A Property Anthology

Edited with Comments by

Richard H. Chused

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NOTE ON EDITING

All of the materials used in this anthology have been edited. Most footnotes have been deleted without elision marks. Editor's deletion of text is noted by asterisks: * * *. Materials deleted in the original are noted by periods: . . .. Matter inserted by the editor is noted by brackets: [insertion].

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Contents

Part I

Introduction: Possession, Notice and Ownership as Defining Elements of Property

Most property courses begin with a look at the importance and meaning of possession as a defining element of legal rules that create or protect value. Two articles are excerpted below. The first, by Richard Helmholz, reviews the relationships between concepts of morality and legal recognition of one's possession as binding upon others. The second, by Carol Rose, takes an insightful journey through the cases—those discussing the capture of foxes, the unearthing of treasure trove, the existence of adverse possession and the "discovery" of North America—most often used to open introductory property courses. For a somewhat different perspective on the importance of possession, *see* Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

R. H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221–1231, 1233–1237, 1242–1243 (1986)*

I. INTRODUCTION

It is hornbook law that possession of a chattel, even without claim of title, gives the possessor a superior right to the chattel against everyone but the true owner. The possessor has a "special" property interest in the chattel that only the chattel's owner, or someone claiming under him, can dispute. This special property interest exists even in the most extreme case: that in which the possessor has obtained the chattel by trespass, fraud, or theft. Even a wrongful possessor may reclaim the chattel from any nonowner who violates this possessory right. Such is the oft-stated rule of simple possession.

Support for this statement of the law is formidable. It boasts a strong leading case, *Anderson v. Gouldberg*, an 1892 Minnesota decision which held that a possessor of logs acquired by trespass had a right to them "against all the world except those having a better title."[3] The court's decision rested on the logically unanswerable argument that if the law were to embrace any standard but that of simple possession, the consequence would be "an endless series of unlawful seizures and reprisals in every case

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[3] Anderson v. Gouldberg, 51 Minn. 294, 296, 53 N.W. 636, 637 (1892).

where property had once passed out of the possession of the rightful owner."

In addition, the rule claims the weighty authority of Justice Holmes,[5] Dean Ames,[6] and Sir Frederick Pollock.[7] They described the rule as one firmly established at common law, and they stated that it clearly demonstrated the law's longstanding preference for purely objective standards. Holmes, in particular, used the rule to show the law's indifference toward moral considerations. He argued that since the wrongful possessor could obtain rights to a chattel equal to those enjoyed by a lawful possessor, the law took an objective view of externally verifiable facts. Holmes, therefore, could use the rule to support his vision of a law cleansed of morality.

Yet doubts persist. Despite Holmes' view, morality has been a strong force in American public life, and *Anderson* has turned out to be a peculiar leading case. Although routinely and usefully included in property casebooks, *Anderson* rarely has been cited in subsequent reported cases. No citations for it appear at all after 1950, and most of the earlier cases that cited *Anderson* with approval involved a possessor with rights in addition to that of simple possession. Moreover, scholars recently have criticized Holmes' description of the law as representing largely his own subjective preferences.[12] H.L.A. Hart, for example, has observed that the desire to establish an objective standard, free from considerations of inner-blameworthiness, was "an idee maitresse, which in the end became something of an obsession with Holmes."[13] One cannot help wondering whether Holmes' endorsement of the rule of simple possession might have been wishful thinking on his part. Holmes himself said, "The first call of a theory of law is that it should fit the facts," and there is at least a possibility that his rule does not.

This Article examines whether the rule of simple possession "fits the facts" of modern case law. * * * While later cases do not indicate that *Anderson* was wrongly decided, the case law since 1892 shows three ways in which its black letter rule has been overextended.

First, the paradigmatic situation of *Anderson* almost never has arisen in actual litigation. Virtually all the cases addressing the rights of simple possession have not been contests between two wrongdoers. The argument on which *Anderson* is based—that anything but a simple possession rule would lead to an endless series of seizures by persons having no right to the chattel, although logically sound, turns out not to address the problems most often raised in actual litigation. If there are thieves involved in successive seizures of stolen goods, few of them find their way into a court of law. When they do, the thieves are apt to be defendants to criminal charges, not plaintiffs seeking to vindicate possessory rights. Most cases have involved parties whose claims to property could be weighed against each other, without relying upon who had possession first. The possibility of "endless seizures" is a specter more theoretically frightening than real.

Second, the traditional statement of the rule of simple possession entirely omits one of the most important distinctions that emerges from the case law: that between rightful and wrongful possession. The omission of moral considerations is, of course, exactly what Holmes desired. But Holmes' view does not square with the facts of a large number of subsequent cases. Courts regularly have examined the legitimacy of possession of chattels, and have refused to accord possessory rights when they have found *mala fides* or misconduct on the part of the possessor. Sometimes this has involved balancing equities between two competing possessors, neither of whom has a claim to title. More often, however, it simply has involved closing the door on wrongdoers who are seeking to take advantage of their own wrongs.

Third, although the above might suggest that the rule of simple possession rarely appears in the case law, in fact the opposite is true. Judges use it with some frequency. They do not invoke it, however, to protect wrongfully acquired possession. On the contrary, courts invoke the rule when it can be used to buttress claims of rightful possession. In other

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[5] O.W. HOLMES, THE COMMON LAW 190 (M. Howe ed. 1963). Holmes gave judicial voice to the doctrine in Odd Fellows' Hall Ass'n v. McAllister, 153 Mass. 292, 295, 26 N.E. 862, 863 (1891).

[6] Ames, *The Disseisin of Chattels*, in LECTURES ON LEGAL HISTORY 172, 179 (1913).

[7] F. POLLOCK & R. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 91-93 (1888).

[12] See J. NOONAN, PERSONS AND MASKS OF THE LAW 65-110 (1976); R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 58-59, 179-81 (1982); Atiyah, *The Legacy of Holmes Through English Eyes*, 63 B.U.L. REV. 341, 357-59 (1983); Kaplan, *Encounters with O. W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1830 (1983); Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U.L.Q. 681 (1983); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984).

[13] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 242 (1968).

words, courts have not employed the rule of simple possession to protect simple possession. Hornbook law could usefully be amended to take account of what the rule actually does.

II. REPLEVIN, TROVER, AND CONVERSION

The actions of replevin, trover, and conversion must provide the primary test of the simple possession doctrine. The rule of simple possession holds that a possessor who can allege no more than prior possession can recover a chattel against anyone but the rightful owner. The cases, however, show that in practice the law is considerably more complex. Few of the cases decided since 1892 have involved the paradigmatic case of two equal wrongdoers. When the situation has arisen, courts most often have held that "one trespasser or wrongdoer can not maintain trover against another." They have forbidden either party to bring suit.

The few courts that have applied the hornbook rule in cases of wrongful possession have dealt with unusual facts. A recent New York case, for example, involved a soldier who had taken some of Adolf Hitler's effects at the end of World War II and kept them openly for many years. His chauffeur stole the effects from him, and the former soldier sued to recover them. The court invoked the rule of simple possession to allow the soldier to prevail.[24] The facts of this case were, to say the least, out of the ordinary. Even if the former soldier's possession were tainted by the means of acquisition, he was not what most judges would think of as a thief.

Such direct contests between two thieves have been very rare in reported litigation. In the great majority of cases in which a wrongdoer has attempted to assert possessory rights, his opponent has not also been a wrongdoer. The opponent instead has had some legitimate claim to custody of the chattel, even if it did not amount to a claim to title. In such cases the wrongful possessor virtually always has lost. Courts have distinguished between rightful and wrongful possession and have accorded legal protection only to the former. * * *

Cases involving money acquired illegally provide one illustration. In a Montana case, the owner of slot machines sued to recover money confiscated by the police.[26] The court held that the machines' owner could not recover the money from the police, even though no statute permitted forfeiture of the money: "[T]he power of our courts, either at law or in equity, cannot be invoked in aid of one showing a violation of the law to . . . secure to the violator the fruits of his outlawry." * * *

In these cases, a wrongdoer has sought the aid of the courts to recover from a third party property he had unambiguously possessed. The third party has neither been the owner nor claimed under the owner. But neither has he been a wrongdoer. Often the third party has been a governmental agency or a stakeholder. In such situations, the possessors have invoked the doctrine that the law looks no further than the fact of prior physical possession. The courts, however, have rejected the doctrine and instead have applied fundamental concepts of morality and fair dealing to deny the possessor's claim. The recurring theme found in the resulting case law is this: What a man has acquired illegally he cannot replevy.

* * *

The common policy justification for denying the wrongful possessor's claim is simple and pervasive in the case law: courts should not allow wrongdoers to take advantage of judicial resources. The policy is based upon what courts characterize as "the dignity of the law," and it is much the same policy that also has resulted in the well-established rule that courts will not enforce illegal contracts. This policy prevents application of the doctrine of simple possession in replevin cases. It would require courts to sanction what they consider wrongdoing. They hold, contrary to the black letter rule, that "no court should be required to serve as paymaster of the wages of crime, or referee between thieves."[42]

Despite this seemingly conclusive rejection of the rule, recent cases exist in which American judges have invoked the doctrine that even wrongful possession deserves the protection of the law. In fact, such cases are not infrequent. Judges clearly find the doctrine useful, and research into the case law does not suggest that the rule plays no part in the current work of the courts. But its function in the decided cases normally has not been to protect possession acquired by wrongdoing. Its function has been the protection of lawful possession against inequitable claims.

The most frequent cases have involved possessors with a legitimate, but limited, interest, such as a

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[24] Lieber v. Mohawk Arms, Inc., 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. 1970) * * *.

[26] Dorrell v. Clark, 90 Mont. 585, 4 P.2d 712 (1931).

[42] Stone v. Freeman, 298 N.Y. 268, 271, 82 N.E.2d 571, 572 (1948) * * *.

bailee of a chattel. If a wrongdoer takes the chattel from the bailee's possession, or damages it through negligence or design, the wrongdoer may set up bailee's lack of title as a defense. This is an attempt to escape the consequences of the defendant's acts by showing a defect in the title of someone in lawful possession. The rule of simple possession provides a sufficient answer to this plea.

In one typical case, a court permitted the state of Montana to maintain an action of replevin to recover a road roller a state employee had converted wrongfully.[46] The road roller had come into the state's possession from the federal government, and the defendant urged that the state failed to obtain authorization for the transaction under state law. He argued that title remained in the federal government, so that the state lacked the right to sue. The court, however, dismissed this argument, citing with approval Justice Holmes' views on possession. The court conceded that "the state is not the absolute owner of the disputed road roller." Nevertheless, the court held that "the controlling fact here is that the state did come into the lawful possession." Citation of the hornbook rule allowed the Montana court to treat the matter as an easy case, because the greater (wrongful possession) necessarily included the lesser (legitimate possession).

* * *

Indeed, it is noteworthy how often judges couple the recitation of the hornbook rule protecting wrongful possession with a finding that the plaintiff in the case before them had a legitimate right to the chattel. No incongruity occurs to them. Thus, one finds the rule that the law protects even wrongful possession joined with express findings that a plaintiff had acquired the chattel "in a lawful manner," or that he had held "peaceable possession of the property," or that he was "rightfully and not wrongfully entitled to the chattel." How ironic to see the doctrine of the skeptic Holmes pressed into the service of morality.

III. THE LAW OF FINDERS

Cases involving finders of lost or abandoned chattels provide a second test of the status of wrongful possession. They make a particularly good test, since very often the only claims that arise in finders cases are possessory claims. In these cases, courts must concentrate upon the circumstances under which the finder's simple possession ought to prevail over everyone but the true owner. Moreover, the cases are valuable because they take a uniform position on the issue of wrongful possession. Although the law of finders contains contradictory decisions and artificial distinctions, the cases are consistent on the subject of wrongful possession.

Most finders cases do not involve two wrongful possessors. The paradigmatic case represented by *Anderson* is not at issue. Instead, the typical case involves a person who discovers a lost chattel while on property where he has a right to be and takes the chattel into his control. *Armory v. Delamirie*,[58] the leading English case, arose in just such a situation. The chimney-sweep's boy found a jewel while cleaning a chimney. The court held the boy was entitled "to keep it against all but the rightful owner."[59] Today, cases of underwater divers who have discovered treasure in old ships sunk off the American coast have raised the same legal questions and most have reached the same result. Courts have awarded possessory rights to the divers who first reduced sunken treasure to their unequivocal control. In such cases, no serious competing claims emerge at the time of finding because the goods have been abandoned. Moreover, the finder has done nothing wrong by seeking out the treasure. His initiative, labor, and pluck rather deserve praise. Courts, therefore, find it easy to invoke the doctrine that the mere possessor has valid rights against everyone but the chattel's owner.

When the facts become more tangled, however, the limitations of the hornbook rule appear. Nothing changes the reaction of courts more quickly than wrongdoing on the part of the finder. Thus, courts have held that one cannot become the "finder" of a book of traveller's checks, or of shopping carts left in the vicinity of a supermarket, because the "finder" could have ascertained quite easily that another person had a good claim to them. The "finder" is a wrongdoer. The same holding is reached when the discovery occurs in the course of a trespass. The wrongfulness of the trespass disqualifies the "finder" from claiming the item discovered. Of one such "self-confessed thief," an Ohio judge remarked that "to talk of his 'finding' the money under the circumstances is just pure twaddle."[64] * * * A Pennsylvania judge, dealing with three boys who had entered an

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[46] State ex rel. Olsen v. Sundling, 128 Mont. 596, 281 P.2d 499 (1955).

[58] 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722).

[59] * * * *[S]ee also* Hannah v. Peel, [1945] 1 K.B. 509.

[64] Niederlehner v. Weatherly, 73 Ohio App. 33, 38, 54 N.E.2d 312, 314, aff'd, 142 Ohio St. 366, 51 N.E.2d 1016 (1943).

unused building and discovered $280 made the same point. Refusing their claim as finders of the money, he held that "they should get none inasmuch as they had no business being in the building."[66] In other words, trespassers cannot "find" in any sense the law will credit.[67] It does not matter that the owner of the property has no title to the chattel. What matters in the cases is that a trespassing finder can acquire no rights in the fruits of his wrong.

* * *

Good-faith possession, therefore, has played a vital role in the finders cases. * * * Courts have shaped the law of finders to encompass this ethical factor. Judicial decisions regularly go beyond the rule of simple possession and treat wrongful possession quite differently from lawful possession. Rightful conduct is the first step in qualifying as a finder. Only when such conduct exists will American courts invoke the rule that simple possession is protected by the law.

IV. POSSESSION AND THE STATUTE OF LIMITATIONS

A third test of the rule of simple possession arises out of cases invoking the statute of limitations to defeat the rights of chattel owners. According to hornbook law, the possessor of a chattel belonging to someone else has a valid possessory interest in the chattel, which will ripen into full ownership after the passage of a statutorily fixed number of years. The law provides the owner with that period of time to reclaim the chattel, but if he fails to act within that time, title passes to the possessor by operation of law. The passage of time alone cures the defect in the possessor's title. * * * Under this view, wrongful conduct by the person claiming under the statute of limitations is irrelevant if that person has held nonpermissive possession for a sufficient length of time.

American case law has not, however, evolved quite this way. Courts have not looked simply to the fact of possession and the passage of time in deciding cases in which the statute of limitations is involved. Courts do sometimes expressly invoke the rule of simple possession as a title-clearing mechanism. It is essential that they be able to do so: otherwise the possibility of perpetually unownable property might arise. But courts rarely invoke the rule to protect the wrongful possessor. Only when other factors favoring the possessor coincide with unambiguous possession does the statute of limitations in practice convert possession into title. The working principle that best explains the pattern of case law is the distinction between clear wrongdoing and honest, if mistaken, possession.

The distinction between wrongful and honest possession lies behind the many statutes that toll the statute of limitations when the defendant fraudulently has concealed the existence of the cause of action from the owner or when the cause of action itself is based upon the defendant's fraud. American legislatures have given concrete shape to the maxim that no man should profit from his own wrong by enacting statutes precluding use of statutes of limitations when they would allow defendants to hide behind their own fraudulent acts. The thief is not the only sort of defendant caught by such statutes, but he is one of them. "Theft," said one Minnesota court, "is an aggravated case of fraud or wrong where every effort is made to conceal the property taken . . .. In such case the courts hold the statute does not start running until discovery so that legal redress may be possible against the wrongdoer."[83] The rule is based on "good morals" and "the plainest principles of justice."

Even without express statutory authorization, American courts rarely have permitted dishonest possession to ripen into title. To avoid applying the statute of limitations, courts have employed a variety of theories. One frequently invoked is equitable estoppel. Courts have held that a defendant is estopped to invoke the statute of limitations when it would enable him to take refuge behind the shield of his own wrong. Thus, when someone knowingly withholds property from its rightful owner, he will be estopped to set up the statute of limitations when the owner sues to recover the property. The flexibility of the doctrine and the incantation-like sound of the words "equitable estoppel" allow courts to set aside the plain language of the statute of limitations when the interests of justice seem to require it.

A second device used to avoid awarding title based upon wrongful possession is judicial manipulation of the phrase "accrual of the cause of action." It plausibly can be argued that no cause of action has accrued until someone has a meaningful chance to assert it. When a thief has taken personal property,

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[66] Bussler Estate, 12 B. Fiduc. 281 (1962).

[67] The leading case is Barker v. Bates, 30 Mass. (13 Pick.) 255 (1832); *see also* * * * Favorite v. Miller, 176 Con. 310, 407 A.2d 974 (1978) * * *.

[83] Commercial Union Ins. Co. v. Connolly, 183 Minn. 1, 5-6, 235 N.W. 634, 636 (1931).

for example, the rightful owner lacks any real chance to reclaim it. Until he discovers who has taken his property, courts hold that no cause of action has accrued within the meaning of the statute of limitations. Such an interpretation of "accrual of a cause of action" prevents dishonest possessors from successfully asserting title under the statute of limitations.

A third judicial device for evading the statute of limitations depends directly upon considerations of fairness. An early case from New Hampshire presents a typical set of facts. The plaintiff lost a pocketbook in 1871.[88] The defendant found the purse and spent the money inside, even though he knew it belonged to the plaintiff. The plaintiff discovered what had happened twelve years later and sued to recover the money appropriated. By then the statute of limitations had long since run, and the defendant set up the statute as a bar. The New Hampshire court, however, summarily rejected the defense. Even though the state had not enacted an exception to its statute of limitations for fraudulent concealment, the court held that the defendant's "willful silence" amounted to constructive fraud and "constitute[d] a sufficient answer to the plea." The defendant's possession and use of the pocketbook for the statutory period was not enough to "cure the vice" of the initially wrongful appropriation.

Although the New Hampshire case is old, its rationale has not weakened over time. A modern New Hampshire court emphatically rejected a similar plea: "It is well established that our courts will not countenance fraudulent conduct."[90] Nor is New Hampshire alone. Other American courts have continued to reject statute-of-limitations defenses when they would protect dishonest possessors. Even when the statute of limitations contains no exception for fraudulent concealment, most judges enforce the rule that it would be "shocking both in morals and to common sense" to confer title on a wrongful taker simply because he escapes detection for long enough.[92]

But this is not the whole story. American courts have found the doctrine of simple possession useful when the wrongdoer has sold the chattel to a bona fide purchaser, who subsequently holds it for the statutory period. In this situation, courts often have awarded title to the bona fide purchaser. The result certainly is correct. Clear title must be established at some future point; title eventually must pass out of the original owner. Otherwise, no one could ever gain secure title. The rule that the law protects even wrongful possession helps to make this result possible.

The clearest illustration of the rule's utility involves cases in which a wrongful taker has sold the chattel to a bona fide purchaser and the statute of limitations does contain a fraudulent concealment exception. The question in such cases becomes whether the purchaser falls within the exception. If a court holds that his possession is fraudulently concealed, title will not pass to him no matter how long he holds the chattel. It is a difficult case. On the one hand, he will very likely have "concealed" the chattel from its owner just as completely as the wrongdoer did. On the other hand, his conduct will lack the element of conscious fraud or wrongdoing that would have kept the statute of limitations from operating in favor of the original taker. Does his possession retain the character it had in the hands of the thief, or does he take a new, untainted possessory interest?

In this situation, American courts have called upon the hornbook rule of simple possession when the equities have favored the bona fide purchaser. For title to accrue to the purchaser, three things generally must exist: (1) honesty on the part of the purchaser; (2) open use by him for the statutory period; and (3) failure on the part of the owner to take reasonable steps to secure his rights. The heralded recent case of *O'Keeffe v. Snyder*[96] expressly laid down this test, although in fact the result is less innovative than the New Jersey Supreme Court announced. The test it adopted is very much like what American courts have long done in practice.

* * *

It cannot be said that the American cases involving bona fide purchasers of stolen goods have been altogether harmonious. Courts within the same jurisdiction may reach seemingly contradictory results, sometimes allowing the statute of limitations as a bar, sometimes not. Nevertheless, virtually all the cases in which courts have allowed possession to ripen into title have involved good-faith takers of the property. There must be a title-clearing mechanism for chattels, and the bona fide purchase largely serves that function. The evident wrongdoer, the out-and-out thief, and the willful defrauder cannot set up the statute of limitations as a defense to actions brought to recover the chattel or its value. * * * [I]t is not the

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[88] Quimby v. Blackey, 63 N.H. 77 (1884).

[90] Lakeman v. La France, 102 N.H. 300, 303, 156 A.2d 123, 126 (1959).

[92] Lightfoot v. Davis, 198 N.Y. 261, 267, 91 N.E. 582, 584 (1910) * * *.

[96] 83 N.J. 478, 416 A.2d 862 (1980).