

# TITLE TO FOUND AND STOLEN GOODS: THE RIGHT TO SUE IN CONVERSION

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## I. INTRODUCTION

In certain circumstances the law has seen competing claims made to goods by persons who do not own them and who have come into possession of them without the consent or knowledge of the owner of them. Such claims may be made, typically, where goods which have been lost by their owner are found by someone who takes possession of them; or where goods have been stolen and are in the possession of the thief or a person who has received or taken them from the thief. In such cases, of course, the proprietary title of the owner remains paramount but, in the absence of an owner to assert such a claim, the question of entitlement to found or stolen goods may be disputed by other parties who have taken possession of the goods, dealt with them in some way or had some relation to them. In such disputes, legal proceedings, usually in conversion, may be undertaken by the plaintiff with the purpose of establishing an interest in the goods sufficient to prevail over any claimed interest of the defendant.<sup>1</sup> The purpose of this paper is to discuss the interests involved in cases of found and stolen goods, and to describe the way in which the law deals with rival claims in such cases. The nature of the possessory right necessary to found a successful conversion action in the absence of the true owner of goods is central to such a discussion, and an attempt will be made to analyse the principles involved in this context in establishing such a right. In particular, this paper revisits and questions the correctness of the reasoning in *Costello v Chief Constable of Derbyshire*,<sup>2</sup> which equated the interests of finders, thieves and other wrongdoers; and concludes that the decision failed to make the necessary distinction between the respective rights in goods of finders, thieves and others who are in possession of unlawfully obtained goods.

## II. PROTECTION OF POSSESSORY INTEREST

The right to immediate or physical possession of goods is not always a necessary incident of ownership of them. Although ownership of goods may be vested in a particular person, he or she may have transferred the right to possession of them to some other person by, for example, some form of bailment such as a lease or hire purchase. In such cases there are of course two different kinds of interests simultaneously in existence in respect of the same goods; ownership is vested in one party, and possession in the other. In agreements of this kind, the bailee, being entitled to possession pursuant to the agreement, may maintain an action in conversion against a third party who converts the goods. This is because the essence of the tort of conversion is that the defendant's conduct is inconsistent with the plaintiff's right to possession of the goods, and encroaches on the plaintiff's rights by excluding him or her from the use and possession of them. In effect, the defendant must be shown to have deprived the plaintiff of possession of the goods.<sup>3</sup> Thus, the person who is entitled to complain of such deprivation is the one who is entitled to possession, and it is the interference with that possessory right which is the subject of the action in conversion. Therefore the plaintiff in conversion proceedings may or may not be the owner of the goods, and indeed a bailee entitled to exclusive possession may sue in conversion the owner of goods who has excluded him or her from it.<sup>4</sup> Of course the true owner of goods generally has the right to sue

in conversion, because a normal incident of ownership of goods is the right to possession of them.<sup>5</sup> However, the true owner may be unable to maintain an action in conversion if he or she has parted with the goods to another under an arrangement whereby the owner is not entitled to regain immediate possession. In such a case, the owner may lack the possessory title which is required for a right to sue in conversion, which will lie with the person to whom the owner has ceded the right and fact of possession. This is because a person claiming in conversion must show the necessary possessory title. A possessory title may be established by proving either possession in fact or the immediate right to possession.<sup>6</sup> In this context, possession in fact, provided it is coupled with the manifest intention of sole and exclusive dominion over the chattel in question, always constitutes possession in law.<sup>7</sup> Whether or not there exists a right to immediate possession may be a more legally complex question, but it is clear that the existence of this right confers a right to sue in conversion.<sup>8</sup> The facts constituting possession generate rights as truly as do the facts which constitute ownership, although the rights of a mere possessor are less extensive than those of an owner.<sup>9</sup> The principle that a non-owner in lawful possession of goods is entitled to sue in conversion is of respectable antiquity. For example, in the seventeenth century case of *Wilbraham v Snow*<sup>10</sup> it was held that a sheriff who had seized goods in execution of a writ of *feri facias* could maintain an action of trover against the defendant, a person who had taken the goods from him. The sheriff had a right of possession under the writ and so was entitled to the return of the goods from the defendant. The entitlement to possession was a special property in the goods which the sheriff could assert against the defendant who had wrongfully converted the goods to his own use. Many cases have affirmed this principle in respect of other bailees in possession.<sup>11</sup> What is necessary is that the plaintiff in each case should be considered to have, legally speaking, a sufficient property or interest in the goods which are the subject of the claim, such property or interest being derived from the plaintiff's possession or right to possess.

Case law indicates that it is not necessary that the plaintiff's possession or right to possession should derive from a contractual relationship, such as a hire or carriage of goods, or be based upon legal justification such as a writ, as occurred in *Wilbraham v Snow*. A mere general bailment which gives the plaintiff possession of the goods with the consent of the owner is sufficient. So a borrower may sue in conversion.<sup>12</sup> In *Sutton v Buck*,<sup>13</sup> a case decided in 1810, a 'purchaser' who took possession of a ship under an invalid sale was similarly entitled. In that case, the owner of a stranded ship sold the ship as she lay to the plaintiff, who paid the purchase price. In fact the sale was not registered as required by legislation and the sale was void. The plaintiff expended time and money in attempting to refloat the ship. His efforts were unsuccessful and the ship broke up. Parts of the wreck drifted onto the land of a manor, the defendant bailiff of which took them and refused to return them to the plaintiff. The defendant argued that the plaintiff, not being the owner of the ship, did not have a sufficient title in the ship to maintain trover. The Court held that the plaintiff had been in possession of the ship with the consent of the owner, who had intended to transfer it to the plaintiff; and the fact of the plaintiff's possession was enough to defeat any right claimed by the defendant. The plaintiff's right to possession derived from the true owner and it made no difference that the purported sale had not resulted in property in the ship passing to the plaintiff. The position would have been the same had the owner made a gift of the ship to the plaintiff, said Mansfield CJ:

If [the owner] had said I give, or I abandon the ship to you, and the Plaintiff had said, I will endeavour to save her, and had laid out great sums of money, and failed, might a stranger come and take possession of a part? It would be a monstrous thing to say that he could do so.<sup>14</sup>

Lawrence J colourfully agreed that the defendant was not entitled to keep the pieces of the wreck as against the plaintiff:

See to what length that argument would go! We should have lords of manors going on board vessels and saying, 'Here is a crew on board, but I know not the owner, and I will therefore break the ship to pieces.' All would be violence and outrage.<sup>15</sup>

This concern to avoid a free-for-all is echoed in many cases<sup>16</sup> and is said to be one of the reasons that the law protects a possessory title. It has been suggested that such

protection is necessary for public peace and security and is 'an extension of that protection which the law throws around the person'.<sup>17</sup>

A further reason for according protection to a mere possessory title is sometimes stated to be the presumption that a title goes with possession. Sir Frederick Pollock, in his famous essay on possession, stated that there exists a rule that '[p]ossession in fact is prima facie evidence of possession in law';<sup>18</sup> and Collins MR said in *The Winkfield*<sup>19</sup> that 'the presumption of law is that the person who has possession has the property'. This presumption in most cases accords with reality; and it has the advantage of protecting a possessor of a chattel from having constantly to prove title to it. Whatever the reason or reasons for the rule, it is clear that possession, based upon either the fact of physical possession<sup>20</sup> or a claim to the immediate right to it,<sup>21</sup> confers sufficient title to sue a wrongdoer.<sup>22</sup> For this reason, the law allows a finder, despite being one who has come into possession of goods without the knowledge or consent of the owner, to maintain an action in conversion.

### III. THE POSSESSORY INTEREST OF A FINDER

In a case where the true owner of found goods is unknown, any entitlement to such goods on the part of some other person must, *ex hypothesi*, rest on a possessory, rather than a proprietary, right. A finder of goods may claim a possessory title to the found goods derived from the mere fact of possession. In such circumstances the finder is not purporting to have derived any title from the true owner, but is asserting his or her claim purely on the basis of the fact of having come into possession, or being entitled to possession, of the goods. Any such title will of course give way to that of the true owner or other person with a superior title. Therefore, a typical circumstance in which competing claims to found goods may arise is where the goods subsequently find their way into the hands of some other person, and the finder wishes to recover them. In such a case, the finder, having lost physical possession of the goods, must show that he or she has a right to immediate possession of them. The authorities indicate that such a possessory title of a finder may in some circumstances prevail over that of a subsequent possessor of the goods. The *locus classicus* of this principle in relation to finders is of course the well known eighteenth century case of *Armory v Delamirie*.<sup>23</sup> The plaintiff was a chimney-sweeper's boy who found a jewel and handed it to the apprentice of the defendant, a goldsmith, for the purpose of ascertaining what the jewel was. The apprentice removed the stones from the jewel and refused to return them to the boy. In an action in conversion against the defendant, it was held that the boy was entitled to succeed. This was because the boy, as a finder, acquired a possessory title which enabled him to keep the jewel as against anyone but the true owner; the true owner could not be found, and the defendant, being a wrongdoer, was not entitled to keep the jewel as against the boy. The boy's interest in the jewel, although based upon nothing more than the fact of having taken the jewel into his possession upon finding it, prevailed over that asserted by the wrongdoing defendant. The plaintiff boy had, of course, come into possession of the jewel lawfully. He was a 'true finder';<sup>24</sup> that is, he was an innocent finder of goods which had been lost and had not obtained the jewel by dishonest means.

*Armory v Delamirie* has been cited in numerous cases in many jurisdictions; and the principle is beyond argument that the finder of a chattel, although he or she does not acquire ownership, obtains such property as enables him or her to keep the chattel against all but the rightful owner (or other with a superior title).<sup>25</sup>

In *Armory v Delamirie*, the contest was, of course, between a genuine finder of the jewel and a wrongdoer who retained it with the knowledge that there existed no legal justification for such retention, and in defiance of the finder's right to possession. However finding cases may be more complex, in that rival claimants may be persons who honestly assert, because of some relationship or connection with the chattel or the place where it was found, a right superior to that of the finder. Typically, this category comprises those who occupy the land upon which the chattel is found. Such claims must result in a ranking of the interests of the rival claimants; the question is whether the other party has an interest, proprietary or possessory, which is superior to the possessory interest of the finder. Generally speaking, the cases tend to

show that the occupier of the land will establish rights superior to those of the finder where the found chattel was attached to the land; and, where the chattel is not attached but is on the land, the occupier who has, before the finding, manifested an intention to exercise control over the land and the things which may be on it will have a better right to the chattel than that of the finder.<sup>26</sup> This is because the interest which the occupier is regarded as having in the goods is taken to have existed before the act of 'finding' occurred. If the landholder is unaware of the presence of the goods in or on the land, the necessary *animus possidendi* exists by virtue of the fact that the goods form part of the land or are under the control he or she exerts over the land and things on it. The fact that the 'finder' takes possession of such goods does not divest the landowner of his or her superior title. However an honest finder may succeed against the occupier of land where no such intention to control has been manifested. So in the well known case of *Parker v British Airways*<sup>27</sup> the plaintiff, Mr Parker, who found a lost bracelet in an airport lounge, was held to be entitled to it as against the airline which had failed to demonstrate any intention to search for, or take control of, property which might be lost on its premises.

It is submitted that these rules concerning finders are entirely in accordance with the established principles concerning possessory rights which are described above. However it is questionable whether it is justifiable to apply the finders cases to cases concerning stolen goods, to which we will now turn.

#### IV. THE POSSESSORY INTEREST OF A THIEF

It has been said in a number of authoritative contexts that a wrongdoer may acquire a possessory title in goods which he or she has unlawfully taken into his or her possession. If possession is in fact taken it is regarded as possession in law whether the physical control or dominion is acquired dishonestly or innocently. One who takes a chattel from its owner acquires, legally speaking, possession of the chattel, even though the very act of taking possession of it, or retaining it, may constitute a wrong. In such a case, the possessor's title of course does not prevail over that of the owner. However in the absence of the owner, or anyone else with a better title, the possessory title of the wrongdoer may be the best, or only, interest shown to exist in the chattel. For this reason, in *Parker*, Donaldson LJ said, citing the Ontario case of *Bird v Fort Frances*,<sup>28</sup> that a dishonest finder 'probably has some title, albeit a frail one because of the need to avoid a free-for-all';<sup>29</sup> and that '[t]he finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.'<sup>30</sup> The general principle that the dishonest acquisition of goods does not preclude the right to assert a possessory title has been stated in a number of cases.<sup>31</sup> In the New Zealand case of *Tamworth v A-G*<sup>32</sup> the issue was the entitlement to a cache of money which was found beneath the floorboards of a disused building by police during the execution of a search warrant. Cannabis and evidence of drug dealing was found on the same land. The sole director of the company which had occupied the land denied all knowledge of the money and the cannabis, and was acquitted on the charges which were brought relating to cannabis dealing. Some years later, he claimed to be entitled as occupier of the building to the money which had been found. It was held that the right the police had previously had to seize the money as a potential exhibit gave them, once the charges had been disposed of, no further right higher than that of a finder of lost or abandoned property who had taken it in his or her care and control. The right of an occupier who had manifested an intention to exercise control over the land would prevail over such a finder, and the claimant had failed to prove such an intention. Accordingly, his case failed. However, Eichelbaum CJ observed that if a claimant could establish a claim to lost chattels in such circumstances, he would be entitled, in the absence of a statutory order of forfeiture, to succeed even if he had been implicated in an illegal contract or dealing from which the lost chattel had been derived. This point had been previously stated by a majority of the Court of Appeal in *R v Collis*,<sup>33</sup> a case in which there was no doubt or ambiguity as to the origin of the money which was in dispute. Collis had been convicted of possession of cannabis for supply and after his conviction acknowledged that the money which the police had taken as evidence was the proceeds of drug dealing. No forfeiture order was made however,<sup>34</sup> and Collis was held to be entitled, as against the police, to have the money returned to him. Hardie Boys J observed that the case presented 'a dilemma of conscience', but its resolution required the application of legal rather than moral principle. Collis was able to show the requisite proprietary interest in the money, and the fact that the interest had been acquired through an

illegal transaction did not operate to give a better title to the police. The maxim *ex turpi causa non oritur actio* did not apply, for Collis's cause of action did not depend upon establishing or pleading the illegality for its success.

Similar reasoning was applied in *Webb v Chief Constable of Mersey side Police*,<sup>35</sup> in which two appeals were heard. In both cases, the police had seized money from the claimants on suspicion that it had been obtained from drug trafficking. The claimants were not prosecuted to conviction and sought return of the money from the police. As against one of the claimants, W, it was held to be established on the balance of probabilities that the money was the proceeds of drug dealing and that W could not recover it because he had obtained it illegally. The police, on appeal, accepted that their statutory power to retain the money had expired, but contended that it would be contrary to public policy to allow W to keep it. In the second case it was held that the two claimants could recover the money even if it were the proceeds of drug dealing. The Court of Appeal held that, in both cases, the police had no statutory right to retain the money, which should be returned to the respective claimants. To hold otherwise would amount to allowing the expropriation without statutory authority by the police of money belonging to an individual who had not been convicted of an offence in relation to it. Citing *Tinsley v Milligan*<sup>36</sup> the Court of Appeal held that there was no test of public interest, or affront to public conscience, to preclude an order for the return of the money to the claimants, even if their initial acquisition of it had been tainted with illegality. No illegal agreement was being enforced and the applicants were not required to rely on their own illegality to establish their case.

The principles stated in *Tinsley v Milligan* and *Webb* as well as the observations of Donaldson LJ in *Parker* to the effect that a dishonest finder has some title were also cited in *Costello v Chief Constable of Derbyshire Constabulary*.<sup>37</sup> *Costello* however differed from the cases cited above in that the claimant was found in civil proceedings to have either stolen the goods in question himself or to have received them knowing that they were stolen. In that case, the police had lawfully seized from the claimant, C, a car in the belief that it had been stolen. No criminal proceedings were brought against C and the statutory purposes for which the police held the car were then exhausted. The police refused to return the car to C, contending that the car was stolen and that C was aware of that. C's claim against the police for wrongful detention of the car and damages was unsuccessful at first instance, the judge holding that C was aware that the car was stolen and was therefore not entitled to maintain a claim to it. C's appeal was successful. The Court of Appeal considered that the trial judge's finding that the car was stolen and that C knew it was 'hardly surprising', and that he had been fully entitled to reach that conclusion which was not open to question on the appeal. However, the Court of Appeal held that C was entitled to the return of the car from the police and to damages for its unlawful detention by the police after the date the statutory justification to hold it had passed. C had a possessory title to the car which was deserving of protection, and this was so whether or not the car had been obtained lawfully or by theft or other unlawful means. The other party to the proceedings, the police, could not show a better title, their entitlement to possession conferred by statute having expired. The Court of Appeal in *Costello* cited *Webb* as authority for three propositions.<sup>38</sup> First, the fact of possession of a chattel gives a possessory title which the possessor may rely on regardless of whether possession was obtained unlawfully or under an illegal transaction; the possessor's claim can be defeated only by proof of a superior title. Second, in the case of competing claims, titles are relative and the party with the stronger title, no matter how frail, is entitled to succeed. Third, the statutory power of the police to seize or retain property does not confer on the police any permanent entitlement to retain it; the right of the police is limited and their obligation to return property to its 'owner' is unaffected by any perceived public policy consideration that the fruits of crime ought to be withheld from a criminal.

These propositions are, it is submitted, clearly unexceptionable. However it is suggested that the decision in *Costello* does not necessarily follow from the law as stated in this way, and that the authorities cited in the judgments in *Costello* (including *Webb*) do not support the decision which was made by the Court. Principal amongst these authorities were *Buckley v Gross*<sup>39</sup> and *Field v Sullivan*.<sup>40</sup>

First, the Court in *Costello* considered and extensively quoted *Buckley v Gross*.<sup>41</sup> In that case, tallow which had been in a warehouse melted and flowed into a river where it was

unlawfully picked up by a person who sold it to the plaintiff, who, the court found, unlawfully or feloniously received it. The police took possession of the tallow from the plaintiff, an act which the court held to be legally justified in the circumstances. Neither the plaintiff nor the person from whom he had bought the tallow was convicted in criminal proceedings, but a court order which allowed the police to detain it for 12 months and then sell it if no true owner were ascertained was validly made. The tallow having become a nuisance, the police sold it within a few days to the defendants. The plaintiff brought proceedings in conversion against the defendants in respect of the tallow. The Court of Appeal held that the court order had the effect of depriving the claimant of any entitlement to the tallow based upon an asserted possessory title. Cockburn CJ stated:

The plaintiff, who had nothing but bare naked possession (which would have been sufficient against a wrongdoer) had it taken out of him by virtue of this enactment. As against the plaintiff, therefore, the defendant derives title, not from a wrongdoer, but from a person selling under authority of the justice, whether rightly or not is of no consequence. I wholly disagree with the doctrine of the plaintiff's counsel, that if the policeman did anything ultra vires, that would re-vest the possession of this tallow in the plaintiff. He had no title beyond what mere possession gave, and so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.<sup>42</sup>

Compton J was of the same opinion:

I agree with my Lord Chief Justice that where possession is lawfully divested out of a man, and the property is ultimately converted by a person who does not claim through an original wrong-doer, the party whose possession was so divested had no property at the time of the conversion. Here, in my mind, the plaintiff's possession was gone. The goods were properly taken from him, and there is no such doctrine as that it will re-vest in him in the manner contended for; otherwise every person who is the possessor of goods at any time, however short, may bring an action against any person afterwards found in possession of them, however he may have come by it. That would be pressing too far the doctrine of sufficient title against a wrongdoer.<sup>43</sup>

Blackburn J said:

I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrong doer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him; and I do not know that it makes any difference whether the goods had been feloniously taken or not. But assuming that to be the law, the plaintiff has not brought himself within it ... [T]here can be no doubt that property the ownership of which was known as this was did not belong to the persons who picked it up ... [T]he constable was justified in taking it into his possession ... [T]he possession [of the police] was the possession of the true owner and not of the wrong doer, whose possession was terminated by their taking possession. It is therefore not necessary to consider whether the sale of the tallow to the defendants by the police was right or wrong.<sup>44</sup>

*Buckley v Gross* had previously been considered by the Supreme Court of Victoria in *Field v Sullivan*, a case which was cited with approval in both *Webb* and *Costello*. In *Field v Sullivan*, the police lawfully took from the plaintiff possession of goods which they suspected had been stolen. The plaintiff was discharged in subsequent criminal proceedings relating to the goods and sought their return from the police. The plaintiff succeeded. There was nothing to indicate that the goods were not the property of the plaintiff or that they belonged to any third person. Macfarlan J, with whom Cussen J agreed, said:

The true position, in my opinion, is as follows: — If A is in possession of goods, he is *prima facie* in lawful possession of them and *prima facie* has the right to that possession; in the absence of any evidence to the contrary, in any proceedings that possession is proof of ownership; but that possession may be divested out of him, either lawfully or unlawfully. If unlawfully, his right of possession remains ... [I]f the divesting is lawful, A's right of possession may be destroyed entirely or may be merely suspended or temporarily divested ... [S]o where the law permits them to be seized or detained for a certain time, or for a certain purpose, or until a certain event, A's right to possession is vested in, or A's right to possession is displaced by, the right of possession in the person authorised to seize them or detain them for the period during which he is so authorised. In other words, A's property and right to possession are made subject to the right of the police or other person seizing under the authority of the law to detain them during the period during which the detention is authorised; when that time expires, and no lawful order has been made for their disposition, his right to possession, if nothing more appears, again operates. I say 'if nothing more appears' for it may appear by evidence that A never had a right of possession, as in *Buckley v Gross*, and that therefore there was no suspended right of possession to revive or again operate ... In the case of seizure under authority of law, *prima facie*, when B's right of detention is ended, the only person entitled to possession is A, from whom B lawfully took them. If, however, it appears that A (at the time when B, acting under authority of law, so took possession of them), was in unlawful possession of them, and therefore was not entitled to possession of them,

that *prima facie* presumption is rebutted, and there is nothing in principle or in reason to prevent B in an action by A from setting up that A was not entitled to them.<sup>46</sup>

In *Field v Sullivan*, there being nothing to rebut the presumption that the plaintiff was the owner of the goods, the plaintiff was entitled to possession of them after the authority of the police to retain them was exhausted. Macfarlan J explained *Buckley v Gross* in this narrow way:

The real decision in *Buckley v Gross*, in my opinion, goes no further than this: Where A has feloniously or unlawfully taken possession of goods shown to be the property of a third person, who is known, and that possession has been divested out of A by a lawful seizure by the police, followed by an order of a magistrate made under statutory power, the goods are held by the police for the true owner, and if the police wrongfully (that is, without the authority of the true owner) dispose of the goods to C, the only person who can complain is the true owner.<sup>47</sup>

It is suggested that the decision in *Costello* does not follow from, and is not consistent with, the authorities cited; and nor does it accord with the principles relating to possessory title which are discussed above. The reason for this, it is submitted, is that in *Costello* the principle that a thief has a possessory interest was applied without a full examination or analysis of the precise nature of the interest. As discussed above, a sufficient possessory right to succeed in conversion may be based upon either the fact of physical possession or the right to immediate possession. The judgments in *Costello* do not sufficiently distinguish these two possible circumstances but tend to the view that the fact of previous physical possession, albeit unlawful, suffices to confer a right to immediate possession. In consequence, the effect of *Costello* is to place thieves and knowing receivers of stolen goods in the same position, legally speaking, as honest finders; and the interests of those who have proprietary interests in goods, although obtained by unlawful transactions, are similarly conflated. It is submitted that this result cannot be right.

#### V. FINDERS AND THIEVES DISTINGUISHED

It is suggested that the possessory interest of a thief is different in nature from that of a finder, and that this is apparent from an examination of the authorities. It must be borne in mind that the law protects *de facto* possession because it is an indicator of a right to possess. In the case of an honest finder of a chattel, the appearance of a right to possess it accords with the reality of the position, for such a person obtains not only the physical possession of it, but also, in the absence of a better title in a third party being shown, the right to possess it. For this reason the finder who loses, or hands over for a limited purpose, physical possession, as in *Armory v Delamirie* and *Parker v British Airways*, will be entitled to recover the goods for the reason that he or she is the person, as against a wrongdoer, who has the better right to immediate possession. The finder's physical possession was originally obtained lawfully and that right is not broken by the intercession of a wrongdoer.

By contrast, the possessory title of a thief or knowing receiver of stolen goods is based upon no more than the physical fact of possession. The appearance does not match the reality, and the thief, although in fact in possession of the goods, has no other right to possess them. Such a title has been judicially described, as stated above, as 'some title, albeit a frail one because of the need to avoid a free-for-all';<sup>48</sup> and 'bare naked possession'.<sup>49</sup> It is suggested that the possessory title of a thief is so described because the thief at no time acquired a right to possession of the stolen goods, and the only basis upon which any title can be asserted is that of physical possession. Once that is lost to a person who obtains lawful possession of the goods in question, there remains no foundation for the thief to claim a right to regain possession or any other residual interest in the goods. This view, it is submitted, is supported by the dictum of Compton J in *Buckley v Gross*:

It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong doer who takes property from a person having possession of it. It is not clear, however, that the plaintiff ... was a finder of it within the principle of *Armory v Delamirie* and other cases. I think, on the evidence and the inferences to be fairly drawn from it, that he is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas I look on the term finder in those cases to

mean an innocent finder. This action must be founded on possession; here the possession was divested out of the plaintiff, and he cannot revert to a right of property to re-establish it.<sup>50</sup>

Apart from the fact that a court order was made in respect of the tallow, it is submitted that the facts of *Buckley v Gross* are essentially the same as those of *Costello*. In *Costello*, it was found as a fact in civil proceedings that the goods were stolen, and that C was aware of that. C, as a knowing receiver was by definition one who had unlawfully come into possession of the goods. Nevertheless, as the authorities cited above indicate, this would suffice to give C a possessory title, derived from the fact of his possession, which would be good as against a wrongdoer. However, once C had lost possession of the car to the police, who took it pursuant to statutory authority, C's claim should, it is suggested, have succeeded only if he had been able to show a right to immediate possession. Having lost possession of the car, he was in the same position as the plaintiff in *Buckley v Gross*, of whom it was said:

He had no title beyond what mere possession gave and, so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.<sup>51</sup>

On this reasoning, the fact that the statutory purposes for which the police held the car in *Costello* were exhausted is simply irrelevant. The police had gained possession lawfully and were, at the point their statutory powers expired, in possession of the goods. C's 'bare, naked' physical possession, the only possible ground for his claim, had gone; and there was no right to immediate possession or other right, proprietary or possessory, which could revive to defeat the possessory title of the police.

The Court in *Costello*, although citing *Buckley v Gross* as authority for the decision which was reached, and approving the narrow ratio of it which was stated in *Field v Sullivan*, did not fully explain the precise nature of C's title which it found to exist; and the ground upon which C was held to have a possessory title once he had lost physical possession is not entirely clear. Lightman J, with whom Robert Walker and Keene LJ agreed, cited *Buckley v Gross* as authority for the principle that a wrongdoer in possession is entitled to possession as against a wrongdoer, and observed that there might be some moral disinclination to recognise the entitlement of a thief. However, he said:

such a disinclination and public policy do not afford a sufficient ground to deprive a possessor of such recognition and protection. This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen.<sup>52</sup>

This statement is of course unexceptionable. However, the Court seems to have regarded the police as being in the position of a wrongdoer once their statutory purposes had expired. Such a view is, it is suggested, to beg the very question to be determined. It may be argued that, in an inquiry into entitlement, there is no reason why the police should be in a different legal position from anyone else. In the circumstance that any person lawfully removes possession of a chattel from one whose only interest in it, as in the case of a thief, was the fact of mere possession, no statutory authority would be required for that other person's physical possession to defeat any claim of the thief. The thief's previous physical possession cannot, in such a case, defeat the possessory title obtained by the other in consequence of his or her present *de facto* possession. The only interest the thief had has gone and there remains no residual basis upon which the thief may claim. The thief is merely one who, in the past, was previously in possession.

Further, it must be remembered that the tort of conversion involves an unlawful dealing with the plaintiff's goods by asserting dominion over them in a manner inconsistent with the plaintiff's rights.<sup>53</sup> What is the right of a thief once the goods have lawfully been removed from him or her? It is submitted that the thief in such circumstances has no right or interest in the goods at all. Pollock, while observing that mere physical possession may suffice for an action in conversion, says:

If however a mere actual possession of a thing acquired wrongfully or existing without right is once lawfully divested, and the thing comes lawfully into the possession of another person, the former possessor cannot



recover it from him, for wherever a plaintiff has to rely on a right to possession as distinguished from actual possession he must prove his right or the defendant may disprove it.<sup>54</sup>

By contrast with a thief, an honest finder obtains not only the *de facto* possession which the law protects against a wrongdoer, but also the right to immediate possession. Such a right is of course defeasible by one who can show a better right; but in the absence of such a person, an honest finder will be able to recover goods taken from him or her. This is because the right to immediate possession will remain in the finder despite his or her loss of physical possession.<sup>55</sup> For this reason, the chimney sweep's boy in *Armory v Delamirie* succeeded against the jeweller who took the jewel into his possession, for the jeweller was intending to retain it in defiance of the boy's right to possession of it. Any right the jeweller had in the jewel could have stemmed only from the boy himself, for the jeweller had had no rights in it before the boy handed it to him. The jeweller therefore took the jewel subject to the rights of the boy. The jeweller could have succeeded only if the boy had acquired no rights in the jewel by his acts of finding and taking possession of it; if that had been so, the court would then have been faced with two claimants, neither of whom had any proprietary rights, but one of whom had *de facto* possession. However the boy, as an honest finder had acquired both *de facto* possession and a right to possession of the jewel by the time he handed it to the jeweller. Similarly, when Mr Parker handed the bracelet to British Airways it was no longer lost and they accepted it on terms that it would be returned to him if the owner were not found.<sup>56</sup> British Airways could have succeeded only by establishing that it had rights in the goods immediately before Mr Parker found it, which, of course, it was unable to do. Therefore the wrongdoing jeweller's physical possession of the jewel did not, of itself, confer a right to immediate possession, which remained with the boy; and Mr Parker had a similar right as against British Airways.

The police in *Costello*, it is suggested, did not derive their possession from C, or subject to any possessory right of C. The police took possession of the car pursuant to statutory authority and did not derive their possessory title from C at all. At the point C lost physical possession of the car, the police obtained both *de facto* possession of it as well as a right to possession under statute. After the statutory right had expired, the police remained in *de facto* possession, which had been obtained lawfully. C at the point had no remaining right or interest in the car. It is submitted that this view is supported by the statement of Donaldson LJ in *Parker*<sup>57</sup> that, if goods are dishonestly taken, a subsequent honest taker is likely to have a superior title. Accordingly, it is suggested that the view stated in *Field v Sullivan*, and which was accepted by the Court in *Costello*, to the effect that *Buckley v Gross* was confined to cases in which the goods in question were transferred to a third party pursuant to statute, is neither strictly accurate nor necessary. The Court in *Buckley v Gross* of course emphasised the fact that the tallow had been lawfully removed from the claimant and sold by the police pursuant to statute, and that the effect of that was to deprive the claimant of what had been no more than his bare possession. However, it is suggested that the reasoning of the Court in *Buckley v Gross* would have led the Court to the same result even if the statutory order vesting the right to sell the tallow in the police had not been made; for the Court found that the police had been justified in taking possession of the tallow in the first place from the plaintiff who had unlawfully received it. The defendant in *Buckley v Gross* was not the police, but the person to whom the police sold the tallow, and his title was said to be unquestionable as a result of the court order permitting the police to sell. However, it is submitted that even if no court order had been made, the plaintiff would have not succeeded against a person who purchased the tallow from the police; or against the police if the police had retained it without selling it. This is supported by the views expressed by all three judges in *Buckley v Gross* to the effect that the plaintiff's possessory title was removed once the goods were lawfully taken from his possession. So, Cockburn CJ observed that the plaintiff had no title beyond mere possession and 'so soon as the goods were taken from him by force of law' the possession was broken; and Compton J said that the plaintiff's possession had gone by virtue of the fact that 'the goods were properly taken from him'. Blackburn J went further, saying it was not necessary to consider whether the sale of the tallow by the police to the defendant was right or wrong, for the plaintiff's possession was terminated when the police took possession.

These dicta indicate that the court order enabling the police to sell the tallow was not crucial to the result of *Buckley v Gross*. That order was made after the police had justifiably taken possession of the goods. Thus, at the point the Court made its order, the plaintiff had

already lost the only interest he could have claimed in the tallow and the possessory interest in it was already vested in the police. If that is correct, the statement in *Field v Sullivan* to the effect that where A's unlawful possession of goods has been divested out of A by a lawful seizure by the police, followed by an order of a magistrate made under statutory power the only person who could complain was the true owner is unnecessarily restrictive. In such circumstances, A loses his or her title at the time of the lawful seizure by the police (or any other person) and the court order made later is simply irrelevant to A's position. The divesting occurs by the lawful removal of possession from A, and not by the court order.

It is also suggested therefore that the decision in *Field v Sullivan* would have been the same without the unnecessary adoption in that case of the narrow and confining interpretation of *Buckley v Gross*. Unlike the plaintiff in *Buckley v Gross*, the claimant in *Field v Sullivan* was not shown to have stolen the goods or received them unlawfully. Therefore the presumption that the claimant's actual possession was a *prima facie* indicator of a right to possess was not displaced; and the police would in any event have been obliged for that reason to return the goods to her. This appears to be implicit in the reasoning of the Court in *Field v Sullivan*, in which it was said (as quoted above):

A's property and right to possession are made subject to the right of the police or other person seizing under the authority of the law to detain them during the period during which the detention is authorised; when that time expires, and no lawful order has been made for their disposition, his right to possession, if nothing more appears, again operates. I say 'if nothing more appears' for it may appear by evidence that A never had a right of possession, as in *Buckley v Gross*, and that therefore there was no suspended right of possession to revive or again operate ... In the case of seizure under authority of law, *prima facie*, when B's right of detention is ended, the only person entitled to possession is A, from whom B lawfully took them. If, however, it appears that A (at the time when B, acting under authority of law, so took possession of them), was in unlawful possession of them, and therefore was not entitled to possession of them, that *prima facie* presumption is rebutted, and there is nothing in principle or in reason to prevent B in an action by A from setting up that A was not entitled to them.<sup>58</sup>

It is not suggested in *Field v Sullivan* that any court order would be necessary to enable the police to succeed against a thief once the goods were lawfully in the possession of the police. Rather, it is made clear that if A never had a right of possession, A could have no continuing interest in the goods once physical possession of them had passed lawfully to the police. It is therefore suggested that the reliance by the Court of Appeal in *Costello* on authorities concerning finders was misplaced and that *Buckley v Gross* and *Field v Sullivan* were inappropriately applied. The interests of thieves in stolen goods and of honest finders in found goods are essentially different and the case did not fully distinguish these interests. *Costello* appears to have been the first case in which a thief or knowing receiver of stolen goods has succeeded in a claim against a defendant whose obtaining of the disputed goods was lawful;<sup>59</sup> and it is submitted that the authorities discussed above do not support this result.

## VI. THIEVES AND PARTIES TO UNLAWFUL TRANSACTIONS DISTINGUISHED

It may also be posited that the cases cited in *Costello* concerning title to goods obtained by unlawful contracts, such as the drug dealing in *Webb*, are similarly inapplicable. The proceeds of a sale of drugs, whether the sale is lawful or not, are vested in the seller. So the plaintiffs in *Webb* and *Collis*, whether convicted or not of dealing, each obtained a proprietary title to the money which they received; and the fact that the money might have been tainted with an illegal origin could not of itself operate to alter the ownership of it. As owners of the money, the plaintiffs could be divested of it only pursuant to legislation which permitted its removal or forfeiture. The title of a drug dealer to his or her money is therefore not a mere possessory one; the dealer also has a proprietary right. Accordingly, the removal of the money from the alleged dealers, whether by the police or anyone else, could not lawfully be effected without statutory authority; and the fact that the police took physical possession of their money could not of itself operate to divest the dealers of their proprietary interest in it. The thief or receiver of stolen goods has, by contrast and by definition, no such proprietary right in the stolen property. As described above, his or her weak possessory title survives only as long as the goods remain in his or her physical possession. Accordingly, the circumstances in *Webb* may be viewed as essentially different from those of *Costello*. Although the central issue in *Webb* was one of entitlement to money derived

from drug dealing, the question for the Court was in reality whether there was some principle of law or public interest which would justify the police in retaining money which belonged to a plaintiff but which had been illegally obtained by him or her. The issue was essentially one relating to forfeiture of goods, and not title. The question was therefore not the same as that before the Court in *Costello*, which was required to determine which of two asserted possessory titles should prevail in circumstances where no proprietary rights were established or claimed. No question of unjustified expropriation by the police could arise in *Costello* for C, having lost his possessory interest, had no longer had any title or interest which could be the subject of any such expropriation.

## VII. CONCLUSION

The principle that physical possession is sufficient title to sue a wrongdoer in conversion is well established and has been applied in many contexts. Its application to finders of goods which belong to unknown owners entirely accords with that principle and the reasons for it. However it is submitted that the decision in *Costello* actually contravenes the principle. By placing on the same footing thieves, honest finders and those with proprietary interests tainted with illegality, the Court in effect accorded to a past, merely physical and unlawful possession (that of the thief) priority over a present and lawfully obtained possession (that of the police). Such a finding, it is suggested, subverts rather than supports the principle that physical possession merits protection as against a wrongdoer.

- 1 Although detinue has been abolished in the United Kingdom, it continues to exist in New Zealand and could be a possible action in such cases.
- 2 [2001] 3 All ER 150 (CA).
- 3 *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL).
- 4 See, for example, *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161, in which the owner of goods bailed under a hire purchase agreement who repossessed them in breach of the agreement was successfully sued in conversion by the purchaser .
- 5 *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA).
- 6 *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161.
- 7 Pollock, *An Essay on Possession in the Common Law* (1888) 20.
- 8 The issue is discussed by Palmer in 'Possessory Title' in Palmer & McKendrick (eds), *Interests in Goods* (2nd ed, 1998).
- 9 See the authorities cited in *Bird v Fort Frances* [1949] 2 DLR 791, 793.
- 10 Hil 20 & 21 of King Charles the 2d, Roll 1540. This case and many others are the subject of an extensive commentary in 2 Wms Saund 47.
- 11 See, for example, *The Winkfield* [1902] P 42 (CA).
- 12 *Wilbraham v Snow* Hil 20 & 21 of King Charles the 2d, Roll 1540, 628.
- 13 2 Taunt 303.
- 14 Ibid 308.
- 15 Ibid 313.
- 16 For example, *Parker v British Airways Board* [1982] 1 QB 1004, 1010 (Donaldson LJ).
- 17 See Landon, *Pollock's Law of Torts* (15th ed, 1951) 280, citing *Rogers v Spence* (1844) 13 M & W 581.
- 18 Pollock, above n 7, 20.
- 19 [1902] P 42, 55.
- 20 Possession in this context is established by establishing physical possession in fact of the chattel in question, together with the intention of exercising sole and exclusive dominion over it.
- 21 See, on this point, *International Factors Ltd v Rodriguez* [1979] 1 All ER 17 (CA), discussed by Palmer, above n 8.
- 22 This was stated to be the 'ordinary' and 'quite unexceptionable' statement of the law by Wilmer LJ in *Irving v National Provincial Bank Ltd* [1962] 2 QB 73, 82. See also *Graham v Peat* (1801) 1 East 244; *Jeffries v Great Western Ry Co* (1856) 25 LJQB 107; *Glenwood Lbr Co v Phillips* [1904] AC 405; *Eastern Construction Co v National Trust Co* [1914] AC 197; *Daniel v Rogers* [1918] 2 KB 228 (all cited in *Bird v Fort Frances* [1949] 2 DLR 791; and the cases on finders cited in n 25 below.
- 23 (1722) 5 Stra 505.
- 24 In the sense used in, for example, *Bird v Fort Frances* [1949] 2 DLR 791.
- 25 See, as examples, the finders cases cited in *Parker v British Airways* [1982] 1 QB 1004 (CA); *Bird v Fort Frances* [1949] 2 DLR 791 (Ont HC); *Byrne v Hoare* [1965] Qd R 135 (FCA); *Tamworth Industries Ltd v A-G* [1988] 1 NZLR 296; *Waverley Borough Council v Fletcher* [1995] 4 All ER 756 (CA).

- 26 See the rules listed by Donaldson LJ in *Parker v British Airways* [1982] 1 QB 1004, 1017- 1018 (CA); *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616; *Waverley Borough Council v Fletcher* [1995] 4 All ER 756 (CA).
- 27 [1982] 1 QB 1004; [1982] 1 All ER 834 (CA).
- 28 [1949] 2 DLR 791.
- 29 [1982] 1 QB 1004, 1009 (CA).
- 30 Ibid 1017. See also the authorities cited in *Bird v Fort Francis* [1949] 2 DLR 791, 795; *Field v Sullivan* [1923] VLR 1 (FCA); *Irving v National Provincial Bank Ltd* [1962] 2 QB 73 (CA); *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616.
- 31 The principle is sometimes referred to as 'the *Bowmakers* principle' because the distinction between a claim based upon proprietary or possessory rights and one based upon contractual rights was discussed in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; [1944] 2 All ER 579 (CA). See also *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080.
- 32 [1991] 3 NZLR 616.
- 33 [1990] 2 NZLR 287 (CA).
- 34 The money had not been obtained 'in the course of or consequent upon' the possession offence, as required by s 23(3) of the *Misuse of Drugs Act 1975*.
- 35 [2000] QB 427.
- 36 [1994] 1 AC 340 (HL).
- 37 [2001] 3 All ER 150 (CA).
- 38 [2001] 3 All ER 150, 157 (Lightman J) (CA).
- 39 (1863) 3 B & S 566.
- 40 [1923] VLR 70.
- 41 (1863) 3 B & S 566.
- 42 Ibid 572-3.
- 43 Ibid 573.
- 44 Ibid 574-6.
- 45 [1923] VLR 70.
- 46 Ibid 84.
- 47 Ibid.
- 48 *Parker v British Airways* [1982] 1 QB 1004, 109 (Donaldson LJ), citing *Bird v Fort Frances* [1949] 2 DLR 791.
- 49 *Buckley v Gross* (1863) 3 B & S 566, 572 (Cockburn CJ).
- 50 Ibid 573. See also *Wilbraham v Snow 2 Wms Saund* 47, in which it is said that, in the absence of physical possession, a stranger or wrongdoer cannot acquire sufficient property in the goods to maintain trover.
- 51 Ibid 573 (Cockburn CJ).

- 52 [2001] 3 All ER 150, 164 (CA).
- 53 *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 (CA & HL);
- 54 *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74
- 55 Above n 7, 148
- 56 See the cases on finding cited above, and *Wilbraham v Snow* 85 ER 624, 629 which hold that a special property arises simply out of lawful possession.
- 57 [1982] 1 QB 1004, 1008 (Donaldson LJ) (CA).
- 58 Ibid 837.
- 59 [1923] VLR 70, 84.
- 60 No court has ever allowed an admitted, or even a clearly proved, thief without a claim of right to recover, and it seems improbable that one ever will.'': see Prosser, *Handbook of the Law of Torts* (4th ed, 1971) 94.