
8. Possession

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1. INTRODUCTION

The tensions present within the law of possession have long fascinated writers in both the common law and civil law traditions (Harris, 1961: 69). Possession gives rise to a number of legal effects. The most important of these are legal protections available in both common law and civil law systems to possessors against disruptions of their possession; presumptions that the possessor of a thing is also the thing's owner; and acquisition through adverse possession in the common law, or through acquisitive prescription in the civil law. This potential for the right of possession to prevail even over the rights of a true owner is one of the most remarkable aspects of possession: in some situations the law goes so far as to protect thieves and squatters against the thiefed or against the owner.

The various common law and civil law jurisdictions can be roughly arranged on a spectrum according to their relative willingness to recognize a person as having possession of a thing rather than mere detention, the latter being the word used in some jurisdictions to refer to situations deemed less worthy of legal protection. This chapter compares the law of possession in some legal systems, especially France, Quebec, England, Canada, and Germany, with additional forays into the law of Switzerland and the United States.

This chapter also takes up some of the primary features of possession: it compares approaches to the traditional definition of possession according to a physical element and one of intention, it discusses the protections to which possession gives rise, and it also explains the conceptual independence of possession from any underlying right of ownership. Although these features are accepted in the major legal systems, the approach taken by each system to these features may vary.

2. POINTS OF CONTENTION

Two of the most prominent of these disagreements are, first, the proper formulation of the elements of possession, namely the physical and – especially – mental requirements to be in possession, a topic which has been greatly influenced by the nineteenth-century debate between two German legal scholars, Savigny and Jhering; and, second, the tendency for civil law jurisdictions to view possession as a fact, while common law jurisdictions see it instead as a right. These two debates, which reflect different paths to the regulation of possession, will be discussed in turn. Each is now less pronounced than it has been in the past, allowing the potential to imagine a harmonized approach to possession.

The two debates raised here are not the only points of contention with respect to the law of possession. Important disagreements also arise surrounding actions to protect possession, notably concerning who should be entitled to the benefit of such protection. These further questions – which flow from these initial issues – are dealt with in the remainder of the chapter.

A. What Constitutes Possession? The Savigny–Jhering Debate

When should a person be recognized as being in possession of a thing? This question centres on the proper understanding of the two elements of possession, known in the civil law as *corpus* and *animus*. Even civilian traditions remain divided on this question according to the foundational doctrinal debate between two nineteenth-century German scholars, Frederich von Savigny and Rudolf von Jhering. Savigny's narrower, subjective view of possession is normally seen as coinciding with French law, which allows for the distinction between possessor and detentor, while Jhering's more permissive, objective approach was consciously adopted by the codifiers of Germany's Civil Code (BGB) (Bergel et al., 2000: 138), which adopts a unitary notion of possession (*Besitz*), although leaving the door open to the distinction between *Eigenbesitz* (Article 872) and *Fremdbesitz*. Switzerland built its own approach to possession from Germany's objective framework (Bergel et al., 2000: 139; Steinauer, 2012: 89), while the mixed civil law jurisdiction of Quebec has clung more tenaciously than France to Savigny's subjective view (see Section 4A below).

In Savigny's view, to which he refers as the subjective theory of possession, *corpus* is physical custody of a thing, while *animus* is the intention to exercise the right of property, or another real right such as usufruct (Savigny, 1845: 102). The *animus domini* – the intention to own the thing – plays an essential role in this theory. In Jhering's objective theory of possession, in contrast, *corpus* is fulfilled through acts that an owner would carry out, while *animus* is simply the will to exercise the *corpus*. In the subjective theory, 'the *animus* recedes behind the *corpus*, nearly to the point of disappearing entirely' (Jourdain, 1995: 18). The *animus* tends to be inferred from the *corpus*, although an expression of the possessor's will remains necessary. In Quebec, the subjective theory is less explicitly discussed than in France, but in practice the same underlying idea emerges (Normand, 2000: 301).

Even if the Savigny–Jhering debate is not the starting point of an analysis of possession in the common law, it has still held a measure of influence over developments in this area (Pollock and Maitland, 1968: 44, see also Holmes, 1881: ch. 6). Given the importance it places on *corpus*, the common law is usually seen as having adopted an essentially objective approach to possession.

It would, however, be too simplistic to state that the common law simply follows the objective theory, while the civil law has adopted a subjective approach. This is, first, because 'objective though it may be, the English notion of possession cannot free itself entirely from a mental element' (Papandréou-Deterville, 2004: 114).¹ Second, as noted, not all civil law jurisdictions have adopted the subjective theory, and in fact Germany and Switzerland place even less importance on intention than does the common law,

¹ All translations in this text from French sources to English are the author's.

and are more permissive in allowing, for example, concurrent possession in a thing. Even in France, the text of the Code Napoléon was initially closer to the objective theory, although it later developed in the direction of the subjective interpretation (see, e.g., Larroumet, 2004: 50).

Although one may be tempted to present these variations as problem of conceptual definition of the notion of possession, the truth of the matter is that the path to the modern law shows the traces of different historical backgrounds and understandings lurking behind the subjective and the objective notions of possession illustrated above. They are connected to the distinction between the Romanistic *possessio* and the Germanistic *Gewere*, the first attached to the distinction between possession and ownership, the second ignoring it (Zwalve, 2014).

B. Possession as a Fact or as a Right

Civilian jurisdictions – such as France, Quebec, Germany, and Switzerland – tend to describe possession as primarily factual, while common law jurisdictions – like England, the United States, and Canada – analyze it instead as a right. The factual civilian approach is often intended to clearly distinguish possession from the corresponding right of ownership. As explained by Mazeaud and Chabas (1984: 152), ‘Possession is power in fact’ whereas ‘Property ... is power in law’. Quebec civil law adopts a similar approach. The definition of possession in Article 921 of its Civil Code refers to ‘the exercise in fact ... of a real right’. Pierre-Claude Lafond explains the provision by citing the French writer Carbonnier’s description of possession as ‘custody in fact, physical *power* exercised over a thing’ (Lafond, 2007: 200).

This opposition would traditionally have been impossible to set up in the common law, in which a notion of ownership is much more recent (Reeve, 1980). Previously the concept of seisin played the most prominent role in common law. Because the common law evolved gradually from its feudal origins, in which no absolute right of ownership was known, seisin as a predominant right in property had strong conceptual ties with possession: according to common law historian J.H. Baker, seisin was simply the word for ‘[t]he fact of being in possession as a feudal tenant’ (Baker, 1990: 263). But others, such as Milsom, doubt that from a contemporary perspective we can fully understand the concept, which he describes as ‘a possession contrasted with right, yet somehow imbued with it’, which of course ‘[i]n a Roman or modern world, ... is a contradiction’ (Pollock and Maitland, 1968: vol 1, xlix). This helps to explain how seisin came to incorporate aspects of both property and possession (Radley-Gardner, 2005). The same mechanism, the action of ejectment, was used to protect both possession and ownership (Runnington, 1781: 9). Possession was thus functionally a lower-order version of the right of ownership: where ownership allowed the exclusion of any other person, possession permitted the exclusion of anyone aside from the owner.

The fact–right divide, however, is not nearly as stark as it at first appears. In the civil law Carbonnier, for example, is quick to clarify that possession ‘is undoubtedly not *purely* factual’ (2000: 215) and is best understood as the ‘shadow of property’ (2000: 202). Similarly, Roman law viewed possession as a fact, but a ‘legal fact’ (Ourliac and Malafosse, 1957: 201):

[P]ossession was not a fact if by that one means that it was unregulated by law. In the case, for example, of my taking possession of a farm, whether I have entered on the land is indeed a question of fact, but whether such an entry, assuming it to have occurred, amounts to a taking of possession is a matter governed by legal rules. What the Romans did mean by possession as a fact can be seen by contrasting possession with ownership, which in this sense is not a fact but a right. Ownership exists whether or not there is any material manifestation of it, whereas possession is dependent for its existence on such manifestation. (Nicholas, 1965: 115)

Moreover the common law has significantly shifted from its earlier approach. After seisin ceased to be the foundational notion of property in land, *Salmond on Jurisprudence* in the 1960s, for example, clearly differentiated ownership, described as a set of rights, from possession, characterized as a set of facts and actions (Salmond and Fitzgerald, 1966: 266; Gray and Gray, 2011: 205–206). Therefore, both traditions now tend to occupy similar positions, at least in that property and possession are two distinct yet nonetheless loosely connected concepts.

3. THE ELEMENTS OF POSSESSION

Roman law defined possession through its two constitutive elements, *corpus* and *animus* (Ourliac and Malafosse, 1957: 201). Civil law doctrine invariably makes reference to these twin concepts (Mazeaud et al., 1984: 158; Bergel et al., 2000: 145; Carbonnier, 2000: 202; Lafond, 2007: 205), even when only to note that a particular system places little importance on *animus* (Fromont, 2001: 145; Steinauer, 2012: 89). *Corpus* is generally defined as ‘physical control’ over a thing, whereas *animus* refers to a possessor’s will to present himself as the owner or the holder of a real right in the eyes of others (Normand, 2000: 300–301; Lafond, 2007: 207).

The formulation of Article 2192 of the *Civil Code of Lower Canada*, for example, whose wording defined possession identically to Article 2255 of the Civil Code of France, relies on law to define possession as ‘the detention or enjoyment of a thing *or of a right ...*’.² Today, the *Civil Code of Quebec* (CCQ) describes possession in Article 921 as ‘the exercise in fact, by a person himself or by another person having detention of the property, of a real right, with the intention of acting as the holder of that right’. If possession can also relate to an incorporeal right, the requirement of factual control becomes less intuitive.

The common law similarly requires that possessors satisfy twin elements of control and intention, but it has not felt as bound by the Roman framework. Although in the writings of Bracton in the thirteenth century, ‘[a]nimus and corpus are both treated on Roman lines’ (Scrutton, 1885: 89), and while Sir John William Salmond – for whom ‘[i]n the whole range of legal theory there is no conception more difficult than that of possession’ – carefully analysed the concept on the basis of the two principles of Roman origin (Salmond and Williams, 1957: 321–325), other authoritative common law writers have ignored *corpus* and *animus* altogether. For example, *Blackstone’s Commentaries on the Laws of England* does not explicitly refer to *corpus* or *animus* at

² ‘La possession est la détention ou la jouissance d’une chose ou d’un droit ...’.

all (Blackstone, 1783 [2001]): 159–162). There are nonetheless important points of commonality between the traditions, and even where the common law does not name *corpus* and *animus*, both traditions require two necessary elements for possession, one of them physical, the other intentional.

A. The Physical Element: Corpus

In both the common law and civil law traditions, a physical element of possession is necessary, which is often referred to as *corpus* or *factum*. The basic understanding is essentially the same across systems: physical control of a thing. But there are also a number of extensions beyond direct physical contact. Some systems, for example, explicitly define possession as including the enjoyment of a right, or allow incorporeal property to be possessed despite the impossibility of physical contact. The latter part of this section discusses another means of indirectly exercising *corpus*, in particular by means of another person acting as an intermediary.

i. Control or enjoyment

The physical element is implied by the definition of possession in the Civil Code of France, which requires ‘detention or enjoyment of a thing or of a right ...’. As Jean Carbonnier describes, ‘[t]he *corpus* of possession consists in physical actions carried out on the thing, of the kind that an owner would perform. But only *physical* actions. Legal actions (e.g., lease, sale) are of no significance with respect to possession, as there is no need to be in possession to carry them out’ (2000: 202–203). But Carbonnier immediately qualifies this by stating that the *corpus* can be much more conceptual than physical. For example, it includes ‘acts of enjoyment’ that involve no physical contact with the object itself, such as accepting rental payments, or exercising ‘virtual’ control: ‘a motorist who steps away momentarily from a car in a parking lot retains it nonetheless in possession’ (2000: 203).

Germany’s Civil Code – the BGB – defines possession in Article 854(1), which declares that ‘[p]ossession of a thing is acquired by obtaining actual control of the thing’. Multiple simultaneous possessors are permitted (Fromont, 2001: 144). As in France, even simply being ‘in a position to exercise control over the thing’ is sufficient for a person to whom the previous possessor has agreed to transfer possession, according to Article 854(2). Michel Fromont notes that ‘the mere fact of access to the thing, for example after delivery of the key, with the consent of the previous owner is thus sufficient’ (2001: 145). These forms of symbolic delivery are allowed in many legal systems.

Possession in the Civil Code of Switzerland is similar to that in the BGB. Article 919 requires only ‘effective control of the thing.’ Paul-Henri Steinauer (2012: 90) notes that not only when a person lacks immediate control, but also when others could just as easily seize the property, such as where a pile of wood has been cut and left in a forest, this is a sufficient basis for the Swiss ‘open’ conception of possession (*offener Besitz*). This conception only denies the status of possession to custody which is ‘purely transitory’, so that ‘a client who is handed articles by a merchant does not acquire their possession’ (Steinauer, 2012: 91).

The common law instead takes a stricter view, at least for real property. In *Powell v McFarlane*, the High Court of Justice of England and Wales, Chancery Division, comes close to the view of Carbonnier that, beyond merely having custody, a possessor must interact with the thing in the same way its owner would. The court held that ‘what must be shown ... is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so’.³

England and Canada have been particularly sensitive to the concern that custody is more challenging for aspiring possessors to demonstrate for certain types of property, and adopt an accordingly relative standard of *corpus*. Although ‘possession cannot be founded on trivial or equivocal conduct ... what is trivial varies in accordance with the nature and location of the thing being claimed. Acts which are insignificant in relation to large areas of open land may take on quite a different relevance in a suburban garden’ and thus ‘[i]n establishing the required possessory control over an area of land it helps to show a bit of “attitude”’ (Gray and Gray, 2011: 80).

Civil law jurisdictions have, in their own way, also demonstrated sensitivity to the object of possession, the thing possessed. In France, for example, writers have been less troubled by things that are difficult to control, and have instead turned their attention to incorporeal things, which are arguably impossible to physically control. This includes both more recent forms, such as intellectual property, as well as incorporeal rights that have been recognized since Roman times, such as servitudes and usufructs, property rights that are more restricted than a full right of ownership. The civil law traditionally aimed to respond to these challenges by using concepts such as ‘quasi-possession’ to refer to possession of rights. On the other hand, the circumstance that under German law a ‘thing’ is defined as a corporeal object (Article 90 BGB), and that possession is possession of a ‘thing’ makes it difficult to conceive that objects of intellectual property can be possessed at least in this jurisdiction.

ii. Possession on behalf of another

All legal systems allow the *corpus* of possession to be held through intermediaries. The Civil Code of France establishes presumptions:

2256. A person is always presumed to possess for themselves, and as owner, unless it is proven that the person became a possessor on behalf of another person.

2257. When a person becomes a possessor on behalf of another person, that relationship is always presumed to persist, absent proof to the contrary.⁴

French writers refer to this arrangement as possession *in corpore alieno*: through the body of another. ‘By inhabiting a landlord’s building, the lessor enjoys it, exercises rights of way, and maintains it on the landlord’s behalf’ (Bergel et al., 2000: 146).

³ *Powell v McFarlane* (1977) 38 P & CR 452 (Ch) at 471.

⁴ **2256.** On est toujours présumé posséder pour soi, et à titre de propriétaire, s’il n’est prouvé qu’on a commencé à posséder pour un autre. **2257.** Quand on a commencé à posséder pour autrui, on est toujours présumé posséder au même titre, s’il n’y a preuve du contraire.

The general principle of possession on another's behalf operates in a similar fashion in German law. *Agency in possession* is set out in Article 855 of the BGB:

If a person exercises actual control over a thing for another in the other's household or in the other's trade or business or in a similar relationship, by virtue of which he has to follow instructions from the other that relate to the thing, only the other shall be the possessor.

Unlike the BGB, with its notion of agency in possession, the Swiss Code does not explicitly provide for any form of possession on behalf of another. Swiss doctrine and jurisprudence, however, generally accept that possession through an intermediary, referred to as an 'auxiliary of possession', exists in the case of 'a worker, with respect to tools or instruments placed at her disposal; a store employee, with respect to the merchandise at that outlet; a shepherd, with respect to the livestock under his supervision, Children may also be auxiliaries to their parents' possession' (Steinauer, 2012: 95).

The common law similarly allows for possession through an intermediary. One mechanism that is used to achieve this result is *symbolic possession* (Pollock and Wright, 1888: 13). *Constructive possession* is a notion that applies more broadly to situations in which a person is not in direct contact with property and is yet deemed by common law courts to be in legal possession of the thing, and some have suggested that the notion also encompasses possession through another person (Pollock and Wright, 1888: 14; Ziff, 2010: 133).

B. The Intentional Element: Animus

The second element required by legal systems for possession is an element of intention. The content and scope of the intention varies more widely than the physical *corpus*, but its presence is pivotal. In civil law jurisdictions, *corpus* without this intention is often seen as mere detention, which traditionally did not give rise to protections or legal effects. The common law has a somewhat similar pair of concepts, and considers that physical control without the necessary intention gives rise only to factual possession, and not full-fledged legal possession (Pollock and Wright, 1888: 118).

Civil law jurisdictions that mostly follow Savigny's subjective approach, such as France, have seen significant debate as to whether the appropriate *animus* for possession is *animus domini*, the intention to own, or *animus possidendi*, which at various times has been employed to mean either an intention to use, to possess, or to exclude others. The dominant approach in France is *animus domini*. Bergel observes that the necessary *animus* goes beyond simply the intent to carry out acts on a thing. In order 'to assert or acquire rights, a more specific intention is required, namely, to act as would the holder of those rights, to have custody of the thing as an owner, a usufructuary, or the beneficiary of a servitude ...' (Bergel et al., 2000: 147). Carbonnier describes the *animus domini* as 'the will to act toward the thing as its owner, absolutely and in perpetuity, without having to account to or to provide restitution to any person' (2000: 203).

The BGB's approach to intention flows from the definition of possession in Article 854(1): 'Possession of a thing is acquired by obtaining actual control of the thing.' German possession evolved from the medieval possessory notion of *Gewere*, which

originated in the solemn act of transferring title of immovable land (Bergel et al., 2000: 126), and which thus bears a similarity in its origin to the common law possession-like notion of seisin. As mentioned above, *Gewere* laid the groundwork for the BGB's later adoption of Jhering's objective approach to possession, which requires very little in the way of *animus*, thereby greatly expanding the scope of potential possessors. German 'possession is broader in scope than the French notion in the sense that it simply refers to physical custody of the thing, *animus* not normally being required for there to be possession; no more is required of the *animus* than it be conscious and lasting' (Fromont, 2001: 144–145). *Animus* thus does not entirely disappear, though it is largely inferred from the fact of *corpus*.

Nonetheless, Swiss law, which relies very little on *animus*, similarly requires an element of intention (or 'will') despite the fact that this will can be both very limited and very general:

That the will to possess is required is controversial in [Swiss] doctrine, but it is accepted by the leading doctrinal sources as being included within the notion of effective control in the first paragraph of article 919 [of the *Civil Code*].

It is not necessary that the person concerned have the will to possess each item over which that person has factual control. It is sufficient to have the *wholly general will* to possess property of a determinate kind or that meets certain conditions. (Steinauer, 2012: 91)

Common law systems have come to the same basic conclusion that *intentional* custody of a thing is required to give rise to legal effects. Common law judges and writers have disagreed with one another, however, about whether the necessary intention is one of *animus possidendi* or *animus excludendi*. Oliver Wendell Holmes suggested that the intentional element of possession is properly understood as *animus excludendi*, an intention to exclude others. This criterion is regularly found in common law decisions, and is seen as less problematic than the notion of *animus possidendi*, which was particularly ambiguous in the case of leasehold tenants, who could not hold the thing for themselves. The jurisprudence therefore reflects a sort of semantic slide which led to the meaning of the two terms merging gradually. For example, in *Littledale v Liverpool College*, the *animus possidendi* was defined as the intention to exclude others.⁵ More recently, in *Keefer v Arrilota*, a Canadian court used a similar definition of *animus*: 'The *animus possidendi* which a person claiming a possessory title must have is an intention to exclude the owner from such uses as the owner wants to make of his property.'⁶

In England, the rejection of *animus domini* in favour of a combined *possidendi–excludendi* approach is the 'clear consensus' (Gray and Gray, 2011: 81). Justice Slade, in the English case of *Buckinghamshire County Council v Moran*, for example, held:

There are some dicta in the authorities which might be read as suggesting that an intention to *own* the land is required. ... Nevertheless, I agree with the judge [in the lower court] that 'what is required for this purpose is not an intention to own or even an intention to acquire

⁵ [1900] 1 Ch 16, 16 TLR 44.

⁶ (1976) 13 OR (3d) 680, 72 DLR (3d) 182.

ownership but an intention to possess' – that is to say, an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title.⁷

In the recent House of Lords case of *J.A. Pye (Oxford) Ltd. v Graham*,⁸ possession is even easier to prove as a possessor no longer has to demonstrate the intention to exclude the paper owner or registered proprietor, but merely the intention to further the possessor's self-interest. Lord Justice Browne-Wilkinson held that '[t]he only intention which has to be demonstrated' is 'an intention to occupy and use the land as one's own' and to 'stay as long as he can for his own benefit' even if expecting eviction.⁹

The unifying features across all legal traditions is that each one requires both a physical and a mental element to show possession. However the required physical or intentional investment may vary across legal traditions, depending primarily on whether the system tends more toward an objective or subjective view of property.

4. CONCEPTUAL APPROACHES TO POSSESSION

A. Possession as Communication

A comparative approach to possession strengthens the idea, which has been suggested by some authors, that the concept functions as a form of communication or messaging to third parties. Carol Rose, for example, suggests that possession 'requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question' (1985: 78).

Rose cites the famous United States common law decision of *Pierson v Post*.¹⁰ In this case, Post had organized a fox hunt and, while in pursuit of a fox, Pierson came across the fox and killed it, taking the fox for himself. The Supreme Court of New York noted that possession requires a clear and unequivocal act demonstrating the intention to possess even, apparently, if this runs contrary to the principle that property rewards socially useful behaviour, such as organizing a fox hunt (Rose, 1985: 77). This notion of a 'clear act', according to Rose, is a form of communication that rewards socially useful behaviour on an even more basic level, by requiring that a possessor establish a clear and unequivocal intention to be recognized as a person with rights over the thing.

This is not far off traditional Western conceptions of possession. The French author Raymond Saleilles, for example, sees a possessor as 'a person who appears in the world of external facts as the person in factual control of the thing, and who desires to be so' (1984: 376). Therefore, possession is 'the conscious and intended actualization of the economic appropriation of things' (1984: 113). Other civilian theories have expressed ideas close to those of Saleilles (Danos, 2007: 289).

⁷ *Buckinghamshire County Council v Moran* (1989) [1990] Ch 623, [1989] 3 WLR 152 at 643.

⁸ [2002] UKHL 30, [2002] 3 WLR 221 [cited to UKHL].

⁹ *Ibid* at para 71.

¹⁰ 3 Cai R 175, 2 Am Dec 264 (Sup Ct NY 1805).

Practical examples abound in both legal traditions. Frédéric Zenati-Castaing, for example, underlines that applying the legal mechanism for possession to incorporeal property is ‘not without difficulty’ but reassures the reader that ‘a few adaptations allow the obstacles to be overcome’: ‘In particular, a reduced role for possession, given that the thing is impossible to have in one’s physical custody, is compensated for by means of the public registry, which plays the same role with respect to third parties as possession’ (Zenati-Castaing and Revet, 2008: 99). Where possession is unworkable, in other words, the civil law substitutes – as an apparently equivalent mechanism – the publication of rights in the public registry, a clear means of communicating rights to third parties.

Possession becomes unworkable in the English common law under different circumstances, but with the same result: the common law substitutes a more direct form of communication instead of possession. As mentioned earlier, it can be more difficult to demonstrate *corpus* in the case of an expansive area than of a tiny plot, and as such Gray and Gray suggest, one has to send the proper message to all others: hands off, this is mine!

The communicative function of possession is also apparent in Swiss legal doctrine. Steinauer notes that ‘[t]he owner of a mailbox is ... the possessor of the mail deposited in it even before having collected it, because by setting it out, he has already expressed, in a general sense, his will to have its contents in his custody’. Once again, initially counterintuitive effects of possession become clear when understood as serving an essentially communicative function.

The Supreme Court of Canada, as it attempts to establish a new form of possession for the purposes of Aboriginal title that is not tied to common law notions, has made the communicative role even more explicit. In order to ground a claim of Aboriginal title, ‘the Aboriginal group in question must show that it has historically acted in a way that would *communicate to third parties* that it held the land for its own purposes’.¹¹

B. Conceptual Independence from Ownership

Another fundamental feature of possession is its conceptual independence from ownership. It is common for legal doctrine to observe that in the normal state of affairs, the two coincide in the same person (Carbonnier, 2000: 202; Steinauer, 2012: 87), but that there is no causal relationship between the two: either one can be present without the other. The conceptual independence of possession and ownership in fact goes even further than these writers claim. Beyond simply failing to coincide with actual possession, there are forms of ownership which include no *right to possess*.

The beneficiary of a common law trust, for example, generally has no right – whether present or future – to use the thing that constitutes the object of the property in question, but instead holds a set of rights of enjoyment in the property, including a right to the income it produces or to a share of it, and a right to the proceeds of any sale of the property or part of the property (Waters et al., 2012: 1263–1267). A similar situation exists in France for owners of a *fonds commun de placement*. This form of

¹¹ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 38, [2014] 2 SCR 256 (emphasis added).

property is defined by statute in the French *Code monétaire et financier*, and is conceptually independent both of company law and of the law of trusts. It is instead presented as analogous to physical land: a *fonds* is an aggregate abstraction that bears fruits as an organized unit (Zenati-Castaing and Revet, 2008: 100–101). But the owner of a *fonds* does not have ownership of its assets, as the regime divides responsibilities between investors and managers (Zenati-Castaing and Revet, 2008: 110–111). Because most legal systems allow possession's *corpus* to be fulfilled by appropriation of the fruits the property produces, this means that despite that owners of common law trusts and French *fonds commun de placement* may still be able to possess the property by receiving the profits or proceeds.

In other situations, the separation of possession and ownership is even more complete. For example, neither a vested remainder interest at common law, nor bare ownership of a property in civilian jurisdictions, brings with it any right of immediate possession of the property, either to use or to benefit from it. This remains the case until the encumbering life estate, usufructuary dismemberment, or other lesser property interest, as the case may be, is ultimately extinguished.

5. ACQUISITIVE PRESCRIPTION AND ADVERSE POSSESSION

The main effect of possession is acquisitive prescription in civil law and adverse possession in common law. Acquisitive prescription in French and Quebec civil law is a means of acquiring property that is based on possession. As stated in Article 2258 of the French Civil Code (C civ), 'la prescription acquisitive est un moyen d'acquérir un bien ou un droit *par l'effet de la possession* sans que celui qui l'allègue soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception tirée de sa mauvaise foi'. Similarly, Quebec law defines it as 'a means of acquiring a right of ownership, or one of its dismemberments, *through the effect of possession*' (Article 2910 CCQ). There is a general agreement that, in the majority of cases, acquisitive prescription reinforces the owner's rights and helps to support ownership, by conferring true title or assisting in proving ownership (Aubry and Rau, 1961: 697; Martineau, 1977; Lafond, 2007: 668). Sometimes, however, acquisitive prescription can deprive an owner of his right by conferring title on another who was not the owner (Martineau, 1977: 14).

In common law, adverse possession is the functional equivalent of acquisitive prescription, as it also permits a possessor to become an owner after the passage of time and under certain conditions (Massey, 2012: 75). In the English case *Treloar v Nute*, the court ruled that 'if a squatter takes possession of land belonging to another and remains in possession for [the statutory period] to the exclusion of the owner that represents adverse possession'.¹² Adverse possession is generally considered in parallel with the limitation principle: if adverse possession is a possible source of title for real property, the principle of limitation refers to the fact that the prior possessor's right to recover possession is itself curtailed by the imposition of time limits on the assertion of claims. As title is relative in common law, the absence of a limitation period would make the owner's position perpetually subject to an action by a prior possessor for

¹² [1976] 1 WLR 1295 (CA).

recovery of possession. To avoid this, Limitation Acts impose a time period, typically 12 years in English common law, during which prior possessors can recover possession of property. After this period has run, no one can claim better title than the current possessor, who, through the indirect effect of Limitation Acts, thereby acquires an exclusive title (Gray and Gray, 2009: 1158).

In French and Quebec civil law, for possession to be useful and lead to acquisitive prescription, it must simply be peaceful (not obtained through physical duress or psychological abuse), continuous (without abnormal interruption), public (not clandestine) and unequivocal (exclusive and not ambiguous).¹³ Common law jurisdictions also require that certain criteria for possession be present for the purposes of adverse possession. In Canada possession must be public (open and notorious), exclusive (not shared with the owner), peaceful (not obtained by force), actual (the possessor must be using the property as though he were the owner) and continuous (without interruption). In all cases, there must be an element of adversity: in other words, the possessor seeking to invoke adverse possession must be in possession without the consent or authorization of the owner (Ziff, 2010: 142). One can find similar requirements in English common law, where possession must be public, exclusive (the possessor cannot be in possession at the same time as the owner), actual (the possessor must show that he dealt with the land as an owner would have) and continuous (without loss of control over the property).¹⁴ In English common law as well, possession needs to be adverse (Mackenzie and Phillips, 2012: 142).

If adverse possession is limited to real property or land, acquisitive prescription is generally limited to immovable property but is also applicable to movable property. With respect to movables, other modes of acquisition of ownership based on possession exist in both traditions. Occupation is, in civil law, a mode of acquisition of *res nullius* (things without an owner), based on possession (Cornu, 2005: 479). Occupancy also exists in common law. One can find a clear example of occupancy in the case *Pierson v Post* already discussed.¹⁵

In respect of lost or forgotten movables, they cannot be acquired by occupation in civil law. In Quebec law, they continue to belong to the owner despite the dispossession; however, they could be acquired by acquisitive prescription.¹⁶ The prescription period for acquisitive prescription is 10 years.¹⁷ Therefore, the owner of a lost or forgotten thing may revendicate it, on certain conditions, so long as no prescription has arisen.¹⁸ If the thing has been alienated, the owner's right is exercised only against what is left of the price of sale, at certain conditions.¹⁹ In French law, Article 2276, paragraph 2 C civ authorizes the true owner to claim his property even from the bona fide purchaser, when he has been unintentionally dispossessed as a result of a loss or a theft. Acquisitive prescription is, however, possible, by three years if the possessor is in

¹³ Arts 2261 C civ and 922 CCQ.

¹⁴ *Zarb and Another v Parry and Another* [2011] EWCA Civ 1306, [2012] 1 WLR 1240.

¹⁵ 3 Cai R 175, 2 Am Dec 264 (Sup Ct NY 1805).

¹⁶ Art 939 CCQ.

¹⁷ Art 2917 CCQ.

¹⁸ Art 946, para 1 CCQ.

¹⁹ Art 946, para 2 CCQ.

good faith, or by 30 years if he is in bad faith (e.g., the thief) (Cornu, 2005: 680). One may find similar rules in common law; it is indeed well established that the finder of lost property, ‘though he does not by such finding acquire an absolute property or ownership ... has such a property as will enable him to keep it against all but the owner’.²⁰ Unless the relevant time limit has expired (which varies from jurisdiction to jurisdiction), a finder who refuses to answer the loser’s demand for delivery of the thing can successfully be sued in conversion (Hickey, 2010: 159). Similarly, the bona fide purchaser of stolen personal property may become immune from the owner’s claim after a certain number of years (which varies from jurisdiction to jurisdiction) (Dari-Mattiacci and Guerriero, 2015: 3–4). For example, English law does not recognize the Roman institution of *usucapio*, but its function is fulfilled, depending on circumstances, by the six-year statute of limitations, as from the date on which the purchaser in good faith acquired the object (Kowalski, 2000: 97). Similarly, in the American legal system, the statute of limitations gives a purchaser in good faith an opportunity to keep the purchased object. Such case does not entail the transfer of title but rather bars the owner’s claim, which in practice has the same effect (Gerstenblith, 1988).

However, in French law, if the owner has entrusted the property to another person, who, in turn, alienated it without due authorization, the owner has to bear the consequences of his excessive confidence. The penalty for such over-trust is the inability to recover the property in question from a bona fide purchaser. The rule ‘With regard to movables, possession is equivalent to title’, which is of Germanic origin (Kowalski, 2000: 92), applies in such circumstances.²¹ The rule differs in Quebec law. Article 1714, paragraph 1 CCQ stipulates that the true owner may revendicate the sold property from the buyer unless the sale was made under judicial authority or unless the buyer can set up acquisitive prescription. The period for acquisitive prescription is 10 years,²² except for the possessor in good faith who acquires the movable property by three years running from the dispossession of the owner.²³ If the property is a movable sold in the ordinary course of business of an enterprise, the owner is bound to reimburse the buyer in good faith for the price he has paid.²⁴

6. POSSESSORY PROTECTION

While the previous section examined the independence of possession and ownership from the perspective that ownership does not always include a right of possession, it is also the case that the effects of possession are not always linked to the right of ownership. Although some of possession’s effects – such as the potential to acquire property – are linked to ownership, the actions to protect possessors explored in this section are kept completely independent in the civil law from its *action pétitoire*, which

²⁰ *Armory v Delamirie* (1722) 93 ER 664 (Court of King’s Bench).

²¹ Art 2276, para 1 C civ.

²² Art 2917 CCQ.

²³ Art 2919 CCQ.

²⁴ Art 1714, para 2 CCQ.

restores possession to an owner. The aims of possessory actions are broad, in that they target preventing violence and preserving stability. The first section describes who has or should have possessory protection. It then gives more details on the various possessory actions.

A. Possessors and Detentors

The ultimate effect of the debate between Savigny and Jhering, which opposed subjective and objective theories of possession, has to do with the protection of detentors' factual possession of property. Whereas Savigny refused to grant this protection, arguing that detention was not true possession, Jhering claimed that detention should be viewed as possession, particularly in light of social justice concerns. In his *Treaty of Possession*, Savigny defended the idea that the possession must be shown through *animus domini*, in other words, the intention to act as a true owner (Savigny, 1845: 102). As a consequence, Savigny refused to grant possessory protection to detentors 'for theoretical reasons tied to the nature of possession' (Savigny, 1845: 103–104). On the other hand, Jhering, in his *Fondements des interdicts possessoires* (*The Basis of Prohibited Forms of Possession*) (1882), defended the idea that possession and detention both arise from the same intention, to hold and maintain control of a thing, the *animus tenendi*. It follows therefore that, irrespective of the possessor's specific will, the law must recognize the situation as possession and give it legal effect. Jhering notes that Roman law did not rely on theoretical justifications to deny detention protection, but rather 'it is practical considerations that tipped the scales in this case' (Jhering, 1893: 226–229). In Rome, detentors included renters, farmers, and others of an inferior social class, which led to them needing 'to assign to their landlords, who were better equipped to defend themselves in court, their right of action against disruptions to possession' (Mazeaud et al., 1984: 160). Today, however, no practical objections to allowing detentors direct possessory protection remain (Ourliac and Malafosse, 1957: 225–226; Mazeaud et al., 1984: 160), yet the debate persists.

In Quebec civil law, possession is defined in opposition to detention: Article 921 of the Civil Code defines possession as 'the exercise in fact, by a person himself or by another person having detention of the property, of a real right, with the intention of acting as the holder of that right', and the second paragraph specifies that 'the intention is presumed. Where it is lacking, there is merely detention.' This definition therefore excludes detention from the benefit of possession.

The drafters of the Civil Code clearly wanted to distinguish possession from detention by allowing the benefits only for possessors who displayed both a *corpus* and an *animus*. The *Office de révision du Code civil's* report states that 'the word "possession" is used exclusively to indicate legal possession and never to refer to precarious or natural possession; in the latter case, we will invariably use the term "detention"' (ORCC, 1977: 44). For this reason, a detentor has no right to a possessory action in Quebec law. Before the reform of the Civil Code, Article 770 of the *Code of Civil Procedure*, which has since been abrogated, systematically excluded detention

from the benefit of the possessory action.²⁵ Nowadays, many authors argue this position stems from an interpretation of the combined effect of Articles 921 and 929 of the Civil Code; the former article integrates intention as an element of possession, whereas the latter explicitly empowers possessors and not detentors to institute possessory actions.²⁶

The recognition of quasi-possession as a legitimate form of possession by Quebec legislators has the effect of giving the detentor at least a partial possessor status. But this possessory protection could be extended further, in particular to renters (Lafond, 2007: 248; Lamontagne, 2009: 450), or even to depositories (Naz, 1965: 51), who are detentors but not possessors of a real right. Such an extension of possessory actions has been advocated by some scholars (Caterina, 2004: 271; Lafond, 2007: 248; Lamontagne, 2009: 450). As stressed by Professor Caterina, historically the *actio spoli* (a precursor to the *action en réintégration*) extended to simple detentors (Caterina, 2004: 270). Furthermore, the idea would be beneficial from a practical point of view, both for detentors, who are usually in a better position to act, and for the true owner, who would not need to intervene in case of a dispute (Caterina, 2004: 270–271). This argument is reinforced by the recent Supreme Court of Canada decision *Ciment Saint-Laurent v Barrette*, where the court decided that renters could act directly in cases of nuisance, without having to go through the owner.²⁷

Several civil law jurisdictions recognize the right of detentors to possessory protection. In France, Article 2278 of the Civil Code states that ‘possession is protected, irrespective of the underlying right, against actual or threatened disruption. *This same possessory protection is granted to a detentor with respect to all others aside from the person through whom the detentor holds their rights.*’²⁸

The English common law allows detentors to have recourse to possessory actions which closely resemble those of the civil law (Papandréou-Deterville, 2004: 72–80 and 97–102). For example, in the classic English case of *Armory v Delamirie*,²⁹ a young chimney sweep found a jewel in the course of his work, only to have it taken from him by an appraiser to whom he then brought it. Despite the fact that the boy was not a good-faith possessor, he was nonetheless successful in his action in trover – which would now be known as an action in conversion – and the court ordered the jewel to be returned to him in its original state.

²⁵ Art 770, para 1, *Code of Civil Procedure*: ‘Celui qui est en possession d’un héritage ou d’un droit réel immobilier depuis plus d’un an *et à titre non précaire*, a, contre celui qui trouble sa possession, l’action en complainte pour faire cesser le trouble, et contre celui qui l’a dépossédé par violence, l’action en réintégration pour être remis en possession’ [emphasis added].

²⁶ Art 929 CCQ: ‘Le possesseur dont la possession a été continue pendant plus d’une année a, contre celui qui trouble sa possession ou qui l’a dépossédé, un droit d’action pour faire cesser le trouble ou être remis en possession.’

²⁷ *St Lawrence Cement v Barrette*, 2008 SCC 64 at para 83, [2008] 3 SCR 302.

²⁸ ‘La possession est protégée, sans avoir égard au fond du droit, contre le trouble qui l’affecte ou la menace. *La protection possessoire est pareillement accordée au détenteur contre tout autre que celui de qui il tient ses droits.*’

²⁹ (1722) 93 ER 664 (Court of King’s Bench).

B. Protection of Possession

Although infringement of possession may be remedied through several different actions in all legal systems, there are fundamental differences between the civil law and the common law traditions. Civil law countries distinguish between actions recognized for the protection of ownership (petitory actions) and actions given for the protection of possession (possessory actions), which are clearly separated from tort law instruments (Van Erp and Akkermans, 2012: 98). On the contrary, English law deals with the protection of property interests mainly by tort law (Van Erp and Akkermans, 2012: 161), and does not distinguish between the protection of property rights and the protection of possession (Van Erp and Akkermans, 2012: 98).

In the civil law, possessors are generally protected against dispossession and disruptions of their possession (Normand, 2000: 306). The *action en complainte* aims to end disruption of possession by another person (Carbonnier, 2000: 318; Lafond, 2007: 238), whereas the *action en réintégration* restores possession following violent dispossession (Bergel et al., 2000: 436; Carbonnier, 2000: 318). The final possessory action is the *action en dénonciation de nouvel œuvre*, which is not explicitly set out in Quebec legislation, but which is recognized in scholarship and in jurisprudence as a means to prevent future disruptions of possession when these are imminent and likely to prejudice the possessor (Carbonnier, 2000: 318).

The English common law has actions that are analogous to these. Apart from the more general tort of negligence, English law provides several specific property-related torts, the so-called *property torts* (Van Erp and Akkermans, 2012: 208). The *action for trespass to land* protects possessors against disruption of possession (Papandréou-Deterville, 2004: 77; Gray and Gray, 2009: 171) when a third party enters the property without consent (Clarke and Kohler, 2005: 286), allowing a claim for damages or an injunction (Papandréou-Deterville, 2004: 72). *Nuisance* – which constitutes a clear equivalent to the *troubles de voisinage* doctrine of the civil law (Emerich, 2011) – can also be invoked in case of indirect interference with the use and/or enjoyment of land (Van Erp and Akkermans, 2012: 208). Moreover, the *action for possession* (or *action for recovery of land*) allows a possessor to defend himself against a dispossession by an intruder or squatter, and to have his possession restored (Gray and Gray, 2009: 170).

For a possessory action to succeed, the common law requires not only possession, but ‘better’ possession than the other party. This relative approach is often referred to as ‘degrees’ of possession. For example, the decision in *Costello v Chief Constable of Derbyshire* (2001) stresses that possession of a passenger vehicle by a presumed thief gives him a possessory title against all but the legitimate owner:

[T]he fact of possession of a chattel of itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained: his entitlement to do so is not prejudiced by the fact that he obtained such possession unlawfully or under an illegal transaction. His claim can only be defeated by proof of a title superior to his possessory title.³⁰

³⁰ *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381.

A further subtlety is that conditions required to acquire title by adverse possession are sometimes abandoned in the context of possessory protection. The conditions that are necessary for the acquisition of property – such as that possession is unequivocal and continuous, which give the owner fair warning – might be inappropriate in possessory actions, or at least where violent dispossession occurred. In the English case *The Tubantia*, for example, the plaintiffs, who were a team of underwater divers, sought an injunction to protect a shipwreck they had been exploring.³¹ Judge Duke granted the injunction, even though their exploratory activities had not been continuous. Therefore, intermittent possession is not fatal to a possessory action³² so long as there is sufficient coherence and regularity to the relevant acts (Gray and Gray, 2009: 153), which is evaluated in the context of the thing possessed (Papandréou-Deterville, 2004: 115).

In French civil law as well, the mere fact that possession is equivocal or discontinuous is never an obstruction to the *action en réintégration*. There is no underlying necessity that this rule should apply only to this particular possessory action, and some writers of French doctrine would prefer that, for a possessory action to be accepted, possession not be ‘required to assume the features of civil possession, because the action does not aim to acquire ownership’ (Zenati-Castaing and Revet, 2008: 697–698).

Canadian common law does not require either peaceful possession for the possessor to benefit from possessory actions. For example, in the Ontario decision of *Bird v Fort Frances*, Justice McRuer had to decide if a thief could maintain an action in trover or conversion against a defendant who had dispossessed him of the stolen goods.³³ The judge held that there was no need to determine whether the young boy was an illegitimate possessor or whether he had fraudulent intentions because the result would be the same: the boy would be entitled to the money he found, barring a claim from the rightful owner. It thus appears that the conditions imposed on possessory actions and in acquisition of property should not simply mirror one another. The conditions imposed for possessory protection should instead be less strict than those for the acquisition of property rights.

Although this general tendency holds true across common law and civil law traditions, the operation of possession sometimes differs significantly. The common law provides rights to possessors which would be unthinkable for civil lawyers. Because adverse possession, for example, is rooted in the common law concepts of relativity of title and the expiry of limitation periods, an adverse possessor does not acquire freehold title in land at the end of the period, but instead at the moment the adverse possession begins (McFarlane, 2012: 250). Relativity of title relieves the judge of having to identify the true owner, and the task is instead to determine the party with a stronger claim to possession. A second example illustrating the strong rights held by possessors in the common law is the case of *The Winkfield*, which held that in a contract of bailment, if the property in question is wrongfully damaged by a third party while in the bailee’s possession, that possessor is entitled to sue the wrongdoer for the

³¹ *The Tubantia* [1924] P 78, [1924] All ER 615 (HC).

³² *Taylor v Willigar* (1979) 99 DLR (3d) 118, 32 NSR (2d) at 125–126; *Smith v Waterman* [2003] EWHC 1266 (Ch) at 61, All ER (D) 72 (Jun); *Howard v Kunto*, 3 Wn App 393, 477 P (2d) 210 at 213 (Ct App 1970).

³³ (1949), 2 DLR 791, OR 292, (Ont CA).

full value of the property – not merely the value of the possessory interest – without the bailor’s consent and, furthermore, that a successful action of this type extinguishes the bailor’s rights against the wrongdoer.³⁴

7. CONCLUSION

Carol Rose’s idea of possession as communication is an insight that carries weight in both civil law and common law systems. Communication can helpfully explain the shift toward a more objective view of possession, as within the objective approach messaging takes on a greater importance than a person’s subjective intention toward the thing possessed. It also helps to understand the analysis of *corpus* relative to the object in question, as in *The Tubantia*, or even relative to the subjects in question, as in *Tsilhqot’in Nation*.

A number of other similarities across legal systems have long been apparent. Both major legal traditions require a physical and an intentional element. Both allow a thing to be possessed on another’s behalf. Both keep the concept of possession relatively distinct from that of ownership. Both allow possession to be protected without respect to the underlying property right, and both allow property to be obtained through possession under certain conditions.

Half a century ago, Salmond and Fitzgerald felt confident in making the claim that ‘to look for a definition ... that will summarize the meanings of the term “possession” in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible’ (1966: 268). While such a broad definition remains unlikely to emerge in the foreseeable future, many of the tensions that underlie the law of possession have been attenuated to the degree that it may now at least become feasible to imagine a harmonized view of possession across legal traditions.

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³⁴ *The Winkfield* (1901), [1902] P 42 Ct of App, (1901) All ER 346.

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