

## Concepts and remedies in the law of possession\*

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### *The Scottish debate*

A recent controversy about possession in Scots law revives one of the most classical debates in the civil law tradition.

On one side of the controversy is Professor David Carey Miller. He maintains that possession proper “occurs where the thing is held in circumstances which support an animus or design in the detainer of holding it as his own property”<sup>1</sup>. Only possession proper is protected against unlawful deprivation by the remedy of spuilzie: “relief by way of spuilzie will not be available to one who holds on the basis of a contract – such as loan or hire”<sup>2</sup>.

Professor Kenneth Reid criticizes Carey Miller’s approach. While “in Roman law the necessary mental act was in general possession as owner (*animo domini*)”, “in Scots law the rule is very much less restrictive”; “all that is required of a possessor is detention ‘for our own use’. The test is *animus sibi habendi* and not *animus domini*”<sup>3</sup>. Consequently, Kenneth Reid criticizes “Carey Miller’s narrow view of the meaning of possession”, which “leads him to a narrow view of the remedy of spuilzie as excluding those holding property on the basis of a contractual right”<sup>4</sup>. However, “a thing held exclusively for another is not possessed: the detentor in such a case has custody and not possession”<sup>5</sup>.

If we look at the institutional writers, both the views seem to have some basis. According to Erskine, “possession (...) is defined the detention of a thing with a design or animus in the detainer of holding it as his own”<sup>6</sup>. Stair, on the other hand, contents himself with saying that possession is the holding or detaining of any thing “for our use”; the necessary mental act is simply “the inclination or affection to make use of the thing detained”<sup>7</sup>.

If we look outside of Scotland, we find out: a) that both views of possession had noble vindicators in the civil law tradition, and both correspond to the definition of possession currently adopted in some civil law country; b) that deriving practical consequences (for instance, as to spuilzie) from such definitions is probably arbitrary.

### *Distances and convergences in the civil law tradition*

According to traditional civilian doctrine, possession comprises two elements: the animus and the corpus. The volitional element of possession is often qualified in the civilian literature as *animus domini* (intent to own). “These terms, however, are not of Roman origin. They have been coined by Savigny who asserted in his celebrated treatise on possession that the intent to own the thing is an indispensable element of possession in the proper sense of the word. Savigny contrasted the *animus domini* with the *animus detinendi*, that is, the intent to detain a thing on behalf of another person who has the intent to own and qualifies as possessor. Thus, possession and detention are distinct and distinguishable notions. (...) Savigny’s theory is

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<sup>1</sup> DL Carey Miller *Corporeal Moveables in Scots Law* (1991) p. 12.

<sup>2</sup> *Ibid* p. 220.

<sup>3</sup> KGC Reid *The Law of Property in Scotland* (1996) p. 108.

<sup>4</sup> *Ibid* p. 135, n. 1.

<sup>5</sup> *Ibid* p. 108.

<sup>6</sup> Erskine *Principles of the Law of Scotland II*, i, 12.

<sup>7</sup> Stair *Istitutions of the Law of Scotland II*, i, 17.

known in the civilian literature as the subjective theory of possession because of its reliance on a person's subjective intent to own a thing. Jhering challenged this theory and sought to demonstrate that the subjective intent of the person who has physical control over a thing is implicit in his factual authority, but it is not determinative for the qualification of that authority as possession. Jhering's theory is known as the objective theory of possession, because any intentional exercise of physical control over a thing is possession. Jhering distinguished between possession and detention, but he did not ground the distinction on the presence or absence of the intent to own the thing. According to Jhering, a person has detention rather than possession when the *causa possessionis* (the "cause of possession") is of a nature that implies exercise of physical control over a thing on behalf of another person. When this happens, there can be no possession in the proper sense of the word, and the *causa possessionis* becomes a *causa detentionis*<sup>8</sup>.

The civil law systems are still split up in two factions along the line of the Savigny-Jhering debate.

While the French civil code is not clear on the point (art. 2228 c.c.: "possession is the detention or enjoyment of a thing or of a right which we hold or exercise by ourselves, or by another who holds and exercises it in our name"), French literature sticks to the old idea of possession as *corpus plus animus*. "Mere material control and use is not by itself sufficient to constitute possession in the eyes of the law; there must, in addition, be a mental element. The possessor must have the *animus domini*, the *animus rem sibi habendi*, in other words the intention to exercise the material mastery on his own behalf, and not on behalf or by licence of another person. Where the physical control or occupation of the thing is exercised by one person on behalf of another, as lessee, bailee or bare licensee, the former has only the *détention précaire*"<sup>9</sup>. More precisely: the intent to possess as owner or as holder of a real right is an indispensable requirement for possession<sup>10</sup>. Thus, a bailee or a lessee<sup>11</sup> is not a possessor.

Italian law is similar on the point. According to the Italian civil code (art. 1140), "possession is the power over a thing that is manifested by an activity corresponding to the exercise of ownership or other real right. One can possess directly or by means of another person, who has detention of the thing". The distinction between possession and detention is explained by the Italian scholars through the idea of possession as *corpus plus animus*. The *detentore* is said to have *corpus* but not *animus*: he lacks the intent to exercise property or another real right<sup>12</sup>. The lessee, the depositary, the borrower are not possessors.

Jhering ideas apparently had a greater influence in Germany. "In Germany, possession is the exercise of factual authority over a corporeal thing (*Sachbesitz*). The intent to possess as owner is not an indispensable requirement for possession. Any person who exercises factual authority over a thing is a possessor, even if he exercises that authority on behalf of another person"<sup>13</sup>. The BGB states that "possession of a thing is acquired by obtaining actual power or control over the thing" (§ 854), and explicitly qualifies the lessee and the depositary as possessors (§ 868). However, "if a person exercises actual power of control over a thing on behalf of another person in the latter's household or place of business, or in a similar relationship by virtue of which he has to comply with the instructions of the other concerning the thing, only such other person is the possessor" (§ 855); the detainer is known as possession-helper (*Besitzdiener*).

<sup>8</sup> AN Yiannopoulos *Possession*, 51 *Louisiana Law Review* 523 (1991), p. 525.

<sup>9</sup> *Amos and Walton's Introduction to French Law* (3<sup>rd</sup> ed., 1967) p. 100.

<sup>10</sup> See, *ex multis*, P Malaurie – L Aynès *Cours de droit civil – Les biens, La publicité foncière* (5th ed., 2002) p. 145; J Carbonnier *Droit civil – Les Biens* (14<sup>th</sup> ed., 1991) p. 200.

<sup>11</sup> As in many other civil law countries, in France the lessee's right is not recognized as a real right.

<sup>12</sup> See, *ex multis*, A Trabucchi, *Istituzioni di diritto civile* (39th ed., 1999) pp. 455-456. See also R Sacco – R Caterina *Il possesso* (2<sup>nd</sup> ed., 2000) p. 98 ff.

<sup>13</sup> Yiannopoulos *Possession* (supra n. 8) p. 535.

So far, it seems that Professor Carey Miller is in line with the Savignyan – French – Italian tradition, while Professor Reid is nearer to Jhering and BGB's position. Things, however, are more complicated.

We can start from Italian law. According to art. 1168 of the civil code, "one who has been violently or by stealth deprived of possession can, within a year of the taking (*spoglio*), sue the taker for recovery of possession". Italian case law qualifies as violent every taking carried out against the will (even the implicit will) of the possessor<sup>14</sup>. Given this interpretation, practically every dispossession can be considered violent. What is more interesting to us, however, is the second comma of the article: "the action is also available to him who has detention of the thing, except in the case in which he has it for reasons of service or of hospitality". According to the case law, both the lessee<sup>15</sup> and the borrower<sup>16</sup> can exercise the action for recovery of the thing. According to the prevailing opinion, also the depositary can exercise the action<sup>17</sup>.

In France, the civil code originally did not regulate the possessory actions. However, the French courts recognized several forms of action for the protection of possession, and among them the *réintégrande*. "In *réintégrande*, which lies for violent dispossession, proof that the plaintiff's possession (...) was exercised *animo domini* (...) is dispensed with"<sup>18</sup>. The matter has been settled by a law of July 9, 1975, which introduced art. 2283 of the civil code: "Possession is protected, regardless of the substance of the right, against disturbance which affects or threatens it. Protection of possession is also granted to the person who holds the thing (*au détenteur*) against all other than the one from whom he holds his rights".

In Germany, according to § 861 of the BGB, "if the possessor is deprived of possession by an unlawful interference, he may demand the restitution of possession from the person whose possession is defective relative to him". As already said, the category of possessors includes any person who exercises factual authority over a thing, even if she exercises that authority on behalf of another person.

To sum up so far: German law has a wide category of possessors, and gives the action for recovery of the thing to possessors; French and Italian law have a narrow category of possessors, and give the action for recovery of the thing to possessors and to many holders that do not qualify as possessors.

If we look at another important effect of possession, acquisitive prescription, we find the inverse situation. In Italy (c.c. art. 1158) and France (c.c. art. 2229) usucaption requires possession. In Germany while any person who exercises factual authority over a thing is a possessor, a distinction is drawn between a person who possesses as owner (*Eigenbesitzer*) and a person who lacks that intent (*Fremdbesitzer*) (§ 872 BGB); this distinction is pertinent for acquisitive prescription, because prescriptive rights accrue only in favor of a possessor who possesses as owner (§§ 900 and 937).

In other words, the French, German and Italian legal systems reach similar results even if they use different categorizations. The German category of possessors include holders who are not recognized as possessors in France and Italy; but not all the German possessors can acquire ownership by usucaption, and other hand possessory remedies are not restricted to possessors in France and Italy.

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<sup>14</sup> See Cass. civ., 23/02/1981, n.1101; Cass. civ., 13/02/1999, n.1204.

<sup>15</sup> See Cass. civ., 20/05/1963, n. 1306; Cass. civ., 05/03/1968, n. 710.

<sup>16</sup> See Cass. civ., 11/08/1986, n.5008; Cass. civ., 30/06/1987, n.5746.

<sup>17</sup> See, for instance, Sacco – Caterina *Il possesso* (supra n. 12) pp. 196-197.

<sup>18</sup> *Amos and Walton's Introduction to French Law* (supra n. 9) p. 103. See for instance Aubry & Rau *Droit civil français* (7<sup>th</sup> ed., 1961) tome deuxième pp. 225-226: « La réintégrande n'exige pas, pour son admission, une possession proprement dite (...) Spécialement ceux qui ne détiennent que pour le compte d'autrui, tels que le fermier ou le créancier sur antichrèse, sont admis à la former ».

## The actio spolii

A first explanation of the situation described above lies in history. The common historical root of the actions for the recovery of possession is not a Roman remedy, but an action taken from canon law and known as the *actio spolii*<sup>19</sup>. The remedy had been based on a passage in the *Decretum Gratiani*. The text began with the word “redintegrandā” 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 the merits of his expulsion, everything had to be restored to the bishop. Apparently this remedy originally took the form of a special plea, an *exceptio spolii*, in terms of which the expelled bishop could claim to be restored before he was prosecuted criminally. It was later transformed into an action at first known as the *condictio ex canone redintegrandā*, later as the *actio spolii*. From very early times it was made available to ordinary citizens. By the 17<sup>th</sup> and 18<sup>th</sup> century, the *actio spolii* had, in practice, displaced the Roman interdict *unde vi*.

What is more interesting to us is that this remedy “as the 17<sup>th</sup> and 18<sup>th</sup> century writers inform us, was wider than the Roman *unde vi*. 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”<sup>20</sup>.

With some hesitations (partly deriving from the temptation to identify the *actio spolii* with the *unde vi*) the availability of the action to mere holders like the hirer or the borrower was widely recognized<sup>21</sup>. This rule was explicitly followed by the Prussian *Allgemeines Landrecht* of 1794<sup>22</sup>.

Now, “it seems reasonable to infer that in Scotland, as in some other European countries, spuilzie derived ultimately from the *exceptio spolii* of the canon law”<sup>23</sup>. The very name is a strong clue. But it is not the only clue. According to Bankton, spuilzie comes “in place of” the Roman interdicts<sup>24</sup> (which would make sense for the *actio spolii*); Bankton quotes the rule “spoliatus ante omnia est restituendus”, which is a maxim of canon law<sup>25</sup>, and the same maxim can be found in a number of old cases<sup>26</sup>.

If spuilzie derives from the *actio spolii*, it becomes apparent that the following reasoning: “the hirer and the borrower are not possessors, and thus spuilzie is not available to them” is not logically stringent. *Actio spolii* was available to mere holders; and today several legal systems do not recognize hirers and borrowers as possessors, and still give them the remedy for recovering of the thing.

On a practical plane, it is not difficult to understand why all the mentioned legal systems give the remedy also to mere holders. This is advantageous to the holders, but also to the owners, who are spared the need to intervene in the defence of the holders (who are usually in the best position to act, while the owners may be absent). The unavailability of the remedy to the holders is advantageous only to the wrongdoers.

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<sup>19</sup> A classical treatment of the subject can be found in F Ruffini *L'actio spolii: studio storico-giuridico* (1889). See also H Coing *Europäisches Privatrecht* (1985) I p. 285 ff.; J Gordley – U Mattei *Protecting Possession*, 44 *American Journal of Comparative Law* 293 (1996) p. 306 ff.

<sup>20</sup> Gordley – Mattei *Protecting Possession* (supra n. 19) pp. 307-308.

<sup>21</sup> See, for instance, U Zasius *Opera Omnia* vol. III *De acquir. Vel amit. Possess.* c. 322, 163; J Oldendorp *Opera t.II De iure possessionis persequendo*, 152; Pontanus *De Spolio (Tractatus Uni. Iuris t. XIV fol. 270) lib. 1, cap. XIII, n. 126*; R Maranta *De ordine Iudiciorum Tractatus, vulgo Speculum Aureum, et Lumen Advocatorum dictus*, 4, 7, 58; A Leyser *Meditationes ad Pandectas*, specimen 451, 1.

<sup>22</sup> I Theil, 7 tit., § 141: “Gegen Gewalt muß jeder Inhaber und Besitzer geschützt werden“.

<sup>23</sup> K Reid “Property Law: Sources and Doctrine”, in K Reid – R Zimmermann (eds.) *A History of Private Law in Scotland* (2000) I, 185, p. 212.

<sup>24</sup> Bankton *An Institute of the Laws of Scotland* II, 1, 31.

<sup>25</sup> *Ibid* I, 10, 126.

<sup>26</sup> See e.g. *Haliburton v. Rutherford* (1541) Mor 14739, quoted in Reid “Property Law: Sources and Doctrine” (supra n. 23) p. 213.

There are thus strong historical and practical reasons for recognizing the availability of spuilzie to those holding property on the basis of a contractual right. This prescind (at least in some measure) from the concept of possession that one opts for.

A system can use a narrow category of “possessors”, inspired by the traditional idea of possession as *corpus plus animus*. Possessors can acquire ownership (or other real rights) by usucaption; the remedy against dispossession is, however, available also to at least some holders not recognized as possessors. This is, more or less, the French and Italian solution.

A system can use a wider category of possessors, including all the persons protected by possessory remedies. In this case, it may be necessary for some purposes (e.g. usucaption) to further distinguish among possessors. This is, more or less, what happened in Germany, where Jhering’s ideas have in effect legitimized an older situation.

There is a third possibility. A system may use an elastic concept of possession. This is perhaps what happens in South Africa. The only possessory remedy currently known in South African law is the *mandament van spolie*<sup>27</sup>, which can be traced back to the *actio spolie*. It is now accepted in South African law that any person who exercises physical control over a thing with the intention of deriving some benefit from it (*animus ex re commodum acquirendi*) is in principle entitled to the *mandament van spolie*. This *animus* has been widely interpreted by the courts and possessory protection has been extended to most of the traditional detentors, such as a lessee, a borrower, an agent, a depositary, a hire-purchaser<sup>28</sup>. Still, for some purposes (e.g. occupation, acquisitive prescription) such holders are not recognized as possessors.

“The latest approach in textbooks on property law is to refrain from giving a single comprehensive definition of possession since, it is argued, the content thereof depends on the particular consequence or function one has in mind”<sup>29</sup>. It has for instance been recognized that “the content of the state of mind required for possession differs according to the function served by possession in a particular case”<sup>30</sup>. Different forms of *animus* are identified, such as the *animus domini*, the *animus sibi habendi*, the *animus ex re commodum acquirendi*.

This is maybe an instructive lesson for all legal systems. Possession is a functional and relative concept; it cannot be fully defined prescind from the consequences which will follow from the qualification of a particular factual situation as possession, and in a dubious case one should always consider the context of the particular rules which are to be applied<sup>31</sup>.

As to Scottish law, all systematizations are legitimate, provided that undue consequences are not derived from them. However, in a system where positive prescription has probably never being recognized for moveable property, and is probably disappearing for land<sup>32</sup>, the French-Italian model is maybe not the most desirable from the point of view of cognitive economy.

### Lessons

What lessons can be derived from all this?

A first lesson concerns possession. European scholars have often discussed possession on the basis of Roman law, ignoring the fact that the courts applied remedies which were not of Roman origins. Thus, the general possessory theory has often been somewhat out of tune with the concrete reality of possessory protection. A full historical understanding of possession

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<sup>27</sup> See CG Van der Merwe “The Law of Things”, in CG Van der Merwe – MJ de Waal *The Law of Things and Servitudes* (1993), p. 66 ff.; D Kleyn “Possession”, in R Zimmermann – D Visser (eds.) *Southern Cross. Civil Law and Common Law in South Africa* (1996) 819, p. 835 ff.

<sup>28</sup> See Van der Merwe “The Law of Things” (supra n. 27) p. 69; Kleyn “Possession” (supra n. 27) pp. 844-845.

<sup>29</sup> Kleyn “Possession” (supra n. 27) p. 825.

<sup>30</sup> Van der Merwe “The Law of Things” (supra n. 27) pp. 53-54.

<sup>31</sup> In the English literature see, in a similar vein, DR Harris, “The Concept of Possession in English Law”, in Guest (ed.), *Oxford Essays in Jurisprudence* (1961), 69.

<sup>32</sup> Reid “Property Law: Sources and Doctrine” (supra n. 23) p. 215.

cannot prescind from the recognition that the civilian tradition has, in this regards, a strong debt towards canon law and Germanic law.

A second lesson is more general. Practical rules usually do not depend on concepts and categorizations. In many cases, legal systems may reach similar results (deriving from history or practical convenience) while using different conceptual tools to explain them. Deriving a concrete solution from a concept is often a dangerous game.

