them; and if an amendment of the Statute should be in contemplation, it might be well to add to the form of ballot-paper short explanations as to the effect of each resolution such as are contained in the form of voting paper scheduled to the *Temperance (Scotland) Act* 1913.

PRIVY COUNCIL. 1919. WHITE v. LICENSING COURT (S.A.)

[HIGH COURT OF AUSTRALIA.]

MOORS . . . . . APPELLANT;
DEFENDANT,

AND

BURKE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1919.

MELBOURNE, *June* 16, 19.

Isaacs, Gavan Duffy and Rich JJ.

Criminal Law—Possession of property suspected of being stolen—"Actual possession"—Physical control of goods—Exclusive right to obtain manual possession—Police Offences Act 1915 (*Vict.*) (*No.* 2708), *sec.* 40.

Sec. 40 of the *Police Offences Act* 1915 (Vict.) provides that "(1) Any person having in his actual possession or conveying in any manner any personal property whatsoever suspected of being stolen or unlawfully obtained may be arrested either with or without warrant and brought before a Court of Petty Sessions, or may be summoned to appear before a Court of Petty Sessions. (2) If such person does not in the opinion of the Court give a satisfactory account as to how he came by such property he shall be liable to be imprisoned for a term of not more than twelve months. (3) The said property if proved to be or to have been in the actual possession of such person whether in a building or otherwise, and whether or not the possession thereof had been parted with by him before being brought before the said Court, shall for the purposes of this section be deemed to be in his actual possession."

Held, that a person has not "actual possession" of property, within the meaning of the section, unless he has the complete present personal physical

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control of the property, to the exclusion of others who are not acting in concert with him, either by having the property in his present manual custody or by having it where he alone, to the exclusion of such others, has the right or power to place his hands on it, and so to have manual custody when he wishes.

Decision of the Supreme Court of Victoria: *Burke* v. *Moors*, (1919) V.L.R., 138; 40 A.L.T., 143, reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Melbourne an information was heard whereby James Burke charged that Adrian Moors did on 30th October 1918 "have in his actual possession certain personal property . . . suspected of having been stolen" contrary to the *Police Offences Act* 1915 (Vict.). At the hearing the information was amended by substituting the words "unlawfully obtained" for the word "stolen." Evidence was given to the effect (so far as is material) that the defendant was a Customs officer; that at the material time the property in question, which included twelve skeins of wool, was found by the informant in a locker, in a shed on the Melbourne wharfs which was under the control of the Customs, the locker having been opened by the defendant at the informant's request; that the defendant had access as of right to and used the locker, and that at least one other Customs officer had access as of right to it; and that the defendant had put the wool into the locker at an earlier date than that on which the informant found it there.

The defendant, having been convicted, obtained an order *nisi* to review the conviction on the ground (*inter alia*) that the property was not in his actual possession. The Full Court of the Supreme Court discharged the order *nisi*: *Burke* v. *Moors* (1).

From that decision the defendant now, by special leave, appealed to the High Court.

T. C. Brennan (with him *R. G. Menzies*), for the appellant. The words "actual possession" in sec. 40 of the *Police Offences Act* 1915 mean manual possession, and should not be construed as including constructive possession, or as applying to a case where the property is out of the manual possession of the defendant but is under his control. In *Tatchell* v. *Lovett* (2) the

(1) (1919) V.L.R., 138; 40 A.L.T., 143.

(2) (1908) V.L.R., 645; 30 A.L.T., 88.

words were interpreted as meaning actual physical control. The origin of the section is found in the English Act 2 & 3 Vict. c. 71, sec. 24. In *Hadley* v. *Perks* (1) it was held that that section must be read with sec. 66 of 2 & 3 Vict. c. 47, which authorized the arrest and detention of a person "having or conveying" goods suspected of being stolen, and therefore that the word "possession" should be interpreted *ejusdem generis* with "having or conveying," that is, as referring to the physical possession of goods in a public street. The provisions of those two sections of the English Acts were enacted in New South Wales in practically identical language by 17 Vict. No. 31, sec. 19, and 19 Vict. No. 24, sec. 1, and in *In re Keyes* (2) and *In re Frith* (3) the decision in *Hadley* v. *Perks* was followed. The provisions of sec. 24 of 2 & 3 Vict. c. 71 were then re-enacted in the *Police Offences Act* 1901 (N.S.W.), sec. 27. In Victoria the provisions of the latter Act were enacted in sec. 10 of the *Police Offences Act* 1907 (Vict.), but with the addition of provisions now contained in sub-sec. 3 of sec. 40 of the Act of 1915. Under the Act of 1907 *Tatchell* v. *Lovett* (4) was decided, and then by sec. 40 of the *Police Offences Act* 1912 the words "actual possession" were substituted for the word "possession." That alteration merely emphasized the decision in *Tatchell* v. *Lovett*. Sub-sec. 3 of sec. 40 does not give any right to go into a house, but merely authorizes an arrest to be made in a house, which apart from the sub-section would, under the English and New South Wales decisions, have been unlawful.

Lewers, for the respondent. The words "actual possession" are satisfied if a man has effective control of property, as, for instance, if he puts a thing in such a position that he can get it into his hands whenever he wishes (*Pollock and Wright on Possession in the Common Law*, pp. 12, 13, 27, 28, 63, 65, 93, 147, 148; *Encyclopædia of the Laws of England*, 2nd ed., vol. XI., tit. "Possession."). There is no reason for limiting the meaning of the word "possession" in sec. 40 such as there was in the

(1) L.R. 1 Q.B., 444.
(2) 5 N.S.W.L.R. (L.), 359.
(3) 17 N.S.W.L.R. (L.), 421.
(4) (1908) V.L.R., 645; 30 A.L.T., 88.

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English and New South Wales Acts; for the section when originally enacted in Victoria was complete in itself, and was in quite different language from the section in the New South Wales Act. The possession need not be exclusive. It would be sufficient that for all practical purposes the defendant had the exclusive occupation of the locker, and so had the effective control of the wool, and that is what the evidence shows. When the locker was opened in the informant's presence by the defendant and the wool was found there and the defendant acknowledged that he had put it there, he had "actual possession" of it.

T. C. Brennan, in reply.

Cur. adv. vult.

June 19.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

The question we have to consider is whether the wool was in the "actual possession" of Moors within the meaning of the *Police Offences Act* 1915. The meaning given to the phrase in the judgment under appeal is simply "possession in fact as distinguished from possession in law." The expression "actual possession" is taken to be a definite accepted phrase in the law, and, when found in the section, is assumed to bear its technical meaning. No doubt technical expressions must receive their technical meaning unless the contrary intention appears. But is "actual possession" a technical expression? Passages from *Pollock and Wright on Possession in the Common Law* were referred to. All except one, however, relate to the portion of the work relating to civil matters, and the one reference at p. 148 which relates to criminal matters draws a distinction between "actual possession" and the "right to possession," which does not determine this case. But it is observable that after Sir *Frederick Pollock* deals with the ambiguity of "constructive possession" he says, at p. 27:—"'Actual possession' as opposed to 'constructive possession' is in the same way an ambiguous term. It is most commonly used to signify *physical control*, with or without possession in law." A foot-note refers to a decision in which it was held in a Statute to include purely legal possession. And at p. 28 the learned writer states: "The whole terminology of the subject, however, is still

very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context." It cannot, we think, be taken on the authority of Sir *Frederick Pollock* that the term "actual possession" has a definite legal signification that cannot be departed from when used in connection with a drastic and novel criminal enactment.

But, further, if "*de facto* possession" is to be here used simply in the sense of "actual possession" as contrasted with "constructive possession" as these terms are understood with respect to real property, we must also bear in mind that *Pollock*, on p. 58, also states: "A servant in charge of his master's property . . . generally has not possession." If he has not "possession," he has not either "actual" or "constructive" possession. And if a servant is to be excluded from the operation of the section on this ground—assuming *Pollock's* real property definitions are the guide—and the master is by the same standard to be arrested because by the technical expression he is the person having in law "actual possession," a most astonishing and unexpected result would be produced. As Sir *James Stephen* says in his *Digest of the Criminal Law*, p. 243, "A movable thing is in the possession of . . . the master of any servant who has the custody of it for him, and from whom he can take it at pleasure." In *New Trinidad Lake Asphalt Co.* v. *Attorney-General* (1) the Privy Council say that in a deed the words "lands which now are or at any time . . . shall come into the possession of Her Majesty" mean "land in the actual possession of the Crown or its officers." As the Crown or, indeed, any corporation can only possess land in that sense by servants or officers, it follows that unless in such case the master is in "actual possession" neither the Crown nor any corporation could ever be in actual possession of anything. It is evident that the discrimen for this enactment is not to be found merely by arbitrarily separating possession into two classes "actual" and "constructive," and then assuming a fixed and invariable meaning to each term.

When, however, we come to the part of the work of *Pollock and Wright* which was written by the late Mr. Justice *Wright*, dealing

(1) (1904) A.C., 415, at p 422.

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with Crime—which is cognate to our present inquiry—we find some expressions that help us to ascertain the essentials of possession. At pp. 118 and 119 the learned author says :—" The word ' possession ' is used in relation to movable things in three different senses. Firstly, it is used to signify mere *physical possession* . . . which is *rather a state of facts than a legal notion.* The law does not define modes or events in which it may commence or cease. It may perhaps be generally described by stating that when a person is in such a relation to a thing that, (1) so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and (2) so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him, or *in some receptacle belonging to him and under his control,* he is in physical possession of the thing." The division of the parts and the italics are ours. The receptacle belonging to him and under his control implies that it belongs to no one else and is subject to no other person's independent control. This is, if necessary, made still more clear by the passage at p. 129 : " No phrase is more usual for describing the ordinary test of possession than the question—' had he *the separate undivided and exclusive control of the thing* ' ? "

The requisite of exclusiveness is insisted on by other writers of authority. The article in the *Encyclopædia of the Laws of England,* 2nd ed., vol. XI., quoted in the judgment of the learned Chief Justice (1), is, at p. 320, most insistent as to exclusiveness. Among other observations is this : " The determining factors in legal possession are, then, the exercise of *exclusive physical control,* and the character in which this control is exercised." Sir *James Stephen* in his *Digest of Criminal Law,* 5th ed., p. 243, observes :—" A movable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word ' servant ' here includes any person acting as a servant for any particular purpose or occasion. The word ' custody ' means such a relation towards the thing as would constitute possession if the person having custody had it on his own account." Judicial opinion of the highest rank supports this. In

(1) (1919) V.L.R., at p. 145 ; 40 A.L.T., at p. 146.

Charlesworth v. *Mills* (1) Lord *Halsbury* L.C., speaking of a sheriff's possession, says: "I never understood that the possession of the sheriff was other than physical and actual possession." He says that does not mean that the man has at every moment in his possession every article in the house. Some are incapable of being "grasped by the hand, if that is what is meant by taking physical possession." Then says the Lord Chancellor:—"I find that there was a man in the house for the purpose of preventing any other person interfering with or removing or taking away any of the property in question; and it is not denied that if the assignor or any one on his behalf had attempted to remove any of the articles which were in the house at the time when this man was in possession on behalf of Mr. Charlesworth, he would have been immediately stopped. Therefore, I should have thought that this possession was just as much a *physical and actual possession* as it is possible for any one man to have in articles which are distributed all over a house."

Possession is proved by various acts varying with the nature of the subject matter. But exclusiveness is essential. That, of course, does not mean that several persons may not in concert have and exercise that exclusive possession as against the rest of the world. As to anything further, it is evident that the phrase "actual possession" not being a definite technical expression, we have to interpret it by other standards. And here what was said in *The Lion* (2), quoting *Abbott* C.J. in *R.* v. *Hall* (3), becomes important. Lord *Romilly* said: "The meaning of particular words in an Act of Parliament . . . 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.'" The "subject or occasion" here is a new crime introduced into the code, the provision of the enactment being very drastic and summary. The administration of the enactment is given in the first place to justices, who usually are business men, not trained lawyers, and who, it cannot be presumed, are familiar with the delicate and various shadings that sometimes differentiate actual from constructive possession in relation to real property.

(1) (1892) A.C., 231, at p. 237. (2) L.R. 2 P.C., 525, at p. 530.
(3) 1 B. & C., 123, at p. 136.

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The enactment is to be construed according to its language, as Parliament is supposed to have intended those concerned in obeying it and in carrying it out and administering it as a branch of the criminal law, and for the prevention of crime, would naturally understand it. Its history is not unimportant.

The English Acts were passed in 1839, and in 1853 and 1855 New South Wales copied them with some variation of language. In 1866 *Hadley* v. *Perks* (1) decided that the Imperial legislation did not apply to a case where the goods were on a person's premises. The reason given was that on the true construction of the two Acts it was intended only that the power in question should be exercised where the accused person was found in the street. In 1884, in *In re Keyes* (2), the Supreme Court of New South Wales held that the words " any thing " which occurred in both the English and New South Wales enactments did not include cattle, but only things that could, so to speak, be grasped manually and carried. In 1896, in *In re Frith* (3), it was held by *Stephen* J., following *Hadley* v. *Perks* (1), that the goods, being in a building, were not within the early Statutes. The Full Court agreed with him on that point, and differed on a point immaterial to this case. In 1901, the *Police Offences Act* (N.S.W.) No. 5, sec. 27, re-enacted the former law. In 1902, in *Ex parte Lisson* (4), the Court seemed disposed to qualify the former cases. It did not so decide, but it questioned the limitation of the Act to streets, but agreed that houses were not within it.

When the Victorian Legislature in 1907 proceeded to enact the provisions of sec. 10 of Act No. 2093, they had before them the provisions of the English Acts and the New South Wales Act. But, in view of the decisions up to that date, the Victorian Act substituted for the words " any thing " the words " any personal property whatsoever," to meet *Keyes's Case* (2). It also, in order to meet *Hadley* v. *Perks* (1), *Frith's Case* (5) and *Lisson's Case* (4), introduced the provision in sub-sec. 3 as to the " building or otherwise." And—apparently to meet the cases of *R.* v. *Drage* (6) and

(1) L.R. 1 Q.B., 444.
(2) 5 N.S.W.L.R. (L.), 359.
(3) 17 N.S.W.L.R. (L.), at p. 422.
(4) 2 S.R. (N.S.W.), 373.
(5) 17 N.S.W.L.R. (L.), 421.
(6) 14 Cox C.C., 85.

R. v. *Carter* (1), decided in 1884 and up to 1907 not departed from—it introduced the latter alternative of sub-sec. 3.

In 1908 the case of *Tatchell* v. *Lovett* (2) was decided. The judgment of *Hood* J. throws great light on the subject. His Honor, reading sec. 10 as a whole and in conjunction with sec. 12, held that the object of the legislation was to provide for the immediate arrest *flagrante delicto* of suspected persons in possession of or conveying in some way personal property supposed to have been stolen. He added that sec. 12 implied that the disputed property must necessarily be before the Court, and that the absence of any power to enter premises or seize property, apart from the accused person, seemed to show that the property referred to is to be in the actual custody or control of the accused. In the course of his judgment he also adverts to what he calls a colloquial expression. He refers to the phrase "how he came by such property." That is a very significant phrase. It shows, in the first place, that the Legislature was not speaking in technical terms; for, since it used the expression "how he came by such property" as the equivalent of "having possession" of it, it is very evident Parliament was not doing more than dealing with a very ordinary evil that everybody knew of, in very ordinary terms that everybody understood. It is true that in the latter part of his judgment the learned Judge refers to the evidence of the defendant's knowledge. But that has a double bearing: in the first place, it might be very important on the second branch of Mr. Justice *Wright's* definition of possession, and, next, it might be very relevant as to the satisfactory nature of the defendant's explanation of how the property came there.

That case stood unchallenged until 1912, when the *Police Offences Act* of that year was passed. It is intituled "An Act to amend and consolidate the law relating to Police Offences." And it does amend the enactment now under consideration by inserting the word "actual" three times before the word "possession," and by inserting a provision as to summoning the accused as an alternative to arresting him. It is clear that Parliament inserted the word "actual" as a definite legislative declaration that the "possession" which is to bring about criminal consequences entailing possibly

(1) 12 Q.B.D., 522. (2) (1908) V.L.R., 645; 30 A.L.T., 88.

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twelve months' imprisonment is to be no mere legal conception based on real property distinction, but a plain fact personal to the accused. The very circumstance that the mere "opinion" of the justices that the defendant's explanation is not "satisfactory," coupled with the legislative care to secure "actuality" of possession as a condition precedent, indicates to us that the justices were not limited by any rigid technical connotation of "actual possession," but had to consider whether in the particular instance, in the circumstances, the man was in such physical control of the property as in ordinary life would, if unexplained, indicate that he was its possessor. "Having actual possession" means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes. In its nature it corresponds to its companion expression "conveying," which necessarily involves instant personal physical control to the exclusion of others. These two expressions are obviously intended to cover the whole ground of actual personal control—that is, whether the property is kept stationary or is in motion. But it does not include the case of a person who has put the property out of his present manual custody and deposited it in a place where any other person independently of him has an equal right and power of getting it, and so may prevent the first from ever getting manual custody in the future. In that event the property is not in his actual possession: it is where he may possibly reduce it again into actual possession, or, on the other hand, where the other person may himself reduce it into his own actual exclusive possession.

That is the present case. The wool, placed in the locker by Moors, had ceased to be in his actual possession, because, though it was in the locker, the locker itself was not, in the words of Mr. Justice *Wright*, a "receptacle belonging to him" or "under his control," nor had he the exclusive means or right of opening it and obtaining the contents. Another Customs clerk had equal right and power

with Moors, and independently of him, to open the locker and take out its contents. The wool was, therefore, at the crucial moment, not in fact in the "actual possession" of Moors, and the prosecution necessarily fails.

The appeal is allowed. The order to review is made absolute, and the conviction set aside. Appellant to have costs of this appeal and in the Supreme Court.

In view of other proceedings pending in this Court, we desire to add that nothing we have said is to be taken as going beyond the necessities of the present case.

We also say nothing as to the right of a State officer to interfere with a Customs locker without the consent of the Customs authorities. That question has not been raised or argued.

Appeal allowed. Order to review absolute and conviction set aside. Appellant to have costs in High Court and in Supreme Court.

Solicitors for the appellant, *Loughrey & Douglas.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.