

9-1-1995

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Recommended Citation

John V. Orth, *Russell v. Hill (N.C. 1899) Misunderstood Lessons*, 73 N.C. L. REV. 2031 (1995).

Available at: <http://scholarship.law.unc.edu/nclr/vol73/iss6/3>

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RUSSELL V. HILL (N.C. 1899) MISUNDERSTOOD LESSONS

JOHN V. ORTH*

In this essay, Professor Orth examines the North Carolina Supreme Court's opinion in Russell v. Hill, which has long been unfavorably compared with the contemporaneous Minnesota case of Anderson v. Gouldberg. Both cases concerned claims to property by two parties, neither of whom was the true owner, and both cases relied on the venerable common law case of Armory v. Delamirie. Professor Orth explains that the North Carolina court's decision resulted from strict insistence upon the elements of the common law forms of action. In contrast, the Minnesota court, broadly construing precedent, made a policy choice which it believed would best protect property. Professor Orth concludes, however, that the North Carolina court's decision has proved to be no less protective.

*Russell v. Hill*¹ is, in its way, one of the most famous cases ever decided by the North Carolina Supreme Court, but it has an unenviable fame because most right-thinking lawyers today think it was wrongly decided.² A staple of first-year property courses,³ the case involved a claim by Russell for the value of logs that the partnership of Hill and Nelson had taken from his possession without authority.⁴ Plaintiff honestly but mistakenly believed that the logs

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1. 125 N.C. 470, 34 S.E. 640 (1899).

2. See, e.g., BARLOW BURKE, PERSONAL PROPERTY IN A NUTSHELL 139 (2d ed. 1993) (saying of *Russell*, "[t]here is much wrong with this analysis"); Recent Case, 13 HARV. L. REV. 607 (1900) (noting *Russell* and concluding that "the doctrine of the principal case seems indefensible").

3. See, e.g., OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 41-42 (5th ed. 1989) (misdating *Russell* as 1900); JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 140-41 (6th ed. 1990) (same); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 54 (2d ed. 1993).

4. *Russell*, 125 N.C. at 471, 34 S.E. at 640.

were his; defendants showed that title was in a third person.⁵ The case was tried in the Superior Court for Swain County, North Carolina, on an agreed statement of facts, and judgment was rendered in favor of defendants.⁶ The state supreme court affirmed the judgment, holding that title was an essential element of plaintiff's case and that, while possession raised a presumption of title, that presumption had been rebutted in this case.⁷ *Russell* is usually paired in the property books with a contemporary case on similar facts from Minnesota, *Anderson v. Gouldberg*,⁸ which held for plaintiff. The latter case is normally understood as deciding that possession, even if wrongfully acquired, gives a title that defendants can defeat only by proving a better title in themselves, not in a third person.⁹

The logic of *Anderson* is compelling: Plaintiff should not have to prove title in order to recover the value of something taken from his possession without authority, so defendants should only be able to defeat the claim by proving their own title, not by disproving plaintiff's. In terms of civil procedure, plaintiff should be able to establish a prima facie case by showing prior possession and defendants' unauthorized taking; defendants' only affirmative defense on the merits should be a showing of better title in themselves (or authority from one with such a title). Learned discussions usually conclude with a restatement of the rule in *Anderson* in terms of the Latin phrase *jus tertii* (the right of a third person):¹⁰ defendants in an action for wrongful taking cannot assert *jus tertii*.¹¹ This third person is not party to the suit, does not put in a claim, and will not be bound by any judgment respecting title. Were a court to leave the thing or its value with defendants just because plaintiff could not prove title, it would render rights in personal property precarious,

5. *Id.* at 471-72, 34 S.E. at 640.

6. *Id.* at 471, 34 S.E. at 640.

7. *Id.* at 472, 34 S.E. at 640.

8. 53 N.W. 636 (Minn. 1892). A more complete statement of the facts appears in the Minnesota Reports, 51 Minn. 294 (1892).

9. See, e.g., RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* 311-12 (Walter B. Raushenbush ed., 3d ed. 1975) (citing *Anderson* for the proposition that "even a convertor who tortiously holds the goods of another has been held able to recover their value from a third person who, while the goods were in the plaintiff's possession, damaged or converted them"). But see WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 95 n.18 (3d ed. 1964) (citing *Anderson* as a case in which plaintiff was in possession "under some colorable claim of right").

10. See RUSS VERSTEEG, *ESSENTIAL LATIN FOR LAWYERS* 89 (1990).

11. See, e.g., John Frederick Hurlbut, Note, *Jus Tertii as a Defense to Conversion Suits in Indiana—Toward a More Rational Approach*, 18 VAL. U. L. REV. 415, 427-28 (1984).

since most chattels are without title deeds and a system of recording. Furthermore, were the third party never to assert a claim against defendants, the latter would receive a benefit from wrongdoing.¹² Denied a legal remedy, plaintiff would be tempted to take the law into his own hands. "Any other rule would lead," the Minnesota court summed up the consequences in *Anderson*, "to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."¹³

How could the North Carolina Supreme Court have blundered so badly? Examination of the original trial records in *Russell* reveals that the case was a tangle of misunderstandings. Beginning with a mistake concerning title to land, it became through an error of trial tactics a case to try title to chattels rather than to protect possession. The records show that the litigation spanned ten years, beginning in 1889 with *Hill v. Russell*.¹⁴ In 1894, following a voluntary nonsuit in that action, the principal case began. Delayed by continuances and procedural mishaps, *Russell v. Hill* required two rounds over six years, including two trials and two trips to the state's highest court, before final resolution in 1899.¹⁵ On its second appeal, this routine dispute forced the North Carolina Supreme Court to examine its precedents and attempt to distinguish the celebrated eighteenth century English case of *Armory v. Delamirie*,¹⁶ which involved a chimney sweeper's boy who found a jewel.

Extrinsic to *Russell* is yet another misunderstanding. In legal pedagogy, discussion usually centers on the perceived implications for public policy of deciding in favor of defendants: Law students dutifully parrot the lesson that this will lead to "an endless series of unlawful seizures and reprisals." In fact, there is no reason to believe that a century of experience with contrasting rules in North Carolina and Minnesota shows any real difference in this regard.

12. On the legal principle traditionally expressed as "no one should be permitted to profit from his own wrong," see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23 (1978) (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40-41 (1921) (same).

13. *Anderson v. Gouldberg*, 53 N.W. 636, 637 (Minn. 1892).

14. The case history of *Hill v. Russell* can be gathered from the Statement of the Case on Appeal in *Russell* and from the Swain County Court Minute Books. See *infra* notes 24, 29-32 and accompanying text.

15. *Russell I*, 122 N.C. 773, 30 S.E. 27 (1898); *Russell II*, 125 N.C. 470, 30 S.E. 640 (1899).

16. 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722).

In terms of legal historiography, a study of *Russell* raises a question about the value of extended historical reconstructions of well-known cases: How does such a study affect classroom discussion? Aside from adding verisimilitude to what would otherwise be merely a hypothetical question concerning *jus tertii*, historical research can supply important contextual information. North Carolina at the time of *Russell* had recently enacted a new system for recording titles to land, which may have created a feeling of certainty about the identification of the logs' true owner. Furthermore, on the specific facts of *Russell*, Tertius was no bodiless abstraction but had in fact a name and identity: F.H. Busbee, one of the state's leading lawyers, a man well known to every member of the supreme court that decided the case.

Finally, reflection on *Russell* and its contrasting case, *Anderson*, prompts a suggestion for restatement of the substantive law. What is troubling about *Russell* is the concern that an innocent person may be without remedy against a wrongful taker merely because the wrongdoer can assert *jus tertii*, while what is troubling about *Anderson* is the concern that a party can defend possession even if wrongfully acquired. Both problems may be avoided by a rule that conditions the assertion of *jus tertii* on a showing that the prior possessor did not hold in good faith.

I. THE FACTS IN *RUSSELL*

As lawyers and judges are acutely aware, discovering what actually happened in a case is often a difficult and uncertain business. Matters are only made worse as the time of the original dispute grows distant. In *Russell* the task is relatively easy because so many of the important facts were matters of public record or were agreed upon by the parties. For purposes of the present discussion, facts agreed upon (and, occasionally, facts not disputed) are assumed to be true. All the original materials, trial records and recorded deeds, are now located in the North Carolina State Archives in Raleigh.

The facts in *Russell* date back to May 18, 1887, when F.H. Busbee, who had made a prior entry and survey, received a grant from the state for 10,297 acres¹⁷ in Swain County, a sparsely settled mountain county in western North Carolina.¹⁸ Busbee, who had paid

17. State Grant No. 8108, State to F.H. Busbee, Trustee, Swain County Register of Deeds, Book 9, at 39 (1887).

18. In 1890 Swain County had a population of 6,577, all classified as rural. NORTH CAROLINA GOVERNMENT, 1585-1979, at 1283 (John L. Cheney, Jr. ed., 1981). The 1990

12-1/2 cents an acre, took title in himself as trustee for an unnamed beneficiary.¹⁹ On June 1, 1887, Busbee recorded his patent in the county courthouse in Bryson City²⁰ pursuant to the state's newly adopted race-type recording act, generally known in the state as the Connor Act.²¹ Less than two years later, on January 28, 1889, Iowa McCoy made an entry and survey of a one-hundred-acre tract that she believed to be in the public domain but that was in fact part of the land granted to Busbee, trustee.²²

In September 1889, prior to the issuance of her patent, McCoy and Aaron Miller sold the standing timber on the land embraced in McCoy's grant to D.S. Russell for \$113.50.²³ Thereafter Russell's

census reported its population as 11,268. NORTH CAROLINA MANUAL, 1993-1994, at 1083 (Lisa A. Marcus ed., 1994).

19. The deed recites the consideration. State Grant No. 8108, *supra* note 17. The Statement of the Case on Appeal certified by the presiding judge William S. O'B. Robinson reports that at the jury trial in 1897 (*Russell I*) "[t]here was no evidence to show for whom F.H. Busbee was trustee."

20. At its foot the deed is inscribed "Registered this 1st day of June A.D., 1887," and signed by the Register of Deeds. State Grant No. 8108, *supra* note 17. Although "registered" is the term used to mean placed of record, "recorded" is the term used in this Essay, to avoid confusion with the registration of title permitted later under the Torrens Title Act. Act of March 8, 1913, ch. 90, 1913 N.C. Pub. Laws 147 (current version codified at N.C. GEN. STAT. § 43-1 to 43-64 (1984)).

21. Act of Feb. 27, 1885, ch. 147, 1885 N.C. Sess. Laws 233 (effective Dec. 1, 1885) (current version codified at N.C. GEN. STAT. § 47-18 (1984)). The bill that became the North Carolina recording act was originally introduced by state Senator Henry Groves Connor and became known by his name. See Obituary of Henry Groves Connor, NEWS AND OBSERVER (Raleigh, N.C.), Nov. 24, 1924, at 1.

Grants from the state were recordable in the same manner as other deeds. Code of North Carolina §2779 (1883) (present version in N.C. GEN. STAT. §146-55 (1991)) (grants to be recorded within two years).

22. The fact of entry appears in *Russell II*, 125 N.C. at 471, 34 S.E. at 640; the date of entry appears in the Statement of Facts agreed upon by both parties for the bench trial in 1899 (*Russell II*).

23. The contract with McCoy and the consideration are described in the Statement of Facts agreed upon by both parties for the bench trial in 1899 (*Russell II*). The 1897 Statement of the Case on Appeal, certified by Judge Robinson, reports that at the jury trial in 1897 plaintiff introduced the contract in evidence and testified as follows: "I bought the timber in September 1889 from Aaron Miller and Iowa McCoy. I had a written contract with McCoy and Miller." Statement of the Case on Appeal, *Russell v. Hill*, 122 N.C. 772, 30 S.E. 27 (1898). Miller's interest was never explained.

Standing timber is an interest in land, so its transfer technically requires a deed. *Chandler v. Cameron*, 229 N.C. 62, 64, 47 S.E. 2d 528, 529 (1948). In the present case a contract seems to have been used, granting Russell a license to enter the land and cut the timber and transferring to him title to the logs. The sufficiency of the contract was not challenged in *Russell*.

It seems to have been taken for granted by all parties that, after entry and survey, a person had a transferable interest in the land.

crew entered the land and built shelters, cutting timber over the course of several weeks. By December 16, 1889, they had transported the logs to the banks of the Nantahala River to float them downstream for sale. A week earlier, however, on December 10, 1889, the partnership of L.J. Hill and L.B. Nelson of Atlanta, Georgia, through their agent in Swain County, W.S. Saul, had filed an action in superior court against Russell and McCoy, claiming ownership of the McCoy tract,²⁴ and on December 18, 1889, the partners were granted an injunction restraining Russell and McCoy.²⁵ On December 26, 1889, while the injunction was still in force, Saul took possession of the logs on behalf of Hill and Nelson and sold them to the Asheville Lumber Company for \$686.84.²⁶

On February 8, 1890, McCoy received from the state the deed for the hundred acres, for which she also paid 12-1/2 cents an acre.²⁷ She recorded her patent on March 11, 1890.²⁸ Soon thereafter, it appears, doubts about McCoy's title developed, and on June 12, 1890, Busbee was made a third party defendant in *Hill v. Russell* and a survey was ordered.²⁹ For a reason now unknown, Busbee moved

24. Statement of the Case on Appeal (*Russell I*). The superior court was not in session at the time, and the first judicial record of the ejectment action is in the Swain County Court Minute Books, Spring Term 1890, at 499 (June 12, 1890). The basis of Hill and Nelson's claimed ownership does not appear.

25. Statement of the Case on Appeal (*Russell I*). The terms of the injunction were not stated.

26. *Id.* (The company was also referred to in the trial records as the Asheville Furniture and Lumber Company. In the Supreme Court's statement of the facts in *Russell II*, a spurious distinction appears between a furniture company and a lumber company: Plaintiff is said to have planned to float the logs down the Nantahala River to the Asheville Furniture Company, but defendants sold and delivered them to the Asheville Lumber Company, *Russell v. Hill*, 125 N.C. at 470, 471, 34 S.E. at 640.) By the time of the final appeal in *Russell* the company was insolvent. *Russell*, 125 N.C. at 470, 34 S.E. at 640.

It was alleged in Plaintiff's Amended Complaint in *Russell II* (*Russell v. Hill*, 125 N.C. 470, 34 S.E. 640 (1899)) that defendants had obligated themselves to the Asheville Furniture and Lumber Company to repay the price of the logs if they failed in their action against Russell and McCoy. Defendants in their answer denied this allegation.

27. State Grant No. 9909, State to Iowa McCoy, Swain County Register of Deeds, Book 11, at 514. The Statement of the Case on Appeal certified by Judge Robinson (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)) mistakenly identifies McCoy's deed as State Grant No. 9009.

28. Inscription on State Grant No. 9909.

29. Swain County Court Minute Books, Spring Term 1890, at 499 (June 12, 1890).

A contemporary newspaper account establishes that F.H. Busbee was personally in attendance: "This term of the Superior Court is of more than ordinary importance. Several important suits are on the docket and in consequence there is a large and fine array of legal talent in attendance. F.H. Busbee, Esq. of Raleigh, is attending court here. He puts up at Swain Hotel." SWAIN COUNTY HERALD (N.C.), June 12, 1890, at 1.

at the Spring Term 1891 to withdraw as party defendant.³⁰ The motion was granted at the Fall Term 1891,³¹ at which term Hill and Nelson also took a judgment of nonsuit in their action against Russell and McCoy.³²

II. RUSSELL: ROUND ONE

On January 17, 1894, Russell filed suit against Hill and Nelson, beginning Round One of the principal case.³³ Continued from term to term for three and a half years, *Russell* was tried to a jury on August 6, 1897.³⁴ Plaintiff, who was represented by G.S. Ferguson³⁵ and J.F. Ray,³⁶ introduced into evidence his contract with McCoy and Miller and testified that he had cut and removed the timber pursuant to that contract. He also introduced the record in the case of *Hill v. Russell* and testified as to the value of the timber taken by Saul. A witness for plaintiff testified that Saul was Hill and Nelson's agent, adding "Saul told me that he got the timber claimed by plaintiff and sold it to the Asheville Lumber Co. He seemed to enjoy the joke on Russell."³⁷ In response, defendants, who were represent-

Hill v. Russell was "continued for survey" at the Fall Term 1890. Swain County Court Minute Books, Fall Term 1890, at 530 (Nov. 6, 1890).

30. The motion "to Strike out the Interpleadings of F.H. Busbee" was continued. Swain County Court Minute Books, Spring Term 1891, at 560 (June 11, 1891).

31. "Defendant Busbee through his counsel withdraws his answer and is permitted by the court to withdraw as party defendant or interpleader." Swain County Minute Books, Fall Term 1891, at 27 (Nov. 7, 1891).

32. *Id.* at 27 (Nov. 10, 1891). Hill and Nelson were ordered to pay costs. *Id.*

33. Summons (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)). Defendants were the partnership of Hill and Nelson and L.J. Hill and L.B. Nelson individually. *Id.*

34. Swain County Court Minute Books, Spring Term 1894, at 319 (June 14, 1894); Fall Term 1894, at 393 (Nov. 29, 1894); Spring Term 1895, at 456 (June 22, 1895); Fall Term 1895, at 512 (Nov. 27, 1895); Spring Term 1896, at 40 (June 16, 1896); Fall Term 1896, at 103 (Dec. 2, 1896). Because of a backlog of cases, a special term of Swain County Superior Court was held in August, 1897.

35. Garland S. Ferguson, a resident of Haywood County, adjacent to Swain County on the east, had served one term in the state senate, 1876-77. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 457. In 1902 he was elected to an eight year term as a superior court judge and was re-elected in 1910. *Id.* at 579, 598 n.98.

Also listed as counsel for plaintiff was the firm of "Jones and Johnson," with which Ferguson seems to have been associated. On G.A. Jones, who appeared for plaintiff in *Russell II*, see *infra* note 50.

36. J. Frank Ray of Macon County, adjacent to Swain County on the south, served in the state house of representatives sporadically over 54 years: 1881-83, 1891-1900, 1911-13, 1917-20, 1923-24, 1935. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 461, 463, 471-72, 474-75, 488, 491, 494, 496, 500, 510.

37. Statement of the Case on Appeal (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)) (testimony of F.R. Hewitt). Although clearly hearsay, Saul's words would seem to have

ed by R.L. Leatherwood,³⁸ relied on the successive deeds to Busbee and McCoy to show that McCoy had not had any rights in the land from which plaintiff cut the trees.

Three issues were joined for the jury:

- (1) "Is Iowa McCoy the owner of the land from which the plaintiff cut the timber purchased?"
- (2) "Did the defendants wrongfully convert the personal property, the timber, of the plaintiff?"
- (3) "What is the value of said property?"³⁹

In his judgment, Judge W.S. O'B. Robinson⁴⁰ recorded the jury's answers to these questions as follows:

been accepted into evidence as an "admission by an agent," although at the time of *Russell*, it was said that North Carolina law did not to permit the introduction of such admissions if made subsequent to the completion of the transaction to which they relate. WALTER S. LOCKHART, A HANDBOOK OF THE LAW OF EVIDENCE FOR NORTH CAROLINA § 154 (1915). Under the Rules of Evidence adopted in 1984, admissions by agents are generally admissible. 2 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE §169 (3d ed. 1988).

38. Robert L. Leatherwood, a resident of Swain County, served in the state senate in 1893 and in the state house of representatives in 1899-1900. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 472, 478.

39. Trial Record (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)).

40. William S. O'B. Robinson, a resident of Wayne County in eastern North Carolina, had been elected to an eight-year term as a superior court judge in 1894. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 579, 596 n.71. The North Carolina Constitution of 1868 as amended in 1876 required the rotation of superior court judges in judicial districts. N.C. CONST. of 1868, art. IV, §11 (1875) ("[E]very Judge of the Superior Court shall reside in the district for which he is elected. The Judges shall preside in the Courts of the different districts successively, but no Judge shall hold the Courts in the same district oftener than once in four years . . ."). The changing boundaries of judicial districts are charted in D.L. Corbitt, *Judicial Districts of North Carolina, 1746-1934*, 12 N.C. HIST. REV. 45 (1935).

Judge Robinson had earlier been criticized by a Swain County newspaper:

When Judge Robinson left here at the close of his fall term of court, not a single lawyer attended him to the depot. This morning every lawyer in town was at the depot to bid Judge Timberlake "Bon Voyage."

Was there ever such a contrast between Judges as there has been at this and last fall term of our court?

We overheard the Clerk of the Court say, that Judge Timberlake had been one of the best judges and disposed of more business at this term than any Judge since he had been in office. Nuf sed!

BRYSON CITY TIMES (N.C.), June 19, 1896, at 1.

No stranger to criticism, Judge Robinson had written six months earlier to Henry Groves Connor, thanking him for a supportive letter and describing his emotions at seeing published "that I made an ass of myself in every County in which I had been, that I had made use of obscene blasphemous language on the bench and that no member of the bar dare come to my rescue." Letter from W.S. O'B. Robinson to H.G. Connor (Dec. 20, 1895) in H.G. Connor Papers (on file with the Southern Historical Collection, Wilson Library, The University of North Carolina at Chapel Hill).

- (1) "No. Busbee Trustee was the owner of the land."
- (2) "Yes."
- (3) "\$686.84 with interest from January 1890."⁴¹

Without reported explanation Judge Robinson entered judgment for plaintiff.⁴² At the prevailing legal rate of interest the total came to \$995.90, to which plaintiff's costs were to be added.

Defendants promptly appealed to the supreme court,⁴³ which heard the case during its February 1898 term. Rather than making a decision on the merits, however, the court on May 3, 1898, ordered a new trial because of a conflict in the record.⁴⁴ Although Judge Robinson clearly reported the jury's findings as above, the trial record itself, also before the court on appeal, just as clearly recorded the following answers:

- (1) "No."
- (2) "No. Busbee Trustee was the owner of the land."
- (3) "\$686.84 with interest from Jan. 1890."⁴⁵

The crucial variance was in the answer to the second question—whether defendants had converted plaintiff's property. According to the trial record, in contrast to the judgment, the answer was in the negative, presumably because the jury found the timber to be Busbee's, not plaintiff's.

Although a clerical error in the record could be corrected on appeal by a writ of certiorari or by amendment,⁴⁶ the repugnance in this case was incurable: In its per curiam opinion the supreme court reported that "counsel concur that the conflict is in the original record

41. Judgment (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)).

42. To sustain a judgment for plaintiff, while at the same time accepting Busbee's legal title to the land, requires a rationale explaining how plaintiff acquired a property interest in the timber. Various theories are discussed below: adverse possession of the land by plaintiff's vendor, *see infra* text accompanying notes 76-78; title by accession, *see infra* note 78; and peaceful possession as itself a form of property, *see infra* text accompanying note 115.

43. North Carolina had no intermediate appellate court until 1967, when the Court of Appeals was organized. N.C. GEN. STAT. § 7A-16 (1989) (implementing N.C. CONST. art. IV, § 7).

44. *Russell v. Hill*, 122 N.C. 772, 773, 30 S.E. 27, 27 (1898) (per curiam).

45. Trial Record (*Russell I*, 122 N.C. 772, 30 S.E. 27 (1898)). The same answers are recorded in the Swain County Court Minute Books, August Special Term 1897, at 194 (Aug. 6, 1897).

46. *State v. Beal*, 119 N.C. 809, 811, 25 S.E. 815, 815 (1896); *State v. Preston*, 104 N.C. 733, 734, 10 S.E. 84, 85 (1889).

below."⁴⁷ Because of such confusion the court concluded: "the only remedy is by a new trial."⁴⁸

III. *RUSSELL*: ROUND TWO

Remanded on May 3, 1898, *Russell* was tried a second time in superior court on January 28, 1899. Waiving their right to trial by jury,⁴⁹ the parties, who were represented by the same counsel as before,⁵⁰ this time submitted the case for decision on an agreed statement of facts. Together they stipulated that the grant to Busbee was prior to that to McCoy and that "Busbee Trustee was the owner of the land from which the timber was cut by virtue of this said grant,"⁵¹ but that plaintiff had believed in good faith that McCoy, from whom he purchased the timber, was the rightful owner. Defendants conceded that they "did not claim right or title to the logs by purchase or otherwise from Busbee Trustee."⁵² Without reported explanation Judge H.R. Starbuck⁵³ ruled that "plaintiff is not entitled to recover in this action" and ordered him to pay defendants' costs.⁵⁴

47. *Russell I*, 122 N.C. at 773, 30 S.E. at 27 (listing counsel as G.S. Ferguson for plaintiff-appellee and R.L. Leatherwood for defendant-appellant).

48. *Id.*

49. See N.C. CONST. of 1868, art. IV, § 18 ("In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the Judge upon the facts, shall have the force and effect of a verdict of a jury."). The current provision, substantially the same, is in N.C. CONST. art. IV, § 14.

50. The firm of "Ferguson and Ferguson" was listed for plaintiff, as well as J.F. Ray, "Jones and Johnson," and E.B. Norvell. One of plaintiff's papers was signed by G.A. Jones, presumably of Jones and Johnson.

George A. Jones of Macon County served in the state house of representatives in 1889. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 468. Appointed to fill a vacancy, he was a superior court judge in 1901-02. *Id.* at 579, 597 n.89.

51. Facts Agreed Upon, Jan. 28, 1899 (*Russell II*, 125 N.C. 470, 34 S.E. 640 (1899)).

52. *Id.*

53. Henry R. Starbuck of Forsyth County in central North Carolina had been elected to an eight-year term as a superior court judge in 1894. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 579, 597 n.73. He later served two terms in the state senate (1909, 1911). *Id.* at 486, 488.

54. Swain County Court Minute Books, Spring Term 1899, p. 460 (June 26, 1899). In both rounds of *Russell*, defendants had asserted in their Answer the affirmative defense of the statute of limitations: three years for conversion. See Code of North Carolina, ch. 10, 155(4) (1883) (current version codified at N.C. GEN. STAT. § 1-52(4) (1983)). That defense may have been asserted at trial. If so, plaintiff's answer as forecast in his Amended Complaint in *Russell II*, was that "this action was begun within the year next after the judgment of nonsuit" in *Hill v. Russell*. In fact, more than two years but less than three had elapsed: November 10, 1891 to January 17, 1894. See *supra* notes 32-33 and accompanying text. A confused passage in the Facts Agreed Upon seems to allude to the statute of limitations. The handwritten passage, which seems to conflate the two issues of defendants' presence in the jurisdiction and the statute of limitations appears

Plaintiff appealed to the supreme court, which decided the case on December 19, 1899.⁵⁵ In an opinion by Justice Walter A. Montgomery⁵⁶—the opinion that appears in the property casebooks⁵⁷—the court affirmed the judgment for defendants. One justice of the five-member court, Justice Robert M. Douglas,⁵⁸ dissented without opinion.

IV. THE LAW IN *RUSSELL*

The reasoning of the North Carolina Supreme Court in *Russell* was technical, but at its heart was a very practical proposition. Plaintiff's cause of action sounded in trover, the remedy for conversion.⁵⁹ Actually, since the forms of action had been abolished in

verbatim as follows:

Hill and Nelson the time of the alleged wrongful conversion and continuously up to the commencement of this action and since nonresidents of the state that from the alleged wrongful conversion to the commencement of this action they had occasionally from year to year for short periods at a time been in the state and county for more than three years from the alleged wrongful conversion elapsed before the commencement of this action.

Facts Agreed Upon (*Russell II*, 125 N.C. 470, 34 S.E. 640 (1899)).

Since Judge Starbuck did not divulge the basis of his judgment, there is no means of knowing whether he relied on the statute of limitations. The supreme court later made no mention of it. *Russell v. Hill*, 125 N.C. 470, 34 S.E. 640 (1899).

55. *Russell v. Hill*, 125 N.C. 470, 34 S.E. 640 (1899).

56. Walter A. Montgomery (1845-1921) had been elected in 1894 to fill an unexpired term as an associate justice of the state supreme court; in 1896 he was elected to a full eight-year term. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 576, 589 n.29. Regarded as a Populist, Montgomery owed his election to the Republican-Populist fusion. T.T. Hicks, *Presentation of the Portrait of the Late Walter A. Montgomery to the Supreme Court of North Carolina*, 186 N.C. 787, 796-97 (1923); Joseph F. Steelman, *Republican Party Strategists and the Issue of Fusion With Populists in North Carolina, 1893-1894*, 47 N.C. HIST. REV. 244 (1970).

Joining in Montgomery's opinion on the five-member court were Chief Justice William T. Faircloth and Associate Justices Walter Clark and David M. Furches.

57. See *supra* note 3.

58. Robert M. Douglas (1849-1917) had been elected in 1896 to an eight-year term as an associate justice of the state supreme court. NORTH CAROLINA GOVERNMENT, 1585-1979, *supra* note 18, at 576, 589 n.30. The son of Stephen A. Douglas, Abraham Lincoln's debating partner, Robert M. Douglas (unlike his father, a Republican) owed his election to the Republican-Populist "fusion." 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 98-99 (William J. Powell ed., 1986). He was impeached in 1900 by the resurgent Democrats but was acquitted. See *infra* text accompanying notes 95-96.

59. The action of trover (*trouvé* in Law French) was originally a form of trespass on the case for the recovery of damages from a person who had found plaintiff's goods but refused to return them. Because of procedural advantages the action was favored, and the allegation of finding became a legal fiction. The action was thereby turned into one for refusal to return plaintiff's goods however acquired, described as a conversion (or appropriation) of the goods to the holder's own use. 3 WILLIAM BLACKSTONE, COMMEN-

North Carolina in 1868,⁶⁰ it was (as the court carefully observed) an action "in the nature of the old action of trover."⁶¹ Prior North Carolina decisions were very clear that to recover in trover a plaintiff had to show both title and possession. Although possession raised a presumption of title, it was a presumption rebuttable by a clear showing of title in another.⁶² Possession may be, as the old adage says, nine-tenths of the law,⁶³ but the plaintiff in *Russell* was short the crucial fraction.

The insistence on title in actions of trover was supported by the logic of the old forms of action. Trespass was also a remedy for the unauthorized taking of chattels. Over the centuries the common law judges had sought to distinguish the two forms of action by aligning them with the distinction between title and possession.⁶⁴ Referring to trover, the supreme court in an early North Carolina case observed: "It is one of the characteristic distinctions between this action and

TARIES ON THE LAWS OF ENGLAND *152-53 (1768). In *Barwick v. Barwick*, 33 N.C. (11 Ired.) 80 (1850), the North Carolina Supreme Court summarized the law:

In trover, the injury done by the *wrongful taking* is waived, and the plaintiff supposes he has lost the property, and alleges that the defendant found it and wrongfully converted it to his own use. So the gist of the action is not that the defendant, having found the property, took it into his possession, but that, after doing so, he wrongfully converted it to his own use; and the measure of damage is the value of the property.

Id. at 81.

60. N.C. CONST. of 1868, art. IV, § 1, stated:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits shall be abolished, and there shall be in this State but one form of action, for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated a civil action.

The current provision, substantially the same, is in N.C. CONST. art IV, § 13.

61. *Russell II*, 125 N.C. at 472, 34 S.E. at 640.

62. *Boyce v. Williams*, 84 N.C. 275, 276-77 (1881); *Rose v. Coble*, 61 N.C. (Phil. Law) 517, 519 (1868); *Barwick v. Barwick*, 33 N.C. (11 Ired.) 80, 81 (1850); *Laspeyre v. McFarland*, 4 N.C. (Taylor) 620, 621 (1817); *Hostler's Adm'r v. Skull*, 1 N.C. (Tay.) 183, 183-84 (1801). The earliest of these North Carolina cases has been described as "the earliest American decision on the question." J.E. Macy, Annotation, *Mere Possession in Plaintiff as Basis of Action for Wrongfully Taking or Damaging Personal Property*, 150 A.L.R. 163, 176 (1944).

63. BLACK'S LAW DICTIONARY 1164 (6th ed. 1990). In light of the result in *Russell*, the explanation given in *Black's* is interesting:

This adage is not to be taken as true to the full extent, so as to mean that the person in possession can only be ousted by one whose title is nine times better than his, but it places in a strong light the legal truth that every claimant must succeed by the strength of his own title, and not by the weakness of his antagonist's.

Id.

64. 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 402-31 (2d ed. 1937). Holdsworth's account, in a particular not relevant to the present discussion, has recently been criticized and described as a "heresy." C.D. Baker, *The Jus Tertii: A Restatement*, 16 U. QUEENSLAND L.J. 46, 46 (1990).

trespass, that the latter may be maintained on possession; the former only on property and the right of possession."⁶⁵ In consequence, the action of trover had become the means to try title to chattels: "Trover is, to personals, what ejectment is as to the realty."⁶⁶

In *Russell*, plaintiff should have at all costs avoided the characterization of his action as in trover (or in the nature of trover). By emphasizing the damage to possession, rather than to title, plaintiff could have maintained his action in trespass (or in the nature of the old action of trespass). The problem with that label was that the measure of damages in trespass was not the value of the property but rather the injury caused by the loss of possession,⁶⁷ so plaintiff would seemingly not have been able to claim the full value of the logs.

There is some evidence that plaintiff's lawyers perceived the problem: In the superior court's minute book, *Russell* is labeled an action of "debt,"⁶⁸ presumably some form of quasi-contract. Perhaps this was an attempt to waive the tort, whether trover or trespass, and sue in assumpsit for the value of defendants' unjust enrichment.⁶⁹ Unfortunately for plaintiff, what defendants had done was soon being called a conversion, for which every lawyer knew the remedy was trover: Trover and conversion went together in legal lore like remedy and wrong.⁷⁰ Once title to the logs became the issue, plaintiff's cause was almost certainly lost. The forms of action may have been buried, but as the great English legal historian Frederic Maitland

65. *Laspeyre*, 4 N.C. (Taylor) at 621.

66. *Id.* When quoted later in *Russell* the phrasing became crisper: "Trover is to personalty what ejectment is to realty." *Russell II*, 125 N.C. at 472, 34 S.E. at 640.

67. See *Barwick v. Barwick*, 33 N.C. (11 Ired.) 80, 81 (1850):

The bare possession is sufficient to maintain an action of trespass against a wrongdoer, for the gist of that action is an injury to the *possession*, and the measure of damage is not the value of the property, but the injury done to the plaintiff by having his possession disturbed.

The old learning on trespass continues to be repeated by North Carolina courts. See *Motley v. Thompson*, 259 N.C. 612, 618, 131 S.E.2d 447, 452 (1963): "The gist of trespass to personalty is the injury to possession, and possession alone is sufficient to maintain trespass against a wrongdoer." The latter case, however, applied as the apparent measure of damages the value of the property. *Id.*

68. Swain County Court Minute Books, Spring Term 1894, at 319 (June 14, 1894); Fall Term 1894, at 393 (Nov. 24, 1894); Spring Term 1895, at 456 (June 22, 1895); Fall Term 1895, at 512 (Nov. 27, 1895); Spring Term 1896, at 40 (June 16, 1896); Fall Term 1896, at 103 (Dec. 2, 1896); August Special Term 1897, at 194 (Aug. 6, 1897); Spring Term 1898, at 336 (June 24, 1898).

69. For a brief history of waiver of tort, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 311 (2d ed. 1979).

70. See, e.g., EDWARD H. WARREN, TROVER AND CONVERSION: AN ESSAY 2 (1936) ("Conversion was the name of the wrong; trover was the name of the remedy.").

trenchantly put it at almost that very moment, "they still rule us from their graves."⁷¹

The dead hand of legal history lay heavily on all traditionally minded lawyers, but it was particularly heavy south of the Mason-Dixon Line. An agrarian economy and atavistic social system based on slavery had produced an antebellum legal culture of common law conservatism.⁷² It is indicative of North Carolina society that the leading cases on trover cited in *Russell* in 1899 were both "trover for a negro."⁷³ Abolition of the forms of action (like abolition of slavery) came to Southern states such as North Carolina in the knapsacks of Union soldiers. Rather than being a response to demands from a society impatient with legal technicalities, law reform was imposed as part of the state's Reconstruction Constitution of 1868.⁷⁴ Demanding a wrenching change in settled ways of doing legal business, reform imposed yet another demand on ill-prepared practitioners already struggling to adjust to bewildering social and

71. F.W. Maitland, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 296 (A.H. Chaytor and W.J. Whittaker eds., 1929) (compiling lectures delivered during period 1888-1906).

72. Robert A. Ferguson has described the interaction of law and society in the South:

Regional peculiarities in the law itself reinforced the Southern lawyer's broad social role. Because commercial law developed very slowly in the South, the generalist ruled legal practice much longer than elsewhere, and his ability to unify communal sympathies remained a vital professional skill. Then, too, the southern lawyer always had to be more than a lawyer. As scholars have shown, the law constituted just one of several competing modes of social order in the antebellum South. The code of honor and slavery both impinged upon formal legal prerogatives. The leaders of the Old South settled matters of slander, libel, assault, battery, and other differences of opinion on the field of honor, bypassing courtroom remedies and overtly breaking state laws that prohibited dueling. At the same time, slavery barred a third of the South's population from the legal rights of citizenship, and it placed the plantation owner above the law by allowing him to wield absolute power over those people who were his personal property. These tendencies were part of "the unwritten constitution of the Old South," and, in restricting the meaning and application of the legal process, they created a paradox. The more restricted the law became, the more expansive the lawyer had to be.

ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 293-94 (1984).

73. *Laspeyre v. McFarland*, 4 N.C. (Taylor) 620, 621 (1817); *accord Barwick v. Barwick*, 33 N.C. (11 Ired.) 80 (1850). The phrase also appears in *Hostler's Adm'r v. Skull*, 1 N.C. (Tay. 152) 183, 183 (1801).

74. See JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 14 (1993).

political upheaval.⁷⁵ Long after they had turned to dust, the old forms of action continued to beguile North Carolina lawyers.

Conscientiously, and perhaps on its own motion since it appears nowhere in the trial records, the supreme court considered an argument that plaintiff actually had title: that McCoy, his vendor, had been in adverse possession of the land from which he had cut the timber.⁷⁶ Had that been the case, she would have had a title to pass to him, since an adverse possessor acquires title to products severed from the soil.⁷⁷ The only remedy then available to the true owner, "Busbee, trustee," would have been an action against her for damages to the freehold. As a matter of fact, however, McCoy had not been in actual possession of the land.⁷⁸

75. See, e.g., H.G. Connor, *Presentation of the Portrait of Hon. William T. Dortch to the Supreme Court of North Carolina*, 171 N.C. 841, 844-45 (1916):

It is not easy, at this day, to understand or appreciate the difficulties and perplexities which confronted those men who, having passed the preparatory period of life, living and working under conditions existing prior to the Civil War, were called upon to act, and counsel others in acting, after four years of war, ending disastrously and revolutionizing the political, social, and industrial life of the South.

....

The adoption of the Code of Procedure, resulting in radical changes in the procedural law, in which the lawyers of the age of Mr. Dortch were trained and with which they were familiar, and other changes in the statute law of the State, imposed upon them the necessity and duty of close application and study.

See also H.G. Connor, *Presentation of the Portrait of Hon. George Howard to the Supreme Court of North Carolina*, 173 N.C. 819, 830 (1917):

Referring to [Howard's] early retirement from the active pursuit of his profession, one who from boyhood knew him well, spending some time as a student in his office, says:

....

He was skilled in the system of pleading and practice of the Common Law, and a strenuous opponent of the men and the methods by which the changes of 1868 were brought about. Yet he fully recognized many improvements and advantages of the new system, and was one of the first men of the old regime whom I heard commend the Code of Civil Procedure.

As required by N.C. CONST. of 1868 art. IV, § 2, a commission of three appointed by the constitutional convention drafted the rules of practice: Ordinance of March 13, 1868, in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, AT ITS SESSION 1868, at 439-42 (1868). The Code of Civil Procedure was adopted at the special session of the General Assembly, 1868. CODE OF CIVIL PROCEDURE OF NORTH CAROLINA (1868).

76. *Russell II*, 125 N.C. at 472, 34 S.E. at 640.

77. *Macy*, *supra* note 62, at 239.

78. Unexamined in *Russell* is the further possibility that plaintiff had acquired an original title to the logs by accession. Acting in the mistaken but good faith belief that he had a right to enter the land and cut timber, plaintiff had, through the actions of his crew, transformed standing trees into dressed logs assembled on the bank of a floatable stream.

Beneath the technicalities in *Russell* lurked a very practical question: If plaintiff had been awarded the value of the logs, where would defendants have stood with respect to the true owner? As the implications of treating trover as an action to try title to chattels had been thought through, it had seemed clear that a judgment for plaintiff in such an action should confer a right *in rem*, good against all the world. A judgment against defendants, in other words, appeared to amount to a judicial order of sale; satisfaction of the judgment would then consummate a kind of purchase. Yet defendants in *Russell* stood confessed in the agreed statement of facts of having converted the property of the true owner: They "did not claim right or title to the logs by purchase or otherwise from Busbee Trustee."⁷⁹ Defendants therefore remained liable to an action of trover brought by Busbee, legal owner of the logs. Satisfaction of a judgment for plaintiff in *Russell* would have been no defense. "Consequently," the supreme court reasoned, adopting as its own the language of an earlier case, "trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title

His labor apparently added much of their value: Plaintiff had paid only \$113.50 for timber subsequently sold, after cutting and hauling, for \$686.84—almost a sixfold increase. The hundred-acre tract itself, and all that grew on it, had been sold by the state for only \$12.50, 12-1/2 cents an acre. (It is true that the timber contract had been with Aaron Miller as well as with Iowa McCoy. See *supra* note 23 and accompanying text. If Miller added rights to cut trees on other land, the acreage would have been greater.)

The problem with a claim of title by accession, which may explain why plaintiff did not assert it in *Russell*, was that in the traditional view it was grounded on a "change of species," the standard examples being grapes changed into wine, olives into oil, wheat into bread. 2 BLACKSTONE, *supra* note 59, at *404; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 363 (1836); 2 SAMUEL F. MORDECAI, LAW LECTURES: A TREATISE, FROM A NORTH CAROLINA STANDPOINT, ON THOSE PORTIONS OF THE FIRST AND SECOND BOOKS OF THE COMMENTARIES OF SIR WILLIAM BLACKSTONE WHICH HAVE NOT BECOME OBSOLETE IN THE UNITED STATES 1095-97 (1916). An innovative Northern court under a strong-minded judge had already abandoned the old approach and substituted a new one based on "relative values": A great increase in value attributable to the expenditure of time and labor was held "of more importance in the adjustment than any chemical change or mechanical transformation." *Wetherbee v. Green*, 22 Mich. 311, 320 (1871). But see *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332, 333, 337-38 (1877) (indicating that a twofold increase in value of logs due to cutting and stacking was not sufficient to implicate doctrine of title by accession).

The legal culture of the North Carolina judiciary, looking back as it did to the old forms of action and less attuned to the market, was not likely to be fertile ground for such an argument. *Potter v. Mardre*, 74 N.C. 36, 40 (1876) ("[M]ost of the American cases hold that when the alteration of the timber taken by a trespasser has gone no farther than its change into boards . . . the owner of the timber may follow his property into the manufactured article, and recover its value in that shape."). The logs still looked like trees, and no one at the time probably thought of asking if title had nonetheless changed.

79. See *supra* note 52 and accompanying text.

in the defendant.”⁸⁰ Implicitly, the court held that the same reasoning applied with respect to an action “in the nature of the old action of trover.”

The continuing liability of defendants to an action of trover brought by the true owner, even after satisfying an adverse judgment in *Russell*, would indeed be troubling. Yet in such a hypothetical case, *Busbee v. Hill*, the measure of damages would seem to be the damage to the freehold. That is, the damages would be equal to the value of the trees in place,⁸¹ presumably the price Russell paid McCoy (\$113.50), a sum well below the value of the logs when they were subsequently sold.⁸² Nor would defendants’ liability to Busbee have been avoided had Russell framed his complaint in trespass for damage to his possession; defendants would still have been answerable to the true owner in trover or, for that matter, in trespass. In addition, as a practical matter Hill and Nelson would seemingly be able to assert a successful defense based on the statute of limitations. Busbee’s presence in the initial case of *Hill v. Russell* in 1890 would seem to prevent him from denying knowledge of the operative facts. Furthermore, one should not ignore that Russell, too, stood confessed as a convertor, equally liable to an action by Busbee, unless barred by the statute of limitations.⁸³ In fact, no possible outcome in *Russell*

80. *Russell II*, 125 N.C. at 473, 34 S.E. at 640 (quoting *Barwick v. Barwick*, 33 N.C. (11 Ired.) 80, 82 (1850)). The quoted sentence concluded with an exception, albeit one not applicable to the facts of *Russell*: “except where the property is restored and the conversion was temporary.” *Id.* (quoting *Barwick*, 33 N.C. (11 Ired. 80, 82 (1850))). In other words, if plaintiff in *Russell* had recaptured the logs from defendants, he would have had a good cause of action in trover, despite the fact that satisfaction of the judgment by defendants would not have vested title in them. How in this case trover could have been distinguished from trespass was a question the judges were never able to answer.

81. The rule at the time was stated to be:

[W]here the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed.

Gaskins v. Davis, 115 N.C. 86, 91, 20 S.E. 188, 189 (1894). It is assumed that the liability of Hill and Nelson would be no greater than that of Russell.

Today double damages are provided by statute, N.C. GEN. STAT. § 1-539.1(a) (1983), although reimbursement from a third party is available in case of liability due to “misrepresentation of property lines by the party letting the contract.” *Id.* § 1-539.1(c).

82. Aaron Miller was co-promisee with Iowa McCoy. See *supra* text accompanying note 23. Miller’s contribution is unknown and thus cannot be valued.

83. Busbee would also seem to have causes of action against McCoy, who had made entry and survey on his land and who purported to grant Russell the right to cut timber, and against the Asheville Furniture and Lumber Company, the timber’s ultimate consumer.

could provide either party a defense against the true owner, who was not joined in the final suit.⁸⁴

The holding in *Russell* seemed to involve the court in a contradiction of the leading English case of *Armory v. Delamirie*.⁸⁵ In that case a chimney sweeper's boy found a jewel and delivered it to a goldsmith for appraisal.⁸⁶ The goldsmith refused to return it to the boy, who brought an action of trover for its value.⁸⁷ The Court of King's Bench ruled that the action would lie even though the boy was not the true owner.⁸⁸ It is noteworthy that *Armory* dated to the early eighteenth century, before the logical development of the distinction between trespass and trover was complete. Yet over the years *Armory* had never been overruled, only confined. The finder of the jewel was described by the *Russell* court, somewhat disingenuously, as "the owner because of having it in possession,"⁸⁹ and the court emphasized the fact that in *Armory* the true owner was not known: "[T]he case would have been very different if the owner had been known."⁹⁰

In a case such as *Armory* it is rather difficult to imagine how the identity of the true owner could ever be known. There is generally no registered owner of chattels; engraved initials, even a full name, are no more than evidence of ownership. In *Russell*, by contrast, the name of the owner was established as a fact: Plaintiff agreed to it in the statement of the case. When defendants in *Russell* asserted the defense of *jus tertii*, therefore, they were actually asserting the rights of a named individual: F.H. Busbee, trustee.

Whether or not Busbee was actually present in the supreme court chambers in Raleigh at the moment the decision in *Russell* was announced cannot now be determined, but his presence there would not have been surprising: Busbee was, in fact, a leading advocate before the state supreme court. He appeared in a case decided the same day as *Russell*, a case in which, incidentally, counsel for

84. Failure to interplead the true owner, it has been argued, would constitute acceptance by defendants of the risk of double liability. BURKE, *supra* note 2, at 141.

85. 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Russell II*, 125 N.C. at 473, 34 S.E. at 641. In *Armory* the English court had described the finder as having "such a property as will enable him to keep it against all but the rightful owner." *Armory*, 1 Strange at 505, 93 Eng. Rep. at 664.

90. *Russell II*, 125 N.C. at 474, 34 S.E. at 641 (citing *Barwick v. Barwick*, 33 N.C. (11 Ired.) 80, 82 (1850)).

opposing sides in *Russell* had together represented the other party.⁹¹ A specialist in the emerging field of corporate law, Busbee had enjoyed the lucrative and powerful position of attorney for the Southern Railway Company for over a decade.⁹²

Not only prominent before the bench, Busbee was also known personally to every member of the court. Justice Montgomery, who authored the opinion of the court in *Russell*, numbered Busbee among his dearest friends,⁹³ and Montgomery's memorialist linked the two at a prominent event thirty years earlier.⁹⁴ Justice David M. Furches, who had joined in Montgomery's *Russell* opinion, and Justice Douglas, the sole dissenter in *Russell*, soon were linked very publicly with Busbee: The *cause célèbre* of 1901 in North Carolina was the impeachment of the two justices, and Busbee served on the defense team.⁹⁵ The prosecution ultimately failed, in part perhaps because

91. *Brendle v. Spencer*, 125 N.C. 474, 474-75, 34 S.E. 634, 634 (1899) (listing G.F. Bason and F.H. Busbee for appellant-defendants; T.H. Cobb, R.L. Leatherwood, and G.S. Ferguson for appellee-plaintiff).

92. *Memorial of Fabius Haywood Busbee*, 11 N.C. B. ASS'N REP. 177, 178 (1909).

93. See Autobiography of Walter A. Montgomery 74 in *Montgomery Papers* (on file with the Southern Historical Collection, Wilson Library, The University of North Carolina at Chapel Hill):

Of all my friends at the time I was retired from office [1905], Mr. Fabius Haywood Busbee was the most actively sympathetic and helpful. I had known him more than forty years; and our relations were friendly throughout that entire time. His interest in my future welfare was redoubled because of the intimate relations between our wives. They had been all their lives like sisters. But for Mr. Busbee's generosity and assistance in aiding me to procure legal business after my retirement from the bench, my financial situation would have been much embarrassed. He not only wished me well—I think many others did that, too—but he showed that interest by his works. He had me employed in cases that brought me good fees

Id.

94. Hicks, *supra* note 56, at 791:

That summer [1867] he attended the commencement at Chapel Hill, saw President [Andrew] Johnson made an honorary member of the literary society, and was himself, on motion, made an honorary member, and signed his name just under that of the president. Mr. [William H.] Seward [Secretary of State] excused himself from accepting the honor because he had never been a member of a secret society, when Mr. Fab Busbee, knowing, as ever, what to say, moved a suspension of the rules in the case of Secretary Seward, and he signed up just under the name of Walter A. Montgomery.

The occasion is described in 1 KEMP P. BATTLE, *HISTORY OF THE UNIVERSITY OF NORTH CAROLINA* 759-63 (1907).

95. TRIAL OF DAVID M. FURCHES, NOW CHIEF JUSTICE, AND FORMERLY ASSOCIATE JUSTICE, AND ROBERT M. DOUGLAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS vi (1901) (listing counsel for respondents); *id.* at 791-820 (providing a transcript of "Speech of F.H. Busbee, of Counsel for the Respondents").

of Busbee's lawyerly talents, but in larger part because of a split in the political ranks.⁹⁶ The true owner in *Russell* was hardly, therefore, a bodiless abstraction to the justices who decided the case.

The reason, of course, that title could be so readily located in *Russell* was the peculiar nature of the personalty involved—severed realty, for which (at least in the original form of standing timber) there was a record owner. Plaintiff's lawyer seems, nonetheless, to have conceded too much when he agreed on behalf of his client that "Busbee Trustee was the owner of the land from which the timber was cut."⁹⁷ Trover may indeed have been an action to try title to chattels, functioning in the same manner for personalty as ejectment functioned for realty, but it could not simply be turned into an action in ejectment. Strictly speaking, the most plaintiff need have conceded about Busbee's title was that it was apparent or record title, and a bare legal title at that, since the grant ran to "Busbee, as trustee." Whether Busbee's title to the land was defective could not be established in an action in which neither Busbee, McCoy, nor any other interested parties were joined.⁹⁸

In every state a title search would have revealed the identity of the record owner, but in North Carolina record ownership was accorded even greater weight. On December 1, 1885, the state's race-type recording act, the Connor Act, went into effect;⁹⁹ exactly eighteen months later, on June 1, 1887, Busbee recorded his deed to the land from which the disputed timber came.¹⁰⁰ By eliminating notice of prior conveyances as an issue in determining priority of recorded deeds,¹⁰¹ the Connor Act increased the security of record

96. The removal of the Republican justices was a project of the Democratic Party, a large majority of whose members supported it, but a minority—led by Henry Groves Connor—opposed it. For a memoir of the trial, focusing on Connor's role, see Josephus Daniels, *Presentation of the Portrait of Hon. Henry Groves Connor to the Supreme Court of North Carolina*, 196 N.C. 830, 851-63 (1929).

97. See *supra* note 51 and accompanying text.

98. Although Busbee was described in the deed as "trustee," it appears to have been the law of North Carolina at the time that, without further evidence of the identity of the beneficiary and terms of the trust, no trust was created and the trustee took an unrestricted fee simple. See *Freeman v. Rose*, 192 N.C. 732, 733-34, 135 S.E. 870, 871 (1926). The current law on this issue is in N.C. GEN. STAT. §§ 43-63 to 43-64 (1984) (providing that unless recorded instrument in chain of title sets forth name of beneficial owner, "trustee" has full power to dispose of real property).

99. Act of Feb. 27, 1885, ch. 147, §5, 1885 N.C. Sess. Laws 233, 234.

100. See *supra* note 20 and accompanying text.

101. The effect of a race-type recording act is described by two modern authorities as follows: "[I]t is a pure question of race to the records; the purchaser who first records wins." LEWIS M. SIMES, *HANDBOOK FOR MORE EFFICIENT CONVEYANCING* 18 (1961).

title. Its avowed aim had been to facilitate mortgage financing and thereby improve credit in the state.¹⁰² There was no dispute in *Russell* about Busbee's priority over McCoy: He had clearly won the race to the courthouse. The lawyers who litigated the case were still working through the implications of the new race-type statute, but the statute's adopters had recently and publicly assured them of one thing: a record title would be extremely difficult to defeat. The admitted fact that Busbee's recorded deed was filed prior to McCoy's was almost proof positive of ownership.

Anderson v. Gouldberg,¹⁰³ the contemporaneous Minnesota case with which *Russell* is unfavorably compared, also involved logs, and that decision also rested on a very practical proposition, but unlike the reasoning in *Russell*, the reasoning in *Anderson* was not hyper-technical. Plaintiff, who suffered the loss of certain logs that defendants took without authority, brought an action for their recovery or for their value.¹⁰⁴ A jury trial in the District Court for Isanti County resulted in a judgment for plaintiff in the amount of \$153.45.¹⁰⁵ The Minnesota Supreme Court, which affirmed the judgment, treated the case as one sounding in replevin, the old form of action for the restitution of goods wrongfully taken.¹⁰⁶ The

"The best argument in favor of the race statute . . . is that it enables the title searcher to rely upon the records without the substantial risk under other types of acts that one will have constructive notice of unrecorded instruments." Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 232-33 (1962).

102. See Robert W. Winston, *A Century of Law in North Carolina*, 176 N.C. 763, 771 (1919) (commemorating the hundredth anniversary of the establishment of the state supreme court). Winston noted that:

Perhaps the wisest of these remedial statutes is the Connor Act of 1885, requiring all deeds to be registered, and practically placing an unregistered deed on a footing with an unregistered mortgage. Prior to said act, no one could with safety make a loan on North Carolina lands, and foreign capital avoided the State.

Id.

It is an exaggeration to describe the Connor Act as "requiring all deeds to be registered," but it is a pardonable exaggeration since the security of title offered by the act makes recording extremely attractive. Still, an unrecorded deed is valid between the parties. *Patterson v. Bryant*, 216 N.C. 550, 552-53, 5 S.E.2d 849, 850-51 (1939); *Weston v. J.L. Roper Lumber Co.*, 160 N.C. 263, 266, 75 S.E. 800, 801 (1912); *Warren v. Williford*, 148 N.C. 474, 479, 62 S.E. 697, 699 (1908); *Hargrove v. Adcock*, 111 N.C. 166, 170-71, 16 S.E. 16, 17 (1892).

103. 53 N.W. 636 (Minn. 1892).

104. *Anderson v. Gouldberg*, 51 Minn. 294, 294 (1892).

105. *Id.*

106. Originally the remedy for wrongful distress (seizure of goods to secure the payment of a claimed debt, particularly rent), 3 BLACKSTONE, *supra* note 59, at *145-46, replevin was generalized in America to become the remedy for any unlawful taking,

Minnesota court's relaxed attitude toward the technicalities of the forms of action is evident in its willingness to view the case as one in replevin despite the award of money damages, the characteristic remedy for trover (or trespass), but even more in its disregard of common law precedents requiring plaintiffs in replevin to prove title as well as prior possession¹⁰⁷—precedents that parallel those relied on in *Russell* with respect to the old action of trover.

Spare as was the record in *Russell*, that in *Anderson* was sparer still. While the jury in *Russell I* was asked three questions—Was plaintiff's grantor the owner of the land? Did defendants take the logs without authority? What were the logs worth?—the jury in *Anderson* was presented only the last two. Although plaintiff in *Anderson* admitted that he had cut the timber on land belonging to a stranger, and although the specific section, township, and range were given, making the identification of the particular stranger relatively easy,¹⁰⁸ the trial judge refused to permit plaintiff's title to be questioned and limited the issue to whether defendants' taking was authorized.¹⁰⁹ The record on appeal in *Anderson*, therefore, contained no finding of fact concerning the state of plaintiff's title, thus enabling a well-known scholar years later to limit the case severely.¹¹⁰ The Minnesota Supreme Court made clear, however, that as far as it was concerned the limited state of the record was of no consequence: "For the purposes of this appeal, we must . . . assume the fact to be (as there was evidence from which the jury might have so found) that the plaintiffs [sic] obtained possession of the logs in the first instance by trespassing upon the land of some

JEROME MICHAEL, *THE ELEMENTS OF LEGAL CONTROVERSY* 16-19 (1948).

107. *Presgrave v. Saunders*, 2 Ld. Raym. 984, 985, 92 Eng. Rep. 156, 156 (K.B. 1704); *Butcher v. Porter*, 1 Salkend 94, 94, 91 Eng. Rep. 87, 87 (K.B. 1693); *Wildman v. North*, 2 Lev. 92, 92, 83 Eng. Rep. 465, 465 (K.B. 1673); see 7 HOLDSWORTH, *supra* note 64, at 427-28.

108. *Anderson v. Gouldberg*, 51 Minn. 294 (1892), identified the land in question: Plaintiff claimed to have cut the logs on section 22, township 27, range 25, Isanti County, in the winter of 1889-1890, and to have hauled them to a mill on section 6, from which place defendants took them. The title to section 22 was in strangers, and plaintiff showed no authority from the owners to cut logs thereon. *Id.* at 294.

109. *Id.* ("The court charged that even if plaintiff got possession of the logs as a trespasser, his title would be good as against any one except the real owner . . . and left the case to the jury on the question as to whether the logs were cut . . . by defendants under . . . authority.")

110. PROSSER, *supra* note 9, at 95 n.18 (citing *Anderson* as a case in which plaintiff was in possession "under some colorable claim of right," without, however, identifying the source of the "claim of right").

third party.”¹¹¹ The question on appeal, therefore, could be formulated to be whether “bare possession of property, though wrongfully obtained, is sufficient title” to permit plaintiff to maintain an action for unauthorized taking.¹¹² Answering the question in the affirmative, the court relied on the venerable precedent of *Armory v. Delamirie*.¹¹³ Generalizing from *Armory*, the court stated the sweeping rule: “One who has acquired the possession of property, whether by finding [as in *Armory*], bailment, or by mere tort [as arguably was the case in *Anderson*], has a right to retain that possession as against a mere wrongdoer who is a stranger to the property.”¹¹⁴

The implication of this rule, as the court explicitly acknowledged, was that “possession is good title against all the world except those having a better title.”¹¹⁵ It is the exception, of course, that is of interest. Rights in rem—that is, property rights—are good against all the world *without exception*. By contrast, rights in *personam* are good against only a limited class or classes. The view of property expressed in *Anderson* falls somewhere in between these two axioms and implies the possibility of a series of titles to the same thing, one better than the other, a view that might without too much exaggeration be expressed as the Theory of Relativity of Titles. Possession does more, according to this theory, than raise a presumption of title; possession *is* title, albeit one possibly inferior to some higher title or titles.

111. *Anderson v. Gouldberg*, 53 N.W. 636, 637 (Minn. 1892). The sole plaintiff in *Anderson* was Sigfrid Anderson, 51 Minn. 294, 294 (1892).

112. *Anderson*, 53 N.W. at 637.

113. 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722).

114. *Anderson*, 53 N.W. at 637. Without apparent recognition of the fact, the court in *Anderson* was repeating an association of ideas propounded a decade earlier by Oliver Wendell Holmes:

The meaning of the rule that all bailees have the possessory remedies is, that in the theory of the common law every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and as even a wrongful possessor may have full damages or a return of the specific thing from a stranger to the title.

THE COMMON LAW 138 (1881).

Within a few years of the decision in *Anderson*, Dean James Barr Ames wrote of the action of trover: “[T]he plaintiff need not prove that the chattel was his own property, or that he was in actual possession of it. It is enough to show actual possession as a bailee, finder, or trespasser, or to prove merely an immediate right of possession.” James Barr Ames, *The History of Trover*, 11 HARV. L. REV. 277, 277 (1897).

115. *Anderson*, 53 N.W. at 637. This is an extension of *Armory*, which held only that a finder acquires “such a property” as will support the action. 1 Strange at 505, 93 Eng. Rep. at 664.

For all its appearance of modernity—eschewing absolutes and stressing relative values—this theory is in fact consonant with the medieval approach to property. Once the ancient writ of right fell into disuse, replaced for all practical purposes by the petty assizes of *mort d'ancestor* and *novel disseisin*, title to real property in England became a relative concept.¹¹⁶ Only by a slow process, beginning in the sixteenth century and not complete until the nineteenth, was absolute title to reemerge as a functional idea. It was precisely because *Armory* was decided as early as it was, before this process was complete, that the Minnesota Supreme Court could rely on it so confidently in *Anderson*, while the North Carolina Supreme Court felt so uncomfortable with it in *Russell*.

What clinched the result in *Anderson* was not precedent but policy. As in *Russell*, the *Anderson* court addressed a very practical problem, but while in *Russell* the problem concerned the defendants—if the judgment went against them, where would they stand with respect to the true owner?—in *Anderson* the concern was for the plaintiff—unless “bare possession” was protected against unauthorized taking, property would be insecure. The *Anderson* decision is the perfect epitome of one strand of 1890s legal culture, valuing security of property above all else.¹¹⁷ Acquisitive capitalism was then viewed as sound economic policy, and in the age of the “robber barons”¹¹⁸ possession was to be protected without too much inquiry into its provenance. The concluding sentence in *Anderson* is its oft-repeated policy argument, a classic *argumentum ad horrendum*: “Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.”¹¹⁹ It is perhaps this argument that is *Anderson*’s clearest mark of modernity.

The reasoning in *Russell*, too, involved a policy argument, after a fashion, but one so old-fashioned as almost to escape the notice of modern readers. The policy vindicated in *Russell* was the age-old

116. See BAKER, *supra* note 69, at 201-02.

117. See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 69-81, 105-06 (1960).

118. See MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901 (1934). Josephson’s concept of the “robber barons” stimulated a once-lively literature. See, e.g., Edward C. Kirkland, *The Robber Barons Revisited*, 66 AM. HIST. REV. 68, 68-73 (1960); Allen Solganick, *The Robber Baron Concept and Its Revisionists*, 29 SCIENCE AND SOCIETY 257 (1965).

119. *Anderson*, 53 N.W. at 637; see also BROWN, *supra* note 9, at 312 (quoting and approving this policy argument).

judicial concern for keeping the forms of action distinct: If plaintiff had won his action "in the nature of the old action of trover," then what would have remained of the distinction between that old action and the other old action of trespass? The reasoning in *Anderson* avoided such theological niceties and directly posed the stark modern question: What would the consequences be, not for the parties but for society, of holding for defendants? The result envisioned by the court was nothing short of anarchy.

And yet, of course, the very rule rejected in *Anderson* was adopted in *Russell* without the dire social consequences predicted. If a state is indeed, in Justice Brandeis' memorable phrase, a laboratory in which social and economic experiments may be conducted,¹²⁰ then North Carolina has experimented for almost a century with a dangerous rule without triggering "an endless series of unlawful seizures and reprisals."¹²¹ Nor, on the contrary, have the courts of Minnesota been converted into tribunals for the protection of thieves' ill-gotten gains.

V. LEGAL HISTORY

For more than a century, American legal education has been based on the study of appellate cases such as *Russell* and *Anderson*.¹²² The "case method," coupled with the newly emergent law reviews, quickly spawned the characteristic form of published student material: case notes and comments.¹²³ *Russell* itself was promptly noted by the student editors of the *Harvard Law Review*, who found its doctrine "indefensible."¹²⁴ Professional literature, too, followed the fashion and focused on cases: In the *American Law Reports*, first

120. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

121. The failure of the predicted consequences to appear was noticed earlier. R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221, 1223 (1986) ("The possibility of 'endless seizures' is a specter more theoretically frightening than real."); Macy, *supra* note 62, at 215 ("It is curious to observe . . . that in states which have adhered to the property rule [requiring plaintiff to show title], there have been no 'endless series of unlawful seizures and reprisals.' Most of the cases have been those of unfortunate sheriffs.").

122. The establishment of the case method as the standard form of legal education is associated with the deanship of C.C. Langdell at Harvard Law School, 1870-95. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 36 (1983).

123. See Michael I. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 777 (1985).

124. Recent Case, 13 HARV. L. REV. 607, 607 (1900). *Russell* was inconsistent with Harvard Dean James Barr Ames's view of the law of trover. See *supra* note 114.

established as a series in 1919, the steadily lengthening "annotations" were really essays on various legal topics. In 1944, a ninety-two page annotation was dedicated to the question of whether mere possession could support an action of trover; the annotation was perfunctorily appended to a twelve-page reported case.¹²⁵

Tardily, but perhaps inevitably, legal historians have made cases the objects of research. While favoring great constitutional cases for obvious reasons,¹²⁶ scholars have not ignored less momentous cases made familiar to generations of law students by coverage in required first-year courses.¹²⁷ Always enriching the particular case with a wealth of hitherto unknown detail, these studies rarely if ever expressly address the issue of how they should inform classroom discussion. Without attempting to answer that question in other cases, this study can at least address it in this one.

Russell is a fascinating and troubling case because, stripped of all its technicalities, it starkly presents for decision the following dispute:

A owned land; B thought she owned the same land and sold C the right to cut trees on it; C cut the trees and removed the logs in good faith; D took the logs with no authority from anyone else and sold them to E. C sues D for the value of the logs. Who wins?

The first point about this question is that it was actually asked in a real courtroom; it is not a mere hypothetical question, posed in a

125. Macy, *supra* note 62, at 163-254 (comprising an annotation on *New England Box Co. v. C & R Construction Co.*, 49 N.E.2d 121 (Mass. 1943)).

126. E.g., DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (1981); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994); PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971); ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964) (detailing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK* (1966).

127. E.g., A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* (1984) (discussing *Regina v. Dudley and Stephens*, 14 Q.B.D. 273, 560 (1885)) (review by John V. Orth in 16 *ALBION* 440 (1984)); Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 *J. LEGAL STUDIES* 249 (1975); Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 *S.C. L. REV.* 415 (1988) (discussing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)); A.W.B. Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 *J. LEGAL STUD.* 345 (1985) (discussing *Carill v. Carbolic Smoke Ball Co.*, 2 Q.B. 484 (1892), 1 Q.B. 256 C.A. (1893)).

classroom. All the alphabet characters have real names (which, incidentally, students usually find much easier to handle). Use of a specific case lends an air of actuality to the discussion that focuses both teacher and student on the practical problems of decision making.¹²⁸ Long ago, even before the first process was issued in *Russell*, an early defender of the case method and pioneer property law teacher, John Chipman Gray, pointed out that "dealing with actual cases is an effectual corrective to unreal and fantastic speculation, which is the most dangerous tendency of academic education."¹²⁹

That the question in *Russell* is not hypothetical does not, however, require extended historical research for demonstration: the case as reported makes that clear. What research can do is to restore the context of the reported case. Every lawyer and judge in the courtroom when the decision in *Russell* was announced knew F.H. Busbee (A in the above formula), and knew him as a man well able to look after his own affairs.¹³⁰ The "third person" whose right is asserted by defendant was no shadowy abstraction, and his concrete identification may make the decision in *Russell* more defensible.¹³¹

In addition to restoring the context of the decision, historical research can illuminate the process by which the record in the case was created. Plaintiff's attorney made an initial mistake in permitting the action to be categorized as one "in the nature of the old action of trover": North Carolina law made title an issue in actions of trover,¹³² but state law did not dictate how title was to be established.

128. Had *Russell* never arisen, it is likely that property teachers would have invented it as a hypothetical case.

129. Letter from John Chipman Gray to Editors, 1 YALE L.J. 159, 160 (1892).

130. See *supra* notes 91-96 and accompanying text.

131. See, e.g., BURKE, *supra* note 2, at 140:

[T]he final and dispositive argument for the *Russell* court is the possibility of double liability for the convertor who pays a trover judgment, receives the plaintiff's rights in the timber, but is still forced to pay the timber's value a second time to the true owner who later sues. Protection against multiple liability is perhaps the most cited rationale for accepting a *jus tertii* defense.

....

Under the facts of *Russell v. Hill*, the result there may be justified, because the true owner is known. He is an adjoining landowner. He is nearby and his proximity makes the concern of the *Armory* [sic: read *Russell*] court a real one. It is not exactly accurate to describe the true owner, F.H. Busbee, as "an adjoining landowner." He was in fact an out-of-town attorney who held legal title to over 10,000 acres from a small part of which the logs at issue were cut. That Busbee knew of the dispute between *Russell* and *Hill* is shown by his intervention in the initial action, *Hill v. Russell*. See *supra* note 29 and accompanying text.

132. See *supra* note 65 and accompanying text.

In a second mistake, in what became the decisive bench trial in 1899 (*Russell II*), plaintiff's attorney stipulated that title to the land—and therefore to the trees cut from it—was in Busbee, trustee.¹³³ While that conceded too much, since only record title was established, it has been shown that the concession was made in the context of the state's new race-type recording act, the Connor Act, widely touted as granting well-nigh complete security to record title.¹³⁴

With regard to the supreme court's reliance on the distinction between trespass and trover, it has been pointed out that although the forms of action had been abolished in North Carolina three decades earlier, the older generation of lawyers in the state had found the change profoundly unsettling.¹³⁵ Southern legal conservatism, established in the static and traditional society of the antebellum period, was, if anything, reinforced by the social restoration of the post-Reconstruction era. *Russell* stands as a monument, albeit a small one, to the enduring conservatism of the legal profession in the state.

What historical research cannot supply in this case is the moral reality behind the agreed facts. Did defendants take possession of the logs because of a good faith belief that they, rather than Busbee, owned the land on which the timber stood, as *Hill v. Russell* would imply?¹³⁶ Or were they engaged in a not-so-subtle scheme to deprive plaintiff of the fruits of his labor, misusing the legal process to that end, as their agent's alleged enjoyment of the "joke on Russell"¹³⁷ would indicate? While not, strictly speaking, relevant to the decision, if indeed title and not good faith was the only issue, that moral judgment would at least be helpful in evaluating the effect of the rule in *Russell*. What is troubling about the opposite rule, the one adopted in *Anderson*, is that it may protect wrongdoing plaintiffs. If the contrary rule were seen to protect wrongdoing defendants, it would lose some of its appeal. On this point, however, research is unavailing, and the past remains inscrutable.

VI. LESSONS

Like any decision based more on precedent than on policy, *Russell* sought to apply in the present the lessons of the past. With regard to whether title was an essential element of plaintiff's case in

133. See *supra* note 51 and accompanying text.

134. See *supra* note 102 and accompanying text.

135. See *supra* note 75 and accompanying text.

136. See *supra* notes 24-26 and accompanying text.

137. See *supra* note 37 and accompanying text.

an action of trover, the state's case law was clear: It was.¹³⁸ Whether the requirement of title in trover, as opposed to mere possession in trespass, should continue to matter after the creation of a unified cause of action was a significant question that went unasked in *Russell*. The implied answer, of course, was yes. Continuing to apply the rules of the past in the changed circumstances of the present was not, however, necessarily keeping faith with the past. The lessons of history hold true in the present only *ceteris paribus*, "other things being equal," which they never are.¹³⁹

Looming large over North Carolina decisional law was the great common law case of *Armory v. Delamirie*,¹⁴⁰ the Chimney Sweep's Case. Decided when the common law system of forms of action was still viable, that case nonetheless held that a mere finder could maintain an action of trover for the value of a found item that was wrongfully withheld from him. *Armory* allowed the finder the same remedy that a bailee would have, despite the fact that a voluntary bailee is entrusted with possession by the owner, while a finder simply takes possession; the similarity of lawful possession in both cases overshadowed the difference in the means by which possession had been acquired.¹⁴¹ *Russell* distinguished *Armory* on the ground that the true owner in that case was not known. By contrast, *Anderson* likened *Armory* to any case involving possession, on the ground that possession alone—even possession "wrongfully obtained"—could support the action. It may be that both *Russell* and *Anderson* misunderstood the lesson of *Armory*: *Russell* cabined it too narrowly, while *Anderson* read it too broadly. It is suggested that the proper reading of *Armory* is that it protects good faith possessors: bailees and finders, certainly, but also innocent trespassers. Only if defendants can show that plaintiff acquired possession by intentional wrongdoing, should title in another (*jus tertii*) matter.¹⁴² If that

138. See *supra* note 65 and accompanying text.

139. The author made this same point in a different context. JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 158 (1987).

140. 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722).

141. Finding is sometimes said to create a "quasi-bailment." BROWN, *supra* note 9, at 30, 320.

142. Innocent mistake is not a defense to an action by the true owner; this is necessary to protect the property. Dan B. Dobbs, *Trespass to Land in North Carolina: Part I. The Substantive Law*, 47 N.C. L. REV. 31, 32-33 (1968). Yet the rationale does not necessarily extend to suits over mere possession like *Russell* and *Anderson*. Even if defendants are permitted to assert *jus tertii* as a defense, they are not subrogated to the rights of the third person but are permitted only to show the fact of the third person's rights.

reading of *Armory* is correct, then *Russell* (and prior North Carolina case law) was wrong: Plaintiff had established a *prima facie* case, and defendants should have been able to assert *jus tertii* only if they could first have shown that plaintiff was a willful wrongdoer. On the other hand, *Anderson* was too loose in its formulation: A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell*, in other words, deserved a new trial at which to show, not his title, but his *bona fides*. Likewise, defendant in *Anderson* deserved a new trial to show that plaintiff had obtained possession through willful wrongdoing.¹⁴³

Policy may beguile as surely as precedent. If *Russell* looked longingly toward the past, *Anderson* looked fearlessly toward the future, yet the policy argument it made is as surely flawed as the lame precedent in *Russell*. "Any other rule" than the one applied in *Anderson*, protecting possession no matter how acquired, would lead (so the Minnesota Supreme Court predicted) "to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."¹⁴⁴ It has already been remarked that another rule, applied in North Carolina for almost a century, has not resulted in these dire consequences. The reason it has not should be a cautionary lesson to the whole legal community, from beginning law students to practitioners to law professors and judges. Before talking loosely about the consequences of a decision, not to the parties but to society at large, one must first ascertain whether anyone is really listening. A few laws, mostly criminal or tax laws, speak to the public directly; many others, such as laws concerning deeds and wills, communicate through the legal profession.¹⁴⁵ Only rules that people generally consult *before* taking specific action will shape that action. Rules such as the one invoked in *Anderson* will rarely, as a practical matter, influence behavior. The best policy with regard to policy arguments in such cases is to keep quiet.

In *Russell*, for all its backwardness, the policy argument concerned exclusively legal behavior in the narrow sense: what to prove

143. Such results would comport with what research has shown modern judges actually do. See Helmholz, *supra* note 121, at 1223-24.

144. *Anderson v. Gouldberg*, 53 N.W. 637, 637 (Minn. 1892).

145. See John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681, 693 (1989).

in order to make a case. That, it is submitted, is the right kind of argument, although it has already been suggested that the particular answer in *Russell* was atavistic. This is not to praise legalism or technicality as such. Courts should consider the social implications of their decisions but not indulge bizarre conjectures of unlikely consequences. The proper concern in *Russell* was with judicial efficiency: Should a court adjudicate a possessory dispute between plaintiff and defendants when it is conceded by both sides that title is in a third party? The proper concern in *Anderson* was with judicial integrity: Should courts protect possession wrongfully acquired? Such concerns are significant, but above all they are manageable by the courts. "Unreal and fantastic speculation" is as out of place in the courtroom as in the classroom.

