POSSESSION

In the whole range of legal theory there is no conception more difficult than that of possession. The lawyers brought their usual acumen to the analysis of it, and since their day the problem has formed the subject of a voluminous literature, while it still continues to tax the ingenuity of jurists. Nor is the question one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. The transfer of possession is one of the chief methods of transferring ownership. The first possession of a thing which as yet belongs to no one is a good title of right. Even in respect of property already owned, the wrongful posses- sion of it is a good title for the wrongdoer, as against all the world except the true owner. They are sufficient to show the importance of this conception, and the necessity of an adequate analysis of its essential nature.

Possession in Fact and in Law

It is necessary to bear in mind from the outset the distinction between possession in fact and possession in law. We have to remember the possibility of more or less serious divergences between legal principles and the truth of things. Not everything which is recognised as possession by the law need be such in truth and in fact. And conversely the law, by reasons good or bad, may be moved to exclude from the limits of the conception facts which rightly fall within them. There are three possible cases in this respect. First, possession may and usually does exist both in fact and in law. The law recognises as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary. Secondly, possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognised as such by the law, and he is then said to have detention or custody rather than possession. Thirdly, possession may exist in law but not in fact; that is to say, for some special reason the law attributes the advantages and results of possession to someone who as a matter of fact does not possess. In consequence of this divergence, partly intentional and avowed, partly accidental and unavowed, between the law and the facts of possession, it is impossible that any abstract theory should completely harmonise with the detailed rules to be found in any concrete body of law. Such harmony would be possible only in a legal system which had developed with absolute logical rigour, undisturbed by historical accidents, and unaffected by any of those .special considerations which in all parts of the law prevent the inflexible and consistent recognition of general principles.

Corporeal and Incorporeal Possession

We have seen in a former chapter that ownership is of two kinds, being either corporeal or incorporeal. A similar distinction is to be drawn in the case of possession. Corporeal possession is the possession of a material object—a house, a farm, a piece of money. Incorporeal possession is the possession of anything other than a material object—for example, a way over another man's land, the access of light to the windows of a house, a title of rank, an oflflce of profit, and such like. All these things may be possessed

as well as owned. The possessor may or may not be the owner of them, and the owner of them may or may not be in possession of them. They may have no owner at all, having no existence de jure, and yet they may be possessed and enjoyed de facto. Incorporeal possession is distinguished as possession juris, the possession of a right, just as incorporeal ownership is the ownership of a right. The Germans distinguish in like fashion between Sachenbesits, the possession of a material thing, and Rochsbesitz, the possession of a right. The significance of this nomenclature and the nature of the distinction indicated by it will be considered by us later. It is a question much debated whether incorporeal -possession is in reality true possession at all. Some are of opinion that all genuine possession is corporeal, .and that the other is related to it by way of analogy merely. They are of opinion that there is no single generic conception which includes possessio corporis and possessio juris as its two specific forms. The possession of a right of way is generly identical with the possession of the land itself, though specifically different from it.

The Animus Possidendi

The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. It is a purpose of using the thing oneself and of excluding the interference of other persons. As to this necessary mental attitude. The animus sibi habendi is not necessarily a claim of right. It may be consciously wrongful. The thief has a possession no less real than that of a true owner. To possession in good faith the law may and does allow special benefits which are cut off by fraud, but to possession as such—the fulfilment of the self-assertive will of the individual—good faith is irrelevant. The claim of the possessor must be exclusive. Possession involves intent to exclude other persons from the uses of the thing possessed. A mere intent or claim of unexclusive use cannot amount to possession of the material thing itself, though it may and often does amount to some form of incorporeal possession. He who claims and exercises a right of way over another man's land is in possession of this right of way; but he is not in possession of the land itself, for he has not the necessary animus of exclusion.

The animus possidendi need not amount to a claim or intent to use the thing as owner. A tenant, a borrower, or a pledge may have possession no less real: than that of the owner himself. Any degree or form of intended use, however limited in extent or in duration, may, if exclusive for the time being, be sufficient to constitute possession. The animus possidendi need not be specific, but may be merely general. That is to say, it does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it. A general intent with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual objects belonging to that class, even though their individual existence is unknown.

The Corpus of Possession

To constitute possession the animus domini is not in itself sufficient, but must be embodied in a corpus. The claim of the possessor must be effectively realised in the facts ; that is to say, it must be actually and continuously exercised. The will is sufficient only when manifested in an appropriate environment of

fact, just as the fact is sufficient only when it is the expression and embodiment of the required intent and will. Possession is the effective realisation in fact of the animus sibi habendi.

The Relation of the Possessor to other Persons

So far as other persons are concerned, I am in possession of a thing when the facts of the case are such as to create a reasonable expectation that I will not be interfered with in the use of it. I must have some sort of security for their acquiescence and non-interference. "The reality," it has been well said, "of de facto do- minion is measured in inverse ratio to the chances of effective opposition." A security for enjoyment may, indeed, be of any degree of goodness or badness, and the prospect of enjoyment may vary from a mere chance up to moral certainty. At what point in the scale, then, are we to draw the line? What measure of security is required for possession? Any measure which normally and reasonably satisfies the animus domini. A thing is possessed, when it stands with respect to other persons in such a position that the possessor, having a reasonable confidence that his claim to it will be respected, is content to leave it where it is. Such a measure of security may be derived from many sources, of which the following are the most important.

1. The physical power of the possessor
2. The personal presence of the possessor
3. Secrecy
4. Custom
5. Respect for rightful claims
6. The manifestation of the animus domini
7. The protection afforded 'by the possession of other things

Relation of the Possessor to the Thing Possessed

The second element in the corpus possession is the relation of the possessor to the thing possessed, the first being that which we have just considered, namely the relation of the possessor to other persons. To constitute possession the animus domini must realise itself in both of these relations. The necessary relation between the possessor and the thing possessed is such as to admit of his making such use of it as accords with the nature of the thing and of his claim to it. There must be no barrier between him and it, inconsistent with the nature of the claim he makes to it.

Immediate and Mediate Possession

One person may possess a thing for and on account of someone else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as immediate or direct. Of mediate possession there are three kinds. The first is that which I acquire through an agent or servant; that is to say through some one who holds; solely on my account and claims no interest of his own In such a case I undoubtedly acquire or retain possession ; as, for example, when I allow my servant to use my tools in his work, or when I send him to buy or borrow a chattel for me, or when I deposit goods with a warehouseman who holds them on my

account, or when I send my boots to a shoemaker to be repaired. In all such cases, though the immediate possession is in the servant, warehouseman, or artisan, the mediate possession is in me; for the immediate possession is held on my account, and my animus domini is therefore sufficiently realised in the facts.

The second kind of mediate possession is that in: which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to obtain from him the direct possession, whenever I choose to demand it. That is to say, it is the case of a borrower, hirer, or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is pre- pared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf.

There is yet a third form of mediate possession, respecting which more doubt may exist, but which must be recognised by sound theory as true possession. It is the case in which the immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned.

The animus and the corpus are both present: the animus, subject to the temporary right of another person, to claim the exclusive use of the thing for myself; the corpus, in as much as through the instrumentality of the bailee or pledge, who is keeping the thing safe for me, I am effectually excluding all other persons from it, and have thereby attained a sufficient security for its enjoyment. In respect of the effective realisation of the animus domini, there seems to be no essential difference between entrusting a thing to an agent, entrusting it to a bailee at will, and entrusting it to a bailee for a fixed term, or to a creditor by way of pledge.

Concurrent Possession

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realisation. Hence there are several possible cases of duplicate possession: 1. Mediate and immediate possession coexist in respect of the same thing, as already explained. 2. Two or more persons may possess the same thing In common, just as they may own it in common. This is called compossessio by the civilians. 8. Corporeal and incorporeal possession may coexist in respect of the same material object, just as corporeal and incorporeal ownership may.

The Acquisition of Possession

Possession is acquired whenever the two elements of corpus and animus come into co-existence, and it is lost so soon as either of them disappears. The modes of acquisition are two in number, namely Taking

and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of someone else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the other hand, is the acquisition of posses sion with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive. Actual delivery is the transfer of immediate possession; it is such a. physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the mediate possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession; the delivery of a chattel by way of loan or deposit is an instance of the reservation of mediate possession on the transfer of immediate. Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds.

Relation between Possession and Ownership

It is in fact what ownership is in right. Possession is the de facto exercise of a claim; ownership is the de jure recognition of one. Ownership is the guarantee of the law ; possession is the guarantee of the facts. Possession without ownership is the body of fact, uninformed by the spirit of right which usually .accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. Ownership strives to realise itself in possession, and possession endealvours to justify itself as ownership. The fact that one wishes, desires, or needs to have possession of an object is not, in itself, sufficient. More specifically the requirement of occupancy is that one do something with or to the object that can be reasonably construed as presently and effectively bringing it under one's own purposes—that it is oneself, and not others, who control it. Whether one has actually brought an external object under one's control is decided by how one's act reasonably would appear to others. And this in turn will depend upon the contingent particular features of the thing, its physical relation to the person, and so forth. In the case of wild animals, such as Pierson's fox, occupancy can be achieved only if the animal is deprived of its freedom of movement. Where the object is inanimate or incapable of escape, it may be sufficient to grasp or mark it, to bring it onto one's property, and so on, depending upon the object's particular characteristics and its physical relation to oneself and others. In all instances, one treats the thing as subordinate to one's purposive capacity by affecting it in some way—by, as it were, touching it ab extra and imposing upon it a contingent condition that is by no means native or necessary to it.

Now it is certainly possible that a given instance of taking possession may involve nothing more than merely grasping the object. If such is the case, occupancy—and with it the right and correlative disability—are coeval with physical possession of the thing and cease the instant one no longer has it in such possession. While this perfectly satisfies the definition and requirement of taking possession, it is nevertheless categorically ambiguous, from a legal point of view. Because others are excluded only in so far as one is physically connected with the thing, they cannot touch it without affecting in some way one's bodily integrity. Thus, the exclusion can be viewed as rooted in the right of bodily integrity; it is unnecessary to refer it to a right to an external thing, that is, to something that can be separable and different from one's body. Yet if there is to be a right of property that is irreducibly distinct from the right of bodily integrity, it must be necessary to so refer it. Consequently, it is essential to the very

existence of a distinct juridical category of property that it be possible to view individuals as having possession of something in a way that satisfies the definition and requirement of first occupancy even when they are no longer in actual physical possession of it. Where taking possession consists in merely grasping the thing, this point is not brought out and remains purely implicit. Yet it is perfectly possible to take possession in a way (e.g. by marking it) that reasonably exhibits to others that one has put, and that one is continuing to put, something to one's purposes even when the object is not in one's present physical possession. In these instances, the occupancy that establishes the right can continue in time despite an interruption in present physical possession; a first occupier does not automatically cease to have the right of possession just because he or she no longer has the object in actual physical possession. Taking possession is accomplished in a way that makes explicit the fundamental point that it must be possible to be in rightful possession of an external thing without having it in one's physical possession.