their recognition. It is one thing to acknowledge the possibility of plural justifications for institutions of property generally, but quite another to allow that a given property institution should respond to incompatible aims. Even if we agree that all possession should in some way be protected, because it is the interests of society to restrain unauthorised disturbance with settled-possession-however-acquired, we might still configure the rights of the possessor differently to reflect differing circumstances and priorities. Sometimes possession might generate a property right, available against all wrongdoers who come later in time to the thing; sometimes it might generate personal right, available against all *trespassers*, that is, against all those who interfere directly with possession. Crucially, the space for this kind of (re-)evaluative exercise exists within the current confines of common-law authority. Despite the impression that we have leading cases of ancient and indisputable authority, close examination reveals that they have responded with a plural range of concerns that belies the monistic structures protecting possession through access to standard legal remedies for interferences with things.

D. CONCLUSION

The common-law orthodoxy has it that possession generates entitlement, but this proposition seems surprisingly novel, and may not in the end be suitable for universal application. At the very least, common lawyers need to articulate more fully the reasons why and circumstances in which the consequence of possession should be the acquisition of an original property right by the possessor. This entails deeper recognition of the history of possession in the common law, including its peremptory connection to procedural learning and rationalisation. When these connections are appreciated and understood, they explain equally the need for and possibility of reappraisal. There is room to reconfigure the common-law responses to possession, such that sometimes possession generates a property right, and sometimes a personal right. In the latter sense, it seems possible that the common law of possession might not be so distant from civilian systems as prima facie it appears, at least insofar as the response in a *Jeffries* situation should be something very close to a possessory interdict. The boundaries and contours of these positions will need to be worked out with much greater clarity, but as was the case with Holmes and Pollock, civilian solutions may still have a heavy influence on efforts to understand the protection of possession at common law.

5 The Evolution of Possessory Actions in France and Italy

Raffaele Caterina[*]

The Continental systems of possessory protection seem to be different mixtures of the same ingredients: namely, the Roman interdicts, the actions developed for protecting the Germanic *Gewere*, and the canon law's *actio spolii*. However, through accidents of history, these same ingredients gave origin to very different systems.

The great divide between systems which require *animus domini* in order to have possession of a thing, and thus distinguish between possession and detention (for instance France and Italy), and systems which do not consider the intent to possess as owner as an indispensable requirement for possession (for instance Germany) is well known and studied. However, there are important, profound differences between systems which are traditionally seen as quite close. France and Italy, for instance, give different answers to the important question about the extension of possessory protection to movables. As I will try to show, the different legal systems have in a way bent the same arsenal of tools in different directions, so that even intelligibility between two different legal systems is difficult.

It is easy to see some converging lines which seem to be the result of common practical needs. Possessory actions make thus an interesting case study of legal evolution, showing both how different systems are built starting from the same roots and how they can converge to meet the same practical needs.

A. THE ORIGINS OF POSSESSORY ACTIONS

The possessory remedies in force all over Europe, as we will see, did not have their origins in Roman law. However, since these remedies were often re-read through Roman lenses during the Middle Ages, a first important historical root to be considered is the Roman interdicts. Roman law gave protection to possessors. One who had been dispossessed could recover land by bringing the interdict *unde vi*. One who had not been dispossessed could bring the interdict *uti possidetis* against a person who interfered with his possession of

land. One who wished to recover or protect possession of moveable property could bring the *interdict utrubi*. The Roman interdicts could only be brought by possessors and not by mere holders. Lessees, borrowers, or depositees were not considered to have possession in Roman law.[1]

A second, and practically more important, historical root of the modern systems of possessory protection is the Germanic rules regarding *Gewere*. Germanic law did not distinguish between ownership and possession; it protected *Gewere* (in English seisin, in French *saisine*). Originally, *Gewere* was not possession, but the only form of relationship between an individual and a thing. It was protected by the law, through different actions which were developed in the different countries.

According to a rule of uncertain origin, but which was widely applied across Europe, when he was ousted of possession (disseisin), a person had to act within one year and a day:

> If one forcibly disseised did not within one year and a day proceed, in reliance upon his incorporeal seisin, against the holder of the corporeal seisin, then the corporeal seisin, which was as such defective because of the breach of right, was transformed into a legitimate ("rechtsmässige") seisin, in favour of the disseisor and every later holder. The defective origin was wholly overcome by the fact of physical control exercised through a year and a day; for the disseisee had forever estopped himself by silence.[2]

When re-read through Roman glasses in the late Middle Ages, *Gewere* was equated with possession and opposed to ownership.

The third root of the modern systems of possessory actions lies in canon law. The *actio spolii*, a canon law remedy, was based on a passage in the *Decretum Gratiani*. The text began with the word "redintegranda" and so gave this name to the remedy (which was also called *condictio ex canone reintegranda*). According to the text, when a bishop was ejected from his diocese, before a synod was called to consider the merits of his expulsion, everything had to be restored to the bishop. Apparently this remedy originally took the form of a special plea, an *exceptio spolii,* in terms of which the expelled bishop could claim to be restored before he was subject to criminal prosecution. It was later transformed into an action, at first known as the *condictio ex canone redintegranda,* later as the *actio spolii.* From very early times it was made available to ordinary citizens.

1 See W W Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 3rd edn revised by P Stein (1963) 196-197; W W Buckland and A D McNair, *Roman Law and Common Law. A Comparison in Outline*, 2nd edn revised by F H Lawson (1952) 70 ff.

2 R Huebner, *A History of Germanic Private Law* (1968) 201.

The *actio spolii* was not originally developed to protect possessors, in the Roman sense, and there is some evidence that it was available also to mere holders (albeit with some hesitation, probably deriving from the temptation to identify the *actio spolii* with the Roman interdict *unde vi*). There was also much discussion whether the mere holder could act against the possessor, or only against third parties. For instance, according to the Italian jurist Pontanus, the remedy "ex canone reintegranda" was given also to mere holders, "ut commodatario, depositario, aliisque nomine alieno rem detenentibus"; several authorities said that "tam ex eius verbis, quam ex mente ipsius canonis detentori contineri"; "non tamen procederent predicta in depositatio & commendatario spoliator ab eius authore, sed si spolierentur a tertio".[3]

Mixing these different influences meant that a new law of possession was born in the late *ius commune* period which was very different from Roman law:

> The doctrine of seisin was unable to hold its own against the intruding alien law. The alien law before which it had to yield was not, however, the pure Roman law of "possession". It was rather that law which Italian theory and the practice of legists and canonists had developed out of the Roman, following the lead of canon law.[4]

At least in some parts of Europe, possessory protection was at this point generally extended to mere holders.

According to the German jurist Augustin von Leyser, possession "in genere" can be distinguished "in nudam detentionem & possessionem in specie sic dictam"; but "quod ad precipuum possessionis effectum, remedia nempe possessoria, nudus detentor a possessore in specie dicto, qui nempe animum sibi habendi habet, vix differt, quum uterque iis remediis gaudeat".[5] While *detentio* is conceptually kept distinguished from possession proper, because the possessor, but not the *nudus detentor*, has the *animus sibi habendi*, with regard to possessory remedies they hardly differ, because both the possessor and the *nudus detentor* enjoy them.

The extension of possessory protection to mere holders was explicitly stated by the Prussian *Allgemeines Landrecht* of 1794: "Gegen Gewalt muß jeder Inhaber und Besitzer geschützt warden".[6]

3 J B Pontanus, *De Spolio* (*Tractatus Uni Iuris* t XIV f 270) bk 1 ch XIII, 126.

4 Huebner, *History* (n 2) 204 ff.

5 A Leyser, *Meditationes ad Pandectas*, vol VII (1780) specimen 451.

6 *Allgemeines Landrecht*, Pt I, Tit 7 § 141.

B. POSSESSORY ACTIONS IN FRANCE BEFORE THE CODIFICATION

In France possession was traditionally protected by two actions: *réintégrande* and *complainte en cas de saisine et nouvelleté*. (*Dénonciation de nouvelle œuvre* will not be considered in this paper.)

It is important to note that these two actions had different origins. While *réintégrande* was obviously derived from the *condictio ex canone reintegranda* of canon law, *complainte en cas de saisine et nouvelleté* was originally born to protect *saisine* (*Gewere*): "unlike the German law, the Anglo-Normans and the French law did develop distinctive possessory actions ... particularly the so-called 'querela novae dissaisinae'".[7] The importation of Roman concepts caused it to be re-read as an action to protect possession.

> Possession of land was traditionally protected by two actions, *réintégrande* and *complainte en cas de saisine et nouvelleté* ... A person dispossessed could bring either action without having to prove title. *Réintégrande* could be brought by anyone who had been dispossessed by violence however long he had been in possession. *Complainte* could only be brought by one who had once been in continuous possession for a year and a day. It could be brought either to recover possession, however it had been lost, or to stop a disturbance to one's possession. In many cases, then, *complainte* and *réintégrande* overlapped.[8]

This illogical system was the result of the fact that the two actions derived from two completely different roots: the protection of Germanic *saisine* simply coexisted with the action derived from canon law.

It was the absolutely prevailing view in legal practice that *réintégrande* and *complainte en cas de saisine et nouvelleté* were two different actions, with different requisites: "pour intenter la complainte, il faut avoir la possession d'an & jour dans le dernier temps, & y être troublé"; "pour demander la réintégrande, la possession actuelle, au temps où l'on a été dépossédé, suffit".[9] However, there were attempts to "rationalise" the system of possessory actions, while re-reading it through Roman glasses. Pothier, for instance, reduces the two actions to one:

> Le possesseur, quel qu'il soit, doit avoir aussi une action pour être maintenu dans sa possession, lorsqu'il y est troublé par quelqu'un, et pour y être rétabli, lorsque quelqu'un l'en a dépossédé par violence ... Notre droit français donne aussi au possesseur, quel qu'il soit, pour l'un et pour l'autre cas, une action qu'on appelle complainte. Lorsque le possesseur l'intente pour le cas auquel il est troublé dans sa possession, elle s'appelle complainte en cas de saisine et nouvelleté. Lorsqu'il l'intente pour le cas auquel il a été dépossédé par violence, elle s'appelle complainte pour force ou pour dessaisine, autrement action de réintégrande.[10]

7 Huebner, *History* (n 2) 201.

8 J Gordley and U Mattei, "Protecting possession" (1996) 44 *American Journal of Comparative Law* 293 at 313.

9 J B Denisart, *Collection de décisions nouvelles*, 7th edn, vol 1 (1771) *Complainte & Réintégrande* 567. I

In Pothier's mind, there is just one action, which takes a different name when it is used in case of violent dispossession or in case of simple disturbances. The general name of the action is *complainte*; it is however more properly called *complainte en cas de saisine et nouvelleté* when it is used to react to disturbances; it is called either *complainte pour force ou pour dessaisine* or *action de réintégrande* when it is used to react to violent dispossession. While appealingly rational-sounding, it is very doubtful that Pothier's reconstruction corresponds with the reality of French law.

It is not entirely clear whether the *réintégrande* was available also to mere holders. For reasons that we will see shortly, it seems plausible that in legal practice mere holders could bring *réintégrande*. However, Pothier expressly excludes this possibility. It has to be noted that, with regard to *réintégrande*, Pothier writes: "on appelle en droit cette action *interdictum unde vi*".[11] Pothier expressly identifies the French actions with the Roman interdicts; it is thus quite logical that he gives *réintégrande* only to possessors in the Roman sense:

> L'action de réintégrande étant l'action qu'a celui qui a été dépossédé, et n'y ayant que celui qui possédait, qui puisse être censé avoir été dépossédé, il s'ensuit que lorsqu'un fermier a été chassé par violence d'un héritage qu'il tenoit à ferme, il peut bien avoir une action *in factum* contre celui qui a exercé la violence, pour réparation du tort qu'il lui a causé; mais il ne peut pas intenter contre lui l'action de réintégrande: car ce n'est pas lui qui possédait l'héritage, ni par conséquent lui qui en a été dépossédé.[12]

According to Pothier, when he is expelled by violence, a lessee can bring an action in tort but he cannot bring against the wrongdoer an *action de réintégrande* since he has never possessed the land and it is not he who has been dispossessed.

C. THE SURVIVAL OF *RÉINTÉGRANDE* AS AN AUTONOMOUS ACTION

The French Code Civil did not regulate possessory actions in its original version. However, they were later regulated (without being defined or enumerated) by the Code de Procédure Civile, art 23: "Les actions possessoires ne seront recevables qu'autant qu'elles auront été formées dans l'année du

10 R J Pothier, "Traité de la possession", ch VI, n 84, in Œuvres *de Pothier*, vol IX (1846) 291-292.

11 R J Pothier, "Traité de la procédure civile", ch III, n 311, in Œuvres *de Pothier*, vol X (1848) 138.

12 Pothier (n 10) at ch VI, n 115.

trouble, par ceux qui, depuis une année au moins, étaient en possession paisible par eux ou les leurs, à titre non précaire".

The "one year and a day rule" was transformed into the requisite of having been in possession for at least a year, and apparently extended to any possessory action. However, the old system, with its distinction between *complainte* and *réintégrande*, was able to survive.

A pivotal role in the survival of the distinction was played by Henrion de Pansey, an influential judge, President of the Chambres des Requêtes of the Court de Cassation. In his famous treatise *De la compétence des juges de paix*,[13] when dealing with the Code's reference to the *actions possessoires*, he makes extensive use of the historical sources, taking for granted the distinction between *complainte* and *réintégrande*.

Discussing the distinction between *complainte* and *réintégrande*, he writes:

> Une autre différence, c'est que, pour être admis à la complainte, il faut avoir *saisine*, c'est-à-dire avoir possédé pendant tout le cours de l'année qui a precedé le trouble, et que, pour la réintégrande, il suffit de prouver que l'on possédoit au moment de la spoliation.[14]

However, the point was far from uncontroversial, and by the first half of nineteenth century the idea that the requisite of ultra-annual possession was applicable to both possessory actions was well represented among the French legal writers. Troplong, for instance, writes that the Code of Civil Procedure "cimente l'alliance définitive de la complainte avec la réintégrande ; il soumet ces deux actions aux mêmes conditions".[15] There was little doubt, however, about which opinion prevailed in legal practice. What is more interesting is that the French courts easily admitted that mere holders (like lessees) could bring *réintégrande*; and in effect this quickly became the key point of the debate. This seems indicative of the prevailing perception among French legal practitioners of *réintégrande* as an action which was not restricted to possessors in the strict sense.

After describing the debate among French legal scholars, the *Répertoire Dalloz* concludes that Henrion's doctrine has "le constant suffrage de la court de cassation": "ainsi, elle a jugé que l'action en réintégrande est valablement intentée, soit par celui qui ne possède qu'à titre précaire, tel qu'un fermier ou un antichrésiste;– soit par celui qui n'avait pas la possession annale au moment de la violence ou voie de fait".[16] Several cases are thus reported, where the

13 The justice of the peace was given competence in possessory actions.
14 P P N Henrion de Pansey, *De la compétence des juges de paix* (1831) 464-465.
15 R T Troplong, *Commentaire sur la prescription* (1843) 181.
16 A Dalloz, *Répertoire de législation, de doctrine et de jurisprudence*, vol III (1846) 89.

action en réintégrande was given to a lessee[17] and a creditor in antichresis,[18] and to someone who had been in possession for less than a year.[19] In the first of the cases reported by the *Répertoire Dalloz*, Mr Dauphinot, the lessee of a piece of land, was granted the *action en réintégrande* against Dame Dea, who had occupied three meters of land along the border with her own property.[20] The case was decided by the Chambres des Requêtes of the Court de Cassation, chaired by Henrion de Pansey.

French legal writers were quick to accept the view sponsored by the case law. Still it is plain to see that they accepted it with some uneasiness. We may conventionally consider the adoption of Henrion's thesis in the influential *Treatise* by Aubry and Rau (which had adopted the opposite view in earlier editions) as its definitive consecration. It is remarked, however, that "la réintégrande est une action possessoire *sensu latissimo*":

> Elle diffère des actions possessoires proprement dites, et spécialement de la complainte, en ce qu'elle est accordée, bien moins pour la garantie et la conservation de la possession, que pour la réparation du fait illicite et contraire à la paix publique dont s'est rendu coupable l'auteur d'une dépossession consommée par violence.[21]

Réintégrande is not a true possessory action: it is different from *complainte* since its aim is less protecting possession than redressing a wrong which is contrary to the public peace, committed by the perpetrator of a violent dispossession. Only in this light can one justify the fact that "la réintégrande n'exige pas, pour son admission, une possession proprement dite". Since the *réintégrande*'s function is guaranteeing the public peace, it can be brought only in cases of violent dispossession: réintégrande "suppose en outre, non pas seulement un simple trouble, mais une dépossession"; "encore faut-il que cette dépossession ait été consommée par des voies de fait exercées contre les personnes ou contre les choses, et qui soient d'une nature assez grave pour compromettre la paix publique".[22]

This had been the situation in France for more than a century. The *complainte* could be brought in case of "simple" dispossession or in case of disturbances of possession; the *réintégrande* only in case of violent dispossession. The *complainte* could be brought only by ultra-annual possessors, the *réintégrande* by any possessor and by mere holders.

17 Cass Req 10 November 1819.
18 Cass Req 16 May1820.
19 Cass Req 28 December 1826.
20 Cass Req (n 17); also in *Laporte* (1820) 189.
21 C Aubry and C Rau, *Cours de droit civil français*, 5th edn, vol 2 (1897) 249 ff.
22 Aubry & Rau, *Cours* (n 21) 249 ff.

D. THE REFORM OF 1975

It is not easy to explain why the law changed in France. Certainly, French legal writers often mentioned the fact that in German law both possessors and mere holders are able to bring possessory actions.

On the other hand, it could be quite embarrassing to determine when a dispossession was "violent" enough to justify *réintégrande*. It may be noted that even in the seminal *Dauphinot* case there is no mention of any particularly blatant act of violence by Dame Dea. Furthermore, it is quite difficult to understand why a mere holder, who was protected by the law, could not bring any action in case of mere disturbance of his enjoyment of the land (as in case of nuisances).

In any case, in 1975 a new statute (Loi n 75-596 du 9 Juillet 1975) introduced a new chapter to the Civil Code, "De la protection possessoire", composed of two articles: 2282 and 2283, which, as a consequence of other reforms of the Code, are now arts 2278 and 2279. According to art 2278, "Possession is protected, regardless of the substance of the right, against disturbance which affects or threatens it. Protection of possession is also granted to a person who holds a thing against all other than the one from whom he holds his rights". The Code of Civil Procedure, with its original reference to possession for at least one year, created some problems of coordination with the new articles of the Civil Code, and it was later changed. According to art 1264 of the Code of Civil Procedure,

> subject to compliance with the rules relating to public property, possessory actions are initiated within the year during which the disturbance occurred to those who possess or hold peacefully the property for at least a year. However, the *action en réintégration* against the perpetrator of a forceful act may be brought even when the victim of the dispossession has possessed or held the property for less than a year.

According to contemporary French law, both possessors and mere holders can bring both *complainte* and *réintégrande*. Mere holders, however, cannot bring possessory actions against those from whom they hold their rights (e.g. the lessor). There is still a difference between *complainte* and *réintégrande*: *réintégrande* does not require that the thing has been possessed or held for at least a year.

On a terminological note, it has to be noted that, in opposition to "true" possession, the situation of the mere holder is indifferently called *possession précaire* or *détention précaire*.[23]

23 See e.g., F Terré and P Simler, *Droit civil: Les biens*, 7th edn (2006) 154-155; F Zenati-Castaing and T Revet, *Les biens* (2008) 649-650.

E. THE POSSESSORY PROTECTION OF MOVABLES

It is well settled in France that possessory actions do not apply to movables. With regard to *réintégrande*, the point was quite uncertain before the Civil Code.[24] However, limiting *réintégrande* to immovables was coherent with the strategy of assimilation of *réintégrande* to the Roman interdict *unde vi* and of resystematisation of *réintégrande* and *complainte* as two instances of the same action.[25]

In any case, there is no doubt today that movables are excluded from possessory protection.[26] Apart from some references to the low value of movables,[27] which hardly make sense in contemporary society, the most frequent explanation of this exclusion is linked to the rule: "En fait de meubles, la possession vaut titre", "qui a pour effet de rendre le possessoire inséparable du pétitoire".[28]

According to art 2276 (formerly art 2279) CC,

> in matters of movables, possession is equivalent to a title. Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

In France, the possessor can thus simply bring the *action de revendication*: this last action is given to the owner, but, with regard to movables, the proof of "possession antérieure équivaut à prouver la propriété".[29] However, the exclusion of movables from possessory protection is still puzzling. When one considers that the mere holder of a movable (for instance a depositee) is not presumed owner *ex* art 2276 CC, why should a depositee, or a borrower, of a moveable be excluded from the *réintégrande*?

24 See e.g., Denisart (n 8) 567: "La complainte ne peut avoir lieu que pour un immeuble ou droit réels, ou une universalité de meuble; au lieu que la réintégrande peut s'intenter pour un meuble, lorsqu'il a été enlevé par violence ou voie de fait".

25 See e.g., Pothier (n 10) ch VI, n 107: "L'interdictum *unde vi* du droit romain, auquel répond notre action de réintégrande, a lieu à l'égard de toutes espèces de biens fonds dont quelqu'un a été dépossédé, soit fonds de terre, soit maisons ... Pareillement, dans notre droit, notre action de réintégrande étant une branche de l'action de complainte, n'a lieu que pour les immeubles, et non pour des simples meubles"; C J Ferriere, *Dictionnaire de droit et de pratique*, 3rd edn (1749) vol II, *Réintégrande* 720 : "Réintégrande est l'interdit unde vi, ou l'action possessoire, par laquelle celui qui a été déjetté & spolié de la possession d'un immeuble, se peut pourvoir dans l'an & jour de la spoliation, afin d'être remis & réintegré es sa possession ... ".

26 See Emerich, Chapter 2 of this volume, text to nn 120 ff.

27 See, e.g., Terré & Simler, *Droit civil* (n 23) 172: "le meubles ayant souvent peu de valeur, il serait excessif d'engager deux débats, l'un au possessoire, l'autre au pétitoire".

28 See Terré & Simler, *Droit civil* (n 23) 172.

29 See J Djoudi, "Revendication", in *Encyclopédie Dalloz* (2008) at 20.

The answer lies in the rules concerning *revendication*. Not only is anterior possession considered as equivalent to proving ownership for a movable, but mere holders, like the depositee, can also bring an *action en revendication*.[30] For instance, a decision gave the *action en revendication* to the simple depositee of some bicycles which were stolen.[31]

Some legal writers admit that "l'action de revendication exercée par le dépositaire semble jouer le rôle d'une action possessoire comparable à l'action en réintégrande en matière immobilière":[32] it plays the role of a possessory action comparable to the *action en réintégrande* for immovables.

While other legal systems (for instance, Italy) take the Roman idea that in *rei vindicatio* the plaintiff has to prove his ownership quite seriously, in France *revendication* of movables is in effect given to possessors and even to mere holders. The system of possessory protection in France (and not in other civil law systems) includes *revendication* of movables.

F. A GLIMPSE AT THE EVOLUTION OF GERMAN LAW

We have already mentioned how the German-speaking world adopted a system of possessory actions which was influenced by both the Germanic and the canonistic traditions, and very distant from Roman law. It has to be noted that, in the context of his return to the original Roman law, Savigny was strongly critical of the extension of possessory remedies to mere holders. According to Savigny, the *actio spolii* had been usefully applied to some new legal institutes, which were unknown to the Romans:

> The middle ages have bequeathed to us several important new legal institutes, to which a protection of Possession would have been afforded by the Roman law, if they had been known to the latter. To this class belong especially, besides the numerous jurisdictionary and ecclesiastical rights, the widely extended servitudes on land of the German Empire. In this latter case the application of the above remedy introduced in practice raises no question.

But further than this:

> I do not conceive that spoliatory suits can be carried. Not for instance to those legal institutes, that in their nature do not contain any necessity, or even a capability, for any logical or sound application of the protection of Possession; I mean family rights and obligations. But I consider the application of spoliatory suits to the province, already fully occupied by the possessory interdicts of the Roman law, to be equally unfounded … If this view is correct, then the hirer and the borrower, to whom interdicts are refused, must also be denied the use of spoliatory suits.[33]

30 See Djoudi (n 29) at 20.
31 Tribunal civil de Hazebrouck, 15 mars 1901, in *D.* 1902, 2, 11.
32 Djoudi (n 29) at 20.
33 F K von Savigny, *Treatise on Possession* (1848; repr 2003) 402 ff.

Savigny's view, however influential, was not widely followed in legal practice. Windscheid explicitly says that Savigny's view had triumphed in legal theory, but was not consistently followed in practice.[34] As is well known, the German Civil Code rejected the Savignian subjective theory of possession, which considered the intent to own the thing as an essential element of possession in the proper sense of the word.

In German law, possession is the exercise of factual authority over a corporeal thing (*Sachbesitz*). The intent to possess as owner is thus not an indispensable requirement for possession. Any person who exercises factual authority over a thing is a possessor, even if he exercises that authority on behalf of another person. The BGB states that "possession of a thing is acquired by obtaining actual power or control over the thing" (s 854), and explicitly qualifies the lessee and the depositee as possessors (s 868). However, "if a person exercises actual power of control over a thing on behalf of another person in the latter's household or place of business, or in a similar relationship by virtue of which he has to comply with the instructions of the other concerning the thing, it is only that other person who is the possessor" (s 855); the detainer in this case is known as the possession-helper (*Besitzdiener*).

According to s 861 of the BGB:

> If the possessor is deprived of possession by unlawful interference, he may demand the restitution of possession from the person whose possession is defective relative to him. The claim is excluded, if the possession taken away was defective relative to the present possessor or his legal predecessor and was obtained within the year preceding the deprivation.

According to s 862 of the BGB:

> If the possessor is disturbed in possession by unlawful interference, he may demand from the disturber the cessation of the disturbance. If further disturbances are apprehended, the possessor may seek an injunction. The claim is excluded, if the possession of the possessor is defective relative to disturber or his legal predecessor and the possession was obtained within the year preceding the deprivation.

On the whole, the practical coincidence with French law is evident: in German law the lessee is a possessor and so he enjoys possessory protection; in French law the lessee is not a possessor but he enjoys possessory protection.

G. THE ITALIAN CIVIL CODE OF 1865

The Italian Civil Code of 1865 expressly regulated possessory actions. According to art 694, "chi trovandosi da oltre un anno nel possesso legittimo

34 B Windscheid, *Lehrbuch des Pandektenrechts*, vol I (1891) 476-477.

di un immobile, o di un diritto reale, o di una universalità di mobili, viene in tale possesso molestato, può entro l'anno dalla molestia chiedere la manutenzione del possesso medesimo" ["one who has been for more than a year in the lawful possession of an immovable, of a real right in an immovable, or of a universality of movables and is disturbed in such possession, can, within a year of the disturbance, sue for protection of possession"].

According to art 686, Possession was considered "legittimo" (lawful) when it was "continuo, non interrotto, pacifico, pubblico, non equivoco e con animo di tenere la cosa come propria" ["continuous, uninterrupted, peaceful, public, unequivocal, and with the intention of holding the thing as the owner"]. It was thus obvious that the action regulated by art 694, commonly called "azione di manutenzione", was the equivalent of the French *complainte*, and that it was open only to ultra-annual possessors in the proper sense.

However, according to art 695, "chi è stato violentemente od occultamente spogliato del possesso, qualunque esso sia, di una cosa mobile ed immobile, può entro l'anno dal sofferto spoglio chiedere contro l'autore di esso di venir reintegrato nel possesso medesimo" ["one who has been violently or by stealth deprived of possession, whatever it is, of a movable or an immovable thing, can, within a year of the loss, sue the taker for recovery of possession"]. The action regulated by art 695 was commonly called the "azione di reintegrazione".

The words "possesso, qualunque esso sia" were read as including the situation of the mere holder (which in Italian is called "detenzione"; but at the time was also frequently called "possesso precario" [precarious possession]).[35] The more common theoretical reconstruction strongly denied that the situation of mere holders could be qualified as possession, and justified the extension to them of the *azione di reintegrazione* with reasons of public order:

35 See e.g., P Baratono, *Delle azioni possessorie e delle azioni di denuncia di nuova opera e di danno temuto*, 2nd edn (1876) 386 ("Ma, nel caso di spoglio violento od occulto, anche l'affittuario e ogni altro qualsiasi possessore precario possono agire in reintegrazione"); F Ricci, *Corso teorico-pratico di diritto civile*, 2nd edn, vol V (1886) 178: "la reintegrazione è diretta ad ottenere la restituzione della cosa toltaci violentemente od occultamente, quand'anche ne fossimo detentori senza alcun titolo e senza la pretesa di esercitare un diritto di proprietà"; G C Consolo, *Trattato teorico-pratico del possesso e delle azioni possessorie* (1901) 674 ("Si può allegare quindi un possesso legittimo o illegittimo, anche la semplice detenzione; in maniera che i fittaiuoli, i coloni possono sperimentare la reintegra, come possono sperimentarla le persone nel cui nome detengono").
It has to be noted that the Code itself, speaking of the lessee, the depositary and all those *"che ritengono precariamente la cosa" (which detain precariously the thing)*, said that they *"possedono in nome altrui"* [possess in the name of another] (art 2115, excluding that they could acquire by adverse possession). This reference, while hardly incompatible with maintaining a strong distinction between *possesso* and *detenzione*, showed that in the language of the Code they still could be considered as possessors in some sense of the word.

> Nobody, who detains the thing or exercises a right in the name of another person, can have in himself possession, which belongs to the person in the name of whom he detains the thing or exercises the right ... if, for reasons of public order, the lessee can, in spite of the precariousness of his detention, bring the *azione di reintegrazione* in case of dispossession, this right derives from an exceptional provision, which does not have any fundament in the lawfulness of his possession.[36]

It is interesting to note, however (and not too difficult to understand, given the wording of the Civil Code), that some Italian writers preferred to say that the situation of mere holders could still be included into possession, in a wide sense of the word: "possession, even though secondary and derivative, belongs also to those who detain the thing in the name of another person".[37] There was little doubt, in Italy, that the mere holder could bring *azione di reintegrazione* even against the owner of the thing.[38] With regards to movables, art 695 CC (in line with the Italian tradition) made it clear that the *azione di reintegrazione* was applicable.

H. CONTEMPORARY ITALIAN LAW

The Civil Code of 1942 makes the rules which had been developed in France and Italy explicit (and reflects quite well the Italian tradition which had been developed since the late *ius commune* period). Art 1168 regulates "azione di reintegrazione". According to the Italian Civil Code:

> One who has been violently or by stealth deprived of possession can, within a year of the loss, sue the taker for recovery of possession. The action is also available to him who has the *detenzione* of the thing, except in case in which he has it for reasons of service or of hospitality.

Art 1170 regulates "azione di manutenzione":

> One who has been disturbed in possession of an immovable, of a real right in an immovable, or of a universality of movables can, within a year of the disturbance, sue for protection of possession. The action is available if the possession has lasted more than one year, continuous and uninterrupted, and was not acquired

36 Baratono, *Delle azioni possessorie* (n 34) 110 ("nessuno, il quale detenga la cosa od eserciti un diritto a nome di un altro, può avere un possesso proprio, risiedendo questo in colui, a nome del quale esso detiene la cosa od esercita un diritto ... se per ragioni di ordine pubblico può l'affittuario, malgrado la precarietà di sua detenzione, esercitare l'azione di reintegrazione nel caso di spoglio, questa specie di diritto deriva da una disposizione eccezionale, che non ha alcun fondamento nella legittimità del possesso").

37 L Borsari, *Commentario del Codice Civile italiano*, vol II (1872) 1110 ("un possesso, quantunque secondario e derivato, appartiene anche a quelli che detengono la cosa in nome altrui").

38 See e.g., Baratono, *Delle azioni possessorie* (n 35) 399: "La materiale detenzione della cosa è sufficiente per far luogo a quest'azione, anche contro il proprietario della medesima, che abbia violentemente od occultamente spogliato del possesso questo detentore".

> violently or clandestinely. When possession was acquired in a violent or clandestine manner, the action can nonetheless be brought after a year from the day on which the violence or clandestinity ceased. He who has suffered a non-violent or non-clandestine taking can sue to be put back into possession, if the conditions indicated in the preceding paragraph exist.

In Italian law, it is thus clear that any possessor or mere holder can bring an *azione di reintegrazione*, if he is deprived of possession violently or by stealth (the only exception is the holder who detains the thing for reasons of service or of hospitality, more or less corresponding with the *Besitzdiener* of German law; this holder is called "detentore non qualificato", or, much to the confusion of those familiar with the French terminology, "detentore precario"). Only the ultra-annual possessors of immovables or universalities of movables can bring the *azione di manutenzione* in case of disturbances or of non-violent and non-clandestine dispossession.

Italian law is thus very similar to French law before 1975. However, in Italy there has never been any doubt about the availability of *azione di reintegrazione* to possessors or mere holders of movables. It has to be noted that what in Italy goes under the name of the "possesso vale titolo" principle is quite different from the French rule: the Italian Civil Code simply states that "he to whom movable property is conveyed by one who is not the owner acquires ownership of it through possession, provided that he is in good faith at the moment of consignment and there is an instrument or transaction capable of transferring ownership" (art 1153).

Possession of movables is thus a means of acquisition of ownership. However, in principle the *azione di rivendicazione* cannot be brought by anyone except the owner. The possessor of a movable thing may very well not be the owner, for instance, because he was not in good faith or the transaction was invalid for reasons independent from the lack of ownership of the transferor. In such a case, he cannot bring the *azione di rivendicazione*, nor can a mere holder. They can, however, bring *azione di reintegrazione*. It should also be remarked that in Italy there is little doubt that the mere holder can bring the *azione di reintegrazione* against those from whom he holds his rights (for instance: the lessee can bring the *azione di reintegrazione* against the lessor).[39]

Apparently, after the French turnaround in 1975, the two systems parted ways: in contrast to France, Italy continues to discriminate between possessors and mere holders with regard to possessory protection. However, this has to be accepted with some reservations.

39 Among the most recent decisions, see Cassazione civile (24 March 1979) n 1737; Cassazione civile (6 November 1991) n 11853; Pret Milano (9 December 1991) in *Foro italiano* (1992) I, 2463.

Italian courts have interpreted "violence" in such a way that every dispossession is necessarily violent. According to the Italian Corte di Cassazione:

> In case of dispossession any action which deprives someone of possession against his will should be qualified as violent, even if there are no true acts of physical violence, and so the requisite of violence is satisfied if the dispossession is perpetrated through arbitrary acts aimed at depriving someone of his possession or preventing him from exercising it, against his explicit or implicit will.[40]

The possessor's contrary will is presumed, and this presumption is rebutted only on condition of an explicit manifestation of consent; mere silence is in itself ambiguous.[41] Now, someone taking something with the possessor's consent is not dispossessing him at all. This means that any dispossession in the proper sense of the word, according to Italian case law, is necessarily violent (and thus gives rise to an *azione di reintegrazione*, which can be brought also by a mere holder).

On the other hand, the Italian courts have shown a distinct tendency to allow an *azione di reintegrazione* in cases where possession has been disturbed but not lost. For example, in one case ploughing a tract of land, thus precluding its utilisation as pasture, was considered as dispossession and not mere disturbance of possession.[42] It is also worth mentioning that several Italian legal writers think that at least the lessee can bring the *azione di manutenzione*, on the basis of art 1585 CC. According to this article, while "the lessor is bound to warrant the lessee against disturbances which diminish the use or enjoyment of the thing, caused by third persons claiming rights in it", "the lessor is not bound to warrant the lessee against disturbances which diminish the use or enjoyment of the thing, caused by third persons who do not claim rights, but the lessee has the power to bring action against them in his own name". Some Italian writers think that the last part of the article implicitly confers to the lessee the power to bring the *azione di manutenzione*[43] (while

40 Cassazione civile (23 February 1981) n 1101: "In tema di spoglio deve ritenersi violenta qualsiasi azione che produca la privazione del possesso contro la volontà anche presunta del possessore, ancorché non vi ricorrano veri e propri atti di violenza materiale, e, pertanto, l'estremo della violenza sussiste anche se lo spoglio venga compiuto con atti arbitrari, comunque finalizzati, contro la volontà espressa o tacita del possessore, a togliere a questi il possesso o ad impedirgliene comunque l'esercizio".

41 Cassazione civile (13 February 1999) n 1204: "Ricorre "spoglio violento" anche nella privazione dell'altrui possesso mediante alterazione dello stato di fatto in cui si trova il possessore eseguita contro la volontà, anche soltanto presunta del possessore, presunzione sussistente sempre che manchi la prova di una manifestazione univoca di consenso e che non è superata dal semplice silenzio, fatto di per sé equivoco che non può essere interpretato senz'altro come manifestazione di consenso o di acquiescenza".

42 Cassazione civile (6 November 1991) n 11853.

43 R Sacco, *Il possesso, la denuncia di nuova opera e di danno temuto* (1960) 101; F Galgano, *Diritto civile e commerciale*, 2nd edn, vol 1 (1993) 400-401.

the traditional opinion is that that he can only sue for damages).

While Italian law still distinguishes between possessors and mere holders, this is probably not true for "simple" dispossession, and there are some signals that Italian scholars and practitioners are somewhat uneasy with excluding protection against disturbances for mere holders.

I. FINAL REMARKS

The system of possessory actions in France, Germany and Italy is the result of a stratification of legal institutes, having different origins. They were variously recombined in legal practice; any effort of rationalisation should be handled with caution. In France, for example, the attempt to read *complainte* and *réintégrande* as two variants of the same action led to a substantial miscomprehension of the rules applied by the courts. Similarly, the attempts to read the possessory actions through Roman-law lenses were often the source of deformations. Modern possessory actions were not born to protect possession in the Roman sense.

In all the legal systems here considered, we can see a definite tendency to extend the legitimisation to bring possessory actions, notwithstanding the hostility of two of the most influential legal scholars in the Western legal tradition in Pothier and Savigny, and notwithstanding a provision in the French Code of Civil Procedure which when enacted did not seem at all favourable.

On a practical plane, it is easy to understand why all legal systems give possessory remedies to mere holders. This is advantageous to holders, but also to owners, who are spared the need to intervene in the defence of holders (who are usually in the best position to act, while owners may be absent). Denying any remedy to holders is advantageous only to wrongdoers.

On the other hand, once you allow a limited protection to mere holders, there is a strong pressure to enlarge it. It seems evidently quite artificial to distinguish between "simple" and violent dispossessions, and between dispossessions and mere disturbances.

6 The Protection of Possession in Scots Law

Craig Anderson°

A. POSSESSION IN SCOTS LAW

This paper is concerned with how possession is protected in Scots law. Most of the paper is concerned with one possessory remedy in particular, the so-called possessory judgment. To see how this fits into the law of possession more generally, we shall begin with an overview of the Scots law of possession.

Unlike the majority of civilian systems of property law, Scots law is not codified. Except where the law is governed by statute (and the law of possession is largely free from this), we look to the institutional writers of Scots law,[1] especially Stair, and to the decisions of the courts.

When we look at the Scots law of possession, we find marked similarities to the Roman law.[2] For example, we see in Roman law a distinction drawn between possession and ownership, Ulpian saying that the two have "nothing in common",[3] with the result that possessory questions are not determined by asking who has the *right* to possess. Possession gives no right to possess beyond a right not to have that possession disturbed without consent or legal process. Certainly, it gives no rights against third-party acquirers: the main possessory interdicts, *utrubi* for moveables[4] and *uti possidetis* and *unde vi* for land,[5] are not worded to give any right against third parties.[6] Furthermore,

° The author has benefited from helpful comments by Professor George Gretton and Mr Scott Wortley, School of Law, University of Edinburgh, on a draft of this paper. Any errors remaining are the author's responsibility.

1 The institutional writers are a small group of writers, writing between the seventeenth and nineteenth centuries, whose works are considered to be a formal source of law. In private law, the most important such works are Stair's *Institutions*, Erskine's *Institute*, Bankton's *Institute* and Bell's *Principles* and *Commentaries*. Craig's *Jus Feudale* is also sometimes included in the list.

2 On the relationship between the Roman and Scots laws of possession, see further K Reid, "Property law: sources and doctrine", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000) at 210-212.

3 D 41.2.12.1.

4 D 43.31.1 *pr.*

5 D 43.17.1 *pr.* (*uti possidetis*); D 43.16.1 *pr.* (*unde vi*).

6 This must be qualified slightly for the interdict *utrubi* in the classical law, which gave possession to the party who had had possession for longest in the previous year, that possession not being *vi clam aut precario*. In theory, therefore, it could be used in appropriate circumstances to recover possession from someone other than the immediate dispossessor. In the law of Justinian, however,