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**Uses of Roman Law in the Construction of the Concept of Possession in the German-Speaking Countries in the Nineteenth Century**

**Neophytos Christodoulides**

**PhD**

**The University of Edinburgh**

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## Abstract

In my thesis, I examine how German jurists, beginning with Carl Friedrich Savigny, at the dawn of the 19<sup>th</sup> century, to Rudolf von Jhering, towards the end of it, interpreted the Roman sources on *possessio*, thus, constructing the German concept of possession (*Besitz*); a development that was to be adopted by the two major civil codifications of the German-speaking world, namely the Austrian *ABGB* and the German *BGB*.

Influenced by German idealism, notably the views of Kant, but also driven by contemporary considerations regarding the place and usefulness of Roman law in the German-speaking countries, leading German jurists of the nineteenth century radically pursued a new approach towards Roman sources and simultaneously informed their interpretation with notions of German idealism, while always pledging their faith towards the historical material.

This motley group included noted jurists like Puchta, Keller, Windscheid, Brinz, Bekker, Kuntze, Dernburg, Loehr, Huschke, Sintenis, Arndts, Böcking, Bethman-Hollweg, Regelsberger and Unger. They called themselves members of the ‘Historical school’ because they believed it to be their task to trace Roman law back to its classical roots, by ‘cleaning it’ from ‘medieval contamination.’ I also included Rudolf von Jhering in my discussion because he holds an ambiguous position, he is both considered part of the ‘Historical School’ and its opponent.

Since they all looked at Savigny as the founder of their school, it comes as no surprise that the scholars all reacted in various ways to Savigny’s seminal monograph on possession *Das Recht des Besitzes*, which appeared in six editions with slight modifications from 1801 to 1836.

In my examination, I draw on a limited circle of jurists that participated in the debate on possession, but I also include scholars who were not considered as part of the group, such as

Maximilian Theodor Zachariä, but who engaged with the group extensively on the matter of possession.

In my treatment of the discussion of the concept of possession and possessory interdicts (*interdicta possessionis*), I trace the different lines of thought of various members of the ‘Historical School.’ I compare the points where they agree, or disagree and, I am trying to trace their influence on others, and eventually on the German civil code, the *Bürgerliches Gesetzbuch*. My treatment will show that the ‘Historical School’ was not as homogenous as it is often assumed even today day.

For this, the movement must be placed in its historical context. The rising citizen class in Germany would seek to terminate the old feudal order in Germany, which represented an agrarian, land-based economy and society. For this aim, they needed a different private law, namely, one that perceived both the contract and ownership as central. This becomes obvious when we compare the *Preußisches Allgemeines Landrecht* of 1794, or the Austrian civil code, of 1812 though enlightened codes, still preserving the old feudal order with different degrees of possession and ownership (*Gewere*), with the *Bürgerliches Gesetzbuch* of 1900, which was strongly influenced by Savigny and his disciples.

I will dispute the commonly held notion that ‘Pandektists’ tried to mould Roman law, which was perceived as casuistic and not systematic, into a theoretic, abstract one by showing that, on the one hand, ‘Pandektists’ themselves were less prone to abstracting as Jhering held them to be, and, on the other, that Jhering himself might be more given to theorizing than he would have us believe he did, thus, Jhering cannot be seen as the antipode of the ‘Historical School’, but his contribution to the discussion of possession is seminal as we will see.

In discussing the treatment of *possessio*, I will examine two separate questions, namely, how possession is created, and why is it protected? These two questions are often intermingled in the argument but a crucial as they live on in both the German and Austrian civil codifications (*Possessorischer Besitzschutz*, §859 BGB, *petitorischer Besitzschutz*, §1007 BGB; §372ff ABGB), and only the latter goes back to the Roman sources, (*actio publiciana*). The debate on the nature of possession, and its ramifications, ushered in by Savigny, and continued by followers and opponents, still informs the legal discourse in Germany and Austria today.

I leave the Latin word *possessio* untranslated throughout my work and render only the German *Besitz* as ‘possession’ since *possessio*, and possession is often false friends. I also left the term *detentio* untranslated. I either quote it in Latin or as the German rendition *Detention*. I do this because the English ‘detention’ does not render the meaning of Latin or the German. The term ‘*detentor*’ is equally problematic as it is rendered as ‘*Inhaber*’ in the Austrian civil code and can include the possession of rights. In the German civil code, the ‘*Inhaber*’ is strictly separated from the possessor; the former referring to a holder of rights, the latter only to a holder of physical objects.

## **Declaration**

I, Neophytos Christodoulides, hereby declare that this thesis, which is approximately 81 000 words in length, has been composed by me. I further declare that it is a record of work carried out by me and that no part of it has been submitted in any previous application for a higher degree.

Signature

25 February 2021

## **Acknowledgements**

I cannot imagine that my thesis project would have been more fitting anywhere else than the School of Law at the University of Edinburgh, nor can I imagine a supervisor other than Professor Paul du Plessis, who patiently guided me through this endeavour.

The School of Law of the University of Edinburgh is a hotbed of intellectual ideas and radically new approaches to law and legal theory, standing in a country of mixed jurisdiction where Roman, continental, and Anglo-American techniques find prosperous ground to blossom. The wide range of interests of the faculty and the interdisciplinary and international approach formed the ideal environment for this

My topic, which stands at a crossroads of ancient Roman law, German ‘Pandektism,’ the philosophical ideas of ‘Idealism’ and ‘Enlightenment’ was conceived through discussions with Professor du Plessis and started to develop during classes, lectures, conferences, and informal discussion with members of the faculty.

As my primary supervisor, Professor du Plessis was on my side from the beginning, actively supported me in my academic endeavours, and offered valuable support and advice. This work would not have been possible without his emotional and intellectual support.

Professor John Cairns, my secondary supervisor, patiently read my drafts and gave constructive advice at every stage of the work. The intellectual stimuli I received during my supervisor meetings are ubiquitous in my work.

## Introduction

The famous German jurist Rudolf von Jhering (1818 – 1892) described possession in his monograph *Der Besitzwille* in 1889 ‘as the most voluptuous of all jural institutions; soft and malleable; it does not resist the attached to it like sturdier institutions such as ownership and obligations.’<sup>1</sup>

As distinct from ownership, possession is a fundamental yet equally problematic jural concept, both in classical Roman law and in the modern civil-law jurisdictions of Europe. The civil codes of France, Austria and Germany all recognise possession, granting it protection through possessory interdicts. Still, their concept of possession varies, as does the extent to which they protect it.

And yet Jhering was not the only jurist with this opinion about possession. Another important German jurist of the *Ius commune pandectarum*, Augustin von Leyser (1683 – 1752) noted more than one hundred years before him that: ‘*doctrina de possessio intricatissima est et vitio veterum.*’<sup>2</sup>

The notion of the protection of possession through possessory interdicts, either as ‘possessory’ or ‘petitory protection,’ based on the ‘better possession’ or the ‘better right’ is

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<sup>1</sup> Rudolf von Jhering, *Der Besitzwille* (1889 Fischer) 285

<sup>2</sup> Augustin von Leyser, *Meditationes ad Pandectas, Vol 3 (Leipzig 1744) spec 451 De variis possidendi modis, 96*

peculiar to Roman law and not be found in the Anglo-American legal tradition (a notable exception is the *Code of Civil Procedure of Louisiana*).

In English law, the concept of property stems from Germanic (Anglo-Saxon and Norman) vernacular law and is ingrained in the feudal structure of mediaeval society. English law links land ownership with land's actual use without distinguishing between possession and ownership.<sup>3</sup> In this case, the undisturbed use of the property is protected by trespass laws and injunctions, while a clear distinction between ownership and possession is not maintained.

Thus, using the term 'possession' or 'rights' in English law does not correspond to 'possession' in civil law. Historically, the law of the Norman elites of medieval Britain even accepted the notion of ossification of possession into a right, which was impossible in Rome.

Today it is interesting that the European Charter of Human Rights seems to blur the lines between possession and property when it states in the First Protocol to the *ECHR*: 'Every natural

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<sup>3</sup> Ugo Mattei, *Basic Principles of Property Law, A Comparative Legal and Economic Introduction* (Greenwood Press 2000) 19; Jan Smits, *The Making of European Private Law, towards a Ius Commune Europaeum as a Mixed legal System* (trans Nicole Kornet, Intersentia 2002) 256: English property law is not very accessible for a continental lawyer; see also Oliver Wendell Holmes, *The Common Law* (first published 1881). On how the glossators used the Roman terms 'dominium utile' and 'dominium directum' (D. 41, 2, 17, 1) to underpin the legal practice of the Lombards see: Robert Feenstra, 'Der Eigentumsbegriff bei Hugo Grotius im Licht eigener mittelalterlicher und spätscholastischer Quellen' in Behrends et alii (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (Vandenhoeck & Ruprecht 1978) 212-213

or legal person is entitled to the peaceful enjoyment of his possessions.’ And nobody shall be deprived of his ‘possessions’ except in the public interest and subject to the conditions provided for by law and by general principles of international law.

In addition, the European Court of Human Rights has interpreted the term ‘possession’ rather broadly to include movables and immovable rights, like the right to shares in a company, entitlement to a pension, etc.<sup>4</sup> So we see that in the present time, the lines are blurred.

But how much do we know of the concept of possession and how reliable are the Roman sources? Most of the legal evidence we have about the ancient Roman concept of possession (*possessio*) is found in book 41 of the *Digest*. And although *possessio*, as opposed to ownership (*dominium*), features prominently in the *Corpus iuris civilis*, and is even protected through possessory interdicts, it is not clear how Romans viewed possession.

The eminent classical jurists have all discussed possession; they never doubted its existence but have voiced their ideas on its nature and have said different things. Ulpian has left us with the apothegmatic statement: ‘*Nihil commune habet proprietas cum possessione.*’<sup>5</sup> And Paul says: ‘*eam [sc. possessionem] enim rem facti, non iuris esse.*’ While Papinian claims: ‘*possessio non tantum corporis, sed iuris est.*’<sup>6</sup> These are only general statements that offer a large margin of interpretation. Equally problematic are the often-found additional designations to possession as *naturalis* or *civilis*.

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<sup>4</sup> *ibid* 25

<sup>5</sup> Ulp. D. 41, 2, 12, 1

<sup>6</sup> Pap. D. 41, 2, 49



The picture of the history of possession becomes more complex because, though essentially authoritative, Roman legal texts were interpreted in conformity with actual mediaeval European legal practice and Canon law for many centuries. And since Germanic law did not have a separate concept of possession, while at the same time allowing various degrees of control over the same object, mainly land,<sup>7</sup> it is not surprising that an important possessory interdict developed by Canon law, the *summarissimum*, supposedly based on Roman sources, blurred the lines between possession and ownership.

How to treat possession was always disputed among legal scholars of continental Europe, especially during the so-called *usus modernus pandectarum* of the sixteenth century.

However, the dawn of the nineteenth century ushered in a new era in legal theory, mainly in the German-speaking countries, which could not leave the discussion on possession unaffected. The important jurists of that period, who sought to reassess the Roman sources, were later called ‘Pandectists’ and were loosely associated with the ‘Historical School’, whose founding father was considered Friedrich Carl von Savigny (1779-1861).

In 1803 Savigny wrote a monograph on possession, *Das Recht des Besitzes*, the most comprehensive work on the subject to date.<sup>8</sup> He sought to rediscover the ‘true’ Roman concept of

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<sup>7</sup> Otto von Gierke, *Deutsches Privatrecht II* (Duncker & Humblot 1905) 192; Hans Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (10th ed, UTB 2005) 64

<sup>8</sup> Friedrich Carl von Savigny, *Das Recht des Besitzes. Eine Civilistische Abhandlung* (first published 1803: Nomos 2011)

possession in his work. The work would go through six editions, the last being published posthumously, with every edition making various modifications and adjustments to correspond to the ensuing debate of the following decades.

The monograph rose to prominence with its author and found many followers, but it also attracted fierce critique from contemporaries and later generations of scholars. Savigny's pupils were Friedrich Julius Stahl (1802–1861), Georg Friedrich Puchta (1798–1846), Adolf August Friedrich Rudorff (1803-1873) and Carl Georg Bruns (1816–1880).

His opponents were Eduard Gans (1797–1839), Theodor Maximilian Zachariä (1781–1847) and, later, Rudolf von Jhering, who wrote two important monographs on possession towards the end of the nineteenth century.

One would assume that establishing the German civil code (*Bürgerliches Gesetzbuch: BGB*) in 1900 would have brought the discussion on the nature of possession to an end. However, a survey of German legal academic scholarship shows that the debate that started in the nineteenth century is far from over, nor has the code settled all matters about possession conclusively.<sup>9</sup> There is still controversy among scholars on the exact concept of possession that the *BGB* adopted.<sup>10</sup>

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<sup>9</sup> See Frank Hartung, *Besitz und Sachherrschaft*, 32; Harry Westermann, Karl-Heinz Gursky and Dieter Eickmann, *Sachenrecht* (C.F. Mueller 1998) §8 sub 4.

<sup>10</sup> See Hans Wieling, *Sachenrecht*, (3rd edn, Springer 1997) 37, who assumes that the *BGB* contains two concepts of possession.

While the views of Savigny and Puchta about possession as a protection of the will, are still accepted today.<sup>11</sup>

Equally, the courts have had to deal several times with possession. In recent years, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) ruled that the possession of a tenant falls under the protection of Article 14 of the German Constitution (*Grundgesetz*) justifying its decision with the fact that a major part of the population does not own property and needs to cover its needs through rent. Consequently, the court argued, possession retains a function otherwise filled by ownership (*Eigentum*). The court also claimed that this role of rented possession was clear to the lawgiver who has given tenants special protections.<sup>12</sup> This decision attracted critique.<sup>13</sup>

Possession also plays an essential part in other areas of civil law, such as ownership and obligation, as it relates to transfer, etc. But a look outside Germany, in the civil law jurisdictions, shows that the picture concerning possession and its protection is far from uniform. In some jurisdictions, transfer of possession is necessary for transferring ownership (Germany, Austria, Greece); in others, it is not (France). Some codifications, namely, the *Allgemeines bürgerliches*

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<sup>11</sup> *ibid* 38

<sup>12</sup> *Bundesverfassungsgerichtsentscheidung* 89, 1

<sup>13</sup> Hermann von Mangoldt, Friedrich Klein, Christian Starck *Grundgesetz I, Kommentar* (C.H. Beck 2018), Art 14 Rn 159f; Volker Emmerich, 'Der Mieter als Eigentümer von Gerichts wegen – Das Bundesverfassungsgericht, das Mietrecht und das Eigentum' in Heinz Meinhard (ed) *Festschrift für Wolfgang Gitter zum 65. Geburtstag am 30. Mai 1995* (Chmielorz 1995) 241.

*Gesetzbuch für die gesamten deutschen Erbländer der österreichischen Monarchie (ABGB)* of Austria define possession. The German *Bürgerliches Gesetzbuch (BGB)* carefully avoided a definition.

Efforts to harmonise civil law on a European level are ongoing through the Study Group on a European Civil code (SGECC) that has already worked out a Draft Common Frame of Reference. The DCFR focuses on transferring ownership of mobile goods and their possessory protection (Rules for the Transfer of Movables).<sup>14</sup>

In scrutinizing their work, it may be said that the ‘Pandektists,’ the group of legal scholars of the nineteenth century that were loosely connected to the ‘Historical School’ despite their professed conservatism, were highly innovative, first, because they insisted on the strict separation between ownership and possession, and, second because they conceived ownership as an absolute right.

Savigny conceives ownership as absolute and thus rejects the old feudal order still in place in Germany and enshrined by the *Allgemeines Landrecht* of Prussia. The new concept was in tune with the needs of a capitalist economy and a liberated bourgeoisie.

This thesis will trace the debate on possession in the nineteenth century by a group of scholars, often called ‘Pandectists’. It will examine how the debate on Roman sources shaped the civil codes of Austria and Germany. I believe a fruitful investigation will not only examine the

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<sup>14</sup> *Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) ed, Principles, definitions and model rules of European private law, Common Frame of Reference, Interim Outline Edition (2008)*

various threads of the debate about possession but will unravel the intellectual milieu and background of the leading scholars and examine how they inform their views on the topic.

Authors like Savigny and Rudolf von Jhering were prolific and brought forth their worldview on the law, while their stance sometimes seems to have changed as they matured. It is not the scope of this thesis to examine their work in its entirety. But their programmatic statements and views must be mirrored against their reading and specific conclusions on the nature and protection of possession.

In Germany, the codification of private law through the *BGB* has not brought the discussions on possession to a standstill; on the contrary, the numerous comprehensive monographs on the topic for the last decades bear testament to the fact that the debate is still alive.<sup>15</sup> It is not the scope of this work to analyse the *BGB* or the *ABGB* and offer a solution for the current law. This is a historical investigation into how the debate on possession in the nineteenth century has shaped the modern academic landscape on possession.

In my examination, I will examine how various influential authors perceived possession and their views on its protection. I will examine why authors like Savigny, Bruns Thibaut and Jhering, though starting from the same Roman sources, come to different conclusions.

In the *Usus modernus* of the seventeenth century Struve and Lauterbach adhered to the classical Roman distinction between *detentio* and *possessio*, the former meaning the mere holding, the broadest sense, typically found in the borrower in the case of *commodatum*, the depositary, the

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<sup>15</sup> See Wolfgang Ernst, *Eigenbesitz und Mobiliarsachenrecht* (Mohr 1992); Olaf Sosnitza, *Besitz und Besitzschutz* (Mohr 2003)

leaseholder. *At the same time*, the latter was seen as a *separate species iuris in re*.<sup>16</sup> *Possessio* in its proper sense (*ius possessionis*) was defined as ‘*detentio rei cum affectione et animo sibi habendi*.’<sup>17</sup> They further distinguished between two kinds of possession, namely, the ‘*possessio naturalis*’ and ‘*possessio civilis*.’

The former was characterized by the will of the holder to merely hold the thing as its possessor, but not as its owner.<sup>18</sup> There was disagreement between Struve and Lauterbach if the usufructuary had *detentio* or *possessio*, with the former claiming he had mere detention while the latter claimed he had *possessio naturalis*.<sup>19</sup> Max Kaser believes that *possessio naturalis* is narrower in the *Usus modernus* than in classical Roman law.<sup>20</sup>

The latter form of possession defined the possessing owner and the bonitary possessor, characterized by the *animus domini*.<sup>21</sup>

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<sup>16</sup> Struve (n 16) 3.88; 11.3; 45.68; Lauterbach, 1.83; 5

<sup>17</sup> Lauterbach (n 16) 41.2.4; Struve (n 16) 42.3

<sup>18</sup> Struve (n 16) 42.7: ‘*absque opinione domini*’; Lauterbach (n 16) 41.2.9 mentions as examples the pledgee, sequester, precarist, *emphyteuticarius* (planter) the *superficiarius* (superficiary)

<sup>19</sup> Peter Christoph Klemm, *Eigentum und Eigentumsbeschränkungen in der Doktrin des usus modernus pandectarum, untersucht anhand der Pandektenkommentare von Struve, Lauterbach und Stryck* (Helbing & Lichtenhahn 1984) p.51, n.35

<sup>20</sup> Max Kaser, *Das römische Privatrecht 2, Die nachklassischen Entwicklungen* (C.H. Beck 1959) 182

<sup>21</sup> Struve (n 16) 42.6; Lauterbach (n 16) 41.2.10

Consistent with the above, Struve and Lauterbach did not allow the *vindicatio* of the owner against the *detentor* who has received his detention from the former himself.<sup>22</sup> The owner can only pursue his property through the *actiones* on the relevant obligation that has created the detention in the first place, namely, lease, *depositum*, and *precarium*.

However, if the item is no longer in the hands of the initial *detentor*, but in the hands of a third party then the owner is granted vindication against the latter.<sup>23</sup> Whether vindication was available against the *detentor* in the Roman sources is unclear; Kaser believes it was possible.<sup>24</sup>

## **Chapter 1. The Philosophical Foundations of Modern Conceptions of Possession: Kant, Fichte**

### **1.1. Introduction**

When the German jurist Friedrich Carl von Savigny (1779-1861) published his monograph on possession, *Das Recht des Besitzes*, in 1803, he laid down a radically new approach to the methodology of jurisprudence. He famously claimed that a jurist must work in a twofold manner. He must look at the sources and operate systematically. In the seventh edition of his work, he further clarified his view by reiterating the need to go back to the sources.

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<sup>22</sup> Struve (n 16) 11.10; Lauterbach (n 16) 6.1.10

<sup>23</sup> Struve (n 16) 11.37; Lauterbach (n 16) 6.1.23, see also Klemm (n 19) 82

<sup>24</sup> Max Kaser, *Das römische Privatrecht I* (C. H. Beck 1972) 433, see also Klemm (n 19) 81

Savigny's views on possession (and his methodology more generally) opened a Pandora's Box in the German-speaking world. The arguments favouring and against his approach would shape the discussion on possession for the entire nineteenth century. Some of the issues that Savigny raised are still a point of dispute today, more than one hundred years after the *BGB* was enacted.

Before analysing Savigny's monograph in detail, it is important to investigate the intellectual history that has influenced his views and formed the academic milieu of Savigny. His immediate source of influence was his near contemporaries, Immanuel Kant (1724 – 1804) and Johann Gottlieb Fichte (1762 – 1814), both heirs to a long tradition in philosophy. Moreover, the approach of 'systematizing' the law is much older. Therefore, I intend to summarise Kant and Fichte's intellectual precursors.

## **1.2. Protagoras, Plato, Aristotle**

When the Greek sophist Protagoras of Abdera (490 – 420 BC) stated that man was the measure of all things,<sup>25</sup> he meant nothing less than that the standard of all laws, their interpretation, and development, originate from human nature itself, that is from human perception and human

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<sup>25</sup> Plato, *Theaetetus* 152 c; Ideas from other dialogues influenced the German humanists, especially Philip Melanchthon, namely the theory of Plato's Menon that learning is the recognition of the idea, therefore, jurisprudence the guidance to remember the legal idea (*ratio iuris*). See for this, Franz Wieacker, *Gründer und Bewahrer* (Vandenhoeck und Ruprecht 1959) 72, 84



needs.<sup>26</sup> With this lofty statement, he ushered the doctrine of natural law into Western legal and philosophical thinking.

Plato (428/7 – 348/347), without abandoning the *homo-mensura* principle, sought to find ways to scientifically attain knowledge of abstract values such as justice and virtue and to arrive at objective truths, despite the instability of human nature. His solution to this problem was to utilize the science of medicine and mathematics. For this purpose, he adhered to the method of the physician Hippocrates of Kos, who classified diseases according to their common kind (*eidōs*), as attained through differentiation (*diaeresis*).<sup>27</sup>

The science of mathematics impressed Plato because he believed that students of geometry and calculation could arrive with certainty at the first principle through hypotheses.<sup>28</sup> Plato considered the study of mathematics useful for the lawgiver.<sup>29</sup> Therefore, according to Plato, the lawgiver must follow the method of doctors in sifting out concepts through the process of differentiation and separation.

According to Plato, the lawgiver must proceed like a doctor, not only relying on experience but also scientific knowledge (εὐ γὰρ ἐπίστασθαι δεῖ) about what is wholesome for the citizen

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<sup>26</sup> Dieter von Stephanitz, *Exakte Wissenschaft und Recht* (de Gruyter 1970) 14

<sup>27</sup> Interestingly the word *diaeresis* in Greek means both differentiation and division, so it is also a mathematical term. This bears testament to the close link between mathematics and formal logic at the time

<sup>28</sup> Plato, *Politeia* 510 c –e

<sup>29</sup> Plato, *Nomoi* 747 b

body, like a doctor, who examines the nature of an illness to prescribe the right remedy. To do this, however, both the lawgiver and the doctor must study and understand the origin (εξ αρχής) of the ailment and survey the natural constitution of the human body (περί φύσεως πάσης [...] των σωμάτων).<sup>30</sup> However, finding a common law system proved more difficult, as no agreement could be found, even in Plato's time on the exact human nature and the laws ensuing.

The legacy of the Sophists and Plato for jurisprudence was twofold. First, they positioned human nature as the standard for all laws, and second, they sought to elevate the technique of creating and applying laws into a science.

Aristotle refined the findings of Plato and set up the formal principles of logic. According to Aristotle, any scientific discipline is always a 'system' consisting of principles (*axiomata*) and doctrines. Definitions are classified into basic and derived definitions; basic definitions must always be easily comprehensible.<sup>31</sup>

This brief sketch of Greek philosophical thinking shows that the seeds of a twofold pattern are already discernible. Legal science deals with humans, and therefore, human beings are its starting point. To arrive at precise results, however, one needs the help of the sciences of logic and mathematics.

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<sup>30</sup> Plato, *Nomoi* 857c – d; see also Plato *Protagoras* 361b

<sup>31</sup> Aristotle, *Organon Analytica Posteriora*; Heinrich Scholz *Die Axiomatik der Alten* (Mathesis Universalis 1930) 29

### 1.3. The Intellectual Milieu of Savigny: Kant and Fichte

Jean-Jacques Rousseau's teaching about the social contract and the perception that all human beings have innate, natural rights, including freedom, while all forms of state and property are an act of the convention, fundamentally changed the intellectual and political landscape of Europe. The French Revolution and its consequences, including the subsequent regime of terror, brought to the fore the pressing matter of the boundaries of human freedom.<sup>32</sup>

Germany was at that time comprised of an array of feudal states, as opposed to centralized France. Therefore, it could not muster the revolutionary forces that fought about a radical change in neighbouring France. The nearest attempt at an uprising was stifled in 1848 in Frankfurt. However, France's intellectual debates influenced and shaped Germany's intellectual landscape at that time.<sup>33</sup>

The accession to the throne of the Kingdom of Prussia by Frederick Wilhelm IV in 1840 marked a turning point in German history. The trend ushered in by the monarch was also described as a 'historical course' or 'historical principle.'<sup>34</sup>

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<sup>32</sup> On the influence of natural law on private law in Europe, see: Wieacker (n 25) 90: '*hat das moderne Naturrecht eine völlige renovatio des Privatrechtsdenkens großartig verwirklicht.*'

<sup>33</sup> Max Kaser, 'Wege und Ziele der deutschen Rechtswissenschaft' in *L'Europa e il diritto romano, Studi in memoria di Paolo Koschaker* (Giuffrè 1954) 561

<sup>34</sup> John Edward Toews, *Becoming Historical, Cultural Reformation and Public Memory in Early Nineteenth-Century Berlin* (Cambridge University Press 2004) 19, 21

To understand the new course, it is significant to note in this context that the monarch went to great lengths to secure the appointment of Friedrich Wilhelm Joseph Schelling as a professor of philosophy at the University of Berlin. Schelling was to form a counterweight to Hegel and Hegelian influence in Prussian intellectual life.

Schelling maintained that Hegel's *Science of Logic* proved inadequate to answer fundamental questions that concerned philosophy because, in all its abstraction, it ignored life itself, namely the existence of a finite human being and a people.<sup>35</sup>

Schelling, instead, proposed a 'historical' or 'positive' philosophy, starting from the premise that life is always exemplary<sup>36</sup> and that philosophy must be 'positive' and 'empirical.'<sup>37</sup>

This emphasis on 'historical' experience was programmatic for the new monarch. The most prominent proponents of this new 'Historical School' were the historian Leopold von Ranke, the philologist Jacob Grimm, and the jurist Friedrich Carl von Savigny, all of whom had flocked to Berlin.<sup>38</sup> These three men, working in different fields, all started from the premise that all science

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<sup>35</sup> Friedrich Wilhelm Joseph von Schelling, *Philosophie der Offenbarung* (first published 1841-42, Manfred Frank ed, 1977) 121-53

<sup>36</sup> *ibid* 92

<sup>37</sup> *ibid* 147

<sup>38</sup> Erich Rothacker, 'Savigny, Grimm, Ranke: Ein Beitrag zur Frage nach dem Zusammenhang der Historischen Rechtsschule' (1923) 128 *Historische Zeitschrift* 415, 416

is historically embedded, while every discipline had to be considered holistically. Their common enemy was the ‘ahistorical abstraction of natural law and pure reason.’<sup>39</sup>

Let us now focus on the views of the philosophers Immanuel Kant and Johann Gottlieb Fichte on jurisprudence and examine how their ideas formed an intellectual matrix for Savigny and the school he founded, the ‘Historical School of Jurisprudence’ or so-called ‘Pandektists.’

### 1.3.1. Kant

Kant was instrumental in bringing history's value into the jurisprudence theory. According to Kant, reason prescribes formal principles; to which one must adhere (the law must be just!). However, formal logic cannot say anything about the content of these principles. For example, it cannot answer the question of what justice is in the first place. This is rather the result of historical experience (*Erfahrung*) and, therefore, is open to dispute.<sup>40</sup> Hence, philosophy is not pure reason.<sup>41</sup>

However, in his *Metaphysik der Sitten*, we find the following statement:

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<sup>39</sup> *ibid* 417

<sup>40</sup> Immanuel Kant, *Kritik der reinen Vernunft* (2<sup>nd</sup> edn: B, 1787; 2<sup>nd</sup> edn, 1944) 195, 303, 743

<sup>41</sup> *ibid* 741

‘All jural<sup>42</sup> pronouncements are a priori pronouncements, for they are pronouncements of reason.’<sup>43</sup>

Kant goes as far as to compare a merely empirical legal doctrine, devoid of any reason, to a beautiful but hollow human head.<sup>44</sup> Therefore, what law is can only be answered following the rules of reason (*Vernunft*). Law can be attained through concepts, namely, by perceiving the specific in the general,<sup>45</sup> or through constructions, by understanding the general in the specific.<sup>46</sup>

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<sup>42</sup> I have decided to translate the word *Recht* when it is used as a compound in *Rechtsverhältnis*, *Rechtssatz*, as ‘jural’ instead of ‘legal’ since the former is more neutral. Legal can be perceived as the opposite of ‘illegal’ or be equated with positive law, for which German would use *Gesetz*. In this, I follow, William Henry Rattigan, *Jural Relations; or the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny’s System of Modern Roman Law* (Wildy & Sons 1884)

<sup>43</sup> Immanuel Kant, *Metaphysik der Sitten in zwey Theilen* (Nicolovius 1797) 57: ‘*Alle Rechtssätze sind Sätze a priori, denn sie sind Vernunftsgesetze.*’

<sup>44</sup> *ibid* 34: ‘*Eine bloß empirische Rechtslehre ist ein Kopf, der schön sein mag, nur schade! dass er kein Gehirn hat.*’

<sup>45</sup>*ibid* 246

<sup>46</sup> Kant (n 40) 741

Kant formulates a basic jurial principle thus: ‘Act only in a way that the free rein of your will can exist with the freedom of everybody else following a general law.’<sup>47</sup> From this general principle, Kant would deduce other principles.<sup>48</sup>

Kant nonetheless conceded that there was at least a partial applicability of mathematics to jurisprudence. He says:

‘She [sc. the legal doctrine: *Rechtslehre*] wants to concede to each their own (with mathematical precision), something that cannot be expected from the doctrine of virtue (*Tugendlehre*), as the latter cannot deny a certain space for exceptions.’<sup>49</sup>

As a result, according to Kant, jurisprudence somehow takes a middle ground between mathematics, with its prerequisite of absolute precision, and philosophy, with its affinity with history.

### 1.3.2. Kant on Possession

Kant distinguishes between the ‘*Sinnenwelt*’ and the ‘*intelligible Welt*’ The former is governed by natural law (*Naturgesetz*), and the latter is governed by the ‘categorical imperative’ (*kategorische*

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<sup>47</sup> Kant (n 43) 35: *Einleitung in die Rechtslehre B*: ‘Handle äußerlich so, dass der freie Gebrauch Deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Prinzip zusammen bestehen könne.’

<sup>48</sup> *ibid* 36.

<sup>49</sup> *ibid* 38: *Einleitung in die Rechtslehre*: ‘das Seine einem jeden (mit mathematischer Genauigkeit) bestimmt wissen, welches in der Tugendlehre nicht erwartet werden darf, als welche einen gewissen Raum zu Ausnahmen (*latitudinem*) nicht verweigern kann.’

*Imperativ*).<sup>50</sup> The categorical imperative, in turn, forms the basis of all laws.<sup>51</sup> Therefore, according to Kant, the laws are embedded in the ideal world.

For our discussion, Kant distinguishes between ‘*sinnlichem*’ or ‘*physischem Besitz*’ and ‘*intelligiblem*’ or ‘*rechtlichem Besitz*.’ The former denotes the actual control of an object (*tatsächliche Sachherrschaft*), the latter the mental control over an object that can exist without physical control and corresponds to ownership.<sup>52</sup> An attack on possession impinges on ‘*physischen Besitz*’ affects the ‘*innere Meine*,’ namely, the freedom of a person.’<sup>53</sup>

It is interesting at this point to also cite Kant’s definition of ownership and possession:

‘*Das rechtlich Meine ist dasjenige, womit ich so verbunden bin, dass der Gebrauch, den ein anderer ohne meine Einwilligung von ihm machen möchte, mich lädieren würde. Die subjektive Bedingung der Möglichkeit des Gebrauchs überhaupt ist der Besitz*:’<sup>54</sup>

‘What is legally mine is the thing I am connected to in such a way that nobody else could use the item without injuring me. The subjective condition of the possibility of use is possession’

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<sup>50</sup> Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* 311

<sup>51</sup> Kant (n 43) 27; also compare: Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (1873) I §63, 176 fn 1: ‘*das Recht ist nichts real Existierendes*.’

<sup>52</sup> Kant (n 43) 246

<sup>53</sup> *ibid* 248

<sup>54</sup> Kant (n 43) 51



Two points are significant here. First, Kant accepts a duality of possession, belonging to the world of facts and laws (Ideas), and, further, Kant establishes a link between the person and their will, on the one hand, with possession, on the other hand. Thus, possession is defined as the ‘subjective condition of the possibility of use.’ This is in tune with the doctrines of natural law, which place a person's will on the highest footing. Perceived thus, possession is the objective manifestation of the will, which every legal order needs to protect.

Significantly both Kant and Savigny distinguish between obligations and real rights (*Sachenrecht*) according to the relation of the will (*Willkür*) to a person or a thing.<sup>55</sup>

This view is worth citing here when we will look closely at the views of Savigny, Puchta, Bruns, and others. We will find that the link between possession and the human will, is a persisting leitmotiv, with some variations, in the discussion on the nature of possession and the rationale for its protection.

### 1.3.3. Fichte

It is worthwhile to look at some detail into the work of Fichte and trace the latter's influence on Savigny, as his theories came at a crossroads of German philosophical thinking and because Savigny himself acknowledges him often.

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<sup>55</sup> *ibid* §11, IV; Friedrich Carl von Savigny, *System des heutigen Römischen Rechts Vol I-VIII* (Veit und Comp 1840-49) I, 338: ‘*Die erste mögliche Beziehung zu einer fremden Person ist die, worin dieselbe, auf ähnliche Weise wie eine Sache in das Gebiet unserer Willkür herein gezogen, also unsrer Herrschaft unterworfen ist.*’

When Fichte chose the title *Grundlage des Naturrechts* for his work that appeared in 1797, it was already risky to allude to natural law, affecting the work's reception.<sup>56</sup> However, as we will see, his view on natural law and its relation to the 'legal order' (*Rechtsordnung*) differ markedly from Rousseau and Kant, both of whom he criticized. Furthermore, Fichte differs from Rousseau in that he sees all law, including the law of ownership, as deriving from the social contract, thus, not having an existence before it; therefore, the law of property is positivistic. Nonetheless, like Rousseau, he places the 'will' as the expression of the human being at the forefront of his doctrine.

For Fichte the I-hood (*Ichheit*) is the starting point of all philosophy because reason is defined by the 'I':

*'Darum ist die Vernunft überhaupt durch die Ichheit charakterisiert worden. Was für ein vernünftiges Wesen da ist, ist in ihm da.'*<sup>57</sup>

'This is why reason is characterized by the I-hood in the first place. What exists for a rational creature exists in itself.'

Furthermore, Fichte describes the 'rational being' thus:

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<sup>56</sup> Jean-Christophe Merle (ed), *Johann Gottlieb Fichte: Grundlage des Naturrechts* (de Gruyter 2016) 1

<sup>57</sup> Johann Gottlieb Fichte, *Grundlage des Naturrechts nach Principien des Naturrechts* (Gabler 1796) 2

*‘Das vernünftige Wesen setzt nothwendig sich selbst: es thut sonach nothwendig alles dasjenige, was zu seinem Setzen durch sich selbst gehört und in dem Umfange der durch dieses Setzen ausgedrückten Handlung liegt.’<sup>58</sup>*

‘The rational being, by necessity, positions itself. It does, therefore, everything that necessarily pertains to its positioning, and to the extent that lies in the expressed actions towards this positioning.’

Therefore, for Fichte, the basic unit of a society is the person, whom he describes as a rational being that consciously ‘positions itself through its actions.’ Fichte says further:

*‘Personen, als solche, sollen absolute frei, und lediglich von ihrem Willen abhängig seyn. Personen sollen, so gewiss sie das sind, in gegenseitigem Einflusse stehen, und demnach nicht lediglich von sich selbst abhängig sey.’<sup>59</sup>*

‘Persons as such must be free and merely dependent on their will. Persons as such must stand in reciprocal influence, but must not merely be dependent from themselves.’

Here he further clarifies his view on rational beings as free, only driven by their will. So, according to Fichte, will and person are inextricably linked, and will is expressed through action. Therefore, the freedom of the human will be preserved.

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<sup>58</sup> ibid 4

<sup>59</sup> ibid 85

But Fichte is also aware of the potential conflict between the colliding free wills of human beings. The task of regulating this matter falls to the legal order set up by the social contract.

*‘Jeder einzelne sonach muss im Staatsbürgervertrage, wenn durch diesen Vertrag ein allgemeines Rechtsverhältnis eingeführt werden soll, mit allen Einzelnen einig werden, über das Eigenthum, die Rechte, und Freiheiten, die er haben, und über die, welche er dagegen den anderen unangetastet lassen, und auf welche er aller seiner natürlichen Rechtsansprüche sich begeben soll. Jeder muss mit jedem für die Person darüber einig werden können’.*<sup>60</sup>

‘Each individual, therefore, if a general jural order is to be set up through the social contract, must come to an agreement with all other individuals about the property, the rights, the liberties that he will have, as well as those that he will leave intact for the others, towards which he will direct all his natural jural claims. Everybody must agree with everybody else about personhood.’

The avoidance of conflict through self-containment by the individual is an expression of a free person, and it can only be understood as an anticipated concept here. In other words, it cannot be imagined that everyone constantly debates with everybody else about their rights. Therefore, this contractual agreement is ideal, having taken place at one fictional moment in time.

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<sup>60</sup> *ibid* 107

From this critical passage, we see that Fichte's idea of the jural order (*Rechtsordnung*) is one that pre-eminently protects the will of the individual and that the will finds its boundaries where the will of the other individuals is curtailed. Consequently, if the jural order is created by rational beings, the law itself is a rational concept, stemming from free will. It comes not as a surprise that Fichte defines law thus:

*'Der Begriff des Rechts soll ein ursprünglicher Begriff der reinen Vernunft seyn: er ist mithin auf die angezeigte Weise zu behandeln.'*<sup>61</sup>

'The concept of law must be an original concept of pure reason, and must be, thus, treated in this way.'

*'Und so hätten wir dann das ganze Objekt des Rechtsbegriffes; nämlich eine Gemeinschaft zwischen freien Wesen als solchen.'*<sup>62</sup>

'In this way, we would have the entire object of the jural concept, namely, a community of free beings as such.'

More precisely for Fichte the law is nothing else than:

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<sup>61</sup> *ibid* 17

<sup>62</sup> *ibid* 19.

*‘Das deduzierte Verhältnis zwischen vernünftigen Wesen, dass jedes seine Freiheit durch den Begriff der Möglichkeit der Freiheit des anderen beschränke, unter der Bedingung, dass das erstere die seinige gleichfalls durch die des anderen beschränke, heißt das Rechtsverhältnis: und die jetzt aufgestellte Formel ist der Rechtssatz.’<sup>63</sup>*

In other words, the jural relation regulates the equilibrium of the free wills of rational beings.

#### **1.4. Conclusion**

So, to sum up, we can say that for both Kant and Fichte the laws of a society, namely, the jural order is a rational construction created by free, rational beings, with the ultimate end of protecting a community of free beings. They conceived law as a rational construction and, thus, allowed the application of formal logic and mathematics to jurisprudence. This goes back to a long legal tradition in Germany that associated mathematics with the law and can be traced back to Melanchthon and Leibniz. What is new, is that the philosophers now highlight the importance of ‘personhood’ and ‘will’ as the starting point of any jural institution.

The above has shown that Savigny has immersed himself in philosophy to a larger extent than he might have conceded later. The influence of the intellectual milieu of his time was inevitable, as someone who had received his legal training in the German legal tradition of the time. Thus, an analysis of Savigny’s concept of possession must bear his various influences and his individuality in mind.

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<sup>63</sup> ibid 213

The above investigations have shown that we must approach our investigation of Savigny's concept of possession with an open mind and be acutely aware of the various currents that might have influenced his thoughts.

## Chapter 2. Friedrich Carl von Savigny's *Das Recht des Besitzes*: Supporters and Critics

### 2.1. Introduction

Friedrich Carl von Savigny's view on possession is laid down in his monograph *Das Recht des Besitzes*, which first appeared in 1803. His main question was why we protect possession. The work sparked a discussion on the possession that moved throughout the nineteenth century and informed the debate on the nature of possession in the German civil code (*BGB*) to this day.<sup>64</sup>

However, to comprehend Savigny's views and the ensuing debate, I believe it is important to examine his other major works first to understand his broader juristic methodology and codification views. This, in turn, will be significant when we discuss the concept of possession in the civil codes of Austria and Germany.

### 2.2. Savigny: The Founder of the Historical School?

Friedrich Carl von Savigny was a towering figure of German jurisprudence; one of the few German jurists whose fame rose beyond the German borders and whose work elicits international interest even today. The splendour of the funeral for the legal scholar and politician von Savigny

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<sup>64</sup>James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 *The American Journal of Comparative Law* 295: 'Answering Savigny's question was one of the major intellectual projects of 19th-century German jurists. Rarely if ever have more brilliant legal minds argued.'



(1779 – 1861), in the presence of the King of Prussia, is telling both for his standing as a jurist and a politician in the Prussian state under Friedrich Wilhelm IV, whose private tutor he once was.<sup>65</sup>

Savigny's fame was perpetuated beyond the borders of Germany by his numerous students, who became important scholars in their own right, such as the Swiss legal scholars and politicians like Friedrich Ludwig Keller (1799 – 1860) and Johan Caspar Bluntschli (1808 – 1881). The English jurist Henry Crabb Robinson, who had met Savigny when the latter was still beginning his academic career, praised him as a philosopher of the new school.<sup>66</sup>

Even before Savigny entered academia, he was already intent on pursuing jurisprudence. He was familiar with the philosophical movements of his time, especially the circle of Jena, having studied law in Marburg, Göttingen and Jena between 1795-1799.<sup>67</sup>

The debates around his work were legendary. His enmity towards Eduard Gans (1797 – 1839), a follower of Hegel, whose appointment as a professor he fiercely sought to prevent because

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<sup>65</sup> Wieacker (n 25) 108; Savigny privately lectured the Crown prince in 1814-17; see Joachim Rückert and Frank L Schäfer (ed) *Repetitorium der Vorlesungsquellen zu Friedrich Carl von Savigny* (Klostermann 2016) 72

<sup>66</sup> Hertha Marquardt, *Henry Crabb Robinson und seine deutschen Freunde. Brücke zwischen England und Deutschland in Zeitalter der Romantik, Band 1* (Vandenhoeck & Ruprecht 1964) 60; see also Thomas Duve and Joachim Rückert (eds) *Savigny International?* (Klostermann 2015) 53 – 54

<sup>67</sup> Joachim Rückert, 'Savignys Konzeption von Jurisprudenz und Recht, ihre Folgen und ihre Bedeutung bis heute' (1993) 61 *Tijdschrift voor Rechtsgeschiedenis* 66

of Gans' Jewish faith, even after the latter's conversion to Christianity in Paris in 1825, was both a personal and a professional one. Savigny's antisemitism was well known, and he opposed the appointment of Jews to professorships.<sup>68</sup>

The Gans – Savigny debate on whether possession was a right or a fact (*Recht oder Factum*) became well known beyond academic circles in Berlin. It was so famous that the fashionable newspaper of the time, *Zeitschrift für die elegante Welt* (*The Journal for the Elegant World*) featured a fictional debate on the question of whether the prima donna 'Achmalia Rindfleisch' (Achmalia Beefcake) was actually, 'in possession of her voice or not, and if she was, whether her voice was a fact or a right.'<sup>69</sup>

The rising antisemitism in the Prussian state resulted from the epoch's marked neo-conservative, Christian-centric turn, the years after the French Revolution and the German victory over Napoleon ushered in an era of political and intellectual conservatism and anti-liberalism. During the reign of King Frederic Wilhelm IV, the state of Prussia, and notably its capital Berlin, sought to promote a culture of protestant homogeneity bound together by a perceived collective past. The lectures of Leopold von Ranke and Savigny were ideal fits.

Savigny was born a few years before the French Revolution and died a few years after the failed pan-Germanic revolution in 1848, whose aim was to unify Germany as one nation based on a common language and heritage. He met natural philosophers, romantic poets, and politicians

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<sup>68</sup> Thomas Henne and Carsten Kretschmann, 'Der christlich fundierte Antijudaismus Savignys und seine Umsetzung in der Rechtspraxis' (2002) 119 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 250

<sup>69</sup> *Zeitung für die elegante Welt* 1839, 318

during his life. They all influenced, to some extent, his views on the law. Savigny's writings were numerous, and some of his lecture notes were saved through transcripts of his students. Unfortunately, together with his correspondence, they were only recently published.

Let us first look at some of his early letters to significant intellectuals of the age as they reveal insights into his nascent academic views. Savigny opposed Hegel and his followers, notably Marx, but seems not to have generally dismissed philosophy.

In several letters to his friends, Georg Friedrich Creuzer (1771–1858), professor of Classics at Heidelberg, and his brother, the noted theologian Andreas Leonhard Creuzer (1768 – 1844) from Marburg. He approvingly mentions Johann Gottlieb Fichte, while the conversations reveal that Savigny was well informed about the debates with and about Fichte.<sup>70</sup>

One letter, however, addressed Constantin von Neurath (1739–1816), a judge of the *Reichskammergericht* (Imperial Appellate Court) in Wetzlar, who would become Savigny's legal guardian and mentor,<sup>71</sup> is of particular interest to us. The letter is dated either 1798 or 1799.<sup>72</sup> In it, Savigny first lays down his approach to jurisprudence in detail. He says:

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<sup>70</sup> Adolf Stoll, *Friedrich Karl von Savigny. Ein Bild seines Lebens mit einer Sammlung seiner Briefe, Band I* (Haymann 1927): Nr. 5, 64-66; Nr 13, 74-76; Nr 17, 83-85; Wieacker (n 25) 132.

<sup>71</sup> Margaret Barber Crosby, *The Making of a German Constitution: A Slow Revolution* (Berg 2008) 65; Hans Hattenhauer, *Thibaut und Savigny, Ihre programmatischen Schriften* (2<sup>nd</sup> edn, Vahlen 2002) 12

<sup>72</sup> Stoll (n 70) Nr 9, 69-71

*‘Jener plan führt mich ganz natürlich auf etwas, was damit nothwendig verbunden werden muss, das Studium des Naturrechts.’*

This text is significant, as it is the only excerpt I found in the surviving letters, where Savigny strongly endorses the study of natural law as a prerequisite. However, the above passage does not clarify how he conceives this process and what he means by ‘verbunden’ ‘roped together.’

In another letter to Neurath, dated 10 February 1799, Savigny takes a stauncher position. Here he criticizes the current trend set upon distinguishing between positive law (*Praxis*) and the law’s reasons (*Gründe*); he further finds that both positivist legal theory and natural law doctrine, as ‘complacent’ (*bequemlich*) and ‘egoistical’ (*egoistisch*). He argues, instead, for harmonization between the two.<sup>73</sup>

It is clear from those early surviving letters that Savigny was familiar with Fichte and that he deemed natural-law doctrines crucial for the future jurist. His position is clear: Theory and practice cannot be separated. The theory of natural law is necessary for providing the reasons (*Gründe*), the scientific underpinning of legal science. So even before he entered academia and produced his writings, Savigny had already formed in his mind a basic. However, the somehow vague concept of how a jurist must proceed, theoretically and practically, does not further elaborate.

Savigny wrote down lecture notes, but transcripts by his students, notably the brothers Wilhelm and Jacob Grimm, also survive. Various manuscripts, mostly held at the University of

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<sup>73</sup> *ibid* Nr. 10, 71-72

Marburg, have only recently been edited and published.<sup>74</sup> Publishing manuscripts that Savigny himself did not write but transcribed by his students can be rewarding. Still, it can be problematic, and they must be carefully examined against the background of his work to corroborate an argument. This thesis chose to look at both the transcription and his original work.

As early as 1802/3, Savigny further clarified the basic tenets of his approach in his *Methodologie*, his lecture notes at the University of Marburg:

*‘Erster Grundsatz: Die Jurisprudenz ist eine historische Wissenschaft [...] Zweyter Grundsatz: Sie ist eine philosophische Wissenschaft [...] Dritter Grundsatz: Verbindung des exegetischen und systematischen Elements: in dieser Verbindung ist die juristische Methode vollendet.’*<sup>75</sup>

The statement that jurisprudence is a ‘historical’, but also a ‘philosophical’ science is found throughout his notes. The ‘historical’ he further subdivides into ‘philological,’ and ‘historical proper.’<sup>76</sup> His definition of history in the same text is important:

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<sup>74</sup> On the problem of publishing transcriptions see: Horst Hammen (ed) *Friedrich Carl von Savigny, Pandektenvorlesung 1824/25* (Klostermann 1993) XXXIII

<sup>75</sup> Aldo Mazzacane A (ed), *Friedrich Carl von Savigny: Vorlesungen über juristische Methodologie 1802 – 1842* (Klostermann 2004) 139, 141

<sup>76</sup> *ibid*, after Jacob Grimm, 140

*‘Die Notwendigkeit des Staates selbst beruht darauf, dass etwas zwischen den einzelnen hingestellt werde, das die Herrschaft der Willkür einzelner gegenseitig beschränke.’<sup>77</sup>*

In his *System* he says: *‘Das Recht dient der Sittlichkeit aber nicht indem es ihre Gebote vollzieht, sondern indem es die freye Entfaltung ihrer jedem einzelnen Willen innewohnenden Kraft sichert.’<sup>78</sup>*

Thus, the rationale for the historical existence of the state and its laws lies in regulating individual wills. Here Savigny echoes Kant and Fichte most clearly by claiming that society is composed of individuals with a personality and a will, which needs to be regulated by law, hence, the ultimate justification of the state and the law. Kant has famously said that the aim of the law is:

*‘Der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinem Gesetz der Freiheit zusammen vereinigt werden kann.’<sup>79</sup>*

Thus, law for both Kant and Savigny is conceived as the regulator of individual wills (*Willkür: arbitrium liberum*). The will is paramount as the expression of the personality, while man's universal dignity and freedom must be acknowledged.<sup>80</sup>

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<sup>77</sup> *ibid*

<sup>78</sup> Savigny (n 55) 331

<sup>79</sup> Immanuel Kant, *Metaphysik der Sitten, Rechtslehre IV, A 33, B 34*

<sup>80</sup> Savigny (n 55) 55: *‘Anerkennung der überall gleichen sittlichen Würde und Freyheit des Menschen’*; see also Heinz Wagner, *Die Politische Pandektistik* (Spitz 1985) 103

This terse, programmatic statement on the twofold purpose of jurisprudence is crucial as it lays down the foundations of Savigny's *modus operandi*. The method of the jurist is a twofold one; first, he must look at his sources as a historian, and second, he must approach them with the tools of philosophy. The historical component, on the one hand, will enable an exegetic, casuistic approach, while the philosophical one is responsible for turning law into a coherent system. The terms 'Systematic' and 'philosophic,' on the one, and 'historical' and 'exegetic,' on the other are used interchangeably.<sup>81</sup>

When Savigny means 'material' (*Materie*), he mostly refers to Roman law, and his view is reiterated again in his pamphlet *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814.<sup>82</sup> Here we read again:

*‘Ein zweyfacher Sinn ist dem Juristen unentbehrlich: der historische, um das eigenthümliche jedes Zeitalters und jeder Rechtsnorm scharf aufzufassen, und der systematische, um jeden Begriff und jeden Satz in lebendiger Verbindung und Wechselwirkung mit dem Ganzen anzusehen.’*<sup>83</sup>

‘A jurist must have a double sensibility: he must think both historically to form a clear understanding of the peculiarities of each age and each legal form, and systematically, to

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<sup>81</sup> *ibid* 36

<sup>82</sup> Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr & Zimmer 1814)

<sup>83</sup> *ibid* 48; for a review of all the sources where Savigny formulates his 'twofold sensibility' see Rückert (n 67) 71: 'Doppelorientierung.'

allocate to every concept and proposition its proper place in a living interactive union with the whole.’<sup>84</sup>

This statement contains a clarification, or a modification, of the previous one. Here, Savigny equates the ‘historical’ with the ‘particular’ of a certain age. At the same time, the ‘systematic’ view is the one that will allow the jurist to perceive the connection and reciprocity of every concept and sentence with the total. So again, historical sources are the starting point, but then the jurist must be able to delineate the concepts and definitions and bring them together. In other words, the jurist must proceed with the tools of logic and must be able to create a system free of contradictions from the terms given in the sources. How these two different modes could be fused, and their exact relationship has been an object of speculation among scholars.<sup>85</sup>

The German legal historian Helmut Coing claimed that for Savigny, the historical perception provides the matrix of the systematic. Thus, the jurist must trace back the various legal institutions to define them and capture their ‘inner connection’ (*innerer Zusammenhang*) in a system. This does not, however, clarify how one should proceed if the desired ‘System’ cannot be found in the historical material.

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<sup>84</sup> trans. quoted after James Q Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton University Press 1990) 108

<sup>85</sup> For a recent discussion see: Martin Schermeier, ‘Interpretatio triplex? Germanisten und Romanisten vor Savigny’ in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 2020 (137) 494, 496, 500



The Italian scholar Giulio Marini claimed that Savigny does not intend his ‘*System*’ as a deductive one, in the sense of natural law, but as an organization that orders the historical material.<sup>86</sup> However, in my opinion, this fails to explain the exact workings of Savigny’s envisaged method. Savigny himself explains his procedure in his *Methodologie* of 1802:

*‘Neue Ansicht für die Wissenschaft: historische Behandlung in eigentlichen d.h. Betrachtung der Gesetzgebung als sich fortschreitend in einer gegebenen Zeit – Zusammenhang unserer Wissenschaft mit der Geschichte des Staats und des Volks -. System selbst muss als fortschreitend gedacht werden.’*<sup>87</sup>

Here Savigny says that the system must be perceived as proceeding forward (*fortschreitend*). This appears as an oxymoron because it is supposed to have its roots in history but proceeds to the future; thus, it could be seen as ahistorical; therefore, negating history. The apparent oxymoron, however, can be negated if we realise that Savigny would perceive logic as inherent in the historical material itself, which for him can only be the Roman sources, as our examination will show further down.

Nevertheless, it is safe to say that Savigny, though emphasising a new, historical approach, is not immune to the German legal tradition, highlighting the application of logic and deduction. Moreover, the importance of logic harks back to a tradition that set in, in Germany with the protestant humanists of the Wittenberg circle of the Renaissance, like Philipp Melanchthon (1497-

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<sup>86</sup> Giuliano Marini, *Savigny et il metodo della scienza giuridica* (Giuffrè 1966) 54

<sup>87</sup> Mazzacane (n 75) 37, 93

1560), who sought to replace the traditional exegetical method of the *mos italicus*, with a logical that perceived the entire material as one.<sup>88</sup>

Interestingly, Savigny favourably mentions the jurist and mathematician Gottfried Wilhelm Leibniz (1646 – 1716), who wished for a complete rearrangement of the Roman material under the principles of logic.<sup>89</sup> Leibniz' *Nova methodus discendae docendaeque jurisprudentiae* of 1667 was a prescribed text for students of jurisprudence.<sup>90</sup>

The German legal historian Hans Kiefner has sought to explain Savigny's dichotomy of 'historical' and 'philosophical' method from a tradition going back to Aristotle, who distinguished between '*historia*' and '*philosophia*,' to Kant, who differentiated between *cognitio ex datis* and *cognitio ex principis*.<sup>91</sup> His approach to explaining Savigny from the long tradition of methodology is compelling.

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<sup>88</sup> Wieacker (n 25) 83

<sup>89</sup> Savigny (n 82) 127; On Leibniz, see: Pio Caroni, *Gesetz und Gesetzbuch, Beiträge zu einer Kodifikationsgeschichte* (Helbing & Lichtenhahn 2003) 298; Erich Molitor, 'Der Versuch einer Neukodifikation des römischen Rechts durch den Philosophen Leibniz' in L' *Europa e il diritto romano, Studi in memoria di Paolo Koschaker Vol I* (Giuffrè 1954) 360, 364

<sup>90</sup> Molitor (n 90) 364

<sup>91</sup> Hans Kiefner, 'Der junge Savigny (Marburg 1795 – 1808) Zu den Ursprüngen seiner Konzeption einer „Philosophie des positiven Rechts“' in H G Leser (ed) *Akademische Feier aus Anlass der 200. Wiederkehr des Geburtstages von F. C. von Savigny* (1979) 15, 50; see also Mazzacane (n 75) 32 but see also Wagner (n 80) 71

In Savigny's multi-volume *System des heutigen Römischen Rechts*,<sup>92</sup> we find his views more clearly articulated that law must be organised and perceived in an 'organic' and 'logical' way, both together leading to what he calls '*System*.'

His notion of a '*System*' is significant because he seeks to organise the Digest (Pandectae) material according to 'organic' and 'logical' principles. 'Organic' is a new concept introduced by Savigny and was destined to have a long afterlife in German legal science, up to the drawing of the German civil code, as will see further down.

According to Savigny, we need to start from the Roman institutions (*Rechtsinstitute*), which stem from the 'rich and vivid reality'<sup>93</sup> and whose nature is 'organic,' having grown from the *Volksggeist*.<sup>94</sup> To comprehend these legal institutions, we must identify the underlying 'jural relations' (*Rechtsverhältnisse*).<sup>95</sup> It is the task of legal scholarship to lay open those common jural relations that permeate the separate institutions, tying them into a system.<sup>96</sup>

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<sup>92</sup> Savigny (n 55) *ibid*

<sup>93</sup> *ibid* XXXVII

<sup>94</sup> *ibid* 9: '*Das Wesen des Rechtsinstituts ist organisch.*'

<sup>95</sup> *ibid*

<sup>96</sup> Friedrich Carl von Savigny, *Pandekten, Goeriz 10*: '*Die Aufgabe der Wissenschaft [sc. ist es] diesen systematischen Faden, der sich durch die Rechtsverhältnisse hindurchzieht darzulegen.*' and *System* 139: '*Das Systematische Element bezieht sich auf den inneren Zusammenhang, welcher alle Rechtsinstitute und Rechtsregeln zu einer großen Einheit verknüpft.* See also Otto Lenel '*Der Irrtum über wesentliche Eigenschaften*' (1902) 44 *Jherings Jahrbücher für die*

The legal historian Karl Larenz claimed that for Savigny, the logical link of definitions rather than the organic component of jural institutes created a ‘System.’<sup>97</sup>

In my view, the ‘organic’ component and the logical are equally significant for Savigny, as the former provides the matrix to be shaped by the jurist. Savigny mentions the ‘organic’ many times in his works.

Savigny is convinced that the *Corpus iuris civilis* contained special decisions for individual cases, and the jurist's task is to identify the general rules underlying them through ‘Abstraktion,’ and *Reduktion*.<sup>98</sup> Hence, the jurist must apply the rules of formal logic to find the general rule or definition behind the passages. He illustrates his thesis with the *condictiones*. He claims that the individual *condictiones*, namely, *condictio indebiti*, *sine causa*, *ob causam datorum*, can all be traced back to a simple principle (*Grundsatz*).<sup>99</sup> Thus, he perceives the casuistic nature of the

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*Dogmatik des bürgerlichen Rechts* 11: ‘Die römischen Entscheidungen geben den Stoff, aus dem er seine Lehre abstrahiert hat.’

<sup>97</sup> Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th, revised edn, Springer 1991) 15: ‘Systembildend ist also nicht der „organische“ Zusammenhang der Institute, sondern der logische Sinnzusammenhang der (abstract-allgemeinen) Begriffe.’

<sup>98</sup> *ibid*, Friedrich Carl von Savigny, *Vorlesungen über juristische Methodologie* (1809) 220: ‘Ein großer Theil der Pandekten und des Codex besteht aus ganz speciellen Entscheidungen, die aber nur dastehen, um eine allgemeinere Regel auszusprechen.’ See also *Methodologie* (1802) 42

<sup>99</sup> Savigny (n 55) 511

*Corpus iuris civilis* was the mere veneer behind which the jurist must be able to discover the underlying principles with the help of logic.

Through this quest of ‘abstraction’ and his professed purism, Savigny and later the ‘Historical School’ were able to flesh out a concept such as the ‘*Rechtssubject*’ and the concepts of ownership and possession. Thus, it comes as no surprise that Savigny saw possession and ownership. He defined ownership as:

*‘die unbeschränkte und ausschließende Herrschaft einer Person über einer Sache.’*<sup>100</sup>

Ownership thus conceived differed radically from the old Germanic feudal concept of ownership, with different grades of ownership etc.<sup>101</sup> It was not only a concept reborn out of the Roman sources but also a radically new concept, designed for the burgeoning middle class and representative of the new era of liberalism set in nineteenth-century Germany.<sup>102</sup>

### 2.3. Savigny and the ‘*Pandektists*’

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<sup>100</sup> *ibid* 367

<sup>101</sup> Wagner (n 80) 39, 41

<sup>102</sup> *ibid* 58, 91 see also: Richard A Posner ‘Holmes, and the Law and Economics of Possession’ (2000) 86 Nr 3 Virginia Law Review 546: ‘he [sc. Savigny] was thus, in his own way, an agrarian reformer.’

Savigny's organisation of the Roman sources is also significant. He organised the material of the Roman sources into a '*Pandectensystem*' that he used for his lectures. He separated his material into four books and a general part (*Allgemeiner Teil*). Savigny's many students were to follow his method. His followers were later called '*Pandektisten*.'<sup>103</sup>

However, the '*Pandectensystem*' did not start with Savigny. Gustav Hugo (1764 – 1844) made the first attempt.<sup>104</sup> Hugo was significant because, although he was a student of the natural-law professor Johann Stephan Püttner (1725–1807) at Göttingen, he developed a critical stance against the fashionable doctrines of natural law at the time. He sought to show that the supposed neutral deductive method could lead to the creation of a positive law of a certain kind and its opposite. Thus, natural law is no less positive law than positive law itself, and arguments for and against various institutions, like slavery, and private property, since the same ideas can be deployed against and for it, namely, fear of misuse and infringement of freedom.

Hence Hugo maintains that written laws derive from the accident of birth of a specific monarch than from perennial a priori tenets since the same arguments could be used to argue for and against a certain legal institution.<sup>105</sup>

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<sup>103</sup> For the significance of the the term '*Pandectensystem*' see: Andreas Schwarz, 'Zur Entstehung des modernen Pandektensystems' (1921) 42 in *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 578

<sup>104</sup> Hans-Peter Haferkamp, *Die Historische Rechtsschule* (Klostermann 2018) 47, 81

<sup>105</sup> Gustav Hugo, *Beyträge zur civilistischen Bücherkenntniß der letzten vierzig Jahre, aus den Göttingischen gelehrten Anzeigen und den Vorreden, besonders zu den Theilen des civilistischen*

Therefore, Hugo concludes that the right law must be selected on account of a careful gauging of the various legal institutions' merits and faults, something that can be furnished by historical experience.<sup>106</sup> Hugo here introduces custom and 'historical experience' as a corrective of natural law and a-priori deduction.

Because of his views, Hugo is justly accorded a liminal position between the age of natural law and the 'Historical School' to be founded by Savigny.<sup>107</sup> Nevertheless, his twofold method is significant for understanding the work of Savigny.

Thus, the twofold method of the historical and logical approach, as we saw below, becomes significant in the work of Savigny. Despite Savigny's debt to Hugo, the former was by some seen as a precursor, not the founder of the 'Historical School.'<sup>108</sup> Others perceive him as equal to Savigny.<sup>109</sup> Hugo's method was misunderstood by his contemporaries, like Thibaut, who accused

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*Cursus, zusammen abgedruckt und mit Zusätzen begleitet, I* (Mylius 1828) 375-376: 'Es ist durchaus kein einziges Rechtsverhältnis möglich das sich nicht chicanieren ließe.'

<sup>106</sup> Gustav Hugo, *Lehrbuch der juristischen Encyclopaedie* (4th edn, Mylius 1811) §21; *ibid* *Lehrbuch des Naturrechts* (1809 Mylius) §§ 144-150

<sup>107</sup> Franz Zwißgmeier, *Die Rechtslehre Savignys: eine rechtsphilosophische und geistesgeschichtliche Untersuchung* (Weicher 1929) 10

<sup>108</sup> *ibid* 52 fn 1, 53

<sup>109</sup> Haferkamp (n 106) 13, 51. Haferkamp claims that Hugo's importance for the 'Historical School' dwindled in the 30s and 40s, 112

him of relying on philosophy.<sup>110</sup> In truth, Hugo's approach included an application of philosophy to historical data.<sup>111</sup>

Hugo was also the first to create a 'Pandectensystem' in his *Institutionen des heutigen römischen Rechts* (Mylius 1789). Therein, he arranged the entire Roman material of the *Digest* into five books, namely, the General Part (*Allgemeiner Teil*), Real Rights (*Sachenrecht*), Obligations (*Schuldrecht*), Family Law (*Familienrecht*) and Law of Inheritance (*Erbrecht*). However, it was the influential jurist and judge at the Appellate Court of Lübeck, Georg Arnold Heise (1778 – 1851) with his *Grundriß eines Systems des gemeinen Civilrechts zum Behuf von Pandecten-Vorlesungen* (1807), who became a direct influence on Savigny, as the correspondence of the two men shows.<sup>112</sup>

The said stratification was partly based on Roman and, later, natural-law models. Notably, the distinction between 'real rights' and 'rights of obligation' is Roman. In contrast, the general part and the difference between family law and the law of inheritance is based on natural law.<sup>113</sup>

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<sup>110</sup> Anton Friedrich Justus Thibaut, *Versuche über einzelne Theile der Theorie des Rechts I* (2nd edn, Mauke und Sohn 1817) 148: 'und doch weiß jeder, wie uns endlich das Bestreben nach logischer Einheit der Rechtswissenschaft geschadet hat.'

<sup>111</sup> Hugo, *Rez. Thibaut* 392

<sup>112</sup> Otto Lenel, 'Briefe Savignys an Georg Arnold Heise' (1915) 36 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 96; Mazzacane (n 75) 21; Haferkamp (n 106) 81

<sup>113</sup> Schwarz (n 105) 580 – 581, 584



The jurist Ernst Zitelmann has interpreted the distinction between the former as being based on two types of jural consequences (*Typen von Rechtswirkungen*). In contrast, the latter are distinguished based on the facts under which the law will be subsumed (*Tatbestände*).<sup>114</sup>

Savigny was not the first to have sought to organise the Roman material this way. Still, he can at least be credited with making this method popular and passing it on to his many students who would become professors, practising lawyers and judges.

Savigny justified the stratification into the three main fields of law, namely: family law, the ‘law of things’ (*Sachenrecht*), the law of obligations, because of the underlying jural relations (*Rechtsverhältnisse*). He perceived jural relations as an expression of ‘the independent power of the individual will, of which the said fields form the three main objects, namely, the own person (*eigene Person*), inanimate nature (*unfreie Natur*) and alien persons (*fremde Personen*).<sup>115</sup>

Therefore, to sum, up, if one seeks to sketch a general picture of Savigny’s view of jurisprudence and the correct method to be used, one must accept that his view was a nuanced, albeit not always clear, one. He espoused a twofold approach to law, a ‘logical,’ namely, a methodology of arranging legal pronouncements following formal logic, which he inherited from the tradition that preceded him. But he also introduced an ‘organic’ approach. He does not define the latter clearly despite using the word repeatedly. Savigny conceives ‘organic’ as something related to ‘history’ and can be contrasted to ‘logic’ but its exact nature is unclear.

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<sup>114</sup> Ernst Zitelmann, ‘Der Wert eines „allgemeinen Teils“ des bürgerlichen Rechts‘ (1906) 33 *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart* 6-8

<sup>115</sup> Savigny (n 55) 334

The entire law must fit into a ‘System,’ by which he means an organised body where the various principles must be ordered according to their relationship to the person and his environment. The person and their will are paramount in the legal organisation of a state.

#### **2.4. Savigny and the Codification**

Savigny was embroiled in a major debate with Anton Friedrich Justus Thibaut (1772 – 1840) on the need for a universal codification for the German states.<sup>116</sup> The disagreement was well known and received particular attention in neighbouring France.<sup>117</sup>

Interestingly, Thibaut was a jurist and a student of Kant, living in an area formally under French occupation, where the French *Code civil* (CC) was still in force.

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<sup>116</sup> Ernst Wolf, ‘Der Kampf gegen das BGB’ in Theo Mayer-Maly (ed) *Arbeitsleben und Rechtsleben: Festschrift für Gerhard Müller* (Dunker & Humblot 1981) 863; Hattenhauer (n 71) 1, 28, 29

<sup>117</sup> The periodical *La Themis*, which appeared in France in 1819, admired Savigny and his historical school and made his opposition to Savigny well known there, see J Bonnacase *La Themis* (1819 – 1831), Son fondateur A Jourdan (1914) 244; The debate was also reported in the *Le Globe*, see Raymond Saleilles, *Le code civil et la method historique* (S. I. 1904) see also Eduard Laboulaye, *Essai sur la vie et les doctrines de Savigny* (1842); On the French interest in Savigny see: Duve and Rückert (n 66) 8-9

Savigny, born in Frankfurt, a student at Göttingen and a professor at Marburg, and later Berlin, lived in areas that still followed a mixture of the *Usus-modernus* tradition and the old Germanic custom law.

Because of his fierce opposition to a civil code for the German countries, Savigny was often portrayed as an enemy of codification at large. This is mostly because of his position on the matter, as developed in his monograph *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), as an answer to Thibaut's *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814).<sup>118</sup>

The *Beruf* is also considered the founding manifesto of the 'Historical School' of law.<sup>119</sup> It received wide attention, and the bibliography on it is substantial. Here too, the recent publication of hitherto unknown manuscripts can shed new light on the discussion.<sup>120</sup>

I believe, however, that Savigny's view on codification is a more nuanced one. He does not dismiss codification off-hand. Instead, he criticises the recent codifications of his time, namely,

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<sup>118</sup> Savigny, (n 82) 4; On the debate, see Jacques Stern, *Thibaut und Savigny, Ein programmatischer Rechtsstreit auf Grund ihrer Schriften* (Berlin 1940, reprint 1959 Darmstadt).

<sup>119</sup> Rothacker (n 38) 419; Haferkamp (n 106) 111

<sup>120</sup> Hietake Akamatsu and Joachim Rückert, *Friedrich Carl von Savigny, Politik und Neuere Legislationen. Materialien zum „Geist der Gesetzgebung“* (Klostermann 2000)

the *Code civil*, the Preussisches *Allgemeines Landrecht (ALR)* and the *ABGB*, as being inadequately conceived in the wrong time.<sup>121</sup>

Therefore, he is concerned that the German countries of his time would produce a work that would equally fall short of its mission.<sup>122</sup> He believes that codification (*Gesetzgebung*) is desirable but need not be uniform for all German countries, as requested by Thibaut. Also, a codification must not necessarily derogate Roman law.<sup>123</sup> Savigny fears that a codification at present would further entrench the differences between the German countries, dividing them into the Prussian, Austrian and the remaining jurisdictions.<sup>124</sup>

The main fault he finds with the said codifications is that they relied on the recent philosophical movements of natural law, or the law of reason (*Naturrecht*, which he distinguishes from *natürliches Recht*, namely, a law that is natural to humans),<sup>125</sup> which seek to fashion laws that are abstractly conceived for all times and ages, and all peoples alike.<sup>126</sup> These codes are doomed to fail because they do not respect the individuality of a nation. Instead, they aim, as the

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<sup>121</sup> Savigny (n 82) 108; cf Caroni (n 61) 248; see also Schlosser (n 7) 144: ‘*Insoweit beinhaltet der Kodifikationsstreit keine Auseinandersetzung zwischen zwei Antipoden.*’

<sup>122</sup> Savigny *ibid* 6, 45, 47

<sup>123</sup> *ibid* 131, 132, 135: ‘*man würde mich missverstehen, wenn man diese Meynung so deuten wollte, als ob damit die Abschaffung der Gesetzbücher für etwas Wünschenswertes erklärt wäre*’; 152.

<sup>124</sup> *ibid* 154

<sup>125</sup> *ibid* 13; he contrasts this with the ‘*gelehrtes Recht*’ of the jurists.

<sup>126</sup> *ibid* 7, 18, 76, 115

single source of law, at producing jural sentences to be applied mechanically by judges without considering history or national peculiarities.<sup>127</sup>

According to Savigny, the correct approach of a lawgiver is to identify the ‘guiding principles’ (*leitende Grundsätze*) from which law is developed and applied. By ‘*leitende Grundsätze*’ he means basic truths, like those found in mathematics, such as the rule of the two sides and an angle of a triangle, from which one can proceed to identify other rules. Savigny first mentions ‘*leitende Grundsätze*’ in his lecture notes (*Methodologie*) in Berlin, in 1810, in his lecture on the pledge.<sup>128</sup>

In *Beruf*, he exclaims that both the jurist and the lawgiver must identify these basic definitions and sentences and proceed from them.<sup>129</sup> If the lawgiver of a code fails to identify these,

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<sup>127</sup> *ibid* 5, 21, 36, 88, 110, 130, 158

<sup>128</sup> Mazzacane (n 75) 247: *Pfandrecht Wintersemester 1810*: ‘*Durch das ganze System hindurch nämlich geht eine Reihe von Begriffen, Ansichten, Grundsätzen, welche als leitend und herrschend betrachtet werden müssen.* We already find a similar approach in the work of the important jurists of the *Usus-modernus* period, Samuel Stryk (1640 -1710), who said that in the *Corpus iuris*, we often find behind the ‘*subtilitates, saluberrimae constitutiones*’; and Augustin Leyser (1683 – 1752), See Klaus Luig, ‘Samuel Stryk (1640 -1710) und der „*usus modernus pandectarum*,“’ and ‘Richterkönigtum und Kadijursprudenz,’ both in *Römisches Recht, Naturrecht, Nationales Recht* (Keip 1998) 231 176; also Stern (n 120)

<sup>129</sup> Savigny (n 8) 22, 28, 66, 90

the project is equally doomed to fail.<sup>130</sup> This scientific method is only one aspect of the work of a jurist; the other is to understand and preserve what has grown ‘organically’ out of the people’s will and must develop it. This he calls the ‘political’ aspect.

As an example of this method, he cites the Romans. Roman jurists transformed the laws of the people, which had grown over many centuries (*politisch*) during the Republic, into technical (*technisch*) ones.<sup>131</sup> This was not done by subtracting what was the raw product of the people’s will,<sup>132</sup> but by developing scientifically the jural relations already existing.<sup>133</sup>

In this way, they added other institutions, such as *bonitary possession* next to *hereditas*, the *actio Publiciana* next to *rei vindicatio*, and the *actiones utiles* next to the *actiones directae*.<sup>134</sup> Thus, the Roman jurists could work scientifically in that they could ‘calculate’ (*rechnen*) with definitions.<sup>135</sup>

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<sup>130</sup> *ibid* 23, 148

<sup>131</sup> *ibid* 12, 28, 43, 46

<sup>132</sup> *ibid* 10

<sup>133</sup> *ibid*: ‘*Man kann diese förmlichen Handlungen als die eigentliche Grammatik des Rechts in dieser Periode betrachten und es ist sehr bedeutet, dass das Hauptgeschäft der älteren Römischen Juristen in der Erhaltung und genauen Anwendung derselben bestand*’; 12, 29, 30

<sup>134</sup> *ibid* 32

<sup>135</sup> *ibid* 29; A similar statement is found in his lecture notes of 1810 in Berlin, Mazzacane (n 75) 247, where he emphasises the geometric acumen (*geometrische Schärfe*) of Roman jurists; so admired by Leibniz

At the same time, according to Savigny, the jurists would not abandon the will of the people, and thus, they developed a law that was ‘organic.’<sup>136</sup> He also claims that past and present are interconnected organically.<sup>137</sup> Finally, he acknowledges the importance of Justinian’s codification for preserving Roman law for posterity, especially its spirit (*Geist*). Still, he says that its compilation was ultimately the product of the external decay of law.<sup>138</sup>

Consequently, his view that law ‘has always been there and never new’ does not preclude a codification but makes the task of correctly recording the existing law difficult.<sup>139</sup> Savigny criticises the three existing codifications of his time that were influenced by natural law: the *ALR*, the *CC* and the *ABGB*.

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<sup>136</sup> *ibid* 12: *„Aus dem Zusammenwirken dieses Doppelten Lebensprinzips [...] ist nunmehr begreiflich, wie auch jenes ungeheure Detail ganz auf organische Weise [...] entstehen konnte.*

the state is itself is called ‘organisches Wesen.’

<sup>137</sup> Savigny, ‘Über den Zweck dieser Zeitschrift’ (1815) 1 *Zeitschrift für geschichtliche Rechtswissenschaft* 3, 11-17

<sup>138</sup> Savigny (n 82) 35: *‘nur durch den äußersten Verfall des Rechts herbeygeführt worden.’*

<sup>139</sup> *ibid* 21: *‘das vorhandene, was nicht geändert, sondern beybehalten warden soll, muss gründlich erkannt und richtig ausgesprochen werden.’*

He finds fault with them all, but especially with the *CC*, which he believes was done in great haste after the upheavals of the French Revolution and misguided by populism.<sup>140</sup> Its cardinal sin, however, in Savigny's eyes, was that it omitted a general part!<sup>141</sup>

He further maintained that the *CC* and the *ALR* failed in so many aspects because they did not adopt the precision of concepts so characteristic of Roman law.<sup>142</sup> The civil code of Austria, on the other, succeeded more in that it did not seek to exhaust all cases but sought to set up the terms for the jural relations and the general rules for the same.<sup>143</sup>

Savigny criticises the *ABGB* for having adopted the definition of the object (*Sache*) in §303 in a far too imprecise and general way with far-reaching consequences on the important jural concepts, such as possession (*Besitz*) in §309 and ownership (§§ 353, 354).<sup>144</sup> Furthermore, he believes the code is equally vague on the division between real rights (*Sachenrechte*) into real (*dingliche*) and personal ones according to §307.<sup>145</sup>

His preoccupation with the laws, including codifications as developing organically (*organisch*), is reiterated throughout the text.<sup>146</sup> For him, a codification must above all display 'organic unity.'

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<sup>140</sup> *ibid* 78

<sup>141</sup> *ibid* 56, 60, 83

<sup>142</sup> *ibid* 66, 90

<sup>143</sup> *ibid* 97

<sup>144</sup> *ibid* 99

<sup>145</sup> *ibid* 100

<sup>146</sup> *ibid* 11,74: '*organische* [...] *Ergänzung*;' 75; 105, 112: '*organische*[r] *Zusammenhang*.'



To sum up, in the *Beruf* we find again Savigny's two tendencies of juristic methodology; a 'scientific' one, based on the principles of logic, and an 'organic' one, grown out the 'historical will' of the people. The task of the excellent jurist is to fuse those two. The skilled lawgiver must not ignore history for the sake of natural-legal abstraction, but he must not slavishly adhere to the Roman sources either; instead, he must trace back the organic principle (*organisches Prinzip*) of the institutions.<sup>147</sup>

Savigny perceives an organically proceeding jurisprudence (*organisch fortschreitende Rechtswissenschaft*) as the correct remedy for the present jurisprudence in German countries.<sup>148</sup> The idea of legal science as 'proceeding' from a historical context we have already encountered above.

However, Savigny also fails to give an actual example of his method. Instead, he merely mentions that in today's jurisprudence, practice must be more 'theoretical' and theory more 'practical.' At the same time, adjudication must consider individual cases, as in Roman times, instead of displaying today's uniformity.<sup>149</sup>

Most importantly, he fails to explain why a modern jurist should find the method of the Roman jurists exemplary in developing a concept of 'bonitary possession' or 'bonitary ownership'

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<sup>147</sup> *ibid* 117

<sup>148</sup> *ibid* 161

<sup>149</sup> *ibid* 128

or *actio Publiciana*,<sup>150</sup> The Roman method was certainly ingenious. Still, it could be objected to that it would have been more practical to extend a single form of ownership to all adults with legal capacity, something the natural law-based codes promulgated. It is unclear why the Roman method should be preferred over the new one.

Moreover, Savigny displays a somehow ambiguous relation to generality and abstraction (*Allgemeinheit*). He criticised the said codes for not being general enough, having failed to give precise definitions, but at the same time, he warns against an abstraction that stems from natural law and is divorced from history.<sup>151</sup>

Thus, in his *Beruf*, Savigny lays down his concept of the historical approach in detail, namely, that all law is historical, organically grown from a people; as opposed to a philosophical, abstract, natural law. At the same time, he maintains that the jurist must operate following the principles of logic, proceeding from the special to the general, and back. Thus, his use of the term ‘historical’ is ambiguous, it must not blind us to the fact that here again, he proposes a twofold process.

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<sup>150</sup> In his *Methodologie* of 1809, he cites the example of Paul. D.6.2.6 as an example where the jurist Paul, had identified the jural principles of *bona fides* and *iustus titulus* to apply the *actio Publiciana* in case the defendant of a noxal claim failed to appear in court. Cited in Mazzacane (n 75) 49, 217, 218

<sup>151</sup> Savigny (n 82) 115: ‘*Sobald wir uns nicht unseres individuellen Zusammenhangs mit dem großen Ganzen der Welt und ihrer Geschichte bewußt werden, müssen wir notwendig unsre Gedanken in einem falschen Lichte der Allgemeinheit und Ursprünglichkeit erblicken.*’ 124

In his *System*, Savigny seeks to reconcile his idea of a law that comes from the people with the codification to the extent that a codification can express the ‘will of the people.’ Notably, in his *System*, he first uses the term ‘*Volksgeist*,’ whereas, in the *Beruf*, he only used ‘*Volkscharacter*.’ In the *System*, he claims that the lawgiver must become the ‘organ of the people’s law’ (*Organ des Volksrechtes*) and the representative of the people’s spirit (*Vertreter des Volksgeistes*).<sup>152</sup>

Whereas in the *Beruf*, Savigny still saw codification as the product of arbitrary power, enmeshed in natural law, he now understands that it can also be a product of the ‘*Volksgeist*.’<sup>153</sup>

In an attempt to see Savigny as ‘purely historical,’ the German scholar Horst Heinrich Jakobs denied that the ‘*Volksgeist*,’ a concept associated with Hegel, influenced the latter in his legal thinking.<sup>154</sup> However, this view cannot be accepted, given the textual evidence.

Ironically, despite his fierce polemic against it, Savigny helped revive the - by his time marginalised - *ALR*, making it popular and the object of scientific discussion through his lectures, starting in 1819/1820 at the University of Berlin.<sup>155</sup> However, as we will see, he proposed a concept of ownership radically different from the one adopted in the *ALR*, representing the old

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<sup>152</sup> Savigny (n 55) 39

<sup>153</sup> Zwiłgmeyer (n 109) 15

<sup>154</sup> Horst Heinrich Jakobs, *Die Begründung der geschichtlichen Rechtswissenschaft* (Schöningh 1992) 49 239. cf Kraut Hans-Christof Kraus, ‘Historische Rechtsschule zwischen Philosophie und Geschichte’ in (1997) 36 *Der Staat* 463, 464: ‘*Freilich steht und fällt Jakobs These mit seiner konsequenten Ignorierung der zentralen Äußerungen Savignys zum Staat.*’ 465

<sup>155</sup> Schlosser (n 7) 125

feudal agricultural order. Savigny's concept of ownership as an absolute right, which he allegedly merely discovered in the Roman sources, is a radically new concept of Germany, suitable for a capitalist bourgeoisie.

In the *System* we also find the influence of Kant most clearly when Savigny says that: *'das Recht als Regel der Vereinigung der Freiheitssphären mehrerer Personen ein selbstständiges Dasein, d. h. eine formale Struktur habe.'*<sup>156</sup>

In examining three important works of Savigny, we can conclude that he proposed a twofold procedure, an historical and a logical one and that he considers precision in definitions, notably, possession. Though he always takes Roman law as his starting point, he says that the jurist must reshape it according to principles of logic. The often-casuistic nature of the *Corpus iuris civilis* should thus be brought back to its basic principles. This method leaves many questions open, notably, how are these two strings to be balanced, and when does one work at the expense of the other. We will now seek to show how the theoretical concept works *in praxi*.

## 2.5. Savigny on Possession

Let us turn to *Das Recht des Besitzes* and see how this work on a particular legal concept, namely, on possession, reflects his views as laid out in his other works. *Das Recht des Besitzes* was first published in 1803 and went through six editions during Savigny's lifetime, with a seventh one published after his death, under the care of the legal scholar Adolf August Friedrich Rudorff (1803

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<sup>156</sup> Savigny (n 55) 332; see also Wieacker (n 25) 111

- 1873).<sup>157</sup> A new translation of the *Besitz* into French appeared with a foreword as late as 1866 by the Belgian scholar Henri Staedtler (1835 – 1926).<sup>158</sup> It is divided into six sections: 1 The Concept of Possession, 2 Acquisition of Possession, 3. Loss of Possession, 4 Interdicts, 5 *Iuris quasi possessio*, 6. Modifications of Roman Law.

In his various editions, Savigny never changed his basic positions, but he made minor adjustments as a response to his critics. We will discuss these further down. Interestingly the work received attention beyond the borders of Germany, notably in Italy.<sup>159</sup> In his influential work *The Common Law*, one of the earliest critiques outside Germany was the American jurist Oliver Wendell Holmes.<sup>160</sup>

Holmes criticises Savigny's requirement of *animus domini*; he thought it impractical and remote from reality.<sup>161</sup> He believes that Savigny's requirement of *animus domini* for possession

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<sup>157</sup> For the book's later influence see: Heinrich Dernburg, *Lehrbuch des Preußischen Privatrechts I* (Buchhandlung des Weisenhauses 1875) § 169, 391

<sup>158</sup> Duve and Rückert (n 66) 26

<sup>159</sup> See Fadda, who succinctly described the lasting legacy of the said book, 5: '*il libro che ha aperto una nuova epoca [...] che ha per lungo tempo tenuto il campo quasi indiscusso nelle sue line fondamentali; che anche dopo le molte criticcuc sui punti speciali e I fieri attacchi rivolti proprio contro le sue idee madri, ancora forse predomina nella letteratura.* '; Mario Lauria, *Possessiones, Età repubblicana* (Moreno 1957) 3: '*la monografia tra tutte la piu celebre.* '

<sup>160</sup> Oliver Wendell Holmes, *The Common Law* (1881 Dover 1991) 207, 208, 218-9

<sup>161</sup> *ibid*

stems from the philosophy of Kant and Hegel, who perceives possession as an expression of a person's will that needs to be protected.<sup>162</sup> He claims that this preoccupation with the personal will as an extension of the personality accounts for the awkward distinction in civil law between petitory and possessory claims, not found in common law, where the title of ownership would always succeed.<sup>163</sup>

Wendell Holmes also discusses the passage, Pap. D. 41, 2, 44 pr. He claims that the Romans would probably have decided all cases differently but cannot be supposed to have worked out the refined ideas built upon this passage by future generations of jurists.<sup>164</sup>

British jurists, on the other, embraced Savigny's definition of possession since Common Law lacked one itself, and both English translators of Savigny's *Besitz*, Kelleher<sup>165</sup> and Perry<sup>166</sup> noted in the forewords to their translations the relevance of Savigny's doctrine of possession to Indian land. Frederick Pollock and Samuel Wright state in the *Essay on Possession in Common Law* that they have learned from Roman law and its modern expounders in Germany.<sup>167</sup>

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<sup>162</sup> *ibid* 208-9

<sup>163</sup> *ibid* 209: 'a theorist readily finds mystical importance in possession,' 210

<sup>164</sup> *ibid* 224

<sup>165</sup> James Kelleher, *The Civil Law, Abridged from the Treatise of von Savigny* (1888 Thacker)  
Preface iv

<sup>166</sup> Thomas Erskine Perry, *Von Savigny's Treatise on Possession* (6<sup>th</sup> edn, 1848 Sweet) Preface iv

<sup>167</sup> Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888) vi

In the foreword to the seventh edition, Savigny reiterates his call to go back to the sources (*ad fontes*), a statement that earned his movement the title ‘Historical School.’ He also claims that possession has traditionally been neglected because of its unfortunate placement in the last ten books of the *Digest*. As a result, it was never allotted its proper place. Something that he is set to correct.<sup>168</sup> However, the most important programmatic statement of his *modus operandi* is laid out in the first edition of the work and deserves to be quoted here in full:

*‘Der Begriff und die Rechte des Besitzes sind nämlich in den Gesetzgebungen neuerer Zeiten auf mancherley Weise anders als bey den Römern bestimmt worden. Soll also eine Theorie des Besitzes auf **practische** Anwendung Anspruch machen können, so muß sie den Ansichten des Römischen Rechts die Modificationen hinzufügen, unter welchen jene Ansichten für uns **practische** Gültigkeit haben. Allein auch für die gründliche Kenntniß des Römischen Rechts ist dieser letzte Theil der Untersuchung (Abschn. 6.) nicht ohne Werth, indem das **Wesentliche** vom **Zufälligen** auf keine Art sicherer geschieden werden kann, als wenn die **Grundsätze** beybehalten, und nur die Bedingungen der Anwendung verändert werden’* (emphasis mine).<sup>169</sup>

Here Savigny acknowledges that the definition of possession of recent times differs from that of the Romans. Surprisingly, however, this does not pose a problem for the same Savigny who just avowed a return to the sources. Instead, he affirms that a theory of possession that aims at being practical must add (*hinzufügen*) the modifications through which those perceptions (*Ansichten*) of

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<sup>168</sup> Savigny, *Das Recht des Besitzes*. (7<sup>th</sup> edn, A F Rudorff ed, Hayer 1865)

<sup>169</sup>Savigny (n 8) 120

Roman law gain practical value. So far, this statement is not problematic; it makes sense that law must change with the times, but it is at odds with the previously proclaimed aim *ad fontes*.

At the end of the passage cited above, we find the following: The study of the modifications, to which he devoted the last chapter of his work, is also important for a thorough grasp of Roman law because this enables us to most accurately sift out the ‘essential’ from the ‘accidental.’ We do this, he says, by keeping the principles and merely modifying the exigencies of their application.

In this complex statement, Savigny claims that the knowledge of the modifications to the law of possession, and the Roman law in general, allows us to lay bare the ‘basic principles of Roman law and gauge its modifications accordingly. Using the ‘basic principles’ as a guide, we can sift out the ‘accidental’ from the ‘essential’ ones, the former being an error of time and judgement, the latter a logical development of Roman law. As we have seen, Savigny will further develop his concept of ‘*leitende Grundsätze*’ a few years later in his *Beruf*.

In his *Besitz*, Savigny proposes to answer the nature of possession, its relevance, and how possession is defined. The first question Savigny seeks to answer is what is possession? Is it a fact (*Factum*) or a right? Moreover, to what class of rights does it belong if it is a right? A matter, he admits, is highly disputed.<sup>170</sup>

Thus, a basic tenet of Savigny’s theory of possession, as presented in the first edition - an object of subsequent and fierce debates - is that possession is ‘initially’ (*ursprünglich*) a fact

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<sup>170</sup> *ibid* 49, 52



(*Factum*), not a right. However, even though a fact, it can have legal relevance.<sup>171</sup> Hence, it is right and fact simultaneously.<sup>172</sup> Savigny never sought to clarify this statement on the nature of possession but modified it in the sixth edition of his work.

So, whereas we read in the first edition that possession was initially a fact (*ursprünglich ein Factum*), we now read in the sixth one:

*‘Nämlich der Besitz ist Factum, insofern ihm ein bloss factisches (unjuristisches) Verhältniß (die Detention) zum Grunde liegt [...] Aber der Besitz ist ein Recht, insofern mit dem blosen Daseyn jenes factischen Verhältnisses Rechte verbunden sind.’*<sup>173</sup>

From this, he concludes tersely:

*‘So ist also der Besitz Factum und Recht zugleich.’*<sup>174</sup> But further down, he states that possession in itself is not a right;<sup>175</sup> thus, having no place in the system of law *‘keine*

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<sup>171</sup> *ibid* 50

<sup>172</sup> *ibid* 50: *‘Demnach ist er Factum und Recht zugleich’*; 51: *‘So ist also der Besitz Factum und Recht zugleich.’* cf *ibid* 83: *‘Der Besitz nämlich wird als Recht betrachtet.’*

<sup>173</sup> Friedrich Carl von Savigny, *Das Recht des Besitzes. Eine Civilistische Abhandlung* (6th revised edn, Hayer 1837) 30

<sup>174</sup> *ibid*

<sup>175</sup> *ibid* 43

*Stellung.*<sup>176</sup>Savigny accepts, however, that the inviolability of the person (*Unverletzlichkeit der Person*) forms the reason for possessory interdicts.<sup>177</sup>

This passage is significant despite its vagueness because Savigny clarifies for the first time that possession is a fact in as much as it contains *detentio*. This is in tune with his overall view that *detentio* is a fact, and necessary for all possession, as we will discover further down. Consequently, he concludes that possession is also a right as far as there is a jural component, namely, other additions that make *detentio* a *possessio*. Therefore, his formulation is not as vague as would appear at first sight, but as we will see, consistent with his view that *detentio* is always contained in *possessio*. Finally, further down, he delivers his apophthegmatic resume:

*‘Die vielen Verhandlungen anzuführen, welche man bey Schriftstellern über diese Frage findet, wäre eben so unnütz, als ihre Lectüre unbelehrend ist.*<sup>178</sup>

Then he becomes more specific and addresses his opponents directly:

*‘Über die allgemeine Natur des Besitzes, so wie sie in den §. §. 2. 5. und 6. angegeben worden ist, haben sich mehrere Schriftsteller, nach Erscheinung der 5ten Ausg. meines Werks, auf verschiedene Weise ausgesprochen. Um mich über diese abweichenden Meinungen kürzer und deutlicher erklären zu können, wird es zweckmäßig seyn, meine eigene Ansicht, etwas ausführlicher und mit Berichtigung einer früher versuchten Modification, hier zu wiederholen. Der Besitz erscheint uns zunächst als die blos factische*

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<sup>176</sup> *ibid* 45

<sup>177</sup> *ibid* 48

<sup>178</sup> *ibid*

*Herrschaft über eine Sache, und daher als ein Nichtrecht (verschieden von Unrecht), als ein rechtlich Indifferentes.*<sup>179</sup>

So having not clarified whether possession was a right, he proceeds to discuss what kind of right it is. Subsequently, Savigny distinguishes between *possessio* that leads to *usucapio* and *possessio ad interdicta*. In the former case, one does not even ask the question, because possession is a part of the entire action that brings about ownership, like *iusta causa*.<sup>180</sup>

*Possessio ad interdicta*, on the other, belongs to the right of obligations (*Obligationenrecht*), and more specifically, it is related to *obligationes ex delictis* and *ex maleficio*. This he believes to be able to trace from Ulp. D. 43, 1, 1, 3: ‘*interdicta omnia licet, in rem videantur concepit, vi tamen ipsa personalia sunt,*’ and Ulp D. 43, 16, 1, 14: ‘*Sed et si quod alius deiecit, ratum habuero, sunt qui putent secundum Sabinum et Cassium, qui ratihibitionem mandato comparant, me videri deiecisse interdictoque isto teneri, et hoc verum est: rectius enim dicitur in maleficio ratihibitionem mandato comparari.*’

Savigny acknowledges that possession plays a role in both *traditio* and *occupatio*, as the transfer of ownership and possession happen simultaneously in these instances, possession has no independent function.<sup>181</sup> Similarly, in the case of *usucapio*, where *the actio Publiciana* applies, we

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<sup>179</sup>Savigny (n 8), *ibid* 40

<sup>180</sup> *ibid* 52, 53

<sup>181</sup> *ibid* 42

already have ‘relative’ ownership; thus, we are not dealing with possession here either but with ownership.<sup>182</sup>

Savigny emphatically rejects the notion that the interdicts are a kind of interim *vindicatio*, thus, related to property. For this, he cites Ven. D. 41, 2, 52: ‘*quemadmodum nec possessio et proprietas misceri debent,*’ and Ulp. D. 41, 2, 12, 1: ‘*Nihil commune habet proprietas cum possessione: et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possessionem renuntiasse, qui rem vindicavit.*’<sup>183</sup>

### **2.5.1. *Possessio civilis, possessio and possessio naturalis***

From the various functions of possession, Savigny examines where possession is relevant in Roman law. From there he proceeds to ‘reconstruct’ the various definitions of *possessio* ‘implicitly acknowledged’ in Roman law.<sup>184</sup> Finally, he states that *possessio* is jurally relevant only in two ways, namely, for *usucapio*, and interdicts.<sup>185</sup>

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<sup>182</sup> *ibid* 39: ‘*Es finden sich im ganzen Römischen Recht nur zwey Folgen, welche dem Besitz an sich, abgesondert von allem Eigenthum, zugeschrieben werden können: Usucapion und Interdicte*’

see also: 40, 41, 49

<sup>183</sup> *ibid* 56

<sup>184</sup> *ibid* 84: ‘*Die Begriffe selbst liegen ohne Zweifel im Römischen Recht.*’

<sup>185</sup> *ibid* 39: ‘*Es finden sich im ganzen Römischen Recht nur zwey Folgen, welche dem Besitz an sich, abgesondert von allem Eigenthum, zugeschrieben werden können: Usucapion und Interdicte.*’

see also: 40, 41, 49

His following argument is complex: all possession is *detentio*, but for *detentio* to become *possessio*, other elements must be added.<sup>186</sup> Accordingly, the *usucapio* has different requirements than the interdicts. *Usucapio* requires both *bona fides* and *iusta causa*, and even the latter differ.<sup>187</sup> Therefore, these legal institutions create different jural relations; thus, we have different kinds of *possessio* (*Besitz*). In other words, the different types of possession are conditioned by the different functions of the same.<sup>188</sup> Only the possession that leads to bonitary ownership through *usucapio* is called *civilis possessio*.<sup>189</sup>

*Possessio civilis* always contains an *iusta causa* and can lead to *usucapio*. Therefore, *Possessio civilis* is always jural possession (*juristischer Besitz*). The opposite of *possessio civilis* is *possessio naturalis*.<sup>190</sup> However, the term *possessio naturalis* is imprecise as it is used both for *possessio* ‘as such’ (*possessio überhaupt, possessio schlechthin*) and *possessio naturalis (detentio)*, thus, has two meanings.<sup>191</sup>

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<sup>186</sup> *ibid* 56: ‘Diese Detention aber wird unter gewissen Bedingungen ein Rechtsverhältnis, indem sie durch Usucapion zum Eigentum führt: dann heißt sie civilis possession und nun ist es nöthig, alle übrige Detention auch durch die Sprache von ihr zu unterscheiden’ 70, 73

<sup>187</sup> *ibid* 68

<sup>188</sup> *ibid* 90

<sup>189</sup> *ibid* 58

<sup>190</sup> *ibid* 56, 64, 78

<sup>191</sup> *ibid* 56, 57, 70 -71, 73

‘Possession proper’ does not create a jural relation (*juristisches Verhältnis*) such as *usucapio* but can form a legal relation (*Rechtsverhältnis*) by allowing the interdicts. Therefore, Savigny calls the latter jural possession too, but it is ‘possession proper’ instead of *detentio*.<sup>192</sup> *Possessio* ‘as such’ can form the basis of interdictal protection.<sup>193</sup>

Savigny must concede that the term *possessio* found by itself in the sources is always ambiguous and needs to be seen in its context. Nevertheless, if it leads to protection by interdicts or *usucapio*, it will be *civilis*, namely, ‘*possessio* proper.’<sup>194</sup>

To conclude, we have two kinds of jural possession: *possessio civilis* and ‘*possessio* proper’ (*Besitz überhaupt*).<sup>195</sup> The relation between these three forms of possession is one of genus and species: *Possessio ad usucapionem* is always *possessio ad interdicta*; both are always also *detentio*.<sup>196</sup> As evidence for his theory, Savigny cites the following sources: Ulp. D. 39, 2, 7:

*‘Eum, cui ita non cavebitur, in possessionem eius rei, cuius nomine ut caveatur postulabitur, ire et, cum iusta causa esse videbitur, etiam possidere iubebo.’*

And Pap. D. 41, 2, 49:

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<sup>192</sup> *ibid* 73

<sup>193</sup> *ibid* 57, 69

<sup>194</sup> *ibid* 74, 102

<sup>195</sup> *ibid*: ‘*Es giebt demnach zweyerley juristischen Besitz: possessio civilis (ad usucapionem) und possessio (ad interdicta).*’

<sup>196</sup> *ibid* 57, 81

*'Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere possidere non possunt, qui possessio non tantum corporis, sed et iuris est'.*

Paul. D. 41, 2, 3, 3:

*'Et solo animo non posse nos adquirere possessionem, si non antecedit naturalis possessio.'*

Here, Savigny must acknowledge that the Roman sources do not mention *possessio civilis* and *possessio naturalis* but distinguish between in '*possessione habere*' and '*tenere*.'<sup>197</sup> Thus, the terms are fluid in that *possessio civilis* is contrasted with *possessio naturalis*, and *possessio naturalis* can mean both possession proper and detention.<sup>198</sup>

As evidence for this, Savigny cites Ulp. D 43, 16, 1, 9: '*Deiicitur is qui possidet, sive civiliter sive naturaliter possideat: nam et naturalis possession ad hoc interdictum pertinent. Denique et si maritus uxori donavit, eaque dejecta sit: poterit interdicto uti: non tamen, si colonus.*' Here Ulpian says that a wife, even though she cannot legally hold what her husband has given her, still has an interdict, as opposed to a tenant, who has merely *detentio*. The wife here possesses merely *naturaliter* but is nonetheless protected.

Savigny cites this text is cited to illustrate that *possessio civilis* is mentioned in contrast to *possessio naturalis*, but with two distinct meanings; in the case of the wife, it means '*possessio proper*,' thus, the interdict is allowed. In the case of the leaseholder, it is mere *detentio*, therefore,

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<sup>197</sup> *ibid* 66

<sup>198</sup> *ibid* 72

not jural possession, and not eligible for interdicts.<sup>199</sup> Both *detentio* and ‘*possessio* proper’ are, therefore, *naturalis* as opposed to *civiliter*.

Finally, as evidence that the Romans recognized the various possession categories, Savigny cites Paul. D. 41, 2, 3, 21: ‘*Et in summa magis unum genus est possidendi, species infinitae.*’ Here he argues that the *species infinitae* refers to the various *causas possidendi*, thus, the *causae possidendi* correspond to the definitions he gives. But is this true?

This text merits our closer attention and needs to be quoted in full. Paul D. 41, 2, 3, 21: ‘*Genera possessionum tot sunt, quot et causae acquirendi eius quod nostrum non sit, velut pro emptore, pro donato, pro legato, pro dote, pro herede, pro noxae deditio, pro suo, sicut in his quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus. Et in summa magis unum genus est possidendi, species infinitae.*’

‘There are as many kinds of possession as there are causes of acquisition of what does not belong to us, such as [sc. possession] as a buyer, as a gift, as a bequest, as a dowry, as an inheritance, as something delivered because of delict, as for oneself, for the things that we catch on land or sea, or from our enemies, or that we have made that they might be something new. In short, there is rather one kind of possession, but an infinite number of types.’

This text is not adequately discussed in scholarship to this day and merits our closer examination here. Especially about the different terms used in the passage, such as *causae acquirendi; eius quod nostrum non est; sicut in his quae; unum genus possidendi, species infinitae*. It is problematic

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<sup>199</sup> *ibid* 71



that initially, our passage mentions ‘*genera possessionum*’ at the beginning and closes with ‘*unum genus possidendi* and *species infinitae*.’<sup>200</sup>

For now, let us clarify that the passage cited by Savigny does not mention the three kinds of possession he has delineated; it refers to ‘many kinds.’ There is no mention of *possessio civilis*, *possessio* and *possessio naturalis*.

At first sight, the excerpt distinguishes between kinds of possession according to their titles, and their corresponding *causae* of acquisition. So, an *emptio* creates a *possessio pro emptore*, a *donatio*, *pro donato*. After *sicut* in Savigny’s version, we have a list of *possessio pro suo*; namely, the kinds of original possession, obtained through hunting, fishing. The latter example is grouped and does not correspond to a *causa acquirendi* as the first six.<sup>201</sup>

Whereas Savigny has so far identified *usucapio* as the only form of possession that requires *iusta causa*,<sup>202</sup> the passage elevates the *possessio ex iusta causa* to the most important kind of qualified possession. There is no link between *usucapio* as the exclusive application of *iusta causa*. The lawful possession of oneself (*Eigenbesitz*) also includes the said kinds.<sup>203</sup>

The Dutch legal scholar Eric H Pool believes that one must distinguish carefully between titles of possession (*Besitztiteln*) and causes of acquisition (*Erwerbsgründen*). The relation

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<sup>200</sup> See Eric H Pool, ‘D.41, 2, 3, 21: Titulierte Besitzarten, Erwerbsgründe und das unum genus possidendi’ (2013) 81 Tijdschrift voor Rechtsgeschiedenis 527, 529

<sup>201</sup> *ibid* 529

<sup>202</sup> Savigny (n 8) 85

<sup>203</sup> Pool (n 202) 533, 534

between the two is, thus: *possessio pro emptore* requires a valid *emptio*, this is necessary but not sufficient, possession must be *sine vitio*, and if it is a foreign one, there must be *bona fides*.<sup>204</sup>

Therefore, it is possible that the possessor possesses on the ground of an *iusta causa*, like *emptio*, but cannot have *usucapio* because he is not in good faith. Paul means this. D. 41, 4, 2, 1: ‘*separata est causa possessionis et usucapionis.*’ Most notably, Savigny here fails to countenance that the dichotomy *naturaliter/civiliter* might refer to natural law/civil law.<sup>205</sup>

### 2.5.2. Different Categories of *animus*

Having laid out the relation of the different terms, *detentio*, *possessio ad interdicta*, *possessio ad usucapionem*, and having started from the premise that detention, as something purely physical, needs another element (*Modification*) to become possession, Savigny states that the element that turns *detentio* into *possessio*, is, a ‘specific intention, a specific will’ (*animus*).<sup>206</sup> As evidence for this, he cited Paul. D.41, 3, 1:

‘*Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.*’

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<sup>204</sup> *ibid* 531

<sup>205</sup> Savigny recognises this elsewhere, see Hammen (n 74) 13: ‘*überall wo etwas naturaliter erworben wird d:h nach jus gentium.*’

<sup>206</sup> Savigny (n 8) 77: ‘*Es muß nämlich zu jeder Detention, wenn sie als Besity gelten soll, eine bestimmte Absicht, ein bestimmtes Wollen (animus) hinzukommen (I).*’

Savigny bases his distinction between *detentio* and *possessio*, where the latter possesses for himself, on the paraphrase of Theophilus in the *Liber Basilicorum*, where *possessio* is described *κατωχή ψυχῆ δεσπόζοντως (detentio with animus domini)*.<sup>207</sup>

Savigny further distinguishes between two kinds of will: *animus domini*[i] and *animus possidendi*. He claims that the will creating jural possession is always *animus domini*. The *animus possidendi*, on the other, is a pleonasm since the holder always wishes to hold possession. However, to be considered as having *animus domini*, the holder must hold for himself and treat the object as his own. Consequently, the thief is a possessor as much as the rightful owner is.<sup>208</sup>

Therefore, for Savigny, when the sources mention *animus*, it can either be *animus domini* or *animus possidendi*. Their relation is again one of the genus to a species. Hence, *detentio* and *animus possidendi* lie at the core of all variations of possession. In contrast, *animus domini* is the will to possess for oneself, thus, marking off different degrees of jural possession.<sup>209</sup>

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<sup>207</sup> *ibid* 25

<sup>208</sup> *ibid*

<sup>209</sup> *ibid* 89: ‘*Nun ist also der allgemeinste Ausdruck für den materiellen Begriff des Besitzes dieser: es ist Detention, verbunden mit animus possidendi, und dieses Wort muß verschieden erklärt werden, je nachdem von einem ursprünglichen oder abgeleiteten Besitz die Rede ist.*’

Savigny admits there are instances where the possessor does not have the *animus domini* but rather the *animus possidendi* because he is a ‘derivative possessor’ to whom the right of possession was transmitted. This is the case of possession given as a pledge to the creditor.<sup>210</sup>

Savigny’s distinction between the two kinds of *animus* enables him to distinguish between ‘*Eigenbesitz*’ and ‘*Fremdbesitz*.’ He says that whereas *detentio* must always be present, the *detentor* must not necessarily have *animus domini*. In that case, however, somebody else must have *animus domini*, somebody for whom the former possesses (*Fremdebesitzer*).<sup>211</sup>

Thus, we can distinguish between direct possession (possessing for oneself) or derivative (possessing for somebody else, where *ius possessionis* takes the place of *animus domini*) possession, depending on whether *animus possidendi* or *animus domini* is present.<sup>212</sup> Accordingly, pledge (*pignus*) is an example of derivative possession because the creditor does not want the item as his own but is, nonetheless, considered possessor. *Animus possidendi* refers to the *ius possessionis*.<sup>213</sup>

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<sup>210</sup> *ibid* 83: ‘So hat z.B. der creditor den juristischen Besitz des Pfandes, obgleich er kein Eigenthum ausüben will, denn der Schuldner, der den vollen Besitz der Sache hatte, hat ihm mit der Detention zugleich das *ius possessionis* übertragen.’

<sup>211</sup> *ibid* 80: ‘Detention ist überall nöthig, wo juristischer Besitz angenommen werden soll: der *animus domini* kann fehlen, aber dann muß dieser Besitz von einem andern abgeleitet werden können, in welchem beides vereinigt war.’

<sup>212</sup> *ibid* 84

<sup>213</sup> *ibid* 83-84.

So, Savigny concludes, there are instances where the original possessor allows somebody else to possess for him.<sup>214</sup>

Savigny gives the same explanation in his *Pandektenvorlesung* of 1824-25, where he defines possession thus:

*‘Zum Begriffe gehört noch: neben der factischen Herrschaft das Bewussteyn dieser Herrschaft [...] Animus possidendi.’*

He further explains that the possessor can have the will to possess for somebody else and remarks that *‘diese Fälle sind wichtig.’*<sup>215</sup> He cites various instances where *animus domini* is assumed, namely, when the possessor in good faith believes he is the owner, but also if he is a thief. Possessing in the name of somebody else can never be perceived as *animus domini*.<sup>216</sup> Interestingly, he does not cite any sources.

Let us now look at a primary source, which Savigny cites and discusses in the *Recht des Besitzes* in detail, as the source for his definition of possession. Also, let us examine the precision of his reading of the said source. The passage is from Ulp. D. 6,1,9:

*‘Officium autem iudicis in hac actione in hoc erit, ut iudex inspiciat, an reus possideat: nec ad rem pertinebit, ex qua causa possideat: ubi enim probavi rem meam esse, necesse habebit possessor restituere, qui non obiecit aliquam exceptionem. Quidam tamen, ut Pegasus, eam solam possessionem putaverunt hanc actionem complecti,*

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<sup>214</sup> *ibid* 282

<sup>215</sup> Hammen (n 74) 64

<sup>216</sup> *ibid* 65

*quae locum habet in interdicto uti possidetis vel utrubi. Denique ait ab eo, apud quem deposita est vel commodata vel qui conduxerit aut qui legatorum servandorum causa vel dotis ventrisve nomine in possession esset vel cui damni infecti nomine non cavebatur, quia hi omnes non possident, vindicari non posse. Puto autem ab omnibus, qui tenent et habent restituendi facultatem peti posse.’*

‘In this action, it will be the judge's task to ascertain if the defendant possesses. Moreover, it is irrelevant on what grounds he possesses. As soon as I have furnished proof that I am the item's owner, the possessor must restore it to me if he cannot bring forth an objection. However, certain jurists, like Pegasus, maintain that the action only applies to that form of possession, which is the object of the *interdictum uti possidetis* or *utrubi*. Therefore, he says, that one can vindicate neither from the depositor, nor from the commodatary, nor the hirer, nor the legatee nor from the one who holds in the name of dowry or an unborn. Neither can one give to the one who has not received the *caution damni infecti* for the above mentioned are all not possessors. I believe, however, that (the disputed item) can be claimed from anybody who holds the thing and can restore it.’

The present excerpt is about the *rei vindicatio*. The *rei vindicatio* is an action by which the plaintiff, who claims to be the owner of a disputed item but not in possession of it, can claim it from the possessor. The *rei vindicatio* is an *actio in rem*, (real action) as opposed to an *actio ad personam* (obligational). It is directed against an item, not a person; it is a recuperatory action.<sup>217</sup> If the

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<sup>217</sup> Heinrich Honsell, *Römisches Recht* (4<sup>th</sup> edn, Springer 1997) 64

plaintiff succeeds, the defendant will be sentenced (after an *actio ad exhibendum*) to restore the disputed object; if he fails to do that, he will be condemned to pay money.<sup>218</sup>

Here, Ulpian states the obvious, namely, that the *vindicatio* must always be addressed against the possessor of the disputed object. However, from this point on opinions differ. The jurist Pegasus claimed that only those possessors could be defendants of an *actio rei vindicatio* who could bring forth the *interdictum uti possidetis vel utrobi*. The implication is that those who ‘hold’ from somebody else, namely, have physical control over a thing, but are not considered possessors themselves - for whatever reason - cannot be the defendants in the said suit.

The following explanatory sentence, from *denique...omnes non possident*, seems an awkward and slightly inelegant enumeration of cases of mere ‘holding’ as opposed to ‘possessing’ since a Roman jurist would have known that the recipient of a *precarium* is not considered possessor and therefore not able to bring forth the said interdicts. Consequently, it is reasonable to believe that it might be a later amplification of the original text of Pegasus, which is otherwise undisputed.<sup>219</sup>

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<sup>218</sup> See H F Jolowicz, *Historical Introduction to the Study of Law* (Barry Nicholas ed, 3<sup>rd</sup> edn CUP 1972) 211 fn 7

<sup>219</sup> Max Kaser, *Eigentum und Besitz im älteren römischen Recht* (2<sup>nd</sup> ed, Böhlau 1956) 288 fn 32: ‘Die Stelle ist in dem über die Ansicht des Pegasus berichtenden Teil sicher klassisch, mag auch die Aufzählung der Detentionsfälle überarbeitet sein.’

The author of the text, either Ulpian himself or Tribonian, the Byzantine editor of the *Corpus iuris civilis*,<sup>220</sup> does not agree with Pegasus and believes that the *actio rei vindicatio* can be directed against the mere holder as well. The rationale is that if somebody ‘holds’ (*tenent*) and can restore an item (*habent restituendi facultatem*), he should also be compelled to do so.

We do not know the reasons that led Pegasus to his opinion. Still, we could guess that it has to do with the fact that it is assumed that the possessor from which the *detentor* would derive his detention would have more knowledge of the item and its provenance. However, the advantage of the second opinion is that it is more practical.

What is essential from this excerpt is to note that we have, on the one hand, the opinion of Pegasus, a classical jurist, *praefectus urbi* under the Emperors Vespasian and Domitian, follower of Proculus. At the same time, Ulpian is a late classical jurist, recorded as *praefectus praetorio* under Alexander Severus in 223 AD.<sup>221</sup>

We can trace here a pattern, whereby in the later Empire, the classical distinction between possessing and mere holding becomes obsolete concerning the *rei vindicatio*, as opposed to the earlier era of jurists, who seemed to have attached importance to the relationship between the possessory interdicts and the *actio rei vindicatio*.<sup>222</sup> The trend towards simplification is general and does not come as a surprise here.

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<sup>220</sup> *ibid*

<sup>221</sup> *ibid* 34

<sup>222</sup> Max Kaser, *Römisches Privatrecht* (16<sup>th</sup> edn, CH Beck 1992) 127: ‘*doch hat man schon in spätclassischer Zeit auch die Verteidigung durch den Detentor zugelassen* (D.6,1,9 a. E.).’



Now let us turn to Savigny's discussion of the said passage. It is worthwhile to quote Savigny's citation of the passage in full here, as he considerably alters the original one. Savigny renders thus:

*'Officium autem iudicis in hac actione in hoc erit, ut iudex inspiciat, an reus possideat. ...Quidam tamen, ut Pegasus, eam solam possessionem putaverunt hanc actionem complecti, quae locum habet in interdicto uti possidetis, vel utrobi. Denique (2), ait, ab eo, apud quem deposita est vel commodata, vel qui conduxerit, aut qui legatorum servandorum causa, vel dotis, ventrisve nomine in possession esset vel cui damni infecti non cavebatur, quia hi omnes non possident, vindicari non posse. Puto autem, ab omnibus, qui tenent, et habent restituendi facultatem, peti posse.'* (emphasis original).<sup>223</sup>

In comparing the text with the original, we immediately notice that Savigny left an important sentence out, namely: *'nec ad rem pertinebit, ex qua causa possideat: ubi enim probavi rem meam esse, necesse habebit possessor restituere, qui non obiecit aliquam exceptionem.'* This sentence merely states the obvious that the judge must ascertain that the defendant is possessing, while the reason for possession is irrelevant. However, Savigny, in leaving it out, reads that the judge must ascertain if the defendant possesses (*an reus possideat*), while both Pegasus' and Ulpian's views are read as explanations of the various kinds of possession that exist, of which the judge must decide.

Savigny's reading of the passage is this: First the word *possessio* is put into the passage, left as vague as possible, then, Pegasus defines one kind of *possessio*, namely, the one that leads

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<sup>223</sup> Savigny (n 8) 67

to interdicts, as opposed to the second kind of possession where no possession is assumed, which Ulpian includes. Savigny explains:

*‘Das Wort possessio soll eben hier erst bestimmt werden, es wird also im Anfang der Stelle so unbestimmt als möglich genommen: nun [53] glaubt Pegasus, der Satz gelte nur von der Art der possessio die das Interdict begründe, und nicht von den Fällen, worin eigentlich keine possession angenommen werden könne: Ulpian aber entscheidet gegen ihn.’<sup>224</sup>*

‘Here, the word *possessio* must still be defined. It is therefore placed at the beginning of the passage in as vague a manner as possible. Now [53] Pegasus believes the sentence applies only to the kind of *possessio* that allows the interdict, and not to the cases where now possession can be assumed.’

Therefore, having distinguished between the two kinds of *possessio*, Savigny draws his following conclusion. He says that both Pegasus and Ulpian assume the existence of a general, natural concept of possession. In contrast, only the one that allows interdicts is called possession, while the other is referred to as: ‘*est in possessio*,’ ‘*tenet*,’ ‘*non possidet*.’<sup>225</sup>

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<sup>224</sup> *ibid*

<sup>225</sup> *ibid* 67-68: ‘*Beide gehen aus von einem allgemeinen (natürlichen) Begriff von possessio: von dieser giebt es zwey Arten. Die eine ist die, welche die possessorischen Interdicte (1) begründet,*

So, Savigny has now neatly constructed the following constellation: Natural *possessio* as the basic principle inherent in *possessio* proper. He also believed to have found proof that *possessio* proper (*überhaupt*) alone leads to interdicts in this single passage. Thus, he can now move on to distinguish between *possessio (ad interdicta)* and *possessio civilis*.<sup>226</sup> Savigny also digresses from the actual wording in another respect, he speaks of interdicts in general, instead of the two mentioned in the original.

To strengthen his position, Savigny cites C 7.32.10:

*‘Nemo ambigit possessionis duplicem esse rationem, aliam quae iure consistit, aliam quae corpore.’*

Surprisingly enough, vociferous criticism came from Savigny’s camp, namely, from Gustav Hugo, who countered in his review on the *Besitz* that Savigny’s view on *possessio civilis* and *naturalis* can still be assumed if one interpreted the text either way.<sup>227</sup> He bitingly added that Savigny supports his thesis only with Doneau, thus, have created a theory that has the advantage of being

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*folglich die andere die, welche sie nicht begründet. Von dem Besitzer dieser zweiten Art heist es gleich nachher: “est in possessio, tenet, non possidet” also muss nun die erste Art notwendig possessio schlechthin heisen.’*

<sup>226</sup>ibid 68: *‘So ist aus dieser einzigen [54] Stelle der ganze Beweis nochmals geführt, der für den Begriff der possessio (ad interdicta) geführt werden sollte (emphasis original)*

<sup>227</sup> Hugo (n 107) 488

like a portrait of which one perceives must have been successful even if one has not seen the original.<sup>228</sup>

We can conclude from the above analysis that Savigny took considerable liberties with the Roman text. He left passages out and used them in such a way that helped him support his view of the clear separation of the three concepts of possession. On the other hand, one must also remember that he openly admitted that he would not limit himself to the ‘surface’ of the sources but would seek to derive his theory from Roman law's ‘basic principles’. His concept of *possessio*, inherently always containing *detentio*, which is a mere fact, explains his ambiguous definition of possession as a right and a fact.

The precise definition and delineation of the various forms of possession, he believes to have developed from the sources. However, his theory is purely deductive, moving from the general to the specific and proceeding according to the Aristotelian *diaeresis*, which he will call ‘*Distinktionen und Definitionen*.’<sup>229</sup> The table he draws in his *Besitz*, where he presents the different forms of *possessio* as Venn diagrams, can ultimately be fitted into every jurisdiction and any place; it is not peculiar to any particular jurisdiction, and thus runs the risk of being like the natural law codices he will so fiercely attack.

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<sup>228</sup> *ibid* 488: ‘*So sieht man es dieser Theorie an, dass sie im Geiste des Römischen Rechts ist, auch wenn man noch nicht alle Stellen durchgelesen hat.*’

<sup>229</sup> *Savignys Juristische Methodenlehre nach der Ausarbeitung des Jakob Grimm* (G Wesenberg ed, Kohler 1951) 37

Though Savigny had built on the concept of possession current in the *Usus modernus*, the perception of detention as a fact without legal consequence is his innovation, and so is the *animus possidendi*.

We would assume that Savigny's insistence on the *animus domini* and the link to *usucapio* would lead him to the connection between ownership and possession, taking *animus* for the *usucaptor* and, thus, perceiving *possessio* as nascent ownership. But Savigny categorically refuses this because Romans would protect possession regardless of title, even in the hands of a thief.<sup>230</sup>

### **2.5.3. The Nature of Protection through Possessory Interdicts**

For Savigny, the question of why possession is protected is linked to the concept of possession itself. He follows here Niebuhr, who believed that the remedy of interdictal possession is a result of the *ager publicus* of the Republic. During the military conquests of the Republic, a lot of lands fell into the hands of the state and were leased to Roman citizens. These tenants held possession only but needed to be protected against interfering third parties.<sup>231</sup>

According to Savigny, the right to protect possession or *detentio* from violence does not derive from possession itself or its jural consequences. Still, it is a general principle of the right to self-defence as enshrined in criminal law.<sup>232</sup> Consequently, the right to defend one's possession and claim it through interdicts is not based on any right to possession but on the general principles

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<sup>230</sup> Savigny (n 8) 61

<sup>231</sup> Barthold Georg Niebuhr, *Römische Geschichte II*, (2nd edn 1931) 167

<sup>232</sup> Savigny (n 8) 65

of self-defence. This is consistent with his claim throughout the several editions of his *Besitz* that possession is a ‘non-law or ‘non-right.’ We find:

*‘Dennoch wird er [sc. Besitz] gegen gewisse Verletzungen geschützt, und um dieses Schutzes willen werden Regeln aufgestellt über Erwerb und Verlust des Besitzes; gerade als ob er ein Recht wäre. Der Grund jenes Schutzes, und dieser, einem Rechte ähnlichen, Behandlung soll angegeben werden: das ist die Aufgabe. Dieser Grund nun liegt in der Verbindung jenes factischen Zustandes mit der besitzenden Person, durch deren Unverletzlichkeit er gegen diejenigen Arten der Verletzung mit gedeckt wird, durch welche stets zugleich die Person berührt werden würde. Die Person nämlich soll schlechthin sicher seyn gegen jede Gewalt; geschieht ihr Gewalt, so ist dieses immer ein Unrecht.’<sup>233</sup>*

This passage is significant because it differs from his statement in the fourth edition, where he said:

*‘Fragt man nun nach dem Grund, warum diese Art des Schutzes gegen Gewalt eingeführt ist, d. h. warum der Vertriebene eben den Verlorenen (vielleicht ganz unrechtlichen) Besitz wieder erhalten soll, so kann man allerdings sagen, dieser Grund liege in einer allgemeinen Vermuthung, der Besitzer dürfte wohl auch Eigenthümer seyn. Insoferne also kann man den Besitz als einen Schatten des Eigenthums, als ein präsumtives Eigenthum, betrachten, nur trifft dieses lediglich die Begründung des Rechtsinstituts im allgemeinen, durchaus nicht den Rechtsgrund irgendeines concreten Besitzes. Dieser*

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<sup>233</sup> Savigny (n 136) 40

*Rechtsgrund liegt vielmehr lediglich in dem Schutz gegen die formelle Verletzung, weshalb eben die possessorischen Interdicte eine durchaus obligatorische Natur haben (§. 6) und auf keine Weise für provisorische Vindicationen gelten können (§. 36).<sup>234</sup>*

So here, he called possession a ‘shadow’, a ‘presumption’ of ownership. He also maintained that the justification for interdicts was not the presumption of ownership but the protection of the will. Thus, interdicts were obligatory, thus, rights *ad rem*, not *in rem*. Perhaps to clarify his point against other views, he abandoned the definition of possession as a ‘shadow of ownership’ to avoid any confusion about the nature of interdicts in the 6<sup>th</sup> edition.

Interestingly, in the said edition, he returns to its original thesis of his 1st edition where we no longer find any reference to possession ‘as a shadow’ of ownership. Now he merely states:

*‘Ganz abweichend von dieser Ansicht sehen die Meisten jede Verletzung des Besitzes für eine materielle Rechtsverletzung an, den Besitz selbst also für ein Recht an sich, nämlich für ein präsumtives Eigenthum (1), die possessorischen Klagen für provisorische Vindicationen. Dieses letzte, als die practische Seite der Meinung, wird unten (§. 36) ausführlich widerlegt werden.’<sup>235</sup>*

In the footnote (1) he indirectly concedes his shift,

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<sup>234</sup> Savigny, *Das Recht des Besitzes* (4<sup>th</sup> edn, Hayer 1822) 9

<sup>235</sup> *ibid* (6<sup>th</sup> edn, 1837) 9

*„Ich nenne hier nur den neuesten Vertheidiger dieser Ansicht, Hufeland vom Besitz, S. 43-45. – In der dritten Ausg. des gegenwärtigen Werks war der Versuch gemacht worden, dieser Ansicht eine richtige Seite abzugewinnen. Am Schluss des §. 6. wird gezeigt werden, warum jetzt (in der 6. Ausg.) dieser Versuch wieder aufgegeben worden ist.“*<sup>236</sup>

Savigny must acknowledge that his view of *possessio ad interdicta* admits of an exception since the sources list cases where interdicts are granted even though there is no *possessio (civilis)*. Nevertheless, he believes that the modern law of possessory interdicts must be strictly kept to the Roman and not mediaeval.

His view that interdicts are delictual/obligational is consistent with his view on *rei vindicatio* as presented in the *Pandektenvorlesung* 1824/25: He says that *rei vindicatio* is an *actio in rem*, but from the moment the owner is prevented from exercising his rights by a certain person, the relation becomes delictual/obligational.<sup>237</sup>

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<sup>236</sup>ibid fn 1

<sup>237</sup> Hammen (n 74) 19: ‘Bei den actiones in rem entsteht dies obligatorische erst im Augenblick der Verletzung.’ For an interesting parallel of this view in Scots Law see F H Lawson, ‘Rights and other relations in rem’ in *Festschrift für Martin Wolff* (Mohr 1952) 117: ‘Scots Law speaks of the obligation of the possessor in the same part of the law in which it deals with the obligations to restore unjust enrichment, or to make reparation for damage unlawfully inflicted. [...] the peculiarity of the right in rem is not that it operates against persons generally but that it imposes a duty *in personam* upon anybody who takes possession of the thing over which it exists.’



#### 2.5.4. Possession as ‘Physical Ability’

In this passage, we will discuss how Savigny constructs the argument that possession is retained merely through ‘physical ability’ (*physische Möglichkeit*). Then, we quote longer passages in full, to give a picture of how Savigny weaves his arguments with the sources.

*‘Wer ein Stück Geld in der Hand hält ist Besitzer desselben, daran ist kein Zweifel: und von diesem und andern ähnlichen Fällen wurde eben der Begriff einer körperlichen Berührung überhaupt abstrahiert, welche in allem Erwerb des Besitzes das wesentliche [151] seyn sollte. Aber es liegt in jenem Fall noch etwas anderes, was nur zufällig mit dieser körperlichen Berührung verbunden ist: nämlich die physische Möglichkeit, auf die Sache unmittelbar zu wirken, und jede fremde Wirkung auf sie auszuschließen. Dass beides in jenem Fall enthalten sey, wird niemand läugnen: dass es mit körperlicher Berührung nur zufällig verbunden sey, folgt daraus, dass jene Möglichkeit ohne diese Berührung, und eben so diese Berührung jene Möglichkeit gedacht werden kann. Das erste: denn wer in jedem Augenblick eine Sache ergreifen kann, die vor ihm liegt, ist ohne Zweifel eben so unumschränkter Herr dieser Sache, als wer sie wirklich ergriffen hat. Das zweite: denn wer mit Stricken gebunden ist, berührt diese unmittelbar, und doch könnte man leichter behaupten, dass er von ihnen besessen werde, als dass er sie besitze.*

*‘Jene physische Möglichkeit also ist das, was als factum in allem Erwerb des Besitzes enthalten seyn muss: aus ihr lassen sich alle einzelnen Bestimmungen der Gesetze auf gleiche Weise erklären, körperliche Berührung ist in jenem Begriff gar nicht enthalten [...]* Dieser Satz ist jetzt zu beweisen, d.h. es ist zu zeigen, dass er in allen Anwendungen

*würklich enthalten ist, die sich in den Gesetzen finden. Dann erst wird es möglich seyn, diesem Begriff der körperlichen Handlung (factum) vollständig zu bestimmen, da er hier nur angedeutet werden konnte.'*<sup>238</sup>

‘Somebody who holds a coin in his hand is a possessor of it; there is no doubt about this. Moreover, from this, and other, similar, cases the concept of corporeal contact as such was deduced, which is supposed to be essential for every acquisition of possession. But something else lies in this case too; something that is only accidentally linked with corporeal contact, namely, the physical ability to directly control an item, while excluding everybody else’s control from it.’

‘Nobody will deny that both instances are present in the case mentioned above. The fact that it is only linked by chance with corporeal contact follows from the fact that the said ability can be conceived without the contact, and vice versa. THE FIRST: for anybody who can grasp a thing that lies in front of him, at any given moment, is undoubtedly as much an absolute master over the thing as the one who has taken hold of it. THE SECOND: Someone who is tied with ropes is in direct contact with them, but one could easily claim that he is rather possessed by them, than that he possesses!

‘This physical ability is therefore what must be contained as a *factum* at every acquisition of possession. From the latter, all individual requirements of the laws can be explained in the same way. Corporeal contact is not at all contained in this concept [...] It is now time to prove this sentence, namely, to demonstrate that it is contained in the laws because only

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<sup>238</sup> Savigny (n 8) 125.

then will it be possible to comprehensively define the concept of corporeal action (*factum*), as he could here only be alluded to.’

In this passage, Savigny makes a declaration that will receive much attention from subsequent scholarship and, therefore, merits our close attention. His syllogism runs thus: The traditional view that corporeal contact is necessary for the acquisition of possession comes from the visualization of the quotidian example of somebody holding a coin in his hand. But, he says, there are two elements involved, one is the physical ability (*physische Möglichkeit*) to control an object, and the other is the corporeal contact (*körperliche Berührung*).

In the example cited above, both elements happen to be present. However, Savigny argues, this need not always be the case since the two elements can exist separately. For example, it is conceivable that one has physical ability without having physical contact. It is also possible, and here his argument becomes sophistry, that one is ‘in touch’ with a thing but ‘held’ by it rather than holding it, as it is the case of a person tied in ropes. Therefore, he concludes that only the first element is the one that is essential for holding possession. Having proceeded through syllogisms, distinguishing the ‘necessary’ from the ‘sufficient,’ Savigny says he will now demonstrate how this concept is contained in the laws, meaning the Roman sources.

So, to ‘prove’ his argument from the sources, Savigny cites the following passages: Ulp. D.6,1,77; Paul. D.41, 2, 3, 1; Cel. D.41, 2, 18, 2. The choice is interesting because they all deal with an exception to the principle that possession is acquired ‘*animo et corpore*,’ but also because they offer instances of gradual physical distance of the acquirer from the object of acquisition. Something that will be important to Savigny’s argument, as we will see further down. The first excerpt Ulp. D.6, 1, 77 reads thus:

*‘Quaedam mulier fundum non marito donavit per epistulam et eundem fundum ab eo conduxit: posse defendi in rem ei competere, quasi per ipsam adquisierit possessionem veluti per colonam. Proponebatur, quod etiam in eo agro qui donabatur fuisset, cum epistula emitteretur: quae res sufficebat ad traditam possessionem, licet conductio non intervenisset.’*

The above passage concludes that a man acquired possession of a piece of land that was donated to him by a woman through a letter she sent him. Here Ulpian considers it sufficient for the transmission of possession that the man was standing on the land when the said letter arrived. The second passage is Paul. D. 41, 2, 3, 1 :

*‘Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore. quod autem diximus et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet : sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere.’*

It is noteworthy that our text is structured in such a way that it starts with a broad explanation of a principle, followed by an interpretative example.<sup>239</sup> In the said example, it is deemed sufficient that the person acquiring possession simply enters any part of the lot with the relevant intention (*mente*) and contemplation (*cogitatione*). Therefore, compared to the previous example, he is physically even further remote from the object of acquisition.

The third excerpt that Savigny cites is Cels. D. 41,2,18, 2:

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<sup>239</sup> Hausmaninger (n 223) 16

*‘Si venditorem quod emerim deponere in mea domo iusserim, possidere me certum est, quamquam id nemo dum attigerit: aut si vicinum mihi fundum mercato venditor in mea turre demonstrat vacuumque se possessionem trader dicat, non minus possidere coepi, quam si pedem finibus intulissem.’*

In this excerpt, Celsus cited two parallel cases, connected with *aut*.<sup>240</sup> In the first instance, an item is delivered to my house, and the question is if the buyer acquires possession even if he does not physically touch the item. Celsus affirms this. In the second case, the buyer of a plot of land becomes possessor after the said object was shown to him from a tower and it was agreed that he received *vacuumque possessionem* (empty possession).

In the first example, it is unclear where the buyer is at the time of the purchase, if he is in the house or not, and whether it makes a difference, as Celsus’ answer is cautious. However, it can be assumed that it would make no difference since even the absent buyer has a sphere of influence in his own house.<sup>241</sup>

Therefore, comparing the three examples, we see that Roman sources allow possession to be acquired through different levels of physical contact between the subject and the object, with the third example, the buyer being the remotest away. Savigny uses the said examples to set up his general rule about the acquisition of possession through the mere ‘ability to control’ an item, as opposed to the physical presence. What is merely needed is corporeal presence, a presence that

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<sup>240</sup> *ibid* 18

<sup>241</sup> *ibid* 19

can, in turn, be influenced by the will.<sup>242</sup> Savigny uses the sources deftly to underpin his theory that physical control over the object is unnecessary. What is required is merely ‘the ability to control it,’ something he had sought to prove above through a syllogism. He is consistent with his proclaimed method. He looks at both sources but also tries to ‘systematize’ them, namely, ‘interpret’ them according to the principles of logic.

This apparent contradiction in Savigny's theoretical framework was already highlighted in the 50s by the legal historian Franz Wieacker, who noted a contradiction between the organic law of the ‘*Volksgeist*,’ on the one hand, and the ‘*Juristenrecht*’ ‘Justinian law,’ therefore, an alien law, on the other.<sup>243</sup>

Wieacker believes that Savigny seeks to avoid this contradiction by conceiving the ‘*Volk*’ not as the actual people but as an ideal society, thus, being able to sift out only the intellectual achievements of worthy people.<sup>244</sup> Consequently, in his doctrine of possession, he has no qualms in rejecting the *Ius commune* tradition and openly returning to the sources.<sup>245</sup>

Moreover, Savigny does not address the fact that these instances of the *Digest* might refer to particular circumstances, either because the given land is difficult to reach or if the delivery at the house was the result of extenuating circumstances that might call for exceptions in the law.

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<sup>242</sup> Savigny (n 8) 127

<sup>243</sup>Wieacker, (n 26) 111

<sup>244</sup>ibid; Savigny (n 82) 93 distinguishes between: ‘*gesunden dogmatischen Neubildungen des gemeinen Rechts und ungesund.*’

<sup>245</sup>ibid

## 2.6. Conclusion

Savigny's monograph *Das Recht des Besitzes* is a ground-breaking examination of possession as far as it attempts to delineate definitions of the various degrees of possession clearly. In this way, he is faithful to his programmatic statement about the request for clarity. Nevertheless, Savigny's view of possession cannot be divorced from its overall jural concept.

He also seeks to delineate clear definitions of what possession and its various kinds are. He aims to attach each kind of possession to a different result. Thus, *possessio naturalis* sometimes leads to interdicts, while *possessio civilis* to *usucapio*. He also maintains that there are instances where *possessio naturalis* does not allow interdictory possession; here it is only *detentio*

To underpin his theory, Savigny cites several texts from the Digest, Paul. D. 41, 2, 3; Iul. D. 41, 5, 2; Ulp. D. 43, 16, 1, 9 and comes to the following conclusion regarding the nature of possession. He says that possession is a fact, but with jural consequences, therefore, it is both a fact and a right. Further, he distinguishes between jural possession (*juristischer Besitz*) and mere detention, the latter having no jural consequences.

He distinguishes three kinds of possession, namely, the possession that leads to *usucapio*, a possession that allows protection through interdicts, and mere *detentio*. These are called: *possessio civilis*, 'possession proper' and *possessio naturalis*. The former are jural possessions, the latter is a mere fact. Their relation is that of the genus to species, where *detentio* lies at the core of all.

The sources do not use the term *detentio*, but only *possessio civilis*, *possessio naturalis* and sometimes *possessio*. Savigny believes that the terms *civilis* and *naturalis* are used interchangeably and that *possessio naturalis* has a twofold meaning, sometimes it can mean detention, sometimes

possession proper. However, his theory is problematic because the sources refer to *possessio civilis* once, namely in Jul. D. 41, 5, 2, 1: ‘*ut possessio non solum civilis sed etiam naturalis intellegetur.*’ Savigny cites this but fails to say that it is an hapax legomenon in the whole corpus of the Digest.

Further, Savigny claims that *detentio* as a mere physical control requires the element of the will (*animus*) to become possession, and he cites the famous passage of Paul for this Savigny further distinguishes between *animus domini* for direct possession and *animus possidendi* for derivative possession. However, the sources do not speak about *animus domini* or *animus possidendi*. Savigny feels he can reconstruct this differentiation of *animi* through his overall conceptual classification of possession.

Savigny himself had to acknowledge that possession thus defined becomes problematic considering the sources themselves, as the *Digest* recognized the holder of *precarium*, the sequester and the creditor of *pignus* as possessors, despite them not having *animus domini*. This, in turn, led him to create the artful and somehow forced construction of the ‘derivative possessor,’ a concept mentioned nowhere in the sources.

Furthermore, his view that ‘derivative possession’ depended on the original possessor transferring his possession on somebody else, thus, being disposable, does not tally with the fact that in the Roman sources it was only assumed in certain instances, strictly defined by law, like *emphyteuta*, *pignus*, and sometimes *depositum* and *precarium*.



The theory of derivative possession was justly attacked as the weakest part of Savigny's theory of possession.<sup>246</sup> The lack of its documentation and the logical inconsistency will be attacked, especially by Jhering in the following decades.

Savigny cites Paul as the authority for the duality of possession, composed of *corpus* and *animus*.<sup>247</sup> However, if we look at the sources, we find Paul. D. 41,2,31: '*apiscimur possessionem corpore et animo.*' We acquire possession in this way; Paul does not define what possession is, only how we acquire it. There is a difference between the two.

To sum up, we can say the following: The Roman sources only contain the terms *animus domini*, *detentio* (*in possessione esse*) and *possessio* (*naturaliter aut civiliter*). From this Savigny proceeded to develop new concepts, such as *animus possessionis*, *possessio civilis* and *possessio naturalis*. He carefully delineated these different terms, operating in building blocks. He says *detentio* lacks the *animus*; with the *animus*, *detentio* becomes *possessio*. With an additional feature, namely, *iusta causa, bona fides*, possession becomes *civilis*.

In addition, he ordered the terms in their relation to each other. Thus, *detentio* is the genus, contained in all forms of possession, also *possessio naturalis*. *Possessio naturalis* is opposed to *possessio civilis*, as it is a 'lesser' possession. However, *possessio naturalis* encompasses three

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<sup>246</sup> Paola Biavaschi, *Ricerche sul precarium* (Giuffrè 2006) 10: '1' *aspetto piu fragile di tutto il monolitico sistema.; 11: La teoria legata all' abgeleiteter Besitz non era tuttavia sostenuta da testimonianze presenti nelle fonti.*'

<sup>247</sup> Savigny (n 8) 82: '*Es muss nämlich zu jeder Detention, wenn sie als Besitz gelten soll, eine bestimmte Absicht, ein bestimmtes Wollen (animus) hinzukommen.*'

different ‘degrees’ of possession: first, all kinds of derivative possession, namely, pledge and *depositum* and *precarium* in exceptional circumstances; second, it can be *detentio* with *animus*, but without *bona fides* or *iusta causa*, in case of a stolen item. Third, *possessio naturalis* can be *pure detentio* ‘holding’ (*esse in possession, tenere, corporaliter*). if the holder is a slave, a *furiosus*, or the object is *res extra commercium*. Further in cases of *emphyteuta*, *depositum* and *precarium* as a rule in Roman law.

What makes Savigny’s argument complex is that his concepts are not merely delineated as genus and species, in the Aristotelean sense of *diairesis*, thus, stand in the relation of a broader to a narrower concept; a fact is also procedurally relevant since the bonitary possessor always has the option of the interdicts, but not vice versa.<sup>248</sup>

But what is more, his concepts (*Begriffe*) are also related in the shape of a Venn diagram. So, *detentio* is both in ownership and possession, though these two are strictly separated. Then both *possessio* and *possessio civilis* belong to the category called jural possession (*juristischer Besitz*) as opposed to *detentio*. While *possessio* proper (*possessio ad interdicta*) can be both *possessio civilis* and *possessio naturalis*. *Possessio naturalis* encompasses *detentio* but also *possessio*.

From the background of Fichte, we need to look more closely at his concept of *detentio* and especially the following:

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<sup>248</sup> Savigny (n 8) 57: ‘*possessio ad interdicta ist ganz in der possessio ad usucapionem enthalten, und diese hat nur noch einige Bedingungen mehr als jene. Wer also ad usucapionem besitzt, besitzt immer auch ad interdicta.*’

*‘Dieser Zustand, welchen man Detention nennt, und welcher allem Begriff des Besitzes zum Grunde liegt, ist an sich durchaus kein Gegenstand der Gesetzgebung, und der Begriff desselben kein juristischer Begriff: allein es zeigt sich sogleich eine Beziehung desselben auf einen juristischen Begriff, wodurch er selbst Gegenstand der Gesetzgebung wird. Da nämlich das Eigentum die rechtliche Möglichkeit ist, auf eine Sache nach Willkür einzuwirken, und jeden andern von ihrem Gebrauch [3] auszuschließen, so liegt in der Detention die Ausübung des Eigentums, und sie ist der natürliche Zustand, welchem dem Eigentum, als einem rechtlichen Zustand, correspondirt.’<sup>249</sup>*

‘This situation, which is called *detentio*, and lies at the core of the entire concept of possession, is not an object of legislation, while its concept is not legal. Nonetheless, it has at the same time related to a jural concept, which in turn makes it the object of the legislation. For in the same way that ownership is the legal possibility to control a thing at will while excluding everybody else from its use, *detentio* forms the exertion of ownership being the natural situation that corresponds to the jural situation.’

Here detention is a natural situation, as opposed to ownership and possession which jural relations. This is not surprising if we turn back at Fichte. According to him, there is only a will of intelligent beings into a priory right before the formation of the state. The legal order comes in later when the individual beings form a state and is used to regulate the individual wills. Therefore, possession is protected. And this makes it clear why Savigny insists that interdicts protect the person.

Further down, when he mentions the right of self-defence he says:

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<sup>249</sup> Savigny (n 8) 38

*‘da die Notwehr überhaupt bey der blosen Detention eben sowohl möglich und erlaubt ist, als bey dem juristischen Besitz.’*

What Savigny did, was to take a Roman legal term, *detentio*, to construct it as a natural term of the *conditio naturalis*, to see it as a manifestation of human will that merits protection, and to use that term as a building block for his concepts of ownership and possession. Consistent with his views, he sees the interdicts as protecting the will and the personality. However, again the Roman sources are reticent about the reason for interdicts.

Savigny came to his findings by looking at the texts and creating concepts that he believed lay in the structure of Roman law. He openly admits that the distinction between *animus domini* and *animus possidendi* or *sibi habendi* – both sub-categories of the *animus possidendi*, on which he bases his theory of derivative possession, does not appear in the *Digest*. He claims, however, that this does not impinge upon the verity of his findings either, as the ‘Romans certainly, and without any doubt, had a concept for it.’<sup>250</sup> We must also add that Savigny did not cite his sources carefully, and from the sentence *naturaliter aut corporaliter possidemus* it is a stretch to create the term ‘natural possession.’

What will prove most problematic for future generations of jurists, is Savigny’s a-priori statement that possession is a fact, not a right, merely with legal consequences. Consistent with this, he claims that interdicts only protect the person, thus, are related to delictual remedies. He nowhere actually proves his thesis, apart from using a ‘systematic’ argument. He says interdicts

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<sup>250</sup> *ibid* 84: ‘Darum kann es ihr auch nicht zum Vorwurf gereichen, dass die Römischen Juristen keine Namen dafür haben: die Begriffe selbst liegen ohne Zweifel im Römischen Recht.’

are not placed near delictual actions because they are no actions. His argument seems contrived and derives from the influence of natural law, namely, the protection of the will and the personality.

But otherwise, he adhered to his concept, laid out that he wants to look both at the system organically and the words. He did not say how much he would rely on each and how he would operate if there were a clash. But the influence of mathematical reasoning is apparent here, and the desire to create strictly delineated terms.

The major inconsistency in his work is his effort to perceive interdicts as protecting the person. This is consistent with his view that possession is a mere fact, not a right, but it can also be explained from the background of natural-law philosophy. Savigny maintains that possession is protected for the sake of social peace. As we will see later, Jhering will fiercely object to this as he sees the reason why we protect possession in the protection of property. Savigny's view bears strong resemblances to Fichte's, who proposed, as we saw above, that legal science has as its main task to regulate the individual wills and prevent societal clashes.

Despite its inconsistencies, Savigny's theory on possession is the first attempt at a thorough and sharp definition of possession. His thoughts would be debated for many generations of jurists to come. Though he sees himself as belonging to the 'Historical School,' his work set the foundation of what would later become known, sometimes pejoratively, as the '*Begriffsjurisprudenz*' (conceptual jurisprudence), a school of thought that worked with definitions as its essential elements.<sup>251</sup>

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<sup>251</sup> Wieacker (n 26) 206

The philosopher and mathematician Christian Wolff (1679 – 1754) is often called the father of *Begriffsjurisprudenz* because he designed a most comprehensive system of natural law in his *Ius naturae: Methodo Scientifica Pertractatum* (1748).<sup>252</sup>

His view reiterated throughout his life, the Roman law, as preserved in the *Corpus iuris civilis*, contains a *ratio scripta* which the jurist only needs to sift out, something he believes he did. As he showed in his theory of ‘objective possibility’ his tools are the tools of formal logic.

Significant is not only Savigny’s definition of possession as a hybrid construct, fact and a right but his further distinction between facts with the legal consequence (*rechtserhebliche Tatsachen*) and facts without legal consequence. This would become a major theme in the ‘Pandectist’ tradition and will be discussed below.

Paul Sokolowski, an early critic of Savigny’s theory of possession, has claimed that the concept of *animus domini*, is indebted to Kant’s theory of the will. Sokolowski believes that the requirement of will for possession goes back to the metaphysic of morals and has influenced not only Savigny but also the *BGB* and the *ABGB*.<sup>253</sup>

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<sup>252</sup>Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Vandenhoeck & Ruprecht 1967) 320; Waldemar Schreckenberger, *Die Gesetzgebung der Aufklärung und die europäische Kodifikationsidee* in Gottfried Baumgärtel et al (ed), *Festschrift für Heinz Hübner zum 70. Geburtstag* (de Gruyter 1984); Schlosser, (n 7) 109

<sup>253</sup> Sokolowski P, *Die Philosophie im Privatrecht Band 2; Der Besitz im klassischen Recht und dem deutschen bürgerlichen Recht* (first published 1907; Scientia 1959)

This view was attacked by Emil Strohal, who claimed that the concept of *animus domini* is older than both Kant, or the drafts to the *ABGB*, and among the later German practising lawyers (*späteren Deutschen Praktikern*), by which he means the jurists of the *Usus modernus*.<sup>254</sup> We have shown that this is true and that the term is already found in Struve and Lauterbacht, but this does not exclude the fact that Kant's concept of the underlying will could have made an impression on Savigny, and that Kant was a direct influence.

The extent to which Kant might influence Savigny was highly debated. Several scholars throughout the twentieth century argued for a significant influence of Kantian thought on Savigny.<sup>255</sup> It is noteworthy that Savigny, in a Kantian way, justifies the protection of possession because the latter is an expression of a person and their will.

Scholars of Savigny, like Aldo Mazzacane believe that Savigny's philosophical views in his *Methodologie* are hard to pin down but that he eventually turned his attention to Roman law entirely, thus, attempting a fusion of law and philosophy.<sup>256</sup> I find it convincing.

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<sup>254</sup> Emil Strohal, 'Literatur Beilage' (1909) Nr 14 *Deutsche Juristenzeitung* 273; see also Zwilgmeyer (n 108) 53 fn 6

<sup>255</sup> Hermann Kantorowicz, 'Savignys Marburger Methodenlehre' (1953) 53 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 465-471; Walter Wilhelm, 'Savignys überpositive Systematik' in Jürgen Bluehdorn and Joachim Ritter (eds) *Philosophie und Rechtswissenschaft. Zum Problem ihrer Beziehung im 19 Jahrhundert* (Klostermann 1969) 123, 126

<sup>256</sup> Mazzacane (n 75) 41-42

The shortfalls of Savigny's construction are that the sources he believes to have derived the terms do not contain the term *detentio*. Instead, he presents this as axiomatic in a statement, 'this condition, which one calls *detentio*, and which lies at the core of all possession.'<sup>257</sup>

Furthermore, the sources do not explain *naturalis* as opposed to *civilis*, they merely contrast it. Most notably, Savigny fails to mention both Mod. D. 41, 3, 3, and Ulp. Epit. 19, 8, where we only have *possessio* for usucapio, instead of *possessio civilis*.

Further, Savigny fails to explain convincingly while the sources would use *possessio naturalis* in apparently two ways, first to denote '*possessio überhaupt*', as in interdicts, Ulp. D. 43, 16, 1, 9: '*deicitur is qui possidet, sive civiliter sive naturaliter possideat: nam et naturalis possession ad hoc interdictum pertinent.*' Ulp. D. 43, 16, 1, 10: '*denique et si maritus uxori donavit eaque deiecta si, poterit interdicto uit: non tamen si colonus*'. In addition, Paul. D. 41, 2, 1,4: '*quoniam res facti infirmari iure civili non potest.*'<sup>258</sup> He fails to explain why the sources would operate with the same term for both *possessio* and *detentio*.

Further, he claims axiomatically that the will is needed to turn *detentio* into *possessio*, without justifying it.<sup>259</sup> His view that *animus possidendi* is a pleonasm; merely describing *detentio* is contradicted by himself when he admits of derivative possession. Savigny believes to have found justification for the requirement of *animus* in the famous passage of Paul. However, there is a flaw

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<sup>257</sup> Savigny (n 8) 38: '*Dieser Zustand, welchen man Detention nennt, und welcher allem Begriff des Besitzes zum Grunde liegt.*'

<sup>258</sup> *ibid*: '*also das Civilrecht erkennt diesen Besitz nicht an.*'

<sup>259</sup> *ibid* 90: '*ohne animus, kein Besitz von den Gesetzen anerkannt wird.*'



in his reasoning, as Paul merely describes how possession is acquired, not what it is. Despite this, the Romans allowed for variations of the requirements in different modes of possession.

We see here that Savigny, faithful to his programmatic concept of identifying basic definitions and rules, ‘identified’ a basic concept of possession, through the process of reduction, thus, interpreting Paul. D. 41, 2, 3, 21 to fit the possessory interdicts.<sup>260</sup>

He operates similarly when he points to Theophilus’ paraphrase to support his doctrine of the *ius possidendi*. However, Theophilus does not mean the will to possess for oneself but to be an owner.<sup>261</sup> Eduard Böcking was the first to claim that the translation of the Greek was wrong as *animus domini* but should be *dominantis*.<sup>262</sup>

We see that Savigny’s aim at finding a general principle and definition into the sources lead him to create a general concept of possession. However, his view that the *Digest* contained only individual cases was justly criticised by Larenz on the basis that the former has simply not justified this thesis.<sup>263</sup>

Savigny attempts to sidestep the whole problem by emphatically stating that it does not matter the Romans had no name for these concepts, namely, derivative possession, direct

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<sup>260</sup> *ibid* 69

<sup>261</sup> Kiefner (n 92) 42; Savigny (n 8) 79

<sup>262</sup> Eduard Böcking, *Einleitung in die Pandekten des gemeinen Civilrechts* (2nd edn, Marcus 1853) 449, 450

<sup>263</sup> Larenz (n 98) 13

possession, *animus possidendi*, *animus domini*, as those terms ‘are certainly existing in Roman law.’<sup>264</sup>

His emphasis on protecting the person's will to justify the possessory interdict shows his debt to Kant, and Oliver Wendell Holmes first acknowledged this.<sup>265</sup>

If Ernst Zitelmann could accuse Savigny of violating the sources elsewhere,<sup>266</sup> the same can be claimed for his reading of the sources on possession. At the same time, the German philosopher Erich Rothacker aptly declared about Savigny that the rationalism he had not conceded to the enlightenment, he generously conceded to Roman law.<sup>267</sup>

Besides, Savigny does not decide whether possession is a fact or a right; he vaguely says it is both because it has a legal consequence but fails to justify this.<sup>268</sup> This is not entirely true because Savigny has explained that possession can be acquired by violence and as violence is no

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<sup>264</sup> Savigny (n 8) 85

<sup>265</sup> Oliver Wendell Holmes (n 117) 207 209; see: Posner (n 104) 535. For a partial defence of Savigny. For a detailed discussion on Posner's view on Savigny's theory of possession, see Mathias Reimann ‘Savigny - Übersetzungen und Savigny-Bilder in der Welt des Common Law’ in Duve and Rückert (n 66) 87

<sup>266</sup> Ernst Zitelmann, *Irrtum und Rechtsgeschäft* (Duncker & Humblot 1879) 574

<sup>267</sup> Rothacker (n 39) 428.

<sup>268</sup> Kenichi Moryia, *Savignys Gedanke* (Klostermann 2003) 185: ‘Savigny hat aber seine Antwort auf sie nirgends thesenhaft formuliert [...] Jeder Versuch, die Kernaussage der Besitzlehre Savignys herauszuarbeiten, misslingt.’

jural action (*keine juristische Handlung*), and also he claims that no possessor can be seen as a successor of a previous one, thus, possession is acquired anew, independently of the first predecessor.<sup>269</sup> Furthermore, he believes that the protection of possession against violence is not due to a right of possession itself, but rather based on general principles of criminal law and self-defence. Thus, jurisdiction protects possession because it protects the person.

To sum up, we can for now say that Savigny sought to define possession in a rational, mathematical way, drawing a table that resembles a Venn diagram. He believes he was able to elicit this from the Roman sources. In the *Besitz*, Savigny himself proceeded in the way he preached in his lectures on the Digest in Berlin (*Pandectenvorlesung* of 1824/25):

*‘Im römischen Recht müssen wir die Entstehung der vorhandenen Regeln aufsuchen, und uns so ihres Principis bemächtigen. Die Arbeit des römischen Juristen ist unvollendet, weil sie es in materieller Hinsicht unvollendet bleiben musste; in ihrem Geiste müssen wir dieselbe fortsetzen. Dies ist die historische Methode.’<sup>270</sup>*

Here the author says that the contemporary jurist must sift out of the sources the principles behind it since Roman law is incomplete, and we must continue it in spirit. This professed method he applies to the concept of possession with far-reaching consequences.

Savigny’s perception of possession must have a hybrid nature, a fact with legal consequences that will inform the heated debate on possession, which was to inform the nineteenth and twentieth centuries in Germany and beyond.

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<sup>269</sup> Savigny (n 8) 50

<sup>270</sup> Hammen (n 74) 3

Towards the end of the nineteenth century, Carl Adolf Schmidt (1815 – 1903) criticized Savigny and the ‘Historical School’s entire perception of the suitability of Roman law for the German in the whole monograph.<sup>271</sup> Schmidt claimed that Savigny and his followers had fallen short of their professed aim to explain why Roman law was historically necessary for Germany.<sup>272</sup>

Schmidt believed that Savigny and his heirs fell into a tautology by merely arguing from the fact that because Roman law is prevalent in Germany today, it must have been on account of a ‘historical’ or ‘inner necessity’ or ‘inner truth’ (*innere Wahrheit, innere Nothwendigkeit*) that it prospers in this matter.<sup>273</sup>

In truth, Roman law, according to Schmidt was an imposed law, by the jurists ‘*Juristenrecht*’ developed by academia and later found its way into the courts through the princes who supported it, thus, suppressing the ‘*Volksrecht*’ against the people’s will.<sup>274</sup> This Savigny

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<sup>271</sup> Carl Adolf Schmidt, *Reception des römischen Rechts* (Stillersche Buchhandlung 1868)

<sup>272</sup> *ibid* VIII, 14, 27, 275, 284: ‘*so folgt er [sc. Savigny] auch darin der bisherigen Methode, dass er das römische Recht rein theoretisch und ohne Rücksicht auf seine praktische Anwendbarkeit darstellt, ohne zu ahnen, dass grade hierin das Ungeschichtliche der neuern Jurisprudenz liegt.*’  
292, 295

<sup>273</sup> *ibid* V: ‘*Schon in der Thatsache der Reception selbst der beste beweis für ihre Nothwendigkeit*’;  
25, 57, 59, 175

<sup>274</sup> *ibid* 42, 66, 68, 69, 79, 88, 164

ignores, and what is more, he failed to convincingly explain why this ‘*Juristenrecht*’ is the ‘*Volksrecht*’ of the German people.<sup>275</sup>

Savigny’s quest to understand how classical Roman law was before it underwent various transformations is praiseworthy. Still, it fails to explain why this law of the Roman people is the most suitable for the German people.<sup>276</sup> Schmidt claims that Savigny and the ‘Historical School’ resemble the Glossators who thought that Roman law was the best of laws and the only suitable because they had simply not bothered to study anything else.<sup>277</sup>

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<sup>275</sup> *ibid* 59, 62, 176, 217, 279

<sup>276</sup> *ibid* 23, 44

<sup>277</sup> *ibid* 43, 45, 47, 288, 289

## Chapter 3. Critique of Savigny: What is possession?

### 3.1. Introduction

Savigny's monograph on possession received particular attention from students of law, civil servants in the various German principalities, and scholars around Germany, both contemporary and of later generations. It also attracted the attention of the philosopher and colleague of Savigny, Hegel, who considered Savigny's concept of possession as being abstract from ownership 'one-sided.'<sup>278</sup>

In this chapter, I will focus on a selected group of scholars and practitioners who criticised Savigny. From the vast material available I believe I have selected the most vocal critics that seminally shaped the discussion on the nature of possession. I will examine the following points: Savigny's view on possession; his reading of the sources, and his general concept. I will seek to trace how the debate on possession relates to the larger preoccupation.

This otherwise disparate group of jurists who adopted, at least, some of the principles of Savigny and considered themselves as part of the '*Historische Schule*' because of the 'School's, and especially Savigny's, and Hugo's, as its founders, professed aim to reach back at the historical

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<sup>278</sup> Georg Wilhelm Friedrich Hegel, *Die Philosophie des Rechts: die Mitschrift Wannemann (Heidelberg 1817/18) u. Homeyer (Berlin 1818/19) /G.W.F. Hegel. Karl-Heinz Ilting (1st edn Klett-Cotta 1983) §27A, 29-32: 'Der Besitz ist wesentliches Moment des Eigentums, und Savigny ist darum einseitig in seinem "Besitzrecht" weil er den Besitz bloss als Verhinderung der Verjährung betrachtet. '*

Roman sources. Nevertheless, we have already seen in our examination of Savigny that the label ‘*Historische*’ is simplistic and that Savigny’s views are more nuanced.

Apart from Thibaut, discussed above, Savigny’s famous treatise on possession attracted the attention of the noted legal scholars of the period: Anton Justus Friedrich Thibaut, Eduard Ganz, Georg Friedrich Puchta, Friedrich Julius Stahl, Adolf August Friedrich Rudorff, Theodor Maximilian Zachariä and Bernhard Windscheid.

What these men certainly had in common was that they all lived in the nineteenth century, held chairs of civil law and various notable German universities, and shared some of the views held by Savigny while criticising or attempting to ‘improve’ other parts. To describe them as a ‘School’ and a ‘Historical School’ is problematic if this presumes a homogeneity that cannot be postulated *a priori*.<sup>279</sup>

The question of who belonged to the ‘Historical School’ was already debated at the beginning of the nineteenth century and is still scrutinised by modern scholarship. The German legal historian Joachim Rückert, though acknowledging Savigny as the school's founder (*Das Programm schrieb ihr Savigny*),<sup>280</sup> concedes that, ‘*Der Topos Historische Rechtsschule ist also im Einzelnen nur mit großer Vorsicht zu gebrauchen.*’<sup>281</sup>

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<sup>279</sup> Eduard Gans, *System des Römischen Civilrechts im Grundrisse* (Dümmler 1827), 161 wonders why Christian Mühlenbruch and Zimmern are not included; See Haferkamp (n 106) 2, 23, 27

<sup>280</sup> Joachim Rückert, *Historische Rechtsschule nach 200 Jahren – Mythos, Legende, Botschaft* Studien zur europäischen Rechtsgeschichte, Savignyana (Klostermann 2011) 81

<sup>281</sup> *ibid* 96

Most recently, another German legal historian, Hans Peter Haferkamp, devoted an entire monograph to the topic. Haferkamp claims that one cannot find a comprehensive investigation on the ‘Historical School’ as a scientific group based on criteria of cohesion among the scholars until this day. Examinations have hitherto been fragmentary and thematic, comparing agreements and disagreements on different topics, such as codification.<sup>282</sup>

Haferkamp believes that it is important, first and foremost, to examine how individual members of the school were perceived by their contemporaries rather than by later generations, thus, avoiding the circular argument by associating certain persons with it and, then deducing from them the tenets of the school.<sup>283</sup> Haferkamp proposes that we should not perceive the ‘Historical School’ as a homogenous group but instead as a network of scholars based on personal relations, scientific exchange and similar characteristics.<sup>284</sup> It is not the purpose of this thesis to examine in depth the ‘Historical School,’ but it is important to stress that where the term is used, it is done so with an awareness of the problems this entails.

Moreover, I have included in my investigation the name of Theodor Maximilian Zachariä (1781 – 1847), roughly a contemporary of Savigny but traditionally not included in the group. Even today, he is lesser known. His academic career at Marburg was tragically cut short when he was declared insane (*pro mente capto*) and dismissed with a small pension because he had become

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<sup>282</sup> Haferkamp (n 106) 6

<sup>283</sup> *ibid* 13, 16

<sup>284</sup> *ibid* 14



inconvenient to powerful personalities in Hessen.<sup>285</sup> Nonetheless, Zachariä was a prolific writer who wrote one of the earliest responses to Savigny.

I have also included the work of Gustav Thon (1805 – 1882), a state minister for the Kingdom of Saxony and member of a noted family of civil servants and legal scholars. He was the father of the jurist August Thon (1873-1879). The discussion of the work of Thon is important here because it reveals the extent of the awareness of the debate on possession in Germany, not only within the academia but also among practising lawyers and civil servants who were dealing with daily legal practice. This is often overlooked in German scholarship on the matter.

### **3.2. Thibaut**

Anton Friedrich Justus Thibaut taught at Heidelberg. Due to his success and fame as a teacher, Heidelberg became a serious competitor to the newly formed University at Berlin, where Savigny was teaching. Many students started to prefer the former over the latter.<sup>286</sup> At Heidelberg, he co-founded with Christian Friedrich Mühlenbruch the legal periodical *Archiv für die civilistische Praxis*, whose co-editor he became in 1822.

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<sup>285</sup> William Fischer, ‘Zachariä, Theodor Maximilian’ in *Allgemeine Deutsche Biographie* 44 (1898), 652-653

<sup>286</sup> Hattenhauer (n 71) 6

Because of his fierce criticism against Savigny, Thibaut was described as the ‘antipode’ of Savigny by modern scholarship.<sup>287</sup> Nevertheless, his views are rather hard to pin down.

With Savigny and the ‘Historical School,’ Thibaut shared an aversion towards philosophy.<sup>288</sup> At the same time, he criticized the ‘Historical School’s attempt to ‘explain history out of history.’ Moreover, in a programmatic article published in the *Archiv für die Civilistische Praxis*, Thibaut explained his mission: the defence of legal practice and a desire to accord it its due place in the face of ‘misguided,’ new theories.<sup>289</sup>

His professed aim was to criticise any current theory if it appeared to him to be inadequate.<sup>290</sup> Thibaut praised the theorists of old, particularly Trendelenburg, whom he called, ‘*ein eleganter Jurist.*’<sup>291</sup> Thibaut explains that:

‘Legal theory cannot exist without a thorough study of practice [...] A large part of our legal books (namely, Roman law, especially its most excellent part, the *Pandectae*) did not

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<sup>287</sup> See Hans Kiefner, ‘A.F.J. Thibaut’ (1960) 77 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 304

<sup>288</sup> *ibid*

<sup>289</sup> Anton Friedrich Justus Thibaut, ‘Vertheidigung der Praxis gegen manche neuen Theorien’ (1822) Band 5 *Archiv für die civilistsiche Praxis* 314-14

<sup>290</sup> *ibid* 316: ‘*ich habe mir daher vorgenommen, dann und wann in dieser Zeitschrift dem herkömmlichen Recht gegen neue Theorien das Wort zu reden, wenn mir diese Theorien falsch oder ungenügend scheinen.*’

<sup>291</sup> *ibid* 314

come into being from philological-historical examinations, but out of the observation of life (*die Betrachtung des Lebens*).<sup>292</sup>

Thibaut does not explicitly mention the ‘Historical School’ but discusses various legal matters and opposes the recent views of both Sigmund Wilhelm Zimmern and Karl Unterholzner, both associated with it.<sup>293</sup>

Overall, his reference to Trendelenburg as an ‘elegant jurist’ and his overall critique suggested that he favoured an exegetic approach to Roman law, with a mind towards the practicability of its findings.

Much to the horror of Savigny and his followers, Thibaut requested that the views of laymen, both peasants and citizens (*Bauern und Bürgern*), be considered for the interpretation of the Roman sources.<sup>294</sup> Furthermore, Thibaut maintained that Roman lawyers, unlike his contemporary German lawyers, characterised by their ‘non-juristic stiffness’ (*unjuristische Hölzernheit*), stood out for their acute perception of life.<sup>295</sup>

As regards material law, Thibaut was significant for having vindicated the classical Roman concept of ownership (*dominium*) as an absolute right that did not admit of stratification. We have seen above that the Glossators, to align the Roman sources with contemporary medieval Germanic

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<sup>292</sup> *ibid* 315

<sup>293</sup> *ibid* 331, 345

<sup>294</sup> A F J Thibaut, ‘Über die Regel dies interpellat pro homine’ (1833) 16 *Archiv für die civilistische Praxis* 184

<sup>295</sup> *ibid* 184

practice, used the terms *dominium directum* and *dominium utile*, which were originally Justinian's substitution for the - by now - obsolete 'Quiritian' and 'bonitary' ownership, to support the feudal stratification of land. The Germanic law recognized an 'upper' owner and 'lower' owner, the former could fare with the property as he pleased, the latter could use it, and even pass on the usage to the descendants.

Thibaut explained in a monograph that the traditional interpretation of the sources is flawed and unclassical; that Romans knew only of an absolute concept of ownership, based on Justinian's mention of the *actio utilis* and *actio directa*, for the obsolete distinction between 'Quiritian' and 'bonitary' ownership<sup>296</sup> and any rights on somebody else's ownership are *ius in res aliena* (*dingliche Rechte*).<sup>297</sup> Through his careful reading of the sources, Thibaut helped vindicate the classical Roman concept of ownership as an absolute right.<sup>298</sup> His views will be important for the concept of the whole 'Historical School' and the design of the *BGB*.

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<sup>296</sup> Thibaut (n 112) II 85

<sup>297</sup> *ibid* 86: 'Solange der Eigenthümer die wesentlichen Proprietät-Rechte einem andern nicht gänzlich übertragen hat, und nur bloß erlaubt, das sein anderer einzelne Rechte an seiner Sache ausübe, ist und bleibt er wahrer Eigenthümer, und die, welchen jene einzelnen Rechte concedirt sind, haben nichts weiter, als ein *ius in re aliena*.'; 87

<sup>298</sup> Andre J van der Walt, *Property in the Margins* (Hart 2009) 30

### 3.2.1. Thibaut on Possession

Thibaut's monograph of possession appeared one year before Savigny's monograph on the same subject.<sup>299</sup> Here Thibaut defines Roman possession as primarily a physical holding, based on the etymology of the Latin word *possidere* and the German '*Besitzen*,' lit. 'to sit on something.' He continues that the law is necessary to protect this factual situation. But this protection must only comprise cases where the holder has both the will to hold (*die Absicht zu detinieren*) and a cause to hold the said object (*aus irgendeinem Grunde*)<sup>300</sup> Thibaut believes that the jurist who assumes possession in each instance must request the 'intention' (*die Absicht verlangen*) from the part of the holder to exclusively appropriate for himself (*sich ausschliesslich anmassen zu wollen*) the *factum* of possession. This he calls *animus detinendi*.<sup>301</sup>

Thibaut acknowledges that Roman law does not always follow his definition of 'original,' (*ursprünglichen*) natural (*natürlichen*) possession, but has broadened the concept of *detentio* in certain instances so that somebody who might appear to possess is considered to be a *detentor*.<sup>302</sup>

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<sup>299</sup> Anton Friedrich Justus Thibaut, *Über Besitz und Verjährung* (Mauke 1802)

<sup>300</sup> *ibid* 3: 'Das blosse Factum des Besitzes muss also in jedem Staat eine Quelle von Rechten werden, jedoch natuerlich nur insofern, als der Besitzende die rechtliche Absicht hat, den Besitz wirklich auszuueben, um die Sache aus irgendeinem Grunde zu detinieren.'

<sup>301</sup> *ibid* 5

<sup>302</sup> *ibid* 10

In other instances Roman jurists resort to legal fiction to assume that somebody is a *possessor* whereas he is not (*quasi possessio*).<sup>303</sup>

Thibaut agreed with Savigny's basic view that the distinction between *detentio* and *possessio* lies in the existence of an *animus domini*.<sup>304</sup> But in other points, he was critical of him.<sup>305</sup>

Thibaut was also an early reviewer of Savigny's *Besitz*, which appeared anonymously and serialised in the *Allgemeine Literatur-Zeitung* of 1804. In this detailed review, he initially praised the great erudition of the work and proceeded to discuss each point that Savigny made in detail.

Thibaut initially endorses the monograph as 'highly instructive' and 'intellectually stimulating' (*höchst lehrreiche und geistvolle Werk*). At the same time, its author can be counted 'amongst our finest jurists of civil law' (*mit unsern ersten Civilisten in eine Reihe zu treten*).<sup>306</sup> Then the tone changes, as he discusses the individual points Savigny makes and states his disagreement with each one.

### 3.2.2. The Nature of Possession

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<sup>303</sup> *ibid* 30

<sup>304</sup> A F J Thibaut, *System des Pandektenrechts I* (8th edn, Mauke 1834) 163; Thibaut (n 301) 4: 'animus und corpus sind also erforderlich zum Besitz.'

<sup>305</sup> Rudolf von Jhering (n 1) 234 notes that Thibaut had an otherwise keen eye for Savigny's aberrations.'

<sup>306</sup> Anonymous (Thibaut) *Recensio Num 41* (1804) *Allgemeine Literatur – Zeitung* 321

First, Thibaut disagrees with Savigny's view that the effect (*Wirkung*) of possession lies only in the *usucapio* and the interdicts. He believes that *occupatio* and transfer of ownership through *traditio* must equally be counted among its effects.<sup>307</sup> He states that possession is nothing more than 'physical holding,' hence, its consequence merely consists of the fact that the complete holding brings about certain consequences:

*'Zum reinen Begriff des Besitzes gehört nichts weiter, als das Merkmal der körperlichen Inhabung und also zum Wesen einer Wirkung des Besitzes nichts weiter, als dass die vollendete Inhabung durch ihr Daseyn gewisse Folgen nach sich ziehe).*<sup>308</sup>

Therefore, both *occupatio* and the transfer of ownership must be counted, against Savigny's view, among the consequences of possession, despite the lack of a temporary interval.<sup>309</sup>

Thibaut also objects to Savigny's view that the presumption of ownership for the possessor is merely a consequence of the principle favouring the defendant. Since this presumption also exists in favour of the plaintiff when he is the possessor of servitude and files against the owner an *actio confessoria*. This is further supported by the fact that the possessor of *pignus* has priority in the case of administration.<sup>310</sup>

Thibaut also takes issue with Savigny's view that the right to self-help against interference with possession belongs to criminal law. Thibaut states that the *Corpus iuris civilis* contains both

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<sup>307</sup> *ibid* 322

<sup>308</sup> *ibid* 323

<sup>309</sup> *ibid*

<sup>310</sup> *ibid*

criminal and administrative law and civil and private law, and the two cannot be separated. Moreover, as is the case with many civil rights, this too is a citizen's right against a citizen (*ein Recht des Bürgers gegen den Bürger*) with consequences for public law.<sup>311</sup>

Thibaut concludes that limiting the consequences of possession to *usucapio* and interdicts would lead to a doctrine of possession that missed its original spirit (*eigentlichen Geist*). He concedes that Roman jurists highlighted *usucapio* and interdicts especially as effects of possession, but this cannot serve as a satisfactory explanation of possession.<sup>312</sup>

Instead, he claims that in a 'rational system' (*räsoniertem System*), possession must be accorded a very different meaning. Hence, the 'original idea' (*ursprüngliche Idee*) of possession: the possessor must be treated as provisory and when in doubt (*vorläufig und im Zweifel*) as having a right to his factual action (*als ob er wirklich dazu berechtigt sey, was er factisch thut*). And, if the evidence is otherwise equal, a right to self-defence and interdicts.<sup>313</sup>

Thibaut claims that the correct method for comprehending the true nature of possession is to present its effects, divided into rights and duties, and then to further divide the former into natural and accidental (*natürlichen, und den zufälligen Wirkungen von einander absondert*).<sup>314</sup>

Thibaut dismisses Savigny's argument that possession does not have jural significance because it is not presumptive ownership. He says that if we exchange in Savigny's sentence the

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<sup>311</sup> *ibid* 324

<sup>312</sup> *ibid*

<sup>313</sup> *ibid*

<sup>314</sup> *ibid*



word ‘Ownership’ (*Eigentum*) with ‘Right’ (*Recht*), we can neutralise the argument. Accordingly, the possessor is not treated interim as an unconditional owner but as the holder (*Inhaber*) of the right entailed in possession (*Inhaber des im Besitz ausgeübten Rechts behandelt*).<sup>315</sup>

An example that possession does not always correspond to a right is the summary procedure (*summarischer Prozess*), where actual rights are not examined, but a formal procedure is adhered to (*nach formalen Rechtssätzen*). Thus, possession corresponds to a provisional right whenever interim formality replaces the actual rights (*welche provisorisch das wirkliche bedeuten*).<sup>316</sup> Roman law furnishes proof for this when it allows interdicts only for objects that can be possessed, namely not *res sacra, sancta, religiosa* and *communis*, as well as in the case of a slave and *filius familias* who cannot possess.<sup>317</sup>

To conclude, Thibaut disagrees with Savigny that possession is fact and right at the same time. He believes that the rights resulting from possession are not intrinsic to it so that the distinction between *possessio* leading to *usucapio*, on the one, and *possessio* leading to interdicts, on the other, is an obsolete one. The consequences of possession are there but are not inherent to it.

Thibaut’s starting point is that the original idea (*ursprüngliche Idee*) of *possessio*, common to all jurisdictions, was that the possessor was protected summarily and, when in doubt simply

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<sup>315</sup> *ibid*

<sup>316</sup> *ibid* 325

<sup>317</sup> *ibid*

because of his factual action of holding (*was er factisch thut*). Thibaut does not consider possession presumptive ownership as giving a prerogative to interim protection.

Regarding the nature of possession, whether it is a right or a fact, he seems to agree with Savigny's statement in some editions that it is a fact, and he treats it in his *Allgemeiner Theil* of his *Pandekten*.<sup>318</sup>

### **3.2.3. *Possessio naturalis* and *possessio civilis***

The second point of disagreement is about Savigny's definition of *possessio civilis*, *possessio naturalis*, and *possessio* 'as such' (*überhaupt*). Thibaut calls it a 'highly disputed partition' (*äußerst streitige Eintheilung*)<sup>319</sup> and concedes that it is only due to Savigny's 'detailed' (*feinen*) and 'sharp' (*scharfsinnigen*) historical and dogmatic analysis that the whole doctrine became comprehensible to him.

However, despite its plausibility, he states that even Savigny must concede that the evidence for this is scarce and relies on a new interpretation of the Roman '*civiliter non possidere*.' However, this needs to be re-examined because of the utmost importance of the division.<sup>320</sup>

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<sup>318</sup> A F J Thibaut, *System des Pandektenrechts* (8<sup>th</sup> edn 1834) 160

<sup>319</sup> *ibid* 321

<sup>320</sup> *ibid* 326

Thibaut agrees with the threefold division of Savigny but disagrees with the conclusions drawn from the sources, particularly from two passages of the *Digest* discussed by Savigny.<sup>321</sup> One is from Iav. D. 41, 2, 24: ‘*quod servus civiliter quidem possidere non posset, sed naturaliter tenet, dominus creditur possidere,*’ and the other is from Ulp. D. 45, 1, 38, 7: ‘*sed quamvis civili iure servus non possidet, tamen ad possessionem naturalem hoc referendum est.*’

Here Savigny has claimed that ‘*possessio civilis* is always the logical opposition to *possessio naturalis.*’ (*Daß die possessio naturalis überall als logischer Gegensatz der civilis (als possessio, quae non est civilis) vorgekommen ist, bedarf kaum einer Erinnerung*).<sup>322</sup> And sought to demonstrate this with the passages cited above.

Thibaut claims against this that it is wrong to perceive the sentence ‘*civiliter non possidet*’ as just a negation of ‘*possessio civilis,*’ namely, that it only negates *possessio ad usucapionem*. Instead, according to Thibaut, both fragments cited merely state that no legal consequence at all occurs.<sup>323</sup> This is so because the examples given refer to a slave, and the slave cannot legally possess (*Nichtbesitzer*). Consequently, according to Thibaut, ‘*civiliter non possidere*’ can mean two kinds of possession, namely, *possessio* that is not *civilis*, thus, leading only to interdicts, and *detentio*, which is neither relevant to interdicts nor *usucapio*, and, thus, the opposite to *possessio* proper (*Besitz überhaupt*), so only the latter is the opposite of *possessio civilis*.<sup>324</sup>

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<sup>321</sup> Savigny (n 155) 65

<sup>322</sup> *ibid* 64

<sup>323</sup> Anonymous (Thibaut), (n 266) 326

<sup>324</sup> *ibid* 327

Savigny will respond to the first part of the anonymous *Recension* of Thibaut in the second edition of his *Besitz*, two years afterwards, by making modifications. First, Savigny explicitly mentions Thibaut's point in a footnote, praising his distinction as 'very important and 'only strengthening my explanation.'<sup>325</sup>

We can conclude that both scholars agree on the dichotomy between 'natural' and 'civil' possession but disagree on the demarcation of each definition. The interpretation of the sources that indirectly refer to *possessio civilis* and *naturalis* is rendered differently. But what is significant is that both authors attempt to work out the distinct concepts of *possessio civilis* and *naturalis* under the method of formal logic. They do this even though they consider themselves as working 'historically.'

In the second instalment of his *Recensio*, Thibaut discusses Savigny's elaboration of the modes of acquisition of possession. Savigny claims that it is irrelevant for the acquisition of possession if the possessor held, or was able to hold, the possession (*es ist also ganz gleichgültig, ob die Sache wirklich ergriffen ist, oder ob sie in jedem Augenblick ergriffen werden könnte*), and then proceeds to list instances where this is 'illustrated.'<sup>326</sup> Thibaut disagrees with Savigny's interpretation of Iav. D. 41, 2, 51. The text will be quoted here in full:

*'Quarundam rerum animo possessionem apisci nos ait Labeo: veluti si acervum lignorum emero et eum venditor tollere me iusserit, simul atque custodiam posuissem, traditus mihi videtur. Idem iuris esse vino vendito, cum universae amphorae vini simul essent sed*

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<sup>325</sup> Friedrich Carl von Savigny, *Das Recht des Besitzes* (2nd edn, Heyer 1806) 46 fn 1

<sup>326</sup> Savigny (n 8) 129

*videamus, inquit, ne haec ipsa corporis traditio sit, quia nihil interest, utrum mihi an et cuilibet iusserim custodia tradatur. In eo puto hanc quaestionem consistere, an, etiamsi corpore acervus aut amphorae adprehensae non sunt, nihilo minus traditae videantur: nihil video interesse, utrum ipse acervum an mandato meo aliquis custodiat: utrobique animi quodam genere possessio erit aestimanda.'*

Savigny believes that Iavolenus reports Labeo's words from 'quarundam' to 'essent,' while Iavolenus refers to himself in 'inquit.' Savigny summarizes 'Labeo's' statement thus: In this case, possession is acquired without corporal action.<sup>327</sup>

Savigny interprets thus: Iavolenus claims that Labeo is wrong because he confounds two entirely different circumstances (*zwey ganz verschiedene Umstände miteinander vermengt*), namely acquisition by the agent, and acquisition without corporeal contact.<sup>328</sup> It is rather the case that corporeal contact (*corporis traditio*) is present in both instances, either in the person of the buyer himself or his agent. Thus, Labeo errs when he assumes that in the latter case possession is acquired *solo animo*.<sup>329</sup>

Thibaut objects to this reading of Savigny. He believes that Iavolenus speaks in his voice from in, 'eo puto' to the end. According to Thibaut, Iavolenus merely clarifies that there is no difference whether the buyer acquires in person or through the agent; possession is acquired in

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<sup>327</sup> *ibid* 130: 'Labeo also sagt: in diesem Fall sey eigentlich ohne körperliche Handlung der Besitz erworben.'

<sup>328</sup> *ibid*

<sup>329</sup> *ibid* 131

both instances in the same way, *animo*; thus, both cases must be treated as similar.<sup>330</sup> Thibaut's reading is closer to the source. The Roman sources cited provide evidence that for Roman law, in principle physical transfer is necessary, either through the contracting party or through a dependent.

Thibaut claims that Labeo, in his strictness, wanted to see an acquisition of possession *corpore* in both cases, which Iavolenus seems to correct.<sup>331</sup> In this way, Thibaut claims the sentence, '*nihil video interesse*' is not a mere repetition of Labeo's words by Iavolenus but a clarification against a point driven to the top by Labeo.<sup>332</sup>

In modern scholarship, the text is treated as genuine, and Alan Watson believes that Iavolenus begins to speak in his voice from '*nihil*' to the end. However, Watson also claims that it is not clear from the text whether the agent can only be a slave, a person *in potestate* or an *extranea persona*. He believes that Roman jurists saw it as a possibility.<sup>333</sup> This would mark the turning point in Roman law for the acquisition of ownership and possession through an agent.

Thibaut considers Savigny's attempt to dismiss the fact that there are 'peculiar' (*singulären*) modes of the acquisition of possession that form the exception to the regular ones, and to conclude from the *traditio longa manu* and the *traditio symbolica*, that possession is acquired merely through the 'awareness of physical control' (*Bewusstsein physischer Möglichkeit*) misguided.<sup>334</sup>

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<sup>330</sup> Anonymous (Thibaut) *Recensio Num 42*, 331

<sup>331</sup> *ibid*

<sup>332</sup> *ibid*

<sup>333</sup> Alan Watson, *Studies in Roman Private Law* (Hambledon Press 1991) 112.

<sup>334</sup> Anonymous (Thibaut) (n 332) 329.

In reality, he claimed, Roman law always considers the transfer of possession without physical control as something ‘deviant’ (*uneigentliches*) and ‘peculiar’ (*singuläres*). This is how the Romans would perceive it regardless of how they bent their own rules.<sup>335</sup>

Therefore, Thibaut continues, it is crucial to clarify to what extent the Romans allowed the acquisition of possession through *animus possidendi* only. Besides, here one must bear in mind the rule contained in Paul D. 50, 17, 1 *De diversis regulis iuris*, under which a rule (*Regel*) must be deduced from the law (*Recht*) and not the other way around.<sup>336</sup> Thus, the fact that physical proximity, as opposed to control, is sufficient in some instances is not enough to assume a general rule for all cases.<sup>337</sup>

Instead, Thibaut believes that to ascertain how the Roman sources understood acquisition of possession, one must start from the ‘natural meaning of the word’ (*natürliche Wortbedeutung*) *possidere*, which means physical apprehension (*körperliche Ergreifung*).<sup>338</sup>

The view that Roman law clings to its basic rule in cases that it might not be expected to do so is, according to Thibaut, illustrated by Paul D 41, 2, 3 3, and cited by Savigny himself. The passage will be cited in full because it is significant:

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<sup>335</sup> *ibid* 330

<sup>336</sup> *ibid* 332

<sup>337</sup> *ibid*: ‘Die Vorschrift, dass in diesem und jenem Falle körperliche Nähe hineinreichen solle, kann durch keine Abstraction auf eine Regel für alle Fälle führen.’

<sup>338</sup> *ibid*

*‘Neratius et Proculus et solo animo non posse nos acquirere possessionem, si non antecedit naturalis possessio. Ideoque si Thensaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet. Ceterum quod Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam Thensaurum cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet Thensaurum, quamvis fundum possideat. Sed et si sciat, non capiet longa possessione, quia scit alienum esse. Quidam putant Sabini sententiam veriore esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.’*

Here the jurists do not let the requirement of *animus* suffice for acquiring possession but require actual physical control of the treasure buried in the garden. Savigny explains this with the fact that *custodia* is not present in the land. Therefore, the latter example differs from those instances where the possessor acquires possession when something is left in his edifices because here, he has *custodia*, hence ‘physical ability.’<sup>339</sup>

Thibaut dismisses this interpretation. He claims that this text proves precisely the opposite, namely, that the theory of Savigny is flawed. If the latter’s approach were correct, then consequently, acquisition of possession of the buried treasure *solo animo* would be sufficient if the possessor of the land knew where the said treasure was buried because this would suffice for

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<sup>339</sup> Savigny (n 155) 137: *‘Allein bey dem Hause lag der Grund, warum der Besitz der beweglichen Sachen erworben wurde, in der ganz eigenen custodia, die nur darin möglich ist: demnach ist in unserm Fall der Besitz des Schatzes dem Besitzer des Grundstückes durchaus nicht erworben.’*



the ‘objective possibility’; instead, the law requires unearthing and physical contact.<sup>340</sup> According to Thibaut, this source negates Savigny’s view.

Thibaut’s reading is preferable here; Neratius and Proculus imply that physical control, which is always required, is given in the case of the owner of the land, but not in the case of the possessor, as in the latter case no *custodia* can be assumed; he possesses for somebody else. Thus, for reason following the status of the holder of the land.

Thibaut concludes that if Roman jurists had been allowed to further develop and adjust the doctrine of the acquisition of a possession, they would perhaps have developed a theory like that held by Savigny. Thus, they would not operate according to rules and exceptions of acquisition but instead, develop an abstract notion of transfer of possession. But, in any case, they did not come that far, and the sources do not warrant this view.<sup>341</sup>

#### **3.2.4. Conclusion - Thibaut**

We can conclude that Thibaut agrees with Savigny regarding the nature of possession, perceiving it as a fact. But disagrees with the latter’s interpretation of the Roman sources. For Thibaut, possession is a fact and protected as a presumption of ownership. *Possessio iuris* is the exact opposite of both *possessio naturalis* and *possessio* as such.

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<sup>340</sup> Anonymous (Thibaut) (n 332) 332

<sup>341</sup> *ibid* 333

Thibaut dismisses Savigny's view that possession is acquired through the 'objective possibility of physical control.' For him, possession is by default acquired through corporeal apprehension. The cases where this is not required are exceptions. Thibaut consistently applies the principle of *regula iuris* to explain a rule and its exceptions and his reading of the sources is very careful.

Although his reading is clear, it does not become apparent what he means with *animus detinendi*, and if it should also apply to the leaseholder and tenant. His definition of possession as physical apprehension leads him to exclude possession of rights (*Rechtsbesitz*). This will be significant during the draft of the concept of possession in the *BGB*.

However, Thibaut, as opposed to Savigny, wants to grant the tenant and the leaseholder possessory interdicts,<sup>342</sup>

### 3.3. Zachariä

Zachariä discussed possession in two separate treatises, *Die Lehre vom Besitz und der Verjährung nach Römischer Rechte*,<sup>343</sup> and in a detailed review of Savigny's *Das Recht des Besitzes*, in *Neue*

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<sup>342</sup> Anton Friedrich Justus Thibaut, 'Über possessio civilis' (1835) 18 *Archiv für die civilistische Praxis* 315, 322

<sup>343</sup> Theodor Maximilian Zachariä, *Die Lehre vom Besitz und von der Verjährung nach Römischer Rechte* (Holäuffer 1816)

*Revision der Theorie des Römischen Rechts vom Besitze, mit besonderer Rücksicht auf von Savigny, Recht des Besitzes.*<sup>344</sup>

### 3.3.1. Zachariä's Concept of Possession

Zachariä defines 'Besitz' (*detention, possession*) as the physical relation (*physisches Verhältnis*) through which an 'external' object (*äußere Sache*) is subjected to a person (*der Einwirkung einer Person*), even if it were for one moment. In support of his definition, he cites Paul. D. 41, 2, 1 which he considers pivotal among the sources. He also believes that 'detentio' refers instead to mobile goods, while 'possessio' refers to immobiles.<sup>345</sup>

The relation of a person to a thing as possession is a *res facti* (*bloßes tatsächliches Verhältnis*), as opposed to a *res iuris* (*Rechtsverhältnis*), according to which a person can claim an action.<sup>346</sup> From this dichotomy of *ius* and *factum*, Zachariä claims that the nature of possession emerges self-evidently (*Der Besitz nämlich ist seinem Wesen nach kein Rechtsverhältnis sondern eine bloße Thatsache*).<sup>347</sup>

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<sup>344</sup> Theodor Maximilian Zachariä, *Neue Revision der Theorie des Römischen Rechts vom Besitze, mit besonderer Rücksicht auf von Savigny, Recht des Besitzes* (Reclam 1824)

<sup>345</sup> *ibid* 1

<sup>346</sup> *ibid* 11

<sup>347</sup> *ibid*

*Possessio (Besitz)* is composed both of an ‘internal’ element of will (*animus*, also referred to as *intellectus possidendi, possidendi affectus*) and an ‘external’ (*corpus*: Paul D. 41, 2, 3, 1), through which the will is manifested.<sup>348</sup> These two elements are necessary for possession.<sup>349</sup>

Furthermore, Zachariä distinguishes between two main categories of ‘*Besitz*,’ namely, jural (*juristischer Besitz*) and non-jural (*nichtjuristischer Besitz*) possession. Only the former is called in the sources ‘*possessio*’ (Pap. D. 41, 2, 49, 1) and includes all instances where the power is exerted with a will to fare with the object as an owner (*animus rem sibi habendi*).<sup>350</sup>

The latter is referred to as ‘*detentio*’ and it lacks the will.<sup>351</sup> ‘*Detentio*’ also includes instances where such an *animus sibi habendi* is impossible because it is directed towards an unspecified part of a thing: Pomp. D. 41, 2, 26; Pomp. D. 41, 3, 32, 2 (*incertam partem possidere nemo potest*).<sup>352</sup>

However, these two categories are further subdivided: Jural possession can include exerting a will to handle an object as an owner (*animus domini*) under the law. An example of this is, Ulp. D. 43, 17, 3, 7 and is called ‘perfect jural possession’ (*vollkommen juristischer Besitz*).<sup>353</sup>

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<sup>348</sup> *ibid* 1 2

<sup>349</sup> *ibid* 16

<sup>350</sup> *ibid* 3: ‘*Der mit dem Willen, eine dauernde und ausschließliche Einwirkung auf die Sache vorzunehmen, (animus rem sibi habendi), nicht verbunden ist.*’

<sup>351</sup> *ibid* 3

<sup>352</sup> *ibid* 10

<sup>353</sup> *ibid* 3

However, if the *animus domini* of the said person is not legitimate, we call this ‘imperfect’ (*unvollkommen*) or derivative possession (*abgeleiteten Besitz*). This includes the cases of the thief (Iav. D. 41, 2, 22: ‘*Non videtur possessionem adeptus is qui ita nactus est, ut eam retinere non possit*’),<sup>354</sup> but also the instances where the possessor recognizes the owner and wishes merely to ‘hold’ (*verwalten*) the object in his name. These include *pignus* (Iav. 41, 3, 16), *precarium* (Tert. D. 41, 2, 1, 28; Iul. D. 41, 2, 36) and sometimes *depositum* (Ulp. D. 16, 3, 17, 1; Iul. D. 41, 2, 39).<sup>355</sup>

Non-jural possession is further subdivided into two categories concerning its relation to jural possession. There is non-jural possession that stands in no relation to a jural one, and this is found in Ulp. D. 10, 4, 5 pr.<sup>356</sup>

Then there is non-jural possession that stands in a relation to jural possession. The latter encompasses the instances where non-jural possession is an integral part of jural possession (Paul. D. 41, 2, 13) or is a separated part of the jural possession, granted by the jural possessor himself to a third party. This is what the Romans call ‘*in possessione alterius*.’

In the latter category, we always have the following: the *detentio* because of commission (Ulp. D. 43, 16, 1, 22); the *detentio* of *missio in bona ex primo decreto* (Paul. D. 39, 2, 16 and 18); the *detentio* of the usufructuary (Ulp. D. 43, 26, 6, 2), of the superficiary and the *emphyteuta*.<sup>357</sup> It

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<sup>354</sup> *ibid* 4

<sup>355</sup> *ibid* 5

<sup>356</sup> *ibid* 6

<sup>357</sup> *ibid* 7

is also sometimes found in the *detentio* of a depositary (Paul. D. 41, 2, 3, 20, the *commodatarius* (Pomp. D. 13, 6, 8) and the lessee ‘*conductor*’ (Ulp. D. 43, 26, 6, 2.).<sup>358</sup>

Zachariä supports his claim with Paul. D. 41, 2, 1, 3: ‘*eam enim rem facti, non iuris esse*,<sup>359</sup>’ and states that the words, ‘*possessio res facti est, non iuris*’ are so clear that it is in direct opposition to the wording of the text of the source to maintain that possession is in principle a right and not a *factum*, or even right and fact at the same time. He claims that the dichotomy between *factum* and *iuris* made it clear,<sup>360</sup> and this clarity makes it more bewildering that Savigny - otherwise such a sharp observer - insisted on a different concept.<sup>361</sup>

Furthermore, Zachariä claims that it must be borne in mind that Roman law, though recognizing possession as *factum*, allows exceptions by assuming the existence of possession in certain instances where the ‘factual features’ (*factischen Merkmale*) are not present.<sup>362</sup> In other instances, however, the law denies the existence of possession even though the factual features are present.<sup>363</sup> An example for the first modality is found in Pap. D. 41, 2, 49 pr:

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<sup>358</sup> *ibid* 7

<sup>359</sup> *ibid* 12

<sup>360</sup> *ibid* 12, 64

<sup>361</sup> *ibid*: ‘*Bey dem in der That bewunderungswürdigen Scharfsinne Savignys, ist mir daher diese letztere Behauptung in seinem Munde von jeher ein Räthsel gewesen.*’

<sup>362</sup> *ibid*

<sup>363</sup> *ibid* 16, 17, 18

*‘possessio quoque per servum, cuius usus fructus meus est, ex re mea vel ex operis servi acquiritur mihi, cum et naturaliter a fructuario teneatur et plurimum ex iure possessio mutuetur.’*

Whereas we find in Pap. D. 41, 2, 49, 1:

*‘Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis, sed et iuris est,’* is an example of the latter.<sup>364</sup>

The positive fiction of possession (*fingierter Besitz*) can be assumed about either the jural subject (*Rechtssubject*) of possession, or the jural object (*Rechtsobject*) in cases where *animus possidendi* cannot exist because the person is not free or where the object cannot be possessed.<sup>365</sup>

As examples of the positive fiction of possession, Zachariä cites Pap. D. 41, 2, 44, 1 (*ex causa peculiari* of a *dominus*), Ulp. D. 4, 6, 23, 3 (*captivus*). But examples are not limited to the *paterfamilias* or *dominus* but also apply to the usufructuary and *bona fide possessor*, as Pap. D. 41, 2, 49.<sup>366</sup> An example is the *ius postliminii* where the restored citizen is considered to have had possession of objects acquired by his subaltern *ex causa peculii* (Paul. D. 41, 3, 15; Trypho. D. 49, 15, 12, 2).

In addition to fictional possession, Roman law has, according to Zachariä, developed the concept of *quasi possessio* (*Quasibesitz*). This is an analogous application of possession on an

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<sup>364</sup> *ibid* 16, 32, 33

<sup>365</sup> *ibid* 8, 17, 18

<sup>366</sup> *ibid* 33

object that cannot be possessed.<sup>367</sup> Initially, quasi-possession could only comprise corporeal objects, and this derives from its ‘factual’ nature. However, it was gradually applied to rights. *Quasi-possessio* thus conceived is the ‘physical ability’ (*physische Möglichkeit*) over only a certain set of qualities (*Eingeschaften*) of an alien object, thus, something incorporeal.<sup>368</sup> *Quasi possessio* exists in *pignus* and both personal and real servitudes.<sup>369</sup>

Regarding the acquisition of a possession, he cites Paul. D. 41, 2, 3, 1: ‘*adipiscimur possessionem corpore et animo, neque per se animo aut per se corpore,*’ as a principle (*Grundsatz*) deriving from the very nature of the matter (*Natur der Sache*).<sup>370</sup> However, he claims that Romans recognised modifications to this principle.<sup>371</sup>

### 3.3.2. Zachariä’s Critique of Savigny

Subsequently, Zachariä attempts to enumerate the arguments brought by Savigny and refute them. The first argument in favour of Savigny’s view that possession is at least also a right could be supported by the fact that at least jural possession has a jural consequence (*rechtliche Wirkungen*).

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<sup>367</sup> *ibid* 19

<sup>368</sup> *ibid* 20

<sup>369</sup> *ibid* 21-26

<sup>370</sup> *ibid* 38

<sup>371</sup> *ibid*



However, Zachariä claims, from the fact that something has a ‘jural’ consequence, it does not follow that it has a jural quality (*Recht*).<sup>372</sup>

Furthermore, he claims that the various passages that mention *ius possessionis*, namely, Pap. D. 41, 2, 44; Ulp. D. 43, 8, 2, 38; Marc. D. 48, 6, 5, 1 and C. 7, 16, 5, cannot be brought forth in support of the view that possession is a right. This is so because the passages merely deal with the question when possession is continued the reference is also to *detentio* and not limited to ‘moral’ possession.<sup>373</sup>

Third, the argument from Paul. D. 41, 3, 21: ‘*rei sue emptio non consistere*’ – shows that *possession* can be the object of sale - merely refutes the erroneous belief that *facta* cannot be jural objects (*auch blosse facta eigentliche Rechtsobjecte seyn können*).<sup>374</sup>

Lastly, neither Pap. D. 41, 2, 49: ‘*quia possessio non tantum corporis, sed et iuris est*’ vindicates Savigny, as this statement in no way negates the ‘*possessio res facti est, non iuris,*’ but merely modifies its first part, and the reading must be supported by Paul. D. 41, 2, 1,3 *res iuris* to make sense.<sup>375</sup> Zachariä claims that the factual element in possession also consists of corporeal and jural elements. Zachariä also believes that Savigny is wrong to assume that there is a real possession on the *res emphyteuticaria*, he believes that it is the case of quasi possession, and for this, he cites C. 4, 66.

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<sup>372</sup> *ibid* 13

<sup>373</sup> *ibid*

<sup>374</sup> *ibid* 15

<sup>375</sup> *ibid*

Zachariä's view that possession is a fact consequently leads him to challenge Savigny's interpretation of *possessio naturalis* and *possessio civilis*. The latter sees the definitions as stemming from the various effects that these concepts have, namely, concerning *usucapio*, interdicts. Each form corresponds to a different one. Zachariä, on the other, perceives *naturaliter vel civiliter possidere* as modifications of the same concept, namely, possession.<sup>376</sup>

### 3.3.3. Savigny's Response

Savigny took the critique of Zachariä as seriously as Thibaut's and responded by making changes to his manuscript in the fourth edition of *Das Recht des Besitzes*, which appeared in 1822.<sup>377</sup> Savigny added footnotes citing sources. In a footnote (2) at the beginning of §7, he defends himself against the futility of attempting to arrive at precise definitions:

*‘Neuerlich ist behauptet worden, die genaue Bestimmung dieser Begriffe sey ein fruchtloses Unternehmen, weil die Begriffe selbst und ihre Bezeichnungen im gemeinen Leben entstanden und dann erst von den Juristen herübergenommen worden seyen, natürlich mit aller Unbestimmtheit, die ihnen von diesem ihrem Ursprung der eigen seyn musste: es sey also derselbe Fall, wie mit den Ausdrücken culpa lata und levis u.s.w. Zachariä Besitz und Verjährung s.6.7.37. Diese Bemerkung ist völlig ohne Grund. culpa lata und levis bezeichnet ursprünglich sittliche Begriffe, also allerdings solche deren erste*

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<sup>376</sup> *ibid* 123

<sup>377</sup> Friedrich Carl von Savigny, *Das Recht des Besitzes, eine Civilistische Abhandlung* (4th edn, Hayer 1822)

*Entstehung in einem anderen Gebiete liegt, als in dem der Rechtswissenschaft. Ganz anders possession civilis und naturalis; dieses ist gleich ursprünglich etwas juristisches, und ein nichtjuristischer Begriff existiert darüber überall gar nicht: die Ausdrücke können also nicht im gemeinen Leben entstanden, und nicht durch dasselbe schwankend geworden seyn.*<sup>378</sup>

‘It was claimed recently [sc. by Zachariä] that the precise definition of these concepts was futile because the terms and their definitions appeared in common life and were then taken over by the jurists. Of course, this happened with all the imprecision that must be inherent in their origin. It is the same situation as it is with the terms *culpa lata* and *levis*. (Zachariä, *Besitz und Verjährung*) pages 6,7, 37. However, this comment is utterly unreasonable, for *culpa lata* and *levis* originally describe ‘customary’ concepts, therefore, those that have come into being in a field other than jurisprudence. This is entirely different from *possessio civilis* and *naturalis*, which is jural in origin, and a non-jural concept does not exist at all. Therefore, these definitions cannot have first appeared in common life and cannot have become fickle through it.

This argument, occasioned mainly by the critique of Zachariä, is important as it reveals an aspect of Savigny’s *Weltanschauung*. Savigny claims that the various terms of possession can be defined precisely because they are jural concepts, not concepts transplanted from daily life into jurisprudence. Thus, he is certain that precision is feasible. Savigny does not deem it necessary to

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<sup>378</sup> *ibid* 34 fn 2

claim that the Roman sources warrant these concepts; for him, it is sufficient that the concept of possession is a jural one and, therefore, can be delineated with precision. This harks back to his original viewpoint that the jurist must work out both the sources and a system.

However, this dichotomy between jural and non-jural, as a priori concepts will be gradually challenged with the tools of philosophy, as we will see further down, with implications for the concept of possession. Furthermore, in the same edition, Chapter §7, before discussing the five sources on *possessio civilis*. He offers the following clarification:

*‘Zur Erklärung dieser Stellen ist eine allgemeine Vorerinnerung nöthig. Vorausgesetzt nämlich, dass die possessio civilis von dem ius civile ihren Namen führt, kann der Ausdruck civiliter non possidere oder: jure non possidere eine zweifache Bedeutung haben, je nachdem das civiliter entweder auf die Wirkung oder auf den Grund des non possidere bezogen wird. Erstens nämlich, kann es heißen, denjenigen Besitz entbehren, welcher für das ius civile als Besitz gilt, und in diesem Sinn drückt es die reine Negation der possessio civilis aus und ist für unsere Untersuchung brauchbar. Zweitens kann es heißen, allen Besitz überhaupt entbehren, und zwar aus einem Grunde, der in dem jus civile enthalten ist: diese Bedeutung interessiert uns jetzt nicht, indem sie sich gar nicht auf die possessio civilis bezieht. Welche von beiden Bedeutungen in jedem Falle anzunehmen sey, lässt sich meistens mit Sicherheit angeben: so z.B. ist es gewiss die erste, wenn es sich auf andere Weise darthun lässt, dass possessio überhaupt vorhanden sey: ebenso ist es wahrscheinlich die zweite, wenn des Gegentheil bewiesen werden kann.’<sup>379</sup>*

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<sup>379</sup> ibid 41- 42

‘To explain these passages, a general reminder is necessary. If *possessio civilis* derives its name from the *ius civile*, the expression *civiliter non possidere* or *iure non possidere* can have a twofold meaning, depending on whether *civiliter* refers to the effect of the reason of *non possidere*. First, it can mean losing that kind of possession that counts for the *ius civile* as possession. In this sense, it expresses the pure negation of the possession *civilis* and is useful for our examination. Second, it can mean to exclude all possession, namely because of a reason that is contained in the *ius civile*. This meaning does not interest us because it does not refer to the *ius civile*. Which of the two meanings can be assumed in each case, can in most instances be safely stated? Accordingly, it is certainly the first, if it can be derived in another way that possession as such is present, it is equally plausible that it is the second instance when the opposite can be proven.’

This insertion is interesting and important because Savigny implicitly needs to address a leap he performed in his work. While the sources only speak of *civiliter* and *naturaliter*, thus, using an adverb, he previously proceeded without qualms to create various concepts of possession. In this passage, therefore, he sees the need to further elaborate his steps in the view of critique.

### **3.3.4. Conclusion**

To sum up, it is important to note that Savigny firmly clung to his tripartite division, despite the objections of his opponents, that he could define three kinds of possession and carefully distinguish them as jural concepts. He further believed that the sources could warrant his findings. His definition of possession is will-orientated; what counts is the human ability to control an object, a definition we first encountered with Kant. The passages discussed display Savigny’s complex

method: the sources must be read, logic must apply, and the tenets of natural law must be included. Two basic tenets of his worldview permeate Savigny's concept of possession: the will and the quest for abstract definition.

Zachariä's approach, on the other, has the advantage of clarity and simplicity. He can subsume all constellations regarding possession in the Roman sources under two main possession categories. In this way, he can avoid the complex delineation attempted by Savigny between three types of possession, namely: *possessio*, *possessio naturalis* and *possessio civilis*, and their difficult separation; a problem Thibaut also had to struggle with.

Zachariä is right in raising doubts as to whether the term *ius possessionis* is used with precision in the sources (*ius possessionis ebenfalls ohne nähere Bestimmung*).<sup>380</sup> Also, Zachariä's concept of jural fiction is straightforward and his reading is closer to the sources.

Zachariä agrees with Thibaut that possession cannot be based on the *obligationes ex maleficio*; thus, it is not classified as an obligation but as a real right, a view that passes without mentioning for him.<sup>381</sup>

Zachariä's concept of *quasi-possession* on rights is very important, though not original to him. In accepting a form of possession on rights and touches upon the fundamental distinction between possession of rights (*Rechtsbesitz*) and possession on things (*Sachbesitz*). If actual physical control is necessary for possession, then possession can only apply to physical objects. But if an ability, Zachariä calls this '*physische Möglichkeit*' or right is sufficient, possession can

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<sup>380</sup>Zachariä (n 345) 13

<sup>381</sup> *ibid* 111

apply to incorporeal objects such as rights. These fundamentally different concepts of possession will become apparent in the contrast of the *BGB* with the *ABGB* and the *CC*. The former only recognizes possession of corporeal objects, the latter on both.

Savigny only accepted possession of corporeal objects. This is strange because he went at great length to establish possession around the ‘objective possibility to handle an item’, which would also allow him to include rights. Zachariä brings in an important concept but does not clarify its nature and relation to possession.

However, his concept of *quasi-possession* is not clearly distinguished from ‘fictional possession.’ It is unclear why the instances that fall under the former could not be subsumed under ‘fictional possession.’ Zachariä introduces a new element into the discussion; something that Savigny has not discussed, namely, whether there can be possession only of corporeal or non-corporeal objects. This discussion will be significant for drafting the Austrian and German civil codes.

Thibaut and Zachariä seem to strike back at Savigny with the latter’s weapons when they work with the categories of the rule and exception by referring to the Roman concept of *regula iuris*, as a method suitable for deducing exceptions from a general rule. Hence, they accept the acquisition of *animo et corpore* as the default; a rule that admits of exceptions.

They both believe that possession is a fact and that Savigny’s arguments brought forth in favour of its being a right are flawed. They nonetheless wish to accord possession a jural quality and explain its interim protection.

### 3.4. Gans

Eduard Gans (1797 – 1839) criticised Savigny's monograph on possession both in his *System des Römischen Civilrechts im Grundrisse* (1827) and in his, *Über die Grundlage des Besitzes; eine Duplik* (1839). In the latter, he also seizes the occasion to defend himself against Puchta.

Gans believed in the importance of Roman law and held that those nations that had not imported it, as the English, have remained 'on a lower level of civilisation.' But he also criticises the recent trend of his time to make legal history paramount and to seek to restore Roman law exactly as it was at the time of the Twelve Tables. He claims that Roman law has adjusted itself and grown with our spirit (*Geist*) and state (*Staat*) to accommodate our needs. Thus, we have two species of Roman law, the Roman law of today (*heutiges Römisches Recht*) and the law of the Roman people (*Recht des Römischen Volkes*)

In his review of Savigny, Gans reiterates that possession is not a mere fact (*kein blosses Factum*) and does not become a right through a detour of lawlessness (*entseht nicht als Recht, durch den Umweg des Unrechts*).<sup>382</sup> He further claims possession is 'nascent,' 'presumptive' ownership (*Anfangendes, präsumtives Eigenthum*), and for this, he cites Pap. D. 4, 6, 19 and Paul. D. 41, 2, 1, 1: '*dominiumque rerum ex naturali possessione coepisse*.'<sup>383</sup>

Moreover, in the said treatise, he gives us a unique insight into his approach to Roman law, which deserves to be quoted in full as it will explain his general approach:

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<sup>382</sup> Eduard Gans, *Über die Grundlage des Besitzes, Eine Duplik* (Weit 1839) 28, 31: '*ich sagte, er sey ein Recht.*'

<sup>383</sup> *ibid* 59



*‘Daß das System eines Rechts überhaupt eine Vernünftige Auffassung voraussetzt: wenn ich sage, ich will dieser oder jene Sache systematisieren, so heist dies, ich will diese oder jene Sache nach ihrer Vernunft aufstellen. Die neueren Systeme des Römischen Rechts sollen nicht Anordnungen seyn, die das Römische Recht selbst hat, sondern sie sollen das Römische Recht nach unsern Vernunft classificieren.’<sup>384</sup>*

This excerpt is important because it gives us Gans’ worldview. He understands ‘*System*’ as a rational presentation of Roman law; the legal pronouncement must stand the test of logic, actual Roman law as a historical phenomenon is irrelevant here. We will see further down that he gauges Savigny’s theory against the principles of rationality. In this way, he differs significantly from Savigny and the ‘Historical School’ professed aim to return to the roots.

He states that Savigny’s view, maintained through all editions of his work on possession, namely, that possession is a fact and law simultaneously is fundamentally flawed and problematic, as it cannot explain why possession is protected in Roman law.<sup>385</sup> Instead, if we believe Savigny, the fact of possession emerges as a right through a process of pupation out of itself.<sup>386</sup>

According to Gans, Savigny’s attempts to attach a jural quality to possession by calling it a ‘shadow of ownership’ (*Schatten des Eigentums*) is equally absurd and cannot be explained rationally (*sonderbar, unerklärlich*): if *possessio* is a fact then any legal relevance and protection

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<sup>384</sup> *ibid* 18

<sup>385</sup> *ibid* 10: ‘*Man kommt also in einige Verlegenheit, indem man nun zu erklären hat, wieso denn nun der Besitz, welcher ein natürlicher Zustand ist, zu Rechten gelangen kann.*’

<sup>386</sup> *ibid* 15

of possession granted to a person must, consequently, stem from something other than possession itself, namely, due to force.<sup>387</sup>

These problems, Gans claims, lead Savigny to abandon his thesis once again, now saying that ‘possession is a ‘shadow of ownership’ merely concerning the jural institution in general, but does not apply *possessio in concreto*.<sup>388</sup> Gans wonders, however, how we conceive possession in general, as opposed to *possessio in concreto*, and how can the former have a principle that is not part of the latter.<sup>389</sup> The only meaning attached to ‘shadow’ here is ‘deception’ (*Täuschung*).<sup>390</sup>

Gans concludes that since Savigny has eliminated the words ‘shadow of ownership’ hence ‘presumptive ownership,’ back in the sixth edition of his *Besitz*, he does not want to pursue the matter anymore; as it is not always necessary to chase a retreating enemy.<sup>391</sup>

Gans reiterates here again that possession is only one thing, not two; it is a fact that becomes right on account of the application of force (*Gewalt*) from the injuring party.<sup>392</sup>

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<sup>387</sup> *ibid* 11

<sup>388</sup> *ibid* 12

<sup>389</sup> *ibid*: ‘*Nun aber möchte ich fragen, wie ist ein allgemeiner Besitz, ohne die concreten Besitze zu begreifen? Wie kann der allgemeine Besitz oder der Besitz im Allgemeinen ein Princip haben, das nicht auch die concreten Besitze theilten?*’

<sup>390</sup> *ibid* 13

<sup>391</sup> *ibid*

<sup>392</sup> *ibid* 13-14, 20

Gans explains his critique of Savigny by stating that in law, there is nothing purely factual that does not have a jural vein (*rechtliche Ader*): All jural concepts are facts, but they contain a relation (*Beziehung*) of jural quality.<sup>393</sup> Hence, we can only call ‘factual’ what contains no will; it is devoid of venation, like pure *detentio* (*reine Detention*), because the *detentor* does not even have a will to keep the object for himself, hence, he does not stand in a jural relation (*Rechtliche Beziehung*) to the object.<sup>394</sup>

He states that when Savigny sees the reason for the protection of possession in the application of force, then this can only mean the force against a person, but possession conceived as a fact cannot be ‘injured’ because if the injury of possession were to be seen as *iniuria* in Roman law, then the opposite of what Savigny claims is true.<sup>395</sup>

Savigny’s attempt to explain interdicts as obligations *ex maleficis* he considers equally misguided.<sup>396</sup> Savigny’s presentation is so nebulous it must not be allowed to take one step without challenging its justification.<sup>397</sup>

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<sup>393</sup> *ibid* 14

<sup>394</sup> *ibid*

<sup>395</sup> *ibid* 17: ‘*dass niemals ein Unrecht ohne die Voraussetzung des Rechts, das es eben aufhebt besteht.*’

<sup>396</sup> *ibid* 18

<sup>397</sup> *ibid* 21

Moreover, Savigny's fanciful vision (*Phantsamsagorie*) cannot explain why the inviolability of a person can stretch to a fact to which the person has no right. If possession is not a right, why is its disruption considered a violation of the law?<sup>398</sup>

Gans maintains that the correct approach is to establish the jural justification (*Rechtsgrund*) of possession neither through the presumption of ownership nor forbidden violence. Instead, it must be seen in the relation of a person to a thing.<sup>399</sup>

The will of a person can be twofold, it can be generally or particularly recognized (*besonderer, allgemein anerkannter wille*), and if the will is only particular, then we have only nascent ownership (*anfangendes Eigentum*), or possession, but if a general will is given, thus, a will recognized by the jurisdiction, then we have real ownership (*wirkliches Eigentum*).<sup>400</sup>

This view shows the influence of Hegel on Gans, who has conceived possession as a 'direct relation of the will on an object.'<sup>401</sup> Hegel also sees a direct relation between possession and ownership when he says that 'possession entails the external relationship to an object, the other,

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<sup>398</sup> *ibid*: 'Wer mir einen Besitz nimmt, auf den ich kein Recht habe, verletzt mich nicht, berührt mich nicht, und ich kann überhaupt gar nicht davon sprechen, dass ich verletzt oder berührt werde.'

<sup>399</sup> *ibid* 19

<sup>400</sup> *ibid*; 27: 'Dass der Wille schon an sich ein substantielles zu schützendes ist, und dass dieser besondere Will nur dem höheren Allgemeinen zu weichen hat.'; again in Gans (n 281) 211, following Hegel

<sup>401</sup> Hegel (n 281) §16A 43 13-14: 'die unmittelbare Beziehung meines Willens auf eine Sache.'

the fact that it is incorporated into my will, it is ownership, the substantial timeless relation to freedom.’<sup>402</sup>

Thus, the jural justification of possession (*Rechtsgrund des Besitzes*) is due to the application of neither force nor presumed ownership, but because a person's ‘particular’ will, as manifested in an object, is a right and needs to be treated as such.<sup>403</sup>

### 3.4.1. Gans’ Critique against Puchta

In his short treatise, Gans defends himself against Puchta’s attack on his definition of possession as ‘*anfangendes Eignethum.*’ On the other hand, Puchta wrote an article in which he defended Savigny against Gans, while criticising the latter’s definition of possession.<sup>404</sup>

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<sup>402</sup> *ibid* §24, 51, 33-35: ‘*Der Besitz hat die äußerliche Seite der meiner Beziehung auf die Sache; nach der anderen Seite, dass die Sache zugleich wesentlich in meinem Willen aufgenommen ist, ist er Eigentum, die zeitlose substanzielle Beziehung der Freiheit.*’

<sup>403</sup> *ibid* 20: ‘*Dass schon der besondere Wille der Person, wie er sich in den Sachen äußert, ein Recht ist, und als solches behandelt werden muss.*’

<sup>404</sup> Georg Friedrich Puchta, ‘Zu welcher Classe von Rechten gehört der Besitz? Beantwortet durch eine Classification überhaupt’ (1829) 3 *Rheinisches Museum für Jurisprudenz*

### 3.4.2. Puchta's Definition of Possession

Puchta supported Savigny and shared his view on 'derivative' possession (*abgeleiteter Besitz*) if the *emphyteuticarius* and the holder of *precarium*, as 'derivative' possessors have *animus domini*.<sup>405</sup>

Puchta's professed aim in the said treatise is to discuss the views both of Savigny, whose work made it possible for Puchta to discuss possession, and of Christian Frierdrich Mühlenbruch (1785 – 1843), before presenting his own.<sup>406</sup>

Puchta traces a fallacy in the reasoning of Savigny about the *ius possessionis* (*Besitzrecht, Recht des Besitzes*). He observes that Savigny justly distinguished between, '*Recht zu besitzen*' and '*Recht des Besitzes*,' the former describing the right to possess, while the latter denotes the law of possession.

However, he believed that Savigny fell into a tautology when he equated '*Recht des Besitzes*' with the rights that possession creates (*das Recht, welches der Besitz wirkt*). Savigny, thus, slips into a circular argument by merely stating that 'the law of possession is the law of the effects of possession.'<sup>407</sup> Therefore, Savigny fails to explain what possession is.<sup>408</sup> Consequently,

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<sup>405</sup> Georg Friedrich Puchta, 'Recensionen: Das Recht des Besitzes, sechste vermehrte Auflage' (1837) 2 Kritische Jahrbücher von Richter 679

<sup>406</sup> Puchta (n 407) 289

<sup>407</sup> *ibid* 290, 291, 293

<sup>408</sup> *ibid*: '*Der Besitz erzeugt nicht bloß Rechte, welche man allerdings Rechte des Besitzes nennen kann, sondern er ist selbst ein Recht und diess muss man ebenfalls Rech des Besitzes oder Besitzrecht nennen*'; 293

if his syllogism is accepted, namely, that the law of possession is only what it affects, it inevitably concludes that possession is no right.<sup>409</sup>

Puchta states that we must clearly distinguish between the '*Recht des Besitzes*' and the '*Recht zu besitzen*,' and the former must mean both the effects of, as Savigny put it, but also what possession actually is; hence it must be classified.<sup>410</sup> Puchta also disagrees with Mühlenbruch, who defined possession as, 'a right on an object' (*Recht an der Sache*) because if possession is conceived as a right, it cannot be distinguished from ownership.<sup>411</sup>

Puchta states that the recently proposed definition of possession by Gans, whom he calls 'the latest of the systemics' (*der neuste Systemiker*) as 'nascent' ownership (*anfangendes Eigenthum*) is equally not correct because it does not say what possession is and it is certainly not ownership because it is only '*anfangendes*.'<sup>412</sup>

Puchta claims that Professor Gans knows neither what the matter is, nor what he is talking about when he so strongly criticizes Savigny for not having come up with a definition of possession, while not even proposing one himself.<sup>413</sup> This argument, Puchta maintains, is also proof of Gans's

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<sup>409</sup> *ibid* 293: '*Wenn man sagt, das Recht, welches der Besitz ist, sey nur dasjenige, welches er wirkt, so heist dies nichts anderes, als: er ist kein Recht.*'

<sup>410</sup> *ibid* 291

<sup>411</sup> *ibid* 293

<sup>412</sup> *ibid* 295

<sup>413</sup> *ibid*: '*daß er weder weiß wovon die Rede ist, noch wovon er selbst redet.*'

botched philosophical reasoning (*Pfuscherey in die Philosophie*), as he confuses the categories of present and future and defines the present as the future.<sup>414</sup>

According to Puchta, Gans' second definition, namely, that possession is 'ownership following the particular will,' is equally inane as it merely describes the physical control over an object.<sup>415</sup> Despite all this, however, Gans' theory has its merits because once it is established that possession is nothing, it can be freely placed everywhere. Thus, Gans' agreed opinion with Mühlenbruch that possession stands, 'on the pinnacle of the *iura in re*' cannot even be argued with.<sup>416</sup>

Nevertheless, leaving Gans aside, Puchta says that the previous attempts were wrong because instead of asking, 'How to classify a right?' one must ask, 'How do rights classify themselves?'<sup>417</sup> The entire system of law is composed of 'jural relations' (*Rechtsverhältnisse*): jural relation means the subjugation (*Unterwerfung*) of an object (*Gegenstand*) to the jural (*rechtlichen*) will; a subjugation that grants a right.<sup>418</sup> As the objects differ, so does the nature of their respective jural relations.<sup>419</sup>

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<sup>414</sup> *ibid* 295: 'als sey der gegenwertige nun auch schlechterdings nichts weiter als der zukünftige.'

<sup>415</sup> *ibid* 296

<sup>416</sup> *ibid* 296

<sup>417</sup> *ibid* 297

<sup>418</sup> *ibid*

<sup>419</sup> *ibid* 298: 'hiernach ist nun klar, dass die Verschiedenheit der Gegenstände eine Verschiedenheit der Rechte hervorbringt.'



The possible objects of the jural will are: things (*Sachen*), actions (*Handlungen*), and persons. The latter falls into three categories: persons outside us (*Personen außer uns*), persons that once existed outside of ourselves but now belong to us, and our person (*unsre eigne Person*).<sup>420</sup> In the last case, the will has as its object its person: the will wants itself, hence, wants to exist as a will.<sup>421</sup>

Now, the protection accorded to the right of personhood is twofold, protection of the person, including honour, and to the ‘natural subjugation of things’ (*natürliche Unterwerfung der Sachen*), and this is called the law of possession (*Recht des Besitzes*).<sup>422</sup> Hence, the object of the law of possession is the owner’s personality, its will as such.<sup>423</sup>

Conceived like this, possession is consumed by other rights, such as the right of possession, which only indirectly protect the personality, but directly protect an object. The fact that possession protects a ‘natural subjugation’ as opposed to a ‘jural one’ explains its subsidiarity against the former.<sup>424</sup> Ultimately, for Puchta possession is the embodiment of the ‘will’.

### **3.4.3. Gans’ Defence against Puchta**

Gans was especially upset by Puchta’s statement that the former did not know what he was talking about and saw himself compelled to defend his thesis that possession is ‘incipient’ ownership.<sup>425</sup>

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<sup>420</sup> *ibid* 300

<sup>421</sup> *ibid* 305: ‘*Der Wille will sich, heist so viel als: er will als Wille gelten.*’ 306

<sup>422</sup> *ibid*

<sup>423</sup> *ibid*

<sup>424</sup> *ibid* 307

<sup>425</sup> Gans (n 384) 35

Gans reminds Puchta that he was once at school in Nürnberg, where Hegel was a rector and must have heard the rudiments of metaphysic and logic.<sup>426</sup> Thus, he must have learned that the ‘pure being’ (*reine Seyn*) and the ‘pure nothing’ (*reine Nichts*) are the same and that the movement of one to the other is the ‘becoming’ (*Werden*).<sup>427</sup>

Now that Puchta became a ‘haggard missionary’ of the Historical School, his logical reasoning was impaired. He now erroneously thinks that because the ‘becoming’ is nothing, so is the ‘beginning.’ Equally, because the beginning of the abstract being is the nothingness (*das Nichts*) he erroneously assumes that so is the beginning of a concrete something (*der Anfang eines sehr concreten Etwas*), namely ownership.<sup>428</sup> Here Puchta mixed up ‘being’ (*Seyn*) and something (*Etwas*).<sup>429</sup>

Gans defends himself against the second point of Puchta, namely, that Gans agrees with Mühlenbruch in placing possession on the ‘pinnacle of the *jura in re*’ even though possession is nothing in itself. Gans retorts that Puchta has not given a definition himself and his classification of rights according to objects is fundamentally flawed; all rights are rights on the person; thus, Puchta does not say anything new.<sup>430</sup>

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<sup>426</sup> *ibid*

<sup>427</sup> *ibid* 36

<sup>428</sup> *ibid*

<sup>429</sup> *ibid*

<sup>430</sup> *ibid* 38

Moreover, Puchta's much-advertised 'new' improvement on the theory of Savigny is not new at all, because the latter had already drawn the nature of possession from the inviolability of the personality; a point on which all parties, including Gans, agree.<sup>431</sup>

#### 3.4.4. Conclusion - Gans

Gans, as opposed to Savigny, Thibaut and Zachariä, believes possession is a right, not a fact. According to Gans, jural concepts are facts, but if they stand in a jural relation to a person, they become rights. This is the case of *detentio*, which becomes *possessio* once the person forms a will to hold a thing. For Gans, *detentio* is a fact, *possessio* is a right, and *usucapio* is the linking chain to ownership (*Zusammenhangskette*).

Gans' analysis of Savigny is sharp and he is right to point out the sequence of slight changes that appeared throughout the six editions of the *Besitz*. Gans is also correct in pointing out that if it is only the inviolability of the person that lends possession of its legal quality, the same should apply to *detention*. The *detentor* should have been protected in the same way as the possessor ad *interdicta*, but clearly, Roman law did not recognize this.<sup>432</sup> However, it is unclear how Gans understands 'pure' *detentio*, as a mere holder would typically also have a will to hold.

Gans rejects Savigny's notion of possession as 'presumptive' ownership but accepts the notion of incipient ownership (*blosses anfangendes Eigentum*) and has to defend himself against

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<sup>431</sup> *ibid*

<sup>432</sup> *ibid* 24

Savigny's attack that he conflates *usucapio* and interdicts.<sup>433</sup> Gans denies it and says this applies only to the particular will. Here Gans commits a fallacy, however when he perceives the will only as *animus domini*, namely, as the will to fare with an object as one wants, because this leaves out the possibility of a will merely to possess (*animus possidendi*). Gans links the *animus domini* of the *usucaptor* with ownership.<sup>434</sup>

Gans raises many issues, but he seems to put his hand on a fundamental problem, namely, the dichotomy of fact and right that Savigny accepts as given for his analysis. Gans correctly says that all law is based on facts, but he does not elaborate on the matter. If we develop the thought, we must admit that law is always abstract, 'ideal' and is subsumed to an action of the natural world, thus, giving it a legal quality, this quality however is always normative. Hence, an agreement of two people to sell something at a particular time and place becomes a 'contract' a '*Rechtsgeschäft*' only if we subsume that action under the specific rule; so, the jural quality is not inherent but the result of a cognitive process. Once we establish what possession is in the physical world, namely the holding of something with or without a will, we can proceed to subsume the relevant provisions.

We can state that the extent to which possession is jural depends on a particular jurisdiction's normative order. The laws are abstract conceptions that describe the physical actions of the real world. In the same way, a will becomes a testament because writing one's wishes on paper gains legal relevance because it is recognized as such.

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<sup>433</sup> *ibid*

<sup>434</sup> Gans (402) 202

This point challenges the a priori distinction between jural and non-jural possession made by Savigny and accounts for the problems Savigny ran into when trying to explain why Romans protected certain forms of possession and not others, though the physical act was the same in all instances.

Unfortunately, Gans does not fully develop this point, as his primary concern seems to be to establish the relation between the ‘will’ and the ‘jural quality.’ His distinction between the ‘particular’ and ‘general’ will hark back to Hegel, who perceived the ‘universal truth as manifested in the particular.’ It goes back to Hegel’s effort to align historical relativism with the formalism of natural law through the dialectic process.<sup>435</sup>

Puchta’s review of Savigny was much milder. Still, he correctly pointed out that Savigny only poses the question of what possession is, without answering it, instead of moving to discuss the nature of interdicts.

### **3.5.1. Schaaff and Huschke**

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<sup>435</sup> For a discussion of this point see Franz Wieacker, ‘Naturrecht und materiale Gerechtigkeit’ (1964) 20 *Juristenzeitung* 637

The review of Gans against Savigny prompted another review, surprisingly this time by an otherwise unknown student of law at the University at Berlin, Friedrich Schaaf.<sup>436</sup> Schaaf attempted a defence of Savigny in his review.<sup>437</sup>

Schaaff contrasts the two opposing approaches thus: Savigny developed a theory that is philosophically sound and warranted by the sources, while Gans derived his concept from a philosophical principle whose confirmation he finds in the sources. Schaaff will seek to demonstrate that both aspects of Gans' method are wrong.<sup>438</sup>

Schaaff explains Savigny's reasoning thus: possession is a factual situation, distinct from ownership, which is a right; therefore, possession cannot establish a jural relation, and, thus, the disrupting party (*Störer*) is treated as the perpetrator of unlawfulness (*Vollbringer eines Unrechts*) rather than the injuring party of a right (*Verletzer eines Rechts*).<sup>439</sup>

For Schaaff, the contrast between right and fact is the following: right is the freedom granted by the sovereign to act within its parameters, while fact (*Thatsache*) is what can be jurally relevant.<sup>440</sup>

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<sup>436</sup> He cannot be identified as the privy councillor Friedrich Theodor Schaaff (1792 – 1876) and not likely as the latter's son who was a customs officer in 1865

<sup>437</sup> Friedrich Schaaff, *Gans' Kritik gegen Herrn von Savigny, die Grundlage des Besitzes betreffend* (Enslingsche Buchhandlung 1839)

<sup>438</sup> *ibid* 3

<sup>439</sup> *ibid* 8

<sup>440</sup> *ibid*

This review prompted another review by Georg Philipp Eduard Huschke (1801 – 1886), a professor at Breslau.<sup>441</sup> Huschke noted first that it was problematic that a student of Savigny would undertake to answer for the master, especially, as the present issue requires, a ‘penetration into the innermost nature of the law, warranting the involvement of the masters only.’<sup>442</sup>

Huschke states that though it is a noble cause to run to the defence of one’s teacher, the treatise is haughty in tone, not effortlessly noble, ‘resembling rather an offensive speech of a plebeian.’<sup>443</sup>

Huschke remarks on the definitions of Schaaf for both possession and factum and finds them both unfortunate.<sup>444</sup> Huschke takes issue with Schaaff’s view that ‘right is a freedom granted by the state,’ as this, ‘smacks of the most common absolutism of the modern liberal view, garnished with Kantian reminiscences, something the Historical School can very well do without.’<sup>445</sup>

Huschke does not understand why the passage in Paul. D. 43, 17, 2: ‘*possessor, hoc ipso, quod possessor est, plus iuris habet, quam ille, qui non possidet,*’ cited by Gans as evidence that law is a right for the Romans, is mistranslated by the latter.<sup>446</sup> However, Huschke believes that

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<sup>441</sup> Georg Philipp Eduard Huschke, ‘Gans’s Kritik gegen Herrn von Savigny, die Grundlage des Besitzes betreffend, erörtert von Friedrich Schaaff, recensiert vom Herrn Professor Dr. Huschke’ (1839) 5 Kritische Jahrbücher für deutsche Rechtswissenschaft

<sup>442</sup> *ibid* 292

<sup>443</sup> *ibid* 293

<sup>444</sup> *ibid* 294

<sup>445</sup> *ibid* 295

<sup>446</sup> *ibid* 298

Schaaff is right in claiming that Paul. D. 41, 2, 1 1: ‘*dominiumque rerum ex naturali possessione coepisse, Nerva ait*’ merely says that the earliest form of ownership was possession, not that ownership stemmed from possession.’<sup>447</sup>

Having dismissed Schaaff’s review, Huschke himself now asks, ‘Is possession foremost a right or not? He attempts to give his owner an answer.’<sup>448</sup> Huschke believes that the question of whether possession is a right or a fact is unfortunate in itself and would not have been formulated thus in the first place if clarity on the concept of right existed.<sup>449</sup>

He believes that both the views of Savigny and Gans have shortcomings. The former is influenced by certain basic views (*Grundansichten*) of Roman law on the antithesis between *ius* and *factum* without delving deeper into the matter. And the latter starts from the abstractions of Roman philosophy without further elaborating.<sup>450</sup>

But though they are both speaking a different language, both agree on one point, namely, that violent disruption of possession must be considered unlawful (*ein Unrecht seyn soll*), while the possession itself may not be considered as a right.<sup>451</sup>

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<sup>447</sup> *ibid*

<sup>448</sup> *ibid* 299

<sup>449</sup> *ibid*

<sup>450</sup> *ibid*

<sup>451</sup> *ibid*



However, what makes matters more complicated, according to Huschke, is that Gans claims that Roman law adheres to the principles of reason (*raison écrite*), a matter hardly disputed, and in tune with his own philosophical views.<sup>452</sup>

Huschke reasons as follows: The mind is always superior to the body, and according to the Roman concept a right (*ius, ein Recht*) is related to the spiritual part since this can only influence itself or others (*sich selbst oder andere zu bedingen*). It is, thus, superior to the physical aspect (*Körperliche*) that cannot condition anything but is conditioned by the spirit.

Therefore, the right as such (*des eigentlichen Rechts nach*) pertains only to people because of their spirit (*animalia*).<sup>453</sup>

The relation of a person to a thing can be either ownership or possession. The person is composed of spirit and body, but only the former gives her standing under the law, while the latter is subordinated to the spirit.<sup>454</sup>

Consequently, if a person draws an object (*zieht sie nun nach dieser Seite eine Sache*) that is conditioned by the spiritual personality (*die eben als solche von der geistigen Persönlichkeit absolut beding wird*), according to legal pronouncements, then the relation is called ownership. If, however, the person draws the item under its physical component only, it is not entitled; thus, the situation is not legal but physical, thus establishing a ‘natural control of an object’ (*natürliche Herrschaft über die Sache*); it is possession and therefore not a right.<sup>455</sup>

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<sup>452</sup> *ibid* 300

<sup>453</sup> *ibid* 301, 304: ‘*denn das Recht ruht im Geiste.*’

<sup>454</sup> *ibid* 302

<sup>455</sup> *ibid* 303

Now, this division admits of further distinctions: if the control is purely physical, without a will, then the situation is a strictly factual, physical one. However, if the control is exerted both with the physical and spiritual components of the person then the situation is not purely factual but receives its quality from the spiritual component.<sup>456</sup> Consequently the jural aspect of possession (*rechtliche Seite*) is not something positively added (*positiv beygelegtes*) but a necessary consequence of its nature (*fließt aus seiner Natur selbst mit Nothwendigkeit her*).<sup>457</sup>

Therefore, the Romans themselves describe possession in, Paul. D. 41, 2, 1, 3 as: *'eam enim rem facti non iuris esse;*' in Pap. D. 4, 6, 19 as: *'possession autem plurimum facti habet;* Pap. D. 41, 2, 49, 1as: *'possessio non tantum corporis, sed et iuris est.'* Thus, claiming possession is only a fact with a legal consequence or a right in the proper sense is equally false.<sup>458</sup>

Gans' view went in the right direction but missed the mark. His distinction between 'particular' and 'general' will and identifying possession and ownership according to each is unclear. Gans probably meant to say that the 'particular' will is equal to the physical, the species, while the 'spiritual' will is universal, and this is how one should distinguish.<sup>459</sup>

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<sup>456</sup> *ibid* 303: *'So ist der Zustand so wenig ein rein factischer, wie sein Leib, in der Person aufgefasst, ausschließlich als Leib thätig ist, sondern entlehnt vermöge seiner Einheit dem animus in diesem dessen äußerliche Seite.'*

<sup>457</sup> *ibid*

<sup>458</sup> *ibid* 304

<sup>459</sup> *ibid*: *'In diesem Verstande könnte man den natürlichen Willen des Besitzers einen besonderen, den geistigen des Eigenthümers einen allgemeinen nennen.'*

The above clarifies why interdicts must also be classified as standing, next to ownership, but having their nature (*auf die ihm zukommende eigenthümliche Weise*). A *vindicatio* is always *in rem*, an interdict *in personam*, as the latter is directed only against the attacking person.<sup>460</sup>

### **3.5.2. Conclusion – Schaaff and Huschke**

Huschke finds fault with both Savigny and Gans and attempts to solve the question of the nature of possession by negating the duality of fact and right and by perceiving possession as a fact and a right simultaneously. This approach stems from the dual nature of the personality, composed of spirit and body. Therefore, the degree of each component involved concerning an object decides whether ownership or possession exists. Thus, Huschke believes to have clarified the view of Gans.

Huschke's view is based on philosophy, and Hegel is his influence. Nevertheless, he seems to realize that the argument was so entrenched that a radically different approach was needed. His reading of Savigny and Gans is perceptive. He realizes that both want to accord possession a legal quality but have problems establishing it while preserving the difference between ownership and possession without breaking the rules of logic considered inherent in Roman law.

He, therefore, offers an attempt to fuse the two opposites, as each position seems to have the same advantages and shortcomings. However, Huschke's take leaves many questions open, and his explanation is not convincing. He does not explain the proportion between the mental and the physical element necessary in each instance and how this is to be ascertained.

### **3.6.1. Stahl**

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<sup>460</sup> *ibid* 306

Let us now turn to Friedrich Julius Stahl. Stahl was a notable figure in the ‘Pandectist’ movement, who took part in the discussion about the nature of possession, praising and criticizing Savigny, and was cited by subsequent jurists of the ‘Historical School,’ such as Regelsberger.

Stahl was born Julius Jolson into the Jewish faith but converted to Lutheranism and became a conservative politician, an anti-revolutionary, called the ‘German Edmund Burke.’<sup>461</sup> His most important book is *The Philosophy of Law*, where he develops his positions on law and philosophy. He was a protégé of Savigny but somehow more dogmatic and conservative than his master.<sup>462</sup> Stahl succeeded Eduard Gans at the law faculty of the University at Berlin.

He places the personality and its free will at the basis of any community. Still, he opposes the voluntarism of Rousseau in that he believes an objective order must be observed and channel human will. Thus, he opposes allowing ‘frivolous’ divorce because it makes people make the wrong choice.

Accordingly, he criticized his mentor Savigny, who perceived law as stemming exclusively from the *Volk*, as much as the latter disregarded the need for the law to be regulated by a higher objective, moral order, which he saw in God.<sup>463</sup> Thus, the ‘Historical School’ had, in his view, failed in that it could not create a moral law (*sittliches Recht*).<sup>464</sup>

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<sup>461</sup> Friedrich Julius Stahl, *The Philosophy of Law, Book III Private Law, translated edited and introduced by Ruben Alvarado* (World Bridge 2007) XI; Toews (n 34) 306

<sup>462</sup> Toews (n 34) 282

<sup>463</sup> Friedrich Julius Stahl, *Philosophie des Rechts* (1963) I 587-8

<sup>464</sup> *ibid* II part I 70-190

Personality, as the primal being (*Ursein*), the correlate of subjective free will in the world, was Stahl's starting point for his theory. The personality and the 'I' stood at the centre of the historical process.<sup>465</sup>

Stahl takes an 'institutionalist' view of the law, in opposition to Savigny, who perceived jural institutions as organically linked.<sup>466</sup> He maintained that legal institutions (*Rechtsinstitute*) are separate from jural relations (*rechtlich geregelte Lebensverhältnisse*.)<sup>467</sup> Instead, the institutions have a purpose, a *τελος*, and this informs the interpretation of the individual laws.

### 3.6.2. Stahl's Concept of Possession

In the second volume of his *Die Philosophie des Rechts*,<sup>468</sup> Stahl discusses possession and possessory interdicts in *Chapter V: Besitz*, having previously discussed ownership (*Eigentum*) in *Chapter IV: Das Sachenrecht (Law of Material Things)*.<sup>469</sup> In *Sachenrecht*, he defines ownership as the complete power (*gesamte Herrschaft*) of a human being over a thing. Ownership conceived

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<sup>465</sup> *ibid* 14, 57, 6; see also Toews (n 34) 310

<sup>466</sup> Schlosser (n 7) 289

<sup>467</sup> Zwiłgmeyer (n 108) 13

<sup>468</sup> Friedrich Julius Stahl, *Philosophie des Rechts, Zweiter Band, Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung* (Mohr 1854)

<sup>469</sup> I adhere here to the English translation, Friedrich Julius Stahl, *The Philosophy of Law, The Doctrine of Law and State based on the Christian Worldview* (Ruben Alvarado, trans, Worldbridge 2007) 71

thus cannot be fragmented (*ihm würde nicht die Zersplitterung entsprechen*), as an object to be owned must be subjected entirely to the will to do with it as one pleases.<sup>470</sup>

Stahl defines possession as the factual control over an object, intending to own it, without establishing ownership.<sup>471</sup> Possession, he continues, does not establish a right over an object (*kein Recht auf die Sache*), but, like ownership, also serves the general purpose of property, namely, the satisfaction of human needs through their submission to the human power and will. For this reason, it is fitting to accord possession legal protection too.<sup>472</sup>

However, due to its differing nature, legal protection of possession must be different from that afforded to ownership.<sup>473</sup> Possession is not absolutely protected against anyone who withholds the object (*nicht eine Gewähr der Sache selbst, und daher gegen jeden, der die Sache vorenthält*) but only vouchsafes a factual situation (*nur eine Gewähr des faktischen Zustandes*), thus, against anyone who seeks to alter this factual situation through a positive act.<sup>474</sup>

### 3.6.3. Stahl's View on the Protection of Possession

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<sup>470</sup> *ibid* 382, 385: 'Eigentum ist sonach das Recht (die rechtliche Gewalt) über eine Sache in seiner Totalität.'

<sup>471</sup> *ibid* 395: 'Der tatsächliche Zustand der Gewalt über die Sache, die in Eigentumsabsicht ausgeübt wird, ohne dass Eigentum begründet wäre.'

<sup>472</sup> *ibid*

<sup>473</sup> *ibid* 404: 'Der Art nach etwas ganz anderes.'

<sup>474</sup> *ibid*

Stahl maintains that the protection of possession has a delictual nature at its core but is only concerned with the restitution of the factual situation. Therefore, possessory protection aims not to protect the person against violence. This explains why possessory protection does not grant damages through *actio iniuriarum*, but only non-interference and restitution of the possessory situation and only against actions that endanger the security of the factual situation, namely, violent or secret disruption.<sup>475</sup>

Stahl admits that possessory protection is similar to other delicts since the former is also directed against a person (*actio in personam*) and forms the basis of delict in general. However, this category has an additional feature, namely, the injury of the factual situation attained by a person. Further, possession is only secured against specific forms of injury, namely, those directly and actively perpetrated by another party, and only indirectly protected through *actio in personam*.<sup>476</sup>

Stahl warns that we cannot conclude from this that possession is an irrelevant fact (*gleichgültiges Faktum*) that only gains legal significance as a natural precondition of an injurious action; on the contrary, it carries its legal meaning in itself, and it is because of this that the former actions are considered injurious.<sup>477</sup> Stahl maintains that the withholding of *precarium* is seen in

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<sup>475</sup> *ibid* 396

<sup>476</sup> *ibid* 396 \*‘den von der Person errungenen faktischen Zustand zur Sache verletzen.’ (\*in the original)

<sup>477</sup> *ibid*: ‘Er [sc. *possessio*] trägt seine rechtliche Bedeutung nach Obigem in sich selbst, und nur um dieser willen gelten jene Handlungen als verletzend.’

Roman law as falling under violation of possession, rather than contract, as having to do with a 'purely historical character and had good historical grounds.'<sup>478</sup>

Thus, Stahl concludes, the institute of possession is a provisory (*provisorische*) or subsidiary (*subsidiäre*) regulation of the same conditions of life that are actually and conclusively regulated by the institution of ownership, namely, the relation between a person and an object. However, the former is not a regulation of the rights of the object but a regulation according to the viewpoint of mutual human action, namely, 'that one may not injure somebody else's factual situation' (*nach dem Gesichtspunkte des gegenseitigen Handelns der Menschen, das seiner den andern nicht absichtlich in seinem faktischen Zustand verletze*).<sup>479</sup>

He warns, however, that from this 'auxiliary' position, protection of possession through possessory interdicts cannot be conceived as a provisory *vindicatio*; thus, possession is no interim ownership. Neither can possession be called 'incipient' (*präsumtives*) ownership unless it is *bona fide possessio*.<sup>480</sup> Possession does not merit protection as a presumption of ownership but as a 'factual situation' (*faktischer Zustand*) that merits 'protection' (*Konservation*) in its own right.<sup>481</sup>

Interesting is also his opinion about the relationship between Roman and Germanic law. According to Stahl, the protection of possession is a peculiar feature of Roman law because the latter recognizes ownership as an absolute right, thus, leaving space for another institution that grants protection from the intervention of all persons, regardless of the right to an object. As

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<sup>478</sup> *ibid* 396 fn 44

<sup>479</sup> *ibid* 397, 398

<sup>480</sup> *ibid* 404: 'Das würde auf die *bonae fidei possessio* passen, aber nicht auf die *possessio*.'

<sup>481</sup> *ibid* 397\* (\*in the original)



opposed to this, the Germanic law recognized the concept of *Gewere*, which claimed a ‘middle position’ (*Mittelding*) protected against unlawful disruption (*rechtswidrige Entziehung*) by anyone.<sup>482</sup>

Consequently, the nature of possessory protection has also a different character (*einen generisch verschiedenen Character*) as it is not based on the recognition of the absolute right of possession, but on state authority (*obrigkeitlichen Fürsorge*), as all possessory interdicts rely on the authority of the praetor.<sup>483</sup> They belong to the *iudicia imperio continentia* as opposed to the *iudicia legitima*.<sup>484</sup> He cites the *ager publicus*, on which no ownership was possible but only possession. So, in the case of absolute rights (*Rechte*) authority follows that right, while in the case of possessory interdicts, the authority gives a right. Even later, when the provisory interdicts became institutions of private law, they retained their character.<sup>485</sup>

Stahl criticizes Roman jurists for not recognising the right consequences from the subsidiary and accessory nature of the possessory interdicts, thus, adhering to the principle in Ulp. D. 41, 2, 12, 1: ‘*nihil commune haben proprietas cum possessione.*’ However, correctly applied,

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<sup>482</sup> *ibid* 397

<sup>483</sup> *ibid* 398

<sup>484</sup> *ibid* \*(in the original)

<sup>485</sup> *ibid*: ‘*Dafür sind bei uns an den Provisorien wieder Schutzmittel für den faktischen Zustand an Sachen hinzugekommen, die sich, wie ursprünglich die possessio, nicht an das Recht der Partei, sondern auf Ansehen und Fürsorge des Richters gründen.*’

possessory interdicts must regulate following factual considerations (*faktische Rücksichten*), only when legal ones are not present.<sup>486</sup>

Roman law has maintained this link only in one aspect, namely, the *interdictum retinendi possessionis*, as a preparatory action for the action of ownership, but has otherwise disregarded the deep origin and aim (*tiefern Ursprung und Zweck*) of the concept of possession, treating it merely as an *obligatio ex delicto* in which the right to the object is not considered.<sup>487</sup>

The German legal practise developed this link, partly based on canon law. This can be deduced from, the following: a) incontrovertible (*‘liquide’*) objections of ownership are sustained against the interdict, b) *possessorium* and *petitorium* are not considered as actions on different things, but aimed at one final aim, c) the whole institution finds application on other jural relations that are not of the character of real rights (*dinglichem character*) but where similar formal interruptions happen and a final settlement is to be obtained.<sup>488</sup>

Stahl claims that the further development of these institutions is a natural development and amelioration of the same (*naturgemäße Fortbildung und Verbesserung*) of Roman law and does not impinge upon the nature of ownership as a real, absolute right, and possession as indirect protection through an *obligatio ex delicto*.<sup>489</sup>

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<sup>486</sup> *ibid*: ‘Dieser Beziehung nun gewährt das römische Recht (und noch mehr die römische Theorie) nicht die gehörige Geltung.’

<sup>487</sup> *ibid* 399: ‘Bei welcher das Recht auf die Sache auch gar nicht in Betracht kommt.’

<sup>488</sup> *ibid* 399

<sup>489</sup> *ibid* 400

The Roman form (*Gestaltung*) of the institution of possessory protection, as clarified by Savigny and the form it took in German practice is different. The former is based on the contrast of ownership and delictual claim, the latter on the contrast between *definitivum* and *provisorium*. According to our entire philosophical principle (*philosophisches Princip*), Stahl claims the aim of possession (τέλος) requires that we unify both forms in the way that the objective of the Germanic practice is preserved, and the entire Roman technique (*römische Technik*) is applied as a link (*Mittelglied*) to achieve this aim.<sup>490</sup>

This passage is significant as it is the first lengthy treatise of a member of the ‘Historical School’ that extensively deals with the Germanic concept of *Gewere* and asks that it be accorded its place next to the Roman one.

#### **3.6.4. Stahl’s Critique of Savigny, Thibaut and Puchta**

Stahl agrees with Savigny that possession is a fact with legal consequences and calls the latter’s monograph on possession, ‘an example of a juristic monograph.’<sup>491</sup> He believes, however, that Savigny, though having correctly identified the nature of possession as the factual relation to an object that corresponds to the right on an object, has not consistently applied his accurate identification of possession in his further discussion of it because he uses the inviolability of a person - not the inviolability of possession itself - as the basis of possession, the latter being only protected as an annexed injury of a person (*Mitverletzung*).<sup>492</sup>

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<sup>490</sup> *ibid*

<sup>491</sup> *ibid* 401: ‘*Das Muster juristischer Monographie.*’

<sup>492</sup> *ibid* 405

Stahl states that Savigny's treatment of possessory protection as an obligation *ex delicto* is consistent with Roman thinking but not with possession's 'inner nature.'<sup>493</sup> Stahl states that Savigny eventually, correctly placed possession into *Sachenrecht* in his lectures (*Kursus des Civilrechts*).<sup>494</sup>

In this respect, he also disagrees with Puchta, who conceives the disruption of property as a 'violation of the right to one's own will.' Stahl says that Puchta's attempt to explain the jural nature of possession out of the rights of personhood, more specifically, its will, reveals a significant aspect of the jural philosophical justification of possession, but it does not exhaust it.<sup>495</sup> Stahl argues that the will is always present, but in these specific circumstances, the will to keep a certain factual position towards an object is protected.<sup>496</sup> Stahl disagrees with the natural-law doctrine that seeks to derive possession exclusively from the will.<sup>497</sup>

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<sup>493</sup> *ibid* 402

<sup>494</sup> *ibid*

<sup>495</sup> *ibid* 405: '*Enthüllt ein wesentliches Moment der rechtsphilosophischen Begründung des Besitzes, nur erschöpft er sie nicht.*'

<sup>496</sup> *ibid*: '*Nicht der grundlose Wille der Person an und für sich ist es, den das Recht schützen will und zu schützen den Beruf hat, sondern der unter Gunst der Umstände von ihr errungene Vortheil vor andern, ihre thatsächliche Stellung zur Sache.*'

<sup>497</sup> *ibid*

Stahl disagrees with Thibaut as he believes the latter see possession as a right, but he agrees with Thibaut that possessory interdicts are subsidiary.<sup>498</sup> Stahl disagrees with Gans who claims that possession is a decisive right (*entschiedenes Recht*) and that all rights are based on facts.<sup>499</sup> Stahl argues against this that Gans confuses the fact as a transitory or immanent cause; all rights require a fact for the existence (*Entsehung*), but ownership, *usucapio* and the rest live on after the fact ceases. Possession, on the other, belongs to the latter category, its continuation (*Fortdauer*) rests on the fact; as the fact ceases, possession ceases.<sup>500</sup> Further, Stahl criticizes Gans's view that all legal institutes are relative but never absolute.<sup>501</sup> According to Stahl, in contrast, all institutions, family, state and contracts have their teleology.

### 3.6.5. Conclusion - Stahl

In Stahl, we find an attempt to explain possession within a greater institutional scheme of the law and an effort to settle wide-ranging philosophical matters conclusively. Moreover, his quest to mingle the Germanic and Roman components of possession is an innovation, as we have not seen advocacy for Germanic law in this discussion.

Hence, Stahl conceives possession in contrast to ownership. The latter being an absolute right; the former having merely jural consequences and being only relatively protected against

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<sup>498</sup> *ibid* 402

<sup>499</sup> Gans (n 384) 33

<sup>500</sup> Stahl (n 466) 403

<sup>501</sup> Gans (n 384) 3

positive interference. Thus, it has its position among real rights (*Sachenrecht*) since he conceives *Sachenrecht* as encompassing rights that aim at ordering relation to an object, despite not being a right to an object itself,<sup>502</sup> something that the right of possession is. In this view, he is consistent with the *Usus modernus pandectarum* and notably Gustav Hugo, who had heavily criticized Savigny. Hugo had placed possession initially among obligations and stated that possession belonged to *Sachenrecht* as it was similar to a right. After all-natural ownership (*natürliches Eigentum*) was not absolute either.<sup>503</sup> Stahl claims that this is not true; all institutions are sacred, and there cannot be one; however, jural possession is merely unlawful and thus void concerning ownership.<sup>504</sup>

In this respect, Stahl aligns himself with a tradition that goes back to the *Usus modernus pandectarum* and Gustav Hugo, against Savigny's view, who had sought to place possessory interdicts into their original Roman context.

Stahl's claim that possession merits protection as a factual situation directed only towards the restitution and preservation of a factual possessory situation, not as a precondition to injury to a person, leads him to disagree with Savigny, Puchta and Thibaut. Puchta and Thibaut followed Savigny in that they saw the protection of interdicts merely delictual protection of the person.

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<sup>502</sup> Stahl (n 466) 401

<sup>503</sup> Hugo (n 107) 490: '*Offenbar hat der Besitz selbst mehr Ähnlichkeit mit den Rechten auf eine Sache, als mit persönlichen Forderungen [...] Nur freylich ist der Besitz kein strenges dingliches Recht gegen den dritten Besitzer, wie das Eigentum, aber Dieß was das natürliche Eigentum auch nicht.*'

<sup>504</sup> Stahl (n 466) 404

Stahl sees the aim (τέλος), or inner nature, of possession as being a help to ownership. Stahl's desire to identify a philosophical aim (*Bestimmung*) for each institution ties in with his larger view that jural institutions follow a purpose; the inner nature of the institution guides its way. He argues with a legal, philosophical justification (*rechtsphilosophische Begründung*) of possession.

He indirectly points out an inconsistency in Savigny's thinking, who had asked what possession was and to what class of right it belonged but only comprehensively answered the first question. We have seen above that Savigny asked if possession was a right and, if yes, to what class it belonged but only answered the first. In this regard, he is in the same camp as Zachariä and Gans.

### 3.7.1. Thon, Rudorff, Hasse

Gustav Thon defends Savigny against his critics in an article ten years after the 4<sup>th</sup> edition of *Das Recht des Besitzes*.<sup>505</sup> Thon states that delineating the various possession concepts is crucial for understanding possession.

In picking up the invective of Zachariä against Savigny, he uses the same arguments against the critique that the latter had used but claims further that the only concept deriving from life was that of *detentio*, which is not a jural concept, but drawn from life itself (*factische Verhältnisse der Detentio [...] aus dem gemeinen Leben entnommen*) while all other belong to the *ius civilis*.<sup>506</sup>

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<sup>505</sup> Gustav Thon, 'Über civilis und naturalis possessio' (1833) 4 *Rheinisches Museum für Jurisprudenz* 95

<sup>506</sup> *ibid* 96

Thon claims that the Roman jurists' aversion to definitions as encapsulated in the sentence '*omnis definitio in iure civili periculosa est*', is why we might not find much in terms of definitions. However, Savigny can be credited with fleshing out the seeds (*Keime*) of these concepts from the sources by distinguishing between *civiliter possidere* and *civiliter non possidere*, the former leading to *usucapio*.<sup>507</sup> The second point of dispute is the delineation of *naturalis possessio* and *civilis possessio*. Thon defended Savigny's view, against both Thibaut and Gans.<sup>508</sup>

We see that Thon adheres to the dichotomy between 'jural' and 'non-jural' concepts, namely, *possessio* and *detentio*, despite the mounting criticism of Thibaut and Gans.

Rudorff, in his article, 'Über den Grund der possessorischen Interdicte,' tries to tackle the question from another angle, namely, the possessory interdicts. He asks why juridic possession (*juristischer Besitz*) is protected through interdicts. Rudorff says that while it is undisputed in the sources that possession is thus protected, the reason for its protection remains highly disputed. He maintains that this question goes together with the question of the nature of possession itself; Is it a right or a factum?

By *factum*, he means something legally irrelevant (*rechtlich Indifferentes*).<sup>509</sup> Rudorff believes that this question is crucial, as opinions vary on the matter. He credits the glossator

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<sup>507</sup> *ibid* 97

<sup>508</sup> Thon (n 507) 95

<sup>509</sup> Adolf August Friedrich Rudorff, 'Über den Rechtsgrund rund der possessorischen Interdicte' (1831) 7 *Zeitschrift für geschichtliche Rechtswissenschaft* 91: '*Die Frage, wie es sich juristisch*



Bassius<sup>510</sup> with having described possession as a right, starting from the term *ius possidendi*, used in the sources vaguely by the Romans themselves. He traces this view to his contemporaries, most notably Savigny, who maintained possession as a right.<sup>511</sup> Further, the proponents of this school were again divided into various groups and disagreed among themselves on what kind of right possession is.<sup>512</sup> Some, mainly older jurists, claim that possession was right *ad rem* (*Obligation*).<sup>513</sup> Rudorff cites Savigny, Puchta and Thibaut as belonging to that school.<sup>514</sup> Savigny, Puchta and Thibaut all claim that possession is right *ad rem*, thus belonging to obligations because possessory interdicts are rights of an obligatory nature.<sup>515</sup> Rudorff dismisses this view as flawed in as much as the nature of possession cannot be derived from the right of the interdicts.<sup>516</sup>

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*rechtfertigen lasse, dass der bloße Besitz durch Interdicte geschützt wird, steht in der engsten Verbindung mit einer allgemeineren: ob nämlich der Besitz ein Recht oder rein Factum sei. ’*

<sup>510</sup> *ibid* 92

<sup>511</sup> Rudorff (n 512) 93

<sup>512</sup> *ibid* 92: ‘*in welche Classe von Rechten dieses ihr Besitzrecht gehöre? ’*

<sup>513</sup> *ibid* 93

<sup>514</sup> *ibid* 94

<sup>515</sup> Savigny, (n 8) 52: ‘*Zu welcher Classe von Rechten gehört der Besitz? [...] Es lässt sich nämlich zeigen, dass der Besitz in das **Obligationsrecht** gehört. ’* (emphasis in the original); Puchta (n 407) 307; Thibaut (n 301) 59

<sup>516</sup> Rudorff (n 512) 94

The second group claims that possession is an *ius in re* (*dingliches Recht*). This group comprises most notably Gans, Hugo, Mühlenbruch.<sup>517</sup> For Gans, possession is protected as the expression of personal will on a thing, a right.<sup>518</sup> Further, Gans, who must acknowledge that possession is a fact, distinguishes between the will and the general will to hold a thing. If the holding occurs under the will, it is unlawful and leads to possession. If it is under the general will, it is lawful and leads to ownership.<sup>519</sup>

Against this reasoning, Rudorff holds that if a thing is held according to the ‘general will’ and is, therefore, ownership, it must be protected. Still, if it is held according to the ‘particular will,’ that is not in tune with the ‘general’ one. It must be something factual, hence not legally relevant (*rechtlich indifferent*), or even an injustice that does not merit protection. Therefore, if

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<sup>517</sup> *ibid* 94

<sup>518</sup> Gans (n 281) 211: ‘*Der Rechtsgrund des Besitzes liegt also – darin, dass schon der besondere Will der Person, wo er sich in den Sachen äußert, ein Recht ist und als solches behandelt werden muss.*’

<sup>519</sup> *ibid*: ‘*Findet dieses haben bloß nach der Seite des besonderen Willens statt, so ist – Besitz, ist dagegen die **Allgemeinheit, das heist die Berechtigung** dieses Besitzes vorhanden, so wird er **wirkliches Eigentum.***’ (emphasis in the original)

possession held against the ‘general’ will’ is protected nonetheless, it is not because it is a right but because of something else.<sup>520</sup>

We remember that Gans attempts to justify the protection of possession as nascent ownership (*anfangendes Eigentum*) through *usucapio*.<sup>521</sup> Against this Rudorff maintains that this does not say anything about the nature of possession in its present status. Moreover, he believes that the argument brought forth by the proponents in favour of seeing possession as a right according to which possession is a right as incipient ownership (*usucapio and longis temporis praescriptio*) is flawed because these entail further requirements, namely *iustus titulus* and *bona fides*; hence, they do not explain why possession should be a right in the first place, they just assume it is.<sup>522</sup>

More specifically, Gans’ citation of the Roman sources, which require *animus possidendi*, does not entail that the will is protected, while his citing of Paul. D.41,2,1.1 54 ad ed. as an argument in favour of the thesis that possession is incipient ownership is not satisfactory.<sup>523</sup>

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<sup>520</sup> Rudorff (n 512) 98: ‘*Wenn also trotz dem der Besitz einigermaßen geschützt wird, so kann dieser Schutz nimmermehr der Schutz eines Rechts sein, sondern es muss hier in der That gegen die Regel einem Richtrecht Schutz zu teil geworden sein.*’

<sup>521</sup> Gans (n 281) 211, 215; see Stahl (466) 404

<sup>522</sup> Rudorff (n 491) 92: ‘*Nur haben sie freilich oft diese secundäre Frage mit überwiegender Vorliebe behandelt und die Hauptsache, nämlich ob der Besitz ein Recht überhaupt ist, darüber etwas leichtgenommen.*’

<sup>523</sup> *ibid* 99; Gans (n 281) 212

Rudorff is right in his assessment of the said sources, ‘natural possession’ refers to occupation, namely, possession leads to ownership of things that don’t belong to anybody. The passage does not say anything about the nature of possession.

Rudorff considers Puchta as the main representative of the third sub-category. He sees the protection of possession as the person's right (*Recht an der eigenen Person*). According to Puchta, the ‘particular’ will (*der besondere Wille*) in itself deserves protection.<sup>524</sup> Rudorff justly sees this view as similar to that of Gans, and gives the same objection, namely that the reasoning is flawed in that it fails to explain the nature of possession from its protection.<sup>525</sup>

The second group that Rudorff identifies can be traced back to Accursius. Accursius perceived possession as a *factum*.<sup>526</sup> So naturally, he concludes, this school must seek to explain the position of possession in the legal system, as possession itself cannot be classified under a legal category.<sup>527</sup> Rudorff believes that nobody managed to clarify why possession as a factual act was a right based

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<sup>524</sup> Puchta (n 407) 292: ‘*Daß nun das Besitzrecht ein Recht an der eigenen Person ist, davon enthält unter Voraussetzung seiner Existenz schon das bisherige den Beweis.*’

<sup>525</sup> Rudorff (n 512) 101, 103 n2.: ‘*Auch wenn der Besitz ein Recht wäre, würden mir die historischen Argumente s.307 (sc. Rhein. Museum) nicht zu beweisen scheinen, dass er ein persönliches sein müsste. Denn die persönlichen warden ja eben sowohl durch Präjudizien und Vindicationen geschützt als andere durch prohibitorische Intedicte.*’

<sup>526</sup> Rudorff (n 512) 103

<sup>527</sup> *ibid* 92: ‘*Bei den Schriftstellern der zweiten Partei kann natürlich nur von einer Stellung des Besitzes im Rechtssystem, nicht von einer eigentlichen Classification desselben die Rede sein.*’

on its will, i.e. the *animus possidendi* because the latter can either be in tune with the general will or against it and if it is against it, it must be broken.<sup>528</sup>

Rudorff himself perceives possession as a *factum*. For him, the rationale behind the protection of possession lies in the early Roman effort to forbid self-help.<sup>529</sup> He cites various sources for that. This effort to manifest a monopoly of the adjudicatory powers led to the situation where a material injustice could be protected as a formal justice, while a formal injustice, namely, the lack of a title, would not be protected even if it were materially lawful. Thus, any attempt to infer from the right of an interdict on the nature of possession itself must, by necessity be flawed. Only by comprehending the nature of the interdict, namely, as forbidding self-help, can we understand why possession is protected.<sup>530</sup>

The practising lawyer Gustav Hasse wrote a lengthy article ‘Über das Wesen der actio, ihre Stellung im System der Privatrechts und über den Gegensatz der in personam und in rem actio,’ which appeared in the *Rheinisches Museum*, founded by his father, the noted jurist Johann Christian Hasse, co-founder of the said journal.<sup>531</sup> Gustav Hasse is lesser-known, but his contribution to the debate is lively and he argues with the leading opinions of the time, namely, Puchta and Rudorff.

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<sup>528</sup> Rudorff (n 512) 104

<sup>529</sup> *ibid* 107

<sup>530</sup> *ibid* 114

<sup>531</sup> Gustav Hasse, ‘Über das Wesen der actio, ihre Stellung im System des Privatrechts und über den Gegensatz der in personam und in rem actio’ *Rheinisches Museum* (1831) 6

Like Rudorff, he asks, ‘What kind of actions are the actions *ex interdictis*’ to answer that this depends on the nature of possession itself.<sup>532</sup> However, he disagrees with Puchta who claimed that interdicts protect a person's will, and Rudorff, who claimed that interdicts replace self-help, as both avoid the question of what right they are based on.

Instead, Hasse claims that possession is a *factum*,<sup>533</sup> but that the act of possessing creates a relative right, as opposed to the right of ownership that is absolute.<sup>534</sup> The differing nature of the two rights is supposed to be the reason for the interdicts (*Durch jede Besitzergreifung entstehe ein relatives Recht an der Sache, dies wird dem Eigenthume als absolutem Rechte an der Sache entgegengesetzt*).<sup>535</sup>

Hasse gives the example of *occupatio*, where an item in nobody’s possession is taken, and ownership occurs as an example of absolute right. In contrast, an item already possessed creates a relative right of possession. However, this right of possession does not affect the nature of possession.<sup>536</sup> Hasse believes that it is in this way that Savigny’s statement, ‘*Besitz ist Recht und Besitz zugleich.*’

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<sup>532</sup> Hasse (n 513) 183

<sup>533</sup> *ibid* 187

<sup>534</sup> *ibid* 191: ‘*Besitz is [...] Unterworfenheit einer Sache unter den Willen, also nicht ein Recht, denn nicht das Unterworfenheit, sondern das Gehören unter den Willen ist Recht.*’ 189 191

<sup>535</sup> *ibid* 189, 190

<sup>536</sup> *ibid* 191

However, he points out that the relative right is not a result of possession, as it comes into being with the former; thus, it cannot be properly said that possession is protected by interdicts or that legal consequences (*rechtliche Wirkungen*) can be attached to possession.

### 3.7.2. Overall Conclusion

From the above sketch of opinions, we can discern that by the middle of the nineteenth century, one could detect four different views on the nature of possession concerning whether possession is a right or a fact and, if it was a right, what kind of right. To this question, four different views were supported by leading jurists of the time.

As we saw, Rudorff, following Savigny, claims possession is a *factum*.<sup>537</sup> He does not explain, however, why possession is protected through interdicts, even though it is not a right. He merely claims that it is because of the disappearance of self-help, but this merely relegates the question, because self-help must stem from a right; thus, the question of the existence of a right need to be answered. The interdicts speak of an interdiction to interfere with somebody else's possession, but this interdiction must be based on a right. The problem Rudorff finds himself in is the same one Savigny found himself in, namely, how to leap from a fact to a right.

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<sup>537</sup> Rudorff (n 512) 91

Puchta claims that possession is not a right *in rem* but a right of the own person (*Recht an der eigenen Person*).<sup>538</sup> This however leads to tautology because the statement ‘the will wants itself’ does not say anything about the nature of possession.

Hasse forms a third opinion that separates the nature of possession from that of interdictual protection by stating that the act of possessing creates a right that is either relative or absolute, depending on whether we have possession or ownership. Hasse’s view is significant as it is a step towards moving away from seeking a definition of possession and instead focusing on the nature of possessory interdicts. We will see that this will be significant for future discussion.

The fourth view can be summed up thus: possession as such is a *factum*, but it is recognized that if this *factum* is combined with something else (*animus domini*), therefore the disruption of possession would justify petitory actions (*eigenthümliche Klagen*), then a particular right to possession must also exist. For nothing can come out of nothing, and if the disruption of possession is merely seen as the result of forbidden self-help, then a mere *detentor* must by necessity be a possessor, as the one who has the *animus domini*. It cannot be the case that interdicts always have petitory effects (*eigenthümliche Auswirkung*).

As the object of this rights is an actual thing (*Sache*) then the right of possession is a direct right of things (*Sachenrecht*).<sup>539</sup> Mühlenbruch and Thaden differ between each other as the former considers the right of possession as a direct right (*unmittelbares Recht*) without the nature of *res*

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<sup>538</sup> Puchta (n 407) 305

<sup>539</sup> Christian Friedrich Mühlenbruch, *Doctrina Pandectarum II* (Swedtke 1839) *de possessorum personis* §233 Note 7; Thaden, 8



(ohne eigentliche Dinglichkeit, d.h. ohne die Möglichkeit der Geltendmachung des Rechts durch *in rem actio*), while the latter holds the possessory interdicts as *in rem actiones*, defining them, however, in a peculiar way (*eigenthümlichen Sinn*).

Against this, a view is held by Johannsen, who follows Thibaut.<sup>540</sup> The author distinguishes between the ‘grammatical’ possession (*grammatischen Besitz, Detention*) and the juridic (*juristischen*), which is merely called possession (*schlechthin possessio genannt*). We have the latter when ‘*detentio*’ is combined with the will of a person to detain the thing (*zu detinieren*). The intention does not have to be directed towards ownership. This derives from the fact that we can have juridic possession next to ownership of another. According to the author, every recognised form of possession, namely, any possession that has validity in the *ius civile*, is *possessio civilis* (*Besitz der Gegenstand der Rechtswissenschaft is*), and *naturalis possessio* every other possession, which, however, relates to the effect that the *interdictum unde vi* is applicable in case of violent dispossession only if *animus possidendi* is present.

The most attacked Savigny ideas were those about limiting the right of possession to interdicts and *usucapio*. Especially Savigny’s idea of a derivative possession (*abgeleiteter Besitz*).

By the middle of the century, we see that the debate around possession was already lively and deeply entrenched by opposing views on several aspects of possession. All authors seem to agree that possession must be accorded a legal quality but are having difficulties explaining satisfactorily. The main points of disagreement are a) the exact nature of possession and b) the reason that interdicts protect possession. One could group the opinions further into ‘absolute’

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<sup>540</sup> Johann Petersen Johannsen *Begriffsbestimmungen aus den Gebieten des Civilrechts* (1831)

theories, those who perceive possession as having legal standing of its own, and ‘relative’ theories, which see the protection of possession for the sake of another good. Savigny, Thibaut and Gans belong to the former, while Stahl belongs to the latter. This crosses over with the dichotomy of possession as the right of fact. Those who perceive it as a right are at pains to establish its distinction from ownership as the absolute right in rem. Therefore, they seek to group it under obligations, and accord possession a relative position.

Savigny believed that ownership is a jural situation (*Rechtlicher Zustand*) as opposed to possession, which is a natural situation. He probably traced this from the sources, where there is mention of a *factum possessionis*. Therefore, protection of possession, can, according to Savigny not be the result of the protection of a right but a person. Gans opposes this because he believes that possession, though based on a fact, is nonetheless a right since all rights derive from a fact. The §308 *ABGB* follows Gans here.

We can say that eventually Savigny, Gans and Puchta agreed that possession is somehow linked with the ‘will of the person’, and this was in opposition to the views of Stahl and Rudorff, who so an objective aim behind the possessory interdicts, namely, societal peace.

## **Chapter 4. Critique of Savigny: How do we Protect Possession and Why?**

### **4.1. Introduction**

Towards the middle of the nineteenth century, we find again authors who, like Savigny, have devoted entire monographs on a comprehensive analysis of possession instead of short articles. An important example of this is Carl Georg Bruns.

#### **4.2.1. Bruns**

Perhaps the most comprehensive treatment of the nature of the interdicts written in the nineteenth century is found in Carl Georg Bruns,' important monograph *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (1848). The work discusses the classical Roman sources on the interdicts extensively, Medieval canon law, and the later developments, especially the *summarissimum*. His views on the nature of possession and his approach are interesting and merit our attention here.

#### 4.2.2. Brun's Concept of Possession

Bruns believes that possession is always associated with ownership, and as evidence for this, he cites the famous passage of Paul (Paul. D. 41,2,1, 1 pr: *dominiumque rerum ex naturali possessione coepisse*.)<sup>541</sup> Bruns further discusses the nature of possession itself. He claims that the Romans perceived possession as a fact rather than a right, but with legal consequences.<sup>542</sup> However, here he remains as vague as Savigny.

Bruns maintains that the Romans distinguished between jural possession (*juristischer Besitz*) and *detentio* (*Detention*). While the former comprised all instances where the physical act of 'holding' an object is coupled with a will that merits legal protection, the latter encompassed the cases where the 'holding' happened without 'a will,' either because the latter was incapable of a will (slave), or because the object itself was incapable of being possessed, or, finally, because the object was held in another name. For the latter, they used the terms, *tenere, detinere rei*

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<sup>541</sup> Carl Georg Bruns, *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (1848: Keip 2005) 1

<sup>542</sup> *ibid* 18, 19

*insistere in re esse, corpore rem contingere, or corporaliter possidere, naturaliter tantum, and in possessione esse.*

Bruns perceives possession as a genus, which he translates as ‘jural possession’ (juristischen Besitz) and encompasses the species: *possessio civiliter; naturaliter; iuste; iniuste; bona* and *mala fide*.<sup>543</sup> He distinguishes all these variations from *detentio*.

Bruns maintains that by default possession requires an *animus domini* (*Eigentumswille*). He justifies his interpretation of the word *animus* found in the classical sources as *animus domini* with the position of the text of Paul, conveniently placed between ownership and *usucapio*.<sup>544</sup>

This is both an insightful observation and an innovation because, from Savigny’s time, it was always held for granted by German jurists that the word ‘*animus*’ in the Roman sources referred to the ‘*animus domini*,’ namely, that ‘will’ must always refer to the ‘will of an owner,’ but this was never explained.

#### **4.2.3. *Possessio and detentio***

Hence for Bruns, *possessio* without *animus domini* is not possession, but mere *detentio*, as found in lease and *depositum*, and given in cases where the jural subject (*Rechtssubject*), the person holding the object, has no legal capacity to exert this form of will, such as a slave.

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<sup>543</sup> *ibid* 21, 32

<sup>544</sup> *ibid* 2, 4

Bruns' discussion of how to distinguish *detentio* from *possessio*, namely, the two kinds of 'physically holding' is interesting. He states that only 'holding for oneself' qualifies as possession, but the 'holding for somebody else is *detentio*.'

*'Wer für sich detiniert, ist Besitzer, wer für einen anderen detiniert, ist bloß Detentor.'*<sup>545</sup>

What he means by this he further seeks to clarify thus:

*'Wenn die Detention äußerlich darin besteht, beliebig, also auf jede Weise, auf die Sache einzuwirken und fremde Einwirkung auszuschließen, so ist es eine natürliche Consequenz, dass nur derjenige vollständig als für sich detinierend angesehen werden kann, bei dem der Inhalt des Willens dem Faktum der Detention entspricht, der also den Willen hat, durch die Detention sich selber dieser Möglichkeit der beliebigen ausschließlichen Einwirkung zu verschaffen, also nur Der, der den Willen hat, jede mögliche Einwirkung auf die Sache, sobald sie ihm beliebt, vorzunehmen, und jede fremde Einwirkung, sobald sie ihm nicht gefällt, auszuschließen.'*<sup>546</sup>

For Bruns, it is only the will to completely (*vollständig*) hold something, while excluding the influence of everybody else, that can lead to possession. The will must 'correspond' (*entspricht*) to the fact of *detention*. From this, he distinguishes the 'will' of the *detentor*, which he explains thus:

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<sup>545</sup> *ibid* 467

<sup>546</sup> *ibid* 468

*‘Wer dagegen bei der Detention von vorn herein nur den Willen hat, sich bestimmte einzelne, wenn auch weit gehende, Einwirkungen möglich zu machen, im Übrigen aber einem Anderen die Möglichkeit der Einwirkung offen halten will, der detiniert [...] ist wenigstens bis auf einen gewissen Grad stets Stellvertreter fremden Besitzes’<sup>547</sup>*

So, if the will to hold is merely limited to specific, ‘individual applications’ (*einzelne [...] Einwirkungen*) and not complete, then the holder is a mere *detentor*, or at least, an agent, but no possessor. Implicitly, Bruns assumes two kinds of animus- an *animus domini* and an *animus detentionis* - the latter being more limited. He also mentions the concept of agency but does not discuss it in detail.

His conclusions are also interesting from the background of Germanic law and the concept of *Gewere*, which admitted of various degrees of possession of an object. Bruns rejects such a concept in favour of the Roman one, which he perceives as absolute. In this respect, he does not differ from his predecessors. Notably, Savigny, as the latter sharply distinguished between *possessio* and *detentio*, conceived the former in absolute terms and separated from ownership.

However, Brun’s concept of the *animus detentionis* is an innovation because he accepts that the *detentor* also has a will, something that Savigny denies, and which authors like Gans and Puchta - as we saw - found problematic. Savigny stated that the Roman sources defined possession as ‘holding’ coupled with ‘*animus*’ and thus concluded that the *detentor* cannot have a will. However, this syllogism, as we saw, is flawed as it fails to distinguish between a factual situation, namely, a will as a physical fact, and its legal recognition. Bruns seems to be the first to have seen this problem and to have sought to address it by adding the *animus detentionis*, as a sub-species of

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<sup>547</sup>ibid 468

the *animus domini*. As we shall see, the debate on animus will reach into the present day, making his analysis so important.

#### 4.2.4. The Reading of the Sources

However, Bruns must acknowledge that the sources are not so clear in demarking the main kinds of possession and distinguishing them from *detentio*.<sup>548</sup> Nonetheless, it is clear from the sources that slaves cannot have *possessio civilis*, neither can the spouses who received gifts from each other, nor the creditor of a pledge.<sup>549</sup>

Bruns adopts a more critical approach towards the Roman sources in his effort to explain what Savigny described as the ‘anomaly’ of the sources on possession. However, under the *Chapter Abgeleiteter Besitz (Derivative Possession)*, he concedes that Roman law recognizes closely defined exceptions (*eigenthümliche Modification*) from that rule, namely, in cases where only possession is transferred, as in pledge. He claims that the Romans use the term *possessio* even for the cases of mere ‘holding’ without the *animus domini*.<sup>550</sup>

These cases include sequestration, *superficium*, *precarium*.<sup>551</sup> Notably, possessory interdicts belong to that category.<sup>552</sup> Hence *possessio* without *animus domini* must be

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<sup>548</sup> *ibid* 24

<sup>549</sup> *ibid* 25, fn 1, 2, 3, 4

<sup>550</sup> *ibid* 5

<sup>551</sup> *ibid* 4

<sup>552</sup> *ibid* 6



distinguished from *detentio* and ‘*possessio* proper.’<sup>553</sup> The reason for this anomaly lies for Bruns in the expediency (*Interesse*) Roman jurists saw in applying the possessory interdicts, as the mere holders would otherwise not be adequately protected.

His reasoning is significant here because he accepts a broad concept of possession for possessory interdicts that explains away some of the problems that Savigny had encountered, which, as we will see, will be significant for drafting the *BGB*.

Bruns notably adds to the discussion the element of ‘jural expediency’ and ‘practicability,’ thus, treading new ground and discussing aspects that were hitherto not problematised. Bruns seems to move away from Savigny’s strictly theoretical concept of ‘will’ as part of a ‘system’ to a concept that serves societal interests.

Bruns concludes from all these examples that it can safely be assumed that a jural fault - be it the lack of the *causa possessionis*, or the lack of *animus domini* (in the case of ‘derivative’ possession) or ‘jural capacity’- leads to the negation of a *possessio civilis* (*der civilrechtlich gemissbilligte Eigentumsbesitz und der abgeleitete Besitz*), and thus to a *possessio naturalis*.

However, he must admit that *possessio naturalis* includes also *detentio*:

*‘Naturalbesitz dagegen hiesse außer der bloßen Detention auch der Besitz, bei dem man den animus domini etweder gar nicht hat, oder eines civilrechtlichen Grundsatzes wegen*

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<sup>553</sup> *ibid* 6

*civilrechtlich nicht haben kann, also der civilrechtlich gemissbilligte Eigenthumsbesitz und der abgeleitete Besitz.*<sup>554</sup>

In this way, however, *detentio* and *possessio naturalis* become highly convoluted, as it is not clear where the one begins and where the other ends. The sources cited above, by saying that possession civilis is not given do not say whether it is *possessio naturalis* or *detentio*, Bruns must admit.<sup>555</sup>

In summing up, we can say that despite not being able to distinguish between natural possession and *detentio* clearly, Bruns claims that possessory interdicts are only applied in cases of possession and that Roman jurists sometimes accepted the existence of possession where ‘*Detention*’ would be assumed, thus, creating the concept of ‘alien possession’ (*Fremdbesitz*). However, despite the clarity of the reasoning, it can be held against Bruns that this distinction is not found in the sources, nor is it clear how *Fremdbesitz* differs from *Detention*.

Very significant is Bruns’ following statement. He holds that there is a distinct *condictio possessionis*, which could be applied next to the interdict in elective concurrence. Still, because the latter was more expedient, he claims the former is sparsely mentioned in the sources.<sup>556</sup> He holds that whereas the interdict *unde vi* has as its starting point the dejection and is directed against the ejector of possession, the *condictio possessionis* stems from the *habeo ex iniusta causa*.<sup>557</sup>

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<sup>554</sup> *ibid*

<sup>555</sup> *ibid* 25 fn 5

<sup>556</sup> *ibid* 33

<sup>557</sup> *ibid* 32-33

Regarding the interdict *uti possidetis*, Bruns believes that the sources, notably Gaius, Paul, and Ulpian, treat it as having a dual, even contradictory nature. On the one hand, it is seen as related to the *vindicatio* and the interim allocation of possession - until the main action is adjudicated - on the other, it is seen as a means that protects possession against every form of violence. He believes that the said interdict began as the former and ended up as the latter. For this, he also cites Justinian. He also discusses the question of *vis*, and whether it must have occurred before, or after the issuance of the interdict.

Bruns believes to have traced a development in the *interdictum uti possidetis* from a procedure that required the issuing of an individual *ne vis fiat possidenti* by the praetor to a simplified process where the injured party did not require a prior injunction to receive a right to sue by the time of Justinian (*Inst.* 4, 15, 8).

Bruns' innovation against all his predecessors examined above consists in the fact that he considered possession as 'a constituent element of property' (*Bestandteil des Vermögens*),<sup>558</sup> thus it can be the object of one of the *condictiones*, namely, the *condictio sine cause*, and thus be claimed through unjust enrichment.<sup>559</sup> For Bruns, the *condictio possessionis* the claim was possessory in character so that petitory claims could not be brought against it.<sup>560</sup> This would ensure

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<sup>558</sup> Carl Georg Bruns, *Die Besitzklagen des römischen und heutigen Rechts* (Böhlau 1874) 187, 188

<sup>559</sup> *ibid*

<sup>560</sup> *ibid* 204

a strict separation between possessory and petitory claims that is still enshrined in the German *BGB* today, despite its controversies.

Again, Bruns's concept is only tenuously supported by the Roman sources. The sources mention the *condictio possessionis* in Ulp. D. 13, 3, 2; Ulp. D. 47, 2, 25, 1 and Paul. D. 12, 6, 15, 1 on various occasions. The first passage concerns the case where the plaintiff has paid an assumed debt with foreign coins and seeks to get the coins back. These individual instances, however, do not allow us to assume that Romans had developed a general action for the *condictio possessionis*. Therefore, Bruns' reading can be explained from a quest to develop a general action whenever an unjustified transaction occurs, and from the understanding that possession has an economic value; it can be traced to contemporary economic theory. Bruns lives in an era where rapid economic changes occurred in Germany, the advancement of technology, commerce and the movement of capital let possession shine in a new light, thus, creating a new awareness and a shift of perception among jurists. The importance of possession as a commodity now becomes obvious to legal scholars, something that was not a concern to the previous generation of Savigny. Here it is noteworthy that Savigny has already sought to establish the *condictio* as a general principle.<sup>561</sup> But Savigny does not mention *condictio possessionis* in *Das Recht des Besitzes*.

#### 4.2.5. Conclusion - Bruns

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<sup>561</sup> See already Savigny (n 55) V 523: '*Auch dasjenige kann condicirt werden, was aus meinem Vermögen anders als durch meinen Willen in fremdes Eigenthum übergeht, sei es dass der Andere durch seine Handlung, oder durch zufällige Umstände auf meine Kosten bereichert werde.*'

We see from the above that Bruns adhered to the basic principles of the ‘Historical School’ in that he seeks to clearly delineate *possessio* from other forms of ‘holding’ namely *detentio* and seeks to provide abstract definitions.

What makes him different is that he is more alert to the problems inherent in the Roman sources and to what extent they support this quest for abstraction. He is unsatisfied with explaining excerpts that do not fit the said categories as ‘anomalies’ as Savigny would have done.

Another significant point in Brun’s theory is that he is the first jurist to treat possession as an economic interest consistently and seeks to comprehend the Roman sources with this consideration in mind. Bruns does not explicitly say so, but for him, possession emerges as a commodity that merits protection based on expediency. In this light, he consistently develops the *condictio possessionis*. This must be perceived against the background of economic changes that occur in the nineteenth century. Interestingly the First Commission for the *BGB* will later describe possession and *detentio* as ‘*ökonomische Güter*’ (economic values).<sup>562</sup>

### 4.3. Jhering

Rudolf von Jhering will further develop the direction that the discussion of possession took with Bruns. Rudolf von Jhering stands next to Savigny as a towering figure of German jurisprudence in the nineteenth century. He belonged to a generation younger than Savigny, and his prolific

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<sup>562</sup> Horst Heinrich Jakobs and Werner Schubert (eds), *Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen. Materialien zur Entstehungsgeschichte des BGB* (1978 de Gruyter) III, 769.

scholarly output falls into the latter half of that century. Nevertheless, his extensive contribution to the discussion about possession is so thorough and radical that he merits a special chapter.

A series of fundamental political changes and intellectual quests in the German-speaking countries mark the nineteenth century. While neighbouring France had early emerged as a unified nation under a strong, central government, notably through the efforts of Kings such as Louis XIV and as a result its capital Paris became a major cultural and intellectual centre, which eventually facilitated the revolutionary powers that threw off the *ancient regime* in favour of a liberal society, Germany – a cultural rather than a political unity – was firmly in the grip of feudalism.

The German Empire with its still feudal stratification, its miniature states, and persisting medieval village culture, could not see the same geographic accumulation of revolutionary and progressive forces in a single place. Therefore, a movement like the French Revolution was unthinkable in Germany.

Though there was no equivalent to Paris in Germany, the neighbouring nation's intellectual ideas spread into the various intellectual centres in Germany, notably Jena and Leipzig, and the liberal cities of Frankfurt am Main and gave the quest for a pan-Germanic cause new impetus.

However, Germany saw significant changes during the long nineteenth century. The closest Germany came to a movement like the French Revolution was the rising of 1848, which culminated in the Assembly of Frankfurt, the *Vormärz*, which resulted in partial satisfaction of the quests of the rising middle class. In particular, the '*Ablösungsgesetz*' partially abolished the feudal structure of ownership. At the same time, the German Customary and Commercial Union (*Deutsche Zoll- und Handelsunion*) sought to bring the desired unity and address the needs of a rising commercial class.

The *Accords of Vienna*, which established the German Confederation of 1815 (*Bundesakte*) strengthened the position of the German princes, abolished the Holy Roman Empire of the German Nation, and ushered in a new era of both innovation and reactionism so that the aims of the bourgeoisie were only partially satisfied.

As we saw, Prussia aspired to a hegemonic role in German culture and politics, as reflected in the reforms of the University at Berlin, where Savigny, Stahl and Gans have taught. As we saw, the Prussian hegemony and the rise of German nationalism ushered in an era of neo-conservatism. At the same time, we saw reactionary forces, such as those of Hegel and Marx at work in Berlin, who challenged Savigny's 'historical' approach.

When Jhering started his scholarly output around the middle of the nineteenth century, the pressing need for a single German civil code was not seriously disputed anymore. Still, the question of its exact nature and what kind of law it would contain came forcefully to the fore.

Regarding possession, the legacy of German idealist philosophers like Kant and Hegel, who tenaciously clung to the concept of the 'will' as an expression of personhood,<sup>563</sup> persisted. And, as we saw, their premises influenced scholars like Puchta and Gans, who, in turn, emphasised the importance of volition as the manifestation of personhood. For the said circle of jurists, the protection of the will was an important aspect of any legal system and, thus, the single most crucial explanation for the protection of possession. From this premise, it was only consistent that

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<sup>563</sup> Immanuel Kant, *Metaphysik der Sitten, Rechtslehre* §5, Hegel (n 280) I §16A, 43 13-14: '*die unmittelbare Beziehung meines Willens auf eine Sache.*'

possession was interpreted as the manifestation of the abstract will of a person, hence, its legal relevance.

We also saw that the feudal division of property and its alleged Roman origins, based on the division of ownership between *dominium directum* and *dominium utile*, was attacked by Thibaut, who strongly criticised the division of ownership as ‘non-roman.’ While most of the jurists of the ‘Pandektist’ tradition stood behind an absolute concept of ownership, distinct from possession, Hegel went a step further than Thibaut and requested that full ownership be given to the tenant farmers, claiming that he who used it had a right to own it, thus pleading for the total lift of feudal law.<sup>564</sup> Therefore, the absoluteness of ownership, already found in the *CC*, was a political and scholarly object of debate in Germany. The connection between possession and ownership must also be appreciated from this background.

Hegel saw possession as merely the factual side of ownership, ownership itself being the jural side.<sup>565</sup> We also noticed that several jurists have tried to link ownership with possession, and even Savigny, at some point, called possession the ‘shadow of ownership.’ Interestingly, towards the middle of the nineteenth century, we observed a shift in the discussion of volition in Bruns, who first defined the ‘will’ as ‘interest.’

In Bruns, we saw a shift from the abstract concept of ‘will’ conceived by German idealism into a ‘will’ that expresses ‘interest.’ We also saw that by ‘interest,’ Bruns means those pursuits

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<sup>564</sup> Hegel (n 281) II §24 A 52, 2

<sup>565</sup> *ibid* 3 - 6 ‘*Besitz und Eigenthum sind wesentlich eins. Das Eigenthum ist die rechtliche Beziehung des Besitzes.*’



that satisfy human needs, namely, economic interests. For Bruns, ‘subjective rights consist of the objectively recognized freedom of the individual to pursue his vital interests.’<sup>566</sup>

The emphasis on ‘interest’ is essential and will also be fundamental in the work of Jhering. Jhering will more forcefully move away from ‘abstract’ theories of natural law and will instead conceive law and its institutions as the product of teleology, an evolutionary process where the fittest law is destined to survive and most expedient for the interests of society.

Jhering’s scholarly production falls into the second half of the nineteenth century, an era that differs from the time of Savigny as far as new questions and concerns arise. We have the rise of socialism; the discussion on working-class conditions dominates political debates. The merits of a unified civil code for German-speaking countries are unanimously acknowledged as a worthy task.

Jhering’s work addresses these concerns by adding something radically different to the discussion of possession, namely, the concern of usability and practicability of any given jural concept, including possession. According to Jhering, the concern of practicability must override any considerations of faithful adherence to a given doctrine of Roman law. An important term in this regard is his ‘*Verkehrsanschauung*.’

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<sup>566</sup> Carl Georg Bruns ‘Geschichte und Quellen des römischen Rechts’ in *Encyklopädie der Rechtswissenschaft in systematischer Bearbeitung: Herausgegeben unter Mitwirkung vieler Rechtsgelehrter Auflage* (Franz v. Holtzendorff ed, 3rd edn, Duncker & Humblot 1877) 352: ‘*Sie [sc. Die subjectiven Rechte] bestehen im Allgemeinen in der vom objective Rechte anerkannten und geschützten Freiheit des Einzelnen in Verfolgung ihrer Lebensinteressen.*’

Jeremy Bentham and Auguste Comte influenced Jhering's work. His later work radically clashed with the 'Historical School,' which he called 'Pandectistic.' Jhering coined the term 'Begriffsjuristen' (conceptual jurists) and 'Begriffsjurisprudenz' (conceptual jurisprudence). This term was meant to describe jurists who are unworldly, preoccupied with abstract definitions, and have no regard for real life.<sup>567</sup> He opposed the mingling of theories of natural law with Roman legal sources.<sup>568</sup> So it is in his *Geist* we already find attacks on the 'Historical School' and its alleged unworldly quest for logical precision.<sup>569</sup> Jhering's invective against Savigny and Puchta seminally influenced the negative perceptions of the '*Pandektists*' and '*Begriffsjuristen*' that persist, both in Germany and abroad.<sup>570</sup>

In his later works, such as the *Geist des römischen Rechts auf den Verschiedenen Stufen seiner Entwicklung*, Jhering polemicized against what he perceived as, 'a new and dangerous 'trendsetting' among the younger generation of jurists in Germany,' namely, 'civilistic

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<sup>567</sup> Rudolf von Jhering, *Scherz und Ernst in der Jurisprudenz* (8th edn, Breitkopf & Härtel 1884) 260, 317, 325

<sup>568</sup> Ernst Becker, *Ernst und Scherz über unsere Wissenschaft. Festgabe an Rudolf von Jhering*. (Leipzig 1892) 126: '*mir besonders unsympathische Naturrechtleri.*' cf Christof-Eric Mecke, *Begriff des Rechts und Methode der Rechtswissenschaft bei Rudolf von Jhering* (Vandenhoeck & Ruprecht 2018) 62

<sup>569</sup> Jhering (n 571) 10 fn 1: '*Der Kultus des logischen, der die Jurisprudenz zu einer Mathematik hinaufschraubt.*'

<sup>570</sup> Hans Peter Haferkamp, *Georg Friedrich Puchta und die „Begriffsjurisprudenz“* (Klostermann 2004) 44, 57, 60, 100

construction' (*civilistische Konstruktion*). He alleged that this fashion became 'as indispensable for a jurist nowadays as a crinoline to a lady.'<sup>571</sup> Jhering maintained that 'the era of juristic constructionism brought unnecessary turbulence and a *Wanderlust* into jural concepts.'<sup>572</sup>

Despite the invective, however, a closer look reveals that Jhering's stance towards the 'Historical School' is more nuanced and had more in common with it than he would acknowledge. He considered it the great merit of the said School that it held that all law is the result of the 'national feeling of justice' (*nationale Rechtsgefühl*), thus, aligned with the subjective feeling of what is right, held by the *Volk* (*subjectives Rechtsgefühl*), as opposed to a mechanical, external imposition by an enlightened despot.<sup>573</sup>

Therefore, the 'Historical School' as far as it only accepts as law the product of 'unmediated expression of the national spirit' (*ein Produkt der unmittelbaren Tätigkeit des Volksgeists*), instead of the mere sum of formally passed legislation - as was held by the older doctrine – is important for Jhering.<sup>574</sup>

He thinks, however, that the said School goes too far in exalting customary law while anathematising written law. He believes that the proponents of the 'Historical School' - notably

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<sup>571</sup> Jhering (n 571) 7

<sup>572</sup> *ibid* 16: 'Es ist mit der Epoche der juristischen Konstruktion eine Unruhe, eine *Wanderlust* in die juristischen Begriffe gekommen.'

<sup>573</sup> Rudolf von Jhering, *Der Geist des römischen Rechts auf den Verschiedenen Stufen seiner Entwicklung*, (Darmstadt 1954) II, 1, 29 – 30

<sup>574</sup> *ibid* 28

mentioning Stahl <sup>575</sup>- all too eagerly painted a naive picture of customary, primitive law as an ideal condition, as opposed to codified law. As proof of this fallacy, Jhering cites the *Twelve Tables* (approx. 451 BC) as an example of codification born out of the ‘national spirit.’ (*Volksgeist*).<sup>576</sup>

Jhering seeks to demonstrate in the *Geist* that the process from customary to written law is part of a ‘legal evolution’; thus, the two phases complement each other.<sup>577</sup> He maintains that law that stems from a people's ‘national spirit’ follows linear progress: from customary to primitive, to advanced and, finally, codified law. Thus, the shift from customary law to written codification is characterised by him as ‘the first tremor of the law’s tendency for self-determination.’<sup>578</sup> Therefore, to privilege the former over the latter fails to appreciate the development that law underwent in its codifying stage.<sup>579</sup>

He disagrees with Savigny that codification is inherently bad but concedes to the enemies of codification that written legislation (*Gesetz*) has its drawbacks. Statutes ossify; they become out of touch with everyday life and the ‘public spirit.’ They end up dead letters arbitrarily imposed

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<sup>575</sup> *ibid* 29 fn 14

<sup>576</sup> *ibid* 39

<sup>577</sup> *ibid* 34, 37, 38

<sup>578</sup> Jhering (n 577) 35: ‘*Es ist die erste Regung des Selbstständigkeitstriebes des Rechts.*’

<sup>579</sup> *ibid* 30-31: ‘*Der Vorwurf, den ich dieser Lehre mache, besteht darin, dass sie in Überschätzung der s.g. “naturwüchsigen Bildung” des Gewohnheitsrechts den ungeheuren Fortschritt ignoriert, den das Recht durch seinen Übergang von dem Gewohnheitsrecht zum gesetzlichen Recht gemacht hat.*’

upon a people. Inevitably, legislation becomes only a fragment of the people's spirit.<sup>580</sup> On the positive side, however, through written codes, a society attains a high level of stability, uniformity, clarity and justice.<sup>581</sup>

Like Savigny, Jhering perceives law as a living organism, born and blossoming in a community from which only that part of the law survives that is stronger because it is more beneficial to that society. He radically breaks with the older concept of *Volksgeist* and the metaphysics of the law of the first half of the eighteenth century for the sake of a 'naturalistic,' 'Darwinian' approach to law.<sup>582</sup>

However, his concept of '*organisch*' differs from that of Savigny in that it is conceived as developing like a living organism. Jhering's '*Volksgeist*' is not statically conceived as it is by Savigny but subject to a process of evolution,<sup>583</sup> a historical reality from which the legal philosopher must sift out the 'the utilitarian idea' (*Zweckmäßigkeitssidee*).<sup>584</sup>

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<sup>580</sup> *ibid* 35 -36

<sup>581</sup> *ibid* 34, 35: '*Das Mittel dazu* [sc. the road to justice] *ist das Gesetz.*'

<sup>582</sup> On Jhering's turning point his '*Damascuserlebnis*' see: Karl Kroeschell, 'Zwei unbekannte Briefe Jherings' in *Festschrift für Franz Wieacker zum 70. Geburtstag* (Vandenhoeck & Ruprecht 1978) 274 cf Mecke (n 572) 20

<sup>583</sup> Mecke (n 572) 63, 71, 83, 92, 138

<sup>584</sup> Jhering (n 577) I, 299

According to Jhering, law grows organically, out of the ‘Interest’ (*Interesse*) or ‘purpose’ (*Zweck*) of the individual and society. Individuals and society are constantly pursuing their vital interests, which they seek to satisfy. Perceived thus, the law results from a Darwinian power struggle and the goal of society as a whole; ultimately, the law is intrinsically valueless.<sup>585</sup> These views are more pronounced in his later works, *Der Zweck im Recht* and *Der Kampf ums Recht*, where the influences of Darwin and Comte become more apparent.<sup>586</sup>

Although Jhering’s philosophical endeavours were seen with mistrust by his critics in Germany, his work - especially *Der Zweck* - translated into English- was positively received in the United States. In Germany and Austria, Jhering was ‘resurrected’ in the twentieth century by jurists who belonged to the movement of ‘Freirecht’ (free law) and considered him their founding father.

While Jhering’s views did not visibly shape the contemporary debate on the *BGB*, they significantly influenced and shaped the scholarly debate in Germany and Austria. It will be my argument that Jhering’s ideas carried more weight in that respect than often acknowledged.<sup>587</sup> Jhering is not named in the drafts to the *BGB*, but it is my opinion that he crucially shaped both the discussions and the final version of the concept of possession (*Besitz*) adapted therein, as a comparison between the *ABGB* and the *BGB* will show.

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<sup>585</sup> Wieacker (n 25) 203, 205, 207

<sup>586</sup> Charles Darwin’s *The Struggle for Life* was translated into German, as *Kampf ums Dasein*.

<sup>587</sup> cf Ernst (n 15) 5

As we will now take a closer look at Jhering's views on possession, we will trace how his overall concept of law informs his views of that institution and the view's academic afterlife and later influences.

#### 4.3.1. Jhering on Possession

Though Jhering had a wide range of interests in legal matters, he seemed to have had a lifelong preoccupation with the concept of possession, which spanned from his doctoral thesis of 1842<sup>588</sup> to his monographs on possession, *Über den Grund des Besitzschutzes*<sup>589</sup> and *Der Besitzwille*, his last work.<sup>590</sup>

In his doctoral thesis, he discussed the concept of *hereditatis petitio*, a remedy similar to the possessory interdict. He claimed that the Romans devised it for the *hereditas iacens* because in those instances the designated heir was not perceived - according to Roman law - as possessor before he took actual control of the estate so that interdicts would not be applicable.<sup>591</sup>

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<sup>588</sup> Rudolf von Jhering 'Dissertatio de hereditate possidente' in *Vermischte Schriften* (Scientia 1968)

<sup>589</sup> Rudolf von Jhering, *Über den Grund des Besitzschutzes, Eine Revision der Lehre vom Besitz* (2nd edn, Mauke 1869)

<sup>590</sup> Jhering (n 1)

<sup>591</sup> Jhering (n 592) 45, 46

In that work, Jhering extensively discussed Ulp. D. 47, 4, 1, 15 (on the impossibility of stealing an estate because it is in nobody's possession) and Paul. D. 41, 3, 15, and elaborated on the effects of the law of *postliminium* concerning the acquisition of possession and its consequences on the heirs concerning *usucapio*.<sup>592</sup>

In his viscerally satirical take on the '*Begriffsjuristen*' in *Scherz und Ernst in der Jurisprudenz* the narrative persona relates his trials and tribulations as a jurist in a novel of the epistolary form.<sup>593</sup>

In his desperate quest to understand jurisprudence, the narrator eventually falls sick and dies but goes to heaven, where he has the chance to finally meet the Olympians of Savigny's School, which is also the 'School of the entire nineteenth century.' In heaven, our protagonist hears lectures on the 'pure' and 'theoretical ideas.' Here, the chthonic creature can finally ask questions about jurisprudence and receive illumination from good authority.

In the fourth letter of *Scherz und Ernst*, the narrator relates his first epiphany when, as a novice court clerk, he had to decide on *constitutum possessorium*. But, alas! Having hitherto had unreserved trust in Savigny's enlightened theory of possession, he would soon be dismally disappointed!<sup>594</sup>

The case was as follows: a certain Peter Habermeier had taken possession of the farmstead of his brother, Jürgen Habermeier, who had become too political and had to flee one day and leave behind the farm to hide beyond the mountains. However, the newly found peace and tranquillity

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<sup>592</sup> *ibid* 23

<sup>593</sup> Jhering (n 571)

<sup>594</sup> *ibid* 63



of Peter Habermeier was to be shattered half a year later when his rapacious neighbour Henry Crow invaded the former's property with his children and maids.<sup>595</sup>

Now Peter Habermeier decided to apply for possessory protection (*possessorium ordinarium*), and the matter came before our narrator for adjudication. The latter, adhering faithfully to Savigny's theory of possession, which he had studied with diligence, requested that Peter Habermeier brought forth his *animus domini*, which would show that he possessed like an owner and which was necessary to prove possession since Savigny had said that *animus domini* was essential to possession.<sup>596</sup>

Unfortunately, it was only now that our clerk realised the full extent of his decision, namely, how difficult it was to prove *animus domini* in the real world. How can you ascertain which of the heaps of dung or piles of hay is carried away by a *possessor* and by a *detentor*? At this moment, our court clerk realised that the requested *animus domini* was very tricky. What if a leaseholder, who was not supposed to have *animus domini*, decided he had it? What if a jural possessor, though entitled to it, did not want it after all?

Of course, the doctrine would say this was all out of the question. Nevertheless, if it is not possible because, as the theory goes, possession will always be possession, and *detentio* will always be *detentio*, looking for *animus domini* to ascertain possession resembles looking at the shadow of a quadruple to ascertain that it is a quadruple.<sup>597</sup> In other words, to ascertain if in a

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<sup>595</sup> *ibid* 65

<sup>596</sup> *ibid* 68

<sup>597</sup> *ibid* 69

certain situation we have *animus domini*, we simply hypothesise that it must have *animus domini* because it must be possession, hence it is possession. The argument is entirely circular. As a result, this affair cured our clerk of his obsession with the *animus domini*, but Peter Habermeier paid the full price for it.

Jhering summarises the sorry picture of the history of possession thus:

‘Possession is the worst of all concepts, a very slippery fellow (*höchst unruhiger Geselle*).’<sup>598</sup>

‘Possession cannot stand still in place for long. According to Thibaut it has its place in the general part (*allgemeiner Teil*); the next moment it is found among the rights of personhood (*Rechte der Person*), as Puchta claims. At present, possession is, according to current opinion, found among ‘real rights’ (*Sachenrecht*), but has even gate-crashed the party of obligations.’<sup>599</sup> About the nature of possession, Jhering says the following:

‘I was initially under the impression it was a right, but now it appears as a fact (*factum*) – according to Savigny.’<sup>600</sup>

‘But wait, you will see it as a right because it transforms itself incessantly (*er verwandelt sich unausgesetzt*); it is Proteus among our concepts. But wait again, it gets even better!’

Now possession is both a fact and a right, according to Savigny, though I have just heard,

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<sup>598</sup> Jhering (n 571) 282

<sup>599</sup> *ibid* 283

<sup>600</sup> *ibid*

again by Savigny, that is a right concerning its nature (*dass er seinem Wesen noch ein Recht sei*).<sup>601</sup>

‘But all this is of no avail: its nature seems to lie in the fact that possession is not what it is. Possession is like an eel; as soon as one thought he had him, it is gone!’<sup>602</sup>

Later in the text, the narrative persona turns to the ‘cursed protection of possession’ (*der verwünschte Besitzschutz*) and admits that he was naïve enough as a jurist to ask about the purpose of the institution (*die frage nach seinem Grunde aufzuwerfen*), only to be told off since this seemed to be a philosophical question.<sup>603</sup>

‘Of course, one might deduce from this those Roman jurists themselves did not know the difference between jurisprudence and philosophy since they were led astray and asked about the ‘philosophical reason’ of *usucapio* both in Gai. D. 41, 3, 1 (*bono publico usucapio introducta est*) and Nerat. D. 41, 10. 5 (*pr. usucapio rerum, etiam ex aliis causis concessa interim, propter ea, quae nostra existimantes possideremus, constituta est, ut aliquis litium finis esset*).<sup>604</sup>

However, despite the precise wording in the sources cited, Savigny’s School would have none of this because to ask for the reason for the protection of possession is as trivial as it would be for

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<sup>601</sup> *ibid*

<sup>602</sup> *ibid* 284

<sup>603</sup> *ibid.*

<sup>604</sup> *ibid* 285.

any other jural institution.<sup>605</sup> ‘It would be the last straw if the lofty (*erhabenen*) concepts of Savigny’s School, that is to say of the School of the entire nineteenth century had to suffer questions about its ‘hither’ and ‘why!’<sup>606</sup>

Despite the disappointments, however, our narrator is still convinced that the concepts of the said School are ‘absolute truths’ (*absolute Wahrheiten*), and to challenge either their nature or their foundation would be to ask why two and two make four. Therefore, these concepts are absolutely valid.<sup>607</sup>

Eventually, when our clerk goes to heaven, he receives illumination by the Celestials and realises that all along, ‘the lowly earthly creatures, who do not understand truth, seek to yoke the truth under legislators and practitioners. However, what, pray, can the lawgiver say about the truth? Can he say that two and two are five?’<sup>608</sup>

Our hero finally learns from the Celestials that even Roman jurists themselves are an example to shun (*abschreckendes Beispiel*) as they have often let themselves be guided by shallow questions on usefulness (*Utilitätsgründe*). And this is the reason why Roman jurists do not live in heaven.<sup>609</sup>

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<sup>605</sup> *ibid.*

<sup>606</sup> *ibid* 287.

<sup>607</sup> *ibid*

<sup>608</sup> *ibid* 288

<sup>609</sup> *ibid* 289

In heaven, the Celestial Creature also attempts to explain the idea of quasi-possession to the ‘earthworm’ court clerk (*Quasibesitz*). Roman law assumes that *quasi-possession* depends on the verb *uti* in D. 43, 19, 1 and D. 43, 20 1. However, this requirement is only necessary from a practical point of view (*vom practischen Standpunkt*).<sup>610</sup>

The Celestial further clarifies that if we now elevate ourselves to the theoretical standpoint (*wenn ich mich auf den theoretischen Standpunkt erhebe*) the matter changes entirely because this form of possession is acquired too like any other form of possession, through the ‘uninterrupted ability to reproduce the original control of an object.’ Thus, the once-off use of the servitude is now sufficient to assume *quasi-possessio*. Ultimately, the requirement of *uti* – so annoying in the Roman sources - with its ‘sensory reality’ (*sinnliche Realität*) is relegated to earth where it fits. We Celestials, however, have elevated the reality of being (*die Realität des Seins*) to the idealism of thinking (*Idealität des Denkens*).<sup>611</sup>

Finally, the Celestial Creature is gracious to explain the irregularity of quasi-interdictual possession. Thus, if positive law, which cannot fool out theory, denies the *quasi-possessor* protection, as Roman law irresponsibly did, then we ask the person to bear this with stoicism (*mit Fassung ertragen*). But, after all, it will be a great comfort to know that theory recognizes him as the *quasi-possessor*.<sup>612</sup>

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<sup>610</sup> *ibid* 290

<sup>611</sup> *ibid* 291

<sup>612</sup> *ibid*

We see from the above that Jhering's presentation of the prevailing opinions of the 'Historical School' is vividly satirical and highly iconoclastic. However, as we have hoped to demonstrate with the brief sketch of the state of the discussion on possession, his polemic hit the mark because it touched upon pressing questions, such as the practicability of the application of a jural concept in the real world, its practical usefulness, and ultimately its support in the Roman sources.

The fierce discord among jurists on the nature and the scope of possession was already sketched above. By the middle of the nineteenth century, the leading German jurists could not agree on the nature of possession. Is it a fact, or right? Savigny himself seemed to have shifted his view through the various editions of his seminal monograph. In addition, there was discord regarding the place of possession in the institutional scheme and why possession was protected in the first place.

The new and vital aspect that Jhering brings into the discussion here is the problem of the practical application of a jural concept and its connection with life. Neither of his predecessors: Thibaut, Puchta, Ganz and Stahl, did consider this aspect.

In *Scherz*, the narrative 'I' struggles with applying the theoretically well-conceived concept of *animus domini* as soon as he has left academia and starts to decide real problems. Similarly, Savigny's view that possession requires the 'uninterrupted ability to reproduce the original control over an object' is equally abstract and not useful for practical life. It is also problematic as any Roman source does not verify it.

For our subsequent discussion, it is significant to note that Jhering attacks two aspects of Savigny's theory, the *animus domini*, and his definition of possession as the 'objective ability to

reproduce the state of control over an object.’ As we realise with the discussion above, scholars who subsequently informed the debate on possession had hitherto not seriously challenged these concepts, despite their vocal opposition to other aspects of Savigny’s theory on possession.

We will see below how Jhering developed those points of critique already present in the *Scherz* in his subsequent work and how his position eventually influenced the *BGB*.

#### **4.3.2. Jhering’s Theory of Possession in *Über den Grund des Besitzschutzes* and *Der Besitzwille***

Jhering extensively discussed possession and the important theories on possession of his century in his two later works, *Über den Grund des Besitzschutzes* and *Der Besitzwille*. In the former, he mainly elaborated on the nature of possessory interdicts; in the latter, he focused on *animus in possessio*. As each work highlights different aspects of the same concept, it is noteworthy to discuss both in detail and to consider possible overlaps and differences.

##### **4.3.2.1. *Über den Grund des Besitzschutzes***

In this treatise, Jhering seeks to explain why possession was protected through possessory interdicts in Roman law in the first place since he believes that scholarship had previously not succeeded in convincingly answering this question.<sup>613</sup>

In grouping his predecessor's views, Jhering uses a different axis for his classification of the theories of possession than the one used by Rudorff, who - as we have seen - stratified the views based on their perception of the nature of possession. Jhering distinguishes between two 'principal views' (*Grundansichten*), namely, between 'relative' and 'absolute' theories of possession. The former claim that possession is protected for the sake of something else (relative theories).<sup>614</sup> The latter maintain that possession should be protected for its own sake (absolute theories).<sup>615</sup> Jhering considers Savigny, Rudorff and himself as 'relative theorists'<sup>616</sup> and Puchta, Gans and Bruns as 'absolute theorists' but acknowledges that some authors could be classified either way.<sup>617</sup>

#### 4.3.2.2. Critique of Current 'Relative Theories'

Jhering credits Savigny with having influenced for over half a century the prevailing view that the protection of possession merely exists for the sake of the protection of the person, thus, has a

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<sup>613</sup> Jhering (n 593) 29

<sup>614</sup> *ibid* 6, 21

<sup>615</sup> *ibid* 4

<sup>616</sup> *ibid* 5 – 6

<sup>617</sup> *ibid*: ' *Dass sich bei einigen Schriftstellern Anhänge an beide Grundansichten finden.* '



delictual nature whereby any disruption of possession is automatically treated as ‘an attack on the legal order’ (*Rechtsordnung*).<sup>618</sup>

According to Jhering, this view is flawed because if the interference with possession is always an injury to the person, it does not explain why a *detentor*, such as a tenant, or a person *alieni iuris*, is not granted possessory interdicts as well.<sup>619</sup> Instead, he is given other remedies, such as the *interdictum de migrando*,<sup>620</sup> or the *interdictum vi et clam*.<sup>621</sup> The fact that the *detentor* has so many other remedies negates Savigny’s argument in support of his view that the *detentor* must be deemed sufficiently protected by the possessor in these cases.<sup>622</sup>

Moreover, Jhering argues, if possessory interdicts were just another delictual remedy, their benefit would not be evident since all delictual claims are covered by the *actio iniuriarum*. He maintains that if possessory interdicts are designed ‘to protect the person,’ it is not clear why a father cannot bring it forth if somebody kidnaps his son but can bring it forth if somebody takes his slave, for, surely, a father suffers a bigger injury when he loses a son, as opposed to a slave.<sup>623</sup>

Jhering notes that Savigny’s claim that possession is a ‘shadow of ownership,’ as maintained in several editions of *Das Recht des Besitzes*, points to the right direction. At the same

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<sup>618</sup> *ibid* 7, 9, 12, 69: ‘*Das πρότον ψεύδος seiner ganzen Besitztheorie.*’ 97, 105

<sup>619</sup> *ibid* 9, 13

<sup>620</sup> *ibid* 11

<sup>621</sup> *ibid* 10

<sup>622</sup> *ibid* 9; cf Savigny (n 8) 59

<sup>623</sup> *ibid* 14

time, however, the claim that ‘possession is a presumption of ownership’ further begs the question of why this is so, something that Savigny leaves unanswered.<sup>624</sup>

Jhering maintains that Savigny’s successors, namely Thibaut, Puchta and Gans, have all recognised that their mentor’s view was problematic and modified his theory. These authors sought to seek the reason for the protection of possession not in delict, thus, in the attack of the jural order (*Rechtsordnung*), but rather in the inviolability of ‘the will of a person,’ and sought to define its protection as an ‘expression of the personhood.’<sup>625</sup>

However, they failed to explain how possession, being a fact, attains jural relevance and how the ‘will possess,’ being just a factual one, can suddenly be protected on a jural level. As we saw above, Gans’ view of the ‘particular’ and the ‘general will’ touches on the legal order and moves away from the factual nature of possession.<sup>626</sup> The notion of priority of one person’s will over another’s, is, however, a purely jural question that also needs to be addressed on a jural level since it deals with rights and not facts.<sup>627</sup>

Against this, Jhering points out that the ‘will’ is not ‘inviolable’ as there are instances where the law prevents its breaking; thus, the question of priority and justified attack is again a question of the law. Thus, the authors inevitably slip into a tautology.<sup>628</sup>

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<sup>624</sup> *ibid* 27

<sup>625</sup> *ibid* 6

<sup>626</sup> *ibid* 22

<sup>627</sup> *ibid* 23

<sup>628</sup> *ibid* 21

#### 4.3.2.3. Critique of the ‘Absolute Theories’

Jhering considers Stahl as belonging to the group of ‘absolute theorists’ since the latter claimed that possession has an ‘inherent legal significance’<sup>629</sup> and is, therefore, ‘preserved’ for its own sake, namely, for the preservation of an ‘actual condition.’<sup>630</sup> On the other hand, Stahl has argued that possession poses an ‘interim regulation of the condition of ownership’ and that possession has an economic interest for the possessor.<sup>631</sup>

Jhering identifies two problematic points in Stahl’s theory. First, the ‘economic interest’ of possession is always present - whether the possessor is entitled or not.<sup>632</sup> Thus, ‘economic interest’ cannot justify its protection.<sup>633</sup> In addition, it is unclear why Roman law allows possessory interdicts, even between the possessor and the owner, instead of settling the matter immediately with the *vindicatio* since an interim situation would not be necessarily the case.<sup>634</sup> Second, if the

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<sup>629</sup> *ibid* 42

<sup>630</sup> *ibid*

<sup>631</sup> *ibid*

<sup>632</sup> *ibid* 64

<sup>633</sup> *ibid* 43: ‘*Zu dem Interesse muss sich vielmehr noch ein Grund hinzugesellen, welcher der Person einen Anspruch auf rechtlichen Schutz verleiht, [...] das Interesse bleibt ein bloss factisches.*’

<sup>634</sup> *ibid* 43

‘preservation of the factual situation’ is the aim of possessory interdicts, why do they also not apply to the detentor?<sup>635</sup>

#### **4.3.4. Jhering’s Conclusion**

Jhering claims that his predecessors have not succeeded in answering all these open questions because they merely sought to find the aim (*Zweck*) of possession.<sup>636</sup> Instead, Jhering will seek the answer in the historical reconstruction of possessory interdicts in Roman law.

#### **4.4.1. Historical Scope of Possessory Interdicts**

Jhering believes possessory interdicts were initially designed as a remedy of self-help, where society thought this desirable.<sup>637</sup> Historically, according to him, possession is related to *vindiciae* (Gai. IV, 16); the provisory granting of possession before a trial of ownership.<sup>638</sup> The process of

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<sup>635</sup> *ibid* 44

<sup>636</sup> *ibid* 55

<sup>637</sup> *ibid* 33

<sup>638</sup> *ibid* 72

*vindicias dicere* was an *iudicium duplex*, where both parties asserted their rights (*vindicatio* and *contravindicatio*), thus, the proof merely required a relative right.<sup>639</sup>

At that time, both the *petitorium* and the *possessorium* were not yet separate in Roman law.<sup>640</sup> Therefore, the initial aim of the *vindiciae* process was the grant of interim ownership, not of possession in the latter sense.<sup>641</sup> Therefore, the interdicts are the remnant of the *vindiciae* process.<sup>642</sup>

In addition, Jhering claims that possessory interdicts were initially formulated narrowly, ‘*vi, clam et precario,*’ but were not supposed to be limited only to cases where force was applied. As a parallel example, Jhering draws attention to the narrow formulation of the *lex Aquilia*: ‘*quod usserit, fregerit, ruperit,*’ which was subsequently extensively developed by the Roman jurists to encompass cases that did not fall under the letter of the law.<sup>643</sup>

Jhering claims that though Roman jurists never abandoned the wording of the three *vitia possessionis* in the interdicts, they went beyond it in later times to include all cases of disruption of possession, even when no violence was involved. Therefore, according to Jhering, the protection of possession was ultimately not limited to cases of violence, as Savigny mistakenly claimed.<sup>644</sup>

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<sup>639</sup> *ibid* 73, 95

<sup>640</sup> *ibid*

<sup>641</sup> *ibid* 75

<sup>642</sup> *ibid* 76

<sup>643</sup> *ibid* 104, 122, 126

<sup>644</sup> *ibid* 128

Thus, for the sake of societal interest, possessory interdicts were not granted only in the case of the three *vitia possessionis*, but in all cases where possession is threatened.<sup>645</sup>

Perceived thus, possessory interdicts are, ‘a necessary complementation of the protection of ownership,’<sup>646</sup> ‘an easement of proof for the owner that also benefits the non-owner.’<sup>647</sup> This is so because the aim (*Zweck*) of possession is the easement of proof for the owner. Thus, possession is ultimately protected for the sake of ownership and not for the sake of itself, as Savigny and others have claimed.<sup>648</sup>

From this follows also that possessory interdicts, such as the *interdictum adipiscendae possessionis*, only regulate an interim situation, while petitory ones, regulate a permanent one.<sup>649</sup> Savigny was again wrong when he claimed that the *interdictum adipiscendae possessionis* was not a possessory interdict at all since it was not delictual.<sup>650</sup>

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<sup>645</sup> *ibid* 131

<sup>646</sup> *ibid* 143

<sup>647</sup> *ibid* 45: ‘*Der Schutz des Besitzes als der Thatsächlichkeit des Eigenthums ist eine nothwendige Vervollständigung und Ergänzung des Eigenthumsschutzes, eine dem Eigenthümer zugedachte Beweiserleichterung, die aber nothwendigerweise auch dem Nichteigenthümer zu Gute kommt*’;

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<sup>648</sup> *ibid* 55

<sup>649</sup> *ibid* 66

<sup>650</sup> *ibid* 68, 77, 92; Savigny (n 8) 17, 383

#### 4.4.2. Definition of Possession

Subsequently, for Jhering, possession is the presumption of ownership.<sup>651</sup> It was initially an interim form of ownership, as Call. D. 48, 18, 15, 2 proves, where a rescript of Antoninus Pius describes the possessor of an estate as: ‘*interim domini loco habeatur.*’<sup>652</sup> In its most ancient form, the possessory interdicts were preserved next to *vindicatio*. The fact that possessory interdicts became also available to thieves and robbers posed an ‘attendant evil’ and was not an aim of the institution.<sup>653</sup>

Jhering defines possession succinctly through the following syllogism: If ownership is not possible then no possession is possible,<sup>654</sup> but if there is ownership, there is also possession.<sup>655</sup> He defines possession of real things as ‘the manifestation of ownership.’<sup>656</sup> Hence, the definition of possession is in itself malleable and proves the flaw of Savigny’s view that possession is acquired

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<sup>651</sup> *ibid* 84

<sup>652</sup> *ibid* 75

<sup>653</sup> *ibid* 55, 59, 63, 78

<sup>654</sup> *ibid* 145

<sup>655</sup> *ibid* 155

<sup>656</sup> *ibid* 187: ‘*Der Sachbesitz ist die Thatsächlichkeit des Eigenthums.*’

and maintained through the ‘physical ability’ (*physische Möglichkeit*) to reproduce the original control of an object’ by excluding everybody else.<sup>657</sup>

Instead, Jhering claims, possession is assumed wherever items are encountered in their ‘normal economic purpose.’<sup>658</sup> What constitutes possession is not an ‘aspect of the will’ (*Willensmoment*) but an ‘aspect of morality and law’ (*moralische[n] oder rechtliche[n] Moment*), that is to say, through the perception of society and the natural coyness of law-abiding citizens to respect it.<sup>659</sup> In the end, the question of whether possession can be assumed is decided on the ground of the differing economic expediencies of an object.

Jhering seeks to illustrate this with several Roman sources. He cites Paul. D. 41, 2, 3: ‘*saltus hibernos aestivosque animo possidemus, quamvis certis temporibus eos relinquimus.*’ Here the possession of the fields is assumed following practical considerations of transhumance pasture and other needs of agricultural life, not according to an abstract definition of possession. Hence, the Roman jurist recognises possession even if fields are abandoned for a while.

As further evidence for the Roman flexibility of possession, Jhering sees the possibility of acquiring possession through *custodia*.<sup>660</sup> However, he also allows for the option whereby the

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<sup>657</sup> *ibid* 161 165; cf Savigny (n 8) 210, 21, 236

<sup>658</sup> *ibid* 179: ‘*Indem sie ihre ökonomische Bestimmung erfüllt.*’

<sup>659</sup> *ibid* 180, 182

<sup>660</sup> *ibid* 162



requirement of physical presence is dispensed with altogether, for which he cites Proc. D. 41, 1, 55 and Gai. D 41, 1, 5, 3.<sup>661</sup>

#### 4.4.3. *Possessio* and *dominium*

Jhering claims that possession linked to ownership is not new since Savigny and his followers have referred to possession invariably as the ‘expression of ownership’ and the ‘presumption of ownership.’<sup>662</sup> Here Jhering agrees with them.<sup>663</sup> Most possessors can be assumed to be owners.<sup>664</sup>

Jhering acknowledges that the Roman sources, and particularly the statement in Ulp. D. 41, 2, 1: *nihil commune habet proprietas cum possessione*,’ and Ven. D. 43, 17, 1: *permisceri causas possessionis et ususfructus non oportet, quemadmodum nec possessio et proprietas cum possessione*,’ as well as Ulp. D. 43, 17, 1: *quod separate esse debet possessio a proprietate*,’ can be interpreted as evidence against his argument.

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<sup>661</sup> *ibid*

<sup>662</sup> *ibid*

<sup>663</sup> *ibid* 53, 54

<sup>664</sup> *ibid* 62

He maintains, however, that these refer to the ‘practical’ (*praktische* [n]) and ‘dogmatic’ (*dogmatische* [n]) independence of possession concerning ownership, not to the ‘legislative’ (*legislative*) or legal-philosophical (*rechtsphilosophische*) link.<sup>665</sup>

In other words, those statements are only meant to refer to the procedural applicability of possessory interdicts and their treatment of possession as separate from ownership. They do not refer to the large idea of possession.<sup>666</sup>

Jhering’s quest for the ‘ultimate purpose’ of possession is in tune with his overall *Weltanschauung*, as it will be developed in his later works. Nonetheless, Jhering acknowledges that the task is difficult as the Roman sources do not give any indication about the ‘legislative purpose’ (*legislative Zweck*) of any institution, so it must be inferred.<sup>667</sup> Nevertheless, based on the above, the ‘historical aim of possessory interdicts’ can be seen in the regulation of possession (*Besitzregulierung*) in a suit for ownership.<sup>668</sup>

To support his view, Jhering cites Ulp. D. 41, 2, 35: ‘*exitus controversiae possessionis hic est tantum, ut prius pronounciet iudex.*’ C. 8, 6, 1: ‘*die proprietate cognoscat.*’ C.3, 32, 13.<sup>669</sup> Jhering sees in the *Basilicae* 50, 3, 72 the exclusive relation of the *interdictum uti possidetis* to

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<sup>665</sup> *ibid* 46

<sup>666</sup> *ibid*

<sup>667</sup> *ibid* 60

<sup>668</sup> *ibid* 78: ‘*Das historische Motiv der Einführung jener Interdicte wird in das Interesse der Besitzregulierung beim Eigentumsstreit gesetzt.*’

<sup>669</sup> *ibid* 79

*vindicatio: 'quando de possessio movetur actio uti possidetis, is vincit, qui nec vi nec clam nec precario possidet; et deinde aut satisfacit et suscipit reivindicationem aut non satisfacit et possessionem ad alterum transfertur.'*<sup>670</sup>

Jhering believes that the concept of possession does not always correspond to the protection of possession, as the *hereditatis petitio*, or the *possessio* of the *furiosi* show in Pap. D. 41, 3, 44, 6: '*utilitate suadente relictum.*' Here, too we conclude that protection is granted for reasons of expediency and equity, to protect ownership.<sup>671</sup> This leads to the observation that possession and possessory interdicts do not correspond, which is not awkward because, as we have shown, possessory interests exist for the sake of ownership.<sup>672</sup> Thus, the interest of ownership (*Eigentumsinteresse*) conditions the protection of possession, and, ultimately, the definition of possession.<sup>673</sup>

Jhering refers to his dissertation *De hereditate possessionis*, to reiterate that the *hereditatis petitio* functions as a possessory interdict where possession was lost due to the death of the original owner and possessor, while there was as of yet no new possessor due to the lack of knowledge and

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<sup>670</sup> *ibid* 80

<sup>671</sup> *ibid* 88, 90, 131, 157

<sup>672</sup> *ibid*: 144: '*, dass der Besitzschutz gewährt wird, wo es an dem Besitz in jenem Sinn fehlt, diese Thatsache hat daher nach meiner Theorie, welche über die Schutzfrage nicht die Definition des Besitzes selber, sondern das Interesse des Eigentums entscheiden lässt, durchaus nichts Auffälliges.*'

<sup>673</sup> *ibid*

will on the side of the heir so that possessory interdicts are not available. The *hereditatis petitio* is an argument against the requirement of the ‘will’; here, the factual situation is protected by reasons of expediency without the requirement of the will.<sup>674</sup> The answer to the question of who will be granted possessory protection of any kind is conditioned by ‘factual economic interests’ rather than the logical consequence of a personal injury.<sup>675</sup>

#### 4.5. Conclusion

Jhering constructs a complex argument here. He seeks to define the nature of possession by tracing back the nature of possessory interdicts in its historical context. He postulates that both the lawyer and the legal historian must always examine the reasons for which an institution exists and its merit before proceeding to seek a definition of it. Accordingly, possessory interdicts and possession itself must be examined in the face of their intrinsic merit, or ‘interest’ (*Interesse*) of Roman society in them. At the same time, their evolutionary character must be recognized and laid bare.

From this, he concludes that the nature of possessory interdicts must be sought not in delictual considerations concerning the person or object involved but in ownership. This means that possessory interdicts are designed to preserve ownership. For this purpose, the concept of possession must be adjusted to the interest of ownership. Equally, the definition of possession

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<sup>674</sup> *ibid* 85, 87: ‘*Es fehlt hier zwar der Besitz, aber nicht die Besitzidee.*’

<sup>675</sup> *ibid* 11

cannot be sought in any considerations of abstract logic but must be traced in the teleology of that institution. Thus, possession merely expresses ownership, serving the latter's interest.

Here Jhering applies to the institution of possession, and the possessory interdicts, the theory developed in *Der Zweck im Recht*, where he sought to trace the aim and purpose of every legal enactment. Similarly, for Jhering, possessory protection aims at protecting the possessor's 'interest' (*Interesse*).<sup>676</sup>

Jhering seems to follow the path of Rudorff, who started his contribution to the debate with the question of the nature of possessory interdicts; perhaps a quip at the famous question, '*Zu welcher Classe von Rechten gehört der Besitz?*' already asked by Savigny. Jhering elaborates further and forcefully establishes his argument for a teleological analysis of possession and possessory interdicts. Ultimately, he advocates dismissing a schematic definition that slavishly follows the precepts of formal logic but is neither practical nor warranted by the Roman sources.

#### **4.6.1. Jhering's *Der Besitzwille***

Jhering's second monograph on possession deals especially with the requirement *animus* for possession and fundamentally challenges Savigny's theory that possession always comprises *animus* and *corpus*, as opposed to *detentio*, which only contains the latter.

#### **4.6.2. *Possessio* and *detentio***

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<sup>676</sup> *ibid* 102

As we have seen above, Savigny used the definition of Paul's *Sententiae* 5, 2, 1: '*possessionem adquiremus et animo et corpore*' to support his view that possession comprised both physical contact and, 'the will to deal with the object as its owner,' namely, the *animus domini*. Although the source cited by Savigny did not specify the nature of *animus*, he did not consider it problematic to define it as '*domini*.' According to Savigny, if either component is missing, then we do not have *possessio*.<sup>677</sup>

Moreover, Savigny maintained that possession does not require a constant manifestation of the actual will but rather the 'ability to reproduce that control at any time.' Consequently, lack of *animus domini* leads us to *detentio*, or 'natural possession,' the latter not being jurally relevant.<sup>678</sup>

We have also seen above that Savigny acknowledged the difficulty of supporting his theory in the light of the Roman sources, especially since Roman jurists accepted possession, in cases of the recipient of the pledge, the *emphyteuticarius*, the sequester and the holder of *precarium*. In all these instances, the person holds something for somebody and does not wish - or is at least not supposed - to act as the owner. We remember that Savigny sought to explain these instances as 'anomalous' and then developed the concept of 'derivative' possession.

However, this remained problematic because the Roman sources treat other categories of borrowers, namely, the depositary and the tenant (*locator*), as *detentors*. At the same time, the thief, who has *animus domini*, is protected through interdicts.

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<sup>677</sup> Jhering (n 1) 6, 249

<sup>678</sup> *ibid* 44

In his *Besitzwille*, Jhering believes that Savigny's basic distinction between *possessio* and *detentio*, as one of the 'subjective will', is wrong; a misinterpretation deriving from postclassical sources the latter accepted uncritically.<sup>679</sup>

In contrast, Jhering maintains that 'the will' (*der Wille*) is always present in both *detentio* and *possessio*, as 'a conscious manifestation of the body' and cannot be separated from it. Hence, we must distinguish between *possessio* and *detentio*, both of whom require the *animus*, on the one hand, and mere 'physical proximity' (*Raumnähe*), on the other.<sup>680</sup> The latter situation is found when somebody is tied up or is unconscious.<sup>681</sup>

Furthermore, Jhering stresses, there is a distinction between *naturalis*, or *corporalis possessio (detentio)* and civil possession.<sup>682</sup> However, this distinction is again not to be found in the 'subjective will,' as knowledge and awareness, but in a modification of the will' (*eine Qualifikation des Besitzwillens*).<sup>683</sup> The will of the *possessor* might be different from that of the *detentor* but is always present and distinguishes the *detentio* from 'mere physical proximity.' Jhering finds evidence for this in Paul. D. 41, 2, 1, 3.<sup>684</sup>

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<sup>679</sup> *ibid* 248, 321

<sup>680</sup> *ibid* 21, 39, 44, 51.

<sup>681</sup> *ibid* 22, 40: 'Das corpus ist auch hier die reale Bethätigung, das Werk des animus'; 52.

<sup>682</sup> *ibid* 37, 42.

<sup>683</sup> *ibid* 26, 44.

<sup>684</sup> *ibid*: 'Damit ist das Besitzverhältnis vom Raumverhältnis aufs klarste abgehoben.'

For his view that *animus* is also necessary for *detentio*, Jhering cites Paul. D. 41, 2, 1, 9: ‘*ceterum et ille, per quem volumus possidere, talis esse debet, ut habeat intellectum possidendi.*’ He concedes that some confusion might occur due to Paul. D. 41, 2, 1, 3: ‘*furiosus et pupillus sine tutoris auctoritate non potest incipere possidere, quia affectionem tenendi non habent*’ where the shift between ‘*intellectum possidendi*’ and ‘*affectio tenendi*’ is unfortunate. He argues, however, that Paul uses the terms interchangeably and as complete synonyms.<sup>685</sup>

For Jhering, the strongest proof that the ‘subjective will’ is also necessary for *detention*, is found in the correct reading of *Pauli Sententiae*, 5,2,1: ‘*possessionem acquirimus et animo et corpore; animo utique nostro, corpore vel nostro vel alieno.*’ Here, the sentence must not be read in the sense that Paul denies the agent a will; it merely says that the agent can release the principal from the necessity to exert his will.<sup>686</sup> Moreover, for Jhering, ‘the will,’ as conceived by Savigny, is eminently unreliable because it is internal, cannot be proved since it is not always manifested; merely a state of mind.<sup>687</sup>

Jhering believes that one must distinguish between an ‘abstract will,’ namely, a will that is manifested and, thus, interpreted by the community, and a ‘concrete will’ that is internal.<sup>688</sup>

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<sup>685</sup> *ibid* 44.

<sup>686</sup> *ibid* 38: ‘*So will er damit in der Person des Stellvertreters nicht den animus leugnen, sondern nur sagen, dass der Stellvertreter uns die reale Bethätigung des Besitzwillens abnehmen.*’

<sup>687</sup> *ibid* 217.

<sup>688</sup> *ibid* 190: ‘*Der Besitzwille, der in der herrschenden Lehre eine so große Rolle spielt, wird in der praktischen Anwendung des Rechts niemals sichtbar.*’ 222.



Secondly, Jhering states, it is not supported by the sources that Romans had developed the notion of an *animus domini* instead of proceeding on a case-by-case basis.<sup>689</sup>

Savigny's theory of *animus domini* is equally problematic for the instances he calls, 'derivative possession (*abgeleiteter Besitz*), namely, the *emphyteuticarius* and the holder of *precarium*, as there is disagreement among the group on the exact nature of the *animus*, namely, whether it is *animus domini* or *animus possidendi ad interdicta*.<sup>690</sup>

Jhering's main argument against Savigny's theory of 'the will' is that if *animus domini* is the feature that distinguishes *possessio* from *detentio*, then would be entirely up to the holder of an object to freely determine at will when he holds for himself and when not.<sup>691</sup> However, Roman law had a *numerus clausus* of possession; only for the *emphyteuticarius*, the creditor of pledge, the precarist and the superficiary,<sup>692</sup> as Savigny himself has to acknowledge, did not recognize this,<sup>693</sup> and merely referred to the instances as 'anomalous'<sup>694</sup>

Jhering also attacks Savigny's view that 'the reproduction of the abstract ability to control an object' would be considered sufficient to establish possession. He believes, instead, that there

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<sup>689</sup> *ibid* 201, 206.

<sup>690</sup> *ibid* 244; see also Puchta (n 408) 679.

<sup>691</sup> Jhering (n 1) 57, 209.

<sup>692</sup> *ibid* 312.

<sup>693</sup> *ibid* 206, 285; Savigny (n 8) 284.

<sup>694</sup> Savigny (n 8) 132: '*das Anomalische*.'

must be a ‘real manifestation’ (*reale Bethätigung*).<sup>695</sup> He acknowledges that Roman sources have held knowledge as sufficient, as we find in Ner. et Proc. D. 41, 2, 3, 3: ‘*continuo me possidere simulatque possidendi animum habeor.*’ Jhering believes that this was merely a minority opinion, superseded by Sabinus, who required ‘*loco movere*’ in Sab. D. 44, 15.<sup>696</sup>

Instead, Savigny and his followers, like Thibaut, were at odds to explain why the creditor of *pignus* was considered a possessor, though he would normally have lacked *animus domini*,<sup>697</sup> having to explain this out as ‘singularities’ (*Singularität*).

Ultimately, for Jhering, linking possession with ‘the will’ is not only contrary to the Roman sources; it is also downright dangerous, as could create ‘anarchy’ in the law, because ‘the will’ could freely turn detention into possession and backwards at whim.<sup>698</sup>

Jhering acknowledges that the sources themselves can be misleading because of the jurist Paul and his ‘problematic’ relationship with the *animus*.<sup>699</sup> Paul is the only jurist to claim that possession needs *animus* and *corpus*, but Jhering claims *corpus* initially meant the corporeal relation to an object (*das körperliche Verhältnis zur Sache*).<sup>700</sup> Paul discusses ‘the will’ in various

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<sup>695</sup> *ibid* 29.

<sup>696</sup> *ibid*.

<sup>697</sup> *ibid* 239.

<sup>698</sup> *ibid* 13, 14, 229: ‘*Die Anheimstellung des Besitzverhältnisses an den individuellen Willen ist die Anarchie im Recht.*’

<sup>699</sup> *ibid* 285, 301, 364.

<sup>700</sup> *ibid* 34, 35.

other passages: Paul. D. 41, 3, 4, 2 (*animus possidendi* of a ward); Paul. D. 13, 7, 37 (*conducenti non sit animus possessionem apiscendi*), Paul. D. 41, 3, 13 pr (*pignori rem acceptam usu non capimus, quia pro alieno possidemus*).

According to Jhering, another example where Paul formulated clumsily is Paul. D. 41, 2, 1, 5 (*quia nostra voluntate intellegantur possidere, qui eis peculium habere permissimus*). Here the explanation about *voluntas* is forced and would not make sense if the master was dead.<sup>701</sup> Since Roman sources require *animus* and *corpus*, it was erroneously held that one of the two independent elements could be missing whereas in truth they are cumulative, both must be always present.<sup>702</sup>

After all, Paul, in his efforts, to ‘construct concepts’ has always shown a preoccupation with the *animus* and its variations, namely, *animus sibi habendi*, and *animus possidentis*, a jural construction, as shown in his discussion of both Paul. D. 41, 2, 1, 4: ‘*nam quid adinet dicere non possidere mulierem, cum maritus, ubi noluit possidere, protinus amiserit possessionem?*’, and Paul. D. 41,2, 1, 20: ‘*alioquin si dicamus, per eos non acquire nobis possessionem, qui nostro nomine accipiunt, futurum, ut neque is possideat, cui res tradita sit, quia non habeat animum possidentis, neque is, qui tradiderit, quoniam cesserit possessionem.*’

Both times, Paul refuses to countenance that possession can simply be lost, it does not have to be transmitted, but because he cannot see this, he comes to absurd conclusions.<sup>703</sup> For

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<sup>701</sup> *ibid* 278.

<sup>702</sup> *ibid* 36.

<sup>703</sup> *ibid* 296.

Jhering it remains unclear why for Paul, the agent does not have *animus possidendi*.<sup>704</sup> The will of the agent is entirely irrelevant.<sup>705</sup>

The strongest proof for Jhering's against Savigny's '*Subjektivitätstheorie*' is encapsulated in the tenet in C. 7 32 5: '*nemo sibi causam possessionis mutare possit.*'<sup>706</sup> Jhering claims that one might say that the Romans invented the said principle to anticipate Savigny's 'subjective theory.' How problematic Paul is, is demonstrated with the latter excerpt, where he accepts acquisition of possession through free agents, something that is entirely alien to Roman law (*neque enim rerum natura recipit, ut per eum aliquid possidere possimus, quem civiliter in mea potestate non habeo*).<sup>707</sup>

Jhering distinguishes two theories of possession, a 'subjective' and an 'objective,' and expresses them in mathematical formulas.<sup>708</sup> The 'subjective theory' sees possession as  $x = a + c + A$ , where  $x$  is possession,  $a$  is *animus*,  $c$  is *corpus* and  $A$  is the extra ingredient of 'the will.' *Detentio* is, according to the 'subjective theory'  $y = a + c$ . The construction of Savigny asks the

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<sup>704</sup> *ibid* 297.

<sup>705</sup> *ibid* 298, 303, 381.

<sup>706</sup> *ibid* 357, 358: '*Der Gedanke lautet: Machtlosigkeit des subjectiven Willens gegenüber der objectiven Rechtsregel.*'

<sup>707</sup> *ibid*.

<sup>708</sup> *ibid* 8.

*possessor* to prove his special will.<sup>709</sup> Therefore, the ‘subjective theory is untenable’; an ‘unhealthy sophistry.’<sup>710</sup>

Jhering supports the ‘objective theory.’ The ‘objective theory’ expresses possession as  $x = a + b$  and *detentio* as  $y = a+b-n$ . Here N is a variant that must be absent whenever we assume possession. This was the Roman view.<sup>711</sup>

Thus, according to Jhering, by default, Roman law recognized the physical control over a thing as possession, and as *detentio* only if an element was missing.<sup>712</sup> The evidence for this is this time found in *Pauli Sent. 5, 11, 2*: ‘*probatio traditae vel non traditae possessionis non tam in iure quam in facto consistit ideoque sufficit.*’<sup>713</sup>

Jhering argues that what constitutes a *detentio* is not a lack of will, but the existence of a jural impediment of some kind. This impediment lies either in the person of the holder, namely, because he is *alieni iuris*, or in the thing, namely, because it is a *res sacra*, or, finally, because any statutory *causa possessionis* might exclude it.<sup>714</sup> As evidence for the fact that the subjective will

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<sup>709</sup> *ibid* 12, 54, 232.

<sup>710</sup> *ibid* 308, 309.

<sup>711</sup> *ibid* 55, 362.

<sup>712</sup> *ibid* 17, 18: ‘*Das Besitzverhältnis ist stets Besitz so weit nicht das Gesetz ausnahmsweise Detention eintreten lässt.*’ 53, 61.

<sup>713</sup> *ibid* 9.

<sup>714</sup> *ibid* IV, 10, 11, 303, 362: ‘*Der Theorie der römischen Juristen zufolge entsteht stets Besitz, soweit nicht eine der gesetzlichen causae detentionis ihn ausschließt.*’

is irrelevant, he cites where the *filius familias* obtains possession as soon as his father dies, without him even knowing, or when the agent acquires something for somebody else.<sup>715</sup>

Jhering defines the relation of possession (*Besitzverhältniss*) as the ‘interest of a person in a thing.’<sup>716</sup> Furthermore, *detentio* is not the opposite of *possessio* in the sense that the former has no jural consequence, but rather a lesser importance.<sup>717</sup> Thus, possession occupies the middle ground between *detentio* and *bonae fidei possessio*, the latter warranting permanent control over an object.<sup>718</sup> Further, possession is not an aim in itself but only serves to further economic interests.<sup>719</sup>

Since *detentio* and *possessio*, or *naturalis possessio* and *civilis possessio* both comprise will and physical control, their distinction is a jural one, namely one of the law. There are cases where Roman law does not recognize a will with a jural consequence to a person, who might have the *animus domini* but is *alieni iuris*, or a slave. Another example is a lease, where we find: ‘*prior locator possessionem per conductorem rectissime retinet.*’<sup>720</sup> However, in contrast to Savigny,

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<sup>715</sup> *ibid* 66, 303.

<sup>716</sup> *ibid* 24: ‘*Das Besitzverhältnis ist constatirung des Interesses der Person an der Sache.*’

<sup>717</sup> *ibid* 46, 51.

<sup>718</sup> *ibid* 191.

<sup>719</sup> *ibid* 26: ‘*Der Besitz ist nicht Selbstzweck, sondern lediglich Mittel zum Zweck.*’

<sup>720</sup> *ibid* 209.

Jhering maintains that *detentio* is also jurally relevant,<sup>721</sup> and protected through remedies as the *actio iniuriarum*.<sup>722</sup>

Given the above, Jhering naturally criticises the recent draft to the *BGB*, where §797, which defined possession as having a thing as one's own (*als das seinige wollen*) as opposed to *detentio*.<sup>723</sup> The exact wording of §797 to which Jhering refers is the following:

*‘Der Besitz einer Sache wird erworben durch die Erlangung der tatsächlichen Gewalt über die Sache (Inhabung) in Verbindung mit dem Willen des Inhabers, die Sache als die seinige zu haben (Besitzwille).’*<sup>724</sup>

Jhering also attacked the requirement of *‘tatsächliche Gewalt’* since he believed that actual control would make possession a most incomplete institute, not suitable for the role required from it.<sup>725</sup> Instead, he believed, the *BGB* should define possession as the factual relation (*thatsächliche Verhältnis*) of a person to an object that is warranted by the aim of economical use.<sup>726</sup>

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<sup>721</sup> *ibid* 46.

<sup>722</sup> *ibid* 49, 50.

<sup>723</sup> *ibid* 470.

<sup>724</sup> Jacobs and Schubert (n 565) §797 *El Anlagen* 880.

<sup>725</sup> Jhering (n 551) 478.

<sup>726</sup> *ibid* 481: *‘Besitz ist das thatsächliche Verhältnis der Person zur Sache, welches durch den Zweck ihrer wirtschaftlichen Verwendung geboten ist.’*

#### 4.6.3. *Possessio* vs Ownership

Jhering also sought to dismantle Savigny's theory of the *animus domini* by postulating that possession came historically before ownership so that from a logical point of view, possession is necessary for ownership, but ownership is not necessary for possession. Thus, *animus domini*, the will to deal with an object as its owner for possession, is both logically and historically not tenable.

#### 4.6.4. The Aim of Possession; *Zweck* and *Interesse*

Jhering applies his concept of the aim (*Zweck*) and *Interesse* on the jural institute of possession, to trace its historical development in Roman society.<sup>727</sup> He believes that what distinguishes proximity from *detentio* is practical interest (*practisches Interesse*).<sup>728</sup> He argues that *detentio* does not have an aim itself but derives its standing for the sake of possession (*begriffliche Reflexwirkung*).<sup>729</sup>

Jhering traces the genealogy of *detentio*, or *possessio naturalis*, in its primal form, as a concept applying to the Roman household. *Detentio* was held by persons *alieni iuris* to the paterfamilias, it meant a form of unprotected holding.<sup>730</sup> It extended from there to all immobile goods, for instances where the property was rented out. Therefore, it moved to contractual obligations. In a further step, detention was extended to *jura in re*, namely on servitudes and

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<sup>727</sup> *ibid* 224, 365.

<sup>728</sup> *ibid* 44.

<sup>729</sup> *ibid* 45.

<sup>730</sup> *ibid* 432.



superficiaries. Here, the Roman lawgiver granted possessory protection to the *quasi-possessor*, namely, the *possessor iuris*, as opposed to *the possessor corporalis*, the holder of a right.

The consideration for this was a mere practicality.<sup>731</sup> In general, the reason why Roman law assumes *detentio* in the case of a lease, but not pledge, has to do with practical jural considerations, namely, the practical interest; something that should be the preeminent consideration of the lawgiver and the judge.<sup>732</sup> Thus, the assumption of the requirement of *animus domini* and its strict doctrinal application goes against any practical considerations.<sup>733</sup>

Consequently, Jhering accepts the concept of ‘derivative possession,’ but defines it differently from Savigny, in that the difference between possession and derivative possession does not lie for him in the lack of *animus domini* but is the result of a deliberative choice of the Roman lawgiver. The reasons for this choice must be seen in considerations of expedience and practicability.<sup>734</sup> Ultimately, the Romans decided to grant the creditor of pledge, possession, despite not having *animus domini*.

The case of the *emphyteuticarius* is similar, the latter was made possessor because his possession would not threaten the landlord; as the *emphyteuticarius* could safeguard his possession

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<sup>731</sup> *ibid* 310.

<sup>732</sup> *ibid* 199, 200.

<sup>733</sup> *ibid* 202.

<sup>734</sup> *ibid* 5, 7.

from threats on his own, through possessory interdicts, something that was in the interest of the landlord as well.<sup>735</sup>

Furthermore, *detentio* as the unprotected holding was no longer expedient in certain instances.<sup>736</sup> This is the case of the creditor of *pignus*. The latter is given ‘*possessio*’ instead of *detentio*, despite not wanting the object as its own because if he had mere *detentio*, the owner could bring forth the possessory interdict, making the concept of pledge obsolete. In addition, there would be a contradiction between possessory and petitory protection, as the creditor of the pledge would have the *actio hypothecaria*.<sup>737</sup> Jhering concludes that Savigny and his supporters, with blind devotion to their *animus* theory, had no other choice than to call these cases ‘anomalous.’<sup>738</sup>

Hence, the opinion of the jurists that the master receives possession of objects of his slave, without him knowing it, is equally based on considerations of practicality. In this respect, Papinian mastered it better than Paul when he states: ‘*utilitatis causa iure singulari receptum, ne cogentur domini per momenta causas et species peculiorum inquirere*.’<sup>739</sup>

However, if one is inclined to construct definitions, as Paul was in ancient Rome, and Puchta today,<sup>740</sup> one might wish to explain this singularity away by creating the theory of

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<sup>735</sup> *ibid* 374, 375, 379, 433.

<sup>736</sup> *ibid* 432.

<sup>737</sup> *ibid* 208.

<sup>738</sup> *ibid* 242.

<sup>739</sup> *ibid* 277.

<sup>740</sup> *ibid* 283.

representation of will (*nec movere nos debet, quod ... etiam ignorantes possidemus, quas servi peculiariter paraverunt*).

#### 4.6.5. Conclusion

To sum up, as opposed to Savigny's 'formalistic and dialectic view (*formalistisch* [en] *oder dialektisch* [en]), Jhering proposes a 'realistic' or 'teleological' view (*realistisch*[en] *oder teleologisch*[en]).<sup>741</sup> Protection of possession cannot be seen in any protection of the person or the will but to facilitate the protection of ownership through ease of proof.<sup>742</sup>

In his second monograph on possession, Jhering continues to dismantle Savigny's theory on possession and its various aspects. He rejects the requirement of the will; reassesses the sources concerning consideration of expediency and practicality. In many ways he continues what he had started in his previous work, but whereas in the first he started from possessory interdicts, and attained to a definition of possession from there, in this work he directly creates a theory of possession.

Most significantly, Jhering challenges Savigny's basic distinction between *possessio* and *detentio* as between a jural and non-jural concept. For Jhering all jural concepts, *possessio* and *detentio* included, are facts that have jural relevance. Here he develops a point started by Gans, as we saw above, and further supported it.

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<sup>741</sup> *ibid* IX, XI, XIV.

<sup>742</sup> *ibid* 50.

The great merit of Jhering's work is that it comprehensively challenges for the first time Savigny's a priori distinction between jural and non-jural concepts and that he comprehensively attacks the requirement of the *animus domini*. Jhering shifts the concept of possession from a will based to a factual, general, or external perception; for him possession is what is perceived as such by the community.

#### **4.6.6. Conclusion for both Works**

Jhering's contribution to the discussion on possession consists of two important elements: The first is his concept of 'interest' (*Interesse*) as the driving force behind the human will. According to Jhering, humans constantly strive towards the satisfaction of their vital interests, and their will is shaped accordingly. Jhering's concept replaces the previous concept of the 'abstract will,' as conceived by the natural-law philosophers and adopted by Savigny and subsequent generations of scholars.

As we saw, Jhering is not the first to identify the concept of '*Interesse*' - as we have also found it in Bruns - but he develops it much further and elevates it into an important feature of the discussion. Hence, Jhering can now propose a radically new definition of possession: Possession is not there to protect the abstract will of a person or a society per German idealism but to further its vital interests. In this way, possession and possessory interdicts are weaved in a pattern of societal teleology. The second element of Jhering's innovation is the concern for the practicability of any legal concept.

Jhering is the first author to discuss comprehensively the nature of interdicts in *Über den Grund des Besitzschutzes*. Rudorff undertook the same task - as we have seen - but he did not develop it into great detail. Here too Jhering goes further. He proposes a teleological examination of possessory interdicts and, consequently, of possession.

This is in line with his larger theory of law, as laid down in his *Geist* and his *Zweck*. For him, jural institutions serve a specific purpose in a society that the historian who wants to appreciate correctly the institution must recognize. In addition, institutions undergo an evolutionary process and constantly adjust. Thus, the jurist is ill-advised to seek to impose a uniform pattern led only by formal logic. According to Jhering, all law is in constant flux and changes according to the needs of any given society, including the Roman. Consequently, the rigid definition proposed by Savigny, and slavishly adopted by his followers, is not warranted by the sources, and does not explain why in some instances physical control is regarded as possession, and in others not.

In der *Besitzwille*, Jhering attacks Savigny and his followers for distinguishing *possessio* from *detentio* based on a specific form of will, namely the *animus domini*. Jhering claims that this requirement is both impractical and historically inaccurate. In truth, the usufructuary and the tenant wanted to hold for themselves but were not considered as possessors in Roman law.

In addition, the defendant would have to prove the *animus domini*. It is impractical because the will is the internal aspect, not discernible and thus problematic, as the plaintiff would have the onus of proof if the one followed the subjective view.<sup>743</sup> The logical consequence of Savigny's theory would be that the holder would have it in its hand to turn *detentio* into *possessio* because he has control over his will.

In the course, of the discussion, Jhering also touches upon another fundamental aspect of Savigny's theory. Savigny initially considered *detentio* as a fact and *possessio* as a fact with legal consequences and changed his opinion over several editions of his work. His, a priori distinction

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<sup>743</sup> Jhering (n 571) 63.

between jural and non-jural concepts was not seriously challenged until Gans, as we have seen, who stated that this is entirely arbitrary and circular, as it is the lawgiver that decides what is jural and not. Gans too did not develop this point further, but Jhering did.

To sum up, the main contributions of Jhering to the discussion of possession are the following: a) both *possessio* and *detentio* have a corporal and mental element. By default, Roman law always assumed possession, unless a *causa possessionis* is denied by the lawgiver, as in certain instances, namely *commodatum*, *usufructus*, location, *emphyteusis*, *depositum*. This was in the public interest. Romans would accept possession - or not - in each situation where they would be more expedient;<sup>744</sup> b) possession is attached to ownership, and functions as presumptive ownership in the case of *rei vindicatio*,<sup>745</sup> thus, possessory interdicts have a subservient function to the former. Therefore, the owner must be the possessor and have the possessory interdicts; c) the legal scholar must always look at the practicability and the aim of a given jural institution (*realistisch*, *teleologisch*) and not be driven by pure logic (*dialectisch*, *formalistisch*).

Finally, Jhering's view that possession needs to be defined from its external shape, namely, *Verkehrsanschauung*, as opposed to 'subjective will' has the advantage of procedural practicality, and it seminally influenced, as we will see further down, the concept of '*Besitz*' adopted in the *BGB*.

To sum up, Jhering was the first scholar to reveal serious flaws in Savigny's reasoning and has furnished evidence from the sources to attack the concept of *animus domini*. However, his reading is problematic, as well because his 'evolutionary' analysis is not warranted by the Roman

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<sup>744</sup> Jhering (n 1) 384: '*praktische Zwecke sind es gewesen.*'

<sup>745</sup> *ibid* 430: '*Der Grundgedanke des Besitzes ist der erleichterte Eigentumsschutz.*'

sources. Ultimately, the Romans did not explain how they perceived possession, and where it came from, and the exact nature of possessory protection remains a matter for speculation even today.

Unlike Bruns, who considered possession as an independent entity that can be the object of a *condictio*, Jhering cannot come to this conclusion easily, as he perceives possession as the factual side of ownership. This is problematic however in the case of *bonae fidei possessio*, leading to prescriptive acquisition since here an independent position is attained.

Furthermore, Jhering has notably failed to explain how his view of possession as relative to ownership, can be explained given the strict separation between possessory and proprietary actions. More specifically, why can a title of ownership not carry weight in a possessory suit if possession is subservient to ownership? A matter that raised questions in Roman law and is still an object of dispute in both the *ABGB* and the *BGB*.

Another inconsistency with Jhering's theory has to do with the nature of possession. Jhering perceives possession initially as a fact, but since he argues that possession protects interests, and legally protected interests are rights, he must concede that possession is a right after all.<sup>746</sup>

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<sup>746</sup> Jhering (n 577) *III*, 351; *ibid*, 'Der Besitz' in (1893) 32 *Jherings Jahrbücher* 63.

## Chapter 5. The Construction of the Austrian and German Civil Codes

### 5.1. Introduction

In this chapter, we will take a systematic look at the civil law codes of Austria (*ABGB*) and Germany (*BGB*) regarding their respective concepts of possession. The two major civil codifications of the German-speaking world have an age gap of almost one hundred years and display significant differences, especially in their respective conception of possession. But they also have similarities; both aimed at the exclusive and final regulation of civil law in their territories, and both were designed to unify civil law and facilitate commerce. Finally, both codices sought to replace the mixture of local Germanic and Roman law, in the form of the *Ius commune*, but took the Roman sources as their basis.

We will look at them more closely and will seek to ascertain how a different interpretation of the same Roman sources led to the adaptation of differing concepts of possession. And we will closely examine to what extent the ‘Pandektist’ movement was responsible for this difference.



The work for the compilation of a new civil code for the entire Empire of the Austrian Monarchy started under Maria Theresia in 1753, the *Codex Theresianus*.<sup>747</sup> The *ABGB* is the successor of the *Codex Theresianus* and went through three readings before its final draft.

On the other hand, the consultations for the *BGB* lasted about thirty years, and we have detailed documentation of the drafts, the findings of the two Commissions responsible for drafting them, and the detailed justifications of the final drafts (*Motive*).

It must be added here that to speak of ‘codes’ and ‘codification’ might be simplistic, as the word is used to describe a wide range of legal texts, ranging from the Justinian’s *Corpus iuris civilis* (529 AD), the old German *Sachsenspiegel* (1230) to the *Dutch civil code* (1992). All these textbooks can certainly be identified as ‘codices’ in the broadest sense as they contain legal pronouncement that commands validity in their societies but differs significantly from each other.<sup>748</sup>

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<sup>747</sup> Martin Schennach, ‘Provinzialrechte und Kodifikationsprozess in den österreichischen Ländern’ in Barbara Dölmeyer und Heinz Mohnhaupt (ed) *200 Jahre ABGB (1811-2011) Die österreichische Kodifikation im internationalen Kontext* (Klostermann 2012) 99.

<sup>748</sup> Pio Caroni, *Gesetz und Gesetzbuch, Beiträge zu einer Kodifikationsgeschichte* (Heilbing & Lichtenhan 2003) 2 Hans Hattenhauer, ‘Das ALR im Widerstreit der Politik’ in Detlef Merten and Waldemar Schreckenberger (ed) *Kodifikation gestern und heute. Zum 200. Geburtstag des Allgemeinen Landrechts für die Preußischen Staaten* (Duncker & Humblot 1995) 28.

The Swiss legal scholar Pio Caroni identifies three characteristic features that all codices have in common: their written form (*Verschriftung*); their pretention to comprehensiveness (*Anspruch auf Vollständigkeit*); their unificatory quality (*vereinheitlichende Funktion*).<sup>749</sup>

Caroni observes that the extent to which these codices follow each tendency varies. Thus, the *ALR* of Prussia does not have pretensions to a monopoly, requesting for itself only a subsidiary function,<sup>750</sup> as opposed to the *CC* of France. The *ABGB* follows in this respect a middle path since it contains the famous, but vague §7, which allows interpretation following natural principles (*natürliche Rechtsgrundsätze*).<sup>751</sup> At the same time, the *ALR* can be seen as less unificatory than both the *CC* and the *ABGB* in that it promotes, at least, the image of an egalitarian society.<sup>752</sup>

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<sup>749</sup> *ibid* 5 – 6, 116; Hans Schlosser ‘Kodifikationen im Umfeld des Preußischen Allgemeinen Landrechts’ in Detler Mertens and Waldemar Schreckenberger *Kodifikation gestern und heute. Zum 200. Geburtstag des Allgemeinen Landrechts für die Preußischen Staaten* (Duncker & Humblot 1995) 67; Thomas Simon, ‘Inhalt und rechtspolitische Bedeutung der “Einleitung” des ABGB im Kontext der Kodifikationsgesetzgebung des frühen 19. Jahrhunderts’ in Barbara Dölemeyer and Heinz Mohnhaupt (eds), *Die österreichische Kodifikation im internationalen Kontext, Studien zur europäischen Rechtsgeschichte* 267 (Klostermann 2012) 44.

<sup>750</sup> Caroni (n 752) 259; see also: Schlosser (n 7) 122: “*subsidiäres Gesetzbuch*” zur *ausschließlichen Rechtsquelle.*’

<sup>751</sup> *ibid* 56, 62; Simon (n 753) 57, 63.

<sup>752</sup> *ibid* 55, 62, 68, 72; for the preservation of divided ownership see: Ernst Bruckmüller, ‘Über die Lage der Habsburgmonarchie in den Jahrzehnten zwischen Maria Theresia und Metternich in

Historically, the roots of a common codification for the Holy German Empire can be traced to the seventeenth century and are closely connected with the rise of natural law and the axiomatic-logical worldview (*more geometrico*) as laid down by Samuel Puffendorf (1632 – 1694). And it was during that time that the legal scholar and mathematician Gottfried Wilhelm Leibniz (1646-1716) was commissioned by the Prince Elector (*Kurfürst*) Johann Philipp of Mainz to rearrange the Roman sources of the *Corpus iuris civilis*.<sup>753</sup> Leibniz, instead, created his own *Corpus iuris reconncinnatum* in 1672, which worked out a system of private law that arranged the Roman sources anew under the principles of natural law.<sup>754</sup>

Leibniz's plan for a common civil law code for the entire territory of the Empire did not materialise but helped foster a perception of the need for such a codification.<sup>755</sup> The scholarship only recently recognized the value of this work.<sup>756</sup> Its importance lies in the fact that it laid the intellectual foundations of the ‘wave of codifications’ that swept through Europe in the following centuries.

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Hinblick auf die Kodifikation des ABGB’ in Barbara Dölmeyer und Heinz Mohnhaupt (ed) *200 Jahre ABGB (1811-2011) Die österreichische Kodifikation im internationalen Kontext* (Klostermann 2012) 21.

<sup>753</sup> Matthias Armgardt, ‘Leibniz as Legal Scholar’ (2014) 20 (1) *Fundamina* 30.

<sup>754</sup> Schlosser, (n 7) 104.

<sup>755</sup> *ibid* 102.

<sup>756</sup> *ibid*.

We have seen above that Savigny perceived the three major codifications of his time, the *ALR* of 1794, the *CC* of 1804<sup>757</sup> and the *ABGB* of 1812 as natural-law codifications and polemicised them. They were, however, greatly praised at their time as the *ratio scripta*; universally applicable for all times and places.<sup>758</sup>

The age of codification marked a turning point in Western European legal science. The codices were thought of as being based on the eternal principles of nature and logic; the law could be deduced from them according to the perennial principles of logic. This meant that the law should cease to grow historically. The law code had to be applied mechanically and exclusively, derogating the custom law, unless expressly provided otherwise.<sup>759</sup> This would facilitate adjudication, create uniformity, simplicity, and justice.

However, Caroni dismisses the habit of referring to the said codices as ‘*naturrechtliche Gesetzbücher*,’ maintaining that the philosophy of natural law did not develop any theory of codification. Instead, he maintains, authors of various ideologies picked up ideas of natural-law

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<sup>757</sup> Hattenhauer (n 751) 24.

<sup>758</sup> Ernst Landsberg, *Geschichte der Deutschen Rechtswissenschaft 3 Abteilung, I Halbd* (Mohr 1910) 486; Heinz Mohnhaupt, ‘Zum Verhältnis zwischen Kodifikation und Rechtsprechung am Beispiel von Kommentaren und Rechtssprechungssammlungen zum ABGB’ in Dölmeyer and Mohnhaupt (eds) *200 Jahre ABGB (1811 – 2011), Studien zur europäischen Rechtsgeschichte* 267 (Klostermann 2012) 121, 123.

<sup>759</sup> Zwilgmeyer (n 108) 43.

philosophers and embedded them into their theories of codification, thus, the degree with which each codification is imbued with the natural-law doctrines differs.<sup>760</sup>

We can agree with Caroni that the general label ‘natural-law codification’ is too simplistic; however, we cannot deny the significant influence that the doctrines of natural law have had on the said codifications. This is seen especially in the desire to rationalize the existing law following principles of mathematical truths as propagated by Christian Wolff. Wolff’s ‘*System*,’ both concerning its concept of definition and its technique of syllogism is especially noteworthy in the *ALR*,<sup>761</sup> but is found in the other two codes as well.<sup>762</sup>

Finally, despite their differences, we must stress that the codes brought about a fundamental break with the legal tradition of Europe, not so much concerning the divide between Roman/ non-Roman law, but in that the codes were now the sole basis for interpretation. Before the movement of codifications – strongly endorsed by absolutist monarchs, such as Frederik the Great of Prussia - Germanic and Roman law was applied next to various customary laws (*consuetudo fori*), as customary law.<sup>763</sup>

In the age of codification, Roman law, as preserved in the *Corpus iuris civilis*, and interpreted by the Glossators was now, in theory at least, relegated into the sphere of antiquarianism, a matter of historical interest. In truth, however, the *Corpus iuris civilis* and its

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<sup>760</sup>ibid 17, 54.

<sup>761</sup> Hattenhauer (n 751) 29.

<sup>762</sup> Schlosser, (n 7) 109.

<sup>763</sup> Schennach (n 749) 81.

sources never lost their authority and prestige and formed a basis for the codices, which were advertised at the times as ushering in a new era.

It is safe to say that the era of codification generated a conflict between the presumed state monopoly of legislation and the court practice.<sup>764</sup> As a result, we find in the new codes a mixture of classical texts and new ideas, namely, natural law with its quest for logical precision, and there is often tension between the different elements. Our examination of the concept of possession will exemplify this.

The extent to which natural law derogated classical Roman sources in each code can best be investigated by examining specific institutions, such as ownership and possession. This comparison will also reveal how much these two elements influenced each other.

Humanists saw ownership as an integral part of human welfare. Thus, Christian Thomasius defines ownership thus: ‘*in potestate disponendi pro lubitu de usu rei cum exclusion aliorum.*’<sup>765</sup> He also says that ‘ownership derives from nature itself; it is the opposite of non-ownership not of common ownership.’<sup>766</sup> Thus, the central importance of ownership for human nature, its happiness and personality, are central to the new order, as enshrined by the codes, and will be significant until this day.

Regarding possession, it is noteworthy that the leading German natural-law theorists, Leibniz, Thomasius and Wolff, are not concerned with the concept of possession, unless in the

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<sup>764</sup> Simon (n 753) 51.

<sup>765</sup> Thomasius, *Fundamenta* 2.10.3.

<sup>766</sup> *ibid* 2.10.7.

context of *vindicatio*, or loan. Their interest lies in ownership and the return of possession to the owner. Possession as such is not mentioned. It will be my argument that the humanists' lack of interest in the specific institution of possession, featuring so prominently in Roman law, partly accounts for the 'problematic' position of the institution in the codices.

### 5.2.1. History of the *Allgemeines Bürgerliches Gesetzbuch (ABGB)*

The *ABGB* is based on a manuscript consisting of eight folia, based on the commentaries to the *Digest*, completed in 1767. Johann Bernhard Horten made an excerpt from this, which was worked into a law code by Carl Anton von Martini (1726 – 1800), a professor of natural law in Vienna. In 1790, the Imperial Law Commission set to task under the guidance of von Martini and later his successor to the chair of natural law, Franz von Zeiller (1751 – 1828), a follower of Kant.<sup>767</sup> Martini and Zeiller closely followed the structure of the *Institutiones*.<sup>768</sup>

There were three drafts (1801 – 1806, 1807-1808, 1809-1810), and the final version came into force on Jan 1, 1812, as *Allgemeines Bürgerliches Gesetzbuch für die gesamten Deutschen Erbländer der Österreichischen Monarchie (ABGB)*. The *ABGB*, though firmly embedded in the spirit of natural law, differed from the *CC* in that it accepted various degrees of property but did

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<sup>767</sup> Schlosser (n 7) 76

<sup>768</sup> Philipp Harrass v Harrasowsky, *Geschichte der Codification des österreichischen Civilrechts* (1868 Manz) 164

not clearly define the proprietary classes to which it pertained.<sup>769</sup> Thus, it assumed the existence of a feudal, land-owning society, but under somehow vague terms. The *ABGB* also differed from the *ALR* in that it limited itself only to civil law.<sup>770</sup>

Initially applied to all countries belonging to the Habsburg Monarchy, its jurisdiction is since 1918 limited only to the German-speaking countries of Austria and Liechtenstein. Interestingly, however, the *ABGB* was translated over the two centuries of its existence into all languages of the multilingual Austrian Empire, in addition to Latin, French and Hebrew, making it fourteen in total.<sup>771</sup> As compared to the German *BGB* of the twentieth century, the consultation and drafts for the *ABGB* largely took place away from the public.<sup>772</sup> The *ABGB* was not the result of a public debate but the work of an appointed elite.

### 5.2.2. German Influence on the *ABGB*

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<sup>769</sup> Wilhelm Brauner, 'Das Allgemeine Bürgerliche Gesetzbuch für die Gesamten Deutschen Erbländer der österreichischen Monarchie von 1812' (1987) Gutenberg Jahrbuch 247

<sup>770</sup> Werner Ogris 'Zur Geschichte und Bedeutung des österreichischen Allgemeinen Bürgerlichen Gesetzbuches (ABGB)' in Olechowski Th (ed), *Werner Ogris, Elemente europäischer Rechtskultur, Rechtshistorische Aufsätze aus den Jahren 1961 -2003* (Böhlau 2003) 316

<sup>771</sup> *ibid*

<sup>772</sup> Barbara Dölmeyer 'Die Kodifikation im Blick der Öffentlichkeit: ABGB 1811 und Teilnovellen 1914 -16' in Barbara Dölmeyer und Heinz Mohnhaupt (eds) *200 Jahre ABGB (1811-2011) Die österreichische Kodifikation im internationalen Kontext* (Klostermann 2012) 354, 367, 372



In the middle of the nineteenth century Joseph Unger (1828 – 1913), a professor of law in Vienna and a colleague and friend of Jhering, ushered in a new era in Austrian civil jurisprudence with his work *System des österreichischen allgemeinen Privatrechts*. In this, he attempted to interpret the *ABGB* in accordance with the ‘historical–systematic’ method favoured by the German ‘Pandectists.’ His attempts had the political support of the Austrian government who had become suspicious of the natural law and its revolutionary powers in view of the attempted revolution of 1848 in Frankfurt.

Unger was influenced by the German movements and especially Otto von Gierke’s quest for a law that is compatible with social realities.<sup>773</sup> As a result, several emendations to the *ABGB* were carried out in 1914 – 1916.

If Unger’s attempts marked a watershed in Austrian jurisprudence; a shift from an exegetic to a ‘Pandektist’ school, is still debated.<sup>774</sup> It is also politically sensitive given the German annexation of Austria during World War. During the *Anschluss*, Germany passed legislation that affected, as we will see, the law of possession as well.

Let’s speak of the influence of the German private law on that of Austria. We cannot generally speak of an influence between the codes, as the German code is much younger, but this does not exclude the reception of jurist law, and what the Italian legal scholar Rodolfo Sacco called

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<sup>773</sup> *ibid* 369.

<sup>774</sup> See Wilhelm Brauner, ‘Privatrechtsfortbildung durch Juristenrecht in Exegetik und Pandektistik’ in (1983) 5 *Zeitschrift für Neuere Rechtsgeschichte* 22.

‘*circolazioni di modelli.*’<sup>775</sup> However, we can state that Austrian jurisprudence maintained its own legal culture, and continues to define institutes like possession differently from Germany.

### 5.2.3. Definition of Possession in the *ABGB*

The *ABGB* defines *possessio* and *detentio* thus in §309: ‘*Wer eine Sache in seiner Macht oder Gewahrsame hat, heißt ihr Inhaber. Hat der Inhaber einer Sache den Willen, sie als die seinige zu behalten, so ist er ihr Besitzer.*’

‘Someone who has an object in his *power* or *custody* is its *detentor*. If the *detentor* has the will to keep the object as his own, then he is the possessor.’<sup>776</sup>

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<sup>775</sup> Rodolfo Sacco, in L Neville Brown and Mauro Cappelletti (ed) *New Perspectives for a Common Law of Europe* (Leyden 1978) 97.

<sup>776</sup> (emphasis mine) cf the cumbersome definition of the *ALR*: I, 7 *Von Gewahrsam und Besitz Begriffe*. §. 1. *Wer das physische Vermögen hat, über eine Sache mit Ausschließung Andrer zu verfügen, der hat sie in seinem Gewahrsam, und wird Inhaber derselben genannt.* §. 2. *Auch der ist ein bloßer Inhaber, der eine Sache nur in der Absicht, darüber für einen Andern oder in dessen Namen zu verfügen, in seinem Gewahrsam hat.*

§. 3. *Wer aber eine Sache in der Absicht, darüber für sich selbst zu verfügen, unmittelbar oder durch Andere, in seinem Gewahrsam nimmt, der wird Besitzer der Sache.* §. 4. *Wer ein Recht ausübt, ist Inhaber des Rechts.* § 5. *Wer aber ein Recht für sich selbst ausübt, wird Besitzer des Rechts genannt.*

The *ABGB* clearly distinguishes between *Inhaber* (*detentor*) and *Besitzer* (*possessor*) based on the will; possession requires *corpus* and *animus*. Austrian scholarship perceives this definition as being Roman.<sup>777</sup>

In this way, the *ABGB* follows the natural-law tradition, showing an influence of the *ALR*.<sup>778</sup> Though the *ALR* used the term *Inhaber* in a slightly different way, namely, to describe both the *possessor* and *detentor*, the *detentor* only had in his power (*Macht*) or custody (*Gewahrsame*), while the latter needed to have the will to keep the object as his own. The influence of Savigny's *Besitz*, which first appeared in 1803, is apparent, especially since Zeiler referred to the work.

If we compare the phrasing of the *ABGB* with that of the *ALR* we see that the *ABGB* added the concept of '*Macht*,' whereas the former only had '*Gewahrsam*.' It is not entirely clear how '*Macht*' and '*Gewahrsam*' are to be distinguished. Austrian scholarship defines the two terms broadly, including not only physical control (*körperliche Herrschaft*) but also the real ability to

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<sup>777</sup> Franz Gschnitzer, *Sachenrecht* (1968 Springer) 5: '*Dem römischen Recht entnimmet es fast wörtlich den Besitzbegriff (pos-sidere = be-sitzen) mit den beiden Elementen corpus und animus (§ 309) und die Scharfe Scheidung in Possessorium und Petitorium.*'

<sup>778</sup> Georg Kodek, *Die Besitzstörn. Materielle Grundlagen und prozessuale Ausgestaltung des Besitzschutzes* (Manz Verlag 2002) 50.

deal with an object (*tatsächliche Verfügungsmacht*). The latter is defined as a ‘clearly visible external appearance of a legal situation that is recognized in transactions.’<sup>779</sup>

The requirement of the will follows the view of Savigny, who distinguished between *detentor* and *possessor*, perceiving the former as the generic category to which other elements had to be added to turn it into *possessio*. As a result, the *ABGB* treats the tenant - like Roman law- as a mere *detentor* and not a *possessor*.

Interestingly, scholarship has sought to objectify the will into a visible manifestation.<sup>780</sup> This bears similarities to the view held by Jhering, who raised concerns about the ability to prove the abstract will.

Similarly, the *ABGB* has adopted in §311 *ABGB* a broad concept of *Sachen*, including all corporeal and incorporeal objects as distinguished from persons. Legal scholarship accepts the inclusion of rights under this broad concept.<sup>781</sup> However, claims (*Forderungen*) and personal and family rights are inalienable and cannot be possessed.<sup>782</sup> Again, we see the proximity to the *ALR*

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<sup>779</sup> Gschnitzer (n 781) 6: ‘Für jedermann erkennbare äußere Erscheinung einer Rechtslage, die im Verkehr anerkannt zu werden pflegt.’

<sup>780</sup> *ibid*: ‘Der Wille ist zunächst ein subjektives Element, wird aber dahin objektiviert, dass nach dem äußeren Anschein die Sache dem Inhaber gehören muss.’

<sup>781</sup> Michael Schwimman and Georg Kodek, *ABGB Praxiskommentar Band II* (4th edn, Lexis Nexis Verlag 2017) §285 Rn 1, 311 rn 1

<sup>782</sup> Gschnitzer (n 781) 9

(I 7 5 4), where one can be a possessor or a *detentor* of a right too, stemming from the common Roman heritage.<sup>783</sup>

However, with the annexation of Austria by Germany (*Anschluss*) in 1938 the German Commercial Code was adopted (*Handelsgesetzbuch*) and the German concept of possession was applied therein and remains in force to this day. Accordingly, ‘*an animus sibi habendi*,’ as required by §309 *ABGB* is not necessary.<sup>784</sup> Thus, the Commercial Code contains a broader concept of possession than the *ABGB*; the two concepts existing side by side.

Regarding the nature of possession, whether it is a right or a fact, already problematised by Savigny, the *ABGB* does not commit itself. However, scholarship has initially thought it is a right, from its position in the book; a thesis later debated. The *ABGB* by including *Rechtsbesitz* in possessory interdicts, has adopted a more generous view than Savigny.

#### **5.2.4. Protection of Possession in the *ABGB***

The *ABGB* distinguishes between possessory (*possessorium*) and petitory (*petitorium*) claims in §§339 346 and §347 *ABGB* §459 II *ZPO*, respectively.

Both §§339 346 *BGB* grant the possessory interdict and the right of self-help respectively, to the *possessor*, not the *detentor*.<sup>785</sup> §347 *ABGB* and §459 II *Zivilprozessordnung* (*ZPO*) allow

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<sup>783</sup> Kodek (n 782) 50

<sup>784</sup> Art 5 der 4 *Verordnung zur Einführung handelsrechtlicher Vorschriften*; Gschnitzer (n 784) 5

<sup>785</sup> *ibid* 93; Gschnitzer (n 781) 7

later action in which the defeated party can still bring an action based on a ‘better right.’ §347 *ABGB*: ‘*Der Sachfällige kann auch nach dieser Entscheidung die Klage aus einem vermeintlich stärkeren Rechte stärkeren Rechte auf die Sache noch abhängig machen.*’ §459 II *ZPO* reiterates this. So, both the material and procedural law conceive of the possessory action as a potentially interim, provisory, settlement that can still be overridden by later adjudication.

However, the *ABGB* does not regulate the effect of the *petitorium* on the *possessorium* in the case of simultaneity, namely, the question of what happens if the right to possess is adjudicated while possessory action is still pending. Some authors recognize the subsidiary nature of the possessory interdict as one that provides interim regulation, thus, accepting the principle ‘*petitorium absorbet possessorium.*’<sup>786</sup>

This is against the wording of §346 *ABGB*, which expressly stipulates that the former possessor must be reinstated regardless of the better rights, but authors like Kodek read it as to refer only to the accelerated process of §454 *ZPO*, thus not applying to cases where *possessorium* and *petitorium* are brought forth simultaneously.<sup>787</sup> Interestingly, the *ABGB* accepts the notion of possession as presumed ownership in §372 *ABGB*, thus, similar to Jhering’s views, but does not draw any conclusions from it.

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<sup>786</sup>Hans W Fasching and Andreas Konecny, *Zivilprozessgesetze* (3rd edn, Manz 2022) §457 Rn 11; Kodek (n 782) 908 fn 18

<sup>787</sup> Fasching and Konecny (n 790) §454 Rn 276

Both §§339 346 *ABGB* grant the possessory interdict and the right of self-help respectively to the *possessor*, but not to the *detentor*.<sup>788</sup> However, the *detentor* can also be the possessor of a right, and thus can claim possession under the said paragraph. In addition, Austrian scholars argue that the ‘*Sachbinhaber*’ (*detentor*), who is also ‘*Rechtsbesitzer*’ has a possessory right over the *Sachbesitzer* (*possessor*) due to his ‘proximity.’<sup>789</sup> Thus, the culmination of the capacity of a *detentor*, coupled with the possession of a right overrides the claim of the physical possessor of an object.

Moreover, Austrian scholarship has extended the right of self-help against third parties, in spite of the original wording of the said paragraphs, to include the *detentor*.<sup>790</sup> This view is, however, sometimes modified to the extent that the *detentor* can only repel attacks in the interest of the possessor or the context of a quasi-contract (*Geschäftsführung ohne Auftrag*), thus, not against the expressed will of the possessor.<sup>791</sup>

The scholarly debate on this matter reveals that the denial of the possessory interdicts to *detentors* has proved unsatisfactory in some cases, thus, an interpretation *contra legem* was considered necessary.

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<sup>788</sup> Fasching and Koecny (n 790) *ibid* Rn 93; Gschnitzer (n 781) 7

<sup>789</sup> Gschnitzer (n 781) 22

<sup>790</sup> *ABGB Praxiskommentar* (n 785) §344 Rn 3; Gschnitzer (n 784) 7.

<sup>791</sup> Peter Rummel (ed) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch I* (3rd edn, Manz 2000) §344 rn 3; Kodek (n 782) 528.

§339 *ABGB* mentions *Besitzstörung*, namely any interference with possession and its use, while the claimant must be still in possession. §346 *ABGB* allows the possessor an action of recovery of lost possession from the ‘*unechten*’ possessor, the ‘*quasi possessor*.’ A ‘*quasi possessor*’ is somebody who has gained possession by force (*Gewaltsam*) secretly (*heimlich*) or through *dolus* (*List*) or holds as *precarium*. Legal scholarship often uses ‘*unecht*’ also ‘*fehlerhaft*’ thus like *possessio vitiosa*.<sup>792</sup> According to §345 ‘*unechter besitz*’ (*possessio vitiosa*), thus, the result of *vi, clam* and *precario* do not have possessory protection.

§344 *ABGB* is seen as allowing self-help to keep possession against immediate attack (*defensive Selbsthilfe*) as well as §345 *ABGB*, which allows self-help for recently lost possession (*offensive Selbsthilfe*).<sup>793</sup> Others want restricted use.<sup>794</sup>

### 5.2.5. Transfer of Property in the *ABGB*

Unlike its contemporary *CC*, which has adopted the consensual principle and, thus, a greater level of abstraction since the transfer of property occurs at the moment of a valid agreement,<sup>795</sup> the *ABGB* follows the *Traditionsprinzip*, namely, the physical act of placing the

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<sup>792</sup> Rummel (n 795) §345 Rn 1; Klang/von Schey/Klang §§345-349 sub III.

<sup>793</sup> *ABGB Prtaxiskommentar Klicka* §344 Rn 2.

<sup>794</sup> Rummel (n 795) §344 Rn 2.

<sup>795</sup> See: Art 711 : ‘*La propriété des biens s’acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l’effet des obligations* ; the now defunct Art. 1138 : *L’obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le*



objects into the hands of the new possessor. It does not, however, go as far as the *BGB* who adopted the ‘*Abstractionsprinzip*’, namely, the strict separation between obligation and transfer.

Thus, in the *ABGB* the *iusta causa* is a requirement for the transfer of ownership and can invalidate transfer. In this sense, the *ABGB* is closer to the Roman *traditio* than both the *CC* and later the *BGB*.

We can conclude that the *ABGB*’s separation of *detentio* (*Inhaberschaft*) and *possessio* (*Besitz*) bears similarities with the views of Savigny. As his *Besitz* appeared several years before the *ABGB*, and his work was widely read, it cannot be excluded as an influence, especially as it was in German and, thus, easily accessible to the compilers of the *ABGB*. However, it also differs as it allows for possession of rights, which Savigny opposed.

### **5.3.1. History of the *Bürgerliches Gesetzbuch* (*BGB*)**

As we have seen above, Savigny, and his protégé Stahl, fiercely fought the idea of a codification for the German-speaking countries, therefore it might appear as a great irony that

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*créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer ; auquel cas la chose reste aux risques de ce dernier.*’ (in force until 2016) and Art. 1583.

subsequent generations of legal scholars would nonetheless call the Civil code of Saxony of 1865 (*Sächsisches Bürgerliches Gesetzbuch*) as ‘*der kleine Savigny*.’<sup>796</sup>

The reason for this was that the said code followed in his pattern the ‘Pandektist’ approach already used by Savigny in his lectures and his *System*, namely, the arrangement of the most legal sources, according to the logic promulgated by natural law, thus, moving from a general to a specific, supplanting a general part.<sup>797</sup>

We have also observed that a closer reading of the *Beruf* and the *System* warrants a more nuanced understanding of Savigny’s view on codification. In the *Beruf*, he attacked any codification as it would be out of touch with the people (*Volk*), but in the *System*, he conceded that a codification could eventually be a product of the people’s will. His main objection was that Germany was not intellectually ready for a common code.

However, as we also saw above, the latter half of the nineteenth century brought about significant changes in economic and social life in the German countries, which included the rise of the middle-class, the industrial revolution, and the development of transnational commerce. To facilitate these developments, the German Customs Union was agreed upon, and several specific codes were passed during the latter half of the nineteenth century, notably the Code on Exchange, and the Commercial Code (*Allgemeine Deutsche Wechselordnung* 1848, *Allgemeines Deutsches Handelsgesetzbuch* 1861).

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<sup>796</sup> Gustav Boehmer, ‘Der Einfluß des Code Civil auf die Rechtsentwicklung in Deutschland’ (1951) 151 *Archiv für die Civilistische Praxis*, 305.

<sup>797</sup> *ibid.*

When in 1871, the German Kingdoms - except Austria - united under Prussian hegemony into the German Empire, the cultural unity of the German-speaking countries became a political unity. Now the Empire (*Reich*) gradually acquired the prerogative to pass laws for all areas of private law. Prussia supported the project most actively, intent on overcoming the resistance of states like Bavaria and Saxony.

The First Commission of the *BGB* convened on 17 of April 1874 for the First Draft of the *BGB*. It included six judges, three civil servants, and the professors Bernhard Windscheid and Paul Roth. The said commission worked out a draft, which was published on 30.3.1889 and sparked a heated debate but was, nonetheless, considered suitable as a basis for a Second Draft.<sup>798</sup>

The Second Commission convened in 1890 and out of its twelve members comprised only three professors, namely, Gustav von Mandry, Albert Gebhard and Gottlieb Planck. In addition, the influential jurist Bernhard Windscheid (1817-1892) is believed to have still fundamentally influenced the work towards the traditions of 'Pandektism.'<sup>799</sup>

The German Upper House (*Bundesrat*) appointed the members of the new commission with a wish that the revised draft would be closer to the reality and everyday problems of the people than dogmatic.<sup>800</sup>

In the *Motive*, Planck felt compelled to address Savigny's concern that a project of a 'pangermanic' civil code should not be undertaken prematurely if political unity was not yet

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<sup>798</sup> Jacobs and Schubert (n 565) 50.

<sup>799</sup> Michael John, *Politics and the Law in Late Nineteenth-Century Germany* (1989 Oxford) 80.

<sup>800</sup>Jacobs and Schubert (n 565) 57.

developed. He agreed with Savigny that legal science was not then developed in a way that would allow a reconciliation (*Aussöhnung*) of the Germanic and Roman directions (*Richtungen*), which was necessary for the creation of general code. In addition, political unity was lacking at the time; both elements being now present.<sup>801</sup>

It is noteworthy that the compilers considered from the outset the fusion of Germanic and Roman elements as a necessary precondition for fashioning a civil code for Germany. We will see that these efforts of reconciling often-disparate elements are significant for the code's subsequent definition of ownership and possession, with varying results.

We also notice that in contrast to the *ABGB*, the *BGB* was the result of an elaborate, long-drawn, political process, with various stakeholders; a situation that reflected the political structure of Germany, as opposed to that of Austria, namely, a federal democracy as opposed to a centralized monarchy.

The *BGB* follows the 'Pandektist' tradition, in that it contains a general part (*Allgemeiner Teil*) and is divided into the books of Obligations (*Schuldrecht*), of 'Real Things' (*Sachenrecht*), Family law (*Familienrecht*), and the Law of Inheritance (*Erbrecht*). As we saw above, the separation between *Sachenrecht* and *Schuldrecht* - the former dealing the will of a person on a

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<sup>801</sup> Benno Mugdan (ed), *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Sachenrecht* (Decker's Verlag 1899) Vol I 890: 'Diese beiden Faktoren sind jetzt vorhanden.'

thing (*ius in rem*) the latter with the will of a person against another person (*ius ad rem*) – can be traced back to Kant, Savigny and Thibaut.<sup>802</sup>

The general part (*Allgemeiner Teil*) of the *BGB* will become the legacy of Savigny and Thibaut, who had developed a ‘*System des Pandectenrechts*,’ that will be often noted beyond Germany.<sup>803</sup> This level of ‘Pandektist’ abstraction sets the *BGB* apart from the *ABGB*, which follows the threefold division of the institutional scheme of Gaius and Justinian.<sup>804</sup> The natural-law jurist Leibniz already dismissed the institutional scheme in Germany.<sup>805</sup> Thus, this development can be traced back to the era of enlightenment. In this respect, the *ABGB* is closer to the *CC*.<sup>806</sup>

Furthermore, as we saw, the book of *Sachenrecht* in the *ABGB* does not distinguish between mobile and immobile goods, whereas the *BGB* strictly distinguishes between immobile (*Liegenschaftsrecht*) and mobiles (*Fahrnisrecht*). This is so because the *BGB* assumes that the land registry, which is a concept not widely available in antiquity, forms the counterpoint to possession

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<sup>802</sup> See also Wagner (n 80) 97; Savigny (n 55) I, 334.

<sup>803</sup> Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan and Co 1882) 14.

<sup>804</sup> Ernst A Kramer, ‘Der Einfluss des BGB auf das schweizerische und österreichische Privatrecht’ (2000) *Archiv für die civilistische Praxis* 200, 367; See also Paul Jörs, *Geschichte und System des römischen Rechts* (Springer 1927) 22, 26 for Gaius’ precursors, namely, Q Scaevola, Sabinus.

<sup>805</sup> Gottfried Wilhelm Leibniz, *Nova Methodus discendae docendaeque jurisprudentiae* (Frankfurt 1667) 289 : ‘*Persona enim et res sunt facti, potestas et obligatio etc, juris termini.*’

<sup>806</sup> Schwarz (n 105) 585.

in the case of mobile goods, and thus requires a different treatment in the code. Here too we find a ‘Pandektist’ touch in the penchant for division and abstraction. Austrian scholarship, on the other, to this day, does not assume a difference between mobile and immobile goods and believes that the many similarities between the two do not warrant a separate treatment.<sup>807</sup>

Finally, it is noteworthy that the *Motive* describe the *BGB* as an ‘*organisches Gefüge*.’<sup>808</sup> This bears testament to the often-used description of Savigny himself. It expresses the wish to create a code that is harmonious both with itself and society. The idea of a code that is not ‘revolutionary’ but ‘organic’ and rooted in the national spirit, thus respecting regional diversity, shows the influence of Savigny and the ‘Historical School.’<sup>809</sup> Thus, the creation of the *BGB* is based on a tension between finding the historical and creating a systematised book.<sup>810</sup> We will see that this is shown in possession.

### 5.3.2. Definition of Possession in the *BGB*

Like other major European codifications of the nineteenth century, the *BGB* adopted a concept of absolute ownership, as opposed to the long-lasting concept of the Germanic, feudal

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<sup>807</sup> Gschnitzer (n 784) 3.

<sup>808</sup> Mugdan (n 805) I 365.

<sup>809</sup> John (n 803) 38, 75, 242: ‘the widespread acceptance of the *Volksgesitelehre* was important in undermining fears that codification would involve the introduction of radical legal reforms.’

<sup>810</sup> *ibid* 83.

‘divided ownership’ (*getheiltes Eigentum*), which recognized various degrees of ownership and rights of use on the same object.<sup>811</sup>

Following ancient Germanic, legal tradition, land ownership was usually divided between a landlord (*Lehnsherr*) and a vassal.<sup>812</sup> The feudal tradition was maintained in Germany until the middle of the nineteenth century when feudalism was largely abolished, and land was largely granted to its actual occupants.

Against the background of the revolution of 1848 in Germany, it is noteworthy that the *Ablösungsgesetz* of 1850 significantly curtailed feudal law by granting full ownership to the ‘*Untereigentümer*’ in many instances.<sup>813</sup> However, feudal distribution of land was not yet as radically abolished as in neighbouring France.

Notably, the jurists of the ‘Pandektist’ tradition opposed the established view of the *Ius commune* and conceived ownership as an absolute right.<sup>814</sup> We have also seen above that Thibaut, who sought to vindicate the classical Roman concept of ownership as absolute, forcefully challenged the Glossators’ hitherto universally accepted interpretation of the classical Roman

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<sup>811</sup> Schlosser, (n 7) 64.

<sup>812</sup> Dirk Olzen, ‘Die geschichtliche Entwicklung des zivilrechtlichen Eigentumsbegriffs’ (1984) Jus 328, 332.

<sup>813</sup> See Berndt Busz, *Die Historische Schule und die Beseitigung des geteilten Eigentums in Deutschland* (Dissertation München 1966) 89.

<sup>814</sup> Olzen (n 816) 334.

terms *dominium directum* and *dominium utile*, as signifying various degrees of ownership, and had, thus, adjusted it to the realities of Northern and Central Europe's feudal land stratification.

Thus, it comes as no surprise that the editors of the First Commission for 'Real Rights' (*Sachenrecht*) for the *BGB* noted that a separation between 'upper-' and 'under owner' would not be adopted in the *BGB* since it was considered to be neither Roman nor compatible with the concept of possession.<sup>815</sup>

In this respect, the *BGB* departs radically from the *ALR*,<sup>816</sup> and to a certain extent from the *ABGB*; the latter having initially adopted the concept of divided ownership in §357 *ABGB*,<sup>817</sup> and having allowed the existence of feudal laws in the territory of the Austrian Empire. Similar to the *CC*, the *BGB* takes the propertied citizen class as its paradigm and allots ownership a central position. Therefore, we see a perceived direct return to Roman sources and a rejection of the

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<sup>815</sup>Reinhold Johow, *Sachenrecht Teil 1 in Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches* (Werner Schubert, ed, first printed 1876 -1888, de Gruyter 1982) 522.

<sup>816</sup> *ALR* §16, I, 8: 'Das Eigentum einer Sache ist geteilt, wenn die darunter begriffenen verschiedenen Rechte, verschiedenen Personen zukommen.'

<sup>817</sup> 'Wenn das Recht auf die Substanz einer Sache mit dem Recht auf die Nutzungen in Einer und derselben Person vereinigt ist, so ist das Eigentumsrecht vollständig und ungeteilt.'



graduated property both of Germanic law, and the distinction of the Glossators of the 14th century between *dominium directum* and *dominium utile*.<sup>818</sup>

However, despite the strong political and scholarly impetus, one observes throughout the editorial process of the *BGB* that the adoption of both the absolute concept of ownership (*dominium perfectum*) and the strict separation between ownership and possession was not a matter of course and remains problematic until this day.

It must be noted that despite the professed intentions and strong views of the jurists, the concept of absolute ownership - in strict distinction to possession - is consistently maintained in neither the *BGB* nor the subsequent case law of the country's highest courts throughout the twentieth century. We will see in our examination that the boundaries between possession and ownership are broken in certain areas, such as lease, and that the exact concept of possession adopted in the *BGB* remains controversial even today.

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<sup>818</sup>Schlosser (n 7) 69; see also: Dieter Strauch, 'Das geteilte Eigentum in Geschichte und Gegenwart' in Gottfried Baumgärtel et al (ed), *Festschrift für Heinz Hübner zum 70. Geburtstag* (de Gruyter 1984) 273. cf Max Kaser, 'Geteiltes Eigentum älteren römischen Recht' in *Festschrift für Paul Koschaker zum 60. Geburtstag, Band 1* (1938) 446. Kaser claims that early Roman law knew of 'divided possession' as illustrated by the land servitudes.

Unlike Art 544 CC<sup>819</sup> and §354 ABGB, as we have seen, the *BGB* does not actually define ownership (*Eigentum*), but merely lists the sum of rights of the owner (*Befugnisse des Eigentümers*) in § 903 *BGB*. The definition of ownership in § 903 *BGB* is the following:

*‘Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen. Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten, ’*

We see that ownership thus conceived is a right to deal with an object as one pleases unless the law and rights of third parties prevent this, so it is in principle limitless unless other laws override it, thus, it is not really an ‘absolute’ right. Ownership is here described as a sum of the main prerogatives of the owner.<sup>820</sup> If we compare this with the definition of ownership in the *CC*, we find the former to be much more pronounced, containing a superlative unlikely to be found in the *BGB*.

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<sup>819</sup> *Code civil*, art. 544: *‘La propriété est le droit de jouir et disposer des choses de la manière la plus absolue qu’ on n’ en fasse pas un usage prohibé par les lois et par les règlements.’*

<sup>820</sup> Sigmund Schlossmann, ‘Über den Begriff des Eigentums’ (1903) 45 *Jherings Jahrbücher* 313: *‘Das BGB definiert nicht den Begriff des Eigentumsrechts, auch nicht den des Eigentümers. Aber indem es die wesentlichen dem Eigentümer zustehenden Befugnisse in einer allgemeinen Formel zusammenfasst, lässt es doch nicht Bestimmtheit erkennen, was es unter Eigentumsrecht versteht.’*

The *BGB* is also careful to highlight the limitations of ownership for the sake of other principles, but without further identifying them. The concept of ownership is will-based, thus, like the one adopted by Savigny. Ownership reflects the manifestation of the free will of a person to deal with an object as it pleases. However, where Savigny would have ‘*Willkür*,’ we now have ‘*Belieben*’ as the former terms would later mean ‘arbitrarily and received a negative connotation.’<sup>821</sup>

The *BGB* does not define possession either but assumes the existence of the concept throughout the Code; with various paragraphs taking it for granted. The exact concept of possession must be reconstructed out from the various rules on it in the third book of *Sachenrecht*.

In addition, it is controversial until this day if the *BGB* follows a single concept of possession throughout, or rather two different kinds. The controversy is largely the result of the code’s reticence and its avoidance to commit to a definition; an approach of the compilers of the *BGB* in tune with their general coyness towards definitions of jural concepts.<sup>822</sup> I will seek to demonstrate that this is the result of the fierce debate on possession, preceding the drafting.

Reinhold Johow, the editor in charge of the First Draft of the *Sachenrecht* to the *BGB*, acknowledges that the question of the nature of possession and the reason for its protection is fiercely contested in contemporary scholarship. While some believe that possession is a fact, others consider it a right, and it is not for the lawgiver to decide these controversies.<sup>823</sup>

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<sup>821</sup> Wilhelm (n 257) 134.

<sup>822</sup> Schubert and Jacobs (n 565) 240, 263.

<sup>823</sup> *ibid* 476 (352)

Johow also concedes that the Roman sources do not define possession since the Romans perceived it as a tangible relation, as shown in C. 7, 32: '*veritas rei.*'<sup>824</sup> Thus, he shows his awareness of the difficult task the compiler of a common civil code faced because of the fierce debates and the Roman legal tradition.

Further, Johow states that since the Roman concept of acquisition and loss of possession has established itself in the *Ius commune* and was adhered to by the *ALR* and the *CC*,<sup>825</sup> the codifications of Bavaria and Saxony, the *BGB* must follow this tradition.

However, the Roman concept must only be taken as a starting point (*Ausgangspunkt*) but with the acute awareness (*waches Bewusstsein*) that the law of possession in the new code must respond to the needs of modern German legal life (*ein den Bedürfnissen des heutigen deutschen Rechtslebens entsprechendes Besitzrecht aufzustellen*).<sup>826</sup> This is an important observation, as it shows the scholar's awareness of the exigencies of his contemporary world.

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<sup>824</sup> *ibid* 477 (353): '*Eine Definition von dem Tatbestände des Besitzes wird nicht gegeben, derselbe vielmehr als ein anschauliches Verhältnis angenommen.*'

<sup>825</sup> *Code civil*, art. 2228: '*La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous-mêmes, ou par un autre qui la tient ou qui l'exerce en notre nom.*' Here *Rechts-* and *Sachbesitz* are equal. It bears similarities with Pothier, : *On peut la définir la détention d ; une chose corporelle que nous tenons en notre puissance, ou par nous-mêmes, ou par quelqu' un qui la teient pour nous en notre nom*' 524

<sup>826</sup> *ibid* 476 (352)

Johow eventually decides to commit himself to a single definition. He concludes that the place of possession in the civil codes undoubtedly stems from the fact that this factual control over an object entails legal consequences for all legal institutions, most of all though for ownership, both for the acquisition, transfer, and preservation of rights.<sup>827</sup> Thus, he points out that in possession of things (*Sachbesitz*) we find two elements, the external power relation to an object and the will to have the object; for this, he cites Paul. D. 41, 2, 3, 1:

*'Et adipiscitur possessionem corpore et animo, neque per se animo aut per se corpore.'*<sup>828</sup>

Thus, he concludes that only the conscious and wilful factual power can have legal consequences; the mere possibility (*zuständige Möglichkeit*) to control an object does not entail legal consequences.<sup>829</sup>

Johow further explains his choice of the concept of *Inhaber* as *detentor nomine alieno*, and explains how the *detentor* becomes a '*Besitzer*' (*possessor*) when a corresponding is given (*Willensinhalt*), namely, an '*animus possidenti*, or *animus domini*' which he calls *Aneignungswille*.

<sup>830</sup> Johow proposed the following definition for possession in the *Teilentwurf* § 48:

*'Wer eine Sache mit seinem Willen in thatsächlicher Gewalt hat, ist Inhaber. Hat der Inhaber den Willen, die thatsächliche Gewalt nur für einen Anderen zu üben, der Andere*

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<sup>827</sup> *ibid* 476 (352)

<sup>828</sup> *ibid* 478 (354)

<sup>829</sup> *ibid*

<sup>830</sup> *ibid*

*aber den hiermit übereinstimmenden Willen, so ist dieser Andere Besitzer. In allen übrigen Fällen ist der Inhaber Besitzer.*<sup>831</sup>

*‘Someone who has actual power over an object willingly is the detentor. If the detentor intends to exert the actual power only for another and the other the corresponding will, then the other is the possessor. In all other cases, the detentor is the possessor.’*

We notice that this definition is inelegant and more cumbersome than the one of the *ABGB* but defines the concept similar to the natural-law codifications. Here too actual power (*Gewalt*) over a thing constitutes *detentio*, and the will to hold the item for oneself makes the person *possessor*.

Johow's proposal was incorporated into the final version of the First Draft to the *BGB* of 1888 in §797:

*‘Der Besitz einer Sache wird erworben durch die Erlangung der tatsächlichen Gewalt über die Sache (Inhabung) in Verbindung mit dem Willen des Inhabers, die Sache als die seinige zu haben (Besitzwille).*

Thus, the draft follows the *ALR*, the *ABGB* and the views of Savigny. This definition reminds us of the view espoused by Savigny, where possession is a combination of *animus* and *corpus*.

We also noted above that this phrasing drew critique, notably by Jhering, regarding both components of the definition of possession: factual control and will. Jhering challenged the traditional view and regarded this division as mistaken. He believed the ‘will’ is always present as

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<sup>831</sup> Johow (n 819) 9

it leads to conscious action, and thus no measure of distinction. What distinguishes *detentio* from possession is ultimately the law.

The Preliminary Commission (*Vorkommission*) for the Second Commission deliberated on the draft in 1892 and decided to adopt the comments made by the Prussian Minister of Justice against a distinction between *possessio* and *detentio*, instead of the views of Johow. Now possession should be defined broadly (*jedes in Betracht kommende Besitzverhältnis Besitz zu nennen.*) and to grant possession possessory protection.<sup>832</sup>

It was also decided that a definition of possession in §797 should be abandoned, as it was now assumed that *animus domini* was not necessary for possession. Instead, the ‘will’ should be directed towards appropriating the object.<sup>833</sup> Jhering is not mentioned in this context, but the fact that Jhering’s *Der Besitzwille* appeared just three years before and that the Commission voiced concerns similar to those found in the said book and discussed above lays the assumption close that Jhering’s views influenced the final version more than is immediately obvious.

Interestingly the Preliminary Commission comments thus:

*‘Für die Annahme des Vorhandenseins eines entsprechenden Willens sei keineswegs ein spezieller, bei der Erlangung der Gewalt besonderes zutage tretender Wille erforderlich, sondern es genüge ein sogenannter Generalwille, ein Will des Inhalts, über alle in einem*

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<sup>832</sup> Jacobs and Schubert (n 565) 128

<sup>833</sup> *ibid*

*bestimmten Machtkreis des Besitzes gelangenden Sachen die tatsächliche Gewalt haben zu wollen.* <sup>834</sup>

Here it is clear that this statement marks a shift from Savigny towards Jhering. However, the Commission has also noted,

*‘Trotzdem sei es bedenklich den Willen als Thatbestandsmerkmal für den Besitzerwerb nicht zu erwähnen, weil hieraus das Missverständnis entstehen könne, als ob nur das räumliche Verhältnis des Besitzers zur Sache für das Vorhandensein des Besitzes entscheidend sein.’* <sup>835</sup>

The Commission recognised the traditional distinction between *possessio* and *detentio* as problematic but had to realise that *possessio*, however, defined, had to be distinguished from mere proximity.

In the final version, a definition of possession is eventually abandoned. Instead, there is a definition of how possession is acquired in §854 BGB:

*‘(1) Der Besitz einer Sache wird durch die Erlangung der tatsächlichen Gewalt über die Sache erworben.*

*(2) Die Einigung des bisherigen Besitzers und des Erwerbers genügt zum Erwerb, wenn der Erwerber in der Lage ist, die Gewalt über die Sache auszuüben.’*

*‘(1) Possession of a thing is acquired by obtaining actual control of the item.*

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<sup>834</sup> *ibid* 129

<sup>835</sup> *ibid*



(2) Agreement between the previous possessor and the acquirer is sufficient for acquisition in the acquirer's position to exercise control over the thing.’

In this way, the *BGB* sidestepped the delicate question of what possession is and merely sought to define how possession is acquired. German scholarship claims that §854 *BGB* does not define possession but deals with the question of how one acquires possession.<sup>836</sup> Thus, also abandoning the concept of the *detentor*, which, as we will see further down, became problematic, as it did not entail possessory protection under classical Roman law. I believe that Jhering was crucial for this shift, as his forceful critique appeared contemporaneously with the draft and carried the day against Johow.

However, Johow was more successful in another matter, namely the discarding of the ‘*Rechtsbesitz*’, namely the possession of rights. In the explanation to §48, Johow offers the following justification for this choice. First, he explains that several codifications, including the *CC* and the *ALR*, and the older codification for Bavaria and Saxony, recognised possession of rights and things; the former was called *Rechtsbesitz* and the latter *Sachbesitz*. He decided, however, to eliminate *Rechtsbesitz* and allow possession of items only.<sup>837</sup> His explanation for this choice is that ‘meanwhile legal science has clarified that the concepts of *detentio* (*Inhaben*) and possession (*Besitz*) only apply to things, they can only be metaphorically applied to rights as both

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<sup>836</sup> Westermann, Gursky, Eickmann (n 9) § 9 I 1; Jost in *Münchener Kommentar zum BGB*, § 854 Rn 1

<sup>837</sup> Johow (n 819) 350: ‘*Der vorliegende Entwurf glaubt von dem Rechtsbesitz ganz absehen zu sollen.*’

terms presuppose a physical control.’<sup>838</sup> Hence, *Rechtsbesitz*, for Johow, contradicts the very nature of possession, as an actual factual power over a thing (*thatsächliche Sachherrschaft*) to make it dependent on rights, either property, ownership, obligations etc.<sup>839</sup>

The final version of the *BGB* limits possession to real things in §90 *BGB* and §854 *BGB* - as opposed to the French and Austrian codes and previous German codifications - consistent with its requirement for ‘actual control over an object’ that would make possession of an intangible impossible.

However, the *BGB* makes an exception to this rule in §1029 *BGB*. §1029 *BGB* gives the possessor of land a quasi-possessory interdict if he is prevented from using a servitude belonging to land in analogy to §585 *BGB*. This can be considered an anomaly in the code. Still, one might also recognize its usefulness since the possessor owner can more quickly gain protection than in §1027 *BGB* foreseen for owners.

The formulation §854 *BGB*, emphasising factual control, reminds us of the *ALR*, where the Draft to the same explained: ‘He, who has control over an object, is generally called the possessor of the same.’<sup>840</sup>

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<sup>838</sup> *ibid* 349: ‘Inzwischen hat die Rechtswissenschaft unwiderleglich klargestellt, dass die Begriffe *Inhaben und Besitz im eigentlichen Sinne nur auf Sachen passen.*’

<sup>839</sup> Johow (n 819) 479 (355)

<sup>840</sup> August Heinrich Simon and Heinrich Leopold von Strampff (eds), ‘Materialien des allgemeinen Landrechts zu den Lehren von Gewahrsam und Besitz und von der Verjährung’ (1836)

### 5.3.3. The Relation between Books 2 and 3 of the *BGB*

As we saw, the *BGB* follows a tradition that goes back to the *Usus modernus*. It distinguishes between obligations (*ius in personam*) and real rights (*dingliche Rechte, ius in rem*). The former is treated in the second book (*Schuldrecht*) the latter in the third, (*Sachenrecht*). The compilers of the *BGB* wished to adhere to a strict separation in tune with the ‘Pandectist’ wish for abstraction and clarity. Accordingly, unjust enrichment (*condictiones* §812 *BGB*) is treated in the former, while *vindicatio* (§985 *BGB*) is in the latter.

The placement of possession proved very difficult, though, and soon after the *BGB*’s enactment, fierce debates arose regarding the relationship between obligatory and real right (*dinglich*) claims concerning possession. The discussion between prominent scholars like Martin Wolff and his student Margarethe Scherk lasted well into the 50s.<sup>841</sup> And the country’s highest courts were eventually called upon to offer clarification.

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Vol 3 Zeitschrift für wissenschaftliche Bearbeitung des preußischen Rechts 116: ‘*Wer eine Sache in seiner Gewalt hat, heist überhaupt der Besitzer derselben.*’

<sup>841</sup> Martin Wolff, ‘Das Recht zum Besitze’ in *Festgabe der juristischen Gesellschaft zu Berlin zum 50jährigen Dienstjubiläum ihres Vorsitzenden, des Wirklichen Geheimen Rats Dr. Richard Koch* (Liebmann 1903) 5; Margarethe Scherk ‘Die Einrede aus dem Recht zum Besitz gegenüber dem Eigentumsanspruch auf Herausgabe der Sache (§986 I *BGB*) (1917) 67 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 301

Issues of content were: the relationship between contractual claims and vindication, where a contract of lease existed between owner and possessor; the nature of the objection of a right to possess § 986 BGB, whether it is a defence (*Einrede*) only to be considered by the court if brought forth by the defendant, or an impediment (*Einwand*) to be considered by the judge *ex officio*; and the relation between a *condictio possessionis* (*Recht zum Besitz*) both to ‘Vindication’ and the possessory interdicts.

The proponents of the view that §986 BGB contains an impediment (*Einwendungstheorie*) like Scherk tried to argue with the nature of the right to possession. Scherk argued that the right to possess is entailed (*Teilhalt*) in ownership; it derives from it but can be separated. She acknowledged that it does not have a real right nature (*auch wenn es keinen dinglichen Charakter trägt*) as it is a relative right, therefore, it cannot shrink the right of the owner. But it is created not only by an obligation but also by the actual transfer. Thus, the right of possession does not negate the right of the owner but causes forestalment of the *Vindication* of §985 BGB.<sup>842</sup> This discussion also touches upon the question of ownership as an absolute right instead of one that can be dissected.

Heinrich Siber, on the other, argued that the right to possess is a defence (*Einrede*); to be considered only if brought forth by the possessor. Siber argues thus: The right to possession of §986 BGB includes cases where the possessor has a right to retain the object, namely, in cases

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<sup>842</sup> Sherk *ibid*

where a transaction is void, but the owner still holds the payment of the possessor.<sup>843</sup> The *Reichsgericht* shared this view.<sup>844</sup>

At the same time, Siber sought to prove that there is a concurrence of claims between contractual and real rights, with the latter being subsidiary.<sup>845</sup> He also sees the *condictio possessionis* of §812 *BGB* as excluding § 985 *BGB*.<sup>846</sup>

Siber's view about the concurrence of claims was fiercely opposed by Paul Oertmann, who claimed against the former that the *BGB* never intended a subsidiary function of the *dingliche Rechte* as opposed to *Schuldrechte*.<sup>847</sup> Oertmann argued with §1004 II *BGB*: '*Der Anspruch ist ausgeschlossen, wenn der Eigentümer zur Duldung verpflichtet ist,*' which states that a claim on disruption of ownership is excluded if the owner is obliged to tolerate a certain incursion, thus, phrasing this inroad in absolute terms, not in terms of defence.<sup>848</sup> He argues that the view that

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<sup>843</sup> Heinrich Siber, *Die Passivlegitimation bei der Rei Vindicatio als Beitrag zur Lehre von der Aktionenkonkurrenz* (Georg Böhme 1907) 239; in agreement with him: Rudolph Sohm, *Institutionen des Römischen Rechts* (Duncker & Humblot 1884) 394 cf Martin Wolff, *Sachenrecht* 243

<sup>844</sup> *Reichsgerichtsentscheidungen* 124, 28; 136, 426; 137, 353

<sup>845</sup> Siber (n 446) 244, 249

<sup>846</sup> *ibid* 90

<sup>847</sup> Paul Oertmann, 'Dingliche und persönliche Herausgabeansprüche' (1912) 61 *Jherings Jahrbücher* 44

<sup>848</sup> *ibid* 45 - 46

ownership as an absolute right, leading to *dingliche Rechte*, can only lead to claims that could be invalidated (*entkräftbar*) by an objection but not be excluded through an agreement from the start is not convincing.<sup>849</sup> Oertmann carefully points out the absolute nature of ownership, which only occasionally comes amidst inroads.<sup>850</sup>

Both sides begin their argument with the view that ownership is an absolute right from which *dingliche Rechte* emanate. Both Siber and Oertmann are equally careful in admitting any inroads into the absoluteness of ownership. In my view, the whole argument - and the opposition to Siber - goes back to the ingrained view in German legal scholarship, as propagated by the ‘Pandectists,’ who wanted a strict separation of the books and defined ownership as a rigid abstract concept, as opposed to possession and obligation, thus, ‘*dingliche Rechte – Schuldrecht.*’<sup>851</sup> In addition, ownership could not be graduated or differentiated.

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<sup>849</sup> *ibid*

<sup>850</sup> *ibid*: ‘*Mit dem Wesen des absoluten Rechts ließe sich das auf verschiedene Weise in Einklang bringen [...] Die Absolutheit der Wirkung wird doch dadurch nicht ausgeschlossen, dass sie ausnahmsweise in einem bestimmten Falle entfällt.*’

<sup>851</sup> See Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (Kipp Th ed, 9th edn, Rütten & Loening) I § 167: *Das Eigentum ist als solches schrankenlos, anm 5: an sich*. Here Windscheid refers to ownership ‘as such.’ cf Schlossmann (n 824) 337; similar to this, Anton Randa, *Das Eigentumsrecht nach oesterreichischem Rechte mit Beruecksichtigung des gemeinen Rechtes und der neueren Gesetzbücher Vol I* (2nd edn, 1893 Breitkopf & Härtel).1; Puchta *Pandekten*, §144; Heinrich Dernburg, *Pandekten I, Allgemeiner Theil und Sachenrecht* (5th edn, Müller 1896) §192.

Approaches that called for a more relative, less strict separation between the two can be seen in Franz Wieacker and Dulckeit.<sup>852</sup> Notably, Wieacker was part of the ‘Kieler Schule’ movement comprised of university professors at the University of Kiel law faculty in 1934. The movement was working under the auspices of the Nazi regime, and called for a ‘simplification of the *BGB*,’ in truth, it fought the liberal tendencies of the Weimarer Republic, both in criminal and civil law.<sup>853</sup>

Siegmund Schlossman was one of the early critics of the definition of ownership of the *BGB*. Schlossman notes that the *BGB* does not contain a definition of ownership or the owner but merely states some of the ‘essential’ (*wesentliche*) essential prerogatives of the owner in § 903 *BGB*.<sup>854</sup> From there, however, we can deduce the concept of ownership adopted by the *BGB*, especially by complementing it with the definition of the *CC* and the *ABGB*. But, he says, the definition is inherently flawed, illogical and contains a ‘fallacy’ (*Denkfehler*).<sup>855</sup>

By defining ownership as an absolute right, on the one hand, but only as far as the law or rights of third parties do not limit this; it gives a specious definition, like saying a monarch is an

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<sup>852</sup> Gerhard Dulckeit, *Die Verdinglichung obligatorischer Rechte* (Mohr 1951) 30

<sup>853</sup> Christina Wiener, *Kieler Fakultät und ‘Kieler Schule,’ Die Rechtslehrer and der Rechts- und Staatswissenschaftlichen Fakultät zu Kiel in der Zeit des Nationalsozialismus und ihre Entnazifizierung* (Baden-Baden 2013) 97, 104

<sup>854</sup> Schlossmann (n 824) 313

<sup>855</sup> *ibid* 322

absolute rule, as far as he is not limited in his powers by the constitution. The first part of the definition seems to describe a lake, and the latter part turns it into a small lake or dried moor.<sup>856</sup>

Thus, Schlossman concludes the view espoused by scholars like Windscheid, who perceived ownership in abstract terms, like the platonic idea, is far removed from reality<sup>857</sup>; ownership must be interpreted in the way it appears in society, so different forms of power over various objects in different situations, as opposed to a theoretical concept that has no application in the real world.<sup>858</sup> According to Schlossmann, ownership was never granted absolutely. Still, it was usually limited in various ways, both by administrative and criminal laws (Normen des öffentlichen Rechts) and private law, such as servitudes. At the same time, its limitations differ, which might have led to the view that limitations (Beschränkungen) are accidental.<sup>859</sup>

Schlossmann also criticised the traditional perception of ownership as having a positive and negative component; both are vague as the ability to deal with an object or exclude others pertains to non-owners.<sup>860</sup>

Schlossmann instead sought to define ownership as the right to exclude others that are not tied to a purpose (*das durch ein Zweck nicht begrenzte [...] Ausschliessungsrecht*).<sup>861</sup> Schlossmann

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<sup>856</sup> *ibid* 355

<sup>857</sup> *ibid* 332, 339

<sup>858</sup> *ibid* 322

<sup>859</sup> *ibid* 323

<sup>860</sup> *ibid* 327, 342

<sup>861</sup> *ibid*



equally criticises the word ‘*dinglichkeit*’, which he says is a purely technical term, remote from real use, that merely means that a person can exclude every other party from a thing.<sup>862</sup>

Eventually, even the *BGB* did not consistently perceive ‘*dingliches Recht*’ as an absolute right, as it allows for the *bona-fide* acquisition of ownership, thus, shrinking the Roman concept of *ubi invenio vindico*; limitation, however, is not a contradiction to ownership.<sup>863</sup>

Despite his critique of the current absolutist view of ownership, Schlossman does not attempt to create a new one; he merely calls upon legal science to acknowledge that ownership is a right that grants its holder a specific sphere of security (*befriedete Sphäre*) but is curtailed through numerous obligations, both public and private, and consider this social reality when interpreting §903 *BGB*.<sup>864</sup>

For Schlossmann, the laws on the protection of possession are different. Here the lawgiver grants protection on purely formal grounds, aiming at protecting the legal order in disputed ownership until the matter is settled.<sup>865</sup>

#### **5.3.4. Various Forms of Possession: *Mittelbarer Besitz*, *Besitzdiener***

Despite the *BGB*'s intention not to adopt the traditional distinction between *possessor* and *detentor*, the exact nature of possession adopted by the *BGB* remains problematic. This is because - despite

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<sup>862</sup> *ibid* 350

<sup>863</sup> *ibid* 352, 354

<sup>864</sup> *ibid* 390

<sup>865</sup> *ibid* 362

the definition of §854 *BGB* - which requires physical control, the *BGB* recognises the concept of the ‘indirect possessor’ (*Mittelbarer Besitzer*) by which somebody is recognized as the possessor without physically holding an object. The *BGB* also recognises the concept of the ‘agent in possession’ (*Besitzdiener*) in §855 *BGB*, by which somebody has an object without being considered a possessor.

The existence of both concepts makes it doubtful if the external physical control is the sole criterion for possession, or rather than the aspect of a right and the corresponding will. This is relevant to the discussion of the exact nature of possession in the *BGB*. But let us look at these different concepts one by one. First, we have in §872 *BGB*:

*‘Wer eine Sache als ihm gehörend besitzt ist Eigenbesitzer’*

*‘A person who possesses a thing as belonging to him is a proprietary possessor.’*

By introducing the concept of ‘*Eigenbesitzer*’ (proprietary possessor), the *BGB* seems, after all, to bring in the *animus domini* of Savigny. Moreover, if the *BGB* recognizes the ‘*Eigenbesitzer*’, it also acknowledges the ‘*fremdbesitzer*’, somebody who possesses for somebody else. Nevertheless, the *BGB* does not define how the *Eigenbesitzer* differs from the *Fremdbesitzer* and the relationship between those two concepts, whether a relationship of species and genus, thus, reviving the *detentio-possessio* relationship again or two parallel concepts.

The *BGB* speaks of *Eigenbesitz* in the case of prescriptive acquisition (§937 *BGB*) and original acquisition (§959 *BGB*). Scholarship assumes the existence of *animus domini* as a

constituent element of possession.<sup>866</sup> Furthermore, in §868 *BGB*, we have a definition of the concept of indirect possession (*mittelbarer Besitz*):

*‘Besitzt jemand eine Sache als Nießbraucher, Pfandgläubiger, Pächter, Mieter, Verwahrer oder in einem ähnlichen Verhältnis, vermöge dessen er einem anderen gegenüber auf Zeit zum Besitz berechtigt ist, so ist auch der andere Besitzer (mittelbarer Besitz).’*

‘If a person possesses a thing as a usufructuary, a pledgee, a usufructuary lessee, a lessee, a depositary or in a similar relationship by which he is about another, entitled to possession or obliged to have possession for a while, the other person shall also be a possessor (indirect possession).’

Both paragraphs point to an inconsistency in the *BGB*. If, on the one hand, possession is actual control - as stipulated in §854 *BGB* - but, on the other, one can nonetheless be a possessor without being in control of the object; merely by having a right to possess it (indirect possessor) -as stipulated in §868 *BGB* - then we can conclude that §854 *BGB* does not contain a comprehensive definition of possession. As mentioned above, unlike the *ABGB*, the *BGB* does not define what

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<sup>866</sup> Theodor Süss, ‘Das Traditionsprinzip – Ein Atavismus des Sachenrechts’ in E von Caemmerer, W Hallstein and F A Mann and Raiser W (eds) *Festschrift für Martin Wolff* (Mohr 1952) 142: *‘Besitz und Wille zum Eigentum.’*

possession is, but says in § 854 1 *BGB*, how it is acquired, namely: ‘Possession of a thing is acquired by obtaining actual control of the thing.’<sup>867</sup>

The fact that §854 *BGB* does not reference the will has sparked an acrimonious discussion in German scholarship until this day regarding the kind of possession the *BGB* recognizes.

Hence, the relationship between these two ‘kinds’ of possession, namely, one that requires a ‘will possess for oneself’ and one that does not is disputed to this day. The German scholar Wolfgang Ernst has recently claimed that the *BGB* adopted the common law concept of *possessio ad interdicta* instead of *possessio ad usucapionem*.<sup>868</sup> Ernst maintains that the *BGB* clearly distinguishes between those two concepts but does not always use the word *Eigenbesitz* where we would expect it but uses *Besitz* to avoid a cumbersome formulation.<sup>869</sup>

Ernst claims that the *BGB* recognises *possessio civilis* as opposed to *possessio*, as a distinct kind, rather than as a species to a genus, and to support this, he cites the indirect possessor, as a concept that can only exist if the *animus* is recognised as a constituent part of possession. He claims that the confusion is because the editors of the *BGB* wanted to apply for possessory protection further

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<sup>867</sup> ‘*Der Besitz einer Sache wird durch die Erlangung der tatsächlichen Gewalt über die Sache erworben.*’

<sup>868</sup> Ernst (n 15) 26: ‘*ist aber doch der possessorisch geschützte Tatbestand im BGB von dem Besitz als Voraussetzung des Rechtserwerbs so klar getrennt.*’

<sup>869</sup> *ibid* 27

than the Romans have granted, to persons not holding *possessio civilis*.<sup>870</sup> So, to make possessory protection available to a large circle of stakeholders, the compilers of the *BGB* convoluted the definition of possession.

Ernst's argument is sound, but it is also problematic because the final draft of the *BGB* does not indicate any of this. Ultimately, he has to rely on the *Motive* and the various comments throughout the editorial process. Moreover, this historical interpretation based on the *Motive* is problematic because an argument can always be made that the final version results from a conscious choice. But perhaps a look into the draft of the *BGB* can offer clarity.

In the *Motive*, Johow has already discussed the question of a gradation of possession (*abgestufter Besitz*) as found in the old Germanic *Gewere*, a middle thing, between ownership and possession, tied with the medieval Germanic feudal structure of property.<sup>871</sup> However, Johow decided not to adopt this institute into his draft. He maintained that it was already replaced by the Roman concept of possession early on and irrelevant to the modern world.<sup>872</sup> However, societal

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<sup>870</sup> *ibid* 3, 7, 11, 14, 15: 'Damit ist die Grundlage gelet für die Divergenz des Besitzes als geschützter Position und des Besitzes als Tatbestand des Rechtserwerbs, die wir als maßgebliches Charakteristikum des *BGB* erweisen und die wir in ihrer Konsequenz durchführen wollen. 18, 24.

<sup>871</sup> See Bethmann-Hollweg 49, Bruns (n 545) 105, 413. Beseler, *System des gemeinen deutschen Privatrechts*, (3rd edn, Berlin 1873) 282: 'Die *Gewere* ist das factische Innhaben einer Sache, '

<sup>872</sup> Johow (n 819) 474 (350)

considerations of the time wanted the leaseholder to hold possessory protection, thus, is seen as more as a *detentor*.<sup>873</sup>

Therefore, the concept of 'indirect possession' was introduced; so both the tenant and the landlord could claim possessory protection. This concept combines the Roman notion that the tenant only had *detentio*, thus, not possession, and the Germanic approach. According to this, the person physically holding the thing was always its possessor, while various grades of possession of the same object were possible (*Gewere*). This Roman law denied, as we have seen above (Paul. D. 41, 2, 3 5, Paul. D. 41, 2, 30, 6).<sup>874</sup>

In addition, Johow recognized that the distinction between *detentor* and *possessor* was not as clear-cut in Roman sources as was later assumed. Both scholarship and the lawgivers of previous codifications sought to grant the leaseholder possessory protection, like the one found in the Germanic *Gewere*. Jhering considered the concept of *Gewere* preferable to the Roman approach, which gave the tenant only *detentio*.<sup>875</sup>

As we have noted, the problem is that Roman law recognized cases of possession without *animus domini*, such as the *pignus* and *emphyteuta*, which were perceived as possession without *animus*

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<sup>873</sup> *ibid* 475 (351)

<sup>874</sup> Gustav Klemens Schmelzeisen Schmelzeisen, 'Die Relativität des Besitzbegriffs (1932) 136 *Archiv für die Civilistische Praxis*, 135 n 68 claims that there is no fundamental difference between the Roman concept of *possessor* vs *detentor*, as opposed to the *Gewere*, the difference lies merely in the fact that the Roman approach was 'hierarchical-individualistic' and the Germanic 'cooperate-social.'

<sup>875</sup> Jhering (n 1) 311

*domini*, and *sequestum* and *precarium*, which were not possession but could have *animus possidendi*, was already seen by Savigny, who classified them as ‘anomalous’ exceptions to the rule.<sup>876</sup>

Johow acknowledged that the problem remained insurmountable if one started from the principle that the possessor must want to have the object in its totality for his purposes, either in tune or against the law. Thus, possession could not be assumed for cases where a ‘possessor’ holds for an alien purpose.<sup>877</sup>

To sidestep this problem, scholarship and lawgivers found various solutions. Warnkönig sought to define the *animus* as so general that instances of derivative possession (*abgeleiteter Besitz*) could be subsumed under it.<sup>878</sup>

The compilers' dogmatic problem here was establishing possession through possession of a right (*Rechtsbesitz*) and not a possession of an object (*Sachbesitz*), something that the current draft rejects. It contradicts the very nature of possession, as an actual factual power over a thing (*thatsächliche Sachherrschaft*) to make it dependent on rights, either property, ownership, obligations etc.<sup>879</sup>

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<sup>876</sup> Johow (n 819) 478; Savigny (n 8) 148-150

<sup>877</sup> *ibid* 479 (355)

<sup>878</sup> Leopold Augustus Warnkönig, ‘Über die richtige Begriffsbestimmung des *animus possidendi*’ (1830) 13 Nr 9, *Archiv für civilistische Praxis*, 170. Warnkönig criticises Savigny’s notions of ‘*abgeleiteter Besitz*’ as a weak point in his theory

<sup>879</sup> Johow (n 819) 479 (355)

As we remember, the *ABGB* could afford protection to the tenant because it allowed possession of rights, in addition to possession of objects. Thus, the tenant was ultimately granted possessory interdicts, despite being a *detentor* because he had ‘*Rechtsbesitz*.’ According to Austrian scholarship, the *ABGB* indirectly developed the concept of ‘*mehrstufigen Besitz*’ in that one person can be a *detentor* and possessor of a right (*Rechtsbesitzer*), while another, the *Sachbestitzer*, on the same object.<sup>880</sup>

The compilers of the *BGB* refused the idea of a *Rechtsbesitz*, as we saw, and wanted possession only limited to physical objects. The *BGB* defines the holder of a right, as a ‘*Rechtsinhaber*’ but the use of the word *Inhaber* in the *BGB* does not correspond to that of the *detentor* in the *ABGB*, the *BGB* and several other German codes, such as the code for copyrights and patents *Urheberrechtsgesetz* mean the owner of a right.

From this background, the compilers developed the concept of the direct (*unmittelbarer Besitzer*) and the ‘indirect possessor’ (*mittelbarer Besitzer*) §868 *BGB*. The landlord is the latter. This structure resembles the old Germanic *Gewere* that allows for various grades of possession of immobile goods.<sup>881</sup> Several scholars believed that *Gewere* have influenced the concept of possession of the *BGB*.<sup>882</sup>

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<sup>880</sup> Gschnitzer (n 784) 5: ‘*Auch gelangt das ABGB. Mit Hilfe des Rechtsbesitzes zum mehrstufigen Besitz.*’

<sup>881</sup> Gierke (n 7) 218

<sup>882</sup> Martin Wolff and Ludwig Raiser *Sachenrecht, ein Lehrbuch* (Mohr 1921) 20



However, let us now turn to the concept of *Besitzdiener*. As we saw, the *BGB* does not recognize the concept of *detentio* (*Inhaberschaft*) as a technical legal term as the §797 of two drafts of §1880 and §1888<sup>883</sup> attracted critique and was eventually dismissed.<sup>884</sup>

To complicate things further, the Second Commission introduced the concept of *Besitzdiener* (somehow tediously translated ‘agent in possession’). *Besitzdiener* is defined as socially dependent on the primary possessor, not just obligated to him, which would make him appear as a tool for the possessor.<sup>885</sup> According to this, the holder does not possess for itself, but for somebody else, often in a strict hierarchical structure (army, prison etc.). However, since the will and intentions are in principle free and *animus domini* can always exist in a person’s mind, something that Jhering already highlighted, the concept of *Besitzdiener* is cited as a corrective (*Verkehrsanschauung*).

The *Besitzdiener* is interesting because it resembles the figure of the *detentor*. In classical Roman law, a person *alieni iuris* could not possess because his capacity to have a ‘will’ was simply not recognized, even though he might have had a will. This concept made the ‘will’ theory problematic and was already discussed by Savigny.

We have seen that the *BGB* has officially abandoned the concept of *detentio* and has blurred the lines between *possessio* and *detentio* for the sake of broader protection in tenancy law. Here

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<sup>883</sup> Jacobs and Schubert (n 565) §797 E1 Anlagen 880; Werner Schubert, *Die Entstehung der Vorschriften des BGB über Besitz und Eigentumsübertragung* (1966) 60

<sup>884</sup> Otto von Gierke, *Der Entwurf eines bürgerlichen Gesetzbuchs* 295

<sup>885</sup> Enders, *Der Besitzdiener*; BGH-LM 1006 Nr. 2

we see, however, that the final draft reintroduced the concept of *detentor*. The difference to classical Roman law does not lie like the concept, but its use, notably the extent of protection. According to the leading jurists of the time, a tenant in Roman law was holding *detentio*, not possession, and thus, was not afforded possessory protection, either against his landlord or any third party.

Here in the *BGB*, a dogmatic inconsistency for the sake of societal ends, and this approach reminds us of Jhering's statement, discussed above. In the *BGB* the difference between *detentio* and *possessio* is, ultimately, what the lawgiver says it is, hence, the holder of the lease is not a tenant because the *BGB* says he is a *Besitzer*, whereas, in all other circumstances where the holder does not have or is not supposed to have *animus domini*, he is merely *Besitzdiener*.

The compilers of the *BGB* have here eventually abandoned ingrained concepts of dogmatic consistency for the sake of a social-friendly law. However, the code's overall 'Pandektic' structure creates a tension that cannot be quickly resolved.

### **5.3.5. *Animus possidendi* or not?**

We have already discussed the most recent view on the matter by Wolfgang Ernst. However, the debate is not new, and the existence of the various concepts of possession and the vague formulation has sparked a fierce debate from the time of its publications on whether the lawgiver of the *BGB* had sought to eliminate the requirement of *animus domini* or not. The question of *animus* is not only relevant for the distinction between *detentio* and possession, and the protection of possession but also concerns the acquisition of possession.

Otto von Wendt could observe as early as 1907 that a minority of important scholars ‘still adhered to the Roman principle ‘*ignoranti non acquiritur possessio*’ against the current stream.<sup>886</sup> These included Dernburg, Gierke, Lehmann and Landsberg.

But even among those who wanted to preserve the Roman doctrine of Paul ‘*nulla possessio nisi corpore et animo acquire potest*’, like Dernburg, accepted a parallel form of possession ‘*Nebenformen des Besitzes*’ where *animus domini* was not present but would still be protected by possessory interdicts.<sup>887</sup> Here Dernburg seems to have argued with the *ALR*, which protected possession of items that were stored in our premises of which we had no knowledge but could have access to it.<sup>888</sup>

The above group of scholars was criticised for being entangled in historical, ‘Pandectic’ reminiscences. Their main argument against the *animus domini* was that the lawgiver had not consciously obliterated the separation between *detentio* and jural possession (*juristischer Besitz*), thus, the Roman concept of *alienae possession ministerium praestare* was entirely alien to the *BGB*.<sup>889</sup>

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<sup>886</sup> Otto v. Wendt, ‘Besitz und Besitzwille’ *Festschrift der Juristischen Fakultät der Universität Gießen zur Dritten Jahrhundertfeier der Alma Mater Ludoviciana* (Alfred Toepelmann 1907) 3

<sup>887</sup> Heinrich Dernburg, *Das bürgerliche Recht des Deutschen Reichs und Preussens: Bd. Das Sachenrecht des Deutschen Reichs und Preußens* (Buchhandlung des Waisenhauses, 1904) 55

<sup>888</sup> *ibid*

<sup>889</sup> Eduard Bartels, ‘Ausführungen zur Besitzlehre des BGB’ *Beiträge zur Erläuterung des deutschen Rechts, begründet von Gruchot*, 42 (1898) 645-683

Against this view, Wendt argued with §855 *BGB*, which recognizes the concept of possessing for somebody else; Wendt sees here - against the majority view - the incorporation of the *detentor*, now called *Besitzdiener* since §855 *BGB* recognizes as possessor a person who does not have physical control over a thing.<sup>890</sup> Thus, the will is a component of possession.

We can agree with Wendt here, who concedes that modern applications are much narrower than in the Roman world.<sup>891</sup> But we must also see that the *BGB* has chosen where to apply each concept; it allows for its applications in certain instances.

Wendt argues that the argument that wording of §854 *BGB* mentions only ‘*tatsächliche Gewalt*’ indicates that the lawgiver wanted to eliminate the *animus domini* as flawed. Wendt supports his argument with the reading of the First Draft of the *BGB* to §797 (mentioned above) and its discussion in the *Motive*. He claims that the present §872 *BGB* replaces §797. He also maintains that the *Motive* assumes a will to hold (*Inhabungswille*).<sup>892</sup> The problem with Wendt is again that the final version contains none of this and concludes as an unfinished draft.

A contemporary legal historian, Paul Jörs, summed up the contemporary discussion by claiming that the German *BGB* has not improved the Roman concept of possession, which is based on the

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<sup>890</sup> Wendt (n 896): ‘*Besitzdiener is doch nichts anderes als seine Übersetzung jenes ministerium praesatre.*’

<sup>891</sup> *ibid*

<sup>892</sup> Wendt (n 896) 7

will, by requiring ‘physical control’ in §854 *BGB* as §855 *BGB* shows, thus, the Roman concept of *Besitzwille*, he concludes, is the most useful one, despite its flaws.<sup>893</sup>

More recent scholars, like Karl Larenz, noted on the fluidness of the term *Besitzdiener* (*begrifflich nicht genau festgelegte Typen*).<sup>894</sup> He calls the *Besitzdiener* ‘Einen normative Realtyp[n] since this type is not set out because neither the term ‘*soziales Verhältnis*’ nor the extent to which they belong to a specific structure and have to follow instructions is delineated.’<sup>895</sup>

Larenz problematises that the *normative Realtypus* describes a person found in social reality but gains legal relevancy in that a certain consequence is suitable for him (*angemessen*). Thus, its definition is not free from value judgment (*Werturteil*).<sup>896</sup> However, Larenz’s point is valid and shows the problem that the *BGB* has in creating a concept of possession that is consistent but also socially useful.

We must here not lose sight of an important point, namely, that a careful distinction must be made between what is possession and how it is acquired. §854 *BGB* merely states how it is acquired, and similar to the classical Roman sources, the *BGB* does not define possession. It is only in the *Basilicorum Libri* that we find a definition of possession as κυρίως ψυχῇ δεσπόζοντος κατοχή, which is translated as *detentio* with *animus possidendi* in the Latin paraphrase. Νομη was

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<sup>893</sup> Jörs (n 811) 78

<sup>894</sup> Larenz (n 98) 220: ‘ohne dass sich in der einen oder der anderen Hinsicht genaue Abgrenzungskriterien angeben ließen.’

<sup>895</sup> *ibid* 220

<sup>896</sup> *ibid* 221

the Greek term for possession.<sup>897</sup> We can conclude that the *BGB* was consciously vague on the concept to forestall problems that a possible future inadequacy of a clear definition would pose.

If we compare the two drafts to the *BGB*, we could assume that the first still adheres to Savigny's view on possession as requires *animus domini*, while the second, by eliminating it, adopts Jhering's more recent approach. Wolfgang Ernst opposed this view.<sup>898</sup> He claims that §854 *BGB* is not the result of Jhering's critique on the theory of *animus domini* but stems from the quest, already a consideration of the First Commission, to extend possessory protection.<sup>899</sup> While he admits that drafting the *BGB* is unfortunate, he claims that the *BGB* has never dismissed *animus* from possession. Wieling shares this view.<sup>900</sup> This ties in with Ernst's previous theory that the *BGB* has adopted two possession concepts.

I agree with Ernst that Jhering cannot be seen as the exclusive influence of the second draft. Still, I believe that Jhering's fierce critique of the requirement of the *animus domini*, and the concerns raised about the concept's practicability and historical accuracy, have influenced the compilers to drop the requirement of will in §854 *BGB*. Moreover, Jhering's forceful argumentation and direct attack on the draft, and its underlying approach to jurisprudence in

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<sup>897</sup> Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreiches* (Teubner 1891) 32

<sup>898</sup> Ernst (n 15) 23

<sup>899</sup> *ibid*

<sup>900</sup> Wieling (n 10) 38

general by the majority of jurists, did not remain unnoticed by the editors of the *BGB*, has, in my opinion, significantly contributed to the revision of the concept of possession in the second draft.

Evidence of the reaction of the principal compilers of the *BGB* to Jhering's critique of the work of the First Commission and the prevalent methodology of the time, which he labelled as '*Begriffsjurisprudenz*', is scarce. This makes the eulogy delivered by Windscheid for Professor Albrecht in Frankfurt in 1889, recorded by the Frankfurt judge Heinrich Dove, most important because in this speech, the former seized the opportunity to address Jhering and his polemic directly. He says the following:

*'In der neueren Zeit macht sich in der Litteratur mit einer gewissen Aufdringlichkeit eine Richtung geltend, welche den Ruf "Zweckjurisprudenz" nicht "Begriffsjurisprudenz" erhebt – auch hier nenne ich keinen Namen. Sie wissen alle, was ich meine. In meinen Augen sind das keine Gegensätze. Alles Recht verfolgt Zweck; jeder Rechtssatz ist nur deswegen da, um menschliche Interessen und Bedürfnisse, wie er sie auffasst, zu befriedigen. Das ist keine neue Entdeckung, ebensowenig wie es eine neue Entdeckung ist, dass bei der Ergründung des wahren Sinnes eines Rechtssatzes vorzugsweise auf dessen Zweck Rücksicht genommen werden muss. Aber deswegen ist es auch nicht weniger wahr, dass sich alles Rechts sich in Begriffen bewegt, ihre Aufgabe keine andere ist, als scharfe Begriffe zu fassen und den Inhalt derselben darzulegen.'*

Here Windscheid replies to Jhering's critique directly by arguing that the terms '*Zweckjurisprudenz*' and '*Begriffsjurisprudenz*' do not signify opposing directions, despite the polemic of a particular scholar he prefers not to mention ('I will not name names').

Windscheid claims, both in the passage cited and elsewhere in his speech, that jurisprudence that aims at satisfying human interests and needs does not preclude its quest for logic, clarity, and precision, nor that one component must be abandoned for the sake of another.<sup>901</sup> In another part of the speech, Windscheid insists on the importance of proceeding according to logic but stresses the need to verify the outcome against the consideration of equity. However, if the outcome does not tally, the lawgiver is ultimately called upon to remedy the problem.<sup>902</sup>

Most importantly, Windscheid not only criticizes Jhering's critique as an accusation without substance but ultimately burdens the lawgiver with making laws that serve societal and individual interests. The fact that the towering figure of Windscheid, being himself one of the compilers of the First Draft, saw himself compelled to address Jhering's accusations directly bears testament to the fact that Jhering's opinions were considered. Windscheid's remark about the role of the lawgiver in creating laws that adhere to the principle of equity (*Takt*) is significant here, given the ongoing deliberations for the Code.

The difficulty of the task of the editors in aligning all those positions can be seen with the famous '*Normenwiderspruch*' of §934 *BGB*. The *BGB*, as seen, recognises the *constitutum possessorium* (*Besitzkonstitut*) in §930 *BGB*. But it is not enough to transfer bonitary ownership

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<sup>901</sup> Heinrich Dove 'Rudolf von Jhering und Bernhard Windscheid' in *Berichte des Freien Deutschen Hochstifts zu Frankfurt am Main Vol 9* (Gebrüder Knauer 1893) 153

<sup>902</sup> *ibid* 143. 'Die Quelle der Entscheidung kann nur das juristische Denken sein. Wenn aber das Resultat des juristischen Denkens zu dem, was der Takt ergibt, nicht stimmt, so soll das dem Richter eine Warnung sein [...] Abhilfe ist dann nur von der Gesetzgebung zu erwarten.'



as §933 *BGB* stipulates. The transferee must become possessor to be able to acquire by prescriptive acquisition (*gutgläubiger Erwerb*), but §934 *BGB* is again an exception to the rule.

If the not-entitled transferor is the *mittelbarer Besitzer* and transfers his right to the transferee, then prescriptive acquisition is possible. The idea behind this seeming discrepancy is that *mittelbarer Besitz* is a form of possession and can be transferred by cessation. The *ABGB* does not contain a paragraph like §931 *BGB*, as this is considered to blur the lines between *Sachenrecht* and *Schuldrecht*.<sup>903</sup> The *ABGB* also does not recognize the ‘*antizipiertes Besitzkonstitut*’, arguing from §319 *ABGB* ‘*bisher*’ and ‘*künftig*’.<sup>904</sup>

### 5.3.6. Protection of Possession in the BGB

Let's compare the concept of possession of the *ABGB* with that of the *BGB*. First, we see that the former has adopted a narrower concept, and in following, the Roman has not accepted various degrees of possession, namely, direct and indirect. Thus, the tenant in Austrian, being the mere *detentor* can be seen as less protected, as he is not a possessor (*Besitzer*) as in Germany.

As Therese Mueller has rightly observed, the narrow concept of possession in the *ABGB*, requiring the *animus domini*, and subsequently the possessory interdict, which requires possession instead of detention, is offset by the broad definition of possessive objects, including rights and

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<sup>903</sup> Gschnitzer (n 784) 18; Süß (n 873)145 152: ‘*Unpopulärer und komplizierter kann man den für das praktische Leben so simplen Vorgang nicht gestalten.*’

<sup>904</sup> *ibid* 20

incorporeal things. Thus, the tenant in Austria though not the possessor of the building rented is the possessor of the right to rent. In addition, in the same vein, the creditor of *pignus*, the holder, and the buyer on a provisory basis.<sup>905</sup>

The Germanic concept of *Gewere* did not distinguish clearly between possession and ownership and accepted different levels of possession. The old Germanic law knew of a remedy called, ‘*auf gebrochene Gewere*’ where petitory claims could be brought in a possessory suit.<sup>906</sup> This contrasts with Roman law, where even a thief could have possession.

The *BGB* stipulates possessory interdicts in §858 *BGB* as opposed to petitory claims of §1007 *BGB*. In contrast to the earlier German codifications,<sup>907</sup> the *BGB* adhered to a strict separation between two kinds of possessory claims based on the factual situation (*possessorium*) and possessory claims based on a right to possession (*petitorium*). In this, it follows Savigny.

Unlike the *ABGB*, the *BGB* does not clarify the relationship between those two, neither on the material nor the procedural level. Wolfgang Ernst is right in observing that the nature of possessory possession was not debated in the *Motive*, especially given the discussion of Jhering in 1868.<sup>908</sup>

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<sup>905</sup> Therese Müller, *Besitzschutz in Europa* (Mohr Siebeck 2010) 95, 96

<sup>906</sup> Bruns (n 544) 319

<sup>907</sup> *ALR* §27 I 7

<sup>908</sup> Ernst (n 15) 17: ‘Über den Grund des Besitzschutzes hat man zu keinem Zeitpunkt beraten.’

The Roman trias: *vi, clam, precario*, initially found in the drafts of the First Commission,<sup>909</sup> was not adopted into the Second, and was instead exchanged for ‘*verbotene Eigenmacht*’<sup>910</sup> Thus, the protection granted to the possessor in the §1004 *BGB* and §862 *BGB* is much broader than the one granted to Roman, including all kinds of disruption, irrelevant of *dolus malus, culpa*.

In the decades following the promulgation of the *BGB*, the *Reichsgericht* developed the concept of ‘*Störung*’ to include ‘emissions of all kinds, noise, humidity from a neighbouring building.’<sup>911</sup> The *Bundesgerichtshof* has even applied §1007 *BGB* on immobile property,<sup>912</sup>

This broad approach to the concept of ‘*Störung*’ can be explained from the background of tenant protections, and the *ALR*. The latter considered the tenant as ‘*unvollständiger Besitzer*,’<sup>913</sup> similar to the ‘*fremdbesitzer*’ of the *BGB* but granted him all real rights.<sup>914</sup>

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<sup>909</sup> *Motive zum Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Amtliche Ausgabe III* (Guttentag 1888) 118

<sup>910</sup> Albert Achilles, Albert Gebhard and Peter Spahn (eds), *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs, Im Auftrag des Reichs-Justizamts III*, 36

<sup>911</sup> *RGRK* 11 Auflage 1959 §858 Anm 6

<sup>912</sup> *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 7, 208ff.

<sup>913</sup> §6 I 7 *ALR*

<sup>914</sup> §2 I 21 *ALR*: ‘Seine Befugnis hatte [...] die Eigenschaft eines dinglichen Rechts.’

So, the *ALR* turned the *ius ad rem* into an *ius in re*.<sup>915</sup> The tenant had a possessory and real protection against third parties, including the action *confessoria* and *negatoria*.<sup>916</sup> In this respect, the *ALR* differed from the Roman concept of possession, which granted the possessor only possessory rights and the tenant no rights.<sup>917</sup>

The *Bundesgerichtshof* was called upon to clarify the relationship and has so far affirmed the option of a counterclaim.<sup>918</sup> Scholarship has agreed to this.<sup>919</sup> The *Bundesgerichtshof* bases its argument on §864 II and says that if both claims are to be adjudicated simultaneously, the petitory one has priority.<sup>920</sup>

Another matter concerns the possessory protection of the *Besitzdiener*. According to §869 *BGB*, the agent in possession is only entitled to claim possessory protection if the attack is directed towards immediate control. In this context, it is noteworthy to mention the concept of ‘*Verdiglichung obligatorischer rechte*.’ Scholars like Dulckeit and Canaris claim that aim of

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<sup>915</sup> §123 I 2 *ALR* §. 125. ‘*Ein Recht ist dinglich, wenn die Befugniß zur Ausübung desselben mit einer Sache, ohne Rücksicht auf eine gewisse Person, verbunden ist.*’

<sup>916</sup> Dernburg (n 159), §277,1 and §250

<sup>917</sup> See Jhering (n 1) 200

<sup>918</sup> *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 53, 166; *ibid* 73, 355

<sup>919</sup> Jürgen Baur and Rolf Stürner (ed) *Sachenrecht, begründet von Fritz Baur* (C H Beck 2008) 97; Münchener Kommentar zum *BGB*/Joost §863 9; Peter Bassenge (ed) *Palandt, Bürgerliches Gesetzbuch* (C H Beck 2008) §863 rn 3

<sup>920</sup> BGH in (1979) *Neue Juristische Wochenschrift* 1359

possessory interdicts is to protect those holders of actual detention (*Inhaber tatsächlicher Sachherrschaft*) whose possession or *detentio* derives from a contract and are those not protected against interruptions for third parties.<sup>921</sup>

In its final draft, we saw that the BGB did not accept the Roman concept of a lease, which perceived the tenant as the detentor, thus denying him the possessory interdict. The BGB, in perceiving the tenant as possessor (*unmittelbarer Besitzer, Fremdbesitzer*), has granted him possessory interdicts, both in §859 BGB (*Selbsthilfe*) and against forbidden self-help in §858 BGB (*verbotene Eigenmacht*), as well as §§ 861, 862 BGB. Through §861 BGB, the tenant can request restoration of his possession by the property owner, even after the contractual relationship has expired.<sup>922</sup>

The desire to extend possessory protection further than it was desired in Roman law - and supported by Savigny - as to include the *detentor* follows a tradition in German scholarship, notably stated by the noted jurist of the *usus modernus* Augustin von Layser (1683 – 1752) in his

*‘Nudus detentor etiam possidet, atque remedia possessoria habet.’*<sup>923</sup>

We have noted above that the BGB followed a strict distinction between *ius in re* (real rights) and *ad rem* (obligatory), dealing with them in separate books. The logical consequence for tenancy is

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<sup>921</sup> Dulckeit (n 857) 18; Claus-Wilhelm Canaris ‘Die Verdinglichung obligatorischer Rechte’ in *Festschrift für Werner Flume zum 70. Geburtstag* (1978) 371

*Palandt* (n 925) §861 Rn 1; OLG Düsseldorf in *Der Betriebs-Berater* 1991, 721

<sup>923</sup> Leyser, (n 2) 96f; concerning the practice of higher courts, such as the *Appellationsgericht of the city of Magdeburg* of 1727

that the tenant or leaseholder only acquires a relative right, as opposed to the owner, who has an absolute right, protected through *vindicatio* in §985 *BGB*. Thus, the sale of the rented property would lead to the loss of the right by the tenant; a right which he could offset through claims against his landlord on account of breach of contract.

The First Commission did not see any fault with this consequence.<sup>924</sup> However, heavy criticism at the time, notably by Otto von Gierke,<sup>925</sup> must have led to the insertion of §§ 571, 580 and notably §566 *BGB*, which stipulate that about the lease of immobile goods, the sale does not override tenancy (*‘Kauf bricht Miete nicht’*). And though the *BGB* does not define the right of the leaseholder as a *‘dingliches Recht,’* it has regulations like §566 *BGB* *‘Kauf bricht Miete nicht,’* where a right of the possessor to a third party is granted similarly, leading some jurists to believe that lease is, after all, a *‘real right’* (*dingliches Recht*).<sup>926</sup> Some voices even claimed that given the above, the law of tenancy should not be found in the Second Book of the *BGB*, dealing with obligations, but in the third, and dealing with real rights.<sup>927</sup>

### 5.3.7. Developments considering the Court Decisions

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<sup>924</sup> *Motive* II (n 916) 383

<sup>925</sup> Gierke (n 891) 74

<sup>926</sup> Dulckeit, (n 857) 17; Canaris (n 927) 371, 373

<sup>927</sup> Justus Wilhelm Hedemann, *Grundrisse der Rechtswissenschaft, Vol. 3: Sachenrecht des Bürgerlichen Gesetzbuches* (1<sup>st</sup> edn, 1924) 327

Interestingly, the Highest Federal Court of Germany for civil and criminal matters (*Bundesgerichtshof*) has interpreted the paragraphs thus: the new owner is not merely a successor, against whom the possessory interdicts apply (§986 II *BGB*) but assumes the legal responsibilities of the previous owner, stepping into his shoes.<sup>928</sup>

In addition, the Second Commission had with the concept of possession can also be seen in delictual protection of possession. The Second Commission refused to add *Besitz* among the protected goods (*Schutzgueter*) of §823 *BGB*, among ownership, and other rights (*sonstiges Recht*) claiming, that this would lend possession a ‘doctrinary character’ (*einen durchaus doktrinären Eindruck machen und geeignet sein, zu Missverständnissen zu führen, als wenn damit die wissenschaftliche Frage über das Wesen des Besitzes habe entschieden werden sollen*).<sup>929</sup> This showed again the problem that the Commission had in defining possession (*Besitz*).

However, by granting §858 *BGB* protective character (*Schutzgesetzcharakter*), which then falls under §823 II *BGB*, it has indirectly granted delictual protection to possession<sup>930</sup>, thus, elegantly circumventing the need to include possession among the protected goods and having to deal with the question of the definition of *possessio*.

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<sup>928</sup> *Bundesgerichtshof* in (1962) *Neue Juristische Wochenschrift*, 1390

<sup>929</sup> *Protokolle II* (n 917) 573

<sup>930</sup> *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 20, 169ff; *Reichsgericht* in (1931) *Juristische Wochenschrift*, 2904

However, the Highest Imperial Court (*Reichsgericht*) has even gone so far as to grant the possessor delictual protection under 823 I as a *Besitzer* by subsuming ‘*Besitz*’ under ‘*sonstiges Recht*’, regardless of a right to the lease.<sup>931</sup> This view was adopted in scholarship.<sup>932</sup>

To sum up, the *Reichsgericht* defined possession as a right, despite it being defined in the law as ‘*tatsächliche Sachherrschaft*’ and the tenant is protected in his possession, regardless of his right to possess. The Court has thus indirectly revived the old question of whether possession is a right or a fact, and has this time even gone against the letter of the law. This leap was criticized by some voices in scholarship, who preferred that only justified possession should count as a ‘*sonstiges Recht*.’<sup>933</sup> Thus perceiving delictual protection of possession as more limited to possessory protection of 859 *BGB*.

More recently, Germany’s Federal Constitutional Court (*Bundesverfassungsgericht*) has even pushed the whole matter further by declaring in a landmark decision in 1993 that ‘the right of the tenant to possess is ownership per Art. 14 I 1 of the German Constitution.’<sup>934</sup> Interestingly, this decision assumes a concept of ownership where the right to deal with an object and the right

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<sup>931</sup> *Reichsgerichtsentscheidungen in Zivilsachen* 91, 66; 170

<sup>932</sup> Ludwig Enneccerus, Theodor Kipp, Martin Wolff and Heinrich Lehmann, *Lehrbuch des Bürgerlichen Rechts*, II (14ed, Mohr 1954) 943

<sup>933</sup> Dulckeit (n 857) 15; Georg Anton Löning, *Die Grundstücksmieta als dingliches Recht* (Fischer 1930) 154

<sup>934</sup> *Bundesverfassungsgerichtsentscheidung* 89, 1: ‘*Des Besitzrecht des Mieters an der gemieteten Wohnung ist Eigentum im Sinne von Art. 14 I 1 GG.*’



to use it can be split, thus, resembling the *dominium directum* and *dominium utile*; a concept categorically rejected by the drafters of the *BGB*.

The Constitutional Court justified its decision with a twofold argument, on the one hand, it stressed the importance of adequate living space for any human being, and on the other, it noted that the lawgiver himself has granted heightened protection to the tenant, which goes above the protection usually granted to contractual obligations, as it is shown by §§ 571, 858 I, 861 I, 862 I and 823 *BGB*.<sup>935</sup>

It maintained, however, that the owner of the property also has a constitutional right under Art. 14 *GG*, and both rights need to be weighed against each other. The court has claimed that it is a matter for the lawgiver to balance.<sup>936</sup>

### **5.3.8. Transfer of Property in the *BGB***

The *BGB* has decided to adopt the principle of abstraction instead of the causal principle. Therefore, obligation and transfer of ownership are separate acts (similar to *mancipatio*). In addition, the *BGB* has adopted the '*Traditionsprinzip*'; namely, an obligation does not in principle entail a transfer of property; a physical transfer must occur. This is found in §§ 929 1 *BGB*. 929, 2 *BGB*. This differs significantly from the *CC*, where transfer of ownership takes place without the requirement of physical transfer.

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<sup>935</sup> *ibid* 6

<sup>936</sup> *Bundesverfassungsgerichtsentscheidung* 89, 8

However, the *BGB* also allows an exception if the object is already in the hand of the buyer.<sup>937</sup> In this case, now tradition is necessary, the mere agreement of the transfer of possession suffices (*Brevi manu traditio*).

A further exception to the rule of the requirement of tradition is contained in §930 *BGB* (*Besitzkonstitut*).<sup>938</sup> In this constellation, the original transferee of the property retains possession of the object transferred. Here for the transfer, it is sufficient that the parties agree on a ‘*Besitzmittlungsverhältnis*’ (an agency of possession) by which the former possesses for the latter as a direct possessor.

The difference between the *CC* and *BGB* can be traced back to the influence of varying Roman sources. As we have seen above, the *Digest* contain the texts that require *traditio* but also allow for exceptions, namely, through the interpretation of Cel. D. 41, 2, 18, which mentions

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<sup>937</sup> ‘Zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll. Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums.’

<sup>938</sup> ‘Ist der Eigentümer im Besitz der Sache, so kann die Übergabe dadurch ersetzt werden, dass zwischen ihm und dem Erwerber ein Rechtsverhältnis vereinbart wird, vermöge dessen der Erwerber den mittelbaren Besitz erlangt.’

‘*alieno nomine possidere [...] desino possidere*’ and Ulp. D. 6, 1, 77, which was later called *constitutum possessorium*.<sup>939</sup>

Jhering acknowledged that Roman jurists accepted these forms of transfer but called them ‘*misslungene Constructionsversuche*’ whose practical application would lead as *ad absurdum*.<sup>940</sup> He called the jurist Paul a formidable fanatic of constructing.’<sup>941</sup>

§929 II *BGB*, on the other, preserves the Roman *brevi manu traditio*. While the compilers of the *CC* elevated the concepts of the *constitutum possessorium* and *brevi manu traditio* into the rule, thus, abolishing the requirement of tradition, the German *BGB* clung to the ‘*Traditionsprinzip*’ as a rule. Thus elevating C. 2,3,20: *Traditionibus et usucapionibus dominia rerum non nudis pactis*

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<sup>939</sup> The origin of the term is disputed, Andreas Wacke, *Das Besitzkonstitut als Übergabesurrogat in Rechtsgeschichte und Rechtsdogmatik: Ursprung, Entwicklung und Grenzen des Traditionsprinzips im Mobiliarsachenrecht* (Hanstein 1974) 10, who believes it goes back to Azo of William Morrison Gordon, *Studies in the Transfer of Property by traditio*, (Aberdeen University Press 1970) 16-18.; Wacke (1945) 11, disputes the majority of scholars (Wesenberg, Gordon) who see in Cel. D. 41, 2, 18pr the basis of the *brevi manu traditio*, he believes that it applies only to indirect agency

<sup>940</sup> Jhering (n 1) 273

<sup>941</sup> *ibid* 274: ‘*Das Bild, das sie uns von ihm vorführen, ist das, ich kann es nicht anders ausdrücken: eines wüsten Fanatikens im Construieren.*’

*transferuntur*, a text that is considered axiomatic but given without any explanation,<sup>942</sup> into the default rule of §929 I *BGB*, while allowing exceptions through §929 II *BGB* and §930 *BGB*.

During the drafting of the *BGB* and the ensuing debate, Jhering was a staunch defender of the ‘*Traditionsprinzip*’ as opposed to the ‘*Konsensualprinzip*’ adopted by the *CC*. Though otherwise praising the *CC*, Jhering perceived the *traditio* ‘as a precious tool for the shift from obligations to real rights,’ and its disappearance would lead to major procedural problems, as it would be not clear if the parties wanted to bind themselves or wanted to establish real rights merely.<sup>943</sup>

Jhering’s polemic focused on practicability, and ease of proof; the same argument he brought against the theory of *animus domini*, as a distinguishing feature between possession and *detentio*. Furthermore, he believed that the *constitutum possessorium*, though recognized by the Romans, remained the exception.<sup>944</sup>

The First Draft also provided for the *constitutum possessorium* §805:

‘*Die Übergabe einer in der Inhabung des Besitzers befindlichen Sache an einen Andern kann, wenn der Besitzer auf Grund eines zwischen ihm und dem Andern bestehenden besondern Rechtsverhältnisses befugt oder verpflichtet ist, die Sache als Inhaber zu*

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<sup>942</sup> Gordon (n 945) 1-2

<sup>943</sup> Jhering (n 1) 194: ‘*In der Tradition erblicke ich ein äußerst werthvolles Merkmal für den Übergang aus dem obligatorischen in das sachenrechtliche Stadium. Mit Wegfall desselben würde die Frage: hat die Partei sich zunächst bloß verpflichten oder bereits das Eigenthum übertragen wollen, in manchen Fällen den größten Schwierigkeiten ausgesetzt.*’

<sup>944</sup> *ibid* 219-220

*behalten, dadurch bewirkt werden, dass der bisherige Besitzer im Einverständnis mit dem Andern diesem den Willen erklärt, die tatsächliche Gewalt fortan für den Andern auszuüben.*<sup>945</sup> This also drew criticism by Jhering.<sup>945</sup>

Criticism of preserving the principle of tradition has persisted throughout the twentieth century in Germany by jurists who considered it an outdated ‘Pandectist veneration’ of C. 2,3,20.<sup>946</sup> On the other hand, others praised the *constitutum possessorium* highly as an ingenious invention that allowed us to sell ‘our plantations in Jamaica’ with one word, thus, a jural concept in tune with the modern world.<sup>947</sup>

The consultations for the *BGB* state that the aim of preserving the *Traditionsprinzip* for mobiles was the careful avoidance of the separation between ownership and possession to compensate for the lack of a land registry for immobile goods.<sup>948</sup> The choice of the *Traditionsprinzip* can also be explained by the fact that the compilers of the *BGB* merely wished to unify legislation in the German states, not to innovate.<sup>949</sup> But, of course, in certain parts of

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<sup>945</sup> *ibid* 221: ‘*ich würde es bedauern, wenn dieser Paragraph Gesetzeskraft erhielte*’; 226: ‘*Das Constitutum possessorium ist ein höchst gefährliches Institut.*’

<sup>946</sup> See Süss (n 873) 145; Karl Larenz, *Lehrbuch des Schuldrechts II* (1972) 16

<sup>947</sup> Josef Kohler, ‘Vertrag und Übergabe’ *Archiv für Bürgerliches Recht* (1900) 18

<sup>948</sup> Mugdan (n 805) *III* 185: ‘*ein Auseinanderfallen von Besitz und Eigentum tunlichst verhütet und in einer, wenn auch dem Grundbuche gegenüber unvollkommenen, aber doch immer von großem praktischen Werthe bleibenden Weise zur Kundbarmachung des zeitigen Rechtszustandes beiträgt*’

<sup>949</sup> Schubert, (n 889) 174

Germany, the French *CC* was still valid, and it is not surprising if the most potent attacks came from those parts.

In other words, the *Motive* focus on only one aspect of the principle of publicity, as opposed to the Roman contained in *mancipatio* and *traditio*, where the passing of ownership was to be made public *inter omnes*.

#### **5.4. Conclusions**

We see from the above, that when the First Commission on the *BGB* began its task, the debate on the nature of possession polarized Germany and even influenced the academic debate in Austria. The committee acknowledged this and decided to abstain from a definition of possession. Instead, it decided to cite Paul's famous passage on how we acquire possession.

The fact that the *BGB* refused to define '*Besitz*' and to commit on whether *animus domini* is required, or not left, matters unsettled while the debate on the exact nature of possession is ongoing. The situation became more entangled because the *BGB* added various other forms of possession, namely, indirect possession (*mittelbarer Besitz*) and 'agent in possession' (*Besitzdiener*). It did this partly to account for the different needs of contemporary society and partly to preserve and fusion the various forms of possession found both in Roman and Germanic law. The result was confusion regarding the exact boundaries of each variation. The debate is ongoing, but a redraft was never contemplated.

We also saw that although Savigny and Jhering were not mentioned in the *Motive*, their influence is felt throughout. The *BGB* though aiming at a comprehensive treatment of the concept of possession has not managed to resolve the issues concerning the nature and the use of possession that ensued early in the nineteenth century.

## Chapter 6. Overall Conclusions and Assessment of the Material

Possessing, namely, exerting physical power over objects, is interwoven with human existence and serves a primal purpose in every human society. We possess things to sustain and protect ourselves and exert influence over others. As a physical act, it often has societal, economic and jural implications. This lends the concept of possession (*possessio*, *Besitz*) its protean quality, fascination, malleability and complexity.

Roman jurists, notably Paul, never problematised the existence of '*possessio*' distinct from 'ownership' and have recognized its importance for various other transactions, such as *traditio*, but have not given a conclusive definition. Nevertheless, the unclarity of the primary source triggered a lively debate on the nature of possession and why it has been protected, over many centuries in the Western world.

German legal scholars of the nineteenth century, notably Hugo and Savigny, attempted to 'systematise' the law and make it scientific through abstraction. Thus, the need to delineate possession and ask why it should be protected became pressing. The tendency to abstract concepts was the school's most celebrated accomplishment. Hence, *possessio* (*Besitz*) had to be defined in abstract terms as an absolute concept and delineated from ownership and *detentio* (*Inhaberschaft*).

However, our investigation of Savigny showed that even the founders of the 'Historical School' cannot be seen as one-dimensional. Savigny aimed at approaching the Roman sources from a 'systematical' and a 'historical' point of view. Both Hugo and Savigny were imbued with the ideas of the German philosophical movements of their time, an approach that emphasised the individual human being and his personhood. The attempt of Savigny and the subsequent generation

of scholars to add the ‘idealist’ element into the discussion of possession attained various degrees of success but is still clung to today in German legal scholarship.

In addition, both the ‘systematic’ and the ‘historical’ approach were problematic for the German jural science because the Roman sources did not give enough information on the pressing questions of the time and because ‘systematisation,’ even if logically sound, might not always lead to the desired outcome.

Jhering forcefully highlighted the latter point in the latter half of the century. It is no coincidence that the latter half of the nineteenth century saw the rise of theories of evolution and socialism and the emancipation of the middle class. The questions about the importance of property, distribution, and protection were seen in a new light, as were the theories of possession. The question now is not ‘What is possession?’ but ‘What should it be?’

The generations of brilliant legal minds that succeeded Savigny and perceived themselves as members of ‘his’ school or opposed to it varied in their views and reasoned differently. Still, all clung to the concept of possession as separate from ownership sought, as we have seen, to justify it differently. The influential jurists of the ‘Pandektist’ movement have turned their backs on the Germanic concept of *Gewere*, which allowed for various levels of ownership and possession of the same object.

I intended to show that the important jurists of the early nineteenth century followed the traditional *Usus-modernus approach* in their quest to define possession and ‘systematise’ it clearly. Still, they also imbued it with the ideas of the German philosophical movements of their time. Thus, the Roman sources on *possessio* were seen in a new light: possession as the extension of personhood. In this way, possession emerged amid the movement for the emancipation of the



emerging middle class, whose entity was based on ownership and possession, rejecting the traditional feudal understanding of possession and ownership as graduated concepts.

At the beginning of the nineteenth century, Austria already had its civil code the *ABGB*, conceived in the spirit of enlightenment and following the *Usus-modernus* tradition, with a clear distinction between *possessio* (*Besitz*) and *detentio* (*Inhaberschaft*).

An equivalent for Germany had to wait for almost another hundred years. The various considerations of the ‘Pandektist’ School and its opponents had to be considered and would not leave the concept of possession unaffected. The jurists commissioned with drafting a civil code for the entire German Reich faced the impossible task of aligning all those disparate considerations.

They had to be faithful to the Roman sources but also consider the concepts of societal usefulness, as well as the shape it had taken in the Germanic tradition from the *Ius commune* onwards; they had to grant *Besitz* a sufficient level of clarity to meet the exigencies of a code, and particularly its aim at comprehensiveness and clarity. Unfortunately, the drafts for the code started amid an entrenched debate where jurists could neither agree on the exact meaning of the Roman sources nor the correct method.

As opposed to the *ABGB*, the *BGB* shied away from defining possession and instead assumed the existence of it and possibly various forms of it. Moreover, the *BGB* sought to interpret the sources differently from the *ABGB*. Nonetheless, it, too, clung to it as an absolute concept. It is disputed to this day who of the towering figures of German jurisprudence carried the day, Savigny or Jhering? What can indeed be said is that although the former has not succeeded in his polemic of a universal civil code for Germany, he was, however, vindicated as far, as the belief of

natural-law jurists in the existence of a code that could conclusively regulate all legal matters through subsumption was proven a naïve one, and their task a futile one.

The court decision of Germany's highest courts and legal opinions on possession proves that. Over time, the concept of possession was adjusted, politicised, and reshaped. The debate in both Germany and Austria is ongoing, thus, vindicating Savigny's view of law as organic growth.

The investigation of the complex concept of *possessio* also displays the fruitfulness of an engagement with the Roman sources and shows that the basic premises of that debate can be useful for discussing the unified concept of possession on a European level. The fact that we will never reach clarity on the matter of possession and the exact wording of the Roman sources does not preclude a fruitful discussion and must not prevent us today from seeking that unity the 'Pandektists' strove for.

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