

Protecting Possession

It is often thought that one of the basic differences between the continental civil law and the Anglo-American common law is that they are based on radically different conceptions of ownership and possession.¹ While the common law blurs these concepts, "[c]ontinental law makes a sharp distinction."² The accounts that civil and common lawyers give of possession do seem to be polar opposites. Typically, continental jurists say that the owner has the right to possession while the mere possessor does not. Then they try to explain why the law protects someone who is acting without right. In contrast, Anglo-American jurists typically identify possession with ownership. They say that possession gives a sort of title, good against anyone who cannot show a better title.

Both accounts have one premise in common. They equate title or ownership with the right to possess. Because continental jurists think that the mere possessor lacks title, they find the protection the law affords him problematic. Because Anglo-Americans think that the possessor has a title, they often take the protection the law affords him for granted.

This Article will argue that the common premise is wrong. In the first part of this Article we will see that it is wrong as a matter of theory. It was born of the conceptualism of the 19th century. Once continental jurists had defined the owner as a person with the right to possession, it seemed to them that they had to define the mere possessor as a person without this right. Once they had done so, they entered a theoretical box canyon from which they never emerged.

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1. This Article is the first step in a larger project. We would like to reexamine other supposedly basic distinctions between the common and civil law of property. We suspect that many of them will disappear on closer analysis.

2. Beekhuis, "Civil Law," in "Chapter 2 Structural Variations in Property Law," 3, 18 to be published in *Property and Trust* (Lawson ed.) 6 *International Encyclopedia of Comparative Law*.

The supposedly ancient Anglo-American doctrine that possession gives a kind of title was in fact invented, as we will see, by two scholars who were thoroughly familiar with the continental debate: Oliver Wendell Holmes and Sir Frederick Pollock. They reacted by going to the other extreme. If possession as such is worth protecting, it must be a relative title, good against everyone except the owner. They did not explore the consequences of that idea which, indeed, are more extreme than they or the English or American courts would care for.

These theories are also wrong as descriptions of what courts have been doing, as we will see in the second part of this Article. Continental legal systems have not treated the possessor as one who has no right to possess. The common law has not treated him as an owner with a title good against everyone but the true owner. They have both accorded him a right like that of an owner but not amounting to ownership because it is more fragile.

The third part of this Article will develop a functional theory of the protection of possession. According to the theory, the possessor should have a right to possess but not the same right as an owner. This theory better explains the protection that possession has actually received in civil and common law

I. THE LAW IN THEORY

A. *The German Debate*

Continental thought about possession was shaped by a great debate in Germany in the 19th century in which Savigny and Ihering were the foremost participants. Today, even outside Germany, jurists typically explain that there are two theories of why possession is protected. One, for which they often cite Savigny, is to preserve public order. The other, for which they often cite Ihering, is to provide a more complete protection for the true owner. These are almost the only explanations that French jurists give.³

The German debate is a case study in the consequences of assuming that only the owner can have a genuine right to possess. Savigny began from that premise. Possession is a physical situation

3. J. Carbonnier, *Droit civil 3 Les Biens* § 43, pp. 155-56 (8th ed. 1975); A. Colin, H. Capitant, & L. Juilliot de la Morandière, *Traité de droit civil 2 Obligations Théorie générale Droits réels principaux* § 446, p. 242 (1959); G. Cornu, *Droit civil 1 Introduction Les Personnes Les Biens* §§ 1155-56, p. 362 (4th ed. 1990); C. Larroumet, *Droit civil 2 Les Biens Droits réels principaux* §§ 64-65, pp. 45-46; §§ 66-67, pp. 46-47 (1985); G. Marty & P. Raynaud, *Droit civil Les Biens* § 14, 14-15 (2d ed. 1980); Some jurists also mention that the owner who leaves his land idle is not making economic use of it, and that the law should protect third parties who innocently buy from the person in possession, believing him to be the owner. They seem to be using these considerations to explain why the possessor gains title with the passage of time. A. Weill, F. Terré & P. Simler, *Droit civil Les Biens* § 54, pp. 63-64; § 55, pp. 64-65 (3d ed. 1985); H. Mazeaud, L. Mazeaud, J. Mazeaud & F. Chabas, *Leçons de droit civil 2 Biens Droit de propriété et ses démembrements* §§ 1413-14, pp. 190-91 (8th ed. 1994).

that corresponds to the legal situation called ownership. The owner has the legal power, and the possessor the physical power, to deal with an object as he wishes and to exclude all others from using it.⁴ Therefore, according to Savigny, the question was "how possession, without any regard to its own lawfulness, can be a basis for rights."⁵

Answering Savigny's question was one of the major intellectual projects of the 19th century German jurists. Rarely if ever have more brilliant legal minds argued. Yet they found no convincing answer. Whenever one German jurist suggested a solution, another was able to explain why it would not work. Studying the debate should convince us that question is unanswerable. If one begins with the premise that only the owner has the right to possess, one can never explain why the possessor who is not an owner is protected.

Savigny claimed that his own answer explained the protection Roman law gave a possessor. In Roman law, an owner could recover his property by bringing an action called *vindicatio*. A possessor, whether he was the owner or not, could bring actions known as possessory interdicts. In a *vindicatio*, Savigny pointed out, "it is entirely irrelevant how the other party came into possession since the owner has the right to exclude him from possession."⁶ In contrast, "all of the possessory interdicts . . . presuppose an act that is unlawful by its form":⁷ an interference with possession.⁸ Savigny concluded that the interdicts were a kind of tort action given the victim of such an unlawful interference. He pointed out that the interdicts, like other Roman tort actions, lay only against the perpetrator or his estate, and could be brought only within a year.⁹

One difficulty with Savigny's theory was that in other ways the Roman interdicts were not like tort actions. As critics pointed out, the plaintiff's remedy was not damages but recovery of possession.¹⁰ Moreover, the defendant could be liable without fault.¹¹ Indeed, the plaintiff had to prove the defendant violently dispossessed him only if he brought the interdict *unde vi*, an action to recover land. He did not need to prove violence or even bad faith if he brought the interdict *uti possidetis* to protect his possession of land when it was threatened or disturbed but not lost, or if he brought the interdict *utrubi* to re-

4. F.C. von Savigny, *Das Recht des Besitzes* 2-3 (6th ed. 1837).

5. Id. at 9.

6. Id. at 9.

7. Id. at 8.

8. "[T]he right which mere possession gives consists only in the claim which the possessor has to interdicts when a certain form of interference occurs." Therefore, the interdicts were a type of tort action. Id. 31-33.

9. Id. at 32-33.

10. A. Randa, *Der Besitz mit Einschluß der Besitzklagen nach österreichischem Recht* § 8, p. 274 (3d ed. 1879); C.G. Bruns, *Die Besitzklagen des römischen und heutigen Rechts* § 7, pp. 49-51 (1874).

11. Bruns, *supra* n. 10, at § 7, pp. 49-51.

cover or protect the possession of moveable property.¹² Also, the interdicts only protected one who claimed the object in his own right. They did not protect lessees and others who based their right on the right of another. That was odd if they were supposed to provide tort-like protection against unlawful acts.¹³ Finally, the possessory interdicts could be brought by a thief or a robber but Roman tort actions could not.¹⁴

More important for our purposes, however, is the way Savigny answered the theoretical question why the law should protect a possessor if possession was not in itself a right worthy of protection. According to Savigny, "[a]n independent right of the person . . . is not violated but the situation of the person is altered to his disadvantage; the unlawfulness, which consists in the use of force against this person, can only be eliminated with all of its consequences by the restoration and protection of the factual situation to which the force extended."¹⁵

That answer is not perfectly clear. It suggests two rather different explanations for the protection of possession, each of which had its champions among the German jurists. According to the first, the law protects the peace and order of society against unlawfulness and force. According to the second, the law protects the victim himself. The victim has a legally protectable claim against unlawful interference even though he does not have a legally protectable claim to possession.

The first explanation was accepted by Rudorff in the 19th century¹⁶ and by most German jurists today.¹⁷ Supposedly, relief is given merely because public order has been disrupted and not because the plaintiff has a protectable interest. German critics have raised some powerful objections. If the plaintiff has no protectable

12. R. Ihering, *Über den Grund des Besitzschutzes Eine Revision der Lehre vom Besitz* 17-19 (2d ed. 1869); 1 H. Dernburg, *Pandekten* § 170, p. 402 (4th ed. 1894).

13. Randa, *supra* n. 10, at § 8, p. 274; Ihering, *supra* n. 12, at 9-12.

14. Ihering, *supra* n. 12, at 15-16 (noting that thief and robber do not have protection under *actio furti* and *lex Aquilia*, and citing Dig. 47.2.12.1; Dig. 47.2.76.1; arg. Dig. 9.2.17.6).

15. Savigny, *supra* n. 4, at 41.

16. Rudorff, "Über den Rechtsgrund der possessorischen Interdicte," 7 *Zeitschrift für geschichtliche Rechtswissenschaft* 90, 110-14 (1831).

17. G. Seuffert, in 3. J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* vor § 854 no. 3 (11th ed. 1956); M. Wolff & L. Raiser, *Sachenrecht Ein Lehrbuch* § 17, p. 52 (1957); R. Haase in 4 *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vor § 854 no. 7 (1981); W. Kregel in 3 *Das Bürgerliche Gesetzbuch Kommentar* vor § 854 no. 2 (12th ed. 1979). J. von Gierke, *Das Sachenrecht des bürgerlichen Rechts* § 9 I 2, p. 22 (4th ed. 1959); F. Lent & K.H. Schwab, *Sachenrecht Ein Studienbuch* § 3 IV, p. 13 (19th ed. 1983); Mühl, in T. Soergel & W. Siebert, *Bürgerliches Gesetzbuch* vor § 854 no. 13 (11th ed. 1978). It has been accepted as a partial explanation by E. Wieser, "Der Schadensersatzanspruch des Besitzers aus § 823 BGB — BGH JZ 1954, 613," 10 *Juristische Schulung* 557, 559-60 (1970); H.P. Westermann, *Sachenrecht* § 8, 3 pp. 78-79 (6th ed. 1990).

interest in maintaining his possession, then the unlawfulness or disruption of public order cannot consist in the mere fact that the plaintiff was deprived of possession. It must be found in the unlawful or disruptive way in which the defendant deprived him of it. But relief is given when there has been dispossession without violence or a breach of the peace:¹⁸ for example, when defendant took plaintiff's hat by mistake in place of his own.¹⁹ Moreover, it is hard to see why public order should be protected by a civil action, rather than by administrative or police measures, if no one has suffered an injury to any protectable interest.²⁰ Nor can one see why the successful plaintiff should recover possession.²¹ His incentive to defend public order by bringing the action will then depend on the value of what he has lost, a consideration which, by hypothesis, has nothing to do with the extent to which public order has been disrupted.²²

In the 19th century, most German jurists turned to the second explanation instead. The possessor should be protected against interference even though his possession itself is not worthy of protection. According to Gans, Puchta, Windscheid, Bruns and Randa, the reason was that the possessor's will was actualized or expressed in his exercise of dominion over an object. The will was worthy of protection without regard to whether this exertion of dominion was rightful or wrongful.²³ To interfere with another's exercise of will was to interfere with his freedom or personality,²⁴ or to violate the principle that each person is the equal of every other.²⁵ Today, Wieling takes the same approach.²⁶

18. Ihering, *supra* n. 12, at 8; 1 H.J. Wieling, *Sachenrecht* 3 III b, p. 127 (1990).

19. P. Heck, *Grundriß des Sachenrechts* § 3, 6 p. 12 (1930); Wieling, "Grund und Umfang des Besitzschutzes," in *De iustitia et iure Festgabe für Ulrich von Lübtow zum 80. Geburtstag* 550, 576 (M. Harder & G. Thielmann, eds. 1980).

20. Weiling, *supra* n. 18, at III 3 b, p. 127; Wieling, *supra* n. 19, at 576-77; Heck, *supra* n. 19, at § 3, pp. 12-13; Westermann, *supra* n. 17, at § 8, 3 pp. 78-79.

21. Weiling, *supra* n. 18, at 3 III b, p. 127.

22. In the 19th century, a further objection was that a concern for public order cannot explain why Roman law gives no remedy to a person such as the lessee who is not claiming in his own right. Randa, *supra* n. 10, at § 8, p. 276; 1 G.F. Puchta, *Vorlesungen über das heutige römische Recht* § 122, p. 244 (F. Rudorff, ed., 2d ed. 1849); Puchta, "Über die Existenz des Besitzrechts," in G.F. Puchta, *Kleine Zivilistische Schriften* 239, 259, 262 (F. Rudorff, ed. 1851).

23. E. Gans, *System des römischen Civilrechts* 211-12 (1827); 2 G.F. Puchta, *Curus der Institutionen* § 224, p. 333 (3d ed. 1851); Puchta, *supra* n. 22, at § 122, p. 243; Puchta, "Zu welcher Classe von Rechten gehört der Besitz?" in Puchta, *Kleine Schriften*, *supra* n. 22, at 255-56; B. Windscheid, 1 *Lehrbuch des Pandektenrechts* § 148, p. 401 (3d ed. 1873); Bruns, "Das heutige römische Recht," in F. von Holtzendorff, *Encyclopädie der Rechtswissenschaft* 247, 293 (1870); C.G. Bruns, *Das Recht des Besitzes im Mittelalter und in der Gegenwart* § 58, pp. 491-92 (1848); Randa, *supra* n. 10, at § 8, p. 284.

24. Puchta, *supra* n. 22, at § 122, p. 243; Bruns, *Römische Recht*, *supra* n. 23, at 293; Randa, *supra* n. 10, at § 8, p. 284.

25. Windscheid, *supra* n. 23, at § 148, p. 401 n. 6.

26. Wieling, *supra* n. 18, at 3 III b, p. 128; Wieling, *supra* n. 19, at 577-78.

The advantage of this approach, as Puchta and Randa pointed out, is that the victim is protected simply because the act of dispossession interferes with his will, not because the act that interferes is unlawful in any other respect.²⁷ The difficulty is that the law does not protect people against any interference with their will. It protects them against dispossession. German critics have made this point in various ways. Ihering argued that the law does not protect the will regardless of what is willed but rather defines the circumstances in which the will is protected.²⁸ Heck noted that while one can always expand a word like "personality" to cover any instance in which one gives relief, doing so does not explain why relief is given.²⁹ Julius von Gierke observed that any protection the law could afford is protection of the personality in some sense.³⁰ So what is special about possession?

Indeed, if the possessor who is not the owner is acting without right, the law is protecting the will to do something wrongful. Even if, in the abstract, the will should be protected, it is hard to see why the will to do wrong should be.³¹ Moreover, the law is not simply protecting the will of the possessor but settling a conflict among different people's wills. By taking an object, a dispossessor allows his will to override that of the earlier possessor. By keeping it, the earlier possessor allows his own to override the will of all those who come later. Respect for the will does not explain why the earlier possessor should win.³² Nor does it explain why physical possession matters. If the law were merely protecting a person's will to appropriate an object, it would protect that will however it were expressed, whether physical possession was taken or not.³³

As Bruns noted, the theories just discussed did not protect possession as such.³⁴ Ihering recognized that to explain protection, one needed to identify some substantive right in need of protection. In his theory, however, this substantive right was not possession itself. It was ownership. By protecting possession, the law gave a more effective protection to ownership.³⁵ The owner would not have to prove his title when dispossessed.³⁶ The protection given possessors

27. Puchta, *supra* n. 22, at § 122, p. 244; Randa, *supra* n. 10, at 290.

28. Ihering, *supra* n. 12, at 31-34.

29. Heck, *supra* n. 19, at Excurs I, p. 488.

30. Gierke, *supra* n. 17, at § 9 I 2, p. 23.

31. Ihering, *supra* n. 12, at 31-34; Gierke, *supra* n. 17, at § 9 I 2, p. 23; Wolff & Raiser, *supra* n. 17, at § 17, p. 52 n. 1.

32. Dernburg, *supra* n. 12, at § 170, p. 403.

33. Ihering, *supra* n. 12, at 37-38. In the 19th century, another objection was that such an approach could not explain the failure to protect a person such as the lessee who did not claim the object in his own right. Ihering, *supra* n. 12, at 38-39.

34. As noted by Bruns, *supra* n. 10, at § 26 pp. 265-66, speaking of the theory of Savigny, Rudorff, Puchta, Bruns, Windscheid and Randa.

35. Ihering, *supra* n. 12, at 45-46.

36. Ihering, *supra* n. 12, at 47-54.

who were not owners was an "unavoidable consequence," a "price" paid for protecting owners.³⁷ According to Ihering, this theory explained why the Roman possessory interdicts did not look like tort actions, and why they could not be brought against a person such as a lessee not claiming in his own right.³⁸

Few German jurists have agreed with Ihering.³⁹ Critics pointed out that his theory does not explain why a possessor is protected when he clearly is not the owner;⁴⁰ indeed, why he is sometimes protected even against the owner.⁴¹ Moreover, it rests on the assumption that the person dispossessed is most often the owner, an assumption Ihering himself had questioned.⁴²

One begins to suspect that these theories do not work because of the feature they have in common: they give no reason to protect possession as such. The one German jurist who tried to do so was Dernburg. Possession should be protected because it is "the factual order of society (*tatsächliche Gesellschaftsordnung*), the given division of physical goods. It grants the individual directly the instruments of his activity, the means for the satisfaction of his needs."⁴³ If so, one might wonder, why is possession not a right belonging to the possessor? Dernburg denied that it is.⁴⁴ He explained that the owner, and not the possessor, has the right to possess. But if that is so, why should possession be protected?

Phillip Heck, developing Dernburg's insight, tried to answer that question while maintaining, with Dernburg, that the possessor did not have a genuine right to possession. Heck did so by claiming that the law does not protect possession as such but rather the continuity of possession. The law recognizes "the need to protect the continuity of the relationships in life where possible," Heck said, citing Dernburg. "Continuity is recognized as a good without regard to whether a definite right is present."⁴⁵ "Everyone knows from his own experience that adjustment to the loss of the use of a thing can lead to

37. Ihering, *supra* n. 12, at 55.

38. Consequently, some critics have pointed out that his theory does not explain why the German Civil Code does protect persons such as the lessee. Wieling, *supra* n. 18, at 3 III b, p. 127; Wieling, *supra* n. 19, at 575; Gierke, *supra* n. 17, at § 9 I 2, p. 23.

39. An exception is Wieser, *supra* n. 17, at 559-60. Unlike Ihering, he believes the goal of the law is to protect, not only owners, but all possessors worthy of protection, and that protection of the unworthy is the price one pays. He does not explain what other than ownership would distinguish the worthy from the unworthy possessor.

40. Randa, *supra* n. 10, at § 8, p. 276; Dernburg, *supra* n. 12, at § 170, p. 403; Heck, *supra* n. 19, at Excurs I, p. 488; Wieling, *supra* n. 19, at 575.

41. Randa, *supra* n. 10, at § 8, p. 276; Heck, *supra* n. 19, at Excurs I, p. 488.

42. Ihering, *supra* n. 12, at 25-27.

43. Dernburg, *supra* n. 12, at § 170, p. 404.

44. *Id.* § 169, p. 398.

45. Heck, *supra* n. 19, at § 3, p. 13. Similarly, "[t]he attack on continuity is always an injury to interest, a loss of something of value to life. Consequently, it must be remedied until a better right is established." "The protected legal good is the orga-

difficulties and damage."⁴⁶ For Heck, the difficulties and damage against which the possessor is protected are not the loss of thing itself but the consequences of interrupting its use.

The trouble is that it is hard to see why continuity of possession merits legal protection if possession itself does not. Critics have made the same objection to protecting continuity that they would make to protecting possession as such: the theory cannot explain protection of a wrongdoer.⁴⁷ As one critic pointed out, the fact that everyone has an interest in keeping what he possesses does not explain why we protect it.⁴⁸

Other German jurists have pointed out that the protection given possession is like that given property rights. But they have not developed a theory different than the ones already discussed. Bruns tired of his will theory and suggested that the reasons for protecting possession must be found in possession itself.⁴⁹ But he denied that possession could be a right,⁵⁰ and found no reason for protecting it other than the value placed on freedom.⁵¹ Fritz and Jürgen Baur have said that "in possession itself is a value that the law wishes to protect."⁵² But they accept Heck's theory. Gierke criticized Savigny, and Westermann criticized the will theorists, for failing to realize that the protection of possession is the protection of an economic asset (*Vermögen*).⁵³ Nevertheless, Gierke explained protection by the need to maintain public order, and Westermann tried to combine that theory with Heck's. Gierke, E. Wolf, M. Wolff, Raiser, Enneccerus and Nipperdey have concluded that possession must be some sort of right since it can be conveyed and inherited.⁵⁴ But none of them have turned this insight into a new theory.

B. *The Anglo-American Sequel*

English law, according to contemporary treatise writers, "never bothered much with the idea of ownership,"⁵⁵ "never applied the con-

nizational value of possession." *Id.* Protection is given because of "the value . . . that continuity has for people in the relations of life." *Id.* Excurs I, p. 487.

46. *Id.* Excurs I, p. 487.

47. Wieling, *supra* n. 18, at § 3 III b, p. 127; Wieling, *supra* n. 19, at 576-77; Gierke, *supra* n. 17, at § 9 I 2, p. 23; Westermann, *supra* n. 17, at § 8, 3 pp. 78-79.

48. Wieling, *supra* n. 19, at 576-77.

49. Bruns, *supra* n. 10, at § 26, p. 273.

50. *Id.* § 27, p. 292.

51. *Id.* § 27, p. 290.

52. F. Baur & J. Baur, *Lehrbuch des Sachenrechts* § 9 I 3, p. 71 (15th ed. 1989).

53. Gierke, *supra* n. 17, at § 9 I 2, p. 23; H.P. Westermann, *supra* n. 17, at § 8, 3 p. 78.

54. Gierke, *supra* n. 17, at § 5 I, p. 9; E. Wolf, *Lehrbuch des Sachenrechts* § 2 A III b, p. 34 (1971); Wolff & Raiser, *supra* n. 17, at § 3 III, p. 19; 1 L. Enneccerus & H.C. Nipperdey, *Allgemeiner Teil des Bürgerlichgen Rechts Ein Lehrbuch* § 80 I 1, p. 478 (15th ed. 1959).

55. M. Harwood, *Modern English Land Law* 503 (1982).

ception of ownership to land,"⁵⁶ "never really disentangled [the concept of ownership] from that of possession."⁵⁷ In English law, supposedly, ownership or title to land is based on the fact of possession or the best right to possession.⁵⁸ Title is therefore relative. The person with possession has title against anyone who does not have a better right.⁵⁹ A "better right" is a right based on still earlier possession.⁶⁰

This doctrine is supposed to be ancient, English, and judge made. We will see in the second part of this Article that it did not originate in the decisions of English courts. For centuries, they decided cases pragmatically without benefit of the doctrine of relative title or any other theory of what the relationship might be between ownership and possession. It first appeared clearly in the writings of Sir Frederick Pollock although he may have borrowed a suggestion of Oliver Wendell Holmes. Holmes and Pollock were familiar with the German debate and were trying to respond to it. While they both thought their theories would explain English law, their theories had little to do with any feature of the law that was distinctively English.

Holmes criticized the German scholars in his book *The Common Law*. He complained that they began with Kantian philosophical principles and then "cunningly adjusted" them to explain the Roman law. He hoped to do better by explaining the common law, "a far more developed, more rational and mightier body of law than the Roman."⁶¹ At common law, possession and ownership had been protected in a single action, the action of ejectment. It was originally a lessee's remedy, and had become available to owners and possessors who made a fictitious allegation that they had made a lease. Paradoxically, the features of ejectment that struck Holmes as more rational were due, historically, to the fact that it had originally protected a lessee.⁶² At common law, in contrast to Roman law, a lessee could sue, and the defendant could plead his title in defence. Holmes developed a theory of possessory intent which he cunningly adjusted to explain these features.

He discussed the relationship between ownership and possession in his final paragraph. "[R]ights of ownership," he said, "are substan-

56. G. Cheshire & E.H. Burns, *Modern Law of Real Property* 25 (14th ed. 1988).

57. R. Megarry & H.W.R. Wade, *The Law of Real Property* 104 (5th ed. 1984).

58. See Megarry & Wade, *supra* n. 57, at 104; Cheshire & Burns, *supra* n. 56, at 26; Harwood, *supra* n. 55, at 503.

59. Megarry & Wade, *supra* n. 57, at 106; Cheshire & Burns, *supra* n. 56, at 26-27; Harwood, *supra* n. 55, at 503; K.J. Gray & P.D. Symes, *Real Property and Real People Principles of Land Law* 49, 10s (1981); K. Gray, *Elements of Land Law* 65, 752-53 (1987).

60. See Megarry & Wade, *supra* n. 57, at 107; Cheshire & Burns, *supra* n. 56, at 852-53; Harwood, *supra* n. 55, at 503.

61. O.W. Holmes, Jr., *The Common Law* 210 (1923).

62. *Id.* 210-11.

tially the same as those incident to possession." "The owner is allowed to exclude all, and is accountable to no one. The possessor is allowed to exclude all but one, and is accountable to no one but him."⁶³ Whenever he could, Holmes had tried to present his ideas as descriptions of the action of ejectment at common law. This time, Holmes did not mention any feature peculiar to ejectment. He seemed to be discussing ownership and possession considered abstractly.

Possibly, this passage inspired the theory of relative title developed by Holmes' friend, Sir Frederick Pollock. Holmes wrote in 1881. Pollock described his theory in 1888, in his *Essay on Possession in the Common Law*, and in 1896, in his *First Book of Jurisprudence*.

Unlike Holmes, Pollock admired German scholarship and was willing to borrow from it. In his *Essay*, like the Germans, he initially described the owner as the person with the right to possess.⁶⁴ Consequently, he acknowledged that "[w]hy the law should ascribe possession to wrongdoers may be difficult to explain completely."⁶⁵ In the *Essay* and in his *First Book*, he accepted explanations like those of the German jurists: protecting the wrongdoer is necessary to protect third parties, or the true owner, or the order of society, or the mere will of the possessor.⁶⁶

His break with the German tradition was to formulate, and then exploit, an alternative distinction between an owner and a possessor. The owner had rights against everyone, and the possessor had rights against everyone except the owner. In his *Essay*, Pollock defined "possession in fact" as the fact of control. In contrast, "possession in law" is:

"the fact of control coupled with a legal claim and the right to exercise it in one's own name against the world at large, not as against all men without exception. We say as against the world at large, not as against all men without exception. For a perfectly exclusive right to the control of anything can belong only to the owner. . . ."⁶⁷

Defined in this way, possession is a relative ownership, ownership as against everyone but the true owner. While Pollock may have borrowed this idea from Holmes, he thought it resolved a difficulty with the position of German authors such as Savigny:

63. Id. 246.

64. F. Pollock & R.S. Wright, *An Essay on Possession in the Common Law* 1-3 (1888)[hereinafter cited as *Essay*]. Pollock wrote Parts I and II, which we will be quoting throughout, and Wright wrote Part III.

65. *Essay* 3.

66. *Essay* 3-4; F. Pollock, *A First Book of Jurisprudence for Students of the Common Law* 174-75 (1896)[hereinafter cited as *First Book*].

67. *Essay* 16.

"When possession as such is regarded as the proper subject of protection, that is to say, when dispossession without just cause (apart from any violence or physical damage incidental to the act) is treated as calling for a remedy, then the relation to ownership becomes apparent."⁶⁸

Possession must be a right like ownership because it is protected for its own sake, not because of something else, such as the prevention of violence. As we have seen, the failure to recognize that possession was protected for its own sake was, indeed, a source of continual trouble for the 19th century Germans. Pollock was right to try to escape, and his attempt to do so shows he had learned a lesson from the difficulties the German scholars were encountering.

Pollock, however, did not merely conclude that possession must be a right worth protecting. He decided it was a right differing from ownership only because of the number of people against whom the right could be asserted. Consequently, possession "is a kind of title."⁶⁹ It "may have all or most of the advantages of ownership against every one but the true owner, in other words, it may confer a relatively good title."⁷⁰ "[W]e treat the actual possessor not only as legal possessor but as owner, as against every one who cannot show a better right. . . ."⁷¹

It followed, he thought, that the prior right must be the better right. Possession conferred "a right in the nature of property which is valid against every one who cannot show a prior and better right."⁷² "[E]very possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title."⁷³

Pollock did not consider the logical consequences of that statement. They go beyond anything he or an English court would be likely to accept. If Pollock were right, a possessor would have a title which, like an owner's, would not be extinguished when he abandoned the property. Indeed, if Pollock were right, anyone who had been in possession, even for a day, could, until the statute of limitations ran, claim the property from any current possessor who could not trace title flawlessly from a prior possessor. If that is English law, one should spend one's next vacation taking brief possession of as many English houses as possible in hopes of returning years later and finding them occupied by someone who cannot prove title.

The evidence Pollock cited fell far short of establishing this conclusion. Most of the evidence merely showed that possession was in

68. *First Book* 169.

69. *Essay* 19.

70. *First Book* 178.

71. *First Book* 172.

72. *Essay* 93.

73. *Essay* 95.

many ways like ownership, and that ownership could be acquired by adverse possession. Pollock pointed out that the owner and the possessor use the property in the same way;⁷⁴ that the owner's rights can therefore be protected by an action for possession instead of by an action, like the Roman *vindicatio*, that only an owner could bring;⁷⁵ that a person in peaceable possession was assumed to be the owner;⁷⁶ that the possessor's rights were transmissible to others;⁷⁷ that the adverse possessor eventually had the same rights as an owner;⁷⁸ and that, at least in England, where there was no recording system, usually the only way an owner could prove title was to trace it from someone who had possessed sufficiently long to acquire title by adverse possession.⁷⁹ This evidence does not show that the possessor has the same rights as the owner against everyone except the owner. It does not show that the prior possessor has a title good against any later possessor.⁸⁰

Moreover, this evidence is not distinctively English. In continental systems, as we will see, possession is like ownership in the ways Pollock mentioned, and in some, ownership may be established by adverse possession. The fact that the English lack a recording system and the Romans have an unnecessary action does not show their underlying theories of ownership and possession are different.

Indeed, in his *First Book of Jurisprudence*, Pollock presented his theory as one that could explain both English and Roman law:

"It may be worth remarking that in general terms that the relations of possession and ownership in Roman and English

74. *Essay* 19; *First Book* 170.

75. *First Book* 171.

76. *Essay* 20; *First Book* 171-72.

77. *Essay* 19, 22, 93; *First Book* 172.

78. *Essay* 95-96; *First Book* 172.

79. *Essay* 94-95; *First Book* 172.

80. In his *Essay*, 96 nn. 1-3, Pollock also cited three 19th century English cases for the proposition that "possession even for a short time is a good title against all subsequent intruders." That proposition goes well beyond these cases, in all of which the possessor or his heir or assign was trying to recover against one who actually dispossessed him, as he could have done in continental law. He cited *Asher v. Whitlock*, L.R. 1 Q.B. 1 (1865); *Doe dem. Hughes v. Dyeball, M. & M.* 345, 173 E.R. 1184 (N.P. 1829); *Doe dem. Smith & Payne v. Webber*, 1 Ad. & E. 119, 110 E.R. 1152 (K.B. 1834). These cases are discussed, *infra*, at pages 326, 323, and 323, respectively. Pollock did not seem troubled by the fact that in another case, a prior possessor failed to recover against one who dispossessed her when her own pleadings showed that she did not have title. *Doe dem. Carter v. Barnard*, *Doe dem. Carter v. Barnard*, 13 Q.B. 945, 116 E.R. 1524 (1849), cited *Essay* 97 n. 3, discussed *infra* p. 325. Similarly, according to Pollock, under English law "a plaintiff who seeks redress solely for wrong done to his right to possess is not favored to the same extent [as one whose existing possession is interfered with by a wrongdoer.] If his actual possession has not been disturbed by the act complained of, he may be defeated by showing that some one else, who need not be the defendant or any one through whom the defendant claims, had a better right to possess." *Essay* 91. Pollock did not explain why it should be so. And, indeed, it should not if the prior possessor has a title good against anyone who comes later, as Pollock claimed.

law, the difficulties arising out of them, and the devices resorted to for obviating or circumventing those difficulties, offer an amount of resemblance even in detail which is much more striking than the superficial and technical differences. We cannot doubt that these resemblances depend on the nature of the problems to be solved and not on any accidental connection. One system of law may have imitated another in particular doctrines and institutions, but imitation cannot find place in processes extending over two or three centuries, and whose fundamental analogies are externally disguised in almost every possible way."⁸¹

Judged as a general theory, Pollock's idea had one great merit. It avoided all the troubles that German scholars had encountered once they denied that the possessor had a right to possess. But one can avoid those troubles without claiming, as Pollock did, that the possessor had the same rights as the owner except against the owner himself.

II. THE LAW IN PRACTICE

The 19th century German scholars thought the possessor had no right to possess. Pollock thought he had the same rights as an owner. As we have seen, each of these positions has theoretical difficulties. The remaining possibility is that the possessor does have a right to possess but his right is not in all respects like that of an owner. The last part of this Article will show that this possibility is the most acceptable in theory. This section will show that it best describes the protection that civil law and common law systems have usually given the possessor.

A. Continental Law

Savigny, Ihering and their contemporaries in Germany were trying to explain the protection the Roman law gave to possessors. As we have seen, one who had been dispossessed could recover land by bringing the interdict *unde vi*. One who 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*.

To succeed, the plaintiff had to prove his own possession had not been obtained from the defendant by force (*vi*) or secretly (*clam*) or by a grant at will (*precario*) from the defendant. Thus the interdicts could not be used to shield a plaintiff against one whom he himself had dispossessed. But the interdicts had some more peculiar features that figured in the German debate.

81. *First Book* 179.

First, they could not be brought by anyone who held property pursuant to a contract from the owner: for example, the lessee, borrower, or depositary. In Roman law, such people were not considered to have possession. Since they are possessors as far as the English language is concerned, we will refer to them in this Article as "derivative possessors" since they base their claim on that of another.

Second, the Roman possessory interdicts could only be brought against the dispossessor himself. They could not be brought against someone who had dispossessed him in turn or to whom he had transferred the property voluntarily. Indeed, *unde vi* lay only against one who had dispossessed the plaintiff by violence.

The 19th century German jurists supported their theories by pointing to these features of Roman law. According to Ihering, the lack of protection for the derivative possessor showed that the purpose of the interdicts was to safeguard the real owner. According to Savigny and those he influenced, the lack of protection against anyone except the immediate dispossessor and the requirement of violence showed that the purpose was to safeguard the possessor against unlawful acts.

But the Roman law the German scholars were discussing had not been in force in continental Europe for centuries. In Germany and Italy, plaintiffs had recovered land using an action originally taken from canon law and known as the *actio spoli*. In France, plaintiffs had recovered land using a medieval remedy known as *complainte en cas de saisine et nouvelleté*. In both countries, plaintiffs typically recovered movables using actions available in customary rather than Roman law.

These possessory remedies lacked the features of Roman law just described. As we will now see, they seemed more obviously to protect possession as such. In Germany, these older remedies were maintained by the courts despite the objections of scholars and were preserved in the German Civil Code. In France, though the traditional remedy to recover land went into eclipse in the 19th century, similar results are reached in practice today.

It is doubly strange, then, that the theoretical account one finds in continental textbooks still mirrors the positions taken in the German debate. Not only, as we have seen, did this debate raise theoretical difficulties that were never resolved. It concerned a body of law that was never in force in continental countries in its pure form, possibly since the time of the ancient Romans.

1. *Germany*—Before the 19th century, a plaintiff who had never lost possession, but whose possession had been disturbed, would bring the Roman action *uti possidetis*.⁸² But one who had lost

82. 1 H. Coing, *Europäisches Privatrecht* 284 (1985).

possession of movables would not normally bring the Roman *utrubi* for a movable or *unde vi* for land. For movables, he would bring an action that had originated in Germanic custom. For land, he would bring an action that originated in the canon law and was variously known as *redintegranda* or the *actio spoli*.

The action for movables originated at a time when ownership and possession were not clearly distinguished. It originally protected, not possession as such, but *Gewere*, a term analogous to the English seizin or the French *saisine*. Possession was treated as a title; but movables lost or stolen could be recovered from any subsequent possessor, even one who had acquired them in good faith.⁸³

The *actio spoli* had been widely used to reclaim land since the later Middle Ages, and, by the 17th and 18th century, it had, in practice, displaced *unde vi*.⁸⁴ Despite its canon law origins, it had come to be a remedy for disputes among laymen over lay property.⁸⁵ Writers of the period describe it as the standard remedy.⁸⁶

The remedy had been based on a passage in the *Decretum*, a collection of texts made by Gratian in the 12th century, and one of the basic authorities for Canon lawyers. The text began with the word "redintegranda," and so gave this name to the remedy. According to the text, when a bishop was ejected from his diocese, before a synod was called to consider to whom the diocese belonged, everything had to be restored to the bishop that had been taken unjustly.⁸⁷

This text became the basis of a remedy for possessors that, as the 17th and 18th century writers, inform us, was wider than the Roman

83. Sauveplanne, "The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law," 29 *Rabels Zeitschrift für Internationales und Ausländisches Privatrecht* 651, 652-56 (1965); Zweigert, "Rechtsvergleichend-Kritisches zum gutgläubigen Mobiliarerwerb," 23 *Rabels Zeitschrift für Internationales und Ausländisches Privatrecht* 1, 11-12 (1958); von Lübtow, "Hand wahre Hand Historische Entwicklung, Kritik und Reformvorschläge," in *Festschrift der Juristischen Fakultät der Freien Universität in Berlin* 119, 178 (1955).

84. Id. 284-85. See A. Gambaro, *La legittimazione passiva alle azioni possessorie* 8 (1949).

85. Mencken, note to W. Lauterbach, *Thesaurus juris civilis sive succinta explanatio Compendii Digestorum Schützio-Lauterbachiani* ad lib. 43, tit. 16 at p. 1400 n. 18 (1717); 3 W. Lauterbach, *Collegii theorico-pratici a libro treagesimo nono pandectarum* ad lib. 43, tit. 16, at § 22, p. 496 (2d ed. 1715); A. Gaill, *Practicarum observationum tam ad processum iudicarium praesertim imperialis camerae quam causarum decisiones pertinentium libri duo* lib. 2, obs. LXXV, at p. 436 no. 11 (1661). For earlier controversy as to whether it should be, see J. Menochius, *De adispiscendo, retinenda, et recuperanda possessione doctissima commentaria De recup. poss. rem.* XV, at pp. 438-39, nos. 13-21 (1618).

86. J. Voet, *Compendium iuris iuxta seriem Pandectarum adjectis differentiis iuris civilis et canonici* ad lib. 43, tit. 16, p. 583 (1688) ("Moribus. Recuperandae possessionis remediis plenioribus iure Canonico utimur"); Lauterbach, *Collegii*, supra n. 85, at ad lib. 43, tit. 16, at § 22, p. 496 ("Est hodie frequentissimum").

87. C. 3 q. 1 c. 3. On its Canon law origins, see F. Ruffini, *L'actio spoli* 354-75 (1889).

unde vi.⁸⁸ It could be used to demand the return, not only of bishoprics, but of almost anything that one could possess. Unlike the Roman remedy, it was available to any possessor, including the derivative possessor.⁸⁹ Moreover, as the 17th and 18th century writers noted, it was available, not only to those who lost possession by force, but to those who lost possession without a "just cause," however they might have lost it.⁹⁰

Moreover, while the 17th and 18th century writers agreed that *unde vi* could be brought only against the dispossessor and certain people closely associated with him,⁹¹ *redintegranda* would lie against a wider class of defendants. Whether it would lie against anyone who happened to be in possession had been disputed since the Middle Ages.

Gratian's text had not said who must restore what the bishop had lost. In the 13th century, Gratian's *Decretum* was supplemented by the *Decretals* of Pope Gregory IX which contained another text, known as *Saepe* after its initial word. This text explained that people who had been dispossessed and were unable to prove title often lost their property because the dispossessor transferred it to a third party. Therefore, "despite the rigor of the civil law"—a reference to *unde vi*—they would be given a remedy against anyone who "knowingly" received it.⁹²

There were two ways to interpret *Saepe*, neither of which was felicitous, but each with its champions. Bartolus, perhaps the greatest of the medieval jurists, read it as a limitation on *redintegranda* so that no action would lie against one who acquired possession ignorant of the earlier wrongful dispossession.⁹³ By this interpretation,

88. Voet, supra n. 86, at ad lib. 43, tit. 16, p. 583; 4 J. Westenberg, *Principia iuris secundum ordinem pandectarum* ad lib. 43, tit. 16 at § 25, p. 1024 (1764); Gaill, supra n. 85, at lib. 2, obs. LXXV, at p. 436 no. 10.

89. Coing, supra n. 82, at 286.

90. 2 G. Struve, *Syntagmatis iuris civilis exerc.* XLV ad lib. 43, tit. 16, in § cviii p. 728 (1672) ("sive alias quovis modo sine iusta causa ablata res est"); Mencken, note to Lauterbach, *Thesaurus*, supra n. 85, at ad lib. 43, tit. 16 at p. 1400 n. 18 ("competens ei qui sine causa a possessione cujuscunque rei recissit"); 4 Westenberg, supra n. 88, at ad lib. 43, tit. 16 at § 25, p. 1024 ("quocunque modo iniuste ablata"); Lauterbach, *Collegii*, supra n. 85, at ad lib. 43, tit. 16, at § 22, p. 496 ("sine causa cuiusque rei dejectus"); Gaill, supra n. 85, at lib. 2, obs. LXXV, at p. 436 no. 10 ("competit generaliter ei qui iniuste possessione cecidit").

91. Voet, supra n. 86, at ad lib. 43, tit. 16, p. 583; Lauterbach, *Thesaurus*, supra n. 85, at lib. 43, tit. 16, p. 1398; 4 Westenberg, supra n. 88, at ad lib. 43, tit. 16 at § 7, p. 1022; M. Wesenbeck, *In Pandectas Iuris Civilis et Codicis Iustiniani Commentarii* ad lib. 43, tit. 16, at p. 1115 no. 11 (1597); 3 Lauterbach, *Collegii*, supra n. 85, at ad lib. 43, tit. 16, at § 2, pp. 484-85; § 11, p. 489.

92. *Decretales Gregorii IX* 2.13.18 (1595).

93. Bartolus de Saxoferrato, *Commentaria Corpus iuris civilis* ad Dig. 41.2.15 (1615), although he was willing to allow an action against one who obtained possession and *titulus* from the dispossessor. For his own position, Bartolus cited "l. sive autem § 1. de publ. in rem actione." We believe he was referring to Dig. 6.2.9.4 which deals with the *actio Publiciana*, and says that if two people buy in good faith from the

oddly enough, a provision that had clearly been intended to expand the possessor's remedies would have the effect of contracting them. Others took a different view. They read *Saepe*, not as limiting *redintegranda* but as creating a second action which, unlike *redintegranda*, would only lie against a possessor with knowledge of the dispossession.⁹⁴ Consequently, a prior possessor could recover against an ignorant subsequent possessor. By this interpretation, oddly enough, *Saepe* would be superfluous since anyone it protected would already be protected by *redintegranda*.⁹⁵

The dispute never ended. In the early 17th century, the Italian jurist Menochius cited thirty one authorities who believed the action *redintegranda* would lie against one who had acquired possession in good faith, and twenty nine who believed it would not. He took the latter view.⁹⁶ In 17th and 18th century Holland and Germany, some jurists, such as Struve, Mynsinger, Westenberg and Wesenbeck, thought the action would lie against anyone in possession.⁹⁷ Others, such as Gaill and Mencken, thought that the plaintiff might not recover against a good faith possessor, Gaill for the reasons given by Menochius.⁹⁸

The position of the courts during the centuries in which the *actio spoli* was the standard remedy has yet to be studied. The scholars do not mention a uniform practice. The dispute among the scholars may have allowed the courts to act as seemed fair in the individual case. One can imagine cases in which it would seem equitable to allow the prior possessor to recover against subsequent good faith possessor, and circumstances in which it would seem quite harsh.

In part, the debate was, of course, over how to read the old Canon law texts. *Redintegranda* remained, as we have seen, the standard remedy for those who had lost possession. The Dutch and German jurists continued to cite *Saepe* for the extension of the remedy of *unde*

same owner, the first to take delivery wins. But if they buy from different non-owners, the one in possession has the better claim.

94. *Glossa ordinaria* to Gratian, *Decretum ad dicta Gratiani ante C. 3, q. 1 ad "quidam episcopus"* (1595); *Glossa ordinaria to Decretales Gregorii IX*, supra n. 92, at 2.13.18 ad "scienter"; Rolandus, *Die Summa Magistri Rolandi nachmals Papstes Alexander III* ad X 2.13.18 (F. Thaner ed., 1874).

95. As noted by Menochius, supra n. 85, at p. 445, no. 93.

96. Menochius, supra n. 85, at p. 445, no. 89.

97. 2 Struve, supra n. 90, at exerc. XLV ad lib. 43, tit. 16, in § cviii p. 728 ("adversus quemlibet ejus rei possessorem, quamvis ipse non spoliaverit, nec etiam spoliationis sit conscius"); Mynsinger, note to Lauterbach, *Thesaurus*, supra n. 85, at ad lib. 43, tit. 16 at p. 1400 n. 18 ("datur contra possessorem tam malae quam bonae fidei"); 4 Westenberg, supra n. 88, at ad lib. 43, tit. 16 at § 25, p. 1024 ("adversus quemcunque possessorum, licet non spoliaverit, nec spoliis conscius fuerit"); Wesenbeck, supra n. 91, at ad lib. 43, tit. 16, at p. 1115 no. 12 ("quemcunque possessorum persequuntur").

98. Mencken, note to Lauterbach, *Thesaurus*, supra n. 85, at ad lib. 43, tit. 16 at p. 1400 n. 18; Gaill, supra n. 85, at lib. 2, obs. LXXV, at p. 436 no. 12.

vi.⁹⁹ They did not develop a theory of possession. Nevertheless, they did mention competing reasons for giving a remedy. As Lauterbach summarized the debate, jurists such as Struve and Mynsinger had appealed to the odium of the law for dispossession and to considerations of public advantage. Jurists such as Gaill and Menochius had appealed to considerations of justice and equity.¹⁰⁰

None of these considerations would have fit easily into the 19th century German debate. A premise of the debate, as we have seen, was that possession in itself was not protected. If that was so, then it would be bizarre to argue, like Struve and Mynsinger, that dispossession was so odious that the prior possessor should be able to recover against a subsequent possessor ignorant of any wrong done him. It would be hard to see the public advantage of allowing him to do so.

But Gaill and Menochius did not argue that remedy should not be limited because the possession as such was not worth protecting. They said it was unjust to deprive the third party of something acquired in good faith. The argument presupposed that the prior possessor had an interest that would be protected absent this unfairness. That presupposition was not shared by the 19th century German scholars. But then again, the 19th century German scholars were not trying to explain the *actio spoli* even though it remained the remedy given by 19th century German courts. They were trying to explain a Roman remedy which did appear more delictual, as Savigny said, but which had long since fallen into disuse.

The drafters of the German Civil Code followed the practice of the courts, not the ancient Roman law of the scholars.¹⁰¹ Movable property, if lost or stolen, could be recovered, not only from anyone who acquired it in bad faith, but also from anyone except an owner or a still earlier possessor who acquired it in good faith.¹⁰² Land could be recovered in an action that looked much like the *actio spoli* as interpreted by Gaill and Menochius.

The Code allows actions for the loss or disturbance of the possession of land to be brought by the derivative possessor as well as by one claiming in his own right.¹⁰³ These actions can be brought when possession has been taken or disturbed "by illegitimate force." (*durch*

99. 2 Struve, *supra* n. 90, at exerc. XLV ad lib. 43, tit. 16, in § cviii p. 726; 3 Lauterbach, *Collegii*, *supra* n. 85, at ad lib. 43, tit. 16 at § 12, p. 489.

100. Lauterbach, *Collegii*, *supra* n. 85, at ad lib. 43, tit. 16, at § 22, p. 496.

101. 3 *Motive zu dem Entwurfe eines Bürgerliches Gesetzbuches für das Deutsche Reich* 118 (1888).

102. German Civil Code (*Bürgerlichesgesetzbuch*) § 1007.

103. German Civil Code (*Bürgerlichesgesetzbuch*) §§ 861, 862. The derivative possessory may even bring the possessory actions against the person from whom he holds possession, and it is not a defence that the derivative possessor no longer had the right to possess. E. Bund in 3 J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* § 863 no. 2, p. 75 (12th ed. 1989).

verbotene Eigenmacht)¹⁰⁴ But, according to the Code, "illegitimate force" merely means the premises are taking the will of the possessor.¹⁰⁵ Possession can be recovered, not only from the dispossessor, but from one who acquired possession knowing that the plaintiff had been illegitimately dispossessed.¹⁰⁶

The drafters sought justifications for these provisions that would not contradict the premises of the German scholarly debate. Their justification of the remedy to recover moveable property was like that of Ihering. A remedy is given to protect the true owner. Normally, the person in possession of moveable property is presumed to be the owner.¹⁰⁷ But, they claimed, the former rather than the subsequent possessor is presumed to be the owner when property is lost or stolen.¹⁰⁸

In explaining recovery of possession of land, they tried to follow Savigny. They observed that "in recent times the need for a purely possessory protection has been denied. It is also admitted that such a protection is not a necessity in the same way as the protection of a right."¹⁰⁹ They provided in the Code that, as a general rule, possession of land could be recovered only from one who dispossessed the plaintiff or ordered his dispossession.¹¹⁰ They gave a delictual explanation of why possession could also be recovered from a third party who had acquired possession knowing the plaintiff had been dispossessed. "The new acquirer of possession who allows it to be given him from one whom he knows to be under the statutory requirement of restitution of § 819, acts *in fraudem legis*."¹¹¹ A remedy was given to avoid "frustration and circumvention of the law."¹¹²

It would be surprising, however, if explanations that Savigny and Ihering had given for the old Roman law justified the non-Roman remedies which they were never meant to explain. In the case of movables, to speak of a presumption of ownership was a fiction. The current possessor cannot win by showing title is a third person. Today, German commentators often admit that the former possessor wins because he has a relatively better right to possession.¹¹³

104. German Civil Code (*Bürgerlichesgesetzbuch*) §§ 861, 862.

105. German Civil Code (*Bürgerlichesgesetzbuch*) § 858. Nevertheless, because possession must be acquired against the will of the person dispossessed, the action cannot be brought against the derivative possessor by the person from whom he holds possession. Bund, *supra* n. 103, at § 861 no. 6, p. 67.

106. German Civil Code (*Bürgerlichesgesetzbuch*) §§ 858 II, 861.

107. German Civil Code (*Bürgerlichesgesetzbuch*) § 1006.

108. 3 *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs* 382-83 (1899).

109. 3 *Motive*, *supra* n. 101, at 116.

110. *Id.* 123.

111. *Id.*

112. *Id.*

113. Baur & Baur, *supra* n. 52, at § 9 IV, p. 73; Mühl, *supra* n. 17, at § 1007 no. 1, p. 507; Wolff & Raiser, *supra* n. 17, at § 23, p. 69.

Equally unpersuasive is the drafter's explanation of their remedy to recover possession of land. Supposedly, they gave a remedy against a third party only to prevent "frustration and circumvention of the law" by the original dispossessioner. Circumvention of the law, however, cannot simply mean that the third party has possession knowing the plaintiff was dispossessed. Neither the Code nor the German courts have given a remedy against a subsequent possessor who later learns of plaintiff's dispossession.¹¹⁴ Nor does circumvention mean that the third party knowingly acted as the dispossessioner's accomplice. The German courts have allowed the remedy against a third party who acquires possession knowing of the dispossession but without the agreement of the dispossessioner or even against the dispossessioner's will.¹¹⁵ The drafters themselves had no clear idea of what circumvention meant. They did not design the remedy because they were concerned about circumvention and wished to prevent it. They used the word circumvention to justify a remedy that had been in use for centuries without such a justification.

After the turmoil and injustices of the Second World War, when the interest of prior possessors seemed compelling, and that of subsequent possessors often dubious, the courts refused to protect even subsequent possessors in good faith. They applied to land the rule that allows recovery of lost or stolen movable property even from a subsequent possessor in good faith.¹¹⁶ That decision is understandable if possession itself is a protectable interest, and its protection is normally cut off only to avoid a greater injustice to the acquirer in good faith. It is not what one would expect if the aim is simply to prevent future disorder.

2. *France*—In medieval and early modern times, the French protected movables in a variety of ways.¹¹⁷ By the 18th century, however, the typical form of protection was to allow possession to be recovered only by bringing a *revendication*, the action normally used to protect ownership rather than possession. The possessor, however, was assumed to be the owner¹¹⁸ if he acquired possession in good faith.¹¹⁹ The rule "possession counts as title" passed into the French Civil Code.¹²⁰ But French courts have allowed movables to be recovered by the prior possessor against a possessor in bad faith, or, if they

114. Bund, *supra* n. 103, at § 858 no. 55, p. 56.

115. *Id.* no. 53, p. 56.

116. BGH 7, 208, 215.

117. J. Brissaud, *Manuel d'histoire du droit français* 1198-1212 (1908).

118. 2 C.-J. de Ferrière, *Dictionnaire de droit et de pratique* v. "possession de bonne foi," 328 (nouv. ed., 1769); 3 J.B. Denisart, *Collections de décisions nouvelles et de notions relatives à la jurisprudence actuelle* v. "meubles" no. 32 (7th ed. 1771); 1 M. Pigeau, *La Procédure civile du Châtelet de Paris* 115 (1779).

119. 1 F. Bourjon, *Le Droit commun de la France* 3.2.1.1 (nouv. ed. 1770); Brissaud, *supra* n. 117, at 1213-14.

120. French Civil Code (*Code civil*) art. 2279.

were lost or stolen, even against a possessor in good faith.¹²¹ For movables, then, the rule in France is like that in Germany, not like that of ancient Rome.

Possession of land was traditionally protected by two actions, *réintégrande* and *complainte en cas de saisine et nouvelleté*. They received their final form in the *Ordonnance civile* of 1667.¹²² A person dispossessed could bring either action without having to prove title.¹²³ *Réintégrande* could be brought by anyone who had been dispossessed by violence¹²⁴ however long he had been in possession.¹²⁵ *Complainte* could only be brought by one who had once been in continuous possession for a year and a day.¹²⁶ 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, and a *complainte* was understood to include a *réintégrande*.¹²⁷

A year and a day of continuous possession thus gave one a right something like a title, which one could assert against anyone except the owner, and which one lost to anyone who came later and possessed for a similar period. Unlike the *actio spoli*, *complainte* could not be brought by a lessee.¹²⁸ The restriction was probably not due to Roman ideas about possession but to medieval and early modern ideas about the significance of leases. Before the French Revolution, in many arrangements in which a person paid rent permanently or indefinitely, the person paying rent was considered an owner rather than a lessee.¹²⁹

121. Weill, Terré & Simler, *supra* n. 3, at § 416, p. 363.

122. 1 Coing, *supra* n. 82, at 288; Gambaro, *supra* n. 84, at 47.

123. 1 de Ferrière, *supra* n. 118, at v. "complainte" 314; 2 *id.* v. "saisine en matière de complainte," 363; 1 H. Lacombe de Prezel, *Dictionnaire portatif de jurisprudence et de pratique* v. "complainte," 309 (1763); 3 *id.* v. "réintégrande," 328; F. L'ange, *La Nouvelle pratique civile, criminelle et bénéficiale ou le nouveau praticien françois* 168, 174 (11th ed., 1717); C. le Brun de la Rochette, *Les Procez civil et criminel* 405 (nouv. ed., 1647).

124. L'ange, *supra* n. 123, at 174; le Brun de la Rochette, *supra* n. 123, at 406.

125. 1 Denisart, *supra* n. 118, at v. "complainte et réintégrande," 567.

126. 1 Denisart, *supra* n. 118, at 567; 1 Lacombe de Prezel, *supra* n. 123, at v. "complainte" 309; 2 de Ferrière, *supra* n. 118, at v. "saisine en matière de complainte," at 363; L'ange, *supra* n. 123, at 167.

127. 2 de Ferrière, *supra* n. 118, at 472.

128. 1 de Ferrière, *supra* n. 118, at v. "complainte," 313; L'ange, *supra* n. 123, at 173; le Brun de la Rochette, *supra* n. 123, at 405.

129. In a fief, a *censive*, which were traditional feudal tenures, and in an *emphytéose*, which was not, "domaine" or "ownership" was divided between the parties. The person entitled to homage, *cens*, or rent owned an interest called the *domaine directe*, and the other party owned one called the *domaine utile*. Both interests were treated as types of real property. F. de Boutaric, *Traité des droits seigneuriaux et des matières féodales* ii-iii, 429 (nouv. ed. 1775); 1 de Ferrière, *supra* n. 118, at v. "cens," 584; C. Loyseau, *Traité du deguerpissement et delaisement par hypothèque* 26 (1636), 26; R. Pothier, *Traité du droit de domaine de propriété* § 4, p. 103 in 9 *Oeuvres de Pothier* (Bugnet ed. 1861). In a *rente foncière*, the person paying rent was an owner. The person collecting it held an interest in the land that was recognized as a type of real

Originally, *complainte* was not thought of as a remedy that protected possessors as distinguished from owners. It protected *saisine*. Open and peaceful possession for a year and a day was the only title that the legal system recognized.¹³⁰ By the 13th century, however, *saisine* was no longer the only recognized title. The expansion of the Roman concept of ownership was relegating it to the status of possession."¹³¹

Though 17th and 18th century French jurists did distinguish ownership from possession, they said that the possessor for more than a year could bring *complainte* because he had a right like a title that was good against everyone except the true owner. According to the celebrated 17th century legal theorist Jean Domat:

"Possession is lost when another comes into possession and possesses for a year. For after possession for a year, if peaceable, even by a usurper, one is regarded as a just possessor and even as a master until the true master establishes his right to recover possession."¹³²

Similarly, according to de Ferrière, author of a popular 18th century legal dictionary, "possession for a year is as good as title until the right of property has been proven against it."¹³³

No one explained successfully why such possession should be as good as a title. Domat said that the possessor was assumed to be the owner.¹³⁴ But that did not explain why he was protected even if he clearly was not the owner, or why he was not protected when he had been off the land for over a year. Some jurists said that he lost his rights after a year because of his own negligence.¹³⁵ But none of them allowed him to recover if he could prove he had not been negligent. The possessor, then, had a property-like right though no one had a good theory why he had it.

In the early 19th century, the drafters of the new Code of Civil Procedure intended to preserve this system. Article 23 provided:

property but not as ownership. 2 de Ferrière, supra n. 118, at v. "rente foncière," 548; Loyseau 28; Pothier, *Traité du contrat de bail à rente*, no. 3, p. 172; no. 16, p. 177; no. 19, p. 178 in 4 *Oeuvres*.

130. See Charte des franchises de cournon of 1244, in Boudet, "Cournon et ses chartres de franchises 1244-1408," 26 *Revue d'Auvergne* 48 reg. xviii (1909).

131. Gambaro, supra n. 84, at 39. The tendency is illustrated by a passage in 1 Philippe de Beaumanoir, *Coutumes de Beauvaisis* 488 no. 961 (Salmond ed. 1899): "When the action of *nouvele dessaisine* is over, the person losing *saisine* can sue the one who has it over its ownership (*propriété*) but must do so within a year, and a day of his loss of *saisine*. If he waits a year and a day go by, he has given up his ownership (*propriété*) and can never demand it."

132. J. Domat, *Les Loix civiles dans leur ordre naturel* III.7.2.30 (1713).

133. 1 de Ferrière, v. "complainte," supra n. 118, at 315.

134. Domat, supra n. 132, at III.vii.1.13, 15; III.vii.3.4; similarly, 2 Pigeau, supra n. 118, at v. "complainte" 8.

135. 2 de Ferrière, supra n. 118, at v. "réintégrand," 471; L'ange, supra n. 123, at 168.

"The possessory actions must be brought within a year of the disturbance by those who, for at least a year, were in peaceable possession, by themselves or through others, in their own right (*à titre non précaire*).” A spokesman explained to the Tribunal: “It says, like the Ordonnance of 1667, that the possessory action must be brought within a year of the disturbance; but it adds, as the case law alone has established, that the one who brings the action must be in possession at least a year.”¹³⁶ The article gave rise to little discussion because “the matter was too simple.”¹³⁷

An unintended change occurred since, as leases became more common, more people found themselves without a possessory remedy. By the mid-19th century, however, the French courts allowed the lessee an action in *réintégrande*.¹³⁸ A law of July 9, 1975 finally allowed him to bring *complainte*.¹³⁹

There was also some initial confusion about why Article 23 of the Code said that “possessory remedies” can be brought by one who has held possession for a year. Some of the earlier writers such as Lepage and Carré concluded that one no longer needed to distinguish *complainte* and *réintégrande*.¹⁴⁰ The view that prevailed, however, was that of Henrion de Pansey. He was not only a scholar who understood the history of the possessory remedies but first president of the *Cour de cassation*.¹⁴¹ He claimed that although *complainte* required a year’s possession, *réintégrande* could be brought, as before, by anyone who had been violently dispossessed.¹⁴² This view was accepted by many of the commentators: by Carré, Toullier, Marcadé, and, finally, in their fourth edition, by Aubry and Rau.¹⁴³ It was adopted by the *Cour de cassation* in a series of decisions beginning in 1826.¹⁴⁴

136. 1 B. Locré, *Esprit du Code du procédure civile* 71 (1816).

137. *Id.* 69.

138. Cass., 25 mars 1857, Dalloz 1858.1.315, Sirey 1858.1.453; Cass., 18 nov. 1873, Sirey 1874.1.217.

139. Now French Civil Code (*Code civil*) § 2282, par. 2.

140. Lepage used the term *complainte* for any possessory action. P. Lepage, *Nouveau style de la procédure civile* 25 (1806). Carré mentioned both actions, but said that the Code of Civil Procedure did not distinguish them “undoubtedly because it would have been useless since there is no difference” between them. G.L.J. Carré, *Les Lois de procédure civile* 45 (1824).

141. R. Sacco, *Il Possesso* 40 (1988).

142. M. Henrion de Pansey, *De la compétence des juges de paix* 516 (6th ed. 1822).

143. 1 Carré, *supra* n. 140, at 46-47 (citing the views of Duparc-Poullain and Lanjuinais); 6 C.B.M. Toullier, *Le Droit civil français suivant l'ordre du Code* 57 n. 126 (1830); V. Marcadé, *Explication du Code Napoléon, La prescription* 69 (1854); 2 C. Aubry & C. Rau, *Cours de droit civil français* 121 (4th ed. 1869-71). Disagreeing with this view were 1 M. Berriat-Saint-Prix, *Cours de procédure civile* 117-18 (1825); 1 G. de Linage & G.F. Colmet-Daage, *Leçons de procédure civile par Boitard* 631-34 (8th ed. 1861).

144. Cass. 28 déc. 1826, Dalloz, rep. v. “Actions possessoires” no. 102; Cass. 19 août 1839, *id.* no. 103; Cass. 5 avril 1841, *id.* no. 104; Cass. 5 août 1845, Dalloz 1845.1.403; Cass. 25 mars 1857, Dalloz 1858.1.315. The rule was eventually enacted by D. 28 mars 1979, art. 2.

Today, *réintégrande* is still recognized as a distinct possessory action that can be brought by anyone who is ousted from possession against the dispossessor.¹⁴⁵ *Réintégrande*, however, can only be brought against the dispossessor or his accomplices. It cannot be brought, as in German law, against one who took possession knowing of the dispossession.¹⁴⁶

Traditionally, a prior possessor had used *complainte* to regain possession from one who was not the dispossessor. Since the mid-19th century, however, *complainte* has been eclipsed as a remedy for those who have lost possession. A few jurists mention that it can be brought by one dispossessed.¹⁴⁷ Most merely say that *réintégrande* is brought when possession is lost, and *complainte* when it has been disturbed.¹⁴⁸ In practice, *complainte* is rarely, if ever, brought by one who is dispossessed.

In the early 19th century, Henrion de Pansey had illustrated how *complainte* protected the dispossessed with a case described in the 13th century by Philippe de Beaumanoir. If I return from a trip of several months, find someone in my house, and expel him by force, he can recover possession by bringing *réintégrande*. But because he does not have a year's possession and I do, I can immediately recover the house by bringing *complainte*.¹⁴⁹ Indeed, even the early 19th century commentators who had not distinguished the two possessory actions described the protection of one who had possessed for a year in the same way as the pre-revolutionary jurists. Lepage explained that one who possessed for a year could recover because "possession is as good as title until it has been shown to be defective." "[P]ossession that dates from less than at least a year is not a valid title for bringing a possessory action."¹⁵⁰ Carré said that "possession establishes a legal presumption of one's property." The object of a possessory action is to assert it.¹⁵¹

In the following decades, however, French jurists lost touch with the traditional role of *complainte*. One reason is that, in giving a sim-

145. It had always been said that dispossession can occur either violently or by *voies de fait*, and almost any means of obtaining possession against the will of the previous possessor would probably satisfy contemporary case law. Weill, *supra* n. 3, at 175, citing case law. Cour d'appel, Versailles 11 nov. 1979, Dalloz 1981 I.229 note Robert.

146. M. Planiol & G. Ripert, *Traité pratique du droit civil* 218 (2nd ed. 1952); A. Gambaro, *Legittimazione passiva alle azioni possessorie* 95-98 (1979).

147. 3 M. Planiol & G. Ripert, *Traité élémentaire de droit civil* § 198, p. 206 (5th ed. 1950); Mazeaud, Mazeaud & Chabas, *supra* n. 3, at § 1463, p. 224.

148. E.g., Carbonnier, *supra* n. 3, at § 66, p. 252; Cornu, *supra* n. 3, at § 1594, p. 507; Marty & Raynaud, *supra* n. 3, at § 214, p. 271; Weill, Terré & Simler, *supra* n. 3, at § 188, pp. 1743-74; § 519, p. 448 (assuming a dispossessed plaintiff would bring *réintégrande*).

149. *Id.* 516.

150. *Id.* 25.

151. Carré, *supra* n. 140, at 45.

ple account of the difference between the possessory actions, they oversimplified. Henrion de Pansy said that to bring *complainte* "it is enough to be disturbed in one's possession" whereas for *réintégrande* "one must be really deprived."¹⁵² The former "tends toward maintaining the possession one has," the latter "toward recovering the possession one has lost."¹⁵³ Pre-revolutionary jurists had made similar statements while making it clear that *complainte* could be brought by one dispossessed.¹⁵⁴ Writing after Henrion de Pansey, Berriat-Saint-Prix replaced his careful formulations with definitions of *complainte* as an action to maintain possession and *réintégrande* as an action to recover it.¹⁵⁵ Writing still later, de Linage and Colmet-Daage explained that the *complainte* is not brought by one who "has not been expelled, has not been despoiled, but who is disturbed, troubled in his possession."¹⁵⁶

Also, most French commentators knew Roman law better than they knew pre-revolutionary customary law. The Roman interdict *unde vi* was brought when possession was lost; the interdict *uti possidetis* when it was disturbed. It was easy to assume that the distinction between the two French actions was the same.¹⁵⁷ Indeed, the French actions had been equated with the Roman ones by Pothier,¹⁵⁸ the most prestigious and accessible of the pre-revolutionary jurists.

Another reason *complainte* lost its traditional role, however, was that French courts began using *revendication* to protect a prior possessor. Supposedly, the plaintiff in *revendication* has to prove ownership. But beginning in the 1830's, the *Cour de Cassation* held that the plaintiff could recover on the basis of "presumptions which the law has left to the intelligence and prudence of the magistrates" to evaluate.¹⁵⁹ Presumptions could be created, not only by the present

152. Henrion de Pansey, *supra* n. 142, at 515.

153. *Id.* 517.

154. E.g., 2 de Ferrière, *supra* n. 118, at v. "réintégrande" 472; C. le Brun de la Rochette, *supra* n. 123, at 399.

155. 1 Berriat-Saint-Prix, *supra* n. 143, at 109-10, 113, 116.

156. 1 de Linage & Colmet-Daage, *supra* n. 143, at 615. They spend a page imagining uses a party in possession might have for the action. He might be harmed by someone acting under a claim of right. He might be settling a boundary dispute; or objecting to the location of his neighbor's trees. *Id.* 617-18.

157. Henrion de Pansey had known that "we did not borrow the *complainte* from the Romans; it belongs to French law." "[I]t happens so rarely to us that we walk the path of the law without the help of the Romans that when we have this advantage, it is in some way a national honor to point it out." Henrion de Pansey, *supra* n. 142, at 357-58. It is ironic that this solution, which had survived six centuries despite the prestige of Roman law, lost its traditional role when Roman law itself was in decline.

158. R. Pothier, *Traité de procédure civile* II.iii.1, 3. Others had equated *réintégrande* with *unde vi*. E.g., 1 de Ferrière, *supra* n. 118, at v. "complainte"; Boutaric, *Explication de l'ordonnance de Louis XIV roi de France et de Navarre sur les matières civiles* 163 (1745).

159. Cass., 31 juill. 1832, Sirey 1832.1.783. Similarly, Cass. 20 nov. 1834, Sirey 1835.1.70 (speaking of "indices"); Cass. 13 juin 1838.1.886 (speaking of "présomptions").

possession of the defendant, but by the prior possession of the plaintiff.¹⁶⁰ According to the court, the party prevails whose possession has the "better characteristics" (*est mieux caractérisée*).¹⁶¹ Commentators today mention such characteristics as whether possession is in good faith,¹⁶² and whether it is peaceable, open, continuous, and unequivocal.¹⁶³ Whether the plaintiff had prior possession matters but does not guarantee victory unless it has lasted the statutory period for adverse possession which is thirty years.¹⁶⁴ The commentators emphasize the "relative" character of the proof. The plaintiff need only show a "better right" (*droit meilleur*) than the defendant.¹⁶⁵ Whether he has done so is up to the trial court. Moreover, due to the "relative authority of the matter decided," if A prevails against B, "A must be considered the owner, not *erga omnes*, but only by B."¹⁶⁶

Today, then, a plaintiff whose prior possession is *mieux caractérisée* can prevail against a defendant whose possession is less so, just as once, a plaintiff who possessed for a year could prevail against a defendant who possessed for a lesser period. In both cases, the plaintiff has a right something like a title. In neither case have French jurists given a good explanation of what this right is and why it is protected. It is no more convincing today to say the plaintiff has made a "relative" proof of ownership than it was once to say the plaintiff was presumed to be the owner.

3. *Italy*—The Italian Civil Code of 1865, enacted after unification, adopted a system of possessory remedies like the French. One who had lost possession violently or clandestinely could bring an action like *réintégrande* called *reintegrazione* but he could do so only against the dispossessor.¹⁶⁷ One whose possession was disturbed could bring an action called *manutenzione* which was like *complainte*. The action could not be brought by a derivative possessor such as a lessee or by one who had been in possession less than a year.¹⁶⁸

160. Cass., 31 juill. 1832, Sirey 1832.1.783; Cass. 26 août 1839, Sirey 1839.1.920 ("Dans l'absence de titres la possession suffit seule pour justifier la propriété.")

161. Cass. 16 avr. 1860, Sirey 1860.1.801. The court still uses that expression. Cass. 26 nov. 1964, Bull. civ. 1964.1.406.

162. Marty & Raynaud, *supra* n. 3, at § 223, p. 280.

163. Weill & Terré, *supra* n. 3, at § 525, p. 455.

164. Marty & Raynaud, *supra* n. 3, at 223, p. 280; Mazeaud, Mazeaud & Chabas, *supra* n. 3, at § 1644, p. 373; Weill, Terré & Simler, *supra* n. 3, at § 517, p. 447.

165. Carbonnier, *supra* n. 3, at § 68, p. 258; Cornu, *supra* n. 3, at § 1612, p. 514; Weill, Terré & Simler, *supra* n. 3, at § 517, p. 447. For a study of the use of *revendication* to protect possession, see S. Ferreri, *Le azioni reipersecutorie in diritto comparato* 111-20 (1988).

166. Larroumet, *supra* n. 3, at § 687, p. 361; Cornu, *supra* n. 3, at § 1612, p. 514.

167. Art. 695: "One who has been violently or clandestinely deprived of possession . . . can within a year of the deprivation ask of the party who despoiled him to be put back into possession."

168. Art. 694: "One who has been in legitimate possession of an immovable for more than one year and is disturbed in his possession can within one year ask to be restored to possession."

In the 20th century, these limitations have been escaped. The new Italian Civil Code of 1942 preserved the old rules that *manutenzione* cannot be brought by the derivative possessor¹⁶⁹ and can only be brought after possession has lasted a year.¹⁷⁰ Nevertheless, Italian courts have circumvented these requirements by allowing an action of *reintegrazione* when possession has been disturbed but not lost. For example, the action has been allowed against a defendant who built a gate that blocked plaintiff's access to the land¹⁷¹ or who dug or buried someone in a grave on the plaintiff's land, or hindered the free flow of water.¹⁷²

Whether *manutenzione* can be used to recover possession from parties other than the dispossessor is disputed among Italian scholars.¹⁷³ But the use of that action would rarely be necessary. The new Italian Civil Code of 1942 followed the German example, and allowed the action for loss of possession not only against the dispossessor but against a third party who acquired possession knowing of the earlier dispossession.¹⁷⁴ As in Germany, the requirement that possession be lost violently or clandestinely has been taken to mean merely that it be lost against the will of the prior possessor.¹⁷⁵ Thus, as in Germany, the results are like those reached using the old *actio spoli*. Indeed, as Antonio Gambaro has said, "This is not only a mixed system but it is also the most antique because it corresponds perfectly to the solution of the *ius commune* as explained by such authors as Menochius and Oldendorp."¹⁷⁶

B. Anglo-American Law

According to contemporary treatise writers, the doctrine of relative title is ancient and English. That is the principal argument they make for it. In their view, the doctrine descends from the medieval English actions to recover land, which, they note correctly, protected seizin rather than ownership.¹⁷⁷ Seizin was a relative right belong-

169. Thus the action cannot be brought by the lessee (Cass. 3797/1954; Cass. 3333/1962; Cass. 3132/1975). Scholars have criticized this restriction very severely as an injustice. Nevertheless, the Italian Constitutional Court recently held that it is not unconstitutional. Corte Cost. 7/3/1990.

170. Italian Civil Code (*Codice civile*) § 1170.

171. Cass. 3831/1985.

172. R. Sacco in P. Cendon, *Commentario al Codice civile* § 1168, p. 619.

173. Sacco, *supra* n. 141, at 64. See also De Martino, "Possesso, 'Denuncia di nuova opera ed i damno temuto,'" in A. Scialoja & G. Branca, *Commentario del Codice civile* 133 (1970).

174. Italian Civil Code (*Codice civile*) § 1169; Cass. 3272/1987; Cass. 2656/1987.

175. Sacco, "La massima mentitoria," in Visintini, *La giurisprudenza per massime ed il valore del precedente* (1989); A. Levoni, *Rassegna di giurisprudenza sulle azioni possessorie* 418 (1976). See Cass., dec. 6.3.1969 727, Foro it. 1969.I.119; Giust. civ. 1969.I.1257.

176. Gambaro, *supra* n. 84, at 150.

177. Cheshire & Burns, *supra* n. 56, at 26-27; Gray & Symes, *supra* n. 59, at 48-49; Gray, *supra* n. 59, at 63-64; Megarry & Wade, *supra* n. 57, at 104, 1155-56.

ing to a prior occupant of land. While the historical details are not supplied, their view seems to be that even after ejectment replaced the medieval actions, courts still protected seizin, and when the technical rules of seizin were forgotten, English law protected a relatively better right to possession.

If it were so, it is odd that the doctrine of relative title was first formulated clearly by Holmes and Pollock in the 1880's. As we have seen, their account was only loosely tied to the features peculiar to the English common law. It is also odd that when, half a century ago, Sir William Holdsworth and A.D. Hargreaves debated the basis of the action of ejectment, neither of these eminent English historians thought that the action was based on the relativity of title.

Holdsworth thought the plaintiff had to prove ownership in the sense of a right good against all the world.¹⁷⁸ One who proved twenty years prior possession could recover since then the statute of limitations would bar prior claims. By way of exception, and only since the 19th century, a plaintiff could recover against a wrongdoer who had dispossessed him.¹⁷⁹

Hargreaves claimed that the plaintiff in ejectment had to prove, either that he really was a lessee, or that he once had seizin. For Hargreaves, seizin did not mean prior possession. Prior possession was merely evidence of seizin, and it could be rebutted under some very technical medieval rules.¹⁸⁰ Hargreaves complained that the courts had been losing touch with the concept of seizin "in a fit of absentmindedness."¹⁸¹ A "yearning for ownership" had "infect[ed] the terminology of ejectment" ever since "a spate of loose language set in . . . with the sentimental liberalism of the [eighteen]-fifties."¹⁸² Yet paradoxically, he claimed that the technical rules of seizin could explain all the decided cases, including the recent ones.

An odd feature of the debate is that each protagonist claimed that for centuries, the courts had followed a single clear and consistent principle though they never clearly articulated it. Lawyers often make such claims, but historians should be wary of them. If we pay attention to what the judges said, we can see that they impressed a principle into service and then used it pragmatically, twisting it to get the results they liked, and then jettisoned it when it could not be twisted to do so.

178. 7 W.S. Holdsworth, *History of English Law* 62-63 (1926). For his response to Hargreaves see Holdsworth, "Terminology and Title in Ejectment—A Reply," 56 *Law Quarterly Review* 479 (1940).

179. 7 Holdsworth, *History*, supra n. 178, at 59-60.

180. Hargreaves, "Terminology and Title in Ejectment," 56 *Law Quarterly Review* 376, 390 (1940).

181. *Id.* 398.

182. *Id.* 387.

The principle was laid down by Lord Holt in *Stokes v. Berry*¹⁸³ at the end of the 17th century. He said that if A has possession for twenty years, "and then B gets possession," A wins in ejectment because "the possession of twenty years shall be a good title in him, as if he still had been in possession."¹⁸⁴

According to Hargreaves, "[t]he precise meaning of this note [by Holt] is not easily determined."¹⁸⁵ Actually, it seems rather clear. It is certainly clear, as Hargreaves himself seems to admit, that Holt was not thinking of seizin.¹⁸⁶ In 1769, Lord Mansfield went further and said, "plaintiff can not recover but on the strength of his own title."¹⁸⁷

But it does not follow that Holdsworth is right that the plaintiff had to prove title to recover. So far as we know, neither Lord Holt nor Lord Mansfield were dealing with cases in which it was clear that neither party had title. We do not know what they would have done in such a case. One had arisen in 1670, before Lord Holt laid down this rule. The court had allowed the plaintiff to recover without proving title but merely prior possession followed by ouster.¹⁸⁸ We cannot conclude that Holt and Mansfield changed the law since they were

183. 2 Salk. 421, 91 E.R. 366 (K.B. 1699).

184. The reporter notes that Holt had ruled the same way in an earlier case "because a possession for twenty years is like a descent which tolls entry." In another report of same case, *Stocker v. Berney*, 1 Ld. Raymond 741, 91 E.R. 1396 (K.B. 1699), the reason given for the holding is that "possession for twenty years now by virtue of the statute 21 Jac. 1, c. 16, s. 1, is like a descent at common law, which tolls entry."

185. Hargreaves, *supra* n. 180, at 389.

186. Hargreaves, *supra* n. 180, at 397, n. 4.

187. *Roe dem. Haldane & Urry v. Harvey*, 4 Burr. 2484, 2487, 98 E.R. 302, 304 (K.B. 1769).

188. *Allen v. Rivington*, 2 Wms. Saund. 111, 85 E.R. 813 (K.B. 1670). According to John Hiblin's will, his land was to go to Ann Harrison, the daughter of his son-in-law, only if his own son Thomas has no son. Thomas had a son Richard, but the son died. The land was then claimed by Ann Harrison and by the female heirs of Richard, Ann and Elizabeth Hiblin. The court, however, thought the arrangement was like a fee tail, so that when Richard died, the land should go to the heirs of John Hiblin. But these heirs were unidentified and not before the court. When Richard died, it seems that Ann Harrison took possession first and was ousted by Rivington, the guardian of the Hiblin sisters. Ann Harrison brought ejectment and won "because it appeared in the record that the plaintiff had a priority of possession and that there was not any title found for the defendant." The only hint as to when this prior possession occurred is the finding of the jury reported *Allen v. Rivington*, 2 Wms. Saund. 108, 85 E.R. 811 (K.B. 1670): "that the said Richard . . . died without issue male, and that the said Ann Harrison entered into the lands within written, and demised them to the within named Geo. Allen, the plaintiff."

Hargreaves thought that Ann won because, as a prior possessor, she had seizin. Hargreaves, *supra* n. 180, at 393. But the court spoke of "a priority of possession." If there had been a requirement of seizin, it is odd that neither this court nor Lord Holt mentioned it. Holdsworth thought that the case showed that English law hesitated between requiring plaintiff to prove ownership and requiring plaintiff to prove priority of possession, an issue that was settled in *Stokes*. 7 Holdsworth, *History*, *supra* n. 178, at 62-63. The problem in *Allen*, however, was what to do when it was clear that neither party had title. If it seems odd to protect the first to take possession, it would be odder to protect the second party who ousted the first. The court in *Allen* dealt

dealing with different circumstances. In Lord Mansfield's case, the plaintiff's deed was in court, and the plaintiff refused to produce it. Lord Mansfield insisted he do so.

In 1777, in *Denn ex dem. Tarzwell v. Barnard*,¹⁸⁹ Lord Mansfield repeated Holt's rule that the plaintiff must show twenty years prior possession. Paradoxically, however, he allowed a plaintiff to recover who could not do so. Plaintiff claimed under a will made in 1755. The testator died in 1756. It was not known how long the testator had been in possession before 1755. Lord Mansfield allowed the jury to infer a period of twenty years. If Hargreaves were right that any prior possession raised a presumption of seizin, Lord Mansfield would not have mentioned a requirement of twenty years possession. But if Holdsworth were right that the courts genuinely insisted on proof of ownership, Lord Mansfield would not have allowed the requirement to be sidestepped.

In the 19th century, the courts continued to say, like Lord Mansfield, that the plaintiff must recover on his title. If the plaintiff proved twenty years of prior possession, he had a "presumptive title."¹⁹⁰ Like Lord Mansfield, however, the courts often allowed a plaintiff to recover even when he could not prove title or twenty years possession.

There were exceptions. In 1829, in *Doe dem. Wilkins v. Marquis of Cleveland*, plaintiff did not recover because of a flaw in his title despite eight years prior possession.¹⁹¹ There, dispossession had not been forcible, and the defendant was not a complete stranger but the lord of the manor to which the property originally belonged. Most often, however, the courts allowed title to be inferred from less than twenty years possession.

with that problem without laying down a general principle. Lord Mansfield laid down his general principle in a case that did not involve that problem.

189. Cowp. 595, 98 E.R. 1259 (K.B. 1777).

190. *Doe dem. Harding v. Cooke*, 7 Bing. 346, 131 E.R. 134 (C.P. 1831). Jones, for the plaintiff, argued that defendant's later possession could not create a counter-presumption that he had title: "If ten years subsequent possession were sufficient, why not five, or one, or less than one?" Park, speaking for the court, held that "[t]here is presumption against presumption, which throws the defendant upon establishing if he can, a title of a higher description." 7 Bing. 348, 131 E.R. 134. If Hargreaves were right then, the twenty-year period should not have mattered. But if Holdsworth were right, one would think the court would simply say plaintiff had made out a title by adverse possession. Instead, the court and counsel talked mysteriously about where evidence that establishes presumptions, which may or may not be rebutted by evidence establishing counterpresumptions, as to where title really is.

191. 109 E.R. 321, 9 B. & C. 864 (1829). Curiously enough, this anomalous case is one that both Holdsworth and Hargreaves cited in support of their views. Holdsworth thought it showed that twenty years possession was required. 7 *History*, supra n. 178, at 64-65. Hargreaves argued that the twenty year period was important, not to show title by adverse possession, but to raise a presumption of livery of seizin. Hargreaves, supra n. 180, at 382-83.

The court did so in 1834 in *Doe dem. Smith & Payne v. Webber*.¹⁹² Each party had presented only "some evidence" or "some slight evidence" of when they had possessed the land previously. The court did not mention the dates. The court did not even say, as Lord Mansfield had in *Tarzwell*, that the jury had to infer a prior twenty years of possession. Indeed, little was said about what the jury was to infer, except that plaintiff's possession was legitimate. Erle, arguing for the plaintiff, said the question was whose possession was "rightful" or "legitimate." When Erle mentioned the 20 year requirement, Parke, J., noted that it was "prima facie evidence." Evidence, presumably, of title or rightful possession. If Holdsworth were right, the court should have insisted on proof of twenty years possession. If Hargreaves were right, the twenty year requirement and the rightfulness of possession would not matter and should not have been mentioned at all.

Similarly, in cases of forcible dispossession, the courts allowed plaintiff to recover by saying that the dispossession was evidence of title.¹⁹³ In 1829, in *Doe dem Hughes v. Dyeball*,¹⁹⁴ plaintiff won by proving that after he had been in possession a year, "defendant had forcibly taken possession." Chitty, for defendant, objected that plaintiff had not proven title. Lord Tenterden, C.J. answered: "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out; you must show your title." Dispossession

192. 1 Ad. & E. 119, 110 E.R. 1152 (K.B. 1834).

193. Holdsworth thought that before the 19th century, a prior possessor who could not show title would not have had an action even against a trespasser. It would be more accurate to say that the courts had not had to face this problem squarely since Holt had said the plaintiff should prove twenty years prior possession.

Hargreaves showed that the cases Holdsworth cited are not in point. One was *Johnson v. Barret*, Aleyn 10, 82 E.R. 887 (K.B. 1646), cited 7 Holdsworth, *History*, supra n. 178, at 59 n. 10. It was a trespass action for carrying away soil and timber from a "key" built on land allegedly belonging to the king. According to the reporter: "It was . . . agreed that an intruder on the king's possession might have an action of trespass against a stranger but he could not make a lease whereupon the lessee might maintain *ejectione firmæ*." Aleyn at 11, 82 E.R. at 888. Hargreaves points out that the case does not state a general principle but one regarding crown lands. Hargreaves, supra n. 180, at 384, 392. This case was cited and the principle was reaffirmed in *Harper v. Charlesworth*, 4 B. & C. 574, 107 E.R. 1174 (K.B. 1825) where a person was allowed to bring trespass because his acts on the 1000 acres of the king's woodland amounted to possession. He paid a nominal rent and hunted there. He had this action even though he had no legal right against the crown since he had a parol license from the crown and paid less than one-third the annual value of the land in rent. In dicta, Bayley said that an intruder on Crown lands could not maintain *ejectione firmæ*.

Holdsworth also cited *Doe v. Barber*, 2 T.R. 749, 100 E.R. 403 (K.B. 1788). The lessee of a rectory was unable to recover it against a "stranger and a wrongdoer" because the lease was void under a statute invalidating leases of rectories unless the lessor was in residence at least eighty days a year. Hargreaves argues persuasively that the plaintiff failed to recover because his right to possession depended on a void lease. Hargreaves, supra n. 180, at 386, 392.

194. M. & M. 345, 173 E.R. 1184 (N.P. 1829).

sion, then, was proof of title. The headnote summarized: "Prior possession, however short, is sufficient prima facie title in ejectment against a mere wrongdoer."

Again, in 1841, in *Doe dem. Humphrey v. Martin*,¹⁹⁵ a plaintiff recovered against a dispossessor even though he could not prove twenty years prior possession, as defendant's counsel pointed out. Lord Denham, C.J. allowed the jury to decide whether plaintiff had title, taking into account the fact that the defendant dispossessed him: "I think that the lessor of the plaintiff has given sufficient evidence for me to leave it to you . . . whether [he] is the owner of the property. For aught that appears in this case [defendant] is a mere wrong-doer."¹⁹⁶

In 1847 in *Davison v. Gent*,¹⁹⁷ plaintiff also recovered from one who dispossessed him forcibly. Plaintiff had held the property under a twenty-one year lease executed in 1849. The same lessor had given a twenty-one year lease in 1842 to Sherwood, a third party through whom neither plaintiff nor defendant were claiming. A copy of the lease with its seals torn off that had been in the lessor's custody was produced in court. Plaintiff proved it was the lessor's custom to make a new twenty-one year lease every seven years, canceling the old one and tearing off its seals. There was much discussion of whether that was an adequate proof that Sherwood's lease had been canceled. All three judges, however, said that plaintiff need not make out a perfect title against a wrongdoer.¹⁹⁸

In all of these cases, the judges would not have mentioned title if Holdsworth were right and all that mattered were dispossession. Yet they would not have mentioned dispossession if Hargreaves were right and all that mattered were prior possession giving rise to a presumption of seizin. Indeed, Hargreaves admitted that the result in *Davison* was hard to explain by the technical rules of his theory since plaintiff proved neither seizin nor an interest such as a leasehold on which ejectment could be brought.¹⁹⁹

195. Carr & M. 32, 174 E.R. 395 (N.P. 1841).

196. Carr & M. at 33; 174 E.R. at 396.

197. 1 H. & N. 744, 156 E.R. 1400 (Ex. 1857).

198. Pollock, C.B., said, "a plaintiff in ejectment is not deprived of his right to rely on his prior possession, as against a mere wrongdoer, because he has brought forward documents which if complete might make out a perfect title, but which on account of some defect of proof, do not establish his title to the property in question." 1 H. & N. at 750, 156 E.R. at 1403. Bramwell, B., said, "If it appeared that the plaintiffs had been wrongfully in possession, it may be that they could not rely on mere possession as against the defendant. But it does not follow that they were wrongfully in possession because they failed to show that they had a perfectly valid title." 1 H. & N. at 751, 156 E.R. at 1403. Watson, B., said, "plaintiff's proved their title by shewing a lease and possession under it. . . . The present defendant, a person coming in without a title . . . does not answer that case." 1 H. & N. at 751-52, 156 E.R. at 1404.

199. Hargreaves, *supra* n. 180, at 392. He argued that Bramwell and Watson seemed to think plaintiff had some sort of title. He is right, but these judges also said the plaintiff could recover without proving that he did.

The courts, then, had been reaching results that were satisfactory in practice by using the concept of title pragmatically. Twenty years prior possession was "presumptive evidence" of title; prior possession was some evidence; so was forcible dispossession. The courts might have decided cases indefinitely in this satisfactory but conceptually unclear manner except that cases arose in which plaintiff plainly did not have title. The courts could not say that plaintiff recovered because prior possession or forcible dispossession were evidence of title. They had to say, either that plaintiff could not recover, or that he need not have title to recover, at least in the sense that the word title had once been used. Initially, the courts gave the first answer. Then they flip-flopped and gave the second.

They gave the first answer in 1849, in *Doe dem. Carter v. Barnard*.²⁰⁰ Cooter took possession and let his son John live on the premises from 1815 to 1834. Then his widow remained in possession for thirteen years. Then, as in *Doe dem Hughes v. Dyeball* and *Doe dem Humphrey v. Martin*, the defendant "turned her out and shows no title in himself." Defendant's claim under a mortgage from Cooter in 1829, was barred by lapse of time. The widow lost, however, because, according to the court, prior possession was only *prima facie* evidence of title. One could see she did not have title since she had proven the prior possession of her husband.

Neither Holdsworth nor Hargreaves could explain this result. Though Holdsworth cited it to show plaintiff must prove title, he admitted that by his rules the widow should have won because, by his theory, a plaintiff without title can recover against a dispossessor.²⁰¹ Hargreaves thought the widow should have won, not because the defendant was a wrongdoer, but because she had seized.²⁰² The court, however, was simply taking seriously the statements English judges had made in *Smith*, *Dyeball*, and *Humphrey* that prior possession and dispossession by the defendant were only evidence of title in the plaintiff, and the importance they had attached in *Davison* to the fact that the plaintiff might have had title. Here the plaintiff did not.²⁰³

200. 13 Q.B. 945, 116 E.R. 1524 (1849).

201. 7 Holdsworth, *History*, supra n. 178, at 66-67.

202. Hargreaves, supra n. 180, at 396.

203. The same answer to the question of whether it must be possible that the prior possessor had title was given in *Dixon v. Gayfere*, 17 Beav. 421, 51 E.R. 1097 (Chancery, Rolls Ct. 1853). Legal estate was in a trustee. The equitable owner died intestate in 1818. A person occupied the land without title and collected rent for eighteen and a half years. He died intestate. His widow collected rent for another one and a half years. Then the tenants refused to pay rent for another four years because they did not know to whom it was due. The trustee filed a bill to determine who has the right to the rent. The court held that the heir of the equitable owner was entitled to it. The heir of the first person to enter was not since he was not there 20 years. The widow was not since she could not tack her period to his. Lord Romilly said that at law when there is a series of trespassers, each holding less than 20 years, but the entire period extending over 20 years, the person actually in possession would

The court gave the opposite answer in *Asher v. Whitlock* in 1865.²⁰⁴ Williams had enclosed the waste of a manor in 1842. In 1850, he enclosed more land and built a cottage. He occupied it until his death in 1860. He left it to his wife for as long as she remained unmarried, and then to his child Mary Ann. The widow and daughter remained in possession after his death. When the widow remarried in 1861, she, her daughter, and her new husband remained in possession until the daughter died at age eighteen in 1863. The daughter's heir then sued the widow and her new husband for possession, and won.

Here, as in *Carter*, it was clear that the plaintiff did not have title. So the court could not allow a jury to find for the plaintiff on the grounds that the possession of Williams or his daughter was evidence of title. Yet the court resisted the temptation to nonsuit the plaintiff. Cockburn, C.J., recognized that if Williams enclosed the waste, and a third person turned Williams out, those facts of themselves should allow Williams to bring ejectment. If Williams could do so, his heirs and assignees could do so. In effect, Cockburn interpreted cases like *Dyeball* to mean, not that prior possession followed by dispossession was relevant as evidence of title, but that these facts warranted recovery by themselves even when plaintiff lacked title.

Though *Asher* was not a case of forcible dispossession, the court recognized that it did not matter whether or not defendant had used force to oust the plaintiff as long as plaintiff was ousted. Merewether, for defendant, had argued, "the case is that of two trespassers, and in such a case, the one last in possession is entitled to keep the land until the person having title ejects him. . . ." The court interrupted him: "But doesn't the disseisee have good title against the disseisor?" He answered: "This is not the case of a disseisor," and distinguished *Dyeball* because there, possession was obtained by force. Cockburn answered that to take possession without leave is a trespass and all trespass counted as force.

Asher v. Whitlock, then, established the important propositions that even the prior possessor who clearly did not have title could recover against a dispossessor; that it did not matter if he was dispossessed by force or by occupation of the property without force; and that the rights of the prior possessor could pass by will, and presumably, by contract. All of these propositions, we have seen, were also true in continental legal systems. Certainly, the fact that an English court agreed with these propositions does not prove that it adhered to the doctrine of relative title that Pollock invented nearly a quarter century later.

keep the property "not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." 17 Beav. at 430, 51 E.R. at 1101.

204. L.R. 1 Q.B. 1 (1865).

Cockburn said, "[p]ossession is good against all the world except the person who can shew a good title." But that does not show he subscribed to a theory of relativity of title. It shows he thought that the possessor could recover in ejectment against one who dispossessed him. Indeed, Cockburn's exchange with Merewether, just quoted, shows that Cockburn was prepared to concede that a prior possessor might not recover against anyone except a disseizor. Mellor, J. said concurring: "The fact of possession is *prima facie* evidence of seizin in fee."²⁰⁵ But since the court had just rejected the old formulation by which prior possession was evidence of title, it is not surprising that he reached for something else that possession might evidence. It does not show he subscribed to the theory of Hargreaves or that of Pollock.

We see then that, verbally, English courts clung a long time to Lord Mansfield's dictum that plaintiff must prove his title to recover in ejectment. But to make this rule work in practice, they had to relax the requirements for such a proof. By the mid-19th century, the plaintiff was proving his title in ways that would never have worked had he not been in possession. The day of reckoning came, however, when cases arose in which the plaintiff clearly did not have title. Then the courts either had to give up lip service to the rule or live with its consequences. Wisely, though after some hesitation, they did the former.

There was then, no ancient English doctrine of relativity of title. *Asher v. Whitlock* did not adopt one. It merely allowed the heir of a prior possessor to recover the property from a dispossessor, as in continental law. According to the doctrine of relative title, the prior possessor has a title good against anyone who comes later, not simply against anyone who dispossesses him. In no case of which we are aware, however, has an English court allowed a prior possessor, on the strength of his prior possession alone, to recover against a later possessor who neither dispossessed him nor claims the land through someone who did. The English and Commonwealth cases commonly cited for the doctrine of relative title involve different questions.²⁰⁶

205. L.R. 1 Q.B. at 6.

206. *Perry v. Clissold*, [1906] A.C. 73 (state must pay compensation for land, taken for a public purpose from a squatter who had occupied waste land for ten years); *Allen v. Roughly*, [1955] 94 C.L.R. 98 (devisee of prior possessor recovers from one who was either a dispossessor or whose possession was not adverse or who was estopped as a trustee under the prior possessor's will from asserting claims adverse to the prior possessor's devisee); *Oxford Meat Co. Pty. Ltd. v. McDonald*, [1963] S.R. (N.S.W.) 423 (plaintiff lessor, who was unable to terminate the lease when the lessee died, could not recover the property from the defendant, whom the lessee had allowed to live there, and who continued to live there after lessee's death); *Nair Service Society v. Alexander*, [1968] A.I.R. S.C. 1165 (plaintiff dispossessed by defendant); *Spark v. Whole Three Minute Car Wash (Cremarne Junction) Pty. Ltd.*, [1970] 92 W.N. (N.S.W.) 1087 (plaintiff lessor recovers when lessee fraudulently induced to give

Indeed, if the prior possessor has a title good against all the world except someone who can show an earlier and hence a better right, then the prior possessor's title should not disappear if he stops using the land himself. He should have the same rights as an owner. An owner's rights persist even when he is no longer in possession. Even the owner's right to an easement in another's land is not lost by mere non-usership. He must intend to abandon the right.²⁰⁷ If the prior possessor's right does not persist, then it is not ownership.

Few cases squarely raise this question. According to Lord Macnaghten, delivering judgment of the Privy Council in *Agency Co. v. Short*,²⁰⁸ "the possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose." In that case, the court held that the statute of limitations did not run against the owner after the intruder left. In the Australian case of *Allen v. Roughly*,²⁰⁹ Judge Williams applied Lord Macnaghten's statement to the relations between prior and subsequent possessors. The prior possessor, who left plaintiff the land in his will, died in 1895, and defendant did not take possession until 1898. Williams said he "cannot accept" the rule that prior possessor is presumed to be seized in fee if it "means that the presumption in his favour continues after he has abandoned the possession and would be available against any person who subsequently entered into possession so that any plaintiff who could prove prior possession at any time could recover the land against any subsequent possessor."²¹⁰ Nevertheless, Williams held against the defendant on the ground that his possession was adverse.

In the United States, settlers often occupied land without formal title and later moved away. It was decided early on that unless a prior possessor intended to relinquish possession temporarily, he could not recover the land from a later possessor. Chief Judge Kent said in *Smith dem. Teller v. Lorillard*, "the prior possession of the plaintiff [must not have been] voluntarily relinquished without the animus revertendi, (as is frequently the case with possessions taken by squatters)."²¹¹ When plaintiff had simply moved off, the lack of an animus revertendi would be presumed unless he could prove the con-

premises to defendant, both because of the fraud and because defendant, having taken the premises from a lessee, is estopped from denying lessor's title).

207. Megarry & Wade, *supra* n. 57, at 897-98.

208. 13 A.C. 793, 799 (1888).

209. [1955] 94 C.L.R. 98.

210. 94 C.L.R. at 114-15. He said that the rule proposed by Holdsworth that plaintiff must prove title "refers and refers only, to cases where a person in possession abandons the land so that a succeeding intruder does not disturb an existing possession in any one. If an existing possession is disturbed, the person in possession can sue the disturber as a trespasser. Proof that he is in possession confers on him a good title against the whole world, except those who show a better title." 94 C.L.R. at 115.

211. 10 Johns. 338, 356, 4 N.Y.C.L. 1057, 1064 (1813)(but prior possessor recovers because he did not relinquish voluntarily but was expelled by British troops in 1776).

trary. Thus, in 1887, the United States Supreme Court held that when a prior possessor died intestate, his heir, who had moved away after one year, could not recover the property against a subsequent possessor who had moved on seven years later.²¹² The court said that "in cases where the proof on the part of the plaintiff does not show a possession continuous until actual dispossession by the defendant, or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession had not been abandoned."²¹³ In other cases, plaintiffs surmounted this burden, for example, by showing they had spent large sums of money making improvements, the value of which had been appropriated by defendant;²¹⁴ or by showing the premises had been left vacant because their tenant had moved off without their knowledge²¹⁵ or because they were driven off by foreign troops.²¹⁶ In the absence of such circumstances, some courts have simply said that "possessory title continues only as long as possession is held, and after it has ended there can be no recovery from one who subsequently takes possession (or otherwise invades the premises)."²¹⁷

III. THE RIGHTS OF A POSSESSOR

As we have just seen, it would be more descriptive of continental and Anglo-American law to say that possessor has a right to possession but one that is not as extensive as the right of the owner. In particular, it is much more easily lost.

Continental and Anglo-American jurists have encountered difficulties because they equate a right to possession with ownership. But one can imagine a legal system that recognizes private and exclusive rights of possession but does not recognize ownership in the Western sense. Indeed, Rattray described such a system in his classic work on the law of the Ashanti of West Africa. By considering his description of Ashanti law, we can see how rights of ownership differ from mere rights to possession.

Among the Ashanti, land used for hunting and gathering was held in common. Private rights in this land would have been an inconvenience to everyone, as Rattray points out. Hunters want to follow an elephant wherever it goes.²¹⁸ In contrast, farmland belonged

212. *Sabariego v. Maverick*, 124 U.S. 261 (1887).

213. 124 U.S. at 300.

214. *National Milling & Mining Co. v. Piccolo*, 54 Wash. 617, 104 P. 128 (1909).

215. *Jackson dem. Murray v. Denn*, 5 Cowen 200, 8 N.Y.C.L. 625 (1825), quoted in *Sabariego v. Maverick*, 124 U.S. 261, 300 (1887).

216. *Smith dem. Teller v. Lorillard*, 10 Johns. 338, 4 N.Y.C.L. 1057 (1813).

217. *Marinero v. Deskins*, 344 S.W.2d 817 (Ct. App. Ky, 1961)(plaintiff, tracing title through the heirs of a prior possessor, cannot recover because the heirs failed to assert their claim for nearly thirty years while defendant was in possession after the prior possessor's death).

218. R.S. Rattray, *Ashanti Law and Constitution* 345 (1929).

to a particular person or a family group. Nevertheless, according to Rattray, it was not owned in the Western sense. The person or group to whom it belonged had only the right to clear it and farm it.²¹⁹ The right was initially acquired by applying to a chief who would assign a plot that previously belonged to the hunting and gathering land.²²⁰ Once the plot was assigned, no else could use it. The chief himself could not take it back except for non-payment of an annual tax or rent equal to the value of a sheep.²²¹ The person to whom the plot belonged could sell it, and his heirs could inherit it.²²² The right to use the plot lasted, however, only as long as it was farmed, or more technically, only as long as the claimant "was able to point out some trees—kola, plantain, palm oil—which he had once cultivated, and still grew and bore fruit."²²³ When cultivation ceased, the land became, once again, land that anyone could use for hunting and gathering, and that the chief could reassign to someone else.

Similar systems of landholding were found throughout sub-Saharan Africa where land was abundant relative to the population.²²⁴ The "cardinal principle," according to Kwamena Bentsi-Enchill, "is that land first reduced to cultivation from virgin forest becomes the property of the person or persons who clear it."²²⁵ The cultivator's interest is freely alienable to other members of the same group.²²⁶ It is lost when the cultivator abandons the land, but it is otherwise indefeasible.²²⁷

This system struck Rattray, and might strike most people, as quite fair. Land was abundant. Therefore, a person could appropriate it for farming without diminishing the resources available to others. To clear and farm the land required hard work. No one was allowed to appropriate the value of someone else's labor. No one was allowed to appropriate land and not use it.

This system might also strike a modern economist as efficient in a society in which land itself is not a scarce resource. A person will invest labor in clearing and cultivating the land up to the point where the marginal cost of so doing equals the marginal product he can obtain from it. He can sell his rights to someone else for whom the costs of cultivation are smaller or the returns greater. Indeed, the only feature of the system whose fairness or efficiency one might question

219. Id. 340-66,

220. Id. 350-51.

221. Id. 350-51, 353.

222. Id. 353-54, 356.

223. Id. 352. A right to use land held by someone not a subject to this chief may have reverted immediately when it was not cultivated. Id. 353.

224. Bentsi-Enchill, "The Traditional Legal Systems of Africa," in *Structural Variations*, supra n. 2, at 68, 88-89.

225. Id. 81.

226. Id. 89; T.O. Elias, *The Nature of African Customary Law* 165 (1956).

227. Bentsi-Enchill, supra n. 225, at 89; Elias, supra n. 226, at 163.

is that the chief gets a sheep every year for allotting land. That task is unnecessary if land is not scarce since one could simply allow the first person to clear it to use it. The chief's sheep is like a tax, justified, if at all, by the public functions he performs.

Ownership is a solution to two problems that did not arise among the Ashanti where land was abundant, and private land had only one productive use. One is how to allocate scarce resources among people who want them. Under a system of ownership, one normally acquires resources by buying them. The other is the problem of deciding how resources will be used. Under a system of ownership, this decision is left to the owner. Even his decision to leave the land idle is respected.²²⁸

A system of ownership will be fair if wealth is fairly distributed. Economists regard it as efficient because it gets resources to their most highly valued use. They go to the people who will pay the most for them and be put to the uses that these people value most highly. According to the economists, even the person who leaves his land idle may be warehousing it for some future use, and so this nonuse of resources may be productive.

If we regard ownership functionally, as a means of solving these two problems, we will not conclude that only the owner can have a right to use property. We will merely conclude that the owner will prevail in a conflict with somebody else about how and for whose benefit the property may be used. There may be other conflicts to which the owner is not a party: between a possessor and a non-possessor, a former and a subsequent possessor, a party dispossessed and the party who dispossessed him. The owner may have an interest in how such conflicts are resolved. But none of them is a conflict between the owner and a non-owner about the use of the property. The principle that the owner would win if there were such a conflict does not tell us who should win if there were not.

There is nothing contradictory, then, about recognizing a right in the possessor, good against anyone else, to use the property until the owner appears and asserts his own rights. Indeed, if we imagine the non-owner can use the property without hurting the owner, it would be strange not to recognize such a right. At least the property will have been put to some use. Hugo Grotius, the 17th century founder of the northern natural law school, argued that non-owners should have a "right of innocent use," a right to use another's property provided they could do so without injuring the owner.²²⁹ This conclusion

228. While according to Elias, under traditional African land law, the possessor can decide to what use his land should be put, the only uses seem to be cultivation and building a dwelling. Elias, *supra* n. 226, at 166.

229. H. Grotius, *De iure belli ac pacis libri tres* II.ii.11 (de Kanter-van Hetting Tromp, ed. 1939).

followed from the functional or teleological approach Grotius took to rights of ownership. Private property exists to avoid the disadvantages that would arise if everything were owned in common: people would not work and they would quarrel over how things were to be divided.²³⁰ But rights of ownership should extend no further than necessary to serve this purpose.²³¹ Therefore, non-owners have a "right of innocent use." This functional approach to ownership disappeared with the rise of 19th century conceptualism when possession came to be defined as use without right.

Suppose next that the non-owner's possession of the property may hurt the owner. It might do so in several ways. It might endanger or depreciate the property. It might also prevent the owner from putting the property to a use of his own.

Paradoxically, even in these cases, there is still a good reason for recognizing a right in the possessor good against other non-owners. The property is likely to be better cared for if it is in the hands of a single possessor while the owner is absent. Moreover, on his return, the owner will have a single defendant to sue for any damage he has suffered.²³²

One would want to recognize a right in the possessor, then, for two different reasons although the consequences will be similar in practice. One reason is that the possessor's use may be the best use of the property. In a system of ownership, the owner has the right to decide its best use. But sometimes, he is not actively exercising that right. It is better for this right to be exercised by someone else than by no one at all. The other reason is that even if the possessor's use may harm the owner, it may cause less harm if the possessor's right is protected against non possessors than if it is not protected at all.

In both cases, the law is not simply protecting the possessor against dispossession. It is protecting him so that he can benefit from his possession. Nevertheless, there is a difference. In the first case, the possessor obtains the benefit without hurting the owner. His possession is protected because it is better that someone should benefit than that no one should. In the second case, the possessor is hurting the owner. He is protected only because otherwise the harm to the owner would be greater. His possession is protected to give him an incentive to protect the property from others and so minimize the harm the owner may suffer.

Although, in both cases, the law should recognize a right to possess, the right should not be as extensive as ownership. An owner

230. *Id.* II.ii.2.4.

231. *Id.* II.ii.6.1.

232. Also, if this defendant ousted the owner, and the owner is not allowed to recover against one who later acquires possession in good faith, the owner will be able to recover his property more easily if he finds this defendant still in possession since he will not have to prove bad faith.

has typically paid for his property. Therefore, there is a reason for respecting his decision to warehouse it by leaving it idle. If that is not the best economic use, the owner is the one who will suffer. The possessor, however, is protected only so that the property will be used and cared for by someone. The reason for protecting him ceases as soon as he ceases to use and care for it. Moreover, because the owner typically has paid for the property, it will usually be more unfair to deprive him of it than to deprive the possessor. The possessor will suffer a loss only to the extent he has invested labor or expense in improving the land. If he has made no investment, to deprive him of the property might be unfair in the sense that he is being treated arbitrarily, but it will not be unfair in the sense that he has suffered a loss.

We can see, then, why in many of the systems we have examined, the prior possessor cannot assert his rights after he had voluntarily departed. The formal reasons why he cannot are often different. Under the old *actio spoli* he could not show loss through an unjust cause. Under modern German and Italian law, he cannot show dispossession. Under modern French law, while it is difficult to predict the result, presumably his voluntary departure would make his possession *moins bien caractérisée*. Under the common law, at least in the United States, his rights will be lost by abandonment. The common feature is that the possessor is not protected when he has ceased to use or care for the property.

The only case in which this result might be unfair is if he has made an investment of labor and expense, and then is unable to use the land for a period of time. It is hard to take account of this possibility directly. The unfairness depends on the value of his investment and the reasons he did not use the land. One could give the prior possessor a remedy in unjust enrichment. But some legal systems allow him to recover possession. Among the Ashanti, as we have seen, the prior possessor can return to the land as long as he could point out "some trees—kola, plantain, palm oil—which he had once cultivated, and still grew and bore fruit." In one American case, the prior possessor was allowed to reclaim mining property because the investment he had made, which was still of value, was said to be evidence he did not abandon the property.²³³ Perhaps the most convenient rule was that of the old French *complainte*. The prior possessor had to use the land, or assert his rights, within a year. In part, the requirement of one year may simply have evidenced an intention to depart. But it also protected any labor and expense he had incurred in the planting season.

233. *National Milling & Mining Co. v. Piccolo*, 54 Wash. 617, 104 P. 128 (1909), discussed p. 329, *supra*.

The case is more complicated when the prior possessor did not voluntarily depart, and yet the current possessor took the property in good faith without knowing the prior possessor was dispossessed. One might decide to protect the prior possessor because he should not lose his right arbitrarily. As we have seen, on those grounds, some jurists said that the old *actio spoli* should allow the prior possessor to recover against one who acquired possession in good faith.

In most legal systems, however, the person who acquired possession in good faith is protected instead. On the whole, this choice is the most reasonable. The current possessor's investment in the property is likely to be more recent. Dislocating him may cause additional expense. Moreover, one reason for protecting the prior possessor is so that he will put the land to some valuable use. The more valuable the use he found for it, the more likely he is to recover the property before anyone else can take possession in good faith. Since he has not paid for the property, his delay should not be treated as leniently as that of the owner. The other reason for protecting the prior possessor is to protect the owner indirectly by giving the possessor an incentive to care for the property and keep others off it. To deny him recovery does not destroy this incentive. If anything, his incentive is stronger since he must act before a third party acquires possession in good faith. Again, the old French *complainte* may have been the most pragmatic solution. The current possessor was not protected until after he had been in possession for a year.

The theory of possession we have outlined provides a good explanation of the different ways in which protection has actually been protected. It cannot show that only one of these solutions is correct. It can show why each has its advantages. It can therefore explain, not only why each system protects possession, but why they do so in different ways. That is all that a theory can realistically hope to do.