Possession in Scots Law: Selected Themes

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Declaration

I, Daniel James Carr, declare that this dissertation has been composed by me; that the work is my own; and that the work has not been submitted for any other degree, or professional qualification.

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Daniel James Carr
30th August 2005

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ABSTRACT OF THESIS **(Regulation 47.14)**

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The development of a reasoned and clear theory of possession is vital for the development of Scots property law. Contribution to this development is the aim of this thesis. In the introductory and second chapters a general treatment of possession is given; before the remaining chapters examine the role of possession in specific contexts. The context specific role of possession illustrates the importance of the general issues in practical situations. The introductory chapter considers aims and objectives; before going on to introduce the topic through the examination of the jurisprudential and Scottish literature.

The second chapter will expand upon the core tenets of the theory of possession, notably the dual roles of animus *and* corpus. *This duplex analysis allows examination of the contrast between civil and natural possession. The meaning of corporeality is examined further, by suggesting that an incorporeal can be a thing capable of possession, if a practical interpretation of corpus is accepted. The final matter considered in the chapter is the misuse of the term 'exclusive possession'.*

In the third chapter the role of possession in relation to the law of leases is considered. The role of possession in giving a lease real effect is explained as a potential result of possession of an incorporeal interest. There is subsequent illustration of the importance of the meaning of the term 'exclusive possession', with regard to the distinction between a lease and a license. The latter part of the chapter examines possession of a game lease and the question of the right to possession.

The fourth chapter is concerned with the aspects of possession required for the constitution of rights by prescription. The chapter discusses the need for possession in good faith to acquire ownership, before discussing the extent to which the possession must be adverse.

The final chapter encapsulates the concluding remarks of the thesis. The analysis will suggest that a unitary theory of possession could exist in Scots law given consistent use of terminology. This possible unitary theory of possession will be proposed against a background of the conclusions gleaned from the general and specific parts of the thesis.

Possession: an Overview[1]

> Every treatise on fundamental legal ideas devotes space to a discussion of possession. By general consent, possession has been regarded by jurists at once as one of the most important, and easily as the most difficult, of legal notions. Like many others who have had occasion to deal with the idea in a systematic way, the writer, for several years, as inclination and opportunity have concurred, has sought to understand clearly the difficulties of the problem, and it may be confessed without shame, has entertained hope to solve them, if only to satisfy his own needs.[2]

[1] The reference guide used in this thesis is The Oxford Standard for the Citation of Legal Authorities. It is available at http://denning.law.ox.ac.uk/published/bigoscola.pdf (10th September 2005).

[2] A Kocourek *Jural Relations* (2nd edn The Bobbs-Merrill Company Publishers 1928) x.

A Introduction

In the history of private law, and perhaps even beyond, few subjects have attracted such an intense level of debate as possession. Certain questions within the debate have been at the fore. Perhaps the most vexed of these, is what is the requisite intent, or *animus*, that a person must show to constitute possession? Another celebrated debate, is whether possession is a mere matter of fact; or, whether it carries a juristic quality to define it as a right.[3]

In seeking to map out the basic tenets of possession, the pre-dominant focus will be on its role in private law. The treatment here will be selective. I will evaluate the manner in which possession is attained by reference to *animus* and *corpus*. There then follows scrutiny of the maintenance of possession *animo solo*, which in itself involves discussion of the loss of possession. The examination of *corpus* and *animus* will allow analysis of exclusive possession; and, the idea of possessing an incorporeal. Following the general part, it will then be possible to identify the importance of possession in relation to leases and prescription.

It is also useful to state what will not be discussed due to limitations of space. Protection of possession and *bona fide* possession will not be examined; nor will the question of whether possession is a right or a fact.[4]

B Possession in Scots Law

1 Sources and Development

Possession in Scots law today is overwhelmingly influenced by the civil law.[5] Stair's treatment is described as '…entirely borrowed from the civil law.'[6] The potentially greater influence of the canon law, upon the treatments by Hope[7] and Balfour,[8] is offset by the minimal treatment they give to possession. A reasonably detailed treatment is given by Craig,[9] before the reasoned expositions of Stair;[10] Erskine;[11] Bankton,[12] and to some extent by Bell.[13]

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[3] Stair II. 1. 8.
[4] For a useful discussion see: LPW van Vliet *Transfer of Movables in German, French, English and Dutch Law* (Ars Aequi Nijmegen 2000) 40-44; and, CG Van der Merwe 'Things' in WA Joubert (ed) *The Law of South Africa* (First Reissue Butterworths Durban 2002) Vol 27 [243]
[5] KGC Reid *The Law of Property in Scotland* (Butterworths 1996) [114]; Lord Elchies *Annotations on Lord Stair's Institutions* (Bell & Bradfute 1824) 105.
[6] Lord Elchies (n 5) 105. This is not always seen as a positive model: 'The inveterate German habit of regarding the Roman law as "formulated reason" must be held responsible for this confusion.' H Bond 'Possession in the Roman Law (1890) 6 LQR 259, 260; OW Holmes *The Common Law* (Little, Brown & Co 1945) 206.
[7] Lord Clyde (ed) *Hope's Major Practicks 1608-1633* (Stair Society 1937).
[8] PGB McNeill (ed) *Balfour's Practicks* (Stair Society 1962), Vol 1, 148-49.
[9] Craig 2. 2. 5.
[10] Stair II. 1. 8-27.

The idea of possession is not as merely a fact or a right; rather, the situation is more complicated.[14] A common error, not confined to Scottish sources, is to state that possession is concerned with fact, and ownership with right.[15] Somewhat concomitantly it is often said, in both civilian and common law literature, that: *nihil commune habet proprietas cum possessione*.[16] The fact that these have been conflated to an extent is not a surprise, since we may observe that the gestation of the blurring is civilian. In the classical law, possession was merely a physical state of affairs, which was given protection by the Praetor.[17] With the development of the law, the legal institutions under which physical control could be exercised and associated multiplied. The multiplication required a regulatory device by which the protection of possession was limited to certain of these relationships. Hence the dissonance in the sources of the Digest, and the resulting juristic divide between those requiring *animus domini* and those seeking alternative devices.[18]

The extent to which the phrase *nihil commune habet proprietas cum possessione* represents the position in Scotland is unclear. Despite the punchy attractiveness of the phrase, there is little doubt overlap occurs.[19] Take the presumption of ownership given to the possessor of a moveable for example.[20] This is not to conflate the two concepts; rather it illustrates their relation to each other. Ulpian's phrase, it is submitted, can be taken too far.

2 Importance of the Concept[21]

(a) Moveable Property

[11] Erskine II. 1. 18-30.
[12] Bankton II. 1. 26-35.
[13] Bell §1311-1314.
[14] KGC Reid (n 5) [114].
[15] Stair II. 1. 8. cf LA Selby-Bigge (ed) *Hume's Treatise of Human Nature* (Clarendon Press Oxford 1960) 507; also CJ Berry 'Property and Possession: Two Replies to Locke, Hume and Hegel' in JR Penncock and JW Chapman (eds) *Property* (New York University Press New York 1980) 98.
[16] D. 41. 2. 12. 1. The statement is attributed to Ulpian. cf Craig 2. 2. 5; KGC Reid 'Property Law: Sources and Doctrines' in KGC Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (Oxford University Press Oxford 2000) Vol 1 210; J Domat *Les Loix Civiles dans leur Ordre Naturel* (2nd edn Coignard & Coignard 1645) 470; JW Harris *Property and Justice* (Clarendon Press 1996) 81; FW Maitland 'The Mystery of Seisin' in HLA Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press 1911) 359; HL MacQueen *Common Law and Feudal Society in Medieval Scotland* (Edinburgh University Press 1993).
[17] JAC Thomas *Textbook of Roman Law* (North-Holland Publishing Company 1976) 138.
[18] A Borkowski and P du Plessis *Textbook on Roman Law* (3rd edn Oxford University Press 2005) [6. 3. 2. 2].
[19] This is also the case elsewhere: CG Van der Merwe 'Things' (n 4) [245].
[20] DL Carey Miller *Corporeal Moveables* (W Green & Son Ltd 1991) [1. 12].
[21] It would appear that Hegel was of the opinion that one could possess one's own body: TM Knox (tr) *Hegel's Philosophy of Right* (Oxford University Press Oxford 1967) 47-48; cf Lord Rodger's observation that "*Dominus membrorum suorum nemo videtur*: no-one is to be regarded as the owner of his own limbs, says Ulpian in D 9. 2. 13. pr. Equally, we may be sure, no-one is to be regarded as being in possession of his own limbs." *R v Bentham* [2005] UKHL 18 [14]. See also W Hastie (tr) *Kant's the Philosophy of Law* (T & T Clark Edinburgh 1887) 64-84.

The importance of possession in Scots private law is beyond doubt. The development of a coherent and robust definition of possession is essential in certain areas. In property law, the area with which this work is primarily concerned, the importance is huge. The possession of a corporeal moveable creates a presumption of ownership[22]; and furthermore in relation to this type of property, the doctrines of reputed ownership[23] and delivery are also heavily linked to possession. Likewise, the scope of the remedy spuilzie, which allows recovery of vitiously dispossessed property, is contingent upon the definition of possession.[24] Further, there remain certain forms of right of security in relation to moveables which require possession of the object of the security.

(b) Heritable Property

Possession also has a key role to play in relation to heritable property. Thus, in registration of title the 'proprietor in possession' has special statutory protections from rectification of the register.[25] The acquisition of land by prescription also depends on the manner in which possession is defined; so too the acquisition by prescription of subordinate real rights over land, such as rights of way and servitudes.[26] In addition, the statutory protection which gives a lessee under a short lease protection against third parties requires that possession is taken of the land.[27] The statutorily prescribed form of heritable security also, to some extent, requires clarity as regards rights to possession.[28]

(c) Obligations and beyond

Within private law, but beyond property law, there remain areas in which possession is important. In the law relating to delictual liability, any recovery for consequential economic loss depends on the pursuer showing a 'possessory interest'.[29] The nominate delicts of trespass; ejection, and intrusion[30] are dependant on showing some form of possession. Similarly, statutory liability pertaining to animals and occupiers liability is predicated upon possession of some form. Remaining with non-consensual obligations, the role of possession is crucial in Unjustified Enrichment. The right of the bona fide possessor to fruits and improvements is a clear example; so too is the need to redress unjustified enrichment by possession.

[22] KGC Reid (n 5) [130]; DL Carey Miller (n 20) [1. 12].
[23] KGC Reid (n 5) [532].
[24] DL Carey Miller (n 20) [1. 13].
[25] Land Registration (Scotland) Act 1979 s 9 (3).
[26] See below on page 82.
[27] See below on page 65.
[28] See bellow on page 44.
[29] *Simpson & Co v Thomson* (1877) 5 R (HL) 40, 46 (Lord Penzance).
[30] Kenneth McK Norrie 'The Intentional Delicts' in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (Oxford University Press 2000) Vol 2, 491-493

In criminal law possession is of obvious importance in relation to controlled drugs, reset, theft and other crimes. It is thought that there is scope for using criminal authorities to understand private law possession, and vice versa where there are no policy objections.

3 The Scope of the Present Work

(a) Coverage and Structure

Having set out the numerous areas where possession is important, it is now necessary to indicate which areas have been the subject of attention here. The present work begins with a necessarily selective 'general part', which seeks to examine key aspects of possession. These aspects include the nature of *corpus* and *animus*, as constituents of the acquisition of possession. In this regard, reference is made to the different ways *corpus* may be shown; before considering the dual elements: intention to control or exclude and the intention to benefit oneself, which constitute *animus*. In considering *animus*, the possession of concealed objects is discussed; thereafter, the classical debate over the requirement for *animus domini* is resolved in favour of a qualified *animus domini*.

Afterwards, the 'general part' discusses the nature of civil possession and natural possession. The examination centres on the different connotations attached to the terms; before posing the question whether civil possession depends on natural possession. The tentative suggestion is that civil possession is an independent form of possession, which can be reconciled with institutional authority. The idea of possessing an incorporeal is then discussed. The nature of corporeality is studied in the context of taking possession, which in turn leads to the assertion that one can possess an incorporeal. The final aspect of the general discussion concerns the inherent exclusivity of possession, and highlights the problems of attaching a prefix of 'exclusive' in certain areas of the law.

Having examined possession at a general level and advanced certain conclusions in relation to more controversial areas, the following chapters are specialised. The approach is designed to draw out general conclusions, before illustrating their application in specific areas. The third chapter deals with possession in the context of leases, and focuses on the nature of possession required by the Leases Act 1449. There is then illustration of the problems associated with 'exclusive' possession in relation to licences. The chapter goes on to consider the idea of possessing an incorporeal as regards a game lease; and latterly the right to possession.

In chapter four, prescription is the subject of analysis. The chapter seeks to show that themes enunciated in the general part concerning *animus* and *corpus* find practical expression in relation to prescription. More particularly, an explanation is suggested as regards the *animus* required for prescriptive possession; while in relation to *corpus*, the idea of 'adverse' possession is considered.

(b) Conclusions and their Consequences

Throughout the thesis, at the end of each chapter or section there is a brief summary, which seeks to encapsulate any conclusions reached in that section. The individual section conclusions are framed to allow the general conclusion to draw upon each 'mini-conclusion', so allowing conclusions to be drawn at a taxonomical level. This in turn allows limited discussion of the effects of the findings here on extraneous areas of law that have not been covered in depth in this work. The final conclusion will be to advance a suggestion that there is a unitary theory of possession in Scots law.

The General Part

A Acquisition of Possession

1 Generally

The classic test for the acquisition of possession is composed of the dual requirements of *animus* and *corpus*.[31] The *animus* requirement is concerned with an act of the mind, and represents a subjective limb for the rule of acquisition.[32] The *corpus* is an objective limb concerned with physical detention.[33] Stair states that both elements must be present to begin possession: 'To come now to the requisites for entering *or* beginning possession, there must be both detention of the body, and detention of the mind for use; for neither of the two alone can begin possession.'[34] The elements are now considered in turn.

B *Corpus*

1 Generally

The literal translation of *corpus* from the Latin is 'body'.[35] In private law *corpus* was the term that the Romans used to denote the physical aspect of possession: detention, through which exclusive power or control over the subjects is exercised.[36] Exclusivity is a fundamental component of the *corpus* of possession, and dictates that only one person may possess an interest at one time.[37] It is a matter of logic—and of law—that the nature of physical detention will vary according to the subject matter of the detention.[38]

2 Corporeal Moveables

The manner in which corporeal moveables are physically detained is the most obvious and simple. For Stair the detention of moveables was by '…holding and detaining them in our hands, or upon our bodies, or keeping them under our view or power, and making use of them, or having them in fast places, to which others had no easy

[31] JAC Thomas *Textbook of Roman Law* (North-Holland Publishing Company 1976) 140, notes that the two are both matters of fact. There may be exceptions to the need for both: *Fascastell v Blanerne* (1541) Mor 10598.
[32] Although perhaps ultimately objective since no-one can look into another's mind.
[33] CG van der Merwe *The Law of Things* (Butterworths 1987) [56].
[34] Stair II. 1. 18. cf D. 41. 2. 3; 41. 2. 8; Craig 2. 7. 3; Bankton II. 1. 26; Erskine II. 1. 20; Bell *Principles* §1311; *Moore v Gledden* (1869) 7 M 1016 (IH) 1020; *Beggs v Kilmarnock and Loudoun District Council* 1995 SC 333 (IH) 336H; J Rankine *The Law of Landownership in Scotland* (4th edn W Green & Sons 1909) 4-5; WM Gordon *Scottish Land Law* (2nd edn W Green & Son Ltd 1999) [14-03]; TB Smith *A Short Commentary on the Law of Scotland* (W Green & Son Ltd 1962) 462; KGC Reid *The Law of Property in Scotland* (Butterworths 1996) [117].
[35] PGW Glare (ed) *Oxford Latin Dictionary* (Clarendon Press 1968) 448.
[36] Stair II. 1. 17 & 18; Bankton II. 1. 29; Erskine II. 1. 20.
[37] Craig 2. 2. 5; Stair II. 1. 20; Bankton II. 1. 27; Erskine II. 1. 21; E Perry (tr) *Von Savigny's Treatise on Possession* (6th edn S Sweet 1848) 113-128; D. 41. 2. 3. 4, 5; PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12th edn Sweet & Maxwell 1996) 287; W Markby *Elements of Law* (6th edn Clarendon Press 1905) 203. This point is discussed in more depth on page 61.
[38] *Young v North British Railway Co* (1887) 14 R (HL) 53, 54 (Lord Watson) & 56 (Lord Fitzgerald).

access'.[39] Thus, the *corpus* of actual possession of corporeal moveables is a matter of little difficulty.[40]

3 Corporeal Heritable Property

The *corpus* element required for corporeal heritable property is necessarily more refined, by virtue of the greater disparity between a person's physical actions compared to the size of the subject. The impracticality of exerting physical control, over an entire piece of land, resulted in the rule that detention of a part was detention of the whole, in the absence of contrary physical acts.[41] Possession of land is not *a coelo usque ad centrum*. It is preferable to say that there is a right to possession, which extends *a coelo usque ad centrum*, since physical actions on the surface will not constitute possession of the substrata.[42] The owner's right to possess allows him to prevent others acting to possess the substrata, but does not give possession itself.

4 Symbolical and Constructive Possession

The constitution of the *corpus* of possession may occur in a symbolic or constructive sense in Scots law. Reid suggests that the acceptance of symbols for *traditio* or feudal investiture may have ameliorated inflexibility; however, the delivery of a symbol alone does not necessarily give possession of the thing which the symbol represents.[43] It appears that Stair felt that delivery of a symbol in the presence of the land to be possessed would give possession of the land.[44] It is difficult to reconcile this with a requirement to take physical control. However, it is a convenient *fictione juris*. The approach of Bankton is informative as regards moveable property:

> There is likewise symbolical delivery of moveables, when, in place of the things themselves, a symbol is delivered; but, if the deliverer continues in possession, the property, or other real right, does not pass to the receiver by such delivery, tho an instrument of possession be taken thereon, for that is understood to be simulate; but, if together with the symbol, power and liberty is given to the receiver to take possession, which the owner quits, the property is thereby transferred: thus, the delivery of the keys of a granary or cellar to a purchaser of the corn, wine, or other things therein, infers the delivery of the same. If it is not upon a bargain of sale, or other cause, sufficient to transmit the property, a delivery of keys will only

[39] Stair II. 1. 11. cf E Perry (tr) (n 37) 152-168.
[40] Though, there may be problems with concealed objects: see page 20.
[41] Stair II. 1. 13; *Merchiston v Napier* (1549) Mor 14731; *Hunter v Hardie* (1630) Mor 13793; D. 41. 2. 3. 1.
[42] cf KGC Reid (n 34**Error! Bookmark not defined.**) [119]; *Crawfurd v Bethune* (1821) 1 S 111 (IH); *Forbes v Livingstone* (1827) 6 S 167 (IH), 3 RossLC 409; D. 41. 2. 3. 3; F Lyall 'The maxim *cujus est solum* in Scots law' (1978) 23 JR 147.
[43] KGC Reid (n 34) [119].
[44] Stair II. 1. 15.

> imply a trust or custody. An owner's suffering the buyer to mark the things sold with his sign, is understood thereby to deliver them.[45]

This passage discloses many truths. The delivery of a symbol does not give possession, of the moveable that is symbolically represented, alone. There must be delivery of the symbol and an opportunity for the receiver to take possession, with the concomitant cession of possession by the owner.[46] Thus, while one may observe that the different types of delivery in Scots law may be closely linked with possession,[47] they are not one and the same.

C *Animus*

1 General

As noted above, the mental requirement is *animus*.[48] Reid's approach here is distinctive, because he splits the *animus* required into two distinct elements: an intention to control or exclude others; and an intention to benefit oneself.[49] Both are controversial, and have been the subject of considerable academic discussion and discord.

2 Intention to Exercise Control

(a) General

The importance of this aspect of the *animus* is the relationship between the *animus* and the *corpus*.[50] Another way of describing the matter is to say that the intention to exercise control is the intent to meet the *corpus* requirements of possession. It is the intent which is manifested in the fact aspect of possession; as opposed to the intention to benefit oneself, which one may say is the intent concerned with the right aspect of possession. The intent to exercise control is the aspect of *animus* which concerns the vexed question of the possession of concealed objects, and it is this aspect which will now be examined.

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[45] Bankton II. 1. 22. cf *Taylor v Ranken* (1675) Mor 9118 (Having a key inferred possession of clothes in locked chest); *The Royal Bank of Scotland plc v Macbeth Currie* 2002 SLT (Sh Ct) 128, 133 (Sheriff Forbes); *Gray v Cowie* (1684) Mor 9121; *Maxwel v Maxwels* (1676) Mor 14729. cf *Fraser v Frisby* (1830) 8 S 982 (IH); *Roberts v Wallace and Douglas (*1842) 5 D 760 (IH); *Melrose & Co v Hastie & Co* (1850) 12 D 665 (IH).

[46]KGC Reid (n 34) [619]-[623]; A Rodger 'Pledge of Bills of Lading in Scots Law' 1971 JR 193; *Hamilton v The Western Bank of Scotland* (1856) 19 D 152 (IH); *Sim v Grant* (1862) 24 D 1033 (IH).

[47] Erskine III. 1. 20.

[48] See above on page 15.

[49] KGC Reid (n 34) [123].

[50] F Schulz *Classical Roman Law* (Clarendon Press 1969) 437 would have said this was *animus possidendi*.

(b) Concealed Objects

Concealed objects pose the question whether a thing which is within the power of the potential possessor, but is not known to him as such, is possessed. If a locked box is possessed by A, does A subsequently possess the contents of that box? Does B's possession of land constitute possession of moveables on the land? Beyond these questions there exists a multitude of potential vicissitudes. What if the possessor initially knew of the concealed item, yet has now forgotten about it? What if the item was placed within the receptacle after its acquisition? To what extent do claims of others to possession of the concealed object have an impact on the possession of the possessor of the receptacle object? To these questions we now turn.

(i) Comparative approaches

(α) Roman Law

In the Digest, we find this statement by Paul: 'A person possessing a building as a whole is not deemed to possess the individual things in the building. The same applies to a ship and to a cupboard.'[51] It is unclear whether this is predicated upon lack of control or lack of intent to control. The logical answer is that the lack of possession is due to a lack of intent to control; but it is too wide a statement to say that things, of which we may have full knowledge, are not possessed. Inference permits us to speculate that the passage refers only to objects of which the possessor is ignorant; which can be drawn from the fact that moveables which the possessor knows about will be possessed in their own right. The control of the house will— normally[52]— mean that there is separate control of the moveables.

As regards things we may have had in our house, but have now misplaced: 'If we possess something and lose it in such circumstances that we do not know where it is, we lose possession of it.'[53] This seems unduly broad, especially when talking of losing something within a thing which we continue to possess. To the extent this thing is truly 'lost' probably makes the statement accurate, if read with the semantic caveat that things within something we possess are not lost: they are merely misplaced.[54]

Papinian says that the concealment of an object within someone else's object will not deprive the person hiding the thing of possession.[55] The exclusivity of possession further means that the possessor of the receptacle object does not take possession of

[51] D. 41. 2. 30.
[52] There may of course be things possessed by others within the house: for example a guest's sandals.
[53] D. 41. 2. 25.
[54] AM Prichard *Leage's Roman Private Law* (3rd edn Macmillan & Co Ltd 1964) 165.
[55] D. 41. 2. 44. cf *Parker v British Airways Board* [1982] 1 QB 1004 (CA), where the bracelet was lost, not deliberately concealed.

the hidden object.[56] It is questionable to what extent this relies on the greater expanse of heritable property, and the consequent lesser control on behalf of the possessor of the land over the concealed object. It is less clear that if A surreptitiously placed a diamond inside B's jewellery box that A would continue to possess the diamond. It may be that the diamond would be possessed by B in light of the overwhelming level of control which B exercises *vis-à-vis* A; or the diamond. But, one could also argue that A continues in possession *animo solo*; whereas, B cannot acquire possession due to his ignorance, and consequent inability to form the intent to control the diamond.

(β) English Law[57]

In English law the idea of possessing a concealed object has been much discussed, and indeed litigated. The reason for this appears to be the importance attached to possession when resolving ownership disputes.[58] The person with the best right to possession will be considered to be the owner. This is not to say that possession and ownership, as a civilian may say, are indistinct; rather, it means that in a two party question the right to possession will resolve the dispute. The *vindicatio* known to the civil law does not exist insofar as recovery is not because of a title of ownership; rather, the recovery occurs because ownership gives the best right to possession.[59]

The hierarchy of the rights to possession depends upon the chronological order in which the possession was acquired. An owner will have the earliest right to possession which will trump all others. Thereafter, 'later possessors of any tangible object whatever also acquire a title, one which will yield to that conferred by earlier, but prevail over that conferred by later, possession.'[60]

Therefore, the idea of a multitude of competing possessions, based upon chronological ranking, almost *prior tempore est potior jure*, explains why possession is of importance in concealed objects cases. The cases are normally those of 'finding', whereby an object unbeknown to the parties has been concealed upon or within a thing. When these things are discovered, the idea of possession becomes crucial in ascertaining whose possession was the earliest, which accordingly explains ownership. An example will be useful:

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[56] It must be assumed that *accessio* had not occurred, or else the things would now be a single thing, and possession would most likely be in the possessor of the land.

[57] Considerations of space mean other common law jurisdictions may only be referred to by footnote: *A-G for Canada v Brock* 1993 CanLII 640 (British Columbia Court of Appeal, 5th August 1993) <www.canlii.org>; *Margaret Elizabeth Flack v Chairperson National Crime Authority* [1997] 1331 FCA (Federal Court of Australia, 26 November 1997)<www.austlii.edu.au> (9th July 2005); *Chairman, National Crime Authority & Anor v Margaret Elizabeth Flack* [1998] 932 FCA (Federal Court of Australia Court of Appeal, 7 August 1998)<www.austlii.edu.au> (9th July 2005); *R v. NG Kam-chuen* HCMA000881/1986 (Court of First Instance of Hong Kong, 9th September 1986)<www.hklii.org> (9th July 2005); *Webb v Ireland* [1987] IESC 2; [1988] IR 353; [1988] ILRM 565 (Supreme Court of Ireland, 16th December 1987)< www.bailii.org>(9th July 2005).

[58] *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) 703-04 (Lord Hoffmann).

[59] W Swadling 'Property: General Principles' in P Birks (ed) *English Private Law* (Oxford University Press 2000) [4.37]. More surprising to civilian is that the recovery would be on the basis of the tort of conversion.

[60] FH Lawson and B Rudden *The Law of Property* (3rd edn Oxford University Press 2002) 51.

Example: A distrusts financial institutions, and thus secretes her priceless Ming Vase in the garden. Moreover, A has no heirs and would like to keep the vase hidden for ever. A dies in 2000. In 2001 B purchases the house, and is unaware of the vase buried in his garden. Within a month his son C, who has permission to be in the garden,[61] decides to dig for treasure. C finds the vase. B and C have a disagreement about entitlement to the vase.

The importance of ascertaining whether B can possess a concealed object is obvious. If B possessed the vase by virtue of his possession of the garden, then he has a prior and stronger right to the vase than C.

Famously, a chimney-sweep's assistant found a ring which was concealed in a chimney.[62] The assistant then took the ring to a jeweller so that the ring could be valued, whereupon the jeweller refused to return its stones. In an action of trover[63] against the jeweller the assistant was successful. This was because the assistant had possession of the ring first, and thus his right was stronger than that of the jeweller. Yet, the owner of the chimney in which the ring was found was not a party to the action. It is a strong possibility that by possessing the chimney, he would also have had possession of the ring. In this case the chimney owner has a better right than the assistant and the jeweller, but not the true owner of the ring should they have made themselves known later.[64]

Cases concerning crime[65] provide further guidance. The removal of money hidden in a bureau deposited with by a carpenter during repairs, amounted to larceny.[66] This must have been due to initial possession of the money by the possessor of the bureau; though, the carpenter did not have possession of the bureau either, since it was merely deposited for repair.[67]

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[61] If he were a trespasser would he be barred from a claim? *Webb v Ireland and A-G* [1987] IESC 2; [1988] IR 353, says yes. cf W Swadling (n 59) [4. 461].
[62] *Armory v Delamirie* (1772) 1 Strange 505, 93 ER 664.
[63] Trover being the 'forerunner of the modern-day tort of "conversion"' W Swadling (n 59) 218 n 67.
[64] W Swadling (n 59) [4.42]. cf *The Men of Selkirk v Tenants of Kelso* (1541) Mor 14738, where a third party was not allowed to make representations in a spuilzie case to the effect that they were the true owner. This highlights the strict distinction between matters petitory and possessory.
[65] Superseded by the statutory offence of theft: Theft Act 1968 s 1. *Cartwright v Green* (1803) 8 Ves Jun 405. cf *R v Rowe* (1859) Bell's CC 93, 8 Cox 139; *R v Riley* (1853) Dears 149; *R v Ashwell* (1885) 16 QBD 190; *R v Hudson* (1859) 1 Bell 93; *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (HL); *R v Woodman* [1974] QB 754 (CA); *Corporation of London v Appleyard* [1963] 2 All ER 834; *Lockyer v Gibb* [1967] 2 QB 243 (CA); *R v Land* [1997] EWCA Crim 2409; [1999] QB 65; *R v Leeson* [1999] EWCA Crim 2176; [2000] 1 Cr App R 233; [2000] Crim LR 195; *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545; *R v Murphy, Lillis and Burns* [1971] NI 193 (NICA) 199 (Lord MacDermott CJ); *R v McKenzie* [2005] NICA 7; *Beaver v The Queen* (1957) SCR 531; *Daraiz v A-G* (Supreme Court of Hong Kong 15th April 1976); *Atholwood v The Queen* [2000] WASCA 76; *Police v Kennedy* [1998] SASC 6638; A Ashworth *Principles of Criminal Law* (4th edn Oxford University Press 2003) 109-10; J Herring *Criminal Law: Text, Cases, and Materials* (Oxford University Press 2004) 225-26; JC Smith *The Law of Theft* (6th edn Butterworths 1989) [62]-[67]; J Smith *Smith & Hogan's Criminal Law* (9th edn Butterworths 1999) 109-10;D Hughes 'Possession: Roman and English' in E Attwooll (ed) *Perspectives in Jurisprudence* (University of Glasgow Press 1977) 116.
[66] *Cartwright v Green* (1803) 8 Ves Jun 405.
[67] MG Bridge *Personal Property Law* (3rd edn Oxford University Press Oxford 2003) 20; *Merry v Green* (1841) 7 M & W 623.

Beyond the criminal law there are a series of cases which do not admit of easy reconciliation. In *Bridges v Hawkesworth*[68] some bank notes that were accidentally dropped were discovered on a shop floor by a customer. The shopkeeper was unaware of their presence. The customer was able to retain to the notes. The shopkeeper could not have had initial possession of notes; because he was unaware they had been dropped in his shop. The reasoning is problematic, insofar as a number of theories have been advanced as to the true ground of the decision.[69] But, subsequent case law has allowed a finder initial possession in the absence of knowledge by the possessor of the land.[70]

Later cases have not always followed *Bridges*[71] and have not assisted in the search for clear principle. A pre-historic boat found in the ground was held to be possessed by the possessor of the land.[72] It appears that the presence of the boat beneath the surface of the land rendered it within the possession of the landowner.[73] The possession of land *a coelo usque ad centrum* appears to have had the effect of ensuring that objects under the surface were also possessed.[74] The test may be whether the thing is attached to or in the land, as opposed to merely resting upon the surface of the land.[75]

Contrary possession was not in issue though, since the earlier possessors of the boat were long deceased. If possession in English law continues *animo solo*,[76] then a living possessor could be said to continue to possess an object hidden in the ground. Had the original possessor of the boat been alive, it may have been relevant that the plaintiff had no knowledge of the boat in a question with the true owner.

If a moveable is possessed *animo solo* indefinitely, in the absence of contrary possession, if that moveable is buried in the garden, then the possessor of the land cannot possess it; unless the minute it goes in the ground he can be said to have contrary possession. This is because of the exclusive nature of possession. The answer may turn upon whether the moveable is lodged intentionally or not. The test of the ability to resume physical control may resolve some difficulties in this area.

The modern leading case is *Parker v British Airways Board*.[77] In the executive departure lounge at Heathrow airport, a passenger found a gold bracelet. The question was whether the airport authority had obtained a title by possession to the thing before

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[68] *Bridges v Hawkesworth* (1851) 15 Jur 1079; 21 LJQB 75. The report in the *Jurist* is fuller: AL Goodhart *Essays in Jurisprudence and the Common Law* (Cambridge University Press Cambridge 1931) 77 n 7. cf *R v Moore* (1861) Le & Ca 1.

[69] AL Goodhart (n 68) 77-86.

[70] *Hannah v Peel* [1945] KB 509 (EWHC). DR Harris 'The Concept of Possession in English law' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Clarendon Press 1961) 94. cf *Grafstein v Holme & Freeman* (1958) 12 DLR (2nd) 727; *In re Cohen* [1953] Ch 88 (EWHC).

[71] *Bridges* (n 68).

[72] *Elwes v Brigg Gas Company* (1886) 33 Ch D 562 (EWHC) 568 (Chitty J).

[73] F Pollock and RS Wright *Possession in the Common Law* (Fred B. Rothman & Co 1985) 41; Pollock's explanation that the plaintiff had the right to possession, rather than actual possession solves nothing since to have the right to possession the boat must have been possessed by the owner.

[74] This is criticized above on page 17.

[75] *South Staffordshire Water Company v Sharman* [1896] 2 QB 44 (CA) 47 (Lord Russell CJ); AL Goodhart (n 68) 87-88. cf *Willey v Synan* (1936) 57 CLR 200 (HCA); *Waverley Borough Council v Fletcher* [1996] QB 334 (CA).

[76] OW Holmes *The Common Law* (Little, Brown & Co 1945) 237; F Pollock and RS Wright (n 73) 15.

[77] *Parker v British Airways Board* [1984] QB 1004 (CA).

the plaintiff. The Court of Appeal held that the plaintiff's possessory right was *prior tempore*, and was accordingly *potior jure* in a question with the airport. The basis of the decision was intent to exercise control; notably, the airport had failed to show intent to exercise control of the lounge, and anything else which may have been in or on it.

It seems to be the case that things underground will be possessed by the possessor of the surface, at least in the absence of contrary possession. Moveables that have acceded to the ground are possessed by the possessor of the land, since they are no longer separate moveables: they are now constituent parts of the land. As regards things on the surface of land, the position is less clear. It would appear to be possible to suggest, that if intent can be shown to possess moveables on the land, even in the absence of specific knowledge of the particular moveable, then the thing will be possessed by the land possessor.[78]

(γ) Scots law

In Scotland, civil authorities[79] on the subject of concealed objects are scarce.[80] Reid suggests that Scots law would follow *Parker v British Airways Board*.[81] The 'unimportant exception', to which Reid refers, is *Hogg v Armstrong and Mowat*,[82] which on similar facts applies *Bridges*.[83] The case involved the discovery of a five pound note on the floor of a spirit merchant. The sheriff remarked, that generally a finder can keep an object against all but the true owner;[84] but more pertinently stated:

> It has been laid down, that to see a lost thing, or to know where it is, confers no right to it, but only the corporal possession of it. The corporal apprehension was that of the pursuer, and the defenders did not even see the note or know of its being in the shop till the pursuer picked it up.[85]

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[78] W Swadling (n 59) [4.461].

[79] There are a great deal of authorities from the criminal law in this area, and on possession generally: *Lustmann v Stewart* 1971 SLT (Notes) 58 (HCJAC); *Black v HMA* 1974 JC 43 (HCJAC); *Mingay v MacKinnon* 1980 JC 33; *McKenzie v Skeen* 1983 SLT (Notes) 121 (HCJAC); *Crowe v MacPhail* 1987 SLT 316 (HCJAC); *Gill v Lockhart* 1988 JC 1 (HCJAC); *Amato v Walkingshaw* 1990 JC 45 (HCJAC); *Hughes v Guild* 1990 JC 359 (HCJAC); *Murray v MacPhail* 1991 SCCR 245 (HCJAC); *Feeney v Jessop* 1991 SLT 409 (HCJAC); *Bain v HMA* 1992 SCCR 705; 1992 SLT 935 (HCJAC); *Davis v Buchanan* 1994 SCCR 369 (HCJAC); *Bath v HMA* 1995 SCCR 323 (HCJAC); *Aktar v Hamilton* 1996 GWD 2-80 (HCJAC); *McAllan v HMA* 1997 JC 28 (HCJAC); *Sim v HMA* 1996 SCCR 77 (HCJAC); *McTurk v HMA* 1997 SCCR 1 (HCJAC); *Salmon v HMA; Moore v HMA* 1999 JC 67 (HCJAC); *Sharkey v HMA* 27th March 2001 (HCJAC); *Henvey and Reid v HMA* [2005] HCJAC 10 (Full Bench); KS Bovey *Misuse of Drugs: A Handbook for Lawyers* (Butterworths Law Society of Scotland 1986); GH Gordon *The Criminal Law of Scotland* (3rd edn W Green 2000-01); F MacDonald *Representing Drug Offenders* (Thomson W Green 2004); KS Bovey *Misuse of Drugs—Latest Cases* (Post Qualifying Legal Education Paper Law Society of Scotland 30th March 1999).

[80] KGC Reid (n 34) [124].

[81] *Parker v British Airways Board* (n 77).

[82] *Hogg v Armstrong and Mowat* (1874) 1 Guth Sh Cas 438.

[83] *Bridges* (n 68).

[84] *Hogg v Armstrong and Mowat* (n 82) 438. The Civic Government (Scotland) Act 1982 changed the position entirely in relation to lost property: KGC Reid (n 34) [547]-[552].

[85] *Hogg v Armstrong and Mowat* (n 82) 439.

The Sheriff felt that Scots law was the same as the position stated in *Bridges*;[86] stating that while one should be wary of England precedent generally, '…its decision really depended upon principles of general jurisprudence which are the law in Scotland as well as in England.'[87] With citation of Pufendorf and Vinnius, it would appear unjustified to dismiss the case as an unimportant exception to a perceived rule, which has yet to be fully enunciated in a reported case. That said, two modern cases from the sheriff court suggest that the creditor who takes possession of a house will take possession of the moveables contained therein.[88] It is explicitly stated that possession of a concealed object will be possible, if the possessor intends to possess everything on the premises.[89] This is close to the approach advocated by Smith: to consider that the possessor of premises, who excludes others from the premises, must be presumed to have the requisite *animus* to possess concealed objects thereon.[90]

The comparative lack of case law on the matter in Scotland may stem from the difference between English and Scottish law in relation to the effects of possession. In Scots law, possession in fact gives the possessor the right not to be dispossessed without due process of law. What is does not give however, is a 'title' in questions with other parties. Thus, if A finds a book then she is possession.[91] She then drops the book herself,[92] and B picks it up. In Scotland, A cannot recover from B, because A's factual possession does not give a prior 'possessory title' which is good against others; if recovery were allowed, it would be on the basis of a title from *occupatio*. In England on the other hand, A could recover the book, because she had earlier possession.[93]

Before leaving this subject, an ancient case must be mentioned. In *Cleghorn v Baird*[94] the owner of a dwelling-house's repairer found L. 50 Scots, though to have been concealed by the pursuer's sister. The court found in favour of the pursuer, as executor, rejecting the suggestion the L. 50 fell to the Crown.[95] It appears that the executor must have had possession, or else the L. 50 would have fallen to the Crown.[96]

(c) Summary

[86] *Bridges* (n 68).
[87] *Hogg v Armstrong and Mowat* (n 82) 439.
[88] *Gemmell v Governor and Company of the Bank of Scotland* 1998 SCLR 144 (ShCt); *Harris v Abbey National Plc* 1997 SCLR 359 (ShCt).
[89] *Harris v Abbey National Plc* 1997 SCLR 359 (ShCt) 360 (Sheriff Craik), following *Parker* (n 55). cf TB Smith (n 34) 463, citing *Corporation of Glasgow v Northcote* (1921) 38 Sh Ct Rep 76; *Dawson v Muir* (1851) 13 D 843 (IH).
[90] TB Smith (n 34) 463.
[91] Ignoring the possible requirement for *animus domini* for the moment.
[92] Ignoring the possibility of continuing *animo solo* possession.
[93] See *Lord Advocate v Aberdeen University and Budge* 1963 SC 533 (IH); and the radical interpretation by R Sutherland 'Possession: Scots law' in E Attwooll (ed) *Perspectives in Jurisprudence* (University of Glasgow Press 1977) 135-36.
[94] *Cleghorn v Baird* (1696) Mor 13523; More's notes to Stair, cxlvi.
[95] *Cleghorn v Baird* (n 94) 13523. cf Craig 1. 16. 40.
[96] cf *Crawford v Kerr* (1807) Mor App I 2.

The comparative approaches examined are instructive, but they are not conclusive. In England the position appears to be clear: intention to possess things within or upon a thing will be sufficient, even in the absence of specific knowledge of that concealed item.[97] This is a robust common-sense approach that has much to commend it. On the other hand, it is open to criticism as unsophisticated and imprecise. The approach favoured here is that to possess an object one must have specific knowledge of its existence *in situ*; and that *Bridges*[98] and *Hogg v Armstrong and Mowat* [99] should be followed. It is also thought, that in this area it is well to remember that possession continues *animo solo*, unless the thing is beyond your physical control.[100] Thus, if a concealed object is beyond the power of the prior possessor they should lose their possession. This will be a matter of fact and degree, and is quite different from saying that possessor of the receptacle thing acquires possession. However, if the possessor of the receptacle thing does know of the extraneous object, then they will take possession of it, to the exclusion of the prior possessor—assuming the *corpus* element has been satisfied as well. It is a matter of choice which approach is preferred.

3 Intention to Hold for Oneself

(a) General

The second aspect of the requirement of *animus*, notably the requirement that the intent is *animus domini* or *animus rem sibi habendi*, will now be examined. This aspect may be said to be concerned with the legal basis, or the right, to which the possessor's intent ascribes his physical detention. It is the subjective intent ascribed to the physical holding by the possessor, and is to be contradistinguished from the intent to satisfy the requirement of *corpus*.

The necessary mental intent required to constitute possession has been the subject of considerable controversy, again as a likely result of the confusion among the classical sources.[101] The present section aims to give a brief introduction to the controversy, before attempting to identify the position in Scots law.

(b) *Animus*: subjective or objective theory[102]

The necessary intent required to constitute possession involves an often bewildering array of terms. Perhaps inevitably, these terms are in turn used by different jurists to mean different things, and even create internal contradictions within their own

[97] See above on page 25.
[98] *Bridges* (n 68).
[99] *Hogg v Armstrong and Mowat* (n 82).
[100] See below on page 45.
[101] WW Buckland and AD McNair *Roman Law & Common Law: A Comparison in Outline* (Cambridge University Press 1936) 65-66; WW Buckland *Textbook of Roman Law* (Cambridge University Press 1921) 199; A Borkowski and P du Plessis (n 34) [6. 3. 2. 2.].
[102] G MacCormack 'The Role of *Animus* in the Classical Law of Possession' (1969) 86 *Zeitschrift der Savigny-Stiftung für Rechtgeschichte (Romanistische Abteilung)* 105.

work.[103] In the present work the following terms[104] are used: (i) *animus domini* represents intent to hold the thing as the owner of that thing; (ii) *animus rem sibi habendi*, is used to refer to the intent to hold for one's own interest—even if that interest is not ownership; and lastly, (iii) *animus possidendi* represents a neutral term to describe the intent requisite to possess,[105] and indicates no preference for either form of intent above.[106]

These twin approaches to *animus* may be identified by reference to their chief protagonists. The standard-bearer for *animus domini*, sometimes known as the subjective theory,[107] was Savigny;[108] whereas his counterpart for the objective theory, encompassing *animus rem sibi habendi*, may be said to have been Jhering.[109] These two great jurists were responsible for defining, and fostering a split in the civilian approach to possession.[110] The split continues to this day between the codified systems of continental Europe.[111]

(c) Subjective Theory

This theory is based on the use of *animus domini* as a means of distinguishing detention and possession.[112] The absence of *animus domini* meant that the detention was not possession proper. This approach has been criticised on the basis that the position it portrays is selective. Doubtless the *animus* requirement Savigny conceived of was significant in Roman law; yet, it was not exhaustive. The possessory interdicts were available to sub-ordinate real right holders, and others, who lacked *animus*

[103] WW Buckland (n 101) 199; RW Lee *The Elements of Roman Law* (4th edn Sweet & Maxwell Ltd 1956)180.
[104] AN Yiannopoulos *Louisiana Civil Law Treatise: Property* (West Group Thomson 2001) § 302; AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 525 states these terms are not Roman, and were coined by Savigny. This is the opinion of Planiol and Ripert also: M Picard (ed) *Planiol & Ripert's Traité Pratique de Droit Civil Français* (2nd edn Librairie Génerale de droit et de Jurisprudence 1952) [146]. However, TE Holland *The Elements of Jurisprudence* (6th edn Clarendon Press 1893) 171 identifies their credence as coined by Cuiacius, himself relying on Theophilus. We may observe the phrase '…*possessio proprie est Detentio rei corporalis animo sibi habendi*…' appearing in a Scottish context, even if used to described Roman law, as early as 1706: G Scott *De Acquirenda vel amittenda Possessione* (Faculty of Advocates Thesis, Volume 5, 1706) 5.
[105] F Schulz (n 50) 437. cf TE Holland (n 104) 171; D. 41. 2. 1. 20: '…*quia non habeat animum possidentis, neque is qui tradiderit, quoniam cesserit possessione*.' '…because he does not intend to possess, nor he who makes delivery, because he has ceased to possess.'
[106] TE Holland (n 104) 169, identifies three forms of *animus.*
[107] AN Yiannopoulos (n 104) s 302; AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 525-27; RW Lee (n 103) 180; M de Juglart (ed) *Mazeaud & Mazeaud*'s *Lecons de Droit Civil* (4th edn Editions Montchrestien 1969) [1422]; G Ripert and J Boulanger *Traité de Droit Civil* (Libraire Generale de droit de Jurisprudence 1957) [2287]; G Marty and P Raynaud *Droit Civil: Les Biens* (Sirey 1965) [15]; F Terré and P Simler *Droit Civil: Les Biens* (5th edn Dalloz 1998) [144].
[108] E Perry (tr) (n 37).
[109] AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 525-27; AN Yiannopoulos (n 104) § 302; RW Lee (n 103) 180.
[110] F Terré and P Simler (n 107) [144].
[111] R Caterina 'Concepts and Remedies in the Law of Possession' (2004) 8 Edin LR 267, 268.
[112] AM Prichard (n 54) 171; M de Juglart (n 107) [1423]; G Ripert and J Boulanger (n 107) [2287]; G Marty and P Raynaud (n 107) [15]; F Terré and P Simler (n 107) [144].

domini.[113] The explanation given by Savigny was that a 'derivative' possession (*abgeleiter Besitz*) was allowed in these situations.[114] The theory to some extent has been revamped, by continuing to emphasize the need for a subjective intent, but purports to avoid difficulty, by merely requiring intent to exclude others.[115]

(d) Objective Theory

The subjective approach of Savigny was subjected to a '…long-prepared attack'[116] by Jhering, who in place of the subjective approach suggested an objective one.[117] Jhering suggested that Savigny's analysis of the Civilian sources was misinformed, and relied too heavily upon the opinion of Paul.[118] In his alternative theory, Jhering shifts the emphasis from *animus* to the physical detention.[119] Intent will be inferred from the physical detention, unless a specific rule denies the possession.[120] The rationale for this approach was that possession was the external manifestation of ownership.[121] Criticism of Savigny's incoherence, and need to fall back upon a theory of 'derivative' possession, becomes inimical to Jhering's theory.[122] This is because Jhering's theory is itself contrary to the sources which deny possessory remedies to lessees, and other such holders. According to his theory, such persons should have possession, and therefore he himself resorts to 'special' rules which bar the remedies in question from these holders.[123]

(e) Modern Divisions

Jurisprudential works recite the arguments,[124] before subjecting them to words of encouragement or dismissal. The latter is referred to when Dias states that 'It is agreed that Jhering succeeded in demolishing Savigny's theory.'[125] Such a statement is difficult to validate, and more pertinently, it is probably irrelevant. While it may be the case that Jhering's approach was more attractive in the abstract, it remains the case that no discussion of possession will proceed without reference to Savigny.

[113] TE Holland (n 104) 171; RW Lee (n 103) 180; JAC Thomas (n 31) 140; B Nicholas *An Introduction to Roman Law* (Clarendon Press 1975) 113.
[114] E Perry (tr) (n 37) 205; JAC Thomas (n 31) 140.
[115] WW Buckland (n 101) 199.
[116] TE Holland (n 104) 172.
[117] AN Yiannopoulos (n 104) § 302; AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 525-27; G Ripert and J Boulanger (n 107) [2287]; F Terré and P Simler (n 107) [144].
[118] WW Buckland (n 101) 199; RW Lee (n 103) 180-81; JAC Thomas (n 31) 140.
[119] WW Buckland (n 101) 199-200.
[120] TE Holland (n 104) 172-73; AN Yiannopoulos (n 104) § 302; AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 525-27; WW Buckland (n 101) 199-200; RW Lee (n 103) 180; M de Juglart (n 107) [1424].
[121] JAC Thomas (n 31) 140; TE Holland (n 104) 172; WW Buckland (n 101) 201.
[122] RW Lee (n 103) 180; B Nicholas (n 113) 113.
[123] TE Holland (n 104) 173; JAC Thomas (n 31) 140. cf WW Buckland (n 101) 200.
[124] TE Holland (n 104) 169-73; DP Derham and GW Paton (eds) *A Textbook of Jurisprudence* (4th edn Clarendon Press 1972) 560; RWM Dias *Jurisprudence* (5th edn Butterworths 1985) 275-77.
[125] RWM Dias (n 124) 276.

Furthermore, there are modern systems which accept Savigny's analysis as their own law.[126]

The Italian Civil Code states that '…possession is the power over a thing that is manifested by an activity corresponding to the exercise of ownership or other real right…'.[127] The *animus domini* requirement here is significant; however it bestows possession on the holders of the *jura in re aliena*, which is a technical departure from holding as one's own, though represents the preferred approach here.

The position in France is dictated by the Code Civil, where the relevant article states: 'Possession is the detention or enjoyment of a thing or of a right which we hold or exercise by ourselves, or by another who holds and exercises it in our name.'[128] This is slightly ambiguous.[129] It would appear, however, that legal literature follows the need for *animus domini*.[130] This will extend to include possession with an *animus* which is pursuant to the *jura in re aliena*.[131] The ambiguity may be due to the ignorance of the compilers of the Code Civil,[132] who in 1804 would likely be unaware of Savigny's book published in Germany in 1803. However, it appears that they followed their 'guides habituels' Domat[133] and Pothier, for whom possession was constituted by having the will to act as the owner.[134] Conversely, the triumph of the subjective approach should not be overstated, especially when a subsequent article adds something of the objective approach when it states: 'One is always presumed to possess for oneself, and in the capacity of an owner, where it is not proved that one has begun by possessing for another.'[135] Therefore, as a matter of evidence, physical detention will give rise to a presumption of *animus domini* in certain circumstances.

The approach to possession in German law[136] is quite different,[137] and is heavily influenced by Jhering.[138] The approach of the civil code, simplified greatly, is to say

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[126] R Caterina (n 111); F Zenati and T Revet *Droit Civil: Les Biens*, (2nd edn Presses Universitaires de France 1988) [305]; F Terré and P Simler (n 107) [145].
[127] Code Civil art 1140. Translated in R Caterina (n 111) 268.
[128] Code Civil art 2228 <http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm> (7th July 2005).
[129] R Caterina (n 111) 268.
[130] RJ Pothier *Traité de la Possession* (Lettelier Garneryn Nicolle Durfesne 1807) [13]; G Marty and P Raynaud (n 107) [16]; M de Juglart (n 107) [1426]; F Zenati and T Revet (n 126) [300]; F Terré and P Simler (n 107) [143] but cf the case law on the matter: F Zenati and T Revet (n 126) [306]. The approach is similar in Louisiana: AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 526; AN Yiannopoulos (n 104) § 302.
[131] G Marty and P Raynaud (n 107) [17]; M Picard (ed) (n 104) [146]; E Bartin (ed) *Aubry & Rau's Cours de Droit Civil Français*, (6th edn Librairie Marchal & Billard 1935) Vol 2 108.
[132] M de Juglart (n 107) [1426].
[133] J Domat *Les Loix Civiles dans leur Ordre Naturel* (2nd edn Coignard & Coignard 1645); RJ Pothier (n 130). Domat states: '*On appelle proprement possession, la detention d'une chose que celuy qui en est le maître, ou qui a sujet de croire qu'il l'est…*' (Possession properly so-called, is the detention of a thing by its owner, or by one subject to the belief that he is…)III. 7. 1. 1.
[134] M de Juglart (n 107) [1426]. 'Les rédacteurs du Code civil de 1804 ignoraient les travaux de Savigny, publiés en Allemagne en 1803. Ils ont suivi leurs guides habituels, Domat et Pothier, pour qui la possession supposait la volonté de se conduire en propriétaire…'.
[135] Code Civil art 2230. cf F Terré and P Simler (n 107) [145].
[136] The 'Germanic' family contains some differences: compare the similarity of the Swiss Civil Code §§ 919-20; G Marty and P Raynaud (n 107) [16]; with the approach in Greece which requires *animus domini*: Greek Civil Code art 974. C Talliadoros (tr) *Greek Civil Code* (Aut N Sakkoulas Publishers 2000).

that factual detention (*Sachbesitz*[139]) gives possession, even if the holding is on another's behalf.[140] This is not to be taken to say no distinction is made between holding for oneself (*Eigenbesitz*) on the one hand; and on the other hand holding for another (*Fremdbesitz*).[141] There is also an explicit recognition that a lessee and a custodier have possession.[142] These approaches are buttressed by the fact that the code recognizes both mediate/indirect (*Mittelbarer Besitz*) and immediate/direct (*Unmittelbarer Besitz)* possession, which are broadly analogous to the traditional Scots understanding of civil and natural possession.[143] On the other hand, this provision is considerably tempered by the fact that possession will be denied to the factual possessor, if their detention for another depends on compliance with instructions from the other.[144] In this situation the physical detentor is known as a possession-helper (*Besitzdiener*).[145]

(f) Scots law

(i) Institutional Divergences

The *animus* requirement in Scots law is also contested. The arguments are in broadly similar terms to the Europe-wide debate.[146] The starting point is the treatments of the Institutional writers. The earliest is by Craig, who states:

> The author of the *Regiam Majestatem* defines sasine thus: - 'sasine is possession whereby property in land is acquired on a valid antecedent title'. He also defines possession as 'the **keeping as one's own** of a corporeal subject, intentionally and physically'… (emphasis added).[147]

Craig stipulates an *animus* requirement tantamount to Savigny's, insofar as it explicitly adopts a requirement of *animus domini*.[148] From this early 'subjective' approach[149] a more modern departure is made by Stair, who suggests that detention 'for our use'[150] will be sufficient. This allows him to frame the requisite *animus* as 'an act of mind, which is the inclination or affection to make use of the thing

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[137] F Terré and P Simler (n 107) [145]; F Zenati and T Revet (n 126) [305]; G Marty and P Raynaud (n 107) [16].
[138] R Caterina (n 111) 268. Savigny's approach was dominant in the first draft of the code; however, it was superseded by an approach closer to that of Jhering.
[139] M Picard (ed) (n 104) [147].
[140] BGB § 854; M Picard (ed) (n 104) [147]; R Caterina (n 111) 268; G Marty and P Raynaud (n 107) [16].
[141] BGB § 872; M Picard (ed) (n 104) [147].
[142] BGB § 868; R Caterina (n 111) 268.
[143] BGB §§ 868, 871. AN Yiannopoulos (n 104) § 302; LPW van Vliet *Transfer of Movables in German, French, English and Dutch Law* (Ars Aequi Nijmegen 2000) 37-40.
[144] BGB § 855; R Caterina (n 111) 268.
[145] AN Yiannopoulos (n 104) § 302; R Caterina (n 111) 269.
[146] R Caterina (n 111) 268.
[147] Craig 2. 7. 3.
[148] I have been unable to trace the passage of the *Regiam Majestatem* to which Craig refers.
[149] See on page 29.
[150] Stair 2. 1. 17.

detained…'.[151] In addition to this apparently 'objective' approach[152], Stair further suggests that this *animus* will be presumed, so long as the presumption would not lead to 'wrong' or 'hurtful' use.

The definition which Bankton suggests is a direct and acknowledged quote from Stair.[153] Consequently, the *animus* Bankton requires is not *animus domini*; but is in fact *animus rem sibi habendi*, expressed in the vernacular as detention for 'our use'.[154] Following this objective approach, Bankton states that *animus* will be presumed from physical detention as well.[155]

Erskine reverts to the model adopted by Craig, stating the volitional aspect involves: '…an *animus* or design in the detainer of holding it as his own property…he holds it in his own name as his own property…the possessor must also hold it as his own right.'[156] It is clear for Erskine there must be *animus domini*, or at the least one holds it as one's own right. It seems to say that holding it as one's own right is a statement confined to detention pursuant to the *jura in re aliena*. Erskine also states that the, different, mental element is to be inferred from the physical detention if that does not infer a crime. This *animus domini* approach to the volitional aspect of the possession is further echoed by Bell: 'Possession is detention, with the design or *animus* of holding the subject as the property of the holder.'[157] The concision of the statement debars further substantive comment; however, one may remark that Bell follows the French Civil Code and Domat by discussing possession in relation to prescription.[158]

The status of Forbes as an institutional work is dubious. His analysis, however, is subtle: '…simple Holding or Detaining, which is the being in Possession only without a Right; or for detaining for one's proper Use, and debarring others by some Title, which is properly term'd Possession.'[159] Intent need not be as owner, but must flow from an actual or perceived right. It is not clear if the right would need to be real.

(ii) Modern Fault Lines

In more recent treatments the controversy, or somewhat perversely the astonishing lack thereof, has continued.[160] Reid takes the view that the *animus* required is *animus rem sibi habendi*, not *animus domini*.[161] This may be contradistinguished from Carey Miller, who is of the opinion that *animus domini* is required for possession proper.[162] Smith was content to express the neutral view by stating *animus possidendi* was required; however, he pointed out that Stair's approach 'seems to ignore' the intent to

[151] Stair 2. 1. 17.
[152] See on page 30.
[153] Bankton 2. 1. 26.
[154] Bankton 2. 1. 26.
[155] Bankton 2. 1. 26.
[156] Erskine II. 1. 20.
[157] Bell *Principles* s 1311.
[158] J Domat (n 133) 469; Code Civil arts 2228-35.
[159] W Forbes *The Institutes of the Law of Scotland* (J Watson, J Mosman & Co 1722) Vol 1, 76.
[160] R Caterina (n 111).
[161] KGC Reid (n 34) [125]; J Rankine (n 34) 5.
[162] DL Carey Miller *Corporeal Moveables in Scots Law* (W Green & Son Ltd 1991) [1.13].

exclude others.[163] Gordon is non-committal, saying that possession '…in the Scots common law has a restricted meaning, and primarily means a holding for oneself, or a holding as one's own property.'[164]

In terms of case law, the terms *animus domini*; *animus rem sibi habendi*, and *animus possidendi* are rarely used.[165] In *Beggs v Kilmarnock and Loudoun District Council*[166] the court makes incidental reference to an English case's[167] use of the term *animus possidendi*. Perhaps more significant, are the *obiter* comments by Lord Hope, who might have been alert to the ambiguity in this area of Scots law. In *J A Pye (Oxford) Ltd v Graham*[168] the House of Lords was disposing of an appeal involving the long controversy regarding the 'adverse' element of adverse possession in English law. During his speech, which deserves a full quotation as the most significant recent statement on the position in Scots law, Lord Hope made the following comments:

> The question as to the nature of the intention that has to be demonstrated to establish possession was controversial…**But it is reasonably clear that the animus which is required is the intent to exercise exclusive control over the thing for oneself…The only intention which has to be demonstrated is an intention to occupy and use the land as one's own.** This is a concept which *Rankine, The Law of Land-Ownership in Scotland*, 4th ed (1909), p 4, captured in his use of the Latin phrase cum animo rem sibi habendi (see his reference in footnote 1 to *Savigny, Das Recht des Besitzes*, translated by Perry (1848), paras 1-11). It is similar to that which was introduced into the law of Scotland by the Prescription Act 1617, c 12 relating to the acquisition of an interest in land by positive prescription. The possession that is required for that purpose is possession 'openly, peaceably and without any judicial interruption' on a competing title for the requisite period: Prescription and Limitation (Scotland) Act, section 1 (1) (a). So I would hold that, if the evidence shows that a person was using the land in the way one would expect him to use it if he were the true owner, that is enough (emphasis added).[169]

If Lord Hope was alert to the ambiguity in Scots law then it appears that he was conscious to support both propositions. Therefore on the one hand he states the necessary *animus* is to exercise control for oneself, which is consistent with the objective approach advocated by Rankine;[170] whereas on the other hand he later states that what is required is intent to use the land as one's own. It is typical of this area of the law, that a speech in the highest civil appellate court, albeit *obiter*, should advance the two conflicting tests in the same paragraph.

If it were necessary to state which side Lord Hope prefers, it may be that *animus domini* has the edge. Thus, in closing the paragraph in his speech, he states: '…if the

[163] TB Smith (n 34) 462-63.
[164] WM Gordon (n 34) [14-03].
[165] *Animus domini* is mentioned in *Sinclair v Sinclair* (1771) Mor 10835.
[166] *Beggs* (n 34).
[167] *Brown v Brash and Ambrose* [1948] 2 KB 247 (CA) 254-55 (Asquith LJ).
[168] *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.
[169] *J A Pye (Oxford) Ltd* (n 168) [71].
[170] J Rankine (n 34) 5.

evidence shows that a person was using the land in the way one would expect him to use it if he were the true owner, that is enough.' This places emphasis on the idea of some form of *animus domini*, but which is evidenced objectively by the use of the land.

(g) Summary

The debate over the Roman law position has raged for so long that comments on the 'true' position are superfluous. Nevertheless, the 'subjective' and 'objective' theories, associated with Savigny and Jhering,[171] have endured in modern systems.[172] In Scots law there is a split in opinion, and direct authority is inconclusive. The suggestion here is that the requisite *animus* is *animus domini*, with the added caveat that detention pursuant to any real right will be necessary—even if that is not technically *animus domini*. Therefore, a licensee does not have possession; nor does a lessee under a lease that is not real, and which the lessee does not intend to make real. This position accords with the French position,[173] and finds support in some of the Institutional writings.[174]

D Civil Possession Contrasted With Natural Possession

1 Institutional Definitions

(a) General

In Scots law the physical manifestation of possession may be exercised on behalf of another. The person with whom the thing has a physical connection is known as the natural possessor; the person who derives their possession from the physical acts of another is known as the civil possessor.[175] Such an understanding is peculiar to Scots law when considered alongside other civilian writings.[176] In some sources, civil possession means to retain possession by mind alone.[177] In other cases it is used to denote possession proper, which was held under a legal cause with *animus domini*,

[171] See above on page 29.
[172] See above on page 31.
[173] See text to n 131.
[174] See above on page 34.
[175] KGC Reid (n 34) [121]; DL Carey Miller (n 162) 12-13; Stair II. 1. 10; Bell *Principles* s 1312; *Grant v Grant* (1677) Mor 10876; *Murray v McLellan* (1713) Mor 10934.
[176] G Likillimba 'La Possession *Corpore Alieno*' [2005] RTD civ 1.
[177] AN Yiannopoulos (n 104) § 304. The same author states: 'The use of the term "civil possession" to designate the preservation of possession merely by intent to own is a Louisiana innovation, (established in Ellis v Prevost, 19 La 251 (1841)', AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 528 n 30. This is startling, as Erskine stated 'Civil possession is either the holding of a subject by a sole act of the mind…'. (II. 1. 22); see also W Forbes (n 159) 77.

and attracted interdictal protection;[178] or, possession imbued with sufficient volitional character, through which *usucapio* could run.[179] The likely cause of diversity of meanings is the predictable confusion among the Roman sources.[180]

(b) Bankton's Binary Approach

In Scots law we may observe an internal confusion among our own sources. While the traditional understanding of civil and natural possession is that set out by Stair, subsequent Institutional writings are not entirely on message. The manner, in which Bankton distinguishes natural and civil possession, may be said to be an example of 'hedging one's bets'.[181] He expresses the opinion that the terms 'civil possession' and 'natural possession' have a double meaning. The first meaning is that given by Stair; the second is intriguing: by suggesting that possession with a concomitant *animus domini* is also known as civil possession[182], Bankton is harking back to the Roman understanding of *possessio civilis*. Lest he be accused of a muddle, it is well to point out that he was in good company: Voet also gives a dual meaning to the terms civil and natural possession.[183]

(c) Erskine's Twofold Elements

Erskine too gives a binary definition of 'civil possession', but it is different. Civil possession is to hold by "a sole act of the mind".[184] This may mean that possession can be continued by act of the mind alone. It is suggested this is recognition that civil possession is a distinct form of possession, to which the owner is entitled, in a manner similar to the Roman law. The meaning given by Erskine accords with the meaning developed in Louisiana. The second meaning which he ascribes to civil possession is

[178] WW Buckland (n 101) 199; R Dannenbring (tr) *Kaser's Roman Private Law* (Butterworths 1965)84; AM Prichard (n 54) 168-69; EE Whitfield (tr) *Salkowski's Institutes and History of Roman Private Law* (Stevens & Haynes 1886) 364; CG van der Merwe (n 33) [65]; D Kleyn, 'Possession', in R Zimmermann and D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press Oxford 1996) 825-826.
[179] E Perry (tr) (n 37) 38-65.
[180] E Perry (tr) (n 37) 39 n (a); AN Yiannopoulos 'Possession' (1991) 51 Louisiana Law Review 523, 528 n 30; JL Barton 'Animus and Possession Nomine Alieno' in P Birks (ed) *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Clarendon Press Oxford 1989); JAC Thomas (n 31) 139; G MacCormack '*Naturalis Possessio*' (1967) 84 *Zeitschrift der Savigny-Stiftung fur Rechtgeschichte (Romanistische Abteilung)* 47; DL Carey Miller 'T B Smith's Property' in E Reid and DL Carey Miller (eds) *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh University Press Edinburgh 2005) 179-80.
[181] Bankton II. 1. 26; KGC Reid 'Property Law: Sources and Doctrines' in KGC Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (Oxford University Press 2000) Vol 1 211.
[182] cf his remarks on page 34.
[183] P Gane (tr) *The Selective Voet, being the Commentary on the Pandects* (Butterworth & Co (Africa) Ltd Beach Grove 1957) 41. 2. 3. D Kleyn (n 178) 825-826.
[184] Erskine II. 1. 22.

the same as Stair, that is to say it is possession derived through the physical actions of others.[185]

The seeming difficulty in defining civil possession is of less importance in the modern law. There are a number of reasons for this. The class of persons to which possession can be ascribed is now so wide as to render the classical distinction superfluous.[186] In modern Scots law, regardless of which test is accepted to constitute civil possession, the function of civil possession has faded to some extent with changes to the registration system.[187] Yet, in the context of moveables and prescription, the concept retains its relevance.

2 Unresolved Issues

(a) Dependence on Natural Possession

To what extent can civil possession subsist after the cessation—voluntarily or otherwise—of the natural possessor's possession? It may be that the civil possession depends upon the manner in which the natural possession was lost. If the natural possessor abandoned possession, without any transfer of possession, then it may be that civil possession continues.[188] The authorities make no distinction between what form of possession may be continued *animo solo*. But, it seems strange to talk of a civil possessor in relation to a thing over which there is no natural possession.

The acquisition of natural possession by another, with whom the civil possessor has no legal relationship, asks fundamental questions about the civil possessor's possession. The exclusive nature of possession may be advanced as a reason why the civil possession must cease. The objection to this argument may be that the exclusive nature of possession is concerned with separate interests of possession.[189] Yet, the contrary natural possession may not necessarily exclude the possession of the civil possessor. The acquisition of natural possession, by a third party with no legal relation to civil possessor, must have the effect of terminating the civil possession. The natural possession will likely be accompanied by an *animus* which does not acknowledge the possession of the civil possessor: this terminates the civil possession.

The reference to *animus* prompts inquiry as regards civil possession through someone who has a legal relationship with the civil possessor, but does not have natural possession themselves. The physical detention of a mere custodier does not amount to natural possession; however, one may possess civilly through a custodier.[190] Therefore, civil possession could exist in a situation where natural possession is entirely absent. This poses a further problem as regards the party through whom

[185] Erskine II. 1. 22.
[186] D Kleyn (n 178) 826.
[187] cf Kaur v Singh 1999 SC 180 (IH).
[188] Erskine II. 1. 22; Bankton II. 1. 29; Stair II. 1. 19. It may automatically revest 'natural possession': *Hay v Douglas* (1666) Mor 10603. cf *Campbell v Glenorchy* (1668) Mor 10604.
[189] Bankton II. 1. 27, Stair II. 1. 20; Erskine II. 1. 21; Craig 2. 2. 5.
[190] KGC Reid (n 34) [121].

possession is derived. The question concerns the nature of their holding, more specifically whether there are limits upon the nature of holding through which civil possession may be exercised.

Consider the *corpus* required of the physical holder: he need not have natural possession, thus he need not show exclusive control. Does this mean that any physical action in relation to a thing allows civil possession to be derived? For example:

> A grants a lease to B to stay in his cottage Charnwood, and B takes up natural possession. Shortly thereafter, B abandons possession. A takes no physical action to re-acquire natural possession of Charnwood, but tells C that he may pick wild mushrooms every four weeks in the garden of Charnwood. It later emerges that A's title (in the GRS) is dubious. Furthermore, R assuming himself to be owner of Charnwood, has told F that he may pick wild mushrooms every four weeks. Who is in possession?

If there is a satisfactory answer to this question, and it is not certain that there is, then it requires systematic analysis. It is not clear that the act of picking wild mushrooms every four weeks would count as natural possession, and the assumption here is that it does not.[191] The acts described are too transitory, and do not exert control that would exclude others from the land. What then of A's civil possession? It is probably the case that B's actions allowed A to acquire/maintain civil possession of Charnwood. Less clear however, is the effect of B's cessation of possession. It is possible that A's civil possession continued *animo solo* until the permission to pick mushrooms was granted.[192] Upon the granting to C of permission to pick mushrooms the position is altered, as there are now physical acts occurring on the property. Furthermore, physical acts of the same nature and quality are being exercised by C and F; but one has a legal relationship with A, and the other without.

Are these acts repugnant to civil possession? It has already been stated these actions do not amount to natural possession; accordingly, to suggest that F's actions result in the loss of civil possession by A appears unjustified. However, it would then be strange to say that the same physical actions by C are sufficient to support civil possession by A. Title is the key: C's right flows from A, F's does not. The physical actions of F purport to flow from R.[193]

It is a nice question whether R has civil possession through F. It is submitted that R does not because of A. A had civil possession by virtue of B's natural possession, and this was subsequently retained; whether by virtue of A's *animus* or C's transitory acts. R has never had contrary natural possession; and it is unlikely that F's physical actions were sufficient to allow R to derive civil possession from them. It would appear that civil possession can arise through either initially taking natural possession before civil possession (an owner granting a lease); or, in the absence of natural possession yourself, then a natural possessor will be required—civil possession through a detentor will not do. What should not happen is the acquisition of civil possession without any natural possession.

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[191] *Hamilton v McIntosh Donald Ltd* 1994 SC 304 (IH).
[192] Erskine II. 1. 22.
[193] This assumes that natural possession and civil possession are inextricably linked, regardless of contrary possession—an approach not reconcilable with aspects of Erskine and Bankton.

An alternative limitation of the physical actions which may ground civil possession would appear to be title. To claim civil possession there must be physical actions exercised pursuant to a legal power granted by the civil possessor to the person exercising the physical acts.[194] In this sense the physical actions must be exercised as a result of some form of grant by the civil possessor. Implicit in such an approach is that the party exercising physical control recognizes the ultimate residual right to possession of his author and owner. On this analysis, it is an interesting question whether more than one person may be in civil possession. In a sub-lease do both the owner/landlord and tenant/landlord have civil possession through the tenant/sub-tenant?

On the assumption that natural possession is defined as a physical holding, which vests civil possession in the person by whom the legal authority to carry out those physical acts was given to the physical holder, then there appears no objection to multiple civil possessors. The exclusivity of possession is not necessarily compromised as the civil possession is derived from a different legal relation, and so presumably represents a different possessory interest. Any conflict between civil possessors would be controlled by the fact that by having necessarily different interests, the respective rights to possession will also be sub-ordinate to others.

3 Summary and Suggestions

Civil possession in Scots law now has a fairly settled meaning. Confusion, such as there is, arises from the problems of definition which permeate the civilian world. The following explanation is tentatively suggested to explain the Scottish problems.

In Roman law the use of term *possessio civilis* was probably to denote possession proper: that is physical detention and *animus possidendi*.[195] To describe something as natural possession was to talk of detention without the proper *animus*. Invariably reference to civil possession would also happen to be reference to possession by an owner, or at least someone believing himself to be the owner.[196] A reference to a natural possessor was a reference to someone lacking that *animus*, and in today's technical sense, we may say that he did not have possession.[197]

With this in mind, one must then consider the Institutional writers' treatments. They may have recognized that in Roman law, persons who were described as civil possessors in the Digest were also the owners of things in question. In rationalizing the law of Scotland they saw owners of things, and they saw persons who had the detention of the thing but were not owners. Accordingly, they may refer to civil possessors as people who were proper possessors—normally owners of the property, but expanded later—who retained possession *animo solo* when the thing was under the hand of actual holder. The actual holder, termed a natural possessor was the same

[194] KGC Reid (n 34) [121].
[195] Be that *animus domini*, or merely *animus rem sibi habendi*.
[196] To some extent this explanation relies upon Savigny's treatise, and may therefore be criticised as discredited. Unfortunately, in the sphere of possession one can only try to rationalise contradiction.
[197] To some extent this depends on the definition of *animus* which one accepts.

person as the Roman natural possessor; but the crucial development was that they might be accepted as true 'possessors' under the less stringent *animus possidendi* test. At this stage a crucial point arises: to what extent are the civil and natural possessions in a symbiotic relationship?

If the civil possession as described by the Institutional writers is derived from—and indeed dependent upon—natural possession or at least physical acts, then civil possession will cease with the end of the physical acts. On the other hand, if civil possession carries the meaning of the Roman law, as Bankton thought, then it is an independent form of possession which may subsist in the absence of physical acts by another. On this view, civil possession is merely a continuation of possession with *animus domini*, *animo solo*; which is not repugnant to the natural possession of those holding merely *animo rem sibi habendi*. The civil possession would continue until a contrary repugnant act of possession with *animus domini* ended the civil possession (itself predicated upon *animus domini*). Thus, cessation of natural possession would not in itself deprive the civil possessor of civil possession.

If the orthodoxy is displaced by Erskine and Bankton, then the natural possessor need not have received the legal authority to carry out physical acts either; rather, all that is required is that the natural possessor need not have an *animus* which denies the civil possession. This explanation also explains how there may be civil possession in more than one person.[198] An illustrative example is a standard security holder:

Example: A grants a lease to B which is made real on day 1. A then grants a standard security to C, which is registered on day 2. A defaults on the debts to C. C now has a real right to possession of the subjects[199], though this is subject to the lease in favour of B.

Here we have a security holder with a real right to possession, a tenant with natural possession, and an owner with civil possession. In this conundrum, the standard security holder is said to be able to collect rents if he has taken possession.[200] Unfortunately, the prior real lease means that the security holder cannot take natural possession. To be able to recover rents, the standard security holder must be in possession, but in what way?[201] His possession is civil possession through the tenant; however, the tenant has no legal relationship with the security holder.

At this point the need to show a legal relationship for civil possession falls away in favour of a more accurate test: that the physical possession must not deny the *animus* of the civil possession. In cases where there is a legal relationship, then evidently the physical acts will not deny the *animus* in the absence of inversion. However, in a limited number of cases, civil possession can exist through a person with whom no direct legal relationship subsists;[202] so long as the natural possessor does not deny the civil possession. It may be that the physical possessor denies the civil possession of an

[198] *Steuart v Stephen* (1877) 4 R 873 (IH); *Brocket Estates Ltd v McPhee* 1949 SLT (Notes) 35 (OH).
[199] The term 'real right to possession' is not necessarily a technical one; rather, it is could merely by an incident of another real right.
[200] Conveyancing and Feudal Reform (Scotland) Act 1970 sch 3 standard condition 10 (5).
[201] It may of course be the case that the security holder is merely unable to recover the rents; however, this would appear to render the legislation somewhat impotent.
[202] Another example it is submitted is an owner and sub-tenant.

intermediate civil possessor, but continues to acknowledge the civil possession of an owner.

E *Retinere possessionem possumus solo animo*

1 Scots Law

Following the initial acts of physical detention, the *corpus* element is satisfied *animo solo*, in the absence of contrary physical actions.[203] Continuation of the possession *animo solo* is presumed in the absence of indications to the contrary, as laid down by Stair.[204] It is questionable to what extent mutually repugnant acts purporting to exercise civil possession may interrupt the possession *animo solo*. One may of course cease to intend to possess, and in so doing possession may end by act of mind alone.[205]

Erskine elaborates further, by tying the retention *animo solo* to a requirement of physical potential to resume actual detention.[206] While the suggestion by Stair was that possession *animo solo* could be broken only by contrary actions; the formulation by Erskine is broader. Erskine states that if the possessor is unable to resume physical detention, then the possession is lost.[207] Thus if A loses his ring, he loses possession as he is unable to resume physical possession due to ignorance.[208] The fact that no-one else knows where the ring is—and thus, there are no contrary acts of possession—is immaterial. An example will help explain some issues that arise from these considerations:

Example: Crispin owns and possesses a castle in Perthshire. After completing University, Crispin decides to go to South America for a 'gap year'. For the first six months Crispin is safe and happy building an orphanage. Unfortunately, he is then taken hostage by Marxist Rebels. They inform him that he will be held until 2018 when he will be executed to celebrate Marx's bicentenary. Crispin is duly held until 2018, and is then executed. Meanwhile, the secluded location of Crispin's castle has meant no-one has set foot on the land since he left. Throughout his ordeal Crispin maintained his intent to possess his castle.[209]

What of the possession of the castle throughout this extreme example? Crispin has not lost his *animus* at any stage. Likewise, the property has not been alienated or abandoned at any stage. What then of the possession? In the first six months of the year Crispin has continuing *animus*, and would apparently be able to resume physical

[203] *Irvine v Ker* (1696) Mor Supp IV 325.
[204] Stair II. 1. 19. cf Bankton II. 1. 29; J Domat (n 133) III. 7. 1. 6.
[205] D. 41. 2. 3.
[206] Erskine II. 1. 21. cf BGB § 856 (1).
[207] cf E Perry (tr) (n 37) 266.
[208] D. 41. 2. 25; 41. 2. 13; 41. 2. 44. F Schulz (n 50) 441, states the reason to be loss of *corpus*.
[209] This example of course concerns heritable property: in South Africa it appears to be the case that loss of control of moveables ends possession; whereas heritage may be possessed *animo solo*. CG van der Merwe (n 33) [71].

possession at will.[210] The absence of contrary acts of possession means that both Erskine[211] and Reid[212] would say that possession is retained.

The position with regard to Crispin's time with the rebels is more problematic. The example states that he maintained his *animus possidendi*, and that no-one exercised contrary acts of possession over the castle. However, having been taken hostage he was deprived of liberty, with the result he was unable to resume physical actions as regards the property. In this situation, according to Reid and Stair the absence of contrary acts, or abandonment of intent, means that Crispin continues to possess the castle.[213] Conversely, Erskine's position is that the removal of the ability to resume physical detention would end Crispin's possession.

2 Summary

It would appear that Erskine's approach accords with common sense, and should be preferred for Scots law.[214] Although, it could be argued that an absence of physical actions, for a length of time, would result in a proportional reduction in the presumed retention by mind. Not to mention the fact that someone else may take up possession, to the exclusion of the *animo solo* possessor. In this way, the seemingly limitless potential of Reid and Stair's approach would be reduced. However, while these limits may reduce some of extremes of the Reid/Stair approach, it is thought that Erskine's approach is sensible, and would reflect the factual element of possession more closely.

F Possession of an Incorporeal: quasi possession

1 The Idea of Possessing an Incorporeal Thing[215]

(a) The General Idea

An incorporeal thing is intangible, and lacks a physical presence.[216] The most common—but not the only—example of this is a right. The present enquiry is whether there can be possession of a thing which lacks a physical presence.[217] It will be

[210] BGB § 856 (2).
[211] Erskine may say civil possession. This was discussed above on page 39.
[212] KGC Reid (n 34) [122].
[213] cf OW Holmes (n 76) 237-38; F Pollock and RS Wright (n 73) 15.
[214] It is the approach taken in South Africa: CG van der Merwe (n 33) [60]; cf *S v Singiswa* 1981 (4) SA 403 (C) 405 (Williamson J).
[215] The importance of the concept applies equally to personal and sub-ordinate real rights; as regards ownership and Intellectual Property rights the position is less clear. It will not be possible to resolve all issues here.
[216] Erskine II. 2. 1; Bankton I. 3. 20; Bell *Commentaries* II, 1; G Wallace *A System of the Principles of the Law of Scotland* (Hamilton & Balfour Edinburgh (1760) Vol 1 § 146.
[217] A concept described by Dias as 'uncouth': RWM Dias (n 124) 274.

immediately clear that the problem with applying the idea of possession in this area is one of *corpus*. But the *animus*—intent to control/exclude and intent to possess—[218] is also important.

(i) *Animus*

To possess a thing the holding must have a volitional content. As we have seen, this may be split into two aspects: intent to exclude others and intent to possess.[219] The nature of a right means it is held by the person entitled to exercise the right, therefore there is no difficulty with intent to exclude others: exercise of powers in accordance with the right will necessarily exclude others. That is of course, not to say that no more than one person may have a right which is effectually the same; rather it means no-one is able to have the same right. I live with two other people under a lease, and we all have rights under the lease; however, we all have a unique right in our patrimony, even if they amount to having the same effect if exercised.

To possess a right the person must hold the right as owner, or for the benefit of himself. If the test is one of *animus sibi habendi*, it may be said that it will normally be satisfied by someone with a right that is real or personal. This is because the very nature of a right means it will be exercised for the benefit of oneself. There may however, be exceptions. A trustee may exercise a real right entirely on the behalf of the beneficiary. In such a situation the right is in the patrimony of the automaton actor; yet, the right is exercised without benefit to that actor, and may be said to merely be in their patrimony.

In such a situation it may be questionable whether the trustee is the owner of the right: it is submitted they are; but the right is held in a separate patrimony as suggested by Gretton.[220] Yet, despite being the owner of the right, it is thought that *animus domini* would not be exercised by such a trustee either; because, an implicit aspect of *animus domini* must be exercise as owner, for the benefit of oneself as the owner: *jura utendi*, *fruendi et abutendi*. A bare title to the right without exercise for oneself will not constitute sufficient *animus* for possession of the right. Of course, the actor may act fraudulently exercise the right for his own benefit, at which point the requisite *animus*, on either test, will be satisfied.

(ii) *Corpus*

(α) General

[218] Intent to possess is used deliberately as a neutral term.
[219] See above on page 18.
[220] GL Gretton 'Trust and Patrimony' in HL MacQueen (ed) *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 186-192; T Honoré 'Trusts: The Inessentials' in J Getzler *Rationalizing Property: Equity and Trusts-Essays in Honour of Edward Burn* (LexisNexis UK 2003).

The traditional reason given against possession is the inability to meet the *corpus* requirement of possession. The difficulty is not with the exclusivity aspect of the *corpus*, as one may exercise a right to the exclusion of others. There is however, a question over whether the inability to detain physically the object is necessarily hostile to possession. The scepticism can be answered in three ways: it is well founded and there is no possession; it is not well founded as the physical aspect is waived in this situation; or, it is incorrect and that there may be physical detention of a right. The submission here is along the lines of the last point: physical detention is constituted by exercise of the right. The suggestion that the physical element is waived is necessarily the antithesis of saying there is possession: to change the rule to accept a situation distorts the rule if it is not merely an incremental development. Incremental development involves looking at the *corpus* aspect anew, by suggesting a new consideration of the meaning of physical.

(β) Physicality

The traditional idea of *corpus* may be said to be 'physical detention'. The word 'physical' is the key aspect of this section. The current approach to possession proceeds upon an understanding of 'physical' which has ossified, to the point that it is now unduly restricting the understanding of *corpus*. The definition of 'physical' given by the Oxford Concise Dictionary is as follows:

> **physical**...*adj. & n.* ● *adj*. **1** of or concerning the body (*physical exercise*; *physical education*). **2** of matter; material (*both mental and physical force*). **3 a** of, or according to, the laws of nature (*a physical impossibility*). **b** belonging to physics (*physical science*). ● *n.* (in full **physical examination**) a medical examination to determine physical fitness…[221]

The two elements which we are interested in here are: those concerning the body, and the requirement to be of matter or material. The literal translation of *corpus* is body.[222] The idea that a thing must be physically detained often connotes the idea of an interaction between a thing, physically manifested to the extent that it is materially tangible, and a person. It a question of holding a thing in one's own hand. However, the law admits a species of thing that is intangible known as an incorporeal.[223] The word 'thing' is used in a technical sense, and can be the subject of rights, and is itself a legal thing which may be alienated like a bag of corn. An incorporeal is an abstract concept: it is a man made thing for a man made system. In the context of possession the *corpus* requirement may be conceived of as applying to all things, including those that are intangible. Therefore the understanding of physical detention is man made, for the man made system.

Law is concerned with explication, and while property law may be the tortoise to the hare of obligations, the tortoise should not be thought of as incapacitated. Development has been ongoing with regard to the definition of possession, as the idea

[221] D Thompson (ed) *The Concise Oxford Dictionary of Current English* (9th edn BCA 1998) 1029.
[222] PGW Glare (ed) *Oxford Latin Dictionary* (Clarendon Press 1968) 448.
[223] cf German law: BGB § 90.

of 'things' becomes more sophisticated. Therefore, the derivation of *possidere* from *sedere* (to sit) means that *possessio* in its earliest form meant to sit upon land. That the idea of possession was not applied to moveables in the Twelve Tables shows the great evolution the concept as undergone.[224]

The *corpus* aspect of possession may arguably be satisfied by physical actions which amount to the exercise of a right.[225] There can be possession of an incorporeal, with the *corpus* exemplified by physical actions which are indicative of a detention or holding of the right which allows these physical actions to take place. In this way, the right itself is possessed through the physical actions in connection with a piece of property. The holder of a servitude, may not be said to possess the land as a *unum quid*, as he does not seek to exclude others beyond his own servitude; however, there are physical acts upon this land indicative of a right which may prescribe.

The leap towards accepting a physical aspect of the possession of a right is not so much a leap as a step, and a step forward at that. The law moves on, and in this context it is right that, with the increasing sophistication of thought, the idea of *corpus* should move to a more sophisticated level. Such an incremental development has the benefit of allowing the law to leave behind the strangely resilient term '*quasi-possessio*'. This is to all intents and purposes possession;[226] except it comes with the rudimentary accompanying mantra that there cannot be possession of an incorporeal, only *quasi possessio*.

Having started with a general statement of the issues of possessing an incorporeal and further stated the proposed development; it falls to examine the current position. It is not maintained that there is considerable support for the position above in those terms, quite the opposite in fact. But, the law's approach in Scotland, and beyond, contains latent suggestions which can be rationalized as coming to these conclusions. It is certainly an area ripe for development.

(b) Roman Law

The idea of the possession of an incorporeal appears not to have been accepted in early Roman law, though it may have been later.[227] The earlier view appears to have been preferable to Savigny.[228] The reason Savigny gave was that, *animus domini* being of the essence of possession, the holder of a *jus in re aliena* could not be said to have possession proper. *Quasi-possessio* for Savigny is not the possession of a right: it is the exemplification of the exercise of a right. It is not in fact possession at all, rather the physical manifestation of the exercise of a right, or a *de facto* exercise of the right.[229] This may be explained by his adherence to *animus domini*, and may be seen as distinguishable as regards the present thesis so far as *animus domini* here is used to encompass the *jura in re aliena*. Savigny also points out that allowing true

[224] F Schulz (n 50) 428.
[225] cf DP Derham and GW Paton (n 124) 556-57.
[226] TE Holland (n 104) 178-79.
[227] D. 41. 2. 3; RWM Dias (n 124) 274.
[228] E Perry (tr) (n 37) 130.
[229] cf EE Whitfield (tr) (n 178) 364.

possession of rights may result in being able to talk of possession of ownership,[230] and indeed the possibility of possession of the right to possession.[231]

Roman sources themselves appear confused. It would appear that a *usufructuary* was given some form of possession,[232] as were the holders of praedial servitudes.[233] This is described as having been some form of possession of the corporeal thing in the classical law; however, in the later law the understanding shifted to having a form of possession of the right itself, yet still a *quasi possessio* due to the intangible nature of the thing.[234] These observations are echoed by Lee; however he suggests that 'In the later law the principle that incorporeal things could not be possessed was an abstract dogma without practical significance. The quasi-possessor enjoyed the use of the usual interdicts or of special interdicts adapted to the particular case.'[235] This is consistent with the present work's argument: there is little point in a dogmatic refusal to state one may not possess a right, if *quasi possessio* is not significantly different beyond the nature of the subject: the incorporeal is still the subject of the *corpus*.

(c) Comparative Approaches[236]

(i) South Africa

A useful indication of the idea of possessing an incorporeal can be seen in South Africa. There, the possessory remedy the *mandament van spolie*, has been used to protect incorporeal property.[237] The implicit suggestion is that there can be possession of an incorporeal. Or, the *mandament* is used to protect *quasi possession*: thus, constituting another star in the possessory galaxy of exceptions, and inconsistency. Indeed, van der Merwe states that possession only applies to corporeal objects,[238] and that one may only have quasi-possession or juridical possession of an incorporeal. This is described as '…the exercise of control over an incorporeal coupled with an animus to exercise such control. Factual control of an incorporeal is exercised whenever the thing is exploited in accordance with an actual or presumed legal right (for example, a servitude or a contractual right of use) with regard to the thing.'[239]

The first part of the definition sounds very like possession proper; whereas the second part states that there will be satisfaction of the *corpus* element when 'the thing' is

[230] Citing Spangenberg: E Perry (tr) (n 37) 133.
[231] E Perry (tr) (n 37) 133.
[232] WM Gordon and OF Robinson (tr) *The Institutes of Gaius* (Duckworth London 1988) IV 139; JAC Thomas (n 31) 147; RW Lee (n 103) 181.
[233] JAC Thomas (n 31) 147.
[234] JAC Thomas (n 31) 147. For similar remarks see: RWM Dias (n 124) 274.
[235] RW Lee (n 103) 181.
[236] A discussion of the position in German law has been omitted because of its denial of the status of 'thing' to incorporeals.
[237] KGC Reid and CG van der Merwe 'Property Law: Some Themes and Some Variations' in R Zimmermann D Visser and KGC Reid *Mixed Legal Systems in Comparative Perspective* (Oxford University Press Oxford 2004) 658-59; CG van der Merwe (n 33) 49.
[238] CG van der Merwe (n 33) [52]. cf *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N); *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 (3) SA 629 (C).
[239] CG van der Merwe (n 33) [52].

exploited as of right. The reference to this thing, in the abstract from the exercise of the right, distinguishes this approach from the one advocated by the present writer. The physical actions are constitutive of an exercise of the right, which in themselves provide the *corpus* element to give possession.

Conversely, Kleyn states: 'The function of incorporeities (i.e. rights) as objects within the realm of property law was recognized by the Romans, and the possession of incorporeities was accordingly protected by the possessory interdicts.'[240] No 'quasi' prefix here. He goes on to say, the term was used in relation to a *usufructuary*, and that it was in the canon law the idea was expanded greatly beyond this.[241] The idea of possession of an incorporeal has a long history in South African law,[242] and the manner of showing this possession is by exercise of the right in question. The concomitant definition of dispossession therefore, is interference with the exercise of that right. The nature of the rights so possessed, or at least so protected, appears to be limited to those that are real or personal rights of use.[243] While the canon law required the applicant to show the right existed, the South African law does not.[244]

The approach of Kleyn is very similar to that advocated here. The fact that he can state that possession of an incorporeal is "part and parcel" of South African law, shows the same could apply here. The hostility to the idea of possessing an incorporeal is, according to Kleyn, a likely result of '…the recent general tendency among some academics to regard only corporeals as things. According to them, property law should concern itself only with material objects.'[245] The statement refers to South Africa; although, it may portray a broader body of opinion, acting as a theoretical bulwark against the development of an idea of possessing an incorporeal.

(ii) Common Law

The Common law has also endured something of an inconclusive flirtation with the idea of possessing an incorporeal.[246] Thus, in a recent work Getzler suggests that there is a problem with the idea of seisin of incorporeities, which cannot be possessed in a true sense.[247] In this connection reference must be made to the masterful analysis of Maitland.[248] In his seminal examination of the meaning of seisin in English law, he talks of the transfer of rights; more particularly he states:

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[240] D Kleyn (n 178) 829.
[241] D Kleyn (n 178) 829, referring to his own work: D Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD Thesis University of Pretoria 1986) 114.
[242] D Kleyn (n 178) 830, and the voluminous authorities cited therein. JG Kotze (tr) *Van Leeuven Commentaries on Roman-Dutch Law* (Stevens & Haynes 1881-1886) 199; RW Lee (tr) *Grotius's the Jurisprudence of Holland* (Clarendon Press 1926-1936) II 2 5; P Gane (tr) (n 183) 41. 2. 11.
[243] D Kleyn (n 178) 830.
[244] D Kleyn (n 178) 830; AJ van der Walt 'Three cases on the *mandament van spolie*' (1983) SALJ 691.
[245] D Kleyn (n 178) 830.
[246] F Pollock and RS Wright (n 73) 35.
[247] Rather than problem the word used is in fact 'mystery': J Getzler 'Roman and English Prescription for Incorporeal Property' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK London 2003) 283.
[248] FW Maitland 'The Mystery of Seisin' in HLA Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press Cambridge 1911); and to a lesser extent FW Maitland 'The

> In truth however the treatment which these rights receive in our oldest books is the very stronghold of the doctrine I am propounding. They are transferable just because they are regarded not as rights but as things, because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed.[249]

This shows a common law understanding of things that are incorporeal capable of being physically possessed; and any suggestion that Maitland speaks loosely of possession in a muddle with ownership would be erroneously bold. The emphasis is on seeing a right as a thing. The approach is confirmed by the following passage from Maitland:

> Bracton's whole treatment of *res incorporales* shows the same materialism, which is all the more striking because it is expressed in Roman terms and the writer intends to be very analytic and reasonable. *Jura* are incorporeal, not to be seen or touched, therefore there can be no delivery of them. A gift of them, if it is to be made at all, must be a gift without delivery. But this is possible only by fiction of law. The law will feign that the donee possesses so soon as the gift is made and although he has not yet made use of the transferred right. Only however when he has actually used the right does his *possessio* cease to be *fictiva* and become *vera*, and then and then only does the transferred right become once more alienable.[250]

This gives an idea of a form of possession in the Common law, explicitly following that of the Roman, which is similar to the approach advocated here. The emphasis is on the fact rights are things by law, and thus legal concepts will be fitted to suit their character—after all, the oft quoted mantra is that the nature of possession depends on the nature of the thing. The emphasis is that the *corpus* is constituted when the right is exercised. The idea of possessing an incorporeal probably does not however, extend to intangible personal property (incorporeal moveables).[251] But the idea of possessing an incorporeal remains as a latent idea, providing for example, an explanation for the ability to sue in nuisance.[252]

(iii) French and Louisianan Law

Beatitude of Seisin' in HLA Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press Cambridge 1911). cf W Holdsworth *A History of English Law* (Methuen & Co Ltd Sweet & Maxwell 1937) Vol 7 23-31; Craig 2. 7. 3.

[249] FW Maitland '*Mystery'* (n 248) 374.

[250] FW Maitland *Mystery* (n 248) 379. cf TE Scrutton *The Influence of the Roman Law on the Laws of England* (Cambridge University Press Cambridge 1885).

[251] MG Bridge (n 67) 15.

[252] DP Derham and GW Paton (eds) (n 124) 556-57; *Newcastle-under-Lyme Corporation v Wolstanton Ltd* [1947] 1 Ch 92 (EWHC) 101-02 (Evershed J); *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL); *Foster v Urban District Council of Warblington* [1906] 1 KB 649 (CA); *State of Louisiana v M/V 'Testbank'* 752 F2d 1019 (1985).

The idea of possessing an incorporeal has been present in French law for some time.[253] The modern position is affirmed by the terms of the relevant provision of the Code Civil: 'Possession is the detention or use of a thing or of a right which we hold or exercise by ourselves…'.[254] The key point here is that code says one may possess a right or a thing,[255] and that the *corpus* is represented by the exercise of the right. The position in Louisiana is that 'The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession.'[256] Yet the idea of the distinction between possession and quasi-possession, is described by Yiannopoulos as having '…mostly doctrinal significance'[257] to the point that the distinction is not observed practically. Yet the law of Louisiana will not admit of the possession of a personal right.[258]

The acceptance of possession of rights in France should not be overstated though. While the code may conflate things and rights as being capable of possession, the French literature is not certain in the matter. Thus Pothier states that 'Incorporeal things, that is to say those *quæ in jure consistunt*, are not truly susceptible to possession properly so-called; but they are susceptible of quasi-possession *jura non possidentur, sed quasi possidentur*.'[259] In addition to this however, he then states 'This quasi-possession is susceptible to the same qualities and the same vices as true possession.'[260] In this sense it would appear the code accepts possession of an incorporeal, yet the academic literature retains a distinction for reasons of analysis. The *corpus* is constituted in this case by the exercise of a real right.[261]

(d) Scots Law

(i) Craig

The idea of possessing an incorporeal has received some limited discussion in Scots law. The clearest early reference to the idea is by Craig: 'This definition is confined to corporeal property; because, as the author [of the Regiam Majestatum] points out quite correctly, incorporeal subjects are incapable of actual possession, although in law they are susceptible of quasi-possession. Nevertheless, incorporeal rights are common subjects of sasine.'[262] This statement it similar to the views expressed by Maitland; however, they are distinguished by the reference to quasi-possession.

[253] J Domat (n 133) III. 7. 1. 5; M Picard (ed) (n 104) 159.
[254] Code Civil art 2228. cf G Ripert and J Boulanger (n 107) [2282]; E Bartin (ed) (n 131) 108; F Terré and P Simler (n 107) 159.
[255] This differs slightly from the present analysis, which suggests a right is a thing.
[256] Louisiana Civil Code art 3421 (art 3432 of LCC in 1870); AN Yiannopoulos (n 104) § 303.
[257] AN Yiannopoulos (n 104) § 303.
[258] AN Yiannopoulos (n 104) § 306. cf E Bartin (ed) (n 131) 110. cf AWT Renton and GG Phillimore (eds) *Burge's Commentaries on Colonial and Foreign Laws* (1981) 245.
[259] RJ Pothier (n 130) 278. 'Les choses *incorporelles*, c'est-à-dire celles *quæ in jure consistunt*, ne sont pas susceptibles d'une quasi-possession *jura non possidentur, sed quasi possidentur*.'
[260] RJ Pothier (n 130) 278. 'Cette quasi-possession est susceptible des mêmes qualités et des mêmes vices que la veritable possession.' F Terré and P Simler (n 107) [140].
[261] M Picard (ed) (n 104) 160.
[262] Craig 2. 7. 3.

Indeed, it appears that Craig would not say that the possession of sasine would be inferred from acts amounting to the exercise of a right.

(ii) Stair

Hostility to the idea of possessing an incorporeal is visible throughout subsequent Institutional works. In Stair the matter is not directly covered in the treatment of possession, and he suggests 'Possession is the holding or detaining of any thing by ourselves, or others for our use.'[263] Potentially one could argue that Stair says 'any thing' and this includes rights; however, is seems likely that is it implicit that corporeal property is involved, with words like 'Corporal possession' used.[264] On the other hand, the absence of any mention of quasi-possession is a little puzzling, and Stair was a contemporary of the Roman-Dutch school which has admitted the wide concept in South Africa.

(iii) Bankton

Bankton is more forthcoming when he observes that 'Possession is properly of things *Corporeal*: but there is likewise a kind of possession of Incorporeal things, as of Servitudes, which are acquired *usu et patientia*…'.[265] Bankton does not use the term *quasi possessio*; however, possession proper cannot be ascribed to an incorporeal either. The quasi-possession envisaged has a *corpus* requirement of exercise or use of the right involved. This appears broadly similar to the proposal of this work; however, the difference is that Bankton does not recognise the possession as 'proper'. A contemporaneous account by Wallace is in similar terms when in relation to 'Incorporeals' he states: 'They cannot be said to be possessed, or to be delivered…But they may be said analogically to be possessed.'[266] The apparent contradiction is explained by an adherence to the necessity for corporeality.

(iv) Erskine

Erskine's treatment is of interest in this area, where he explains possession of servitudes: 'The use, therefore, or exercise of the right, is in servitudes what seisin is in a right of lands; which exercise we improperly call possession, and is in the Roman law styled *quasi possession*.'[267] Therefore, this is another example of the concept of possessing an incorporeal being conceived of by an Institutional writer, yet not being admitted as full possession proper. As regards Bell, there is no direct authority; although in his discussion of the pledge of debt, it may be taken as implicit, that the

[263] Stair II. 1. 17.
[264] Stair II. 1. 18.
[265] Bankton II. 1. 28.
[266] G Wallace (n 216) § 146.
[267] Erskine II. 9. 3. cf *Ogilvie v Tenants of N* (1541) Mor 10849: '*…jura hæc incorporalia et servitutes non possunt sine titulo possideri*.'

inability to pledge a debt is because of the perceived impossibility of delivering an incorporeal.[268]

(v) Modern Views

More recently the idea of possessing a right continues to be the subject of some hostility. It is the opinion of Reid that there can be no possession of an incorporeal due to the inability to physically detain the property.[269] Although, what he does accept is that there is a *fictione juris* that 'interests in land' may be the subject of an improper holding which is termed 'possession'. This improper possession will arise upon the exercise of the right in question.

A less clear account is given by Sutherland who suggests that: 'Possession of incorporeal moveable rights shows the same dependence on the institutional law….The rules as to delivery of possession of rights are to be found in a more or less complete and integrated form in Stair, subject to one formal improvement provided by the Transmission of Moveables Act 1862.[sic]'[270] His argument is hard to follow, and this statement is something of a distraction in the present inquiry. What Sutherland appears to suggest is that Scots law would approach the issue of lost property from the standpoint of rights rather than possession. Therefore he talks somewhat loosely of the possession of rights. It is unclear whether this is refers to a colloquial holding; or, whether it is merely assumed, that rights are capable of technical possession.[271]

(e) Summary

It appears that the idea of possession of an incorporeal is one with which Scots law is acquainted. What is equally clear is that acquaintance is not acceptance. It would seem that the consistent approach in the literature is to reject the concept of possession of an incorporeal, in the full sense of the word, in favour of a limited and exceptional form of possession. The purpose of this rejection appears unclear, if the constituent parts of this qualified possession are the same as possession proper; the only meaningful difference being the *corpus* applied to an incorporeal. Therefore it is submitted that it would be preferable to suggest that possession applies to incorporeals.

G Exclusive Possession

1 The Inherent Exclusivity of Possession

[268] Bell *Comm* II, 23.
[269] KGC Reid (n 34) [120]. Though, see now *Yaxley v Glen* [2007] CSOH 90.
[270] R Sutherland 'Possession: Scots law' in E Attwooll (ed) *Perspectives in Jurisprudence* (University of Glasgow Press 1977) 139.
[271] R Sutherland (n 270) 137-40.

A common habit is a tendency to talk of a requirement of exclusive possession. This is somewhat unhelpful since the very nature of possession is exclusive. The theme of exclusivity appears in two aspects of possession. In the *corpus* aspect it is vital that the physical holding is to the exclusion of physical holding by others. As regards *animus*, the intention to possess whether it be *domini* or *sibi habendi* always carries a concomitant intent to exclude others.[272] It is the *animus* aspect required to effect the factual *corpus* aspect.[273]

(a) Historically

That possession is exclusive by nature has some considerable pedigree. It was the opinion of Paul that '…several persons cannot possess the same thing exclusively; for it is contrary to nature that when I hold a thing, you should be regarded as also possessing it.'[274] The Scottish Institutional writers developed the law on this basis. Craig points out that no more than one person may possess a thing;[275] while Stair indicates that '…nothing can be possessed *in solidum* by more than one, either simply or in relation to the same right…'.[276] The accounts of Erskine[277] and Bankton[278] are in similar terms. Similar sentiments are expressed by contemporary Civilian sources.[279] This can also be stated to be the position today as regards both the Common and Civil law traditions.[280]

(b) Joint Possession

Yet, for every rule there must be an exception. In Scots law the exception is that joint possession is possible, as is possession of a single thing by reference to different interests of possession. As regards joint possession '…each pro indiviso proprietor of heritage has a real right to possession of the whole subjects jointly with his co-

[272] R Sohm *The Institutes: A Textbook of the History and System of Roman Private Law* (Clarendon Press Oxford 1907) 333.
[273] See above on page 18.
[274] D. 41. 2. 3. 5; 41. 1. 3; 41. 1. 26; 41. 3. 32. 2.
[275] Craig 2. 2. 5.
[276] Stair II. 1. 20.
[277] Erskine II. 1. 21.
[278] Bankton II. 1. 27.
[279] J Domat (n 133) III. 7. 1. 3; P Gane (tr) (n 183) 41. 2. 3.
[280] *Chaplin v Assessor for Perth* 1947 SC 373 (LVAC) 378 (Lord Keith); *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29 (IH) [60] (Lord Osborne); *Western Australia v Ward* (2002) 191 ALR 1 (HCA) [477], [502] (McHugh J); *Wilson v Anderson* (2002) 190 ALR 313 (HCA) [194] (Callinan J); *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 (CA) 638-39 (Willmer LJ); F Pollock and RS Wright (n 73) 20-21; AL Goodhart (ed) *Pollock's Jurisprudence and Legal Essays* (MacMillan & Co Ltd London 1961) 98; K Gray and SF Gray *Elements of Land Law* (4th edn Oxford University Press 2005) [3.2]; PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12th edn Sweet & Maxwell London 1966) 287; MG Bridge (n 67) 19; OW Holmes (n 76) 220; W Markby *Elements of Law* (6th edn Clarendon Press 1905) 203; J Hill 'The Proprietary Character of Possession' in E Cooke (ed) *Modern Studies in Property Law* (Hart Publishing 2001); KGC Reid (n 34) [118];E Perry (tr) (n 37) 112-28; CG van der Merwe (n 33) [61].

proprietors.'[281] This is not, in fact, the exception itself: to say that each co-proprietor has a right to possession is different from saying that they can take joint possession together. However, it seems clear that joint possession can be taken by co-proprietors.[282] It is a nice point whether the granting of a lease by a group of co-proprietors to one of their number ends this co-possession. In this connection the agreement by the other co-proprietors could give an exclusive right to possession to the other, though this would be entirely a matter of contract.[283]

Thus, the other co-proprietors would still be able to use this right against third parties; but '…there would seem to be no reason why they should not enter into an agreement among themselves that one of their own number is to be entitled to the exclusive possession of the property…whereby he will have the sole natural possession…'.[284] Could it be that the co-proprietors retain civil possession in such a situation? The contractual nature of the tenancy would mean the *animus* would not be to *animus domini in solidum*, or else this would represent an inversion of the lease denying their title.

In any event, the case is illustrative of the idea of 'exclusive possession' as against others, which in fact is a simple matter of one person taking possession. Exclusivity is of the essence of such an agreement, which rather than giving the 'tenant' exclusive possession, actually depends on a cessation of natural possession on the part of the other proprietors. The 'possession' they will be left with will either be transitory acts amounting to occupancy, or something along those lines; or mere civil possession. Therefore the talk in the case of 'exclusive' possession adds nothing.

At a more general level the idea of co-possessing is rationalized by Reid as '…possible where the claims of the parties are complimentary rather than antagonistic.'[285] This explanation is elaborated to include two distinct situations. The first is where more than one person holds the same right to possession, such a co-owners or co-tenants.[286] The alternative situation is where two or more persons have non-repugnant rights to possession in the same thing.[287] This is an example of possessing one piece of land, but as a result of different interests. The analysis seems sound, and is broadly consistent with the approach of the South African law.[288]

(d) Summary

This section has suggested that as a term 'exclusive' possession is misleading. The use of the term as a test to distinguish between a lease and a licence is considered in the section dealing with possession and leases.[289]

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[281] *Clydesdale Bank plc v Davidson* 1998 SLT 522 (HL) 524D-E (Lord Jauncey); *Carmichael* (1623) Mor 1059.
[282] *Price v Watson* 1951 SC 359 (IH).
[283] *Clydesdale Bank plc* (n 281) 525 (Lord Hope).
[284] *Clydesdale Bank plc* (n 281) 525 (Lord Hope).
[285] KGC Reid (n 34) [118].
[286] KGC Reid (n 34) [118].
[287] KGC Reid (n 34) [118].
[288] CG van der Merwe (n 33) [61].
[289] See below on page 69.

Possession and Leases in Scots law

A Introduction

Possession is important because it is one way[290] that a lease can have real effect against singular successors.[291] The right to possession is the primary right of the lessee.[292] The intention of this section is to try and map out the constitution of possession in relation to leases. It is useful to establish how the general constitutive elements of possession in the law generally relate to leases, which in turn assists in the examination of an idea of unitary law of possession. The section shall then examine the importance of possession in the context of differing and specific areas of lease law.

B Possession and the Leases Act 1449

1 Leases Act 1449

(a) General

The Leases Act 1449 (hereinafter 'the 1449 Act') is a statute which gives a lessee protection in a question with a singular successor of the landlord. Whether this gives

[290] The other is registration: Registration of Leases (Scotland) Act 1857 & Land Registration (Scotland) Act 1979 s 3.
[291] Bell *Principles* ss 1209-11; G Mackenzie *Observations on the Acts of Parliament* (A Anderson 1687) 37; *Earl of Morton v His Tenants* (1625) Mor 15228; *Waddel v Brown* (1694) Mor 10309; *Hutchinson v Ferrier* (1852)1Macq 196 (HL); *Millar v McRobbie* 1949 SC 1 (IH); Lord Kames *Elucidations Respecting the Common and Statute Law of Scotland* (W Creech 1777) 8.
[292] *P &O Property Holdings Ltd v City of Glasgow Council* 2000 SLT 444 (OH).

the lessee a 'true' real right has been doubted.[293] For present purposes, time and space prohibit anything other than an assumption that the real effect justifies the nomenclature 'real right'.[294] It is an interesting question if the fact that the statute technically only gives the lessee a right against incoming landlords, whether this limits the lessee's real right to possession.

Judicial interpretation of the 1449 Act has identified key aspects that must be present before a real right shall be given to the lessee. These include the requirement that the lessee has taken possession. It has been said that 'Even the most formal lease or tack does not give any possessory interest in the land which it purports to demise until the proposed lessee or taker enters into possession actual or constructive.'[295] The taking of possession under a subsequent lease, will give priority to the subsequent grantee's right to possession over that of a lessee who has not taken possession.[296]

It would appear that the requirement for possession is a result of the importance that Scots law affords to the publicity principle. This is the *rationale* given by Rankine when he states: 'The rule is founded on that principle of law which demands, in order that a transaction shall affect third parties, that there shall be some outward and visible sign, such as delivery, sasine, intimation, publication.'[297]

Thus, possession is essential to receive the benefit of real protection under the 1449 Act; however, it is not immediately clear what quality of possession is required, and whether there must be possession of the lands or the lease itself.

(b) Nature of the Possession required under the 1449 Act[298]

It would appear that for Hunter the possession required under the Act had to be natural possession by the lessee.[299] The majority of studies, however, have concluded that civil possession will be sufficient.[300] That is to say, possession by the lessee through another, say by a servant or sub-lessee.

A requirement of possession raises some fundamental problems. Foremost among them, is reconciling Erskine's definition of the requisite *animus* required to give

[293] Lord Kames *Elucidations Respecting the Common and Statute Law of Scotland* (W Creech Edinburgh 1777) 8; C Hugo and P Simpson 'Lease' in R Zimmermann D Visser and KGC Reid *Mixed Legal Systems in Comparative Perspective* (Oxford University Press Oxford 2004) 302-08.
[294] J Rankine *The Law of Leases in Scotland* (3rd edn W Green & Son Ltd Edinburgh 1916) 132 n 1.
[295] *Hutchinson* (n 291) 208 (Lord Truro). cf *Millar* (n 291) 6 (LP Cooper); *Cullen v Town of Aberdeen* (1676) Mor 15231; *Fraser v Pitsligo* (1611) Mor 15227; *Hamilton v His Tenants* (1632) Mor 15230; *Wallace v Harvey* (1627) Mor 15229; G Mackenzie (n 291) 37.
[296] *Ker v Lord Ramsay* (1620) Mor 15227; *McMillan v Gordon* (1627) Mor 15229.
[297] J Rankine (n 294) 137; Bell *Principles* ss1209-211; Hume's Lectures Vol IV at p 79 & 83; SME Vol 13, [308]; *Campbell v McKinnon* (1867) 5 M 636 (IH).
[298] The focus here is not on contractual aspects of possession such as inversion of possession, on which see *Cayzer v Hamilton (No 2)* 1996 SLT (Land Tr) 21.
[299] W Guthrie (ed) *Hunter's Treatise on the Law of Landlord and Tenant* (4th edn Bell & Bradfute 1876) 456.
[300] J Rankine (n 294) 136; Bell *Principles* s 1211; GCH Paton and JGS Cameron *The Law of Landlord and Tenant* (W Green & Son Ltd 1967) 111, A McAllister *Scottish Law of Leases* (3rd edn Butterworths LexisNexis 2002) 33.

possession as *animus domini*,[301] with the fact a lessee is aware he is not holding as owner.[302] This formulation of the requisite *animus* poses problems for the idea of a lessee taking possession for the purposes of the 1449 Act. However, it is generally accepted that the law of Scotland allows a lessee to take possession proper,[303] and accordingly is able to derive protection from the statute.

It would appear at first glance that these different results are antagonistic. Be that as it may, it is submitted that there are alternative rational explanations which are capable of incorporating perceived differences. The first possibility is that the lessee may in fact exercise *animus domini* in relation to his rights under the lease: he may be said to possess the lease.[304] The second explanation is that *animus domini* includes holding by reference to a sub-ordinate real right.[305]

(c) Possessing a Lease: Radical Territory

The idea of possession is often clouded by an assumption that one can only possess a corporeal thing. This may be a premature conclusion to make, as the idea of possessing incorporeals is not necessarily repugnant to another civilian system of property law.[306] It has been suggested above that there could be a workable theory of possessing an incorporeal in Scots law.[307] That statement appears radical.

But in fact, this statement by Rankine would appear to suggest that there is no difference beyond corporeality:

> These ideas [referring to *animus* and *corpus*] are primarily applicable to the possession of corporeal subjects; but, by an obvious extension, the term is used (either alone or as a *quasi*-possession) in regard to incorporeal subjects, such as fishings and shootings, in which case the *animus* is the same, and the detention is notified by the actual exclusion of overt acts in exercise of the right.[308]

There is—admittedly limited—judicial authority which may be understood to suggest possession of an incorporeal right is possible in the area of leases. In *Bethune & Others v Denham*[309] a golf club in St. Andrews sought to have a non-member interdicted from playing golf over land which they leased. The Court held, with Lord Young dissenting, that the club were entitled to have their possession protected by way of a possessory judgement as lessees. Lord Rutherfurd Clark stated: 'I think that

[301] See above on page 34.
[302] Erskine I. 2. 1.
[303] WM Gordon *Land Law* (2nd edn W Green & Son Ltd 1999) [14-04]. For the Roman law see WW Buckland *Textbook of Roman Law* (Cambridge University Press 1921)198-200.
[304] This is possession of an incorporeal: see above on page 47.
[305] See above on page 32.
[306] See for example the French Civil Code Art 2228: available at <http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#CHAPTER%20II%20-%20OF%20POSSESSION> (24th January 2005).
[307] This is discussed in depth above on page 47.
[308] J Rankine (n 294) 136.
[309] *Bethune & Others v Denham* (1887) 14 R 686 (IH).

it has been proved that the members of the club have been in the **exclusive possession of the right or privilege** which they acquired by the lease (emphasis added).'[310] This statement suggests that the golf club are in possession of a right which is distinct from the lease.

Lord Young's dissent appears to suggest he did not consider the golf club to have a lease at all, and only a mere 'permission'.[311] This, coupled with the *dicta* of the other judges, suggests that perhaps this case was concerned with a lease; yet not a lease of land, but a lease of the right to play golf. This is a question of what may form the subjects of a lease; however, the progressive recognition of a lease of the right to shoot suggests such a lease is not logically impossible.[312]

Having put forward a *prima facie* case for the acceptance of the idea of possessing a right in Scots law, it is suggested there is a solution to the problematic possession by a lessee, who is necessarily without the *animus domini* required by Erskine. It is possible to say that the lessee has possession of the lease itself, because he acts with the *animus domini* in connection to his right of lease itself.

It is submitted that the lease is itself a *res*, capable of supporting independent rights of possession with respect to itself. The lessee has (quasi-)[313] possession of the lease as a *res*, by virtue of having the requisite *animus domini*. This approach is not dissimilar to the idea of having the ownership of rights.[314] The lessee receives a lease of certain rights, which he may exercise over the land in respect of which the lease is granted. The primary right of a lessee is said to be the right to physically detain and use the subjects, and this is no doubt truly achieved through the possession of the lease. The uses may be very broad indeed.

The grant of a lease provides a bundle of rights in connection with a piece of land, which themselves may be said to be encapsulated in that lease. Alternatively, for those opposed to the idea of such a bundle in civilian systems, a lease represents the sum of a voluntary derogation of sub-ordinate rights from the unitary primary right of ownership.

A lease is an independent incorporeal *res* capable of being possessed. The possession of such incorporeal things must be by way of exercising those incorporeal rights, or preventing others from exercising those rights. For practical purposes the possession of a lease would normally be achieved by way of exercising rights on the ground over which the lease is granted. These physical facts on the ground, should not be seen as necessarily meaning exercise of possession of the land, rather an exercise of the rights of lease which are connected to that land which have as their physical expression acts factually relating to the ground. In a technical sense the lessee possesses the lease, and not the land itself; however, to the layperson the physical actions which constitute possession of the lease, are indicative of 'possession' of the land.

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[310] *Bethune* (n 309) 711.
[311] *Bethune* (n 309) 706.
[312] On game leases see below on page 76.
[313] The prefix quasi is unhelpful, and it is unclear what exactly it adds beyond flagging up the fact we are talking about the possession of an incorporeal.
[314] KGC Reid *The Law of Property in Scotland* (Butterworths Edinburgh 1996) [3].

This approach has the benefit of explaining, if one accepts the position, satisfactorily how a lease of shootings can receive real effect under the 1449 Act, and satisfies Erskine's requirement of *animus domini.*

C Leases and Licences: Exclusive possession?

1 General

The concept of a licence is a problematic one for Scots law in many ways. In this section the emphasis is on the inherent absurdity of the manner in which a lease is distinguished from a licence in Scots law.[315] The starting point is the suggestion that a workable test to differentiate between a lease and a licence is the requirement in a lease for exclusive possession.[316]

It is likely that the seeds for this view were sown in *Millar v McRobbie*[317] where the Lord President (Cooper) stated:

> Again, there is this further point that by its very nature and according to the juristic principles which underly the doctrine possession, to have the effects which the law imports to it, must always be exclusive.[318]

This statement is correct; the subsequent interpretation of it is not. The Lord President was saying that possession is always exclusive, possession by its very nature being indivisible.[319] The prefix 'exclusive' can necessarily add nothing to the meaning of possession in Scots law. There is either possession by the lessee or there is not. This has been accepted as the position in Scots law in a recent case, where Lord Osborne in an Extra Division stated: 'In this connection it has to be recognised that there exists a principle of law that, save for a situation in which joint possession by two or more parties is involved, no more than one person may be in possession of the same land at the same time.'[320]

2 Rating the Law's Development

In a series of decisions relating to ratings appeals, there have been judicial pronouncements in relation to the idea of contractual licence which allowed mere

[315] See above for a discussion of 'exclusive' possession on page 61.
[316] Stair Memorial Encyclopaedia Volume 13 [120]; M Dailly 'Lease or Licence in Scots Law' (1996) 8 SCOLAG 490.
[317] *Millar* (n 291).
[318] *Millar* (n 291)7-8.
[319] See above on page 61.
[320] *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29 (IH) [60]. cf Stair II. 1. 20; KGC Reid (n 314) [118].

access, as opposed to 'exclusive possession'. While it is necessary to treat cases of statutory interpretation with caution, there remain statements of considerable difficulty.[321]

In *Chaplin v Assessor for Perth*[322] the position is summed up by Lord Keith: 'So far as I can judge on the information before me, each occupier, during the period of his let, has exclusive possession, which is one of the tests of a proper lease.'[323] If the approach in *Chaplin* is the correct one, then the unspoken conclusion appears to be that some form of 'non-exclusive possession' would give rise to a licence. It is submitted that there can be no such thing as non-exclusive possession. The licensee either has possession, or he does not. It is thought that a licensee does not.

The unsatisfactory development of the law has continued apace. In *Brador Properties Ltd v British Telecommunications Plc*[324] a lessee attempted to sublet property. However, the lessee required consent to sublet from the landlord, which was duly refused. The lessee sought to grant a licence of offices by specifically providing in the agreement that the lessee was to continue in possession, thus removing any 'exclusive possession' from the sub-lessee, allegedly required to form a lease.

It would appear that the court attempted to prevent a rather blatant circumvention of the relevant clause by finding that a sub-lease had indeed been granted. The Lord Justice-Clerk's judgement contains the basis of a radical review of the difference between a lease and a licence in Scots law.[325] It appears the Lord Justice-Clerk (Ross) was saying that the idea of a lease in Scots law is not confined to someone with exclusive possession. Here lies the proverbial rub of the current problem: if it is accepted that possession is by its very nature indivisible, then there is no longer any basis, at least on the possession point, for differentiating between a lease and a licence if one accepts a licensee has possession. That is what Lord Pitman's in an earlier comments amounted to saying.[326]

There is a further suggestion, which is that there is no need for the concept of a licence at all. If one thinks of the lease as contractual for a moment, then it is of course plausible that licences are capable of being conceived as leases. The problem arises in connection with the 1449 Act. The judicial authorities are to the effect that only certain types of lease may be made real under the statute. If there is a wide concept of lease as advocated by the Lord Justice-Clerk (Ross), and an indivisible notion of possession, then all licences are potentially leases, and many[327] leases are potentially capable of being possessed and made real under the 1449 Act.[328]

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[321] *Broomhill Motor Company v Assessor for Glasgow* 1927 SC 447 (LVAC) 457. cf *Castlemilk Road Garage Co v Assessor for Glasgow* 1934 SC 169 (LVAC).
[322] *Chaplin v Assessor for Perth* 1947 SC 373 (LVAC).
[323] *Chaplin* (n 322) 378.
[324] *Brador Properties Ltd v British Telecommunications Plc* 1992 SC 12 (IH); 1992 SLT 490.
[325] *Brador Properties Ltd* (n 324) 19-20; 495-496.
[326] *David Allen & Sons Bill Posting Ltd v Assessor for Clydebank* 1936 SLT 163 (LVAC)171.
[327] A long lease—a lease that's term exceeds 20 years—must be registered for real effect: Land Registration (Scotland) Act 1979 s 3.
[328] Assuming there is a set 'rent', and some form of ascertainable duration.

3 A Triumvirate of Holdings?

Another possibility is that a licensee does not have possession proper; rather, a licensee is more correctly thought of has having limited rights of physical use.[329] It is possible that is what is meant by possession and exclusive possession, is physical use and possession respectively. This conclusion is fortified by the idea that the real right to possession is an accessory to real rights,[330] and a licence is merely personal and thus gives no real right to possession beyond the right not to be dispossessed.

The distinction comes out in *Conway v Glasgow City Council*.[331] A lady was staying at a hostel for homeless persons, and was summarily evicted after an incident to which the police were summoned. The lady had a shared room with another, and staff had free access to the room at all times. The lady sought redress on the basis that she was a lessee by virtue of her possession. It was held that there was no ish, and the possession which she enjoyed was neither exclusive, nor indeed sufficient to give rise to a lease. In reaching this conclusion it was noted by Sheriff Gordon that:

> [T]he law has come increasingly to talk of exclusive possession as a necessary condition of a lease, as can be seen in the *Brador* case itself and in other cases such as *Chaplin* and the *Commercial Components* case, where, whatever the Sheriff may have been prepared to infer, the Sheriff Principal said that exclusive possession was one of the badges of a lease.[332]

It would appear that the learned Sheriff thought that there was at least a *prima facie* case for saying that there must be exclusive possession for a lease. In *Conway*[333] it was argued that there may be a contractual lease that possession 'alone' was necessary for, and 'exclusive possession' was a requirement for a lease to be made real under the 1449 Act.[334] The present writer sympathizes with the reasoning behind such an argument, but would again refer to the futility of distinguishing 'exclusive possession' from possession simple.

The Sheriff was unimpressed by this argument.[335] It is submitted that he was absolutely correct to say that there is no real import to the lack of the use of the word 'exclusive' before possession. Unfortunately, it would appear that his realisation is somewhat at odds with his earlier, seemingly complimentary quotation pertaining to the fact that 'exclusive possession' was the 'badge of a lease'.

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[329] See above on page 37.
[330] Or perhaps more correctly, is a factual consequence of a real right.
[331] *Conway v Glasgow City Council* 1999 SCLR 248 (ShCt). (The Sheriff was reversed by Sheriff Principal Bowen (1999 SCLR 1058; 1999 SLT (ShCt) 102); before the Inner House restored the Sheriff's judgement without reasons (2001 SCLR 546; 2001 SLT (Notes) 1472).
[332] *Conway* (n 331) 255.
[333] *Conway* (n 331).
[334] The solicitor in the case later reiterated these views cogently in an article: M Dailly (n 316).
[335] *Conway* (n 331) 256.

There are two apparent conclusions to be drawn from the authorities on distinguishing leases and licences by way of the nature of the possession. These are either: 1) there are licences and/or 'common law contract leases', whereby there is possession that is not exclusive[336], and there are 'common law contract leases' enjoying real effect by way of exclusive possession; or, 2) there are only licences and a unitary type of lease which may be made real by possession, probably exclusive (whatever that may mean). The problem with the first submission is the idea of non-exclusive possession: the very idea is an oxymoron. The problem, with the second approach, is that the authorities appear not to admit of such a wide array of leases capable of real effect. More pertinently, chiming with the comments of Lord Pitman, if all licences are leases anyway why have licences at all?

There is no easy answer to the conundrum. It may be that a possible answer is to say that there may be rights of access or occupation associated with licences, rather than possession. Whatever the solution it is submitted that the idea of varying forms of possession in untenable.

4 English Angst

The test between a lease and a licence is one which has exercised English law considerably in recent years. In seeking to develop the idea of a distinction between a lease and licence, the courts have used the term 'exclusive possession' as a touchstone.[337] The approach has often been ambiguous, and has been criticized as failing to distinguish a right to 'exclusive possession' and the use of the phrase to describe actual 'exclusive possession'.[338] This criticism is sound in that what the courts appear to be trying to say when stating that 'exclusive possession' is required is that there must be possession, and a right against the world to secure that possession. In Scottish terms, the right to possession must be a real one; or certainly a right to possession, rather than a right to undertake physical actions that do not purport to exclude others.

The idea of exclusive possession has been described as the power of the tenant to exclude anyone, including the landlord, from the subjects.[339] A mere occupancy under a licence will not be evidenced by reservations of rights of entry in the agreement, since inclusion of such a term amounts to an admission of the owner's inability to

[336] A difficult idea: cf above on page 61.
[337] *Street v Mountford* [1985] AC 809 (HL) 818, 826 (Lord Templeman); *Westminster City Council v Clarke* [1992] 2 AC 288 (HL); *Aslan v Murphy (No 1)* [1990] 1 WLR 766 (CA); *Antoniades v Villiers* [1990] 1 AC 417 (HL); *Mikeover v Brady* [1989] 3 All ER 618 (CA); *AG Securities v Vaughan* [1990] 1 AC 417 (HL); *Bruton v Quadrant Housing Trust* [2000] 1 AC 406 (HL); *National Car Parks Ltd v Trinity Devlopment Co (Banbury) Ltd* [2001] L & TR 33, affd [2001] EWCA Civ 1686; *Ramnarace v Lutchman* [2001] UKPC 25; [2001] 1 WLR 1651; *Venus Investments Ltd v Stocktop Ltd* [1997] 74 P & CR D23 (CA); W Swadling 'Property: General Principles' in P Birks (ed) *English Private Law* (Oxford University Press Oxford 2000) [4.92]-[4.101].
[338] J Hill 'The Proprietary Character of Possession' in E Cooke (ed) *Modern Studies in Property Law* (Hart Publishing Oxford-Portland Oregon 2001) 28-29.
[339] *Essex Plan Ltd v Broadminster* (1988) 56 P & CR 353 (EWHC) 356-57 (Hoffmann J) ; *Esso Petroleum Co Ltd v Fumegrange Ltd* [1994] 46 EG 199 (CA); M Pawlowski 'Questions and Answers (July/August)' 2004 Landlord & Tenant Rev.

gain access due to the exclusivity of the possession in the tenant.[340] On the other hand, an explicit term reserving exclusive possession may be persuasive;[341] yet, it will not be conclusive since as a matter of property law—and to some extent fact—the state of possession is an actuality out of which cannot be contracted.

These certainties, if that is what they may be called, have been shaken by the decision of the House of Lords in *Bruton v London & Quadrant Housing Trust*.[342] Broadly speaking the decision has accepted that a tenancy could arise in a personal sense, and while it would not be good against third parties, it would represent a personal tenancy without the need for exclusive possession. Furthermore, a licensee with bare personal rights has been allowed to recover possession from a third party.[343] This has caused the question to be posed that if such personal tenancies exist, then what point is there is having the distinction between tenancy and licence.[344]

5 Summary

In Scotland, the term exclusive possession is one which is used frequently as a means of distinguishing a lease from a licence.[345] Unfortunately, it would appear that the effects of relying on such a distinction have not been properly considered. The starting point is that instead of requiring exclusive possession for a tenancy, what should in fact be required is possession without the prefix. This is to be distinguished from a licence by the fact this possession is inherently exclusive. The tenant with a real right to possession can maintain or recover the same from anyone; furthermore, it is only because the tenant acts with *animus domini*[346] that he can possess. The licensee does not have possession in any sense of the word: exclusive or bare, what he has is termed occupancy. It is a right that is personal in nature to carry out physical actions on land. The crux of this point is that the personal occupancy does not purport to exclude others; therefore there could be others with licences simultaneously. The licensee cannot recover possession from anyone except his author in title.

What is left is a potential *sui generis* holding in the nature of a licence by way of its personal nature; yet it is equated to a lease by virtue of an assumption that it is possessed. An example may be where a 'lease' is given of some lands and the 'tenant' takes up residence. The lack of some formality means that the holding is not given

[340] *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 (CA); *Shell-Mex and BP Ltd v Manchester Garages* [1971] 1 WLR 612 (CA) 618 (Buckley LJ).
[341] *Dresden Estates v Collinson* (1988) 55 P & CR 47 (CA).
[342] *Bruton v Quadrant Housing Trust* (n 337); S Bright 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7; M Pawlowski and S Greer 'Leases, Licences and Contractual Tenancies' [2000] Nottingham Law Journal 9; J Morgan 'Exclusive Possession and the Tenancy by Estoppel: A Familiar Problem in an Unusual Setting' [1999] 63 Conv 493.
[343] *Manchester Airport plc v Dutton* [2000] QB 133 (CA); M Pawlowski 'Occupational Rights in Leasehold Law: Time for Rationalisation' [2002] 66 Conv 550; W Swadling 'Opening the Numerus Clausus' (2000) 116 LQR 354.
[344] M Pawlowski 'Occupational Rights' (n 343).
[345] *Brador Properties Ltd v British Telecommunications Plc* 1992 SC 12 (IH); J Rankine (n 294) 2; Stair Memorial Encyclopaedia, Volume 13, para 120; M Dailly 'Lease or Licence in Scots Law' (1996) 8 SCOLAG 490.
[346] In the sense that it will encompass the *jura in re aliena*.

real effect. It is submitted that such a holding is a licence. There can be no possession proper as the tenant lacks the requisite *animus domini*. The moment the requisite *animus domini* could be achieved, would be the moment the holder sought to hold on the basis of a real right, which would convert the holding into a lease.

D Game Leases[347]

Traditionally there has been a question mark over whether the lease of a right to shoot has represented a lease proper, or perhaps a licence. There is a line of authorities that suggest that the right to shoot is not a lease; but rather, a personal privilege, or indeed some form of a licence.[348]

On the other hand, there are alternative authorities that suggest that there may be a lease of shootings; but such a lease is incapable of being made real by way of the 1449 Act.[349] It would appear that the reasoning behind this view was a perception that the possession of the right to shoot was impossible. The comments of the Lord Ordinary in *Birkbeck v Ross*[350] are instructive:

> [T]here may be nothing distinctly to mark boundaries of the shooting lease, or the extent of possession under it…It does not appear to the Lord Ordinary that such leases are of a kind to which the provisions of the Act 1449, or the rule of law that possession is necessary to complete the right as in a question with singular successors, can be effectually or safely applied.[351]

Thus, it appears that there was a view that such leases could not sustain the possession required for statutory protection. However, favourable *dicta*[352] contributed to the idea that such leases could receive protection under the 1449 Act, though no mention is made of a change in attitude to possession. This recent judicial pronouncement lends support to the idea of a lease of shooting being capable of protection under the 1449 Act: 'For the purpose of this action it is unnecessary to decide whether the lease qualifies for the benefit of the Leases Act 1449, c. 6. I refer to the article on the Game Leases in *Green's Encyclopaedia,* Vol. 7, para 1069.'[353]

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[347] I am grateful to Jennifer Sharp for access to her unpublished research on Shooting Leases in Scots Law.
[348] *Crawfurd v Stewart* (1861) 23 D 965 (IH); *Stewart v Bulloch* (1881) 8 R 381 (IH); *Earl of Aboyne v Innes* 22nd June 1813 FC (IH). Cf Bell (n 291) s 952-53; W Guthrie (ed) (n 299) 454. AF Irvine *A Treatise on the Game Laws of Scotland* (T & T Clark Edinburgh 1850) 20-26.
[349] *Pollock v Harvey* (1828) 6 S 913 (IH); *Birkbeck v Ross* (1865) 4 M 272 (IH); *Macpherson v Macpherson* (1839) 1 D 794 (IH); *Sinclair v Lord Duffus* (1842) 5 D 174 (IH); *Menzies v Menzies* (1861) 23 D (HL) 16; *Earl of Fife v Wilson* (1859) 22 D 191 (IH); *Leith v Leith* (1862) 24 D 1059 (IH); *Campbell v Maclean* (1870) 8 M (HL) 44; *Paterson v Johnston* (1879) 7 R 17; *Farquharson* (1870) 9 M 66 (IH) 75 (Lord Kinloch); WM Gloag *The Law of Contract* (2nd edn W Green & Son Ltd Edinburgh 1929) 233; AF Irvine (n 348) 20-26.
[350] *Birkbeck v Ross* (n 349).
[351] *Birkbeck v Ross* (n 349) 275.
[352] *Farquharson* (n 349) 75.
[353] *Palmer v Brown* 1988 SCLR 499 (OH) 502 (Lord Davidson).

The relevant paragraph makes the following submission:

> A game lease was, under the earlier decisions, held not to be protected against singular successors by the Act 1449, c. 18, but in view of the later decisions, although there has been no decision overruling the older cases, it may be taken that it is so protected.[354]

For such a view to be referred to by the court suggests at least the acceptance of the possibility of a shooting lease being protected under the 1449 Act.[355] This being so, it is submitted that the possession required would not be a strained analogy of possession of the ground over which the lease was granted: such a lease is a lease of ground that you happen to hunt on. Rather, the explanation must be that possession is of the right to the exclusive shooting. This possession may be evidenced by way of positive acts pertaining to certain pieces of ground; however, this possession is of the lease of the shootings, by way of possessing the shootings.

E The right to possession under a lease

The question of who has a right to possession has been the subject of little analysis.[356] It would appear that the common subject of dispute is, in a question between lessor, lessee, and third party, who is *entitled* to possession? A further complication is that when talking of the right to possession in this context, there must be account taken of the difference between natural and civil possession.

Since the publication of Professor Reid's influential book, the instructive case *P&O Property Holdings Ltd v City of Glasgow Council*[357] has been decided. The case involved valuation for rating, and turned on the question of whether the landlord was 'entitled to possession' for the purposes of the Local Government (Scotland) Act 1966 s 24. The question had arisen because the lessees had gone into liquidation and left the premises unoccupied, with the lease stipulating that on such an event the landlord would have an option to terminate the lease. In the present case the landlord had not exercised this option, and raised an action arguing that because the lease continued to subsist, it would not be liable for the rates.

The arguments of the landlord were accepted by the court. In reaching this opinion, the court undertook a useful analysis of where the entitlement to possession lies in a landlord and lessee relationship. In a useful passage, Lord Macfadyen opines:

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[354] J Wark (ed) *Encyclopaedia of the Laws of Scotland* (W Green & Son Ltd Edinburgh 1929) Vol 7 [1069].

[355] See also the opinion of the Solicitor General (D Anderson QC) in 1962, where he suggested that the *Pollock* case was not good law, based upon the *Leith* decision. He accordingly advised that a shooting lease could be made real. The opinion may be found as Appendix 2 to the submission from the Scottish Landowners' Federation, to the Justice and Home Affairs Committee of the Scottish Parliament, in relation to the Abolition of Feudal Tenure etc (Scotland) Bill. Also, available submitted in relation to submissions to the Justice 1 committee in relation to the Title Conditions (Scotland) Bill. Available at www.scottish.parliament.uk.

[356] KGC Reid (n 314) [127].

[357] *P&O Property Holdings Ltd v City of Glasgow Council* (n 292).

> It is in my opinion, an ordinary incident of a lease that during its subsistence entitlement to possession of the subjects of the lease rests with the tenant to the exclusion of the landlord…, even when the tenant is entitled to possession as against the landlord, the landlord remains entitled to resist the claims of any third party to possession.[358]

It is clear that the court considered entitlement to possession to be with one person only.[359] This appears sensible,[360] though perhaps with the clarification that this is in relation to natural possession. There is some further analysis required here: if the landlord has civil possession, then presumably he is entitled to possession of some kind. He is entitled to be in civil possession. The civil possession as a matter of fact is derived through the natural possession of the lessee.[361] If the lessee was responsible for the wilful loss of his natural possession, would that result in loss of civil possession by the landlord? Would he then be liable to the landlord for interference with his entitlement to possession?

It is questionable to what extent there is a need for an entitlement to civil possession. If a landlord is in civil possession, then his civil possession can only be lost in a number of ways. The landlord's civil possession may be lost by virtue of a cessation of the requisite *animus* on his own behalf;[362] or, the lessee may invert his possession so as to no longer hold for the landlord but for himself.[363] Alternatively, the landlord's civil possession must be contingent upon continuing natural possession on the part of the lessee, so dispossession of the lessee by a third party would deprive the landlord of his civil possession. This is dependant on sufficient *animus* to exclude the landlord.[364]

In relation to the means of losing possession that were not caused by the landlord, there are potential problems. If there is an inversion of possession by the lessee, then the civil possession ends, and the landlord is entitled to possession. This entitlement to possession in a question with the lessee is for natural possession, since the lessee has inverted his own possession. However, an inversion of possession does not terminate a lease, which ostensibly continues to give the lessee a right to possession; but it does give the landlord power to terminate the lease. In this sense, it can be suggested that the landlord may have an entitlement to possession better than that of the lessee during the subsistence of the lease. However, it may be that the lessee is still able to resist interference and recover possession from third parties.

Further, the landlord has some form of entitlement to protect the entitlement of the lessee to possession. In this sense, the landlord may be said to have a 'shield' to a third party's claim to possession, which ultimately derives from the landlord's civil possession. Does this amount to an entitlement to possession in a natural or civil sense? It is submitted it does not, insofar as the lessee remains entitled to the natural

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[358] *P&O Property Holdings Ltd v City of Glasgow Council* (n 292) 448.
[359] cf *Sutherland v Sutherland* 1986 SLT (Land Ct) 22.
[360] That one person has the right to possession differs slightly from the exclusivity of possession in fact.
[361] On civil possession see above on page 37.
[362] D. 41. 1. 17.
[363] *Mason's Executors v Smith* 2002 SLT 1169 (OH) [13] (Lord Mackay of Drumadoon); *Cayzer* (n 298) 24.
[364] On this point see above on page 44.

possession, the landlord is merely entitled to protect the lessee's entitlement to natural possession.

The question as regards an entitlement to civil possession is more problematic, because of the nature of civil possession.[365] While a natural possessor may be dispossessed in fact, yet still have a right to possession, it is unclear if that is true of civil possession. In the immediate example of the ability to interdict a third party, this ability flows not so much from an entitlement to civil possession, rather from the fact the landlord is in civil possession. It would appear that in a situation whereby a civil possessor is deprived of that civil possession by another, then the landlord is vested with an entitlement to natural possession as a result of usurpation of his civil possession; notwithstanding he may be obligated to return possession to the lessee following recovery of possession from a third party. However, if his lessee is dispossessed, then does the landlord lose his civil possession? Assuming that he does, the remedy he is entitled to is, the return of natural possession to his lessee; and presumably, the ancillary effect of which will re-vest him in civil possession. It therefore remains unclear if there may be said to be an effectual entitlement to civil possession.

F Summary

This section has identified the key aspects of possession in the sphere of leases. The conclusion reached was that while possession in Scots law may have conflicting tests for the *animus* of the possessor, whichever test is used may be explained in relation to the recognition of a lessee as a possessor, whether that be as the possessor of the subjects; or, of the right of the lease itself.[366] This was coupled with an analysis that a lease may be possessed, which itself built upon the idea of possessing an incorporeal which was enunciated earlier.[367]

Furthermore, it has been suggested that there are problems inherent in the manner in which leases and licences are distinguished in Scots law.[368] Indeed, it was submitted that the current state of the authorities makes cohesive analysis difficult. The area is in need of judicial clarification. Finally, regarding the right to possession as between a landlord and lessee, the nature of the interaction has been considered, and the question of an entitlement to civil possession was considered with no clear answer.[369]

[365] On civil possession see above on page 37.
[366] See above on page 66.
[367] See above on page 67.
[368] See above on page 69.
[369] See above on page 78.

Possession and Prescription

A Introduction

The importance of possession in the context of prescription is by and large in relation to positive prescription,[370] whereby heritable rights may be constituted by the passage of time.[371] One of the cardinal requirements required to show that positive prescription has operated, is the need to show possession of the subjects involved.[372]

The Prescription and Limitation (Scotland) Act 1973 (as amended) provides at s 1(1):

> If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and

[370] However, there is of course importance in the loss of possession of moveables as regards negative prescription.

[371] It is potentially controversial whether the wording of the statute in facts constitutes a right, or merely makes it unchallengeable. It is submitted the argument would be of no practical import; however, it may have a bearing upon a possible human rights challenge: *JA Pye (Oxford) Ltd v Graham* [2001] EWCA Civ 117, [2001] Ch 804 [43] (Mummery LJ). cf *Beaulane Properties Ltd. v Palmer* [2005] All ER (D) 413. D Johnston *Prescription and Limitation* (W Green Edinburgh 1999) [14.04]-[14.06]; KGC Reid *The Law of Property in Scotland* (Butterworths Edinburgh 1996) [674]; DA Brand AJM Steven and S Wortley *Professor McDonald's Conveyancing Manual* (7th edn Lexis Nexis UK 2004) [12.5]; *Miller and Barclay v Dickson* (1766) Mor 10937, 10943; *Mann v Brodie* (1885) 12 R (HL) 52, 57. For a discussion of the issue in American law see HW Ballantine 'Title by Adverse Possession' (1918) 32 Harv L Rev 135. This controversy also brings to mind the dated maxim "a right cannot die", abandoned long ago by the Common law: See P Bordwell 'Disseisin and Adverse Possession' (1923) 33 Yale LJ 1, 4.

[372] Whether that subject is land or a right concerning the land.

> followed-….then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge.

The Act also provides the following definition: '...possession includes civil possession, and 'possessed' shall be construed accordingly.'[373] This definition is somewhat minimalist, and it would appear implicit that the nature of possession required is to be gleaned from the old common law rules.[374] It is clear that there must be *animus* and *corpus* to constitute possession.[375]

B Acquisition of ownership by positive prescription

1 *Animus*

(a) General

The *animus* required for possession in the context of prescription would appear to be an intention to hold for oneself, yet not necessarily *animus domini*.[376] This is consistent with the fact that possession for the purposes of positive prescription need not be in good faith.[377] The explanation given, is that the long period required for prescription to run, justifies providing protection in the context of bad faith.[378] It is also a matter of logic. If the *animus* required for prescription were *animus domini*, then the person who is aware that he is not the owner of the property in question, would necessarily be unable to form the *animus* requirement of possession.

On the other hand, this would appear not to be the case in South African law.[379] There, one may have intention to *become* owner while in bad faith, and thus have *animus domini* whilst being in bad faith.[380] In Scotland, that person would be unable to avail themselves of the statute, if the *animus* required were *animus domini*. However, if the *animus* required is only to hold for oneself, then the would-be owner in bad faith may still hold for himself. Further, an individual who begins physical detention by virtue of a right, other than ownership, may then change their *animus* in

[373] Prescription and Limitation (Scotland) Act 1973 s 15 (1). cf Erskine III. 7. 5.
[374] D Johnston (n 371) [16.02].
[375] D. 41. 2. 3. 1; *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 (IH) 371 (Lord Murray). cf *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 (HL) 445-46 (Lord Hope).
[376] M Napier *Lectures on Conveyancing 1843-1844* (Faculty of Procurators in Glasgow 1939) 9; J Rankine *The Law of Landownership in Scotland* (4th edn W Green & Sons Edinburgh 1909) 37: 'there can be no positive prescription, unless the possessor has during the whole period held the subject as owner, *animo rem sibi habendi*'; quoted with seeming approval in *J A Pye (Oxford) Ltd* (n 375) 446 (Lord Hope).
[377] D Johnston (n 371) [16.05]; Scottish Law Commission *Reform of the Law Relating to Prescription and Limitation of Actions* (Report No 15 1970) [13]; M Napier (n 376) 53. cf Bell *Principles* s 2004.
[378] Stair II. 12. 11. The period in Roman law was shorter.
[379] WA Joubert (ed) *The Law of South Africa* (First Reissue Butterworths Durban 2000) Vol 21 [129].
[380] WA Joubert (ed) (n 379), referring to *Minister Van Landbou v Sonnendecker* 1979 (2) SA 944 (A). See also the masterful analysis in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464, 474-75 (Colman J).

such a way as to convert their possession to that of a proprietor. An example is where a detentor or tenant changes their *animus* to hold for themselves.[381] In the computation of the prescriptive period, the period of possession before this change of *animus*, which ascribes the possession to another right, will not count: possession by tolerance will not found prescription.[382]

(b) Must possession be bona fides?

The question whether *bona fides* is a requirement of possession for positive prescription has probably now been settled. It was the view of Kames and Bell,[383] that Scots law must have followed the Roman law of *usucapio*, which required good faith.[384] However, this view was not accepted universally; indeed Guthrie's note in the tenth edition of the *Principles* states: 'But the language of Mr Bell here, in regard to *bona fides*, is not consistent with principle or authority, and has not been accepted as an accurate statement of the law.'[385] The position appears to be summed up by Lord Balgray: 'Even granting that the titles had been derived *a non domino*, still the heir is entitled to plead prescription, whereby any enquiry into that fact or into *mala fides* is excluded.'[386]

Napier noted that the adoption of a *bona fides* element, along the lines of the *ususcapio*, is to ignore the ancient feudal statutes upon which positive prescription was based.[387] He states:

> It would rather seem, then, that we cannot, with propriety of accuracy, speak of *bona fides* as a quality or requisite of our feudal title of prescription; seeing that the notion is only derived from the Roman law, which, in that respect, is quite opposed to the spirit and application of the act of 1617.[388]

It may, however, be the case that '…while bad faith is not fatal to a claim based on prescriptive possession, the absence of good faith in the claim of right to a title does

[381] *Tesco Stores Ltd v Keeper of the Registers of Scotland* 2001 SLT (Land Tr) 23, 36.
[382] C. 7. 39. 2; Stair II. 12. 2; II. 12. 16; *Town of Falkland v Carmichael* (1708) Mor 10916; *Duke of Argyll v Campbell* 1912 SC 458 (IH); *Houstoun v Barr* 1911 SC 134 (IH); *BG Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd* 1999 SLT 524 (OH). cf D Johnston (n 371) [16. 27]; KGC Reid and GL Gretton *Conveyancing 2003* (LexisNexis UK Edinburgh 2004) 75; *Hamilton v Mundell; Hamilton v J & J Currie Ltd.* (Dumfries Sheriff Court, 20th November 2002); *Williams v Jones & another* [2002] EWCA Civ 1097, [2002] 40 EG 169. cf *Love-Lee v Cameron of Lochiel* 1991 SCLR 61 (Sh Ct).
[383] Bell *Principles* s 2004.
[384] With a shorter prescriptive period.
[385] Bell *Principles* s 2004.
[386] *Duke of Buccleuch v Cunnyghame* (1826) 5 S 57, 60, cf 61 (LP Hope); Stair 2. 12. 5; Mackenzie 3. 7. 5; Erskine III. 7. 4; III. 7. 15; H Millar *A Handbook on Prescription* (W Green & Sons Edinburgh 1893) 12.
[387] M Napier (n 376) 51-57.
[388] M Napier (n 376) 51-57.

entail a close examination of the evidence proferred in support of the alleged possession.'[389]

(c) *Is animus domini* required for prescriptive possession?

There has been recent consideration of this question in English law. In the case of *J A Pye (Oxford) Ltd v Graham*[390] there had been an agreement between P and G allowing G to graze animals on a piece of land. The agreement ended, yet G continued to use the land in a like manner. Subsequently, G sought to establish a possessory title on the basis of adverse possession. P sought to argue that G could not claim possession so as to allow him to gain such title, on the basis that G would require *animus domini* to the extent that he sought to 'oust' the true owner. The House of Lords held that this was not the case, and that G had shown the requisite possession. They held that the *animus* required was to hold on one's own behalf with intent to exclude the world at large.[391]

Lord Hope of Craighead made obiter observations on the *animus* requirements of the Scottish law of prescription.[392] These are a helpful insight into the Scottish position. The most important aspect of Lord Hope's speech is the failure to choose clearly between *animus domini* and *animus rem sibi habendi*. The speech also mentions the need in Scots law for there to be a competing title to which the possession is ascribed.[393] Thus, prescription in Scots law must be ascribed to an ostensible title,[394] and this title must be completed by the taking of Sasine, or its modern equivalent of registration.[395] Such a completed title must be *ex facie* valid to allow prescription to operate; however, it may of course be *a non domino*. The possession cannot run on a title granted by a person to himself, which in itself is a transfer of nothing.[396] Further, the onus of proof is on the party seeking to demonstrate the title upon which the possession is based.[397]

This might be a reflection of Scots law's historical concern with the publicity principle, and more specifically the faith of the registers. Accordingly, prescription will fortify a title that has been sufficiently publicised only. On the other hand, this

[389] *Stevenson-Hamilton's Executors v McStay (No 2)* 2001 SLT 694 (OH) [19] (Temporary Judge TG Coutts QC). cf *Tesco Stores Ltd v Keeper of the Registers of Scotland* 2001 SLT (Land Tr) 23, 36; affd. *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29 (IH).
[390] *J A Pye (Oxford) Ltd* (n 375).
[391] *J A Pye (Oxford) Ltd* (n 375) [42] (Lord Browne-Wilkinson).
[392] *J A Pye (Oxford) Ltd* (n 375) [71]. See above on page 35.
[393] See AL Goodhart (ed) *Pollock's Jurisprudence and Legal Essays* (MacMillan & Co Ltd London 1961)107.
[394] *Magistrates of Perth v Presbytery of Perth* (1730) 1 Pat App 39 (HL); *Agnew v Magistrates of Stranraer* (1822) 2 S 42 (IH); *Earl of Zetland v Tennent's Trs* (1873) 11 M 469 (IH); *Auld v Hay* (1880) 7 R 663 (IH); *Edmonstone v Jeffray* (1886) 13 R 1038 (IH); *Robertson's Trustees v Bruce* (1905) 7 F 580 (IH); *Hamilton v McIntosh* 1994 SC 304 (IH) 321 (LJ-C Ross); *Landward Securities (Edinburgh) Ltd v Inhouse Edinburgh Ltd* 1996 GWD 16-962 (SHCT). cf *Johnston v Fairfowl* (1901) 8 SLT 480 (OH); *McLellan v Hunter* 1987 GWD 21-799 (SHCT).
[395] *Officers of State v Ouchterlony* (1823) 2 S 437 (IH); affd (1825) 1 WS 533 (HL).
[396] *The Board of Management of Aberdeen College v Youngson* 2005 SLT 371 (OH).
[397] *Duke of Argyll v Campbell* (1912) 1 SLT 316 (IH); *Fothringham v Passmore* 1984 SC (HL) 96, 1984 SLT 401, 403 (Lord Fraser).

leads to potential tautology, in that the requirement of possession is an act of publication itself.

2 Corpus

(a) Generally

The physical manifestation of possession required to constitute possession is referred to as the *corpus*. This physical manifestation will be dependent on the nature of the thing sought to be possessed.[398] In the context of prescription, like possession generally, this may be natural or civil.[399] Furthermore, it may be symbolic or constructive. The nature of the *corpus* of possession is exclusive.[400] Thus, it has been held that possession of a set of keys gives sufficient control of access to premises as to give natural possession.[401] Furthermore, the possession must be open[402] and continuous; however, there will be some measure of commonsense in determining what may interrupt the prescriptive period.[403]

(b) Indivisible or Co-existing interests?

It would appear that different parties may possess different interests in the same property.[404] This appears to be a result of the role of civil possession in Scots law; it is distinctive in that someone may possess through another, so that more than one person can be said to be in possession.[405] This suggests that to retain the concept of exclusive possession, there must be possession of separate interests within a piece of ground.

Thus, in a sheriff court decision involving a standard security, the pursuer sought to argue that the defenders were unable to show ten years possession. The defenders (debtors) argued that even though they had lost natural possession in 1995, they remained in civil possession through the pursuer (creditor) thereafter, and thus met the requirements of prescription under the Act. In other words, it was suggested by the pursuers, that the exclusive possession required was absent; since upon losing the natural possession, the debtor could not be said to be in exclusive possession, as the bank now had natural possession. This approach was rejected by the Sheriff,[406] who

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[398] *Lord Advocate v Young* (1887) 12 App Cas 544 (HL); *Buchanan and Geils v Lord Advocate* (1882) 9 R 1218 (IH); R Rennie 'Possession: Nine Tenths of the Law' 1994 SLT 261, 261-62.
[399] M Napier (n 376)174-5; Prescription and Limitation (Scotland) Act 1973 s 15(1).
[400] *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29 (IH) [60] (Lord Osborne). cf Stair II. 1. 20; KGC Reid (n 400) [118].
[401] *The Royal Bank of Scotland plc v Macbeth Currie* 2002 SLT (Sh Ct) 128, 133 (Sheriff Forbes) cf *Taylor v Ranken* (1675) Mor 9118.
[402] *A v B* (1550) Mor 10598.
[403] *Lauder v MacColl* 1993 SCLR 753 (OH).
[404] D Johnston (n 371) [16.12].
[405] D Johnston (n 371) [16.10] n 28.
[406] *The Royal Bank of Scotland plc* (n 401) 134 (Sheriff Forbes).

preferred to suggest that the exclusivity of possession can be qualified, so long as third parties were excluded. The immediate question is to what extent this approach is correct and desirable; the second is to what extent this doctrine can be said to permeate other areas of property law. This would appear to show a departure from the need for exclusivity in the context of prescription

In the context of prescription the idea of possessing an incorporeal has a stronger basis than in other areas.[407] The issue arises by way of the constitution of heritable rights being dependent on the possession of the right in question. Lord Hamilton has stated that 'In the present case "the possession in question" is, in my view, the possession by the defenders of the proprietorial interest in particular land, namely, in the schoolhouse subjects. It is the possession by the defenders of that interest which must be challenged by a claim within the decennium.'[408]

It has been observed that the approach to the possible possession of interests in land may have more pedigree than in other areas of the law. This statement by Lord Prosser was not disputed by the Inner House on appeal:

> I would observe that the word "possession" is perhaps most usually and most naturally employed when one is considering the possession of physical property, whether real or personal.[409] The concept of possession of an interest, which is used in sec. 1 of the 1973 Act (and which is evidently not the same as being vested in an interest) perhaps requires some care. In general, counsel for both parties proceeded upon the basis that one is looking for possession of the land, but I think that counsel for the defenders stopped short of accepting that this was the sole test, and relied in some measure upon actions which, while not constituting possession of the land itself, might be seen as constituting possessory acts in relation to the 'interest'.[410] (Footnote added)

It is unclear what 'possessory acts in relation to the interest' are. It is submitted that this at least represents a guarded recognition of the idea of possession of an incorporeal. A possessory act in relation to an interest refers to the *corpus* element of the possession of the interest, and it is submitted that this would be constituted by the exercise of a right.

On the other hand, the reference to 'interest in land' in the 1973 Act as enacted has now been repealed.[411] As enacted the 1973 Act stipulated at s 1(1) "If in the case of an interest in particular land, being an interest to which this section applies, - (a) the interest has been possessed…" To gain ownership by way of prescription the 'interest in land' was possessed: did one possess ownership to obtain ownership? The *corpus* element of such possession would be exercise of the right of ownership, which would involve possession of the land itself.

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[407] cf DJ Cusine and RRM Paisley *Servitudes and Rights of Way* (W Green Edinburgh 1998) [1.70].
[408] *MRS Hamilton v Baxter* 1998 SLT 1075 (OH) 1079.
[409] This language is somewhat unfortunate.
[410] *Hamilton* (n 394) 314.
[411] Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) sch 12 para 33 (4).

The newly amended s 1(1) states: 'If land has been possessed…', and followed by the recording of deed which could give a person a real right in that land. The emphasis has changed. The section now requires possession of the land as the constitutive aspect of the prescription; however, the door may yet be slightly ajar. While the section requires possession of land, we have already seen that the law appears to require possession; but, this is somewhat undermined by the fact that a civil possessor possesses together with a natural possessor. There may be more than one person in possession of land at one time. The manner in which reconciliation between these interests could be understood is the fact they are not repugnant. Thus, my land may be possessed by me civilly through my tenant, who himself has natural possession; furthermore, my neighbour with his servitude has possession of his right to cross my land, and therefore may be said to possess part of the land sporadically and by virtue of his right of servitude. The alternative is to say that the holder of a servitude has no form of possession. If that were the case, then there could be no prescriptive acquisition of a servitude.

Accordingly, there are three people in 'possession' of the land. However, since the nature of the different possessory interests is not repugnant, they can co-exist.[412] Therefore, the land is in fact being possessed by a number of different possessors for different purposes; however, the specific possessory interest which they possess is possessed exclusively.

The policy behind the requirement of physical acts of possession in this context is to publicise to the world, and particularly the true owner, the fact of the prescriptive process running.[413] The 1973 Act demands that the possession be carried out openly, and this requirement is usefully analysed by a Canadian judge who states: 'Possession must be open and notorious, not clandestine, for two reasons. First, open possession shows that the claimant is using the property as an owner might. Second, open possession puts the true owner on notice that the statutory period has begun to run.'[414] These observations are equally applicable to Scots law.

(c) Need the possession be adverse?[415]

(i) General

This is a question which is interesting from a comparative perspective, since it appears that in South African,[416] English and Canadian law the possession required to gain prescriptive title must be adverse. This could be a result of the influence of the

[412] *Safeway Stores plc* (n 389) [60] (Lord Osborne).
[413] D Johnston (n 371) [16-09].
[414] *Teis v Ancaster (Town of)* 1997 CanLII 1688, [14] (Laskin JA).
[415] For an interesting critique see JG Sprankling 'An Environmental Critique of Adverse Possession' (1994) 79 Cornell L Rev 816.
[416] WA Joubert (ed) (n 379) [127].

Common law,[417] and it is accordingly of interest to see if this influence penetrated Scots law.

(ii) South Africa

The law of acquisitive possession in South African law is governed by the Prescription Act 1969, which itself replaced the Prescription Act 1943. As regards acquisitive prescription, the statutes are silent on the question of 'adverse possession'. However, in the reported case law, there are examples of the court requiring proof that such possession was adverse to the owner. Indeed, in *Pratt v Lourens*[418] it was held that the possession in question had to be adverse to the true owner.[419]

This requirement was again repeated in the subsequent case *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another*,[420] where Colman J states:

> The requirement that the possession be adverse is of great importance in the law of acquisitive prescription because it is one aspect of that requirement which, more than anything else, ensures that it is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription…no use, occupation or possession is adverse, for the purposes of the law of acquisitive prescription, unless the owner has a legal right to prevent it.[421]

In another the case the judge provided further elaboration as to the nature of this adverse possession: 'But I do not wish to be understood to hold that "possession adverse to the owner" is anything more or less than *possessio civilis*…'.[422] This apparently simple formulation disguises a more complicated truth, notably that the term adverse possession may be an unnecessary one. If the nature of possession is such that it is a fundamental aspect of the *corpus* that the holding be exclusive, then a person in possession will necessarily be holding that possession adversely.

(iii) England[423]

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[417] The earliest appearance of the phrase appears to be the statement "Twenty years adverse possession is a positive title to the defendant: it is not a bar to the action or remedy of the plaintiff, only; but takes away his right of possession" *Taylor v Horde* (1757) 1 Burr 60, 119 (Lord Mansfield); See P Bordwell (n 371).

[418] *Pratt v Lourens* 1954 (4) SA 281 (N).

[419] *Pratt v Lourens* (n 418) 282 (Broome JP).

[420] *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W).

[421] *Morkels Transport (Pty) Ltd* (n 420) 477-79. cf JE Scholtens 'Recent Cases: *Praescriptio— Jus possidendi* and *Rei Vindicatio*' (1972) 89 SALJ 383, 384.

[422] *Albert Falls Power Co (PTY) Ltd v Goge* 1960 (2) SA 46 (N), 48 (Jansen J).

[423] For a nostalgic account see R Auchmuty 'Not just a good children's story: a tribute to Adverse Possession' [2004] 68 Conv 293. cf M Dixon 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] 67 Conv 136; L Tee 'Adverse Possession and the Intention to Possess' [2000] 64 Conv 113; O Radley-Gardner and C Harpum 'Adverse Possession and the Intention to Possess- A Reply' [2001] 65 Conv 155; L Tee 'Adverse Possession and the Intention to Possess: A Rejoinder' [2002] 66 Conv 50; P H Kenny 'The Squatter's Intention' [2002] 66 Conv 1; O Rhys 'Adverse Possession, Human Rights and Judicial Heresy' [2002] 66 Conv 470. These accounts must all

The relevant legislation in the area is the Limitation Act 1980, and the more recent Land Registration Act 2002. The broad import of the two is that if a period of possession runs under the 1980 Act, then the true owner may be barred from asserting his rights; accordingly, the 1980 Act operates negatively—at least in relation to limitation. Whereas, the 2002 Act allows the person who has possessed for the ten year period to seek to have their interest registered by the registrar, the paper owner having two years to respond[424] The new provisions only apply to registered land,[425] though it has been suggested that this may accelerate registration.[426]

The statutory framework which stipulates the necessary form of possession requires someone to have taken adverse possession. The idea of adverse possession has been described as a '...somewhat complex matter'.[427] However, in *J A Pye (Oxford) Ltd v Graham*[428] Lord Browne-Wilkinson appears to have moved towards the South African treatment of adverse possession.[429]

Accordingly, it would appear that the judicial view of adverse possession in English law has moved towards that of South Africa. In other words, the exclusive nature of possession renders a tag of 'adverse possession' superfluous.[430] It should also be noted that an argument that the loss of property rights was contrary to the Human Rights Act 1998 (HRA 1998), was rejected by the Court of Appeal.[431] The point was not pursued in the House of Lords. In *Beaulane Properties Ltd v Palmer*[432] the Deputy Judge (N Strauss QC) held that the defendant was successful in showing adverse possession under the Land Registration Act 1925. Unfortunately for the defendant, the court also held that these provisions violated Art. 1 of the First Protocol, and by virtue of the HRA 1998[433] the claimant remained owner of the land.[434]

(iv) Scots Law[435]

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be read alongside *J A Pye (Oxford) Ltd* (n 375). S Nield 'Adverse Possession and Estoppel' [2004] 68 Conv 123; C Sara '*Prescription—What is it For?'* [2004] 68 Conv 13.

[424] Land Registration Act 2002 s 96 and sch 6. AJ Oakley *Megarry's Manual of the Law of Real Property* (8th edn Sweet & Maxwell Ltd London 2002) 548-49.

[425] *Inglewood Investments Company v Baker* [2002] EWCA Civ 1733.

[426] R Auchmuty (n 423) 305, n 40.

[427] AJ Oakley (n 424) 551.

[428] *J A Pye (Oxford) Ltd* (n 375). Decided under the old law.

[429] *J A Pye (Oxford) Ltd* (n 375) [33]-[38]. Lords Bingham, Mackay, Hope and Hutton agreed with Lord Browne-Wilkinson's speech and reasoning. See most recently *London Borough of Tower Hamlets v Barrett & Anor* [2005] EWCA Civ 923.

[430] *J A Pye (Oxford) Ltd* (n 375) [38] per Lord Browne-Wilkinson, [69] (Lord Hope).

[431] *JA Pye (Oxford) Ltd v Graham* [2001] EWCA Civ 117, [2001] Ch 804 (CA).

[432] *Beaulane* (n 371).

[433] s 3.

[434] *Beaulane* (n 371). cf *Clowes Developments (UK) Ltd v Walters & Dowsett* [2005] EWHC 669 [38] (Hart J).

[435] For human rights law see R Rennie *Land Tenure in Scotland* (Thomson/W Green Edinburgh 2004) Chapter 16.

Is there an idea of adverse possession in Scots law? It would appear that there is.[436] In one important case, the Lord Justice-Clerk observed that '…it is always a material consideration whether there has been any adverse possession.'[437] It is submitted that the reference to adverse possession is a reticent one.[438] The Lord Justice-Clerk chooses to mention it during his passage regarding the onus of proof being on the possessing party who is not the true owner. Therefore, it is reasonable to suggest that the use of the term adverse possession in Scots law is similar to the position in South Africa, and that recently reached in England. That is to say, the adverse element of the *corpus* of possession required is merely symptomatic of the exclusive nature of possession; whereas the adverse aspect of the *animus* is really a manifestation of the requirement to possess as of right.

However, the word 'adverse' is not used by Stair; though he talks of 'contrary possession'. Furthermore, he rationalizes the idea of a requirement of 'adverse' possession as being no more than symptomatic of the exclusivity of possession. He states:

> Possession then is lost by a contrary possession, and it is interrupted by contrary acts, and attempts of possession, which if they do not attain the effect to expulse it, it is called troubled or disquieted possession; for nothing can be possessed *in solidum* by more than one, either simply or in relation to the same right; as there cannot be more proprietors than one of the same kind….[439]

That the thing possessed may be a right, as part of a matrix of complimentary possessory interests, means the possession of that right will be adverse to anyone else purporting to possess the same interest. Only in such a situation will the adverse possession requirement would be of importance again; insofar as the possessory interest in question, would need to be adverse to the same, or a repugnant possessory interest held by another. Therefore, the lessee has possession; but this possession is not repugnant to the possession of the owner. Both exercise *animus domini* in relation to their interest, but do not impinge upon the interest possessed by the other.

In the context of prescription, whatever adverse element may exist in the requisite quality of possession required, it ought rationally to be seen as no more than an application of the manner idea of exclusivity in possession.

(v) Servitudes and Adverse possession

The need for 'adverse' possession appears to receive more emphasis in the context of servitudes. This seemingly greater emphasis, has prompted the authors of the leading

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[436] *Hamilton* (n 394) 315 (Lord Prosser). cf *Borthwick-Norton v Gavin Paul & Sons Ltd* 1947 SC 659 (IH) 662 (Lord Keith). cf JH Millar (n 376) 50.
[437] *Hamilton* (n 394) 324. cf the arguments for the pursuer in *Forbes v Livingstone* 3 Ross LC 409 (IH) 410. *Buchanan and Geils* (n 398) 1230. "There has plainly been no adverse possession of any kind by the Crown of any part of this foreshore…".
[438] cf *Love-Lee v Cameron* 1991 SCLR 61 (Sh Ct); *Pettigrew v Harton* 1956 SC 67 (IH).
[439] Stair II. 1. 20.

text on the subject of servitudes and rights of way to observe, that "curiously" the term 'adverse' is not used in the 1973 Act.[440] This language is echoed by Gretton & Reid who stated that:

> The possession must also be of the right quality, by which is meant that it must be 'adverse' to the servient proprietor. (Curiously, the 1973 Act does not specify this in terms, but the need for adverse possession has always been accepted.) "Adverse" possession means possession as of right. Its juridical opposite is possession by tolerance of "servient" proprietor.[441]

This is the analysis of the law following *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd*. [442] The conclusion reached by the authors is that the volume of user will demonstrate whether the possession is adverse.[443]

Cusine & Paisley suggest that '…a servitude may be established by prescriptive "possession" only by possession by the party claiming the servitude which is adverse to that of the proprietor of the servient tenement and is more than tolerance.'[444] Examinations of the authorities cited for this proposition are capable of supporting a different emphasis. The passage in Gordon to which they refer makes no express mention of the word 'adverse', and concentrates on the idea of an assertion of right and not mere tolerance.[445] Furthermore, in *McGregor v Crieff Co-operative Society Ltd*[446] the speech of Lord Dunedin does not refer to adverse possession, rather possession 'as of right' is sufficient.[447]

In *McInroy's Trs v Duke of Athole*[448] Lord Watson states:

> I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right.

It is noteworthy that once again there is no mention of the word 'adverse' at any time on the page cited. The final case cited is in fact in relation to a right of way. However, to say that it supports the idea that possession must be adverse is, it is submitted, perverse. Indeed, an extract from the only speech given is clear on the matter.[449]At no stage does Lord Jauncey mention adverse possession. However, by analogy he does talk of adverse interests. These so-called 'adverse interests', he says, need not be

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[440] DJ Cusine and RRM Paisley (n 407) 70 n 69.
[441] KGC Reid and GL Gretton *Conveyancing: What Happened in 1993?* Unpublished paper in University of Edinburgh Library.
[442] *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 43.
[443] cf *Wilson v Ross* 1993 GWD 31-2007 (ShCt).
[444] DJ Cusine and RRM Paisley (n 407) 70.
[445] WM Gordon *Land Law* (2nd edn W Green & Son Ltd Edinburgh 1999) [24]-[46].
[446] *McGregor v Crieff Co-operative Society Ltd* 1915 SC (HL) 93, 103.
[447] cf *Webster v Chadburn* 2003 GWD 18-562 (Inverness Sheriff Court); available in full at www.scotcourts.gov.uk ; *Nationwide Building Society v Walter D Allan Ltd* (Outer House, Court of Session 4th August 2004) [29]-[40] (Lady Smith). KGC Reid and GL Gretton (n 382) 65-68.
[448] *McInroy's Trs v Duke of Athole* (1891) 18 R (HL) 46, 48.
[449] *Cumbernauld and Kilsyth District Council* (n 442) 47 (Lord Jauncey).

adverse. Lord Jauncey suggests that as long as the possession is as of right, and is clearly ascribable as such, then there is sufficient possession for prescriptive progress.

The suggestion that the possession required be 'adverse' is, it is suggested, to place the emphasis incorrectly. The legal connotations associated with the idea of 'adverse' possession generally are not the same as saying that one possesses as of right. To have reached a position, whereby you are in possession of a servitude, you are necessarily exercising a right which is a deduction from another's *dominium*. By possessing a servitude you remove the ability of another to claim exclusive *corpus*, and thus your possession is necessarily adverse to their *corpus.*

The importance of the requirement of adversity is in the area of *animus*.[450] The *animus* required to possess is to possess for oneself, be that as owner or for one's own interest. This *animus* is necessarily adverse to another possessor's, so far as the interest possessed is repugnant to the other's interest; unless, the possession is by the consent of the other possessor. In this case, the party that is able to tolerate the other's possession may be said to possess civilly through the possession they tolerate. When a possessor derives her possession from a right and not by tolerance, the possession is limited to possession on the basis of that founding right. Accordingly, the prescriptive acquisition of a right from possession is the acquisition of the right which founds the possession. Acts of possession consistent with the exercise of a servitude will constitute a servitude, and acts consistent with ownership will constitute ownership. Thus, prescriptive acquisition flows from possession upon an ostensible right.

This possession as of right is adverse so far as two persons rely upon mutually repugnant rights, with the effect that the factual possession predicated upon this disputed right prevails.[451] The idea of adversity connotes physical struggle which is not required to constitute prescription, rather the adversity is a consequence of the repugnantly exercised rights. Thus any acts of possession purporting to be derived from a *jus in re aliena* are repugnant to *dominium*, which is an indivisible aggregate of property rights from which *jura in re aliena* are delegated. Accordingly, anyone who has possession of a thing, and purports to have that possession on the basis of a real right, necessarily has 'adverse' possession.

C Summary

This section has focused on the importance of possession in relation to prescription. It has concluded that possession need not be *bona fides* for prescription. The section also focused on the question of adverse possession. The conclusion advanced was that possession proper is necessarily adverse, insofar as possession *animus domini* relies upon a real right. Multiple possessors can occur if they possess on different non-

[450] *Inglewood Investments Company* (n 425) [21] (Aldous LJ).

[451] There is dissonance in the authorities as regards the actions an owner must take to suggest that actions are tolerated or not: *Cumbernauld & Kilsyth District Council* (n 442) suggests failure by the owner to indicate tolerance will open up the risk of adverse possession. In *Webster* (n 447) the owner did not tolerate the possession, but nor did he take preventative measures, and thus it was for the road user to show possession as of right. cf *Marquis of Bute v McKirdy & McMillan Ltd* 1937 SLT 241 (IH) 252 (LP Normand).

repugnant interests. The lessee may possess without denying the owner's right; on the other hand, prescriptive possession wrests rights from others, and therefore must be repugnant.

Concluding Analysis

A Conclusions

1 The General Part

(a) General

The introduction to the present thesis stated that the methodology of the thesis was to use a general part to analyze general aspects of possession.[452] The present section purports to distil the conclusions reached in the general part. In achieving this it is hoped that discussion of the special part, on leases and prescription, will illustrate the manner in which general aspects permeate different areas of the law. This will lead to a discussion, including how the findings of the thesis may impact upon the areas of law identified in the introduction, where possession is of special importance. Following that discussion of future possibilities, the conclusion will be brought to a close by a suggestion that there can be a unitary idea of possession across the law.

(b) *Animus* and *Corpus*

In the general chapter a number of conclusions were advanced. The importance of the dual elements of *animus* and *corpus* were identified. It was concluded that the view to be taken of *animus* is really two-fold: the intent to exclude others, and to control; otherwise put it is the intent to exercise the *corpus*.[453] This is really concerned with intent to manifest an objective factual condition. The second aspect was the intent to benefit oneself. The conclusion reached was that *animus* that is the most desirable for Scots law is *animus domini*, with the understanding that this includes subordinate real rights.[454] This broadly followed the approach in French law, and that of Erskine.[455]

As regards *corpus*, the question of concealed objects was treated as one which benefits from considerable comparative input. The differences of approach across systems were not doctrinal; rather they represented choices which are open to Scots law. The choice that was suggested here is that concealed objects should only be

[452] See above on page 12.
[453] See above on page 18.
[454] See above on page 37.
[455] See above on page 37.

possessed if there is sufficient *corpus* and specific knowledge. Therefore, a lack of specific knowledge should prohibit possession, regardless of the extent to which there is physical control of the concealed object. However, there will be situations where the physical control is less clear, such as when the 'surrogate' thing is heritable property. In this situation it will be a question to what extent there is an ability to exclude others from the concealed object. There must however, be specific intent in relation to the object.

(c) Civil and Natural Possession

In relation to civil possession, the general part considers the differing accounts given by the Institutional writers.[456] It was suggested that, on the basis of these differing accounts, that one could say that civil possession is actually an independent form of possession. The conclusion was reached that while not dependant upon natural possession, civil possession may be affected if there is a new and contrary natural possession which denies the civil possession.[457] Therefore, while the settled meaning is that civil possession can be obtained through natural possession, it is misleading to say that it is derived from natural possession.

(d) Possessing an Incorporeal and Exclusive Possession

A radical conclusion was reached in relation to the possession of an incorporeal.[458] It was suggested that there can be possession proper of an incorporeal, and that constant resort to the term quasi-possession is supercilious. In suggesting that an incorporeal can be possessed, it was suggested that the *animus* is met by the intent to exercise the right; while the *corpus* requirement is satisfied by the actual exercise of the right. The recommendation made was that the law should develop along these lines and arrest ossification. The notion of incorporeal property is synthetic, and accordingly there appears no objection to having rules geared to facilitate the implementation of incorporeal property.

In the general part the inherent exclusivity of possession was also considered. That joint possession was an exception to this rule was recognised.[459] Furthermore, emphasis was placed upon the test relating to distinguishing leases and licences, and the fact that it demands the misnomer 'exclusive possession'.

2 The Special Part

(a) General

[456] See above on page 37.
[457] See above on page 43.
[458] See above on page 59.
[459] See above on page 62.

The aim of the special part was to analyse the law relating to possession in the context of leases and prescription.[460] In doing so, the conclusions reached in the general part were to be illustrated in practice in the two chosen areas. This serves to show the unitary character of possession.

(b) Leases

The chapter concerning leases attempted to use new perspectives gained in the general part to solve uncertainty. Therefore, the importance of possession in attaining real effect for a lease under the 1449 Act was considered.[461] The difficulty of a requirement for a tenant to possess with *animus domini* is explained, as a based upon the idea of possessing the lease itself.[462] This is an example of possessing an incorporeal; of which there is a further example in the section on game leases. In this way, the possible real effect of a game lease under the 1449 Act is explained.

Furthermore, the use of the term 'exclusive possession'—as a means of distinguishing between a lease and a licence—is rejected as unsuitable. The exclusivity inherent in possession demands that alternative terms should be used to provide greater clarity. It is suggested that 'occupancy'; or another term which encapsulates the inability of the licensee to exclude third parties, should be preferred.[463]

The end of the chapter focuses on the right to possession in the lessor/lessee relationship.[464] The treatment is from the perspective of the role of civil possession, and questions the ability of the landlord to recover possession from third parties. It is suggested that although the landlord may recover possession on behalf of the lessee, this is not a right to actively recover natural possession; rather it is a defensive right to possession which allows the landlord to protect his civil possession.

(c) Prescription

The second chapter of the special part considered the acquisition of ownership through positive prescription.[465] The section confirms that possession need not be *bona fide*, and that this can be reconciled with the need for *animus domini*. The reconciliation is similar to that in South Africa: the intent is to become owner, not intent as owner.[466] This can be contradistinguished from the view of a lessee, whose intent is not to possess as owner, nor to become owner. That would invert the lease.

[460] See above on page 13.
[461] See above on page 63.
[462] See above on page 67.
[463] See above on page 74.
[464] See above on page 78.
[465] See above on page 82.
[466] See above on page 83.

Additionally, the requirement that possession must be 'adverse' is subjected to qualification.[467] It is thought that possession of an interest in land is necessarily exclusive; however, there is an exception to the extent that more than one non-repugnant interest of possession may exist. In order to for prescription to occur, another must take up contrary possession in relation to that interest, which is in reality nothing more than challenging the exclusivity of that possession.

B A Unitary Idea of Possession

1 Stair's Suggestion

Having looked at possession in different areas of private law, the time now comes to consider whether a unitary concept of possession may be said to exist in Scots law. The idea is not a new one, and was evidently to the fore in Stair's mind when he advised that: 'The several kinds and degrees of possession being thus laid open, it will be more easy to take up the common notion and nature of it, and it may thus be described.'[468]

Stair felt the idea of possession was a unitary idea across the law as a whole, and the differences which arose, were the result of different factual applications of similar rules. The examples he gave were to be illustrative. In talking about the possession of moveables and the possession of heritage separately, the object was not to suggest different rules for constituting possession. It was quite the opposite in fact: the specific references to types of possession were to demonstrate how the concept of *animus* and *corpus* were to be applied to different forms of thing and situations. It may also be that the other Institutional writers considered possession to be a universal concept, by virtue of the absence of context specific discussions of possession in favour of a general section.

2 Unitary Today?

In the modern law it is to be doubted whether such an approach subsists: at least in the present state of the authorities. The accumulation of an unwieldy mass of language deployed to cover every conceivable form of holding, while at the same time continuing to make use of the word possession interchangeably, makes such an assertion difficult. The options are twofold: the law can accept the use of terms such as occupation; detention; custody; possession; quasi possession; exclusive possession; adverse possession; use, etc alongside an accompanying explanation. Or, a decision could be made to define possession accurately as a juridical concept, capable of unitary application across the law of property, and potentially into other areas of private law.

[467] See above on page 90.
[468] Stair II. 1. 17.

The position taken here is tentatively in favour of a redraft to provide more accurate labelling. However, despite the proliferation of terms to describe different types of holding, the myriad appears to function; albeit, that its parts require explanation to the point they are almost untenable as a meaningful label.

The idea of a unitary concept—as already noted—requires some form of taxonomical will, and would be a change from the likely lie of the law as it now stands. It appears that Reid conceives of at least the potential for a unitary approach to possession by treating it alone as a chapter.[469] However, there is no explicit statement akin to this statement by Rankine:

> Stair's enumeration of the different degrees of clearness of possession seems to be of no legal value, except as detailing the various modes in which possession may be proved; for the possession, however proved, is the same, and has the same legal effects. A similar remark may be made regarding the term 'symbolical possession' (whether the symbol be part of the thing possessed or not); regarding possession by conjunction of interest, and possession *vi aut clam precario*,—for all these qualifications refer to modes of acquiring possession, not to differences in its nature…But it must be borne in mind that possession proper, as above defined, is always the same, and that any apparent difference in its effects arises from other elements with which it may happen to be combined; and that the only really important elements are the *corpus* or detention, and the *animus* or intention, with which the subject is held.[470]

This passage rings as true today as it did in 1909. It may be true to say that Stair's examples add nothing in a technical sense; but they do assist in conveying to the reader the manner in which this unitary concept operates: common parameters in specific contexts. These common aspects are the notions of *animus* and *corpus*, which extend to define possession wherever in the system of law it may be found: they are universal exports.

C Final Conclusion

The structure of this thesis sought to examine the general nature of possession, and the role of possession in certain areas of law. The general part was not exhaustive; accordingly, whether possession is a fact or a right, or if there is strict distinction between ownership and possession, remain questions unanswered. Had I more time and space, I would have pursued these questions vigorously. Furthermore, the protection of possession is notable by its absence, and is also in need of further research. The special part could also have been much larger, and extended to cover areas beyond leases and prescription. It is thought that recovery for consequential economic loss is an area of considerable importance; however, there are many others which deserve attention.

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[469] KGC Reid *The Law of Property in Scotland* (Butterworths Edinburgh 1996) [114]-[192].
[470] J Rankine *The Law of Landownership in Scotland* (4th edn W Green & Sons Edinburgh 1909) 4-5.

It will therefore be apparent that the conclusion of this thesis is that there is a great deal of research still to do into possession in Scots law. This thesis barely touches the surface due to the limited time, and indeed, space. In the future I hope to attempt to look at the areas which this thesis has not covered. Indeed, it is further hoped that perhaps I may return to some topics which have been considered in this thesis, though not definitely resolved.

I opened the thesis with this quote from Kocourek:

> Every treatise on fundamental legal ideas devotes space to a discussion of possession. By general consent, possession has been regarded by jurists at once as one of the most important, and easily as the most difficult, of legal notions. Like many others who have had occasion to deal with the idea in a systematic way, the writer, for several years, as inclination and opportunity have concurred, has sought to understand clearly the difficulties of the problem, and it may be confessed without shame, has entertained hope to solve them, if only to satisfy his own needs.[471]

During the course of this thesis I have certainly agreed that it is simultaneously the most difficult and important of subjects. It is hoped that the foregoing sections have cast some light upon possession in Scots law. I also confess, without shame, that I may have entertained hope to understand the difficulties of the problem in Scots law. On the other hand, I have entertained less hope of solving them in the time I have had, though occasional observations have been made. There is much still to do

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[471] See above on page 8.

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