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## WRONGFUL POSSESSION OF CHATTELS: HORNBOOK LAW AND CASE LAW

R.H. Helmholtz\*

### 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.<sup>1</sup> 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.<sup>2</sup>

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."<sup>3</sup> 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 where property had once passed out of the possession of the rightful owner."<sup>4</sup>

In addition, the rule claims the weighty authority of Justice Holmes,<sup>5</sup> Dean Ames,<sup>6</sup> and Sir Frederick Pollock.<sup>7</sup> They described the rule as one firmly established at common law, and they stated that it

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<sup>1</sup> See, e.g., R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 11.11, at 311-12 (W. Raushenbush 3d ed. 1975).

<sup>2</sup> See D. BURKE, *PERSONAL PROPERTY IN A NUTSHELL* 74 (1983); Bingham, *The Nature and Importance of Legal Possession*, 13 MICH. L. REV. 535, 561 (1915); Curtin, *The Concept of Possession in Commercial Transactions: Chasing the Quick-Brown Fox*, 10 LOY. U. CHI. L.J. 25, 29 (1978); Comment, 32 YALE L.J. 497 (1923).

<sup>3</sup> *Anderson v. Gouldberg*, 51 Minn. 294, 296, 53 N.W. 636, 637 (1892).

<sup>4</sup> *Id.*

<sup>5</sup> 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).

<sup>6</sup> Ames, *The Disseisin of Chattels*, in *LECTURES ON LEGAL HISTORY* 172, 179 (1913).

<sup>7</sup> F. POLLOCK & R. WRIGHT, *AN ESSAY ON POSSESSION IN THE COMMON LAW* 91-93 (1888).

clearly demonstrated the law's longstanding preference for purely objective standards.<sup>8</sup> 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,<sup>9</sup> *Anderson* rarely has been cited in subsequent reported cases. No citations for it appear at all after 1950,<sup>10</sup> and most of the earlier cases that cited *Anderson* with approval involved a possessor with rights in addition to that of simple possession.<sup>11</sup> Moreover, scholars recently have criticized Holmes' description of the law as representing largely his own subjective preferences.<sup>12</sup> H.L.A. Hart, for example, has

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<sup>8</sup> The status of wrongful possession at common law is somewhat more doubtful than they suggested. Statements in some early English cases suggest that possession, even if wrongfully acquired, sufficed to give full possessory rights. See, e.g., *Basset v. Maynard*, Cro. Eliz. 819, 820, 78 Eng. Rep. 1046, 1047 (K.B. 1601). "[T]he action was maintainable; because by the cutting down of them he had possession, and a good title against the defendant and every stranger." *Id.* at 821, 78 Eng. Rep. at 1047. But good authority also supports the contrary view. See, e.g., *Wilbraham v. Snow*, 2 Wms. Saund. 47, 47f, 85 Eng. Rep. 624, 629 (K.B. 1669) ("[A] person who has no colour of right to cut down rushes, or take any other thing, cannot by cutting the rushes or taking the thing without any colour of right, acquire a property."). When English judges squarely faced the question in the nineteenth century, they correctly treated the question as unsettled. See *Jeffries v. Great W. Ry.*, 5 El. & Bl. 802, 804, 119 Eng. Rep. 680, 681 (K.B. 1856); *Elliott v. Kemp*, 7 M. & W. 306, 312-13, 151 Eng. Rep. 783, 785 (Ex. 1840).

<sup>9</sup> See e.g., O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, *BASIC PROPERTY LAW* 35 (4th ed. 1984).

<sup>10</sup> The author reached this conclusion by examining Shepard's Citations, Westlaw and Lexis, and relevant later cases.

<sup>11</sup> Some cases discussed *Anderson* merely in dicta. See *Morris Plan Indus. Bank v. Schorn*, 135 F.2d 538, 540 (2d Cir. 1943); *Casto v. Murray*, 47 Or. 57, 62, 81 P. 883, 884 (1905). Some dealt with a person in lawful possession. See *Stitt v. Namakan Lumber Co.*, 95 Minn. 91, 94, 103 N.W. 707, 709 (1905); *Berger v. 34th St. Garage, Inc.*, 274 App. Div. 414, 418, 84 N.Y.S.2d 348, 352 (1948); *State ex rel. Hayashi v. Ronald*, 134 Wash. 152, 157, 235 P. 21, 22 (1925); *Dresser v. Lemma*, 122 Wis. 387, 391, 100 N.W. 844, 846 (1904). Some courts cited *Anderson* even while taking a substantive position at odds with it. See *United States v. Jensen*, 291 F. Supp. 668, 670 (E.D.N.Y. 1923); *Morgan v. Jackson*, 32 Ind. App. 169, 176, 69 N.E. 410, 412 (1904) (Wiley, J., dissenting); *Novak v. State*, 195 Md. 56, 65, 72 A.2d 723, 727 (1950). Some cases are more directly on point. See, e.g., *Peru Plow & Implement Co. v. Harker*, 144 F. 673, 675 (8th Cir. 1906); *Jensen v. Eagle Ore Co.*, 47 Colo. 306, 312, 107 P. 259, 261 (1910); *New England Box Co. v. C & R Constr. Co.*, 313 Mass. 696, 709, 49 N.E.2d 121, 129 (1943).

<sup>12</sup> 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).

observed that the desire to establish an objective standard, free from considerations of inner-blameworthiness, was "an *idée maîtresse*, which in the end became something of an obsession with Holmes."<sup>13</sup> 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,"<sup>14</sup> 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. The Article rests upon an examination of the cases decided since *Anderson* that have involved the legal rights of wrongful possessors of chattels as against persons who could make no claim of title. Although the cases are not abundant, their number is by no means negligible, and therefore allows a fair quantitative test of the rule. The problem of wrongful possession also arises in several quite different legal settings, allowing the rule to be examined qualitatively as well. Both types of examination show that the black letter rule of simple possession is incomplete and also suggest how easily absolute statements of the rule can become misleading. 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.<sup>15</sup> 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

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<sup>13</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 242 (1968).

<sup>14</sup> O.W. HOLMES, *supra* note 5, at 167.

<sup>15</sup> See *infra* notes 105-32 and accompanying text.

they have found *mala fides* or misconduct on the part of the possessor.<sup>16</sup> Sometimes this has involved balancing equities between two competing possessors, neither of whom has a claim to title.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> In other 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<sup>20</sup> 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.<sup>21</sup> 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."<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> The facts of this case were, to

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<sup>16</sup> See *infra* notes 62-67 and accompanying text.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., notes 94-97 and accompanying text.

<sup>19</sup> *Id.*

<sup>20</sup> Although these actions differ in origin and retain some of their differences today, they are equivalent for assessing the present state of possessory rights, because pleading reforms have rendered largely irrelevant the form in which the action is brought.

<sup>21</sup> See D. BURKE, *supra* note 2.

<sup>22</sup> McDonald v. Mangold, 61 Mo. App. 291, 294 (1895); see also McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960); *infra* note 42.

<sup>23</sup> See, e.g., New England Box Co. v. C & R Constr. Co., 313 Mass. 696, 709, 49 N.E.2d 121, 129 (1943).

<sup>24</sup> Lieber v. Mohawk Arms, Inc., 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. 1970); see also Berk v. State, 82 Misc. 2d 902, 372 N.Y.S.2d 394 (Ct. Cl. 1975) (items may be replevied if they were not part of an illegal transaction).

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. As one New Jersey court stated, "If [the plaintiff] did not have some claim to the goods more than a mere naked possessory right, it could not maintain replevin."<sup>25</sup>

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.<sup>26</sup> 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."<sup>27</sup> Similarly, in a New York case, gamblers attempted to recover winnings taken by the New York City Police Department. Again the court held that even when New York state law contained no provision dealing with the fruits of gambling, gamblers could not invoke the aid of the courts to recover the money from the police property clerk. The court refused to protect their interest because to allow them to bring replevin would require the court to give its "sanction to titles and possessory rights founded only on lawbreaking."<sup>28</sup>

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"<sup>29</sup> to deny the possessor's claim. The recurring theme found in the resulting case law is this: What a man has acquired illegally he

<sup>25</sup> *Mark-Sachs-Evans Co. v. W.W. Auction Co.*, 123 N.J.L. 102, 104, 8 A.2d 59, 60 (1939).

<sup>26</sup> *Dorrell v. Clark*, 90 Mont. 585, 4 P.2d 712 (1931).

<sup>27</sup> *Id.* at 592, 4 P.2d at 714.

<sup>28</sup> *Hofferman v. Simmons*, 290 N.Y. 449, 457, 49 N.E.2d 523, 526 (1943).

<sup>29</sup> *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 472, 166 N.E.2d 494, 497, 199 N.Y.S.2d 483, 486 (1960).

cannot replevy.<sup>30</sup>

Cases involving animals killed in contravention of state hunting laws provide another illustration of this theme. Today most states have enacted statutes prohibiting the possession of illegally killed animals, so the question of possessory rights does not arise. Even when possession is not a crime by statute, however, courts have refused to protect the wrongdoing hunter. The rule of simple possession would separate the question of the statutory penalty for illegal hunting from the question of possessory rights in the animal. Since no better title to the animal exists, the rule would accord rights to the first possessor, while recognizing that he is subject to criminal prosecution. Most courts, however, have not made this distinction. The cases involving illegal hunting have held that "the law protects the title or claim of no one that arises from a violation of the law."<sup>31</sup> The illegal hunter therefore acquires no possessory rights to the game he kills. Courts will not apply the rule that simple possession, however acquired, prevails over all but rightful ownership.

Some American courts have gone quite far in infusing moral notions into the simple possession doctrine. The United States Court of Appeals for the Ninth Circuit, for example, refused to allow an action of replevin to recover allegedly "soft-core" pornographic movies from Eastman Kodak, to whom the plaintiff had sent them for developing.<sup>32</sup> The court admitted that there had been no prosecution for obscenity and that the test of obscenity was an uncertain one, but it held that the question of prior possession of the films could not be separated from their possible illegality.<sup>33</sup> Although Eastman Kodak made no claim to title, its conduct was comparatively blameless. Hence, the Ninth Circuit reversed

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<sup>30</sup> *Id.*; see *In re Barret*, 476 F.2d 14 (7th Cir. 1973); *Adams v. Queen Ins. Co. of Am.*, 264 Ala. 572, 88 So. 2d 331 (1956); *Bradshaw v. State*, 250 Ark. 135, 464 S.W.2d 614 (1971); *Lee On v. Long*, 37 Cal. 2d 499, 234 P.2d 9 (1951); *Cotto v. Martinez*, 26 Conn. Sup. 232, 217 A.2d 416 (1965); *Southside Atl. Bank v. Lewis*, 174 So. 2d 470 (Fla. Dist. Ct. App. 1965); *Hanaman v. Davis*, 20 Ill. App. 2d 111, 155 N.E.2d 344 (1959); *Maxon v. United States Underwriters Co.*, 246 Ill. App. 385 (1927); *Aircraft Acceptance Corp. v. Jolly*, 141 Ind. App. 515, 230 N.E.2d 446 (1967); *In re Union Cent. Life Ins. Co.*, 208 La. 253, 23 So. 2d 63 (1945); *Lobaudo v. Hart*, 15 Mich. App. 138, 166 N.W.2d 515 (1968); *Wilks v. Stone*, 339 S.W.2d 590 (Mo. Ct. App. 1960); *State v. Frye*, 194 S.W.2d 692 (Mo. Ct. App. 1946); *Jackson v. City of Columbia*, 217 S.W. 869 (Mo. App. 1920); *Ellsworth v. McDowell*, 44 Neb. 707, 62 N.W. 1082 (1895); *State v. Sherry*, 46 N.J. 172, 215 A.2d 536 (1965); *Mark-Sachs-Evans Co. v. W.W. Auction Co.*, 123 N.J.L. 102, 8 A.2d 59 (1939); *Sickles v. Edmonds*, 271 P.2d 717 (Okla. 1954). *Contra Baker v. State*, 343 So. 2d 622 (Fla. Dist. Ct. App. 1977); *Gunn v. Williams*, 246 Ill. App. 494 (1927); *Colburn v. Coburn*, 211 S.W. 248 (Tex. Civ. App. 1919).

<sup>31</sup> *Jones v. Metcalf*, 96 Vt. 327, 332, 119 A. 430, 432 (1921). The recent case of *Langle v. Bingham*, 447 F. Supp. 934 (D. Vt. 1978), allowing a civil rights action for a warrantless seizure of deer hide and meat, might seem to qualify the authority of *Jones*. In *Langle*, however, the court made an express finding that there had been "no judicial determination that the game . . . was unlawfully taken." *Id.* at 940; see also *Dapson v. Daly*, 257 Mass. 195, 153 N.E. 454 (1926); *James v. Wood*, 82 Me. 173, 19 A. 160 (1889); *Thomas v. Northern Pac. Express Co.*, 73 Minn. 185, 75 N.W. 1120 (1898).

<sup>32</sup> *Eastman Kodak Co. v. Hendricks*, 262 F.2d 392 (9th Cir. 1958).

<sup>33</sup> *Id.* at 394.

the trial court's decision that replevin would lie.<sup>34</sup> The claimant's prior possession of potentially unlawful material, although unambiguous, was insufficient title to support an action of replevin.

A similar case arose when a professional photographer organized a "farm outing" to permit other photographers to take pictures of models, some of whom posed nude, in a rustic setting.<sup>35</sup> The "outing" annoyed some local citizens, and the sheriff arrived to stop it. The photographer was charged and later pleaded guilty to the crime of "outraging public decency."<sup>36</sup> He paid his fine, but when he sued to recover the admission fees the sheriff had confiscated at the time of the arrest, the New York Court of Appeals refused to entertain the action, despite the sheriff's lack of statutory justification or colorable claim to the money. Title to the money remained in those who had paid it. They made no claim, but the court still refused to accord possessory rights to the plaintiff. The court based its decision upon the plaintiff's wrongdoing, and nothing more. "We are closing our courts," the judge wrote, "to one who would prove his wrongdoing as a basis of his supposed rights."<sup>37</sup>

It may be that these cases were wrongly decided. They certainly seem prudish. Even if they were, they nonetheless illustrate the common situation that has arisen in litigation in which one party is a wrongdoer in the eyes of the court and the other is not. They also show judges' common reaction to attempts at separating claims of possession from questions involving the conduct of the possessor.<sup>38</sup> They will not make the separation, at least when only one possessor is a clear wrongdoer. As one Missouri judge stated, "[U]nder the situation here involved, justice to all parties requires that the whole circumstances of the transaction be revealed."<sup>39</sup> Courts do this regularly; they look beyond the doctrine of simple possession and into the equities of a case involving possessory rights. When they find that the possession is wrongful, they deny the possessor's claim to recover the chattel.

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,"<sup>40</sup> and it is much the same policy that also has resulted in the well-established rule

<sup>34</sup> *Id.* at 397.

<sup>35</sup> *Carr v. Hoy*, 2 N.Y.2d 185, 139 N.E.2d 531, 158 N.Y.S.2d 572, *modified*, 2 N.Y.2d 880, 141 N.E.2d 623, 161 N.Y.S.2d 137 (1957).

<sup>36</sup> *Carr*, 2 N.Y.2d at 187, 139 N.E.2d at 532-33, 158 N.Y.S.2d at 574.

<sup>37</sup> *Id.* at 187, 139 N.E.2d at 533, 158 N.Y.S.2d at 575.

<sup>38</sup> *See Selby Mfg. Co. v. Grandahl*, 200 F.2d 932, 934 (2d Cir. 1952) ("To recover here plaintiff of course need show only a right to possession; but statement of that rule as an abstract principle is meaningless. For it is still necessary to ascertain upon what the right to possession is based.").

<sup>39</sup> *Wilks v. Stone*, 339 S.W.2d 590, 597 (Mo. Ct. App. 1960).

<sup>40</sup> *See Denning v. Taber*, 70 Cal. App. 2d 253, 259, 160 P.2d 900, 903 (1945).



that courts will not enforce illegal contracts.<sup>41</sup> 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."<sup>42</sup>

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.<sup>43</sup>

The most frequent cases have involved possessors with a legitimate, but limited, interest, such as a bailee of a chattel.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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."<sup>47</sup> Nevertheless, the court held that "the controlling fact here is

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<sup>41</sup> See, e.g., *Burger v. Crocker*, 392 S.W.2d 640 (Mo. Ct. App. 1965). See generally E. FARNSWORTH, *CONTRACTS* § 5.1 (1st ed. 1982).

<sup>42</sup> *Stone v. Freeman*, 298 N.Y. 268, 271, 82 N.E.2d 571, 572 (1948); see also *Lawrence Warehouse Co. v. Menary*, 143 F. Supp. 883, 886 (S.D. Iowa 1956); *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 P. 708, 710 (1907); *Hofferman v. Simmons*, 290 N.Y. 449, 457, 49 N.E.2d 523, 526 (1943); *Harper v. Crain*, 36 Ohio St. 338, 343 (1881).

<sup>43</sup> See generally 3 J. POMEROY, *TREATISE ON EQUITY JURISPRUDENCE* § 939, at 726-28 (S. Symons 5th ed. 1941); *Grodecki, In Pari Delicto Potior Est Conditio Defendentis*, 71 *LAW Q. REV.* 254 (1955); *Wade, Restitution of Benefits Acquired Through Illegal Transactions*, 95 *U. PA. L. REV.* 261 (1947).

<sup>44</sup> See generally R. BROWN, *supra* note 1, at § 11.11; *Warren, Qualifying as Plaintiff in an Action for a Conversion*, 49 *HARV. L. REV.* 1084 (1936).

<sup>45</sup> This is, of course, the defense of *jus tertii*.

<sup>46</sup> *State ex rel. Olsen v. Sundling*, 128 Mont. 596, 281 P.2d 499 (1955).

<sup>47</sup> *Id.* at 600, 281 P.2d at 501.

that the state did come into the lawful possession.”<sup>48</sup> 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).

Courts have treated cases involving title to automobiles in similar fashion. Most states have enacted statutes requiring the use and registration of certificates of title for all automobiles. Courts regularly hold that a buyer who has not completely satisfied the statutory requirements nevertheless may recover the automobile from a person who converts it from him.<sup>49</sup> Since even a wrongful possessor would have a property interest in the automobile, courts reason, it would make no sense to penalize this honest but neglectful possessor for a merely technical failure to meet the registration requirements. His possession is not wrongful in any meaningful sense, and he must possess greater rights than a (theoretical) wrongful possessor.<sup>50</sup> Here, the hornbook rule of simple possession avoids the possibility that a difficult problem of title could be used as a shield for wrongful conduct on the part of the converter.

Several recent cases avoided the question of title when it might have aided a wrongdoer and when the equities favored an honest possessor. For instance, when the ownership of a house was in dispute, but one party to the dispute broke down the door and wantonly destroyed the furniture inside, the court applied the rule of simple possession to permit the prior possessor to recover the value of the furniture.<sup>51</sup> Similarly, when a defendant agreed to take part in a United States Government “Adopt-a-Horse” Program for wild animals, but instead sold the animals he supposedly had adopted to a slaughterhouse, the court employed the rule to brush aside the defendant’s argument that the government had no title to wild animals.<sup>52</sup> Apparently, the courts cite the rule that even wrongful possession is protected by the law, but they do not use it to protect actual wrongdoers. Instead, the courts employ the rule to avoid quibbles over title when the prior possessor has acted honestly and the converter has not.

Indeed, it is noteworthy how often judges couple the recitation of

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<sup>48</sup> *Id.* at 600-02, 281 P.2d at 501-02.

<sup>49</sup> *Felts v. Sugg*, 167 Kan. 488, 492, 207 P.2d 460, 463 (1949).

<sup>50</sup> Other cases involving technically defective titles to automobiles include the following: *Hanaman v. Davis*, 20 Ill. App. 2d 111, 155 N.E.2d 344 (1959); *Welke v. City of Davenport*, 309 N.W.2d 450 (Iowa 1981); *Poteet v. Simmons*, 172 Kan. 310, 240 P.2d 147 (1952); *Pearl v. Interstate Sec. Co.*, 357 Mo. 160, 206 S.W.2d 975 (1947); *Peitsmeyer v. Omar Baking Co.*, 95 Ohio App. 37, 117 N.E.2d 184 (1952); *McKinney v. Croan*, 144 Tex. 9, 188 S.W.2d 144 (1945). Courts have permitted installment-loan buyers of automobiles who default on their payments to bring replevin in similar cases. *See, e.g., Stallworth v. Doss*, 194 So. 2d 566 (Ala. 1967); *Wells v. Central Bank*, 347 So. 2d 114 (Ala. App. 1977); *Alexander v. Jones*, 101 Ga. App. 775, 115 S.E.2d 460 (1960).

<sup>51</sup> *Motley v. Thompson*, 259 N.C. 612, 131 S.E.2d 447 (1963).

<sup>52</sup> *United States v. Hughes*, 626 F.2d 619 (9th Cir.), *cert. denied*, 449 U.S. 1065 (1980), *overruled on other grounds*, 730 F.2d 1255, 1259 (9th Cir. 1984).

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,"<sup>53</sup> or that he had held "peaceable possession of the property,"<sup>54</sup> or that he was "rightfully and not wrongfully entitled to the chattel."<sup>55</sup> 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,<sup>56</sup> 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*<sup>57</sup> 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*,<sup>58</sup> 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."<sup>59</sup> 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.<sup>60</sup> In such cases, no serious competing claims

<sup>53</sup> *Fletcher Aviation Corp. v. Landis Mfg. Co.*, 95 Cal. App. 2d 905, 908, 214 P.2d 400, 402 (1950).

<sup>54</sup> *Powell v. Riddick*, 89 Ga. App. 505, 509, 80 S.E.2d 70, 74 (1954).

<sup>55</sup> *Propes v. Todd*, 89 Ga. App. 308, 315, 79 S.E.2d 346, 351 (1953).

<sup>56</sup> See generally R. BROWN, *supra* note 1, at § 3.4; Angler, *Rights of Finders*, 48 MICH. L. REV. 352 (1950); Angler, *Rights of Finders*, 21 MICH. L. REV. 664 (1923); Cohen, *The Finders Cases Revisited*, 48 TEX. L. REV. 1001, 1010-12 (1970).

<sup>57</sup> 51 Minn. 294, 53 N.W. 636 (1892).

<sup>58</sup> 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722).

<sup>59</sup> *Id.*; see also *Hannah v. Peel*, [1945] 1 K.B. 509.

<sup>60</sup> See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Platoro, Ltd. v. Unidentified Remains of Vessel*, 518 F. Supp. 816 (W.D. Tex. 1981), *aff'd in part and vacated in part on other grounds*, 695 F.2d 893 (5th Cir. 1983); *Wiggins v. 1100 Tons*, 186 F. Supp. 452 (E.D. Va. 1960). *Contra State v. Massachusetts Co.*, 95 So. 2d 902

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.<sup>61</sup> 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,<sup>62</sup> or of shopping carts left in the vicinity of a supermarket,<sup>63</sup> 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."<sup>64</sup> An Illinois judge put the identical sentiment more soberly: "[I]f the discoverer is a trespasser such trespasser can have no claim to possession of such property, even if it might otherwise be considered lost."<sup>65</sup> A Pennsylvania judge, dealing with three boys who had entered an 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."<sup>66</sup> In other words, trespassers cannot "find" in any sense the law will credit.<sup>67</sup> 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.

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(Fla. 1956), *cert. denied*, 355 U.S. 881 (1957). See generally Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383 (1967). It may be, however, that the tide is turning against the finders and in favor of the government. See, e.g., *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985).

<sup>61</sup> See *Rose, Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82-86 (1985).

<sup>62</sup> *State v. Couch*, 250 Iowa 56, 92 N.W.2d 580 (1958).

<sup>63</sup> *People v. Stay*, 19 Cal. App. 3d 166, 96 Cal. Rptr. 651 (1971).

<sup>64</sup> *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).

<sup>65</sup> *Bishop v. Ellsworth*, 91 Ill. App. 2d 386, 391, 234 N.E.2d 49, 52 (1968).

<sup>66</sup> *Bussler Estate*, 12 B. Fiduc. 281 (1962).

<sup>67</sup> The leading case is *Barker v. Bates*, 30 Mass. (13 Pick.) 255 (1832); see also *Conditt v. Holden*, 92 Ark. 618, 123 S.W. 765 (1909); *Grant v. West Haven Gardens Co.*, 181 Conn. 379, 435 A.2d 970 (1980); *Favorite v. Miller*, 176 Conn. 310, 407 A.2d 974 (1978); *Campbell v. Cochran*, 416 A.2d 211 (Del. Super. 1980); *Morgan & Bros. Manhattan Storage Co. v. McGuire*, 114 Misc. 2d 951, 452 N.Y.S.2d 986 (Sup. Ct. 1982); *Mitchell v. Oklahoma Cotton Growers' Ass'n.*, 108 Okla. 200, 235 P. 597 (1925); *Morgan v. Wiser*, 711 S.W.2d 220 (Tenn. Ct. App. 1985). *Contra Groover v. Tippins*, 51 Ga. App. 47, 179 S.E. 634 (1935); *County of Oakland v. Bice*, 386 Mich. 143, 191 N.W.2d 338 (1971).

A noted English case reached the same result in a criminal setting.<sup>68</sup> The defendant, trespassing on a private golf course, picked up eight golf balls and later sold them. He was tried and convicted of larceny.<sup>69</sup> The House of Lords affirmed the conviction, holding that although the balls were legally abandoned by their owners, the defendant's trespass made his acquisition of them larcenous. "The [defendant] was not an honest finder," the court held. "Indeed, he was not a 'finder' at all."<sup>70</sup> He was a thief. Therefore, he could have no possessory rights. This decision seems extreme; it invites ridicule of prosperous and conservative judges. But it embodies the reaction of most judges confronted by a dishonest finding: they will not countenance it.

An even more extreme example of this reaction to wrongdoing is found in contests between honest finders and apparently dishonest land-owners.<sup>71</sup> There have been a few such instances. In a recent Michigan case, for example, a lawful hunter discovered a suitcase containing a large sum of money buried underneath a pile of branches and leaves.<sup>72</sup> He notified the police, and subsequently a man who claimed to be both the owner of the suitcase and the purchaser of the land on which it had been found claimed the money. The claimant's estimate of the amount of money inside the case, however, was slightly mistaken, and he refused to answer any questions about the source of the money.<sup>73</sup> It seemed likely that he had acquired it illegally. The court determined that the claimant had not proved title to the suitcase and refused to accord him any rights as owner of the land. The court's opinion noted that the decision would reward the "honesty on the part of the finder."<sup>74</sup>

This Michigan court did not hold that the dishonesty of the unsuccessful claimant invalidated his rights against the finder. The court held only that he had not proved himself to be the owner of the chattel, and could not therefore recover against a legitimate finder. Yet it seems likely that the suspected illegal source of the money's acquisition doomed the claim. The claimant would not explain the source of the money, probably fearing criminal penalties. This lack of candor allowed the court to conclude that he had failed to prove himself to be the rightful owner, at least when his opponent was an honest finder. Other recent cases have reached this same result.<sup>75</sup>

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<sup>68</sup> *Hibbert v. McKiernan*, [1948] 1 All. E.R. 860.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 862.

<sup>71</sup> See e.g., *Rofrano v. Duffy*, 291 F.2d 848 (2d Cir. 1961); *Peterson v. Diaz*, 379 So. 2d 990 (Fla. Dist. Ct. App. 1980).

<sup>72</sup> *Willsmore v. Township of Osceola*, 106 Mich. App. 671, 308 N.W.2d 796 (1981); see also *Doe v. Osceola Township*, 84 Mich. App. 514, 270 N.W.2d 254 (1978).

<sup>73</sup> The trial court granted a motion for a directed verdict against the claimant and in favor of the finder. The trial court was upheld on appeal.

<sup>74</sup> *Willsmore*, 106 Mich. App. at 681, 308 N.W.2d at 800.

<sup>75</sup> See, e.g., *supra* note 71.

Good-faith possession, therefore, has played a vital role in the finders cases. As one Pennsylvania court explained, the rights of a finder depend "on his honesty and entire fairness of conduct."<sup>76</sup> 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.<sup>77</sup> 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. As Dean Ames put it, "[T]he vice being thus removed, the converter's title is unimpeachable."<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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

<sup>76</sup> *Burnley v. First Nat'l Bank*, 87 Pa. D. & C. 433, 437 (1953).

<sup>77</sup> Ames, *The Nature of Ownership*, in *LECTURES ON LEGAL HISTORY*, *supra* note 6, at 201.

<sup>78</sup> *Id.*

<sup>79</sup> See R. BROWN, *supra* note 1, at § 4.2; *infra* text accompanying notes 88-92.

<sup>80</sup> See *infra* text accompanying notes 94-97.

owner<sup>81</sup> or when the cause of action itself is based upon the defendant's fraud.<sup>82</sup> 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."<sup>83</sup> The rule is based on "good morals" and "the plainest principles of justice."<sup>84</sup>

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."<sup>85</sup> 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.<sup>86</sup> When a thief has taken personal property, 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. As an Oklahoma court recently stated, for the statute to apply the property must be held openly, "so that the owner may have a reasonable opportunity of knowing its whereabouts and of

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<sup>81</sup> See Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933).

<sup>82</sup> See Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591 (1933).

<sup>83</sup> *Commercial Union Ins. Co. v. Connolly*, 183 Minn. 1, 5-6, 235 N.W. 634, 636 (1931).

<sup>84</sup> *Citizens Nat'l Bank of Havre de Grace v. Leffler*, 228 Md. 262, 270, 179 A.2d 686, 690 (1962) (quoting *Wear v. Skinner*, 46 Md. 257, 267 (1876)).

<sup>85</sup> *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127, 219 N.E.2d 169, 171, 272 N.Y.S.2d 337, 339 (1966); see also *Tom Reed Gold Mines Co. v. United E. Mining Co.*, 39 Ariz. 533, 535, 8 P.2d 449, 450 (1932) ("[I]n law as well as in equity, a defendant who, by his conduct, has prevented a plaintiff from knowing of the existence of the facts upon which an action is based, is estopped from setting up . . . the statute of limitations.").

<sup>86</sup> See, e.g., *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Goodbody & Co. v. McDowell*, 530 F.2d 1149 (5th Cir. 1976).

asserting his title.”<sup>87</sup> 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.<sup>88</sup> 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.”<sup>89</sup> 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.”<sup>90</sup> Nor is New Hampshire alone. Other American courts have continued to reject statute-of-limitations defenses when they would protect dishonest possessors.<sup>91</sup> 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.<sup>92</sup>

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

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<sup>87</sup> *Riesinger’s Jewelers, Inc. v. Roberson*, 582 P.2d 409, 412 (Okla. Ct. App. 1978).

<sup>88</sup> *Quimby v. Blackey*, 63 N.H. 77 (1884).

<sup>89</sup> *Id.* at 78.

<sup>90</sup> *Lakeman v. La France*, 102 N.H. 300, 303, 156 A.2d 123, 126 (1959).

<sup>91</sup> See *Free v. Jordan*, 178 Ark. 168, 10 S.W.2d 19 (1928); *Barry Indus., Inc. v. Aetna Casualty & Surety Co.*, 302 A.2d 61 (D.C. App. 1972); *Frye v. Commonwealth Inv. Co.*, 107 Ga. App. 739, 131 S.E.2d 569, *aff’d*, 219 Ga. 498, 134 S.E.2d 39 (1963); *State ex rel. Grassie v. Masterson*, 221 Kan. 540, 561 P.2d 796 (1977); *Commercial Union Ins. Co. v. Connolly*, 183 Minn. 1, 235 N.W. 634 (1931); *Interstate Mfg. Co. v. Interstate Prods. Co.*, 146 Mont. 449, 408 P.2d 478 (1965); *State v. United States Steel Corp.*, 22 N.J. 341, 126 A.2d 168 (1956); *Vaught v. Gatlin*, 31 Okla. 394, 120 P. 273 (1911); *Riesinger’s Jewelers, Inc. v. Roberson*, 582 P.2d 409 (Okla. Ct. App. 1978); *Excaliber Ins. Co. v. Speller*, 220 Va. 304, 257 S.E.2d 848 (1979). *Contra* *Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 531 P.2d 932 (1975).

<sup>92</sup> *Lightfoot v. Davis*, 198 N.Y. 261, 267, 91 N.E. 582, 584 (1910); see also *supra* note 91.



fide purchaser.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> The heralded recent case of *O'Keeffe v. Snyder*<sup>96</sup> 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.<sup>97</sup>

Analysis in many of the reported cases has been focused on whether the rightful owner has had a real chance to claim the item stolen. Accordingly, courts frequently have emphasized that only "open possession" counts for purposes of applying the statute of limitations.<sup>98</sup> They

<sup>93</sup> See, e.g., *Schrier v. Home Indemnity Co.*, 273 A.2d 248, 251 (D.C. 1971); *Riesinger's Jewelers, Inc. v. Roberson*, 582 P.2d 409 (Okla. Ct. App. 1978).

<sup>94</sup> To say that they decide the cases by balancing the equities is no exaggeration. Indeed, in one context it is expressly called the "superior equities doctrine." See, e.g., *Schrier v. Home Indemnity Co.*, 273 A.2d 248, 251 (D.C. 1971).

<sup>95</sup> See, e.g., *Riesinger's Jewelers, Inc. v. Roberson*, 582 P.2d 409 (Okla. Ct. App. 1978).

<sup>96</sup> 83 N.J. 478, 416 A.2d 862 (1980).

<sup>97</sup> Compare *Joseph v. Lesnevitch*, 6 N.J. Super. 340, 153 A.2d 349 (1959) with *Desiderio v. D'Ambrosio*, 190 N.J. Super. 424, 463 A.2d 986 (1983). See also *Comerford v. Hurley*, 246 Ga. 501, 271 S.E.2d 782 (1980); *Bahman v. Oltrogge*, 229 Iowa 449, 294 N.W. 788 (1940); *Aegis Ins. Co. v. Delta Fire & Casualty Co.*, 99 So. 2d 767 (La. Ct. App. 1958); *Lieber v. Mohawk Arms, Inc.*, 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. 1970); *Burroughs Adding Machine Co. v. Bivens-Corhn Co.*, 189 Okla. 616, 119 P.2d 58 (1941).

<sup>98</sup> *Riesinger's Jewelers, Inc. v. Roberson*, 582 P.2d 409, 412 (Okla. Ct. App. 1978) (must be "openly and notoriously" possessed for the statutory period).

have stressed that the law is "not meant to help parties who take no pains to see what is before their eyes."<sup>99</sup> Yet, lack of honest conduct on the part of the possessor also will doom the possessory claim, even if the possessor has purchased for value. For instance, if the purchaser stands in a confidential relationship to the rightful owner, courts will preclude invocation of the statute of limitations.<sup>100</sup> Similarly, if the possessor knows that the property had been stolen, but not from whom, courts also will not apply the statute.<sup>101</sup>

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.<sup>102</sup> Nevertheless, virtually all the cases in which courts have allowed possession to ripen into title have involved good-faith takers of the property.<sup>103</sup> 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. Contrary to what Ames wrote,<sup>104</sup> it is not the simple passage of years that cures the "vice" of wrongful possession. It is honesty.

## V. THE CRIMINAL LAW

A final test of the current status of wrongful possession comes from criminal law. No area of the case law shows more starkly both the limitations and the utility of the hornbook rule of simple possession of chattels. In practice, when the result of the rule's application would be to confer legal protection on a wrongdoer, courts have rejected it.<sup>105</sup> When the result would be to facilitate the conviction of a wrongdoer, they have

<sup>99</sup> *Purdon v. Seligman*, 78 Mich. 132, 135, 43 N.W. 1045, 1045 (1889). In a more recent case, *Interstate Mfg. Co. v. Interstate Prods. Co.*, 146 Mont. 449, 454, 408 P.2d 478, 481 (1965), the court said that the action will not be barred if "the plaintiff is ignorant of his cause of action and such ignorance is neither wilful nor the result of negligence."

<sup>100</sup> *See, e.g., Comerford v. Hurley*, 246 Ga. 501, 271 S.E.2d 782 (1980); *State v. United States Steel Corp.*, 22 N.J. 341, 126 A.2d 168 (1956); *Horlock v. Horlock*, 614 S.W.2d 478 (Tex. Civ. App. 1981).

<sup>101</sup> *See, e.g., Barry Indus., Inc. v. Aetna Casualty & Sur. Co.*, 302 A.2d 61 (D.C. App. 1972); *Dixon Valve & Coupling Co. v. Shea*, 62 Montg. County L. Rep. 337 (Pa. 1946).

<sup>102</sup> *Compare Varga v. Credit-Suisse*, 5 A.D.2d 289, 171 N.Y.S.2d 674 (1958), *aff'd*, 5 N.Y.2d 865, 155 N.E.2d 865, 182 N.Y.S.2d 17 (1959) *with Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804, *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 804 (1966), *rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969); *compare Lieber v. Mohawk Arms, Inc.*, 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. 1970) *with Berk v. State*, 82 Misc. 2d 902, 372 N.Y.S.2d 394 (Ct. Cl. 1975). Perhaps the very flexibility of a test that looks to the openness of the possession, the honesty of the purchaser, and the carelessness of the owner of stolen property invites uncertain results.

<sup>103</sup> *See Dawson*, *supra* note 81, at 899 n.69.

<sup>104</sup> *See supra* text accompanying note 78.

<sup>105</sup> *See, e.g., infra* note 119.

embraced it.<sup>106</sup> The doctrine, in other words, works only one way: to punish wrongful possessors.

Courts have rejected application of the doctrine in dealing with the law of search and seizure.<sup>107</sup> In order to guarantee "the rights of the people to be secure in their persons, houses, papers and effects," the fourth amendment to the United States Constitution forbids "unreasonable searches and seizures."<sup>108</sup> As currently interpreted, the fourth amendment permits a person aggrieved by an unlawful search to suppress all evidence that is the fruit of the unlawful search. Cases involving the rule of simple possession arise when the victim of a warrantless search can claim no more than a possessory interest in the property searched. The driver of an automobile he does not own and the occupant of a house to which someone else has title provide simple illustrations. Can they object to a search of the contents of the car or the insides of the house? Does it matter if the defendant is the driver of a stolen car or if he is a trespasser in the house?

A court strictly applying the hornbook rule of simple possession would hold that the driver and the occupant should be able to invoke fourth amendment protection, no matter what the source of their possession. If a purely possessory interest, enjoyed even by a thief or a trespasser, gives good title against all the world except the true owner, any possessor has a legitimate interest to protect against unlawful searches. Moreover, since the purpose of the fourth amendment is as much to deter illegal police conduct as it is to protect the property interests of individuals,<sup>109</sup> the status of the possessor should be legally irrelevant.

There have been a few cases in which a court has invoked the rule of simple possession to secure protection against an unlawful search of property illegally possessed. The best known is a 1967 decision, *Cotton v. United States*.<sup>110</sup> It involved a motion to suppress evidence obtained from the search of a stolen automobile. The Ninth Circuit used the simple-possession rule to hold that the driver had sufficient interest in the car to suppress the evidence found inside. The court held that the driver was entitled to the protection of the fourth amendment against police acting without a warrant because "one whose possession is wrongful is entitled to protection against all who do not have a paramount right to possession," and "even a thief of a chattel can acquire title to it by adverse possession."<sup>111</sup>

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<sup>106</sup> See, e.g., *infra* notes 124-29.

<sup>107</sup> See *infra* notes 113-15.

<sup>108</sup> U.S. CONST. amend. IV.

<sup>109</sup> See, e.g., J. COOK & P. MARCUS, CRIMINAL PROCEDURE § 4-50 (1981); Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1269 (1983); see also Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U.L. REV. 1, 9-20 (1983).

<sup>110</sup> 371 F.2d 385 (9th Cir. 1967).

<sup>111</sup> *Cotton*, 371 F.2d at 391; see also *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965);

To say that *Cotton* represents a minority view would be an understatement.<sup>112</sup> In 1978, the United States Supreme Court expressly disapproved its holding in *Rakas v. Illinois*. Justice Rehnquist, writing for the Court, described the result in *Cotton* as “inexplicable,”<sup>113</sup> and stressed that illegal possession of property subject to search was not an interest protected by the fourth amendment. Lower federal and state courts have since reached the same result almost unanimously,<sup>114</sup> although they surely might have disregarded Rehnquist’s dictum in the doctrinal morass of fourth amendment case law. In this, their position has not altered. Neither before nor after that decision has wrongful possession of any stripe regularly sufficed to allow the possessor to object to a search of the chattel’s contents. As one state court judge recently concluded after reviewing the considerable case law on the subject, wrongful possessors simply have “not fared well” in the judicial arena of fourth amendment claims.<sup>115</sup>

Judges, including those on the Supreme Court, have advanced several different rationales for denying any rights to wrongful possessors in search and seizure cases. One explanation is that wrongful possessors lack standing to object to a search of an object wrongfully acquired.<sup>116</sup> A second rationale is that the possessor cannot have a legitimate “expectation of privacy” in stolen goods.<sup>117</sup> A third rationale is that the wrongful possessor has no property interest that can be violated by a warrantless search.<sup>118</sup> Whatever the explanation, the result is identical. Criminals who have entered a house and have occupied it to escape detection cannot object to a warrantless search of the premises.<sup>119</sup> The thief of a suitcase was not entitled to suppress evidence found by the police when they opened and searched the case, despite his unequivocal possession.<sup>120</sup> The

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People v. Trusty, 516 P.2d 423, 183 Colo. 291 (1973) (Erickson, J., dissenting); Barr v. State, 531 P.2d 1399 (Okla. Crim. App. 1975).

<sup>112</sup> See generally 3 W. LAFAVE, SEARCH AND SEIZURE § 11.3, at 554-55 (1978); *id.* at 266-71 (Supp. 1985).

<sup>113</sup> *Rakas v. Illinois*, 439 U.S. 128, 141 n.9 (1978).

<sup>114</sup> See *State v. Boutot*, 325 A.2d 34 (Me. 1974) (citing cases).

<sup>115</sup> *State v. Nichols*, 628 S.W.2d 732, 735 (Mo. Ct. App. 1982).

<sup>116</sup> *United States v. McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977) (“It is hard to see on what basis McCambridge has standing to challenge the search of the suitcase since, having been in wrongful possession, he can claim no ownership interest or other right to it.”).

<sup>117</sup> See, e.g., *State v. Hamm*, 348 A.2d 268, 273 (Me. 1975) (“[H]is naked, unlawful possession of the vehicle gives him no expectation of privacy as against the police, whose possessory rights are superior to his.”).

<sup>118</sup> *State v. Purcell*, 586 P.2d 441, 443 (Utah 1978) (“[D]efendant had absolutely no possessory or proprietary interest therein that could have been invaded.”).

<sup>119</sup> *State v. Thomas*, 595 S.W.2d 325 (Mo. Ct. App. 1980); see also *Khaalis v. United States*, 408 A.2d 313 (D.C. Ct. App. 1979), *cert. denied sub nom.* *Adams v. United States*, 444 U.S. 1092 (1980); *Novak v. State*, 130 Ga. App. 780, 204 S.E.2d 491 (1974); *Britt v. State*, 242 Ind. 548, 180 N.E.2d 235 (1962); *State v. Coty*, 229 A.2d 205 (Me. 1967); *State v. Eppley*, 282 N.C. 249, 192 S.E.2d 441 (1972).

<sup>120</sup> *State v. Nichols*, 628 S.W.2d 732 (Mo. Ct. App. 1982).

man who stole a "moped" and a backpack from another could not object to their subsequent search; his possession was "simply not one the Constitution was intended to protect."<sup>121</sup>

As in the other areas of the law surveyed, courts occasionally have pushed this principle beyond the point where it seems defensible. In one Ohio case, for example, four defendants occupying an apartment by permission of the owner were denied the right to object to a warrantless search of the premises because the defendants were conducting an illegal "numbers" game. The court found that they were on the premises "solely for the purpose of engaging in these unlawful activities," and held that this was enough to deprive them of the right to object to an otherwise illegal search.<sup>122</sup> Their unlawful purpose rendered their possession of the premises wrongful. Many commentators have justly criticized the court's holding because the occupancy of the apartment was not illegal per se.<sup>123</sup> Because the occupants were not trespassers, they ought to have been able to claim the status that goes with lawful occupancy of the premises. The decision therefore seems wrong. However extreme it was, this Ohio decision stands as an example of the lengths to which some judges have gone to deny the law's protection to a wrongdoer. It shows how complete the rejection of the hornbook rule of simple possession has been in fourth amendment cases.

In sharp contrast to the rejection of the doctrine in search and seizure cases are the decisions in another area of criminal law, cases involving theft from a person in unlawful possession of a chattel. Here courts invoke the hornbook rule. The legal issue is whether the property is rightly laid in the unlawful possessor, so as to sustain a conviction of larceny against the thief. The problem is raised by asking whether the victim, probably himself a thief of the chattel, has a sufficient property interest in it to permit the criminal conviction of the person who stole it from him. The rule of simple possession furnishes the answer to this problem. Courts find the possessory interest substantial enough to convict the second thief.

Arguments to the contrary have been raised in American courts under a variety of guises. They have been uniformly rejected. In an early Massachusetts larceny prosecution, for example, the defendant's counsel "very ingeniously argued" that money obtained by illegal means was "devoid of the rights of property" and that consequently its taking

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<sup>121</sup> *Graham v. State*, 421 A.2d 1385, 1389 (Md. Ct. App. 1980).

<sup>122</sup> *State v. Keeling*, 182 N.E.2d 60, 68 (Ohio C.P. 1962); see also *United States v. Lang*, 527 F.2d 1264 (4th Cir. 1975), cert. denied, 424 U.S. 920 (1976); *People v. Keller*, 93 Ill. 2d 432, 444 N.E.2d 118 (1983); *Lambert v. State*, 196 Md. 57, 75 A.2d 327 (1950); *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981).

<sup>123</sup> See Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488, 508 (describing *Keeling* as "one maverick decision"); see also Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on its Last Leg*, 18 CATH. U.L. REV. 150, 168-69 (1968).

would not support a conviction for larceny.<sup>124</sup> In a scholarly opinion, the court rejected this "ingenious" plea, expressly invoking the rule that "the possession of one is good against all others, who cannot show a better right of possession."<sup>125</sup> In a more recent case from Hawaii, a man accused of robbery contended that a fatal variance between indictment and proof existed when the indictment alleged ownership in a man whom proof at trial showed to have stolen the money. In response, the court invoked the doctrine that "the thief himself, in possession" has a property interest in the property stolen "as against another than the owner of the property."<sup>126</sup> So it has been consistently held in all criminal cases: those involving the wrongful taking of contraband,<sup>127</sup> those dealing with theft of previously stolen property,<sup>128</sup> and even a few in which the property earlier had been taken from the defendant himself.<sup>129</sup> The rule that even illegal possession is protected by the law is used not to protect illegal possession, but rather to convict a thief.

Courts need not have used this rule. The purpose of the criminal law is to deter and to punish wrongdoing. Criminal law protects society in a stronger sense than simply protecting the victim of a particular crime. Invocation of the hornbook rule of simple possession is not required to achieve that goal. The rule *can* be used to that end, however.<sup>130</sup> Courts regularly describe the possessor of stolen property as "the owner thereof" when the question is the conviction of the thief who steals from him.<sup>131</sup> Entirely absent is the negative characterization of the wrongdoer's possession as the "naked, unlawful possession [that] gives him no expectation of privacy."<sup>132</sup> That characterization belongs only in search and seizure cases. In its place courts invoke the doctrine that even a wrongful possessor has good title against anyone but the rightful owner. The evident common thread is that in both areas of the criminal law, courts find the rule of simple possession useful when it works to the detriment of wrongdoers.

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<sup>124</sup> *Commonwealth v. Rourke*, 64 Mass. (10 Cush.) 397, 398 (1852).

<sup>125</sup> *Id.* at 401.

<sup>126</sup> *State v. Pokini*, 45 Haw. 295, 304, 367 P.2d 499, 504 (1961) (quoting *Maxwell v. Territory*, 10 Ariz. 1, 5, 85 P. 116, 117 (1906)).

<sup>127</sup> *See, e.g., State v. Johnson*, 77 Idaho 1, 287 P.2d 425 (1955), *cert. denied*, 350 U.S. 1007 (1956). *See generally* W. LAFAYE, *supra* note 112, § 57, at 409.

<sup>128</sup> *See, e.g., State v. Wales*, 168 La. 322, 122 So. 52 (1929).

<sup>129</sup> *Commonwealth v. McArthur*, 8 Mass. App. Ct. 908, 909, 394 N.E.2d 1130, 1132 (1979) (no merit to criminal defendant's argument "that he had gone to the park for the purpose of recapturing some marijuana which had been stolen from him").

<sup>130</sup> *See, e.g., MODEL PENAL CODE* § 223.0(7) (Proposed Official Draft 1962) (defining theft as unauthorized taking of property in which any person other than defendant has interest).

<sup>131</sup> *See Hall v. State*, 160 Tex. Crim. 553, 272 S.W.2d 896, 897 (1954).

<sup>132</sup> *See State v. Hamm*, 348 A.2d 268, 273 (Me. 1975).

## VI. CONCLUSION

This survey of the status of wrongful possession of chattels in four areas of the law does not exhaust the subject. It does show the drift. Other areas of the law could be surveyed, but they seem compatible with the four areas studied. For example, in the law of insurance, courts have held that the possession of stolen property is insufficient to create an insurable interest.<sup>133</sup> To have an insurable interest, the possessor "must have *some lawful* interest, and . . . he can not have it in stolen property."<sup>134</sup> Thus, the unlawful possessor cannot collect under an insurance policy covering the chattel lost or damaged. On the other hand, in the law of taxation, courts have reached the opposite conclusion in order to impose liability on criminals. The government may tax money acquired by extortion<sup>135</sup> or embezzlement.<sup>136</sup> The criminal has "actual command over the property" and the "mere" fact that he is under an unconditional obligation to repay the money is not sufficient justification for him to escape payment of taxes on it.<sup>137</sup> In other words, the rule of simple possession again applies only when it works against the unlawful possessor.<sup>138</sup> When an unlawful possessor seeks legal protection equal to that enjoyed by a rightful possessor, courts do not invoke this rule; when the rule can be invoked to a wrongdoer's detriment, they do.

The conclusion that emerges from the accumulation of evidence, therefore, is that a gap exists between the decided cases and the hornbook rule that possession of chattels, however acquired, prevails against anyone but the rightful owner. First, ordinary statements of the rule exaggerate the frequency of disputes between two wrongdoers. Most cases involving purely possessory claims are not like *Anderson v. Gouldberg*. Second, when possessory claims arise in litigation, courts regularly reject them if they stem from wrongful possession. Courts examine the quality of possession as well as the fact of possession. Third, the most common

<sup>133</sup> See generally 4 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 2125 (1969).

<sup>134</sup> *Gordon v. Gulf Am. Fire and Casualty Co.*, 113 Ga. App. 755, 760, 149 S.E.2d 725, 729 (1966) (emphasis in original); see also *Horton v. State Farm Fire & Casualty Co.*, 550 S.W.2d 806 (Mo. Ct. App. 1977); *Perrotta v. Empire Mutual Ins. Co.*, 35 A.D.2d 961, 317 N.Y.S.2d 779 (1970); *Ernie Miller Pontiac, Inc. v. Home Ins. Co.*, 534 P.2d 1 (Okla. 1975). *Contra* *Treit v. Oregon Auto. Ins. Co.*, 262 Or. 549, 499 P.2d 335 (1972).

<sup>135</sup> *Rutkin v. United States*, 343 U.S. 130 (1952).

<sup>136</sup> *James v. United States*, 366 U.S. 213 (1961).

<sup>137</sup> *Corliss v. Bowers*, 281 U.S. 376, 378 (1930), quoted in *James v. United States*, 366 U.S. 213, 219 (1961). See generally Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130 (1974); Libin & Haydon, *Embezzled Funds as Taxable Income—A Study in Judicial Footwork*, 61 MICH. L. REV. 425 (1963).

<sup>138</sup> A further example arises from the law of bankruptcy: A debtor who holds chattels wrongfully does not have a sufficient interest in them so that they are part of his bankruptcy estate. Courts do not treat return of the chattels to the owner as a preference, no matter when it occurs. See 4 COLLIER ON BANKRUPTCY § 547.19, at 67 (L. King 15th ed. 1983). Dean Ames stated that the contrary was good law, using it to illustrate the force of the hornbook rule. See Ames, *supra* note 77, at 202.

use of the hornbook rule in judicial opinions has been to permit courts to disregard technical flaws in one person's title when those flaws might permit a wrongful possessor to prevail. Without recognizing the apparent incongruity, American courts have used an apparently amoral rule to buttress moral claims.

In light of this gap between theory and practice, the hornbook rule of simple possession should be qualified as a statement of the law normally applied by modern American courts. The paradigmatic case of two equally guilty possessors has arisen so rarely, and the unwillingness on the part of judges to close their eyes to ethical considerations has been so persistent, that flat statements of the rule can easily mislead. The attempt to remove morality from the law of possession simply has not "fit the facts" of many cases decided since Holmes wrote in 1892.

On the other hand, the doctrine of simple possession itself surely could not be abandoned without real inconvenience. Courts have applied it in contests between equal wrongdoers and cited it in other situations too frequently to suggest that commentators should give it up. In actual litigation, however, the rule admits of an exception when the prior possessor of a chattel is a wrongdoer and the other litigant is not. In such cases, courts regularly have preferred the merit of honest conduct to the logic of the rule of simple possession. The exception to the rule has arisen often enough that commentators should now recognize its existence.