“THE RELATIONSHIP BETWEEN OWNERSHIP AND POSSESSION IN SCOTS LAW: SELECTED STUDIES OF CORPOREAL MOVEABLE PROPERTY”

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DECLARATION

I, Paul Michael Brogan, do hereby declare that I have composed this thesis, that the work contained in it is my own, and that it has not been submitted for any other degree or professional qualification.

Paul Michael Brogan

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TABLE OF ABBREVIATIONS

Anderson, *Corporeal Moveables*	Anderson C, *Possession of Corporeal Moveables* (Studies in Scots Law, Vol 3) Edinburgh: Edinburgh Legal Education Trust, 2015 .
Anderson, *Property*	Anderson C, *Property: A Guide to Scots Law*, Edinburgh: W. Green, 2016.
Badenhorst et al., *Silberberg and Schoeman*	Badenhorst P.J., Pienaar J.M. and Mostert H., *Silberberg and Schoeman's The Law of Property, Fifth Edition*, Durban: LexisNexis Butterworths, 2006.
Bankton, *Institute*	MacDowall A (Lord Bankton), *Institute of the Laws of Scotland in Civil Rights: With Observations Upon the Agreement or Diversity Between Them and the Laws of England* (3 Volumes) (ed. Gordon W), Reprinted: The Stair Society, 1993-1995.
Bell, *Commentaries*	Bell G.J. (with McLaren J), *Commentaries on the Law of Scotland, and on the Principles of Mercantile Jurisprudence*, *Seventh Edition* (2 Volumes), Edinburgh: T.&.T Clark, 1870.

Bell, *Principles*	Bell G.J., *Principles of the Law of Scotland, Fourth Edition* (Old Studies in Scots Law, Vol 1), Reprinted Edinburgh: Edinburgh Legal Education Trust, 2010.
Birks & McLeod, *Justinian's Institutes*	Birks P & McLeod G (ed.), *Justinian's Institutes*, London: Duckworth, 1987.
Bridge, *Benjamin's Sale of Goods*	Bridge M (ed.), *Benjamin's Sale of Goods*, *Tenth Edition*, London: Sweet & Maxwell, 2017.
Bridge, *Sale of Goods*	Bridge M.G., *The Sale of Goods*, *Third Edition*, Oxford: Oxford University Press, 2014.
Brown, *Sale of Goods*	Brown R, *Treatise on the Sale of Goods: With Special Reference to the Law of Scotland*, *Second Edition*, Edinburgh: W. Green, 1911.
Buckland, *From Augustus to Justinian*	Buckland W.W., *A Text-Book of Roman Law from Augustus to Justinian, Third Edition* (Revised by Stein P), Cambridge: Cambridge University Press, 1963.

Buckland & McNair, *Roman Law*	Buckland W.W. & McNair A, *Roman Law and Common Law: A Comparison in Outline*, *Second Edition* (Revised by Lawson F.H.), Cambridge: Cambridge University Press, 1965.
Burdick, *Principles of Roman Law*	Burdick W.L., *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey: LawBook Exchange Ltd., 2004.
Burrows, *English Private Law*	Burrows A (ed.), *English Private Law, Third Edition*, Oxford: Oxford University Press, 2013.
Carey Miller, *Acquisition and Protection*	Carey Miller D.L., *The Acquisition and Protection of Ownership*, Capetown: Juta, 1986.
Carey Miller, *Corporeal Moveables*	Carey Miller D.L. (with Irvine D), *Corporeal Moveables in Scots Law*, *Second Edition*, Edinburgh: W. Green, 2005.
Carr, *Possession*	Carr D.J., *Possession in Scots Law: Selected Themes* (Unpublished MSc Thesis), Edinburgh: The University of Edinburgh, 2005.
Craig, *Jus Feudale*	Craig T, *Jus Feudale* (Translated by Avon J) (2 Volumes), Edinburgh: W. Hodge & Co. Ltd., 1934.

Davidson et al., *Commercial Law*	Davidson F, Garrity D.J., Macgregor L and Richardson L, *Commercial Law in Scotland*, *Fourth Edition*, Edinburgh: W. Green, 2016.
D	Mommsen T & Krueger P (ed.), *The Digest of Justinian* (4 Volumes) (English Translation edited by Watson A), Philadelphia: University of Pennsylvania Press, 1985.
Du Bois, *Wille's Principles*	Du Bois F (ed.), *Wille's Principles of South African Law*, *Ninth Edition*, Cape Town: Juta & Co. Ltd., 2007.
Du Plessis, *Roman Law*	Du Plessis P, *Borkowski's Textbook on Roman Law*, *Fifth Edition*, Oxford: Oxford University Press, 2015.
Erskine, *Institute*	Erskine J, *An Institute of the Law of Scotland, First Edition* (Old Studies in Scots Law, Vol 5), Reprinted Edinburgh: Edinburgh Legal Education Trust, 2014.
Forbes, *Institutes*	Forbes W, *The Institutes of the Law of Scotland* (Old Studies in Scots Law, Vol 3), Edinburgh: Edinburgh Legal Education Trust, 2012.
Gloag & Henderson, *The Law of Scotland*	Gloag W.M. & Henderson R.C., *The Law of Scotland, Fourteenth Edition* (ed. MacQueen H.L. & The Rt Hon. Lord Eassie), London: Thomson Reuters (Professional) U.K. Ltd., 2017.

Gloag & Irvine, *Rights in Security*	Gloag W.M. & Irvine J.W., *Law of Rights in Security: Heritable and Moveable: Including Cautionary Obligations*, Edinburgh: W. Green, 1897.
Gordley, *Foundations of Private Law*	Gordley J, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford: Oxford University Press, 2006.
Gow, *Mercantile and Industrial Law*	Gow J.J., *The Mercantile and Industrial Law of Scotland*, Edinburgh: W. Green, 1894.
Gretton & Steven, *Property, Trusts and Succession*	Gretton G.L. & Steven A.J.M., *Property, Trusts and Succession*, *Third Edition*, Haywards Heath: Bloomsbury Professional Ltd., 2017.
Grotius, *Jurisprudence*	Grotius H, *The Jurisprudence of Holland* (Translated with a Commentary by Lee R.W), *Vol I* (Text Translation and Notes) Oxford: Clarendon Press, 1926.
Hartkamp et al., *Towards a European Civil Code*	Hartkamp A.S., Hesselink M.W., Hondius E.H., Mak C and Du Perron C.E. (ed.), *Towards a European Civil Code*, *Fourth Revised and Expanded Edition*, The Netherlands: Kluwer Law International, 2011.

Holligan, *Protection of Ownership*	Holligan B, *Protection of Ownership and Transfer of Moveables By a Non-Owner in Scots Law* (Unpublished PhD Thesis), Edinburgh: The University of Edinburgh, 2015.
Hume, *Lectures*	Paton G.C.H. (ed.), *Baron David Hume's Lectures* (6 Volumes), Reprinted Edinburgh: The Stair Society, 1939-1958.
McFarlane, *Property Law*	McFarlane B, *The Structure of Property Law*, North America: Hart Publishing, 2008.
MacQueen & Thomson, *Contract Law*	MacQueen H.L. & Thompson J, *Contract Law in Scotland*, *Fourth Edition*, Haywards Heath: Bloomsbury Professional Ltd., 2016.
Nicholas, *Introduction*	Nicholas B, *An Introduction to Roman Law*, Oxford: Oxford University Press, 1962.
Pollock, *Jurisprudence*	Pollock F, *A First Book of Jurisprudence for Students of the Common Law*, *Sixth Edition*, London: MacMillan, 1929.
Pollock & Maitland, *History*	Pollock F & Maitland F.W., *A History of English Law Before the Time of Edward I*, *Second Edition* (2 Volumes), London: Cambridge University Press, 1968.

Pollock & Wright, *Essay on Possession*	Pollock F & Wright R.S., *An Essay on Possession in the Common Law*, Oxford: Clarendon Press, 1888.
Rankine, *Personal Bar*	Rankine J, *A Treatise on the Law of Personal Bar in Scotland*, Edinburgh: W. Green, 1921.
Reid, *Property*	Reid K, *The Law of Property in Scotland*, Edinburgh: Butterworths, 1996.
Reid & Blackie, *Personal Bar*	Reid E.C. & Blackie J.W.G., *Personal Bar*, Edinburgh: W. Green, 1986.
Reid & Zimmermann, *History*	Reid K & Zimmermann R, *A History of Private Law in Scotland* (2 Volumes), Oxford: Oxford University Press, 2000.
Simpson et al., *Continuity, Change and Pragmatism*	Simpson A.R.C., Styles S.C., West E and Wilson A.L.M., *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte*, Aberdeen: Aberdeen University Press, 2016.
Smith, *Short Commentary*	Smith T.B., *A Short Commentary on the Law of Scotland*, Edinburgh: W. Green & Son Ltd., 1962.

Stair, *Institutions*	Stair J.D. (Viscount of), *The Institutions of the Law of Scotland* (ed. Walker D.M.), Reprinted Edinburgh: Edinburgh University Press and Glasgow: University of Glasgow Press, 1981.
Steven, *Pledge and Lien*	Steven A.J.M., *Pledge and Lien* (Studies in Scots Law, Vol 2), Edinburgh: Edinburgh Legal Education Trust, 2008.
Thomas, *Textbook*	Thomas J.A.C., *Textbook of Roman Law*, Oxford: North-Holland Publishing Co., 1976.
Van der Merwe, *Things*	Van der Merwe C.G., *The Law of Things*, Durban: Butterworths, 1987.
Van der Merwe & Du Plessis, *South Africa*	Van der Merwe C.G. & Du Plessis J.E. (ed.), *Introduction to the Law of South Africa*, The Netherlands: Kluwer Law International, 2004.
Voet, *Commentary*	Voet J, *The Selective Voet, Being the Commentary on the Pandects* (Paris Edition of 1829) (Translated by Gane P) (6 Volumes) Durban: Butterworth & Co. (Africa) Ltd., 1955-1958.

von Bar and Clive, *Draft Common Frame of Reference*	von Bar C and Clive E (ed.), *Principles*, *Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 Volumes), Oxford and New York: Oxford University Press, 2010.
Watson, *Bell's Dictionary and Digest*	Watson G (ed.), *Bell's Dictionary and Digest of the Law of Scotland*, *Seventh Edition* (Old Studies in Scots Law, Vol 2), Edinburgh: Edinburgh Legal Education Trust, 2012.
Watson, *Spirit of Roman Law*	Watson A, *The Spirit of Roman Law*, London: The University of Georgia Press, 1995.
Wilkinson, *Evidence*	Wilkinson A.B., *The Scottish Law of Evidence*, London: Butterworths, 1986.
Yiannopoulos, *Treatise*	Yiannopoulos A.N., *Property: The Law of Things, Real Rights, Real Actions (Louisiana Civil Law Treatise, Vol II, Fourth Edition)*, Minnesota: WestGroup, 2001.
Zimmermann & Visser, *Southern Cross*	Zimmermann R & Visser D, *Southern Cross: Civil Law and Common Law in South Africa*, Oxford: Clarendon Press, 1996.

1 THE RELATIONSHIP BETWEEN OWNERSHIP AND POSSESSION IN LEGAL DOCTRINE

A. OVERVIEW

The relationship between the ownership and possession of corporeal moveable property is a subject which is both large and significantly under-analysed. Certain areas are, or have become, obscure and are in need of clarification. As we will see, the *legal* relationship between ownership and possession has always been one of separation and that remains so in modern times. But yet whilst there is doctrinal separation, the *factual* relationship between ownership and possession is one which has significantly changed over time. A transfer of ownership in goods is not, as it once was, required to be accompanied by a transfer of possession. In fact, in modern times, a transfer of possession of goods often does not occur until a much later point, perhaps long after the transfer of ownership. One consequence of this is that the well-recognised presumption of ownership arising from possession of moveables has become somewhat weakened. In explaining this later, the function and operation of the presumption will be discussed.

It is a further aim of this dissertation to analyse closely various situations in which the ownership and possession of corporeal moveables are factually separated (i.e. where possession resides in one person and ownership in another). The fact patterns involved in sections 24 and 25 of the Sale of Goods Act 1979 are among the examples. Under these provisions (and others), a non-owning possessor can sometimes transfer a valid title to goods to another. The exact type of “possession" required for a non-owning possessor to transfer title has not been sufficiently examined and in fact, as we will see, this has important implications for the relationship between ownership and possession in this context. So too does the common law doctrine of reputed ownership, which allows the moveables of a non-owning possessor to be attached by a creditor in spite of the fact that ownership of the goods is held by another. The operation, scope and possible continued existence of reputed ownership will also be the subject of analysis later in this dissertation.

The examination of these areas of law will help to provide a degree of clarity as to the overall relationship between the ownership and possession of corporeal moveables. For reasons of space, however, the dissertation does not seek to provide definite answers to every area examined, or to analyse *every* area where possession and ownership are split. There remains investigation to be undertaken in many areas of this subject. Rather, it seeks to analyse *certain* aspects of this diverse subject, in order to examine whether a series of common themes or links can be produced in order to help explain the relationship between the ownership and possession of corporeal moveable property.

B. INTRODUCTION TO THE DOCTRINAL DISTINCTION

"The most fundamental distinction of all in the law of property", according to one author, is the distinction drawn in civilian legal systems between ownership and possession.[1] This claim is emphasised by the famous assertion of the Roman jurist Ulpian that "nihil commune habet proprietas cum possessione" ("ownership has nothing in common with possession").[2] It is the purpose of this first chapter to consider the accuracy of this statement, at least in the context of Scots law.

However, in doing so, the approaches of some other jurisdictions will also be examined. Roman law remains the basis for much of the law of property in civilian legal systems and will be examined firstly. Moreover, mixed legal systems, influenced by both the civil law and common law, in particular South African and Louisianan law, will be discussed. Lastly, a comparison will be made with English law to ascertain the extent to which the civil law and common law differ in their approaches towards the doctrinal distinction between ownership and possession. This will provide clarification as to whether there is legal (i.e. doctrinal) separation between ownership and possession.

[1] Nicholas, *Introduction*, 107.

[2] D 41, 2, 12, 1.

C. ROMAN LAW

(1) *Dominium*

Prior to the Republican era, the exercise of control by the *paterfamilias* within the Roman household over property within it and acquired for it excused the necessity for any developed concept of "ownership".[3] Nevertheless, by the late Republican era, the term *dominium* had emerged, to distinguish such control from lesser interests in property such as servitude and *pignus*.[4] *Dominium* was "the oldest title known to Roman law" and conferred with it *ius utendi*, *ius fruendi* and *ius abutendi* (the right to "use", "enjoy" and "abuse" the thing).[5] Therefore, *dominium* conferred extensive entitlements over property.[6] It was regarded as an "absolute" right, enforceable against the world at large but subject to certain restrictions implied by law.[7] Ownership could also be *voluntarily* restricted; a *dominus* could, for instance, grant certain rights over the property to another.[8]

Dominium was, therefore, marked as the "highest, the ultimate entitlement to property".[9] In addition, Roman law recognised certain inferior categories of ownership, such as "bonitary ownership".[10] In the course of time, the law surrounding *dominium* became highly developed and it was given extensive treatment in the *Digest*. In fact, the entirety of Title 1 of Book 41 is devoted to its acquisition in certain types of property.[11] Moreover, an owner was entitled to a *vindicatio* in the event of being

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[3] Thomas, *Textbook*, 133.

[4] Ibid. *Pignus* was simply the Latin terminology given to the modern concept of pledge.

[5] Ibid.

[6] Certain conditions had to be met, however. For example, the property had to be capable of private ownership, see Thomas, *Textbook*, 133.

[7] Such restrictions, such as the restriction upon landowners from planting trees within five feet of the boundary of land, were simply based upon public policy to prevent disputes between neighbours, see Du Plessis, *Roman Law*, 162.

[8] Buckland, *From Augustus to Justinian*, 187.

[9] Du Plessis, *Roman Law*, 160.

[10] However, these types of restricted ownership were not strictly recognised as *dominium*. Thus, the definition of *dominium* as "ownership" has been subject to criticism, see Buckland & McNair, *Roman Law*, 65. For a discussion of bonitary ownership, see Thomas, *Textbook*, 136-137.

[11] D 41, 1 deals with the "Acquisition of Ownership of Things".

unlawfully deprived of his property (e.g. in the event of theft), securing his supreme proprietary interest in the property.[12]

(2) *Possessio*

Possession was treated as an independent subject, with its own title in the *Digest*[13] devoted to discussion of its acquisition and protection. Paul, for example, highlights the requirements for a physical act (usually the exercising of a degree of control over the thing) and a mental intention to hold.[14] The protection of possession by means of the praetorian interdicts was, arguably, the central benefit of having possession.[15] Possession was, however, susceptible to a successful claim of *vindicatio* in certain situations, such as in the case of theft.

By the late Republic the law of possession had developed extensively. As Watson points out, however, this was attributable not to the praetors or higher figures of authority (such as the Roman Emperors), but to the Roman jurists.[16] Indeed, while *possessio* has its own title in the *Digest*, with various rules therein, the *Institutes* of Justinian lacks a detailed account of possession. Instead, possession is discussed in relation to other concepts, such as the acquisition of *dominium* by accession.[17]

(3) The Relationship Between *Dominium* and *Possessio*

As stated above, Ulpian made a clear distinction between ownership and possession.[18] *Dominium* was the highest right in property that one could acquire, higher than a simple acquisition of possession and conferring more extensive entitlements. In principle, a non-owning possessor lacked *ius utendi*, *ius fruendi* and

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[12] Du Plessis, *Roman Law*, 160.

[13] D 41, 2 “Acquisition and Loss of Possession” is the name of the title.

[14] D 41, 2, 8 (Paul) “Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from”. For a discussion of *corpus* and *animus*, see Thomas, *Textbook*, 139-140.

[15] Buckland, *From Augustus to Justinian*, 196. “*Uti-possidetis*” was the interdict protecting possession of land, whereas the interdict protecting possession of moveables was “*Utrubi*”, see Birks & McLeod, *Justinian’s Institutes*, 4, 15.

[16] Watson, *Spirit of Roman Law*, 92. Watson states that the Roman jurists “gave the notion substance and sought to create rules of general application”.

[17] Birks & McLeod, *Justinian’s Institutes*, 2, 1, 33-35.

[18] See Page 18.

ius abutendi. Possession was, it is commonly stated, a mere factual state of affairs, unconcerned with legal entitlement[19] and capable of being acquired and exercised independently of such, whilst protected. Being factual, however, possession could be lost more easily than ownership, with a loss of either physical control or mental intention leading to a loss of possession.[20] We will see the importance of this "factual" nature of possession later in this chapter.

This is an area in which linguistic ambiguity exists; the layman, for example, will commonly speak of the moveable property that he owns as his "possessions".[21] However, the possessor may not be the owner. In other words, factual evidence may not necessarily correlate with legal entitlement. Thus, there is a difference between "having" an item of property and "being entitled" to have such property.[22]

In practice, of course, the possessor was usually the owner (unless, for instance, he had stolen the property). In Roman law, possession was often seen as a form of "presumptive ownership".[23] In any dispute over possession (such as theft), the party in possession, awarded with *utrubi*,[24] would become the defendant in any subsequent litigation regarding ownership,[25] protected by the presumption of ownership conferred by their possession, with no burden of proving entitlement. The owner might then seek a *vindicatio* to secure their legal entitlement.[26] Such remedy was, however, more

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[19] Thomas, *Textbook*, 138.

[20] Take Ulpian's example: "Pomponius discusses the question whether, when stones had been sunk in the Tiber in a shipwreck and some time later salvaged, the ownership of them remained intact throughout the time that they were submerged. My view is that I remain owner of them, but I do not possess them…", see D 41, 2, 13.

[21] Nicholas, *Introduction*, 108. Nicholas speaks of the lawyer and the layman being at "cross-purposes" in this respect.

[22] Ibid, 107.

[23] Du Plessis, *Roman Law*, 181. Du Plessis summarises that a dispute as to possession was "frequently a preliminary step to the resolution of the issue of ownership".

[24] The praetorian interdict for the recovery of possession of corporeal moveables.

[25] Du Plessis, *Roman Law*, 181.

[26] Immediately following his sharp distinction between ownership and possession, Ulpian claims: "a man who institutes a *vindicatio* for land will not be refused the interdict *uti-possidetis*, for he is not deemed to have renounced possession by asserting ownership"; thereby implying that vindication achieves a higher result than a possessory remedy, which would be available to an owner anyway, see D 41, 2, 12, 1.

burdensome upon a claimant due to the necessity of establishing legal title.[27] As we will see in the next chapter, the claimant would have to adduce evidence of his ownership which, in certain cases, could only be highlighted by proof of previous possession.

(4) Concluding Remarks

By the end of the Republic, Roman law had two developed rights over property: ownership and possession. The former, *dominium*, was the highest right, absolute in its content (at least in principle) and enforceable against all third parties. *Possessio*, on the other hand, was of a lesser degree of significance. One might have possession but have no legal entitlement to the thing, as in the case of a thief. Such a party could be protected by the possessory interdicts, but the higher institutional position of ownership meant that the award of a *vindicatio* would trump the possessory interdicts. The two doctrines were thus readily distinguishable, as Ulpian asserted.

Nevertheless, as Carr points out, Ulpian's statement "can be taken too far".[28] Indeed, it does not acknowledge the fact that possession and ownership often overlapped in practice. This overlap and the different institutional position that Roman law has given to the two doctrines are both apparent within other legal systems influenced by Roman law, such as South Africa, Louisiana and Scotland.

D. SOUTH AFRICA

South Africa is a mixed legal system, with civilian and common law influences. Like Scotland, however, its law of property is primarily civilian.[29] As in Roman law there is a clear distinction between ownership and possession. In his *Commentaries*,[30] Voet explains that "proprietorship" has nothing in common with "possession" and cites Ulpian in doing so.

[27] Du Plessis, *Roman Law*, 181.

[28] Carr, *Possession*, 10.

[29] Duard Kleyn, "Possession" in Zimmermann & Visser, *Southern Cross*, 819.

[30] Voet, *Commentary*, 41, 2, 2.

(1) Ownership

The separation of both doctrines is reflected further in South African jurisprudence. One judge has described ownership as "the most comprehensive real right that a person can have in respect of a thing".[31] Ownership is described as "absolute" (compared to lesser rights such as servitude and pledge) and "individualistic", conferring upon an owner exclusive, comprehensive control over a thing, entitling him to the use, fruits and destruction thereof.[32] Thus, the Roman idea of *ius utendi*, *ius fruendi* and *ius abutendi* has been adopted. Grotius explains that ownership "entitles a man to do with a thing and for his advantage anything he pleases which is not forbidden by law",[33] in comparison to "incomplete ownership",[34] where certain rights of ownership can be parted with in certain cases.[35] South Africa acknowledges further entitlements including the right to claim the property back from any unlawful possessor (*ius vindicandi*) and, more notably for present purposes, the right to possess the property (*ius possidendi*).

(2) Possession

The law of possession in South Africa is also heavily Roman in nature.[36] According to Voet, possession involves the "keeping of a corporeal thing with the intention of having it for oneself".[37] The definition of possession given by Grotius is, more or less, the same.[38] Therefore, as in Roman law, there exist requirements for both *corpus*

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[31] *Gien v Gien* 1979 (2) S.A. 1113 (T), 1120 per Spoelstra A.J. For a historical overview of the development of the concept of ownership in South African private law, see John R.L. Milton, "Ownership" in Zimmermann & Visser, *Southern Cross*, 694-696.

[32] Badenhorst et al., *Silberberg and Schoeman*, para 6.1.

[33] Grotius, *Jurisprudence,* II, 3, 10.

[34] Ibid, II, 3, 11.

[35] See *Johannesburg Municipal Council v Rand Townships Registrar* 1910 T.S. 1314, 1319 per Wessels J: "In as much as the owner has the full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all his rights of ownership over the thing".

[36] Duard Kleyn, "Possession" in Zimmermann & Visser, *Southern Cross*, 819. However, the main South African remedy for the recovery of possession (the *mandament van spolie*) has its origins in the canon law.

[37] Voet, *Commentary*, 41, 2, 1.

[38] Grotius, *Jurisprudence*, II, 2, 2.

possidendi and *animus possidendi*.[39] Possession itself is stated to fulfil many different functions. These include:[40]

- a "property related function", as possession can constitute a right of ownership,
- a "security function", as a transfer of possession to a creditor is required for the creation of a pledge and lien,[41]
- a "probative function", as possession presumes a right of ownership in movables, and
- a "policy function", as possession is protected by the *mandament van spolie*.

(3) Differentiation of the Doctrines

As in Roman law, there is a clear distinction between ownership and possession, with possession regarded as merely factual in comparison to ownership which concerns legal entitlement.[42] There is, nevertheless, academic debate as to whether possession is to be regarded as *not* merely factual but also as an individual real right.[43] We will observe briefly this debate towards the end of the chapter. Writers on South African property law are keen to distinguish ownership from possession. Van der Merwe, for instance, highlights that the mental requirement for possession is not a requirement for ownership.[44] Voet also points out that possession can be lost by simple intention (a loss of *animus*) while loss of ownership requires more than a mere reluctance to be owner; it requires some form of action such as delivery.[45]

However, the South African writers also realise the close affinity between ownership and possession. Grotius acknowledges that the acquisition of possession will lead to

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[39] Badenhorst et al., *Silberberg and Schoeman*, para 12.1. For a detailed discussion of the requirements for *corpus* and *animus* in South African law, see Van der Merwe, *Things*, 53-58.

[40] See Duard Kleyn, "Possession" in Zimmermann & Visser, *Southern Cross*, 828.

[41] For a brief overview, in relation to Scots law in particular, of the role of possession in relation to pledge, see Steven, *Pledge and Lien*, paras 6-07-6-34 and 18-09, and in relation to lien, paras 13-04-13-13 and 18-09.

[42] See Cornelius G. van der Merwe, "Law of Property" in Van der Merwe & Du Plessis, *South Africa*, 204.

[43] See Cornelius G. van der Merwe and Anne Pope, "Property" in Du Bois, *Wille's Principles*, 446 for a brief discussion of this academic debate.

[44] Van der Merwe, *Things*, 53.

[45] Voet, *Commentary*, 41, 2, 2.

ownership in many different cases, either originally in the case of *res nullius*[46] or derivatively.[47] Moreover, South African law recognises the presumption that a possessor of a movable is presumed to be the owner.[48] Whilst the South African law of property devotes a significant volume of space in its law books to such development, it is also clear that a large amount of influence has been from Roman law.

E. LOUISIANA

Louisiana is another mixed legal system and an interesting source of comparison for Scots law.[49] A "substantial portion" of its private law (including the law of property) has been influenced by the civil law.[50] However, unlike South Africa and Scotland, the private law of Louisiana has been codified.[51]

(1) Ownership

"Ownership", according to one case, "defines the relation of man to things and may, therefore, be declared against the world".[52] This, however, is an insufficient representation of ownership in Louisianan law. It highlights, but does not go further than stating, that ownership is a real right: a right held in property, enforceable against all third parties. The Civil Code goes further and adopts the Roman conceptions of *ius utendi*, *ius fruendi* and *ius abutendi* in its definition of ownership.[53] In turn, these rights

[46] That is to say, ownerless property; the Latin has been borrowed directly from Roman law.

[47] Grotius, *Jurisprudence*, II, 4, 1.

[48] Van der Merwe, *Things*, 52.

[49] For an interesting discussion on the significance of comparative study between Scotland and Louisiana, see John A Lovett, "A New Way: Servitude Relocation in Scotland and Louisiana" (2005) Edinburgh Law Review, 9(3), 353-355.

[50] Robert A Pascal, "Louisiana Civil Law and Its Study" (1999) Louisiana Law Review, 60(1), 1.

[51] Ibid, 2. See the Louisiana Civil Code, available at the following link: <https://legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent> (Accessed August 10th 2018).

[52] *Reagan v Murphy* 105 So. 2d 210 (1958), 214 per McCaleb J.

[53] Louisiana Civil Code, Art 477: "[Ownership is] the right that confers on a person direct, immediate and exclusive authority over a thing. The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law". According to one judge, "the rights of use, enjoyment and disposal are said to be the three elements of property in things. They constitute the

associated with ownership could, following the Roman tradition, be transferred to another so that another party could have a limited right over the property, such as a usufruct.[54] According to Yiannopoulos, ownership is the "principal" right over property.[55]

(2) Possession

The conceptualisation of possession is also civilian: "Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name".[56] Like South Africa, the law requires *corpus possidendi* and *animus possidendi*.[57] Possession is, determinably, largely factual although its legal significance is recognised in that possession can lead to ownership.[58]

(3) Ownership and Possession Compared

Following the civilian tradition, possession is to be distinguished from ownership. In the words of the Civil Code "the ownership and the possession of a thing are distinct".[59] Voet's acknowledgement (in the context of Roman-Dutch law) that ownership, unlike possession, is retained in the event of "non-use" (or a reluctance to be so) is also highlighted.[60] Thus, possession can exist independently of ownership. Yiannopoulos classifies ownership as a fully-fledged real right under the Civil Code, in comparison to possession which he views as a *sui-generis* right.[61] However, possession and ownership are not entirely distant concepts. Louisianan law recognises the

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"*jura in re*"", see *Reagan v Murphy* 105 So. 2d 210 (1958), 214 per McCaleb J (citing the earlier Louisianan case of *re Morgan R.&.S.S. Co.* 32 La. Ann. 371 (1880), 375).

[54] Indeed, *usufruct*, use and habitation are cited as three examples of such dismemberments by Yiannopoulos, conferring upon a person "real" rights of enjoyment over a thing belonging to another, see Athanassios N Yiannopoulos, "Usufruct: General Principles – Louisiana and Comparative Law" (1967) Louisiana Law Review, 27(3), 369.

[55] Yiannopoulos, *Treatise*, §223.

[56] Louisiana Civil Code, Art 3421.

[57] Ibid, Art 3424.

[58] Ibid, Art 3422.

[59] Ibid, Art 481.

[60] Ibid: "Ownership exists independently of any exercise of it and may not be lost by nonuse".

[61] Yiannopoulos, *Treatise*, §237.

presumption of ownership given to the possessor of a movable, with a possessor considered be the owner on a provisional basis until a possible true owner's title is revealed.[62] The legal "right to possess" conferred upon an owner is a further example.[63] A possessor, however, may not always have such right.

F. ENGLISH LAW

(1) A Difference in Approach

Writing in the late nineteenth century, Pollock and Wright said that "the want of any systematic account of possession in English law-books has often been remarked upon".[64] One need only consult a sample of leading English law texts[65] to discover that possession is a concept treated significantly differently in England.

Ownership, according to Pollock, is the "entirety of the powers of use and disposal allowed by law".[66] This is similar to the civilian definition. Prior to the nineteenth century, however, English law lacked a general, systematic doctrine of possession.[67] The two concepts were conglomerated, with ownership described as "the right, or the best right, to possess".[68] However, the law's development of a "priority of rights" (or a "relativity of title") approach concerning property law has resulted in little necessity to give importance to such a doctrine.

To understand this lack of necessity, this "priority of rights" approach must be examined. Imagine that an innocent party ("P") walks along the beach and discovers

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[62] See Louisiana Civil Code, Arts 530 and 3423.

[63] Yiannopoulos, *Treatise*, §301.

[64] Pollock & Wright, *Essay on Possession*, V (Preface).

[65] See e.g. John H Baker, *An Introduction to English Legal History*, *Fourth Edition*, London: Butterworths, 2002, 389; William Swadling, "Property: General Principles" in Andrew Burrows (ed.), *English Private Law*, *Third Edition*, Oxford: Oxford University Press, 2013, paras 4.422 and 4.427-28; Pollock & Maitland, *History*, 33.

[66] Pollock, *Jurisprudence*, 179.

[67] Anderson, *Corporeal Moveables*, para 1-06.

[68] Pollock, *Jurisprudence*, 184. See also Charles Harpum, Stuart Bridge and Martin Dixon (ed.), *Megarry & Wade: The Law of Real Property*, *Eighth Edition*, London: Sweet & Maxwell, 2012, paras 4-006-4-007.

a bangle, lost by its owner ("O"), picks the bangle up and pockets it. In Scots law, a clear distinction is maintained: O is the owner of the bangle whereas P is the (non-owning) possessor.[69] English law conceptualises this situation differently. P, in taking control of the bangle, acquires a "property right" which is enforceable against all persons other than those with a superior property right in the bangle. Here, the only party with a superior claim would be the owner (O).

What is the legal basis, however, for O's right being of a higher priority than P's, given that English law does not readily distinguish ownership from possession? The answer seems to concern the point in time at which the right was acquired. Being its owner, O will have acquired the bangle at an earlier point in time than P.[70] Thus, rather than O being considered "the owner" and P being considered "the possessor", English law regards both parties as having property rights in the bangle, with one simply being of a higher priority than the other. However, whilst time *seems* to be of significance, it is not the deciding factor. Thus, if O transfers his ownership of the bangle to "O1" whilst P retains control of it, O1 can still assert his ownership against P even though P acquired control of the bangle at an earlier point in time than O1, as long as O1 establishes a "better right"[71] to be in possession (for instance, by adducing evidence of the sale from O – who, in turn, had a "better right" than P).

Therefore, an owner's property right is the subject of protection. However, a bare possessor's property right is also the subject of protection (against everyone but the owner). The protection of a bare possessor allows a party who is not the owner to "use and care for" the property, as such use may possibly be "innocent".[72] According to Gordley "it is better that someone should benefit than no one should"[73] and it is better for a bare possessor to be protected against further dispossession than for such

[69] Disregarding considerations of good faith. In Scots law, if the bangle was ownerless, P would acquire both possession and ownership of the bangle by means of *occupatio*. However, this is an unlikely scenario given the nature of the property. If the bangle had instead been abandoned by O, it would belong to the Crown, see Reid, *Property*, para 540.

[70] Gordley defines a "better right" as a "right based on still earlier possession", see Gordley, *Foundations of Private Law*, 51.

[71] Ibid.

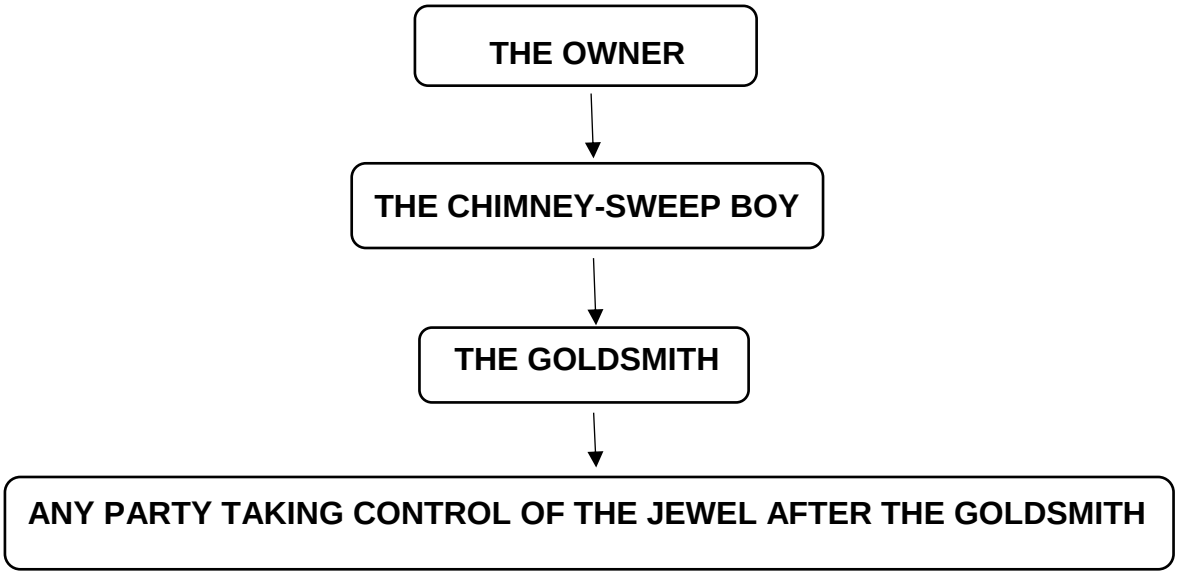
[72] Ibid, 64.

[73] Ibid.

possession not to be protected at all.[74] Therefore, the protection of possession seems to support the optimum use of the property.

(2) Case Analysis

A famous English case dealing with such a situation is *Armory v Delamirie*.[75] A chimney-sweep boy (the plaintiff) found a jewel within the chimney of the house he was cleaning and delivered it to a goldsmith (the defendant) for valuation. Upon discovery of its worth (at three halfpence) the defendant refused to return the jewel, resulting in the plaintiff raising an action of trover for its return. The court declared that the plaintiff had not, by finding such jewel, acquired "an absolute property or ownership" but was, nevertheless, entitled to keep the jewel "against all but the rightful owner".[76] As the boy had acquired a property right to the jewel before the goldsmith (by discovering it within the chimney), the plaintiff's property right was of a higher priority than the defendant's. One can deduce that the true owner of the jewel[77] would, in turn, have a superior property right to that of both the plaintiff and defendant respectively. These property rights as a ladder would look like this:



[74] Gordley, *Foundations of Private Law*, 64.

[75] (1722) 1 Str. 505. The case concerns moveable property (known in English law as "chattels"). For further interest, *Asher v Whitlock* (1865-66) L.R. 1 Q.B. 1 is a similar case applying to land.

[76] Ibid, per Chief Justice Pratt.

[77] Most likely to be the owner of the house in which the jewel was found.

(3) "Relativity of Title"

In English law, every party acquiring possession is technically classified as an "owner".[78] This classification is achieved by focusing not upon the content of an individual's property right but upon its time of acquisition. In the context of chattels, a thief of a bicycle (as the possessor) has the same property right as that of its true owner in terms of content: exclusive control.[79] The thief, however, can only enforce such right against subsequent parties as illustrated above.[80] The true owner can enforce such right against the thief and anybody else. These principles can also be illustrated with the above example of the bangle and of the jewel in *Armory*.

English law's focus upon the enforceability of property rights is encapsulated in the idea of "relativity of title". In other words, English law regards "title" in property as valid or void "relative" to the position of another. Therefore, using the example of land,[81] a landowner's property right is good relative to anybody else, including potential squatters. Conversely, a squatter's property right in the land is void relative to the landowner but valid relative to anybody else.[82] The same can be said of goods. To use the above example of the bangle, P will, in taking possession, acquire title to the

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[78] McFarlane, *Property Law*, 145. As McFarlane states, to overcome any confusion, a simple linguistic distinction would be to state that a thief is "an" owner, whereas the true owner is "the" owner.

[79] Ibid.

[80] Those with a keen interest may wish to consult *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 W.L.R. 1437. In this case, the plaintiff was the suspected thief of a stolen car in his possession. He was, however, held to have a valid possessory title over the car, enforceable against the defendant police force who had seized the car from him, entitling him to recover possession. The basis for the decision lay upon the fact that the police's detention permit under the Police and Criminal Evidence Act 1984 had expired. Upon expiration, the property right of the police in the car was rendered unlawful relative to the plaintiff who, by acquiring the car *before* the police (regardless of the legality of the manner of acquisition), had a "better" title to it (see [31] per Lightman J.). For analysis of this case, see David Fox, "Enforcing a Possessory Title to a Stolen Car" (2002) Cambridge Law Journal, 61(1), 27-29.

[81] See David Fox's example of "P1" (the landowner), "P2" (a squatter acquiring his own right/"title" to the land) and "P3" (a third party who may later acquire possession from "P2"), David Fox, "Relativity of Title at Law and in Equity" (2006) Cambridge Law Journal, 65(2), 331-332.

[82] This is a very basic example. Note that the Land Registration Act 2002, sch 6(1) allows an "adverse possessor" of the land (such as a squatter) to apply to the registrar to be registered as proprietor of the estate in land in certain circumstances.

bangle (i.e. a right to exclusive possession)[83] which is valid relative to all parties other than O. Conversely, O will have a valid title to the bangle relative to P and all third parties.[84] The examples can go on.[85] It is in this sense that an English title can be simultaneously "valid and void, depending on which claimant's title it is being compared with".[86]

(4) Concluding Remarks

Focusing upon the enforceability of rights means that, in a dispute over title in England, recognition of a right of "ownership" is not essential. "No-one is ever called on to demonstrate an ownership good against all men; he does enough even in a proprietary action if he proves an older right than that of the person whom he attacks".[87] The common law focuses upon priority of entitlement and not absolute entitlement. However, a distinction between theory and practice must be made. In theory, ownership and possession are concepts recognised in English law and distinguishable from one another.[88] In practice, however, the use of a relativity of title approach has meant that such separation matters little in English law.

G. SCOTS LAW

Finally, the institutional positions of ownership and possession in Scots law must be discussed, to lay the foundations for subsequent chapters on the relationship between

[83] William Swadling, "Property: General Principles" in Burrows, *English Private Law*, para 4.422.

[84] In English law, statute permits, subject to certain conditions, that in any litigation concerning competing titles, the defendant to such action ("P" above - the party who has made a "wrongful interference" with the plaintiff's ("O"'s) property right) is entitled to show that a third party has a "better right" to the goods than that of the plaintiff by joining them to the action, see the Torts (Interference with Goods) Act 1977, s 8(1).

[85] To see a slightly more complicated scenario, see Pollock & Wright, *Essay on Possession*, 23-24.

[86] Fox, "Relativity of Title" (n 81), 335.

[87] Pollock & Maitland, *History*, 77.

[88] Pollock & Wright, *Essay on Possession*, 2. The authors state that "Possession […] does not necessarily concur with title. No plain man would hesitate to say that a squatter or a thief possesses himself of the land occupied or the goods carried away; and the law says so too. But the true owner, or someone claiming through him, *ought* to have the physical control of whatever has been wrongfully occupied…" (emphasis added).

both doctrines. As will become clear, the adoption by the Scottish institutional writers of Roman law concepts in their texts has resulted in Scots law closely following the civilian distinction between ownership and possession.[89]

(1) Before Stair

Prior to Craig's *Jus Feudale*, one's search for a coherent definition of possession would be in vain. Indeed, no definition of possession was attempted prior to the seventeenth century. A definition, for example, is absent from the *Practicks* of Balfour[90] and Hope.[91] Even then, the *Jus Feudale*, written around 1600, only contains meagre discussions of ownership and possession in relation to land. The acquisition of title to land is indeed discussed under the first title of Book II but in a feudal context which has ceased to be relevant today. More usefully, "possession" is said to connote "the holding and use of the immoveable possessed in the sense in which a man is said to possess his own home […] possession includes the putting of the property to all those uses of which it is naturally susceptible".[92] This last statement is highly misleading and has been criticised.[93] In fact, what Craig is likely to mean is that the taking of possession includes "the ability" to put the property to such uses of which it is capable.

Beyond this, Craig makes no attempt to define the relationship between ownership and possession other than to say that possession "is not a right or title and has nothing in common with a right of property".[94] Craig's final words can be viewed as a restatement of Ulpian's.[95] This assertion, however, is the only treatment Craig gives to the matter.

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[89] Reid describes the Scots law of possession as "resolutely civilian", see Kenneth Reid, "Property Law: Sources and Doctrine", in Reid & Zimmermann, *History*, 210.

[90] Peter G.B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich* (2 Volumes), Reprinted Edinburgh: The Stair Society, 1962-1963.

[91] James A Clyde (ed.), *Hope's Major Practicks* (2 Volumes), Reprinted Edinburgh: The Stair Society, 1937-1938. See Reid's brief discussion of the treatment, by both *Practicks*, of possession, Kenneth Reid, "Property Law: Sources and Doctrine" in Reid & Zimmermann, *History*, 211.

[92] Craig, *Jus Feudale*, 2, 2, 5.

[93] Anderson criticises Craig's exposition, see Anderson, *Corporeal Moveables*, para 3-07.

[94] Craig, *Jus Feudale*, 2, 2, 5.

[95] D 41, 2, 12, 1.

(2) From Stair to Erskine - 1681 to 1773

Stair's *Institutions*, the first edition of which was published in 1681, was the first comprehensive exposition of the law in Scotland. Its account of the law of property borrowed heavily from Roman law.[96] According to Stair, ownership (which he termed "dominion" or "property")[97] "is a power of disposal of things in their substance, fruits, or use", distinguishing such rights from personal rights.[98] "Property" is defined by Stair as "the main real right […] standing in the middle betwixt community and possession, which precede it, and servitude and pledge which follow it".[99]

It is at this point that one begins to notice Stair's differentiation between ownership and possession. On more than one occasion, the importance of possession as a means of constituting ownership is emphasised, claiming that the taking of possession of "things belonging to man"[100] or property that is "simply void and belong(s) to none"[101] leads to an acquisition of ownership. Stair also reinforces the more factual nature of possession.[102] Indeed, Stair's differentiation is summarised by his statement: "The second step of real right [after "property"] is possession, which, as it is the way to property, and in some cases doth full accomplish it, so it hath in it a distinct lesser right than property".[103] If, therefore, one was to envisage a ladder of real rights defined by

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[96] Indeed, even the structure is highly similar. Book II of Stair's *Institutions* deals with the law of property, more specifically the law surrounding "real rights" (or, as Stair puts it, "Rights Real"). Under Roman law, Justinian previously devoted Book II of his *Institutes* to the law of things and both figures structure such "books" similarly; beginning, notably, with the acquisition of ownership.

[97] Note that the word "dominion" is close to that of the Roman term "*dominium*". Many of the institutional writers of Scots law adopt the word "property" in their references to ownership. In fact, the word "property" derives from the Latin terms "*proprius*" (one's exclusive right to own an object) and "*proprietas*". Thus, the terms "property" and "ownership", in essence, refer to the same thing, see Burdick, *Principles of Roman Law*, 325.

[98] Stair, *Institutions*, II, 1, Preface. Stair claims that personal rights are instead "a power of exacting from persons that which is due".

[99] Ibid, II, 1, 28. Book II of Stair's *Institutions* does, in fact, follow this structure.

[100] Ibid, II, 1, 29.

[101] Ibid, II, 1, 33.

[102] Ibid, II, 1, 8.

[103] Stair, *Institutions*, II, 1, 8.

Stair, ownership would lie at the very top of the ladder. Possession, in turn, would be the highest rung leading to such ownership.

The influence of Stair upon Bankton's *Institute* is apparent in Bankton's discussions of ownership and possession. Indeed, Bankton (similarly to Stair) states that ownership is "the first real right, in a proper sense, and indeed the principal one".[104] On the other hand, possession (discussed in the section immediately following that of ownership) is detention or holding of property "by ourselves or others for our use".[105] Bankton's discussions of possession are, like Stair's, strongly influenced by Roman law[106] and include the recognition of spuilzie (and ejection) protecting possession in the same manner as the possessory interdicts did under Roman law.[107]

Erskine's *Institute* also bears the influence of Stair's treatment. Book II (also dealing with the law of property in the same manner that Stair and Bankton's respective works do) begins in Title 1 with discussing "the division of rights". Erskine agrees with Stair and Bankton that ownership is "the sovereign or primary real right […] which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or by paction".[108] The paragraphs following this statement discuss at length the various ways in which ownership may be acquired.[109]

Erskine's discussion of possession is lengthy,[110] beginning with the explanation that "if property be so nearly connected with tradition, which is the delivery of possession, it cannot be improper in this place to explain the general nature and effects of possession".[111] He goes on: "Property would be but a name, without possession; for *it*

[104] Bankton, *Institute*, II, 1, 6.

[105] Ibid, II, 1, 26. The definition is nearly identical to Stair's, following Roman law.

[106] See e.g. Bankton, *Institute*, II, 1, 32 where Bankton acknowledges that *bona fide* possession will entitle the possessor to retain the fruits of the property, and also II, 1, 33 on the benefits of a possessory judgement.

[107] Ibid, II, 1, 31. On spuilzie more generally, see Kenneth Reid "Property Law: Sources and Doctrine" in Reid & Zimmermann, *History*, 212-214. Stair discussed spuilzie in great detail, see Stair, *Institutions*, I, 9, 16-24 and IV, 30, 1-6. See also Stair's discussions of "ejection": Stair, *Institutions*, I, 9, 25-27 and IV, 28, 1-9.

[108] Erskine, *Institute*, II, 1, 1.

[109] Ibid, II, 1, 5-8.

[110] Ibid, II, 1, 20-30.

[111] Erskine, *Institute*, II, 1, 20.

is by possession alone that we are put in a capacity to enjoy our property".[112] It is clear that Erskine is marking a distinction between "property" and "possession". For example, Erskine is implying (in his final words emphasised above) that an absence of possession will remove the benefits associated with ownership. Erskine is also highlighting a common theme across the early institutional writings in his former statement linking "property" to "tradition": that possession is important to the constitution of ownership.

(3) The Nineteenth Century - Hume and Bell

As has been seen, in the seventeenth and eighteenth centuries, the institutional writers made a clear distinction between ownership and possession. The former was the most important right over property in contrast to the latter which, although being more factual in nature, had an important role to play in the constitution and exercise of ownership. However, by the nineteenth century, the distinction between the two had begun to lose prominence. In his *Lectures*, Hume deals at length with the law of property.[113]

However, analysis of Hume's distinction between ownership and possession is halted when one realises that Hume attempts no general discussion of possession. Various areas of property law are tackled, including "Pledge and Hypothec",[114] "Tacks" (leases),[115] "Liferent",[116] "Adjudication"[117] and "Prescription".[118] Possession, however, does not receive separate treatment. Indeed, the only points in Hume's *Lectures* at

[112] Erskine, *Institute*, II, 1, 20.

[113] G. Campbell H. Paton (ed.), *Baron David Hume's Lectures* (6 Volumes), Reprinted Edinburgh: The Stair Society, 1939-1958. Parts III and IV of Hume's *Lectures* deal with the law of property – comprising the last few chapters of Volume III and the whole of Volume IV of this reprint of his *Lectures*.

[114] Hume, *Lectures*, *Vol 4*, 1955, 1-37.

[115] Ibid, 73-124.

[116] Ibid, 349-369.

[117] Ibid, 412-489.

[118] Ibid, 510-556.

which the importance of possession is mentioned is in the context of delivery[119] and prescription.[120]

Does Bell change matters? In his *Principles*, Bell differentiates the ownership of land from the ownership of moveables. The former, he claims, "is the right of deriving from land, and its accessories, all the uses or services of which they are capable", identifying that ownership is an absolute right in relation to its content and exclusive in relation to its enforceability.[121] These elements of absoluteness and exclusivity appear again in Bell's account of ownership in relation to corporeal moveables.[122]

Like Hume, Bell departs from the earlier approach of distinguishing ownership from possession in detail. There is a succinct, civil law definition of possession as "detention, with the design or *animus* of holding the subject as the property of the holder"[123] coupled with a statement that possession of moveables presumes ownership of them.[124] Aside from this, Bell says little about possession.

(4) The Early-1900's to the Present Day

Does this trend continue into the twentieth century? The most recent edition of Gloag and Henderson[125] defines ownership as the "primary form" of proprietary interest, being "the ultimate real right in the sense of being the most comprehensive right".[126] The "exclusive fragmentation" of ownership is also discussed.[127] Possession, on the other hand, is defined as "occupation or physical holding on the basis of an intention to hold or control the thing".[128] It is, therefore, more factual than legal, a point we will

[119] Hume, *Lectures*, *Vol 3*, 246. Delivery may transfer ownership (but see the Sale of Goods Act 1979, s 17) but there is no mention of the role of possession with regards to original acquisition.

[120] Ibid, *Vol 4*, 510-556.

[121] Bell, *Principles*, §939.

[122] Ibid, §1284.

[123] Ibid, §1311. In fact, Bell cites Stair and Erskine in such definition.

[124] Ibid, §1313. For the legal presumption of ownership from possession, see ch 2.

[125] Gloag and Henderson's *The Law of Scotland* was originally published in 1927 but has been updated numerous times. The most recent edition (the fourteenth) was published in 2017.

[126] Gloag & Henderson, *The Law of Scotland*, para 30.01.

[127] Ibid. This is the idea that rights associated with ownership, such as that of enjoyment, can be conferred upon others.

[128] Ibid, para 30.09.

return to in the next section. Its importance as a presumption of ownership is also acknowledged.[129]

Writing in the early 1960's, T.B Smith undertakes discussion of ownership and possession and expresses the Roman influences upon their development. According to Smith, "Ownership, 'Property' or *dominium* is the most extensive of real rights that can be exercised over a *res*, the owner being, subject to important qualifications, free to enjoy it and dispose of it at will".[130] Thus, the perception that ownership is the highest real right remains. Furthermore, Smith undertakes discussion of possession, identifying that it is "a state of fact" in comparison to ownership[131] and discussing the requirements for *corpus possidendi* and *animus possidendi*.[132] The role of possession in presuming the ownership of corporeal moveables is also acknowledged.[133] What is apparent from such treatments on Scots law is that whilst ownership is clearly the highest right that one can hold in property, possession is of lesser importance.

Of course, Smith's work, as well as that of Gloag and Henderson, is an account of the whole of private law. A systematic account of Scots property law in particular, and with it a detailed account of the law of possession, did not come about until Kenneth Reid's *The Law of Property in Scotland*, published in 1996,[134] described by one author as a "seminal work".[135] Indeed, possession is the subject of its own lengthy chapter,[136] with immediate emphasis upon its separation from ownership. At the beginning of his work, Reid lists possession as one of the "subordinate" real rights that Scots law recognises alongside, but independent of, ownership.[137] Reid attempts to clarify the difference: possession "is in some sense a matter of fact, and not law" whereas

[129] Gloag & Henderson, *The Law of Scotland*, para 31.02.

[130] Smith, *Short Commentary*, 459.

[131] Ibid.

[132] Ibid, 462-465.

[133] Ibid, 465-467.

[134] Reid, *Property*. The textbook is actually an updated, printed version of the *Stair Memorial Encyclopaedia*, *Vol 18*, produced originally in 1993.

[135] Andrew J.M. Steven, "Scottish Property Law 2017" 2017 Juridical Review, 1, 29.

[136] Reid, *Property*, ch 4.

[137] Ibid, para 5. The author places possession in sixth position upon such list, after, firstly, ownership, secondly, rights in security, thirdly, a proper liferent, fourthly, a servitude and, fifthly, a lease.

ownership “is a matter of law, and not fact”.[138] The differences in the content of both rights is also analysed.[139]

Later textbooks on property law also contain separate discussions of possession. Gretton and Steven, like Reid, devote a separate chapter to the topic and emphasise its difference from ownership.[140] In another leading modern textbook, Anderson devotes a lengthy chapter to possession.[141] Moreover, recent works of doctrinal research have focused upon possession also.[142]

(5) Concluding Remarks

Stair, Bankton and Erskine all closely adopt the Roman private law division between ownership and possession. In doing so, they place ownership at the top of the hierarchy of proprietary interests a person can hold. Possession, in turn, is classified as a “secondary” (or “subordinate”) right. However, this categorisation is lost sight of in the absence of a general discussion of possession in the later writings of Hume and Bell. By the time of the twentieth century the position appears to change. Smith, in particular, emphasises a distinction between ownership and possession and, in the academic revival of property law from the 1990’s onwards, possession is given due prominence.

H. THE NATURE OF POSSESSION

The nature of possession has been referred to at various points in this chapter. As we have seen, whilst it has been claimed that possession is factual in nature, some writers have gone further and claimed that possession is a fully-fledged real right. In analysing the distinction between “ownership” (which we have established is an absolute and exclusive real right) and “possession”, it is important to clarify the nature of the latter.

[138] Reid, *Property*, para 114.

[139] Ibid.

[140] Gretton & Steven, *Property, Trusts and Succession*, paras 12.3-12.4. “Possession” is the subject of the whole of chapter 12.

[141] Anderson, *Property*, paras 3-02-3-04. “Possession” is the subject of the whole of chapter 3.

[142] See Carr, *Possession* and Anderson, *Corporeal Moveables*.

(1) Scots Law – An Institutional View

In Roman law, Papinian opined that "possession is very much a matter of fact".[143] Nevertheless, in a different text, Papinian recognised that possession "is a matter not merely of fact but also of right", in respect that children of the Roman household (and those in the power of another such as slaves) cannot "possess"[144] (as despite being able to take physical custody of property, the lack of capacity of children and slaves in Roman society denied them the protection and benefits of possession, in the same manner in which their lack of capacity prohibited them from acquiring contractual rights).[145] As we observed above, with respect to Scots law, the view of Stair and Erskine was that possession was both a "fact" and a "right". Stair, for example, defines possession as a "fact, it is not only requisite to constitute real rights but is also an effect thereof, when constitute",[146] distinguishing the fact of possession from the legal right of possession which he claims stems from such fact. Erskine maintains such distinction, linking the factual element of possession to detention (i.e. physical holding) and describing the right of possession as one's intention to possess for one's own benefit.[147]

Later, Bell maintains a similar distinction.[148] Indeed, as will be explained, the factual element of possession relates to physical holding. It is often, but not always, straightforward to determine if another is in possession, following from the requirement for *corpus possidendi*. Later literature would focus upon the "right" of possession in more detail. T.B Smith, for example, frequently refers to the "right" of possession[149]

[143] D 4, 6, 19. Papinian notes this in the context of "acquisition by use".

[144] D 41, 2, 49.

[145] W.M. Gordon and O.F. Robinson (ed.), *The Institutes of Gaius (With the Latin Text of Seckel and Kuebler)*, New York: Cornell University Press, 1988, 2, 87: "we acquire things which descendants within our power and also our slaves obtain by mancipation or delivery […] someone in our power can have nothing of his own". See Du Plessis, *Roman Law*, 96-97 and 116-117 for a general discussion.

[146] Stair, *Institutions*, II, 1, 8.

[147] Erskine, *Institute*, II, 1, 20.

[148] Bell, *Principles*, §1311.

[149] Smith, *Short Commentary*, 462.

and undertakes discussion of the further rights flowing from *bona fide* possession such as the entitlement to retain the fruits of the property.[150]

(2) The Views of Other Jurisdictions

Other jurisdictions place a larger degree of emphasis upon possession as a matter of fact. In South African law, for example, Voet claims that "ownership is matter of law, but possession matter only of fact […] and not of law".[151] Nevertheless, there emerges a contradiction as Voet includes possession within his list of the "fivefold" division of real rights.[152] Grotius defines possession as a real right alongside ownership,[153] claiming that the "right of possession is the consequence of possession" (i.e. that the right flows from the fact).[154] The Louisiana Civil Code claims that "possession is a matter of fact".[155] Nevertheless, the benefits of those in possession are recognised under the Code, such as the presumption of ownership that possession creates.[156]

One frequently comes across mentions of the debates in standard South African textbooks as to whether possession is to be regarded as a "right".[157] Possession is the subject of protection by various remedies (such as the *mandament van spolie*).[158] It has been noted, however, that as possession can on occasion be unlawful (e.g. as in the case of theft) then such possession cannot be a matter of "right". In other words, to claim that a thief has an "unlawful right" is "a contradiction in terms".[159] Van der Merwe states that the best approach is to regard possession as a right *sui generis*, instead of a real right belonging strictly to the law of property.[160] Yiannopoulos also

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[150] Smith, *Short Commentary*, 466.

[151] Voet, *Commentary*, 41, 2, 2.

[152] Ibid, 5, 2, 2. In this list he includes "one right for ownership, one for possession, one for servitude, one for pledge and one for inheritance".

[153] Grotius, *Jurisprudence*, II, 1, 60.

[154] Ibid, II, 2, 1.

[155] Louisiana Civil Code, Art 3422.

[156] Ibid, Art 3423.

[157] See Badenhorst et al., *Silberberg and Schoeman*, para 12.2; Van der Merwe, *Things*, 50; Du Bois, *Wille's Principles*, 446.

[158] Badenhorst et al., *Silberberg and Schoeman*, para 12.2.

[159] Ibid.

[160] Van der Merwe, *Things*, 50.

regards possession as a right *sui generis* in Louisianan law,[161] referring to the fact that possession can mean many things, including the "factual authority" one has over property[162] as well as the legal "right to possess", including the right to be "maintained" or "restored" in possession in the event of eviction.[163]

(3) Analysis

It seems, therefore, that possession is *both* factual and legal and that it is impossible to define possession solely as a fact or solely as a right. As stated above, possession is factual in the sense that it is easily observable by others (with exceptions such as civil possession). A definition of "factual" given by the Oxford English Dictionary is that of "having a basis in fact; accurate; actual, real".[164] The only way in which to determine the truthfulness, reality or accuracy of whether one is in "possession" is, in principle, by observation for oneself. One's holding of property is, in principle, more straightforward to observe than other proprietary interests such as ownership, servitude and so on, which require further investigation to determine their existence, such as the examination of the Land Register. One could state that the factual element of possession relates to a question of *act*, as it stems from the act of physical holding, which can then become apparent to others. This, in turn, leads to the presumption that a possessor of corporeal moveables is the owner.[165] It is in this respect that the *fact* of possession, not the right of possession, leads to a presumption of ownership as the factual nature of possession means that possession is easily discernible.

However, possession is also a real right, as it is, fundamentally, a right in property (moveable and heritable), enforceable against third parties who may attempt to interfere with such possession. Thus, possession is the subject of possessory remedies such as, historically, spuilzie (for moveables)[166] and ejection (for land).[167] Being a right against all third parties, the world is under a corresponding obligation not

[161] Yiannopoulos, *Treatise*, §237.

[162] Ibid, §301. According to Yiannopoulos, this is possession "in the proper sense of the word".

[163] Ibid.

[164] Oxford English Dictionary Online (available at the following link): <http://www.oed.com/view/Entry/67528?redirectedFrom=Factual#eid> (Accessed August 10th 2018).

[165] See chapter 2.

[166] Of which, see Stair, *Institutions*, I, 9, 16-24; Erskine, *Institute*, III, 7, 16, IV, 1, 15.

[167] Of which, see Stair, *Institutions*, I, 9, 25-27; Erskine, *Institute*, III, 7, 16, IV, 1, 15.

to dispossess the possessor, other than by consent or by the force of law. However, if ownership is the "principal" real right, or the "parent" real right (as the authorities claim) then possession must (given the civilian classification of real rights into "ownership" and rights less than ownership, often discussed thereafter in the institutional writings) fall into the latter category and be subject to ownership.

Thus, possession is a subordinate real right, alongside servitude, pledge etc. and is included by Reid within his list of the subordinate real rights.[168] This is not to state, of course, that possession is *the same as* the other subordinate real rights in terms of its enforceability. Each real right is different. A lease, for example, has had the ability since 1449 to survive a change in ownership of the property and is, therefore, enforceable against a new owner.[169] A right of pledge can trump the ownership of the debtor in the event of the debtor's insolvency. However, as possession is a right in property enforceable against others but subject to ownership, it can be classified as a real right subordinate to ownership.

One can, therefore, say that possession is both a fact and a right. To put it another way, possession is simply a subordinate real right that is more factual in nature than other real rights. It is not always straightforward to determine if one has ownership, or has a right of servitude or usufruct and so on. It is, however, more straightforward to simply observe possession. From the factual nature of possession various legal consequences follow, as we will see.

I. CONCLUDING REMARKS

Roman law defined ownership as the highest right in property, an approach which has been followed in Scotland as in other countries including South Africa and Louisiana. The civilian influence has also resulted in such systems developing ideas of

[168] Reid, *Property*, para 5.

[169] See Leases Act 1449, s 1. There is a wealth of case law and literature on whether a lease is, therefore, a real right or merely a personal right. See *Brock v Cabbell* (1830) 8 S. 647; *Edmond v Reid* (1871) 9 M. 782; *Hamilton v Hamilton* (1845) 8 D. 308. See further the discussions in David Haughey, "Transmissibility of Lease Conditions in Scots Law – A Doctrinal-Historical Analysis" (2015) Edinburgh Law Review, 19(3), 333-359 and Peter Webster, *The Relationship of Tenant and Successor Landlord in Scots Law* (Unpublished PhD Thesis), Edinburgh: The University of Edinburgh, 2008, ch 1.

possession based upon Roman law. The view that possession is largely factual and is the legal mechanism used for constituting ownership (e.g. through *occupatio*, delivery or prescription) marks possession out as subordinate to ownership.

English law, albeit in a different manner, also marks a clear distinction between ownership and possession. In principle, an owner's property right is ranked as a higher priority in terms of protection relative to everybody else and is accordingly placed higher than a bare possessor's whose title is only enforceable against later parties. The civil law, with its separation of ownership (protected by the remedy of vindication) and possession (protected by possessory remedies) does not recognise such an approach and instead protects the real rights of its citizens upon the basis of a clear distinction between both.

If ownership is the highest real right, where, therefore, lies possession? In Scots law, and Roman law as well, possession is viewed as having a close affinity with ownership. The structure of both the Roman *Digest*[170] and the institutional writings, by discussing possession alongside ownership, reflects this. Possession remains a fundamentally important doctrine. The delivery of possession remains a requirement for the transfer of ownership of corporeal moveables other than by sale.[171] Possession is important for the operation of prescription.[172] Acquisition of possession by a creditor remains a requirement for a real right of pledge.[173] Ownership is the principal real right. Possession, in turn, is a subordinate real right, sometimes derived from (but

[170] Indeed, the title on possession in the *Digest* (41, 2) is placed immediately following that of ownership (41, 1) but before *usucapio* (41, 3) to highlight the importance of possession in relation to the acquisition of *dominium* by the passage of time. Du Plessis highlights this: Du Plessis, *Roman Law*, 177.

[171] The Sale of Goods Act 1979, s 17(1) states that *intention*, not possession, transfers ownership in sale of goods cases. Nevertheless, sections 24 and 25 deal with instances where the seller remains in possession (s 24) and the buyer acquires possession (s 25), following the sale.

[172] See Prescription and Limitation (Scotland) Act 1973, sections 1 and 2.

[173] See Steven, *Pledge and Lien*, paras 6-07-6-34 and 18-09. However, see the changes proposed under the Scottish Law Commission, *Report on Moveable Transactions Vol 2: Security over Moveable Property* (SCOT LAW COM No. 249, 2017), recently published in December 2017. It is arguable whether it remains so for lien, see paras 13-04-13-13 and 18-09 of the same work.

sometimes also arising independently of) ownership. It is also factual, and from the fact of possession important legal consequences flow.

2 THE PRESUMPTION OF OWNERSHIP ARISING FROM POSSESSION

A. INTRODUCTION

In the previous chapter, we observed that ownership and possession are treated in Scots law as two distinct legal concepts. That is not to say, however, that the two concepts are distant from one another. In fact, ownership and possession are, in certain respects, closely linked. One legal mechanism by which the two are linked is the presumption of ownership from possession. As we will see, the presumption is fundamentally important in describing the relationship between possession and ownership with respect to corporeal moveable property. Notwithstanding such importance, however, the analysis of the matter remains rather underdeveloped.[174] It is the purpose of this chapter to highlight the role of the presumption in practice, its importance within the field of property law and its declining significance today.

B. THE PURPOSE OF THE PRESUMPTION

(1) Function

A few introductory remarks must be made. The presumption of ownership presumes, in cases of possession, that the possessor of property is its owner.[175] Ownership of land and incorporeal moveable property can be deduced easily by written evidence,[176]

[174] David Carey Miller has, however, given a very detailed account of the presumption and its legal role in a posthumously published essay, see David Carey Miller "The Presumption Arising from Possession of Corporeal Moveable Property: Questioning Received Wisdom" in Simpson et al., *Continuity, Change and Pragmatism*, 339-366.

[175] Indeed, as Anderson states, a presumption is a "device used in the law of evidence to fill in the gaps where there is insufficient evidence" present, see Anderson, *Property*, para 2-15.

[176] Title to land is determinable by accessing the Land Register or the Register of Sasines. Furthermore, the use of written assignations renders it straightforward to determine to whom obligations are owed. Assignations are almost always placed into writing as they must be delivered to the debtor to satisfy the requirement for intimation. See Gretton & Steven, *Property, Trusts and Succession*, para 5.42; Reid, *Property*, para 655.

meaning that (whilst one can presume, for example, that an occupier of residential heritable property is its owner) it is not important to recognise a presumption of ownership in these types of property. With corporeal moveables, however, there is no public register of rights (subject to minor exceptions)[177] and it can be difficult to ascertain whether such rights exist and by whom they are held. As one author has said, possession is usually the "easiest" and sometimes the only manner in which ownership can be demonstrated in respect of corporeal moveables.[178] Like all presumptions, the presumption of ownership can be rebutted and it is not, of course, the only presumption known to Scots property law. For example, statute provides a rebuttable presumption that spouses are "presumed [to have] a right to an equal share" to any matrimonial household goods,[179] a presumption equally extended to cohabitants.[180] Moreover, for the purposes of attachment of goods, a Sheriff Officer is entitled to rely on the debtor's possession as evidence of his ownership.[181]

(2) The Dual Burden Placed Upon The Pursuer

Any person in possession has the benefit of the presumption. In practice, a non-owning possessor may often be either (1) a thief (or other dispossessor) who asserts that the property he has stolen is really his, or (2) a *bona fide* third party who seeks to assert ownership over property transferred to them from a non-owning possessor (e.g. a thief). The issue often arises, therefore, in the form of a dispute between the true owner and another party who has acquired possession, a situation which underlies the following discussion at many points. As the presumption operates in favour of the possessor, the possessor need prove nothing to prove their ownership, not even whether they acquired the property in good faith.[182] The burden of proving ownership lies upon the party challenging the possessor's right to the property (generally the

[177] Gretton & Steven, *Property, Trusts and Succession*, para 12.19.

[178] Reid, *Property*, para 130.

[179] Family Law (Scotland) Act 1985, s 25(1).

[180] Family Law (Scotland) Act 2006, s 26(2). Neither presumption, however, applies to goods received during the marriage "by gift or succession from a third party".

[181] Debt Arrangement and Attachment (Scotland) Act 2002, s 13(1).

[182] Anderson, *Property*, para 2-18. See the discussion of *Chief Constable of Strathclyde Police v Sharp* 2002 S.L.T. (Sh Ct) 95 below at Pages 55-57.

pursuer). In order to "discharge the evidential burden",[183] the pursuer must show two things (hereinafter named as the "two-stage test").

Firstly, the pursuer must show that they, at one point in the past, had ownership of the property. As will be explained in further detail below, this first stage was historically more restrictive, requiring that the pursuer establish past "possession" as opposed to ownership.[184] Given that an owner may not ever have had possession (a situation increasingly common in modern times) it seems sufficient for a pursuer simply to prove that they were (until the point of dispute) the owner, for instance by proving that a contract for the sale of goods was concluded.

Secondly, the pursuer must prove that the current possessor (seeking to rely upon the presumption) did not acquire possession in a manner consistent with a loss of the pursuer's ownership.[185] For example, the pursuer must prove, not only their former title, but that the property was stolen from him, or delivered under a contract of loan, or pledged, with the result that the pursuer did not lose ownership by such action. Thus, a pursuer is faced with the dual burden of adducing evidence in relation to two related but distinct matters: (1) evidence as to past ownership (i.e. ownership until the point of acquisition of possession by the defender) and (2) evidence as to the *retention* of such ownership following the defender's acquisition of possession.

The presumption thus increases the difficulties faced by the pursuer. In its absence, the pursuer would still have to prove his ownership (and, upon doing so, presumably would be entitled to vindicate his property). He would not, however, have to show that his possession terminated in a way which was inconsistent with the acquisition of ownership by the defender. The presumption, however, requires this second step. It has been suggested that these requirements may have developed to strike a balance between the rights of the true owner and the rights of those relying upon the

[183] Reid, *Property*, para 130.

[184] See e.g. Stair, *Institutions*, IV, 21, 5.

[185] Anderson, *Property*, para 2-18.

presumption.[186] As we will see, the presumption is most frequently associated with *bona fide* acquisition of corporeal moveables.[187]

It is worth noting that possessory remedies such as spuilzie allowed (and allow still) a pursuer to recover possession of goods taken from him unlawfully (i.e. without his consent or by the force of law).[188] All the pursuer would have had to establish was unlawful deprivation.[189] Thus, the pursuer would avoid the difficulties of the two-stage test, in particular proving his former ownership. The option of raising a possessory remedy was, therefore, presumably more attractive to a dispossessed owner, so much so that it is unclear why, in cases such as theft, a pursuer would ever seek to prove ownership instead. Nevertheless, in instances where goods had been *lawfully* placed into the possession of another (e.g. under a contract of loan), the pursuer would, due to the unavailability of spuilzie, have to prove his ownership.

C. THE ORIGINS OF THE PRESUMPTION

At this point, it will be of use to outline the historical origins of the presumption in Scots law as well as whether the presumption is present in certain other jurisdictions.

It seems that Roman law recognised a direct presumption of ownership from possession, although the presumption was not as clearly developed as it stands in Scots law today. According to Du Plessis, possession in Roman law was "some evidence (though not conclusive) of [one's] ownership"[190] and Burdick also describes

[186] Holligan, *Protection of Ownership*, 67.

[187] According to one author, the presumption of ownership really only applies in relation to heritable property in the respect that it underlies the rules surrounding, *inter alia*, positive prescription of land and possessory judgements relating to land, see Wilkinson, *Evidence*, 198.

[188] See Stair, *Institutions*, I, 9, 16-24; Bankton, *Institute*, I, 10, 124-144; Erskine, *Institute*, III, 7, 16 and IV, 1, 15.

[189] Bankton, *Institute*, I, 10, 126. See Kenneth Reid "Property Law: Sources and Doctrine" in Reid & Zimmermann, *History*, 212-213.

[190] Du Plessis, *Roman Law*, 176. According to Du Plessis, the use of title deeds was relatively uncommon until the later Empire. For further information on the reforms to Roman law introduced under Emperor Augustus, see Du Plessis, *Roman Law*, 13-14.

possession as a "badge of ownership"[191] as it essentially acted as a representation of one's ownership of movables. The presumption operated in relation to both movable and immovable property due, presumably, to the lack of a system of land registration, at least until the time of Augustus.[192]

As in Scots law, the party seeking to rebut the presumption was faced with the challenge of discharging a difficult burden of proof. The party awarded with possession by the praetor in a possessory action might subsequently become the defendant in any litigation regarding ownership.[193] Conversely, the party defeated on the issue of possession might become the plaintiff in the subsequent action, with the burden of proving legal entitlement.[194] As a result of the necessity of proving legal entitlement (as opposed to factual possession) the possessor would have an advantage over the plaintiff faced with the burden of proving ownership.[195]

The presumption of ownership in Scots law today is reflective of the presumption of ownership that was present in Roman law. The word "reflective" is used as it is unclear of the extent to which the presumption has been received *exactly* from Roman law. It is likely that the Scottish institutional writers were influenced by the Roman presumption, but none of Stair,[196] Bankton[197] nor Erskine[198] gives a Roman source. In addition to Scotland, this Roman presumption of ownership is reflected in other legal

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[191] Burdick, *Principles of Roman Law*, 328. In Scots law, Bell similarly describes possession as "the badge of property in moveables", see Bell, *Commentaries*, *Vol 1*, 304.

[192] Du Plessis, *Roman Law*, 176.

[193] See D 41, 2, 35 (Ulpian): "The outcome of a dispute over possession is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of possession will take on the role of plaintiff when the question of ownership is contested".

[194] Du Plessis, *Roman Law*, 181.

[195] See D 6, 1, 24 (Gaius): "Anyone who contemplates suing for a thing ought to consider whether he can obtain possession of it by some interdict. For it is far more convenient for him to be in possession himself and put the burden of being plaintiff on his opponent than for him to sue with his opponent in possession".

[196] Stair, *Institutions*, IV, 21, 5.

[197] Bankton, *Institute*, II, 1, 34.

[198] Erskine, *Institute*, II, 1, 24.

systems, including South Africa[199] and Louisiana.[200] The presumption is also present in English law, which recognises a "presumption of title in chattels"[201] as well as, with regards to land, a presumption of "seisin in fee simple".[202] Indeed, virtually all legal systems appear to have the presumption.

D. DOCTRINAL DEVELOPMENT - THE INSTITUTIONAL WRITERS

(1) The Presumption

As Holligan notes, it was Stair who first set out the presumption in detail in Scots law.[203] Stair says, in his title dealing with petitory actions, that "it is presumed, that the moveables possessed belong to the possessor"[204] (applying the presumption to corporeal moveables by claiming that "the clearest possession is of moveables").[205] Bankton associates the effect of the possession of moveables with their transfer, stating that possession "presumes his right of property" in the same manner that "delivery of them transfers the property".[206] As we will see later, the link between delivery and subsequent possession is important. In his *Institute*, Erskine says that "in moveables […] the law presumes the property to be in the possessor; so that till

[199] In South African law, the presumption is often described as the "probative" function of possession ("bewysregtelike funksie") and, like Roman law, possession determines which of the two contesting parties becomes the defender in any litigation regarding ownership. See Duard Kleyn, "Possession" in Zimmermann & Visser, *Southern Cross*, 828; Van der Merwe, *Things*, 52; Voet, *Commentary*, 41, 2, 16; Grotius, *Jurisprudence*, II, 2, 7.

[200] See Louisiana Civil Code, Arts 530 and 3423.

[201] For discussion of the concept of the presumption in English law, see Pollock & Wright, *Essay on Possession*, 25 and Fox, "Relativity of Title" (n 81), 342-346. One must, however, be wary as questions of possession in the common law give rise to issues unfamiliar to the civilian property lawyer such as relativity of title.

[202] Fox, "Relativity of Title", 342.

[203] Holligan, *Protection of Ownership*, 67.

[204] Stair, *Institutions*, IV, 21, 5. See also II, 1, 42 where Stair claims that "property in moveables […] is presumed from possession".

[205] Ibid, II, 1, 11. However, Stair, at II, 1, 12, does claim that "possession of the ground is also clear in many cases".

[206] Bankton, *Institute*, II, 1, 34. Delivery, of course, is no longer fundamental, see Sale of Goods Act 1979, s 17.

positive evidence be brought that he is not the right owner, he will be accounted such by the bare effect of his possession".[207] The presumption is also dealt with by Hume[208] and, in a lesser degree of detail, by Bell in both his *Principles*[209] and *Commentaries*.[210]

According to the institutional writers, the presumption is a consequence of the lack of a general register of ownership of moveables.[211] The necessity for the security of commerce was already highlighted by Stair, stating that the presumption "is the great security of commerce, which would be extremely prejudiced, if men were obliged to prove the titles of their possession of moveables".[212] Alongside Erskine,[213] Hume also highlights the necessity for promoting the passage of moveables, claiming that the need to prove title "would put an end to all sort of security or facility in the traffic of moveable subjects",[214] giving the example of a horse that has been sold on five or six times and the unfairness imposed upon the possessor if he need prove the title of his predecessors.

(2) Rebuttal

The institutional writers were also in agreement as to the requirements needed to rebut the presumption, namely proof of prior entitlement (usually evidenced by past possession) and proof that such entitlement did not cease. Significant emphasis, however, was placed upon the pursuer establishing previous "possession". Stair, for example, states that, with regard to the first stage of the two-stage test, a pursuer must "prove that he once *possessed* these moveables" (emphasis added) before showing that "they did not pass from him by any right of alienation".[215] Stair could, of course,

[207] Erskine, *Institute*, II, 1, 24.

[208] Hume, *Lectures*, *Vol 3*, 229.

[209] Bell, *Principles*, §1313-§1315.

[210] Bell, *Commentaries*, *Vol 1*, 304.

[211] Stair, *Institutions*, II, 1, 42; Erskine, *Institute*, II, 1, 24.

[212] Stair, *Institutions*, IV, 45, 17 (III).

[213] Erskine, *Institute*, II, 1, 24.

[214] Hume, *Lectures*, *Vol 3*, 229.

[215] Stair, *Institutions*, IV, 21, 5. As Carey Miller points out, the claimant's past possession will presume their ownership at such point, see Carey Miller, *Corporeal Moveables*, 22. In this respect, the presumption is effectively being used by both parties to presume ownership (at different points in time). It is then up to the claimant to show that, while possession was lost, ownership was not.

simply be being loose in his use of language. Bankton requires that the pursuer prove "that he was proprietor" (rather than simply possessor) but, in relation to the second stage of the two-stage test, prove that "he lost the *possession*" without losing ownership in turn.[216] Similarly, Bell requires proof of "the loss of *possession*" in relation to the second stage.[217]

As mentioned, there may be situations where an owner has never received possession. Take the example of a caravan which is purchased by "A". Before A can take delivery (but following the acquisition of ownership) the caravan is stolen from the person selling to A by a thief ("B"), who then sells it on to a third party ("C"). As well as being covered by the presumption of ownership deriving from his own possession, C could seek to rely upon the presumption that B was the caravan's owner at the time of the sale to him (i.e. when B was in possession), a presumption which A is faced with rebutting. If the law required proof of past possession, as Stair seems to suggest, A (as the true owner) would be unable to discharge his burden of proof and, as a result, would be unable to recover. Arguably, A has received civil possession of the caravan following the conclusion of his contract with the seller but, as we will see, civil possession is insufficient to give rise to the presumption of ownership. Indeed, if that were not so, the result would be to allow two presumptions to co-exist: a presumption of ownership from civil possession in A and a presumption of ownership from natural possession in B (and then C).

Therefore, it is better to move away from any requirement that the true owner establish past "possession". The two-stage test as described by the institutional writers is an insufficient representation of how corporeal moveables pass today. Indeed, less emphasis is placed upon possession in this regard by many of the modern textbooks.[218] Possession is, of course, indicative of ownership and proof of past possession can be used where relevant. However, it is more accurate to state that the law requires that a pursuer prove (1) that they, at some point in the past, had ownership of the property (by whatever means) and (2) that, in spite of the acquisition of possession by another, their ownership was not lost.

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[216] Bankton, *Institute*, II, 1, 34.

[217] Bell, *Principles*, §1314.

[218] See Reid, *Property*, para 130; Anderson, *Property*, para 2-18.

E. PRACTICAL DEVELOPMENT – CASE LAW

(1) The Early Cases – Diligence

The first cases on the presumption of ownership from possession come from the beginning of the seventeenth century and so pre-date Stair. The context is diligence. For present purposes, only a brief illustration is necessary. *Turnbull v Ker*[219] and *Brown v Hudelstone*[220] both concerned creditors seeking to rely upon the possession of property held by their respective debtors as evidence of the latter's ownership. In *Turnbull*, the defender-creditor ("K") sought to rely upon his debtor's possession, for two years, of certain "kine and oxen" belonging to the pursuer ("T"), in response to T's claim for spuilzie of such goods. In *Brown*, the defender-creditor argued that his debtor's possession of a cow (belonging to the pursuer) for two years entitled him lawfully to poind such cow.

In both cases, the Lords ruled in favour of the defender creditor and allowed him to transfer ownership of the poinded goods to another. For present purposes, it is sufficient to note the reliance by the defenders on a presumption of ownership arising from the possession of goods by their debtors.

(2) Further Cases

Later seventeenth-century cases developed the presumption further. *Scot v Fletcher*[221] concerned a simple claim for redelivery of books that had been given to the defender under a contract of loan. The defender's ownership of the books was presumed from his possession, a presumption on which the defender relied. The Court of Session highlighted the importance of the presumption in promoting commerce[222] and asserted the two-stage test needed for its rebuttal. In consequence, the court required the pursuer to prove his loss of possession by way of the loan,[223] which the latter did successfully by means of witnesses (thereby repelling the defender's reliance

[219] (1624) Mor. 11615.

[220] (1625) Mor. 14748.

[221] (1665) Mor. 11616.

[222] "Else all commerce would be destroyed" was the wording of the court when discussing the challenge of proving all titles to goods, see 11617.

[223] (1665) Mor. 11616, at 11617.

upon the presumption). In *Geddes v Geddes*,[224] Marion Geddes (the pursuer) had, under a contract of loan, delivered furniture to her late brother during his lifetime. After her brother's death, the pursuer sought redelivery of the furniture against the defender (the brother's executor), who sought to rely upon the presumption of ownership arising from the deceased's possession. The presumption, however, was quickly rebutted as the past delivery of the furniture was "provable by witnesses".

There are, however, cases where the use of the presumption seems open to question. An example is *Scot of Gorrinberry v Elliot*.[225] In this case, the defender had carried a number of sheep "away off the ground" of the pursuer's son, relying upon the presumption that the son was the owner of the sheep. In fact, the sheep had been delivered by the pursuer (i.e. the true owner) to his son for the purposes of grazing and the pursuer was accordingly faced with the burden of proving that his ownership was not lost.[226] The Lords, however, upheld the defender's reliance upon the presumption. Similarly, in *Russell v Campbell*,[227] the defender had, in his capacity as creditor, poinded a mare in the possession of his debtor ("young Elrig") which in reality belonged to the pursuer ("Elrig elder", who had sent the mare to graze with his son's horses). The pursuer was faced with the burden of rebutting the presumption of ownership arising from his son's possession. This was a task he was unsuccessful in completing as he failed to show that his possession terminated in a manner inconsistent with a transfer of ownership.[228]

In *Russell*, one can, however, argue that, as the mare had been sent by the pursuer to graze with his son's horses, the latter had custody and not possession. As we will see later, custody is insufficient to give rise to the presumption, at least in the modern law. The same point can be made of the sheep in *Scot of Gorrinberry*.

[224] (1678) Mor. 12730.

[225] (1672) Mor. 12727.

[226] Ibid, at 12727-12728.

[227] (1699) 4 Bro Sup. 468.

[228] Ibid. At 469, the court reiterated the importance of proving a loss of possession: "If I have a watch, it is not relevant for the watchmaker to say, I offer to prove that the watch was mine last week, to give him *rei vindicationem*; but he must also prove *quomodo* that he lost the possession".

(3) The *Sharp* scenario and Questions of Good Faith

Chief Constable of Strathclyde Police v Sharp[229] is the most famous modern application of the presumption.[230] Sharp ("S") had reported his Porsche motor car as stolen,[231] the car having been taken from the driveway of his home.[232] The car was, at a later stage, bought by[233] (and therefore came into the possession of) McMillan ("M") who purchased the car with false registration plates, without the correct documentation and without the key fob needed to deactivate the car's alarm. The Chief Constable (the pursuer) brought an action of multiplepoinding in relation to the car. The issue was to whom ownership should be awarded: S, the owner of the car who had reported its theft, or M who, in possession, was presumptively its owner.

The Sheriff ruled in favour of S on the basis that M had acquired the car in bad faith[234] as M had received neither documentation in relation to the car[235] nor the alarm key fob (he had, in consequence, uninstalled the alarm system).[236] On appeal, the Sheriff Principal reversed and declared good faith *not* to be a conclusive factor in ascertaining the strength of the presumption, stating that what is essential in these cases is whether the true owner can *in fact* establish that the property in question belongs to him. That said, it was acknowledged that the strength of the presumption will vary depending upon the circumstances, and that the possessor's faith may be an influencing factor.[237]

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[229] 2002 S.L.T. (Sh Ct) 95.

[230] The case is discussed by David Carey Miller in "Title to Moveables: Mr Sharp's Porsche" (2003) Edinburgh Law Review, 7(2), 221-225. In his later chapter, Carey Miller describes it as a "classic modern application of the presumption", see David Carey Miller "Presumption" in Simpson et al., *Continuity, Change and Pragmatism*, 363.

[231] It was argued by the Procurator Fiscal that S had in fact been attempting to commit insurance fraud to his insurers (Norwich Union Insurance Ltd.). However, no further proceedings were brought against him.

[232] It was established that the police noted "gouge marks" on S's driveway "consistent with the vehicle being removed by a low-loader vehicle", 2002 S.L.T. (Sh Ct) 95 at [2].

[233] From an intermediary named as "Mr Struthers", at [3].

[234] At [9]. The Sheriff had ruled that S had shown a "better title" to the car than that of M, in what may seem to be a (perhaps unintended, but to be discouraged) use of English legal terminology.

[235] At [4].

[236] At [3].

[237] 2002 S.L.T. (Sh Ct) 95, at [12].

This seems inconsistent with the earlier decision of *Prangnell O'Neill v Lady Skiffington*.[238] In that case, the pursuer and the defender had lived together for a period of time in the defender's home before a breakdown in their relationship and subsequent separation resulted in the defender refusing the pursuer access to her home (and, in consequence, to his goods). According to Lord Grieve, the defender's ownership of the articles "must be presumed unless it can be demonstrated that she only acquired possession of them by some *unlawful* act" (emphasis added), implying that, in such event, the defender would not be able to rely upon the presumption.[239] The alleged unlawful basis of the possession was the refusal of access to her home (an event that was in fact *not* accepted as unlawful, as the pursuer could not prove that he had been in possession of the articles until the point of separation).[240] Nevertheless, as the pursuer could not establish his prior possession of the articles, he could not rebut the presumption of ownership in favour of the defender.[241]

The Sheriff Principal's reasoning in *Sharp* is to be supported. All possessors, whether *bona fide* possessors such as innocent purchasers or *mala fide* possessors such as thieves, should be entitled to rely upon the presumption. After all, to a third party, the fact of possession creates an impression of ownership regardless of whether the possessor is, in reality, an innocent purchaser or a thief. Moreover, even if the presumption were to be disapplied in the event of *mala fide* possession, the true owner would still need to prove his ownership in pursuing a vindicatory action. What the owner would not need to establish is that his possession terminated in such a way that the possessor could not have acquired a right of ownership (i.e. the second step of the two-stage test). This difference, however, is not a strong justification for differentiating between *bona fide* and *mala fide* possessors, especially when considering that, to the outside world, the appearance of possession suggests that the possessor is the owner.

Disregarding such questions of faith, the Sheriff Principal in *Sharp* declared that "the well-established presumption which arises from the possession of moveable property

[238] 1984 S.L.T. 282.

[239] Ibid, at 291 per Lord Grieve.

[240] Ibid.

[241] Ibid, at 283.

must be held to apply".[242] This was on the basis that, although S had established that the car once belonged to him, he had failed to satisfy the second step of the two-stage test and prove that "his possession terminated in such a way that [M] could not have acquired a right of property" as it could not be established that the car had in fact been stolen.[243] In consequence, M was awarded ownership, based upon the presumption. The case is a well-known one and has attracted a certain amount of discussion.[244]

F. DOES THE PRESUMPTION BELONG TO THE LAW OF PROPERTY?

This section aims to assess whether the presumption of ownership is simply a rule of the law of evidence or whether it belongs to the substantive law (in this case, the law of property). If the presumption belongs to the law of property, various consequences may follow such as the ability of non-owning possessors to transfer ownership based upon the presumption. If, conversely, the presumption is nothing more than a matter of the law of evidence, it is merely a useful mechanism in title disputes.

(1) The Law of Evidence – A Matter of Definition

At the outset, it must be remembered that the presumption of ownership from possession is, by matter of definition, a "presumption", which is (as defined by a leading modern textbook on the law of evidence) "an inference as to the existence of one fact, drawn from the existence of another fact".[245] In consequence, the fact of possession is not conclusive of the presence of ownership and it is open to the challenging party to adduce evidence to rebut the presumption. Textbooks on the law of evidence usually have a section devoted to the presumption of ownership from

[242] 2002 S.L.T. (Sh Ct) 95, at [14].

[243] Ibid, at [15], citing William Gillespie Dickson, *A Treatise on the Law of Evidence in Scotland, Third Edition*, *Vol 1*, Edinburgh: T.&.T Clark, 1887, §150.

[244] See e.g. David Carey Miller "Mr Sharp's Porsche" (n 230) and David Carey Miller "Presumption" in Simpson et al., *Continuity, Change and Pragmatism*, 363-364.

[245] Fiona Raitt (with Eamon H Keane), *Evidence: Principles, Policy and Practice*, *Second Edition*, Edinburgh: W. Green, 2013, para 7-02. It must be noted that this definition, in turn, is taken from Dickson, *Treatise*, §109 (n 243), who, in turn, cites Stair, see Stair, *Institutions*, IV, 45, 9.

possession. Dickson,[246] for example, devotes nine paragraphs to the presumption, including its rebuttal by means of overcoming the two-stage test[247] and also its rebuttal by individual circumstances.[248] The presumption from possession is also discussed in Wilkinson's textbook on the law of evidence.[249] Stair too discusses the presumption in the context of the law of evidence[250] and, as Sellar says, the views of Stair are often cited even today as authoritative statements of the law surrounding presumptions.[251]

According to Carey Miller, "the predominant strand of modern thinking" seems to classify the presumption as a rule of the law of evidence as opposed to the law of property.[252] Indeed, Dickson's work on evidence is cited in many of the cases dealing with the presumption, including *Prangnell O'Neill*[253] and, more notably, *Sharp*[254] which engages with Dickson in some detail.[255]

Furthermore, the presumption of ownership from possession has been classified, within the law of evidence, as a "rebuttable presumption of law", as it applies

[246] Dickson, *Treatise* (n 243), §149-§157. Dickson considers the presumption in Chapter IV under "The Secondary Rules of Evidence".

[247] Ibid, §150.

[248] Ibid, §151. As an example, Dickson cites the case of *Abercromby v Story* (1687) Mor. 11618, in which a widow acquired possession of moveables belonging to her late husband after his death. Upon remarrying, her children "of the first [deceased] husband" were entitled to reclaim possession by proving that the deceased had possession of the moveables at the time of his death. Wilkinson later gives a further example where the specific relationship between the parties will rebut the presumption: where "the possessor is an agent or carrier", see Wilkinson, *Evidence*, 198-199.

[249] Wilkinson, *Evidence*, 198-199.

[250] Stair discusses the presumption from possession alongside other presumptions in his account of "Probation Extraordinary", see Stair, *Institutions*, IV, 45, 17.

[251] W David H Sellar, "Presumptions in Scots Law" in R.H. Helmholz and W David H Sellar (eds.), *The Law of Presumptions: Essays in Comparative Legal History*, Berlin: Duncker & Humblot, 2009, 219. According to Sellar at 206, most of the presumptions that Stair lists, including the presumption of property from possession which Sellar describes as a "general" presumption, are all "generally familiar in the civilian tradition".

[252] David Carey Miller, "Presumption" in Simpson et al., *Continuity, Change and Pragmatism*, 361.

[253] 1984 S.L.T. 282.

[254] 2002 S.L.T. (Sh Ct) 95.

[255] See David Carey Miller, "Mr Sharp's Porsche" (n 230), 223.

automatically in every case of possession.[256] This is opposed to a "rebuttable presumption of fact" where the presumption only arises because of the existence of a particular state of facts.[257] With the presumption of ownership, individual circumstances are important (an example is Hume's illustration of the weakening of the presumption in the case of a beggar with a valuable jewel),[258] with the factual context regarded as determining the presumption's strength.[259] Its classification, however, as a "rebuttable presumption of law" ensures its automatic application in cases of possession.

(2) The Law of Property – The Publicity Principle

Might, nonetheless, the presumption be classified as a substantive rule of property law? On first thought, it may be difficult to envisage such. The presumption is, as stated, a "presumption" and is open to rebuttal, securing its place within the law of evidence, as opposed to the law of property which relies upon strict rules and principles.[260] How then, can one conceptualise the presumption as belonging, at least in part, to property law?

According to Carey Miller, the tendency of the cases (such as *Sharp*) to cite works on evidence stems from the fact that, until recently, there existed no texts dealing specifically with corporeal moveable property in Scots law.[261] Today, however, that is

[256] Wilkinson, *Evidence*, 192.

[257] The author gives the example of a presumption of theft where a party is found to be in possession of goods "in criminative circumstances", see Wilkinson, *Evidence*, 193. The author also explains a third category of presumptions known as "conclusive presumptions", which are not "presumptions" in the strict sense of the term but are rather rules of law expressed in the form of presumptions. An example is the conclusive presumption that a child under the age of 8 is incapable of incurring criminal liability, see Wilkinson, *Evidence*, 192.

[258] Hume, *Lectures*, *Vol 3*, 231. According to Hume, in such cases "from their nature the presumption in favour of the possessor is not so strong".

[259] *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139, at 147 per Lord President Cooper: "the possession of the moveables can create no more than a presumption of fact, more or less strong according to the circumstances, but capable of being redargued…".

[260] Holligan defines the dependence upon certainty in this area of the law as a "key value in property law doctrine", see Holligan, *Protection of Ownership*, 187.

[261] David Carey Miller, "Mr Sharp's Porsche" (n 230), 223.

not the case[262] and the presumption appears in textbooks dealing with property law.[263] The presumption's affiliation with the law of property lies mainly within the latter's strict insistence upon publicity. As Holligan notes, the publicity principle is of fundamental importance: "as a real right may be enforced against third parties, it is important that the public are able to comprehend its content and have a reliable means of ascertaining if and when it exists".[264] Thus, unlike personal rights (which merely concern individual parties who come under some form of obligation either voluntarily or involuntarily), real rights can affect any third party, which necessitates an "external act" to express their acquisition,[265] such as the registration of a deed in the case of land.[266]

As already stated, there is no register of corporeal moveables and ownership will pass, in instances other than sale, by delivery. Such delivery, however, may not have been witnessed by others. It is, therefore, difficult for third parties to determine the ownership of the moveable, given the lack of written evidence and the lack of attestation of the necessary "external act". This is where the presumption comes into play. To return to Reid's remarks, possession is often the only manner in which ownership can be expressed.[267]

For the moment, we must disregard the possibility (in sale of goods cases)[268] that the parties may have intended ownership to transfer at a point other than delivery. Delivery is, to put it simply, a transfer of possession. If the contract involving the moveable was not in writing and was not witnessed (take the example of a moveable being purchased in an empty market-place) then the existence of possession following delivery is the only manner in which third parties can observe that the possessor has ownership of the moveable. In other words, the possession by the transferee provides a formal

[262] Indeed, Carey Miller has devoted an entire textbook to the subject, see Carey Miller, *Corporeal Moveables*.

[263] Reid, *Property*, para 130; Anderson, *Property*, paras 2-15-2-19.

[264] Holligan, *Protection of Ownership*, 187. One academic has described publicity as the "cornerstone of property law", see Andrew Steven, "Scottish Property Law 2017" (n 135), 31.

[265] Gretton & Steven, *Property, Trusts and Succession*, para 4.19.

[266] Land Registration etc. (Scotland) Act 2012, s 50(2).

[267] Reid, *Property*, para 130.

[268] Sale of Goods Act 1979, s 17(1).

expression that the external act (i.e. delivery) was, at some point in the past, carried out, in the same manner in which an inspection of the Land Register will determine whether a transferee has previously registered a disposition.[269] Even on a simpler note, as moveable property often cannot be utilised without possession, it is often reasonable for a third party to assume that the possessor is the owner.

Whilst, however, possession indicates ownership in the moveable, this is not conclusive. A valid title may not be vested in the possessor, or the possession might be attributable to some other lawful (e.g. loan) or unlawful (e.g. theft) circumstances. The publicity principle is, therefore, slightly altered (or, one can argue, weakened) in the case of corporeal moveables, in the respect that third parties can observe, not that a valid title vests in the possessor, but that a valid title *presumably* vests in the possessor. This ties in with the assertion made in a leading property law textbook that the publicity principle has been significantly weakened in the case of corporeal moveable property.[270]

Notwithstanding property law's preference for certainty, this weakening of the publicity principle must be accepted. If the law of property insisted upon a strong publicity principle for moveables, then the commercial passage of goods would be limited to a severe degree. In such case, the owner of moveable property might need to retain possession which is, in many instances, highly impractical. Moreover, the presumption of ownership would become obsolete. It would no longer be necessary to "presume" that the possessor is the owner as the possessor *would* be the owner.

(3) The Law of Property – The Form of "Possession" Required

Alongside ownership, the presumption utilises a further concept belonging to the law of property, namely possession. But what type of possession is required for the presumption to operate? According to Reid, the property must be "possessed in the

[269] The title sheet relating to the property can be found within the Title Sheet Record of the Land Register, with any encumbrances over the property (other than standard securities) found within Section D (the "burdens section") of the title sheet (e.g. real burdens). Standard securities will be found under the preceding Section C (the "securities section"). For further information, see Gretton & Steven, *Property, Trusts and Succession*, paras 7.31-7.35.

[270] Gretton & Steven, *Property, Trusts and Succession*, para 4.20.

strict sense of the term".[271] Bell requires natural possession for the presumption to operate,[272] thus excluding civil possessors from its operation. As we observed above, the exclusion of civil possession is a sensible one and precludes the presumption from being present in two different parties (the natural possessor and the civil possessor) simultaneously. For Carey Miller, what is needed is "possession in the full sense of holding on the basis of belief in a right to the thing", although no authority is given for this proposition.[273] Thus, it would appear to be that, in order for property to be covered by the presumption, it must be "possessed" in the sense that Scots property law conceptualises possession. In other words, the corporeal moveable must be subject to a degree of control (*corpus possidendi*) with corresponding intention to hold the thing for the possessor's own benefit (*animus sibi habendi*).[274]

If that is correct, then "mere custody is insufficient".[275] Bell, however, in his *Commentaries*, mentions those who have "custody and possession" in relation to the presumption, resulting in a possible implication that the presumption may apply to custodiers also.[276] Moreover, a few of the older cases, such as *Scot of Gorrinberry v Elliot*[277] and *Russell v Campbell*,[278] discussed above, are arguably instances where the holder of the property had custody and not possession. Indeed, the existence of "custody" is expressly stated in *Russell*.[279]

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[271] Reid, *Property*, para 130.

[272] Bell, *Principles*, §1313.

[273] David Carey Miller, "Presumption" in Simpson et al., *Continuity, Change and Pragmatism*, 351.

[274] Despite the claims to the contrary in Erskine, *Institute*, II, 1, 20 and Bell, *Principles*, §1311, *animus sibi habendi* has been accepted as satisfying the mental element of possession in Scots law. Indeed, without it tenants and liferenters could not possess. For further discussion of *animus possidendi* in Scots law, see Reid, *Property*, para 125; Anderson, *Corporeal Moveables*, paras 1-10-1-13.

[275] Reid, *Property*, para 130.

[276] Bell's exact words are (in stating that possession is not conclusive of ownership): "For the possession of moveables is frequently unaccompanied by the ownership; since they are necessarily in the course of dealings entrusted to the custody and possession of persons who have no further concern with them than to keep them safely…", see Bell, *Commentaries*, *Vol 1*, 304.

[277] (1672) Mor. 12727.

[278] (1699) 4 Bro Sup. 468.

[279] Ibid, 469.

Bell's mention of custody, however, is brief and any implication is a weak one. Indeed, the other institutional writers do not mention the possibility that the presumption may apply to those who have custody as opposed to possession.[280] Stair even cites custody as an example of the rebuttal of the presumption, stating that the presumption is defeated by proof that the property was the subject of "impignoration, *custody*, loan, or by being stolen, or taken by violence, or having strayed, or having been lost…".[281] Therefore, whilst an owner (deprived of possession) can rely upon custody as being a ground for rebutting the presumption, it would appear that custodiers cannot rely upon their custody as proof of entitlement. It seems, therefore, that (since the nineteenth century at least) the law has required strict possession for the presumption to operate.

Based upon the definition given three paragraphs ago that the presumption requires *animus sibi habendi* to operate, it may seem that the property need not be held by the possessor as his own (i.e. on the basis of belief that he has ownership of the property), otherwise known as *animus domini*. The fact that the possessor need not subjectively hold as owner and may hold on the basis of asserting a real right less than ownership, may seem counter-intuitive when discussing a presumption of *ownership* based upon possession. Perhaps for that reason, it has been suggested that *animus domini* is required where the presumption is in issue. Hume, for example, states that: "we presume in his favour from his possession alone, *qua dominus*, in the character of owner, that the thing came fairly to him on some just and lawful title of acquisition".[282] It is likely that the presumption's focus upon the security of commerce (which Hume explains) is the basis for such an approach.

Carey Miller also supports the *animus domini* approach (i.e. that in order for the presumption to operate, the property must be held by the possessor on the basis that they do in fact have ownership).[283] In doing so, he cites good faith purchase as the prime example for supporting such, on the basis that it is, as he describes it, "the rationale for the presumption".[284] As we will see in the next chapter, the good faith of a purchaser often stems from their reliance upon the possession held by their

[280] See e.g. Stair, *Institutions*, IV, 21, 5; Bankton, *Institute*, II, 1, 34; Erskine, *Institute*, II, 1, 24.

[281] Stair, *Institutions*, IV, 21, 5.

[282] Hume, *Lectures*, *Vol 3*, 229.

[283] David Carey Miller, "Presumption" in Simpson et al., *Continuity, Change and Pragmatism*, 352.

[284] Ibid, 352-353.

respective seller. If the seller is possessing on the basis of a right less than ownership then this will, in consequence, undermine the reliance given to the possession by a purchaser. However, the presumption is, of course, not confined to *bona fide* acquisition. A thief who possesses *animo domini* can, for example, rely upon the presumption. Therefore, it seems to be the law (although there is little authority) that the party holding the property must have natural possession with the mental state of *animus domini*. For present purposes, however, it is sufficient to recognise the way in which the presumption is associated with the law of property through the analysis of the form of possession needed in order for the presumption to operate.

(4) The Importance of The Question

In summary, it is difficult to classify the presumption of ownership from possession as belonging entirely to the law of evidence or belonging entirely to the law of property. The presumption is, in fact, associated with both areas of law. The presumption is not a strict rule of substantive law but is rather a "presumption", securing its position within the law of evidence. At the same time, the presumption of ownership is closely associated with the law of property, turning upon questions of "ownership" and "possession". Indeed, the evidence needed to rebut the presumption involves separating possession from ownership. Furthermore, the presumption from possession is a direct consequence of the publicity principle with respect to corporeal moveables, indicating to the world that, following delivery, a real right of ownership "presumably" exists.

Of course, one can argue that all presumptions must lie both within the law of evidence and within some other area of law. Take as examples the "presumption in favour of innocence" (belonging partly to the law of evidence and partly to criminal law) and the "presumption of probativity" (belonging partly to the law of evidence and partly to the substantive law surrounding the execution of deeds).[285] However, as we will see, the classification within the law of property of the presumption of ownership has further significance in respect of certain situations within the law of property, including the acquisition of ownership by *bona fide* third parties from non-owning possessors, a topic discussed in the next chapter.

[285] See Wilkinson, *Evidence*, 196-197.

G. THE WEAKENING OF THE PRESUMPTION

(1) The Presumption's Declining Importance

Is the presumption as influential in modern times as formerly? To answer this question, one must consider whether title to moveables is more easily ascertainable today. Reid considers the presumption to be "less strong" today.[286] The institutional writers pointed out that title to corporeal moveables often passes without writing.[287] Bell even claims that the presumption is a direct consequence of the reluctance to adopt writing in moveable transactions.[288] However, in modern times, when moveable property is sold (e.g. in shops or market-places), purchasers will usually receive a written receipt. This is particularly likely in the case of transactions undertaken on the Internet. Consumers often retain receipts of goods purchased or hired, not merely for the purpose of clarifying the ownership of the property in question (or for the practical purpose of allowing defective goods to be returned to sellers), but for the purposes of VAT or capital gains tax.

Moreover, in the case of more valuable goods such as cars, compulsory registration (with the D.V.L.A.) has strong evidential value.[289] There exists, also, an accessible U.K. register of ships.[290] In addition, the fact that valuable moveables such as household furniture and vehicles are insured against damage and/or loss has the result that the corresponding insurance documents are highly indicative (although not conclusive) of one's title. These factors have, over time, rendered the presumption unnecessary in many cases.

As well as being less necessary than it once was, the presumption is also weaker. In sale of goods cases the transfer of possession is no longer necessary to transfer

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[286] Reid, *Property*, para 130.

[287] Stair, *Institutions*, IV, 45, 17 (VIII); Erskine, *Institute*, II, 1, 24; Hume, *Lectures*, *Vol 3*, 229.

[288] Bell, *Commentaries*, *Vol 1*, 304.

[289] See the requirements on vehicle registration in the United Kingdom at the following link: <https://www.gov.uk/vehicle-registration> (Accessed August 10th 2018).

[290] See George L Gretton, "Ships as a Branch of Property Law" in Simpson et al., *Continuity, Change and Pragmatism*, 370-375 for a detailed discussion of shipping registration in the United Kingdom. However, there is no requirement that they *must* be registered although, as Gretton notes at 371, "in practice that is not really an option for shipowners".

ownership.[291] Delivery is neither necessary nor sufficient to transfer ownership of the goods sold.[292] It is the mutual intention of the parties that transfers title.[293] It is in this respect that Reid remarks that "there has been in recent times a marked decline in the coincidence of ownership and possession".[294] Thus, whilst possession may indicate ownership of goods, the presumption is weakened as a result of the law's abandonment of the necessity for delivery for the derivative acquisition of ownership of goods.

Furthermore, ownership of certain corporeal moveables such as cars passes today not with delivery but much later, under a contract of hire-purchase. The contract, determining which party has ownership depending upon certain factual criteria being satisfied,[295] will invariably be in writing as both parties will wish to give recognition to the other party's rights and obligations. In consequence, ownership will be easily determinable.[296] Indeed, the common usage of the "retention of title" clause has the result that, in commercial sales, a transfer of possession often does not go hand-in-hand with a transfer of ownership.[297]

(2) The Presumption as a "Safety Net"

Writing, of course, is not always used. Take the simple example of a busy bar on a Friday or Saturday night. The possession of a drink in a thirsty buyer's hand is the only indicator as to whom the drink belongs. It is in this sense that one can think of the presumption as a safety net in the absence of other evidence. This is not to say that the presumption does not exist at all where evidence can be easily produced. The

[291] And has not been since January 1st 1894 when the Sale of Goods Act 1893 came into force. The position is now governed by the Sale of Goods Act 1979, s 17(1).

[292] Although it may do if the parties intend such. In the absence of clear intention, the legislation moves further away from the need for delivery, see s 18.

[293] Sale of Goods Act 1979, s 17(1).

[294] Reid, *Property*, para 130.

[295] For example, the completion of payment of the price of the property.

[296] Take the following statement by Lord President Cooper, setting out the shopping habits of the 1950s: "The furniture and plenishings now acquired by a very large section of the population are so acquired under some form of hire-purchase or instalment contract", see *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139, at 147.

[297] Carey Miller, *Corporeal Moveables*, 23.

presumption is always present in cases of possession. Where evidence can be produced, the presumption is present but, if inconsistent with the paper trail, can be readily rebutted.[298] Where evidence cannot be produced, the presumption remains the decisive factor in litigation. Arguably, therefore, the presumption remains very much alive in Scots law today.

(3) The Relationship Between Possession and Ownership

Lastly, a few remarks must be made on the presumption's impact upon the relationship between possession and ownership. The presumption closely associates possession with ownership by presuming the latter from the mere fact of the former. However, this is not the end of the matter.[299] The presumption works mainly for corporeal moveable property, on the basis that title to moveables generally passes without writing whereas for heritable property writing is (and must be) used, and must be followed by registration. The fact of possession offers no more than a minor indication of ownership in the case of land, because determination of ownership is ultimately made by reference to the Land Register or the Register of Sasines.

Therefore, possession acts as a representation of ownership but the presumption may be rebutted by establishing the two requirements needed to circumvent its operation. In other words, the presumption renders the factual relationship between ownership and possession a close one but one that is susceptible to challenge. If the presumption is overturned, and the possessor is shown not to be the owner of that which he possesses, the result is a *factual*, as well as a legal, separation between ownership and possession. In summary, the relationship between ownership and possession with regards to corporeal moveable property is one that is factually close but not conclusive.

[298] Thus, in litigation, the presumption would be easily overcome although, given the simple existence and production of written evidence, it is unlikely that litigation would even occur.

[299] Or, as Carey Miller states, one must not "equate" ownership with possession because of the presumption, see Carey Miller, *Corporeal Moveables*, 23.

H. CONCLUDING REMARKS

A few concluding remarks must be made. The presumption of ownership is well-established and certain aspects of the presumption are reasonably clear. One aspect, as stated earlier,[300] is the fact that the presumption is enhanced in the context of corporeal moveable property in comparison to heritable property. Another is the fact that the presumption is significantly weaker today than it once was.

However, certain aspects of the presumption remain significantly under-discussed and it is hoped that this chapter has shed a degree of light upon such areas. One such area is the presumption's substantive classification within Scots law. As we have seen, the presumption is, by its very nature, a subject belonging to the law of evidence. Nonetheless, by virtue of its linkage to property law's fundamental publicity principle and by its requirement of natural possession (in the property law sense), the presumption remains an important aspect of the law of property also.

Finally, whilst possession remains less important for heritable property, possession of moveable property remains a fundamental indication of ownership in many cases. As possession is legally perceived as a vital sign that ownership exists, possession and ownership are intertwined. We observed in the previous chapter that ownership and possession are distinct legal concepts in Scots law. However, the two doctrines are not as distinct as one may initially conclude. Despite this legal separation, the factual relationship between possession and ownership is a close one. It is not, however, a conclusive one.

[300] See Pages 45-46.

3 THE TRANSFER OF OWNERSHIP BY NON-OWNING POSSESSORS

A. INTRODUCTION

In Chapter 1 we examined the extent to which ownership and possession are distinct legal concepts in Scots law (and the laws of various other jurisdictions), as well as the distinctive role of possession with regards to the acquisition of ownership. In Chapter 2, we saw that, despite such distinction, ownership and possession are closely associated in certain circumstances, including when corporeal moveables are held. One can summarise matters by stating that, in principle, factual and legal possession are conceptually distinct from ownership but also that the fact of possession presumes ownership. Thus, there is overlap. In the present chapter, the concern is with whether bare possession by one person can, of itself, result in the acquisition of ownership from that person by another. In other words, can a party who is not the owner, but is nevertheless in possession of corporeal moveable property (a non-owning possessor), confer ownership on a third party?

B. THE *NEMO PLUS* PRINCIPLE

(1) The Strength of *Nemo Plus*

As a matter of principle, any attempted transfer by a non-owner will fail due to the *nemo plus* doctrine (i.e. the rule that no one can transfer greater rights to someone else than he possesses himself).[301] The rule is well established in Scotland, as elsewhere, and can be found in the institutional writings[302] and in modern texts on the law of property.[303] Moreover, the demands of modern commerce has meant that the rule has even worked its way into legislation dealing with the transfer of property, both

[301] D 50, 17, 54 (Ulpian): “nemo plus juris ad alium transferre potest, quam ipse haberet”.

[302] See Bankton, *Institute*, IV, 45, 100; Erskine, *Institute*, III, 1, 10 and III, 3, 8; Hume, *Lectures*, *Vol 3*, 231.

[303] See Reid, *Property*, paras 669-683; Gretton & Steven, *Property, Trusts and Succession*, paras 4.42-4.44; Anderson, *Property*, para 4-05.

moveable[304] and heritable.[305] Indeed, the rule as it stands today is uncontroversial. Nevertheless, the *nemo plus* rule is important for the discussion later in this chapter and it is important to take brief notice of the exceptions to the rule.

(2) The Weakening of *Nemo Plus*

The rule that one cannot transfer a right that one does not have is not an absolute one. But, unlike the laws of the countries of Continental Europe (discussed in further detail below), Scots law does not adopt one single, uniform exception to *nemo plus* in the context of corporeal moveables.[306] Instead, various exceptions exist, most of which derive from statute. In the case of land, a transferor in possession[307] (who is not the owner) is able to transfer a right that he does not have (ownership) to a grantee providing that, *inter alia*, the grantee is in good faith[308] and the transferor is named on the Land Register as owner and has been in possession for at least one year.[309] In relation to goods there are numerous examples, the most important of which are considered below. What is fundamentally important to note is that these situations all involve a factual separation between possession (held by the transferor) and ownership (held by another).

C. FURTHER STATUTORY EXCEPTIONS TO *NEMO PLUS*

(1) The Factors Act 1889[310]

The first-mentioned statutory exception to *nemo plus* came with the Factors Act 1889 (extended to Scotland by the Factors (Scotland) Act 1890). The 1889 Act allows a

[304] Sale of Goods Act 1979, s 21(1).

[305] Land Registration etc. (Scotland) Act 2012, s 50(2). Under this provision, only a "valid" disposition can transfer ownership. Therefore, an *invalid* disposition (such as that from a non-owner) cannot and does not transfer a good title.

[306] Arthur F. Salomons, "Good Faith Acquisition of Movables" in Hartkamp et al., *Towards a European Civil Code*, 1070.

[307] Gretton & Steven, *Property, Trusts and Succession*, para 7.74.

[308] Land Registration etc. (Scotland) Act 2012, s 86(3)(c).

[309] Ibid, s 86(3)(a)(i). Alternatively, the seller and the grantee may both have been in possession for periods that constitute such length of time, s 86(3)(a)(ii).

[310] For a much fuller discussion of these provisions, see Holligan, *Protection of Ownership*, 172-176.

"mercantile agent"[311] to transfer ownership of goods (or another right such as a right in security) to a third party, despite having no authority from the owner of the goods to do so.[312] This is subject to the requirement that the third party must be in good faith, with no knowledge of the agent's lack of authority to transfer any such right.[313] There exist a number of additional requirements[314] and the statute has generated numerous cases.[315] For present purposes, the two most important elements are the entrusting of possession to the mercantile agent and the reliance upon such possession by the third party.

The mercantile agent must have had possession at the time of transfer, possession being defined as when the goods are in the agent's "actual custody or are held by any other person subject to his control or for him or on his behalf".[316] Thus, civil possession is included (e.g. where a mercantile agent holds the keys to a warehouse that the goods are contained within).[317] We will return to analyse such "possession" under the Factors Act later. The third party, however, must also be in good faith which, in turn, requires circumstantial analysis.[318] The principles surrounding this issue are generally well-settled. It has been held, for example, that the burden of establishing good faith rests with the third party themselves.[319]

(2) The Sale of Goods Act 1979

It will be of use to give a brief outline of the statutory exceptions to *nemo plus* that lie within the Sale of Goods Act. The exceptions that are discussed here can be split into three situations:

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[311] A "mercantile agent" is defined in s 1(1) as "a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods".

[312] Factors Act 1889, s 2(1).

[313] Ibid.

[314] For a helpful discussion, see Reid, *Property*, para 671.

[315] See e.g. *Oppenheimer v Attenborough & Son* [1908] 1 K.B. 221; *Heap v Motorists Advisory Agency Ltd*. [1923] 1 K.B. 577.

[316] Factors Act 1889, s 1(2).

[317] Reid, *Property*, para 671.

[318] Ibid.

[319] *Heap v Motorists Advisory Agency Ltd*. [1923] 1 K.B. 577.

- **(1)** Where the owner of the goods is precluded from denying the authority of the non-owning seller in possession to transfer title.[320]
- **(2)** Where the non-owning seller, continuing in possession following sale, transfers title to a third party.[321]
- **(3)** Where the buyer in possession (who is not yet the owner), following purchase, transfers title to a third party.[322]

(1) is really just a form of personal bar. Thus, where a seller has possession of goods belonging to another and the owner has made "any representation or holding out of apparent ownership on the part of the person selling the goods",[323] then the owner will be personally barred, by such conduct, from later denying the seller's ability to confer title upon a buyer. However, not only must there be action or inaction on the part of the owner to mislead the buyer, there must also be corresponding reliance by the buyer upon such action.[324] In fact, this provision is analogous to the common law doctrine of reputed ownership, which we will examine in the following two chapters.

(2) and **(3)** are slightly more complicated. As we observed in the previous chapter, a party in possession, following sale, may not be the owner as the transfer of ownership ultimately depends upon the intention of the parties.[325] In the absence of express intention, ownership usually passes upon conclusion of the contract.[326] What happens, however, if a seller who remains in possession of goods, such as a bicycle (e.g. until the buyer is able to collect the bicycle), then resells to a third party, either intentionally (e.g. to make a profit) or inadvertently? Under situation **(2)**, the third party may receive a good title.[327] The provision is strict, however. The third party must have been *bona fide*, without notice of the former sale, and there must have been delivery of the goods

[320] Sale of Goods Act 1979, s 21(1).

[321] Ibid, s 24. For a much fuller discussion of the scope of section 24, see Holligan, *Protection of Ownership*, 152-162.

[322] Ibid, s 25. For a much fuller discussion of the scope of section 25, see Holligan, *Protection of Ownership*, 162-166.

[323] Reid, *Property*, para 680.

[324] Ibid.

[325] Sale of Goods Act 1979, s 17(1).

[326] Ibid, s 18, rule 1.

[327] Ibid, s 24.

to him/her. The third party, however, need not be receiving ownership; they may, for example, be a creditor receiving delivery of the property under pledge.[328]

(3) concerns the case when delivery has been made to the buyer under a contract of sale, but ownership has temporarily remained with the seller. The most common example is a retention of title clause.[329] If a buyer in possession of goods (e.g. a motor-vehicle) decides to disregard such clause and sell the car to a third party purchaser, then the latter will receive a good title - subject to the conditions that, as in **(2)**, they are in good faith and without notice of the fact that the buyer has no title to the goods.[330] Again, it need not be ownership that is transferred. It may be, for example, pledge. Therefore, there must be delivery at both points: firstly, from the true owner to the buyer, and secondly, from the buyer to the third party.

(3) The Hire-Purchase Act 1964[331]

Further protection is afforded to the *bona fide* purchaser from non-owning sellers of motor-vehicles (subject to contracts of hire-purchase) under the Hire-Purchase Act 1964. Any buyer in possession of a motor-vehicle under a hire-purchase agreement (or a "conditional sale agreement") can transfer title to the vehicle to a "private purchaser" (thus, trade and finance customers are excluded),[332] in spite of the fact that they, the hire-purchaser, do not yet have title.[333] This is subject to the requirement that the "private purchaser" must be in good faith at the time of the sale to them,[334] "without notice" that the vehicle "is or was the subject of any such agreement".[335]

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[328] See Steven, *Pledge and Lien*, para 6-39.

[329] For retention of title clauses, see Davidson et al., *Commercial Law*, para 1.9.3; Gloag & Henderson, *The Law of Scotland*, para 12.18.

[330] Sale of Goods Act 1979, s 25(1).

[331] For a much fuller discussion of the scope of sections 27-29 of the Hire-Purchase Act 1964, see Holligan, *Protection of Ownership*, 166-172.

[332] Hire-Purchase Act 1964, s 29(2). See also *Stevenson v Beverley Bentinck Ltd*. [1976] 1 W.L.R. 483. The whole of the Act, aside from Part 3 governing the present case, has been repealed. Reid undertakes a useful discussion of the provisions, see Reid, *Property*, para 683.

[333] Ibid, s 27(2).

[334] Ibid.

[335] Ibid, s 29(3). See *Barker v Bell* (1625) Mor. 14748.

D. "POSSESSION" OR "CUSTODY"?

(1) Interpreting The Term "Possession"

As we have seen, sections 24 and 25 of the Sale of Goods Act 1979 provide for title to goods to be transferred by a party who is not the owner but who is, nevertheless, considered to be "in possession" of the goods. Thus, the provisions seek to operate upon the basis of a factual separation between ownership and possession. However, does the 1979 Act refer to "possession" in the strict sense of the term? In fact, there is no definition of possession within the Act itself. The only mention of "possession" in the interpretation section of the Act is within the meaning of the term "delivery", which is defined as "a voluntary transfer of possession".[336] However, "possession" itself is not defined.

Writing shortly after the passage of the original Act of 1893, and from the perspective of Scots law, Richard Brown redirects the reader at many points to the definition of possession contained in the Factors Act 1889.[337] The authors of *Chalmers' Sale of Goods* do likewise.[338] Similarly, the editors of *Benjamin's Sale of Goods* state that the definition contained in the 1889 Act "is to be applied" to the term "possession" under sections 24[339] and 25[340] of the Sale of Goods Act.

It is not clear why a definition of possession is lacking under the Sale of Goods Act. The answer may be that at the time of its original enactment in 1893, such a definition was thought to be unnecessary. The original provisions on sellers and buyers in possession following a sale were (and still are) contained in the Factors Act 1889, under sections 8 and 9 respectively, and were simply reproduced by the 1893 Act (and later, the 1979 Act).[341] Thus, in the absence of an express definition of "possession" for the purposes of these provisions, examination of the definition contained in the

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[336] Sale of Goods Act 1979, s 61(1).

[337] See Brown, *Sale of Goods*, 156, 308, 325 and 423.

[338] Michael Mark (with assistance from Jonathan Mance), *Chalmers' Sale of Goods Act 1979 (Including the Factors Acts 1889 & 1890)*, *Eighteenth Edition*, London: Butterworths, 1981, 174.

[339] Bridge, *Benjamin's Sale of Goods*, para 7-057.

[340] Ibid, para 7-072.

[341] Reid has commented that the effect of this has been for two identical sets of statutory provisions, contained in two different Acts, to co-exist, see Reid, *Property*, paras 681-682.

Factors Act seems the only logical recourse. One author has noted that, as the scope of section 1 (the definition section) of the Factors Act extends to the whole of that Act (including sections 8 and 9), it would be "perverse" to deny its application to the identical provisions contained in the Sale of Goods Act.[342]

(2) Relying Upon the Factors Act – Civil Possession

As stated above, the 1889 Act defines a person (under that Act, a mercantile agent) as being in "possession" of goods (or documents of title to goods) when such goods are in the person's "actual custody or are held by any other person subject to his control or for him or on his behalf". [343]

Due to the final words of the definition, it is uncontentious that civil possession is included within the scope of sections 24 and 25 of the 1979 Act. Civil possession is also briefly acknowledged by the 1979 Act itself which allows, under both provisions, delivery to be made "by a mercantile agent" acting for the non-owning seller or buyer (the latter would, in consequence, be a civil possessor). Thus, non-owning sellers and buyers following sale have been held to transfer title to a *bona fide* purchaser even where the property was not within their own hands. In one English case,[344] for example, an owner of certain furs which had been stored within a warehouse on his behalf was held to have successfully pledged the furs to the defendants under section 24, in spite of his original contract of sale with the plaintiffs. His possession, albeit "constructive", nevertheless sufficed.

Civil possession has been held also to be included within the scope of section 25(1).[345] In *Four Point Garage Ltd. v Carter*,[346] the existence of a retention of title clause under the relevant contract of sale meant that title remained with the seller, who also retained physical possession on behalf of the buyer. Thus, the latter had "constructive" possession. Remaining without title, the sale of the goods by the buyer to a sub-buyer and corresponding delivery by the seller to the sub-buyer (on instruction from the

[342] Bridge, *Sale of Goods*, para 5.128.

[343] Factors Act 1889, s 1(2). This definition has its origins in the Factors Act 1842 s 4, where (under that Act) the term "agent" is substituted for the term "person".

[344] *City Fur Manufacturing Co. Ltd. v Fureenbond (Brokers) London Ltd*. [1937] 1 All E.R. 799.

[345] Ewan McKendrick (ed.), *Sale of Goods*, London: L.L.P. Professional Publishing, 2000, para 5-083.

[346] [1985] 3 All E.R. 12.

buyer) was held to transmit a good title to the sub-buyer. This was despite the buyer never having had natural possession.

The inclusion of civil possession within the scope of the above provisions does not have far-reaching implications for the relationship between ownership and possession. It is, of course, significant that title to goods may be passed by one who does not own them nor have them physically within his own hands. Civil possession, however, remains a form of possession in itself, meaning that title to goods may still be transferred by a non-owner "in possession". However, the question of civil possession has implications for the *reliance* upon possession by a purchaser, which is discussed below.

(3) Relying Upon the Factors Act – "Custody"

The Factors Act 1889 also defines possession as "actual custody". If one accepts (as we have until now) the definition of "possession" under the Factors Act in relation to the Sale of Goods Act, then this invites the possibility that *custody*, as opposed to possession, may be included within the scope of the 1979 Act (i.e. where the goods are held by a person who has no intention to hold for himself).[347] In Scots law, "custody" is a very different matter from possession.[348] Now it may, of course, be the case that one is simply over-interpreting matters. The Factors Act 1889 is an English statute (extended to Scotland by the Factors (Scotland) Act 1890). English law, as we have examined in the first chapter, conceptualises possession differently to Scots law (simply as a "property right")[349] and it may be that this reference to "actual custody" is simply a reference to being in the physical control of the holder, without any regard being paid to the question of mental intention. According to one author, the definition of possession given under the Factors Act is consistent with the meaning of possession given "in other areas of personal property law" (i.e. that of physical control).[350]

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[347] See Reid, *Property*, para 125.

[348] See Stair, *Institutions*, II, 1, 17; Erskine, *Institute*, II, 1, 20; Reid, *Property*, para 125; *Hamilton v Western Bank of Scotland* (1856) 19 D. 152, at 161 per Lord Ivory.

[349] See Pages 27-31.

[350] Bridge, *Sale of Goods*, para 5.95. See also *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 W.L.R. 1437 and the discussion in McFarlane, *Property Law*, 144.

Nevertheless, it may be the case, upon closer analysis, that custody *is* included within the scope of sections 24 and 25 of the 1979 Act. In other words, there may be cases where the seller (under section 24) retains the goods following the sale and holds them with the mental intention of holding them not for himself, but solely *on behalf of* the buyer (who may not, for example, wish to receive delivery of the goods until a later point). In fact, this is likely to be true in many instances. There will be instances where the seller of goods following the sale has been instructed to retain them by the buyer on the latter's behalf and the seller holds the goods upon such basis. In these cases, the seller cannot be held to be in possession. Despite having the goods within his hands, he does not have the sufficient *animus* for possession.[351] Rather, the seller has custody of the goods on behalf of the buyer. It is the buyer that has possession, albeit civil. To restrict section 24 to cases where the seller has possession (natural or civil) in the strict sense would be to exclude the above type of case from the scope of the provision. Thus, a *bona fide* grantee could not receive a good title from the seller.

Adopting the same interpretation of "possession" throughout the whole of the 1979 Act (as the Factors Act does)[352] would mean that custody is included within the scope of section 25(1) also. However, the reality of this is likely to be less frequent. The buyer, being delivered the goods following the sale (but without receiving title) is likely to hold the goods (e.g. furniture) on his own behalf and may even use the goods for his own benefit throughout the period of his physical detention of them (subject to possible contractual prohibition by the seller). This is because, providing that all contractual terms have been complied with, the buyer will end up receiving title anyway. In this case, therefore, the buyer is likely to hold on his own account. Thus, the buyer has natural *possession*, not custody. Nevertheless, there may sometimes be situations involving custody as, for example, where the buyer has been expressly instructed to hold the goods on behalf of the seller.

The implications of this analysis are not to be overstated. However, they are important and some points must be noted. Firstly, if custody is indeed included within the scope of sections 24 and 25 of the 1979 Act, then there will be, in cases involving custody,

[351] The seller neither intends to hold as the owner (*animus domini*) nor simply for his own benefit (*animus sibi habendi*).

[352] Section 1 of the Factors Act 1889 applies to the whole of that Act.

no factual separation between ownership and possession. The (civil) possessor (the buyer under section 24, and the seller under section 25(1)) will also be the owner. The person whom the Act portrays as the “possessor” (the seller under section 24, and the buyer under section 25(1)) is, in cases like this, the custodier rather than the possessor.

A second implication is that, whilst possession by a non-owner is sufficient for the transfer of title to a *bona fide* grantee, custody is sufficient as well. Thus, it is possible for a mere custodier (who does not have the *animus* required for possession) to transfer a right (i.e. ownership) that he does not have to another. That in turn means that it is possible for a custodier, who holds goods not for himself but for the (civil) possessor who in fact owns them, to transfer ownership to another. The Factors Act 1889 includes “custody” within its definition of possession under the seller and buyer in possession provisions. By its adoption under the Sale of Goods Act, it seems that the latter Act has also.

E. THE CONTINENTAL PROTECTION OF THE *BONA FIDE* ACQUIRER OF MOVABLES

The above statutory provisions permit a transferee of moveable property to receive ownership even when, under the principle of *nemo plus*, they would not otherwise receive such title. The provisions are, therefore, a safety net for a transferee receiving delivery from a non-owner. They are not, however, straightforward to take advantage of as numerous requirements exist for their operation. By contrast, many jurisdictions in Continental Europe (of which it is only possible to discuss a few here) favour the position of the transferee to a much more significant extent, with similar themes emerging across their respective requirements. The following situations concern the acquisition of *ownership* from a non-owner, not a subordinate real right such as pledge. Moreover, at this point the term “acquirer” will be used to refer to the transferee, as the latter is deemed to “acquire” ownership.

(1) France

France permits title to be acquired from a non-owner in possession of goods by means of the simple rule under Article 2276 of the French Civil Code that “in matters of

movables, possession equals title".[353] Thus, the transferee receives "title" simply by taking possession.[354] This, however, is subject to the possibility that the owner may recover the property if it was lost or stolen from him, with a three-year time-limit imposed for recovery following the day of deprivation.[355] This possibility aside, the position, as Stoyanov notes, is that the acquirer is held to receive "clear title" on a "statutory" basis or, to put it another way, the acquirer receives a "statutory title" (instead of strictly on a derivative basis).[356] It is claimed that the rule developed from 18th century Parisian case law.[357] There does not appear to be any requirement of good faith on the part of the acquirer; it is not mentioned by Article 2276 itself and it has been claimed that it is in fact unnecessary.[358]

(2) Spain and Germany

Spain adopts the similar wording in its Civil Code that possession "is equivalent to title", with very similar protection afforded to the owner who has been unlawfully deprived of his property[359] (which has been held, restrictively, to apply only to cases of theft or robbery).[360] However, there appears to be no time-limit under which the owner may recover his property in such circumstances. Also, in contrast to the French position, the acquirer must be in good faith.[361] The acquirer must also be in good faith under German law, in which he is held to be in bad faith if he is "aware" that ownership

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[353] French Civil Code, Art 2276 (translation available at the following link): https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (Accessed August 10th 2018).

[354] Arthur F. Salomons, "Good Faith Acquisition of Movables" in Hartkamp et al., *Towards a European Civil Code*, 1071.

[355] Ibid.

[356] Dimitar Stoyanov, "The Conflict Between the Legal Interests of the Original Owner and the Good Faith Acquirer of Movables – A Comparative Overview of the Solutions" (2015) Lex E.T. Scientia International Journal, 22, Vol 1, 98.

[357] Arthur F. Salomons, "Good Faith Acquisition of Movables" in Hartkamp et al., *Towards a European Civil Code*, 1070-1071.

[358] Holligan, *Protection of Ownership*, 253.

[359] Spanish Civil Code, Art 464 (translation available at the following link): http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6370 (Accessed August 10th 2018).

[360] von Bar and Clive, *Draft Common Frame of Reference*, 4865.

[361] Spanish Civil Code (n 359), Art 464.

of the movable(s) resides in another.[362] Germany likewise affords protection to the owner where the property has been stolen or missing "or has been lost in any other way".[363]

(3) Italy

Italian law provides a much more generous approach, making no distinction between movables which came into the possessor's hands by theft, robbery or, conversely, by lawful means. It does not matter whether the transferor acquired the goods onerously or gratuitously.[364] This is different to the jurisdictions mentioned above where stolen goods can be recovered by the owner. The only requirements under the Italian Civil Code are that the acquirer be in good faith and that the contract between the transferor and transferee has an underlying *causa*.[365] To that effect, bad faith on the part of the acquirer will negate the acquisition of ownership: "to the person who bought it knowing the illegitimate origin of the thing, does not benefit the erroneous belief that its author or a previous owner has become its owner".[366] It has been claimed that this generous regime under Italian law results from the need to support the interests of the good faith acquirer over the interests of the owner.[367] This, in turn, may be due to the necessity to promote commerce.

(4) Analysis

These various approaches adopted by Continental jurisdictions resemble Scots (and English) law insofar as the transferee of moveables from a bare possessor receives title (as long as the requirements specific to the legal system are satisfied). As a matter of comparative law, it has been noted that it is exceedingly difficult to find "one common or dominating doctrinal approach" regarding the prevailing of the good faith acquirer

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[362] German Civil Code, B.G.B., s 932 (translation available at the following link): <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3791> (Accessed August 10th 2018).

[363] Ibid, s 935.

[364] Stoyanov, "Conflict" (n 356), 97.

[365] Italian Civil Code, Art 1153 (translation available at the following link): <http://www.altalex.com/documents/news/2014/10/07/del-possesso> (Accessed August 10th 2018).

[366] Ibid, Art 1154.

[367] von Bar and Clive, *Draft Common Frame of Reference*, 4867.

over the original owner.[368] A common theme in many jurisdictions, including Scotland, is that the acquirer be in good faith, with the burden of proving good faith lying upon the acquirer themselves. One author has noted that as the acquirer "is much closer to the act of acquisition than the original owner", it would be unfair to impose a burden upon the owner of proving that the acquirer received in *bad* faith.[369] The provisions of the Sale of Goods Act go further and require delivery to be made to the acquirer.[370] It is not entirely clear why this should be so.[371] One possible suggestion is that of increasing the barriers to acquisition to the effect of making Scots law less generous in affording title to a *bona fide* transferee than the other systems.

Lastly, these approaches of favouring the acquirer are different to the laws of certain other jurisdictions which favour the position of the original owner. In Louisiana, for example, the Civil Code provides that "the sale of a thing belonging to another does *not* convey ownership" (emphasis added).[372] This implies that the owner has an unlimited right to recover his property[373] (subject to the transferee in good faith possibly acquiring ownership of the property by acquisitive prescription under the Civil Code).[374]

(5) The D.C.F.R. – A Uniform Rule

The D.C.F.R. ("Draft Common Frame of Reference") attempts to harmonise these different continental approaches and provide a uniform rule, drafted by its Study

[368] von Bar and Clive, *Draft Common Frame of Reference*, 4827; Arthur F. Salomons, "Good Faith Acquisition of Movables" in Hartkamp et al., *Towards a European Civil Code*, 1081.

[369] Stoyanov, "Conflict" (n 356), 105.

[370] Sale of Goods Act 1979, sections 24 and 25.

[371] Holligan, *Protection of Ownership*, 217. See Lars van Vliet, "Michael Gerson (Leasing) Ltd. v Wilkinson (Case Comment)" (2001) Edinburgh Law Review, 5(3), 366.

[372] Louisiana Civil Code, Art 2452 (the Code is available at the following link: <https://legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent>) (Accessed August 10th 2018).

[373] P. Michael Hebert and James R. Pettway, "Sales of Another's Movables – History, Comparative Law, and *Bona Fide* Purchases" (1969) Louisiana Law Review, 29(2), 345.

[374] Louisiana Civil Code (n 372), Art 3490. This provision requires good faith and awards title after 3 years of uninterrupted possession. Article 3491 allows title to be acquired after 10 years in the absence of good faith.

Group.[375] This rule provides that "where the person purporting to transfer the ownership (the transferor) has no right or authority to transfer ownership of the goods, the transferee nevertheless acquires and the former owner loses ownership".[376] This is subject to conditions including, *inter alia*, that delivery (or equivalent) be made to the transferee[377] and that the transferee acquires the goods for value.[378] The transferee must also prove his good faith.[379] This rule was drafted to reflect the degree of risk that "all owners of movable assets" are exposed to, as well as promoting the protection of commerce.[380]

The D.C.F.R, however, does not require the transferor to be in possession. It requires merely that delivery be made to the transferee. Behind this is the idea that the law should be brought into a "more modern form".[381] As possession may no longer be as obvious in modern times (following the increasing practice of "distance selling") the trust placed upon the seller's possession of the goods is no longer as strong.[382] However, this is not to alter the picture to a significant extent. It is simply a "stretching" of the idea of the transferor's possession. The requirement for delivery to be made to the transferee symbolises that the transferor must have possession (to transfer) anyway.[383]

[375] von Bar and Clive, *Draft Common Frame of Reference*, VIII.-3:101 (at 4824). For a brief analysis of this harmonised rule, see Stoyanov, "Conflict" (n 356), 105.

[376] Ibid.

[377] Ibid, VIII.-3:101(1)(b) (at 4824).

[378] Ibid, VIII.-3:101(1)(c) (at 4824).

[379] Ibid, VIII.-3:101(1)(d) (at 4824).

[380] Ibid, 4826.

[381] Ibid, 4828.

[382] Ibid.

[383] Ibid.

F. THE IMPORTANCE OF POSSESSION

(1) The Presumption and The Statutory Exceptions

A common feature amongst the exceptions to *nemo plus* (domestic or otherwise) is that the transferor must be in possession of the goods.[384] Of course, the transferor is merely a bare possessor, resulting in a factual separation between possession and ownership. In fact, as we will see, it is on the basis of the transferor's possession that the transferee has often entered into the transaction. The fact of possession has raised not only an appearance of ownership but a formal presumption.[385] According to one author, this reliance upon an "impression of the transferor being owner" (regardless of whether or not delivery has been made to the transferee) is the underlying basis for third party protection.[386]

Similarly, possession can (in some cases) raise an appearance of credibility (or personal wealth) as the transferor has possession of goods that may perhaps be valuable. We will see the importance of personal credibility in later discussions of reputed ownership. Take the following statement by Lord Justice Buckley, for instance, in the context of transacting with mercantile agents: "the question whether or not the [transferee] believed that the person dealing with him had the character of a mercantile agent is not relevant. He deals with the [transferor] because the [transferor] has possession of the goods".[387] Indeed, Holligan claims that the main justification for the protection of the transferee under section 24 of the Sale of Goods Act (a justification that she claims presumably applies to section 25 also)[388] is "reliance on the seller's physical control".[389] The fact of possession is even more attractive when a third party *needs* to receive possession in order to acquire a certain right as, for example, under pledge.

In cases where any of the statutory provisions above apply, the buyer is protected against the possible separation of possession from ownership. Therefore, the

[384] Factors Act 1889, s 2(1) (read alongside s 1(2)); Sale of Goods Act 1979, sections 24 and 25.

[385] For the presumption of ownership arising from possession, see Chapter 2.

[386] Van Vliet, "Michael Gerson (Case Comment)" (n 371), 368-369.

[387] *Oppenheimer v Attenborough & Son* [1908] 1 K.B. 221, at 229.

[388] Holligan, *Protection of Ownership*, 164.

[389] Ibid, 155.

presumption of ownership from possession plays no part, at least in a formal sense. Of course, in reality the buyer may have relied upon a presumption of ownership raised by the transferor's possession. But whereas an owner may be able to rebut the presumption (e.g. by proving a loan),[390] the buyer will continue to be protected if the transfer falls into one of the categories covered by any of the provisions discussed. The presumption is simply a presumption. The above statutory exceptions to *nemo plus* are rules of substantive law. Thus, a third party who may, admittedly, have relied upon the transferor's possession, need not rely upon the presumption when one of the statutory exceptions can be pled.

The underlying reliance upon possession remains, however. If, therefore, a requirement of the statutory provisions is not satisfied (e.g. there has not been delivery),[391] then it will still be possible for the presumption to be pled by a buyer. Moreover, the presumption of ownership on its own does not, as we have seen,[392] depend upon good faith.

(2) The Need for Reliance?

Typically, the transferee relies upon the transferor's possession, as we have seen. But there is no *requirement* of such reliance. Such a requirement would hardly be practicable. For example, in situations involving the sale of goods at a long distance, possession will not always be discernible. The same can be said of transactions undertaken over the internet. If the statutory provisions required knowledge of, and reliance upon, possession, then these types of increasingly commonplace transactions would not be included within the statutory provisions.

Moreover, this is far from being just a problem of modern times. As we have seen, the Sale of Goods Act 1979 includes civil possession within the scope of the protection afforded to the *bona fide* purchaser. In cases of civil possession, the transferor will not be physically holding the property themselves, meaning that (to a layman who has no idea of the concept of "civil possession") it is not apparent that the seller is "in possession". How, then, can there be reliance upon possession? To impose a requirement of knowledge and reliance upon possession in cases where the property

[390] On rebutting the presumption of ownership from possession, see Pages 46-48.

[391] Sale of Goods Act 1979, sections 24 and 25.

[392] See Pages 55-57.

is not held by the seller would hardly be consistent with the fact that civil possession is included within the scope of the statute. One may wonder, therefore, *why* the statutory provisions discussed thus far require the transferor to be in possession (natural or civil) at all, considering that, in many cases, it is not known by (and consequently not relied upon) by the transferee.

(3) Possession and Good Faith

Although reliance is not a requirement, there will be many cases in which possession on the part of the transferor will attract a third party to transact. In addition, there is a link between possession by the transferor and good faith on the part of the transferee.[393] Indeed, good faith is a requirement for protection by the statutory provisions, with good faith defined under the Sale of Goods Act as an action undertaken "honestly, whether it is done negligently or not".[394] However, good faith often stems from the fact of the transferor's possession. In cases where the goods are within the hands of the seller, a buyer will be without knowledge of the rights held by another over the goods and will, in consequence, trust to the seller's possession. There is thus a correlation between the degree of good faith of the transferee and the possession held by the transferor.[395]

With the Continental jurisdictions, too, it has been claimed that the main ground for protecting the position of the transferee is their belief, stemming from the transferor's possession, that the transferor was the owner.[396] Of course, there are other requirements present in the statutory provisions such as the delivery of the goods from the transferor to the transferee.[397] However, the root of these statutory exceptions to *nemo plus* is the reliance generated by the transferor's holding of the goods in cases where the transferor's possession is perceptible. This holding, in turn, results from a factual separation between ownership and possession.

[393] Holligan, *Protection of Ownership*, 237.

[394] Sale of Goods Act 1979, s 61(3).

[395] Van Vliet, "Michael Gerson (Case Comment)" (n 371), 370.

[396] Arthur F. Salomons, "Good Faith Acquisition of Movables" in Hartkamp et al., *Towards a European Civil Code*, 1075.

[397] Sale of Goods Act 1979, sections 24 and 25.

G. CONCLUDING REMARKS

The principle of *nemo plus* has a number of exceptions in Scots (and English) law. This is important, for present purposes, because these situations allow a third party to receive title to goods as a result of a separation between ownership (residing in one person) and possession (residing in another). The idea is not a new one. The Factors Act 1889, as we have seen, allowed a mercantile agent to transfer title in the absence of authorisation. Sections 24 and 25 of the Sale of Goods Act 1979 allow a buyer to receive title from a non-owner in possession. Moreover, due to the likely link to the definition of possession adopted by the Factors Act 1889, it is likely that “custody” is also included within the above provisions of the 1979 Act. Therefore, in these cases, mere custody is capable of transferring ownership and there is no factual split between possession and ownership.

Furthermore, as we have seen, the possession held by the transferor is important in allowing the third party to receive such title. Even in the absence of actual reliance, the good faith of the transferee (which is required to receive title under the statutory provisions) is often linked to the possession held by the transferor. In other words, it is the fact that the transferor is in possession of the goods which allows the buyer to receive title. Scots (and English) law, indeed, goes slightly further in protecting the interests of the original owner by requiring, under the 1979 Act, not only good faith on the part of the transferee, but delivery to the latter also. This is unlike many of the Continental jurisdictions discussed.

4 THE DOCTRINE OF REPUTED OWNERSHIP IN SCOTS LAW – PART 1

A. INTRODUCTION

A further means by which a third party is (or perhaps, as we will examine, "was") protected in Scotland, in transactions with a non-owning possessor of goods, is by the doctrine of reputed ownership. The topic is a large one. The foundations of the doctrine are discussed in this chapter, more specifically its doctrinal and judicial development and its requirements. The underlying legal basis of the doctrine, as well as its relevance in modern times, are discussed in the next chapter.

In certain circumstances a person who has possession but not ownership of property is treated as a "reputed owner" of that property. It is unclear whether the doctrine applies solely to moveable property, although nearly all of the authorities are concerned with moveables and, as will be explained, it is difficult to see how the doctrine could apply to heritable property. Traditionally, the effect of reputed ownership has been for the moveable to be exposed to the diligence of the possessor's creditors, in the same manner in which the property would be exposed if the possessor were the owner of the goods.[398] Thus, in cases like this there are three parties: the owner, the possessor and a third party (typically a creditor) seeking to acquire rights in the property through the possessor.

B. THE INSTITUTIONAL WRITERS

(1) Stair

Stair does not appear to engage directly with reputed ownership. He does, however, speak of "collusion" being committed by debtors. This "collusion" occurs, according to Stair, when creditors are misled by the conduct of their debtor into poinding the

[398] Reid, *Property*, para 532.

moveable(s) in the debtor's possession, and then suffer loss as a result.[399] Stair describes this situation as "import[ing] direct fraud", giving rise (in principle) to the remedy of reparation against "the actor of the fraud" (i.e. the debtor).[400]

Reparation is granted "to all that are damnified thereby",[401] which presumably refers to the particular creditor who has been misled and who has suffered loss. As we will see, this is rather different from the specific law of reputed ownership which, as it later developed, operated in favour of creditors by entitling them to poind.

(2) Bell

One searches in vain for any discussion of reputed ownership in Erskine's *Institute* or Hume's *Lectures*. In fact, it was not until Bell, in the early nineteenth century, that the doctrine was set out in developed form. In his *Principles*,[402] Bell speaks of "collusive" possession as being "a natural ground on which the creditors of the person allowed so to possess may attach it for debt", on the basis that such creditors have "trust[ed] to the apparent ownership in their debtor".[403] Therefore, the trust that creditors have placed upon the possession held by their debtor entitles them to poind. In Bell's account, however, the doctrine is rather restrictive, and cannot be relied upon by creditors in situations where the obviousness of the debtor's bare possession is apparent, such as "legitimate contracts" of deposit or pledge.[404]

For collusive possession to exist, Bell requires: (1) "the appearance of uncontrolled possession and power of disposal" and (2) "acquiescence [by the owner] in something beyond the possession requisite to a fair contract".[405] Thus, it is not enough for a

[399] Stair, *Institutions*, I, 9, 13. Stair writes: "When the debtor or common author opposes some creditors, and concurs with others, that these may attain the first complete diligence".

[400] Ibid, I, 9, 14. According to Bell later in his *Commentaries*, the doctrine of reputed ownership is grounded upon principles of equity, see Bell, *Commentaries, Vol 1*, 269. Reparation in itself is an equitable remedy - for discussion of the equitable nature of reparation, see Daniel J Carr, *Ideas of Equity* (Studies in Scots Law, Vol 5), Edinburgh: Edinburgh Legal Education Trust, 2017, 64-65.

[401] Ibid.

[402] As with before, use is made here of the fourth edition of Bell's *Principles* (1839), the last to be produced by Bell during his lifetime.

[403] Bell, *Principles*, §1315.

[404] Ibid.

[405] Ibid, §1317.

creditor to assume that their debtor is the owner; the debtor themselves must have suggested as much by demonstrating some of the facets of ownership including, for example, an unlimited power of disposal.[406] Possession is not collusive where it is apparent that another party is the owner.

Acting upon such "appearance" of ownership, the creditor was able to poind. This, in turn, entitled the true owner "by civil process" (i.e. under the standard rules operating "for the protection of property")[407] to the remedy of restitution against the possessor[408] (to make a claim for its value – the owner could not physically recover his goods as the possessor's creditors were able to poind) or, if restitution was not possible, to damages against the possessor as "the party by whose fault or delict he has lost it".[409]

Further discussion of reputed ownership can be found in Bell's *Commentaries*.[410] Firstly, Bell expressly restricts the doctrine to corporeal moveables.[411] Secondly, Bell requires "unequivocal [possession] to justify credit".[412] He explains that a creditor must be certain that the goods which he seeks to poind belong to the debtor, taking into account "the many honest occasions of possession independently of property which the varied business and connections of life require",[413] and as such the creditor is put upon his enquiry to determine ownership. However, there was no requirement to *identify* the actual owner. Bell merely seems to be warning creditors of the dangers of relying upon possession alone. Indeed, if identification *was* a requirement, the doctrine of reputed ownership would not be necessary. This is because it would become clear, either (1) that the debtor is *not* the owner of the goods in his possession, in which case the creditor (if proceeding to poind) would be in bad faith and any subsequent diligence would be void, or (2) that the debtor *is* the owner, in which case he is the actual owner, and not a reputed owner.

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[406] For the benefits conferred by ownership, see Chapter 1, in particular Pages 19, 23, 25-26 and 33.

[407] Bell, *Principles*, §1318.

[408] Ibid, §1320.

[409] Ibid, §1321.

[410] As with before, reference is made here to the seventh edition of Bell's *Commentaries*, produced in 1870.

[411] Bell, *Commentaries*, *Vol 1*, 271.

[412] Ibid.

[413] Ibid.

C. "FRAUD" AND THE NATURE OF THE POSSESSION HELD

The mention of "collusion" implies that some form of "fraud" has been committed, or that a fraudulent act of some kind has been carried out. But by whom exactly has the fraud been carried out? What is the nature of this "fraudulent" conduct? And what is its importance to a plea of reputed ownership?

(1) Fraud and Collusion

In his *Commentaries*, Bell notes that the institutional writers before him (although only Stair is cited) placed the doctrine entirely upon the "fraud" of the true owner.[414] That might seem to be going too far. Erskine defines fraud as "a machination or contrivance to deceive".[415] Similarly, Forbes describes fraud as "any unfair way, that is used to cheat another".[416] Of course, it may be, in some cases, that the owner has placed another into possession of his goods so as to exclude them from the reach of his own creditors. The creditors of the owner may believe, in such cases, that the possessor (and not the owner) has ownership of the goods. This type of situation fits into the description of fraud given above. Indeed, Forbes describes this exact scenario as a "fraudulent deed".[417]

However, can it be said that the owner is at fault where he has *innocently* delivered his goods to another (i.e. with no intention to deceive his creditors)? The answer may depend upon the "necessity" for the delivery. Bell regards the owner as committing "gross negligence" when he places another "unnecessarily" into possession of his goods.[418] According to Bell, this lack of necessity is sufficient to bring a case within the scope of reputed ownership even where no fraud (in the sense mentioned earlier) exists. In other words, for Bell there needed to be either a "fraudulent" state of possession, *or* a state of possession that had resulted from "careless" or "unnecessary" conduct. In his *Principles*, for example, Bell differentiates between "legitimate" possession and "such as may be *needlessly, carelessly or fraudulently*

[414] Bell, *Commentaries*, *Vol 1*, 272.

[415] Erskine, *Institute*, III, 1, 16.

[416] Forbes, *Institutes*, III, 10, 10.

[417] Ibid.

[418] Bell, *Commentaries*, *Vol 1*, 270.

given to, or left with, one who is not the owner".[419] He continues, in his *Commentaries*, by stating that creditors are entitled to exercise diligence when the possession is "fraudulent, *or at least careless or collusive*, as not being necessary in the course of honest contracts" (emphasis added).[420]

A transfer of possession is, of course, "necessary" for the constitution of certain real rights such as pledge.[421] These are among the so-called "legitimate contracts" referred to by Bell. However, in situations outside these legitimate contracts, placing another into possession of one's goods cannot be said to be entirely "necessary". Moreover, the creditors of the owner may not be the only persons deceived by such behaviour. The creditors of the person entrusted with possession may also rely upon the possession held by their debtor. Bell claims that "the true owner ought to be aware" of the possibility of such reliance.[422] Thus, where an owner has placed another in possession of his goods unnecessarily or carelessly, with the possibility that the creditors of the possessor may be deceived, the owner is at fault vis-à-vis the creditors.

However, the owner is not the only person who is at fault. As we have seen, the institutional writers also mention the terms "collusion" and "collusive possession".[423] These terms suggest a degree of cooperation between the owner and the possessor intended to deceive third parties. In many cases, there may be a degree of fault on the part of the possessor for allowing the property to be attached without protest. Therefore, it would be inaccurate to state that the fault lies entirely with the owner. It would seem that, in these cases, the "collusion" is between the owner (who has *unnecessarily* placed another into possession) and the possessor (who makes no admission to his creditors that the goods are not his own). This "collusion" is perhaps analogous to the collusion committed by a seller and a second purchaser in an offside goals context, in which the first purchaser (who is said to be defrauded) has the remedy of reduction (of the second purchaser's title); the latter is held to be "an

[419] Bell, *Principles*, §1315.

[420] Bell, *Commentaries*, *Vol 1*, 269.

[421] See Steven, *Pledge and Lien*, paras 2-18-2-21. However, see the changes proposed to Scots law under the Scottish Law Commission, *Report on Moveable Transactions Vol 2: Security over Moveable Property* (n 173), recently published in December 2017.

[422] Bell, *Commentaries*, *Vol 1*, 269.

[423] See e.g. Stair, *Institutions*, I, 9, 13; Bell, *Principles*, §1317.

accomplice in the fraud" with the seller.[424] We will return to the significance of the offside goals context later.

(2) Reliance Upon Possession

Also of significance in allowing the creditor to poind is the trust that a creditor places in the possession of his debtor. This is, of course, subject to the above requirement stated by Bell that a creditor must make independent investigation if he has any suspicions as to a lack of ownership in his debtor.[425] Here, this "trust" is not merely a presumption of ownership arising from the debtor's possession of the particular goods, but it is a reliance upon the appearance of wealth which the possession generates. Robert Bell, for example, claims that "the adoption of the rule" of reputed ownership arises from "the false credit raised by a person exercising all the rights of ownership over a subject not his own".[426]

George Joseph Bell, to whom we now return, also mentions a reliance upon "false credit" on many occasions in his discussions of reputed ownership. In his *Commentaries*, for example, Bell says that placing a party in possession of one's moveables "may raise a false credit to that other",[427] resulting in creditors being "deceived by such false grounds of credit".[428] Later, he states that parties should avoid

[424] See *Morrison v Somerville* (1860) 22 D. 1082, n 2 per Lord Kinloch: "In granting a second right, the seller is guilty of a fraud on the first purchaser […] in taking the second right in the knowledge of the first, the second disponee becomes an accomplice in the fraud, and the transaction is reducible against both alike". For further discussion and analysis of the offside goals rule in Scots law, see Reid, *Property*, paras 695-700; Ross Gilbert Anderson, *Assignation* (Studies in Scots Law, Vol 1) Edinburgh: Edinburgh Legal Education Trust, 2008, paras 11-04-11-31; Scott Wortley, "Double Sales and the Offside Trap: Some Thoughts On the Rule Penalising Private Knowledge of a Prior Right" (2002) Juridical Review, 6, 291-316; John MacLeod, "The Offside Goals Rule and Fraud on Creditors" in Frankie McCarthy, James Chalmers and Stephen Bogle (ed.), *Essays in Conveyancing and Property Law (In Honour of Professor Robert Rennie)*, Cambridge: Open Book Publishers, 2015, 115-140.

[425] Bell, *Commentaries*, *Vol 1*, 271.

[426] Watson, *Bell's Dictionary and Digest*, 914.

[427] Bell, *Commentaries*, *Vol 1*, 269.

[428] Ibid, 271.

the types of “ambiguous dealing” which often give rise to a claim of reputed ownership by a creditor, as such possession “tends to raise credit to the possessor”.[429]

It is not entirely clear where this idea of protecting reliance upon “credit raised on apparent ownership” first came from, although it may be from the English law of reputed ownership, which was governed by statute. Having regard to the bankruptcy statute of James I,[430] which introduced reputed ownership into English law, M P Brown notes that reputed ownership protects against the “injustice which might be done to creditors by the false credit” that possession raises, adding that by “trusting to the false credit” creditors will often suffer injury.[431] It may be questioned why this should be the basis of the creditor’s protection, given that a general creditor has no nexus over particular goods and may be able to recover his debt by other means. As Holligan notes, a creditor (unlike a purchaser) has only a “monetary” interest, and not a “proprietary” interest, in the goods of the debtor.[432]

Be that as it may, a creditor undertaking diligence appears to have been protected not simply because of the conduct of the owner of the goods, or the “collusion“ between the owner and the possessor, but because of their reliance upon the debtor’s possession of the goods, which generated an appearance of “personal credit”. This personal credit presumably encouraged the creditor to lend to the debtor in the first place. Admittedly, in a modern context possession of corporeal moveables is of less concern to creditors such as banks (who will often seek to rely upon other factors such as evidence of income). However, at the time that Bell was writing in the early nineteenth century, possession of goods provided a more realistic representation of personal wealth.

It is unclear, however, whether such reliance was a *strict* requirement. As mentioned above,[433] Bell required creditors simply to believe that their debtor was the owner of the goods (a point Bell seems to insist upon when he states that creditors “*must* so far

[429] Bell, *Commentaries*, *Vol 1*, 273.

[430] 1623 21 James I c. 19. Sections 10 and 11 are the relevant sections dealing with reputed ownership.

[431] Mungo Ponton Brown, *A Treatise on the Law of Sale*, Edinburgh: W.&.C Tait, 1821, 23.

[432] Holligan, *Protection of Ownership*, 156.

[433] See Pages 88-89.

protect themselves as to avoid giving credit too easily").[434] This is reinforced by Bell's assertion (mentioned above) that "the possession *must* be unequivocal to justify credit".[435] Perhaps an insistence upon reliance was regarded by Bell as unnecessary, as reliance may result from the creditor's belief that the debtor is the owner. Thus, as the creditor *must* discharge their burden of enquiry and, if satisfied, believe that their debtor was the owner, their consequential reliance upon such possession provided a further rationale for their protection in any subsequent dispute with the owner of the goods.

D. THE CASE LAW

(1) The Early Decisions

Reputed ownership, as a concept, was listed as a heading in two nineteenth-century cases in relation to agents acting beyond the scope of their authority: *Attwood v Kimiears*,[436] and *Fleming v Findlay & Co.*[437] Neither, on inspection, involved any element of reputed ownership in the sense meant in this chapter, and indeed the term "reputed ownership" did not appear in either judgement.

Other cases, however, were more promising. From the following decisions, it seems that the courts will observe closely the circumstances of the transaction in order to determine the obviousness of the ownership of the property and whether the creditor has discharged his burden of enquiry. In *Dougall v Marshall*,[438] the defender Robert Marshall had acquired ownership of a feu (a plot of land) from his late father. He had, however, permitted his younger brother John to enter into, and remain in, possession of the land for many years until the latter's bankruptcy. This led the pursuer, as the

[434] Bell, *Commentaries*, *Vol 1*, 271 (emphasis added).

[435] Ibid. Bell continues by stating that the possession "*must* imply a full power of disposal; and it *must* be such as actually to raise a reputation of ownership" (emphasis added). As noted above, Robert Bell, in the opening lines of his passage dealing with reputed ownership in his *Dictionary*, states that the rule of reputed ownership has "led" from such "false credit" raised by the debtor's possession, see Watson, *Bell's Dictionary and Digest*, 914.

[436] (1832) 10 S. 817.

[437] (1832) 10 S. 739.

[438] (1833) 11 S. 1028.

creditor of John Marshall, to seek to recover from Robert certain sums which had been advanced to John. One point discussed extensively by the court was the latter's "ownership" of the land. The Inner House, being satisfied on the balance of probabilities that Robert had "fraudulently colluded with John, and that thereby the pursuer trusted him",[439] ruled in favour of the pursuer. Among other things, John had been (1) registered in the superior's rental books as the "feuar", (2) had been providing payment of the feu-duty, and (3) had allowed tenants to occupy a part of the land. Robert, by contrast, had worked as a labourer in the same village and had lived in poor circumstances.

These factors convinced the court that John had publicly assumed the appearance of ownership. Being heritable property, however, (deeds relating to which must have been recorded in the Register of Sasines)[440] it is difficult to see why the issue of reputed ownership arose. Indeed, the fact that proof as to ownership of land could be obtained from the "public records" was raised by Robert as a defence.[441] This case appears to be the only decision reported under the heading "reputed ownership" in the context of heritable property. Even then, reputed ownership as a doctrine is not mentioned within the judgement. Of course, there are elements present which are important to reputed ownership: most notably the existence of "collusion" between the true owner of the land (Robert) and its possessor (John). However, as the creditor sought to recover his debt directly from Robert (the fraudster), instead of seeking to poind the possessor's goods, it would be better to view this case as a decision dealing with fraud in a general sense.

However, *Dougall* is useful in showing how the courts engage in a close examination of the respective conduct of the owner and the possessor. In *Macdougall v Whitelaw*,[442] the court was faced with the task of examining where the ownership of

[439] (1833) 11 S. 1028, at 1030 per Lord Justice-Clerk Mackenzie.

[440] See Kenneth G.C. Reid & George L. Gretton, *Land Registration*, Edinburgh: Avizandum Publishing Ltd., 2017, paras 1.1-1.12.

[441] (1833) 11 S. 1028, at 1030.

[442] (1840) 2 D. 500. Like with *Dougall*, "reputed ownership" is not actually named in the decision, which seems to have been decided upon the basis of the presumption of the pursuer's ownership of the goods from her continuous payment of rent of the houses within which she resided with the goods.

furniture lay which the defender (as the creditor of James Macdougall, the brother of the pursuer, Flora Macdougall) sought to poind in the pursuer's possession.[443] James (the debtor) had lived with the pursuer and had been the original owner and possessor of the furniture before he sold it to Flora upon becoming insolvent in 1826. The defender sought to poind in the lack of any evidence as to such sale.

A proof involved examination of various rental receipts paid by Flora since the sale (as well as her name upon the policies of insurance relating to the furniture) acknowledging her as tenant of the houses within which she and James dwelled (despite, on one occasion, James being portrayed as the tenant)[444] and within which the furniture was held. As established tenant, her possession of the furniture (over which it was established by the Lord Ordinary that "the bankrupt had no control")[445] convinced Lord Gillies that she was its presumed owner, resulting in the defender being unable to poind.[446] Thus, *Macdougall*, like *Dougall*, was not decided strictly upon the basis of reputed ownership. Again, however, the case illustrates the judicial scrutiny of the parties' conduct.

Take *Marston v A.A. Miller (Kerr's Trustee)*[447] as a further example. In this case, a cab had been hired from the pursuer (a coach-builder), under a written contract,[448] by Mr James Kerr who later became bankrupt. In consequence, the defender, a creditor of Kerr, sold the cab on the ground that Kerr was its reputed owner. The pursuer sought to recover the cab's resale value of £70.

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[443] The defender was, in fact, about to commence poinding when he was directly stopped by the pursuer who alleged that the furniture was hers.

[444] (1840) 2 D. 500, at 502. This was the apparent mistake of a servant who, upon opening the door to a surveyor, had stated James Macdougall to be "the occupier".

[445] Ibid, at 503.

[446] Ibid, at 505. The decision, however, seems a little confusing as (1) James Macdougall had continued to live with the pursuer, his (presumed) possession of the furniture was not acknowledged as presumptive of ownership (although, admittedly, this may have been because it was established that he had no control over the furniture) and (2) Flora's name upon the policies of insurance was not further acknowledged by Lord Gillies as indicative of her ownership.

[447] (1879) 6 R. 898.

[448] The contract of hire also contained an option to purchase the cab at a later stage.

What factors were present to indicate ownership? In the course of a proof, it was established that the pursuer was in the habit of hiring out similar cabs. These had the pursuer's name upon them, as did the underside of the cab hired to Kerr. The Inner House was satisfied, therefore, that reputed ownership did *not* apply. There was also the fact that the contract of hire was in writing. As Lord Gifford explained: "reputed ownership applies rather to those ambiguous cases where the title is latent, or rather where the true owner allows another to assume publicly the appearance of ownership, and so to deceive and mislead creditors by raising a false ground of credit".[449] Kerr's possession, therefore, was not fraudulent, careless or unnecessary.

These decisions indicate that not only must the owner have permitted the property to remain in the possession of another, but that creditors are put upon their enquiry to ascertain where the ownership actually lies.

(2) Later Developments

Judicial development was not to be sustained. By the middle of the nineteenth century, it was said that reputed ownership admitted "of more qualifications and exceptions" than any other legal doctrine.[450] By the end of the century, it was the opinion of Lord Justice-Clerk Moncreiff that reputed ownership "has been paid little attention to of late years, and is no longer of much importance".[451] Indeed, one searches in vain for any comprehensive developments of the doctrine towards the end of the nineteenth century.

In the twentieth century, case law dealing with the subject is scarce. The most notable example is *George Hopkinson Ltd. v Napier & Son*,[452] where the doctrine was relied upon by the defender, who was the creditor of a purchaser under a hire-purchase agreement. The pursuers had sold and delivered certain items of furniture on hire-

[449] (1879) 6 R. 898, at 901.

[450] *Shearer v Christie* (1842) 5 D. 132, at 146 per Lord Cunningham. Reputed ownership, however, was not the sole focus of discussion in this case, which concerned a second husband who had renounced his matrimonial interest in the furniture co-owned by himself and his wife, which his creditors sought to poind in the enforcement of a debt due to them.

[451] *Robertsons v McIntyre* (1882) 9 R. 772, at 778.

[452] 1953 S.C. 139.

purchase. Ownership and possession were thus separated.[453] The purchaser, however, incurred a debt with the defenders (another hire-purchase firm) who, in enforcing their debt, poinded the articles of furniture in the purchaser's possession (the ownership of which remained with the pursuers). The pursuers sought redelivery of the furniture or, alternatively, damages.

The court ruled unanimously in favour of the pursuers, allowing the pursuers to recover the poinded furniture. The most important element in *Hopkinson* appears to have been the existence of good faith on the part of the true owner (i.e. the pursuers' lack of fault in allowing the furniture to remain in the possession of the purchasers). This is an important point. As Lord President Cooper acknowledged, hire-purchase had become more common.[454] Thus, in these types of transactions, it is difficult to argue that goods have been "fraudulently" or "carelessly" placed into the possession of those who are, at a later stage, to receive ownership of such goods. In these cases, delivery to the debtor is not unnecessary.

In modern times, motor vehicles are the best example of corporeal moveable property subjected to hire-purchase. We will, therefore, think of a brief example where the above case would be illustrated today. If "B" purchases a car under a hire-purchase agreement from "S" (a motor-dealer) and receives possession of the car, it would be difficult for "C", as a third-party creditor, to seek to attach the car on the basis of reputed ownership, as S has not been "fraudulent" or "careless" in permitting the car to remain in the possession of B. In other words, B does not have "collusive possession" of the car. This is consistent with Bell's view that reputed ownership could not apply where a "legitimate contract" existed requiring possession.[455] Despite the court not expressly stating so in *Hopkinson*, it is evident that hire-purchase is an increasingly commonplace "legitimate" contract which would likely fit into Bell's exceptions to a claim of reputed ownership.

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[453] Ownership, of course, remained with the pursuers until full payment of the price of the furniture had been made.

[454] 1953 S.C. 139, at 147: "It is notorious that the furniture and plenishings now acquired by a very large section of the population are so acquired under some form of hire-purchase or instalment contract".

[455] Bell, *Principles*, §1315.

While the doctrine seemed to disappear towards the end of the twentieth century, it was resurrected briefly in a recent decision: *Canning v Glasgow Caledonian University*.[456] In this case, a librarian raised reputed ownership as one of the grounds for declarator of her ownership of a library collection.[457] This was upon the basis that she had been referred to, by her solicitor, as the *de facto* owner of the collection, having maintained such for over three decades. Reputed ownership, however, was not treated at any great length by the court,[458] being limited to brief investigation of its underlying legal basis. In fact, Sheriff S Reid appeared to depart from all previous case law on the subject by ignoring the importance of fraud and collusion and placing emphasis instead upon a direct presumption of the pursuer's ownership from her possession. The case is discussed in more detail in the next chapter.

E. THE MERCANTILE LAW AMENDMENT ACT (SCOTLAND) 1856

Whilst not expressly stated in the institutional writings, there was originally an important category of instances where the doctrine of reputed ownership could not, in principle, apply. That category was sale (although note the exceptions in the following paragraph). Up to and including December 31st 1893,[459] in any sale of goods cases, ownership remained with the seller until delivery had been made to the buyer. This included symbolical delivery.[460] Thus, any seller that remained in possession of goods following the conclusion of a contract of sale remained the owner of the goods. If, therefore, a creditor of the seller wished to poind the goods, they would be entitled to do so.[461] The doctrine of reputed ownership would not apply as the seller was the

[456] 2016 S.L.T. (Sh Ct) 56.

[457] The pursuer also raised other grounds for such declarator of ownership, including on the basis of abandonment, an averment that the Sheriff dismissed upon the simple basis that the Crown receives ownership of abandoned property, see Reid, *Property*, para 540.

[458] 2016 S.L.T. (Sh Ct) 56, paras [89] to [100].

[459] The Sale of Goods Act 1893, harmonising the law of sale in Scotland with that in England and Wales and dispensing with the requirement for delivery, came into force on January 1st 1894.

[460] See e.g. Erskine, *Institute*, II, 1, 19; Reid, *Property*, para 621.

[461] Gloag & Irvine, *Rights in Security*, 220.

actual owner: possession and ownership coincided. This, however, would not bar the buyer from raising a claim for breach of contract against the seller.[462]

Nonetheless, there may have been cases prior to 1894 where ownership was transferred despite the seller remaining in possession. An example is delivery *constitutum possessorium* (transfer by a possessory declaration or agreement) or, for instance, "sale and lease back".[463] This would occur, for example, where goods had been sold to a buyer and then redelivered to the seller, consequently being in the seller's possession and visible to the seller's creditors. "Goods left with the seller if properly separated […] and marked and distinguished as the buyer's" is a situation included by Bell within his list of exceptions to reputed ownership.[464] However, in cases where a buyer had acquired title and had "allowed the vendor to keep possession" unnecessarily or carelessly, this was "considered as analogous to a case of reputed ownership".[465] However, as stated, it was not possible for reputed ownership to apply where delivery had not taken place, as the seller remained the owner.

This sale scenario was drastically altered with the passing of the Mercantile Law Amendment Act (Scotland) 1856 (hereinafter "the 1856 Act"). Section 1 of the Act allowed the buyer of goods remaining in the "custody of the seller" to claim the goods in the event of the seller's bankruptcy in preference to the creditors of the seller.[466] The seller remained the owner of sold but undelivered goods, as before, but the buyer's personal right to receive delivery of the goods prevailed over the creditors of the seller. This was a drastic change to the previous situation, in which the creditors of the seller could, in principle, poind undelivered goods, as the seller remained the

[462] See MacQueen & Thomson, *Contract Law*, paras 6.16-6.20.

[463] *Constitutum possessorium* originated in Roman law. For discussion see Reid, *Property*, para 532.

[464] Bell, *Principles*, §1315. Bell states that such goods are "not to be taken by the seller's creditors".

[465] *McBain v Wallace & Co.* (1881) 8 R. (H.L.) 106, at 113 per Lord Blackburn.

[466] Mercantile Law Amendment Act (Scotland) 1856, s 1. The provision itself reads: "From and after the passing of this Act, where goods have been Sold, but the same have not been delivered to the Purchaser, and have been allowed to remain in the Custody of the Seller, it shall not be competent for any Creditor of such Seller, after the Date of such Sale, to attach such goods as belonging to the Seller by any Diligence or Process of Law, including Sequestration, to the Effect of preventing the Purchaser or others in his Right from enforcing Delivery of the same […]".

owner. This provision also, in essence, operated as the opposite of reputed ownership, as it *prevented* creditors from exercising diligence over the moveables held by the person who appeared to be (and was) the owner.

The 1856 Act was repealed by the Sale of Goods Act 1893,[467] which instituted a different method of protecting purchasers of goods and opened up the possible application of reputed ownership in cases of sale. However, during the 37 years of its existence, the 1856 Act generated a certain amount of case law, which sought to examine the scope of the rule. It was held, for example, that a contract for the sale of an indeterminate quantity of goods was excluded from the scope of the provision.[468] The provision required "a present sale in the ordinary sense, whereby the seller is under an immediate and present obligation to deliver a specific *corpus*. The buyer, on the other hand, is under an obligation to pay an ascertained price".[469] It was held in subsequent cases that the provision would not operate where the "beneficial use and enjoyment" of the goods had been retained by the seller as well as the possession.[470]

It is unclear why the 1856 Act was held not to apply in cases where the use of the property had been retained by the seller. A possible suggestion is that, in these instances, the seller was more obviously the owner of the goods than in the case where the goods were held but not used. Considering, however, that the seller in possession was often the owner anyway (prior to January 1st 1894), this suggestion can only be taken so far. Another possibility is that the seller went beyond the role of a mere custodier of the goods (by using the goods himself he was "possessing" them). Thus, it may be that the 1856 Act required *custody* on the part of the seller (the word

[467] Sale of Goods Act 1893, sch 1.

[468] *McMeekin v Ross (Scott's Trustee)* (1876) 4 R. 154. This case concerned the purchase of scrap iron not only in the seller's possession but further scrap iron produced over a three-month period. The level of uncertainty was exacerbated further, as the scrap iron produced after the three-month period would not only need to be weighed to ascertain its exact value, but its market price needed to be determined at such date.

[469] Ibid, at 160 per Lord President Rutherfurd.

[470] See, for example, *Sim v Grant* (1862) 24 D. 1033, where the Inner House denied the buyer the protection of the statutory provision where a sold mare had remained in the seller's "beneficial use and enjoyment", and also *Edmond v Mowat* (1868) 7 M. 59, where beach bathing-machines disposed of to the defender did not fall within the scope of section 1 as the seller had continued to use the machines, advertise them as his own and appropriate the profits for them.

used in section 1) and not possession. In the event that the seller overstepped the mark and began to possess, he was brought out of the scope of the provision.

These suggestions are speculative. It is unclear exactly why cases of use were excluded from the 1856 Act. The topic is now only of historical significance, given the 1856 Act's short lifespan.

F. CONCLUDING REMARKS

The doctrine of reputed ownership developed to permit creditors to poind corporeal moveables in the possession of their debtors when such possession had resulted from "fraudulent", careless or unnecessary conduct on the part of the true owner of the goods. Bell developed the doctrine in the most detail. There was also a recognition of "collusion" committed by the owner and the possessor together so as to mislead such creditors. In consequence of such conduct, such creditors may often have trusted to the personal credit of their debtor, which also seems to be the doctrine's underlying rationale.

Litigation in respect of reputed ownership appeared to peak during the nineteenth century. It diminished thereafter. The Sale of Goods Act 1893, which increased the instances of separation of ownership and possession, allowed for the doctrine's possible application in cases of sale. In the next chapter, we will examine the doctrine's legal basis as well as the extent to which reputed ownership survives under the modern law.

5 THE DOCTRINE OF REPUTED OWNERSHIP IN SCOTS LAW – PART 2

A. INTRODUCTION

As we saw in the previous chapter, the doctrine of reputed ownership permitted creditors to poind corporeal moveables which were possessed but not owned by their debtors in circumstances where such possession had resulted from "fraudulent", careless or unnecessary conduct on the part of the true owner of the goods. The development of the doctrine is associated particularly with Bell, who emphasised the "collusion" between the owner and the debtor so as to mislead the creditors of the latter. In this chapter, we examine its legal basis and its possible existence in modern times.

B. THE SCOPE OF THE DOCTRINE

The standard case of reputed ownership is where creditor "C" poinds the goods of debtor "D", not realising that they are actually the property of owner "O". *Macdougall*,[471] *Marston*[472] and *George Hopkinson Ltd.*[473] are all examples. However, an important point that has not been considered in any case is whether the doctrine is capable of applying outside the law of diligence (i.e. in cases where there is no creditor).

At this point a distinction must be made between voluntary and involuntary transfer. In cases where C is a creditor seeking to carry out diligence, there is an involuntary transfer of goods between D and C. As was observed in the previous chapter,[474] D, by failing to disclose the true ownership of the goods, has been "fraudulent", even if the main fault lies with O for carelessly placing D into possession. However, in cases where C is a *bona fide* purchaser seeking to take title from D, there is a potentially voluntary transfer between D and C, signifying a much larger degree of fault upon the

[471] *Macdougall v Whitelaw* (1840) 2 D. 500.

[472] *Marston v A.A. Miller (Kerr's Trustee)* (1879) 6 R. 898.

[473] *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139.

[474] See Page 91.

part of D (in wilfully selling the goods of another). The case for the protection of C is, therefore, correspondingly stronger.

Much of this territory is already governed by sections 24 and 25 of the Sale of Goods Act 1979, as we have seen.[475] These provisions apply where a non-owning possessor (either "A", the seller, or "B", the buyer) enters into a contract of sale with a second purchaser who is in good faith ("C"). In both cases, C will acquire title to the goods, based upon his good faith (i.e. his lack of knowledge as to the true ownership of the goods). Both provisions operate upon the basis that a pre-existing contract of sale has been concluded between A and B, with either A remaining in possession following the sale, or B being placed in possession following the sale. C is rewarded with title as he might not have entered into the contract of sale with his seller if he had knowledge of the true ownership of the goods.

But sections 24 and 25 will not always apply. An obvious example is where B has possession of goods belonging to A, not upon the basis of a contract of sale, but upon some "unnecessary" basis, and then enters into a contract to sell the goods to C. If A discovers the sale of the goods to C and then seeks to recover his goods, can C plead reputed ownership as a defence? In principle, it is difficult to see why not. After all, if A is simply entitled to recover his goods that he has left carelessly in the possession of another, then A's "fraud", and C's good faith, will be disregarded.

However, the case law may have failed to engage with this issue because, by the end of the nineteenth century, it was simply not necessary to do so. This is because section 21(1) of the Sale of Goods Act 1979 provides that an owner may be, in certain cases, "by his conduct precluded from denying the seller's authority to sell". Thus, there will be cases where the owner is personally barred, as a result of his conduct, from recovering the goods received by the buyer. This is similar to reputed ownership. In effect, it occupies the same juridical space as reputed ownership, but in a manner which is much more attractive to a buyer.

[475] See Pages 71-73.

C. THE LEGAL BASIS OF THE DOCTRINE

As was seen in the previous chapter,[476] both Stair[477] and Bell[478] place emphasis upon "fraud" and "collusion" as the underlying basis of reputed ownership. So too do the early cases which deal with the subject. *Dougall v Marshall*,[479] for example, was decided upon the basis that the defender had "fraudulently colluded" with the debtor by placing the latter into possession.[480] Deception is also highlighted as a fundamental element of reputed ownership in *Marston v A.A. Miller (Kerr's Trustee)*.[481]

(1) The Possible Requirement of "Fraud"

Anderson v Buchanan[482] gave the fullest consideration to the doctrine's underlying basis. The facts of this case are similar to *Hopkinson*. The pursuer had purchased furniture from Gordon[483] but had allowed Gordon to remain in possession for six years until the latter's death, when the furniture was poinded by the defender for certain debts that Gordon had incurred to him. The defender argued that Gordon's continued possession rendered him the "possessor and ostensible owner" of the furniture, thus entitling the defender to poind.[484] This claim seemed to be based upon numerous grounds, including the fact that no delivery had ever been made to the pursuer, meaning that Gordon remained the owner of the furniture.[485] The essence of the defender's claim, however, seemed to lie with the presumption of ownership arising from Gordon's possession, of which the term "reputed ownership" appears to have been adopted merely as a synonym.

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[476] See Pages 87-92.

[477] Stair, *Institutions*, I, 9, 13.

[478] Bell, *Principles*, §1316; Bell, *Commentaries*, *Vol 1*, 270. In his *Principles*, Bell states that such deception "justly exposes the owner to the loss of his goods".

[479] (1833) 11 S. 1028 (see Pages 94-95).

[480] Ibid, at 1030 per Lord Justice-Clerk Mackenzie.

[481] (1879) 6 R. 898, at 901 per Lord Gifford.

[482] (1848) 11 D. 270.

[483] The pursuer had actually purchased the furniture from Gordon's trustee following his sequestration in 1840.

[484] (1848) 11 D. 270, at 271.

[485] Ibid.

The court ruled in favour of the defender. For the majority, the decision in favour of the poinding creditor turned on the presumption of ownership arising from Gordon's possession of the furniture.[486] As Lord Justice-Clerk Hope explained: "long continued possession of moveables for personal and family use […] infers property for the benefit of that possessor's creditors, who saw him in such possession and were allowed to trust to such".[487] Lord Cockburn also ruled in favour of the defender upon the basis of a "legal presumption that the possessor [Gordon] is the owner".[488]

As a result, the majority of the judges in *Anderson* do not engage with reputed ownership. Where they do mention the doctrine, however, the importance of fraud and collusion is specifically dismissed. Take the Lord Justice-Clerk, for example: "To limit the effect of possession to cases in which fraud and collusion is proved, is adverse to our doctrine".[489] He continues: "indeed, nowhere is the doctrine of alleged fraud and collusion, as the foundation of reputed ownership, consistently stated. Even Mr Bell states blameable carelessness as equivalent to fraud, which really gives up the notion of fraud and collusion as necessary".[490]

Lord Moncreiff, however, dissented and focused more deeply upon reputed ownership. In Lord Moncreiff's view, a claim of reputed ownership must be decided upon the basis of personal bar. In the present case, the pursuer was entitled to vindicate his furniture as there had been no element of fraud, upon consideration of the contract between the parties.[491] Lord Moncreiff engaged with the doctrine more closely than the other judges, citing the previously mentioned passages from Bell and Stair and reviewing the previous case law.[492] In doing so, he dismissed the importance

[486] However, see (1848) 11 D. 270, at 277-278 where Lord Medwyn, in his short judgement, adopts a much simpler view and declares that Anderson never became the owner of the furniture as no delivery had ever been made to him by Gordon.

[487] Ibid, at 277.

[488] Ibid, at 284.

[489] Ibid, at 277.

[490] Ibid.

[491] The conclusion of the contract of sale between the pursuer and Gordon was executed with the knowledge of Gordon's creditors at such time.

[492] See *Macdougall v Whitelaw* (1840) 2 D. 500; *Fyfe v Woodman* (1841) 4 D. 255.

of a presumption of ownership from possession, claiming the significance of fraud to be "clear and right".[493]

The view taken by Lord Moncreiff is supported in later cases[494] and has been claimed as an accurate statement of the law.[495] Yet the Lord Justice-Clerk was correct in saying that Bell equated "carelessness" or "unnecessary" conduct with fraud for the purposes of reputed ownership. Thus, Bell did not insist upon fraud as such but thought that it was sufficient to show carelessness or unnecessary conduct, in the absence of intentional deceit.

Even in some of the cases discussed, the significance of fraud is downplayed. In *Marston v A.A. Miller (Kerr's Trustee)*,[496] for example, it is only Lord Ormidale who mentions that "there is no ground for saying that there was any fraud or collusion" in such case.[497] What was at issue was whether the possession held by Mr Kerr was necessary or not, in the light of the owner's particular trade.

On the whole, it seems that reputed ownership does not have a strict requirement of fraud. This is an important finding. It will be seen later in this chapter that the best way in which to conceptualise reputed ownership is as a form of personal bar, and personal bar has no requirement of fraud.

(2) The Link with The Presumption of Ownership

Hopkinson,[498] the facts of which were discussed in the previous chapter,[499] marked a clear division between reputed ownership on the one hand and the presumption of ownership from possession on the other. This had the effect of clarifying that the latter could not be the underlying basis of the former. According to Lord President Cooper, reputed ownership applies when the true owner is "personally barred from proving his ownership; but if the circumstances do not raise the plea of bar […] the possession of

[493] (1848) 11 D. 270, at 281.

[494] *Marston v A.A. Miller (Kerr's Trustee)* (1879) 6 R. 898, at 900 per Lord Ormidale; *Orr's Trustee v Tullis* (1870) 8 M. 936, at 951 per Lord Neaves.

[495] Gloag & Irvine, *Rights in Security*, 236.

[496] (1879) 6 R. 898 (see Pages 96-97).

[497] Ibid, at 900.

[498] *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139.

[499] See Pages 97-98.

the moveables can create no more than a presumption of fact […] capable of being redargued".[500] This is, in essence, to allow a third party to rely upon two possible arguments: one of reputed ownership when the owner has been fraudulent or careless, and one of a presumption of ownership arising from possession.

However, in the recent decision of *Canning*[501] (where a librarian raised reputed ownership as one ground for declarator of her ownership of a library collection),[502] there appears to be a conflating of the two doctrines. In his decision, Sheriff S Reid dismissed the pursuer's claim for declarator of ownership upon the basis of reputed ownership on the ground that the pursuer did not fulfil the requirements needed to satisfy the evidential presumption of ownership arising from her possession. As the pursuer did not have possession in the strict sense (as is required for the presumption to operate),[503] "she cannot rely upon the evidential presumption of ownership arising from possession of corporeal moveable property".[504]

The relevant passage in the judgement should be treated with care. Although the term "reputed ownership" is not actually mentioned, the discussion within which the presumption of the pursuer's ownership is contained is headed "Reputed Ownership". Neither fraud nor carelessness is mentioned by the Sheriff, nor are they present on the facts of the case. Perhaps it would be better to ignore the reference to "reputed ownership" in the judgement and consider the case as one concerned only with the presumption of ownership from possession.

(3) South African Law

Some judges and authors, when dealing with reputed ownership, place emphasis upon the true owner being personally barred from recovering his property.[505] For the

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[500] *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139, at 147.

[501] *Canning v Glasgow Caledonian University* 2016 S.L.T. (Sh Ct) 56.

[502] See Page 99.

[503] 2016 S.L.T. (Sh Ct) 56, at para [96]. See Pages 52 and 61-64.

[504] Ibid, at para [100]. According to Sheriff S Reid, "Mrs Canning held the library throughout as a steward, keeper or depositary. In law she did not have possession of it; she held it not for herself but for the true owner".

[505] See *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139, at 147 per Lord President Cooper and at 150-151 where Lord Keith associates "reputed possession" with personal bar (it is likely that Lord Keith is referring to reputed *ownership*, as he discusses the ability of debtors to pass a good title to

purpose of evaluating such a conclusion, it will be of use to examine briefly South African law, which adopts the same approach. In South Africa, however, what in Scotland is called "reputed ownership" is subsumed into the broader doctrine of estoppel.

The South African sources describe "estoppel" in this context as a means of protecting one's interests in property.[506] When an owner has placed property into the hands of another, he is personally barred from seeking the *rei vindicatio* from a third party if certain conditions are fulfilled.[507] Firstly, the owner must have "misrepresented"[508] to such third party that the current possessor is the owner, usually by his or her conduct, with the possessor appearing (to the third party) to have certain *indiciae* of *dominium* (such as a power of disposal). An example is the owner of a motor vehicle delivering the vehicle, together with licence and registration documents, to a dealer who subsequently displays the vehicle in their showroom.[509] Furthermore, the owner must have acted negligently, with the test for negligence being whether a "reasonably prudent person" would have foreseen the harm caused to the third party and would have acted against it.[510] Thirdly, there must have been reliance upon the possession

goods not their own). See also Watson, *Bell's Dictionary and Digest*, 915; Gloag & Irvine, *Rights in Security*, 237. A minor point, but one certainly worth mentioning, is that these sources place emphasis upon the true owner being personally barred from *proving his ownership*. However, proof of ownership is not what is barred here; it is the remedy of vindication, as what is assessed is the owner's *conduct* in his capacity as owner.

[506] According to Van der Merwe and Pope, estoppel was accepted into South African law as a conglomeration of Roman-Dutch law and English law's "estoppel by representation", see Cornelius G. van der Merwe and Anne Pope, "Ownership" in Du Bois, *Wille's Principles*, 552. Even in English law, "estoppel by representation" is analogous to the type of situation covered by reputed ownership, when a party makes a "precise and unambiguous representation of fact" which later bars them from denying its validity if its recipient acted upon such statement to his detriment, see Burrows, *English Private Law*, para 8.202; *Low v Bouverie* [1891] 3 Ch. 82.

[507] Badenhorst et al., *Silberberg and Schoeman*, para 11.2.1.1.

[508] This has been described as "culpable misrepresentation", see Cornelius G. van der Merwe and Anne Pope, "Ownership" in Du Bois, *Wille's Principles*, 552.

[509] Ibid, 553. See *Electrolux (Pty) Ltd. v Khota* 1961 (4) S.A. 244 (W).

[510] See *Konstanz Properties (Pty) Ltd. v W.M. Spilhaus en Kie (W.P.) Bpk* 1996 (3) S.A. 273 (A), where Nienaber J.A. held that the respondent should "reasonably have foreseen" that his client would, as a retailer, upon receiving possession of pipes and valves, seek to resell them to members of the public such as the appellant.

by the third party[511] with resulting loss being potentially suffered which must have been directly caused by such reliance.[512]

The detailed rules do not matter for present purposes. What is worthy of note is that the South African doctrine is very similar to reputed ownership in Scotland. It is also similar both in breadth and content to section 21 of the Sale of Goods Act 1979. If it is correct to classify the South African doctrine as a form of estoppel, as is commonly done,[513] then this may suggest that the corresponding doctrine in Scotland (i.e. reputed ownership) is part of the law of personal bar.

(4) A Form of Personal Bar

Indeed, the best explanation of reputed ownership lies in the law of personal bar. The owner is personally barred from recovering his property, based upon his conduct, and not upon a presumption of ownership arising from the debtor's possession. This section explains why, and how.

To begin with, reputed ownership is, in essence, encapsulated within one of the "scenarios" of personal bar as given by Rankine in his book on the subject:[514] that of a person (i.e. the owner) who "by conduct of culpable negligence" has "led another into the belief of a certain state of facts" (i.e. that the party in possession is the owner) which, in turn, is "the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice" (i.e. resulting in the creditor suffering loss by being unable to exercise diligence). Reid and Blackie, in their standard textbook on the subject, provide a table expressing the "elements of personal bar":[515]

[511] Badenhorst et al., *Silberberg and Schoeman*, para 11.2.1.1.

[512] Ibid.

[513] See David Carey Miller, "Transfer of Ownership" in Zimmermann & Visser, *Southern Cross*, 733-734; Carey Miller, *Acquisition and Protection*, 308-325.

[514] Rankine, *Personal Bar*, 5.

[515] Reid & Blackie, *Personal Bar*, lxv.

(A) <u>INCONSISTENCY</u>:

(1) A person claims to have a right, the exercise of which the obligant alleges is barred.

(2) To the obligant's knowledge, the rightholder behaved in a way which is inconsistent with the exercise of the right. Inconsistency may take the form of words, actions, or inaction.

(3) At the time of so behaving the rightholder knew about the right.

(4) Nonetheless the rightholder now seeks to exercise the right.

(5) Its exercise will affect the obligant.

(B) <u>UNFAIRNESS</u>:

In the light of the rightholder's inconsistent conduct, it would be unfair if the right were now to be exercised. Any of the following is an indicator of unfairness:

(6) The rightholder's conduct was blameworthy.

(7) The obligant reasonably believed that the right would not be exercised.

(8) As a result of that belief the obligant acted, or omitted to act, in a way which is proportionate.

(9) The exercise of the right would cause prejudice to the obligant which would not have occurred but for the inconsistent conduct.

(10) The value of the right barred is proportionate to the inconsistency.

Firstly, we will examine requirement **(2)**. The authors note that the rightholder (i.e. the owner) must behave in a way which is inconsistent with the right to vindicate, whether that be by action or by inaction.[516] Placing goods into the possession of another is inconsistent with the right to recover, as delivering property into the hands of another is factually the opposite of recovering the goods. To strengthen this point, the owner may not have simply delivered the goods to another, but may have allowed the goods to remain in the possession of that other for a significant period of time without any attempt on his part to retrieve them. This, in turn, results in a "misleading impression

[516] Reid & Blackie, *Personal Bar*, para 2-07. According to the authors, "personal bar operates only in the face of inconsistency".

[of ownership] left uncorrected" which leads to the impression "that a challenge will not be forthcoming".[517] Therefore, this behaviour undertaken by the owner is inconsistent with the right to recover the goods.

Secondly, under **(6)**, the owner's conduct can be considered "blameworthy". Reid and Blackie speak of the "culpability" of the rightholder.[518] We have already seen[519] that, for reputed ownership, the behaviour of the owner is required to be fraudulent or careless, and this will be enough to infer blameworthiness. Reid and Blackie clarify that the rightholder is under a "duty to speak" when he had access to information not readily available to the obligant.[520] In these situations, "it is considered reasonable in the circumstances that the party who may act to his detriment should be warned by the other party".[521] Given the third party's reliance upon the credit of his debtor (or the trustworthiness of his seller), there is arguably such "duty to speak" in cases of reputed ownership.

But even blameworthiness is not essential for personal bar. According to the Reid and Blackie table, "any" of factors **(6)** to **(10)** is an indicator of unfairness. Hence, provided that the other factors are satisfied (as they often will be), reputed ownership can still be conceptualised as personal bar even if **(6)** (blameworthiness) is absent. It would seem, therefore, that reputed ownership fits neatly into the requirements for personal bar. This analysis is consistent with judicial and academic opinions which classify reputed ownership as based upon personal bar.[522]

(5) Another Rationale? – Fraud on Creditors

As we have seen, fraud is not a strict requirement of reputed ownership, although its presence will serve to strengthen the position of the creditor. But might it still be possible to conceptualise the doctrine as belonging to the law of fraud?

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[517] Reid & Blackie, *Personal Bar*, para 2-22.

[518] Ibid, paras 2-43-2-46.

[519] See Pages 90-92 and 105-107.

[520] Reid & Blackie, *Personal Bar*, para 2-44.

[521] *Universal Stores Ltd. v O.K. Bazaars (1929) Ltd.* 1973 (4) S.A. 747 (A), at 761-762 per Rumpff J.A.

[522] *George Hopkinson Ltd. v Napier & Son* 1953 S.C. 139, at 147 per Lord President Cooper and at 150 per Lord Keith; Watson, *Bell's Dictionary and Digest*, 915; Gloag & Irvine, *Rights in Security*, 237.

As explained in the previous chapter,[523] "fraud" is often regarded as having a rather narrow meaning: that of intentional deceit.[524] As T.B Smith points out, however, fraud at one time had a wider meaning, being held to encompass "a variety of situations in which one party had taken unfair advantage of the other".[525] Even under the modern law, there remains a category of cases belonging to the law of fraud which does *not* depend upon intentional deceit: that of "fraud on creditors".[526] MacLeod gives the familiar example of an insolvent debtor who gives away his assets to his friends so that they may not be attached by his creditors.[527] In these cases, even where the debtor acts with the full intention of repaying his debts, his creditors are said to be defrauded. MacLeod classifies the offside goals rule as part of the law of "fraud on creditors", the creditor in these cases being the first to purchase.[528] The analogy between the "collusion" between a seller and the second purchaser in the offside goals context, with the owner and the debtor under the law of reputed ownership, was mentioned earlier.[529]

It seems, therefore, that reputed ownership might also be capable of being conceptualised as a type of "fraud on creditors". To allow the owner to recover his property would be to prefer the claim of the person who carelessly created the appearance of personal credit in the possessor to the claim of the possessor's creditor who relied on and was misled by such possession. It is not implausible to regard the creditor as "defrauded", even in the absence of an intention to deceive.

However, it is submitted that the best manner in which to view reputed ownership is as a species of personal bar, as its *effect* is to bar the owner from vindicating his property where his conduct has been fraudulent or careless. The remedy is important. In the types of cases discussed in this chapter and the previous, the pursuer will be

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[523] See Page 90.

[524] See Erskine, *Institute*, III, 1, 16; Forbes, *Institutes*, III, 10, 10.

[525] Smith, *Short Commentary*, 838-839.

[526] John MacLeod, "The Offside Goals Rule and Fraud on Creditors" in McCarthy, Chalmers and Bogle, *Essays in Conveyancing and Property Law* (n 424), 123.

[527] Ibid.

[528] Ibid, 123-140. Fraud as the basis for the offside goals rule has also been supported by Reid, see Reid, *Property*, para 695.

[529] See Pages 91-92.

the owner, seeking to vindicate his goods against the defender creditor (who wishes to attach them). Thus, reputed ownership (raised by the creditor) is always a defence to an action (the action being one for delivery by the owner). This fits in with personal bar, which is always a defence to an action as opposed to a cause of action. By contrast, the doctrine of fraud on creditors provides a cause of action (for example, reduction in the case of offside goals).

Of course, in some cases the owner may have been "fraudulent" in respect that he intended to deceive the debtor's creditors. But the fact that fraud is not a strict requirement means that, whilst it is possible to perceive reputed ownership as part of the law of "fraud on creditors", the best way to conceptualise it is as a form of personal bar.

D. INTERACTION WITH THE PRESUMPTION OF OWNERSHIP

It is easy to see how reputed ownership might interact with the presumption of ownership. Take the typical fact pattern of a creditor having attached goods which were possessed but not owned by his debtor. When the owner seeks to vindicate the goods, one of the possible defences open to the creditor is the presumption of ownership from possession. As we observed in a previous chapter,[530] the pursuer's task in rebutting this presumption involves establishing (1) that he had ownership of the goods at one point in the past, and (2) that such ownership was not lost alongside the cessation of possession. If the pursuer is able to overcome this two-stage test, the defence fails and, in principle, he will be entitled to recover the goods.[531]

In the majority of instances, the owner will indeed be able to rebut the presumption of ownership (by producing evidence of some kind). But the creditor is still left with the defence of reputed ownership. The creditor would, in this case, have to establish that the owner placed the property into the possessor's hands fraudulently or carelessly. If the creditor succeeds, he will be entitled to attach the goods and the owner will be personally barred from seeking recovery.

[530] See Pages 46-48.

[531] *Chief Constable of Strathclyde Police v Sharp* 2002 S.L.T. (Sh Ct) 95.

Sometimes there is a degree of conflation between the two defences, as in the most recent decision of *Canning*.[532] And it is certainly true that a creditor raising a plea of reputed ownership has relied upon the fact of possession as evidence of ownership. But the proper analysis is to see the defences as sequential. The simplicity of the presumption of ownership makes it the obvious first line of defence against an owner who is seeking to vindicate his property. Reputed ownership appears to be a second possible defence raised by a defender if, and when, the presumption has been rebutted. Either plea, if successful, has the effect of preventing the owner from recovering his goods. The requirements for each, however, are different.

E. THE LEGAL EFFECT OF THE DOCTRINE

This discussion leads to a consideration of the legal effect of reputed ownership. If reputed ownership is indeed a form of personal bar then its effect is simply to prevent the owner from vindicating his goods. There is nothing in the discussion undertaken until now to suggest that the third party acquires title to the property. Certainly, the common law of personal bar does not confer title upon the buyer.[533] If this is correct, then reputed ownership cannot be an exception to the *nemo plus* principle. Any recognised exception to *nemo plus* allows a party to transfer to another a patrimonial right that they do not have (in this case, a party in possession transferring the right of ownership). With reputed ownership, however, such right is not transferred; the owner is simply personally barred from recovering.

One must, therefore, consider the practical disadvantage to a third party of raising a plea of reputed ownership, given that the doctrine perpetuates the separation of ownership from possession. In South African law, this has been described as "detrimental to the interests of trade and commerce" as, without having acquired title, the third party cannot later confer a good title upon any other party.[534] Accordingly, Rabie favours the approach of recognising an acquisition of ownership by the party

[532] *Canning v Glasgow Caledonian University* 2016 S.L.T. (Sh Ct) 56.

[533] Reid & Blackie, *Personal Bar*, para 11-24.

[534] J.C. Sonnekus, *The Law of Estoppel in South Africa*, *Second Edition*, Durban: Butterworths, 2000, 197. This book is an updated edition of P.J. Rabie, *The Law of Estoppel in South Africa*, Durban: Butterworths, 1993.

who has successfully raised the plea of estoppel.[535] Nevertheless, in South African law, the acquisition of ownership by such third party is a question which has never been settled.[536]

In Scots law too it would be preferable to recognise an acquisition of ownership by the third party. It makes little sense for the owner to retain their ownership but no longer be entitled to recover the property. From the opposite perspective, the third party has possession without being entitled to the benefits that ownership confers. Historically, a successful plea of reputed ownership allowed a creditor to poind the goods of another and dispose of them (to recover their debts), exercising an important entitlement of ownership (the right of disposal).[537] One wonders, therefore, why they are not deemed to acquire title. Considering, moreover, that reputed ownership may apply to cases of voluntary transfer (in addition to diligence),[538] the acquisition of ownership by a *bona fide* buyer seems plainly preferable.

This would mean, however, that section 21 of the Sale of Goods Act 1979 would likely have to be construed in the same way. Allowing section 21 to pass title is supported by the editors of *Benjamin's Sale of Goods* on the basis of "commercial convenience",[539] a point also supported by Reid and Blackie in relation to Scotland.[540] Reid, moreover, supports the "actual conferring of title" under section 21 but by "statutory authority"[541] and not as a "consequence of the operation of personal bar".[542]

Thus far, Scots law has not engaged with this question. As matters currently stand, it seems that reputed ownership is a form of personal bar and does *not* have the additional effect of being an exception to *nemo plus*.

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[535] Sonnekus, *Estoppel* (n 534), 201.

[536] Ibid, 202. See *Johaadien v Stanley Porter (Paarl) Pty Ltd*. 1970 (1) S.A. 394 (A).

[537] For the benefits conferred by ownership, see Chapter 1, in particular Pages 19, 23, 25-26 and 33..

[538] See Pages 103-104.

[539] Bridge, *Benjamin's Sale of Goods*, para 7-008.

[540] Reid & Blackie, *Personal Bar*, para 11-24.

[541] Reid, *Property*, para 680.

[542] Reid & Blackie, *Personal Bar*, para 11-24.

F. THE PRESENT LAW

It was mentioned briefly in the second chapter that a statutory presumption of ownership currently exists in the law of diligence.[543] That presumption is present in respect of attachment, which today has replaced poinding as the standard diligence in respect of corporeal moveables. Section 13 of the Debt Arrangement and Attachment (Scotland) Act 2002 (hereinafter "the 2002 Act") provides that a Sheriff Officer executing an attachment of the debtor's property may "assume"[544] that the debtor has ownership (sole or common) of the articles in his possession.[545] This is, at first glance, similar to reputed ownership in the respect that a creditor is entitled to treat his debtor as a "reputed owner" of goods in his possession whether or not they belong to him. The Sheriff Officer is, however, under an obligation to make enquiries as to the ownership of the article if people are present at the place where it is situated.[546] This is, in essence, a statutory version of the warning that Bell gives in his *Commentaries*[547] with regards to the duty of creditors to take due care as to ownership. Accordingly, if the Sheriff Officer knows, or ought to know, that the "contrary is the case" (i.e. that the debtor is not the owner of the goods), he is prohibited from proceeding with the attachment.[548]

Moreover, these statutory provisions do not preclude a third party from making a claim under section 34, prior to the auctioneering of the property, that the property in question is really their own.[549] As an example, an owner, upon discovering that his valuable furniture (that he left in the possession of another) is soon to be auctioned, can raise a claim as to his ownership of the goods.

These statutory provisions seem reasonably clear. A Sheriff Officer seeking to attach a debtor's property is entitled to treat the debtor as owner with regards to the goods in his possession, provided that (1) the Sheriff Officer has made enquiries if people are

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[543] See Page 46.

[544] "Assumption", not "presumption", is the language of the specific provision. "Presumption", however, is the term used by the title of the section.

[545] Debt Arrangement and Attachment (Scotland) Act 2002, s 13(1).

[546] Ibid, s 13(2).

[547] Bell, *Commentaries*, *Vol 1*, 271 (see Pages 88-89).

[548] Debt Arrangement and Attachment (Scotland) Act 2002, s 13(3).

[549] Ibid, s 34(1).

present at the place where the article is situated, and (2) there are no disputed claims as to the ownership of the goods under section 34. Where, therefore, does reputed ownership fit into this scheme (if anywhere)?

The answer may possibly lie in the operation of section 34. As we have seen, any party challenging the possession of another will have to overcome the presumption of ownership from possession.[550] This will involve overcoming the two-stage test. If the pursuer cannot overcome this test, he will not be entitled to recover possession. If, however, he can overcome this test and prove his continuing ownership, then the Sheriff Officer or Sheriff will, presumably, be "satisfied" as to the claim under section 34, resulting in the pursuer being entitled to recover his property. In this respect, section 13 is, in essence, a statutory re-enactment of the presumption of ownership, and section 34 is an enactment governing its rebuttal. In consequence, the defender must raise another possible defence if he wishes to hold on to the goods.

In principle, the owner's right of recovery is, like all rights, subject to personal bar. As we have observed, reputed ownership is a part of the law of personal bar. Therefore, it remains a possibility that, in response to an owner's claim for recovery of his goods under section 34, reputed ownership can still be pled by a creditor. If successful, this will result in the owner being personally barred from recovering possession. It appears, therefore, that reputed ownership continues to have a place in the modern law of diligence.

G. CONCLUDING REMARKS

We will conclude matters with a few summarising remarks. Reputed ownership (the foundations of which were discussed in the previous chapter) has the effect of personally barring an owner from recovering goods when he has placed the goods fraudulently, carelessly or unnecessarily into the possession of another. The presumption of ownership from possession is also present in these cases. Yet it is not the basis of reputed ownership. Reputed ownership can alternatively be conceptualised as part of the law of "fraud on creditors" as creditors can be regarded

[550] See Chapter 2, in particular Pages 46-48.

as “defrauded” even where such possession was entrusted without the intention to deceive. However, the most useful way in which to envisage reputed ownership is as a form of personal bar, as it neatly fits into the template for personal bar as expounded by Reid and Blackie.

It remains unclear whether reputed ownership applies to cases of voluntary grants, such as sale and pledge, as well as to cases of diligence. We have observed that, in principle, it can. However, it is highly unlikely to be exploited in respect of sale, given the existence of section 21 of the Sale of Goods Act 1979. Lastly, it is suggested that reputed ownership still survives in the diligence context, as a possible defence invoked by a creditor under section 34 of the Debt Arrangement and Attachment (Scotland) Act 2002. To date, however, there have been no cases concerned with section 34.

6 CONCLUSION

It is time to summarise and reflect upon the topics discussed in this text. It was the aim of this dissertation to analyse closely the relationship between the ownership and possession of corporeal moveable property in selected circumstances. The topic is a large one and difficult to manoeuvre and link together. It was important to ascertain initially the mutual distinctiveness of ownership and possession in legal doctrine. By examining the differences between both in the civilian tradition, through an examination of Roman law as well as legal systems whose doctrines of ownership and possession are based upon Roman law, it was clarified that ownership is the principal, or the "parent", real right. Possession, by contrast, is a subordinate real right. It was concluded that possession is more factual in its nature than other subordinate real rights, but a right from whose factual nature important legal consequences flow.

One such consequence is the presumption of ownership arising from possession. The presumption is primarily a matter of the law of evidence, operating in favour of the possessor against another party who asserts that the moveables are really his. The burden of proof lies upon the latter party, who must overcome the "two-stage test" in order to recover his property. It does not matter whether the possessor is in bad faith or is in good faith. Nevertheless, it seems that the presumption does require *animus domini* and natural possession on the part of the possessor and, by existing as a weakened form of the "publicity principle" (as, from January 1st 1894, a transfer of ownership on sale no longer requires a transfer of possession), it borrows important substantive concepts from the law of property also. As well as questions of legal separation, examining the presumption involves observing many cases where ownership and possession are *factually* separated.

As well as being protected by the presumption, non-owning possessors can, in some cases, transfer ownership of goods to a *bona fide* acquirer. Various statutory provisions enable this, in particular sections 24 and 25 of the Sale of Goods Act 1979. It seems that the meaning of possession adopted under the 1979 Act has its origins in the Factors Act 1889, with the consequence that civil possession and custody are both included. This has important implications for the relationship between possession and ownership in this context, as it invites the possibility that mere *custody* is sufficient to

allow title to be passed. In such a case there is *no* factual split between ownership and possession: ownership and (civil) possession lie together. Ownership and *custody* are separated. Arguably, this is not what the 1979 Act envisaged in allowing title to be transferred upon the basis that the transferor is “in possession” of the goods.

Importantly, Scots law has not adopted one singular, uniform exception to *nemo plus* in the case of moveable property, as has been done in continental jurisdictions such as France, Germany, Italy and Spain. The continental jurisdictions, in various ways, are rather generous in granting title to a *bona fide* acquirer. Scots law, however, requires not only for the transferor to be “in possession”, but also insists upon good faith on the part of the transferee and delivery to the latter. Thus, Scots law favours the position of the true owner to a greater extent than the continental jurisdictions.

The common law doctrine of reputed ownership, developed extensively by Bell and by case law in the nineteenth century, permitted creditors to poind moveables in the possession of their debtors but which were owned by another. The rationale was the fraudulent, careless or unnecessary conduct on the part of the owner in entrusting another with possession, as well as the reliance by the creditor on the appearance of personal credit which the possession generated. Thus, like the statutory provisions mentioned earlier, the doctrine is a narrow one in the respect that a third party (i.e. the creditor) cannot acquire a right to such goods unless the true owner has been fraudulent or careless (as well as the above-mentioned reliance upon the possession). Existing as a defence to an action for recovery raised by the owner, the doctrine can be conceptualised as a form of personal bar, as its effect is to bar the owner from recovering. Traditionally, the doctrine has been confined to poinding but it seems that it *can* exist (although in a weakened form) in cases of sale. Poinding has now been abolished, and the application of reputed ownership to its successor diligence, attachment, remains untested.

Finally, there are three main conclusions which can be drawn from this dissertation. Firstly, there is a distinct legal separation between ownership and possession. Secondly, there can be, in many cases, a factual separation between ownership and possession, a possibility common in modern times given the abolition of the requirement for delivery in derivative acquisition by sale. Nonetheless, possession and ownership do often coincide, leading to the presumption of ownership from

possession. Thirdly (and lastly), it is possible for a third party to acquire a right in the property held by a non-owning possessor, both by statute and at common law. Scots law, however, requires a number of factors to be present, making it slightly less favourable to the position of the *bona fide* acquirer than certain continental jurisdictions. The position of the true owner is stronger in comparison.

There is a degree of uncertainty about the exact type of possession required by the Sale of Goods Act 1979, as well as in relation to the scope of the presumption of ownership and to both the scope and the continued existence of reputed ownership. It is hoped that this dissertation has provided at least some clarification to these areas of Scots law.

BIBLIOGRAPHY

TABLE OF STATUTES

1623 21 James I c. 19.

Debt Arrangement and Attachment (Scotland) Act 2002 (2002 asp 17).

Factors Act 1889 (1889 c. 45 (Regnal. 52_and_53_Vict.).

Factors (Scotland) Act 1890 (1890 c. 40 (Regnal. 53_and_54_Vict.).

Family Law (Scotland) Act 1985 (1985 c. 37).

Family Law (Scotland) Act 2006 (2006 asp 2).

Hire-Purchase Act 1964 (1964 c. 53).

Land Registration Act 2002 (2002 c. 9).

Land Registration etc. (Scotland) Act 2012 (2012 asp 5).

Leases Act 1449 (1449 c. 6).

Mercantile Law Amendment Act (Scotland) 1856 (1856 c. 60 (Regnal. 19_and_20_Vict.).

Police and Criminal Evidence Act 1984 (1984 c. 60).

Prescription and Limitation (Scotland) Act 1973 (1973 c. 52).

Sale of Goods Act 1893 (1893 c. 71).

Sale of Goods Act 1979 (1979 c. 54).

Torts (Interference with Goods) Act 1977 (1977 c. 32).

TABLE OF INTERNATIONAL INSTRUMENTS

French Civil Code: <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (Accessed August 10th 2018).

German Civil Code, B.G.B.: <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3791> (Accessed August 10th 2018).

Italian Civil Code: <http://www.altalex.com/documents/news/2014/10/07/del-possesso> (Accessed August 10th 2018).

Louisiana Civil Code: <https://legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent> (Accessed August 10th 2018).

Spanish Civil Code: <http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6370> (Accessed August 10th 2018).

TABLE OF CASES

Edmond v Mowat (1868) 7 M. 59.

Edmond v Reid (1871) 9 M. 782.

Electrolux (Pty) Ltd. v Khota 1961 (4) S.A. 244 (W).

Fleming v Findlay & Co (1832) 10 S. 739.

Four Point Garage Ltd. v Carter [1985] 3 All E.R. 12.

Fyfe v Woodman (1841) 4 D. 255.

Geddes v Geddes (1678) Mor. 12730.

George Hopkinson Ltd. v Napier & Son 1953 S.C. 139.

Gien v Gien 1979 (2) S.A. 113 (T).

Hamilton v Hamilton (1845) 8 D. 308.

Hamilton v Western Bank of Scotland (1856) 19 D. 152.

Heap v Motorists Advisory Agency Ltd. [1923] 1 K.B. 577.

Johaadien v Stanley Porter (Paarl) Pty Ltd. 1970 (1) S.A. 394 (A).

Konstanz Properties (Pty) Ltd. v W.M. Spilhaus en Kie (W.P.) Bpk 1996 (3) S.A. 273 (A).

Macdougall v Whitelaw (1840) 2 D. 500.

Marston v A.A. Miller (Kerr's Trustee) (1879) 6 R. 898.

McBain v Wallace & Co. (1881) 8 R. (H.L.) 106.

McMeekin v Ross (Scott's Trustee) (1876) 4 R. 154.

Morrison v Somerville (1860) 22 D. 1082.

Oppenheimer v Attenborough & Son [1908] 1 K.B. 221.

Orr's Trustee v Tullis (1870) 8 M. 936.

Prangnell O'Neill v Lady Skiffington 1984 S.L.T. 282.

Re Morgan R.&.S.S. Co. 32 La. Ann. 371 (1880).

Reagan v Murphy 105 So. 2d 210 (1958).

Robertsons v McIntyre (1882) 9 R. 772.

Russell v Campbell (1699) 4 Bro Sup. 468.

Scot v Fletcher (1665) Mor. 11616.

Scot of Gorrinberry v Elliot (1672) Mor. 12727.

Shearer v Christie (1842) 5 D. 132.

Sim v Grant (1862) 24 D. 1033.

Stevenson v Beverley Bentinck Ltd. [1976] 1 W.L.R. 483.

Turnbull v Ker (1624) Mor. 11615.

Universal Stores Ltd. v O.K. Bazaars (1929) Ltd. 1973 (4) S.A. 747 (A).

TABLE OF SCOTTISH INSTITUTIONAL WRITINGS

Bell G.J. (with McLaren J), *Commentaries on the Law of Scotland, and on the Principles of Mercantile Jurisprudence*, *Seventh Edition* (2 Volumes), Edinburgh: T.&.T Clark, 1870.

Bell G.J., *Principles of the Law of Scotland, Fourth Edition* (Old Studies in Scots Law, Vol 1), Reprinted Edinburgh: Edinburgh Legal Education Trust, 2010.

Clyde J.A. (ed.), *Hope's Major Practicks* (2 Volumes), Reprinted Edinburgh: The Stair Society, 1937-1938.

Craig T, *Jus Feudale* (Translated by Avon J) (2 Volumes), Edinburgh: W. Hodge & Co. Ltd., 1934.

Erskine J, *An Institute of the Law of Scotland, First Edition* (Old Studies in Scots Law, Vol 5), Reprinted Edinburgh: Edinburgh Legal Education Trust, 2014.

Forbes W, *The Institutes of the Law of Scotland* (Old Studies in Scots Law, Vol 3), Edinburgh: Edinburgh Legal Education Trust, 2012.

MacDowall A (Lord Bankton), *Institute of the Laws of Scotland in Civil Rights: With Observations Upon the Agreement or Diversity Between Them and the Laws of England* (3 Volumes) (ed. Gordon W), Reprinted: The Stair Society, 1993-1995.

McNeill P.G.B. (ed.), *The Practicks of Sir James Balfour of Pittendreich* (2 Volumes), Reprinted Edinburgh: The Stair Society, 1962-1963.

Paton G.C.H. (ed.), *Baron David Hume's Lectures* (6 Volumes), Reprinted Edinburgh: The Stair Society, 1939-1958.

Stair J.D. (Viscount of), *The Institutions of the Law of Scotland* (ed. Walker D.M.), Reprinted Edinburgh: Edinburgh University Press and Glasgow: University of Glasgow Press, 1981.

TABLE OF TEXTBOOKS AND ACADEMIC ARTICLES

Anderson C, *Possession of Corporeal Moveables* (Studies in Scots Law, Vol 3) Edinburgh: Edinburgh Legal Education Trust, 2015.

Anderson C, *Property: A Guide to Scots Law*, Edinburgh: W. Green, 2016.

Anderson R.G., *Assignation* (Studies in Scots Law, Vol 1), Edinburgh: Edinburgh Legal Education Trust, 2008.

Badenhorst P.J., Pienaar J.M. and Mostert H, *Silberberg and Schoeman's The Law of Property, Fifth Edition*, Durban: LexisNexis Butterworths, 2006.

Baker J.H., *An Introduction to English Legal History, Fourth Edition*, London: Butterworths, 2002.

Birks P & McLeod G (ed.), *Justinian's Institutes*, London: Duckworth, 1987.

Bridge M (ed.), *Benjamin's Sale of Goods*, *Tenth Edition*, London: Sweet & Maxwell, 2017.

Bridge M.G., *The Sale of Goods*, *Third Edition*, Oxford: Oxford University Press, 2014.

Brown M.P., *A Treatise on the Law of Sale*, Edinburgh: W.&.C Tait, 1821.

Brown R, *Treatise on the Sale of Goods: With Special Reference to the Law of Scotland*, *Second Edition*, Edinburgh: W. Green, 1911.

Buckland W.W., *A Text-Book of Roman Law from Augustus to Justinian, Third Edition* (Revised by Stein P), Cambridge: Cambridge University Press, 1963.

Buckland W.W. & McNair A, *Roman Law and Common Law: A Comparison in Outline*, *Second Edition* (Revised by Lawson F.H.), Cambridge: Cambridge University Press, 1965.

Burdick W.L., *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey: LawBook Exchange Ltd., 2004.

Burrows A (ed.), *English Private Law, Third Edition*, Oxford: Oxford University Press, 2013.

Carey Miller D.L. (with Irvine D), *Corporeal Moveables in Scots Law*, *Second Edition*, Edinburgh: W. Green, 2005.

Carey Miller D.L., *The Acquisition and Protection of Ownership*, Capetown: Juta, 1986.

Carey Miller D.L., "Title to Moveables: Mr Sharp's Porsche" (2003) Edinburgh Law Review, 7(2), 221-225.

Carr D.J., *Ideas of Equity* (Studies in Scots Law, Vol 5), Edinburgh: Edinburgh Legal Education Trust, 2017.

Carr D.J., *Possession in Scots Law: Selected Themes* (Unpublished MSc Thesis), Edinburgh: The University of Edinburgh, 2005.

Davidson F, Garrity D.J., Macgregor L and Richardson L, *Commercial Law in Scotland*, *Fourth Edition*, Edinburgh: W. Green, 2016.

Dickson W.G., *A Treatise on the Law of Evidence in Scotland, Third Edition* (2 Volumes), Edinburgh: T.&.T Clark, 1887.

Du Bois F (ed.), *Wille's Principles of South African Law*, *Ninth Edition*, Cape Town: Juta & Co. Ltd., 2007.

Du Plessis P, *Borkowski's Textbook on Roman Law*, *Fifth Edition*, Oxford: Oxford University Press, 2015.

Fox D, "Enforcing a Possessory Title to a Stolen Car" (2002) Cambridge Law Journal, 61(1), 27-29.

Fox D, "Relativity of Title at Law and in Equity" (2006) Cambridge Law Journal, 65(2), 330-365.

Gloag W.M. & Henderson R.C., *The Law of Scotland, Fourteenth Edition* (ed. MacQueen H.L. & The Rt Hon. Lord Eassie), London: Thomson Reuters (Professional) U.K. Ltd., 2017.

Gloag W.M. & Irvine J.W., *Law of Rights in Security: Heritable and Moveable: Including Cautionary Obligations*, Edinburgh: W. Green, 1897.

Gordley J, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford: Oxford University Press, 2006.

Gordon W.M. and Robinson O.F. (ed.), *The Institutes of Gaius (With the Latin Text of Seckel & Kuebler)*, New York: Cornell University Press, 1988.

Gow J.J., *The Mercantile and Industrial Law of Scotland*, Edinburgh: W. Green, 1894.

Gretton G.L. & Steven A.J.M., *Property, Trusts and Succession*, *Third Edition*, Haywards Heath: Bloomsbury Professional Ltd., 2017.

Grotius H, *The Jurisprudence of Holland* (Translated with a Commentary by Lee R.W), *Vol 1* (Text Translation and Notes) Oxford: Clarendon Press, 1926.

Harpum C, Bridge S and Dixon M (ed.), *Megarry & Wade: The Law of Real Property*, *Eighth Edition*, London: Sweet & Maxwell, 2012.

Hartkamp A.S., Hesselink M.W., Hondius E.H., Mak C and Du Perron C.E. (ed.), *Towards a European Civil Code*, *Fourth Revised and Expanded Edition*, The Netherlands: Kluwer Law International, 2011.

Haughey D, "Transmissibility of Lease Conditions in Scots Law – A Doctrinal-Historical Analysis" (2015) Edinburgh Law Review, 19(3), 333-359.

Hebert P.M. and Pettway J.R., "Sales of Another's Movables – History, Comparative Law, and *Bona Fide* Purchases" (1969) Louisiana Law Review, 29(2), 329-360.

Helmholz R.H. and Sellar W.D.H. (eds.), *The Law of Presumptions: Essays in Comparative Legal History*, Berlin: Duncker & Humblot, 2009.

Holligan B, *Protection of Ownership and Transfer of Moveables By a Non-Owner in Scots Law* (Unpublished PhD Thesis), Edinburgh: The University of Edinburgh, 2015.

Lovett J.A., "A New Way: Servitude Relocation in Scotland and Louisiana" (2005) Edinburgh Law Review, 9(3), 352-394.

MacQueen H.L. & Thompson J, *Contract Law in Scotland*, *Fourth Edition*, Haywards Heath: Bloomsbury Professional Ltd., 2016.

Mark M (with assistance from Mance J), *Chalmers' Sale of Goods Act 1979 (Including the Factors Acts 1889 & 1890)*, *Eighteenth Edition*, London: Butterworths, 1981.

McCarthy F, Chalmers J and Bogle S (ed.), *Essays in Conveyancing and Property Law (In Honour of Professor Robert Rennie)*, Cambridge: Open Book Publishers, 2015.

McFarlane B, *The Structure of Property Law*, North America: Hart Publishing, 2008.

McKendrick E (ed.), *Sale of Goods*, London: L.L.P. Professional Publishing, 2000.

Mommsen T & Krueger P (ed.), *The Digest of Justinian* (4 Volumes) (English Translation edited by Watson A), Philadelphia: University of Pennsylvania Press, 1985.

Nicholas B, *An Introduction to Roman Law*, Oxford: Oxford University Press, 1962.

Pascal R.A., "Louisiana Civil Law and Its Study" (1999) Louisiana Law Review, 60(1), 1-12.

Pollock F, *A First Book of Jurisprudence for Students of the Common Law*, *Sixth Edition*, London: MacMillan, 1929.

Pollock F & Maitland F.W., *A History of English Law Before the Time of Edward I*, *Second Edition* (2 Volumes), London: Cambridge University Press, 1968.

Pollock F & Wright R.S., *An Essay on Possession in the Common Law*, Oxford: Clarendon Press, 1888.

Rabie P.J., *The Law of Estoppel in South Africa*, Durban: Butterworths, 1993.

Raitt F (with Keane E.H.), *Evidence: Principles, Policy and Practice*, *Second Edition*, Edinburgh: W. Green, 2013.

Rankine J, *A Treatise on the Law of Personal Bar in Scotland*, Edinburgh: W. Green, 1921.

Reid K, *The Law of Property in Scotland*, Edinburgh: Butterworths, 1996.

Reid E.C. & Blackie J.W.G., *Personal Bar*, Edinburgh: W. Green, 1986.

Reid K.G.C. & Gretton G.L., *Land Registration*, Edinburgh: Avizandum Publishing Ltd., 2017.

Reid K & Zimmermann R, *A History of Private Law in Scotland* (2 Volumes), Oxford: Oxford University Press, 2000.

Simpson A.R.C., Styles S.C., West E and Wilson A.L.M., *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte*, Aberdeen: Aberdeen University Press, 2016.

Sonnekus J.C., *The Law of Estoppel in South Africa*, *Second Edition*, Durban: Butterworths, 2000.

Steven A.J.M., *Pledge and Lien* (Studies in Scots Law, Vol 2), Edinburgh: Edinburgh Legal Education Trust, 2008.

Steven A.J.M., "Scottish Property Law 2017" (2017) Juridical Review, 1, 21-31.

Smith T.B., *A Short Commentary on the Law of Scotland*, Edinburgh: W. Green & Son Ltd., 1962.

Stoyanov D, "The Conflict Between the Legal Interests of the Original Owner and the Good Faith Acquirer of Movables – A Comparative Overview of the Solutions" (2015) Lex E.T. Scientia International Journal, 22, Vol 1.

Thomas J.A.C., *Textbook of Roman Law*, Oxford: North-Holland Publishing Co., 1976.

Van der Merwe C.G. & Du Plessis J.E. (ed.), *Introduction to the Law of South Africa*, The Netherlands: Kluwer Law International, 2004.

Van der Merwe C.G., *The Law of Things*, Durban: Butterworths, 1987.

Van Vliet L, "Michael Gerson (Leasing) Ltd. v Wilkinson (Case Comment)" (2001) Edinburgh Law Review, 5(3), 361-371.

Voet J, *The Selective Voet, Being the Commentary on the Pandects* (Paris Edition of 1829) (Translated by Gane P) (6 Volumes), Durban: Butterworth & Co. (Africa) Ltd., 1955-1958.

von Bar C and Clive E (ed.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 Volumes), Oxford and New York: Oxford University Press, 2010.

Watson A, *The Spirit of Roman Law*, London: The University of Georgia Press, 1995.

Watson G (ed.), *Bell's Dictionary and Digest of the Law of Scotland*, *Seventh Edition* (Old Studies in Scots Law, Vol 2), Edinburgh: Edinburgh Legal Education Trust, 2012.

Webster P, *The Relationship of Tenant and Successor Landlord in Scots Law* (Unpublished PhD Thesis), Edinburgh: The University of Edinburgh, 2008.

Wilkinson A.B., *The Scottish Law of Evidence*, London: Butterworths, 1986.

Wortley S, "Double Sales and the Offside Trap: Some Thoughts On the Rule Penalising Private Knowledge of a Prior Right" (2002) Juridical Review, 6, 291-316.

Yiannopoulos A.N., *Property: The Law of Things, Real Rights, Real Actions (Louisiana Civil Law Treatise, Vol II, Fourth Edition)*, Minnesota: WestGroup, 2001.

Yiannopoulos A.N., "Usufruct: General Principles – Louisiana and Comparative Law" (1967) Louisiana Law Review, 27(3), 369-422.

Zimmermann R & Visser D, *Southern Cross: Civil Law and Common Law in South Africa*, Oxford: Clarendon Press, 1996.

TABLE OF OTHER SOURCES

D.V.L.A. Vehicle Registration: <https://www.gov.uk/vehicle-registration> (Accessed August 10th 2018).

Oxford English Dictionary Online: <http://www.oed.com/view/Entry/67528?redirectedFrom=Factual#eid> (Accessed August 10th 2018).

Scottish Law Commission, *Report on Moveable Transactions Vol 2: Security over Moveable Property* (SCOT LAW COM No. 249, 2017).