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THREE CASES ON POSSESSION—SOME FURTHER OBSERVATIONS

BY JOSEPH F. FRANCIS

Mr. A. L. Goodhart has, in the current number of the Cambridge Law Journal,¹ made some very interesting comments on three well known cases on possession² as involving rights of find-

¹ Vol. 3, No. 2, 1928. Without implying the contrary, this paper will hardly be intelligible until Mr. Goodhart's paper is first read.

For those who do not have access to the Journal here follows a brief summary of the author's conclusions upon the three famous finder's cases (cited in note 2 below). As to *Bridges v. Hawkesworth* he finds five distinct theories to support the finder as against the possessing (occupying) landowner: (1) The court's *no intentional* depositing of the notes—that is, they were lost; (2) Lord Russell's *public access*; (3) Justice Holmes' *no intent* to exclude because no intent to exclude from place where notes were found; (4) Sir Frederick Pollock's, *no de facto control*, for any one could pick up the notes; (5) Sir John Salmond's *no animus*, since *no knowledge* of their existence. The author's own theory is that the case is wrongly decided because the average finder does recognize some *control* in the landowner by usually tendering the property to him for the true owner and because the landowner has a *general intent* to exclude strangers from anything of value on his premises even though it be found in a place where the public is invited. By implication the author sets up some principles of possession involving *intent* and *control*. The last four theories he finds invalid and misleading because these are not the theories of the court deciding the case.

In regard to the case of *South Staffordshire Water Company v. Sharman* Mr. Goodhart finds two theories, a valid one and an invalid one: (1) the court's theory, whereby the landowner has possession of the rings because possession of the land carries with it possession of everything attached to or under the land; and (2) Sir John Salmond's theory, that the landlord has possession because the rings were found by the servant, who found not for himself but for his employer.

Likewise in *Elwes v. Brigg Gas Company* the author finds two theories, one correct and one incorrect: (1) the court's theory that the plaintiff was in possession of the boat because he was in possession of the ground; and (2) Sir John Salmond's theory, that the plaintiff is entitled to the boat because the defendant was a trespasser. Sir John Salmond's theories in both these cases are considered invalid because they are not the theories enunciated by the courts deciding these cases.

Finally the author rather half-heartedly suggests a distinction between the *Bridges* case and the other two cases in that in both of the latter cases the lost articles were found *in* or *under* the soil, but he is not himself impressed with this distinction.

² *Bridges v. Hawkesworth*, (1851) 15 Jur. 1079, 21 L. J. Q. B. 75; *Elwes v. Brigg Gas Co.*, (1886) 33 Ch. Div. 562; *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44.

ers. He rather earnestly takes to task learned judges and eminent text-writers³ for "seeing things" in judgments that are not there. He finds Mr. Justice Holmes "slightly misleading,"⁴ Sir Frederick Pollock with an "interesting theory * * * not part of the *ratio decidendi* of the case,"⁵ and Sir John Salmond's theory "contrary to the established principle of the English Law on the subject."⁶ With great diffidence Mr. Goodhart advances his own theory, *i.e.*, that the *Bridges* case is "incorrectly decided."⁷

Although Mr. Goodhart disclaims any attempt to state a general theory of possession, there are to be found in his paper many interesting assumptions, implicit and explicit, on his theory of possession and on his theory of judicial decision. With great diffidence and with the greatest respect for Mr. Goodhart it is proposed in this paper to examine just a few of these assumptions with the view of casting some doubt on their validity or usefulness.⁸

Quoting Viscount Dunedin⁹ and Professor Wambaugh,¹⁰ Mr. Goodhart assumes that "a case is a precedent for a doctrine on which the judges based their judgment; it is not a precedent for a doctrine which was not in the minds of the judges."¹¹ Thus he rather "cavalierly" disposes of one of the most difficult and most vital questions in Anglo-American law today, *i.e.*, What does a case decide? What is *decision* and what is *dictum*?¹²

³ Op. cit., note 1 *supra*, p. 196.

⁴ *Ib.*, p. 199.

⁵ *Ib.*, p. 201.

⁶ *Ib.*, p. 202.

⁷ *Ib.*, p. 202.

⁸ C. J. Keyser, *THINKING ABOUT THINKING* (1926), pp. 73-76: "Selection of postulates is one thing. Detection of postulates is another. * * * The proposition, that all of our empirical thinking involves essential reference to postulates despite the fact that when we are engaged in such thinking people are for the most part utterly unconscious of any such reference, is very sweeping. It is indeed tremendous. Nevertheless it is true." Walter W. Cook, *Scientific Method and the Law* (1927), 13 *American Bar Association Journal* 303, 306.

⁹ *Great Western R. Co. v. Owners of S. S. Mostyn*, [1928] A. C., 1. c. 73.

¹⁰ *THE STUDY OF CASES*, p. 24.

¹¹ Op. cit., note 1 *supra*, p. 195.

¹² Herman Oliphant, *A Return to Stare Decisis* (1927), 14 *American Bar Association Journal* 71, 159. This paper contains a very searching and critical analysis of this whole question.

Once we choose our postulates we fix our destiny. If we assume that the moon is made of green cheese then we must agree, among other things, that green cheese is that of which the moon is made. If we do not like our conclusions we are always free to change our postulates.^{12a} One cannot quarrel much with Mr. Goodhart's conclusions once he admits his postulates. I take it that no postulate is self-evident and to doubt, occasionally, a proposition that is often taken to be self-evident is a wholesome exercise.¹³

The first case considered by Mr. Goodhart is the famous case of *Bridges v. Hawkesworth*.¹⁴ The facts of this case are summarized—and to summarize is always to omit—by Patteson, J.: “The notes which are the subject of this action were evidently dropped by mere accident in the shop of the defendant by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally * * *. The plaintiff found them on the floor * * *.”¹⁵ Other facts are given by the reporter. The plaintiff handed the notes to the defendant to keep them to be delivered to the owners. The defendant advertised them; three years elapsed; the owner was not found. The plaintiff offered to pay the defendant for the expense of advertising and to indemnify him against any claim in respect to the notes. The defendant refused to deliver the notes to the plaintiff, and the plaintiff brought an action in the County Court. The judge decided for the defendant, and the plaintiff appealed to the Court of Queen's Bench where the judgment was reversed.

Now what did that case decide? It decided what are the legal consequences of the facts of that case, of course, and more. How much more is the real question. It decided what are the legal consequences of any other facts exactly like those of the instant case. But this is not saying very much, for no two cases are exactly alike.¹⁶ There are always some differences, as in the

^{12a} Although we are not so free to change the world in which we live.

¹³ “To have doubted one's own first principles is the mark of a civilized man.” Mr. Justice Holmes, COLLECTED ESSAYS (1921), p. 307. See also Keyser, *op. cit.*, p. 54. ff.

¹⁴ Note 2, *supra*.

¹⁵ At p. 1082, *Jur.*

¹⁶ Oliphant, *op. cit.* note 12 *supra*, p. 72.

parties, time, etc. So, if we are to have any useful method of *stare decisis*, the case must decide more. Some generalization and abstraction must be involved. The question is, How broad and in what direction? Does the case decide what the case upon which it is based¹⁷ seems to decide, *i.e.*, "The finder of a lost article is entitled to it as against all the parties except the real owner?" This rule is clearly too broad—if this were the only difficulty involved. But there are other obvious difficulties, Who is a *finder*? This in turn raises the difficulties of Who comes *first* in possession? and What is *lost* property?¹⁸ Then is it not quite possible that these terms have different meanings for different purposes as, for instance, purposes of procedure, purposes of criminal responsibility, etc.^{18a} Does the case decide that the finding of goods on the land of another in a place of *public access* gives the finder better rights than any one else but the true owner? Mr. Goodhart argues that it does not, because this is not the ground upon which the learned Justice placed his decision.¹⁹ Lord Russell is taken to task²⁰ for attributing to the decision of Patteson, J., that "the place in which they were found makes all the legal difference." A further objection is found in the difficulty involved in drawing a line between a place of *public access* and a place of *public exclusion*.²¹ The implication back of the latter objection will be considered later.

There seem to be two plausible answers to the first objection in the nature of both a confession and an avoidance. It is true that Patteson, J., did say in the *Bridges* case, "the learned [county] judge was mistaken in holding that the place in which they were found makes any legal difference." It is submitted that what the learned judge had in mind is this, "the place in which they were found makes no legal difference *in this case*." It is submitted that this is more probably his meaning because he was dealing with the facts of the instant case and not those of the *Sharman* case or the *Elwes* case or the scores of finder cases that have since arisen. Be this as it may, does it follow that a

¹⁷ *Armory v. Delamirie* (Nisi Prius 1722), 1 Strange 505.

¹⁸ R. W. Aigler (1922), 21 Mich. L. Rev. 664, 57 Am. L. Rev. 511.

^{18a} This will be developed further later. See note 39.

¹⁹ Op. cit. note 1 *supra*, p. 197 ff.

²⁰ *Ib.*, p. 197-8.

²¹ *Ib.*, p. 200.

case cannot be a precedent for a doctrine which was not in the mind of the judge when he made his decision? Generally cases are not precedents for doctrines not involved in the facts of the case and not in the mind of judge; but it is respectfully submitted that where the doctrine is involved in the facts, although it is not noticed in the arguments of counsel or in the opinion of the judge and was not even in the mind of the judge, it may and generally does become part of the decision and hence a precedent. Whether it was noticed or not, the fact remains that these notes were found on the floor of a shop to which the *public had access*. Both judge and counsel may have sensed this, although it failed to appear in their vocal behavior; but whether they did or did not does not derogate from the fact that this parcel was found in a place where the public was invited. If this fact is important then it should be considered part of the decision of the case; if not, then otherwise. It is trite that judges as well as other human beings build wiser than they know and certainly act wiser than they talk. One is more likely than not to give the wrong reasons when justifying his conduct. We can always give "good" reasons for our opinions or our conduct, but the "real" reasons are seldom given and often could not, to save our lives, be given.²² "What you do speaks so loud that I cannot hear what you say" is as good a legal precept as it is a moral precept. Professor Oliphant has ably pointed out how our law has abandoned the old wholesome method of *stare decisis* and adopted in its stead the deleterious method of *stare dictis*, *i.e.*, the following of doctrines and principles rather than of what is in fact *done* by the judges apart from what they have *said*.²³ The effect of these things, he says,²⁴ "is to cause most of our students to remain intellectual infants with toothless gums too soft except for munching elastic generalities with sophomoric serenity. * * * Generalized abstractions are called 'principles' and these are endowed with a reality of their own. Generalized statements, when broad enough and old enough, transcend the world of time, place, and circumstance to dwell in realms of universal reality."

²² J. H. Robinson, *THE MIND IN THE MAKING*, p. 42. John Dewey, *Logical Method and Law* (1924), 10 Cornell L. Quar. 17.

²³ *Op. cit.* note 12, p. 159.

²⁴ *Ib.*, p. 76.

So I should say that it is not what Patteson, J., said or failed to say that determines what the *Bridges* case decides.^{24a}

In commenting on Mr. Justice Holmes' discussion of the *Bridges* case, especially the statement, "There can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be included in the larger intent to exclude

^{24a} One can hardly touch the law at any point without finding examples. Let us take an illustration from criminal law. In *Rex v. Fenton* (1830), 1 Lewin's Cr. Cas. 179, the defendants were charged with throwing stones down a mine, breaking the scaffolding, in consequence of which the deceased was killed in descending the mine. It was proved that these stones were reasonably likely to break the scaffolding and that if it was broken death was likely to ensue to persons using the corf. In other words, negligence was found. Tindal, C. J., broadly lays down the rule: "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter * * *. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful, it was a *trespass*." Fifty-three years later in the case of *Regina v. Franklin* (1883), 15 Cox C. C. 163, a prisoner was charged with manslaughter in that he "took up a good-sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased, C. P. Trechard, who was at the moment swimming underneath, and so caused his death." The prosecution urged that apart from negligence this was sufficient to convict of manslaughter, for the act done by the prisoner was an *unlawful act*, and cited *Fenton's* case. Field, J., said, "The mere fact of a *civil wrong* committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case." There is nothing to indicate that any such distinction existed in the mind of Tindal, C. J. Yet it would not be urged that Field, J., has overruled the *Fenton* case or given an unwarranted *ratio decidendi* of that case. But the end is not yet. The rule now reads somewhat as follows: Anyone who kills another while engaged in a *criminally unlawful act* is guilty of manslaughter. In *Potter v. State* (1904), 162 Ind. 213, 70 N. E. 129, where the prisoner was playing with a friend and accidentally killed him with a pistol which the prisoner was carrying in violation of a statute against carrying concealed weapons, Jordan, J., again modifies the rule of the *Fenton* case to read: Any one who kills another in a *criminally unlawful act* that is the *natural and necessary result* of that act is guilty of manslaughter. Hoke, J., in *State v. Horton* (1905), 139 N. C. 588, 51 S. E. 945, where the prisoner killed a man while hunting on the land of another without written consent as required by statute, adds to the rule "and morally wrongful." What is "natural and necessary" and what is "morally wrongful" will require many more modifications, no doubt. Can it be said that Tindal, J., had all these qualifications in mind or that the *Fenton* case stands for more than is stated in the last version of the rule of the case? To agree that these later judges are making new law is not also to agree that the *Fenton* case stands for more or less than the last version of the rule properly drawn from the facts of similar cases.

others from the place where it is, without knowledge of the object's existence," Mr. Goodhart observes: "In the judgment no mention is made of the two different kinds of intent. It is not clear that the question of intent was considered by the court although it was discussed by counsel. Insofar as a *ratio decidendi* can be extracted from the case it is that the parcel was not in the shopkeeper's *custody*, because he owed no duty to the true owner. If he had been an innkeeper it would have been in his *custody*, because he owed a duty to the guest. The question of particular intent was never discussed at all."²⁵ Likewise in commenting on Sir Frederick Pollock's approval of the case on the theory that there was no *de facto* control on the part of the shopkeeper the learned Editor says: "It is hardly necessary to repeat that this exceedingly interesting theory cannot be found in the judgment itself and is, therefore, not a part of the *ratio decidendi* of the case."²⁶ Without impliedly approving the theories which Mr. Goodhart criticizes, it is submitted that he is here continuing the error of assuming that a court must discuss a point or in some other manner clearly indicate that it had the point in mind before that point can be considered part of the doctrine of the case. There never yet has been any judge wise enough to comprehend more than a few of the facts at a time that go to make up the infinite number of facts that any simple case presents, and a very small percentage of those comprehended are discussed. There are gaps in judicial decisions just as there are gaps in statutes. When later judges or critics find facts or implications of facts overlooked in a prior decision, if these are important enough to have changed the decision had they occurred to the court, then the case is not to be decisive of those facts; if on the other hand, these facts, though material, would not have altered the decision, then the case is decisive of those facts. It is quite another thing to pick out one fact in a decision as *the* decisive fact and erect this fact into some sort of a "principle," as Pollock, Holmes, Salmond, and others seem to do, that will be decisive of all cases containing this crucial fact, regardless of place, circumstance, and time.

Now what shall we say of Mr. Goodhart's version of the *ratio*

²⁵ Op. cit. note 1 *supra*, p. 199. Cf. *Ib.*, 203.

²⁶ *Ib.*, p. 201.

decidendi? What is meant here by "custody" is not at all clear. It seems that the court uses the term in the broad sense to include possession. I am not sure in what sense Mr. Goodhart uses the term. Certainly it is well known that "custody" is a highly technical term meaning different things in different circumstances. Now if "owing a duty" is the criterion of custody then how can the *Bridges* case fairly be said to be a decision on custody at all, since the duty of the shopkeeper was not directly in issue? Is it not just as enlightening to say there is no duty because the shopkeeper did not have custody? When either is decided the case is decided. In neither event do we have a reason but merely a conclusion stated in two different ways. It amounts to saying that the shopkeeper does not have custody because he does not have custody. This quaint old legal game of "ring-around-the-rosy" with respect to decision and reasons for decisions is the inevitable result of trying to decide cases "on principle." Does it follow that if the defendant had been an innkeeper "it would, have been in his *custody*, because he owed a duty to the true owner?"²⁷ This is clearly *dictum*, for innkeeper facts were not involved. Unless the parcel could be proved to be the property of a guest it is extremely doubtful if a court would deprive the finder of any rights to the parcel.²⁸

I believe that Mr. Goodhart's criticism of Sir John Salmond's explanation of the *Bridges* case and the *Elwes* case is perfectly sound. Sir John is equally guilty with Mr. Goodhart and all the writers whom he criticizes of beginning with an *a priori* conception of possession, as, one cannot have possession of a thing without knowledge of the existence of the thing in question. Of the *Bridges* case he says, "It was held that the plaintiff had a good title to them as against the defendant. For the plaintiff and not the defendant was the first to acquire possession of them. The defendant had not the necessary *animus*, for he did not know of their existence."²⁹ This, as Mr. Goodhart points out, is too broad. So when Sir John comes to the *Elwes* case, where the contest was between a finder-tenant and the lessor

²⁷ *Ib.*, p. 199.

²⁸ *Hamaker v. Blanchard* (1879), 90 Pa. 377—money found by the servant of an innkeeper in the parlor of the hotel.

²⁹ *Jurisprudence* (7th ed.), p. 305.

over a pre-historic boat found by the tenant in excavating in construction of a gas holder, he is hard put to it to reconcile this case with his pre-conceived notion of possession, so he grabs a *dictum* from Chitty, J., in respect to a mere trespasser and couples this with the theory that, "The tenants, though entitled to excavate and remove the soil, were not entitled to remove anything else." The implication is that when they took the boat they became trespassers, and a finder-trespasser can have no rights against the owner of the land upon which he has trespassed. Mr. Goodhart points out that Chitty, J., bases his decision specifically on the ground that the lessor was first in possession and said, "It make no difference, in the circumstances, that the plaintiff was not aware of the existence of the boat."³⁰ It seems that a graver defect of the Salmond theory of trespass here is that it cuts too deep: why not say that every finding on the land of another is then a trespass? When you decide that this is a trespass you again decide the case and your rationalization is question-begging. When he comes to the *Sharman* case I believe that Mr. Salmond points out one valuable consideration of the case which he presents as *the* distinguishing feature, namely, "if anyone finds a thing as the servant or agent of another, he finds it not for himself, but for his employer." While this is too broad, for reasons already stated, I cannot agree with Mr. Goodhart that this explanation of the case is invalid because "it was not the explanation upon which the Court based its judgment."³¹

Be it noted that I am not here concerned with the question of the correctness of the decisions of any of these cases. I am now merely interested in the assumptions of those who have discussed these cases, and especially those of Mr. Goodhart. Mr. Goodhart submits that the element of "public access" is not part of the doctrine of the *Bridges* case but he also submits that it *should* not be for two reasons. First, "A shopkeeper invites the public for the purpose of shopping; he intends to exclude them from whatever is not necessary to accomplish this end * * * a shopkeeper intends to possess everything in his shop just as much as a private person intends to possess everything in his

³⁰ Op. cit. note 1 *supra*, p. 204.

³¹ *Ib.*, p. 206.

room; in both cases there is the intent to exclude strangers from the thing."³² Second, "It is difficult to say under what circumstances the public is invited and when it is excluded from a place. Is the public invited to the doctor's consulting room, a solicitor's office, a tailor's shop, a theater, a restaurant, or a store . . . ?"³³

As to the first of these reasons I do not see that Holmes and Goodhart are in conflict; each is merely pointing out and stressing competing elements that go into one of these finder cases. The farther a dog is away from his bone or a bone the less keenly he feels about another dog that picks up the bone. The principle of "finders, keepers" seems to be deeply ingrained in dogs as well as in men. Here we have a conflict between the feeling involved in the extent of privileges enjoyed in the ownership of land and the fundamental home-spun feeling of "finders, keepers." It is submitted that both of these men are in error in their tacit assumption that the "intent to exclude" or the "intent not to exclude" is *the* conclusive element not only of this case but of all cases involving the question of possession. Life is too complex and variable to be ruled by such simple formulas, as Mr. Holmes well knows.

As for the second objection, if there are certain practical considerations why the public accessibility of the place where the thing was found matters in the decision of a case, and the court becomes conscious of these considerations, then in moving from case to case the court will have no more difficulty in drawing this line than any other line not already defined that the courts are marking out. What is a public place is only difficult,³⁴ as are most questions in law, when considered *in vacuo*. The first part of the answer is, Why do you want to know and what difference does it make?

I fear that I have already over-taxed the patience of the reader and as our brothers on the other side have it, "To be everlasting is not to be immortal," I must draw this rather sketchy and informal discussion to a close with a few words on the "principles" deduced from the three cases by Mr. Goodhart.

³² *Ib.*, p. 199.

³³ *Ib.*, p. 200.

³⁴ I mean *relatively* difficult; for all legal decisions are difficult when intelligently based upon the many social interests involved and when a forecast is made of the effects of the decision and all its by-products.

All of the principles listed, with the possible exception of the second, it is submitted, are too broad, as a few illustrations will readily show. Suppose a thief steals my silver and buries it in your land. As between the thief and the finder the thief has possession. So if I lose my silver on your land and it becomes buried by the elements, as in the *Sharman* case, I would be considered as still in possession for purposes of larceny or against you who negligently injured my property. It is not so clear that a loser loses possession^{34a} by losing his article. Again the purposes of the inquiry, the relation of the parties, the circumstances of the case, etc., become important. This is illustrated by the doctrine of "misplaced" property of many of the courts of this country.³⁵ Suppose we assume that the *Bridges* case had been decided for the shopkeeper I do not believe that it would follow that if the purse had been found in an alley of which the shopkeeper owned the fee and over which the public had an easement of right of way, that the shopkeeper would be entitled to the purse. Other illustrations will readily occur to show that the remaining principles are too broad.

Ready-made principles available at a moment's notice for settling any kind of a legal problem and resolving any kind of a doubt have long been the great ambition of lawyers. Such a practice in medicine today is generally accepted as quackery. But in law a hankering for certainty, born of timidity and nourished by the love of authority, has led to the idea that the absence of such a set of ready-made principles is equivalent to legal chaos. Yet situations in which change and the unexpected en-

^{34a} The confusion here arises in using the term in a non-technical sense.

³⁵ *Durfee v. Jones* (1877), 11 R. I. 588, 23 Am. Rep. 528; *Loucks v. Gallogly* (1892), 23 N. Y. S. 126; *McAvoy Medina* (1866), 93 Mass. (11 Allen) 548, 87 Am. Dec. 733; *Silcott v. Louisville Trust Co.* (1924), 205 Ky. 234, 265 S. W. 612, 23 A. L. R. 28; *Kincade v. Eaton* (1867), 98 Mass. 139, 98 Am. Dec. 142; *Foster v. Fidelity Safe Dep. Co.* (1915), 264 Mo. 89, 174 S. W. 376, L. R. A. 1916A 655. If the lost goods happen to be treasure trove, without any apparent practical distinction, the courts of this country seem to favor the finder and ignore both the doctrine of the superior rights of the landowner and the doctrine of mislaid property: *Vickery v. Hardin* (1922), 77 Ind. A. 558, 133 N. E. 922; *Weeks v. Hacket* (1908), 104 Me. 264, 71 A. 858; *Danielson v. Roberts* (1904), 44 Or. 108, 74 P. 913; *Robertson v. Ellis* (1911), 58 Or. 219, 114 P. 100; *Hutchmaker v. Harris' Adm.* (1861), 38 Pa. St. 491, 80 Am. Dec. 502.

ter are a challenge to intelligence to create new principles. Jurisprudence must be a growing science if it is to be a science at all, not merely because all truth has not yet been appropriated by the mind of man, but because life is a moving affair in which old legal truth ceases to apply. Principles are methods of inquiry and forecast which require verification by the case; and the time-honored effort to assimilate law to mathematics is only a way of bolstering up old rules and principles or putting new ones in disguise on the throne of the old. Principles exist as hypotheses with which to experiment. Lightly to disregard them is the height of foolishness. The choice is not between throwing away previously developed principles and sticking obstinately by them. The intelligent alternative is to revise, adapt, expand and alter them. The problem is one of continuous, vital readaptation. Every case may be a unique case.³⁶

If *Bridges v. Hawkesworth* was incorrectly decided it is not so because some *a priori* conception of possession has been violated or because of the dictate of any rule of logic.³⁷ What can we say more of possession than that it is a group of operative facts to which certain legal consequences attach? *What* operative facts will be necessary to constitute "possession" will depend first upon the purpose of the inquiry, *i.e.*, what legal consequences are sought to be attached, and secondly upon the judge's sense of justice, his sense of the mores of his time and place, that is, on his personal background and training, or, as the behaviorists have it, upon his "behavior patterns." In a word the decisions will always be pragmatic. The reasons a court gives for its decisions will always be "good reasons," but the "real reasons" will seldom appear and when they do appear they will appear shamefacedly. The court is more likely to search legal theories and principles to back up a decision it has already arrived at before the argument is half finished than to look to them for the purpose of determining the decision. In the last analysis, all decisions involving novel or doubtful factors, are based upon the

³⁶ John Dewey, *HUMAN NATURE AND CONDUCT* (1921), Chapter on "The Nature of Principles," pp. 238 ff. The paragraph in the text is a paraphrase of a few paragraphs found in Dewey.

³⁷ The term "logic" is here used in the old syllogistic sense and not in the empirical sense that treats all premises as hypothetical.

court's conception of the considerations of policy involved; or, as Mr. Holmes put it, "on legislative considerations."³⁸ Here we have such factors as the extent of rights in land and the feeling of control over things closely associated with land and the feeling of finders, keepers; the protection of chattel owners, *i.e.*, likelihood of the return of chattels to the owners; the penalizing of trespassers; the discouraging of infidelity of servants; and, perhaps improperly, the relative financial worth of the finder and the landowner, etc., etc. This is the stuff that enters into a decision of this kind. Here is the real battlefield of human interests. Other stuff should enter, such as facts and figures showing the relative claims of certain competing social policies. My excuse for laboring this point is not that many people disagree with this thesis in theory, but that this theory of legal technical concepts is continually ignored³⁹ in practice in court opinions and legal literature to the great confusion of both writer and reader, and that scarcely anything is being done on either side of the Atlantic towards a scientific study of this non-vocal behavior of judges. Most of our legal literature and much of our legal education is beside the point. If I understand him correctly, I fail to discern more than the faintest shadows of signs that indicate that Mr. Goodhart is even remotely conscious of these theories as a realistic description of legal concepts and of what is taking place in our court rooms.

What I have tried, above all, to point out is the uncertain ele-

³⁸ THE COMMON LAW (1881), 37. "The language of Judicial decision is mainly the language of logic. And the logical method and the form flatter that longing for certainty and repose which is in every human mind. But certainty generally is an illusion." Per Mr. Justice Holmes, COLLECTED PAPERS (1921), p. 181.

³⁹ Most of our notable contributors on the subject of possession, including Bentham, Maitland, Ames, Holmes, Salmond, and Pollock and Wright seem to have recognized in varying degrees that possession is a double-decked affair, made up of a sub-stratum of series of factual (*i.e.*, non-legal) elements below and of series of different legal consequences above. Some of these consequences are: The rise of certain possessory remedies such as trespass, trover, replevin, detinue, etc.; the rise of certain rights, privileges, powers and immunities generally accorded to a finder, to a disseisor, to an occupier of unowned goods or land, to a donee, to a purchaser, to a patentee, to an inheritor or legatee, to the owner of the offspring of animals; and criminal liability under larceny or liquor or counterfeiting statutes, etc., etc. A careful examination of the cases will disclose, it is confidently believed, that nearly all of these legal consequences or groups of legal consequences

ments in a *ratio decidendi* which is not so much a fact in the sense of a record of past events as an intelligent guess as to future events. To look for a *ratio decidendi* in the former sense is out-of-date, misleading, and fruitless. If it is true that the path of human progress is strewn with dead principles and dead concepts then I venture to suggest that the effort to find the *ratio decidendi* of a case will soon be viewed in the same light as a physiologist trying to locate the "soul."

demand for their occasion widely varying groups of operative facts. Hence any *a priori* rules, generalizations, or principles are almost sure to be non-descriptive of what is implied by the term possession unless half of our data is ignored. At best these principles could represent only a common denominator of many possessions, all differing as differ the purposes which give rise to the inquiries. It would be hardly safe to assume that this common denominator would be an adequate test of what constitutes possession in new or doubtful cases. New cases and legislation would demand constant revision of these principles and there would be a constant danger of mis-using these rules as measuring rods and not as hypotheses. Yet in spite of these facts it is remarkable that all of the above writers have constructed *a priori* principles of their own and have ignored what they have labored to demonstrate. This is notably true of Mr. Justice Holmes in his treatment of possession in his COMMON LAW, pp. 206 ff. Compare Joseph W. Bingham, LEGAL POSSESSION, 13 Mich. L. Rev. 535, 623, for a very searching and critical analysis of possession.