CONVERSION AND REVINDICATION

Few subjects can be more fascinating than the comparative study of the common law and the modern civil law. The civilisations of France, in particular, and of England are closely linked in culture and in history, and the legal systems of both countries have at one time or another, and especially in the past century, had to face similar social and moral problems. Yet the concepts, the classification and the procedure of the two systems are, by a historical accident, so utterly dissimilar that a question asked in the terms of one system may have to be translated into quite other terms, or even split up into a number of different questions, if it is to be asked intelligibly in the other. 'Cette différence des concepts, auxquels les juristes des deux pays ont recours,' says René David, '. . . fait que le juriste français, qui se sentait à l'aise dans le droit italien, le droit uruguayen et le droit allemand, se trouve complètement désorienté lorsqu'il entre en contact avec le droit anglais. Là tout ce qu'il a appris semble devenir inutile: il lui faut réapprendre à penser, à parler et à lire.'[1]

The common lawyer is at some slight advantage here. He has at least some acquaintance, however imperfect, with the system of Roman law upon which the French is in large measure based. The task of re-orientation is nonetheless a formidable one, and the possibilities of mis-understanding numerous and insidious. Not a little part of the fascination, however, lies in the frequent discovery that though the paths taken may lead deviously through widely separated terrains their destinations are the same. Working with different conceptual and procedural apparatus the civil lawyer and the common lawyer often achieve the same end result. And where they do not it behoves us to consider whether one of us has anything to gain from the other in point of justice, our common goal.

The subject of actions which assert a title to property is only one of many which could have been chosen to illustrate these remarks. It is a convenient one, however. Both conversion and revindication have their roots far back in the history of the countries in which they operate; and we can be fairly sure that no Roman model had any significant influence upon our own form of action.

1. 'This difference in the concepts to which the jurists of the two countries have recourse renders the French jurist, who felt at home in Italian law, Uruguayan law and German law, completely disorientated when he comes into contact with English law.' Rene David, *Droit Civil Compare,* (1950) p. 283.

HISTORY

Conversion, or Trover, has been defined by Street as 'an intentional dealing with a chattel which is seriously inconsistent with the possession or right to immediate possession of another person'.[2] The origins of the action are sufficiently well-known to need no recapitulation here. Earlier in point of time was the action of trespass *de bonis asportatis* for the carrying away of a chattel; earlier still detinue for its wrongful detention. All three actions survive in a developed form, and furnish us with nice and not altogether creditable distinctions where their boundaries overlap. With these last two we shall not primarily be concerned in this article.

Revindication is the action available to a person who petitions for the restitution of a thing on the ground that he is the owner of it. It is based upon the Roman *vindicatio rei, a* real action. It is available alike for the recovery of movables and of immovables.

In order to understand the scope of the action at the present day it is necessary to say something about its history.[3]

In early French law, up to the thirteenth century, the owner of a movable was not, strictly speaking, entitled to revindicate at all. In this French law resembled English law of the same period, for we have no reason to suppose that detinue, in spite of the formula with which the writ begins, was at this date conceived of as a real action.[4] The owner, however, was not without a remedy. If he had ceded possession voluntarily, the most he was entitled to was an action of a contractual nature based on loan or deposit, and this of course gave him no right to follow his goods into the hands of a third party. If he had lost possession against his will, as by casual loss or by theft, he was again, in strict theory, confined to a personal action — the 'demande de chose emblée' or 'demande de chose adirée' in the one case, the 'demande de furtive' in the other. These were penal actions in nature, but were eventually allowed against anyone in possession of the goods, and so were as good as a revindication. In a closely analogous way the appeal of larceny

2. Street, *Law of Torts,* 2nd edition, p. 34. Cp. Serjeant Williams' definition: 'In order to constitute a positive act of conversion, there must be a wrongful taking, or using or destroying of the goods, or an exercise of *dominium* over them, inconsistent with the title of the owner.' 2 Wms. Saunders 108. The word 'owner', however, must be suitably qualified.

3. See generally Jobbé-Duval, *Etude Historique sur la Revendication des Meubles Français;* Planiol, *Traité Elémentaire de Droit Civil,* 2461-2475.

4. See Plucknett, *Concise History of the Common Law,* 4th edition, p. 344, criticising Maitland, *Equity and the Forms of Action,* p. 322, and Pollock and Maitland, *History of English Law,* vol. II, p. 205.

could in Bracton's day be converted into an action *de re adirata* by omitting the words of felony, and in this way a chattel could be recovered against a finder.[5]

In other cases — that is, where no loss or theft was involved — the governing maxim was *mobilia non habent sequelam*: movables cannot be followed.

By the sixteenth century, however, the reception of Roman law made it natural for lawyers to take it for granted that revindication would be allowed in all cases. The old maxim *mobilia non habent sequelam* still survived — indeed it still survives to the present day — but only in an attenuated sense, with reference to the rights of mortgage creditors to follow their securities.[6]

The seventeenth and eighteenth centuries witnessed a reaction against the rigour of this doctrine. This reaction took two forms. First, it was sought to reduce the period of prescription applicable; in many provinces the period was reduced to the three years prescribed by Justinian.[7] Secondly, revindication came to be no longer permitted in cases of 'abus de confiance'. That is to say, where the owner of a movable deposited the property with another person, and that other wrongfully parted with possession — say, by way of sale — to another person, the owner could not revindicate against the third party. This development finally was to reach its culmination in the famous maxim of the Code Civile, 'en fait de meubles possession vaut titre', which replaced the older maxim in all but its restrictive sense.[8]

It will be seen, therefore, that, as Planiol has observed,[9] French law, after an interval of five hundred years, returned to its starting-point. But this was not done in imitation of the past. The modern lawyers reached their position by a chain of reasoning which would not have been intelligible to their forebears, who derived their rules rather from Germanic than from Roman sources.

Before considering the effect of this maxim, it is convenient to deal with certain other matters.

5. Holdsworth, *History of English Law,* vol. III, pp. 320-322. In the English action, however, the owner might have to be content with the value of the thing rather than the thing itself; Holdsworth, *op. cit,* Ames, *Select Essays in Anglo-American Legal History,* vol. III, pp. 437-438.

6. Article 2119 of the Civil Code. This applies also to things severed from land which has been mortgaged, and then alienated, *e.g.* crops, timber (Cour de Cassation, 1 mai 1906).

7. Institutes 2.6 pr.; C.7.31.1.

8. Article 2279; 'In the case of movables possession is as good as title.'

9. *Op. cit.* 2469.

NATURE OF THE ACTIONS

Conversion is essentially a personal action of a delictual nature. It is the wrongful act of the defendant in dealing with the plaintiff's goods which is the foundation of the action, not the possession or otherwise of the goods by the defendant. A person may be guilty of conversion by receiving goods in a transaction intended to give him a proprietary interest in them. After that it does not matter what happens to the goods; the conversion has been committed. Or he may be guilty of conversion by retaining the goods after they have been lawfully demanded of him. Or he may be guilty because he has parted with possession of the goods. (The list, of course, is not exhaustive).

Trespass to goods is more obviously a personal and delictual action. Detinue, on the other hand, seems at first sight to be a proprietary action. At an early period, of course, no attempt was made to classify it as contractual, tortious or proprietary, and when, in the eighteenth and nineteenth centuries, a more systematic age sought to categorise the action, the judges stressed now one aspect, now another.[10] Two characteristics, however, distinguished it sharply from an action *in rem.* In the first place, the complaint was that a wrong had been done to the plaintiff (it matters not whether we regard the wrong as contractual or tortious) the wrong consisting in the failure to redeliver the goods to the plaintiff. It was thus no defence to the action that the defendant had parted with possession of the goods, unless possession was lost involuntarily and without negligence. Secondly, the defendant had the option of retaining the goods and paying their value.[11] It is true that, since

10. See Holdsworth, *op. cit.,* vol. VII, pp. 437-440.

11. On the other hand it is to be remembered that detinue was the only action in which the plaintiff could *claim,* and sometimes obtain, not merely damages but the recovery of the thing itself. Holdsworth (*op. cit.,* p. 438) quotes Willes L.C.J. in *Kettle* v. *Bromsall* (1738) Willes 118: 'In trover only damages can be recovered; but the things lost may be of that sort, as medals, pictures or other pieces of antiquity, . . . that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves. Which can only be done in detinue.' The procedure was that judgment was given for recovery of the thing or its value, which therefore had to be assessed and claimed for. (*Per* Frowick C.J. (1505) Keilw. 646). A distringas then issued to the sheriff *ad deliberanda bona,* but if the thing itself were not found then the sheriff inquired into the damages, and execution issued for these or for the amount claimed, whichever were the less; Viner, Abr. 2nd. ed. VIII, 40; Com. Dig. 5th. ed. VI, 406-7; Bacon, Abr. 7th. ed. II, 664. It is not now necessary for the value to be assessed by the plaintiff; *Hymas* v. *Ogden* [1905] 1 K.B. 246. The plaintiff has the option of issuing a fi. fa. without leave, or a writ of delivery with leave under Order 48 rule 1. This gives a power of distress until delivery; but if no delivery is made a writ of assistance issues. In addition *Hymas* v. *Ogden, supra,,* establishes that the defendant may be attached for contempt for disobedience to the writ of delivery. At the present day, therefore, an order for specific delivery is unequivocally and effectively a remedy *in rem.*

1854, the plaintiff has been able to obtain specific delivery of the chattel; but even at the present day this remedy is not as of right, but is within the discretion of the court.[12]

Corresponding to this distinction, the methods of execution are different. In revindication the method of execution known as a 'saisie-revindicatio' puts the owner back into possession of the object claimed. Ordinarily execution of a judgment in an action of conversion lies against the goods of the debtor generally. The consequences of this difference when it comes to an involuntary assignment of the property of the defendant will be considered later.

WHO MAY BRING THE ACTIONS?

English law, like French law, admits the possibility of *dominium* over personal (movable) property, and it is only possible to draw a useful comparison between conversion and revindication because the former, like the latter, is closely bound up with the question of the title of the plaintiff to the property in question.

Nevertheless, typically, English law tends to regard the question 'Who is the true owner?' as an embarrassing and, generally, unnecessary one.

Two consequences flow from this. In the first place, as Street's definition sufficiently indicates, possession or the immediate right to possession is sufficient to ground the action. A person with a 'special title' to the goods, as it is sometimes called, may maintain the action if his possession has been interfered with. For example, a bailee, a pledgee, a licensee and even a finder can sue any third party who takes possession of the goods. The case of the finder is particularly instructive. French law allows him no title at all (unless possession has been abandoned by the owner) and allows no-one to derive a title through him. English law, on the other hand, allows him a sufficient title to bring an action of conversion against anyone at all except the owner or one with a better title. The subject is difficult and controversial in English law,[13] because where, for example, banknotes are found in a house or a shop by one who is not the owner of the building the problem which arises is whether the finder or the owner or occupier of the building is entitled. No-one doubts, however, that this problem is to be settled by deciding which of them first gained possession of the notes; ownership does not

12. Common Law Procedure Act 1854 s.78.

13. The classic case, of course, is *Armory* v. *Delamirie* (1722) 1 Stra. 505. See also *Bridges* v. *Hawkesworth* (1851), 21 L.J.Q.B. 75; *Elwes* v. *Brigg Gas Co.,* (1886) 33 Ch. D. 562; *South Staffs. Water Co.* v. *Sherman,* [1896] 2 Q.B. 44; *Hannah* v. *Peel,* [1945] K.B. 509; *Re Cohen, National Provincial Bank* v. *Katz,* [1953] Ch. 88.

enter into the matter. Conversely, there are many cases in which the owner will *not* be allowed his suit, because he has neither possession nor the immediate right to possession. Thus a bailor in a bailment at will may sue,[14] but not a bailor where the bailment is for a fixed term which has not expired;[15] and a pledgor has no right to sue a third party to whom the pledgee has re-pledged the goods without tendering the sum due, for until then he has no immediate right to possession.[16]

In the second place it follows that there can be no plea of a *jus tertii.*[17] As against a wrongdoer possession is title, and a defendant cannot justify his wrongdoing by setting up the title of a third party, unless, of course, he derives title under that third party.

In theory, at least, French law takes up an entirely different position. Revindication is the unambiguous assertion of the ownership of the plaintiff.[18] It is not, therefore, available to the *mandataire* or *dépositaire* or other 'precarious possessor'. And it is always available to the owner, both against one to whom he has entrusted goods (in addition to any contractual remedy he may have) and against third parties, unless they are able to set up the special defence given them by article 2279.

That is not to say that French law never gave an action to protect possession as distinct from ownership. On the contrary, in the regime of immovable property French law preserves a distinction between real and possessory actions which has long been obsolete in our own law.[19] Further, French law regards the 'apparent owner' — one who is publicly accepted as having title to a thing — as having all the rights of an owner except vis-à-vis the true owner.[20] With truly Gallic logic, hence a person is considered to be 'in possession' of the ownership.

14. *Nicolls* v. *Bastard* (1835) 2 Cr. M. & R. 659.

15. See *The Winkfield* [1902] P. 42.

16. *Donald* v. *Suckling,* (1866) L.R. 1 Q.B. 585

17. *Armory* v. *Delamirie, supra.*

18. Thus in actions to revindicate immovables a great deal of French law turns on the methods of proof of ownership available to the plaintiff.

19. There are three such actions — the 'réintégrande' (reinstatement), the 'complainte' and the 'dénonciation de nouvel oeuvre'. Only the first of these resembles the English possessory actions. The second involves a disturbance of the plaintiff's possession not amounting to dispossession, the third is appropriate where his possession is threatened by works begun on a neighbouring property. See Amos and Walton, *Introduction to French Law,* pp. 100-101; Planiol, *op. cit.,* 2302-2310.

20. Planiol 2361.

But in the case of movable property neither the possessory actions nor the theory of apparent ownership are required. They are obviated by article 2279. That article begins with the maxim before quoted: 'En fait de meubles possession vaut titre'. The maxim is principally a weapon of defence rather than of attack: the nearest parallel in our own law is the defence, in the law of negotiable instruments, of 'holder in due course'. In the present context the maxim raises a presumption of title in favour of a plaintiff who was in possession of movables in good faith, which will enable him to revindicate against any defendant who is not himself in a position to avail himself of the article by way of defence. Moreover good faith is presumed from the fact of possession unless the contrary is shown.

But though the plaintiff in French law, as in the common law, can thus rely upon possession alone to establish his claim, it is a *prima facie* claim only. It is still open to a defendant to show that the plaintiff has no right to revindicate, either because his possession was not in good faith, or by way of *jus tertii* because ownership was in someone else under circumstances which were such that the plaintiff was debarred from claiming that his possession was as good as title.

SUBJECT-MATTER OF THE ACTIONS

Little needs to be said about the subject-matter of the two actions. Revindication is a perfectly general remedy for the recovery of tangible property, both movable and immovable. Conversion is a remedy appropriate to chattels. Both systems have succeeded in assimilating certain kinds of property which are strictly speaking incorporeal to corporeal property proper. In the common law choses in action which are evidenced by a writing which forms the creditor's document of title have been thus assimilated by the courts' treating the value of the document as being, not merely the value of the paper, but the value of the debt which it evidences. In French law credits of this kind, passing as they do from hand to hand with the paper which evidences them, are regarded as being 'merged' in the tangible movable.

ARTICLE 2279 AND THE ROMAN LAW

It will be recalled that throughout the history of the French civil law on this matter there was a recurrent differentiation between the rights of an owner, on the one hand when he voluntarily parted with possession of his goods to another person and that other, in breach of the confidence so reposed in him, parted with possession to a third person, and on the other when the goods were lost by the owner or stolen from him.

This differentiation is reflected in the wording of article 2279, which runs as follows: — 'En fait de meubles possession vaut titre. Néanmoins

celui qui a perdu ou auquel il a été volé une chose peut la revendiquer pendant trois ans, à compter du jour de la perte ou du vol, contre celui dans les mains duquel il la trouve; sauf à celui-çi son recours contre celui duquel il la tient.'[21] The article therefore first asserts a general rule, by virtue of which revindication is disallowed against a *bona fide* possessor, and then goes on to assert as an exception to this rule the principle that revindication is nevertheless permissible in cases of loss or theft.

Planiol criticises this formulation because, he says, it reverses the role played historically by the two rules.[22] Historically there came first the general rule accepted at the Reception that revindication would be permitted in all cases; and then came the later exception, engrafted onto it in the eighteenth century, in favour of the *bona fide* possessor where the owner had voluntarily parted with his possession. He goes on to urge that in fact, at the present day, there are two quite distinct rules, not a rule and an exception.

The formulation is understandable, however, it is submitted, if we consider the Roman model which the French civilians had in mind. To anticipate a more detailed discussion of the present-day content of the French rule, it should be mentioned that the somewhat cryptic wording of the opening maxim, though it contains no reference to good faith, has always been interpreted, in accordance with the law which preceded the introduction of the Code, as operating only in favour of the *bona fide* possessor. It then becomes apparent that there is an extraordinarily close parallel between the acquisition of title by a *bona fide* possessor in French law and acquisition by *usucapio* in Roman law.[23]

The first requirement for this civil law mode of acquisition, which gave *dominium* to the acquirer, was uninterrupted possession — in the case of movables for a period of one year.

Secondly, the acquirer must have acted in good faith. Broadly speaking, this meant that he must have believed genuinely that he had a right to hold the thing as his own.

Thirdly, there must have been a *justa causa* or *justus titulus;* that is to say, the initial taking must have been based upon some fact which is ordinarily a basis of acquisition — a sale, a legacy, a gift, and so forth. In this connection there was in particular no *justa causa* where there

21. 'In the case of movables, possession is as good as title. Nevertheless one who has lost a movable, or from whom a movable has been stolen, may revindicate it within three years, inclusive of the day of the loss or theft, from him in whose hands it is found; but without prejudice to the latter's right of recourse against the person from whom he obtained it.'

22. Planiol 2475.

23. See generally Buckland, *Textbook of Roman Law,* pp. 242-252.

was a supposed *usucapio pro derelicto.* If someone found a thing and reduced it into possession, believing in good faith that it had been abandoned, then it was said that there was only a putative and not a real *causa,* and on this no *usucapio* could be based.[24]

Finally, there could be no *usucapio* of a *res vitiosa.* The most important instance of *vitium* in the case of movable property was *furtum.* A *res furtiva,* stolen property, could never be acquired in this fashion, no matter what intermediate dealings might have occurred.

The effect of these rules may be summarised by saying that a person who received goods in good faith and under a *justus titulus* acquired a good title to them after possessing them for one year; but he could not acquire a title by finding goods which had been lost, and could never acquire a title to goods which had been stolen.

The parallel is clear. Indeed article 2279 occurs under the heading 'De la Prescription' and is treated as one form of acquisitive prescription. We may say that acquisition under the article is a sort of immediate *usucapio* — *usucapio* with the requirement of long possession omitted. The ambit of the rule at the present day, of course, is much wider and much less technical than ever the Roman law was. But if we look upon the article substantively, as describing a mode of acquisition of title, rather than procedurally, as indicating those cases in which revindication is possible and those in which it is not, its present format is not illogical.

WHO MAY BE SUED?

While Equity acted always upon the conscience of a defendant, and so tended to absolve a defendant of liability where no conscious wrongdoing could be imputed to him, the emphasis of the common law was laid upon the right of the plaintiff; if that were infringed by an act of the defendant which was intentional, in the broad sense which that word bears in our law, then the defendant was liable without more. It is not surprising, therefore, that whereas in equity the owner of an equitable interest cannot 'trace' his property into the hands of a *bona fide* purchaser of a legal interest without notice of the owner's right, the ignorance of the existence of the owner's right affords no excuse at law; and while in equity, even against the volunteer the equitable owner will be allowed no rights unless his property is still in the hands of the volunteer, the common law action of conversion will lie against anyone at all who has dealt with the property in a manner inconsistent with the owner's title, even though the property is no longer in his possession, and however innocently he may have acted throughout.

24. The distinction between a real and a putative *causa* is a complex one. If a person found something which had in fact been abandoned, for example, though by one who was not the owner, then there was a real *causa;* Buckland, *op. cit.* 246-247; Digest 41.7.2. pr., h.t.6.

This insistence of the common law upon the inviolability of the title of the owner seems at first sight to be reflected in some of the provisions of the Code Civile. Thus to the common law doctrine *nemo dat quod non habet* there corresponds article 1399 of the Code: 'La vente de la chose d'autrui est nulle'.[25] But we are not to understand this, as we are to understand the common law maxim, as extending its operation to third parties. Professor Lawson quotes from the French jurist Josserand. Once the parties to a contract of sale are *ad idem* 'rien ne semble s'opposer à ce que l'accord produise vis-à-vis d'elles et sur le champ, tous les effets don t il est susceptible, y compris l'effet translatif; mais tout autre est la situation des tiers, lesquels n'ont point été mêlés à l'opération.'[26] While the common law has admitted isolated exceptions to the principle *nemo dat quod non habet,* the position is rather the reverse in French law. Article 2279 has been said to have the effect of making movables fully negotiable, saving only the exceptions laid down in the article itself.

Paradoxically enough, therefore, the civil law revindication, which is essentially a straightforward assertion of the ownership of the plaintiff over a thing, is not available against the *bona fide* possessor; while the common law action of conversion, which is a delictual claim by one with possession or the right of possession, is available against anyone at all, irrespective of possession or good faith.

REMEDIES WHERE THE OWNER VOLUNTARILY PARTS WITH POSSESSION

Where a thing has been confided to someone by the owner, and not lost or stolen, the owner has, as he always has had, a contractual claim against the person entrusted — an action upon the contract of deposit, mandate, hire, etc. But the ambit of article 2279 does not, of course, protect the person entrusted himself from the owner's right *in rem* to revindication. He is not a 'possessor' within the meaning of the article. This is of the utmost importance, because if the owner were confined to a contractual action then his claim, being a personal one, would abate along with the claims of other creditors should the debtor's property be insufficient to meet their demands. But on a revindication the owner is entitled to the thing itself.

The common law, though it has no real action, sometimes succeeds in achieving very much the same effect, but in a different way. It is quite true, of course, that the action of conversion is a personal one, so

25. 'The sale of another's thing is void.'

26. 'Nothing seems to stand in the way of their consensus producing on the spot, so far as they are concerned, all the effects of which it is susceptible, including the passage of title; hut the situation of third parties, who have not been involved in the transaction, is quite otherwise'. 1 *Cours de Droit Civil Positif Francais,* 1960, quoted by Lawson, *The Passing of Property and Risk in Sale of Goods,* (1949) 65 L.Q.R. 352, 353.

that if X converts Y's goods, let us say by a wrongful sale to a third party, the claim of the owner is a personal one against X, and if X becomes bankrupt the owner is in no way a preferred creditor. But there are certain cases where the owner of converted goods can claim in full against the trustee in bankruptcy (or personal representative, or receiver, assignee, etc.). [27]

The first case is where the goods remain in specie in the hands of the bankrupt, and on bankruptcy pass into the possession of the trustee. In this case the owner can point to the goods as being his own, and as never having formed part of the bankrupt's estate. If at that stage the trustee refuses to return the goods then he, the trustee, is himself liable in detinue or conversion. If he sells the goods he may further be liable for money had and received to the use of the owner.

Or there may be an intermediate case, where the debtor sells the goods and then becomes bankrupt, and subsequently the purchase price of the goods is paid to the trustee in bankruptcy. This is what happened in *Scott* v. *Surman,* [28] where the plaintiffs consigned a quantity of tar to the debtor for sale, and after sale the debtor was adjudicated bankrupt. The liability for the price was subsequently discharged by payment to the assignees in bankruptcy of the money due on promissory notes given to the debtor which had passed into the hands of the assignees. They were held to have received this money to the use of the plaintiffs.

A third case is where the goods of the plaintiff are converted by the debtor into a new form, but in such a fashion that the goods can be 'traced' into their new form because their identity is unaffected. An apt example is *Taylor* v. *Plumer,* [29] where a broker fraudulently used eleven £1,000 notes, which were the identical notes which he had received in exchange for a draft on the principal's bankers, to purchase certain stock and shares and some bullion. He was later apprehended while waiting to set sail for America, and this property passed into the hands of the principal. An action by the assignees in bankruptcy to recover the property from the principal so that it should be made available to creditors was unsuccessful, and for reasons which would have been equally applicable had the property passed into the hands of the assignee and the claim been one by the principal in trover or detinue. The property in its new form had become impressed with the ownership of the principal and was still identifiable in that form.

27. It appears that at one time it was recognized that an action in detinue, though not in trover, would lie against an executor in his representative capacity, so that he was liable for a wrongful detention by the deceased even though the goods were not in his hands, this being an exception to the maxim *actio personalis moritur cum perso.*

28. (1742) Willes 400.

29. (1815) 3 M. & S. 562.

We cannot here enter in any detail into the much neglected topic of 'tracing' at common law. It will be observed, however, that of the three instances given only the first would have grounded an action for revindication. Revindication would be possible also in the third case if some sort of agency were implied; but the fiction of agency is repudiated in the case cited. The English action is available *despite* the lack of the agent's authority.[30]

Different considerations apply where the owner has entrusted his property to a person, and that person in turn has parted with the property to a third party, and the owner seeks to revindicate against the third party. The defendant then, to avail himself of the protection of article 2279, must have (1) possession and (2) good faith.

So far as may be, the possession which is envisaged must be of the same nature as that required for acquisitive prescription. It is thus defined in article 2229: 'Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire'. These are, in form, positive requirements; they correspond to the so-called vices of possession — attributes of possession, that is, which 'vitiate' the possessor's claim.

The first requirement, that the possession shall be continuous, does not concern us; it is obviously applicable only to prescription proper. 'Paisible', 'publique' and 'à titre de propriétaire' correspond precisely to the 'nec vi, nec clam, nec precario' of our own law. It should be noted that where a person has a precarious possession, a possession by the permission of another, he is not regarded in French law as having possession at all, properly so called. His possession is on behalf of another. (We may compare the concept of 'custody' in the common law, where the physical possession of the servant does not carry with it the legal possession, which remains in the master.) For the possession to be 'unequivocal' it must not be possible to refer the fact of possession to any other cause than an intent to hold the property *animo domini,* 'à titre de propriétaire'.[31] For example, a co-owner cannot prescribe against his fellow co-owners, for such acts as he may perform which evidence his possession are equally referable either to an intent to exercise exclusive ownership or to an intent merely to exercise the rights of a co-owner.

30. 'The fiction of agency is too transparent ... If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them I am not excusing him. I am protesting violently that he is a thief . . .' *per* Lord Atkin, *United Australia* v. *Barclays Bank,* [1941] A.C. 1, 29. See Denning, *The Recovery of Money,* (1949) 65 L.Q.R. 37-50. But the fiction dies hard — see the judgments in *Union Bank of Australia Ltd.* v. *McClintock,* [1922] 1 A.C. 240 and *Commercial Banking Company of Sydney* v. *Mann,* [1960] 3 All E.R. 482, *passim.*

31. Requêt 22 mai 1906, Dalloz Recueil Periodique 1906.1.351; Requêt 11 janv. 1937, Dalloz Recueil Hebdomadaire 1937.97.

Good faith, as we have observed, is not expressly mentioned in the article, but is to be read into it, both by virtue of the previously existing law, and by the interpretation which has been put upon the mention of 'bonne foi' in article 1141.

There is not, at the present day, the additional requirement of the Roman Law of a justus titulus, or 'juste titre'.[32] All that is necessary is that the possessor should believe the property in the goods to have been validly passed to him by their true owner — a requirement which is included in the concept of good faith. The abandonment of the Roman rule makes the analogy between the negotiability of French movables and the negotiability of certain instruments under the common law a closer one than it would otherwise be.

The common law, of course, takes a quite different view. There, the general rule *nemo dat quod non habet* is still firmly entrenched. Inroads have been made — sale in market overt,[33] for example, or sale by a mercantile agent in possession of goods entrusted to him in the course of business by his principal[34] — but these have not displaced the overriding principle. Sales by hirers under hire-purchase agreements provide a melancholy example in our own day of the operation of the rule.

There is, however, one instance where the rules in the two systems are closely similar, and that is the case of the common law voidable contract for the sale of goods. In French law article 2279 makes it unnecessary to consider any distinction between void and voidable contracts so far as the title of a third party is concerned. In English law it is clear from the case of *White* v. *Garden*[35] that the common law right to avoid a contract of sale, now embodied in the Sale of Goods Act, when exercised revested the title in the vendor, who was then able to sue for conversion. But by section 23 of that Act where a seller has a voidable title to goods, but his title has not been avoided at the time of the sale, the buyer acquires a good title provided he bought in good faith and without notice of the seller's defective title. This preservation of the right to sue the purchaser for conversion, saving the rights of *bona fide* purchasers from him, resembles the French owner's right to revindicate against the 'person entrusted' but not against the *bona fide* possessor claiming through him.

32. It is interesting to note, however, that the present Egyptian Civil Code, which is closely based on the French code, retains this requirement. Article 976 of the former reads (tr.): 'The ownership of movables is acquired by delivery in virtue of a just title, even though the person making delivery is not the owner, provided that the receiver acts in good faith.'

33. Sale of Goods Act 1893 s.22(1).

34. Factors Act 1889 s.2(1).

35. (1851) 10 C.B. 919.

REMEDIES WHERE THE GOODS HAVE BEEN LOST OR STOLEN

In cases where a thing has been lost or stolen, the common lawyer finds himself more at home in the field of the civil law. Here the owner has a straightforward right to revindicate, not only against the thief or the finder (which goes without saying) but also against any other person in whose hands the property may be found. Both systems, however, recognise instances where the rule must be relaxed.

In English law, section 22(1) of the Sale of Goods Act provides: 'Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller'. Apart from this, there are other circumstances in which a purchaser may acquire a good title from one who had a defective title or no title at all — we have already instanced a sale under the Factors Act. In cases of this sort the title which is gained by the purchaser would effectively prevent the original owner from maintaining an action for conversion, and this would be so even if the goods had been initially stolen. Is it just that the owner should be deprived of his property in this way?

The solution ultimately reached is embodied in section 24 of the Sale of Goods Act: 'Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise'.

French law faces a similar problem, but goes about it in a different way. The general rule is that where goods have been lost or stolen the title remains in the owner notwithstanding any intermediate dealing. But is it just that a person who has bought the goods in all good faith in a public market or the like should be compelled to bear the loss?

The solution reached in French law is embodied in article 2280, which reads: 'Si le possesseur actuel de la chose volée ou perdue l'a acheté dans une foire ou dans un marché, ou dans une vente publique, ou d'un marchand vendant des choses pareilles, le proprietaire originaire ne peut se la faire rendre qu'en remboursant au possesseur le prix qu'elle lui a coûté'.[36] In other words in sales of these kinds the right of the true owner to revindicate is preserved, but only, as we should say, 'upon terms'. He can have the thing itself, but is bound to compensate the purchaser for the loss he has sustained.

36. 'If the present possessor of a lost or stolen thing has bought it in a fair or a market, or from a merchant dealing in similar things, the original proprietor may only recover it on reimbursing the possessor to the extent of the price which it has cost him.'

Both French and English law agree in distinguishing between theft and fraud. Section 24(2) of the Sale of Goods Act expressly confines the operation of the section to cases of larceny, and excludes the case where goods 'have been obtained by fraud or other wrongful means not amounting to larceny'. Article 2280 of the French Code does not apply to 'abus de confiance' or 'escroquerie'.[37] The reason in either case is the same, namely, that the victim of a fraud has been induced to consent to the alienation of his property. He is no longer the owner, and cannot be given an owner's remedies at the expense of innocent third parties. It is interesting to note that for a short time this was not so in English law. At first section 100 of the Larceny Act 1861 enacted that goods were to revest in the original owner on the conviction of any person of *any of* the offences laid down in the Act. But the unfavourable comments of the House of Lords in *Bentley* v. *Vilmont*[38] (a case where goods had been held to revest on a conviction of obtaining by false pretences) led to the introduction in committee of the present section 24(2).

REMEDIES AGAINST INTERMEDIATE POSSESSORS

At common law, where goods are stolen from A by B, and thereafter pass (by purchase or otherwise) through the hands of C and D, and are subsequently found in the hands of E, A is entitled to proceed against B, C, D and E by the same form of action. This follows necessarily from what has been said about the nature of the actions of conversion and detinue. The tort consists in the wrongful dealing with the property, and so the intermediate possessor, who no longer has possession, is as much subject to liability as the ultimate possessor, who is in actual possession. The measure of damages for the intermediate possessor is the value of the thing converted. The owner's right of action, of course, is subject to the limitation that he cannot recover in all, despite his several rights of action, more than the damage he has suffered.

In French law the owner can revindicate against the first acquirer — the finder or the thief — if the thing is still in his possession. Even if it is not, he is under an obligation to make restitution to the owner. The owner can also revindicate against the ultimate possessor — the person in whose hands the goods are found.

Revindication, by definition, will not lie against an intermediate possessor who is no longer in possession. But French law equally rejects entirely the notion, accepted by the common law, that any liability can attach to the intermediate possessor simply because at one stage he had possession and relinquished it to another.[39]

37. 'Fraud'.

38. (1887) 12 App. Cas. 471.

39. Planiol comments, indeed, that this would be in violation of the most elementary and best defined juridical principles; Planiol 2484.

The casual finder may, in French as in English law, be guilty of theft. But if he took possession in good faith, believing the property to have been abandoned, he is in the same position as an intermediate acquirer in good faith. Revindication will lie if the property is in his hands; no action will lie otherwise.

In general, therefore, no action will lie against an intermediate acquirer unless he is guilty of a fault.[40] 'Faute' here is delictual in meaning, and receives the interpretation put upon it by article 1382 of the Code. The acquirer in bad faith who later alienates the property is liable to an action 'en dommages-intérêts'. This, of course, is so whether the property was lost or stolen or otherwise.

It should be observed that any other view of the matter would be inconsistent with the provisions of article 2280. If, where stolen or lost goods are sold in open market, etc., the owner who wishes to revindicate must reimburse the possessor, it could not possibly be held that the owner was nevertheless entitled to restitution from an intermediate possessor *qua* intermediate possessor; for that would be to put the acquirer who has possession of the goods in a better position vis-à-vis the owner of the goods than the acquirer who has not got possession. The latter would be bound to pay damages; the former, though he would lose the goods themselves, would receive compensation, and so would not be worse off financially.[41]

RIGHTS OF RECOURSE

Where there is a chain of successive possessors various rights, other than those already discussed, arise *inter se*.

First, what is the position of the possessor against whom an action for revindication is successful? Can he reimburse himself from anyone? Here French law gives much the same answer as English law. If he has purchased the property from a prior possessor article 2279 expressly preserves his right of recourse to the person from whom he received possession. If, for example, possession was received under a contract of sale, he may have an action against the vendor on the guarantee against eviction contained in article 1626.[42] In English law a defendant sued

40. The rule is the same, apparently, if he has consumed rather than alienated the movable; Planiol, 101, 136; Kamil Morsy, *Causes of Acquisition of Property* (Arabic — Cairo) IV, 470.

41. For the problems which arise where an attempt is made to combine the two systems, see Atiyah, *Sudan Govt.* v. *Bakheit Mohammed and the Recovery of Lost and Stolen Property Ordinance,* (1956) Sudan Law Journal 47; Scott, *Recovery of Lost and Stolen Property,* (1958) Sudan Law Journal 239.

42. A seller is not bound, in the civil law, to make the buyer owner of the thing sold; there is no covenant for title, only an obligation to give him *vacua possessio* and to warrant him against eviction; Lawson, *op. cit.,* p. 364.

for conversion in these circumstances may maintain an action on the implied undertaking as to title and quiet possession under section 12 of the Sale of Goods Act.

Secondly, what is the position of the owner who is compelled under article 2280 to reimburse the possessor? Logically, it might appear that, since the possessor himself could, but for his receipt of reimbursement from the owner, have proceeded against his vendor on the guarantee against eviction, the owner ought to be entitled to be subrogated to the possessor, and to reimburse himself from the vendor. Despite the opinions of several French jurists, the French courts have refused to permit this. [43]

NEGOTIABLE INSTRUMENTS

One of the advantages of the French system is that negotiable instruments are placed squarely on a footing with corporeal movables. On the one hand there are 'credits', or as we should say 'choses in action', to the transfer of which special rules apply: on the other hand, as a subclass of these, there are negotiable instruments. To the latter the provisions of both article 2279 and article 2280 apply. Hence where a negotiable instrument has been lost or stolen, even where it was a bearer security, the owner may revindicate against a subsequent holder. But if the security was bought by the holder or his predecessor in title at the Stock Exchange, that is an acquisition 'dans un marché' or 'd'un marchand vendant des choses pareilles' and so the holder is protected by article 2280.

In the special case of bearer securities, however, a law of June 15, 1872 (amended by one of February 8, 1902) gives the owner of such a security a method of protecting his interest by serving two notices. The first is sent to the Association of Stockbrokers in Paris, and serves to prevent the sale of the security in the market. The second is sent to the debtor institution and serves to prevent the possibility that they may discharge the debt to a person other than the owner. Furthermore the notice is also published in the *Bulletin des Oppositions, a* publication of the Guild of Stockbrokers of Paris, and after the date when this Bulletin could have reached a given city any acquisition of the security there is ineffectual against the true owner's title.

CONCLUSION

Throughout the varying rules of the two systems there may be discerned in each, both historically and in operation at the present day, the influence of two opposing trends of thought. The first has regard to

43. Planiol 2486.

the rights of the owner, and seeks to protect those rights against the invasion of others. The English common law actions, and the French rules for the revindication of lost and stolen property, stem from this. The second has regard to the rights of the innocent possessor, who could not be expected to know about the owner's title. English equity, the common law exceptions to *nemo dat quod nan habet* and the law relating to negotiable instruments on the one hand, and the French negotiability of movables generally on the other, stem from this second trend of thought.

The second trend, it is submitted, is the more sophisticated. It has both a moral and a utilitarian aspect. Morally, it seeks to decide questions of title, not by reference to abstract rights *in rem,* but by answering in every case the question, on whom is it just that the loss should fall? From the standpoint of utility it sacrifices rights of property in the interests of commercial fluidity and the certainty and security of commercial transactions.

Viewed in this way, some of the rules in both systems are difficult to understand. Why should the French owner who has casually lost his goods (very probably through his own negligence) be entitled to regain them at the expense of the innocent purchaser? Why should not the English owner who has entrusted his goods to a bailee bear the loss occasioned by having selected an untrustworthy bailee rather than the purchaser at several removes from the bailee? Why should a hire-purchase company which has induced a labourer to hire the latest model in T.V. sets be preferred to the pawnbroker who takes it in in a battered state a year later? On the other hand, if we lean towards the inviolability of the proprietor's rights, why at common law is it not possible, except at the discretion of the court in rare instances, for an owner who lends a chattel to another person, who refuses to let him have it back, be able to have that very chattel back rather than a sum of money in compensation?

It is, of course, impossible to say that one system is 'better' than the other. It is nevertheless submitted, in conclusion, that English law would do well to strive towards the separation achieved in French law between the real right and the personal right — the right to a thing, and the right to damages for a wrong done by a person. It is suggested that not a little of the complexity of the law relating to conversion — a complexity which has been no more than hinted at here — may be due to a failure to recognise this distinction with sufficient clarity,

MICHAEL SCOTT. *

* Senior Lecturer in Law, University of Tasmania.