May 1929

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Link to publisher version (DOI)
https://doi.org/10.15779/Z386N5C

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Two Problems in Possession

CAN A DETENTOR POSSESS?

This problem is suggested by Ashwell's case.\(^1\) There \(A\), intending to lend to \(B\) a shilling, gave to \(B\) a sovereign. Later, \(B\) discovered the error and converted the sovereign. \(B\) was convicted of larceny.

In the court of appeal, seven of the fourteen judges thought that \(B\) got a lawful possession. The other seven judges held a contrary opinion. The conviction here appears to be sustainable only on one of the two following grounds: (1) that the prisoner got possession (and not merely detention) by excusable trespass,\(^2\) and that the subsequent \textit{animus furandi}, as evidenced by the act of conversion, constituted a larceny; (2) that the prisoner got only detention, since there was essential error in the tradition of the coin, and that the conversion of the coin was a trespass with \textit{animus furandi} uniting as a coincident element to constitute larceny.

Each of these alternatives has strong persuasion, but the second alternative alone presents the problem of duality of detention and possession.\(^3\) Suppose that \(B\) after receiving the sovereign departs, and, later, before \(B\) has discovered the mistake — at any rate before he has formed a purpose of acting wrongfully with respect to the money — \(T\) forcibly takes the coin out of \(B\)'s control — would this taking from \(B\) by \(T\) be a trespass against \(B\)? The correct answer would seem to lie in the affirmative whether we regard possessory remedies as being grounded on respect for the person\(^4\) or in the interest of social order. If that answer is the right one, then manifestly \(B\)'s control was of a dual nature — he was a detentor as to \(A\) and he was a possessor as to \(T\).

This view is not logically impossible and there are instances enough of analogous situations. Thus, if \(B\) defrauds \(A\) in taking title to a chattel, \(B\)'s title is defeasible as to \(A\) but \(B\)'s title is indefeasible as to \(T\). This duality in dealing with jural relations is often necessary since each actual legal relation at the point of infringement is unique. On a given

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\(^1\) The Queen v. Ashwell (1885) 16 Q. B. D. 190.

\(^2\) This is the view of Sir Frederick Pollock: \textit{Pollock & Wright, Possession in the Common Law} (1888) 110.

\(^3\) The difficulty of the terminology for problems of possession seems to occur in all languages. \textit{Cf. Jhering, Der Besitzwille} (1889) 1-5. Each writer must state his own program. We mean here by detention the "\textit{possessio naturalis}" of Roman law in contrast with Possession (\textit{possessio civilis}), and we shall employ the term control to include both detention and possession. Detention always involves custody or power to deal physically with an object, while control exists even though there may be no present possibility of physical dealing with the object.

\(^4\) \textit{Savigny, Das Recht des Besitzes} (6th ed. 1848, Perry's Tr.) 27.
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Two problems in possession, it will be found that an actual legal relation will have a different factual content as to different persons. Thus, A as the *dominus* of the right of reputation will stand in a different legal position as to different persons. As to B, a superior judge, in the actual trial of a case, A's interest may be impaired by acts showing malevolence; as to C, an attorney, in the same case, A's interest may be impaired by a defamation not accompanied by malevolence; as to D, a newspaper publisher, A's interest may be impaired by acts falling without the limits of correct reporting of public proceedings; as to other persons, other facts will modify the content of the act that A can claim. Each claim that A has is unique and depends at the moment of infringement or asserted infringement on special facts peculiar to the situation applying to the person against whom the claim is asserted.

The question remains whether control of an object as a jural fact may also have a plurality of applications. Can this control be detention as to one and possession as to another? Relations may present the juristic phenomenon of jural conflict which is the juristic device for simplifying the uniqueness that characterizes concrete legal phenomena. The legal relations growing out of the same jural fact are different as to different persons by reason of the addition of new facts. Thus, the fact of birth invests A with a right of corporal integrity, but if A wrongfully invades the land of B, B may remove A from the land. Here the right of A as against B differs from A's right against C and other persons. It is not necessary to extend this uniqueness of rights beyond the case of jural conflict. Thus, A's rights of corporal integrity as against B and against C do not differ simply because B and C have different factual relations to A. For example, B may own...

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5 As is well known the Roman rule as to two independent possessions was that stated by Paulus (D. 41, 2, 3, 5): "... plures eandem rem in solidium possidere non possunt: contra naturam quippe est, ut, cum ego aliquid teneam, tu quoque id tenere videaris." In the same passage Paulus goes on to state the views of Sabinus, Trebatius, and Labeo. The view of Sabinus was that in the case of *precarium* there could be a double possession. Trebatius agreed but said that such double possession could exist only in case of a conflict between *iniusta possessio* and *ISTA possessio*. See SAVIGNY, TREATISE ON POSSESSION (6th ed. 1848, Perry's Tr.) 116 et seq.

6 The only instance in Roman law which presents this specific problem is *possessio precaria*. Pomponius (D. 43, 26, 15, 4) says: Eum qui precario rogaverit, ut sibi possidere licet, nancisi possessionem non est dubium: an is quoque possideat, qui rogatus sit, dubitatum est. Placeat autem penes utrumque esse eum hominem, qui precario datus esset, penes eum qui rogasset, quia possideat corpore, penes dominium, quia 'non discesserit animo possessione." If, however, as Savigny supposes, the practical effect of this statement is limited to the doctrine of tacking (*accessio possessionis*) then the holder of a *precarium* has not only detention but also possession. See SAVIGNY, op. cit. supra, 90, 123, 222.
an automobile and C may own a shotgun; yet the duties of each to A remain the same.\(^7\)

May a jural fact (e.g., birth, abandonment, usucaption, finding, passage of time, separation of fruits) be uniquely different in the same sense that jural relations are uniquely different?

Before attempting to answer that question, we may examine once more the situation as to jural relations. Thus, A's right of reputation may be invaded by B, a judge, while the same harm could not excusably be inflicted by C, a private person. Here, A's right in no manner changes or is subject to change, but the circumstances may be such that an invasion of the right is excusable, and when we speak of the uniqueness of rights, we mean only the situation presented at the moment of infringement which modifies or takes away the remedy as in the case of privileged defamation.

When F finds a chattel owned by O, the jural fact isprehension or capture. This ultimate jural fact has different consequences as to O and to T, a third person. The owner, O, is entitled to have the control of the chattel from F, but F is entitled to keep control as to T, and if T deprives F of the control, F may recover it by action or by self help. It is clear that the same jural fact may give rise to different jural relations, and, as we have seen, the relations may differ at the moment of infringement as to different persons. Thus, it may be excusable for T to deprive F of the chattel if F by its use is about to inflict a serious corporal harm on himself or on another.

A jural fact does not change under any circumstances; it is the same fact always; and it is the same fact always as to all persons. Perhaps, it may be objected here that where P who though alive in fact, is adjudged to be dead by a presumption arising from seven years absence, we have an instance of a jural fact which is not the same universally. The answer to this is that the death is only a presumptive fact. The presumption may be overcome by anyone in a legal position to rebut it. The problem here is simply one of proof and as such does not differ from any other case. Res iudicata pro veritate accipitur. An adjudicated fact may be true or it may not be true, but as to what was adjudicated, and in that reference, it is in law the same as truth. Adjudicated facts differ from other, unadjudicated jural facts only in the respect that out of the wide realm of possible interpretation of physical phenomena, an authoritative meaning is given to such a phenomenon — a meaning strictly limited to the controversy and binding on parties and privies; but it is a meaning which is universal in its limited reference.

\(^7\)Cf, for a contrary view of the legal results of anomic relations. TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW (1884) 119.
The conclusion which we reach is that a physical phenomenon is unchangeable so far as that phenomenon is given or apprehended. Its legal significance may be different as the phenomenon is altered by proof and it may differ in legal consequences also as to different persons. The phenomenon, however, as it is in scientific fact, or as it is or appears in the jural process, is always the same. It exists or it does not exist. But it may be urged that a jural fact may be considered as if it did or did not exist for different purposes. Putting aside the case where the same physical phenomenon is altered in the process of proof so that it appears as a different fact in different controversies (a point already covered) it may be admitted that the law can, and does, at least appears to, treat a given fact, on occasion, as if it did not exist, but when such a logical contradiction appears it is clearly a fictional operation and must justify itself on cogent grounds of legal policy.

The fiction of postliminium, for example, is a crude instrument. It is an oblique method of attaining a result which could be better attained by a direct operation. It has, however, certain advantages in abbreviating legal norms but under the accompanying disadvantage of not making it clear for doubtful cases where the fiction leaves off. A fiction of this kind is relatively harmless as against the employment of such a fiction to be discussed in a moment, where the loser of a chattel is said to be in possession of it. The outstanding difficulty of the general theory of possession lies at this point. How much of the theory is fictional and how much is based on reality?

As against the suggestion of treating the same jural fact in Ashwell's case as if it did and also as if it did not exist, it may be objected that this goes beyond the proper scope of fictions in any system of law and in opposition to such a suggestion we may invoke a canons of juristic logic which never permits a fiction to be admitted if the necessary result is to destroy the logical symmetry of legal ideas.

The alternative solution of trespass reaches the required result. The difficulty of accepting it is simply one of terminology and of a connotation limited by traditional habits of thinking of trespass as an act which is a legal wrong in all cases and in all events and which never submits to the defense of excusability. The proposal must seem to be

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8 Such fictions as absolute time and space, consciousness, the atom, center of force, infinity, etc., may be necessary as the premises of a system of thought but once the system is postulated it must be logically coherent in all its parts. Law is such a system and the presence of contradictions based on fictions not originally postulated is always a symptom of error in the fundamental structure. Cf. Vaitinger, THE PHILOSOPHY OF AS IF (1925, Ogden's Tr.) passim.

9 E.g. The postliminium of Roman law: Inst. 1, 12, 5; D. 48, 22, 4; C. 8, 50.

10 That is the necessary result if we say that the prisoner had detention as to the owner and possession as to third persons.
one of considerable violence and yet, oddly enough, the law already deals with it in fact. If A loses a chattel and B finds it, knowing the owner, and converts it, B is guilty of larceny. The theory which produces this result is that A still retained possession. If B does not convert the chattel, he has necessarily committed a trespass by taking detention.

There seem to be various kinds of trespass divisible into two chief groups: (1) Invasions (a) of the corpus of the human body (called battery), (b) of the corpus of chattels (for which there does not seem to be any specific name other than trespass), and (c) of land space (for which likewise there is no specific name); (2) dislocation of the factual power of use of objects (usually inexcusable trespasses). Dean Wigmore suggests that the term trespass for analytical purposes should be limited to the first group of cases — invasions of matter or of space not amounting to a dislocation of the factual power to continue to use the matter or space (at least in altered form). For the second group of cases Dean Wigmore suggests use of the term conversion.\(^1\) The question here is encumbered by the historical accidents of the law of procedure. The actions of trover and trespass frequently overlapped.\(^2\) In order to avoid these difficulties, it seems best here to avoid the historical terminology entirely and to attempt to consider the problem in terms unhindered by the restrictions and ambiguities of legal tradition.

In Ashwell's case, the taking of the coin resulted in a dislocation of the lender's power of use of the coin. Such a dislocation of power if accomplished by means contrary to the conduct of the lender would be wrongful. Here, the dislocation of power was accomplished contrary to the objective conduct of the lender. The lender purported to lend a shilling. In fact, he gave up detention of the sovereign. The taking of detention by the borrower, therefore, was not in accord with the lender's act. On the face of the matter, that produced a situation where the lender was deprived of that which the law undertook to protect. It was an invasion of the lender's right. If the borrower's act objectively was directed to taking a shilling (not then present in the objective field of reference) the whole transaction resulted in essential error. If the lender's right was invaded, \(i.e.,\) if the borrower committed a legal wrong,

\[^1\] Cf. Wigmore, Select Cases on Torts: Summary, §§ 123, 124.
\[^2\] Pollock & Wright, \(op. \ cit. \ supra, \) p. 121. Trespass is a concurrent remedy with trover for nearly all illegal takings, but in actual application it is often difficult to understand the distinctions made. Thus, trespass lies against a bailee who wrongfully destroys the chattel but it would seem that trespass does not lie against a bailee who refuses on demand to return the chattel when the term of bailment is ended. Put v. Rawsterne (1803) Sir T. Raym. 472, 83 Eng. Reprint 246; \(cf.\) Lechner v. Toplady (1726) 2 Vent. 169, 86 Eng. Reprint 373. \(Cf.\) Chitty, Pleading (1848) 191.
the effect of the wrong was neutralized by the contributory act of the lender, and it follows that the wrong (whether it be technically a trespass or conversion) was excusable. But the subsequent act of the prisoner in dealing with the sovereign as owner (i.e. as having the highest or most ultimate right to use it) resulted in larceny. The prisoner’s control of the coin was lawful only to the extent that he could successfully defend in an action, but it was not a lawful control for the purpose of acts of dominion. The excuse was limited in extent. The delivery of the sovereign was made under essential error and the detention of the coin was excusable only so long as neither party acted contrary to the error. If the owner had demanded the coin and the prisoner had refused that would have been larceny. When the prisoner spent the money, he acted contrary to the error and committed larceny.

Suppose, now, that A lends his horse to B and that B wrongfully sells the horse. This is not larceny, and why not? The act of the bailee in taking the horse was in accord with the objective character of the bailment transaction. The taking was not a wrong; it was not an act to be excused. In this respect the bailee’s control of the horse differs from the prisoner’s control of the coin in Ashwell’s case. But can we say that the control in the one case is possession and in the other not? That was the distinction adopted to justify the result in Ashwell’s case. But is not this distinction purely verbalistic? Is not the problem of possession here entirely gratuitous and illusory? Is there, in a word, any question of possession involved in such cases?

Both cases are cases of dishonest dealing. The prisoner spends the sovereign which he got through error. The bailee sells a horse which does not belong to him. It is much too late to attempt to make over the history of larceny. It may be too early to suggest that such an idea as possession is wholly irrelevant to change the character of dishonesty. But it is appropriate to consider whether the fact that one may employ possessory remedies is one of such importance as to exempt such person from larceny. There is one instance only where the distinction stands out — the case of the servant. Servants do not in general have possessory remedies. Servants may be guilty of larceny. This instance may be explained on historical grounds entirely apart from any question of possession. That the proposition may employ possessory remedies seems to be an irrelevant fact. The thief, perhaps, has such remedies against third persons. To that it must be answered that the thief only gets his possessory remedies by becoming a thief; he did

13 This raises the interesting question whether when an act otherwise tortious is excusable it is a tort. An analogy is presented by debts barred by limitation.
not have them before. But if A takes B's chattel for temporary use, but furtively, A no doubt may be held in trespass but not for larceny. A has possession and he has also the possessory remedies against third persons. Yet, later, by converting the chattel he may be held in larceny.

It would seem, therefore, that the existence of possession or the having of possessory remedies is of no importance in larceny but that the test is whether the prisoner deprived the owner of the power of use permanently by means of physical control of an object where the control in its inception was tortious (the case of the servant excepted). On this view, it is of no importance whether the prisoner had possession or not.

Reverting to our problem, if the same person can not be detentor and possessor in the same reference, we must deny to one taking control of an object under the circumstances in Ashwell's case either possessory remedies or, alternatively, liability in larceny, upon the theory of that case. Rejecting the theory of that case, we may admit both the rights and the liability with the result that whether the prisoner had possession or had not possession is immaterial. On that basis use of the idea of possession in Ashwell's case was symbolical merely as an operative element reflecting the end to be attained where a rational process was necessary. Unfortunately, the theory of the nature of possession was made highly difficult so far as the idea of possession has any importance in the law and so far as that case affords any explanation of it. If the case is disregarded as one touching the theory of possession that theory will be relieved of considerable analytical embarrassment.

**Possessio Plurium**

Whether the same person may be a detentor as to one and possessor as to another is not entirely free from doubt and certain cases may be explained on that view. Moreover, such duality is not logically impossible. The physical base of possession can not change but the legal implications arising out of the physical fact conceivably may have different contents as to different persons by the addition of special additional facts applicable uniquely because of a different field of reference in each instance. It is believed, however, that neither the Roman nor the English law ever proceeded upon the theory of such duality of possession and detention. This conclusion is reinforced by a

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15 Cf. Green, *Rationale of Proximate Cause* (1927). In this stimulating essay, Professor Green has shown in a convincing manner how the idea of proximate cause is employed in a similar manner in tort causation. There is this difference, however, that in the point under discussion, the symbol appears to be wholly irrelevant.
principle which obtains in both systems and which is the subject of
the present discussion.

Paulus in his discussion of the Edict lays down the principle as
follows: "... plures eandem rem in solidum possidere non possunt:
contra naturam quippe est, ut, cum ego aliquid teneam, tu quoque id
tenere videaris."\(^{16}\)

The problem here is entirely a matter of definition. Two persons
may concurrently use the same object; two persons may concurrently
physically hold the same object. To avoid the obvious difficulties in
such situations we must inquire whether we are concerned here with
detention or with possession or with both.

Savigny states that the principle in question touches only posses-
sion (i.e. legal possession) since the law has no need of defining deten-
tion except as it has legal consequences.\(^{17}\) But this answer is not as
convincing as it appears on first impression. Roman lawyers took a
distinction in their legal terminology between "naturaliter tenere" and
"civiliter possidere".\(^{18}\) Paulus in the principle above set out, uses both
terms — "possidere" and "tenere." It may be surmised that he uses
these terms in the usual professional sense and is attempting to show
that since two persons can not have exclusive detention of the same
object at the same moment, as a proposition of natural law, that like-
wise two persons can not possess the same object "in solidum."

Paulus did not use the word "exclusive." This seems to be an inter-
pretation introduced for the first time by the commentators, but it was
clearly the view of Paulus that two persons could not detain the same
object. In the same book Paulus says: "Non magis enim eadem possessio
apud duos esse potest, quam ut tu stare videaris in eo loco, in quo ego
sto, vel in quo ego sedeo, tu sedere videaris."\(^{19}\)

This passage makes it perfectly clear that it was the opinion of
Paulus that two persons could not concurrently have detention of the
same object. The fortificative illustrations are not as irrebuttable as
they pretend. Two persons at the same moment may stand in the same
room and two persons concurrently may sit on the same bench. Of
course, they can never occupy the same space concurrently, but the
problem of detention is not as simple as that. Certainly, two persons
can detain the same object at the same moment, but equally certainly,
two persons can not detain exclusively at the same moment. In that
form, the rule is wanting in sense and what it implies to give it a
rational content in that where two persons at the same moment detain

\(^{16}\) D. 41, 2, 3, 5.
\(^{17}\) SAVIGNY, TREATISE ON POSSESSION (6th ed. 1848, Perry's Tr.) p. 114.
\(^{18}\) E.g. D. 41, 2, 24; eod. 49 pr. There are numerous other passages.
\(^{19}\) D. 41, 2, 3, 5.
the same object neither one has such detention as amounts to possession. The rule of possession, therefore, is not one derived from natural law as Paulus argues but it is one derived from logic.

This principle is simply that of the logical principle of identity. If A excludes all other persons in the detention of an object, it is impossible in the same reference, that B excludes A or other persons in the detention of the object. This is a matter of logic. But may not both A and B be regarded as if each had exclusive control? Savigny has said on this proposition, that "no fiction can be assumed when the thing imagined is in itself impossible." But the purpose of a fiction is to contradict reality. There is no higher form of impossibility than that. For example, for certain mathematical operations, a curved line may be regarded as if it consisted of an infinite number of infinitely small straight lines. There is, of course, a limit in the use of fictions; and somewhere in the process of use the fiction must be corrected. Both A and B could not be regarded as having exclusive control in the same reference since such a fiction would result in an impasse. But A may be regarded as possessing as against C where B also possesses as to C. This is the rule both in Roman and in English law for positive prescription in cases of so called derivative possession with this difference that in Roman law derivative possession was a legal possession (with exceptions) only in the case of emphyteusis, pledge, depositum, precarium, and mandate, while English law accords a legal possession to all derivative possessors. Whatever may be the connection of English law with Germanic law, it is clear that the English doctrine of possession is not Saxon. In Germanic law there might be several "gewere" in the same land but there could be only one "seisin." Because of the nature of the "gewere" and the possibility of plural "gewere," Germanic law did not develop a system of possessory actions. But, anomalously, considering the exclusive character of seisin, it was and is the universal rule of possessory actions in English law in bailments at will, that against wrongdoers both bailor and bailee may have the

20 D. 13, 6, 5, 15.
21 SAVIGNY, op. cit. supra, 117.
22 VAHINGER, THE PHILOSOPHY OF THE AS IF (1925, Ogden's Tr.) 91 et passim.
23 This is the method of "antithetec error." VAHINGER, op. cit. supra, 109 et seq.
24 Cf. Huebner, HISTORY OF GERMANIC PRIVATE LAW (1918, Philbrick's Tr.) 206 et seq.
25 Cf. Huebner, HISTORY OF GERMANIC PRIVATE LAW (1918, Philbrick's Tr.) 206 et seq.
26 Maitland, The Mystery of Seisin (1886) 2 LAW QUART. REV. 481; Maitland, The Beatitude of Seisin II (1887) 4 LAW QUART. REV. 286; JoüN DES LONGRAIS, LA CONCEPTION ANGLAISE DE LA SAISNE (1925).
27 Vinogradoff, Introduction to Huebner, HISTORY OF GERMANIC PRIVATE LAW (1918, Philbrick's Tr.) xli; cf. CAIIESE, HISTORY OF ITALIAN LAW (1928, Register's Tr.) § 468.
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action. Whether the law in the latter case actually operates with the fiction of double concurrent possessions may be doubted. Certainly such a fiction is unnecessary here since the rules may be framed to achieve the same results without resort to a fictive method. The jural fact of possession (possidere) is sometimes confused with the jural relation of possessing (ius possessionis) but, here, commonly, the jural fact is confused with the right to have possession (ius possidendi).

It is generally supposed that apart from translative possession the right to have possession (ius possidendi) or the power to maintain possessory remedies is based on possession. That assumption underlies the present problem concerning plural possessions "in solidum." The Roman lawyers divided on the question. Labeo and Paulus denied the possibility of plural possessions. Trebatius, Sabnius, and Julian admitted such dualism in the exceptional case of a iusta possessio with an iniusta possessio.

It is indisputable that two or more persons may have claims or duties and powers or liabilities based on the same jural fact. One of the simplest illustrations is that of capture of a res nullius. The fact of occupation of a chattel creates a multitude of duties in other persons not to disturb the chattel. May possession also be such a fact? It is clear that the fact of detention may so operate to create plural rights in tenants in common, but detention is not necessarily possession. If possession is an exclusive detention of an object then tenants in common can not possess. It is needless to inquire further. The test itself of exclusiveness completely answers the question.

Savigny has attempted to overcome the logical difficulty presented by stating that each possesses an imaginary part. "Each, therefore, possesses one part for himself and the different parties stand to one another nearly (ungefährl in the same relation as the possessors of two adjoining houses." Apart from the logical difficulty of the absence of exclusiveness which Savigny seeks to overcome by the fiction of possession of imaginary parts, we encounter the obstacle that only corporeal things can be possessed: possideri autem qui sunt corporalia; and the further obstacle: incertam partem possidere nemo potest.

Three possible solutions present themselves: (1) It may be denied that in such cases anyone possesses. This solution does not however negative the admissibility of the interdicts or other possessory remedies in the case of compossessio. On this theory, the denial of possession is

28 Pollock & Wright, op. cit. supra, 91 et seq.; Ames, The Disseisin of Chattels (1889) 3 Harvard L. Rev. 23, 313, 337.
29 D. 41, 2, 3, 5.
30 Savigny, op. cit. supra, 113.
31 D. 41, 2, 3, pr.
32 D. 41, 3, 32, 2.
not a "mera subtilitas" as Labeo put it but a clear assertion that possession (as defined by Paulus) is not necessary for possessory remedies. A somewhat similar instance is where several persons carry off a piece of timber with the purpose of depriving the owner of it but where no single one of them could have carried it away unaided by the others. All of them are held in an action for theft. The question of possession in the wrongdoers is irrelevant. The situation here is wholly unlike that where two persons simultaneously detain an object and claim exclusive rights as against each other. In such a case, the test of exclusive detention may properly be applied.

(2) Another solution is to regard each detentor as an "as if" possessor as against third persons either upon the fictitious view of possession of ideal parts, or, more boldly, as of the whole corporeal object.

(3) Another possible solution is to regard plural detentors as constituting a new persona to which possession is attributed. There is no fiction involved in this process of re-personifying two or more detentors. This method is necessary for explanation of joint ownership since it is inconceivable that two persons at the same moment can own an object, or, indeed, share any right whatsoever. The doubt of the solution lies in another direction. Possession is based on facts in the external world. The primary fact is a relation of a human being to an object. It is universally accepted that this physical relation (infra-jural relation) exists where a human being has the exclusive control of a corporeal substance or of a space (i.e. land) which can be economically enjoyed. When this physical relation exists, it is called possession but when that point has been reached the situation has become transfigured into a complex of conceptual elements. The object possessed has become a conceptual object and the human detentor has become a conceptual possessor. The difficulty or doubt is now before us. If two human beings, neither having exclusive detention as against each other, are re-personified into a single person, is the test of possession aided? If the person is strictly regarded as a unitary persona, it admits of no logical conflicts in its legal nature. The contradictory elements are reconciled and obliterated in the new synthesis. The new persona possesses because the jural fact of possession is based on the physical fact of two (or more) non-exclusive detentors of one object. The merging of the personateness of the detentors removes the element of non-exclusion since the new persona can not exclude itself.

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34 D. 41, 3, 32, 2.
35 D. 9, 2, 51, ad fin.
36 This logical method is analogous to Hegel's "dialectic moment." See Hegel, GRUNDBLLEGEN DER PHILOSOPHIE DES RECHTS (1833, Collected Works Vol. VIII) (1906 Dyde's Tr. p. 36) § 31.