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REAL ACTIONS IN LOUISIANA AND
COMPARATIVE LAW

A. N. Yiannopoulos*

In civil law systems distinction is frequently made between personal and real actions.¹ This distinction ostensibly corresponds to that between personal and real rights.² Indeed, in medieval Roman law, and in continental legal systems, real rights have been defined as the rights protected by real actions and personal rights as those enforced by personal actions.³ Conversely, the nature of an action as personal or real has been said to depend on the nature of the right protected or enforced.⁴ The purpose of the present study is to clarify the notion of real actions and their relation to real rights in Louisiana and comparative law. Analysis of Louisiana law will be preceded by a discussion of Roman and French law and will be followed by a brief reference to common law and a number of selected continental legal systems.

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1. See Badr, *Some Remarks on Real Action Proceedings in Egypt*, 29 TUL. L. REV. 731 (1955); Bernini, *The Concept of Real Actions in Italian Law*, 29 TUL. L. REV. 635 (1955); Chung Han Kim, *Real Actions in Korea and Japan*, 29 TUL. L. REV. 713 (1955); Hahlo, *The South African Law of Real Actions*, 29 TUL. L. REV. 725 (1955); Hébraud, *Real Actions in France*, 29 TUL. L. REV. 673 (1955); Jurt, *Actions Relating to Possession and Property in the Swiss Civil Law*, 29 TUL. L. REV. 735 (1955); Ramos, *In Rem Actions in Puerto Rico*, 29 TUL. L. REV. 659 (1955); Zepos, *Law of Things and Real Actions in Greece*, 29 TUL. L. REV. 697 (1955).

2. See Bouchard v. Parker, 32 La. Ann. 535, 537 (1880) quoting from BONJEAN, *TRAITÉ DES ACTIONS* (1841-45) ("il semble donc qu'on pourrait définir l'action réelle, celle qui repose sur violation d'un jus in re, et l'action personnelle celle qui repose sur la violation d'un jus ad rem"). Cf. Yiannopoulos, *Real Rights in Louisiana and Comparative Law*, 23 LA. L. REV. 161, 518 (1963).

3. Cf. text at note 11 *infra*.

4. Cf. text at notes 33-34 *infra*; 2 DEMANTE, *COURS ANALYTIQUE DE CODE CIVIL* 377 (1896); 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 191 (1874-82).

A. ROMAN LAW

"Right" and "action" are distinguishable concepts in contemporary civilian theory.⁵ "Right" is conceived as a creature of substantive law, while "action" is regarded as a procedural remedy: rules of substantive law confer rights and rules of procedure provide the means for recognition or enforcement of rights.⁶ In this light, rights are considered as "pre-existing"

5. See CAPITANT, INTRODUCTION À L'ÉTUDE DU DROIT CIVIL 119 (1929); 1 GLASSON, TISSIER ET MOREL, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 441 (3d ed. 1925) [hereinafter cited as GLASSON, TISSIER ET MOREL]; VIZIOZ, ÉTUDES DE PROCÉDURE 33 (1956). "Action" and "right" differ as to their *cause*, *prerequisites of exercise*, and *effects*. MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 26 (2d ed. 1949). Cf. ASCARELLI, STUDI DI DIRITTO COMPARATO ED IN TEMA DI INTERPRETAZIONE 88 (1952); BALIS, GENERAL PRINCIPLES OF THE CIVIL LAW 348 (1955) (in Greek); BRETHE DE LA GRESSAYE ET LABORDE-LACOSTE, INTRODUCTION GÉNÉRALE À L'ÉTUDE DU DROIT 414-16 (1947); and in general, WINDSCHEID, DIE ACTIO DES RÖMISCHEN ZIVILRECHTS VOM STANDPUNKTE DES HEUTIGEN RECHTS (1856); PETER, ACTIO UND WRIT 13 (1957). For the distinction between "right" and "action" in common law systems, see STONE, THE PROVINCE AND FUNCTION OF LAW 128 (1950).

In order to explain more clearly certain features of German civil law, analytical jurists in Germany draw a distinction among "right" (*subjektives Recht*), "claim" (*Anspruch*) and "action" (*Klage*). A right is ordinarily defined as "the power to satisfy a recognized interest." 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 437 (15th ed. 1959). Claim has been defined in the German Civil Code as "the right to demand from another the performance of an act or omission." B.G.B. § 194. Claims, therefore, are species of the generic concept "subjective right." Action is defined as the "demand to afford protection by judicial decision." ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 396 (8th ed. 1960). According to the prevailing view in Germany *actionability* is an indispensable quality of a claim. See LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 82 (10th ed. 1957). For a critique of the various theories concerning the notion of action in Germany, see Groh, *Der Anspruch auf Rechtspflege*, 51 ZEITSCHRIFT FÜR DEUTSCHEN ZIVILPROZESS 145, 173-200 (1926). In France the notion of action has not been elaborated upon as extensively as in Germany and Italy. Doctrinal treatment of this subject has been made mostly by public law writers, Hauriou, Duguit, and Jèze. See VIZIOZ, ÉTUDES DE PROCÉDURE 27, 127-50 (1956). It has been observed that in most French commentaries on the Code of Civil Procedure the notion of action is obscured by the adoption, in different parts of the same treatise, of conflicting theories and definitions. Action is defined "at times as a recourse in justice, in case of contestation or violation of a right, and at times as an aspect of the right itself which the judge will recognize and protect." Thus, while in principle distinction is made between "right" and "action" the two are in some instances assimilated! The notion of action as a recourse in justice is the traditional doctrine of the *processualistes*. See POTHIER, INTRODUCTION AUX COUTUMES, *ch. IV, Des actions* (Rondonneau ed. 1831); 1 BONCENNE, THÉORIE DE LA PROCÉDURE CIVILE 55-56 (1839). The notion of action as an aspect of the right itself derives from the idea that action is the sanction of a personal or real right. The sanction came thus to be regarded as a corollary, and the action as an inherent characteristic, of the right. Accordingly, action was defined as the right itself on the *war path* or the *right in a dynamic state*. Cf. 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 190 (1874-82).

6. See ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 4 (8th ed. 1960); and in general, NEUNER, PRIVATRECHT UND PROZESSRECHT (1925); BINDER, PROZESS UND RECHT (1927); GOLDSCHMIDT, DER PROZESS ALS RECHTSLAGE (1962).

judicial enforcement.⁷ Obviously, this distinction between "right" and "action" is possible in modern law because there is a firmly established analytical distinction between substantive and procedural law.

In Roman law, however, the distinction between substance and procedure was unknown and the juxtaposition of "right" and "action" almost inconceivable. If we were to explain Roman legal institutions by application of contemporary terminology, we could say that rights were the *posterius* rather than the *prius* in relation to procedural remedies: one had a right if one had a remedy.⁸ Thus, at least during the classical period, the Roman law was a system of *nominated* actions. These actions functioned as *writs*, *i.e.*, as procedural forms available to particular plaintiffs for the enforcement of specifically described claims.⁹

As a result of certain peculiarities of Roman civil procedure, distinction was early drawn between personal and real actions.¹⁰ Personal actions were available, in general, for the enforcement of obligations (which we term "personal" or "relative" rights) and real actions for the protection of real rights and claims deriving from status (which we term "absolute" rights).¹¹ For

7. See 1 BONCENNE, THÉORIE DE LA PROCÉDURE CIVILE 55-56 (1839); 1 BERRIAT SAINT-PRIX, COURS DE PROCÉDURE CIVILE 96 (1858) (*le droit de celui qui actionne est necessairement antérieur a son action*); SATTI, DIRITTO PROCESSUALE CIVILE 93 (4th ed. 1954). Actions, however, do not presuppose a right for their initiation and the commencement of the process. A right is presupposed only where the judge concludes that he must grant relief. See VIZIOZ, ÉTUDES DE PROCÉDURE 36 (1956).

8. See PETER, ACTIO UND WRIT 56 (1957); ARANGIO-RUIZ, ISTITUZIONI DI DIRITTO ROMANO 108 (12th ed. 1954); MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 28 (2d ed. 1949). *Cf.* Chung Han Kim, *Real Actions in Korea and Japan*, 29 TUL. L. REV. 713 (1955): "Presently our view is this: 'A person has a right, therefore the right should be protected legally.' The Roman view was just the opposite: 'In such and such a case one can sue, *i.e.*, has an *actio*, so he has a right.'"

9. See 1 LIEBMAN, MANUALE DI DIRITTO PROCESSUALE CIVILE 34 (2d ed. 1957); REDENTI, DIRITTO PROCESSUALE CIVILE 48 (2d ed. 1957).

10. See 4 GAIUS, INSTITUTES 2-3: "An action in personam is one in which we proceed against someone who is under contractual or delictual obligation to us, an action, that is, in which we claim 'that he ought to convey, to do or answer for' something. An action in rem is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right, such as that of use or usufruct of foot or carriage way, of aqueduct, of raising a building or of view. On the other hand, an action (in rem) denying such rights is open to our opponent." Translation by ZULUETA, THE INSTITUTES OF GAIUS 233 (1946). On Roman civil procedure in general, see WENGER, INSTITUTIONEN DES RÖMISCHEN ZIVILPROZESSRECHTS (1925), English translation by FISK, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE (1940); VON KELLER, DER RÖMISCHE ZIVILPROZESS UND DIE AKTIONEN (1850), French transl. by CAPMAS, DE LA PROCÉDURE CIVILE ET DES ACTIONS CHEZ LES ROMAINS (1870).

11. See Yiannopoulos, *Real Rights in Louisiana and Comparative Law — Part I*, 23 LA. L. REV. 161, 163 (1963).

the purpose of this discussion, analysis may be restricted to the protection accorded to the rights of ownership, the *jura in re aliena*, possession, and quasi-possession.

Ownership was protected mainly by a system of three important real actions: the *rei-vindicatio* ("revendicatory action"), the *actio Publiciana* ("Publician action") and the *actio negatoria* ("negatory action"). In the classical period, the revendicatory action¹² was available to the dispossessed quiritarian owner of a thing against a defendant who had the thing in his possession. The ultimate object of the action was restitution of the thing to the lawful owner, but this object could be achieved only indirectly. The action could be brought under two alternative forms of procedure, *per sponsionem* or *per formulam petitoriam*. Under the first of these forms the judge decided only the question of ownership, without decreeing restoration of the property or its value. If, on the strength of the judicial decision, the defendant elected to restore the thing the proceedings terminated. If the defendant were recalcitrant, plaintiff could bring a personal action for damages in the value of the thing. Under the more prevalent second form, the judge could pronounce an *arbitrium* decreeing specific restitution. The judge also had authority to award fruits and damages to the lawful owner and compensation for expenses to a possessor of good faith. If the defendant did not comply with the decree of restitution, the judge had to pronounce a pecuniary condemnation, namely restitution of the value of the thing.

The revendicatory action lay only against a person who possessed the thing at the time of trial. The defendant could avoid responsibility by transferring possession to a third person. The defendant had also the option not to defend the action, by abandoning the thing to the plaintiff. In such a case, the plaintiff could obtain possession of the thing by an *interdictum quam fundum*, for immovables, and an *actio ad exhibendum*, for movables. These last remedies were available even against a former possessor: the defendant was ordered to discover and produce the thing rather than to restore it. The *actio ad exhibendum* was a personal action; it served as preparatory to the revendi-

12. See 1 HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN 532 (1927); KASER, DAS RÖMISCHE PRIVATRECHT 363 (1955); 1 MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 373 (6th ed. 1947); SCHULZ, CLASSICAL ROMAN LAW 368 (1951); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 308 (17th ed. 1923).

catory action, afforded a remedy in case defendant elected to abandon the thing, and was a substitute for the revendicatory action in case defendant had transferred possession. In the Justinian legislation the revendicatory action was reshaped and evolved as a drastic remedy for the protection of ownership. The *arbitrium* of the judge became an enforceable judgment and was no longer an alternative to a money judgment. The sources, however, indicate the possibility of a pecuniary condemnation and doubts still persist as to the extent the defendant could be compelled to make specific restitution.¹³

In revendicatory proceedings the plaintiff ought to prove his quiritarian ownership by original title or by an unbroken chain of valid transfers from the original owner. This was a hard task, since acquisitive prescription was kept within narrow limits and the law did not protect acquisition in good faith. This proof, styled by medieval jurists *probatio diabólica*, was dispensed with in the *actio Publiciana*.¹⁴ This last action was introduced into the Praetorian Edict by an otherwise unknown Praetor Publicius around the first century B.C. It was available to any possessor who, though not having quiritarian ownership of the thing, was in the process of acquiring such ownership by acquisitive prescription. Thus, if a possessor fulfilled all requirements for acquisition of title by prescription except the time element, the judge was instructed in the formula to determine the case as if plaintiff had completed his prescription and as if the action were a *rei-vindicatio*. Technically, the action was not available against the quiritarian owner of the thing claimed but a possessor protected by the Publician action could, in certain cases, prevail over the quiritarian owner who had sold and delivered the thing without thereby transferring quiritarian ownership.

Neither the revendicatory action or the Publician action afforded protection to the owner in possession whose ownership was disturbed by persons claiming a servitude over the thing. Protection to that effect was afforded by another real action,

13. See SCHULZ, CLASSICAL ROMAN LAW 379 (1951).

14. See BUCKLAND, A TEXT-BOOK OF ROMAN LAW 192 (2d ed. 1932); 1 HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN E 542 (1927); KASER, DAS RÖMISCHE PRIVATRECHT 368 (1955); 1 MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 380 (6th ed. 1947); SCHULZ, CLASSICAL ROMAN LAW 375 (1951); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 320 (17th ed. 1923).

the *actio negatoria*.¹⁵ This action derived its name from the negative expressions employed in the *intentio*, namely, that part of the Praetorian formula in which the cause of action was stated.¹⁶ If the judge were convinced that plaintiff's ownership was unencumbered, he issued an *arbitrium* enjoining further interference. If the defendant failed to comply with the injunction, the judge had to pronounce a pecuniary condemnation against him.

Like ownership, the *jura in re aliena* were protected by a number of nominate actions.¹⁷ The usufructuary had a special action known as *actio de usu fructu* or *vindicatio usus fructus*. This was a real action available against the owner and, later on, against any possessor who could be sued by the revendicatory action. The owner of the thing was protected against claims of usufruct by the possessory interdicts and by the *cautio usufructuaria*. The holder of a servitude was protected by the *vindicatio servitutis* which in the Justinian legislation assumed the name of *actio confessoria*. This real action was available against the owner of the servient estate and apparently against any one interfering with the servitude. Finally, rights of real security were protected by a number of actions bearing such names as *actio fiduciaria directa* or *contraria*, and *actio pignoratitia directa* or *contraria*.

Possession of movables and immovables and the quasi-possession of servitudes were protected in classical Roman law by *interdicta* rather than by real actions.¹⁸ Interdicts were available to any possessor whether he had the right to possess or not; they lay against any one who violated another's possession again without regard to whether or not he had the right to possess. Thus, since the only issue was the fact of possession and disturbance, ownership was not a valid defense. The purpose of the interdicts was to preserve the public peace and order and this

15. See KASER, DAS RÖMISCHE PRIVATRECHT 367 (1955); 1 MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 376 (6th ed. 1947); SCHULZ, CLASSICAL ROMAN LAW 374 (1951); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 317 (17th ed. 1923).

16. Cf. Yiannopoulos, *Real Rights in Louisiana and Comparative Law — Part I*, 23 LA. L. REV. 161, 163 (1963).

17. See KASER, DAS RÖMISCHE PRIVATRECHT 380, 393, 374 (1955); SCHULZ, CLASSICAL ROMAN LAW 389, 396, 426-27 (1951); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 334, 348 (17th ed. 1923).

18. See 1 HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN 472 (1927); KASER, DAS RÖMISCHE PRIVATRECHT 335 (1955); 1 MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 393 (6th ed. 1947); SCHULZ, CLASSICAL ROMAN LAW 444 (1951); SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 276 (17th ed. 1923).

was achieved by summary proceedings. There were several kinds of interdicts in classical law for the recovery, and maintenance in possession, of both movables and immovables. In the Justinian legislation the classical interdicts were converted into actions of two species, bearing the names of *interdictum unde vi*, and *interdictum uti possidetis*. The first was available for the recovery of the possession of immovables. The second was available for the maintenance in possession of immovables and movables. Perhaps due to inadvertence, there was no procedure for the recovery of the possession of movables.¹⁹

B. FRENCH LAW

The classical system of nominate actions has been replaced in modern procedure by a general "right of action" for the enforcement of any protected interest alleged in the petition.²⁰ In such a system, it would seem that the traditional distinction between personal and real actions would be without object and no longer justified.²¹ Yet, this distinction has persisted and still exists in contemporary French law. Article 2262 of the French Civil Code declares that all actions, whether "personal or real," are lost by a thirty-year prescription; and several provisions in the Code of Civil Procedure and in special procedural statutes reflect a differentiation between personal and real actions.²² In addition to this distinction, which is said to depend on the *nature* of the protected interest, actions are divided in France into movables and immovables depending on the *object* of litigation.²³ Article 526 of the French Civil Code

19. See SCHULZ, CLASSICAL ROMAN LAW 453 (1951).

20. See MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 29-42 (2d ed. 1949); PETER, ACTIO UND WRIT 13 (1957). Quite frequently, however, courts and writers employ traditional terminology and refer to particular actions by name (e.g., *revendicatory*, *negatory*, *confessory* and the like). This does not mean a return to the *numerus clausus* of the Roman formulas nor to a system of nominate actions. The fact that certain actions carry a name and still have an apparent individuality has no procedural relevance today. Cf. text at note 37 *infra*.

21. The contemporary civil procedure allows great freedom in the formulation of judicial demands and the non-identification, or incorrect denomination, of an action is no bar to the appropriate relief. The various distinctions and classifications of acts are thus mostly a remnant of the past and are analytically valid only to the extent they correspond to a number of special rules relating to venue and capacity to sue. See text at notes 28-29 *infra*.

22. See FRENCH CODE OF CIVIL PROCEDURE arts. 59, 64, 404; Law of Aug. 16, 1790, tit. IV, arts. 4-6; Law of April 11, 1838, art. 1; Law of July 12, 1905, art. 1; Decree No. 1284 of Dec. 22, 1958, arts. 1, 20.

23. See CUCHE, PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE 37 (12th ed. 1960); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 198, 358 (1874-82);

alludes to this second division and declares that actions relating to the revendication of an immovable are immovables by the object to which they apply.²⁴ Courts and commentators have construed this article broadly to include not only the right of ownership but also all other real rights related to immovables; accordingly, actions for the protection of use, habitation, usufruct, predial servitudes, and emphyteusis, in so far as they relate to immovable property, are classified as immovable real actions.²⁵ These distinctions and classifications of actions are for the most part a remnant of the past; they are "the product of a rather excessive spirit of generalization" and "have no absolute value" in contemporary French law.²⁶ In general, personal actions, whether movable or immovable, and movable real actions are subject to the same procedural rules and only immovable real actions are governed by a number of special rules.²⁷ The traditional distinctions, therefore, have practical importance only in combination, to the extent they establish the category of *immovable real actions*.

In the light of the special rules applicable to immovable real actions the classification of a particular action in this category entails significant legal consequences. This is particularly so for the determination of plaintiff's procedural capacity, the identification of the property in the petition, and the power of defendant to implead a third person as warrantor and withdraw from the proceedings.²⁸ Further, classification is important in the light of rules relating to the appealability of judgments, jurisdiction of courts (*compétence ratione materiae*), and venue (*compétence ratione personae*).²⁹ In immovable real actions ap-

1 GARSONNET ET CÉZAR-BRU, *TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE* 584 (3d ed. 1912) [hereinafter cited as GARSONNET ET CÉZAR-BRU]; 1 GLASSON, TISSIER ET MOREL 475; JAPIOT, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET COMMERCIALE* 73 (3d ed. 1935); MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 58 (2d ed. 1949).

24. See also FRENCH CIVIL CODE arts. 464, 482, 529, and 1428.

25. See CUCHE, *PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE* 38 (12th ed. 1960); 2 DEMANTE, *COURS ANALYTIQUE DE CODE CIVIL* 377 (1896); 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 198, 341 (1874-82); 1 GARSONNET ET CÉZAR-BRU 588-89; 1 GLASSON, TISSIER ET MOREL 489; cf. POTHIER, *INTRODUCTION GÉNÉRALE AUX COUTUMES* No. 50, 1 *OEUVRES DE POTHIER* 15 (1861) ("*actio ad mobile est mobilis, actio ad immobile est immobilis*").

26. MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 58 (2d ed. 1949).

27. *Ibid.* See also notes 28-29 *infra*.

28. See Hébraud, *Real Actions in France*, 29 TUL. L. REV. 673, 675 (1955).

29. See 1 GARSONNET ET CÉZAR-BRU 587, 608; 1 GLASSON, TISSIER ET MOREL at 479; MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 59, 63 (2d ed. 1949).

pealibility is determined by reference to the income produced by an immovable, while in personal and movable real actions the value of the object or right as capital is controlling. In matters involving immovable property the civil courts have exclusive jurisdiction, while in matters involving personal property their jurisdiction may be concurrent with that of administrative courts. Finally, with respect to venue, article 59 of the Code of Civil Procedure declares that personal actions are to be brought before a court at the domicile of the defendant, real actions at the situs of the property, and mixed actions either at the domicile of the defendant or at the situs of the property. The term *real* actions in this article has been narrowly construed to mean *immovable* real actions. This was quite natural because according to nineteenth century notions movables had no situs and followed the person of their owner.³⁰ Since the issue of classification of actions was most frequently raised and discussed in connection with questions of venue,³¹ and real actions in the light of article 59 could be only those relating to real rights related to immovables, a tendency has developed to limit application of the term *real* actions to *immovable* real actions. Thus, language in the Code of Civil Procedure and in special procedural statutes creates the impression that real actions are concerned with the protection of real rights related to immovables and personal actions with the protection of personal rights and real rights related to movables.³² Commentators of the Civil Code and of the Code of Civil Procedure, however, have employed, quite consistently, analytically correct terminology and have dispelled the confusion with the assertion that in the framework of substantive and procedural law the

30. See 1 DEMOLOMBE, *COURS DE CODE NAPOLÉON* 105 (1874-82); 1 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS* 184 (1876). Actions involving determination of personal status were in rem actions in Roman law. However, the venue provision of article 59 concerning real actions could not apply to such actions for the same reason that it could not apply to movable property: status did not have a situs according to nineteenth century notions. Actions for the determination of status, therefore, have been assimilated to personal actions for purposes of venue and are to be brought before the court at the domicile of the defendant. See text at note 124 *infra*.

31. See Hébraud, *Real Actions in France*, 29 TUL. L. REV. 673, 676 (1955).

32. See, *e.g.*, FRENCH CODE OF CIVIL PROCEDURE art. 2 (abrogated by Decree No. 1284 of Dec. 22, 1958, art. 41); Law of May 25, 1838, art. 1; Law of July 12, 1905, art. 1; Law of April 11, 1838, art. 1. This tendency, though confusing, did not involve practical difficulties because personal actions and movable real actions are subject to identical procedural rules, distinct from those applicable to immovable real actions.

term real actions applies to both movable and immovable real actions.³³

The problem of classification of particular actions as personal or real has perplexed the courts and the commentators. As neither the Civil Code nor the Code of Civil Procedure furnishes any criteria for classification, the answer to this problem has been sought in the traditional civilian sources. But the old ways of thinking have undergone changes: whereas the Roman jurists spoke of real and personal *actions*, civilians since the Middle Ages have spoken of real and personal *rights*. Indeed, the distinction of actions into personal and real gave rise to the distinction between personal and real rights; and by a curiously inverted process, this last distinction has been invoked to furnish criteria for the classification of actions as personal or real. It became thus settled in the course of the nineteenth century that real actions relate to the enforcement of real rights and personal actions to the enforcement of personal rights. This solution seemed obvious so long as the distinction between personal and real rights remained unchallenged. Controversies arose over the question whether a particular right, rather than a particular action, was personal or real; the nature of the action depended entirely on the nature of the litigious right.³⁴ But when, as a result of the "personalist" approach, real rights and personal rights came to be regarded as a single category of patrimonial rights with a variable content,³⁵ the distinction between personal and real rights became blurred and seemed to lose its *raison d'être*. The idea was advanced that the notions of real and personal actions had no scientific significance. But it has been retorted that even if the distinction between personal and real rights could no longer be fully acceptable in the framework of substantive law, the distinction between personal and

33. See 2 DEMANTE, COURS ANALYTIQUE DE CODE CIVIL 377 (3d ed. 1896); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 342 (1874-82); 1 GARSONNET ET CÉZAR-BRU 614-615; 1 GLASSON, TISSIER ET MOREL 476, 491; MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 64 (2d ed. 1949).

34. See 1 GARSONNET ET CÉZAR-BRU 588, 597. This conceptual inter-dependence of real rights and real actions has led certain writers to attribute to the real actions characteristics belonging to real rights. Thus, it has been stated that real actions avail against the world while personal actions avail against a particular obligor; and the idea has been pressed that a judgment in a real action has *res judicata* effect against the world whereas a judgment in a personal action has *res judicata* effect only among the parties. See Hébraud, *Real Actions in France*, 29 TUL. L. REV. 673, 675 (1955).

35. See Yiannopoulos, *Real Rights in Louisiana and Comparative Law — Part I*, 23 LA. L. REV. 161, 171-73 (1963).

real actions is still meaningful in the framework of procedural law.³⁶ The two species of actions will be discussed separately.

1. *Real Actions*

Since in spite of doctrinal controversies the nature of most patrimonial rights as personal or real has been settled by the jurisprudence, the nature of the corresponding actions for the enforcement of these rights is no longer an open question. Today, it is a generally accepted proposition that all actions for the protection of the right of ownership, dismemberments of ownership, and real security, are real actions — movable or immovable. Depending on whether protection is afforded to the right itself or only to the possession and quasi-possession, real actions or distinguished into *petitory* and *possessory*.

a. *Petitory Actions*

All petitory actions share the same procedural characteristics. Quite frequently, however, they are designated by traditional names as revendicatory (*action en revendication*) or confessorory actions (*actions confessoire*), negatory (*action négatoire*), depending on whether the purpose is recovery of property, injunction against an attempted exercise of a real right related to plaintiff's immovable, or exercise of a real right related to another's immovable. These names are merely a remnant of the past and do not correspond to any procedural particularism.³⁷ Differences among these various actions are explained as pertaining to the substance of the rights enforced.³⁸

i. *Revendicatory Action*.³⁹ The revendicatory action cor-

36. See CUCHE, PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE 37 (12 ed. (1960)). For differences in procedural theory underlying, respectively, personal and real actions, see 3 IHERING, GEIST DES RÖMISCHEN RECHTS 191 (1871) "[in real action] the defendant does not have to give the thing back; the plaintiff takes it; defendant's forbearance is nothing else than his refraining from revolting against the legal order and authority". This statement by Ihering has been said to justify the distinction between personal and real actions in contemporary French law. See HÉBRAUD, *Real Actions in France*, 29 TUL. L. REV. 673 (1955).

37. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 358 (1874-82); Hébraud, *Real Actions in France*, 29 TUL. L. REV. 673, 678 (1955).

38. Cf. Chung Han Kim, *Real Actions in Korea and Japan*, 29 TUL. L. REV. 713, 714 (1955).

39. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 505 (7th ed. Esmein 1961); 2 CARBONNIER, DROIT CIVIL 223 (1955); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 242 (1959); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 348 (2d ed. Picard 1952); Nerson, *Revendication Nos. 1-72* in ENCYCLOPEDIA DALLOZ, IV RÉPERTOIRE DE DROIT CIVIL (1954).

responds to the Roman *rei-vindicatio*. However, it is a much broader action than its Roman prototype. In principle, it is available to a dispossessed owner against a possessing non-owner and also, by analogy, to the holder of a real right other than ownership for the restitution of this right. As the object of the action is protection of a real right, whether ownership, dismemberments of ownership, or real security, the revendicatory action is distinguishable from personal actions in which plaintiff seeks to enforce a personal right whether bearing on a thing or not.

According to *jurisprudence constante* the revendicatory action for the recovery of corporeal immovable property cannot be lost by liberative prescription.⁴⁰ The ownership of corporeal immovable property can be lost only by acquisitive prescription, in which case the revendicatory action against the new acquirer has no object. The revendicatory action for the recovery of movable property, is, however, subject at most to a thirty-year liberative prescription; the action is of no avail in this case, even if the property has not been acquired by a third person in accordance with the rules of acquisitive prescription.⁴¹ Finally, the revendicatory action for the recovery of a real right other than ownership is lost by the ten-year prescription of non-use. This prescription applies to both movable and immovable real rights.

Revendication of immovables. In revendicatory actions for the recovery of immovable property defendant is the actual possessor. Quite frequently, revendication is preceded by possessory actions which determine the respective position of the parties as plaintiff and defendant. But where the period for bringing the possessory actions has expired, a possessor may bring the revendicatory action against the person who also exercises acts of physical control over the immovable.⁴² The action may be brought against a mere detentor or precarious possessor, but if the latter discloses the true possessor the plaintiff must proceed against him.

40. Req. July 12, 1905, D.1907.1.141, S.1907.1.276. See also 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 349 (2d ed. Picard 1952).

41. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 350 (2d ed. Picard 1952). *But cf.* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 159 (7th ed. Esmein 1961); 2 CARBONNIER, DROIT CIVIL 255 (1955).

42. See Cas., Dec. 4, 1901, S.1904.1.172. *Cf.* Civ., Feb. 22, 1956, D. 1956, Somm. 107.

According to the general principle of article 1315 of the Civil Code, the plaintiff in the revendicatory action must prove his right of ownership in order to recover; it is not sufficient for him to prove that the defendant has no right over the thing.⁴³ Since the ownership of immovable property can be acquired only by a chain of valid transfers from the original owner or by acquisitive prescription, the plaintiff should introduce evidence establishing his acquisition of the right of ownership in either of these ways. However, this direct proof of acquisition by original or derivative title is often difficult and at times impossible (*probatio diabolica*). In the absence of direct proof of the right of ownership, therefore, the courts are satisfied by a showing, with the help of circumstantial evidence and inferences drawn from proven facts (*présomptions*), of a preponderance of probabilities of ownership.

This system of proof revolves around the notions of *possession* and *title*. Where none of the parties has a valid title, *i.e.*, a written instrument evidencing a juridical act sufficient to transfer ownership, preference is given to the one who has civil possession or at least a legally preferable possession (*possession mieux caractérisée*).⁴⁴ The defendant is thus maintained in possession if his possession is sufficient for the acquisition of ownership by acquisitive prescription where his adversary is unable to prove by title or by a completed acquisitive prescription that he is the owner of the immovable. In this case a presumption of ownership is attached to civil possession. If the defendant does not have the kind of possession leading to acquisitive prescription, the plaintiff may obtain restitution by proving either a prior civil possession or circumstances giving rise to inferences of ownership in his favor, such as those arising from recordation or from the payment of land taxes.⁴⁵ In the

43. See Appleton, *De la revendication et de la publicienne en droit français*, 18 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 29 (1889); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 506-13 (7th ed. Esmein 1961); 2 CARBONNIER, DROIT CIVIL 224-26 (1955); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 249-53 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 351-61 (2d ed. Picard 1952).

44. Req., March 29, 1933, S. 1933.1.224; Req., May 27, 1936, Gaz. Pal. 1936.2.353; Req., April 19, 1937, S. 1937.1.368; Req., Oct. 24, 1938, Gaz. Pal. 1938.2.898; Req., April 28, 1941, S.1941.1.128.

45. Req., March 5, 1894, S. 98.1.439; Paris, Nov. 11, 1897, S. 1900.2.105; Req., Aug. 6, 1900, S. 1901.1.397; Req., April 14, 1904, D. 1904.1.247, S. 1905.1.266; Req., Oct. 25, 1911, D. 1913.1.119, S. 1913.1.394; Civ., March 10 1953, 52 REVUE TRIMESTRIELLE DE DROIT CIVIL 124 (1954).

last case any possession is taken into account and not only possession leading to acquisitive prescription.

Where both parties produce titles which derive from a common author, the conflict is resolved by the priority of recordation.⁴⁶ If the titles derive from different authors, the question is decided according to the strength of the documents and the circumstances of the case. Where the possession of the defendant is uncertain, the judge may weigh the inferences invoked by the parties and may find in the priority of titles a basis for decision. Where the defendant's possession is certain, the defendant is entitled to judgment, regardless of the priority of his possession or of his title.⁴⁷ But, as an exception to the rule, plaintiff can prove that his author in title could have prevailed over the defendant, and recover.⁴⁸ Where only the defendant produces title, he is maintained in possession; where only the plaintiff produces title, he recovers if his title is anterior to the defendant's possession.⁴⁹

In revendicatory proceedings title is any act sufficient to establish ownership, without distinction between *translative* and *declaratory acts*.⁵⁰ Thus, judgments and partitions, though declaratory acts, are valid titles. Not only authentic acts but also acts under private signature are titles which may be asserted against third parties. "Title" in this context is not regarded as a contract which, in general, cannot be asserted against third parties⁵¹ but as a *fact* giving rise to an inference of ownership.⁵²

The jurisprudential solutions concerning proof of ownership have been explained as based on the Publician action⁵³ of the Roman law. According to another view, the jurisprudence

46. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 511 (7th ed. Esmein 1961).

47. Civ., Nov. 12, 1907, D. 1908.1.313, Note by Ripert; Montpellier, Feb. 3, 1920, D. 1920.2.73, Note by Ripert.

48. Civ., Dec. 21, 1903, D. 1906.1.175.

49. Civ., June 22, 1864, D. 64.1.412, S. 64.1.349; Req., Nov. 15, 1897, D. 98.1.38, S. 98.1.337, Note by Wahl; Req., Jan. 2, 1907, D. 1907.1.125, S. 1913.1.542; Req., Oct. 24, 1938, Gaz. Pal. 1938.2.898.

50. Civ., Jan. 3, 1905, D. 1908.1.441, S. 1905.1.331. For the purpose of acquisitive prescription, however, an act translative of title is indispensable. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 357 (2d ed. Picard 1952).

51. See FRENCH CIVIL CODE art. 1165.

52. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 359 (2d ed. Picard 1952).

53. See Appleton, *De la revendication et de la publicienne en droit français*, 18 REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE 29, 30 (1889).

may be explained on the ground that ownership is a *relative* right available against particular persons rather than against the world.⁵⁴ This view may explain adequately the decisions of the courts but conflicts with the fundamental precepts of the Civil Code. Perhaps the best explanation is that the system developed by the courts is merely a set of rules of evidence relative to the object of proof: instead of proving his ownership of the immovable, plaintiff merely proves the probability of his ownership.⁵⁵ In order to do so, plaintiff must rebut the probability of ownership arising from the possession of his adversary and must show a preponderance of probabilities in his favor. These rules of evidence have been regarded as rules of customary law; their application, therefore, is subject to revision by the Court of Cassation.⁵⁶

In revendicatory actions courts are frequently asked to allocate fruits produced by the immovable and expenses incurred by the possessor. For the purpose of this allocation the good or bad faith of the possessor is determinative. A possessor in good faith is entitled to keep the fruits he has collected up to the time of initiation of the action.⁵⁷ All other fruits, and all products⁵⁸ of the immovable, are restored to the owner. The possessor in bad faith owes restitution, with interest, of all fruits and products he has collected as well as damages for those he has neglected to collect.⁵⁹

An evicted possessor, regardless of good or bad faith, may have a claim for reimbursement of expenses against the owner.⁶⁰ Necessary expenses, namely those indispensable for the preservation of the immovable, are recoverable in full; useful expenses,

54. See LÉVY, *PREUVE PAR TITRE DU DROIT DE PROPRIÉTÉ IMMOBILIÈRE* 88, 114 (Diss. Paris 1896); *cf. id.*, *Les droits sont des croyances*, 23 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 59 (1924).

55. See 3 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 361 (2d ed. Picard 1952).

56. See Ripert, Note, D. 1908.1.313.

57. See *FRENCH CIVIL CODE*, arts. 549, 550; Civ., May 3, 1869, D. 69.1.254; Civ., Jan. 11, 1887, S. 87.1.225; Civ., Dec. 21, 1903, D. 1908.1.377, S. 1909.1.324; Civ., Dec. 21, 1926, D.H. 1927.84, S. 1927.1.148; Civ., Jan. 8, 1936, S. 1936.1.106.

58. For the distinction between fruits and products see Yiannopoulos, *Introduction to the Law of Things*, 22 *LA. L. REV.* 756, 786 (1962). *Cf. Req.*, Dec. 8, 1836, S. 37.1.76; Civ., April 2, 1878; D. 82.1.353, S. 79.1.261; Civ., April 30, 1890, D. 91.1.367.

59. See Civ., Feb. 9, 1864, D. 64.1.72, S. 64.1.137; *Req.*, July 4, 1882, S. 83.1.105, D. 82.1.353

60. See 2 *AUBRY ET RAU, DROIT CIVIL FRANÇAIS* 515-18 (7th ed. Esmein 1961), 3 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 362 (2d ed. Picard 1952). *Cf. Civ.*, Feb. 1, 1955, D. 1955, *Somm.* 76.

which without being indispensable have augmented the value of the immovable, are recoverable to the extent that there are profits to offset them; and luxurious expenses, made for the gratification of the possessor's personal predilections, are not recoverable in any case.

*Revendication of movables.*⁶¹ The revendication of movables is subject to rules strikingly different from those discussed, as a result of the provisions of articles 2279 and 2280 of the Civil Code. The first of these articles declares that "with respect to movables possession is equivalent to title" (2279, § 1), and, by way of exception to this rule, that the owner of a movable which has been lost or stolen may revendicate it in the hands of any possessor within a period of three years from the date of the loss or theft (2270, § 2). Article 2280, section 1, declares that if the possessor of a thing lost or stolen bought it at a fair, or at a market, or at a public sale, or from a merchant selling such things, the owner of the thing cannot obtain restitution without returning to the purchaser the price he paid.

Article 2279 applies, in principle, to individual *corporeal* movables in commerce; it does not apply, therefore, to universalities of things, things of the public domain, things inalienable by provision of law, and incorporeal movables. Certain corporeal movables subjected to a regime of publicity, like ships and airplanes, are also outside the scope of this article. The revendication of these things does not involve difficulties, because the right of ownership can be ordinarily proved by a title valid against any one. When article 2279 applies, it functions either as a rebuttable presumption of ownership in favor

61. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 147 (7th ed. Esmein 1961); 2 CARBONNIER, DROIT CIVIL 249 (1955); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 363 (2d ed. Picard 1952); SALEILLES, DE LA POSSESSION DES MEUBLES 67 (1907); Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589 (1932). It should be noted that even where article 2279 of the French Civil Code does not apply, resort to the revendicatory action for the recovery of movables is seldom made in practice. These proceedings are lengthy and slow moving and afford the defendant an opportunity to dispose of the thing prior to final adjudication. The *saisie-revendication* (Code of Civil Procedure article 826) has proved a much more effective remedy. The claimant obtains a court order without the knowledge of the defendant, authorizing the seizure of the movable in the hands of a designated person. This leads eventually to a judgment as to the validity of the seizure (Code of Civil Procedure article 831) and to a determination of the rights of the claimant over the thing. Where the claimant is successful, the court orders that the movable be restored to him. See 4 GLASSON, TISSIER ET MOREL, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 466 (3d ed. 1932).

of the possessor, or as a title of acquisition of ownership from a non-owner (*a non domino*), in which case the revendication is excluded.

The presumption of ownership may be invoked by any possessor, whether deriving his possession from a transfer by the original owner or having acquired the possession from a non-owner. It is most frequently invoked by persons asserting ownership of the thing by virtue of a contractual relationship with the original owner or his successors. To give rise to this presumption, the possession of the defendant must be actual, *animo domini*, and free of vice.⁶² The presumption is rebutted where the claimant proves that the possession of his adversary is precarious, equivocal, clandestine, or the result of fraud. In all cases in which the presumption either does not arise or is successfully rebutted, the owner can bring a personal action against the possessor for restitution. The admissibility of a revendicatory action in these circumstances, except for things stolen or lost, has been questioned by certain commentators.⁶³ The jurisprudence, however, is settled that the revendicatory action can be brought, provided that the personal obligation of the possessor to deliver the thing has been preliminarily established.⁶⁴ In the absence of such an obligation the possessor would be in the same position as an acquirer from a non-owner who is entitled to keep the thing on the strength of his title.⁶⁵

Bringing the revendicatory action rather than a personal action for the restitution of movables may involve advantages for the claimant. A depositor or a mandator, for example, may claim a movable either by a personal action founded on contract or by the revendicatory action founded on the right of ownership. By taking the second course, the depositor or mandator avoids the risk of the possessor's insolvency. If there are unpaid creditors, the claimant in the revendicatory action recovers the full value of the thing, while in a personal action, as creditor, he shares with other creditors. Further, there may be instances

62. Any possession is presumed to be *animo domini*. See text at note 68 *infra*. Precarious possessors, however, cannot benefit from this presumption when their very title shows that their possession is not *animo domini*. See Req., April 15, 1890, D. 91.1.388, S. 91.1.342; Civ., Aug. 5, 1890, D. 91.1.21, S. 91.1.343; Req., March 12, 1918, D. 1921.1.148.

63. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 145-57 (6th ed. Martin 1935).

64. See Civ., March 24, 1915, D. 1920.1.143.

65. See notes 67-70 *infra*.

in which a personal action for restitution may not be available and the revendicatory action affords the only remedy. This is so where a movable is possessed precariously by an incompetent, or where the usufructuary and the naked owner of a movable derive their respective titles from a testament rather than a contract. In the first case, the personal action is excluded because the incompetence of the defendant forms an obstacle to the valid creation of an obligation of restitution, and, in the second case, because there is no direct contractual relationship between plaintiff and defendant.⁶⁶

In the absence of any contractual relationship between the possessor of the movable and the original owner or his successors establishing an obligation of restitution, the possessor may invoke article 2279 to show a *title* of acquisition of ownership by transfer from a non-owner. This exception to the maxim "no one can transfer a greater right than he himself has" has been established in the interest of the security of transactions. In order to benefit from article 2279, the possessor must be in good faith and have actual possession. Good faith is, however, presumed;⁶⁷ this means that the burden of proof of bad faith is placed on the claimant of the movable. The possession must be *animo domini*, which again is presumed.⁶⁸ According to a settled, though perhaps questionable, interpretation of article 2279, the possession must also be continuous, peaceable, public, and unequivocal.⁶⁹ It is not necessary for the possessor to have just title. Where the requisite conditions are met, the possessor is held to be owner of the thing by virtue of the title he claims and the revendicatory action necessarily fails. Where these conditions are not met, the revendicatory action succeeds and the claimant obtains judgment. The action against the third possessor who cannot benefit from article 2279 is subject to the thirty-year liberative prescription.⁷⁰

There is much disagreement in France about the theoretical foundation of the rule of article 2279, section 1. According to one view which prevailed in the past, the possessor acquires

66. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 377-78 (2d ed. Picard 1952).

67. Req., Nov. 21, 1927, D.H. 1927.553.

68. Civ., Aug. 5, 1890, D. 91.1.21, S. 91.1.343; Req., March 12, 1918, D. 1921.1.148.

69. Cf. 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, *TRAITÉ DE DROIT CIVIL* 266 (1959).

70. See note 76 *infra*.

title by an instantaneous acquisitive prescription.⁷¹ This idea conflicts with the nature of acquisitive prescription as a method of acquiring ownership by the lapse of time. According to a second view, article 2279, section 1, establishes an irrebuttable presumption of ownership, namely a presumption which does not permit evidence of ownership in the claimant. Thus, as to instances in which article 2279, section 1, applies, personal actions may be available, but not the revendicatory action.⁷² According to a third view, article 2279, section 1, establishes merely a method of acquisition of ownership *ex lege*; consequently, the revendication is excluded only in instances in which the conditions set out by the law for acquisition of ownership are met.⁷³ Finally, according to a fourth view, the function of the rule may be explained as a method of acquisition of ownership *ex lege* where the rule is invoked by a third possessor against a dispossessed owner, and as a rebuttable presumption of ownership where the rule is invoked by a possessor deriving his possession from the owner or his successors.⁷⁴

Since article 2279, section 1, does not apply to movables lost or stolen, the possessor of such movables, whether thief, finder, or subsequent acquirer, has no standing to claim that he acquired ownership; accordingly, revendication of these movables is possible according to the provisions of articles 2279, section 2, and 2280, section 1. Theft includes fraudulent dispossession, but not dispossession as a result of abuse of confidence or violation of contract.⁷⁵ Loss may be the result of fortuitous events, irresistible force, or mere negligence. The revendicatory action may be brought by the owner, possessor *animus domini*, pledgee, or depositary of a movable against the actual possessor or detentor, and also against one who transferred possession in order to avoid revendication. The detentor may name the person for whom he possesses and thus avoid litigation. The action against

71. See 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 263 (1959); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 535 (1874-82); 12 MARCADÉ, EXPLICATION DU CODE CIVIL 353 (1874).

72. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 147 (6th ed. Bartin 1935); Planiol, Note D. 92.2.441.

73. See SALELLES, DE LA POSSESSION DES MEUBLES 185-91 (1907). Cf. 1 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 264 (1959).

74. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 388 (2d ed. Picard 1952).

75. See Req., Nov. 21, 1877, S. 78.1.407; Civ., March 25, 1891, S. 91.1.469; Civ., June 19, 1928, D.H. 1928.448; Tr. Civ. Seine, Jan. 10, 1941, D.H. 1941.93, Gaz. Pal. 1941.1.85.

the thief, against the finder, and against subsequent acquirers in bad faith is lost by a thirty-year liberative prescription.⁷⁶ In addition to the revendicatory action, the owner of a stolen thing has against the thief a personal action which prescribes in either three or ten years depending on the characterization of the theft as simple or aggravated.⁷⁷ The action against subsequent acquirers in good faith of a thing lost or stolen prescribes in three years. This prescription is an extinctive delay rather than either liberative or acquisitive prescription.⁷⁸ Upon the lapse of the three years the acquirer becomes owner *ex lege* and his legal situation is the same as that of a possessor protected by article 2279, section 1. The revendication of lost or stolen titles to the order of the bearer is subject to special rules.⁷⁹

ii. Negatory Action. In addition to the revendicatory action, the owner of an immovable has at his disposal a *negatory* action fashioned after the Roman prototype.⁸⁰ The object of this action is the determination of the validity of claims concerning the existence and scope of a servitude on the immovable. The action is available against any person claiming a *right* of servitude. Ownership is presumed to be free of burdens; accordingly, the owner need prove his ownership only. The burden is on his adversary to prove the existence and scope of the servitude.⁸¹ The action may be brought even if defendant obtained judgment in his favor in a possessory action. Attempted exercise of a servitude without right can be enjoined only by a possessory action.⁸²

iii. Confessory Action. The holder of a servitude has against the owner of the servient estate a *confessory* action, corresponding to the Roman *actio confessoria*.⁸³ Object of the action is the recognition of the existence, and determination of the scope, of a servitude. This, in effect, is revendication of a servitude,

76. See Civ., Feb. 7, 1910, D. 1910.1.201, Note by Nast; S. 1910.1.225, Note by Lyon-Caen. Cf. FRENCH Civil Code, art. 2262; text at note 41 *supra*.

77. See CODE D'INSTRUCTION CRIMINELLE arts. 637 and 638 (1908); FRENCH CODE OF PENAL PROCEDURE art. 7 (1957).

78. See Trib. Civ. Seine, Jan. 23, 1950. Gaz. Pal. 1950.1.143.

79. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 164 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 397 (2d ed. Picard 1952).

80. See Civ., June 23, 1890, D. 90.1.289, S. 93.1.519; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 519 (7th ed. Esmein 1961).

81. See Agen, Nov. 23, 1857, S. 57.2.769.

82. See Civ., June 23, 1890, D. 90.1.289, S. 93.1.519; text at note 98 *infra*; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 973 (2d ed. Picard 1952).

83. Cf. text at note 15 *supra*.

and rules applicable to the revendicatory action apply by analogy to the confessorary action. In case his action is successful, the holder of the servitude may demand that the exercise of his right be secured by an *astreinte*.⁸⁴ Holders of real rights other than servitudes on both movables and immovables have in certain cases for the protection of their rights a quasi-confessorary action (*action confessoire utile*).⁸⁵

b. Possessory Actions

The possession of immovable real rights is protected in France by a system of distinct real actions, the *complainte*, *dénonciation de nouvel oeuvre*, and *réintégrande*.⁸⁶ These possessory actions are the result of a combination of Germanic institutions with Roman law and canon law remedies. Distinct possessory protection is excluded in the case of movables by article 2279 of the Civil Code, which renders the issue of possession inseparable from the issue of ownership.⁸⁷ Since possession can be exercised only on individual objects, possessory protection cannot be accorded to universalities.⁸⁸ Object of the possessory actions is the elimination of disturbances or the recovery of a lost possession. Exclusive competence *ratione materiae* and jurisdiction *ratione personae* is vested in the *juge d'instance* at the location of the immovable, and, upon appeal, in the Court of Appeal at the same location.⁸⁹

Possessory actions cannot be cumulated with petitory actions (Code of Civil Procedure, article 25). A judgment obtained in

84. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 967 (2d ed. Picard 1952).

85. *Id.* at 767; Civ., March 5, 1850, D. 50.1.78, S. 50.1.377.

86. See 1 GARSONNET ET CÉZAR-BRU 685; 1 GLASSON, TISSIER ET MOREL 494; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 192 (2d ed. Picard 1952).

87. See 2 AUBRY ET RAU, *DROIT CIVIL FRANÇAIS* 178 (7th ed. Esmein 1961). *But cf.* MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 65 (2d ed. 1949). In the rare cases in which article 2279 does not apply, ownership rights and rights to the possession of movables are ordinarily determined in *saisie-revendication* proceedings. See CUCHE, *PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE* 40 (12th ed. 1960); note 61 *supra*.

88. See 1 GARSONNET ET CÉZAR-BRU 661; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 193 (2d ed. Picard 1952). For the notion of universalities, see Yiannopoulos, *Introduction to the Law of Things*, 22 LA. L. REV. 756, 781 (1962).

89. Decree No. 1284 of Dec. 22, 1958, arts. 7, 35. Prior to this enactment exclusive competence *ratione materiae* and jurisdiction *ratione loci* was vested in the *Justice of the Peace* at the location of the immovable, and upon appeal, at the Court of the First Instance at the same location. See Law of May 25, 1838, Art. 6; Law of July 12, 1905, Art. 7; FRENCH CODE OF CIVIL PROCEDURE, Art. 3.

a possessory action, therefore, cannot prejudice the question of ownership, nor can the right to possess be determined by reference to the right of ownership.⁹⁰ The judge cannot dismiss the complaint on the ground that the action of the defendant was the exercise of a right, nor can he relegate the parties to another court for the determination of the question of ownership. The judge must award possession to the person entitled to it, but he cannot confer a new right on the possessor. The judgment ought to be grounded primarily on material acts of enjoyment, and only in the absence of such acts may the judge examine titles produced by the parties in order to determine the nature of the parties' alleged possession.⁹¹ Where the validity of the titles produced is contested, the powers of the judge vary with the circumstances.

The parties in possessory proceedings can bring an action for the protection of ownership only after the question of possession is determined and they have fully complied with the judgment.⁹² This rule constitutes a dilatory exception.⁹³ The plaintiff in a petitory action is precluded from bringing a possessory action before determination of the question of ownership (Code of Civil Procedure, article 26). By bringing a petitory rather than a possessory action the plaintiff does not concede possession to his adversary, but he is considered to have tacitly renounced his right to bring a possessory action for disturbances preceding the initiation of the petitory action.⁹⁴ The defendant in the petitory action is free to bring a possessory action, whether he has been disturbed in his possession before or after the initiation of the action against him.⁹⁵ The judgment in a possessory action does not have a *res judicata* effect in subsequent proceedings for the determination of the question

90. See Civ., March 14, 1883, D. 83.1.445, S. 83.1.248; Civ., June 14, 1898, D. 1904.1.199; Civ., March 22, 1899, D. 1905.1.245; Req., April 13, 1932, Gaz. Pal. 1932.2.60; Civ., April 9, 1946, D. 1946.285.

91. See Civ., March 6, 1882, D. 83.1.104; Civ., March 14, 1883, D. 83.1.445; Civ., March 12, 1913, D. 1913.1.192; Req., Oct. 17, 1928, D.H. 1928.509; Civ., May 26, 1930, S. 1930.1.302; Trib. Civ. Seine, March 21, 1956, D. 1957, Somm. 8; Civ., Jan. 28, 1959, D. 1959.104.

92. See FRENCH CODE OF CIVIL PROCEDURE art. 27. This article mentions only the "defendant." According to a settled jurisprudence, however, it applies likewise to the plaintiff. Cf. Req., April 26; 1892, D. 93.1.121, S. 92.1.408.

93. See Req., Nov. 13, 1894, S. 96.1.122

94. See Civ., Nov. 15, 1865, D. 66.1.116, S. 66.1.97; Civ., Jan. 15, 1894, D. 94.1.159; Civ., July 7, 1937, Gaz. Pal. 1937.2.678; Req., Oct. 18, 1937, Gaz. Pal. 1937.2.795.

95. See Req., Dec. 16, 1874, D. 75.1.103, S. 75.1.64; Civ., Aug. 5, 1845, S. 46.1.46; Req., April 19, 1869, S. 69.1.265.

of ownership.⁹⁶ The person to whom possession is awarded is, however, entitled to keep the fruits produced by the immovable until the initiation of the revendicatory action. Possessory actions must be brought within a year from the day of disturbance or dispossession (Code of Civil Procedure, article 23). The term is in the nature of an extinctive delay and runs against minors and incompetents. In case of a factual disturbance the delay starts to run from the day on which the acts of adverse possession are performed, and in case of a legal disturbance from the day on which a juridical act contradicting plaintiff's possession is completed.⁹⁷

i. *Complainte and Dénonciation de Nouvel Oeuvre.* The *complainte* is brought by a possessor disturbed in the exercise of his possession.⁹⁸ The *dénonciation de nouvel oeuvre* is a variation of the *complainte*, subject to a number of specific rules. Both actions are available to the holder of a real right on an immovable, if his right is susceptible of possession. Property of the public domain is insusceptible of possession by private persons; therefore, immovables of the public domain cannot be the object of either of these possessory actions brought against the state or a political subdivision. On the other hand, the state, its political subdivisions, and concessionaries of property of the public domain have the quasi-possession of an administrative real right and enjoy against usurpers the benefit of possessory protection.⁹⁹ Property of the private domain is susceptible of possession and is protected by the possessory actions in the same measure as immovable property held by private persons. Discontinuous non-apparent servitudes, unless they are founded on title, are considered to be rights insusceptible of possession,¹⁰⁰ and, accordingly, outside the scope of

96. Req., Jan. 26, 1869, D. 71.1.207; Req., June 19, 1889, D. 89.1.337.

97. See FRENCH CODE OF CIVIL PROCEDURE art. 23; Law of May 25, 1838, art. 6; Civ., June 27, 1864, D. 64.1.336, S. 64.1.334; Civ., Aug. 18, 1880, D. 81.1.451, S. 82.1.398; Civ. Dec. 16, 1929, Gaz. Pal. 1930.1.304; Req., Dec. 18, 1899, D. 1900.1.131.

98. See 1 GARSONNET ET CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 631, 640 (3d ed. 1912); 1 GLASSON, TISSIER ET MOREL, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 501 (3d ed. 1925); MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 68 (2d ed. 1949); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 203 (2d ed. Picard 1952). Cf. Law of May 25, 1838, Art. 6; Law of July 12, 1905, Art. 7.

99. See Civ., Dec. 31, 1855, S. 56.1.209; Req., Jan. 9, 1872, D. 72.1.41, S. 72.1.225; Req., June 13, 1892, S. 93.1.196; MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 67 (2d ed. 1949).

100. See Req., Dec. 26, 1865, S. 66.1.65; Civ., Dec. 6, 1871, S. 72.1.27; Civ.,

possessory protection. In this context, however, the word title has been construed broadly to include an apparent title based on a legal provision or a *destination du père de famille*.¹⁰¹

Disturbance is any voluntary act adverse to one's possession infringing either on actual possession or on the right to possess.¹⁰² Damage, though it may give rise to personal action for restitution, does not necessarily constitute a disturbance. The disturbance may be either factual or legal; factual disturbance is a material act of aggression against another's possession, and legal disturbance is a juridical act contradicting one's right to possession.¹⁰³ In case the disturbance is merely an abuse or violation of a contractual obligation, the proper remedy is a personal or real action for the delivery of the thing, and not a possessory action.¹⁰⁴ The disturbance may be a partial or complete dispossession. If the dispossession is the result of violence, the proper remedy is the *réintégration*.¹⁰⁵ Where the disturbance results from public works the administrative courts have exclusive jurisdiction, but if the disturbance amounts to expropriation the civil courts have jurisdiction to determine the issue of possession and the power to enjoin the continuation of the works. Where private works are executed with the permission of the administrative authorities, the general rules apply and the civil courts have jurisdiction as well as the power to order the destruction of the works.

A possessor may bring the *complainte* or the *dénonciation de nouvel oeuvre* only if he has possessed the immovable for at least one year preceding the disturbance.¹⁰⁶ The acquisition of possession may have been accomplished at any time in the past and not necessarily in the year preceding the disturbance, since

June 26, 1888, D. 88.1.308; Req., July 9, 1918, S. 1920.1.115; Req., May 2, 1919, S. 1920.1.184; Civ., March 13, 1950, D. 1950.415; Dec. 20, 1955, D. 1956.214.

101. See FRENCH CIVIL CODE art. 694; Civ., June 17, 1885, S. 86.1.72; Civ., July 13, 1885, D. 86.1.316.

102. See Civ., Nov. 27, 1895, D. 96.1.247; Civ., Dec. 17, 1912, D. 1913.1.72, Req., Feb. 17, 1914, D. 1917.1.194; Req., Jan. 4, 1925, Gaz. Pal. 1925.1.509; cf. Civ., Jan. 11, 1910, D. 1911.1.312; Civ., July 19, 1911, D. 1913.1.316; Req., Oct. 29, 1924, S. 1925.1.8; Civ., May 5, 1925, D.H. 1925.427.

103. See Civ., Jan. 11, 1910, S. 1910.1.318; July 19, 1911, S. 1915.1.12. Cf. Civ., June 14, 1948, Gaz. Pal. 1948.2.69.

104. See Req., Nov. 17, 1847, D. 48.1.39, S. 48.1.305; Req., June 13, 1904, D. 1906.1.188; Civ., Oct. 20, 1914, D. 1916, 1.188, S. 1915.1.8; Req., Oct. 21, 1929, Gaz. Pal. 1929.2.785; Civ., Jan. 18, 1949, S. 1950.1.147.

105. See text at note 112 *infra*.

106. Civ., Feb. 24, 1953, D. 1953.301; FRENCH CODE OF CIVIL PROCEDURE art. 23. See Civ., April 17, 1894, and March 7, 1898, S. 98.1.516.

possession, once acquired, continues until voluntary abandonment. The plaintiff's possession must be free of vice: it must be continuous, peaceable, public, unequivocal, and not precarious.¹⁰⁷ A simple tenant, therefore, cannot bring these actions. The plaintiff has the burden to prove his one year's possession; in that regard, he may tack his possession to that of his ancestors.¹⁰⁸ Both actions may be brought against the author of the disturbance and his heirs. If the defendant has acted for another person, he must name that person and implead him as a warrantor. Insofar as the object of these actions is the restoration of a pre-existing state of affairs, any person possessing the immovable may be sued, whether in good or bad faith and whether a successor by universal or by particular title. Damages, however, may be awarded against such persons only if their bad faith is proved.¹⁰⁹

The judge may decree the removal of the disturbance but he cannot confer new rights on the plaintiff. He may order the destruction of works after expiration of a delay granted to the defendant in order to bring the revendicatory action. The judge may also award damages and impose an *astreinte*.¹¹⁰ In case the judge is satisfied that both parties are in partial possession, he may decree the preservation of the *status quo* or grant provisory possession to one of the parties with obligation to account after determination of the question of ownership.

Special rules applicable to the *dénonciation de nouvel oeuvre* are derived from the purpose to be served by the action, namely the suspension of works which, if completed, would constitute a disturbance. Prerequisites of this action are that the works are erected on the land of defendant and that they have not been completed at the time of initiation of the action.¹¹¹ The judge has authority to decree suspension of the works but not their destruction. His judgment does not have the force of res judicata in subsequent proceedings.

107. See Civ., Jan. 11, 1950, D. 1950.125, Note by Lenoan. Cf. Req., Dec. 13, 1904, D. 1905.1.194.

108. See Civ., March 27, 1929, S. 1929.1.207.

109. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 210 (2d ed. Picard 1952).

110. See Req., March 12, 1900, D. 1900.1.284; Req., July 18, 1900, D. 1902.1.191.

111. See Req., Feb. 4, 1856, D. 56.1.296, S. 56.1.433; Civ., April 7, 1875, D. 75.1.381; Req. civ., Feb. 21, 1910, D. 1912.1.65, S. 1913.1.385. Cf. CUCHE, PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE 47 (12th ed. 1960).

ii. Réintégrande. This is a distinct action available to any person evicted from an immovable by violent acts.¹¹² It protects any possessor and detentor having physical control of an immovable or of a real right susceptible of possession.¹¹³ The control must be actual, peaceable, and public;¹¹⁴ *animus domini* is not required. Accordingly, the action may be brought by a simple tenant.¹¹⁵ The acts of violence must have occurred on the land of plaintiff and must have resulted in actual eviction. Possession of one year prior to violence is not a prerequisite for this type of protection.¹¹⁶ This action is much broader than the other two possessory actions since it protects one having physical control and not only one having legal possession. The action is available only against the author of the violent acts and his heirs, and, in that regard, it resembles personal actions. The judge has power to decree restitution of the immovable or restoration of the previous state of affairs. The judge may also decree the destruction of works and award damages. The judgment does not have a *res judicata* effect in a subsequent *complainte* or *dénonciation de nouvel oeuvre*. The jurisprudence is firmly settled that the *réintégrande* may be joined with the other two possessory actions.¹¹⁷

2. Personal Actions

Personal actions have been defined as those available for the enforcement of personal rights.¹¹⁸ Actions deriving from the contract of lease, the revocatory actions of creditors,¹¹⁹ and

112. See 1 GARSONNET ET CÉZAR-BRU, *TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE* 641, 629, 644-79 (3d ed. 1912); 1 GLASSON, TISSIER ET MOREL, *TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE* 520 (3d ed. 1925); MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 71 (2d ed. 1949); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 212 (2d ed. Picard 1952). *Cf. Civ.*, May 13, 1952, D. 1952.775 (violence not indispensable).

113. See *Civ.*, Feb. 14, 1912, D. 1913.1.176, S. 1912.1.132 (tenant).

114. See *Civ.*, April 7, 1958, D. 1958. Somm. 124.

115. See *Civ.*, May 21, 1928, S. 1928.1.246; May 13, 1952, D. 1952.775; Lyon, Jan. 6, 1953, S. 1953.2.93, Note by Laurent.

116. *Req.*, March 1, 1932, *Gaz. Pal.* 1932.1.790.

117. See *Civ.*, Aug. 4, 1913, D. 1917.1.66.

118. See 1 GARSONNET, ET CÉZAR-BRU, *TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE* 596 (3d ed. 1912); 1 GLASSON ET TISSIER, *TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE* 477 (3d ed. 1925); JAPIOT, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET COMMERCIALE* 79 (3d ed. 1935); MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 59 (2d ed. 1949). The determination of the nature of the action is thus a matter of substantive law. *Cf. Hébraud, Real Actions in France*, 29 *TUL. L. REV.* 673, 678 (1955).

119. See *Civ.*, July 30, 1884, D. 85.1.62. *But cf. Civ.*, July 6, 1925, D. 1926. 1.25, Note by Cremieu; Grenoble, March 2, 1875, D. 77.2.208 (mixed action).

actions for the recovery of future things are regarded as personal because the rights enforced are personal rights. Determinative is the nature of the right exercised by the plaintiff. Thus, the same action may be personal for one of the parties and real or mixed for the other. In contracts of sale, the vendor's action for the recovery of the price of an immovable is personal,¹²⁰ while the purchaser's action for the delivery of the immovable sold is mixed.¹²¹ As personal rights are frequently connected with, and derived from, real rights, the source of the right exercised is also taken into account. Accessory claims of a personal nature attached to a real action do not change its nature. Thus, a claim for damages accessory to an action for the delivery of an immovable does not affect the classification of the action as real; but a principal action for the recovery of damages deriving from the violation of one's ownership rights is a personal action.¹²²

The classification of certain actions involving enforcement and protection of rights whose nature is controversial is still unsettled. This is so in the case of actions to protect patents, trade marks, and copyrights. The classification of these actions, however, involves only a theoretical problem, because statutory provisions regulate expressly the most important question of venue.¹²³ Actions for the recovery of an entire estate were regarded as real actions in the nineteenth century; contemporary commentators, however, classify these actions, as all actions for the recovery of a universality, as personal.¹²⁴ Finally, actions for the determination of status are assimilated to per-

120. See Civ., March 5, 1850, D. 50.1.102; Amiens, Jan. 7, 1948, D. 1948.1.121. The vendor's resolatory action for non-payment of the purchase price is likewise a personal action. Cf. Aix, March 18, 1903, D. 1904.2.252, S. 1903.2.121, Note by Naquet; Paris, Oct. 14, 1911, D. 1912.2.310.

121. See Req., May 31, 1837, S. 37.1.631; Montpellier, Nov. 18, 1921, D. 1922.2.121. In general actions in nullity for lack of requisite form or vices of consent, actions in resolution on account of lesion, and actions for the revocation of donations are *personal* actions when they are brought by the vendor or donor against the purchaser or donee. The same actions, however, may be classified under certain circumstances as *mixed*, and when they are brought against subsequent acquirers, as *real*. See MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 62 (2d ed. 1949).

122. See Civ., Aug. 28, 1877, D. 78.1.213.

123. See DESBOIS, LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 54, 187 (1953); 1 ROUBIER, LE DROIT DE LA PROPRIÉTÉ INDUSTRIELLE 88, 147, 438-42 (1952).

124. See JAPIOT, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET COMMERCIALE 83 (3d ed. 1935). Cf. MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 60 (2d ed. 1949).

sonal actions for procedural purposes, although according to accurate analysis they are neither personal nor real.¹²⁵

3. *Mixed Actions*

Personal and real rights are at times so closely interwoven that determination of the nature of a legal relationship, and proper classification of the corresponding action as personal or real, become increasingly difficult matters. In order to minimize this difficulty, article 59 of the Code of Civil Procedure has established the analytical category of (immovable) mixed actions.¹²⁶ These actions may be brought at the option of the plaintiff either at the situs of the immovable property (as if they were real actions) or at the domicile of the defendants (as if they were personal actions). Since, ordinarily, it is in the interest of the plaintiff to bring his action at the situs of the immovable rather than at the domicile of the defendant, the category of mixed actions actually tends to broaden the scope of the *forum rei sitae* by the inclusion of certain actions of controversial nature. Further, it tends to secure a measure of flexibility in the application of the venue provisions by discouraging potential disputes over the accuracy of classification. When the defendant challenges the propriety of venue at the situs of the immovable, the courts, quite naturally, are able to uphold their jurisdiction *ratione personae* with the assertion that the action is "real or at least mixed."¹²⁷

In the absence of a legislative definition, the Court of Cassation has declared mixed actions to be those "which involve, simultaneously, a controversy as to a real right and a personal right so that the judicial decision . . . as to the existence of the per-

125. See CUCHE, PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE 36 (12th ed. 1960); Bordeaux, Oct. 28, 1947, Gaz. Pal. 1948.1.74.

126. Mixed actions are either movable or immovable. The movable mixed actions constitute a category of merely theoretical interest: these actions are to be brought along with movable real actions and personal actions, whether movable or immovable, before the court at the domicile of the defendant. The category of immovable mixed actions, however, involves practical interest in the light of the venue option granted to plaintiff by Article 59 of the Code of Civil Procedure. See CUCHE, PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE 38 (12 ed. 1960); 1 GARSONNET ET CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 597 (3d ed. 1912); 1 GLASSON ET TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 480 (3d ed. 1925); MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 60 (2d ed. 1949).

127. Paris, Feb. 11, 1931, Gaz. Pal. 1931.1.630, 30 REVUE TRIMESTRIELLE DE DROIT CIVIL 645 (1931), Note by Japiot. Cf. McMahon, *Jurisdiction under the Louisiana Code of Civil Procedure*, 35 TUL. L. REV. 501 (1961).

sonal right will also resolve the question of the existence of the real right."¹²⁸ According to this definition mixed actions are, in general, those brought for the performance of juridical acts involving transfer of ownership or creation of real rights on immovables,¹²⁹ as well as those brought to secure the annulment, rescission, resolution, or revocation of such juridical acts.¹³⁰ The nature of actions for the partition of estates comprising both movables and immovables,¹³¹ boundary actions,¹³² and actions for the enforcement of real security rights¹³³ remains undetermined, and the classification of these actions as mixed, controversial.

The notion of mixed actions as an analytical category has

128. Civ., July 6, 1925, D. 1926.1.25, Note by Crémieu, S.1925.1.159. See also 12 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 70 (5th ed. Bartin 1922).

129. See Req., May 12, 1926, S.1926.1.211; Montpellier, Nov. 18, 1921, D. 1922.2.121; Dax, June 15, 1922, D.1923.2.197. The courts have held that the action of the purchaser of an immovable against the vendor for the performance of the contract of sale is a mixed action where the ownership of the immovable has been transferred to the purchaser. In this case the purchaser exercises simultaneously a real action based on his ownership and a personal action based on the contract of sale. See Req., May 31, 1837, S.37.1.631; Rouen, March 2, 1899, D. 99.2.285; Trib. Civ. Seine, June 11, 1913, Note by Japiot, 17 REVUE TRIMESTRIELLE DE DROIT CIVIL 159 (1918); Dax, June 15, 1922, *supra*; Req., May 12, 1926, *supra*. If ownership has not been transferred, the action of the purchaser is personal. Cf. Aix, March 18, 1903, D.1904.2.252, S.1903.2.121, Note by Naquet. The courts have also held to be mixed actions those brought for the removal of unauthorized constructions (Paris, Feb. 11, 1931, Gaz. Pal. 1931.1.630), and those brought against the co-owner of an immovable for contribution to the maintenance of the property held in common (Chambéry, Nov. 22, 1892, Gaz. Pal. 93.1.44). Cf. Paris, Nov. 25, 1885, D.86.2.189; Orléans, Nov. 13, 1856, D.57.2.76; Trib. Civ. Evreux, Jan. 29, 1954, Gaz. Pal. 1954.1.248, Note by Hébraud et Raynaud, 52 REVUE TRIMESTRIELLE DU DROIT CIVIL 360 (1954).

130. See Civ., April 8, 1862, D.62.1.332; Nancy, June 10, 1871, S.71.2.130; Req., June 29, 1899, D.1900.1.316; Civ., July 6, 1925, D.1926.1.25, Note by Crémieu, S.1925.1.159; Paris, March 8, 1939, D.H.1939.278.

131. For the proposition that partition and boundary actions are mixed actions, see 12 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 8 (5th ed. Bartin 1922); Paris, Nov. 22, 1838, S.39.2.210; Colmar, Dec. 27, 1848, D.50.5.12. *But cf.* 1 GARSONNET ET CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 592 (3d ed. 1912) (real actions); JAPIOT, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET COMMERCIALE 80 (3d ed. 1935) (personal actions).

132. Cf. note 131 *supra*. The Court of Cassation has held that boundary actions are real rather than mixed actions. Req., Feb. 4, 1885, S.1886.1.212; Civ., Dec. 15, 1885, S.86.1.156. The controversy as to the nature of boundary actions and actions in partition is merely theoretical because special rules in the Civil Code, the Code of Civil Procedure, or in special legislation regulate the questions of venue and competence *ratione materiae*. See MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 60 (2d ed. 1949).

133. According to the best view these actions should be classified as either personal or real depending on the right exercised by the plaintiff. The hypothecary action for the foreclosure of a mortgage involves the exercise of a real right and has been held to be a real action. See Civ., Dec. 21, 1859, D.60.1.29; Req., June 3, 1863, D.64.1.217; Req., March 21, 1894, D.94.1.455. On the other hand the action against the mortgage debtor for the payment of the debt without foreclosure, being the exercise of a personal right, has been correctly classified as a personal action. See Civ., Jan. 7, 1874, D.74.1.13; Amiens, Nov. 9, 1909, S.1910.2.111.

given rise to doctrinal controversies and the question has been asked how there can be mixed actions when there are no mixed rights.¹³⁴ The Court of Cassation has explained that mixed actions involve the exercise of two distinct rights, and thus the joinder of two distinct actions, one personal and one real.¹³⁵ Commentators suggest that in mixed actions there is a joinder of two distinct demands¹³⁶ in a single action.¹³⁷

In the light of the preceding analysis it is apparent that real actions and real rights are related concepts in French law, although their relationship is one of correspondence rather than filiation. Real actions are not indispensable correlatives of real rights; indeed, according to certain commentators, real rights related to movables are protected by personal rather than real actions. But the classification of a given right as an immovable real right determines the nature of the corresponding action for its protection. In France, these immovable real actions display a number of distinct procedural characteristics and are subject to a number of specific rules, the most important of which concern venue. Possessory actions are regulated by the Code of Civil Procedure, whereas actions for the protection of ownership and its dismemberments are regulated in part by the Civil Code and in part by rules developed by the courts following traditional sources.

C. LOUISIANA

Soon after the Louisiana Purchase, Edward Livingston was appointed to draft a Code of Procedure for the Territory of Orleans, and the draft he produced was adopted as law in 1805 under the title "An Act regulating the practice of the Superior Court in civil causes."¹³⁸ The cardinal feature of this act was

134. According to the classical doctrine action is "the right itself in movement." See note 5 *supra*. This complete assimilation of *right* and *action* explains the conceptual difficulty involved in the establishment of the category of mixed actions. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTIONS DES BIENS 349 (1874-82).

135. See Civ., July 6, 1925, D. 1926.1.25, Note by Crémieu, S. 1925.1.159.

136. See 1 GARSONNET ET CÉZAR-BRU, TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE 599 (3d ed. 1912).

137. MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 61 (2d ed. 1949). The author suggests that "*in reality there are no mixed actions* but merely proceedings which involve two demands: a personal demand against the vendor and a real demand founded on the right of ownership of the purchaser for the delivery of the immovable, the second demand being subordinated to the success of the first. Because of the existence of these two interrelated demands the plaintiff has the choice of venue either at the domicile of the defendant or at the situs of the immovable."

138. LAWS OF THE TERRITORY OF ORLEANS, ch. XXVI, p. 210, § 1 (1805): "All suits in th Superior Court shall be commenced by petition, addressed to the

the adoption of one form of action for all cases. There was no distinction in the act between personal and real actions, and no mention of petitory and possessory actions. It thus became settled law that "the petition need only state facts, and that the courts will give the relief to which those facts show that the petitioner is entitled under the law."¹³⁹

The Spanish laws prevailing in Louisiana at the time of the Purchase did, however, indicate the systematic distinctions of actions into personal and real, movable and immovable, and petitory and possessory.¹⁴⁰ It is not surprising, therefore, that these distinctions are at times mentioned, and at times clearly implied, in the Civil Code of 1808.¹⁴¹ Subsequently, mostly through French influence, the same distinctions found their way into the Civil Codes of 1825¹⁴² and 1870, the Codes of Practice of 1825 and 1870, and with certain modifications in the Code of Civil Procedure of 1960. For the purpose of the present study, the provisions of the Civil Code of 1870, of the Code of Practice of 1870, and of the Code of Civil Procedure of 1960 deserve particular attention.

In the Civil Code of 1870 actions are distinguished into movables and immovables, depending on the *object* of the rights protected.¹⁴³ Reference is also made in the Code to personal and real actions,¹⁴⁴ without definition of these terms. This last distinction is obviously based on the *nature* of the rights protected.¹⁴⁵ Since the two distinctions of actions rest on different criteria, it follows that under the Civil Code the terms real actions

court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief, adapted to the circumstances of the case."

139. Hubert, *A Louisiana Anomaly—The "Writ" System in Real Actions*, 22 TUL. L. REV. 459, 463 (1948).

140. See ASSO Y MANUEL, INSTITUCIONES DEL DERECHO CIVIL DE CASTILLA 231 (1806); *id.*, INSTITUTES OF THE CIVIL LAW OF SPAIN 305 (Johnston transl. 1825). Cf. LAS SIETE PARTIDAS, pt. 3, tit. 2, LL. 15, 16-24 (movables); L. 25 (immovables); LL. 27-30 (possessory and petitory actions); L. 31 (personal actions).

141. See, *e.g.*, LA. CIVIL CODE p. 481, arts. 27, 28 (possessory actions); p. 479, art. 26 (possessory and petitory actions distinguished); p. 99, art. 22 (immovable actions); p. 486, art. 65 (personal and real actions) (1808).

142. See, *e.g.*, LA. CIVIL CODE arts. 463, 466 (movable and immovable actions); art. 3501 (prescription of possessory action); art. 3508 (prescription of personal actions); arts. 3512, 3513 (prescription of immovable real actions) (1825).

143. See LA. CIVIL CODE arts. 471, 474 (1870).

144. See *id.* arts. 3454, 3459, 3528, 3544, 3548.

145. See text at note 34 *supra*. For the distinction of rights into personal and real, see Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 177 (1963).

and immovable actions are not synonymous and that movable and immovable actions can be either personal or real.¹⁴⁶ The Civil Code establishes also the distinction between "possessory actions" and "actions for the ownership,"¹⁴⁷ *i.e.*, petitory actions, and determines the prerequisites for the protection of possession. In that regard no distinction is made between movables and immovables and the clear implication is that the possessory protection was intended to apply to all species of corporeal property. Two immovable real actions are regulated by the Civil Code in considerable detail: the action of boundary¹⁴⁸ and the action for the prohibition of new works.¹⁴⁹

In the Codes of Practice of 1825 and 1870 the single action with a right of recovery based on the facts alleged was retained.¹⁵⁰ At the same time, several distinctions were reiterated,¹⁵¹ some of which were already obsolete by 1870. Still important were the classifications of actions as personal, real, and mixed;¹⁵² movable and immovable;¹⁵³ and possessory and peti-

146. *Cf.* text at note 33 *supra*.

147. See LA. CIVIL CODE art. 3456 (1870).

148. See *id.* arts. 663, 823-855.

149. See *id.* arts. 856-869.

150. See LA. CODE OF PRACTICE arts. 170, 171, 172 (1870).

151. See *id.* arts. 2, 5, 6, 8, 11. *Cf.* PROJET OF THE CODE OF PRACTICE OF 1825, 2 LA. LEGAL ARCHIVES 3 Comment by the Redactors (1937): "*Quoique parmi nous, il ne soit pas nécessaire d'exprimer le nom de l'action qu' on intente et de s'astreindre à de certaines formules; quo'il suffise d'exprimer clairement ce que l'on demande, il n'en est pas moins très-important pour prendre des conclusions, justes et convenables sur les actions qu' on forme, de connaitre la nature des principales actions civiles.*" See also McMahon, *The Case against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953); Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading, Exposé des Motifs*, 13 LA. L. REV. 395 (1953).

152. See La. Code of Practice art. 2 (1870): "Actions are divided into several kinds: the first division of actions is into personal, real, and mixed." *Id.* art. 3: "A personal action is that by which a person proceeds against one who is personally bound towards him, either by a contract or by virtue of the law, in order to compel him to pay what he owes to him or to perform what he had promised. This action is called personal, because it is attached to the person bound and follows him everywhere." *Id.* art. 36: "A personal action lies against him who has bound himself towards another, personally and independently of the property which he possesses." *Id.* art. 4: "A real action is that which relates to claims made on immovable property, or to immovable rights to which they are subjected. The object of this action is the ownership or the possession of such property; and they are therefore subdivided into petitory and possessory." *Id.* art. 41: "A real action lies against him who, without having contracted any obligation towards the plaintiff, is nevertheless bound towards him, as possessor of the immovable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immovable right." *Id.* art. 7: "A mixed action is one which in its nature partakes both of the real and of the personal action, such as a claim for the ownership of real property, and also for the fruits it has produced, or their value."

153. See *id.* art. 11: "Actions, with respect to their object, are divided into two

tory.¹⁵⁴ These distinctions carried significant legal consequences.¹⁵⁵ In the Civil Code the concepts of real actions and immovable actions were kept distinct; in contrast, these concepts were blurred in the Code of Practice.¹⁵⁶ Indeed, according to the Code of Practice real actions were those relating to immovable property, whereas personal actions were those relating to movable property and to personal rights.¹⁵⁷ Possessory protection was available for immovable property only.¹⁵⁸ While the origin of these provisions is "conjectural,"¹⁵⁹ they seem to have their source in the treatise of Domat¹⁶⁰ and the French Code of Civil Procedure.¹⁶¹

In the Code of Civil Procedure of 1960 civil actions¹⁶² may be classified as "personal, real, and mixed."¹⁶³ According to ar-

classes; those by which movables, and those by which immovables are claimed"; *id.* art. 12: "Although incorporeal rights be not in reality movables nor immovables, they are nevertheless placed by law in one of those two classes. Actions tending to recover an immovable, or a real right, or an universality of things, such as an inheritance, are considered as real; while actions for the recovery of a movable or for a sum of money, though accompanied with a mortgage, are not real actions." A substantial error in translation ought to be noted. In the English version, the words "action mobilière" have been translated as "real action," and the words "action immobilière" as "not a real action." See note 157 *infra*.

154. See LA. CODE OF PRACTICE art. 5 (1870): "The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled." *Id.* art. 6: "A possessory action is that by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted."

155. See, *e.g.*, *id.* art. 163 (venue in real actions); art. 60 (possessory protection available only for immovables); art. 576 (delivery of movable property); art. 1063 (jurisdiction of the justice of the peace).

156. This blurring of the concepts may be partly the result of erroneous translation. See, *e.g.*, *id.* art. 12, quoted note 153 *supra*.

157. See *id.* art. 4, quoted note 152 *supra*. The French text of this article does not lend itself to confusion of ideas. It reads: "*Les actions qui tendent à la revendication d'un immeuble ou d'un droit réel, ou d'une universalité des biens, comme une succession, sont considérées comme immobilières, tandis que les demandes en revendication d'immeuble ou en paiement d'une somme d'argent, quoique accompagnées d'hypothèques, ne sont considérées que comme des actions mobilières.*"

158. See *id.* art. 60.

159. Hubert, *A Louisiana Anomaly -- The "Writ" System in Real Actions*, 22 TUL. L. REV. 459, 466 (1948).

160. See PROJET OF THE CODE OF PRACTICE OF 1825, 2 LOUISIANA LEGAL ARCHIVES 3 (1937). Cf. 2 DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER: TOGETHER WITH THE PUBLIC LAW 672 (transl. Strahan, 1737): "There are two principal kinds of actions, Personal and Real. Mixt actions are those which partake of the nature of both Personal and Real."

161. See text at notes 29-30 *supra*.

162. A civil action is defined in article 421 as "a demand for the enforcement of a legal right."

163. See LA. CODE OF CIVIL PROCEDURE art. 422 (1960). Real actions are further distinguished into petitory and possessory. See text at notes 212, 229 *infra*.

article 422 "a personal action is one brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim or possess. A real action is one brought to enforce rights in, to, or upon immovable property. A mixed action is one brought to enforce both rights in, to, or upon immovable property, and a related obligation against the owner, claimant, or possessor thereof." These definitions would conform with the terminology of the Civil Code and would establish fully acceptable analytical divisions, if the term "real actions" were defined to include those brought for the protection or enforcement of real rights related to movables.¹⁶⁴ As enacted, article 422 of the Code of Civil Procedure renders real actions synonymous with immovable real actions and leaves room for speculation on the nature of actions "brought to enforce rights in, to, or upon" movables.¹⁶⁵ These actions are not strictly speaking "personal," because they are founded on ownership and other real rights rather than on an obligation;¹⁶⁶ and they are not "real" under the Code of Civil Procedure, because they do not involve protection of immovable real rights. Actions for the protection of ownership, real rights other than ownership, and possession of movables remain thus *innominate* under the Code of Civil Procedure. For the purpose of the present discussion the term real actions will apply to actions for the enforcement or protection of real rights, whether relating to movables or immovables. Real actions relating to immovable property will be termed "immovable real actions," and real actions relating to movable property, "movable real actions." Conversely, personal actions relating to immovable property will be termed "immovable personal actions," and personal actions relating to movable property, "movable personal actions."

The civilian classification of actions as personal, real and mixed, does not, it should be noted, correspond to "the actions

164. Cf. *supra* text at note 33.

165. For a similar confusion of concepts in France, see text at note 32 *supra*.
166. Cf. LA. CODE OF CIVIL PROCEDURE art. 422(1) (1960); Warren v. Salteneber, 6 La. Ann. 351, 354 (1851): "Our Code of Practice is extremely meagre in its provisions as to actions for movable property, although they are so numerous. . . . In defining . . . personal actions, it is with difficulty the definitions can be construed to embrace a suit for a specific thing"; Bouchard v. Parker, 32 La. Ann. 535, 537 (1880): "Now an action of this kind, [for the recovery of movables] although it might not be defined to be a real action according to the definition of our Code of Practice, since a real action proper, by the terms of the Code, would seem to be confined to suits for the recovery of land or a real right, yet it is a species of action closely allied to such action, and fully recognized in the French jurisprudence, from which we derive our system of practice."

in personam, in rem, and quasi in rem — concepts which were brought into the procedure of Louisiana through the jurisdictional requirements of due process of law and full faith and credit under the federal constitution.”¹⁶⁷ This last, constitutionally-inspired distinction, rather than the civilian classification, is determinative for the solution of questions relating to jurisdiction, *i.e.*, “the legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled.”¹⁶⁸ Jurisdiction in actions *in personam* is thus based upon article 6 of the Code of Civil Procedure, in actions *in rem* upon article 8, and in actions *quasi in rem* upon article 9.¹⁶⁹

In contrast to France, where the most important practical consequences of the division of actions into personal, real and mixed relate to questions of venue,¹⁷⁰ in Louisiana the characterization of an action as personal, real, or mixed is not by itself determinative of the venue. Under the Louisiana Code of Civil Procedure venue is determined by the nature of the property involved in litigation rather than by the nature of the right exercised. In general, an action against “an individual who is domiciled in the state shall be brought in the parish of his domicile.”¹⁷¹ This is the *forum generale* for all movable actions, whether personal or real. In addition, the Code establishes a number of special venues, either permissive or mandatory. A permissive venue is established in article 72 for “an action in which a sequestration is sought, or an action to enforce a mortgage or privilege by an ordinary proceeding.” Such an action “may be brought in the parish where the property, or any portion thereof, is situated.”¹⁷² According to an accompanying comment by the redactors, this provision applies “to all property, movable and immovable.” A mandatory venue is established in article 80 for actions involving immovables.¹⁷³ This mandatory

167. LA. CODE OF CIVIL PROCEDURE art. 422, Comment b (1960).

168. *Id.* art. 1.

169. Article 6 declares that “jurisdiction over the person is the legal power and authority of a court to render a personal judgement against a party to an action or proceeding.” Article 8 provides that “a court which is otherwise competent under the laws of this state has jurisdiction to enforce a right in, to, or against property having a situs in this state, claimed or owned by a nonresident not subject personally to the jurisdiction of the court.”

170. See text at note 29 *supra*.

171. LA. CODE OF CIVIL PROCEDURE art. 42(1) (1960); Comment, 21 LA. L. REV. 182 (1960).

172. LA. CODE OF CIVIL PROCEDURE art. 72 (1960).

173. *Id.* art. 80: “The following actions shall be brought in the parish where

forum rei is appropriate not only for immovable real actions but also for immovable personal actions. Mixed actions, for purposes of venue, are expressly assimilated with immovable real actions.¹⁷⁴ The category of mixed actions has thus limited procedural significance in Louisiana. In contrast with French law, under which the plaintiff in a mixed action has a choice of forum,¹⁷⁵ under Louisiana law the plaintiff in a mixed action must utilize the venue of article 80(1). Analytically, therefore, the category of mixed actions is almost meaningless and fully dispensable in Louisiana.

The distinction between personal and real actions is also important in the light of the provisions of the Louisiana Civil Code of 1870 pertaining to the prescription of actions. The Code contains an enumeration of personal actions prescribing in stated periods of time,¹⁷⁶ and a catch-all provision that "in general, all personal actions, except those before enumerated, are prescribed by ten years" (article 3544). There is no corresponding general provision in the Code with respect to real actions. It is specifically provided that the action of the possessor for the protection of his possession prescribes in one year (article 3456), that "the rights of usufruct, use and habitation, and servitudes are lost by non-use for ten years" (article 3546), and that "all actions for immovable property, or for an entire estate, or a succession, are prescribed by thirty years" (article 3548).¹⁷⁷ The interpreta-

the immovable property is situated: (1) An action to assert an interest in immovable property, or a right in, to, or against immovable property, except as otherwise provided in Articles 72 and 2633; and (2) An action to partition immovable property, except as otherwise provided in Articles 81, 82, and 83. If the immovable property, consisting of one or more tracts, is situated in more than one parish, the action may be brought in any of these parishes." Improper venue, however, is waived unless timely exception is interposed. See *id.* arts. 44, 925, 928.

174. See *id.* art. 3652(3): "A petitory action shall be brought in the venue provided by Article 80 (1), even when the plaintiff prays for judgment for the fruits and revenues of the property, or for damages." According to comment (c) accompanying this article "under the third paragraph of this article, venue is limited to the parish of the situs of the immovable; but if the action is brought in an improper venue, the defendant must except timely thereto, otherwise the objection is waived. See arts. 44, 925, *supra*. Express provision is made in this paragraph for the venue of the mixed action."

175. See text at notes 126-127 *supra*.

176. See LA. CIVIL CODE arts. 3534-3543 (1870). Provisions concerning the prescription of certain actions may be also found in the Revised Statutes. See LA. R.S. 9:5681, 5701 (1950); 33:3746 (1950).

177. A substantial error in the English translation of the French text ought to be noted. The word "for" following the words "all actions" should be "in revindication of the ownership of." The English text of article 3548 is obscure and in latent conflict with article 3546. Strictly speaking, the revindicatory action of the owner of an immovable is *never* lost as a result of the prescription of article 3548. The Louisiana Supreme Court has correctly held in *Labarre v. Rateau*, 210

tion and application of these articles has not given rise to difficult questions concerning the precise classification of particular actions as personal or real.

Louisiana courts, while avoiding unnecessary generalizations and concentrating on the solution of concrete problems, have had no difficulty subjecting to the ten-year prescriptive period of article 3544 a number of actions involving enforcement of personal rights,¹⁷⁸ such as actions for accounting,¹⁷⁹ settlement of partnership¹⁸⁰ and usufruct accounts,¹⁸¹ and actions on unjust enrichment,¹⁸² negotiorum gestio¹⁸³ and quasi contracts in general.¹⁸⁴ Quite naturally, Louisiana courts have applied the same prescriptive period to personal actions arising out of legal transactions directly involving corporeal movables and immovables. Thus, actions for the payment of the price of immovable property,¹⁸⁵ for the recovery of the price of the sale in case of im-

La. 34, 26 So. 2d 279 (1946) that the owner's action prescribes only when a third possessor acquires the immovable by acquisitive prescription.

178. See *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So. 2d 264 (1944); *Succession of McCloskey*, 144 La. 438, 80 So. 650 (1919); *Kirby Lumber Co. v. Hicks*, 144 La. 473, 80 So. 663 (1919); *Eichelberger v. Pike*, 22 La. Ann. 142 (1870); *Barelli v. Riviere*, 3 La. Ann. 46 (1848); *Lacoste v. Benton*, 3 La. Ann. 220 (1848); *Goddard's Heirs v. Urquhart*, 6 La. 659 (1834). In most cases, the question before Louisiana courts has been which particular prescription applies to the action at hand rather than the question of the classification of the action as personal or real. In exceptional cases only Louisiana courts felt compelled to avoid application of the ten-year prescriptive period of article 3544 by declaring that the action in question was "not personal but real." The Code does not pose a dilemma since it does not provide for a single prescription applicable to all real actions. Thus, a determination that an action is not subject to article 3544 does not necessarily mean that the action is subject to article 3548.

179. See *Warnock v. Roy*, 217 La. 224, 46 So. 2d 251 (1950); *Succession of Porche*, 187 La. 1069, 175 So. 670 (1937). An action for accounting has been held not to be subject to the ten-year prescription where several persons had bought a tract of land in the name of one of themselves and thus became subject to the action of partition. *Aiken v. Ogilvie*, 12 La. Ann. 353 (1857). See also *Watson v. Succession of Barber*, 105 La. 456, 29 So. 949 (1901) (action for supplemental partition).

180. See *Joyner v. Williams*, 197 La. 43, 200 So. 815 (1941); *King's Heirs v. Wartelle*, 14 La. Ann. 740 (1859); cf. *Browder v. Hook*, 24 La. Ann. 200 (1872) (the action to compel a person to reimburse what has been paid for it on account of the purchase of lands prescribes in ten years).

181. See *Burdin v. Burdin*, 171 La. 7, 129 So. 651 (1930); *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539 (1889); *Cochran v. Violet*, 38 La. Ann. 525 (1886).

182. See *Whitten v. Monkhouse*, 29 So. 2d 800 (La. App. 2d Cir. 1947); *Interstate Trust & Banking Co. v. Alfano*, Orl. Rep. No. 7557 (La. App. 1919); *Prudential Soc. v. Gondolf*, Orl. Rep. No. 7169 (La. App. 1917).

183. See *Gaudé v. Gaudé*, 28 La. Ann. 181 (1876); *Devot v. Marx*, 19 La. Ann. 491 (1867).

184. See *Roussel v. Railways Realty Co.*, 165 La. 536, 115 So. 742 (1923); *Imboden v. Richardson*, 15 La. Ann. 534 (1860); *Garland v. Scott's Estate*, 15 La. Ann. 143 (1860); *Succession of Savant*, 15 La. App. 396 (1st Cir. 1931); *Greenfield Box Co. v. Independence Veneer & Box Mfg. Co.*, 4 La. App. 690 (1st Cir. 1926).

185. See *Scionneaux v. Waguespack*, 32 La. Ann. 283 (1880).

possibility of performance,¹⁸⁶ for the reformation of deeds in case of erroneous description,¹⁸⁷ for the annulment or rescission of sales¹⁸⁸ or mortgages,¹⁸⁹ and actions among co-owners for rents and revenues¹⁹⁰ have been consistently held to be personal actions governed by the prescription of article 3544. With respect to movables, the same rule has been applied by the courts to actions for the recovery of the value of things sold wrongfully¹⁹¹ or in good faith¹⁹² by persons other than the true owner, actions by the vendor for the payment of the price of materials sold,¹⁹³ and actions for the repayment of moneys deposited.¹⁹⁴

In interpreting and applying article 3548, on the other hand, the Louisiana courts have correctly limited application of the thirty-year prescription to immovable real actions involving either "revendication of the ownership of"¹⁹⁵ immovables, *i.e.*,

186. *Raines v. Lyons*, 6 So.2d 364 (La. App. 1st Cir. 1942); see *Ford v. Russel*, 13 La. App. 390, 128 So. 310 (Orl. Cir. 1930).

187. See *Agurs v. Holt*, 232 La. 1026, 95 So.2d 644 (1957); *Mims v. Sample*, 191 La. 677, 186 So. 66 (1938); *Louisiana Oil Ref. Corp. v. Gandy*, 168 La. 37, 121 So. 183 (1929); *Sharpe v. Hayes*, 171 So. 862 (La. App. 1st Cir. 1937).

188. See *Louisiana Truck & Orange Land Co. v. Page*, 199 La. 1, 5 So.2d 365 (1941); *Latour v. Latour*, 134 La. 342, 64 So. 133 (1914); *Southwestern Improvement Co. v. Whittington*, 193 So. 483 (La. App. 1st Cir. 1940). The ten-year prescription of article 3544 has been also applied to an action for the recovery of a tract of land by a vendor claiming fulfillment of a resolatory condition. It seems that the action should be classified as petitory. See text at notes 195, 212 *infra*. The court, however, reasoned that "the action to enforce the resolatory condition is an action to enforce a part, whether expressed or implied, of a contract" and held that "the action, although it may result in the recovery of immovable property, is regarded as a personal action, and is barred by the prescription, *liberandi causa*, of ten years." *R. E. E. de Montluzin Co. v. New Orleans & N.E.R.R.*, 166 La. 822, 828, 118 So. 33, 35 (1928). "Contracts to sell, where the title remains in the vendor are not personal actions subject to the ten year prescription." *Delta Farms Co. v. Davis*, 202 La. 445, 12 So.2d 213, 216 (1943). The ten-year prescription does not run where the vendor is in possession of the land. *Hamilton v. Moore*, 136 La. 631, 67 So. 523 (1915). See also *Delta Farms Co. v. Davis*, 202 La. 445, 12 So.2d 213 (1943). It has been also held that an action to set aside a transaction void *ab initio* is not subject to the ten-year prescription. *Ackerman v. Larner*, 116 La. 101, 40 So. 581 (1906).

189. See *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539 (1889); *Cochran v. Violet*, 38 La. Ann. 525 (1886).

190. See *Juneau v. Laborde*, 228 La. 410, 82 So.2d 693 (1955).

191. See *Kempt v. Kelly*, *Gunby's Dec.* 65 (La. App. 2d Cir. 1885).

192. See *Gaty v. Babers*, 32 La. Ann. 1091 (1880); *Rizzio v. Moriarity*, 1 Orl. App. 150 (La. App. 1904). *But cf.* *Importsales Inc. v. Lindeman*, 231 La. 663, 92 So.2d 574 (1957); *Martin v. Texas Oil Co.*, 150 La. 556, 90 So. 922 (1921).

193. See *Miller v. Krouse*, 177 So. 472 (La. App. 2d Cir. 1937). *Cf.* *Philip Werlein, Ltd. v. Forstall*, 1 Orl. App. 249 (La. App. 1904).

194. See *Bérard v. Boagni*, 30 La. Ann. 1125 (1878).

195. See *Mussina v. Alling*, 11 La. Ann. 568 (1856); *Wilson Motor Co. v. McDonald*, 69 So.2d 91 (La. App. 2d Cir. 1954). The words in quotation marks are part of the French text of article 3548, inadvertently omitted from the English text. See note 177 *supra*.

petitory actions, or the recovery of an entire estate. Actions for the recovery of undivided shares in lands,¹⁹⁶ actions to compel conveyance of immovables,¹⁹⁷ an action by the administrator of an insolvent estate that certain property be decreed to belong to the succession,¹⁹⁸ an action by a judgment creditor for the recovery of his debtor's immovables in the hands of third persons,¹⁹⁹ and an action to compel the surrender of immovables sold under a bond for deed with title remaining in the vendor²⁰⁰ have been held to be petitory actions. Claims to a portion of an estate,²⁰¹ in contrast to claims for the payment of legacies,²⁰² have been held to be subject to the thirty-year prescription. And an action to set aside a *dation en paiement* and a sale as not supported by consideration has been held to be "clearly . . . not a personal action, as it is brought on behalf of an entire estate to have set aside conveyances of property and the property returned to the mass of the succession."²⁰³

Since for real actions there is no provision in the Code corresponding to article 3544, in cases involving the issue of prescription of real actions other than those specifically mentioned in the Code, the courts have either resorted to analogy or have declared an occasional action to be imprescriptible. In actions involving revendication of movables by the rightful owner in the hands of third party possessors Louisiana courts have applied the prescription of article 3544 by regarding these actions as quasi-contractual.²⁰⁴ In an action upon a street paving certificate the court declared that "paving claims are strictly claims in rem," and holding that the action was outside the scope of article 3544 and imprescriptible.²⁰⁵ The hypothecary action, *i.e.*, the action for the enforcement of a mortgage, has been held to

196. See *Pearlstone v. Mattes*, 223 La. 1032, 67 So. 2d 582 (1953); *Labare v. Rateau*, 210 La. 34, 26 So. 2d 279 (1946); *Da Ponte v. Ogden*, 161 La. 378, 108 So. 777 (1926); *Peterson v. Moresi*, 191 La. 932, 186 So. 737 (1939).

197. See *State ex rel. Hyam's Heirs v. Grace*, 197 La. 428, 1 So. 2d 683 (1941).

198. See *Judson v. Connolly*, 4 La. Ann. 169 (1849).

199. See *Spencer v. Goodman*, 33 La. Ann. 898 (1881).

200. See *Louisiana Delta Farms Co. v. Davis*, 202 La. 445, 12 So. 2d 213 (1943).

201. See *White v. White*, 50 La. Ann. 104, 23 So. 95 (1898).

202. See *Succession of Ball*, 43 La. Ann. 342, 9 So. 45 (1891); *Nolasco v. Lurty*, 13 La. Ann. 100 (1858).

203. *Welch v. Courville*, 99 So. 2d 487, 490 (La. App. 2d Cir. 1957).

204. See *Faison v. Patout*, 212 La. 37, 31 So. 2d 416 (1947); *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941). *Cf.* text at notes 380, 399 *infra*.

205. *Barber Asphalt Paving Co. v. King*, 130 La. 788, 789, 58 So. 572, 573 (1912).

be a "real action" whose "duration is contingent upon the existence of the right from which it springs" and, as such, not subject to an independent prescription.²⁰⁶ The action for the enforcement or protection of a right of servitude (corresponding to the Roman *actio confessoria*) has been held to be barred by the ten-year prescription for non-use²⁰⁷ or by the ten-year acquisitive prescription running in favor of a bona fide possessor of the land burdened with the servitude.²⁰⁸ Finally, the owner's action to have his land free of unauthorized rights of servitude (corresponding to the Roman *actio negatoria*) has been held to be lost by the ten-year²⁰⁹ (article 765) or thirty-year²¹⁰ (article 3504) acquisitive prescription of the servitude.

1. Protection of Immovable Real Rights

Immovable real rights (*i.e.*, the ownership of immovable property and dismemberments thereof) and their possession are protected in Louisiana by several innominate real actions²¹¹ as

206. *Gentes v. Blasco*, 20 La. Ann. 403, 405 (1868). See also *Smith v. Johnson*, 35 La. Ann. 943 (1883); *Lanusse v. Minturn*, 11 La. 256 (1837); *cf. Wisdom v. Parker*, 31 La. Ann. 52 (1879).

207. See *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939); *Thompson v. Meyers*, 34 La. Ann. 615 (1882). *Cf. Bonnabel v. Police Jury, Parish of Jefferson*, 216 La. 798, 44 So. 2d 872 (1950); *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938).

208. See *Sample v. Whitaker*, 171 La. 949, 132 So. 511 (1930); *cf. Randazzo v. Lucas*, 106 So. 2d 490 (La. App. Orl. Cir. 1958).

209. See *Webster Sand, Gravel & Constr. Co. v. Vicksburg, S & P.R.R.*, 129 La. 1096, 57 So. 529 (1912); *Ellis v. Blanchard*, 45 So. 2d 100 (La. App. 2d Cir. 1950); *Fuller v. Washington*, 19 So. 2d 730 (La. App. 2d Cir. 1944); *Greco v. Frigerio*, 3 La. App. 649 (Orl. Cir. 1926); *Kennedy v. Succession of McCollam*, 34 La. Ann. 568 (1882); *Vincent v. Michel*, 7 La. 52 (1834). See also *Hale v. Hulin*, 130 So. 2d 519 (La. App. 3d Cir. 1961); *Guesnard v. Bird's Executors*, 33 La. Ann. 796 (1881); *Levet v. Lapeyrollerie*, 39 La. Ann. 210, 1 So. 672 (1887); *cf. Macheca v. Aveguo*, 25 La. Ann. 55 (1873); *Delahoussaye v. Justice*, 13 La. Ann. 587 (1857); *New Orleans & C.R.R. v. Town of Carrollton*, 3 La. Ann. 282 (1848); *Comment, Acquisitive Prescription of Servitudes*, 15 LA. L. REV. 777 (1955). A claim for damages for the unauthorized establishment by a railroad company of a servitude of passage is subject to the prescription of ten years. See *Brewer v. Yazoo & M.V.R.R.*, 128 La. 544, 54 So. 987 (1911). The same prescription applies to the claim for compensation of a landowner who permits a railroad company to build and operate a road upon his land. See *McCutchen v. Texas & P. Ry.*, 118 La. 436, 43 So. 42 (1907). The landowner's action for the removal of a railroad track laid without authorization ought to be regarded as a real action barred by the ten or thirty year acquisitive prescription of the servitude.

210. See *Viering v. N. K. Fairbanks Co.*, 156 La. 592, 100 So. 729 (1924). It has been held that the prescription of article 765 applies to a bona fide possessor and that of article 3504 to a possessor in bad faith. See *Kennedy v. Succession of McCollam*, 34 La. Ann. 568 (1882); *Randazzo v. Lucas*, 106 So. 2d 490 (La. App. Orl. Cir. 1958).

211. *Cf. text at notes 268-278 infra.* On real actions in Louisiana, see, in general, *Hubert, A Louisiana Anomaly—The "Writ" System in Real Actions*, 22

well as by four nominate real actions regulated in the Code of Civil Procedure: the petitory action, the possessory action, the action of boundary, and the hypothecary action.

a. The *petitory action*, an indirect descendant of the Roman *rei-vindicatio*, is defined in the Code of Civil Procedure as an action "brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right, against another who is in possession or who claims the ownership thereof adversely, to obtain judgement recognizing the plaintiff's ownership."²¹² It is essential for the admissibility of the petitory action that the plaintiff be not in possession of the disputed property or real right.²¹³ The petitory action may be brought by a person who claims "the ownership of only an undivided interest in the immovable property or real right, or whose asserted ownership is limited to a certain period which has not yet expired or which may be terminated by an event which has not yet occurred."²¹⁴ In order to set aside any doubts, the Code of Civil Procedure provides that the petitory action

TUL. L. REV. 459 (1948); Johnson, *Real Actions*, 35 TUL. L. REV. 541 (1961); McMahon, *Real Actions, Louisiana Legislative Symposium: 1960 Regular Session*, 21 LA. L. REV. 1, 46 (1960); Riseman, *The Possessory Action in Louisiana*, 20 TUL. L. REV. 524 (1946); Zengel, *The Real Actions—A Study in Code Revision*, 29 TUL. L. REV. 617 (1955); Comment, *Real Actions To Determine Ownership or Possession Under the Proposed Louisiana Code of Civil Procedure*, 20 LA. L. REV. 92 (1959). And for a comparative study of the concept and function of the real actions, see LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19 (1954).

212. LA. CODE OF CIVIL PROCEDURE art. 3651 (1960); Matthews v. Carter, 138 So. 2d 205 (La. App. 2d Cir. 1962). The term "real rights" in the framework of the Code of Civil Procedure applies exclusively to real rights on immovable property. In the framework of the Civil Code, however, the term "real rights" applies to both movable and immovable property. See Yiannopoulos, *Real Rights in Louisiana and Comparative Law—Part I*, 23 LA. L. REV. 161, 180 (1963).

213. See LA. CODE OF CIVIL PROCEDURE art. 3651, Comment (a) (1960). Upon revision, the role of possession as an arbiter of the form of action used under the Code of Practice was criticized and the elimination of the "separate, nominated and labeled real action" was proposed on the ground that "it is possible to have one real action, and to preserve the present substantive effect of possession." LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs*, No. 19, at 5, 9 (1954). See also Hubert, *A Louisiana Anomaly—The "Writ" System in Real Actions*, 22 TUL. L. REV. 459, 469 (1948). This proposal for the adoption of a single real action, with possession merely serving as arbiter of the burden of proof, was rejected after lengthy debate. For a capsuled explanation, see LA. CODE OF CIVIL PROCEDURE Book VII, Title II, Introduction (1960). For extensive argument by Professor McMahon against the proposal, see LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, *Recommended Materials*, Book VII, Title II, Meeting of the Council on Oct. 3 and 4, 1958 (mimeographed).

214. LA. CODE OF CIVIL PROCEDURE art. 3652 (1960); cf. LA. CIVIL CODE art. 556 (1870).

may also be brought by a person who holds a mineral servitude, mineral lease, or mineral royalty.²¹⁵

This action may be brought against an adverse claimant of ownership or of a real right who is in possession, against a possessor who does not assert any adverse claim, and finally, against an adverse claimant of ownership or of a real right who is not in possession.²¹⁶ The plaintiff may join in the action as a defendant "a lessee or other person who occupies the immovable property or enjoys the real right under an agreement" with the adverse claimant.²¹⁷ He may want to do so, for example, in the case of a long term lease in order to have his right of ownership established against the adverse claimant and his right of possession against the lessee.²¹⁸ The action cannot be brought against the lessee alone, since, according to the substantive law, the lessee does not possess for himself but only for the lessor.²¹⁹ The plaintiff is likewise permitted to join a mineral lessee as a party defendant. This joinder is not required but is advisable as a practical matter. Since the mineral lessee is protected by the recordation laws, a plaintiff bringing the petitory action against a mineral lessor should always join the mineral lessee in order to safeguard his interests.²²⁰ Action may be brought against the mineral lessee without the joinder of the mineral lessor, because, in contrast to the lessee of a predial lease, the mineral lessee possesses both for himself and for his lessor.²²¹

Possession, in addition to being important for the determination of the admissibility of the petitory action, is determinative of the burden of proof imposed on the plaintiff.²²² The relevant possession is "corporeal possession . . ., or civil possession . . .

215. See LA. CODE OF CIVIL PROCEDURE art. 3664 (1960); *Scott v. Hunt Oil Co.*, 160 So.2d 433 (La. App. 2d Cir. 1964).

216. See LA. CODE OF CIVIL PROCEDURE art. 3651, comment (a) (1960).

217. *Id.* art. 3652(2). After the commencement of the action, the thing cannot be alienated and a judgment in favor of the plaintiff can be enforced against any person deriving title from the defendant. See LA. CIVIL CODE art. 2453 (1870), as amended by La. Acts 1878, No. 3. This article applied to both movables and immovables. In connection with actions affecting title to immovables, however, arts. 3751-3753 of the Louisiana Code of Civil Procedure establish the procedures to be followed in recording the notice of *lis pendens* as to constitute notice to third persons.

218. *Id.* art. 3652, comment (b).

219. *Id.* art. 3656; art. 3651, comment (b).

220. See Johnson, *Real Actions*, 35 TUL. L. REV. 541, 545 (1961); Hasslocher v. Recknagel, 160 So.2d 421 (La. App. 2d Cir. 1964).

221. See LA. CODE OF CIVIL PROCEDURE art. 3664, comment (b) (1960).

222. *Id.* art. 3653 and comments under this article.

preceded by corporeal possession.”²²³ If the defendant is in possession of the immovable property or real right, the plaintiff “must make out his title,” that is, he must rely on the strength of his own title and not on the weakness of the title of the defendant.²²⁴ Where neither party is in possession of the disputed property or real right, the plaintiff in order to recover need only prove a “better title.”²²⁵

Quite properly, the defenses to the petitory action are not specifically stated in the Code of Civil Procedure. The only defenses which could have been enumerated in the Code were technical procedural objections. These have been deliberately suppressed in order to permit a decision based on the facts and substantive law. Certain defenses, however, are indicated indirectly in articles 3651 and 3653; other defenses are available under the articles of the Code relative to ordinary proceedings and under the prior jurisprudence which has been deliberately and advisedly retained, except to the slight extent it is changed expressly in the new code articles.²²⁶ The action must be brought in the venue provided for immovable property, although claim is made accessorially for fruits, revenues, and damages.²²⁷

223. *Id.* art. 3660; cf. Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218, 229 (1960). Plaintiff's possession may be tacked to that of his ancestors in title. See *infra* text at note 245.

224. See LA. CODE OF CIVIL PROCEDURE art. 3653 (1960); *Schexnayder v. Duhon*, 163 So.2d 393 (La. App. 3d Cir. 1964); *Burt v. Valois*, 144 So.2d 196 (La. App. 1st Cir. 1962); *Mestayer v. Cities Service Development Co.*, 136 So.2d 513 (La. App. 3d Cir. 1962); *Dupuy v. Shannon*, 136 So.2d 111 (La. App. 3d Cir. 1961); *Young v. Miller*, 125 So.2d 257, 258 (La. App. 3d Cir. 1962): “The title of the defendant is not at issue until plaintiff has proved a valid title in himself.” Where the plaintiff is unable to establish his title to the immovable property or real right by acquisitive prescription, “as between claimants to real property acquired from a common source, preference is given him whose title is more ancient.” *Burt v. Valois*, *supra*.

225. See LA. CODE OF CIVIL PROCEDURE art. 3653 (1960) and comment (b) under this article. Cf. Note, 18 LA. L. REV. 360 (1958). When the issue of ownership of immovable property is not raised in a petitory action but in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, the right to possession is correspondingly determinative of the burden of proof. Where one of the parties would be entitled to the possession of the immovable property or real right in a possessory action, this party will be entitled to judgment unless the adverse party makes out his title. Where neither party would be entitled to the possession in a possessory action, judgment will be obtained by the party who proves better title. The same rules as to the burden of proof apply to cases involving the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right. See LA. CODE OF CIVIL PROCEDURE art. 3654 (1960).

226. But see *Johnson*, *Real Actions*, 35 TUL. L. REV. 541, 546 (1961).

227. See LA. CODE OF CIVIL PROCEDURE art. 3652 (1960).

It is indicated in the Code of Civil Procedure that a judgment in favor of the plaintiff in a petitory action shall recognize plaintiff's ownership of the immovable property or real right.²²⁸ But there is no provision in the Code corresponding to article 3662, which specifies in detail the relief that can be granted to the successful plaintiff in the possessory action. This is quite understandable. In the broadened possessory action of the Code of Civil Procedure was merged the former possessory action and the action in jactitation; further, the procedure of the jactitory action was made applicable to the broadened possessory action, technicalities were eliminated, and the procedure was streamlined. These were radical changes, which could be effected only through a detailing of the relief available to a successful plaintiff. In the broadened petitory action, however, a single change was made, and that not a radical one: the requirement that the defendant be in possession was changed to a requirement that the plaintiff be out of possession, so as to permit the use of the action in cases where neither party is in possession. This slight change needed no further implementation.

Following determination of the right of ownership, the courts are frequently faced with the questions of apportionment of economic advantages derived from the thing²²⁹ and of compensation of the possessor for expenses. In these cases, the rights and duties of the parties vary with the good or bad faith of the possessor.

In general, civil and natural fruits²³⁰ and all products²³¹ of the thing belong to the owner "although they may have been

228. *Id.* arts. 3651, 3653.

229. In this matter, no distinction is made between movables and immovables. The relevant articles of the Louisiana Civil Code apply to *all* things. *Cf.* text at notes 378-79 *infra*.

230. See LA. CIVIL CODE arts. 409, 500, 501, 545, 3453 (1870). The word "fruits" has been declared to mean things produced without depletion of the substance of the principal thing. See *Harang v. Bowie Lumber Co.*, 145 La. 96, 81 So. 769 (1919); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914); *cf.* Yiannopoulos, *Introduction to the Law of Things: Louisiana and Comparative Law*, 22 LA. L. REV. 756, 785 (1962).

231. See LA. CIVIL CODE art. 502 (1870). French courts distinguish between *fruits* and *products*. See Yiannopoulos, *supra* note 230, at 786. Louisiana courts, however, have held that the word "products" in article 502 of the Civil Code has the same meaning as fruits. See *Harang v. Bowie Lumber Co.*, 145 La. 96, 114, 81 So. 769, 775 (1919): "Between the alternatives, therefore, of having to give the word 'fruits' the broad and comprehensive meaning of all kinds of products of land, or give the word 'products' the restricted meaning of fruits, properly so called, we adopt the latter."

produced by the work and labor of a third person."²³² A bona fide possessor, however, is entitled "to gather for his benefit the fruits of the thing, until it is claimed by the owner, without being bound to account for them, except from the time of the claim for restitution."²³³ Bona fide possessor is one "who possesses under a title translatif of property and not defective on its face."²³⁴ Possessor in bad faith, on the other hand, is one "who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."²³⁵ This possessor must account to the revindicating owner for all fruits.²³⁶

For the reimbursement of the possessor for expenses, distinction is made in civil law among *necessary*, *useful*, and *luxurious* expenses.²³⁷ Thus, French courts and writers, relying on an uninterrupted civilian tradition and on scattered provisions in the Civil Code, allow recovery for all necessary expenses and

232. LA. CIVIL CODE art. 501 (1870).

233. *Id.* art. 3453. See also arts. 501, 502; *Roussel v. Railways Realty Co.*, 165 La. 536, 115 So. 742 (1923); *Delouche v. Rosenthal*, 143 La. 581, 78 So. 970 (1918); *Adkins v. Cason*, 170 So. 366 (La. App. 2d Cir. 1936). Good faith ceases upon commencement of the petitory action. The good or bad faith of the possessor is thus particularly important for the apportionment of fruits produced prior to revindication. *Woodcock v. Baldwin*, 110 La. 270, 34 So. 440 (1902). Under the Louisiana Civil Code of 1808 good faith ceased upon judicial determination rather than commencement of the action. See *Donaldson v. Winter*, 8 Mart.(N.S.) 175 (La. 1829).

Timber and minerals (as well as bonuses, delay rentals, and royalties derived from mineral rights) are not fruits. See *Harang v. Bowie Lumber Co.*, 145 La. 96, 81 So. 769 (1919); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914); *Steib v. Joseph Rathborne Land Co.*, 163 So. 2d 429 (La. App. 4th Cir. 1964). Even a good faith possessor, therefore, must account to the owner for all values received from timber or mineral operations. See notes 239, 241 *infra*.

234. *New Orleans v. Gaines*, 82 U.S. 624 (1872); *Vance v. Sentell*, 178 La. 749, 758, 152 So. 513, 516 (1934). See also LA. CIVIL CODE art. 3451 (1870): "The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another." *Cf. id.* art. 503.

235. LA. CIVIL CODE art. 3452 (1870). *Cf. id.* art. 503.

236. The possessor in bad faith is liable for such fruits as he might have obtained with ordinary good management. Actual production may not be the measure of damages in all cases. See *Winter v. Zacharie*, 6 Rob. 466 (La. 1844). *Cf. Harang v. Gheens Realty Co.*, 155 La. 68, 98 So. 760 (1924); *Litton v. Litton*, 36 La. Ann. 348 (1884) (fair rental value); *J. Bodinger Realty Co. v. Tulane Investment Co.*, 3 La. App. 261 (Orl. Cir. 1926).

237. See 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 515 (7th ed. Esmein 1961). See also LA. CIVIL CODE arts. 1256 and 1257 (1870) contrasting "expenses which have improved the estate" with "the necessary expenses . . . incurred for the preservation of the estate"; arts. 2509 and 2510 contrasting "useful improvements" with "all expenses, even embellishments of luxury"; art. 2314 providing that: "He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property." *Cf. id.* arts. 2587, 2175.

for useful expenses to the extent they can be offset by profits, but exclude reimbursement for luxurious expenses.²³⁸ In Louisiana, article 3453 of the Civil Code, which has no equivalent in the French Code, provides that the bona fide possessor has the right "in case of eviction from the thing reclaimed, to retain it until he is reimbursed the expenses he may have incurred on it." This article seems to imply that the bona fide possessor is entitled to recover *all* his expenses. The courts, however, have consistently applied a restrictive interpretation and have allowed reimbursement of bona fide possessors for useful and necessary expenses only.²³⁹ The bona fide possessor may also be entitled to reimbursement for "improvements" under article 508 of the Civil Code. This article provides that if "plantations, edifices or works have been made by" a bona fide possessor, the landowner has "his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."²⁴⁰

238. See text at note 60 *supra*.

239. See *Bishop v. Copeland*, 222 La. 284, 62 So. 2d 486 (1953) ("It is, of course, fundamental that a good faith possessor is entitled to reimbursement for the expense he has incurred in improving the property"); *Orr v. Talley*, 84 So. 2d 894 (La. App. 2d Cir. 1956); *Beaulieu v. Monin*, 50 La. Ann. 732, 23 So. 937 (1898) (expenses "for the preservation of the property or which add to its value"); *Litton v. Litton*, 36 La. Ann. 348 (1884); *Davenport v. Knox*, 35 La. Ann. 486 (1883); *Laizer v. Generes*, 10 Rob. 178 (La. 1845); *Bourguignon v. Destrehan*, 5 La. 115 (1833); *Donaldson v. Winter*, 8 Mart.(N.S.) 175 (La. 1829).

Unauthorized persons engaging in timber or mineral operations, regardless of their good or bad faith, must account to the owner for all values received. See note 234 *supra*. According to the jurisprudence, however, persons engaging in timber or mineral operations in *good faith*, are entitled to reimbursement of their production costs. In effect, therefore, these persons, if in good faith, occupy the same position with respect to liability for profits and reimbursement of expenses as ordinary bad faith possessors. As to timber operations, see *Bell & Bro. Lumber Co. v. Simms Lumber Co.*, 121 La. 627, 46 So. 674 (1908); *Guarantee Trust & Safe Deposit Co. v. E. C. Drew Co.*, 107 La. 251, 31 So. 736 (1902); *Gardere v. Blanton*, 35 La. 811 (1883); *Watterston v. Jette*, 7 Rob. 20 (La. 1844). As to mineral operations, see *Huckabay v. Texas Co.*, 227 La. 191, 78 So. 2d 829 (1955); *Allies Oil Co. v. Ayers*, 152 La. 19, 92 So. 720 (1922); *Cook v. Gulf Refining Co.*, 135 La. 609, 65 So. 758 (1914); *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 So. 253 (1905); *Arkansas Fuel Oil Corp. v. Weber*, 149 So. 2d 101 (La. App. 2d Cir. 1963). Recovery of expense in these circumstances is said to rest on the principle of unjust enrichment. See *Scott v. Hunt Oil Co.*, 152 So. 2d 599 (La. App. 2d Cir. 1963).

240. See *Venta v. Ferrara*, 195 La. 334, 196 So. 550 (1940); *Lothrop v. Goudeau*, 142 La. 342, 76 So. 794 (1914); *Gibson v. Huchins & Vaughan*, 12 La. Ann. 545 (1857); *Greenfield v. Manning*, 7 La. 56 (1834); *Daquin v. Coiron*, 8 Mart.(N.S.) 608 (La. 1830); *Gregory v. Kedley*, 185 So. 105 (La. App. 2d Cir. 1938); *Edmiston v. Tulane Investment Co.*, 9 La. App. 112, 119 So. 75 (Orl. Cir. 1928).

A predial lessee does not qualify as a good faith possessor under article 508 "for the sole reason that he is not a possessor at all," *Alexius v. Oertling*, 13 Orl. App. 216, 218 (La. App. Or. Cir. 1916). Accordingly, he cannot "compel

A possessor in bad faith is entitled to reimbursement for expenses incurred for the production of fruits,²⁴¹ and for necessary expenses incurred for the preservation of the property.²⁴² With respect to improvements, article 508 of the Civil Code provides that a possessor in bad faith who erected "plantations, constructions and works" may claim reimbursement "of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby" only if the owner elects to keep the works.²⁴³ According to the same

the owner to reimburse the value of [inseparable] improvements placed upon the land." *Ibid.* In effect, a predial lessee erecting improvements, whether in good or bad faith, occupies the same position as a bad faith possessor. See note 243 *infra*. He may remove all separable improvements unless the owner elects to keep them, in which case the lessee may claim their value and retain the property until he is reimbursed. *Hammonds v. Buzbee*, 170 La. 573, 128 So. 520 (1930); *Elrod v. Hart*, 146 So. 797 (La. App. 2d Cir. 1933).

241. See LA. CIVIL CODE art. 501 (1870). However, persons engaging in timber or mineral operations in *bad faith* are not entitled to compensation for production costs. As to claims for reimbursement of expenses, therefore, the legal situation of these persons is worse than that of ordinary bad faith possessors accounting for fruits. See *Nabors Oil & Gas Co. v. Louisiana Oil Ref. Co.*, 151 La. 361, 91 So. 765 (1922) (reversed on other grounds); *State v. F. B. Williams Cypress Co.*, 131 La. 62, 58 So. 1033 (1912); Comment, *Measure of Damages for Unauthorized Production of Oil and Gas; the Role of Good and Bad Faith*, 15 TUL. L. REV. 291 (1941).

242. See LA. CIVIL CODE art. 2314 (1870); *Green v. Moore*, 44 La. Ann. 855, 11 So. 223 (1892); *Heirs of Wood v. Nicholas*, 33 La. Ann. 744 (1881); *Beard v. Morancy*, 2 La. Ann. 347 (1847). See also *Voiers v. Atkins Bros.*, 113 La. 303, 333, 36 So. 974, 985 (1903): "[A] possessor in bad faith can claim compensation . . . for such expenses as have been incurred in the preservation of the property" but not for useful expenses. The court, however, conceded that "cases may be found here and there in our Reports where the strong magnet of equity has swerved the court from the straight line of the rule." *Id.* at 342, 36 So. at 989. Indeed, it has been held in *Pearce v. Frantum*, 16 La. 423 (1840) that under the regime of the Louisiana Civil Code of 1808 a possessor in bad faith was entitled to reimbursement for both necessary and useful expenses. "In respect to the right to be reimbursed for useful expenses," the court declared, "the Code makes little or no distinction between the possessor in good or bad faith." *Id.* at 430. The case, however, has been expressly overruled in *Gibson v. Huchins & Vaughan*, 12 La. Ann. 545, 548 (1857) as "in marked contrast" with "the jurisprudence of the federal courts and those of our sister States."

243. See *Quaker Realty Co. v. Bradbury*, 123 La. 20, 24, 48 So. 570, 571 (1909) ("Compensation for improvements cannot be claimed by a possessor in bad faith until the owner elects to retain them"); *Labrie v. Filiol*, 9 Mart. (O.S.) 348 (La. 1821). In interpreting this article Louisiana courts have drawn a distinction between separable and inseparable improvements. As to the latter, the rule is that "a possessor in bad faith . . . is entitled to nothing for improvements which cannot be removed." *Davidson v. McDonald*, 131 La. 1047, 1053, 60 So. 679, 681 (1913); *Voiers v. Atkins Bros.*, 113 La. 303, 36 So. 974 (1903); *Ferrier v. Mossler*, 23 So. 2d 341 (La. App. 1st Cir. 1945). As to separate improvements, it has been held that the "possessor in bad faith . . . is entitled to compensation . . . only in the event that the owner elects to keep them." *Davidson v. McDonald*, *supra*; *Heirs of Wood v. Nicholas*, 33 La. Ann. 744 (1881). A possessor in bad faith, however, "may offset the claim for fruits and revenues by a claim for enhanced value resulting from land clearing and other improvements inseparable from the soil." *Quaker Realty Co. v. Bradbury*, 123 La. 20, 25, 48 So. 570, 571 (1909).

article, the owner may elect to demand the demolition of the works at the expense of the bad faith possessor and damages for the prejudice sustained, in which case no compensation is due to the possessor.²⁴⁴

b. The *possessory action*, an indirect descendant of the Roman *interdicta*, has been defined in the Code of Civil Procedure as an action "brought by the possessor of immovable property or of a real right to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted."²⁴⁵ According to the definition, the possessory

244. See *Brown v. Tuzin*, 185 La. 86, 101, 168 So. 502, 507 (1936) (The landowner was "entitled to decline the improvements and therefore not required to pay for them"); *Larido v. Perkins*, 10 Or. App. 19 (La. 1912). Application of article 508 is limited to "possessors." See *Falgoust v. Inness*, 163 So. 429 (La. App. Or. Cir. 1935) (a person placing on the premises a garage with the permission of the owner is not a possessor).

245. LA. CODE OF CIVIL PROCEDURE art. 3656 (1961); *cf.* LA. CIVIL CODE arts. 3454 (2), 3455 (1870). The possessory action of the new Code of Civil Procedure is a combination of the former action of the same name and of the former jactatory action, "with some of the latter's procedural rules made applicable to the new possessory action." LA. CODE OF CIVIL PROCEDURE Book VII, Title II, Introduction (1960). Under the prior law, the possessory action was available to "a person entitled to possession against a person who physically disturbed that possession, to have the plaintiff maintained or restored to possession." The jactatory action was available to "a person in possession against a person whose pretensions of ownership legally disturbed plaintiff's possession, to force the defendant to assert his pretensions in a petitory action." *Ibid.*

The former possessory action was largely fashioned after the model of the French Code of Civil Procedure of 1806. Articles 23-27 of that Code afford a sufficiently broad remedy to cover both disturbances in fact and disturbances in law. See text at notes 101-102 *supra*. In Louisiana, however, the definition of disturbance in law in article 52 of the Code of Practice, which had no equivalent in the French Code, proved too narrow and too confusing to permit utilization of French solutions in cases involving this type of disturbance. Under the circumstances, it was quite natural for early Louisiana courts to look for solutions in Spanish procedural law and to fashion a remedy based on the Spanish jactatory action. *Cf.* LAS SIETE PARTIDAS 3.2.46; *Livingston v. Jeerman*, 9 Mart.(O.S.) 656 (La. 1821); CROSS, PLEADING IN COURTS OF ORDINARY JURISDICTION 215-19 (1885). The action was retained even after the Great Repealing Act of 1828 and the adoption of the Codes of Practice of 1825 and 1870. The need for its retention is explained in Comment (b) under article 3659 of the new Code of Civil Procedure.

Under Spanish law, the action lay to prevent defamation of person or property, whether movable or immovable. In Louisiana, the action was confined to the protection of the possession of immovable property in case of a disturbance in law. The object of the action was to force the defendant to desist from the slander or set forth his title in the answer or in another suit. See *Young v. Town of Morgan City*, 129 La. 339, 56 So. 303 (1911). Slander was any conceivable claim prejudicial to the plaintiff's rights in immovable property. Thus physical acts, declarations made orally or in writing, statements in a previous lawsuit, and even assertions made to a third person have given rise to this action. See Comment, 20 LA. L. REV. 92, 100-02 (1959); Comment, 12 TUL. L. REV. 254 (1938). The broadening of the definition of the possessory action in article 3659 of the Code of Civil Procedure makes it possible for the new possessory action

action may be brought only by a "possessor," *i.e.*, one who "possesses for himself."²⁴⁶

The Code indicates that "a person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself"; and, accordingly, this person may be plaintiff in a possessory action.²⁴⁷ In order to set aside doubts as to the nature of the rights of a "mineral lessee or sublessee, owner of a mineral interest in immovable property, owner of a mineral royalty, or any right under an obligation resulting from a contract to reduce oil, gas, and other minerals to possession" of the Code declares in article 3664 that these are real rights. Accordingly, these rights "may be asserted, protected, and defended in the same manner as the ownership or possession of immovable property, and without the concurrence, joinder, or consent of the owner of the land."²⁴⁸ A person possessing through his lessee, through another person under agreement with him or his lessee, or through a person who has the use or usufruct of the immovable property, is clearly a possessor entitled to bring the possessory action.²⁴⁹ A predial lessee, however, in contrast to a mineral lessee, "possesses for and in the name of his lessor, and not for himself."²⁵⁰ It follows, therefore, that a predial lessee is not entitled to bring the possessory action.

The possessory action may be brought against a person who has caused a disturbance of possession.²⁵¹ The disturbance may

"to perform also the functions of the former jactitory action." See LA. CODE OF CIVIL PROCEDURE art. 3659, Comment (b) (1960).

246. LA. CODE OF CIVIL PROCEDURE art. 3656 (1960). It has been suggested that the possessory action only rarely protects "mere possession where no issue of ownership is ultimately involved" and that the action is ordinarily "a skirmish ground in cases in which ultimate ownership is involved." Hubert, *A Louisiana Anomaly — The "Writ" System in Real Actions*, 22 TUL. L. REV. 459, 469 (1948).

247. LA. CODE OF CIVIL PROCEDURE art. 3656 (1960). *Cf.* LA. CIVIL CODE art. 556 (1870).

248. LA. CODE OF CIVIL PROCEDURE art. 3664 (1960). See also comments under article 3656; Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218 (1960).

249. LA. CODE OF CIVIL PROCEDURE art. 3660 (1960).

250. *Id.* art. 3656. *Cf.* LA. CIVIL CODE art. 3441 (1870).

251. See LA. CODE OF CIVIL PROCEDURE art. 3656 (1960). The possessory action may be combined with a demand for damages. See *Roge v. Kuhlman*, 136 So. 2d 819 (La. App. 3d Cir. 1962); *Gillian v. Jones*, 157 So. 2d 598 (La. App. 2d Cir. 1963). Plaintiff may recover "for the mental anguish and humiliation caused by being wrongfully dispossessed of his property" but he may not recover attorney fees. *Roge v. Kuhlman*, *supra*.

be one in fact²⁵² or in law.²⁵³ The action must be brought in the parish of the situs of the immovable property, even if claim is made accessorially for damages or for the fruits or revenues of the property. Improper venue, however, is waived unless exception is timely taken.

The plaintiff in the possessory action must allege and prove that he had possession of the immovable property or real right at the time of the disturbance; that he and his ancestor had a quiet and uninterrupted possession for more than one year immediately preceding the disturbance, unless evicted by force or fraud; that the disturbance was one in fact or in law; and that the suit was instituted within one year of the disturbance.²⁵⁴

The possession protected by the possessory action is "a corporeal possession" or "civil possession . . . preceded by corporeal possession."²⁵⁵ Good or bad faith is, in that regard, immaterial.²⁵⁶

The possessory action prescribes in one year from the time of the disturbance.²⁵⁷ Where the disturbance is one in fact, the prescription starts to run from the commencement rather than the completion of the disturbance.²⁵⁸ In cases involving disturb-

252. See LA. CODE OF CIVIL PROCEDURE art. 3659 (1960): "A disturbance in fact is an eviction, or any other physical act which prevents the possessor of immovable property or of a real right from enjoying his possession quietly, or which throws any obstacle in the way of that enjoyment."

253. *Id.* art. 3659: "A disturbance in law is the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership or to the possession or immovable property or of a real right, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right." *Cf. Voisin v. Luke*, 142 So. 2d 815 (La. App. 1st Cir. 1962).

254. See LA. CODE OF CIVIL PROCEDURE art. 3658 (1960); *cf. Mount Pleasant Primitive Baptist Church v. Zion Hill Missionary Baptist Church*, 126 So. 2d 852 (La. App. 2d Cir. 1961).

255. See LA. CODE OF CIVIL PROCEDURE art. 3660 (1960). Article 3658 "makes no change in the law" and article 3660 is "declaratory of the established jurisprudence." *Cf. Missouri Pacific Co. v. Littleton*, 125 So. 2d 37 (La. App. 2d Cir. 1961); *Mount Pleasant Primitive Baptist Church v. Zion Hill Missionary Baptist Church*, 126 So. 2d 852 (La. App. 2d Cir. 1961).

256. The possessory action may be brought by a possessor of bad faith, or even by a usurper. See LA. CODE OF CIVIL PROCEDURE art. 3660 (1960); *cf. Smith v. Grant Timber & Mfg. Co.*, 130 La. 471, 474, 58 So. 153, 154 (1912).

257. See LA. CODE OF CIVIL PROCEDURE art. 3658 (1960); *cf. LA. CIVIL CODE* art. 3456 (1870).

258. See *Vermilion Parish School Board v. Muller*, 92 So. 2d 77 (La. App. 1957) (possessory action instituted more than a year after the commencement of the disturbance by the erection of a fence, held, was barred by the one year prescription although the action was brought within one year from the completion of the fence).

ance in law it has been held that the action does not prescribe so long as the slanders remain of record.²⁵⁹

The possession of the plaintiff in the possessory action may be tacked to that of his ancestors in title.²⁶⁰ According to the jurisprudence the two possessions may be tacked only if there is a "privity of contract" between the present possessor and his ancestors in title.²⁶¹ Privity of contract has been interpreted to include universal succession.²⁶²

As in the case of the petitory action, the Code does not indicate directly the defenses available to the defendant in a possessory action. The defenses available in ordinary proceedings and those available under the jurisprudence which has not been superseded ought to be considered as still applicable.²⁶³ The exception of "want of possession"²⁶⁴ has been abolished as "unnecessary and unworkable."²⁶⁵ Under the Code, therefore, the issue of the possession of the plaintiff will be considered by the court in the trial on the merits and not in a preliminary hearing. The defendant may reconvene and pray for any relief which is available to the plaintiff.²⁶⁶

The right of ownership is not at issue in the possessory action. Evidence of ownership is relevant and admissible only to show that a party possesses as owner, the extent of possession, and the length of time the immovable or right has been possessed.²⁶⁷ Whenever the defendant raises or interjects the issue of ownership through his answer the possessory action is converted into a petitory action.²⁶⁸ The consent of the plaintiff is

259. See *Dixon v. American Liberty Oil Co.*, 226 La. 911, 77 So.2d 533 (1955).

260. See LA. CODE OF CIVIL PROCEDURE art. 3658 (1960). Tacking is implemented by article 3661(3) which indicates that the ownership or title of the parties can be offered in evidence in order to show the length of time that a party and his ancestors in title have had possession of the property or right. See article 3661, comment (d).

261. See Johnson, *Real Actions*, 35 TUL. L. REV. 541, 552 (1961). Cf. *Stanford v. Robertson*, 144 So.2d 747 (La. App. 3d Cir. 1962).

262. See *Noel v. Jumonville Pipe & Machinery Co.*, 245 La. 324, 158 So.2d 179 (1963).

263. See Johnson, *Real Actions*, 35 TUL. L. REV. 541, 553 n. 84 (1961).

264. See LA. R.S. 13:5063-5064 (1950).

265. LA. CODE OF CIVIL PROCEDURE art. 3657 comment (g) (1960).

266. *Id.* art. 3662, comments (a) and (c); cf. *McDaniels v. Miller*, 136 So.2d 763 (La. App. 1st Cir. 1962) (reconventional demand for fixing of boundary).

267. See LA. CODE OF CIVIL PROCEDURE art. 3661 (1960); cf. LA. CIVIL CODE art. 3455 (1870).

268. See LA. CODE OF CIVIL PROCEDURE art. 3657 (1960); *Roy v. Elmer*, 153 So.2d 209 (La. App. 2d Cir. 1963); *Stamper v. Bienville Parish Police Jury*,

not required for this conversion. Conversion may be effected also by separate action, by a reconventional demand, or a supplemental answer filed after the judgment ordering the defendant to bring a petitory action.²⁶⁹

The plaintiff in the possessory action has the burden of proof as to all requisite allegations.²⁷⁰ Where the defendant converts the possessory action into a petitory action he is considered as having judicially confessed plaintiff's possession; accordingly, the burden of proof of ownership is on the defendant.²⁷¹

Article 3662 of the Code of Civil Procedure contains a detailed description of the contents of a judgment rendered in favor of the plaintiff. This judgment should, in the first place, recognize plaintiff's right to the possession of the immovable property or real right and should restore him to possession, if evicted, or maintain him in possession, if the disturbance has not been an eviction. If the plaintiff has especially prayed for such relief, the court shall order the defendant to commence a petitory action within a delay of sixty days after the judgment becomes executory; and if the defendant should fail to do so, he should be precluded from asserting in the future his ownership of the property or right.²⁷²

The possessory action and the petitory action cannot be cumulated or pleaded alternatively. If the plaintiff does so, he is considered to have waived the possessory action in favor of the petitory action. If the plaintiff brings the possessory action and then brings a petitory action before judgment in the possessory action, the possessory action is abated.²⁷³ If the defendant in a

153 So.2d 503 (La. App. 2d Cir. 1963); *Phillips v. West*, 144 So.2d 173 (La. App. 1st Cir. 1962).

269. See LA. CODE OF CIVIL PROCEDURE art. 3657 (1960) and comment (e) under this article.

270. *Id.* art. 3658.

271. *Id.* art. 3653, 3657. See also *Roy v. Elmer*, 153 So.2d 209 (La. App. 2d Cir. 1963); *Phillips v. West*, 144 So.2d 173 (La. App. 1st Cir. 1962).

272. See LA. CODE OF CIVIL PROCEDURE art. 3662, comment (b) (1960); *Voisin v. Luke*, 142 So.2d 815 (La. App. 1st Cir. 1962). This period fixed by the court within which the defendant must file the petitory action is a period of peremption rather than one of prescription. *Cf. Canada v. Frost Lumber Indus.*, 9 So.2d 338 (La. App. 2d Cir. 1942). A suspensive appeal from the judgment rendered in a possessory action must be taken within fifteen days and a devolutive appeal within thirty days of the applicable date. See LA. CODE OF CIVIL PROCEDURE art. 3662 (1960).

273. See LA. CODE OF CIVIL PROCEDURE art. 3657 (1960); *cf. Coleman's Heirs v. Holmes' Heirs*, 147 So.2d 752 (La. App. 3d Cir. 1962). The possessory action does not abate when a petitory action concerning the same property is brought in another state. See *Gillian v. Jones*, 157 So.2d 598 (La. App. 2d Cir. 1963).

possessory action brings a separate petitory action against the plaintiff in the possessory action prior to executory judgment in that action, the defendant is considered as having judicially confessed plaintiff's possession.²⁷⁴ The purpose of these provisions is to keep the trial of the issues of possession and ownership as separate as possible and to encourage the determination of the issue of possession before the bringing of the petitory action.²⁷⁵ In contrast to prior jurisprudence, under the Code the plaintiff may have the suit dismissed without prejudice in the case of an improper cumulation of actions rather than be considered as having confessed judicially the possession of the defendant. He may therefore renew his possessory action in a second suit.²⁷⁶

Two of the changes brought about by the Code in this area are definite contributions to the science of civil procedure and deserve additional comment. Under French procedure, if the lawful owner of immovables is sued in a possessory action brought by the actual possessor, the owner may not assert his title as a defense, or even institute a separate petitory action. He must await the termination of the possessory action, satisfy whatever judgment may have been rendered against him in that proceeding, and then institute the petitory action to seek recovery of the damages he has sustained as owner, including the very damages he paid to the successful plaintiff in the possessory action. This was the law of Louisiana under articles 55 and 56 of the Code of Practice, at least until 1920. In that year, article 55 was amended in an abortive effort to solve the problem, but this amendment was productive of nothing more than confusion and distortion of the underlying procedural theory. Upon revision, the old procedural rules did not withstand the reporter's critical evaluation; and the Law Institute adopted the proposed changes. Under the new Code, if the possessory action is brought against the non-possessing lawful owner on the ground that he

274. See LA. CODE OF CIVIL PROCEDURE art. 3657 (1960), comment (a).

275. *Id.* art. 3657, comment (a). Cf. LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, p. 4 (1954): "The issue of possession must be kept separate from the issue of title or property because: (1). It is necessary to discourage self help, which leads to breaches of the peace; (2). The settling of the issue of possession frequently facilitates proof of ownership; (3). The matter of possession should not be subject to the delays ordinarily inherent in the issue of ownership." LA. R.S. 13:5061 (1950) which provided for the automatic cumulation of the possessory and petitory actions when the state or any of its subdivisions was sued in a possessory action has been repealed by La. Acts 1960, No. 32.

276. See LA. CODE OF CIVIL PROCEDURE art. 3657, comment (c) (1960).

has committed a disturbance of possession, the lawful owner may immediately convert the proceeding into a petitory action. If his title is recognized judicially, this is a complete bar to the assessment of any damages against him, because of the disturbance of the possession of the original plaintiff (Code of Civil Procedure article 3657). Of course, when he converts the proceeding into the petitory action, he confesses judicially the possession of the plaintiff in the possessory action.

The second contribution concerns the scope of the possessory action. Under French procedure, an adverse claim to a registered immovable constitutes a disturbance in law and the possessor may immediately institute the possessory action to have his right to the possession recognized, and recover whatever damages he may have suffered. However, the validity of the adverse claim is not, and cannot be, adjudicated in the possessory action; and there is no way under French law for the possessor to obtain an adjudication of the invalidity of the adverse claim, unless and until the adverse claimant brings the petitory action. If there is any merit to the adverse claim, this may keep the property out of commerce until prescription runs against the adverse claim. Under the Spanish jactitory action, on the other hand, the plaintiff could not only have his right to possession judicially recognized, but he could obtain a judgment ordering the defendant to assert his pretensions of ownership within a limited time or be forever precluded from doing so. Under the broadened possessory action of the Code of Civil Procedure, this feature of the former jactitory action has been advisedly retained (article 3662(2)).

c. A third nominate real action under the Code of Civil Procedure is the *action of boundary*. Following the language of article 823 of the Civil Code, article 3691 of the Code of Civil Procedure provides that "if two contiguous lands have never been separated, or have never had their boundaries determined, or if the bounds which have been formerly fixed are no longer to be seen, or were wrongly placed, the owner of one of the contiguous lands may bring an action against the other to compel the fixing of the boundary." This article has been placed in the Code "to overrule legislatively the cases holding that questions of title and ownership cannot be determined in an action of boundary."²⁷⁷

The boundary action is subject to the rules governing ordinary proceedings.²⁷⁸

d. The fourth and last nominate real action regulated in the Code of Civil Procedure is the *hypothecary action*, i.e., the action for the enforcement of a mortgage. The Code provides that a conventional mortgage may be enforced by ordinary or executory proceedings²⁷⁹ and that all mortgages, legal, judicial, or conventional, may be enforced without reference to any alienation or transfer from the original debtor.²⁸⁰ On the basis of this statutory pact *de non alienando* the mortgage creditor can seize and sell the property in the hands of a third person, as if it were still in the hands of the original debtor.²⁸¹ In this case, the mortgage creditor must have notice of the seizure served upon the original debtor and the present owner of the property subject to mortgage.²⁸² The third possessor may arrest the seizure or threatened seizure and judicial sale of the property by injunction and intervention, on the ground of enumerated defenses.²⁸³

In addition to the remedies available to the owner of immovable property or holder of an immovable real right under the nominate real actions of the Code of Civil Procedure, relief is also available under numerous innominate actions based on the Civil Code, the Code of Civil Procedure, or the jurisprudence of the courts. Thus, protection of immovable real rights is involved in actions founded on the Civil Code articles dealing with offenses and quasi-offenses, new works,²⁸⁴ and servitudes imposed by law.²⁸⁵ Under the Code of Civil Procedure the owner of immovable property and the holder of immovable real rights have at their disposal the remedies of sequestration,²⁸⁶ declaratory

277. *Id.* art. 3693, comment. Cf. LOUISIANA LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, p. 14 (1954).

278. See LA. CODE OF CIVIL PROCEDURE art. 3693 (1960).

279. *Id.* art. 3821.

280. *Id.* art. 3741.

281. *Id.* art. 3741, comment (a).

282. *Id.* art. 3742.

283. *Id.* art. 3743.

284. See LA. CIVIL CODE arts. 856-869 (1870). For the protection of real rights by means of delictual action for damages, see note 292 *infra*.

285. *Id.* arts. 664-674.

286. See LA. CODE OF CIVIL PROCEDURE art. 3663 (1960).

judgment,²⁸⁷ and injunction.²⁸⁸ Injunction is available either as an ancillary remedy during the pendency of a possessory action or as an appropriate remedy under an injunction suit brought to enjoin trespassers from interfering with the immovable or real rights.²⁸⁹ Finally, ownership and real rights on immovables may be adjudicated in a number of non-statutory "fringe"²⁹⁰ or "quasi-real"²⁹¹ actions, such as the action of trespass,²⁹² the action to remove a cloud from title,²⁹³ and the action of specific performance.²⁹⁴

287. See *Lincoln Parish School Board v. Ruston College*, 162 So.2d 419 (La. App. 2d Cir. 1964). Actions for declaratory judgments are similar in nature with petitory actions. Cf. LA. CODE OF CIVIL PROCEDURE art. 3654, comments (b), (c), (d); art. 1871 (1960); Note, *Declaratory Judgments Act—Use in Real Actions*, 31 TUL. L. REV. 197 (1956). See also LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, p. 19 (1954): "In a sense all real actions . . . are merely declaratory of rights." Adjudication of the ownership of immovable property may also take place in summary proceedings to show cause. See *Succession of Seals*, 243 La. 1056, 150 So.2d 13 (1963).

288. See LA. CODE OF CIVIL PROCEDURE art. 3663 (1960) and comment (b) under the same article; *Winningham v. Hill*, 164 So.2d 384 (La. App. 2d Cir. 1964).

289. In many instances real rights can be completely protected by injunctive relief alone. See LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE, *Exposé des Motifs* No. 19, p. 18 (1954). Under the regime of the Code of Practice a plaintiff could proceed under the injunctive articles and ignore the real actions. See *Riseman, The Possessory Action in Louisiana*, 20 TUL. L. REV. 424, 525 n.7 (1946). For similar solutions under the Code of Civil Procedure, see *Matassa v. Finazzi*, 159 So.2d 732 (La. App. 4th Cir. 1964); *Williams v. Beverly*, 160 So.2d 291 (La. App. 1st Cir. 1964); *Mitchel v. James*, 144 So.2d 435 (La. App. 4th Cir. 1962).

290. See LA. CODE OF CIVIL PROCEDURE title II, *Introduction*: "No attempt has been made to include in this Title certain of the fringe actions which bear some resemblance to the real actions, such as the action of trespass, the action to remove title, and the action of specific performance."

291. See *Johnson, Real Actions*, 33 TUL. L. REV. 541, 543 (1961).

292. Under the regime of the Code of Practice, Louisiana courts have handled the actions for damages as an independent category of actions, distinguished from the nominate real actions. See *Bossier's Heirs v. Jackson*, 114 La. 707, 38 So. 525 (1905); *Feshee v. Kirby Lumber Co.*, 212 La. 44, 31 So.2d 419 (1947); *Bagents v. Cromwell Long Leaf Lumber Co.*, 20 So.2d 641 (La. App. 1st Cir. 1945) (all cases involving demands for damages for the cutting down of timber). See also the following cases decided under the Code of Civil Procedure: *Stoufflet v. United Gas Pipe Line Co.*, 162 So.2d 828 (La. App. 1st Cir. 1964) (damages to land resulting from the operation of an authorized servitude); *East v. Pan-American Petroleum Corp.*, 168 So.2d 426 (La. 1964) and *Juncker v. T. L. James & Co.*, 148 So.2d 795 (La. App. 4th Cir. 1962) (damages for unlawful removal of dirt); *Fontenot v. Central Louisiana Elec. Co.*, 147 So.2d 773 (La. App. 3d Cir. 1962) (claim for damages for cutting branches of trees).

293. See JOHNSON, GUIDE TO LOUISIANA REAL ACTIONS 67-87 (1961). Several Louisiana decisions have recognized an action to remove a cloud from title. This action differs from the petitory action in that the plaintiff need not allege title in himself. The only relief granted under this procedure has been the cancellation of a recorded instrument from the public records. See *Exchange Nat'l Bank v. Head*, 155 La. 909, 99 So. 272 (1924); *Bodcaw Lumber Co. v. Kendall*, 161 La. 337, 108 So. 664 (1926); *Parish of Jefferson v. Texas Co.*, 192 La. 934, 189 So. 580 (1939). It might be expected that under the Code of Civil Procedure this nonstatutory action would fall into oblivion. The Louisiana Supreme

2. Protection of Movable Real Rights

Movable real rights,²⁹⁵ *i.e.*, the ownership of corporeal movables and rights to possession and enjoyment thereof, are traditionally protected in civil law by rules of the *law of property* and rules of the *law of obligations*. The law of property accords to the owner or person entitled to the possession and enjoyment of corporeal movables a *revendicatory* action for the recovery of movables in kind in the hands of any unauthorized possessor. This action, based on title, is termed "real" action because it is available for the protection and enforcement of a real right.²⁹⁶ The law of obligations likewise affords actions for the recovery of movables in kind, and, in addition, actions for damages, and actions for restitution in accordance with the principle of unjust enrichment. Actions for the recovery of movables in kind may be based on any obligation, contractual, delictual, quasi-contractual, or quasi-delictual. Actions for damages may be based on delictual and quasi-delictual obligations (*i.e.*, offenses and quasi-

Court, however, granted a new lease on life to this action in *Walmsley v. Pan-American Petroleum Corp.*, 244 La. 513, 153 So.2d 375 (1963). The case involved an action against the State Mineral Board for the cancellation of a mineral lease and the issue was whether plaintiff's petition stated a petitory action, in which case the state should be an indispensable party, or merely the non-statutory action to remove a cloud from title, in which case the joinder of the state could be dispensed with since plaintiff did not allege title in himself. The court decided that the petition stated an action to remove a cloud from title, two justices dissenting. For a critique, see Hardy, *Mineral Rights*, 24 LA. L. REV. 315, 229-236 (1964).

294. In a number of cases, actions to compel the conveyance of immovables have been classified as real actions. See *Mussina v. Alling*, 11 La. Ann. 568 (1856); *Peterson v. Moresi*, 191 La. 931, 186 So. 737 (1939); *State ex rel. Hyam's Heirs v. Grace*, 197 La. 427, 1 So.2d 683 (1941). However, this classification was not made for procedural purposes but in order to determine the applicable prescription. See text at note 197 *supra*. Immovable real rights are also affected by adjudications in actions to annul sales of immovables. Louisiana courts have held, however, that these actions are not real actions. See *Reid v. Federal Land Bank*, 193 La. 1017, 192 So. 688 (1939); *Winsor v. Tyler*, 167 La. 169, 118 So. 876 (1925). It has been observed that "since the judgment affects title and ownership of real estate, it is difficult to follow the distinction." LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, p. 12 (1954).

295. Contemporary Louisiana lawyers may, perhaps, consider the category of "movable real rights" as an abstraction of questionable validity. Indeed, legal usage in the state tends to associate the term "real rights" with rights in immovable property exclusively. This, however, was not the usage at the time the first Louisiana Civil Code was enacted; "real rights" could exist in both movables and immovables. And under the Civil Code of 1870 the right of pledge, as well as the ownership, use, and usufruct of movables have all the substantive characteristics of real rights. See Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 180 (1963).

296. See text at notes 33, 39, 61 *supra*; 1 PLANIOL, RIPERT ET BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 1108-14 (1948); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 342, 348, 358 (1874-82).

offenses). Actions for restitution are based on the unjust enrichment of the defendant at the expense of the plaintiff (*i.e.*, on a quasi-contractual obligation). All actions based on obligations are termed "personal" actions because they correspond to personal rights.²⁹⁷ A detailed examination of the relevant provisions of the Louisiana Civil Code and of the solutions reached by Louisiana courts in the interpretation and application of these provisions is appropriate here.

a. Louisiana Civil Code

The Louisiana Civil Code contains a number of provisions dealing with or presupposing the revendication of movables, *i.e.*, the right of the owner to recover corporeal movables in kind by merely asserting title. Articles 3507 and 3508, for example, contemplate the "reclamation" (revendication) of movables stolen or lost. According to article 3507, if the possessor of a thing lost or stolen "bought it at public auction or from a person in the habit of selling such things," the owner can recover it only by returning to the possessor the price he paid.²⁹⁸ Article 3508 excludes the revendication of "stray animals which have been sold in conformity with the regulations of police, or other movable objects lost or abandoned which are sold by authority of law." These articles give rise to an argument *a contrario* that in all other cases revendication is permissible, without any obligation to reimburse the bona fide purchaser.²⁹⁹ The owner's right to revendicate corporeal movables is also clearly contemplated in articles 3453 and 3454 of the Civil Code which, technically, deal with the rights and duties of the possessors of things revendicated.³⁰⁰

Revendication is also authorized by the Code in article 2138 which provides that "if the debtor give a thing in payment of his obligation, which he has no right to deliver . . . the owner of the

297. See text at note 118 *supra*.

298. Louisiana courts have held that article 3507 applies only if the requirements of the preceding article 3506 are fulfilled, *i.e.*, where "a person has possessed . . . a movable thing, during three successive years without interruption." *Security Sales Co. v. Blackwell*, 167 La. 667, 673, 120 So. 45, 46 (1928). See also *Davis v. Hampton*, 4 Mart.(N.S.) 288 (La. 1826).

299. The fact that the Louisiana Civil Code has no article corresponding to article 2279 of the French Code leads to the same conclusion. See Franklin, *Security of Acquisition and Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 601 (1932).

300. See also LA. CIVIL CODE arts. 501, 502 (1870).

thing may reclaim it in the hands of the creditor" unless the object paid is money or a consumable thing which no longer exists. Finally, it ought to be mentioned that article 60 of the Code of Practice made an allusion to the "revendication" of movables.³⁰¹ The new Code of Civil Procedure does not have a corresponding reference, and, therefore, the action for the revendication of movables under this code must be regarded as an *innominate* action. The issue of the ownership of movables is ordinarily determined under the Code of Civil Procedure in proceedings following the issue of a writ of sequestration.³⁰² This broad remedy has proved to be an effective means for the protection of the right of ownership and possession of movables. Recovery in these proceedings may be predicated on any contractual or ownership right.

Apart from the owner, any person entitled to the possession of movables, for example, a usufructuary, a depositary, or a pledgee, may bring an action for the recovery of possession. The Louisiana Civil Code provides expressly in article 556 that the "usufructuary can maintain all actions against the owner and third persons, which may be necessary to insure him the possession, enjoyment and preservation of his right." The right of action of the depositary for the recovery of movables found in the hands of third persons is implied in the Code.³⁰³ With respect to the rights of the pledgee, articles 3157 and 3158, in combination with article 3173, are sufficiently broad to cover the situation.³⁰⁴

301. See LA. CODE OF PRACTICE art. 60 (1870): "Possessory actions cannot be maintained for personal property, the action in revendication for that species of property having nothing in common with the extraordinary privileges secured to the owners of real estate, or of real rights, when they are disturbed in their enjoyment."

302. See LA. CODE OF CIVIL PROCEDURE art. 3571 (1960): "When one claims the ownership or right to possession of property . . . he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." According to comment (a) under Article 3501 "the petition for a writ . . . of sequestration must contain allegations to support the principal cause of action as well as the provisional remedy." For corresponding developments in France, see note 61 *supra*.

303. See LA. CIVIL CODE arts. 2926-2971 (1870); *cf.* Douglas v. Haro, 214 La. 1099, 1102, 39 So.2d 744, 745 (1949) ("a depositary has a sufficient interest to maintain an action for the possession of a deposit wrongfully taken from him"). See also Lannes v. Courege, 31 La. Ann. 74 (1879) (recovery of notes by depositary in the hands of third persons); Newman v. Wilson, 1 La. Ann. 48 (1846) (recovery of movables by a sheriff of another state).

304. *Cf.* LA. CIVIL CODE art. 3397(3) (1870): "[I]f the mortgaged thing goes

Quite apart from the revendicatory action, movables may be recovered *in kind* under the Louisiana Civil Code by personal actions accorded by the law of obligations. Thus, the right of recovery may be based on *conventional* obligations deriving from such contracts as sale (article 2462), lease (article 2727), loan for use (article 2906), deposit (articles 2944, 2961), pledge (article 3164), or, in general, obligations to do or not to do (articles 1926, 1927). Under these conventional obligations the owner of the thing may claim it in kind, and if the thing cannot be returned, he may claim damages for the violation of the contract. The right of the recovery of the thing in kind may also be based on *delictual* and *quasi-delictual* obligations, *i.e.*, the wrongful dispossession of the owner (article 3507), and on the *quasi-contractual* obligation of the payment of a thing not due (article 2312). Article 2312 provides specifically that "if the thing unduly received is a . . . corporeal movable, he who has received it is bound to restore it in kind, if it remain."

Where the owner does not desire recovery of movables in kind, or where recovery in kind is impossible, the Louisiana Civil Code accords rights of action for damages and for restitution. Actions for *damages* are authorized in the case of unlawful interference with the ownership or right to the possession of movables by the broad language of article 2315. These actions are predicated on delictual obligations incurred by the wrongdoer through his fault. Actions for *restitution* are predicated on quasi-contractual obligations deriving from the unjust enrichment of the defendant at the expense of the plaintiff. The Louisiana Civil Code, while recognizing the principle of unjust enrichment,³⁰⁵ has not institutionalized the rules governing restitution. Following the model of the French Civil Code, the Louisiana Code merely regulates one instance of unjust enrichment, the payment of a thing not due. Article 2301 states that one receiving something not due incurs an obligation to return it, and article 2302 makes the right of recovery conditional on "payment" through "mistake."

Theories of recovery, as outlined, ought to be kept distinct not only for the achievement of clarity of thought but also for

out of the debtor's hands, the creditor may follow it in whatever hands it may have passed."

305. See LA. CIVIL CODE art. 1965 (1870): "[N]o one ought to enrich himself at the expense of another."

the solution of a number of practical problems. The conditions for the availability of a particular remedy differ, and, depending on the circumstances of each case, there may be or may not be a concurrence of remedies. The owner who is in a contractual relationship with the defendant may be entitled to the recovery of a movable on the basis of either the revendicatory action or the action deriving from the contract. In certain cases, for example, where the defendant has become bankrupt, the owner may have a special interest to bring the revendicatory action.³⁰⁶ Again, an owner who has delivered a movable by mistake may reclaim it by an action in revendication or by one in quasi-contract. But since recovery on the ground of quasi-contract may be limited to the amount of defendant's enrichment, the owner may have a particular interest to bring the revendicatory action. Where a movable has been lost or stolen, the owner may bring against the thief the revendicatory action or the action in delict for damages, depending on whether his object is recovery of the movable in kind or damages for the unlawful interference with his property. Persons other than the owner entitled to the possession and enjoyment of movables may bring the appropriate actions for the protection and enforcement of their own rights.

b. Louisiana Jurisprudence

Louisiana courts have not always distinguished clearly among the various theories of recovery, nor have they succeeded in developing an entirely consistent pattern for the protection of movable real rights. This may be partly due to the lack of systematic elaboration on the provisions of the Civil Code by Louisiana writers and partly due to the gradual adoption of common law remedies. Borrowings from that system of law in this area may well amount to something more substantial than interstitial seepage. As a result, the law "is presently in a state of confusion," which should be expected, because the common law remedies "are based on an entirely different conceptual framework of property protection."³⁰⁷

306. *Cf.* *Plaquemines Equip. & Machine Co. v. Ford Motor Co.*, 245 La. 201, 157 So. 2d 884 (1963); *Mortec v. Roach's Syndic*, 8 La. 81 (1835); *Hall v. Mulhollan*, 7 La. 383 (1834). The advantage is obvious: by the revendicatory action the plaintiff will be entitled to the recovery of his very movable while by an action in tort, in contract, or restitution, he will have to share as creditor with other creditors.

307. Note, 37 TUL. L. REV. 843 (1963).

A survey of the Louisiana jurisprudence discloses that the ownership of movables and rights to the possession and enjoyment thereof are protected in practice by actions for the recovery of the movables in kind,³⁰⁸ actions for restitution of their value,³⁰⁹ and actions for damages.³¹⁰

308. See, *e.g.*, *Mitchell v. Gulf States Finance Corp.*, 226 La. 1008, 78 So. 2d (1955) (automobile); *Donnell v. Gray*, 215 La. 497, 41 So. 2d 66 (1949) (oil well equipment); *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941) (jewelry); *Jennings & Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 127 La. 971, 54 So. 318 (1911) (oil); *Daniels v. Taubenblatt*, 120 La. 349, 45 So. 273 (1908) (staves); *Kellar v. Victoria Lumber Co.*, 45 La. Ann. 476, 12 So. 511 (1893) (lumber); *Bouchard v. Parker*, 32 La. Ann. 535 (1880) (bonds); *Pritchett v. Coyle*, 22 La. Ann. 57 (1870) (personal property); *Draper v. Richards*, 20 La. Ann. 306 (1868) (household furniture); *Warren v. Saltenberer*, 6 La. Ann. 351 (1851) (furniture); *Newman v. Wilson*, 1 La. Ann. 48 (1846) (lumber); *Campbell v. Nichols*, 11 Rob. 16 (La. 1845) (carriage); *Perryman v. Demaret*, 11 La. 347 (1837) (cattle); *Caro v. McCallef*, 144 So. 2d 133 (La. App. 4th Cir. 1962) (cows); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805 (La. App. 2d Cir. 1962) (automobile); *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 4th Cir. 1962) (diamond ring); *Masciotta v. Du Saules*, 125 So. 2d 181 (La. App. 4th Cir. 1961) (clock); *Lusco v. McNeese*, 86 So. 2d 226 (La. App. 1st Cir. 1956) (counters and stainless steel coffee urn hood); *Schutzman v. Munson*, 51 So. 2d 125 (La. App. 1st Cir. 1951) (cattle); *Crain v. Crain*, 29 So. 2d 404 (La. App. 1st Cir. 1947) (mule); *Sibley v. Lester*, 8 So. 2d 320 (La. App. 2d Cir. 1942) (furniture); *Averett v. Southall*, 8 So. 2d 141 (La. App. 2d Cir. 1942) (household effects); *Dunkelberg Farms v. Madding*, 6 So. 2d 801 (La. App. 2d Cir. 1942) (diamond ear screws); *Roberts v. Bertrand*, 174 So. 201 (La. App. 1st Cir. 1937) (cattle); *Chachere v. Moses George & Son*, 165 So. 522 (La. App. 1st Cir. 1936) (store fixtures); *Muse v. Sharp*, 155 So. 300 (La. App. 1st Cir. 1934) (skidder and tractor); *Dunkelberg Farms v. Mays*, 19 La. App. 106, 138 So. 224 (1931) (diamond ear screws); *Holloway v. Ingersoll Co.*, 133 So. 819 (La. App. 2d Cir. 1931) (cotton); *Anders v. Lee-Rogers Chevrolet Co.*, 7 La. App. 481 (1928) (automobile); *Cobb & Dobson v. Ray*, Gunby's Dec. 23 (La. App. 1885) (raft of saw-logs).

309. See, *e.g.*, *Miller v. Krouse*, 177 So. 472 (La. App. 2d Cir. 1937) (material); *Rizzio v. Moriarity*, 1 Orl. App. 150 (La. App. 1904) (action against the seller of movables belonging to plaintiff); *Gaty, McCune & Co. v. Babers*, 32 La. Ann. 1091 (1880) (machinery); *King v. Cressap*, 22 La. Ann. 211 (1870) (furniture and household effects); *Kempt v. Kelly*, Gunby's Dec. 65 (La. App. 1885) (mule). Quite frequently plaintiff claims certain movables in kind and, in the alternative, their value. See, *e.g.*, *Freeport & Tampico Fuel Oil Corp. v. Lange*, 157 La. 217, 102 So. 313 (1924) (scrap iron or value); *Grant Timber & Mfg. Co. v. Gray*, 131 La. 865, 60 So. 374 (1913) (timber or value); *Dangerfield v. Fauver*, 19 La. Ann. 171 (1867) (mule or value); *Young v. LeBlanc*, 144 So. 2d 905 (La. App. 4th Cir. 1962) (diamond ring or value); *Fontenot v. Johnson*, 77 So. 2d 82 (La. App. 1st Cir. 1954) (railroad jacks or value); *Curry v. Cailler*, 37 So. 2d 863 (La. App. 1st Cir. 1948) (movables or value); *Goodstein v. Millikin*, 14 So. 2d 94 (La. App. 2d Cir. 1943) (cattle or value); *Luening v. Natal*, 11 So. 2d 649 (La. App. Orl. Cir. 1943) (computing scale or value); *Orlesh v. Fairchild Auto Co.*, 13 Orl. App. 303 (La. App. 1916) (automobile or value). In these cases the pecuniary condemnation is made in the alternative, *i.e.*, if the defendant cannot return the movable in kind.

310. See, *e.g.*, *Importsales, Inc. v. Lindemann*, 231 La. 663, 92 So. 2d 574 (1957) (merchandise); *Hitt v. Herndon*, 166 La. 497, 117 So. 568 (1928) (cattle and equipment); *Carter Allen Jewelry Co. v. Overstreet*, 165 La. 887, 116 So. 222 (1928) (ring); *Martin v. Texas Co.*, 150 La. 556, 90 So. 922 (1921) (oil); *Chamberlain v. Warrell*, 38 La. Ann. 347 (1886) (cotton); *Burch v. Willis*, 21 La. Ann. 492 (1869) (cotton); *Davis v. American Marine Corp.*, 163 So. 2d 163 (La. App. 4th Cir. 1964) (swivel); *A. B. C. Oil Burner & Heating Co. v. Palmer*,

i. Recovery of Movables in Kind: The Revendicatory Action.

In France, the dispossessed owner or other person entitled to the possession and enjoyment of corporeal movables may avail himself of all personal actions and of the revendicatory action in cases where article 2279 of the Civil Code does not apply.³¹¹ In Louisiana, however, in spite of the provisions of the Civil Code according the revendicatory action and the conspicuous absence of a rule corresponding to article 2279 of the French Code,³¹² the courts are still groping for solutions in cases involving revendication of movables.

The question of the nature of the action for the recovery of movables in kind by virtue of title of ownership has proved particularly perplexing. Strictly speaking, the action cannot be termed either "real" or "personal" in the light of the Code of Civil Procedure³¹³ or the corresponding provisions of the Code of Practice.³¹⁴ The difficulties concerning the determination of the nature of the action in revendication of movables are illustrated in the case of *Bouchard v. Parker*,³¹⁵ involving the recovery of identifiable bonds. The court declared aptly that "an action of this kind, although it might not be defined to be a real action proper according to the definition of our Code of Practice,

28 So. 2d 462 (La. App. Orl. Cir. 1946), air conditioning equipment); *Edwards v. MacThieme Chevrolet Co.*, 191 So. 569 (La. App. 2d Cir. 1939) (truck and trailer); *cf. Tolbird v. Cooper*, 243 La. 306, 143 So. 2d 80 (1962) (truck). In these cases the courts have allowed damages in the measure of the value of the movables. This tends to confuse actions for damages which in the above cases have been correctly held to be *ex delicto* with actions for the value of movables which have been held to be *quasi-contractual*. The measure of damages ought to be any pecuniary prejudice suffered by the plaintiff as a result of wrongful dis-possession. Quite frequently actions for damages are combined with actions for the recovery of movables in kind. See, *e.g.*, *Pisciotta v. Du Saules*, 125 So. 2d 181 (La. App. 4th Cir. 1961); *Roberts v. Bertrand*, 174 So. 201 (La. App. 1st Cir. 1937) (action for the recovery of cattle and damages); *Chachere v. Moses George & Son*, 165 So. 522 (La. App. 1st Cir. 1936) (action for the recovery of store fixtures and damages); *Orlesh v. Fairchild Auto Co.*, 13 Orl. App. 303 (La. App. 1916) (automobile or its value and damages); *J. A. Bel Lumber Co. v. Stout*, 134 La. 987, 64 So. 881 (1914) (logs or damages).

311. See text at note 72 *supra*.

312. See Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 601 (1932).

313. See text at note 166 *supra*. However, actions for the recovery of movables based on a contractual right rather than ownership are clearly personal actions. See, *e.g.*, *Faison v. Patout*, 212 La. 37, 31 So. 2d 416 (1947) (deposit); *Berard v. Boagni*, 30 La. Ann. 1125 (1878) (deposit); *cf. Plaquemines Equip. & Machine Co. v. Ford Motor Co.*, 245 La. 201, 157 So. 2d 884 (1963) (sale); *Bill Garrett Leasing, Inc. v. General Lumber & Supply Co.*, 164 So. 2d 364 (La. App. 1st Cir. 1964) (lease); *Young v. LeBlanc*, 144 So. 2d 905 (La. App. 4th Cir. 1962) (pledge).

314. See text at note 316 *infra*.

315. 32 La. Ann. 535 (1880).

since a real action, by the terms of the Code, would seem to be confined to suits for the recovery of land or a real right, yet it is a species of action closely allied to such action, and fully recognized in the French jurisprudence from which we derive our system of practice." In another case, *Warren v. Saltenberger*,³¹⁶ involving an action for the recovery of certain pieces of furniture, the court observed that "our Code of Practice is extremely meagre in its provisions as to actions for movable property, although they are so numerous. . . . In defining . . . personal actions, it is with difficulty the definition can be construed to embrace a suit for a specific thing." In order to obviate this terminological difficulty, it has been suggested that the action be termed an *innominate* real action.³¹⁷

Following the example of France, the possession of movables is not protected in Louisiana by a distinct possessory action: under both the Code of Practice³¹⁸ and the Code of Civil Procedure³¹⁹ possessory protection has been confined to immovable property. This reflects perhaps a justified belief that there is no need for a speedy determination of the issue of possession of movables independently of the question of the right to possess.³²⁰ A usurper or thief, therefore, has no standing to claim the recovery of movables in the hands of third possessors. The owner, however, may always bring the revendicatory action for the recovery of movables and persons other than the owner entitled to possession may bring the appropriate actions for the protection and enforcement of their real or contractual rights.³²¹

316. 6 La. Ann. 351 (1851).

317. See text at note 166 *supra*.

318. See LA. CODE OF PRACTICE art. 60 (1870).

319. See text at note 245 *supra*.

320. It is merely in this sense that "possessory" actions are disallowed. Actions directed to the recovery of the possession of movables by virtue of ownership or other rights are clearly admissible. See text at notes 321, 323-25 *infra*. If it is true that the primary function of the possessory action available to the holder of an immovable real right is to determine the respective position of the parties as plaintiff and defendant in a subsequent petitory action (see note 246 *supra*), then a distinct possessory action is not needed in the case of movable real rights because possession is here readily ascertainable.

321. See, *e.g.*, *Douglas v. Haro*, 214 La. 1099, 39 So.2d 744 (1949) (action by "depository"); *Lannes v. Courege*, 31 La. Ann. 74, 76 (1879) (recovery of notes by depositaries in the hands of third persons; "the allegations showing plaintiff's right of possession and the wrongful possession of the defendant . . . are sufficient to maintain" the action); *Draper v. Richards*, 20 La. Ann. 306 (1868) (action by administratrix); *Newman v. Wilson*, 1 La. Ann. 48 (1846) (action by a sheriff of another state to recover movables fraudulently taken out of his possession).

This subtle analysis of the nature of the revendicatory action, and of the relationship between this action and possessory protection, has not been always clearly grasped by litigants in Louisiana. In at least two cases, therefore, an argument drawn from the nature of the revendicatory action has been advanced for the purpose of questioning the availability of the action under Louisiana procedural law. In *Levert v. Hebert*,³²² involving the recovery of certain movables which plaintiff had allegedly purchased, the defendant argued that an action of this nature was a "possessory" action disallowed by the Code of Practice. The court observed that "if, on the trial of the cause, it had developed that plaintiffs were advancing their claims merely as holders, and not as owners, of the articles, the action would have properly failed."³²³ Since, however, plaintiff had established his right of ownership, he was allowed to recover.

A similar line of argument was developed several decades later in *Lusco v. McNeese*,³²⁴ involving an action for the recovery of three counters and a stainless steel coffee urn hood allegedly removed from plaintiff's premises by defendant. The defendant in his answer stated that "the action must be a possessory or petitory action since for the ownership or possession of property, and therefore plaintiff has no cause of action herein (where movable property is concerned) since these actions are by definition restricted to claims made on immovable property. . . . To the contrary, of course, since the subject matter herein is movable property, this action cannot possibly be a real action (possessory or petitory or otherwise)." In strict logic, and in the light of the provisions of the Code of Practice, defendant's argument had, perhaps, some merit. Defendant, however, overlooked the fact that the revendicatory action for the recovery of the possession of movables, though not known by name in Louisiana judicial practice and not mentioned in the Code of Civil Procedure, has persisted through the centuries

322. 51 La. Ann. 222, 25 So. 118 (1899).

323. This may be merely a dictum indicating that a possessor of movables is not entitled to protection *qua* possessor. He may be entitled to protection, however, by virtue of ownership or any other right. See cases cited note 321 *supra*. In the past, possessory protection was accorded in matters involving slaves. See, e.g., *Sears v. Wilson*, 5 La. Ann. 689 (1850); *Adams v. Stuart*, 4 Rob. 180 (1843); *Preston v. Zabrisky*, 2 La. 226 (1831); *Kemper's Heirs v. Hulick*, 16 La. 44 (1840).

324. 86 So. 2d 226 (La. App. 1st Cir. 1956).

as an innominate real action. And the court quite properly allowed recovery of the movables in kind referring to the "multitude of cases concerning recovery of movable property allegedly improperly retained by another . . . in which the owner recovered possession of the property from the possessor."³²⁵

The revendicatory action may be brought by the dispossessed owner against any possessor of the movables.³²⁶ This rule was formally recognized in the early case of *Warren v. Saltenberger*,³²⁷ involving an action against the administratrix of an estate for the recovery of certain pieces of furniture. The question was whether the defendant could be sued personally as possessor and not necessarily as administratrix. The court observed that "in this State, the action for movable property has generally been brought against the possessor of the property. . . . Thus we sue the keeper of the livery stable for the horse stolen from us, and not the purchaser from the thief" and allowed the action by applying "by analogy" provisions governing the recovery of immovables. The rule has been followed implicitly in all subsequent cases.

The owner of things lost or stolen may reclaim them not only in the hands of the finder or thief but also in the hands of subsequent acquirers, even bona fide purchasers for value.³²⁸

325. See also cases cited note 308 *supra*.

326. For the determination of which things are movables, see Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 559-66 (1962). An owner may sue for the recovery of movables which were formerly component parts of an immovable. See, e.g., *Ducros v. St. Bernard Cypress Co.*, 164 La. 787, 114 So. 654 (1927) (timber); *Foley v. Bush*, 13 La. Ann. 126 (1858) (timber); *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 127 La. 971, 54 So. 318 (1911) (action for the recovery in kind of oil unlawfully extracted from plaintiff's land). Where the value of these things is demanded, or damages, the corresponding actions are sometimes termed "actions for trespass." See text at note 292 *supra*. Cf. *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339 (1924); *Liles v. Banhart*, 152 La. 419, 93 So. 490 (1922); *Shields v. Whitlock & Brown*, 110 La. 714, 34 So. 747 (1903).

327. 6 La. Ann. 351, 355 (1851).

328. See, e.g., *Security Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1928) (automobile); *Holton v. Hubbard*, 49 La. Ann. 715, 22 So. 338 (1897) (rice); *Davis v. Humpton*, 4 Mart.(N.S.) 288 (La. 1826) (horse); *Schutzman v. Munson*, 51 So. 2d 125 (La. App. 1st Cir. 1951) (cattle); *Muse v. Sharp*, 155 So. 300 (La. App. 1st Cir. 1934) (tractor and skidder). It has been held that payment of the price of a sale by a worthless check is equivalent to theft. Accordingly, the purported sales is void *ab initio* and the seller is protected even as against a subsequent purchaser of good faith. See *Fisher v. Bullington*, 223 La. 368, 65 So. 2d 880 (1953); *Hub City Motors v. Brock*, 71 So. 2d 700 (La. App. 1954); *Smith, The Work of the Louisiana Supreme Court for the 1956-1957 Term — Particular Contracts*, 18 LA. L. REV. 10, 43 (1957). More recent cases, however, seem to indicate that the acceptance of a check suffices to "convert" the transaction into a "credit sale" so that the buyer acquires title "notwithstanding that the check [is]

The same rule applies where the things are in the hands of a bona fide purchaser as a result of the violation of a confidential relationship or obligation by a person entrusted with the possession of the movables.³²⁹ Where the lost or stolen things are no longer in defendant's possession, the revendicatory action abates;³³⁰ the owner, however, may have available a delictual action for damages or a quasi-contractual action for restitution.³³¹ The bona fide purchaser who bought lost or stolen movables "at public auction or from a person in the habit of selling such things"³³² has a right for reimbursement from the revendicating owner if he "has possessed a movable thing, during three successive years without interruption."³³³ In all other cases, the bona fide purchaser has a remedy for reimbursement and damages exclusively against his vendor.³³⁴

Where movables are in the hands of a bona fide purchaser not as a result of loss, theft, or violation of an obligation, but as a result of a voidable transaction accomplished by the owner for the purpose of transferring ownership, revendication seems to be excluded according to a number of Louisiana cases. This

subsequently dishonored." See *Flatte v. Nichols*, 233 La. 171, 96 So.2d 477 (1957); cases cited note 335 *infra*. The question of whether a movable is "stolen" is determined with reference to civil law standards rather than the provisions of the penal law. See *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So.2d 369 (1956).

329. See, e.g., *Freeport & Tampico Fuel Oil Corp. v. Lange*, 157 La. 217, 102 So. 313 (1924); *Holloway v. Ingersoll Co.*, 133 So. 819 (La. App. 2d Cir. 1931); *Campbell v. Nichols*, 11 Rob. 16 (La. 1845); *Perryman v. Demaret*, 11 La. 347 (1837). See also *Packard Florida Motors Co. v. Malone*, 208 La. 1058, 24 So.2d 75 (1945) (recovery of automobile, bought by bona fide purchaser from a person who had fraudulently taken delivery from the owner); *Security Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1929). In this case, action was brought against a bona fide purchaser automobile originally sold by plaintiff under a conditional sales agreement in Mississippi and subsequently resold by the defaulting purchaser in Louisiana. The Louisiana Supreme Court declared that the first purchaser converted the automobile and that subsequent sales could not pass a valid title *vis-a-vis* the rightful owner.

330. See *Joyce v. Poydras de la Lande*, 6 La. 277 (1834). This follows for the nature of the revendicatory action which is directed to the recovery of movables in kind. Cf. *Caro v. McCallef*, 144 So.2d 133 (La. App. 4th Cir. 1962) (action for the recovery of two cows; when the cows died in the course of litigation the question of ownership became moot).

331. See text at notes 382-86, 387-89 *infra*.

332. LA. CIVIL CODE art. 3507 (1870).

333. LA. CIVIL CODE art. 3506 (1870). Louisiana courts have read in the text of article 3507 a limitation stated in the preceding article 3506. See *Security Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1928); *Davis v. Hampton*, 4 Mart. (N.S.) 288 (La. 1826); Comment, *Prescription of Movables—Stolen or Lost Things*, 4 TUL. L. REV. 78 (1929).

334. See *Schutzman v. Munson*, 51 So.2d 125 (La. App. 1st Cir. 1951) ("His remedy is against the one who sold the cattle to him for reimbursement of the price with damages.").

happens, typically, when the owner delivers a movable to a purchaser who fails to pay the purchase price and who subsequently sells the movable to innocent third persons.³³⁵ These cases have been interpreted as involving recognition by Louisiana courts of the common law bona fide purchaser doctrine.³³⁶ This may be a questionable explanation of the jurisprudence. The issue in these cases was whether the original purchaser had acquired ownership so as to be in a position to transfer to subsequent purchasers a title valid against the revindicating owner. In that regard, the courts liberalized the rules of sales and held that the original purchaser acquired the ownership of the movables in question, although the vendor did not receive payment or was dispossessed as a result of fraud practiced by the purchaser. This is consistent with the rule that the unpaid

335. See *Flatte v. Nichols*, 233 La. 171, 96 So. 2d 477 (1957) (action by Texas dealer for the recovery of an automobile in the hands of a Louisiana dealer. The automobile had been originally sold by the Texas dealer to a Mississippi dealer who failed to pay the purchase price. The court held that the title of the Louisiana dealer, a bona fide purchaser, was good and valid against the original owner); *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So. 2d 369 (1956) (action by the original owner of an automobile for recovery and unpaid vendor in the hands of a bona fide purchaser. The court decided that the automobile had not been "stolen" within the meaning of the penal law, LA. R.S. 14:87 (1950), and that the sale to the bona fide purchaser's ancestor in title had been completed upon the acceptance of a subsequently dishonored draft); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805, 806 (La. App. 2d Cir. 1962). Plaintiff dealer in this case brought an action for the recognition of his right of ownership of an automobile, now in the hands of a bona fide purchaser. The automobile in question had been delivered by plaintiff to another dealer pursuant to a sales agreement. The latter issued a check which was subsequently dishonored and had sold the automobile on the basis of forged documents. The court held that plaintiff could not recover. "By its delivery of the vehicle in question" the court said, "and the acceptance of a check in payment therefor, it completed the necessary formalities of a sale, and, therefore, was solely responsible for the subsequent allegedly fraudulent transactions." The rule was said to rest on the equitable principle that "where two innocent parties must suffer loss through the fraud of another the burden of such loss is imposed upon the one who most contributed thereto." Cf. *Thomas v. Mead*, 8 Mart. (N.S.) 341 (La. 1829) (action for the recovery of two slaves; the court allowed defendant, a bona fide purchaser, to keep the slaves although his title derived from a fraudulent conveyance. That transaction, the court indicated, could be set aside by direct action of the aggrieved party but could not be collaterally attacked); *James v. Judice*, 140 So. 2d 169 (La. App. 3d Cir. 1962). In this case, plaintiff, owner of an automobile, had placed it for sale at a lot and the lot owner sold it to a bona fide purchaser. The court held that the purchaser's title was based on a valid sale by the "agent" of the owner. The bona fide purchase doctrine has been traditionally applied to negotiable instruments endorsed prior to maturity. See *Sagory v. Metropolitan Bank*, 42 La. Ann. 627, 7 So. 633 (1890). Under the conditions of LA. R.S. 30:106 (1950), the purchaser of minerals unlawfully extracted from the ground is protected from claims by the owner of the land. The owner's remedy is an action against the possessor of the land. See *State ex rel. Muslow v. Louisiana Oil Ref. Corp.*, 176 So. 686 (La. App. 2d Cir. 1937).

336. See Note, 17 LA. L. REV. 854, 857 (1957); Note, 25 TUL. L. REV. 146 (1950); Franklin, *Security of Acquisition and of Transactions: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 604 (1932).

vendor cannot exercise the resolutive action where the movables sold are no longer in the possession of the purchaser.³³⁷

The plaintiff in the revendicatory action has the burden of proof of his ownership,³³⁸ and if he fails to carry this burden his claim is dismissed.³³⁹ But, "as against a naked possessor without title, plaintiff, in a suit for the ownership of personal property, need not make a title good against the world; he is only required to repel the slight presumption of ownership resulting from mere possession."³⁴⁰ In contrast with French law, the possession of movables in Louisiana is not "equivalent to title."³⁴¹ Therefore, the defendant who is assisted merely by "a slight presumption of ownership," should, and ordinarily does, offer evidence of his own right to the possession of the movables in order to combat plaintiff's allegations of title and proof.³⁴²

337. See Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 La. L. Rev. 161, 231 (1963).

338. See Daniels v. Taubenblatt, 120 La. 349, 45 So. 273 (1908); Levert v. Hebert, 51 La. Ann. 222, 25 So. 118 (1899); Sagory v. Metropolitan Bank, 42 La. Ann. 627, 7 So. 633 (1890); Draper v. Richards, 20 La. Ann. 306 (1868); Crane v. Allen, 11 La. Ann. 493 (1856); Lusco v. McNeese, 86 So. 2d 226 (La. App. 1st Cir. 1956); Crain v. Crain, 29 So. 2d 404 (La. App. 1st Cir. 1947); Averett v. Southall, 8 So. 2d 141 (La. App. 2d Cir. 1942); Muse v. Sharp, 155 So. 300 (La. App. 1st Cir. 1934); cf. Pritchett v. Coyle, 22 La. Ann. 57 (1870) ("plaintiff must recover on the strength of his own title" rather than the weakness of the title of his adversary). Since the possession of movables is not protected as such, it follows that the plaintiff must prove his right of ownership or a contractual or quasi-contractual right entitling him to the possession of the movable.

339. See Daniels v. Taubenblatt, 120 La. 349, 45 So. 273 (1908); Pritchett v. Coyle, 22 La. Ann. 57 (1870); Moody v. Gossen, 125 So. 2d 264 (La. App. 3d Cir. 1960); Dunkelberg Farms v. Madding, 6 So. 2d 801 (La. App. 2d Cir. 1942); Roberts v. Bertrand, 174 So. 201 (La. App. 1st Cir. 1937); Dunkelberg Farms v. Mays, 19 La. App. 106, 138 So. 224 (2d Cir. 1931); cf. Sibley v. Lester, 8 So. 2d 320 (La. App. 2d Cir. 1942) (action for the recovery of furniture allegedly included in a sale of immovable property. The court held that where the deed mentioned merely "improvements" oral testimony to correct the deed was not admissible). The question of ownership has been said to be "entirely a question of fact." Caro v. McCallef, 144 So. 2d 133 (La. App. 4th Cir. 1962). This merely means that the decision of lower courts will not be upset, "unless it is found that the conclusions reached by said Court are manifestly erroneous." *Ibid.*

340. Rawls v. Clay, Gunby's Dec. 55 (La. App. 2d Cir. 1885). See also Succession of Boisblanc, 32 La. Ann. 109, 111 (1880): "in general, possession is presumptive evidence of ownership"; Robinson v. Taylor, 6 La. 393 (1834); Lee v. Palmer, 18 La. 405 (1841).

341. See Averett v. Southall, 8 So. 2d 141 (La. App. 2d Cir. 1942); Holloway v. Ingersoll Co., 133 So. 819 (La. App. 2d Cir. 1931). See also Donnell v. Gray, 215 La. 497, 41 So. 2d 66, 68 (1949) (action for the recovery of oil well equipment; the court declared that "defendant, with no legal claim of ownership, is without right to question the validity of plaintiff's title which is evidenced by a deed").

342. See Schutzman v. Munson, 51 So. 2d 125 (La. App. 1st Cir. 1951); Crain v. Crain, 29 So. 2d 404 (La. App. 1st Cir. 1947); Averett v. Southall, 8 So. 2d

The possessor may defend the action on the basis of any personal or real right he may have for the possession and enjoyment of the movable. He may thus claim that he is entitled to retain the movable by virtue of any contractual arrangement with the owner³⁴³ or by virtue of his right of usufruct or ownership of the movable.³⁴⁴ His right of ownership, in particular, may derive from a valid transfer by the owner or his agent,³⁴⁵ from acquisitive prescription,³⁴⁶ or from rules of law concerning accession³⁴⁷ and immobilization by nature or destination.³⁴⁸ These defenses, based on the possessor's own right of ownership, may also be regarded as the consequence of the loss of the right of ownership by the original owner.

The exclusion of the revendicatory action in case a movable becomes an immovable by nature or by destination requires some discussion for the purpose of clarification of seemingly inconsistent judicial decisions.³⁴⁹ Under the Louisiana Civil Code the ownership of the soil extends, in principle, to immovables by nature, *i.e.*, crops, trees, buildings and other structures,³⁵⁰ and immovables by destination, *i.e.*, movables permanently attached to an immovable³⁵¹ or placed thereon by the owner for its service and improvement.³⁵² Contention is thus

141 (La. App. 2d Cir. 1942); *Roberts v. Bertrand*, 174 So. 201 (La. App. 1st Cir. 1937); *cf.* *Young v. LeBlanc*, 144 So. 2d 905 (La. App. 4th Cir. 1962) (defendant entitled to keep a diamond ring delivered to him as a gift).

343. See, *e.g.*, *Pisciotta v. Du Saules*, 125 So. 2d 181 (La. App. 4th Cir. 1961) (deposit); *Roberts v. Bertrand*, 174 So. 201 (La. App. 1st Cir. 1937) (payment of debt); *cf.* *Faison v. Patout*, 212 La. 37, 31 So. 2d 416 (1947) (deposit); *Chachere v. Moses George & Son*, 165 So. 522 (La. App. 1st Cir. 1936) (lease); *Holton v. Hubbard*, 49 La. Ann. 715, 22 So. 338 (1897) (pledge).

344. See, *e.g.*, *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 4th Cir. 1962) (gift); *Young v. LeBlanc*, 144 So. 2d 905 (La. App. 4th Cir. 1962) (gift); *Curry v. Cailler*, 37 So. 2d 863 (La. App. 1st Cir. 1948) (inheritance); *Crain v. Crain*, 29 So. 2d 404 (La. App. 1st Cir. 1947) (sale); *Averett v. Southall*, 8 So. 2d 141 (La. App. 2d Cir. 1942) (sale); *Sibley v. Lester*, 8 So. 2d 320 (La. App. 2d Cir. 1942) (sale); *Dunkelberg Farms v. Madding*, 6 So. 2d 801 (La. App. 2d Cir. 1942) (exchange); *Ricketts v. Duble*, 177 So. 838 (La. App. Orl. Cir. 1938) (gift); *Decuers v. Bourdet*, 10 La. App. 361, 120 So. 880 (La. App. 4th Cir. 1929) (gift).

345. See *James v. Judice*, 140 So. 2d 169 (La. App. 3d Cir. 1962) and cases cited note 335 *supra*.

346. See *Rio Hondo Land Co. v. Gibbs*, 49 So. 2d 76 (La. App. 2d Cir. 1950) (action for the recovery of cash register and a pair of scales; *held*, inadmissible where defendant acquired ownership by the acquisitive prescription of three and ten years).

347. See LA. CIVIL CODE arts. 499-501, 504, 521, 526-29 (1870).

348. See text at notes 358-62 *infra*.

349. *Cf.* *Yiannopoulos, Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 541 (1962).

350. See LA. CIVIL CODE arts. 464, 465, 467, 507 (1870).

351. *Id.* art. 469.

352. *Id.* art. 468.

frequently made by landowners that all movables immobilized by nature or by destination belong to them by virtue of their ownership of the immovable and that whatever rights other persons may have to the movables are extinguished by immobilization. Recognition of the possibility of separate ownership of the soil and of movables immobilized by nature or by destination, by virtue of contractual arrangements altering the rule of the Civil Code, has been slowly achieved in Louisiana.³⁵³ Disputes, however, continue to arise.

A typical class of cases involves disputes between vendors and vendees of immovable property over the ownership of certain movables not expressly covered by the act of sale. Determination of the conflicting claims in these cases is ostensibly made on the basis of the rules of the Civil Code governing immobilization. Thus, in the light of the applicable tests, it has been determined that venetian blinds,³⁵⁴ chandeliers,³⁵⁵ bricks lying in the premises,³⁵⁶ and certain staves³⁵⁷ remained movables. Accordingly, these things could be reclaimed by the vendor. On the other hand, certain household fixtures,³⁵⁸ an iron safe,³⁵⁹ a corn mill,³⁶⁰ a hot water heater,³⁶¹ and certain pieces of machinery³⁶² were found to be immobilized and therefore acquired by the vendee along with the immovable. It would seem that in a modern legal system these conflicting claims to the ownership of movables should be determined with reference to the act of sale, the intention of the parties, and all surrounding circumstances rather than with reference to abstract tests of immobilization. And this is precisely what some Louisiana courts have done while at the same time paying lip service to the obsolete rules of the Code.³⁶³

353. See Yiannopoulos, note 349 *supra*, at 525.

354. See *Kelieher v. Gravois*, 26 So. 2d 304 (La. App. Orl. Cir. 1946).

355. See *McGuigin v. Boyle*, 1 Or. App. 164 (1904).

356. See *Key v. Woolfolk*, 6 Rob. 424 (La. 1844).

357. See *Nimmo v. Allen*, 2 La. Ann. 451 (1847).

358. See *Scovel v. Shadyside*, 137 La. 918, 69 So. 745 (1915).

359. See *Folger v. Kenner*, 24 La. Ann. 436 (1872).

360. See *Bigler v. Brashear*, 11 Rob. 484 (La. 1845).

361. See *Scott v. Brennan*, 161 La. 1017, 109 So. 822 (1926).

362. See *Maginnis v. Union Oil Co.*, 47 La. Ann. 1489, 18 So. 459 (1895).

363. Loss of the ownership of movables as a result of their immobilization may be justified in exceptional circumstances, i.e., where the movables are no longer identifiable or are so closely associated with the immovable that separation is economically wasteful. In these cases, however, the owner of the movables should have against the landowner a claim for compensation.

Another class of cases involves disputes between purchasers of immovable property and third persons over the ownership of certain movables on the premises. The claim of the purchasers derives either from an express provision in the act of sale covering the movables in question or from the rule of the Civil Code that in the absence of other indication accessories are included in the sale. The claim of the third persons derives either from a transfer of title to the movables by the landowner prior to the sale of the immovable or from their original and separate ownership of the movables. Again, determination of the conflicting claims is ostensibly made on the basis of whether the movables in question are immobilized or not. Certain pieces of machinery,³⁶⁴ a derrick,³⁶⁵ a hot water heater,³⁶⁶ an automatic sprinkler system,³⁶⁷ and a butane gas tank³⁶⁸ have been found to be movables which could be reclaimed by their owner in the hands of the purchaser of the immovable. On the other hand, a small wooden house,³⁶⁹ a butane gas tank,³⁷⁰ certain "improvements,"³⁷¹ a building,³⁷² an advertising display sign,³⁷³ and a bulk milk tank³⁷⁴ have been found to be immovables by nature or destination which, though originally belonging to third persons, were acquired by the purchaser of the immovable. It would seem that in a modern legal system the acquisition or loss of the ownership of movables should not depend exclusively on a mechanical application of tests of immobilization.³⁷⁵ Owners of movables placed on another's immovable with his consent should be entitled to assert their rights of ownership against any successor of the landowner, at least where their interests are recorded. This may be the "true" rule applied by Louisiana courts. It is submitted that quite a few Louisiana cases may indeed be rationalized as giving effect to a public records doc-

364. See *Folse v. Loreauville Sugar Factory*, 156 So. 667 (La. App. 1st Cir. 1934).

365. See *Jones v. Conrad*, 154 La. 860, 98 So. 397 (1923).

366. See *Appel v. Ennis*, 34 So. 2d 415 (La. App. Orl. Cir. 1948).

367. See *Richardson v. Item Co.*, 172 La. 421, 134 So. 380 (1931).

368. See *Edwards v. S. & R. Gas Co.*, 73 So. 2d 590 (La. App. 2d Cir. 1954).

369. See *Vaughn v. Kemp*, 4 La. App. 682 (1926).

370. See *Holiceer Gas Co. v. Wilson*, 45 So. 2d 96 (1950). The case has been overruled legislatively. See LA. R.S. 9:1106 (Supp. 1960).

371. See *Polhman v. De Bouchel*, 32 La. Ann. 1158 (1880).

372. See *Davis-Wood Lumber Co. v. Insurance Co. of North America*, 154 So. 760 (La. App. 1st Cir. 1934).

373. See *Industrial Outdoor Displays v. Reuter*, 162 So. 2d 160 (La. App. 4th Cir. 1964).

374. See *Chestnut v. Hammatt*, 157 So. 2d 915 (La. App. 1st Cir. 1963).

375. Cf. note 363 *supra*.

trine: A purchaser is entitled to all movables on the premises, when the public records are silent concerning interests of third persons.³⁷⁶

The successful plaintiff in the revendicatory action is entitled to the recognition of his ownership and recovery of the possession of the movable.³⁷⁷ He is also entitled to all the natural or civil fruits produced by the movable since the initiation of the action in any case and since dispossession in the case of a bad faith possessor.³⁷⁸ Depending on his good or bad faith, the possessor may be entitled to claim reimbursement for useful expenses or necessary expenses incurred for the preservation of the movable.³⁷⁹

The Louisiana Civil Code does not provide for a period of liberative prescription applicable to the revendicatory action for the recovery of movables. It could be argued, therefore, that the action is imprescriptible under the Civil Code and that it merely becomes without object when a third person acquires the ownership of the movable by acquisitive prescription. Louisiana courts, however, have classified the revendicatory action for the recovery of movables as one in contract or quasi-contract³⁸⁰ and have accordingly applied to it the ten-year liberative prescription.³⁸¹ Analytically, this means that the revendicatory action may be barred even if the possessor has not acquired the ownership of the movable by acquisitive prescription. This is obviously an anomaly: the owner cannot enforce his right of ownership even against a bad faith possessor!

376. See, *e.g.*, *Industrial Outdoor Displays v. Reuter*, 162 So. 2d 160 (La. App. 4th Cir. 1964); *Chestnut v. Hammatt*, 157 So. 2d 915 (La. App. 1st Cir. 1963).

377. See cases note 308 *supra*.

378. See *Goodstein v. Millikin*, 14 So. 2d 94 (La. App. 2d Cir. 1943) (recovery of cattle and increase); *Dangerfield v. Fauver*, 19 La. Ann. 171 (1867) (recovery of mule and value of its services); *cf. Crane v. Allen*, 11 La. Ann. 493 (1856) (slaves and natural increase); text at notes 230-33, 236 *supra*. *But see Derouen v. LeBleu*, 18 So. 2d 207 (La. App. 1st Cir. 1944). In this case the lower court had ordered defendant, a possessor in good faith, to return to the owner of a cow a calf born during defendant's possession of the cow; the court of appeal questioned the correctness of the lower court's judgment but did not pass on it as defendant failed to appeal that issue.

379. See *Cobb & Dobson v. Ray*, Gunby's Dec. 23 (La. App. 1885). *Cf.* text at notes 239-42 *supra*.

380. See *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941); notes 401-402 *infra*.

381. See *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767, 785 (La. App. 1st Cir. 1958) ("The prescription applicable for the recovery of a movable which has been stolen, even in the hands of an innocent third purchaser, is ten years"). *Cf.* text at note 204 *supra*. The petitory action for the recovery of immovable property, however, is not lost merely by the lapse of the period of liberative prescription. See note 177 *supra*.

ii. *Restitution: The Quasi-Contractual Action.* The dispossessed owner of a movable may have, apart from the revendicatory action, a claim for the return of the movable or its value under the rules of the Civil Code governing the payment of a thing not due.³⁸² Louisiana courts have liberalized the rules of the Code by paying little or no attention to the requirements of payment by the plaintiff³⁸³ through error³⁸⁴ and by construing receipt to include taking by force.³⁸⁵ Thus, it may be said that the courts have fashioned in Louisiana, on the basis of the Code, a general remedy for unjust enrichment. Anyone enriched unjustly at the expense of another is under a quasi-contractual obligation to restore corporeal movables, if they "remain," and if they no longer exist, to account for his enrichment. The contours of the remedy have not as yet been precisely defined and the solutions reached by French courts in the application of the corresponding provisions of the French Civil Code could be particularly useful as guideposts. It ought to be noted, however, that unjust enrichment is not only a distinct ground for recovery but also a remedy allowing a special measure of recovery: traditionally, plaintiff's recovery is limited by the amount of defendant's enrichment at the time of the initiation of the action.³⁸⁶

iii. *Damages: The Delictual Action.* Apart from the revendicatory action and the action of unjust enrichment, an unlawfully dispossessed owner of movables may bring an action deriving from an offense or quasi-offense. This delictual action is predicated on fault. It is directed either to the recovery of the movable in kind³⁸⁷ with damages for the wrong suffered,³⁸⁸

382. See text at note 305 *supra*.

383. See *Smith v. Phillips*, 175 La. 198, 143 So. 47 (1932); *Standard Oil Co. v. Sugar Prod. Co.*, 160 La. 763, 107 So. 566 (1926); *Roney v. Payton*, 159 So. 469 (La. App. 2d Cir. 1935). *Cf. Reeves v. Smith*, 1 La. Ann. 379 (1846). Article 2301 provides that "he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." Although it is expressed in terms of *receiving*, the article clearly envisages that the defendant has received the thing or sum through *payment* by the plaintiff. This becomes apparent in the light of the following articles 2302-2310 all of which speak of payments.

384. See *Jung v. Gwin*, 174 La. 111, 139 So. 774 (1932).

385. See *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941).

386. See *Bender v. Looney*, 22 La. Ann. 488 (1870); and, in general, Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 *TUL. L. REV.* 605 (1962).

387. See *Reynolds v. Reiss*, 145 La. 155, 81 So. 884 (1919); *Pisciotta v. Du Saules*, 125 So. 2d 181, 185 (La. App. 4th Cir. 1961) ("the plaintiff is entitled to recover the property itself").

388. See *Dangerfield v. Fauver*, 19 La. Ann. 171 (1867); *Muse v. Sharp*,

or to damages only, when the owner has no longer interest in the return of the movables.³⁸⁹

Delictual actions deriving from unlawful interference with the ownership or possession of movables are frequently termed in Louisiana actions for "conversion."³⁹⁰ Despite this denomination, they are only rarely completely identifiable with actions based on the common law tort of conversion. It should be kept in mind that conversion in common law is an intentional tort giving rise to strict liability and that an action for conversion is directed to the recovery of the value of a chattel.³⁹¹ In civil law, on the other hand, the corresponding delictual action is based on fault and may be directed to the recovery of the movable in kind. Most Louisiana cases involving recovery for conversion are reconcilable with the precepts of the civil law rather than those of the common law. There are exceptional cases, however, which seem to have incorporated into Louisiana law the common law tort of conversion.³⁹² In this area, therefore,

155 So. 300 (La. App. 1st Cir. 1934) (recovery of movables plus nominal damages); cases cited note 310 *supra*; *cf.* *Roberts v. Bertrand*, 174 So. 201 (La. App. 1st Cir. 1937); *Anders v. Lee-Rogers Chevrolet Co.*, 7 La. App. 481 (2d Cir. 1928) (recovery of automobile; damages not proved); *Orlesch v. Fairchild Auto Co.*, 13 Orl. App. 303 (La. App. 1916). *But see Reynolds v. Reiss*, 145 La. 155, 161, 81 So. 884, 886 (1919) (apparently indicating that plaintiff merely has the alternatives of claiming "his property . . . or as damages the value of his property"); *Pisciotta v. Du Saules*, 125 So. 2d 181 (La. App. 4th Cir. 1961) (damages not allowed).

389. See *Begnaud-Martinez, Inc. v. Pellerin*, 154 So. 2d 644 (La. App. 3d Cir. 1963) (action for the value of potato crates used by defendant against plaintiff's admonition that they will not be accepted after such use; *held*, plaintiff was entitled to the value of the potato crates rather than to restoration in kind). The same rule applies where the thing no longer exists or "has been sold to a third person." *Pisciotta v. Du Saules*, 125 So. 2d 181, 185 (La. App. 4th Cir. 1961). The "measure of damages . . . is the value of the property." *Ibid.*

390. See *Importsales, Inc. v. Lindemann*, 231 La. 663, 92 So. 2d 574 (1957); *Hitt v. Herndon*, 166 La. 497, 117 So. 568 (1928); *Martin v. Texas Oil Co.*, 150 La. 556, 90 So. 922 (1921); *Chamberlain v. Worrell*, 38 La. Ann. 347 (1886); *Davis v. American Marine Corp.*, 163 So. 2d 163 (La. App. 4th Cir. 1964); *Chestnut v. Hammatt*, 157 So. 2d 915 (La. App. 1st Cir. 1963); *A. B. C. Oil Burner & Heating Co. v. Palmer*, 28 So. 2d 462 (La. App. Orl. Cir. 1946); *Edwards v. McThieme Chevrolet Co.*, 191 So. 569 (La. App. 2d Cir. 1939); *cf.* *Tolbird v. Cooper*, 243 La. 306, 143 So. 2d 80 (1962). Quite frequently, however, the term "conversion" is avoided. See, *e.g.*, *Carter-Allen Jewelry Co. v. Overstreet*, 165 La. 887, 116 So. 222 (1928); *Bender v. Looney*, 22 La. Ann. 488 (1870); *Burch v. Willis*, 21 La. Ann. 492 (1869); *Begnaud-Martinez, Inc. v. Pellerin*, 154 So. 2d 644 (La. App. 3d Cir. 1963); *Young v. LeBlanc*, 144 So. 2d 905 (La. App. 4th Cir. 1962); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805 (La. App. 2d Cir. 1962); *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 4th Cir. 1962).

391. See *PROSSER, TORTS* 67, 70 (2d ed. 1955); *HARPER & JAMES, TORTS* 217, 129 (1956); *JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS* 83 (1959).

392. See, *e.g.*, *Importsales, Inc. v. Lindeman*, 231 La. 663, 92 So. 2d 574 (1957); *Martin v. Texas Oil Co.*, 150 La. 556, 90 So. 922 (1921); *Davis v. American Marine Corp.*, 163 So. 2d 163 (La. App. 4th Cir. 1964); *cf.* Note, 37 TUL.

the law of Louisiana seems to be a hybrid system, having borrowed characteristics from both the common law and the civil law.

It is submitted that the importation of the tort of conversion in Louisiana leads to a confusion of ideas and is quite unnecessary. In the framework of the common law, conversion and its standard of strict liability are needed to fill the lacuna caused originally by the narrow delimitation of the action in *replevin*³⁹³ and the absence of a broad revendicatory action for the recovery of movables. Further, conversion may be needed in common law because of the hesitancy with which the courts have recognized quasi-contractual actions. In Louisiana, however, the remedies under the Civil Code are flexible and sufficiently broad to satisfy all reasonable demands for the protection of movable property. It has been stated, quite to the point, that in Louisiana "revendication should be revived and encouraged," the quasi-contractual action "should be permitted to remain at its extended level," and the delictual action "should be allowed only in case of theft or other fault."³⁹⁴ In a recent case, *Edward Levy Metals, Inc. v. New Orleans Public Belt Railroad*,³⁹⁵ the Louisiana Supreme Court has, in effect, confined

L. REV. 843, 847 (1963) concluding that "the action of revendication has thus disappeared, rendered unnecessary by the importation of conversion."

393. See BLUME, AMERICAN CIVIL PROCEDURE 12 (1955) indicating that *replevin* was available in cases of "forcible taking of the property by the defendant out of the plaintiff's control"; JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 92 (1959) explaining that in England "*replevin* only lies where the defendant has wrongfully taken the goods out of the claimant's possession; and it will therefore not lie against someone who merely detains the goods after the claimant has knowingly parted with possession, though in such a case *detinue* or conversion may lie." In this light, the revendicatory action of the civil law appears to afford a much broader remedy. In American jurisdictions today, however, the statutory *replevin* lies for any unlawful detention of personal property, whether the original taking was lawful or unlawful. See text at note 538 *infra*.

394. Note, 37 TUL. L. REV. 843, 848 (1963).

395. 243 La. 860, 148 So. 2d 580 (1963). A load of scrap steel was delivered to the defendant railroad for shipment aboard a vessel in New Orleans. The defendant forwarded the steel by mistake to a scrap metal company who shipped it for its own account. When the owner of the steel brought an action against the railroad for the value of the steel, the railroad brought a third party action against the scrap metal company. The latter then pleaded the one-year prescription alleging that the third party plaintiff elected in his petition to state an action for conversion. The court found that the petition did not allege that the third party defendant had had knowledge of the delivery of the steel and had refused to return it. The petition, therefore, did not satisfy the requirements for the tort of conversion, *i.e.*, it did not allege that the third party defendant had wrongfully deprived defendant of property to the possession of which he was entitled. Accordingly, the action was held to be one for indemnity subject to the ten year liberative prescription. The case was decided under the Code of Practice of 1870. Had the case arisen under the new Code of Civil Procedure, the court would have no

conversion within narrow limits. The result of this case may well be that pleadings in the future will be carefully framed so as to state a quasi-contractual claim rather than a delictual action where both remedies are available to a plaintiff. And conversion may well fall into disuse and oblivion.

iv. Prescription. The question of the nature of an action for the protection of movable real rights acquires great practical significance in light of the applicable rules of liberative prescription: It is in this context that the question has ordinarily arisen in Louisiana cases and has led, at times, to judicial determinations of questionable consistency. If the action is founded on an unlawful act, *i.e.*, an offense or quasi-offense, the period of prescription is one year.³⁹⁶ If the action is one in revendication based on title, no liberative prescription is provided for in the Code; the action, however, becomes without object where the movable has been acquired by someone as a result of the three- or ten-year acquisitive prescription.³⁹⁷ Finally, if the action is one resting on a quasi-contractual obligation, the period of prescription is ten years.³⁹⁸

The jurisprudence has almost consistently overlooked the imprescriptibility of the revendicatory action and has decided the question of the applicable prescription on the basis of the alternative theories of delictual³⁹⁹ and contractual⁴⁰⁰ or quasi-

difficulty reaching the same result by direct application of article 2164 rather than with reference to the wording of the petition. See text at note 406 *infra*.

396. See LA. CIVIL CODE art. 3536 (1870). The one-year prescriptive period begins to run from the day of the discovery of the fraudulent appropriation of the movable property. *McGuire v. Monroe Scrap Material Co.*, 189 La. 573, 180 So. 413 (1938); *cf. Davis v. American Marine Corp.*, 163 So. 2d 163, 167 (La. App. 4th Cir. 1964) (prescription starts to run from the day of "an absolute, unqualified refusal to deliver").

397. See LA. CIVIL CODE arts. 3506, 3509 (1870).

398. *Id.* art. 3544.

399. See, *e.g.*, *McGuire v. Monroe Scrap Material Co.*, 189 La. 573, 180 So. 413 (1938) (action for the value of a stolen "Mickey Mack River Rig"); *Carter-Allen Jewelry Co. v. Overstreet*, 165 La. 887, 116 So. 222 (1928) (action against agent for accounting for property placed in his custody); *Ducros v. St. Bernard Cypress Co.*, 164 La. 787, 114 So. 654 (1927) (action for the value of timber unlawfully cut); *J. A. Bel Lumber Co. v. Stout*, 134 La. 987, 64 So. 881 (1914) (action for the recovery of certain logs or damages; the court found that the action sounded in tort and applied the one year prescription); *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339 (1924) (action for damages for the unlawful extraction of oil); *Liles v. Barnhart*, 152 La. 419, 93 So. 490 (1922) (same); *Martin v. Texas Oil Co.*, 150 La. 556, 90 So. 922 (1921) (same); *Reynolds v. Reiss*, 145 La. 155, 81 So. 884 (1919) (action for damages for the wrongful taking of a switch track); *Shields v. Whitlock & Brown*, 110 La. 714, 34 So. 747 (1903) (action for the value of timber unlawfully cut); *Wood v. Harispe*, 26 La. Ann. 511 (1874) (action for the value of cotton converted by defendant); *Bender v. Leoney*, 22 La. Ann. 488 (1870) (action for the value of cotton sold without

contractual actions.⁴⁰¹ Illustratively, in *Kramer v. Freeman*,⁴⁰² the Louisiana Supreme Court declared that the owner of cash and jewelry wrongfully detained by defendant had two causes of action, one in tort and the other on "quasi-contract" or "an implied contractual obligation to return it." Since it was found that plaintiff had "waived" his tort action and elected to proceed in quasi-contract, the applicable prescription was held to be ten years. Obviously, it would have been more accurate to state that plaintiff in that case had a revendicatory action and a delictual action.

When the plaintiff has available two or more actions based on different theories of recovery, it would seem that he should be entitled to the appropriate relief without being bound to make an election of remedies in his petition. In Louisiana, however, cases decided under the Code of Practice of 1870 indicate that the plaintiff was held to an election.⁴⁰³ As a result of the

authority); *Burch v. Willis*, 21 La. Ann. 492 (1869) (same); *Millsbaugh v. City of New Orleans*, 20 La. Ann. 323 (1868) (action for the value of stone ballast wrongfully taken by defendant); *Davis v. Marican Marine Corp.*, 163 So.2d 163 (La. App. 4th Cir. 1964) (action for the value of a swivel).

400. See, e.g., *Faison v. Patout*, 212 La. 37, 31 So.2d 416 (1847) (action for the recovery of jewelry); *Clark Brothers Co. v. John Blank & Co.*, 3 OrL. App. 439 (La. App. 1906) (action for the recovery of movables); *Kempt v. Kelly*, Gunby's Dec. 65 (La. App. 1885) (action for the recovery of the price of plaintiff's mule wrongfully sold by defendant); cf. *Miller v. Krouse*, 177 So. 472 (La. App. 2d Cir. 1937); Comment, *Prescription, Classification and Concurrence of Obligations*, 36 TUL. L. REV. 556 (1962).

401. See, e.g., *Smith v. Phillips*, 175 La. 198, 143 So. 47 (1932) (payment of a thing not due); *Heirs of Burney v. Ludeling*, 47 La. Ann. 73 (1895) (action for the proceeds of sale of lands); *Gaty, McCune & Co. v. Babers*, 32 La. Ann. 1091 (1880) (action for the price of certain materials belonging to plaintiff and sold by defendant to third persons; held, the action was quasi-contractual, governed by the ten year prescription. The *Gaty* case was found to be "out of harmony with the more recent jurisprudence" in *Importsales, Inc. v. Lindeman*, 231 La. 663, 672, 92 So.2d 574, 577 (1957); *King v. Cressap*, 22 La. Ann. 211 (1870) (action for the recovery of furniture deposited with defendant); *Roney v. Peyton*, 159 So. 469 (La. App. 2d Cir. 1935) (action for the recovery of sums paid by officer of corporation in discharge of personal debt); *Rizzio v. Moriarity*, 1 OrL. App. 150 (La. App. 1904) (sale of plaintiff's movables in good faith); cf. *Roussel v. Railways Realty Co.*, 165 La. 536, 115 So. 742 (1928) (action for rents produced by immovable); *Bryceland Lumber Co. v. Kerlin*, 143 La. 242, 78 So. 482 (1918) (action to recover sums paid by manager of corporation in discharge of his personal obligation); *Wardlaw v. Conrad*, 137 So. 603 (La. App. 2d Cir. 1931) (action for the recovery of a diamond ring or its value; one year prescription not applicable); *Bender v. Looney*, 22 La. Ann. 488 (1870) (action for the recovery of the value of cotton sold without authority; held, the action was one in tort, prescribable in one year. The court indicated, however, that plaintiff could have sued in quasi-contract for the cotton itself in which case the applicable period of prescription would have been ten years). Classification of the action as contractual or delictual may also be important for other purposes. See, e.g., *Morgan's Louisiana Ry. v. Stewart*, 119 La. 392, 44 So. 138 (1907) (attachment).

402. 198 La. 244, 3 So.2d 609 (1941).

403. See *Importsales, Inc. v. Lindeman*, 231 La. 663, 670, 92 So.2d 574, 576

confusion surrounding the various theories of recovery and the stress on the alternatives of delictual and contractual or quasi-contractual actions, courts searched for frequently self-contradictory language in the pleadings and held that a prayer for the thing itself signified an action in contract or quasi-contract,⁴⁰⁴ whereas a prayer for its value evidenced a delictual action.⁴⁰⁵ Under the Code of Civil Procedure, however, Louisiana courts will look to the theory of recovery indicated under the circumstances rather than the wording of the pleading, since articles 862 and 2164 insure that the "theory of a case" doctrine is no longer applicable in trial or appellate procedure.⁴⁰⁶

D. GERMAN LAW

The protection of real rights⁴⁰⁷ in Germany is regarded as a matter of substantive rather than procedural law. The pertinent question, therefore, is which claims accrue to the holder of a real right in the event of an infringement of his right, rather

(1957): "For the determination [of the nature of plaintiff's action] we must examine the allegations and prayer of the petition." The question whether a plaintiff's petition stating a cause of action in tort can be later amended to state an action in restitution was left open in *Davis v. American Marine Corp.*, 163 So. 2d 163 (La. App. 4th Cir. 1964).

404. See *Importsales, Inc. v. Lindeman*, 231 La. 663, 669, 92 So. 2d 574, 576 (1957): "With reference to a claim of the instant kind the proper main demand in a suit in contract is for restitution to plaintiff of his property, or if it has been sold, for judgement against the defendant for the proceeds of sale." Cf. *Edward Levy Metals Inc. v. New Orleans Public Belt R.R.*, 243 La. 860, 140 So. 2d 580 (1963).

405. See *Martin v. Texas Oil Co.*, 150 La. 556, 558, 90 So. 922, 923 (1921). In this case, plaintiff sued for the value of oil unlawfully extracted from his land and purchased by defendant, admittedly of good faith. The court said that the action was one in tort, prescribing in one year, for the reason that plaintiff claimed value rather than the oil itself. "Under the law, a distinction must be made between an action for the property itself," the court declared, "and one for its value, in cases of this nature." See also *Importsales, Inc. v. Lindeman*, 231 La. 663, 669, 92 So. 2d 574, 576 (1957) ("In an action ex delicto . . . plaintiff's recourse is to seek judgement for the value of the property wrongfully detained or appropriated").

406. Article 862 of the Code of Civil Procedure provides that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief." Article 2164 provides that "the appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." Cf. *Hughes v. O'Neal*, 166 So. 2d 549 (La. App. 4th Cir. 1964).

407. The number of real rights under the German Civil Code (hereinafter B.G.B.) is limited (*numerus clausus*) to the following nine: ownership (§§ 903-1011), servitudes (§§ 1018-1093), right of preemption (§§ 1094-1104), real charges (§§ 1105-1112), mortgages (§§ 1113-1190), land debts (§§ 1191-1198), annuity-debts (§§ 1199-1203), pledge (§§ 1204-1296), and the heritable right to maintain a structure under or above another's land (§§ 1012-1017, superseded by the law of January 15, 1919). For details, see Yiannopoulos, *Real Rights in Louisiana and Comparative Law*, 23 LA. L. REV. 518, 538-46 (1963).

than which forms of procedure ought to be followed. In this sense, the notion of real actions as known in Louisiana has no exact equivalent in German law. However, the generally accepted term *Anspruch* (translated as *claim*) may be regarded as the equivalent of the Roman *actio*, expressed in terms of substantive law. Real rights, in general, are protected by rules found in various parts of the Civil Code as well as by rules of public law, including criminal law, police and administrative regulations, constitutional provisions, and even rules of public international law.⁴⁰⁸ This study will be limited to a brief discussion of the protection of real rights by rules contained in the part of the Civil Code dealing with property.

Under the rules of property law, the infringement of real rights gives rise to real claims (*dingliche Ansprüche*).⁴⁰⁹ Substantively, these claims are distinguished from obligatory and other claims in the light of their origin.⁴¹⁰ Procedurally, however, real claims are subject to the same rules governing claims in general, with the exception that the German Code of Civil Procedure establishes a specific exclusive competency *ratione loci* at the situs of immovable property involved in litigation.⁴¹¹ In spite of the absence of procedural particularism, the actions for the protection of real rights are distinguished into petitory actions, *i.e.*, actions for the protection of the property right itself, and possessory actions, *i.e.*, actions for the protection of possession as factual control.⁴¹² The petitory actions are fur-

408. See HEDEMANN, *SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES* 194 (3d ed. 1960); BAUR, *LEHRBUCH DES SACHENRECHTS* 105 (2d ed. 1963).

409. *Cf.* B.G.B. § 221. In the exceptional case of an unlawful interference with a real right which fulfills also the requirements of an offense or quasi-offense, a cross-reference is made in the property book of the Civil Code to the law of delictual obligations for the settlement of the resulting obligatory claims. See B.G.B. § 992.

410. As to their effects, however, real claims are in general subject to the same rules governing obligatory claims. Real claims are subject to special rules only where the law so provides (*e.g.*, B.G.B. §§ 986-1003) or where deviation from the rules governing obligatory claims is indicated in the light of their nature (*e.g.*, in connection with assignment and prescription). See WOLFF-RAISER, *SACHENRECHT* 9, 328 (10th ed. 1957); HECK, *GRUNDRISS DES SACHENRECHTS* 126 (1930); 3 SOERGEL-SIEBERT-MÜHL, *KOMMENTAR ZUM B.G.B.*, p. XV (9th ed. 1960).

411. See GERMAN CODE OF CIVIL PROCEDURE (hereinafter cited Z.P.O.) § 24. The same *forum rei sitae* of the immovable property is also available for the determination of a number of obligatory claims, but in this case the competency is concurrent rather than exclusive. *Id.* §§ 25, 26. For the realization of both personal and real claims concerning movables, appropriate forum is the court at the domicile of the defendant (*forum generale*). *Id.* § 13.

412. See BAUR, *LEHRBUCH DES SACHENRECHTS* 66 (2d ed. 1963); WOLFF-RAISER, *SACHENRECHT* 59, 69 (10th ed. 1957); WESTERMANN, *SACHENRECHT* 101 (4th ed. 1960).

ther divided into revendicatory and negatory. The retention of these historical distinctions, and of the attendant terminology, may be explained in the light of the peculiar nature of the claims under consideration. In contrast with other claims, for example, real claims are directed, as a rule, to satisfaction *in natura* and injunctions for the future.⁴¹³

The German Civil Code regulates in considerable detail the protection of the right of ownership. These provisions apply to both movables and immovables, and, by analogy, to real rights other than ownership.⁴¹⁴ Ownership is protected, in the first place, by the *Herausgabeanspruch*,⁴¹⁵ corresponding to the Roman *rei-vindicatio*. This action aims at the restoration of the thing *cum omni causa*, *i.e.*, recovery of possession of the thing with all its emoluments (fruits and profits).⁴¹⁶ Plaintiff is

413. Section 249 of the Civil Code provides that, generally, compensation may be had by satisfaction *in natura*. In practice, however, obligatory claims are ordinarily satisfied by a judgment for damages. See 1 SOERGEL-SIEBERT-SCHMIDT, KOMMENTAR ZUM B.G.B. 920-930 (9th ed. 1959); ESSER, SCHULDRECHT 168 (2d ed. 1960). Injunctions today have become available for the protection of other absolute rights by application by analogy of the rules governing real rights (quasi negatory action). Cf. text at notes 414, 439 *infra*. 3 SOERGEL-SIEBERT-MÜHL, KOMMENTAR ZUM B.G.B. 289 (9th ed. 1960); WOLFF-RAISER, SACHENRECHT 350 (10th ed. 1957).

414. See, *e.g.*, B.G.B. § 1065 (usufruct), § 1227 (pledge), law of Jan. 15, 1919, § 11 (heritable right to maintain a structure under or above another's land). As to the ownership of individual apartments, see law of March 15, 1951, 3 SOERGEL-SIEBERT-BAUR, KOMMENTAR ZUM B.G.B. 323 (9th ed. 1960). In respect to predial servitudes, the loss of possession is regarded as a disturbance which can be set aside by the negatory action. See note 439 *infra*. Accordingly, the claims of the holder of the servitude for fruits and damages are determined under the general law rather than the rules of the revendicatory action. According to the prevailing view, the rules applicable to revendication apply by analogy to the claims of the holder of a predial servitude only if he has lost possession of both the dominant estate and the servitude. See WOLFF-RAISER, SACHENRECHT 448 (10th ed. 1957); 3, 2 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1073 (11th ed. 1963).

415. See B.G.B. § 985. Where the plaintiff can claim the same thing by virtue of a contractual right, according to the prevailing opinion the revendicatory action may be cumulated with the contractual action. See B.G.H.Z. 34, 122; PALANDT-HOCHE, KOMMENTAR ZUM B.G.B. 899 (22d ed. 1963); WESTERMANN, SACHENRECHT 137 (4th ed. 1960); HECK, GRUNDRISSE DES SACHENRECHTS 277 (1930). Certain authors, however, suggest that in this case plaintiff must bring forth the contractual action. WOLFF-RAISER, SACHENRECHT 320 (10th ed. 1957); 3 SOERGEL-SIEBERT-MÜHL, KOMMENTAR ZUM B.G.B. 249 (9th ed. 1960).

The revendicatory action, though available as to both movables and immovables, is much more frequently brought for the recovery of movables. This is explained by the fact that the owner of immovable property has frequently an effective remedy in the correction of the land-register. See B.G.B. § 894. This claim for the elimination of obnoxious entries in the land-register is similar in nature with the negatory action, discussed *infra* p. 673. See HECK, GRUNDRISSE DES SACHENRECHTS 169 (1930); 3 SOERGEL-SIEBERT-BAUR, KOMMENTAR ZUM B.G.B. 112 (9th ed. 1960); BAUR, LEHRBUCH DES SACHENRECHTS 97 (2d ed. 1963).

416. For the notion of fruits and profits in German law, see Yiannopoulos,

ordinarily the dispossessed owner of the thing, defendant any person possessing⁴¹⁷ the thing without right.⁴¹⁸ The defendant must be specifically designated. If the defendant declines to defend the action, the trial is concluded in favor of the plaintiff. The judgment, if in favor of the plaintiff, pronounces the duty of the defendant to make specific restitution.⁴¹⁹ Since the action is directed to restoration of possession, a judgment in favor of the plaintiff does not, strictly speaking, confirm his ownership.⁴²⁰ Plaintiff, however, may bring a declaratory action for the confirmation of his right of ownership or he may join an action for restoration of possession with a declaratory action.⁴²¹

The burden of proof of ownership rests on the plaintiff. Once proved, however, ownership is presumed free of charges and it is for the defendant to prove his right to the possession of the thing.⁴²² In that regard, the parties may invoke a number of presumptions established in the Code. In actions for the recovery of immovable property there is a rebuttable presumption

Introduction to the Law of Things: Louisiana and Comparative Law, 22 LA. L. REV. 756, 793-796 (1962).

417. Possession is defined in § 854 of the B.G.B. as "actual physical control over a thing." This definition does not fully accord with the legal situation under the Code. Indeed, not all persons having physical control over a thing qualify as possessors. For example, under § 855 of the B.G.B. a person who exercises physical control over a thing for another in the latter's household or place of business and who must follow directions with respect to the thing is merely a "possessory servant" while the master is the possessor. Conversely, persons not having physical control over a thing may qualify as possessors. See 1 FOREIGN OFFICE, MANUAL OF GERMAN LAW 113 (1950). One possessing as owner is designated as *Eigenbesitzer*. B.G.B. § 872. If a person possesses as usufructuary, pledgee, lessee, depository, or in a similar relationship by virtue of which he is temporarily entitled or bound to possess the thing on behalf of another, this person (*Fremdbesitzer*) is a *direct* possessor. The person on whose behalf the thing is possessed is termed *indirect* possessor. *Id.* § 868.

418. The action may also be brought by a person having indirect possession against a person having direct possession. In this case, the action is directed to the recovery of the indirect possession. See WOLFF-RAISER, SACHENRECHT 322 (10th ed. 1957); BAUR, LEHRBUCH DES SACHENRECHTS 84 (2d ed. 1963); 3, 1 STAUDINGER-BERG, KOMMENTAR ZUM B.G.B. 779 (11th ed. 1956). Where the action is brought by a landlord (indirect possessor) against a lessee (direct possessor) for the recovery of the leased thing upon termination of the lessee, the revendicatory action may be cumulated with the contractual action. See text at note 415 *supra*.

419. The judgment, if necessary, is executed by a ministerial officer (*Gerichtsvollzieher*) who takes possession of the thing in the hands of the defendant and delivers it to the plaintiff. See Z.P.O. § 883.

420. The judgment of restoration, in effect, constitutes an indirect confirmation of plaintiff's ownership. See 3, 1 STAUDINGER-BERG, KOMMENTAR ZUM B.G.B. 774 (11th ed. 1956).

421. See Z.P.O. §§ 256, 260, 280; WOLFF-RAISER, SACHENRECHT 321 (10th ed. 1957); 3 SOERGEL-SIEBERT-MÜHL, KOMMENTAR ZUM B.G.B. 255 (9th ed. 1960).

422. See WOLFF-RAISER, SACHENRECHT 320 (10th ed. 1957).

in favor of the person registered in the land-register, the *Grundbuch*.⁴²³ In actions for the recovery of movable property there is a rebuttable presumption in favor of the present possessor, but the revindicating owner may set aside this presumption on proof that he has lost possession involuntarily, in which case he has a rebuttable presumption in his favor as prior possessor.⁴²⁴ The defendant has a number of defenses available, including his right to possession under rules of property law or of the law of obligations.⁴²⁵

In case restoration of the thing has become impossible, the revindicatory action is naturally directed to the recovery of its value in the form of pecuniary compensation. This happens, ordinarily, in the event of an accidental loss or destruction of the thing, or a disposition by the defendant prior to the execution of the judgment.⁴²⁶ Where the thing has been only partially destroyed or otherwise deteriorated, the action is directed to recovery of possession plus pecuniary compensation.⁴²⁷ This pecuniary compensation is grounded on principles of property

423. See B.G.B. § 891. Where the defendant is in a position to invoke this presumption, the plaintiff, in order to rebut the presumption, must prove that the registered right does not exist in fact. See BAUR, LEHRBUCH DES SACHENRECHTS 74 (2d ed. 1963).

424. See B.G.B. § 1006 (1). This provision, in most cases, favors the defendant. See HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 174 (3d ed. 1960). This presumption may be invoked only by a person possessing as owner, whether by himself or through others. See BAUR, LEHRBUCH DES SACHENRECHTS 72 (2d ed. 1963).

425. See B.G.B. § 986.

426. *Id.* § 989. In either case the plaintiff is free to change his demand to one for pecuniary compensation up to the time of the last oral argument. See Z.P.O. § 268(3); BAUR, LEHRBUCH DES SACHENRECHTS 86 (2d ed. 1963). Plaintiff's original demand, however, cannot be stated in the alternative. See 3, 1 STAUDINGER-BERG, KOMMENTAR ZUM B.G.B. 774 (11th ed. 1956). The defendant may effectively, but at his risk, dispose of the property prior to execution of the judgment. His disposition has no influence on the proceeding. See Z.P.O. § 265; STEIN-JONES-SCHÖNKE-POHLE, KOMMENTAR ZUR Z.P.O. § 265 n. IV, 2b (18th ed. 1960). The plaintiff, instead of changing his demand to one for pecuniary compensation and possibly to one for damages under § 989 of the B.G.B., may in this case seek an execution order against defendant's successors or assigns, provided that these persons acquired the property with knowledge of the pendency of the action. See Z.P.O. §§ 325, 727, 731. The alienation by the defendant of a thing that he knows belongs to plaintiff may be a punishable offense under § 246 of the Penal Code.

427. See 3, 1 STAUDINGER-BERG, KOMMENTAR ZUM B.G.B. 793 (11th ed. 1956). The revindicating owner cannot claim in this action the value of the thing in lieu of recovery in kind, at least where the thing has not materially deteriorated. In exceptional circumstances, a claim for the value of the thing might find support in § 242 of the Civil Code. If the plaintiff is no longer interested in the recovery of the thing, his remedy is an action for damages (rather than the revindicatory action) under the law of delictual obligations, provided of course that the defendant has acquired the possession of the thing through the perpetration of an unlawful act. See note 429 *infra*.

law and is distinguished from claims for damages arising under the law of delictual obligations.⁴²⁸ Ordinarily, the revendicatory action cannot be cumulated with an action for damages based on principles of delictual responsibility. The responsibility of the possessor for loss, destruction, or deterioration of the thing is governed, primarily, by rules of property law. However, where the defendant has acquired possession as a result of the perpetration of an offense, the owner may claim recovery of the thing and damages, or damages only, under the rules of delictual obligations.⁴²⁹

The responsibility of the possessor for loss, destruction, or deterioration of the thing, the apportionment of fruits and profits produced by the thing, and the claim of the possessor for reimbursement of expenses, are matters determined according to the good or bad faith of the possessor. In general, good faith is material only prior to the commencement of the action; after the initiation of the proceedings a good faith possessor is treated as a bad faith possessor (*quasi-mala fides*). A good faith possessor is not liable for the loss, destruction, or deterioration of the thing, even if this is the result of his negligence.⁴³⁰ A bad faith possessor is liable if the thing has been lost, destroyed, or deteriorated through his fault.⁴³¹ In cases where the bad faith possessor has acquired possession by the commission of an unlawful act, his liability in possession of the thing is measured under the law of delictual obligations.⁴³²

428. The nature of the action is important for the determination of the applicable period of prescription and for the jurisdiction of the courts. Thus, delictual claims prescribe in three years while real claims prescribe in thirty years. See B.G.B. §§ 852, 195. Further, as to delictual actions, jurisdiction *ratione loci* is vested in the court at the place where the unlawful act has been perpetrated and, as to the revendicatory action, at the place of the situs of the (immovable) property. See Z.P.O. §§ 32, 24; HEDEMANN, *SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES* 181 (3d ed. 1960); 3 SOERGEL-SIEBERT-MÜHL, *KOMMENTAR ZUM B.G.B.* 268 (9th ed. 1960); WOLFF-RAISER, *SACHENRECHT* 334 (10th ed. 1957).

429. Cf. B.G.B. § 992. This type of recovery is clearly predicated on fault.

430. See B.G.B. § 993 (1, 2).

431. *Id.* § 990. If the bad faith possessor is in *default*, his responsibility is extended to cover accidental loss unless there is proof that the loss would have occurred in spite of timely restoration of the thing. See B.G.B. 990 (2); 287. Default is predicated on notice and fault, *i.e.*, knowledge or negligent ignorance that the thing must be restored to the true owner. The commencement of the action constitutes sufficient notice. B.G.B. § 284(1), (2). The proof of the possessor's fault, however, is a difficult matter and, therefore, the provision has little significance in practice. See 3, 1 STAUDINGER-BERG, *KOMMENTAR ZUM B.G.B.* 797 (11th ed. 1956).

432. See B.G.B. § 992, note 429 *supra*.

Where the judgment is in favor of the plaintiff, the courts are frequently faced with the question of the apportionment of fruits and profits produced by the thing. A good faith possessor is entitled to keep all fruits and profits regularly produced.⁴³³ The bad faith possessor must account to the owner for all fruits and profits produced, as well as for those the thing did not produce because of the possessor's negligence.⁴³⁴ A bad faith possessor whose possession derives from an unlawful act is further liable under the law of delictual obligations for all fruits and profits the owner might have extracted from the thing, or for the fruits and profits the possessor has actually derived although the owner would not have derived them.⁴³⁵ With respect to claims for reimbursement of expenses, a good faith possessor is entitled to recover all necessary expenses, with the exception of those regarded as ordinary management expenses, as well as useful expenses to the extent that the value of the thing has thereby increased. The increase in value is determined as of the time of the delivery of the thing to the owner.⁴³⁶ A bad faith possessor is entitled to recover only necessary expenses, if the requirements of a management of affairs in favor of the owner are satisfied.⁴³⁷ No possessor can claim recovery for luxurious expenses.

Ownership is protected, in the second place, by the *Beseitigungs- und Unterlassungsanspruch*, which is a broadened *actio negatoria* of the Roman law.⁴³⁸ This action protects the right of ownership, and by analogy other real rights,⁴³⁹ from unauthorized disturbances falling short of dispossession. Any unprivileged act of a third person, whether intentional, negligent, or non-negligent, which encroaches on the owner's right, constitutes an actionable disturbance. The action aims at elimination of the disturbance and injunction for the future. Where

433. See B.G.B. § 993 (1, 2). See also HEDEMANN, *SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES* 179 (3d ed. 1960); WOLFF-RAISER, *SACHENRECHT* 332 (10th ed. 1957).

434. See B.G.B. §§ 987 (2), 990.

435. *Id.* § 992. See 3 SOERGEL-SIERERT-MÜHL, *KOMMENTAR ZUM B.G.B.* 272 (9th ed. 1960).

436. See B.G.B. §§ 994-996.

437. *Id.* § 994(2). *Cf. id.* §§ 677-687.

438. See B.G.B. § 1004; WOLFF-RAISER, *SACHENRECHT* 347 (10th ed. 1957).

439. See B.G.B. §§ 1027 (predial servitudes); 1065 (usufruct); 1090 (limited personal servitudes); 1134 (mortgage). In respect to predial servitudes, the negatory action is available for the setting aside of any disturbance, including the loss of possession of the servitude. See 3, 2 STAUDINGER-RING, *KOMMENTAR ZUM B.G.B.* 1074 (11th ed. 1963).

the disturbance fulfills the requirements of delictual responsibility, the action may also be directed to the recovery of damages.⁴⁴⁰ The action is available both for movables and immovables, but, by its nature, it is almost exclusively used for the protection of immovable property.⁴⁴¹ In practice, the action is most frequently brought to contain excessive omissions originating in neighboring immovables and, generally, in order to eliminate what would be considered in common law terminology as trespassory invasions.

Plaintiff must prove his right of ownership and the fact of interference. The burden of proof of ownership may be discharged with the assistance of the same rebuttable presumptions available under the Code to the revendicating owner. Ownership, once proved, is presumed to be free of charges, and it is for the defendant, by way of defense, to prove a real or personal right which authorized the invasion of plaintiff's property. The negatory action may be cumulated with the revendicatory action, in case the dispossessed owner is interested in the removal of obnoxious structures erected by the defendant on the immovable.⁴⁴² The broad scope of the negatory action, and its availability by analogy to holders of real rights other than ownership, has rendered unnecessary provisions for an action corresponding to the Roman *actio confessoria*.

Ownership is further protected by two actions, one of which is similar to the revendicatory action and the other to the negatory action. Both actions arise under the rules of property law. The first is granted by article 1005 of the Civil Code to the owner of a thing, which, after having escaped the owner's possession, is located on an immovable possessed by another person. The owner under this article may demand permission to enter, search for, and recover his thing. As in the case of the revendicatory action, the recovery of the thing is only an indirect confirmation of the claimant's right of ownership. The second action is granted by article 894, to any person having a legitimate interest, for the correction of the *Grundbuch* so as to reflect accurately the existing legal situation.⁴⁴³

440. See WOLFF-RAISER, *SACHENRECHT* 349 (10th ed. 1957).

441. See BAUR, *LEHRBUCH DES SACHENRECHTS* 91 (2d ed. 1963); WOLFF-RAISER, *SACHENRECHT* 347 (10th ed. 1957).

442. See BAUR, *LEHRBUCH DES SACHENRECHTS* 95 (2d ed. 1963).

443. *Id.* at 140, 144. *Cf.* note 414 *supra*. Ownership is also protected, indirectly, by the right of intervention to recover movables or immovables in executory proceedings or in bankruptcy. See Z.P.O. § 771, K.O. § 43.

Possession under the German Civil Code is protected by two possessory actions and, under certain circumstances, by the authorization of self-help. In all cases, protection is predicated on an unlawful interference, *i.e.*, an interference which is neither in accord with the will of the possessor nor authorized by law.⁴⁴⁴ The good faith of the aggressor, or his right to possession, is immaterial. The possession acquired by means of an unlawful interference is designated as defective.⁴⁴⁵ The possession of the aggressor's heirs is always defective, but that of his other assigns is defective only if at the time of transfer of possession these assigns knew of the defect.⁴⁴⁶ The possessory actions are directed either to the recovery of a lost possession or to the discontinuation of a disturbance⁴⁴⁷ and injunction for the future, if further disturbances are expected.⁴⁴⁸ Either action must be brought within a year of the dispossession or disturbance. However, even if timely brought, either action will fail, if plaintiff's possession is defective against the defendant or his ancestors and has been acquired by plaintiff within a year prior to the dispossession or disturbance, of which he complains.⁴⁴⁹ In effect, this rule extends the period for recovery of possession by force, because interferences with the possession of the aggressor within a year of the dispossession are not actionable.

The possessory actions may be brought by the direct possessor,⁴⁵⁰ whether he possesses for himself or for others, and by the indirect possessor in case of interference with the possession of the direct possessor by third persons.⁴⁵¹ In the interest of expedient disposition of the possessory action, the defendant

444. See B.G.B. § 858(1). Fault is not necessary. See 3, 1 STAUDINGER-SEUFERT, KOMMENTAR ZUM B.G.B. 48 (11th ed. 1956).

445. See B.G.B. § 858(2).

446. *Id.* § 858(2).

447. *Id.* §§ 861, 862(1, 1). Strictly speaking, distinction is not made in Germany between disturbance in law and disturbance in fact. However, the notion of disturbance is broad enough to cover not only what would be considered in Louisiana as disturbance in fact but also disturbance in law.

448. See B.G.B. 861 (1), (2).

449. *Id.* §§ 861(2), 862(2).

450. The possessory actions are thus available to holders of real rights susceptible of possession, such as predial servitudes (B.G.B. § 1029), usufruct (B.G.B. § 1936), limited personal servitudes (B.G.B. § 1090(2)), and pledge (B.G.B. § 1205). The right of preemption, real charges, mortgages, land-debts, and annuity debts do not give rise to a right to possession. Accordingly, as to these rights, the possessory actions are not available.

451. See B.G.B. §§ 869, 868. The indirect possessor cannot bring the possessory actions against the direct possessor while the latter possesses for him. See 3 SOERGEL-SIEBERT-ROTHE, KOMMENTAR ZUM B.G.B. 38 (9th ed. 1960).

cannot assert title or a right to possession.⁴⁵² He may bring, however, a separate petitory action. In this case, the two actions proceed independently and, as a result, the parties are subjected to a true race of diligence. If the possessory action is disposed of first and the plaintiff is successful, possession is restored to him pending disposition of the petitory action. If the petitory action is passed upon first, the possessory action abates, since the rights of the parties are fully determined in this proceeding.⁴⁵³

The possessory actions have limited practical significance today. In the first place, the evicted or disturbed possessor, in the great majority of cases, is also the owner or holder of a real right and has at his disposal the much more effective remedies for the protection of the right of ownership. In the second place, actions for the protection of possession have proved in practice much slower remedies than the proceeding of *Einstweilige Verfügung* (provisional disposition), which is generally available under the Code of Civil Procedure.⁴⁵⁴ This proceeding displays certain functional similarities with the Louisiana writ of sequestration. The possessory actions retain their significance in cases where neither party has a right to possession or where a lessee seeks protection against excessive omissions from neighboring immovables.⁴⁵⁵

Self-help, in contrast with the possessory actions, has still much practical significance. The Civil Code accords to the possessor the privilege to exercise reasonable force to repel aggression and, in case of dispossession, to recover possession. In that regard, distinction is made between movables and immovables. The possession of movables may be recovered by force when the aggressor is caught in the act or is immediately pursued. The possession of immovables may be recovered only by the expulsion of the aggressor immediately following dispossession.⁴⁵⁶ Self-help may be exercised by one possessing as owner,⁴⁵⁷ by

452. B.G.B. § 863. The defendant, however, may deny that he has committed an unlawful interference. See 3 SOERGEL-SIEBERT-ROTHE, KOMMENTAR ZUM B.G.B. 25 (9th ed. 1960).

453. See B.G.B. § 864(2). It is questionable whether the one who has committed the unlawful interference may rely on a petitory judgment in his favor which antedates the interference. See 3 SOERGEL-SIEBERT-ROTHE, KOMMENTAR ZUM B.G.B. 27 (9th ed. 1960).

454. See Z.P.O. § 935.

455. See BAUR, LEHRBUCH DES SACHENRECHTS 66 (2d ed. 1963).

456. See B.G.B. §§ 859(2) (movables); 839(3) (immovables).

457. The privilege of self-help is even granted to persons having defective

"possessory servants,"⁴⁵⁸ and by persons who, for the time being, are entitled or bound to possess for another.⁴⁵⁹ A person possessing through others (indirect possessor) is not entitled to exercise self-help.⁴⁶⁰ Recovery by force is also excluded where movables escaping one's possession are located on an immovable possessed by another. In this case, the possessor of the movables has a claim against the possessor of the immovable for permission to conduct a search and recover the movables.⁴⁶¹

In addition to his claims arising under the law of property, an evicted possessor or one disturbed in his possession may have claims arising under the rules of delictual obligations and unjust enrichment.⁴⁶² The question of the nature of possession and of possessory actions has given rise to interminable discussions in Germany. Today it is frequently stated that possession, though not a right, is legally protected as a pecuniary interest and a factual relationship in the interest of public peace.⁴⁶³

A peculiar action which arises under article 1007 of the Civil Code and combines characteristics of both petitory and possessory actions deserves special consideration.⁴⁶⁴ This action, granted to a prior possessor for the recovery of movables in the hands of a present possessor, is essentially possessory in nature. The plaintiff, however, if successful, recovers possession definitively as against his opponent and the defendant is not deprived of defenses resting on his right to possession. These are obviously characteristics of petitory actions. The action is available to a prior possessor who acquired his possession in good faith and did not relinquish it voluntarily. It is brought against a present possessor who either acquired possession in bad faith or who, regardless of his good or bad faith, acquired possession of

possession. See 3 SOERGEL-SIEBERT-ROTHE, KOMMENTAR ZUM B.G.B. 19 (9th ed. 1960).

458. See B.G.B. §§ 860, 855; note 417 *supra*.

459. See B.G.B. § 859(1), note 417 *supra*.

460. See 3 SOERGEL-SIEBERT-ROTHE, KOMMENTAR ZUM B.G.B. 38 (9th ed. 1960).

461. See B.G.B. § 867.

462. *Id.* §§ 823, 812. See BAUR, LEHRBUCH DES SACHENRECHTS 68, 69 (2d ed. 1963).

463. See WOLFF-RAISER, SACHENRECHT 52 (10th ed. 1957). This explanation has been criticized. See HECK, GRUNDRISS DES SACHENRECHTS 12 (1930); BAUR, LEHRBUCH DES SACHENRECHTS 65 (2d ed. 1963) (arguing that this "theory of peace" should give way to a "theory of continuity," in the light of an individual's interest in his possession).

464. See HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 191 (3d ed. 1960); 3 SOERGEL-SIEBERT-MÜHL, KOMMENTAR ZUM B.G.B. 318 (9th ed. 1960).

a thing lost, stolen, or otherwise taken from the custody of the prior possessor without his consent. The action has great practical significance in cases where neither party is in a position to prove an obligatory or real right to possession. In spite of its apparent functional similarity with the *actio Publiciana* of the Roman law, the action of the previous possessor may be traced directly to ancient Germanic conceptions.⁴⁶⁵

The discussion may conclude with a reference to actions for the partition of immovable property,⁴⁶⁶ the action of boundary,⁴⁶⁷ and the action for the payment of a credit secured by mortgage.⁴⁶⁸ This last action aims directly at satisfaction of the unpaid credit by judicial sale of the mortgaged immovable. In that regard, it differs essentially from the Roman *actio hypothecaria in rem*, which aimed at taking possession of the property for the purpose of subjecting it to judicial sale.⁴⁶⁹

E. GREEK LAW

The Greek Civil Code is so similar to the German Civil Code in its conceptual technique and methodology that detailed discussion here of the protection accorded to real rights in Greece would be largely repetitious. Attention, therefore, will be focused on points of difference between the two codes.

In general, the Greek Civil Code has deviated from the complex structure of the German Civil Code pertaining to the protection of ownership and possession in favor of much simpler solutions along the lines of Roman law and national practices prior to codification.⁴⁷⁰ Real actions⁴⁷¹ are classified as either petitory or possessory. Ownership, and by analogy other real

465. See WOLFF-RAISER, *SACHENRECHT* 69 n.1 (10th ed. 1957).

466. See B.G.B. §§ 749, 1008. See STEIN-JONAS-SCHÖNKE-POELLE, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG*, § 24 n.III, 6 (18th ed. 1960).

467. See B.G.B. § 919.

468. *Id.* §§ 1113, 1147.

469. See WOLFF-RAISER, *SACHENRECHT* 572 (10th ed. 1957). Section 1147 of the B.G.B. applies by analogy to land-debts. *Id.* § 1192.

470. See Zepos, *Law of Things and Real Actions in Greece*, 29 *TUL. L. REV.* 697 (1955).

471. In contrast with the German Civil Code, the Greek Civil Code does employ the term "real actions." See GREEK CIVIL CODE art. 1292. Real actions under the Code are clearly those for the protection of real rights. They are contrasted to personal actions, available for the protection of personal rights, and mixed actions which, like the actions of boundary (art. 1020) and partition (art. 799), involve both personal and real elements. See Zepos, *Law of Things and Real Actions in Greece*, 29 *TUL. L. REV.* 697, 712 (1955); Diamantakos, *Unlawful Infringement of Another's Real Rights*, 31 *E.E.N.* 609 (1964) (in Greek).

rights,⁴⁷² are protected under the Code by three petitory actions: the revendicatory action, the negatory action, and the Publician action. Predial servitudes are especially protected by the confessorary action, and the right of mortgage by the hypothecary action.

The revendicatory action may be defined as the claim of a dispossessed owner against a possessing non-owner for the recognition of his ownership and return of the thing.⁴⁷³ The action is available for both movables and immovables. Plaintiff is the owner or a person to whom the owner has assigned the revendicatory action. Defendant is any person having possession⁴⁷⁴ or detention⁴⁷⁵ at the time of the commencement of the action.⁴⁷⁶

The defendant has several defenses available. He may deny that the plaintiff was ever the owner of the thing and assert that he is the owner. He may also, without necessarily conceding plaintiff's right of ownership, assert his right to possession or detention vis-a-vis the owner by virtue of a contractual or real right.⁴⁷⁷ The plaintiff has the burden of proof of his ownership,

472. Under the Greek Civil Code real rights are only ownership, servitudes, pledge, and mortgage (art. 973). Possession is neither personal nor real but a *sui generis* patrimonial right. Protection analogous to that of ownership is accorded to the right of usufruct (art. 1173), habitation (*cf.* art. 1187), and pledge (art. 1236). However, the nature of pledge excludes claims for fruits and profits or resort to the Publician action.

473. See GREEK CIVIL CODE art. 1094. Plaintiff may limit his demand to the recognition of his ownership or to the recovery of possession. Where plaintiff has not been dispossessed, the revendicatory action cannot be brought. Plaintiff, however, may bring for the recognition of his ownership an action for a declaratory judgment under article 127 of the Introductory Law of the Civil Code.

474. Possession is defined in the Civil Code as the exercise of physical control over a (corporeal) thing *animo domini* (art. 974). The exercise of servitudes and pledge under claim of right is qualified as quasi-possession (art. 975). Possession may be exercised personally or through others. The person having actual control on behalf of another is called detentor (*cf.* art. 997).

475. Defendant thus may be a person exercising physical control on behalf of a third person (*e.g.*, as lessee of the *animo domini* possessor) or even on behalf of the plaintiff (*e.g.*, as depositary of plaintiff's property). When the action is addressed against the *animo domini possessor*, even if he does not exercise possession personally, a judgment against him will be executed against any person having control over the thing on behalf of the defendant. GREEK CODE OF CIVIL PROCEDURE art. 867(4). If the action is addressed against persons exercising detention or quasi-possession, these persons are entitled to implead the *animo domini possessor*. *Id.* arts. 69, 608. The judgment has *res judicata* effect against the *animo domini possessor* only if he has been sued or impleaded.

476. If at the time of the commencement of the action the defendant is no longer in possession, plaintiff's remedy against him is an action for damages under article 1098 of the Civil Code rather than the revendicatory action. See BALIS, CIVIL LAW PROPERTY 220 (3d ed. 1955) (in Greek).

477. See GREEK CIVIL CODE art. 1095.

unless the defendant concedes plaintiff's prior ownership and asserts affirmatively his own present right of ownership, in which case the burden of proof shifts to the defendant. The person asserting ownership of immovable property must prove acquisition by original title or from a person who had original title.⁴⁷⁸ This *probatio diabolica* necessitates the tracing of land titles for a period in excess of twenty years which is the requisite time for the acquisitive prescription of immovable property. Ownership of movables is proved with the assistance of two presumptions. Under article 1110 the present possessor of movables may rely on the presumption that he is the owner of the things. Plaintiff may rebut this presumption on proof that he was possessor and that he has been dispossessed as a result of loss or theft.⁴⁷⁹ In this case, a presumption arises under article 1111 that plaintiff was the owner during the period of his possession.⁴⁸⁰ This presumption is likewise rebuttable. Since under the Code the ownership of movables may be acquired in certain circumstances *a non domino*,⁴⁸¹ the revendicatory action for the recovery of movables has lost some of the practical significance it had under Roman-Byzantine law.

As in Germany, the liability of the possessor for loss, destruction, or deterioration of the thing, the apportionment of fruits and profits, and claims for reimbursement of expenses are matters determined primarily in the light of the possessor's good or bad faith. A good faith possessor prior to the commencement of the action is not liable for the loss, destruction, or deterioration of the thing, need not account to the owner for fruits and profits, and has a claim for reimbursement of necessary and useful expenses.⁴⁸² After the commencement of the action, the good faith possessor is liable for loss, destruction, or deteriora-

478. *Cf. id.* arts. 239, 1033. This is so because with respect to the acquisition of immovable property the Code adopts the maxim that no one can transfer a greater right than that he himself has.

479. Proof of loss or theft, however, does not rebut the presumption of ownership in favor of the present possessor where the property involved in litigation is money or negotiable titles issued to the order of the bearer. *Cf. GREEK CIVIL CODE* arts. 1039, 1110.

480. If the plaintiff cannot prove that he lost possession as a result of loss or theft, he must prove that he has acquired ownership and that the defendant has not acquired the right he claims. This can be done also in the case of money and negotiable titles issued to the order of the bearer. If the plaintiff proves that the defendant acquired possession from him and that defendant presently exercises possession on behalf of the plaintiff, proof of ownership may be dispensed with because plaintiff may rely on the presumption of article 1111.

481. See *GREEK CIVIL CODE* arts. 1036-1039.

482. *Id.* arts. 1100, 1101, 1103.

tion of the thing attributed to his fault.⁴⁸³ If he is in default, *i.e.*, he positively knows that he is bound to restore the thing, his liability is extended to cover accidental damage, unless he proves that the damage would have occurred in any event.⁴⁸⁴ He must account to the owner for fruits and profits received, even if the owner would not have received them, or for fruits and profits which did not materialize owing to his fault, if they could have been produced under regular management. His claim for reimbursement is limited to necessary expenses other than ordinary management expenses. The bad faith possessor occupies the same position as the good faith possessor after the commencement of the action. But if he has acquired possession through the perpetration of an unlawful act, the bad faith possessor is liable to the owner for damages under the law of delictual obligations.⁴⁸⁵ All possessors are given the right to detach the essential component parts they have attached to the thing (*jus tollendi*) and to retain the thing until satisfaction of their claim for expenses (*jus retentionis*).⁴⁸⁶

The negatory action is available for the protection of real rights against disturbances falling short of dispossession.⁴⁸⁷ The action applies to both movables and immovables and aims at setting aside disturbances with an injunction for the future. Plaintiff may be the owner, co-owner, usufructuary, or pledgee. Mere detentors, like lessees, cannot bring this action. Defendant is the person who has caused the disturbance, or his heirs and assigns who continue the disturbance. The plaintiff must prove his real right, as in the case of the revendicatory action, and the fact of

483. *Id.* art. 1097. Alienation of the litigious property by the defendant after the commencement of the action has no influence on the proceeding. If the plaintiff is successful, the court will order the defendant to return the thing and the judgment may be executed against third persons deriving title from the defendant. See GREEK CODE OF CIVIL PROCEDURE art. 867(4). In the case of movables, however, execution against third persons is excluded if these persons have acquired ownership under arts. 1036-1039 of the Civil Code. When defendant's assigns have not acquired ownership of the litigious property, plaintiff has the choice of proceeding against them for recovery in kind or against the defendant claiming damages under article 1097 of the Civil Code. The liability of the defendant is measured according to the principles of unjust enrichment, and, if he is in default, according to the principles of delictual obligations. See BALIS, CIVIL LAW PROPERTY 233 (3d ed. 1955) (in Greek).

484. See GREEK CIVIL CODE arts. 1098, 344.

485. *Id.* art. 1099.

486. *Id.* arts. 1104, 1106.

487. *Id.* art. 1108. The disturbance need not be attributed to the fault of the person who caused it. The notion of the disturbance for the purpose of the negatory action is the same as that for the foundation of the possessory action. See text at note 497 *infra*.

the disturbance. The defendant may effectively defend the action by proving a real or obligatory right which entitles him to perform the acts characterized by plaintiff as disturbances. In addition to this action, plaintiff may have a claim for damages under the rules of delictual obligations.

The Publician action is very similar in its function to the revendicatory action and is governed by the same rules applied by analogy.⁴⁸⁸ It differs from the revendicatory action in that the plaintiff need not prove acquisition of ownership by original title or from persons who had original title. The plaintiff, in order to recover, must merely prove that he has acquired possession of the property by meeting the requirements for acquisitive prescription and that he has been evicted prior to the completion of the prescription. By its nature, the action cannot be brought against the true owner, or against persons situated in the same position as plaintiff. Under the regime of the Civil Code, the action applies only to immovable property. The reasons for this limitation are that the ownership of movables may be acquired *a non domino* and that there is a presumption of ownership in favor of the present possessor.⁴⁸⁹

Plaintiff in the Publician action is a person having acquired possession by meeting the requirements of acquisitive prescription but evicted prior to the completion of the prescriptive period, as well as his heirs and assigns. Plaintiff may also be a person claiming co-ownership or usufruct.⁴⁹⁰ Defendant is the possessor or detentor of the immovable, whose right is inferior to that of the plaintiff. For the rest, the defenses available to the defendant, his liability for loss, destruction, or deterioration of the property, the apportionment of fruits and profits, and claims for expenses are subject by analogy to the rules governing the revendicatory action. Where the plaintiff has been merely disturbed in his possession, without being evicted, the Publician action functions as a negatory action.

Predial servitudes are especially protected by the confessory action.⁴⁹¹ This action arises when the holder of the right is evicted or otherwise disturbed in the exercise of his servitude. Plaintiff is the owner or Publician possessor of the dominant estate

488. See GREEK CIVIL CODE art. 1112.

489. See text at notes 480, 482 *supra*.

490. See GREEK CIVIL CODE arts. 1116, 1173.

491. *Id.* arts. 1132-1133.

and beneficiary of the servitude. Defendant is the person who has caused the disturbance. Plaintiff must prove his acquisition of the servitude, the ownership of the grantor of the servitude, and the fact of disturbance. The defendant may defend the action by proving that he has a real or obligatory right which entitles him to object to the exercise of the alleged servitude. The action is directed to a judgment recognizing the right of servitude, setting aside the disturbance, and prohibiting any future disturbances. A claim for damages under the rules of delictual obligations may be cumulated with this action. The confessory action is also available in the form of a quasi-Publician action; for example, it may be brought by one who has acquired a servitude by meeting the requirements of acquisitive prescription, if he has been disturbed prior to the completion of the prescriptive period. For the rest, the rules governing the revendicatory action may apply by analogy.

The mortgage creditor has, in addition to a personal action against his debtor for the payment of the debt, a real action referred to in the Civil Code as hypothecary action.⁴⁹² By this action, which is predicated on a valid mortgage and a debt due, the creditor may obtain satisfaction by means of a judicial sale of the mortgaged immovable at public auction. The action must be brought in the first place against the debtor; but if the mortgage has been granted by a third person, or the immovable is now in the hands of persons possessing under a lawful title, the hypothecary action must be brought also against these persons. A judgment in favor of the creditor is effective *erga omnes* and orders the person in possession of the immovable to accept the judicial sale. Neither the debtor, in case the creditor elects to bring the personal action, nor the persons in possession of the immovable, in case the creditor elects to bring the hypothecary action, may invoke the benefit of discussion. Third persons in possession of the immovable, however, may invoke any exception the debtor has against the creditor, as well as any exceptions deriving from their own relations with the creditor, and they may contest the validity of the title or of the registration and the actual existence of the mortgage. From the procedural viewpoint, the hypothecary action is closely regulated in the Code of Civil Procedure.

492. *Id.* arts. 1291-1301.

Possession under the Greek Civil Code is protected by the privilege of self-help and a variety of possessory actions. Any possessor, however wrongful his possession may be, is entitled to protect his possession by the exercise of reasonable force. The same privilege is accorded to persons possessing on behalf of their master or principal. The regulation of this privilege in the Code follows the pattern of the German Civil Code.⁴⁹³

A person evicted from possession unlawfully and without his consent has under article 987 of the Greek Civil Code an action for the recovery of possession.⁴⁹⁴ Plaintiff is the person who had possession at the time of the eviction, or his heirs and assigns. In case possession was exercised by a detentor (*e.g.*, a lessee) on behalf of the lawful possessor, the action may be brought against a third aggressor by either or both of these persons. Where possession has been usurped by the detentor, the lawful possessor may bring the possessory action against him. But an evicted detentor has no possessory action against the person from whom he derived his detention (for example, against his lessor).⁴⁹⁵ Defendant is the person who evicted plaintiff, if he is still in possession at the time of the commencement of the action, whether he exercises possession personally or through others. If at the time of the commencement of the action the wrongdoer is out of possession, plaintiff may either sue him for damages under the law of delictual obligations or proceed against any third person whose possession vis-a-vis the plaintiff is defective. If, after the commencement of the action, the wrongdoer transfers possession to third persons or otherwise loses it, the proceeding continues regularly and the judgment is executed against any person who took possession *pendente lite*.⁴⁹⁶ Object of the action is the recovery of possession. The action may be cumulated with an action for damages under the law of delictual obligations, or with an action for the return of the thing by virtue of an oblig-

493. *Cf.* text at notes 458-463 *supra*. GREEK CIVIL CODE arts. 282-284, 985-986.

494. The quasi-possessor of the rights of servitude and pledge is accorded the same protection as the possessor of corporeal things. See GREEK CODE art. 996. This protection avails also against the *animo domini* possessor or owner of the encumbered thing.

495. See *id.* art. 997. This article of the Civil Code, departing from the strict Roman law notions, establishes the concept of "protected detention." For reasons of practical necessity, the Code accords the possessory actions to persons who acquired physical control over a thing from the *animo domini* possessor by virtue of a lease, deposit, or other similar obligatory relationships. The privilege of self-help, however, has not been extended to a mere detentor.

496. See GREEK CODE OF CIVIL PROCEDURE art. 867(4).

atory right. Plaintiff must prove his prior possession and the fact of eviction.

Unlawful interferences falling short of dispossession are actionable under article 989 of the Civil Code. This article provides that any person unlawfully disturbed in his possession may obtain judgment ordering the discontinuation of the disturbance and prohibiting future invasions. Disturbance may be either an act or an omission. Plaintiff is the unlawfully disturbed possessor and his heirs or assigns. An unlawfully disturbed detentor may bring the action only against third persons. Defendant is the person who caused the disturbance, his heirs, or persons possessing on his behalf. Plaintiff must prove his possession and the disturbance.

The defendant may defend both possessory actions by raising the defense of defective possession, *i.e.*, that plaintiff acquired possession wrongfully vis-a-vis the defendant or his ancestors during the year prior to the eviction or disturbance.⁴⁹⁷ He cannot defend, however, by asserting a right by virtue of which he may be entitled to possession, unless this right has been recognized by final and unappealable decision in litigation between plaintiff and the defendant.⁴⁹⁸ Both possessory actions prescribe in a year from the time of the eviction or interference.

Rights to possession may be provisionally determined, independently of any possessory action, in a special summary proceeding initiated by application to the Justice of the Peace at the situs of an immovable. In this so-called proceeding of "provisional measures,"⁴⁹⁹ the judge may grant possession to either litigant on the basis of a cursory examination of the merits of each case. This disposition has no *res judicata* effect in a sub-

497. See GREEK CIVIL CODE art. 988. Article 629 of the Greek Code of Civil Procedure, inspired from articles 25 and 26 of the French Code of Civil Procedure, establishes a general prohibition against the cumulation or consolidation of petitory and possessory actions. In applying this article in the past, Greek courts reached results comparable to those reached in France. See text at notes 90-96 *supra*. Today, article 629 is considered as repealed by implication as contrary to the provisions of the Civil Code. See INTRODUCTORY LAW to the GREEK CIVIL CODE art. 1; BALIS, CIVIL LAW PROPERTY 83 (3d ed. 1955) (in Greek).

498. See GREEK CIVIL CODE art. 991. The defendant, therefore, cannot defend a possessory action by asserting his ownership, or other real or obligatory right, which enables him to claim possession. But the defendant may deny the foundation of the action, *i.e.*, that an unlawful eviction or disturbance occurred, by asserting that he himself had possession or detention from plaintiff by virtue of a real or obligatory right and that the acts complained of were merely the exercise of his rights or of privileged self-help.

499. Law ΓΨhZ of 1911, as amended.

sequent possessory action. Possession, being a patrimonial right under the Code, is finally protected by actions for declaratory judgments, unjust enrichment, and damages under the law of delictual obligations.

F. COMMON LAW

An exposition of the protection accorded in common law jurisdictions to interests in property is a particularly difficult task due to the complex structure of substantive and procedural institutions.⁵⁰⁰ A detailed comparison with the civil law in this area is an almost impossible undertaking due to substantial differences in conceptual technique and the frequent absence of equivalents. Accordingly, the discussion will be limited to essentials.

Current forms of property protection in common law jurisdictions may be fully understood only in the light of the historical evolution prior to the era of procedural reform. Common law actions for the protection of property rights were distinguished according to their subject matter, perhaps under the influence of civilian doctrine, as personal, real, or mixed.⁵⁰¹ Actions for the recovery of damages to any species of property, as well as actions for the recovery of specific chattels, were designated as personal.⁵⁰² Actions for the recovery of lands, tenements, and hereditaments were referred to as real. Actions for the recovery of real property, as well as for damages for injuries to the property, were qualified as mixed. Mixed actions came to be treated commonly as species of real actions.⁵⁰³

Interests in real property were protected, primarily, by the real (and mixed) actions.⁵⁰⁴ These actions were divided into *proprietary* and *possessory*, according to whether plaintiff

500. The matter is ordinarily dealt with separately from the viewpoints of real and personal property law, torts, equity, and procedure. Cf. WOLFF-RAISER, *SACHENRECHT* 319 n.1 (10th ed. 1957).

501. See MARTIN, *CIVIL PROCEDURE AT COMMON LAW* 8 (1899); 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* 570 (2d ed. 1899).

502. The category of personal actions was broad enough to include, in addition to actions for damages to property and recovery of chattels, actions for the recovery of a debt, breach of contract, and injuries to the absolute or relative rights of a person. Personal actions were said to arise either *ex contractu* or *ex delictu*. See MARTIN, *CIVIL PROCEDURE AT COMMON LAW* 8 (1899).

503. See ROSCOE, *ACTIONS RELATING TO REAL PROPERTY* 1, 3 (1840); MARTIN, *CIVIL PROCEDURE AT COMMON LAW* 8 (1899).

504. See generally 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 46-80 (2d ed. 1899).

sought recovery on the strength of his title or merely on the strength of his possession. The proprietary actions were basically of two kinds, writs of right properly-so-called (four species), and writs in the nature of writs of right (eighteen species). Possessory actions were just as numerous. Of most frequent use were the "most ancient and favored"⁵⁰⁵ writs of assize, the writs of entry, the writ of waste, and the writ of forcible entry and detainer, which, strictly speaking, was an incident to a criminal prosecution rather than a real action. The possessory actions were available to any person having actual, quiet, and peaceable possession of lands, irrespective of the means by which he acquired it. Possessory and proprietary actions were concurrent remedies. Proprietary actions, however, involved delays and were seldom brought when the simpler and much more speedy possessory actions were also available. None of the real actions had more than a temporary place in American law, apart from the practice in parts of New England, where resort was made at an early date to simplified versions of these actions.⁵⁰⁶ In modern times, the various real actions merged into a few simple forms under the name of ejectment.⁵⁰⁷ Apart from the real actions, protection was afforded to interests in real property by equitable remedies⁵⁰⁸ and the "exceptionally rigorous"⁵⁰⁹ personal actions of trespass and trespass on the case, directed to the recovery of damages for unprivileged interferences with the possession and enjoyments of land.

Interests in the possession and ownership of personal property were likewise protected by actions at law and equitable remedies. The earliest forms of protection were the pursuit of the thief, and the *actio furti*,⁵¹⁰ which gave way to the writs of *trespass* and *trespass on the case*.⁵¹¹ Trespass was strictly a personal action directed to the recovery of the value of the chattel. Other early common law remedies for the protection of interests:

505. MARTIN, CIVIL PROCEDURE AT COMMON LAW 120 (1899).

506. See MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 470 (1952).

507. See text at note 518 *infra*.

508. See generally 4 POMEROY, EQUITY JURISPRUDENCE 893, 933, 1014, 1021-31 (5th ed. 1941).

509. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 19 (1906).

510. See 2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE f. 150 b, p. 509 (Twiss' ed. 1870). See generally 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 157-83 (1899).

511. See 1 WALSH, PROPERTY 39 (1947).

in personal property were the actions of *replevin*⁵¹² and *detinue*.⁵¹³ Replevin lay against a person who had made an illegal distress by the seizure of chattels. The action became concurrent with trespass and did not acquire great practical significance, at least until the nineteenth century, when it was resurrected in a substantially different form.⁵¹⁴ Detinue developed from the action of debt and was originally based on the contractual relations of the parties. The gist of the action was the wrongful detention of chattels upon termination of a bailment. A judgment in favor of the plaintiff could be satisfied by the defendant, at his election, by the return of the chattels or payment of their value.⁵¹⁵ The scope of the action was later extended to include proceedings against third persons in possession of bailed chattels who failed to return them on demand. Still later, detinue became available against third persons who in any way acquired possession of chattels wrongfully taken from the owner, by treating the defendant as a finder of lost property. This was the action of *detinue sur trover*, out of which the modern action of *trover and conversion* was developed.⁵¹⁶

Today, ownership, possession, and other proprietary interests in real and personal property are protected in the United States by a variety of legal and equitable remedies.⁵¹⁷ Legal remedies are, generally, actions for the recovery of the possession of property as well as for damages, or actions for damages for trespassory and non-trespassory interferences with the possession and enjoyment of property. Equitable remedies are suits for injunctive or other appropriate relief. This relief is ordinarily limited to the protection of interests in real property. Its availability rests in the discretion of the court and depends upon the adequacy or inadequacy of legal remedies, the comparative hardships to the parties or the public from its use or non-use, and on the comparative equities of the litigants. The details of legal and equitable protection vary with the nature of the property.

512. *Id.* at 42. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 472 (1952).

513. See JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 90 (1959); MARTIN, CIVIL PROCEDURE AT COMMON LAW 74-78 (1899).

514. See text at note 537 *infra*.

515. For all practical purposes this judgment resolved the proceeding into an action for damages. See MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 472 (1952).

516. See text at note 534 *infra*; 1 WALSH, PROPERTY 47 (1947); MARTIN, CIVIL PROCEDURE AT COMMON LAW 85-92 (1899).

517. See BLUME, AMERICAN CIVIL PROCEDURE 19, 24 (1955).

A person out of possession who has a legally protected interest in the immediate possession of real property may be given a judgment for possession, as well as damages, by means of two forms of judicial process: ejectment, and a summary proceeding for unlawful detainer.⁵¹⁸ These are statutory remedies in practically all American jurisdictions, with many variations of detail.⁵¹⁹ Ejectment, the more formal action, is brought in a court of record with jurisdiction over land titles for the settlement of all claims to possession, whether founded on disputed titles or on the construction of leases and other possessory agreements.⁵²⁰ Under code procedure, the remedy, though commonly termed ejectment, is an action formally styled one for the recovery of real property. Although stripped today of its fictitious features, this action is still of a relatively slow and expensive remedy. The plaintiff, in order to recover in an ejectment action, must prove his title or prior right to possession rather than defects in the title of his adversary. Where the defendant does not derive his possession from the plaintiff or his predecessors, he can effectively defend the action by showing title in a third person unconnected with the plaintiff. This defense is not available in cases of dispossession because prior possession gives rise to a right superior to all who cannot show title in themselves or in a person from whom they derived possession.

In many states the statutory ejectment action settles definitively, among the parties, the question of title to the land.⁵²¹ In

518. See VI-A AMERICAN LAW OF PROPERTY 61-63 (1952); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 470-72 (1952); 1 WALSH, PROPERTY 61-74 (1947); BLUME, AMERICAN CIVIL PROCEDURE 19 (1955). Markedly similar with the ejectment action is the action of trespass to try title. This action originated in an early South Carolina statute, was later introduced in Alabama, and still later found its way into Texas as a common law action. South Carolina and Alabama have abolished this action by statute. See MARTIN, CIVIL PROCEDURE AT COMMON LAW 145-46 (1899). In Louisiana, a 1908 statute had provided for an action to establish title. See LA. R.S. 13:5062 (1950). This action has been superseded by article 3651 of the new Code of Civil Procedure.

519. See generally, 3 WAIT, ACTIONS AND DEFENSES 1-134 (1878). On the whole, however, the essential principles governing the various remedies for the recovery of land in the United States "constitute practically one general method of procedure distinguished under a variety of names." SEDGWICK & WAIT, TRIAL OF TITLE TO LAND 47 (2d ed. 1886).

520. See BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES 46-54 (1954).

521. Some statutes provide expressly that the ejectment action may be brought by a person "in or out of possession," while other statutes make the action available only to persons out of possession. Where the action is so limited in scope, persons in possession may ordinarily settle disputes over titles by a recourse to other remedies. See notes 522-523 *infra*. Sample of statutes has been collected in LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, *Exposé des Motifs* No. 19, at 48-50 (1956).

states where the ejectment action leaves open the question of title, the successful plaintiff may bring a statutory action to quiet title.⁵²² In the absence of a pertinent statute he may obtain equitable relief in the form of decrees quieting title, or removing clouds from title and injunctions preventing clouds from being cast on titles.⁵²³ Relief in the form of a declaratory judgment is not always available.⁵²⁴

The unlawful detainer action is also a statutory remedy supplementary to ejectment.⁵²⁵ It is brought informally in justice's courts, is free of delays, and results in speedy restoration of possession. This summary process is limited to cases where the title to the land is not in dispute or where the aggressor has admitted, or is estopped to deny, the claimant's right to possession. The action is available to persons who have been dispossessed, whether forcibly or peacefully, and in some jurisdictions even to persons who have not had prior possession. By its nature, the remedy is most frequently used in disputes between lessors and lessees and in cases of eviction perpetrated by persons without right or claim. The lessee is estopped to put his landlord's title in issue, and can defend the action only by showing that his term has not expired. If the defendant cannot show a right to possession, he is speedily evicted.⁵²⁶ If the defendant is able to show a right to possession, the proceedings are either transferred to a court of record, where they evolve into ejectment action, or dismissed. If dismissed, the plaintiff may resort to a formal ejectment action.

Apart from these actions for the recovery of possession and determination of title disputes, the possessor of land is accorded

522. In many states this is the ordinary mode of trying disputed titles. See 4 POMEROY, EQUITY JURISPRUDENCE 1024 (5th ed. 1941); BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES 73-86 (1954). At common law, the ejectment action did not settle the question of title and the successful plaintiff could be harassed by repeated litigation of the same question. To remedy this situation, equity courts granted perpetual injunctions restraining further litigation. See 4 POMEROY, EQUITY JURISPRUDENCE 1021 (5th ed. 1941).

523. See 4 POMEROY, EQUITY JURISPRUDENCE 1021, 1027 (5th ed. 1941).

524. See 1 ANDERSON, DECLARATORY JUDGMENTS 108 (2d ed. 1951): "Where the only question presented in an action is that the defendant contends that he owns an interest in real estate claimed to be owned by the plaintiff, no justiciable controversy is present and the action cannot be maintained."

525. See BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES 55-59 (1954).

526. In ejectment and unlawful detainer proceedings the judgment of recovery is enforced, ordinarily, by a writ of possession under which the sheriff installs the plaintiff in possession. See MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 471 (1952).

far-reaching legal protection by actions for damages for either trespassory or non-trespassory interferences with the exclusive use and enjoyment of his estate. Any unprivileged intended intrusion or encroachment constitutes actionable trespass, regardless of the duration of the interference or the absence of pecuniary harm.⁵²⁷ Unintended invasions of possession resulting from negligence or ultra-hazardous activities are actionable only if they result in actual damage. The surface possessor's right to exclusive possession extends, in principle, downward *usque infernos* and upward into the overlying air-space insofar as necessary for the present or prospective uses.

The protection against non-trespassory interferences is "qualified in scope and uncertain in existence."⁵²⁸ In general, unreasonable activities in neighboring estates which cause substantial and disproportionate injury to the peaceable possession of others constitute actionable nuisances. Due to loosely defined standards, however, recovery in individual cases is a matter of conjecture. The liability for intentional interferences, or interferences resulting from ultra hazardous activities, is independent of proof of fault; on the other hand, the liability for unintentional interferences is founded on negligence. Plaintiff's remedy is ordinarily an action for damages, but in the exceptional case where this legal remedy is inadequate equity courts may restrain or grant other appropriate relief against existing or threatened nuisances.

The possessor of land may protect his possession against unprivileged intrusions by the exercise of self-help.⁵²⁹ Provided that he first makes reasonable efforts to achieve peaceful termination of the intrusion, the possessor is privileged to repel aggression or, if he has been evicted, promptly expel trespassers with the use of necessary force. The infliction of serious bodily harm, however, is not privileged.

Interests in personal property are protected in American jurisdictions by actions for damages and actions for the recovery of possession as well as damages. Unprivileged interferences with the possession of tangible personal property may be re-

527. See VI-A AMERICAN LAW OF PROPERTY 3 (1952). Protection against non-injurious interferences with the use and enjoyment of land is limited to possessions. Other persons, however, may claim damages for actual injuries to their legally protected non-possessory interests. *Id.* at 37, 40.

528. VI-A AMERICAN LAW OF PROPERTY 64 (1952).

529. See 1 HARPER & JAMES, TORTS 255-69 (1956).

pelled, and if possession is lost the property can be recovered, by the exercise of reasonable force.⁵³⁰ Equitable relief is available, though rarely, in the form of equitable replevin.⁵³¹ In general, the protection afforded to interests in personal property is less drastic than the protection afforded to interests in real property.⁵³²

Damages for unprivileged interferences with the possession of tangible personal property may be recovered in trespass. However, in contrast with real property, the action here lies only for intended injurious interferences.⁵³³ Negligent interferences may be actionable under the law of negligence and, if they fulfill the requirements of conversion, by an action under that name.

Conversion has been defined as any conduct which deprives another of his personal property permanently or for an indefinite time, or any exercise of dominion over personal property which is inconsistent with the owner's right in it.⁵³⁴ Ordinarily, it is necessary that the defendant have committed an overt act. Conversion is an intentional wrong giving rise to absolute liability. A mistaken belief, however innocent, that the dealing with the chattel is proper or privileged will not constitute a valid defense. In the case of dispossession without the consent of the owner, the action lies against the wrongdoer and subsequent transferees. Where the owner has voluntarily parted with possession, as in the case of a bailment, conversion lies against the bailee and his transferees, unless the latter have become owners of the chattel by the rules of the law of property.⁵³⁵ The owner may thus be estopped to assert an interest inconsistent with that which the possessor purported to convey, if by his conduct he created a situation which made it apparent that the possessor had the interest in question and could transfer it, or that the possessor was his authorized agent.

The effect of a successful action is to force a sale of the chattel upon the defendant. The price of the enforced sale, *i.e.*, the measure of plaintiff's recovery, is the value of the chattel at

530. See PROSSER, TORTS 93 (2d ed. 1955).

531. See BLUME, AMERICAN CIVIL PROCEDURE 26 (1955).

532. See 1 HARPER & JAMES, TORTS 105 (1956).

533. *Ibid.*

534. *Id.* at 116; PROSSER, TORTS 66 (2d ed. 1955).

535. See LAWSON, INTRODUCTION TO THE LAW OF PROPERTY 37 (1958); BROWN, PERSONAL PROPERTY 206, 211, 215 (1936).

the time of conversion with interest until the date of judgment. Occasionally, consequential damages are also allowed if demanded and proved. The defendant was not allowed in the past to return the chattel in mitigation of damages, and the rule still prevails in most jurisdictions. In some states, however, the defendant may choose to return the chattel, if the conversion is the result of an innocent mistake and if the chattel is not substantially damaged or impaired in value. Under modern practice, the plaintiff may elect to receive the chattel and recover damages on the theory of trespass, or refuse to accept it and recover its value on the theory of conversion.⁵³⁶

Actions for the recovery of personal property are largely statutory remedies today, referred to as actions of claim and delivery in some states, as *detinue* in at least one, and as *replevin* in most jurisdictions.⁵³⁷ The remedy is available in the case of any unlawful detention of tangible personal property, whether tortiously taken or not.⁵³⁸ The principal relief given is possession of the property, either before trial as in common law *replevin*, or after trial as in common law *detinue*. Ordinarily, plaintiff is entitled to take possession pending trial by filing the requisite affidavits and bond; the defendant may keep possession of the property by offering double the amount of plaintiff's bond.⁵³⁹ If the claimant (*replevisor*) establishes his property right at the subsequent trial, he will be awarded possession and damages for the harm he has suffered. If it appears that the defendant was in the right, he will be awarded costs and damages together with possession of the property. Although in contemporary law the defendant in *replevin* cannot satisfy an adverse judgment by paying the value of the property, as under the earlier common law, defendant's rebonding privilege in

536. See 1 HARPER & JAMES, TORTS 129, 139 (1956).

537. See BROWN, DIGEST OF PROCEDURAL STATUTES AND COURT RULES 60-65 (1954). In England plaintiff still has available two remedies, one being *detinue* and the other *replevin*. See JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 91 (1959).

538. See BLUME, AMERICAN CIVIL PROCEDURE 19 (1955). In England, *replevin* is limited to cases of wrongful taking of personal property. See JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 92 (1959). Where possession of goods is merely withheld from the one entitled thereto, the action of *detinue* is the appropriate remedy. By the (English) Common Law Procedure Act, 1854, the court has been given power, at its discretion, to order the defendant in *detinue* to return the property. *Id.* at 90-91.

539. In some states *replevin* is a distinct independent action. In other states, *replevin* has been reduced to an ancillary proceeding adjunct of a statutory action for the recovery of personal property. See MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 503 (1952).

effect may prevent a specific recovery of the chattels. Indeed, the defendant may dispose of or use up the goods pending trial by electing to forfeit the bond, should judgment eventually go against him. With good reason, therefore, it has been suggested that the power of the adverse party to set at naught the delivery process should be suppressed by a wider adoption of the contempt process.⁵⁴⁰

Conclusion

The preceding brief analysis indicates that the protection of proprietary interests in common law jurisdictions is substantially different from that accorded in civil law countries and in Louisiana. Everywhere the protection may be regarded as adequate and nearly complete. However, a word of caution may be here appropriate: due to underlying fundamental differences in conceptual technique and methodology, borrowing of common law rules for the solution of problems arising under Louisiana law is unnecessary and utterly confusing. It is submitted, therefore, that the legal profession in Louisiana should definitely look for guidance in this area to its own legal tradition and to developments in other civil law countries. Particularly with respect to movable property, it ought to be remembered that the common law has never provided a real action for the revendication of chattels,⁵⁴¹ that today the tort of conversion dominates this area of the law, and that the absolute liability which characterizes conversion is in direct conflict with the Louisiana Civil Code principle of liability based on fault.

540. See *id.* at 507.

541. See JOLOWITZ, *HISTORICAL INTRODUCTION TO ROMAN LAW* 142 (1952); cf. SALMOND, *TORTS* 252 (13th ed. 1961); LAWSON, *INTRODUCTION TO THE LAW OF PROPERTY* 32 (1953): "It is a matter for the discretion of the judge whether he will order the return of goods or give judgment for either the return of the goods or payment of their value at the option of the defendant. Thus a person who loses goods can never be certain that he will recover them in specie."