p. 3.

[5] Nul poit dire 'feras suas.' 12 Hen. VIII. p. 3.

[6] See as to theft of manufactured gas, White, 1853, Dears. 203.

Lastly, either by this rule, or by an extension of the rule as to land, charters and other documents of title to realty are excluded at common law, together with the boxes containing them.[1] A piece of land is the property not of any individual but of a man and his heirs or otherwise according to the particular limitation, and even so what is owned is not so much the land itself as an estate in it; and the charters of title follow the estate and are not the property of any person apart from the estate. On a forfeiture of goods by any person the charters of title of his land are not forfeited, for otherwise the estate would be forfeited with them. Accordingly they are not *in bonis* of any person, and though special trespass lay for taking them as charters in possession, general trespass did not lie (nor therefore does theft at common law) for taking them as goods or property. And the rule has in modern times been extended to records concerning the land, though not of title.[2]

3. Again, theft cannot be committed of things of no value. A thing may be of no value in fact or of no value in law. Things of no value in fact are such as are of no value to sell or exchange, and are of no value to the owner by reason that they can be replaced without expense or trouble.[3] If they are of some value to the owner it seems not to be necessary that they should have originally cost anything, but cost may be evidence of value.[4] The value need not amount to a farthing.[5] A piece of paper is sufficient, though spoiled or defaced by manuscript, print, or designs.[6] Things of no value at common law are documents which are merely evidences of rights, agreements, or other choses in action. Their value in fact as paper or stamps was held to be merged in their

[1] 10 Edw. IV. p. 3, Inst. p. 108. Another reason given in the Year-book is that they cannot be valued. See *inf.* 3.

[2] Westbeer, 1740, 1 Leach, 12. *Quaere* whether the rule extends to heirlooms, or to copies or counterparts. In Powell's case, 1852, 2 Den. 403, the question was raised but not decided whether the rule extends to mortgage deeds.

[3] Clarke, 1810, 2 Leach, 1036.

[4] Morris, 1840, 9 C. & P. 349.

[5] Perry, 1845, 1 Den. 69.

[6] Guernsey, 1858, 1 F. & F. 394.

evidentiary character.[1] But this rule is subject even at common law to the limitation that if the document is so intrinsically imperfect as to be inoperative, it is not a chose in action but is remitted to its material character as a mere paper parchment or stamp as the case may be and therefore may be a subject of theft. Such is the half of a bank note, or an entire promissory note which has been satisfied and which, though re-issuable, has not been re-issued.[2] But the mere want in an agreement of the requisite stamp has been held by the judges[3] not to constitute such an imperfection, when the stamp might be affixed at any time and the agreement was not absolutely void for want of it. Again, bills, notes, orders, and many other valuable securities or instruments which are within the rule at common law, have been taken out of it and made subjects of theft by statute: but in order that the statutes may apply, the instrument must be so far complete and operative as to satisfy the statutory denomination which is alleged in the indictment,[4] and failing this it is remitted to its character at common law either as a chose in action or as a piece of paper as the case may be. It has been held that a satisfied but uncancelled note (though apparently not a chose in action but mere paper at common law) is still a note within the statute 7 Geo. 3. c. 50, so that in this case an indictment would seem to be good either on the statute or at common law.[5] It seems once to have been held that the statutes did not extend to protect notes &c. whilst they remained in the hands of the maker, on the ground that until issued they are not available to give any

[1] 8 Rep. 33, but cp. 12 Rep. 2; Chanel *v.* Robotham, 1606, Yelv. 68 (bonds); 1 Hawk. 33, 35; 2 East, P. C. 597; Watts, 1854, Dears. 326; Walker, 1827, 1 Moo. 155 (records of a court, not concerning land); Powell, 1852, 2 Den. 403 (Mortgage deeds).

[2] Mead, 1831, 4 C. & P. 535; Clarke, 1810, R. & R. 181, 2 Leach, 1036; Vyse, 1829, 1 Moo. 218.

[3] Watts, *ubi sup*, Parke B. *dissent.*

[4] Pooley, 1800, R. & R. 12; Aslett, 1804, R. & R. 67, 2 Leach, 958; Yates, 1827, 1 Moo. 170; Perry, 1845, 1 Den. 69; cp. Hart. 1833, 6 C. & P. 106. N.B. in some of these cases there was no count at common law.

[5] Ransom, 1812, R. & R. 232.

person a right which he would not otherwise possess, but it is now settled that the statutes apply in such a case.[1]

The rule itself has been held not to apply to documents which are evidence not of mere rights of action but of title to specific goods of which the holder of the document has a legal right to possession as against the thief, as in the case of a pawn-ticket.[2]

A railway ticket in the hands of the company's servant *before issue* has been held a subject of theft.[3]

The reason of the rules as to value is obscure. They may not improbably be traced to the ancient doctrine that a motive of gain (*lucri causa*) was necessary for theft. Or they may be an indirect result of the old distinction between grand larceny,[4] of things over the value of twelve pence, and petty larceny. Especially in the case of documents the latter explanation seems probable, for the value of the parchment or paper would seldom have amounted to twelve pence in the times when the rule arose.

4. There remains the special rule which excludes some things on the ground of their vileness in the view of the law. Dogs,[5] cats,[6] ferrets,[7] and some other animals[8] are by common law incapable 'in respect of the baseness of their nature'[9] of being subjects of theft, although they may in some cases be subjects of property and possession and of value and capable of being subjects of civil trespass.[10] The definition of this class is very uncertain. The most probable view appears to be that it includes as a rule all animals which are both *ferae naturae* and unfit for food, even though they are useful for domestic or other purposes. But bees and

[1] Walsh, 1812, R. & R. 215, 2 Leach, 1061; Metcalf, 1835, 1 Moo. 433; Heath, 1838, 2 Moo. 33. Cp. Phipoe, 1795, 2 Leach, 673.

[2] Morrison, 1859, Bell, 158; 28 L. J. M. C. 210.

[3] Beecham, 1851, 5 Cox, 181. Cp. Boulton, 1849, 1 Den. 508, as to false pretences.

[4] Stat. Westm. I. c. 15.

[5] See Robinson, 1859, Bell, 34.

[6] 3 Inst. 109.

[7] Searing, 1818, R. & R. 350.

[8] See 3 Inst. 109; 1 Hale, 512; Hannam *v.* Mockett, 1824, 2 B. & C. 934.

[9] 3 Inst. 109.

[10] Year-b. 12 Hen. VIII. p. 3.

also hawks and falcons of kinds useful for sport are excepted from the rule at common law. And now by statute[1] the rule is abolished as to any 'bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose.'

[1] Larceny Act, 1861, ss. 18–22. In the United States the imposition of a dog-tax has in some jurisdictions been held to amount to a statutory declaration that dogs are valuable property, and thus to abrogate the common-law rule. See Commonwealth *v.* Hazlewood (Kentucky, 1887), 23 Reporter 282.

INDEX.

By F. Pollock and Francis E. J. Smith B.A.
(New College, Oxford.)

[P. = Possession.]

C.

D.

V.

W.