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Protection of Ownership and Transfer of Moveables by a Non-
Owner in Scots Law

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Presented for the Degree of Doctor of Philosophy, The University of Edinburgh
2014

DECLARATION

I confirm that this thesis has been composed by me, that the work contained in this thesis is my own and has not been submitted for any other degree or professional qualification.

Bonnie Holligan

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12th August 2014

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ABSTRACT

This thesis explores the protection of ownership of corporeal moveables in Scots law with particular reference to the position of a good faith acquirer from a non-owner. It exposes three fundamental tenets of Scots property law to critical scrutiny: the sharp theoretical distinction between possession and ownership, the requirement that the owner consent to derivative transfer and the right of the owner to recover his or her property from any third party in possession. In many other civil law jurisdictions, greater protection is afforded to the *bona fide* purchaser. The thesis explores the historical and doctrinal reasons for the strong protection of the original owner in Scots doctrine, including an important Romanist tradition but also a significant moral and theological emphasis on the duty to restore, particularly in Viscount Stair's influential *Institutions*. Utilising a historical and comparative approach, the first part of the thesis outlines the development of early Scots law and the foundation of the modern Romanist structure of the law governing transfer of moveables. It is argued that the modern patchwork of exceptions to the *nemo plus* rule lacks any unifying justificatory principle and produce often uncertain results. The thesis also examines the various justifications advanced for protecting good faith acquirers. The most frequently cited explanation is that of promotion of commerce, but significant difficulties are identified with this argument. It is further concluded that the publicity afforded by possession is not sufficient for it to justify protection of acquirers. In terms of security and certainty of rights, good faith acquisition is not a panacea for the problems associated with highly mobile property such as vehicles. However, in light of the deficiencies of the current Scots law rules, a clear doctrine explicitly conferring ownership in more precisely defined circumstances would be preferable.

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CHAPTER 1 INTRODUCTION

A. THE BONA FIDE PURCHASE PROBLEM

Among the fundamental tenets of Scots property law are three doctrinal characteristics derived from Roman law: a sharp theoretical distinction between possession and ownership, a requirement that the owner consent to derivative transfer and a right of the owner to recover his or her property from any third party in possession.¹ The thesis seeks to investigate these dogmas through consideration of one particular problem: the transfer of corporeal moveable property by a non-owner and the position of a good faith acquirer from a non-entitled party.

In many civil law jurisdictions, greater protection is afforded to the *bona fide* purchaser.² The thesis explores the historical and doctrinal reasons for the strong protection of the original owner in Scots doctrine, including an important Romanist tradition but also a significant moral and theological emphasis on the duty to restore, particularly in Viscount Stair's influential *Institutions*.³

Corporeal moveables present particular difficulties related to goods' physical mobility, the need for facility of transfer and the fact that transactions are not routinely registered. As immovable property raises different issues connected to the need to ensure proper functioning of the land registration system,⁴ discussion is confined to corporeal moveable property,⁵ but the extent to which the principles

¹ See K G C Reid, *The Law of Property in Scotland* (1996) paras 114; 669; 158 respectively. Of course, there are some instances of involuntary transfer but the "cardinal principle" is that no one should be deprived of property without his or her consent. See Reid, *Property* paras 663-668.

² For a comparative survey, see B Lurger and W Faber (eds), *Principles of European Law on Acquisition and Loss of Ownership of Goods* (2010) 890. The variety in solutions adopted within Europe has been strikingly illustrated in a diagram produced by Arthur Salomons, see A F Salomons, "How to Draft New Rules on the Bona Fide Acquisition of Movables for Europe? Some Remarks on Method and Content", in W Faber and B Lurger (eds), *Rules for the Transfer of Movables: A Candidate for European Harmonisation or National Reform* (2008) 141 at 142.

³ J Dalrymple (Viscount Stair), *Institutions of the Law of Scotland* (1681; 2nd edn 1693).

⁴ See for example Scottish Law Commission, *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004) at paras 4.33-4.35.

⁵ Where appropriate, it is recognised that the category of corporeal moveable property is not a homogeneous one. For example, Reid points out that, in relation to remedies protecting possession, ships, aircraft, caravans, oil platforms and other substantial moveable structures may be closer to

identified form part of a unitary property law would be a fruitful area for future research.

Although interesting questions are undoubtedly raised by forms of transfer other than sale (for example donation or exchange), transfer for value provides the clearest example of the general dilemma: following an unauthorised transfer of moveables, should original owner or transferee be recognised as owner? Discussion focuses on three core cases, and the extent to which they can and should be distinguished in Scots doctrine. The first is where an owner, Anne, transfers property to Beth but there is a defect in the transfer giving Anne the right to avoid it, for example the transfer was induced by Beth's fraud. What is Anne's position if, before she can challenge the transfer, Beth sells the thing to Cara? Currently, the answer depends on the distinction between a transfer which is void and one which is merely voidable.⁶ In the case of a voidable transfer, the defect giving ground for challenge is personal, i.e. only relevant in a question with Beth. Subsequent transferees will not be affected. Usually if Anne can be said to have given her consent to transfer, ownership will pass to Beth subject to Anne's personal right to avoid the transfer. Until Anne acts to challenge the transfer, Beth will be thus able to pass ownership to Cara.⁷ Assuming Cara to have no knowledge of the defect, Anne will have no claim against her.

This may be compared with the second core case: Beth's acquisition of physical possession of Anne's property entirely without her consent. This might be because the thing has been stolen from Anne, or because she has lost it. Under the current law, Beth does not acquire any right in the property through possession and thus cannot give any right to Cara: *Nemo plus iuris ad alium transferre potest, quam ipse haberet* ("the *nemo plus* principle").⁸ Anne's complete lack of consent to transfer is a defect which prevents acquisition indefinitely.

heritable property as the pursuer may be more interested in the defender relinquishing his or her unlawful possession than in securing redelivery: Reid, *Property* para 159.

⁶ See Reid, *Property* paras 601 and 607.

⁷ Of course, if Anne acts timeously to avoid the transfer, she can regain ownership of the property and Beth will no longer be able to validly convey it to Cara.

⁸ D 50.17.54 (Ulpian, *On the Edict* Book XLVI): "No one can transfer greater rights to someone else than he has himself". T Mommsen, P Krueger and A Watson (eds), *The Digest of Justinian* (1995) translate "haberet" as "possesses", but this involves the controversial contention that a right can be

While Scots law does not at the moment recognise it as a separate category, it is also relevant to distinguish a third core case of “entrusted” property, that which Anne has consented to Beth’s physical possession of without consenting to transfer of ownership. Under the present law it does not matter whether Beth has borrowed or stolen the property, in neither case will she be able to pass ownership to Cara. The thesis considers the statutory exceptions to this rule, principally contained in the Sale of Goods Act 1979; it is ultimately contended that, despite inconsistencies in the current law, a transferor’s physical possession does not, in itself, justify protection of any transferee.

B. METHODOLOGICAL APPROACH

A historical and doctrinal approach is adopted, beginning with the Roman law and considering Scots law from the earliest mediaeval sources to the current time. Due to the relative inaccessibility (linguistic and otherwise) of manuscript sources, the primary sources used are, for the mediaeval period, principally edited versions of sources already available in print. As a doctrinal thesis, the research focuses on previously recognised sources, with secondary material used to help to place these in context.

By examining the historical roots of current doctrinal confusion it is hoped to bring increased clarity to questions such as the nature of the owner’s right to recover, providing new insight into a fundamental yet under-examined aspect of property doctrine.⁹ Although recent scholarship has explored the implications of moral theology for understandings of unjustified enrichment,¹⁰ the impact of theological

possessed. As the verb “habere” can, in this context, be sensibly translated as “to have” (or also “to hold”), the debate over possession of rights will here be avoided.

⁹ Stewart describes the relationship between property and restitution as “probably one of the areas of greatest uncertainty in Scots private law”: *The Law of Restitution in Scotland* (1995). Compare Reid, *Property* paras 158 and 531 (Gordon). See also K G C Reid, “Unjustified Enrichment and Property Law” 1994 *Juridical Review* 167.

¹⁰ See e.g. G Dolezalek, “The Moral Theologians’ Doctrine of Restitution and its Juridification in the Sixteenth and Seventeenth Centuries” 1992 *Acta Juridica* 104; J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996); D Reid, “Thomas Aquinas and Viscount Stair: the Influence

principles on property law is a particularly fruitful area for further investigation. The wide temporal scope of the research limits the depth of focus that can be achieved in any specific period. It is hoped, however, that tracking the development of property doctrine will contribute to broader scholarly debate regarding legal development in Scotland and the interplay of different factors in forming the modern law.¹¹ There is currently very little academic commentary on the mediaeval law regarding transfer of moveables in Scotland; in examining the problem of *bona fide* purchase the thesis is able to trace the more general evolution of ideas of possession and ownership.

The thesis is also comparative in two senses. Particularly during the period of the *ius commune*, works originating in other jurisdictions were often as directly applicable in Scottish legal debate as those produced by indigenous authors, for example as late as the eighteenth century Dutch jurist Johannes Voet's account of the *rei vindicatio* was regularly cited in courts.¹² Scots doctrine is therefore approached as part of a wider civilian tradition.

Sources from France, Germany and England are also referred to insofar as they provide an opportunity to assess the strengths and weaknesses of the Scots position. These legal systems have been chosen for different reasons, France because the rule "*possession vaut titre*"¹³ may have influenced, through its predecessor the Sale of Goods Act 1893, the drafting of the modern statute regulating sale of moveables in Scotland, the Sale of Goods Act 1979.¹⁴ The German rules regulating acquisition from a non-owner¹⁵ are also interesting because they explicitly allow acquisition from a non-owner in possession,¹⁶ except where the property has been stolen or is lost or otherwise missing.¹⁷ Given what is argued to be fragmentary current provision, it is submitted that a general rule such that contained in § 932

of Scholastic Moral Theology on Stair's Account of Restitution and Recompense" (2008) 29 *Journal of Legal History* 189.

¹¹ For an initial introduction and overview of Scottish legal history, see J W Cairns, "Historical Introduction" in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland Volume I: Introduction and Property* (2000) 14.

¹² See ch 3 B(3)(b)(i).

¹³ Code Civil Art 2276 (formerly 2279).

¹⁴ See ch 4 D(3)(a).

¹⁵ §§ 932-936 BGB.

¹⁶ See § 932.

¹⁷ "[G]estohlen worden, verloren gegangen oder sonst abhanden gekommen war": § 935(1) BGB.

BGB would provide a more coherent and clear-cut approach. Finally, in the context of the close relations (particularly after the enactment of the Sale of Goods Act 1893) between English and Scots law in this area, the thesis investigates why the English law doctrine of “market overt”, which safeguarded purchasers at particular markets from any claim based on previous theft or unauthorised transfer, was not received in Scotland.

The direct relevance of broader philosophical understandings of ownership and property to Scots law doctrine is assumed throughout the thesis. By relating doctrinal development to ideas about the role of law in society and the justifications for recognition of property rights, it is hoped to deepen understandings (at least in the Scottish context) of what ownership means, why it is protected and why, in some circumstances, it is desirable to abrogate the owner’s right.

C. OUTLINE OF CONTENTS AND CONCLUSIONS

Chapter 2 begins by outlining the Roman law and the origins of the idea of ownership as a right to recover the thing wherever it was found. It is argued that early Scots law did not afford a remedy clearly based upon ownership, instead locating the owner’s claim for recovery in the existence of a wrong such as theft. By the sixteenth century there is evidence of the reception of Roman principles, with reference in case law to the *rei vindicatio* as well as to the *nemo plus* maxim. Robert Feenstra has criticised a tendency amongst historians to view development in this area as oscillation between the Roman approach and a “Germanic” one.¹⁸ Early Scots law certainly does not fit such a model, with a diverse range of influences including customary rules shared with other Germanic and Norse cultures, Canon law precepts and Humanist learning. Although requirements that sellers act as warrantor to buyers, often also offering a cautioner or “borgh” to guarantee that this obligation would be satisfied, provided some protection to acquirers there is no evidence of any general rule allowing acquisition from a non-owner.

¹⁸ R Feenstra, “The Development of European Private Law: A Romanist Watershed?”, in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997) 103 at 107.

Chapter 3 focuses on development during the “Institutional period”. This was characterised by a Romanist approach to the transfer of corporeal moveables typical of the *ius commune* but also by new understandings of law influenced by the natural law thought of Grotius and the historical jurisprudence promoted by Lord Kames. It is argued that one of the most important works, Stair’s *Institutions*, further draws on Scholastic moral theology to exclude the possibility of acquisition from a non-owner. Stair’s account of restitution, while philosophically and theologically interesting, does not fit especially well with a Romanist property law structure. A clearer understanding of the owner’s right to recover, and its place in the structure of private law is desirable. Both the Romanist influence and a moral and philosophical emphasis on protection of ownership prevented adoption of any formal rule protecting purchasers; as the system of warranty fell into disuse, the explicit recognition of a presumption of ownership from possession helped to mitigate the difficulties in ascertaining ownership of moveables.

Chapter 4 analyses the current application of the *nemo plus* principle. The introduction of statutory protections for purchasers in both England and Scotland can be linked to the expansion of credit and business practices, such as the management of goods by factors (commercial agents), which separated physical possession and ownership. However, as well as the practical needs of trade, jurisprudential ideology and ideas about the relationship between private law and a society based on commerce played an important role in justifying the enactment of the Sale of Goods and Factors Acts. Despite these statutes, and differences in the underlying systems of property law, English and Scots law remain united in their broad hostility to the possibility of acquisition from a non-owner. It is suggested that the modern patchwork of exceptions to the *nemo plus* rule lack any unifying justificatory principle and produce often uncertain results; particularly in relation to the interpretation of “possession” and “delivery” under the Sale of Goods Act 1979.

Chapters 5 and 6 seek to identify a coherent basis for future development of the law in this area. Chapter 5 draws on broader theoretical accounts of property rights to enrich the doctrinal narrative of ownership in modern Scots law and

examine the political and philosophical assumptions which underlie it. There are a number of internal values currently reflected in Scots property law regarding transfer of moveables which should be the foundation for any future reform, including coherence and certainty of rights. The problem of transfer by a non-owner arguably involves questions of both corrective and distributive justice, emphasising that property law serves both public and private ends. As *bona fide* purchase rules are often justified by reference to furtherance of the ease and rapidity of transactions, a central concern is the market impact of legal policy. To this end, the contribution of non-formalist perspectives such as the Realist and the Law and Economics approaches is considered, but it is concluded that due to insufficient empirical data and inherent methodological limitations, these do not provide a clear solution.

Chapter 6 concludes that there is no single overwhelming argument justifying protection for good faith purchasers but, in the context of moves towards greater harmonisation at the European level, a broad general rule protecting those who follow market norms appears to be the most coherent option. Although possession cannot be treated as a reliable indicator of right, it is argued that good faith acquirers who do not take possession do not form a connection with the thing which would justify protection over the original owner. As the most frequently cited justification for good faith purchase protection remains promotion of commerce, it is logical that any future reform should be based around some notion of acting in accordance with market norms. This would add a strong objective element to existing concepts of good faith and provide a clear yet flexible general basis for protection of purchasers. There are strong arguments for different standards of care to be applicable in some limited contexts, for example where objects are of cultural and artistic significance, but in general there should be a consistent approach to protection of purchasers across all types of corporeal moveable property.

CHAPTER 2: PROTECTION OF OWNERSHIP IN ROMAN AND EARLY SCOTS LAW

A. ROMAN ORIGINS OF THE MODERN LAW

(1) The Relevance of Roman Law

Why does investigation of the modern Scots understanding of ownership require resort to the Roman law? The relation between Scots law and its Roman heritage is a complex one.¹⁹ The development of an indigenous legal tradition in the Institutional period means that many Roman rules are of limited doctrinal relevance; Roman sources are only rarely referred to directly in Scots courts.²⁰ In relation to moveable property, however, the current law is accepted to be “laid on the foundations of the Roman law”.²¹ Particularly in relation to the contemporary concept of ownership as *dominium*²² and the application of the Digest-derived *nemo plus* maxim, the Roman roots of these ideas appear of some relevance.

The protection afforded to ownership in classical Roman law is moreover the ostensible source of the influential Pandectist concept of ownership as an absolute and unitary right.²³ The position of the Roman owner has been characterised as “sacrosanct”,²⁴ the application of the *nemo plus* rule “embod[ying] the principle of inviolability.”²⁵ Such comments are themselves the product of a particular historical period and legal culture; they raise important questions about the relationship between legal history and modern problems, specifically the use of Roman law to

¹⁹ For discussion and further references, see generally J W Cairns, “The Civil Law Tradition in Scottish Legal Thought”, in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 191. On the reception of Roman law in Scotland, see P G Stein, *Roman Law in Scotland* (1968).

²⁰ There is, however, some influence. For an assertion of Roman law’s continuing importance, see J Cairns and P J du Plessis, “Ten Years of Roman Law in Scottish Courts” 2008 SLT (News) 191.

²¹ Reid, *Property* para 2.

²² See Reid, *Property* para 5.

²³ See B Windscheid, *Lehrbuch des Pandektenrechts*, 9th edn (1906) § 167 and G F Puchta, *Vorlesungen über das heutige Römische Recht*, 6th edn (1873, repr 1999) vol 1 § 144. For discussion, see A J van der Walt, “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 *THRHR* 569.

²⁴ F Schulz, *Classical Roman Law* (1951) 335.

²⁵ B Nicholas, *An Introduction to Roman law* (1969) 129.

perpetuate essentially neoteric legal ideals.²⁶ Analysis of the historical background is therefore undertaken with a view to understanding the debates surrounding the modern Scots conception of ownership as a well-protected and theoretically unqualified right.²⁷

Although classical Roman law recognised rights which seem to be between “full” (quiritary) ownership and non-ownership,²⁸ this is only indirectly relevant to the current discussion. What follows is concerned with the effect of transfer by a non-owner, and the extent to which persons could transfer a greater right in property than they themselves had. In accordance with this, the position of the bonitary owner (who typically acquired his or her right when the transferor failed to observe the correct procedure for transfer by *mancipatio*)²⁹ will not be considered in detail. Neither a transfer to nor a transfer by a bonitary owner implies a “true” transfer by a non-owner: a right *in bonis* could not be acquired from a person who did not own,³⁰ nor could a bonitary owner transfer more rights than he or she had. His or her defence against the *rei vindicatio* of the quiritary owner, the *exception rei venditae et traditae*, was available to his or her successors and subsequent purchasers from him or her,³¹ suggesting that it was only the transferor’s right *in bonis* which passed to successors and not quiritary ownership.

(2) The Owner’s Claim for Recovery

(a) *The ancient law*

²⁶ See K Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History*, 2nd edn (2007) 181-193 and also Van der Walt, “Ownership”.

²⁷ See D L Carey Miller and D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) para 1.12.

²⁸ See M Kaser, *Roman Private Law*, trans. R Dannenbring 2nd edn (1968) 94-95.

²⁹ See generally H Ankum and E Pool, “*Rem in bonis meis esse* and *rem in bonis meam esse*: Traces of the Development of Roman Double Ownership”, in P Birks (ed), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 5, especially at 38. The authors suggest that acquisition of mancipable things by delivery (*traditio*) was not necessarily the first example of bonitary ownership.

³⁰ Ankum and Pool, “*Rem in bonis*” 38-39.

³¹ D 21.3.3.

Although the idea of ownership in ancient Roman law is not knowable,³² it is clear that even the early law recognized and protected some special relationship between person and thing, a distinction between “mine” and “thine”.³³ The main indication of this protection is the existence of an action apparently designed to settle disputes over rights³⁴ in things; the procedure applicable to moveable property at the time of the XII tables (c. 450 BC)³⁵ was known as the *legis actio sacramento in rem*.³⁶ The form of this action recorded by Gaius includes not only an assertion by the pursuer that the thing in question is his by Quiritary right (*ex jure Quiritam meum esse*) on the basis of some *causa* or title (*secundum sua causam*),³⁷ but a similar assertion by the defender; the pursuer then asks the defender to state the grounds for the claim.³⁸ This structure has led Kaser to argue that ownership in this period was actually relative, and that the judge was merely required to decide who had the better right;³⁹ it is difficult, however, to draw any conclusive inferences about the nature of ownership from the fact that litigation involved a choice between competing claims.⁴⁰

In ancient law, as today, establishing ownership of moveables presented difficulties of evidence.⁴¹ An obscure guarantee given by a transferor in *mancipatio*⁴²

³² This is due both to the limited nature of the sources and the fact that there may not have existed an “institutionalised” legal concept of ownership at this point. See M Kaser, “The Concept of Roman Ownership” (1964) 27 *THRHR* 5 at 6-7.

³³ The meaning of “*meum esse*” is probably not, however, identical to the meanings given to ownership as *dominium* in later law, see G Diósdí, *Ownership in Ancient and Preclassical Roman Law* (1970) ch 4.

³⁴ Although the term “right” is adopted here, it is not intended to suggest that the existence the modern concept of subjective rights existed in Roman law.

³⁵ See A C Johnson *et al.* (eds), *Ancient Roman Statutes* (1961) 9.

³⁶ See F de Zulueta (trans and ed), *The Institutes of Gaius: Part I* (1946) IV 16 and for commentary M Kaser, *Das Römische Zivilprozessrecht*, 2nd edn (1996) § 14; Diósdí, *Ownership* 96-105. For speculation regarding the origins of the *actio in rem*, see Kaser, *Zivilprozessrecht* 90-93.

³⁷ See F de Zulueta, *The Institutes of Gaius: Part 2* (1953) 233. For an overview of the varying interpretations of “*causam*”, see Diósdí, *Ownership* 99-100.

³⁸ *Institutes of Gaius* IV 16. On defences see Kaser, *Private Law* 113.

³⁹ Kaser, “Roman Ownership” at 8-9. For a fuller account, see M Kaser, *Eigentum und Besitz im Älteren Römischen Recht* (1956) 7-16. Kaser’s view has been criticised, see the references given by Diósdí, *Ownership* 96 fns 14-16 and Kaser’s response in “Zur “*legis actio sacramento in rem*”” (1987) 104 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 53.

⁴⁰ Convincing arguments to this effect are made by Diósdí, *Ownership* 105-106 and H F Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn (1972) 142.

⁴¹ Although, due to the public nature of the transfer by *mancipatio*, perhaps fewer than today. On the witnessing of the transaction, see Jolowicz and Nicholas, *Historical Introduction* 145-146.

known as *auctoritas* seems to have required the defender's *auctor* (transferor) to provide evidence supporting his or her ownership of the thing on pain of liability for twice the purchase price.⁴³ Although there is some debate⁴⁴ over whether the *auctor* played a similar role to the Germanic "Gewährsmann" or warrantor,⁴⁵ resort to the defender's author in disputes over ownership is also seen in other early legal systems.⁴⁶ On completion of the hearing, the praetor declared one of the parties to be interim possessor, and ordered him or her to offer sureties to the other party for the thing and its profits.⁴⁷ Presumably this ensured that the final ruling as to which party's oath was preferred was complied with.⁴⁸ Although the losing party was not personally liable for delivery of the property, this system is assumed to have been relatively efficient at procuring the thing for the winning party.⁴⁹

(b) *Classical law and the development of the vindicatio*

With the development of the formulary procedure,⁵⁰ the *legis actio sacramento in rem* was replaced in the classical period by the *rei vindicatio*.⁵¹ This action lay against the possessor,⁵² and aimed at the recovery or restitution of the thing: "*ubi enim probauit rem meum esse, necesse habebit possessor restituere.*"⁵³ In contrast to systems which require some wrong before the owner can assert his or her right, the

⁴² For an overview of the *mancipatio* see Kaser, *Private Law* 36-38 and Jolowicz and Nicholas, *Historical Introduction* 143-149. The extensive literature on its early history is covered by Diósdí, *Ownership* 64-72.

⁴³ See Kaser, *Zivilprozessrecht* 98-99. Full references are given by Diósdí, *Ownership* 75-81

⁴⁴ On whether the *auctor* entered the process as defender, compare Kaser, *Eigentum* 63-65 and Diósdí, *Ownership* 79-81.

⁴⁵ On which see B(2) below.

⁴⁶ See for example the early Babylonian codes discussed by S Levmore, "Variety and Uniformity in the Treatment of the Good Faith Purchaser" (1987) 16 *Journal of Legal Studies* 43 at 49-53. Generally a purchaser was required to be able to identify his or her seller, particularly in case of an accusation of theft.

⁴⁷ *Institutes of Gaius* IV 16.

⁴⁸ The sources do not give much information about the conclusion of the action, but for a plausible discussion of the possible outcomes see R Monier, *Manuel Élémentaire de Droit Romain*, vol 1 6th edn (1947) 143. As to whether it was possible for both claims to be rejected, contrast Diósdí, *Ownership* 105.

⁴⁹ P F Girard, *Manuel Élémentaire de Droit Romain*, 8th edn (1929) 361-362 characterises the system as providing an efficient means of execution; indeed, a similar device was used in the later procedure *per sponsionem*.

⁵⁰ On which see Jolowicz and Nicholas, *Historical Introduction* 191-201; 218-223.

⁵¹ On the emergence of the *formula* of the *vindicatio*, see A Watson, *Roman Private Law Around 200 B.C.* (1971) 71.

⁵² Originally the possessor in law (rather than the party with physical detention of the object.)

However by the time of Justinian the *vindicatio* could be used against any holder. See D 6.1.9.

⁵³ D 6.1.9: "For once I have proved that the thing is mine, the possessor will have to deliver it to me."

vindicatio was available against any possessor, whether in good or bad faith.⁵⁴ The possessor, however, was not personally liable for the return of the thing and could not be forced to defend the action.⁵⁵ This, in theory, meant that the *rei vindicatio* could not be tried. For this reason, in respect of moveable property the praetor granted the *actio ad exhibendum*,⁵⁶ by means of which the pursuer could demand the production of the thing.⁵⁷ If the defender failed to produce the thing, he or she was condemned to pay the value of the thing as assessed by the pursuer.⁵⁸ Even where the thing was produced, the difficulties of proving ownership meant that it was often preferable to use possessory interdicts to gain possession, placing the burden of proof on the other party who would then be forced to bring his or her own *vindicatio*.⁵⁹

The distinction between actions *in rem* (against the thing itself) and those *in personam* (against a specified person)⁶⁰ emerges from the structure of the *vindicatio*. Whether an action is *in rem* or *in personam* is immediately clear: when a person is claiming *in rem*, the defender's name does not (apart from in exceptional cases) appear in the *intentio* at all,⁶¹ in a claim *in personam* it necessarily does.⁶² This is an extremely significant development; it provides the foundations of the modern Civilian understanding of ownership as a right in a thing, enforceable against all third parties.⁶³ In the classical period, two procedures were available for the trial of the *vindicatio*, the *per sponsionem* and the *per formulam petitoriam*.⁶⁴ In the procedure *per sponsionem*, the defender promised to pay a nominal sum of money if the thing

⁵⁴ This is the logical implication of, for example, D 6.1.9. See Jolowicz and Nicholas, *Historical Introduction* 140.

⁵⁵ D 6.1.80. See L Wenger, *Institutes of the Roman Law of Civil Procedure*, trans O Harrison Fisk (rev ed 1986) 109.

⁵⁶ D 10.4.3.1 states the action to be “perquam necessaria” (extremely necessary) and introduced for the sake of the *vindicatio*.

⁵⁷ D 10.4.2; D 10.4.3.3. See Wenger, *Institutes* 109-110.

⁵⁸ D 10.4.3.2.

⁵⁹ D 6.1.24.

⁶⁰ See *Institutes of Gaius* IV 1-IV 5.

⁶¹ See for example *Institutes of Gaius* IV 41: “si paret hominem ex iure Quiritium Auli Agerii esse”.

⁶² *Institutes of Gaius* IV 41. See further Schulz, *Roman Law* 32-34.

⁶³ See Kaser, *Private Law* 28-29. Kaser posits the distinction as based on a contrast between absolute and relative rights; the extent to which the Roman sources can be said to support a notion of subjective rights is controversial (see M Villey, “L'idée du droit subjectif et les systèmes juridiques romains” (1946) 24 *Revue historique de droit français et étranger* 201) but it is certainly the case that the Roman law provided an important reference point for later development.

⁶⁴ See generally *Institutes of Gaius* IV 91-IV 99. On the historical relation between the two procedures, see Girard, *Manuel Élémentaire* 364.

belonged to the pursuer. Action would then be brought on the promise, and as a result judgment given on the question of ownership. In order to ensure that the thing was actually returned to the pursuer if he or she won, the defender made a further promise (*stipulatio*) for the value of the thing and the litigation.⁶⁵ The other option was the *per formulam petitoriam*; in this case the *intentio* claimed that the thing belonged to the pursuer, if the defender lost he or she was again condemned to pay a sum of money, the value of which was fixed according to the pursuer's oath.⁶⁶ A passage from Ulpian which appears to provide for forcible dispossession of the losing party is probably an interpolation which does not reflect classical law.⁶⁷

(c) Post-classical decline

Levy argues that although the term "vindicare" continued to be used in the post-classical period, it no longer had any necessary connection with judicial proceedings. In some cases, it was applied to extra-judicial seizure and used essentially to mean occupation.⁶⁸ Justinianic law returned to some extent to the system of *actiones*;⁶⁹ the scope of the *vindicatio* was extended to those who had ceased to possess through fraud or bad faith (*dolo*).⁷⁰

(3) Transfer by a Non-Owner and the *Nemo Plus* Rule

(a) Early development

Although the application of the *nemo plus* rule in ancient law is uncertain, reference is made in the XII Tables to the prohibition of the acquisition by *usus auctoritas*⁷¹ of stolen property.⁷² (Corporeal moveable property could probably otherwise be acquired by this means after one year's possession.)⁷³ *Furtum* was broadly defined and could seemingly include unauthorised use by a depositee or even accepting a

⁶⁵ *Institutes of Gaius* IV 94.

⁶⁶ See *Institutes of Gaius* IV 48.

⁶⁷ See Wenger, *Institutes* 152-153; Girard, *Manuel Élémentaire* 371.

⁶⁸ E Levy, *West Roman Vulgar Law: The Law of Property* (1951) 210-219.

⁶⁹ Levy, *Vulgar Law* 202-210.

⁷⁰ See e.g. D 6.1.36; D 6.1.25; D 6.1.27.3. For commentary on this important development, see Girard, *Manuel Élémentaire* 365 fn 3.

⁷¹ This obscure term was probably an antecedent of *usucapio*. See Diósdí, *Ownership* 85-93 where it is concluded that it is simply impossible to define "auctoritas" in a satisfactory manner.

⁷² Table 1 22, collected in Johnson *et al.*, *Roman Statutes* 619-620. See *Institutes of Gaius* II 45; II 49.

⁷³ Table VI 3. See Johnson *et al.*, *Roman Statutes* 658-660.

pledge that was known not to belong to the pledgor.⁷⁴ The *Lex Atinia*, passed in the second century BC,⁷⁵ is thought to have stated “*Quod subruptum erit, eius rei aeterna auctoritas esto*,”⁷⁶ implying that the thing was permanently recoverable by the owner.⁷⁷ There is some scholarly debate about the relationship between the *Lex Atinia* and the XII Tables,⁷⁸ but it seems plausible that, as suggested by Daube, the XII tables prohibited acquisition only by the thief him or herself. It was with the introduction of the *Lex Atinia*, which focused on the right of the owner to recover stolen objects that the prohibition on acquisition was extended to third party acquirers.⁷⁹ It is agreed that by around 150 BC neither the original thief nor third parties could acquire stolen property by *usus auctoritas*. According to Paul, the *Lex Atinia* required stolen property to be returned to the control of the owner, rather than the person (for example a creditor of or hirer from the owner) from whom it had been stolen.⁸⁰

For current purposes, this is a key development, reflecting a new emphasis on the relationship between owner and *res* rather than redress for personal wrong. Given the important role played by corporeal moveable property, in particular *res mancipi*, in the acquisition of wealth,⁸¹ it seems likely that these provisions represented a more general onus on protection of such property and an unfavourable attitude towards those purchasing stolen goods, whether in good faith or otherwise. Indeed, Diósdí suggests that the needs of the rural economy at this early stage favoured the development of ownership as an absolute and exclusive power over the means of

⁷⁴ See Watson, *Private Law* 146.

⁷⁵ See R Yaron, “Reflections on Usucapio” (1967) 35 *Tijdschrift voor Rechtsgeschiedenis* 216.

⁷⁶ “Whatever shall have been stolen, the *auctoritas* in respect of that object is to be everlasting.” This text is taken from Johnson *et al.*, *Roman Statutes* 745-746. For a full discussion and bibliography, see P G Stein, “Lex Atinia” (1984) *Athenaeum* 596.

⁷⁷ M Kaser, “Altrömisches Eigentum und “usucapio”” (1988) 105 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 122 at 140.

⁷⁸ See D Daube, “Furtum Proprium and Furtum Improprrium,” (1936-38) 6 *Cambridge Law Journal* 217 at 217-234, A Watson, *The Law of Property in the Later Roman Republic* (1968) 24-28 and Yaron, “Usucapio”. For a summary, see Jolowicz and Nicholas, *Historical Introduction* 153.

⁷⁹ Daube, “Furtum Proprium” 231-234; Kaser, *Private Law* 106. For contrasting views, see however, Watson, *Property* *ibid.* and Yaron, “Usucapio”.

⁸⁰ D 41.3.4.6.

⁸¹ It is generally accepted that the category of *res mancipi* (mancipable things), which included slaves and beasts of burden such as horses, oxen and mules, represented the most important means of production in a peasant economy. See Kaser, *Private Law* 81; Diósdí, *Ownership* 57. For definition of *res mancipi*, see *Institutes of Gaius* II 14(a).

production, despite the lack of precise legal definition.⁸² The role of the *paterfamilias* as owner and protector of the whole family's assets meant that legal rules were required to protect these assets from dissipation.⁸³ It may thus be conjectured that, even if the *nemo plus* rule was not articulated as such, the impetus for the *de facto* application of such a principle can be traced to this early point.

(b) Classical law

(i) Owner's consent generally necessary for derivative acquisition

For current purposes, the most important forms of derivative transfer⁸⁴ of corporeal moveables in classical Roman law were mancipation (applicable to *res Mancipi*)⁸⁵ or, in the case of non-mancipable things, delivery (*traditio*).⁸⁶ In order for ownership to pass, the modern consensus is that a valid *causa* such as sale or donation was required, typically necessitating the intention of the owner.⁸⁷ Both methods usually involved an important element of publicity, helping to reduce the risk of unauthorised transfers.⁸⁸ What was the position, however, when a thing was transferred without the consent of the owner? Could a good faith purchaser acquire ownership of such property?

It is at this point that the application of the *nemo plus* maxim becomes significant. Several Books of the Digest contain statements by leading jurists which articulate what was probably already an important rule. The version of the rule received into modern Scots law, "*nemo plus iuris ad alium transferre potest, quam*

⁸² Diósdí, *Ownership* 124.

⁸³ B Kozolchyk, "Transfer of Personal Property by a Nonowner: Its Future in Light of Its Past" (1987) 61 *Tulane Law Review* 1453 at 1465.

⁸⁴ The use of the term "derivative transfer" is not intended to imply that Roman law had a theory of derivative acquisition of rights comparable to that in modern Civilian systems. See Kaser, *Private Law* 101; Monier, *Manuel Élémentaire* vol 1 396 and references given there.

⁸⁵ See *Institutes of Gaius* II 18-II 23. For definition of *res Mancipi*, see II 14(a).

⁸⁶ See Watson, *Property* 62.

⁸⁷ See R Evans-Jones and G D MacCormack, "*Iusta causa traditionis*", in P Birks (ed), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 98 at 101. This is, however, subject to debate, as is the meaning of *causa* in this context. See D 41.1.31; D 41.1.36; D 12.1.18. For discussion, see W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (1900) 228-230; Evans-Jones and MacCormack, "*Iusta causa*", W M Gordon, "The importance of the *iusta causa* of *traditio*", in P Birks (ed), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989)123; J L Barton, "Solutio and Traditio", in J W Cairns and O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001) 15.

⁸⁸ In classical law *traditio* generally involved the physical transfer of possession. See W M Gordon, *Studies in the transfer of property by traditio* (1970); Watson, *Property* 62.

ipse haberet,”⁸⁹ is included in the final title of the Digest (50.17), which is entitled “Various Rules of Early Law”. This title contains fundamental legal principles which often aid in the interpretation and construction of legal rules;⁹⁰ Stein suggests that it may have been used heavily by practitioners.⁹¹ The fact that the rule was included at this point suggests that, certainly by the time of the Digest’s compilation, it was seen as a maxim of broad application.

Stein has further argued that the criterion for inclusion in Title 50.17 was expression in a particular form.⁹² There was a preference for the general, and “dogmatic statements introduced by *omnis* or *nemo*”⁹³ The fact that the rule was included in 50.17 does not necessarily mean that it existed as an independent maxim in classical law: often such rules had been abstracted from a specific context, and in some cases altered to give the text a more general meaning.⁹⁴ In the case of the *nemo plus* maxim, the text itself is taken from Ulpian, *On the Edict* Book 46. This contains several provisions relating to succession, specifically the system allowing the Praetor to grant succession rights to certain persons as if they were *heres* (heirs at civil law), *bonorum possessio*.⁹⁵

Later the suggestion that the rule was only intended to apply in the context of succession is considered, but at this point it is sufficient to note that broadly similar principles are reflected in other succession-related maxims, for example “*nemo plus commode heredi suo relinquit, quam ipse habuit*.”⁹⁶ Given that succession is a basic instance of property transfer, it is not unreasonable to suppose that it provided the genesis for the development of a *nemo plus*- type rule.

⁸⁹ D 50.17.54, see fn 8.

⁹⁰ For example D 50.17.9: “In matters which are obscure, we always follow the one which is the least ambiguous.”

⁹¹ P G Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (1966) 123.

⁹² Stein, *Regulae Iuris* 115.

⁹³ Stein, *Regulae Iuris* 120.

⁹⁴ Stein, *Regulae Iuris* 118-120. Indeed, some believe that abstracted from its proper context the maxim is meaningless, see for example E Albertario, *Introduzione Storica allo studio del Diritto Romano Giustiniano* (1935) 158, discussed further in (ii) below.

⁹⁵ On *bonorum possessio* see Kaser, *Private Law* 282.

⁹⁶ D 50.17.120: “No one leaves a greater benefit to his heir than he himself had”.

In assessing the significance of the maxim in classical law, it is important to emphasise the general importance placed in Roman law upon the express and public transfer of ownership.⁹⁷ Kozolchyk argues that this reflects the policy, common to ancient legal systems, of protecting valuable family assets by requiring the express or presumed consent of a historical owner.⁹⁸ Other maxims included in Title 50.17, for example “*Id, quod nostrum est, sine facto nostro ad alium transferri non potest*”⁹⁹ affirm the importance of protection of property, and the need for the owner’s consent to transfer.

As articulated in Title 50.17, the maxim itself does not indicate to which situations it is intended to apply. The Digest contains other statements to similar effect which specifically relate to the transfer of ownership. The most pertinent is that of Ulpian:

*Traditio nihil amplius transferre debet uel potest ad eum qui accipit, quam est apud eum qui tradit. si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert.*¹⁰⁰

Followed to its logical conclusion, this would appear to suggest that good faith acquisition of ownership from a non-owner was never possible, no matter how many transfers of the property took place. Although the term *vitium reale* (real vice) does not appear in the Roman sources,¹⁰¹ in the context of usucaption Pomponius distinguishes between defects (*vitia*) “*ex re*” (such as where the property had been stolen or obtained through violence) and “*ex persona*” (emanating from the person of the possessor).¹⁰² There is some authority to the effect that, outside of usucaption, lapse of time was not allowed to cure void titles: “*Quod initio vitiosum est, non*

⁹⁷ See Kozolchyk, “Transfer” 1467.

⁹⁸ Kozolchyk, “Transfer” 1468.

⁹⁹ D 50.17.11: “Something which is ours cannot be transferred to another without any action on our part”. See also D 50.17.119.

¹⁰⁰ D 41.1.20: “Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient.”

¹⁰¹ In its modern sense, it seems to have been developed by Bartolus of Sassoferrato, *Commentaria in primam Digesti Novi partem doctis* (1547) vol 2 90 (Title “de acquirenda et retinenda possessione”).

¹⁰² D 41.3.24.1.

potest tractu temporis conualescere.”¹⁰³ Gaius’ comment that delivery transfers ownership, providing that the transferor is owner of the property, further supports this view.¹⁰⁴ Gaius specifically mentions several examples of highly fungible property (gold, silver and garments), implying that no special exceptions were provided for such goods.¹⁰⁵

Although the present thesis is concerned only with corporeal moveable property, it is possible to identify intersections between the *nemo plus* maxim and other, more general, legal principles. The maxim “*non debeo melioris conditionis esse, quam auctor meus, a quo ius in me transit*”,¹⁰⁶ again collected in Title 50.17, applies a broadly similar logic to a potentially wide scope of situations, perhaps including the transfer of incorporeals such as debts. The statement that “*Qui in ius dominiumue alterius succedit, iure eius uti debet*”¹⁰⁷ also indicates congruence between transfer of the right to corporeal things and transfer of incorporeals. It appears that the corporeal and incorporeal parts of the inheritance may have been treated in a unitary manner, raising the possibility that *nemo plus* applied equally to transfer of incorporeals.

Given the apparent strictness of the law in relation to the transfer of property, it has been argued that *usucapio* must have been of considerable importance in the establishment of ownership.¹⁰⁸ However, the development of requirements of *iustus titulus*¹⁰⁹ and *bona fides*¹¹⁰ meant that the availability of usucaption to parties deriving title from a non-owner also continued to be severely restricted. As *mala fides* was usually present where the acquirer knew of the non-ownership of the transferor, this meant that one could generally only usucapt someone else’s property

¹⁰³ D 50.17.29: “Something which is defective at the outset cannot be validated with passage of time.”

¹⁰⁴ *Institutes of Gaius* II 20.

¹⁰⁵ *Ibid.*

¹⁰⁶ D 50.17.175.1: “I must not be in a better position than my author from whom the right passes to me”.

¹⁰⁷ D 17.54.177: “Someone who succeeds into the legal position or right or property of another must accept his rights.”

¹⁰⁸ See Gordon, “*iusta causa*” 130-131.

¹⁰⁹ On the meaning of *iustus titulus*, see Schulz, *Roman Law* 356. The precise details of the development of these rules are controversial: Watson, *Property* 31.

¹¹⁰ See for example D 41.3.10; D 41.3.12; Girard, *Manuel Élémentaire* 329.

by mistake.¹¹¹ Some important exceptions are discussed below; a bonitary owner, although he or she knew that he or she held property incorrectly transferred, was not in *mala fides*.¹¹² (This was presumably because the failed transfer had taken place with the consent of the original owner.)

(ii) Instances of transfer by a non-owner

In a society in which public marketplaces such as auctions were common,¹¹³ it is perhaps surprising that there were no further moves to allow innocent third parties to acquire ownership. Good faith in itself usually could not give more rights to a possessor than the bare fact of possession.¹¹⁴ There were, however, some situations in which a good faith possessor could acquire property by usucaption. These are characterized by Gaius as instances where no theft has been committed, due to lack of intent or otherwise.¹¹⁵ He mentions the sale of property loaned or hired by or deposited with a deceased person which the heir believed to belong to the estate and the sale by a usufructuary of a female slave's child which he believed belonged to him.¹¹⁶ Indeed, any transfer of property which had not been acquired by theft or violence allowed a good faith transferee to acquire the property by usucaption.¹¹⁷ This extended to, for example, the property of a deceased person where the heir had not taken possession of the estate, and property transferred to a creditor by mancipation where possession was subsequently regained.¹¹⁸ This is potentially a wide exception to the *nemo plus* principle, particularly where there is no transfer to an innocent third party (such as in the case of the debtor reacquiring ownership of property previously mancipated to the creditor.)¹¹⁹

In addition to acquisition by usucaption, there were some circumstances in which agents and curators could transfer ownership of property which they did not

¹¹¹ Kaser, *Private Law* 107.

¹¹² *Ibid.*

¹¹³ J A Crook, *Law and Life of Rome: Aspects of Greek and Roman Life* (1967) 219.

¹¹⁴ See D 50.17.136; D 43.3.24.

¹¹⁵ *Institutes of Gaius* II 50.

¹¹⁶ *Institutes of Gaius* II 50.

¹¹⁷ *Institutes of Gaius* II.50. See also Julius Paulus, *Opinions* V.II.5, allowing a purchaser to acquire property the ownership of which was in dispute by usucaption after 20 years

¹¹⁸ *Institutes of Gaius* III 201. On *usucapio pro herede* and *usureceptio*, as these were respectively known, see Watson, *Property* 32-58; Kaser, *Private Law* 127-128.

¹¹⁹ On possible explanations for this odd exception, see Watson, *Property* 42-48.

themselves own. Indeed, according to Ulpian “*non est novum, ut qui dominium non habeat, alii dominium praebeat: nam et creditor pignus vendendo causam dominii praestat, quam ipse non habuit.*”¹²⁰ Gaius compares the position of (authorised) agents¹²¹ and curators of persons without capacity to that of a creditor in receipt of a pledge: the principal or the incapax has (expressly or otherwise) consented to the agent or curator selling their property in the same way as a debtor consents to the possibility that the creditor may sell the pledged item if the debt is not repaid.¹²²

Finally, special rules applied in the case of money. Given the particular nature of ownership of coins, and the need for free transferability of money, a good faith acquirer of coins was protected from vindication by the owner.¹²³ Moreover, if coins belonging to different persons were mixed so that neither could identify their own the possessor acquired ownership.¹²⁴ Both from a practical perspective and one of policy such exceptions seem sensible, but they do not affect the broader scheme of property transfer.

According to Schulz, however, the presence of such exceptions renders the idea of a *nemo plus* principle in Roman law “misleading”,¹²⁵ “false”¹²⁶ and “spurious.”¹²⁷ How can the statement of Ulpian quoted above and the existence of these cases in which a non-owner could transfer ownership logically co-exist with such a rule?¹²⁸ Indeed, he goes so far as to suggest that the current text of the Digest is based on an error by the compilers both in omitting to change *haberet* to *habet*¹²⁹

¹²⁰ D 41.1.46: “There is nothing extraordinary in the fact that anyone can transfer to another the ownership of property which he does not have; for a creditor, by selling a pledge, transfers to the purchaser a title which he himself did not have.”

¹²¹ An express mandate was usually required but an exception was made for fruits, or other things which might be easily spoiled: D.3.3.63.

¹²² *Institutes of Gaius* II 64. See also D 41.1.9.4.

¹²³ D 12.1.11.2 and 12.1.13.

¹²⁴ D 46.3.78.

¹²⁵ Schulz, *Roman Law* 352.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ The same point is made by Albertario, *Introduzione* 158.

¹²⁹ Presumably the imperfect subjunctive *haberet* (roughly translated into English as “might have” or “would have”) is consonant with restriction to the context of transfer of future succession rights, whereas the present indicative *habet* (has) is required to make sense of the maxim as a general rule.

and in portraying the rule as a general one.¹³⁰ His argument is similar to that made earlier by Albertario, who suggests that in separating the maxim from the discussion which originally surrounded it, and thus generalising it, the compilers have made an error.¹³¹ Albertario proposes that the statement was made in the context of the procedure *in iure cessio hereditatis*, by which an agnate¹³² could cede his right to accept an inheritance which was offered to him before he had acquired the inheritance by *aditio hereditatis*.¹³³ (In contrast to transfer of an inheritance already acquired, this included incorporeal parts of the inheritance such as debts.) This, in itself, is not an implausible suggestion, and indeed, is mentioned by Lenel in his *Palingenesia*.¹³⁴ The contention that *nemo plus* was never a generally applicable principle is, however, more serious.

The possibility of textual error aside, it is submitted that these assertions are unfounded. Overall, the scheme of transfer of property in classical Roman law is consistent with adherence to the *nemo plus* rule, for example in the restriction on usucaption of stolen goods. Although the exceptions discussed above were certainly important, and others based in legal practice may well have existed, their existence as exceptions confirms the significance of the general principle. Indeed, why else would the situations described be worthy of any particular attention? In his discussion of Albertario's thesis, Buckland comes to a similar conclusion, pointing out that the rejection of the general rule renders the exceptional nature of the situations mentioned here unintelligible.¹³⁵ If Ulpian is indeed talking of *in iure cessio hereditatis*, it is speculated that he may be commenting on the exceptional nature of the institution.

(c) *Continuing application of the nemo plus rule in post-classical law*

¹³⁰ Schulz, *Roman Law* 352

¹³¹ Albertario, *Introduzione* 158

¹³² *Adgnati* were all free persons who were members of the same house community or who would have been members of this community if their common *paterfamilias* were still alive: Kaser, *Private Law* 61.

¹³³ Albertario, *Introduzione* 158. On the *in iure cessio hereditatis* see *Institutes of Gaius* II 35 and Kaser, *Private Law* 309.

¹³⁴ O Lenel and L E Sierl, *Palingenesia Iuris Civilis* (1960) vol 2 col 722 fn 1.

¹³⁵ W W Buckland, "Interpolations in the Digest: A Criticism of Criticism" (1941) 54 *Harvard Law Review* 1273 at 1308-9.

According to Levy, law as developed in the Western Roman Empire continued to reflect the principles of the classical law outlined above. Although there were some relaxations in the formalities of property transfer,¹³⁶ there was no corresponding change in policy in respect of transfer by non-owners. The *nemo plus* doctrine “stood unchallenged in the Roman field through the centuries.”¹³⁷ Indeed, it is contended that it had become part of a *commune ius*, which formed the basis for legislation in the West during what he terms the “vulgar” period.¹³⁸ Although Levy’s general thesis of the vulgarization of Roman law is debated,¹³⁹ the sources in this area appear to support this view.

Levy argues that the *Codex Theodosianus* reflected this rule in allowing children to recover property unlawfully alienated by their father from any acquirer and prohibiting usucaption of such property.¹⁴⁰ In addition, a law of Valentinian 1 allowed for the restoration of property unlawfully alienated by public officials, even against third parties.¹⁴¹ Recent scholarship has suggested that the *Codex Theodosianus* should be read in the context of the general principles of private law developed during the classical period.¹⁴² This approach would support Levy’s thesis. Some of the more general statements contained in the code also suggest the survival of the classical rule, for example “*Vitia autem a maioribus contracta perdurant, et successorem auctoris sui culpa comitatur*”.¹⁴³

There are also, however, some clear exceptions to the *nemo plus* rule. The most important relates to the power of the fisc to transfer good title to property improperly acquired.¹⁴⁴ Those who had been wrongfully dispossessed by the fisc

¹³⁶ Levy, *Vulgar Law* 127-137.

¹³⁷ Levy, *Vulgar Law* 176.

¹³⁸ Levy, *Vulgar Law* 175.

¹³⁹ D Liebs, “Roman Vulgar Law in Late Antiquity”, in B Sirks (ed), *Aspects of Law in Late Antiquity* (2008) 35-53.

¹⁴⁰ *Codex Theodosianus* (hereafter CT) 8.18.1.3. See Levy, *Vulgar Law* 173-174.

¹⁴¹ CT 8.15.5(5). See Levy, *Vulgar Law* 174-175.

¹⁴² See P J du Plessis, “The structure of the Theodosian Code”, in J-J Aubert and P Blanchard (eds), *Droit, religion et société dans le Code Théodosien* (2009) 3.

¹⁴³ CT 4.22.5.1: “Defects in title produced by ancestors persist, and the fault of an author of a right is attached to his successor.”

¹⁴⁴ See for example CT 10.8.3 “Those persons shall not be disturbed to whom We have presented anything for their labours and merits, but they shall remain in possession of their rights, that is, without the annoyance of any suit.”

thus could not bring an action for the recovery of the property, but were instead given a claim for compensation.¹⁴⁵ Purchasers at auctions of property adjudged by the fisc also obtained a wholly valid title, even in cases where the property had been unlawfully seized.¹⁴⁶ This presumably reflects the absolute power vested in the emperor.¹⁴⁷ However, even this relatively limited exception seems to have been debated¹⁴⁸ and in AD 468 was abolished altogether.¹⁴⁹

It is not clear to what extent law in the Eastern provinces followed a similar pattern to that in the West. What is known of the classical law is largely based on statements compiled in the Digest at the time of Justinian. The inclusion of the *nemo plus* principle in title 50.17 demonstrates the extent to which it had become axiomatic. The treatment of ownership in the *Institutes* also emphasises the need for willing participation of the owner in property transfers.¹⁵⁰ In the light of the other maxims compiled in the Digest, it seems clear that the *Institutes* take the existence of the principle for granted. Reference is made to an exception provided for in a constitution of Zeno in respect of property obtained from the Treasury.¹⁵¹ The *Codex Justinianus* further records a number of provisions to the effect that a mistake in ownership cannot prejudice the rights of the owner.¹⁵² *Nemo plus* thus gains the status of a fundamental legal rule and indeed, through the Digest, has been received to varying extents into modern civilian systems.

(4) Conclusions

From a present-day perspective, excluding the possibility of good faith acquisition of corporeal moveable property may often seem impractical or even unfair to innocent

¹⁴⁵ See CT 10.8.3.

¹⁴⁶ CT 10.17.1: "Even minors are debarred for all time from the right to recover any of their property that has been adjudged to purchasers for fiscal debts." See also 10.17.2.

¹⁴⁷ See Levy, *Vulgar Law* 175.

¹⁴⁸ In the case of soldiers returning home who had been held as prisoners of war, it was excluded altogether, see CT 5.7.1 and Levy *Vulgar Law* 175.

¹⁴⁹ *Novellae Anthemii* 3.1.

¹⁵⁰ *Institutes* 2.1.40; which imply the consent of the owner and 2.6.2 which prohibit usucaption of property stolen or obtained by force. See J A C Thomas, *The Institutes of Justinian: Text, Translation and Commentary* (1975) 94-100.

¹⁵¹ *Institutes* 2.6.14.

¹⁵² C 3.32.18. See also C 32.18.23; 32.18.24; 32.18.28.

acquirers. In considering the reasons for the development of the Roman approach, it is important that, in ancient society, property in moveables was often of great economic importance; it is argued by Diósdí that moveables, specifically animal breeding, were the first form of private property.¹⁵³ It is for this reason that the acts used to transfer ownership and the ancient proprietary remedy were based on moveables.¹⁵⁴ In a context in which prosperity is derived largely from ownership of moveables, protection of ownership of moveables will be necessary to secure the accumulations of the better off. Prohibition of usucaption on stolen goods can thus be read as “a provision of a defensive character favouring the wealthy citizens.”¹⁵⁵

It is against this background that classical Roman law developed, and it is evident that it retained much of the antipathy towards theft which characterised the ancient law. Moreover, the ancient legal rituals were slow to adapt to commercial expansion. Although trade played an important role in Roman life, Roman legal institutions originated in a legal culture in which the access of non-citizens to the *ius civile* was severely restricted and the transfer of property cumbersome and complex.¹⁵⁶ (Indeed, Yaron argues that if foreign trade had played a significant role in early Roman society, it would have been stifled by the ancient law’s “radical defence of ownership.”¹⁵⁷) The strictness of the rules governing transfer of property created tensions following the influx of strangers to Rome after the first Punic war,¹⁵⁸ and the consequent explosion of commerce.¹⁵⁹ In an era before the widespread availability of mass produced goods,¹⁶⁰ it is perhaps also more likely that particular objects could reasonably be traced to their former owner. To this extent, the application of the *nemo plus* principle is not surprising, but rather consistent with the social and cultural conditions of the time.

¹⁵³ Diósdí, *Ownership* 30.

¹⁵⁴ Diósdí, *Ownership* 36.

¹⁵⁵ Diósdí, *Ownership* 93.

¹⁵⁶ See generally R Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, 3rd edn trans J Crawford Ledlie (1907) 48-69.

¹⁵⁷ Yaron, “Usucapio” 223.

¹⁵⁸ 264-241 BC.

¹⁵⁹ See A Stephenson, *A History of Roman Law with a Commentary on the Institutes of Gaius and Justinian* (1912) 197-199.

¹⁶⁰ There is evidence of the existence of some large-scale production of consumer goods within the Roman Empire, particularly pottery. See B Ward-Perkins, *The Fall of Rome and the End of Civilization* (2005) 87-122.

Although a number of (sometimes surprisingly wide) exceptions to the rule existed, it is submitted that these do not render the principle incoherent. Against Schulz, it can be argued that the existence of such a maxim is a logical corollary to the requirement that the owner consent to transfer. The structure of the *vindicatio* also reinforces the distinction between mere possession and ownership, and the strength of the owner's right. Conversely, it is also clear that legal logic cannot, in itself, justify the law's preference for the original owner over the honest acquirer. "Neither ownership, agency, sales, nor any of the different types of possessory rights could, by themselves, claim the inherent symmetry of circles, triangles, or rectangles".¹⁶¹ Social conditions and power relations at the time of development also play a significant part.

What are the implications of this for the current law? Undoubtedly the social and economic conditions of modern life place very different demands upon the law of property. It is interesting, though, that some of the exceptions provided in Roman law involving situations where it was reasonable for an acquirer to assume that the transferor had right to the property reflect the type of practical reasoning also vital to the modern law. Particularly in the case of corporeal moveable property, ownership of which it is still difficult to evidence, the role of possession is frequently an important one. If there is no reasonable means of discovering that the possessor is not actually owner, it would be a harsh rule that excludes acquisition in perpetuity. Both modern legal systems and classical Roman law seem, in general, to reflect this.

B. EARLY SCOTS LAW (1200-1500)

(1) Context

The period 1350-1650 has been described as the "dark age" of Scottish legal history.¹⁶² Although there exist some records of the activities of local courts¹⁶³ and

¹⁶¹ Kozolchyk, "Transfer" 1469.

¹⁶² T Cooper, *The Dark Age of Scottish Legal History: 1350-1650* (1952).

what has been described as an instruction manual for the feudal courts,¹⁶⁴ there are few systematic treatises. As in ancient Roman law, the main source of information about the ownership of moveable property is the law of actions, and the forms of words used to make particular claims. What, then, was the procedure by which an owner could recover possession of moveables? By way of social and economic context, in terms of trade and commerce Scotland “shared in the great urban revival of the eleventh and twelfth centuries in Europe”,¹⁶⁵ with the development of towns as trading centres.¹⁶⁶ A significant feature of this period was the grant by the twelfth-century monarchs of burghal status to the most important village markets, establishing spatial monopolies on trade which persisted longer in Scotland than elsewhere in Britain.¹⁶⁷ The Royal Burghs enjoyed extensive trading privileges, usually set out in the charter establishing the Burgh.¹⁶⁸ Burghal markets were strictly regulated, with numerous laws restricting the times and places at which trading could occur.¹⁶⁹ Customs and procedures developed in order to facilitate the trading activities of the burghs,¹⁷⁰ and it is thus here that the earliest developments in laws regulating the sale and transfer of moveable property might be expected to be found.

(2) Sources

Turning to legal provision, there are unfortunately few Scottish sources detailing this early period; those which exist do not devote much attention to the classification of actions. In general, the procedure for recovering moveable property appears similar to that found in many other Germanic legal cultures. Concern with publicity of

¹⁶³ See for example J Stuart (ed), *Extracts from the Council Register of the Burgh of Aberdeen Volume 1: 1398-1570* (1844).

¹⁶⁴ T D Fergus (ed), *Quoniam Attachamenta* (1996) 64.

¹⁶⁵ A Gibb and R Paddison, “The Rise and Fall of Burghal Monopolies in Scotland: The Case of the North East” (1983) 99(3) *Scottish Geographical Magazine* 130 at 132.

¹⁶⁶ See A A M Duncan, *Scotland: The Making of the Kingdom* (1975) ch 18.

¹⁶⁷ Gibb and Paddison, “Burghal Monopolies” 131; 132.

¹⁶⁸ D Walker, *A Legal History of Scotland Volume 1: The Beginnings to A.D. 1286* (1988) 198; Scottish Burgh Record Society, *Ancient Laws and Customs of the Burghs of Scotland, Vol 1, 1124-1424* (1868) xxxvii- xxxviii. See also Gibb and Paddison, “Burghal Monopolies” 132.

¹⁶⁹ *Leges Quator Burgorum* Cap. LXVI; LXXII in Scottish Burgh Record Society, *Ancient Laws* 32; 35.

¹⁷⁰ See W C Dickinson, *Scotland from the Earliest Times to 1603* (1961) 115.

transfer, with requirements for witnessing of sales¹⁷¹ and, in the case of a challenge, reliance on the seller as warrantor¹⁷² were common features of early Germanic laws. Roman terminology does not seem to be commonly used; several of the Scots sources adopt the distinctively British term “haimhald” (as a verb in Latinised form, “haimhaldare”).¹⁷³ This could refer to various things: a pledge exacted that an animal sold is one’s lawful possession, and not stolen or simply anything domestic or belonging to one’s household.¹⁷⁴ Of most interest in the current context is the use of the term to mean “To claim (an animal) as one’s own property.”

The Dictionary of the Scots Language gives the origin of the term as the Old Norse “heimold”, meaning “title or right of possession.” Early Icelandic law (dating from the Icelandic Commonwealth, which ran from the tenth to the thirteenth century) used the verb “hemila” for “to warrant someone’s title to something”; “heimild” was “warrant, warranty or warrantable title.”¹⁷⁵ A law of William the Conqueror refers to the “heimelborh”¹⁷⁶ or “hemoldborh”, a cautioner provided by a seller to guarantee performance of his or her obligations of warranty; this is acknowledged by Thorpe to derive from the Norse, presumably reflecting a rare remnant of the Norse language in Norman French.¹⁷⁷ Johannes Steenstrup has argued that the British “haimhald” relates to the Nordic “Heimildartak”, a kind of pledge typically offered by a seller of used goods; he suggests the Nordic institution was received through the “lively trading relations”¹⁷⁸ between Britain and the Nordic countries, in particular Denmark, during the 11th and 12th centuries.¹⁷⁹ Interestingly,

¹⁷¹ On the position in early English law, compare F Pollock and F W Maitland, *The History of English Law before the Time of Edward I* vol 1, 2nd edn (1898) 58-59.

¹⁷² For an overview, see R Heubner, *History of Germanic Private Law*, trans F S Philbrick (1968) 412. For example, Rothair’s Edict (c. AD 643) ch 232 provides for someone who has bought a horse that is not his own to produce his seller, or swear an oath that he is not a thief, and aid as far as he can in producing the seller. He must also return the horse (Text taken from K Fischer Drew (trans), *The Lombard Laws* (1973) 99.)

¹⁷³ For example, the *Quoniam Attachiamenta* (discussed in ss (e) below.)

¹⁷⁴ Dictionary of the Scots Language entries for “Hamehald”, available at <http://www.dsl.ac.uk/>.

¹⁷⁵ A Dennis, P Foote and R Perkins (trans and eds), *Laws of Early Iceland: Grágás II* (2000) 418.

¹⁷⁶ See B Thorpe (ed), *Ancient Laws and Institutes of England* (2003) 205, cap. 21 (“*De Warranto Produciendo*”) where reference is made to resort to the “hemold-borh” if the defender’s warrantor is not produced. Compare the requirement in the *Leges Scocie* that sellers provide a cautioner, discussed in ss (b) below.

¹⁷⁷ See Thorpe, *Ancient Laws and Institutes of England* Glossary: “Hemoldborh”.

¹⁷⁸ “[L]jivlige Handelsforbindelser”: J C H R Steenstrup, *Normannerne vol 4: Danelag* (1882) 377.

¹⁷⁹ See Steenstrup, *Normannerne* 376-379.

there is evidence that similar terminology and procedures were used in Northern English locations such as Wakefield¹⁸⁰ and Lancaster.¹⁸¹ This may indicate a shared source, or perhaps shared customary development. Although similar to the Anglo-Saxon *getyman* (warrantor),¹⁸² the “hemold borgh” thus had a distinctly Nordic character.

(a) *The “March laws”*

The earliest surviving collection of laws is that contained in the Berne Manuscript,¹⁸³ which has been dated to the late thirteenth century.¹⁸⁴ The origins of the “March laws”¹⁸⁵ a collection of provisions contained within the manuscript which are believed to have regulated the Anglo-Scottish border territory in the twelfth to thirteenth centuries are uncertain.¹⁸⁶ They featured a form of the recovery of stolen property by oath.¹⁸⁷ The claimant must obtain the support of “six lele men.”¹⁸⁸ If the defender alleges that the thing in question is his “awin propir,” the matter is to be resolved by duel.¹⁸⁹ Neilson suggests that this type of procedure may be traced to the Lex Salica;¹⁹⁰ it is certainly true that, as noted above, similar provisions were included in many early Germanic legal codes. The resolution of property disputes by duel does not leave much scope for discussion of questions of good faith acquisition;

¹⁸⁰ See J W Walker (ed), *Court rolls of the manor of Wakefield vol 5: 1322-1331* (1945) 186, where reference is made to recovery of lost property by means of “haymald”.

¹⁸¹ See W Farrer (ed), *Some Court Rolls of the Lordships, Wapentakes and Demesne Manors of Thomas, Earl of Lancaster in the County of Lancaster A.D. 1323-4* (1901) 11; 60.

¹⁸² E B Robertson, *Scotland Under her Early Kings* (1862) 261 describes the “hemold borgh” as a “character of a similar description” to the *getyman*.

¹⁸³ On which see the useful resources provided by the Stair Society, available at http://www.stairsociety.org/resources/about_the_manuscript/the_berne_manuscript.

¹⁸⁴ See H L MacQueen, “Scots Law under Alexander III”, in N H Reid (ed), *Scotland in the Reign of Alexander III 1249-1286* (1997) 74 at 85-87.

¹⁸⁵ Printed in C Innes (ed), *Acts of the Parliament of Scotland Vol 1* (1844) (“APS”) 413-416 and with commentary in G Neilson and T I Rae (ed), “The March Laws”, in *Miscellany 1* (1971) 11.

¹⁸⁶ Neilson and Rae (ed), “March Laws” at 11. For an argument that there was a body of March law and custom existing before 1066, see W W Scott, “The March Laws Reconsidered”, in A Grant and K Stringer (eds), *Medieval Scotland: Crown Lordship and Community* (1993) 82. See also C Neville, *Violence, Custom and Law: The Anglo-Scottish Border Lands in the Later Middle Ages* (1998) ch 1.

¹⁸⁷ Art 8 in Neilson, “March Laws” 20. Neilson suggests that this is a form of recovery by the oath of “hamehald”, although the term is not used.

¹⁸⁸ Neilson, “March Laws” 20.

¹⁸⁹ See, however, the elaborate procedure for avoiding duel by driving a disputed animal into the waters of the Esk or the Tweed. (If the animal managed to reach midstream, the defender avoided the challenge.) On trial by battle, see Neville, *Violence* 6.

¹⁹⁰ Neilson, “March Laws” 20.

it may be assumed that the written law played only a limited role in such situations.¹⁹¹

(b) Leges Scocie

The Berne Manuscript also records several provisions relating to challenge of stolen (*furato*) cattle and the calling of warrantors which probably date from the reign of William I (1165-1214);¹⁹² these specify the locations at which and the times within warrantors must appear.¹⁹³ The practical enforceability of this law, known as “Claremathan”, was doubted by Lord Cooper¹⁹⁴ but later scholars have affirmed its consistence with the other sources of the period.¹⁹⁵

It is further provided that sellers of property should make available a cautioner (*borgh*), who will compensate the buyer if his ownership is challenged.¹⁹⁶ Similar provisions are found in earlier Anglo-Saxon laws.¹⁹⁷ It is difficult to say how far such injunctions were enforced, but there is evidence that formalities of this type were used in the transfer of important objects. For example, an inscription at the end of the Bute manuscript records its sale in 1424, and names, in addition to the buyer and the seller, the “borgh off hamehalde” and two witnesses.¹⁹⁸ The need for this kind of formality suggests that physical detention in itself was not enough to establish a presumption of lawful acquisition; rather it was production of the warrantor, or his or her borgh, which was necessary to evidence the possessor’s right.

(c) Regiam Majestatem

¹⁹¹ Compare, however, Rothair’s Edict ch 229 which provides for someone who has unknowingly sold another man’s property to offer oath to the effect that he believed it to be his own, and return it to the owner along with any fruits (Drew, *Lombard Laws* 98).

¹⁹² See A Taylor, “*Leges Scocie* and the Lawcodes of David I, William the Lion and Alexander II” (2009) 88(2) *Scottish Historical Review* 207 at 223-228.

¹⁹³ See Taylor, “*Leges Scocie*” 251-255; MacQueen, “*Scots Law*” 88-89.

¹⁹⁴ T Cooper (ed), *Regiam Majestatem and Quoniam Attachamenta* (1947) 86.

¹⁹⁵ MacQueen, “*Scots Law*” 89-90; Taylor, “*Leges Scocie*” 224-225.

¹⁹⁶ Taylor, “*Leges Scocie*” 255-256.

¹⁹⁷ See Pollock and Maitland, *History* 36 and for example the laws of King Edward in Thorpe (ed), *Ancient Laws* 68. The important role of the cautioner is discussed by F Garrisson, “*Procédure de garantie et revendication mobilière*” (1958-1960) 4 *Recueil de mémoires et travaux publiés par la Société d’histoire du droit et des institutions des anciens pays de droit écrit* 18 at 42-45.

¹⁹⁸ This is mentioned in APS 1 Notice on the manuscripts vii fn 3.

There are some difficulties in accurately establishing the date at which *Regiam* was compiled, and indeed, its status as representative of Scots law.¹⁹⁹ The provisions collected distinguish civil from criminal causes, with civil causes involving a stake measurable in pecuniary terms and criminal causes penalties of “blood” (mutilation or death.)²⁰⁰ There existed, however, no clear separation of jurisdiction, and most courts could deal with either kind of plea.²⁰¹

Following Glanvill,²⁰² where a thing is claimed from a buyer as stolen the buyer may call a warrantor from whom he acquired the property to vouch for his lawful acquisition.²⁰³ It is stated that this will discharge the buyer from liability “*ita quod propter hoc nihil de recto perdere poterit.*”²⁰⁴ (Presumably this does not mean that he or she always will be able to keep the thing in question, only that any loss may be made good through a claim against his or her warrantor.²⁰⁵) Production of the warrantor will assoilzie the defender from any further part in the process, which will begin anew between the pursuer and the warrantor.²⁰⁶ The process of warranty may continue up to the fourth warrantor.²⁰⁷ Evidence of lawful purchase will be enough to remove the suspicion of theft from a warrantor, but will not protect against the loss

¹⁹⁹ See A Harding, “Regiam Majestatem Amongst Medieval Law-Books” 1984 *Juridical Review* 97; H L MacQueen, “Regiam Majestatem, Scots Law, and National Identity” (1995) 74 *Scottish Historical Review* 1; A A M Duncan, “Regiam Majestatem: A Reconsideration” 1961 *Juridical Review* 199; H G Richardson, “Roman Law in the Regiam Majestatem” 1955 67 *Juridical Review* 155; J Buchanan, “The MSS of Regiam Majestatem: An Experiment” 1937 49 *Juridical Review* 217.

²⁰⁰ Cooper (ed), *Regiam* cap. 1.1, taken from Glanvill. Harding, “Regiam” 105 describes *Regiam* as preoccupied with courts and judging, rather than the distinction made in Justinian’s *Institutes* between persons, things and actions.

²⁰¹ Walker, *History Vol 1* 253. This was a common feature of mediaeval practice; see Garrison, “Revendication” at 29.

²⁰² R de Glanville and G D G Hall (ed), *The treatise on the laws and customs of the realm of England, commonly called Glanvill* (1990) III 1 and III 2 and X 15- X 17.

²⁰³ Cooper (ed), *Regiam* 1.15; 3.12.

²⁰⁴ “[S]o that he shall sustain no loss thereafter”: Cooper (ed), *Regiam Majestatem* 3.12.

²⁰⁵ Cooper (ed), *Regiam* 3.12: “If he should fail in the warranty, then the plea shall proceed between the buyer and the warrantor and it may come to a combat between them.” Compare Glanville, *Treatise* III 1, which refers specifically to the warrantor providing the defender with equivalent property.

²⁰⁶ Cooper (ed), *Regiam* 1.15. É Jobbé-Duval, *Étude Historique sur la Revendication des Meubles en Droit Français* (1880) 65 suggests that this reflects the criminal character of the action: evidence of lawful purchase removes any suspicion that the original defender was complicit in the theft of the thing.

²⁰⁷ Cooper (ed), *Regiam* 1.23; 3.13. There is some debate over the text, but this may correspond to the last part of Glanville, *Treatise* X 15. The extension of the dispute to at least three warrantors seems to have been standard; for Nordic laws compare Steenstrup, *Danelag* 371-372.

of the thing to the rightful owner.²⁰⁸ If a warrantor fails, there may be a duel between the buyer and the warrantor.²⁰⁹ *Regiam* also contains the sources from the Berne manuscript. Stolen money may not be immediately recovered; the claimant must first take the case to the Sheriff to ascertain the facts.²¹⁰

(d) *Quoniam Attachiamenta*

The procedure for claiming moveables is also described in the *Quoniam Attachiamenta*, which uses the verb “haymaldare” for “to claim as one’s own”, or in civilian terminology, “to vindicate.”²¹¹ Further evidence of the usage of this term is found in the *Exchequer Rolls* of 1337, which make reference to use of the *plegio de haymald* in a dispute over cattle.²¹² It was alleged that the cattle had been stolen from a Justiciar but returned by friends of the thief under “oath of haymald”, presumably to verify that the Justiciar was the true owner of the cattle.²¹³

In the *Quoniam* text, only three warrantors may be called²¹⁴ but the process seems essentially to be the same as that described in the *Regiam*. The procedure begins with an allegation that a thing has been taken (*elongatem*) from the pursuer. Production of his warrantor will relieve the defender from any claim against him or her, but if the warrantor fails to show lawful grounds for retention of the disputed thing (“*si non iustam causam rem illam retinendi habeat,*”) ²¹⁵ the pursuer may recover it. If the thing in question is an animal, the pursuer must place the Bible on its horns and swear that he neither sold nor gave away the thing in question,²¹⁶ a process which can be understood as reflecting both the importance of the oath and also the juridical significance attached to certain material acts necessary to claim the thing.²¹⁷ The formulation indicates the influence of earlier Saxon laws;²¹⁸ similar

²⁰⁸ Cooper (ed), *Regiam* 3.13, taken from Glanville, *Treatise* X 17. Explicit reference is made to a criminal accusation (*felonia*).

²⁰⁹ Cooper (ed), *Regiam* 3.12.

²¹⁰ Cooper (ed), *Regiam* Supplement no 5.

²¹¹ T D Fergus (ed), *Quoniam Attachiamenta* (1996) cap. 8.

²¹² J Stuart and G Burnett (eds), *The Exchequer Rolls of Scotland vol 1: 1264-1359* (1878) 436.

²¹³ Stuart and Burnett, *Exchequer Rolls* cli-clv and 435-440.

²¹⁴ Fergus (ed), *Quoniam* cap. 8.

²¹⁵ Fergus (ed), *Quoniam* cap. 8.

²¹⁶ Fergus (ed), *Quoniam* cap. 8.

²¹⁷ This point is made in relation to early Germanic laws generally by Jobbé-Duval, *Étude Historique* 40. The importance of the physical seizure of the thing is also emphasised by Heubner, *History* 411.

provisions are also found in the customary codes of Northern France and Spain.²¹⁹ It is not possible to be certain, but it is submitted that the reference to the pursuer not having sold the thing in any way (*venditum aliquo modo*) does not encompass transfer under a contract for temporary possession such as loan or hire. This would contrast with the then-prevailing general reluctance to permit recovery by an owner who had entrusted his or her property,²²⁰ but is more consistent with later development in Scots law.

What is the nature of these actions? Are they aimed at enforcing the ownership of the pursuer, or redress of a wrong (i.e. the theft of the property)?²²¹ The way the procedures are structured suggests they are designed to redress the wrong of unauthorised transfer; in the sources mentioned, the process usually begins with an allegation of theft (or wrongful taking). Although the question of ownership would be implicitly addressed in the course of the competing claims of the parties, it seems reasonable to say that the right of ownership itself was not the subject of the action. Rather, the action is based on a wrong having been committed. Indeed, the *Quoniam* text refers to an animal having been taken from the pursuer, which may indicate that the action was not only open to an owner, but anyone in lawful possession of the animal (e.g. a hirer or depositary). There is little evidence as to the concepts of ownership of moveables during this period, but these sources suggest that, in some parts of Scotland at least, they were probably similar to that of the Anglo-Saxons and other Germanic legal cultures.

Does this imply that, as in the Anglo-Saxon law, an owner who had voluntarily parted with possession of his property had no action for recovery based solely in ownership? The Germanic action for recovery of moveables has been

²¹⁸ Compare *Liber Papiensis Othonis* I 7 (text taken from G H Pertz (ed), *Monumenta Germaniae Historica* vol 4 (1868) 578), where the pursuer is required to swear that the thing is his property, that he neither sold it or gave it away such that by law he should lose it, but that it was feloniously taken from him (“*quod suus proprius est, nec vendidit nec donavit quod per legem perdere debeat, se furtive ei abstractus est.*”)

²¹⁹ See Garrison, “Revindication” 76-80.

²²⁰ Garrison, “Revindication” 80.

²²¹ This is a controversial question in other jurisdictions; see Garrison, “Revindication” 27-33; 96-97.

characterised as depending on an involuntary loss of possession.²²² For example, the Lombard laws required that where property had been deposited with another freeman, this person should be held responsible for compensating the owner if it was stolen from that person's home. The depositary could pursue the thief. This was to prevent the thief being pursued twice.²²³ It is, however, consistent with the Scots sources to suggest that if a borrower of moveable property had purported to sell it to a third party, the owner would be able to recover it. The question of good faith acquisition is not discussed, but the pursuer's action implicitly depends on establishing ownership through the oath of "haymald".

(e) Leges Burgorum

Further evidence of the strictly regulated nature of commercial transactions in this period is found in a provision collected in the *Ancient Laws and Customs of the Burghs of Scotland* requiring that all transactions apart from those concerning "smale merchandise" require the seller's "lawful borgh" (provision of caution).²²⁴ In case the thing be "chalangit and recouert", it is the borgh which will "sauf him lif and mebris." This again implies that, without a reliable warrantor, a good faith purchaser is vulnerable not only to loss of the property, but to an accusation of theft. A burgess whose goods are challenged by an "uplandis" (rural) man who has no borgh will lose the thing in question, and must clear his name with the oath of twelve of his neighbours.²²⁵ For the purposes of publicity, sales of particularly valuable goods, such as horses, might be proclaimed at the market cross, "before the hale multitude."²²⁶ Special rules existed for the resolution of disputes over ownership of things challenged at fairs.²²⁷

²²² See J Laurence Laughlin, "The Anglo-Saxon Legal Procedure", in H Adams (ed), *Essays in Anglo-Saxon Law* (1905) 198.

²²³ Laws of King Liutprand c.131. See Drew, *Lombard Laws* 202.

²²⁴ Scottish Burgh Record Society, *Ancient Laws* 161 Fragment 4.

²²⁵ *Leges Quatuor Burgorum* XXVI (Scottish Burgh Record Society, *Ancient Laws* 13.) He must also "suere that he wate never whare the dure oppynnis na stekis of hym fra wham he bocht that ilke forsayde thing what sum ever it be" [swear that he did not wait where the door opens or closes of him from whom he bought the forsaid thing]; presumably to ensure that he was not an associate of the presumed thief. Balfour records this as "he knawis not quhair his durre oppinis or steikis": J Balfour, *Practicks: or, a System of the More Ancient Law of Scotland* ed by P G B McNeill (1962; 1963) 60.

²²⁶ See an example of this in Stuart (ed), *Extracts* 17. See laws of Liutprand c.79X (Drew, *Lombard Laws* 178) regarding the need for witnesses to sales of horses at market.

²²⁷ *Leges Quatuor Burgorum* LXXXVII (Scottish Burgh Record Society, *Ancient Laws* 48.)

An example of a successful recovery by the owner and recourse by the buyer to the seller's "borgh" is found in a case of 1398 recorded in the Council Register of the Burgh of Aberdeen concerning a claim by one Johannes against Patricium Crane, who had given "plegio de haymhald" in respect of Henrico de Lothiane. Henrico had sold Johannes a horse, which had subsequently been taken from Johannes by process of law. Johannes now claimed from Patricium the price of the horse, damages for loss caused and in respect of his expenses incurred. Patricium admitted his pledge, and after finding caution, was granted forty days in which to ascertain the amount owed and satisfy the pursuer.²²⁸ In another case, the claimant proved his ownership of the carcass of a cow to the satisfaction of the judges, and the defender was again left to proceed against his warrantor.²²⁹ The process of calling warrantors could be lengthy, as each warrantor would in turn produce his own warrantor.²³⁰

In a case recorded in the *Acta Dominorum Concilii* in 1499, a herdsman was ordained to deliver up various animals in his custody which were alleged to belong to the pursuer. The defender had been given a specified time to produce his warrantor (as later described by Balfour) but failed to do this, so decree was given for the pursuer.²³¹

(3) Roman and Canon law influence

(a) Spuilzie

Particularly during the fifteenth century, but probably also prior to that, the development of a civil remedy protecting against wrongful dispossession of property, spuilzie, is also relevant. This was apparently derived from the *exceptio spolii* of the Canon law²³² which "crossed over into Scots law to provide a category

²²⁸ Case of 16th August 1398 in Stuart (ed), *Extracts* 373.

²²⁹ W C Dickinson (ed), *Early Records of the Burgh of Aberdeen, 1317, 1398-1407* (1957) 25.

²³⁰ See e.g. Dickinson (ed), *Early Records* 131.

²³¹ G Neilson and H Paton (eds), *Acta dominorum concilii: Acts of the Lords of Council in Civil Causes Vol. II: A.D. 1496-1501* (1918) 229; 383.

²³² On the *exceptio spolii*, see G Le Bras, "Canon Law", in G C Crump and E F Jacob (eds), *The Legacy of the Middle Ages* (1951) 321 at 350-351. See also J W Cairns, "Ius Civile in Scotland ca. 1600" (2004) 2 *Roman Legal Tradition* 134 at 146.

in which to deal with wrongs.”²³³ The Robbery Act 1438,²³⁴ which gave spuilzie statutory blessing, is cited by Walker as the first example of the emergence of a legal process to secure the restoration of moveables,²³⁵ but it seems likely that an equivalent existed in the earlier common law.²³⁶ MacQueen has identified references to spoliation in several fourteenth-century cases.²³⁷ However, the height of its popularity seems to have been during the fifteenth century: John Cairns has characterized it as “perhaps the most common action in fifteenth-century Scotland.”²³⁸

As spuilzied moveables could apparently also be recovered from the “resettouris” (resetters) of such,²³⁹ the remedy was afforded a remarkably wide scope. For present purposes, its significance is that it represented the beginnings of a conceptual separation between possession and ownership, and between possessory remedies and those aimed at vindicating the owner’s right.²⁴⁰

(b) *Nemo plus*

Although there is little evidence as to the principles governing transfer of moveables, the *nemo plus* rule was received into Scots law at a relatively early stage. Stein has pointed out that, as the maxim was already in axiomatic form, this may have facilitated its adoption by later legal systems, and indeed its reception into Scots law.²⁴¹ A Justiciar court in 1347 held that the king could not grant lands more freely than he held them himself.²⁴² There is also evidence in legal documents contained in the Chartulary of the Abbey of Lindores that the principle was quoted in legal debate

²³³ Cairns, “Historical Introduction” at 73.

²³⁴ RPS [A1438/12/1].

²³⁵ D M Walker, *A Legal History of Scotland Volume 2: The Later Middle Ages* (1990) 707.

²³⁶ A M Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (2009) 241.

²³⁷ H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (1993) 129; 135 fn 154.

²³⁸ Cairns, “Historical Introduction” 73.

²³⁹ See for example RPS [A1438/12/1].

²⁴⁰ The extent to which its early development reflected this distinction requires further research: Godfrey, *Civil Justice* 245.

²⁴¹ On this point see G Dolezalek, “The Court of Session as a *Ius Commune* Court - Witnessed by Sinclair’s Practicks, 1540-1549”, in H L MacQueen (ed), *Miscellany IV* (2002) 51 at 74-75: “Arguments were often based on *ius commune* proverbs... counsel assumed that the judges knew these proverbs by heart.” The *nemo plus* rule is quoted as an example of this.

²⁴² “*dare nequiuu quam ipse eas habuit, quia nullus plus iuris transferre potest in alium quam possidet in seipso*”: W Fraser, *History of the Carnegies Earls of Southesk, and of their Kindred* (1867) 486-487 (App. Charter 36).

in the fourteenth century in order to argue that an heir could not exact more feudal duties than his author.²⁴³ It is surmised by the editor of the Chartulary that the rule was received directly from the Digest,²⁴⁴ but, whatever the actual source, the maxim was clearly familiar to the practitioners of the period.

One possible reason for this is the great influence of the learned ecclesiastical lawyers on early legal development. Particularly in the thirteenth century, the ecclesiastical courts provided an attractive forum for the resolution of disputes compared to the secular courts.²⁴⁵ At least until the founding of the first Scottish universities in the fifteenth century, Scottish students went to study Civil and Canon law in continental universities, during the fourteenth century often to Paris and Orleans.²⁴⁶ Canon law thus provides an obvious route for reception of the maxim.

To what extent, then, is reference made to the *nemo plus* principle in the Canon law sources? Versions of the maxim made their way into the *Corpus Juris Canonici*; the rescript to a Scottish petition of 1203, later collected in the Decretals of Gregory IX, refers to a version of the principle, stating “*quum regulariter nullus plus iuris in alium transferre possit, quam eum constet habere...*”²⁴⁷ The rule drawn from this in the Decretals is “*Usufructuarius, donans sine consensus domini rem ipsam uxori propter nuptias, non transfert in eam plus iuris quam ipse habebat.*”²⁴⁸ In the *Sextus Liber Decretalium* of Boniface is found “*nemo potest plus iuris transferre in alium, quam sibi ipsi competere dignoscatur.*”²⁴⁹ Along with the civil

²⁴³ J Dowden (ed), *Chartulary of the Abbey of Lindores, 1195-1479* (1903) 205.

²⁴⁴ Dowden, *Chartulary* 211.

²⁴⁵ Stein, *Roman Law* 23. See also H L MacQueen, “Expectations of the Law in 12th and 13th Century Scotland” (2002) 70 *Tijdschrift voor Rechtsgeschiedenis* 279.

²⁴⁶ Stein, *Roman Law* 41.

²⁴⁷ “Since in regular course no one can transfer to another fuller rights than he is himself shown to possess...” D Patrick (ed), *Statutes of the Scottish Church, being a Translation of Concilia Scotiae Ecclesiae Statuta Tam Provincialia Quam Synodalia Quae Supersunt* (1907) 206.

²⁴⁸ “A usufructuary bestowing what he thus owns on his wife as marriage settlement without the consent of the lord of the manor cannot transfer to her greater rights than he himself had.” A L Richter (ed), *Corpus juris canonici: post justi Henningii Boehmeri curas brevi adnotatione critica instructum ad exemplar romanum denuo edidit Aemilius Ludovicus Richter* (1839) Decret. Gregor IX IV XX VI.

²⁴⁹ “No one can transfer to another more rights than he is acknowledged to be competent to”: A L Richter (ed), *Corpus juris canonici* 6.5.12 Reg LXXIX.

law sources, these would very probably have been known to a learned Scots lawyer of the fifteenth century.²⁵⁰

An abbreviated, but essentially equivalent, form of the maxim, “*nemo dat quod non habet*”, was known in fourteenth-century France²⁵¹ and appears in the *Exchequer Rolls* for 1455-1460 in the context of transfer of feus.²⁵²

Stein has argued that, in turning to the Civil and Canon law, Scots lawyers were looking primarily for “a set of universal principles.”²⁵³ Texts which were originally only of limited application were treated as containing broad general rules. As mentioned above in relation to its inclusion in Title 50.17 of the Digest, *nemo plus* is an ideal maxim for such a purpose. Its inherent flexibility means that it would have been easy to apply in situations far removed from those envisaged by the Roman jurists. On the basis of the limited evidence available, this account seems a reasonable one; it is certainly the case that the maxim was known and utilised to solve indigenous legal problems.

(4) Conclusions

In general, the early law reflects the social and economic requirements of the closely knit mediaeval community. Moveable property raises particular issues regarding evidence of ownership, and the use of warrantors was a response to this typical of many jurisdictions. Given the limitations of the early sources, it is difficult to draw any firm conclusions as to how the Scots lawyers of the time reasoned about property rights. As in many mediaeval systems, there was little scope for good faith acquisition of stolen goods; “the property was...identified with the thief, and the quality of stolen was attached to it as if it were a physical quality of the property

²⁵⁰ For example, Stein describes the library of Aberdeen Cathedral as containing, in 1436, “numerous glossed texts of the *Decretum* and *Decretals*”: *Roman Law* 39.

²⁵¹ A Rouiller, *La maxime 'nemo plus juris...' en droit civil français : étude synthétique et critique* (1964) 4 fn 1 refers to Jean Faure (Joannes Fabri) as utilising the maxim. On Faure, see H Leridon, *Jean Faure: Jurisconsulte Angoumois du XIVe siècle* (1865).

²⁵² G Burnett (ed), *Exchequer rolls of Scotland Vol 6, A.D. 1455-1460* (1883) 268.

²⁵³ Stein, *Roman Law* 40.

concerned.”²⁵⁴ It is suggested that the relation between the owner of moveable property and his or her object was not considered in an abstract way, but rather as embedded in particular social relations. For example, the buyer had a relation of trust with the seller. The system of warranty and the use of “borghs” emphasised that questions of property could not be separated from relations of friendship and kin. An owner also had a claim against anyone who had wronged him or her by taking his or her property without consent. Lord Cooper has described the mediaeval Scots law thus:

[i]t is hardly an exaggeration to say that each pursuer eventually presented himself before the tribunal in the guise of ‘an infant crying in the night, And with no language but a cry’, and that the whole of Scots Law had been compressed into a single commandment: ‘Thou shalt do na wrang!’²⁵⁵

The popularity of spuilzie, and the emphasis upon cases of theft, reflects precisely such a focus on wrongs. Although the right of ownership of moveable property was certainly recognized, and protected, the materials available indicate that court procedure was structured around redressing particular injustices, rather than asserting more abstract rights. It is therefore difficult to ascertain the precise extent of the role played by the maxims of the Digest in mediaeval Scots law.

C. SIXTEENTH-CENTURY DEVELOPMENTS

(1) Legal Culture

The sixteenth century brought a number of important legal developments. It has been argued that the foundation of the College of Justice in 1532 caused “a significant change in the organization of central justice in Scotland.”²⁵⁶ A gradual cultural shift occurred, “[creating] a milieu in which formality, the forms and procedures of the

²⁵⁴ J G Sauveplanne, “The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law” (1965) 29 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 651 at 654.

²⁵⁵ Cooper, *Dark Age* 19.

²⁵⁶ Godfrey, *Civil Justice* 159.

law, the written authenticated record, had an appeal and an authority which would in the end far outweigh the amateur justice of lord and kin.”²⁵⁷ The Session in the sixteenth century has been characterised as a “*ius commune*” court, in the sense that the Romano-Canonical law was applied wherever there was no directly contrary domestic legal provision.²⁵⁸

The late sixteenth and early seventeenth centuries also saw the preparation of several important collections of authorities known as “Practicks” from which Scots law began to emerge as a distinctive body of learning. In particular, Balfour’s *Practicks* “stands as the pre-eminent written record of Scots Law until the publication of Stair’s *Institutions*.”²⁵⁹ Balfour attempts primarily to collect the laws and customs particular to Scotland, and does not, unlike Stair a century later, draw on Civil or Canon law sources to locate indigenous materials within a philosophical system.²⁶⁰

(2) Actions for the Recovery of Moveables

In general, a more sophisticated approach to the division of actions is evident. Reference is made to the distinction drawn in *Regiam* between civil and criminal proceedings; civil proceedings “pursewis and concludes ane pecunial pane, and not life or lim.”²⁶¹ More importantly, claims involving property rights are distinguished from those concerning possession: “sum civil actiounis concern propertie and ground richt, and utheris ar of possessioun allanerlie.”²⁶² Cases of spuilzie based only on violent²⁶³ dispossession began to be differentiated from other actions, in which it was necessary to libel a title.²⁶⁴

²⁵⁷ J Wormald, “Bloodfeud, Kindred and Government in Early Modern Scotland” (1980) 87 *Past and Present* 54 at 91.

²⁵⁸ Dolezalek, *Court of Session* 52.

²⁵⁹ Balfour, *Practicks* xxxix.

²⁶⁰ Balfour, *Practicks* xxxix.

²⁶¹ Balfour, *Practicks* 417.

²⁶² Balfour, *Practicks* 418.

²⁶³ For example Balfour, *Practicks* 315 refers to “violent ejection” as does the later work of Hope: *Hope’s Major Practicks, 1608-1633* (1938) vol 2 108.

²⁶⁴ A number of contrasting cases are cited by Balfour, *Practicks* 315. The only specific reference to moveables occurs in discussion of *Dundas v Hagie* 16th March 1543, which affirms that only possession in general need be libelled rather than the “maner and quantitie” of the possession. It can

In respect of the owner's claim for recovery, both criminal and civil actions involved a similar allegation of wrongful taking. The rules mentioned by Balfour are largely based on provision in the *Quoniam Attachamenta*, but are worth quoting:

[T]he persewar may challenge it criminallie, gif he pleisis, alledging that the samin was his lauchful and hame-hald cattel, the quhilk was thiftuouslie stollin fra him sic ane day, sic anezair, and with-haldin fra him sic ane space of time; or it is fre and leasum to him to challenge the samin civillie, alledging the horse or beist to be his awin hame-hald gudis, and wrangouslie stollin fra him, to his damnag and skaith, extending to sic ane sowme, and offeris him readie to preive the samin as law will.²⁶⁵

These provisions refer to stolen horses and cattle, but similar rules were applied in respect of any accusation of theft.²⁶⁶ The focus remains on the fact that the owner had been wronged, reflecting the typical mediaeval approach described above by Lord Cooper.²⁶⁷

Records of some courts of the period demonstrate that the civil and the criminal aspects of a case were often dealt with together, the question of ownership impliedly resolved as part of a criminal process. In the Court Book of the Barony of Carnwath, a case is recorded in which a charge of pykre (a form of theft) is repelled by evidence that the accused had bought the stolen sheep, which are to be restored to the rightful owner.²⁶⁸ In another case, the buyers of another man's sheep are ordered to produce their warrantors, and restore the sheep to the owner.²⁶⁹ Where goods are challenged as stolen, the court orders the goods to be returned to the owner, and the

be speculated that in cases involving moveables, the difficulties of documenting title mean that it is not likely that proof of ownership was required.

²⁶⁵ Balfour, *Practicks* 522.

²⁶⁶ Balfour, *Practicks* 525: "It is leafum to the perfewar for actioun of thift, to perfew the famin in the beginning, civellie or criminalie, as he pleifis..."

²⁶⁷ See also A Harding, "Rights, Wrongs and Remedies in Medieval Scots Law", in H L MacQueen (ed), *Miscellany IV* (2002) 1 at 3-4.

²⁶⁸ W C Dickinson (ed), *The Court Book of the Barony of Carnwath: 1523-1542* (1937) 63.

²⁶⁹ Dickinson (ed), *Carnwath* 64.

possessors to produce the person from whom they coft (bought) the stolen goods.²⁷⁰ This approach is consistent with the close correspondence between civil and criminal claims described above.

As well as reclamation in the course of an allegation of theft, it is probable that some form of action was available simply for asserting ownership of moveables analogous to the *vindicatio*. Balfour states that a victim of theft may decide to seek “simple restitutioun,”²⁷¹ which requires only proof, by sufficient witnesses, of the fact of ownership; if the possessor refuses to make restitution, an accusation of theft may be brought. The Roman terminology, although not a common cause of action compared to *spuilzie*, was recognised in Scotland. In 1566 a ship was claimed “per rei vindicationem” from the possessors; the defence that the defenders had been imprisoned on the ship by pirates and had “hazardit their lyves” to bring it safely to port failed to convince the court that they should be allowed to keep it.²⁷² Godfrey describes an attempt to recover a loaned horse which had subsequently fallen into the hands of other parties on the basis of the pursuer’s ownership; the defender alleges that he has bought the horse and calls his warrantor but unfortunately the case was continued and there is no record of the eventual outcome.²⁷³

These moves towards the development of a vindicatory action, however, must be placed in the context of the popularity of remedies protecting possession. *Spuilzie* continued to grow in importance as a remedy during the sixteenth century.²⁷⁴ Especially in the case of moveable property, it was a useful device to settle questions of right without protracted litigation; for example, *spuilzie* could be used to contest a *poinning*.²⁷⁵ Even more attractively, it often afforded the pursuer chance to recover possession without allowing the defender a chance to establish a competing right by calling a warrantor.²⁷⁶ In the mid-sixteenth century, the question of whether the

²⁷⁰ Dickinson (ed), *Carnwath* 108.

²⁷¹ Balfour, *Practicks* 525.

²⁷² R Sutherland (ed), *The Practiques of Sir Richard Maitland of Lethington* (2007) 177.

²⁷³ Godfrey, *Civil Justice* 260.

²⁷⁴ J A Clyde (ed), *Acta dominorum concilii: 26 March 1501-27 January 1502-3* (1943) xli-xlii.

²⁷⁵ Dickinson (ed), *Carnwath* 180.

²⁷⁶ Godfrey characterises the sixteenth-century development of *spuilzie* as reflecting the emergence of a “truly possessory remedy”: *Civil Justice* 244-245.

defender could call a warrantor was controversial.²⁷⁷ In one case reported in Sinclair's Practicks, a warrantor was permitted.²⁷⁸ However, the issue was a recurrent one.²⁷⁹ It may be surmised from this that actions of spuilzie were often used as a proxy for disputes about ownership; once possession had been regained, the burden of proof shifted to the other party to establish his or her ownership.

(3) Proving Ownership

There continued to be reliance on the obligation of warrandice, with the oath of "borgh and hamehald" continuing to apply to the purchase of cattle and horses.²⁸⁰ Balfour includes the provisions of *Regiam* and the Burgh laws mentioned above requiring sellers of moveable goods to grant warranty.²⁸¹ A record of the giving of warranty on sale of a horse appears in the Council Register of the Burgh of Aberdeen. The warranty was to last for a year, and part of the payment was retained in case ownership of the horse should be challenged.²⁸²

If a person was accused of theft of cattle or horses and wished to defend the action, alleging that he or she acquired the beast lawfully, he or she was required, based on the provision of the *Quoniam Attachmienta*, to call a warrantor, who should also provide a "borgh" (cautioner) to compensate the defender if the action was successful. The possessor was required to find security and exhibit the beasts at a specified time and date.²⁸³ If no caution was found, the challenger could take the beasts into his or her possession without fear of being accused of spuilzie.²⁸⁴

²⁷⁷ See the various decisions cited by Balfour, *Practicks* 320-321.

²⁷⁸ A Murray (ed), *Sinclair's Practicks* (provisional version available at <http://www.stairsociety.org/sinclair.pdf>) 46, case reports 166 and 167.

²⁷⁹ It occurs at least four times in the years covered by Sinclair's Practicks, see Murray (ed), *Sinclair's Practicks* 46; 110, case reports 161; 167; 337; 583.

²⁸⁰ Balfour, *Practicks* 522.

²⁸¹ Balfour, *Practicks* 210.

²⁸² Stuart (ed), *Extracts* 282, 23rd March 1555.

²⁸³ Balfour, *Practicks* 523.

²⁸⁴ Balfour, *Practicks* 523-524.

The warrantor might in turn call a warrantor, and, following *Quoniam*, this could occur up to three times.²⁸⁵ An example of such a process is found in the *Sheriff Court Book of Fife* in which the warrantor of the seller of a horse is called,²⁸⁶ and then the warrantor of the warrantor.²⁸⁷

In order to be successful the pursuer must prove his or her ownership, producing two witnesses to support his or her allegation, and, again following the provision in *Quoniam*, swear that he or she never donated, sold or otherwise alienated the beasts in question:

And gif na ressonabill caufe be alledgit in the contrare, the persewar sall hame-hald, and with him away have, the said beist or cattel, havand twa witnessis with him, makand faith, and preivand the famin to be his proper gude, conform to his clame, and that he never gave, sauld, nor ony maner of way annalzeit the said beist or cattel to ony perfoun.²⁸⁸

The reference to alienation here implies that mere transfer of possession did not prevent the owner from recovery. The similar provisions of the *Leges Quatuor Burgorum* dealing with the procedure where stolen goods or gear are found at fairs are also reproduced by Balfour.²⁸⁹

(4) Bona Fide Acquisition and the *Nemo Plus* Rule

(a) The position of the bona fide purchaser

How was a good faith purchaser treated under these rules? A bad faith purchaser would forfeit his or her claim in warrandice against the seller.²⁹⁰ However, the account given above does not specifically cover the outcome if the defender and his or her warrantors are able to prove that the cattle were legitimately acquired but the

²⁸⁵ Balfour, *Practicks* 326;523.

²⁸⁶ W C Dickinson (ed), *The Sheriff Court Book of Fife: 1515-1522* (1928) 211

²⁸⁷ Dickinson (ed), *Fife* 216.

²⁸⁸ Balfour, *Practicks* 523.

²⁸⁹ Balfour, *Practicks* 213.

²⁹⁰ Balfour, *Practicks* 329.

pursuer successfully establishes that they had not been voluntarily alienated. There is no mention of the position if the property had been entrusted; the focus on the owner having consented to alienation (rather than transfer of possession) might imply that the owner could vindicate in such an instance. Alternatively, perhaps the fact that three warrantors have been called and each proven their lawful acquisition meant that no recovery was possible; in this case the successful production of three warrantors would have an effect analogous to negative prescription.²⁹¹

In general, it seems that sale in open market would defend against an accusation of theft but not recovery by the original owner. If a possessor of stolen goods or gear bought “believand that thayar lauchful merchandice, and knawis nathing of the steilling thairof... in fair or mercat, befor the Baillies, or honest men, quha beiris testimonie and record thairof, and payit toll and custume thairfoir, conform to the law of the realme”, “he fall be quite and fre fra all danger and pane of thift; bot fall be compellit to mak restitutioun of the saidis gudis to the awner thairof... and in this cais he may not seik restitutioun fra the awner of that quhilk he payit for the saidis gudis.”²⁹²

Interestingly, if the goods were not bought “in fair or mercat”, the possessor might be accused of theft,²⁹³ indicating that purchase in open market provided at least some measure of protection. An onus was placed on individuals to ensure that all goods found in their possession had been legitimately and publicly acquired. If cattle or horses were found wandering, they should be delivered to an appropriate official; if a person found someone else’s goods or gear, he or she should attempt to find the owner thereof, or risk being accused of theft.²⁹⁴ One exception to the general rule was when a ship had been taken as a prize,²⁹⁵ it could then lawfully be resold.²⁹⁶

²⁹¹ On this theory see Garrison, “Revendication” 69-70.

²⁹² Balfour, *Practicks* 528.

²⁹³ Balfour, *Practicks* 528.

²⁹⁴ Balfour, *Practicks* 680.

²⁹⁵ See Balfour, *Practicks* 634-640.

²⁹⁶ Sutherland (ed), *Practiques* 95.

Some early reports in Morison's Dictionary also deal with the position of the *bona fide* purchaser. In *Beveridge v Indwellers in Cupar*,²⁹⁷ a decree on the basis of which goods had been sold at auction was reduced, and the purchasers were subsequently found liable to restore the property. Both parties referred to the civil law in support of their contentions.²⁹⁸ The case is an interesting one, because it does not involve an obvious wrong such as theft. However, the report in the Dictionary is brief and, as the defenders were the immediate beneficiaries of the reduced juridical act, it is not clear whether the decree in question was void or merely voidable and therefore whether a subsequent purchaser would be in the same position.

There remains little discussion of the problem of the recovery of entrusted property from a third party purchaser. It is difficult to know whether this is because the pursuer would have had no competent cause of action, or whether the act of transfer in itself was treated as a theft, allowing the owner to recover it from any detentor. There is some indication that property initially transferred with the consent of the owner was not treated as stolen,²⁹⁹ but the later work of George Mackenzie suggests that sale of entrusted property would also be punishable as theft.³⁰⁰

(b) A role for possession?

Did the non-violent acquisition of possession play any part in determining questions of ownership? There is some tenuous evidence of protection based upon possession: on the challenge of a horse, the defender is allowed to "hald" the horse "ay quhill he awin [owns] him lawfully that awcht him."³⁰¹ "Awcht" is defined in the Dictionary of the Scots Language as "that which is owned or possessed by one; possession(s), property." One interpretation of the judgment is thus that "he owns him lawfully that possesses him." However, there is little other evidence of the application of such a rule, and the wording of the (short) judgment is ambiguous.

²⁹⁷ (1583) Mor. 9111.

²⁹⁸ D 43.3; C 8.22; 8.44.

²⁹⁹ Hope, *Major Practicks* vol 2 296 cites *Regiam* 3.9.5 as authority for the proposition that where the initial detention began with the consent of the owner no accusation of theft can be made.

³⁰⁰ Sir G Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678) 19.2: "if [a servant] should...sell his master's horse, with which he was sent to a friend; these misemployments would certainly infer punishment, though the possession flow'd originally from the Master."

³⁰¹ Dickinson (ed), *Carnwath* 54.

(c) *Canon law influence*

(i) *Nemo plus*

As noted earlier, *ius commune* “proverbs” such as *nemo plus* were frequently quoted in the College of Justice. Dolezalek has pointed to several references to the *nemo plus* maxim in the sixteenth-century cases collected in *Sinclair’s Practicks*. These occur, for example, in a case concerning the principle “confiscatioun makis na mair rycht to the king than pertenit to the convict man,”³⁰² a case about the claim for payment of a debt already repaid in kind to an agent³⁰³ and another concerning the sale of lands originally only granted in security.³⁰⁴ As well as quotation of the Latin maxim directly from the Civil or Canon law sources, court records from the early sixteenth century show that the principle was cited in English, and seems to have been accepted as forming part of the law of Scotland. For example, in an action for reduction of an order to pay maills and duties the pursuers argued that “no one can transfer or give to another a greater right than he has himself,”³⁰⁵ a clear reference to the Latin maxim.

Being principally concerned with Scots custom, Balfour does not refer to the *nemo plus* principle. The same may be said of the later collections of Thomas Hope.³⁰⁶ No specific references to the principle in relation to transfer of moveable property by a non-owner have been found prior to 1625.³⁰⁷ This may be due to the fact that moveable property was often less valuable, and therefore less likely to have been the subject of protracted litigation. However, given that Roman law is acknowledged to have had “considerable influence” on the law regulating derivative acquisition of moveable property,³⁰⁸ the early sources are surprisingly silent.

(ii) *Bona fides*

³⁰² Murray (ed), *Sinclair’s Practicks* 100, Case 309.

³⁰³ Murray (ed), *Sinclair’s Practicks* 73, Case 238.

³⁰⁴ Murray (ed), *Sinclair’s Practicks* 67, Case 221.

³⁰⁵ I Shearer (ed), *Selected Cases from Acta Dominorum Concili et Sessionis 1532-33* (1951) 114.

³⁰⁶ See Sir T Hope, *Major Practicks* and with J Spottiswoode (ed), *Practical Observations Upon divers Titles of the Law of Scotland, Commonly called Hope’s Minor Practicks* (1734).

³⁰⁷ The first occurs in *Brown v Hudelstone* (1625) Mor 14748.

³⁰⁸ See D L Carey Miller, “Derivative Acquisition of Moveables”, in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 128 at 154.

Recent scholarship has explored the development of the good faith requirement in the context of usucaption in mediaeval Canon law.³⁰⁹ Although not intended as a platform for development of good faith acquisition, decretist *Summae* have been argued to have created in the European legal tradition an awareness that acquisition of rights from a non-entitled party presupposes good faith.³¹⁰ Although full exploration of the status of concepts of good faith in Scots law is outwith the scope of the thesis, the Canon law developments provide an important context for the later moves to establish protection for good faith purchasers discussed in Chapter 3.

(iii) The obligation of restitution

Doctrinal development was further influenced by the notion of the obligation of “restitution” (“restitutione.”) This theological doctrine, which is argued by Dolezalek to have reached its apogee in the sixteenth century, covered circumstances which in classical Roman law would have been dealt with using the action of *rei vindicatio*.³¹¹ The doctrine is based on the idea that acquisition from a non-owner creates an imbalance which must be remedied. For example, Thomas Aquinas talks of “unevenness with regard to something (tangible or intangible) which one has among one’s goods in the widest sense (*inaequalitas ratione rei acceptae*).”³¹²

The duty to make restitution arises from the fact that the thing in question is owned by another.³¹³ Even if the acquirer is not at fault, a wrong has still been committed in violating the will of the owner:

*Nullus potest licite retinere illud quod contra voluntatem domini acquisivit, puta si aliquis dispensator de rebus domini sui dar etalicui contra voluntatem et ordinationem domini sui, ille qui acciperet licite retinere non posset.*³¹⁴

³⁰⁹ P Finkenberger, *Der Rechtserwerb kraft bona fides in den Summen der Dekretistik, insbesondere bei Huguccio von Pisa* (Doctoral Thesis, 2007 Bayerischen Julius-Maximilians-Universität Würzburg).

³¹⁰ Finkenberger, *Bona fides* 220.

³¹¹ Dolezalek, “Moral Theologians” at 108. See also Hallebeek, *Unjust Enrichment* 53-58 and Dolezalek, “Court of Session” at 78.

³¹² Quoted in Dolezalek, “Moral Theologians” 112. See further Hallebeek, *Unjust Enrichment* ch 1.

³¹³ “To make restitution appears to be nothing else than to re-establish a person in possession of or dominion over a thing which is his.” Saint Thomas Aquinas, *Summa Theologica* (Trans. Fathers of the English Dominican Province 1947-48) 2nd Part of the 2nd Part, qu. 62. Art 2.

A duty is therefore placed upon the holder to restore any property transferred without the owner's consent: "*hoc quod aliquis privetur eo quod accepit, non solum est poena peccati, ab eo qui vendere non potest.*"³¹⁵

Jan Hallebeek has published a fascinating study of the doctrine of restitution and its role in the development of the concept of unjust enrichment in Scholastic thought.³¹⁶ The influence of these ideas can be identified in the decisions of the newly established Court of Session. In a case concerning the duty of a master to return property stolen by a servant, reference is made to the Canonical doctrine: "*Quod cum aliena iactura quis recepit, restituere tenetur.*"³¹⁷ Although not expressly stated, it may be inferred that ownership implied a duty on the part of any possessor to restore, an idea which would be developed further in the institutional period.

Purchasers of spuilzied goods risked at the least civil liability, and possibly prosecution for theft, if they could not convince the court that they had acted properly. In 1552 an action was successfully raised for disgorgement of the profits made by buyers of spuilzied figs, who had resold them. It was argued by the buyers that they were not liable as they were no longer in possession of the figs, and moreover they had bought them in good faith, believing them to be spoils of war. These exceptions were rejected.³¹⁸ In light of the discussion above, this emphasises the close connection between questions of property, and what in modern discourse would be termed unjustified enrichment.

(5) Conclusions

³¹⁴ "No one can lawfully retain that which he has acquired against the owner's will. For instance, if a steward were to give some of his lord's property to a person, against his lord's will and orders, the recipient could not lawfully retain what he received": Aquinas, *Summa Theologica* 2nd Part of the 2nd Part, qu. 100, art. 6, Answer.

³¹⁵ "To be deprived of what one has received is not only the punishment of a sin, but is also sometimes the effect of acquiring unjustly, as when one buys a thing of a person who cannot sell it": Aquinas, *Summa Theologica*, 2nd Part of the 2nd Part, qu. 100, art. 6, Reply to Objection 3.

³¹⁶ Hallebeek, *Unjust Enrichment*.

³¹⁷ "Who that with another man's loss has received, is bound to make restitution": Murray (ed), *Sinclair's Practicks* Case 407 at 139.

³¹⁸ Sutherland (ed), *Practiques* 42, reported in Morison's Dictionary at 14725.

Overall, then, the sixteenth century saw a growth in the influence of Canonical and Civilian principles and procedures. However, the substance of the law continued to reflect its mediaeval Germanic origins, with the system of warranty remaining the principal means of resolving disputes over ownership. Although there is no concrete evidence as to the treatment of the good faith purchaser when entrusted property was transferred without the consent of the owner, stolen property could certainly not be acquired, even by a purchaser in good faith. Although the number of fairs and markets increased throughout the sixteenth century, this does not yet seem to have influenced the laws recorded by Balfour. The emphasis remains upon protection of ownership, with the system of warranty providing, at least in theory, financial compensation for those who lost out.

D. EARLY SEVENTEENTH CENTURY

(1) Recovery of Moveables

Although it is only in the latter half of the seventeenth century that the key phase of Scottish legal development known as the “institutional period” can really be said to begin, the foundations for the works of Stair were arguably laid in its early years. Apart from a few general comments, Sir Thomas Craig’s *Jus Feudale* omits moveable property almost entirely from consideration, but his reasoned and philosophical consideration of the feudal law, with its reference to numerous *ius commune* sources, may be said to set the tone for later works.³¹⁹

The early seventeenth century also saw rapid social and economic changes, particularly in the number and geographical distribution of fairs and markets. Non-burghal markets became numerous from the sixteenth century; there was also a rise in the recognition of non-Royal Burghs throughout the seventeenth century.³²⁰ The

³¹⁹ See J W Cairns, T D Fergus and H L MacQueen, “Legal Humanism in Renaissance Scotland” (1990) 11(1) *Journal of Legal History* 40.

³²⁰ Gibb and Paddison, “Burghal Monopolies” 138.

deregulation of local markets, and the (presumed) increase in the number of transactions³²¹ meant that the system of warranty faced new pressures.

How then, did legal procedures reflect these changes? In 1600, a good part of the business of the Court of Session was related to the restitution of moveables, in particular horses.³²² These might have been spuilzied or stolen; spuilzie as an action was distinct, as it did not require proof of the pursuer's ownership.³²³ The issue of the distinction between the civil and criminal remedies was subject to debate until the mid-seventeenth century,³²⁴ with restitution still sometimes forming a part of the criminal process.³²⁵

At some point, a radical change seems to have occurred in the way that ownership of moveable property was conceptualised. The collections of *Practicks* made by Sir Thomas Hope represent one of the first attempts to systematise Scots law on the basis of the civilian distinction between real and personal rights.³²⁶ The law of actions is clearly structured around the right of the owner to follow the thing and recover it from unauthorised possessors: "*Actiones reales semper sequuntur rem, in whois hands sover it be, and whither moveable or immoveable*".³²⁷ Hope refers extensively to the French jurist Jacques Godefroy³²⁸ and his work on the customs of Normandy;³²⁹ Godefroy's description of a real action as based on a real right in a

³²¹ I D Whyte, "The Growth of Periodic Market Centres in Scotland 1600-1707" (1979) 95(1) *Scottish Geographical Journal* 13 at 22.

³²² W Coutts, *The Business of the College of Justice in 1600* (2003) 22; 23. For the numbers of claims relating to horses, see 53; 54.

³²³ See Coutts, *Business* 23; Hope, *Major Practicks* vol 1 239, vol 2 108.

³²⁴ I J Smith (ed), *Selected Justiciary Cases III* (1974) 712; 724.

³²⁵ Smith (ed), *Justiciary Cases* 725.

³²⁶ See Hope, *Major Practicks* and *Minor Practicks*. The *Major Practicks* distinguish personal obligations (Title 2) from rights relating to things (Title 3). The *Minor Practicks* distinguish (at 336) "a right where only a person and his heirs are bound" (a personal right) and a right where "*res controversa* is tied and affected really therewith" (a real right).

³²⁷ Hope, *Major Practicks* vol 2 73.

³²⁸ For a biographical overview, see M H Hoeflich, "A Seventeenth Century Roman Law Bibliography: Jacques Godefroy and His 'Bibliotheca Juris Civilis Romani'" (1982) 75 *Law Library Journal* 514. Jacques' father Denis Godefroy was also a distinguished legal scholar. On the motivation for Hope's references to Godefroy, see J D Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007) 255-256.

³²⁹ *Commentaires sur la coustume reformée du pays et duché de Normandie, anciens ressorts & enclaves d'iceluy* (1626).

thing as opposed to an undertaking (*promesse*) made by the possessor is an obvious source for his scheme.³³⁰

In the *Minor Practicks*, Hope refers to the *vindicatio* as the appropriate action for claiming moveable property: “*Jus in re in mobilibus, est ubi proprietatis rei mobilis ad aliquem pertinet et actio quae ob hanc competit dicitur rei vindicatio, a quocunque possessore, sive naturali, sive civili*”.³³¹ The importance of these statements is the recognition of the action as derived from the right of the owner, rather than any wrong committed; “*Jus in re, or a Right in a Thing, is a Power or Faculty competent by Law, and inherent in the Thing itself, producing to the proprietor an Action against the Thing, towards the Recovery thereof.*”³³² There is further evidence of this in Lord Durie’s report of *Brown v Hudelstone*,³³³ which refers to the owner’s right to vindicate “*à quocunq; fuerit possessa*” as well as to the *nemo plus* rule.

In terms of procedure, actions solely aimed at enforcing ownership (rather than redressing a wrong such as *spuilzie*) existed. For instance, we find a case in which, although no theft is alleged, an owner is permitted to recover a horse on the strength of witnesses to the fact of his ownership.³³⁴ *Brown v Hudelstone*³³⁵ also refers to an action available against any possessor.

Whether through training in Canon law or from direct contact with the Digest, by the seventeenth century the *nemo plus* maxim was well established within Scots legal discourse. Craig makes several references to the maxim in the context of transmission of feus,³³⁶ indicating that it was seen as relevant to property transfer. It is also interesting that the Roman law is seen as particularly applicable to transfer of

³³⁰ Godefroy, *Commentaires* I 55.

³³¹ “A real right in moveable property is where the property in a moveable thing belongs to someone, and the action which belongs to them on account of this is called the *rei vindicatio* (vindication of a thing), and is available against any possessor, whether natural or civil”: Hope, *Minor Practicks* 336.

³³² Hope, *Minor Practicks* 337.

³³³ (1625) Mor 14748, discussed below.

³³⁴ D M Hunter (ed), *Court Book of the Barony and Regality of Falkirk and Callendar* (1991) 42 at para 40.1.

³³⁵ (1625) Mor 14748.

³³⁶ Sir T Craig, *Jus Feudale*, trans J A Clyde (1934) 2.6.12; 2.7.17.

moveables: “So it has cometh that we Scotsmen follow the precedents and principles of Roman jurisprudence, particularly in the department of moveable rights.”³³⁷ Craig also states that “Scots law borrows directly from that of Rome in the chapters of... restitution.”³³⁸

(2) Protection of Purchasers

(a) Sale in public market

There remains little evidence in relation to entrusted property, but the purchaser of stolen goods continued to be vulnerable to the claim of the original owner. The *Court Book of the Barony and Regality of Falkirk* records in a case of 1642 that the buyer of stolen goods was required to return the goods to the owner.³³⁹ In Morison’s Dictionary, *Bishop of Caithness v Fleshers in Edinburgh*³⁴⁰ concerned an action for return of (yet another) stolen horse. A *bona fide* purchaser in public market was found liable to restore the horse, but was not to be subject to criminal penalties.

In *Ferguson v Forrest*³⁴¹ the defender had two arguments: that he was a *bona fide* purchaser for value at a regular market, and the horse in question was now dead, and could not be restored. It was held that the recipient ought to have taken “*borgh and ham-hold*” from the seller, in conformity with “the old laws of the realm.” Although the horse in question had died, the purchaser was still found liable to refund the purchase price. It is difficult to discern the basis for this judgment; restitution of the price was said to be “in place of” restoration of the horse, but the report does not explain why the death of the horse did not end the defender’s obligation. Perhaps he was considered at fault for not finding caution for the

³³⁷ Craig *Jus Feudale* 1.2.14.

³³⁸ Craig, *Jus Feudale* 1.2.15.

³³⁹ Hunter (ed), *Falkirk* 41 at para 38.4. See also 140 at para 125.1 and 171 at para 151.6.

³⁴⁰ (1629) Mor. 9112; 4145.

³⁴¹ (1639) Mor. 9112; 4145.

purchase,³⁴² or perhaps the death of the horse was thought to have enriched the defender to at least the value of the carcass.³⁴³

A further confirmation that sale at public market in itself did not provide protection is found in *Hay v Eliot*,³⁴⁴ in which the landlord's hypothec³⁴⁵ over the tenant's crops was found to be good against a purchaser in public market who was forced to repay the value of the hypothecated corn.

Despite the lack of protection afforded to purchasers, the cases recorded in Morison's Dictionary demonstrate that the question was relatively frequently litigated. The fact that "burgh and hamhold" were described as part of the "old laws" indicates that the practice of obtaining a warrantor was seen as of less contemporary relevance. However the system apparently remained in use; in one case the buyer of a stolen horse pursues his seller's author, who in turn pursues a man indebted to his own author (who has fled upon being accused of stealing the horse.³⁴⁶) Habukkuk Bisset in his *Rolment of Courtis* records that in 1579 the Lords changed had abrogated the "langsum, tedious and sumptuous" form of process whereby the calling of warrantors would delay settlement of the original question. Instead, the case was now to be decided immediately, but action reserved to the defender to pursue his warrantor "quen and how sone he plesis."³⁴⁷ This statute is also recorded by Hope, who gives the date as 10th November 1576,³⁴⁸ but has not been traced. In 1634, a Baron Court at Killin attempted to legislate that no "blocker or buyer" of horses or other animals was to buy without the caution of "burgh and hamer" guaranteeing that they are "weill come". If no "burgh" was taken, the buyer risked execution if the

³⁴² This is the view of Hume, see G C H Paton (ed), *Baron David Hume's Lectures 1786-1822* vol III (1952) 233.

³⁴³ The extent to which *bona fide* consumption or destruction of another's thing gives rise to liability and the basis of this liability is a topic of frequent doctrinal controversy. For a discussion of the Scholastic position, see Hallebeek, *Unjust Enrichment* 57-58. For the modern position, see A Steven, "Recompense for Interference in Scots Law" 1996 *Juridical Review* 51 at 59-61.

³⁴⁴ (1639) Mor 6219, reported in A Gibson, *The Decisions of the Lords of Council and Session, in Most Cases of Importance, Debated and Brought Before Them from July 1621 to July 1642* (1690) 886. For criticism of the decision see ch 3 B(2)(e).

³⁴⁵ On which see ch 4 D(2)(c).

³⁴⁶ Hunter (ed), *Falkirk* 49 at para 49.1. See also 170 at para 150.1.

³⁴⁷ P Hamilton-Grierson (ed), *Habukkuk Bisset's Rolment of Courtis Vol I* (1920) 171.

³⁴⁸ Hope, *Major Practicks* vol 2 247.

goods were shown to be stolen.³⁴⁹ Despite increasing Romanist influence therefore, the contours of the early seventeenth-century law continued to follow those of the earlier mediaeval provision.

(b) The presumption of ownership from possession.

One element which may have played a key role in ensuring that the law maintained a balance between original owner and innocent purchaser is the development of the presumption of ownership from possession. Although it is only in the later writings of Stair that the presumption is expressly set out, it seems to have originated in the early seventeenth century. The earliest cases cited by Stair in the 1681 edition of his *Institutions* are *Turnbull v Ker* and *Brown v Hunterstoun*, both reported by Alexander Gibson (Lord Durie).³⁵⁰

In *Turnbull* T's cow was poinded by B's creditor, K, while in B's possession. The Lords found that goods remaining "diverse years" in the possession of the debtor were lawfully poinded by a creditor. This was apparently due to a "presumptive qualification of Property, consisting in the retention of Possession sundry years". Although the owner offered to prove himself the true owner of the goods, alleging that they had been "bred upon his own Heretage" and only given to the defender for the purpose of grazing, this was not thought to be relevant where there had been two years where the owner had not been in "real Possession". Unlike in later cases, once established this "presumptive quality" does not appear to be rebuttable, meaning that the doctrine resembles a short form of acquisitive prescription rather than the evidential presumption later developed by Stair.

Brown also concerned an accusation of spuilzie against a creditor poinding cattle not owned by his debtor. The Lords found the possession relevant to defend against spuilzie, and also against the delivery of the cow, which the pursuer insisted for *rei vindicatione*, arguing that, although the defender might be assoilzied of spuilzie and violence, possession of the cow for 2 years was not enough to extinguish

³⁴⁹ C Innes (ed), *The Black Book of Taymouth* (1855) 389.

³⁵⁰ Reported as *Turnbul contra Ker* (1624) and *Brown contra Hudelstone* (1625) in Gibson, *Decisions* at 151; 163 respectively and in Morison's Dictionary at 11615; 14748 respectively.

his right. The cow was held, however, to come under the poinding, because of the two years possession. Stair's interpretation of this decision will be discussed later, but Lord Durie's report again implies a form of short acquisitive prescription rather than an evidential presumption.³⁵¹

Interestingly, it is stated that original owner continued to have an action for restitution of the cow against the person who had "received" it. It is unclear whether this amounts to recognition that the cow could be vindicated from a future possessor, or a reference to a right of action against the original depositary. As will be seen, "restitution" could be used to demand restoration of property, but could also refer to compensation for an unjustly received benefit. In the event that the depositary/receiver no longer possessed the property, presumably "restitution" would amount to a claim for the cow's value.

Spottiswoode does not mention the presumption, but he does state that an owner wishing to vindicate his thing is better off trying to obtain possession through one of the possessory interdicts available, as it is difficult to prove ownership as required by the *rei vindicatio*.³⁵²

³⁵¹ For example, Durie's commentary refers to the effect of the decision being that "for two years possession the possessor should be counted proprietor and owner".

³⁵² Sir R Spottiswoode and J Spottiswoode (ed), *Practicks of the Laws of Scotland* (1706) 275.

CHAPTER 3: THE INSTITUTIONAL PERIOD

A. THE LATE SEVENTEENTH CENTURY

(1) Context

The late seventeenth century has been recognised as a crucial period in Scottish legal history. As John Cairns writes, “[a]t the beginning of the century the law was in an uncertain, confused and disorganised state, while by 1700, modern Scots law had definitely taken shape.”³⁵³ What follows describes the changes that took place in the law regulating *bona fide* acquisition of moveable property and examines the factors which may have impacted on juristic accounts of the problem. An important question is the extent to which the position in English law influenced Scottish legal debate. There is some (limited) evidence of pressure to adopt the English doctrine of market overt, which protected *bona fide* purchasers in open market.³⁵⁴ The development of customary rules protecting *bona fide* acquirers in other influential³⁵⁵ jurisdictions, for example the Netherlands³⁵⁶ and France,³⁵⁷ was also discussed by Scottish jurists. Lastly, the philosophical climate, in particular the theories of property and ownership developed by Grotius and Lord Kames, influenced juristic responses to the *bona fide* purchase problem.

Chapter 2 noted the growth of non-burghal markets during the seventeenth

³⁵³ J W Cairns, “Institutional Writings in Scotland Reconsidered” (1983) 4(3) *Journal of Legal History* 76 at 89.

³⁵⁴ On which see (3)(b)(i)(a) below.

³⁵⁵ Scots lawyers routinely studied in the Netherlands throughout the eighteenth century. See J C Gardner, “French and Dutch Influences”, in *Introductory Survey of the Sources and Literature of Scots Law* (1936) 226 at 231 and R Feenstra and C J D Waal, *Seventeenth-century Leyden Law Professors and their Influence on the Development of the Civil Law: a Study of Bronchorst, Vinnius and Voet* (1975). French influence is argued by Gordon to have waned after the Union in 1707, but important works such as those of Pothier continued to be widely cited in Scotland. See W M Gordon, “Scotland and France. The Legal Connection”, in *Roman Law, Scots Law and Legal History: Selected Essays* (2007) 299.

³⁵⁶ See H Grotius, *The Jurisprudence of Holland*, trans R W Lee (1926; 1936) 2.3.6, where an exception is recognised for those things bought in “vrije mart” (free market) in respect of which the owner must refund the purchase price to the buyer.

³⁵⁷ See F Bourjon, *Le droit commun de la France et la coutume de Paris réduits en principes*, 2nd edn (1770) vol 1 145 and discussion in F Olivier-Martin, *Histoire de la coutume de la prévôté et vicomté de Paris* (1922, repr 1972) 116-119.

century. This was particularly the case in the period after 1660, with the creation of new market centres reaching “an unprecedented level” between the Restoration and the Union of 1707.³⁵⁸ 143 new centres had been established between 1550 and 1660, but 346 were authorised between 1660 and 1707.³⁵⁹ It is reasonable to assume that these changes would have had some influence upon the character, and perhaps the volume, of moveable property transactions.³⁶⁰

More generally, a new intellectual and philosophical climate emphasised the role of law as adaptive to stages of social development;³⁶¹ there was increasing recognition of the role of law in facilitating economic life.³⁶² Although it was only in the eighteenth century that Scottish theorisations of the role of law in the new types of commercial society reached their apogee,³⁶³ the jurists of the late seventeenth century were certainly sensible to the changes occurring around them. The general importance of law in fostering economic development permeates the work of Stair, who refers to it numerous times. Indeed, he states in his introductory title that “all of [the Principles of Equity and of Positive Law] aim at the maintenance, flourishing and Peace of Society, the security of Property, and the freedom of Commerce.”³⁶⁴

With the Scottish economy at this point still based predominantly on trade in agricultural produce and raw materials,³⁶⁵ corporeal moveable property remained of great economic importance. The impact of the new demands, both practical and philosophical, upon the rules regulating *bona fide* purchase is discussed below; there are also other instances in which modification of the law of moveable property to accord with new economic conditions is mentioned. For example, Stair comments on

³⁵⁸ Whyte, “Market Centres” 17.

³⁵⁹ Whyte, “Market Centres” 17.

³⁶⁰ On the difficulties in assessing the trading volumes at the new market centres, see Whyte, “Market Centres” 22. He concludes that the evidence points to an increase in the number of transactions.

³⁶¹ See P G Stein, *Legal Evolution: The Story of an Idea* (1980) ch 2.

³⁶² See for example Grotius’ account of the development of private property: “Men... wanted to live in a more commodious and more agreeable Manner; to which End Labour and Industry was necessary, which some employed for one thing and others for another. And there was no Possibility then of using Things in common”: H Grotius, *The Rights of War and Peace*, trans and ed J Barbeyrac and R Tuck (2005) 426 and further discussion in ch 3 A(3)(b)(i)(b).

³⁶³ See e.g. A Smith, *Lectures on Jurisprudence*, ed by R L Meek *et al.* (1978).

³⁶⁴ Stair, *Institutions* (1681) 1.17.

³⁶⁵ I D Whyte, *Scotland’s Society and Economy in Transition c.1500-1760* (1997) 140-141.

the development of the law relating to inhibitions:

experience did early show, that there was a necessity for current course of Moveables, and that it could not consist with Traffick and Commerce, that no man could securely buy without inspection of registers; and therefore, Inhibitions have now no effect as to Moveables.³⁶⁶

(2) Recovery of Moveables: Stair's Account of Restitution

(a) Prior sources

Spottiswoode's *Practicks* provide some insight into the sources relied on in legal practice prior to the publication of Stair's *Institutions*.³⁶⁷ John Cairns has emphasised Spottiswoode's reliance on contemporary civilian works, "the "common law" was coming to appear as the *ius civile* rather than as the *utrumque ius*";³⁶⁸ his title concerning *rei vindicatio* fits this general depiction. The text is substantially³⁶⁹ taken from a work on the *Institutes* by German professor and judge Joachim Mynsinger von Frundeck (1514-1588).³⁷⁰ On Spottiswoode/ Mynsinger's account, *rei vindicatio* is a real action (*actio realis*), which is given to the owner against any possessor in order to recover his corporeal thing.³⁷¹ If the defender denies that he is the possessor, he is not compelled to submit to judgment, but the *actio ad exhibendum* will be competent against him for production of the thing.³⁷² Although adjusted to incorporate feudal landholdings,³⁷³ the basic structure of the action described is thus that of the Roman law. Spottiswoode's collection does not, in itself, demonstrate reception of the *vindicatio* in Scotland but it nevertheless provides an important

³⁶⁶ Stair, *Institutions* (1681) 23.25.

³⁶⁷ The *Practicks* were compiled by Sir Robert Spottiswoode from the 1620s to the 1640s, and published by his grandson in 1706. On Spottiswoode's sources, see Cairns, "*Ius Civile*" 158-167.

³⁶⁸ Cairns, "*Ius Civile*" 167.

³⁶⁹ The first paragraph and the final one of the title on "*Rei Vindicatio*" correspond more or less word for word with that of J Mynsinger's *Apotelesma sive corpus perfectum scholiorum ad quattuor libros institutionum iuris civilis* (1589) 4.6 §*Omnium* 30. The correspondence of the middle paragraph is less exact but it appears to be based on Mynsinger, *Apotelesma* 4.6 §*Omnium* 35.

³⁷⁰ On Mynsinger, see O F Robinson *et al.*, *European Legal History: Sources and Institutions* (2000) 11.3.8.

³⁷¹ Spottiswoode, *Practicks* 275.

³⁷² Spottiswoode, *Practicks* 275.

³⁷³ There are said to be two kinds of *rei vindicatio*, *directa* and *utilis*. These are competent to the superior and the vassal respectively: Spottiswoode, *Practicks* 275.

indication of the relevance of the Roman law remedy and, by implication, Roman concepts of ownership and possession. Prior to the publication of the first printed edition of the *Institutions* in 1681, there are also several cases which make reference to recovery of a thing “*rei vindicatione*”.³⁷⁴

(b) *The 1681 edition of the Institutions*

Stair’s treatment of the recovery of moveable property, and the position of *bona fide* purchasers, does not occur at the point one might expect in the *Institutions*, i.e. under the titles treating of the law of property. Rather, these topics are dealt with under the law of obligations, under the heading “restitution.” Explicit reference is made to Grotius’ *De Jure Belli et Pacis* and the title “Of the obligation that arises from property” was clearly an important influence.³⁷⁵ Both Stair and Grotius distinguish the obligation of restitution, which arises from the mere possession of another’s property, from those arising from any wrong³⁷⁶ or, according to Stair, voluntary engagement.³⁷⁷ This is in obvious contrast to the earlier law discussed in Chapter 2. The obligation to make restitution arises in a wide range of situations, including to property found, recovered stolen property and property acquired *bona fide* from a non-owner.³⁷⁸

There are several innovative aspects to Stair’s account of restitution. In contrast to, for example, Grotius, he places obligations first in his scheme, treating of

³⁷⁴ See Gilmour and Newbyth’s reports of *Ramsay v Wilson* (1666) Mor 9113; *Forsyth v Kilpatrick* (1680) Mor 9120; *Van Porten v Dick* (1680) reported in J Dalrymple Viscount Stair (ed), *The Decisions of the Lords of Council & Session in the Most Important Cases Debated before them with the Acts of Sederunt* (1683) 750 and J Lauder of Fountainhall (ed), *The Decisions of the Lords of Council and Session, from June 6th, 1678, to July 30th, 1712* (1759) vol 1 80.

³⁷⁵ Stair, *Institutions* (1681) 7.2. Several of Stair’s citations and examples are drawn from Grotius, for example his reference to Deuteronomy 22.1 (at 7.3) and to D 16.3.31.1 (at 7.4.). His citations in the title are discussed in detail by Adelyn Wilson, *Sources and method of the Institutions of the Law of Scotland by Sir James Dalrymple, 1st Viscount Stair, with specific reference to the law of obligations* (PhD thesis 2008-2009, University of Edinburgh) at 135-140. On Grotius’ influence on Stair, see W M Gordon, “Stair, Grotius and the sources of Stair’s *Institutions*”, in *Roman Law, Scots Law and Legal History: Selected Essays* (2007) 255, especially at 260-261 and D L Carey Miller, “Systems of Property: Grotius and Stair”, in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law* (1992) 13.

³⁷⁶ Stair, *Institutions* (1681) 7.1; Grotius, *Rights of War and Peace* 2.10.1.3.

³⁷⁷ Stair, *Institutions* (1681) 7.1.

³⁷⁸ Stair, *Institutions* (1681) 7.3-7.5.

them before rights of property.³⁷⁹ Moreover, in contrast to the position under the classical Roman law, he argues that there is an obligation on a possessor to restore property which belongs to another to its rightful owner.³⁸⁰ If a person buys the property of another *bona fide*, he or she must thus return it and pursue his or her seller in warrandice for its price.³⁸¹ On the basis of this obligation to restore, Stair distinguishes restitution from the real action of vindication, which is an effect of property.³⁸² This differs slightly from the way the obligation is conceived by Grotius, who seems to view it as more firmly derived from the right of ownership: it is “the Essence of property... that every Man who is possessed of another’s goods, is obliged to restore them to the right Owner.”³⁸³

The philosophy underlying Stair’s concept of restitution, it is submitted, was heavily influenced by moral theology. Dot Reid has pointed to Protestant Scholasticism, and its influence at Glasgow University, as providing the intellectual context for Stair’s work;³⁸⁴ there are correspondences between Thomas Aquinas’ account of restoration of property as necessary to preserve equality³⁸⁵ and the circumstances in which Stair identifies an obligation of restitution.³⁸⁶ Scholasticism also influenced Stair’s acknowledged sources, importantly Grotius,³⁸⁷ who states that “the very design of Property was to preserve an Equality, that is, that every Man might enjoy his own.”³⁸⁸ Whether through Grotius, or directly, Scholastic thought thus informed Stair’s work in several ways. However, as Feenstra notes, the Scholastics “did not care for the Roman distinction between *actiones in rem* and

³⁷⁹ See further A H Campbell, *The Structure of Stair’s Institutions* (1954).

³⁸⁰ Stair, *Institutions* (1681) 7.2. It is not clear to what extent the obligation of restitution involves positive duties, Stair states that there is “no duty of Custody, or pains” (*Institutions* (1681) 7.3). Grotius, *Rights of War and Peace* 2.10.1.2 seems to recognise a positive aspect to the obligation to restore: “if the Power of Property reached no farther than to have a Thing restored on demand, Property would have been too weakly secured...”

³⁸¹ Stair, *Institutions* (1681) 7.4; 7.11.

³⁸² Stair, *Institutions* (1681) 7.2.

³⁸³ Grotius, *Rights of War and Peace* 2.3.1.5.

³⁸⁴ See Reid, “Thomas Aquinas” at 202-205.

³⁸⁵ See ch 2 C(4)(c)(iii).

³⁸⁶ See Reid, “Thomas Aquinas” 207-209.

³⁸⁷ For the influence of Scholastic thought on Grotius’ account of restitution, see R Feenstra, “Grotius’ Doctrine of Unjust Enrichment as a Source of Obligation: its Origin and its Influence in Roman-Dutch Law”, in *Legal Scholarship and Doctrines of Private Law: 13th- 18th Centuries* (1996) 197 and Hallebeek, *Unjust Enrichment* ch 5.

³⁸⁸ Grotius, *Rights of War and Peace* 2.10.2.1.

actiones in personam.”³⁸⁹ For this reason, Stair’s account covers obligations arising from what would, in the modern law, be understood as unjustified enrichment, and obligations arising from the fact of possession of property owned by another.³⁹⁰ On a moral level, these cases are perhaps equivalent. From the point of view of the structure of private law, however, this is a potentially problematic move as it neglects the fundamental distinction between recovery of possession and enforcement of the right of ownership.³⁹¹

Among others, Gordon has also emphasised the impact of natural law thought, and in particular the prologomena to *de Jure Belli ac Pacis* on the structure of the *Institutions*.³⁹² Against Grotius, Stair argues the obligation of restitution to be derived from natural law laid down by God rather than tacit consent or contract; “though there were no Positive Law, these Obligations would be binding.”³⁹³ Grotius’ account of the obligation arising from property is linked to his vision of human society as a network of mutual rights and obligations, arising from the sociable nature of humanity.³⁹⁴ The maintenance of social order requires that we return that which is another’s.³⁹⁵ Stair’s understanding of property is clearly influenced by Grotius’ historical narrative,³⁹⁶ but he wishes to retain God as the source of all obligation, whether legal or moral.³⁹⁷

³⁸⁹ Feenstra, “Unjust Enrichment” at 209.

³⁹⁰ For example, Stair, *Institutions* (1681) 7.7 refers to things acquired on the basis of a cause which later ceases and restoration of payments made in error.

³⁹¹ See Hallebeek, *Unjust Enrichment* 81-85.

³⁹² See W M Gordon, “Stair’s use of Roman law”, in A Harding (ed), *Law Making and Law Makers in British History* (1980) 120 at 125.

³⁹³ Stair, *Institutions* (1681) 7.1-7.2. Compare S F von Pufendorf, *Elements of Universal Jurisprudence*, trans and ed W A Oldfather and T Behme (1931, repr 2009) 1.5.25, where it is stated that natural law favours the ignorant *bona fide* purchaser.

³⁹⁴ “[F]or if the Power of Property reached no farther than to have a thing restored on demand, Property would have been too weakly secured and the keeping of it too expensive.” Grotius, *Rights of War and Peace* 2.10.1.2. See further S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (1991) ch 1. Compare S F von Pufendorf, *Of the Law of Nature and Nations*, trans B Kennett 4th edn (1729) IV.13.3.

³⁹⁵ Grotius, *Rights of War and Peace* Prologomena 8.

³⁹⁶ See for example his reference to “utility and common quietness sake”: Stair, *Institutions* (1681) 7.12. Stair’s account of the development of property rights draws heavily on that of Grotius: compare *Institutions* (1681) 12.1 and Grotius, *Rights of War and Peace* 2.2.2. On Grotius’ historical approach, see Buckle, *Natural Law* 35-52.

³⁹⁷ Stair, *Institutions* (1681) 7.1: “of necessity they must have their Original from the Authority and Command of God...”

From the “right of restitution” arises the action of exhibition and delivery, which involves the conveyance of any moveable thing, in particular writings, before a judge, where questions of right can be decided and delivery to the pursuer ordered.³⁹⁸ This is interesting because, although Stair emphasises the existence of a personal obligation on possessors, the results do not seem, in practice, to be substantially different from those obtained using the *vindicatio*. Scots law appears to follow an essentially Roman scheme, with the *actio ad exhibendum* necessary to force a reluctant defender to produce the thing in order that the pursuer can seize it. However, the structures provided by the Roman law are placed in a new theoretical and philosophical framework, and attempt is made to merge them with the pre-existing local custom.

(c) *Mackenzie’s Institutions*

In the first edition of the *Institutions*, Mackenzie does not mention the obligation of restitution. His description of a real action as “that whereby a Man pursues his Right against all singular Successors, as well as the person who was first obliged” fits the action for vindicating moveable property.³⁹⁹ However, in the 1688 edition of the *Institutions*, this Scots definition of a real action based on its availability against successors is contrasted with the “Civil law” definition of a real action as arising from a real right and founded in *dominium* or property, the prime example being the *rei vindicatio*.⁴⁰⁰ This change may follow Stair in seeking to distinguish the *vindicatio* founded on property from the Scots conception of real action, but it is not entirely clear.

The only reference to the procedure for claiming moveable property is the description of the action for exhibition and delivery, which is in similar terms to that of Stair.⁴⁰¹ It is implied that the pursuer in this action may crave delivery of moveable property, but no further detail is given.

³⁹⁸ Stair, *Institutions* (1681) 7.14.

³⁹⁹ Sir G Mackenzie, *The Institutions of the Law of Scotland* (1684) 335.

⁴⁰⁰ Mackenzie, *Institutions*, 2nd edn (1688) 351.

⁴⁰¹ Mackenzie, *Institutions* (1684) 341; (1688) 356.

(d) *The 1693 edition of Stair's Institutions*

(i) Stair's account of restitution

The account of restitution given in the second printed edition of 1693 is substantially similar to that of 1681. However, it includes an extra book, dealing with actions, in which the following inference is drawn from the obligatory nature of restitution:

But we make not use of the name or nature of *Vindication*, whereby the Proprietar pursues the Possessor, or him who by *Fraud* ceases to possess, to suffer the Proprietar to take possession of his own, or to make up his damage by his fraud. This part of the action is rather *personal* than *real*, for reparation of the damage done by the fraudulent quitting possession. Yea, the conclusion of *Delivery*, doth not properly arise from *Vindication*, which concludes no such obligation on the haver, but only to be Passive, and not to hinder the Proprietar to take possession of his own.⁴⁰²

This represents a significant addition to the account given in the edition of 1681. The claim that “we make not use of the name or nature of *Vindication*” is particularly surprising. On the accuracy of Stair's contention, even in Stair's own reports of cases such as *Van Porten v Dick*⁴⁰³ the term *rei vindicatio* is frequently used.⁴⁰⁴ It seems to be interchangeable with “restitution” in referring to the claim of the owner for recovery of moveable property against any possessor.⁴⁰⁵ Analysis of the case law of the intervening period does not yield any evidence that the term had fallen into desuetude, or that the action allowing the recovery of moveable property had substantially changed.⁴⁰⁶

As for “the conclusion of delivery” not arising from vindication, it is true that the Roman *vindicatio* did not expressly conclude for the delivery of the thing but

⁴⁰² Stair, *Institutions* (1693) 4.3.45.

⁴⁰³ (n 374).

⁴⁰⁴ See the cases cited earlier at n 374 and *Forbes v Ogilvy* (1685) Fountainhall, *Decisions* vol 1 359.

⁴⁰⁵ In *Forbes ibid*, an action is pursued “*rei vindicatione* for restitution” of a cup.

⁴⁰⁶ For an example of an action expressly referred to as a *rei vindicatio* in this period, see *Blair v Graeme* (1685) Mor Sup II 86.

rather a pecuniary *condemnatio* if the thing was not restored.⁴⁰⁷ The aim of the action, however, was certainly the restoration of the thing to the pursuer. A text from Paul in the Digest states that restitution should occur either where the thing is or at the place where the action is brought.⁴⁰⁸ If the possessor is in good faith, the pursuer should bear the expense of transporting the thing to site of the judgment.⁴⁰⁹ Although no express obligation is placed upon the possessor, Roman law hence demonstrably was concerned with the return of the thing to the owner, should he or she succeed in his or her claim. Stair refers to an action given by the Praetor which rested on the fiction that the pursuer had acquired by usucaption, presumably the *Actio Publiciana*,⁴¹⁰ as the first provision for recovery of possession;⁴¹¹ on the basis of the above this is not a sound claim.⁴¹²

It is possible that Stair wished to emphasise the distinctiveness of Scots law as body of learning not simply derivative of Roman law.⁴¹³ Additionally, focus on the personally binding nature of restitution corresponds better with his broader philosophical scheme, and in particular the moral aspect of restitution as understood in Scholastic thought. Unlike the Roman law, the theological perspective is centred on the individual conscience of the possessor.⁴¹⁴ Although the concept of a “Real obligation upon Possessors... to Restore or re-deliver”⁴¹⁵ does not fit well with the traditional civil law divide between property and obligation,⁴¹⁶ it emphasises the binding nature of the duty involved and the necessity for personal involvement of the possessor in the restitutionary process.

Stair’s scheme also allows a clearer demarcation of his distinction between

⁴⁰⁷ See Wenger, *Institutes* 150-153 and discussion in ch 2 A(2)(b).

⁴⁰⁸ D 6.1.10.

⁴⁰⁹ D 6.1.10; see also D 6.1.11.

⁴¹⁰ On which see Kaser, *Private Law* 117.

⁴¹¹ *Institutions* (1693) 4.3.45.

⁴¹² The *Actio Publiciana* protected several categories of possessor who did not have quiritary ownership, rather than affording a remedy not offered by the *vindicatio*.

⁴¹³ This would accord with the approach to the civil law set out in *Institutions* (1693) 1.1.16; *Institutions* (1681) 1.15. See further W M Gordon, “Roman Law as a Source”, in D M Walker (ed), *Stair Tercentenary Studies* (1981) 107.

⁴¹⁴ See Hallebeek, *Unjust Enrichment* 82.

⁴¹⁵ Stair, *Institutions* (1693) 4.3.45.

⁴¹⁶ It is described by Carey Miller, *Corporeal Moveables* para 10.04 as having a “somewhat uncomfortable... hybrid quality”.

actions declaratory, petitory and possessory, with the *vindicatio* being merely declaratory, but the action for the restitution of moveables being petitory.⁴¹⁷

(ii) Mackenzie's *Treatise on Actions*

Mackenzie's *Treatise on Actions* contains a passage which directly contradicts Stair's contention that "we make use not of the name or nature of vindication".⁴¹⁸

By our Law we call also these real Actions, by which we pursue for any Thing that is ours' and where the Action is competent against singular Successors if they be Possessors; and... in effect all our Declarators of Property are Vindications, whether we pursue for the Property of Lands, or particular Things which belong to us in Property, tho' the Possession of them be carried away to another, and the Actions for declaring the Property of Land, because of the more noble Signification, called only Declarators of Property; yet if my Horse had strayed from me, and were possessed by another, my Action for recovering him, is in effect a Declarator of Property, tho' we call such Actions for every Thing else (except Lands) Action for Recovery: But we still use in our Debates *rei vindicatio* ...⁴¹⁹

It is argued that the term "vindication" is indeed recognised in Scots law, and moreover, that an action for recovery of moveables is "in effect a Declarator of Property", and hence amounts to a vindication. This conflicts with both facets of Stair's pronouncement; both the name and the nature of vindication are after all part of Scots legal discourse. The passage also emphasises that it is more difficult to classify the action for the recovery of moveables as wholly declaratory or wholly petitory than Stair suggests.

Questions exist regarding the text's authorship and date of composition. The *Treatise on Actions* was printed posthumously; given Mackenzie's death in 1691

⁴¹⁷ Stair, *Institutions* (1693) 4.3.45; 4.3.47.

⁴¹⁸ There are other instances in which Stair directly contradicts comments made by Mackenzie: Ford, *Law and Opinion* 522-523.

⁴¹⁹ G Mackenzie, *Sir George Mackenzie's Works* (1716) vol II 494.

before the publication of the second edition of Stair's *Institutions* it is assumed that it is Stair's treatment which is in response to Mackenzie's (then unprinted) work.⁴²⁰ Perhaps any correspondence between the two accounts is coincidental.⁴²¹ As the volume was edited and published after his death, it is also possible that the text in question was not written by Mackenzie himself but by a later editor, in which case the text would be in response to the 1693 edition of the *Institutions*.⁴²² Given the text's consistency with Mackenzie's views on Roman law,⁴²³ however, this seems unlikely. While Stair's account has proved more influential, it is significant that disagreement existed on such a fundamental issue; at least as regards the historical accuracy of his statements Stair's depiction of Scots doctrine is called into question.

(3) The Position of the *Bona Fide Purchaser*

(a) Recognition of the *nemo plus* principle

(i) Stair's *Institutions*

Although Stair does not explicitly cite the *nemo plus* principle, he quotes the maxim *jus superveniens auctori accrescit successori*,⁴²⁴ which Carey Miller argues to be of equivalent effect.⁴²⁵ The fact that a non-owner cannot transfer ownership follows as a logical consequence from the key role of the owner's consent in derivative acquisition; "[i]t must needs then be the present dispositive will of the Owner, which conveyeth the right to any other".⁴²⁶

Stair also refers numerous times to the existence of a "*vitium reale*" or "*labes realis*" ("real vice") preventing acquisition in cases where property has been obtained

⁴²⁰ A similar assumption seems to be made by Ford, *Law and Opinion* 522-523.

⁴²¹ Given the close correspondence between the arguments discussed here, and also on other matters mentioned in Ford, *Law and Opinion* 522-523 this seems unlikely.

⁴²² On the difficulties of finding an "authentic" version of early modern printed texts and of ascertaining that any given text represented the final view of the author, see J Cairns, "The Moveable Text of Mackenzie: Biographical Problems for the Scottish Concept of Institutional Writing", in J Cairns and O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001) 234.

⁴²³ On which see Ford, *Law and Opinion* 494-495.

⁴²⁴ Stair, *Institutions* (1681) II.24.1; (1693) 3.2.1.

⁴²⁵ Carey Miller, "Systems of Property" at 17.

⁴²⁶ Stair, *Institutions* (1681) 24.3; (1693) 3.2.3.

by theft or robbery.⁴²⁷ It was noted in Chapter 2 that a Digest text concerning usucaption distinguished vices “*ex re*” and “*ex persona*”; this distinction between real and personal vices was developed further by Bartolus, who differentiates the force used in expulsion or taking from that used in compulsion.⁴²⁸ The sources of Stair’s concept are not clear, but substantial discussions of the distinction between real and personal vices also appear in the work of sixteenth and seventeenth-century German Civilian works such as those of Johann Schneidewein (1519-1568),⁴²⁹ Mynsinger⁴³⁰ and Johann Brunnemann (1608-1672)⁴³¹ and, whether directly or indirectly, Stair draws on this body of learning.

(ii) Mackenzie’s *Institutions*

Again, although the principle is not expressly cited it is implicit in the scheme of property transfer set out by Mackenzie. “Tradition” is defined as “a delivery of possession by the true owner, with a design to transfer the property to the Receiver.”⁴³² This definition logically excludes the possibility of acquisition by buyer in good faith from one who is not the “true owner”. Such a supposition is to be borne out by Mackenzie’s discussion of the acquisition of fruits by a *bona fide* possessor, which takes for granted that the thing itself will be recovered.⁴³³

(iii) Case law

The importance of the principle, then, permeates the work of Stair and Mackenzie. It is also evident in the case law of the period. In Stair’s report of *Gordon vs Chein and Crawford*,⁴³⁴ the maxim is referred to as a “general Principle[...] of Civil Nations.”

⁴²⁷ Stair, *Institutions* (1681) 10.15, (1693) 1.9.15; (1681) 12.38, (1693) 2.1.38; (1693) 4.40.28. In his *Decisions* see *Countess of Bramfoord v Hope of Hopetoun and Kerse* (1672) 40; *Stuarts v Whitfoord and the Duke of Hamilton* (1677) 489; *Paterson v McLean* (1677) 541; *Town of Glasgow v Un-free men of Greenock* (1678) 660; *Van Porten* (n 374) 750.

⁴²⁸ Bartolus, *Commentaria* vol 2 90 (Title *de acquirenda et retinenda possessione*).

⁴²⁹ J Schneidewein, *In quatuor Institutionum imperialium Justiniani libros, commentarii* (1677) col 421 (2.6.62). Editions from 1608 and 1677 are listed in the 1692 catalogue of the Advocates’ Library: Faculty of Advocates, *Catalogus librorum bibliothecae juris* (1692) 25; 53.

⁴³⁰ Mynsinger, *Apotelesma* 2.6 § *Furtivae*.

⁴³¹ *Commentarius in quinquaginta libros Pandectarum* (1683) vol 2 44.3 Title *Ad L. An vitium*. A 1663 edition of the *Commentarius* is listed in the 1692 catalogue of the Advocates’ Library: Faculty of Advocates, *Catalogus* 5.

⁴³² Mackenzie, *Institutions* (1684) 80.

⁴³³ Mackenzie, *Institutions* (1684) 82-83.

⁴³⁴ (1676) See Stair, *Decisions* 440.

That case dealt with assignments, as does another case in which the maxim is referred to as a “common ground of Law”, *Mackenzie vs Watson and Stuart*,⁴³⁵ emphasising the status of the maxim as a general principle of derivative acquisition.

(b) Protection of the bona fide purchaser

(i) Stair’s Institutions

(i)(a) English influence?

According to Stair the position in respect of *bona fide* purchases is thus that, as in Roman law, the owner can recover his or her property from any possessor. By way of comparison, English law had by this period developed a special rule in respect of sales in “market overt”, which could confer a valid right even in respect of stolen property.⁴³⁶ Although protection for purchasers in open market had been a part of the common law since at least the mid-fifteenth century, Coke’s report of the *Case of Market Overt* in 1596⁴³⁷ made clear that the rule applied to all fairs and markets in England. Coke also referred to the doctrine approvingly in his *Institutes*.⁴³⁸ Stair does not explicitly refer to Coke, but a copy of the 1670 edition of Coke’s *Institutes* and also his *Reports* from 1656, 1677 and 1680 were available in the library of the Faculty of Advocates in 1692;⁴³⁹ it is reasonable to assume that Stair was familiar with these works.⁴⁴⁰

Although there were a number of Scottish cases in the early seventeenth century in which it was argued that a sale in open market should protect a *bona fide* purchaser, Stair does not explicitly comment on the market overt rule. The English “privilege of fairs” is mentioned, but the case of *Ferguson v Forrest*⁴⁴¹ cited to demonstrate that, in Scots law, even a *bona fide* purchaser in open market must

⁴³⁵ (1678) See Stair, *Decisions* 607.

⁴³⁶ See generally P M Smith, “Valediction to Market Overt” (1997) 41(2) *American Journal of Legal History* 225 and B Davenport and A Ross, “Market Overt” (1993) 2 *International Journal of Cultural Property* 25.

⁴³⁷ (1596) 5 Co. Rep. 83b.

⁴³⁸ E Coke, *Institutes of the Lawes of England* (1628-1644) II 713.

⁴³⁹ Faculty of Advocates, *Catalogus* 7.

⁴⁴⁰ The reference to the English “privilege of fairs” discussed below points to Stair’s familiarity with Coke’s work or at least sources familiar with Coke. On the influence of English law on Stair generally, see W D H Sellar, “English Law as a Source”, in D M Walker (ed), *Stair Tercentenary Studies* (1981) 140.

⁴⁴¹ (n 341).

restore the goods to the original owner.⁴⁴² There is little evidence of explicit pressure to adopt the English approach, but it was presumably one obvious solution to the tensions caused by late seventeenth-century commercial expansion.

(i)(b) Recognition of a principle of good faith protection

The obligation of restitution requires that the thing be restored to the owner, leaving the purchaser to claim against his or her seller or accept the loss. Reference is made to “some cases, wherein Positive Law secures the buyer, and leaves the owner to seek the seller”,⁴⁴³ but this is not elaborated further. Stair’s account of derivative acquisition emphasizes that the passing of ownership implies the “present dispositive will of the owner.”⁴⁴⁴ A logical consequence of this approach is that, in the absence of intention on the part of an owner, ownership can never pass to a *bona fide* acquirer.

There is a clear tension between the moral obligation of restitution and the need to protect commerce in moveable property, which may often be transferred with very little in the way of evidence. Although the development of a presumption in favour of the possessor, discussed below, goes some way towards resolving this tension, relieving *bona fide* transferees of the need to establish their right, acquirers are still vulnerable to the loss of the property. The natural law understanding of property does not, however, necessarily imply that ownership must always be absolutely protected. As the laws of property developed in conjunction with, and for the benefit of, human society, they can be modified or restricted where this will be of public benefit.⁴⁴⁵ Stair sets out that, for reasons of public expediency, the doctrine that transfer requires the owner’s consent may be departed from:

So may the publick content of any people introduce ways of Appropriation, as they find most convenient, for publick good, [...] and albeit it be a good and solide rule, *Quod meum est, sine me alienum fieri nequit*, yet it hath the

⁴⁴² Stair, *Institutions* (1681) 12.40; (1693) 2.1.42.

⁴⁴³ Stair, *Institutions* (1681) 7.4; (1693) 1.7.4.

⁴⁴⁴ Stair, *Institutions* (1681) 24.3; (1693) 3.2.3.

⁴⁴⁵ See for example Grotius, *Rights of War and Peace* 2.2.2. i.

exception of public sanction, or common custom, and so though it be not by the sole and proper consent of the owner, yet it is by the consent of that Society of people, or their Authority, wherein the submission or consent of every one in the Society is implied, in so far as the design of Association extends.⁴⁴⁶

Interestingly, this passage is far more reminiscent of Grotius' account of property as flexible and a product of human society than the earlier account of restitution.⁴⁴⁷ It leaves space for the development of rules protecting *bona fide* purchasers, particularly where it is required for the public good. Indeed, Stair mentions other instances in which commerce has required that *bona fide* purchasers in public market are insulated from defects in the right of the seller.⁴⁴⁸

In this regard, it is worth considering Stair's discussions of the effect of fraud upon purchasers. The 1681 edition of the *Institutions* comments that "nothing is more prejudicial to Trade, then to be easily involved in pleas, which diverts Merchants from their Trade, and frequently marres their gain, and sometimes their credit; therefore we allow not the quarrelling of Bargains upon presumed fraud..."⁴⁴⁹ However, the 1693 edition includes a much stronger statement of the invulnerability of purchasers to claims of fraud:

Yet in moveables, Purchasers are not quarrellable upon the Fraud of their Authors, if they did purchase for an Onerous Equivalent Cause. The reason is because Moveables must have a current Course of Traffick, and the Buyer is not to consider how the Seller purchased, Unless it were by Theft or Violence, which the Law accounts as *labes reales*, following the subject to all Successors; Otherways there would be the greatest Incouragment to Theft and Robbery.⁴⁵⁰

⁴⁴⁶ Stair, *Institutions* (1681) 12.34; (1693) 2.1.34.

⁴⁴⁷ Compare Grotius, *Introduction* 2.3.2.

⁴⁴⁸ See for example Stair, *Institutions* (1693) 4.25.2 regarding goods subject to the landlord's hypothec, at the time a difficult and disputed topic.

⁴⁴⁹ Stair, *Institutions* (1681) 9.10.

⁴⁵⁰ Stair, *Institutions* (1693) 4.40.22. See also 4.40.28.

This passage would later be used by George Joseph Bell as the foundation for his argument that, where property had not been taken by theft or violence, a *bona fide* purchaser was free from the claim of the original owner.⁴⁵¹ Although numerous statements elsewhere in the *Institutions* appear to refute such contentions, Stair's reasoning is persuasive. The reference to the need for a "current Course of Traffick" emphasises the social demand for a more rapid circulation of commodities which was, even in the late seventeenth century, beginning to be felt.

However, it is submitted that Stair is not proposing here a general rule protecting purchasers from *any* claim which would have been good against the seller.⁴⁵² He refers only to fraud, the scope of which is in itself an interesting topic.⁴⁵³ Elsewhere Stair refers to fraud as *labes reales* at common law;⁴⁵⁴ this perhaps indicates that his comments regarding moveables represent an exception to a then-prevailing general rule.⁴⁵⁵ It is not clear whether transfer by a party entrusted with possession, such as a deposittee, was understood as fraud. In general, Stair distinguishes cases where consent has been given to transfer from cases in which, due to factors which take away the "knowledge and reason" of the transferor, there has been no consent at all.⁴⁵⁶ Where consent to transfer is lacking, this will prevent the initial transfer and also acquisition by a later party in good faith. Unauthorised transfer by a deposittee is described as theft, a real vice which would affect subsequent purchasers.⁴⁵⁷ On this basis, it seems likely that Stair's exception referred only to those who had acquired, albeit on the basis of a challengeable transaction, a valid right. Those with no right at all would still not be able to confer ownership, even on a good faith purchaser.

⁴⁵¹ G J Bell, *Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence*, 3rd edn (1816) para 336. The 3rd edition is referred to here because it was the first edition to feature the relevant text.

⁴⁵² This is also the interpretation of Carey Miller, *Corporeal Moveables* para 10.16.

⁴⁵³ See further D Reid, *Fraud in Scots Law* (PhD, University of Edinburgh 2012).

⁴⁵⁴ *Institutions* (1693) 4.35.20.

⁴⁵⁵ At 1.9.15, Stair refers to the fact that fraud was not *vitium reale* being made clear by statute.

⁴⁵⁶ For example Stair, *Institutions* (1693) 1.17.14 distinguishes cases where fear totally deprives the transferor of reason, and those which merely motivate the transaction. See also 4.35.20, where it is stated that the "parity of reason" in cases of force and fraud should secure the innocent purchaser.

⁴⁵⁷ Stair, *Institutions* (1693) 1.13.7.

(ii) Mackenzie's *Institutions*

Mackenzie's treatment of *bona fide* possession, although brief, is predicated on the assumption that the thing itself can always be recovered by the true owner.⁴⁵⁸

(iii) Case law

Thus far, the sources suggest that the "burgh of haimhald" secured a purchaser in public market against financial loss but not restitution of the thing. In *Gordon v Menzies*,⁴⁵⁹ an action of spuilzie was brought against the defender in respect of horses allegedly stolen. The defender had bought these horses in public market, and taken "burgh and hamehald" (burgh of haimhald) from his author. This was found to be a sufficient defence not only against the action for spuilzie, but against a claim for restitution. This is a surprising decision, as the earlier evidence implies that the seller's burgh would protect only against an allegation of theft and not the owner's claim for recovery of the goods.⁴⁶⁰ One explanation is that the decision in the case was anomalous; another is that at this point, sale in a public market with burgh of haimhald did indeed secure the purchaser against the original owner's claim. If this is true, an obvious question is why the defence was not raised in other cases? It may be that the requirements of the burgh of haimhald were simply too cumbersome, but if it had customarily offered such security to purchasers, why was there no attempt to adapt the system to suit contemporary commercial requirements? Geographical and cultural differences may be a factor here: Cosmo Innes reports a note of Lord Auchinleck stating that "borch hamel" (burgh of haimhald) was in common use in the Highlands.⁴⁶¹

(c) *The presumption of ownership from possession*

How, then, did Scots law balance the owner's right to recover with the need to protect purchasers? It has been suggested that facilitation of commerce was an important consideration in doctrinal development. An excellent example of its influence on juridical reasoning is Stair's development of the presumption of lawful

⁴⁵⁸ Mackenzie, *Institutions* (1684) 82-83.

⁴⁵⁹ (1687) Mor. 9122; R Hog (Lord Harcarse), *Decisions of the Court of Session* (1757) 245.

⁴⁶⁰ See for example *Bishop of Caithness v Fleshers in Edinburgh* (1629) 9112.

⁴⁶¹ Innes, *Black Book* XXIX.

acquisition from the possession of moveable property. Chapter 2 referred to a number of cases in the early seventeenth century which appeared to attribute some significance to long-term possession, but it was in the first printed edition of Stair's *Institutions*,⁴⁶² and his reports of the decisions of the Court of Session that these early moves were consolidated.

In the first printed edition of the *Institutions*, the presumption is set out in this way:

[I]n the Commerce of moveables, write useth not to be adhibite, and it would be an unseparable labour, if the acquirer thereof behoved to be instructed by all the preceeding acquirers; as if one should instruct that he bought or bred such goods some years agoe, the present possessor behoved either to instruct a progress of them, through all the hands they passed from the first owner, or lose them, which being destructive to Commerce, Custom hath introduced this way, that possession being present and lawful, presumeth property without further probation, unless the pursuer condescend upon a clear probable way of the goods passing from him, not by alienation, as if they were spuilzied, stolen, strayed.⁴⁶³

Two important points emerge from this account: the key role played by custom and practice in legal development, and the need for law to facilitate commercial life. The arguments given bear a striking resemblance to the terms in which Stair reports the earlier case law. In his *Decisions* of 1683, he reports the defender's argument in *Scot v Sir John Fletcher*, a case of 1665, as being that

in mobilibus possession praesumit titulum; seeing, in these, writ nor

⁴⁶² The *Institutions* was circulating in manuscript form from around 1662: Ford, *Law and Opinion* 68-73; Wilson, *Sources and Method* 1.1.1. Although Stair's own manuscript is not extant, the cases in which the presumption is explicitly set out by Stair are all post-1665 and therefore were probably added in the course of substantial revision for publication of the first printed edition in 1681, on which see Wilson, *Sources and Methods* 1.1.2. Consultation of the manuscript editions was not within the scope of the thesis, but work carried out by Andrew Simpson suggests that the earliest versions of the *Institutions* did contain references to the presumption supported by citation of the cases on spuilzie reported by Lord Durie, discussed below: A Simpson, "Presuming Ownership from Possession", paper presented at Scottish Legal History Conference, University of Aberdeen, 2011.

⁴⁶³ Stair, *Institutions* (1681) 24.7.

witnesses use not to be interposed; and none can seek recovery of such, unless he condescend *quo modo desiit possedere*; else all commerce would be destroyed; and whoever could prove that once any thing was his, might recover it *per mille manum* unless they instruct their title to it.⁴⁶⁴

This case was also reported by Newbyth, and although not inconsistent, it is only in Stair's report that the applicable rules of evidence are rationalised as a presumption.⁴⁶⁵ Newbyth's report focuses on the question of whether written proof was necessary to establish that valuable books had been loaned to the defender (and were therefore liable to be returned to the pursuer).

A number of other cases in which the sole printed report is Stair's are also cited in the *Institutions* as evidence for the existence of the presumption.⁴⁶⁶ The only other authorities mentioned are the earlier reports by Lord Durie discussed in Chapter 2;⁴⁶⁷ it was argued earlier that these establish only an ambiguous role for possession as a possible basis for prescriptive acquisition. The first printed report from a source other than Stair expressly recognising a presumption is *Home v Atchison*,⁴⁶⁸ which, although making reference to a doctrine that "Possession *in mobilibus* supposes a title", does not explicitly set out the key requirement that the pursuer to libel how the property left his or her possession.

Stair's construction of the presumption, then, centres on the claim that the

⁴⁶⁴ From Stair's report of *Scot v Sir John Fletcher* (1665) Mor 11616. See Stair, *Decisions* vol 1 258. Stair's report of *Scot v Eliot* (1672) Mor 12727; *Decisions* vol 2 59 is in similar terms, as is that of *Semple v Givan* (1672) Mor 9114; *Decisions* vol 278: "moveables passing from hand to hand, without writ, if any party who once had right to them, should thereupon pursue the posterior acquirers, and should overtake them...no party could be secure, and all commerce behoved to cease."

⁴⁶⁵ On Stair's motivations and methodology in reporting cases, see Ford, *Law and Opinion* 382-400. Stair describes himself as reporting the "matter and moment" of the decision, rather than the actual arguments of the parties or the terms of the interlocutors: Ford, *Law and Opinion* 383.

⁴⁶⁶ *Institutions* (1681) 12.40 mentions *Scot v Fletcher* (n 464); *Ramsay v Wilson* (1665) Mor 9113, *Decisions* vol 1 326 (also reported by Gilmour and Newbyth); *Scot v Eliot* (n 464); *Hamiltoun v the owners of the Statine* (1673) Mor 11925, 12774, *Decisions* vol 2 221; *Tailour v Rankine* (1675) Mor 9115, *Decisions* vol 2 333. *Institutions* (1681) 24.8 cites *Semple* (n 464). Other cases reported by Stair in which the presumption appears to have been acknowledged are *Geddes v Geddes* (1678) Mor 12730, *Decisions* vol 2 592 and *Hog v Hamilton* (1679) 9119, *Decisions* vol 2 683.

⁴⁶⁷ *Turnbul* (n 350), *Brown* (n 350) (mentioned in *Institutions* (1681) 24.8) and *Russel v Kerse* (1626) Mor 14733 (mentioned *ibid.* at 9.17).

⁴⁶⁸ (1679) Mor 9120.

pursuer must libel, not only ownership of the thing in question, but that possession was lost otherwise than by voluntary alienation. The presumption is, therefore, primarily a matter of how ownership is established rather than how it is transferred; it is a rule of evidence rather than property law. Although in the case of fungibles, and things indistinguishable from others of the same kind, such as money, possession may be seen as actually constitutive of ownership, this is not the general case.⁴⁶⁹ The main impact of the presumption is thus to force the owner to establish that the property had left his or her possession without his or her consent to its transfer.⁴⁷⁰

Given others' mistrust of judge-made law,⁴⁷¹ Stair's argument for the existence of the presumption can also be seen as an argument for the value of judicial decisions (and his own opinions in particular) as evidence of "a body of forensic custom".⁴⁷² This point is reinforced if we consider other significant work of the period, the *Institutions* of Sir George Mackenzie, which does not specifically mention the presumption.⁴⁷³ That fact in itself is interesting, for by the time of publication of the first edition of the *Institutions* in 1684, the presumption had featured in both Stair's *Institutions* and his *Decisions*.⁴⁷⁴ Although Mackenzie's *Institutions* is shorter than that of Stair, and is obviously not intended to be exhaustive, it is possible that this reflects the differing importance placed by Mackenzie and Stair upon the role of judge-made law.⁴⁷⁵ The development of the presumption through judicial decision may not have accorded with Mackenzie's

⁴⁶⁹ Stair, *Institutions* (1681)12.34; (1693) 4.21.5.

⁴⁷⁰ See for example *Russel v Campbells* (1699) Sup IV 468 in which it was argued "If I have a watch, it is not relevant for the watchmaker to say, I offer to prove that watch was mine last week, to give him rei vindicationem; but he must also prove quomodo he lost the possession, else it is presumed to be mine who now have it, for the dominion of moveables transmits without writ, and oftimes without any witnesses, present; and therefore, ere you can recover them, you must first prove that you lost the possession, clam vi, or precario, or by some title not alienative of the property, as loan or the like."

⁴⁷¹ In particular Sir George Mackenzie, see H MacQueen, "Mackenzie's Institutions in Scottish Legal History" (1984) 29 *Journal of the Law Society of Scotland* 498, especially at 501 and discussion and further references in Ford, *Law and Opinion* 538-539. On the role of custom based on judicial decision in Stair's thought, see Ford, *Law and Opinion* 407-439.

⁴⁷² Ford, *Law and Opinion* 371. Ford comments at 471 that "It remains to be seen, however, whether Stair had not in reality been promoting his own opinions in reporting cases in his *Decisions* and in citing them in his *Institutions*."

⁴⁷³ The general role of presumptions is discussed at 367, but the presumption from possession is not one of the examples given, nor is it mentioned elsewhere. See Mackenzie, *Institutions* (1684).

⁴⁷⁴ See n 462 above.

⁴⁷⁵ On this, see MacQueen, "Mackenzie's Institutions" and for an overview of approaches to precedent in the seventeenth century, see G Maher and T B Smith, "Judicial Precedent", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 22 (1990) para 251.

view of legislation as the supreme source of law.⁴⁷⁶ Alternatively, he may simply have regarded it as extrinsic to his purpose of providing a “grammar” of Scots law.⁴⁷⁷

Mackenzie does discuss the presumption in a treatise printed after his death in a collected works of 1722.⁴⁷⁸ He appears to argue that, certainly on the part of the pursuer in an action of *rei vindicatio*, it will not be enough for the pursuer to simply libel that he or she was in possession, this is only appropriate in a case of *spuilzie*. He considers the case of *Ramsay v Wilson* as reported by Stair, and although he does not expressly state that the presumption does not exist, he criticises the decision for attending to the wrong facts. In particular, he sees the main issues as being whether the defender’s author had violently seized the jewels in question, creating a *vitium reale*, and whether the defender had admitted that the jewels belonged to the party to whom the pursuer was executor.⁴⁷⁹

On the question of the presumption, the defender’s main argument had been that his possession presumed property; the pursuer raised two exceptions arguing that the presumption should not apply in this case. Mackenzie dismisses these as of “no Moment”,⁴⁸⁰ implying that he does not find the presumption itself to be a relevant or convincing defence. This contention may find some support in the fact that none of the other reports of the case explicitly mention the presumption at all; on one reading the arguments are limited to whether a form of acquisitive prescription of moveable property exists and in what circumstances a *bona fide* acquirer could be expected to have known that a seller was not the owner of moveables.⁴⁸¹ Again, it is not clear whether Mackenzie objects to the presumption as part of a more general rejection of judge-made law, or whether he feels that there is simply not much evidence for its existence outside of the opinions of Stair.

⁴⁷⁶ See MacQueen “Mackenzie’s Institutions” 500; Ford, Law and Opinion ch 6.

⁴⁷⁷ Mackenzie, *Institutions* (1684) Epistle Dedicatory 3.

⁴⁷⁸ Mackenzie, *Works* vol 2 503.

⁴⁷⁹ On the history of the litigation in *Ramsay*, see A Murray, “‘The monuments of a family’: a collection of jewels associated with Elizabeth of Bohemia” (2001) 131 *Proceedings of the Society of Antiquaries of Scotland* 327.

⁴⁸⁰ Mackenzie, *Works* 503.

⁴⁸¹ The reports of Gilmour, Newbyth and Fountainhall are collected in Morison’s Dictionary. See (1666) Mor 9113; Brown’s Sup I 513, II 422.

In assessing the importance of the presumption, it is thus difficult to establish to what extent Stair's account is an accurate representation of contemporary legal debate. Further, it is not clear that the presumption was a significant departure from the previous practice, given the reference in *Quoniam Attachiamenta* to the owner swearing he had not sold or otherwise alienated the property. The attention given to the question of *bona fide* purchase indicates that it had become a focal point of legal contention. The presumption goes some way towards mitigating the burden placed on purchasers of moveable property, whilst maintaining the theoretical availability of the *vindicatio* to the original owner.

Scots developments in this area were not unique. A similar approach is found in Grotius' *Introduction to Dutch Jurisprudence*.⁴⁸² Grotius refers to a statement in the Code of Justinian that an owner must prove his or her ownership before he or she can compel another to restore his or her property.⁴⁸³ Possession (used here in the sense of physical occupation with intention to retain for oneself)⁴⁸⁴ was thus enough to place the burden of proof on anyone else who wished to claim ownership.

B. THE EIGHTEENTH CENTURY

(1) The Importance of the *Nemo Plus* Principle

The eighteenth century was an extremely rich period for legal writing in Scotland, with a profusion of juristic texts building on the work of Stair and Mackenzie to give reasoned and systematic accounts of Scots law as a distinctive body of learning.⁴⁸⁵ The principle that no one can transfer what he or she does not have maintained a central place in legal discourse relating to derivative acquisition. For example, the pursuer's argument in *Bell v Gartshore* was reported as being that "[i]n the transference of rights there is no principle more plain and equitable than that *Nemo plus juris tribuit quam ipse habet*. The assignee, therefore, *debet uti jure auctoris*."

⁴⁸² See Grotius, *Introduction* 2.2.7. Compare also Pufendorf, *Elements* I.V11.

⁴⁸³ C 3.32.28.

⁴⁸⁴ Grotius, *Introduction* 2.2.2. A lessee, borrower or depositary was not considered to be in possession: 2.2.3.

⁴⁸⁵ For an overview and evaluation, see Cairns, "Institutional writing".

This holds with regard both to real and personal rights.”⁴⁸⁶ In *Benton and Fowler v Brink*, the maxim was described by the pursuer as “the rule of reason.”⁴⁸⁷

Bankton discusses the *nemo plus* maxim at some length in the title of the *Institute* entitled “Rules of Law Illustrated”, also quoting the related maxim from D 50.17.175.1 “*non debeo melioris...*”⁴⁸⁸ He describes these principles as “founded in the nature of things, it being impossible, that there could be an effect without a cause”⁴⁸⁹ However, the *nemo plus* principle does not prevent the transfer of moveable property free from existing personal claims: “the *ipsa corpora* of moveables, as household-furniture, and other such goods, must pass likewise to purchasers, free of any embargo, by the deeds or debts of the sellers, for the facility of commerce.”⁴⁹⁰ The fact that a distinction is made by Bankton between real and personal claims,⁴⁹¹ with only real objections good against singular successors, demonstrates the limitations of the natural law approach: although one may be able to derive the *nemo plus* principle through application of natural reason, it is more difficult to deduce from first principles which claims should be enforceable against successors.

One way of overcoming this problem is by reference to the will of the owner. As in the work of Stair and Grotius, great emphasis is placed by the eighteenth-century writers upon the power of the owner to control the interactions of third parties with his or her property. Erskine writes that “if another had a right to dispose of the subject, or so much as use it, without his consent, it would not be his property, but common to him with that other.”⁴⁹² Forbes links this principle to a Lockean

⁴⁸⁶ *Bell v Gartshore* (1737), reported in G Ross, *Leading Cases in the Law of Scotland* (1850) vol 2 411. In a report in Morison’s Dictionary (at 2848), a slightly different formulation is reported: “*nemo dare potest quod ipse non habet*”.

⁴⁸⁷ (1761) Mor 11949 at 11954.

⁴⁸⁸ See A MacDouall (Lord Bankton), *An Institute of the Laws of Scotland in Civil Rights* (3 vols, 1993-1995) 4.45.100-4.45.107. The maxim “*non debeo melioris...*” is quoted at 4.45.102. On the maxim see ch 2 A(3)(b).

⁴⁸⁹ Bankton, *Institute* 4.45.100.

⁴⁹⁰ Bankton, *Institute* 4.45.105. It is assumed here that “deeds and debts” is, following Stair, *Institutions* 4.40.22, a reference to claims based on fraud and other personal exceptions.

⁴⁹¹ Bankton, *Institute* 4.45.102.

⁴⁹² J Erskine, *An Institute of the Law of Scotland* (1773) 2.1.1.

vision of property as consequence of and incentive to labour:⁴⁹³ “for no man would labour without hopes to enjoy as his own, and not to be quite deprived of it ... without his own consent.”⁴⁹⁴ Building on the civilian distinction between real and personal vices, cases in which there has been no form of consent to transfer (for example because the owner lacked capacity or the property was acquired by violence) can then be distinguished in a principled manner from those instances in which consent has been improperly obtained (for example through fraud.)⁴⁹⁵

(2) The Position of the *Bona Fide* Purchaser

(a) *Forbes*

Like Stair, Forbes expresses concern about the promotion of commerce⁴⁹⁶ but recognises a fundamental right of the owner to recover property transferred without his or her consent. A *bona fide* purchaser must “make restitution without getting the price he paid and recur for that to his warrandice against the seller”.⁴⁹⁷ “[T]he nature of movables that require to be current in all kinds of bona fide commerce”⁴⁹⁸ prevents undisclosed hypothecs and burdens, apart from the landlord’s hypothec,⁴⁹⁹ from affecting *bona fide* purchasers.

(b) *James Innes*

James Innes was a Scot living and working in London; his text appears to have been primarily aimed at giving an English audience a basic understanding of Scots law, “for it’s the Collation and Observation of the Constitutions of other Countries, that makes a Person thoroughly Master of the Laws of his own.”⁵⁰⁰

Given the brevity of the volume (it is 142 printed pages) and its introductory

⁴⁹³ There is a voluminous literature on Locke; for a discussion of his ideas about labour in the context of natural law thought see Buckle, *Natural Law* ch 3, esp. at 150-151.

⁴⁹⁴ W Forbes, *A Great Body of the Law of Scotland* University of Glasgow MS Gen 1246-52 at 340.

⁴⁹⁵ See for example Stair, *Institutions* (1693) 1.17.14.

⁴⁹⁶ See Forbes, *Great Body* 352; 778.

⁴⁹⁷ Forbes, *Great Body* 357.

⁴⁹⁸ Forbes, *Great Body* 778.

⁴⁹⁹ On which see ch 4 D(2)(c).

⁵⁰⁰ J Innes, *Idea Juris Scotici: or, a Summary View of the Laws of Scotland* (1733) preface, j. On Innes, see Cairns, “Institutional Writing” 91-92.

nature, it would be unwise to rely on it too heavily. However, one observation is made which is worthy of attention:

the Venditions of Moveables ... are sustained, tho' not made by the real Owners of them. But in the Alienation of Lands, the Seller is Necessarily required to be true Proprietor, or otherwise the Buyer loses his Right.⁵⁰¹

The other sources considered contradict this statement, but, although without further evidence it must be presumed to be incorrect, it highlights the ease with which the Scots position could be distorted. It is not clear whether the English doctrine of market overt influenced Innes' recollections of Scots law; it is later shown that the availability of greater protection for purchasers in England played some role in shaping Scottish debates.

(c) *Bankton*

Bankton's account is heavily influenced by that of Stair.⁵⁰² He states that "things *bona fide* acquired from others than the proprietors, in a fair way of trade, or by lawful deeds: these ought likewise to be restored to the right owners, without returning the price, which must be sued for against the author,"⁵⁰³ for "it is incident to real rights of property, that if we lose the possession of things belonging to us, there is an action competent for recovering them from all havens or detainers."⁵⁰⁴ The English rules protecting *bona fide* purchasers, even of stolen goods, in open market, are noted,⁵⁰⁵ but there is no extensive commentary on them, or suggestion that they would be suitable for Scotland. Statutory provisions restricting the operation of the market overt rule in favour of original owners, for example in the case of stolen horses, are also mentioned.⁵⁰⁶ Authority for the proposition that "we allow not that privilege of fairs, which elsewhere takes place"⁵⁰⁷ is given as the cases of *Ferguson v*

⁵⁰¹ Innes, *Idea Juris* 52.

⁵⁰² See for example the reference to "expediency [and prevention of] suits" at 1.8.11, which is reminiscent of Stair's reference to "utility and common quietness' sake" in *Institutions* (1693)1.7.12.

⁵⁰³ Bankton, *Institute* 1.8.11.

⁵⁰⁴ Bankton, *Institute* 2.1.1.

⁵⁰⁵ Bankton, *Institute* 1.8. (Observations upon the law of England) 1.

⁵⁰⁶ Bankton, *Institute* *ibid.*

⁵⁰⁷ Bankton, *Institute* 2.1.34.

Forrest,⁵⁰⁸ *Scot v Sir John Fletcher*⁵⁰⁹ and *Boid [Boyd] v Hay*,⁵¹⁰ indicating acceptance of Stair's account of the presumption of ownership from possession.⁵¹¹

Bankton also refers to *ius commune* works, demonstrating particular reliance on Dutch jurists as sources of shared Romanist principle.⁵¹² The rule that an owner can recover property alienated by a dishonest borrower is said to be “plain from the civil law [and] is conform to the custom of other countries.”⁵¹³ Voet's *Commentarius ad Pandectas* and the *Censura forensis* of Simon van Leeuwen are cited in support of this contention.⁵¹⁴ Both Voet and Van Leeuwen describe local statutes restricting the extent to which the owner can recover from a *bona fide* purchaser but conclude that, whatever the commercial arguments in favour of such provisions, as these statutes go against the common law (“*juris communis*”)⁵¹⁵ they should be strictly interpreted. Although the Roman law position prevailed, there is evidence that Roman-Dutch rules protecting purchasers also had some influence on the development of Scots law. The maxim “*mobilia non habent sequelam*” (moveables cannot be followed) is referred to by Bankton at numerous points, but it is not clear exactly what the scope of this maxim is and how it applies in Scotland.⁵¹⁶

⁵⁰⁸ (n 341), discussed in ch 2 D(2)(a).

⁵⁰⁹ (n 464), discussed in ch 3 A(3)(c).

⁵¹⁰ (1712) Mor 11632, which concerned the presumption of ownership arising from a widow's possession of her husband's moveables.

⁵¹¹ Stair also cites *Ferguson and Fletcher* in *Institutions* (1693) 2.1.42.

⁵¹² On the continuing importance of the *ius commune* in the first half of the eighteenth century, see Cairns, “Historical Introduction” 162-163. See also B(3)(b)(i) below.

⁵¹³ Bankton, *Institute* 4.24.37.

⁵¹⁴ J Voet, *Commentarius ad Pandectas* (vol 1 1698; vol 2 1700) 6.1.12 and S van Leeuwen, *Censura Forensis theoretico practica* (1662) 4.7.15.

⁵¹⁵ The cited passages from Voet and van Leeuwen both refer to this concept.

⁵¹⁶ The original sense of this maxim seems to have been that an undisclosed hypothec could not be enforced against a third party: *mobilia non habent sequelam* “*per hypothecam*” or “*hypothecae*”. On the application of the maxim in Roman-Dutch law, see J H A Lokin, F Brandsma and C Jansen, *Roman-Frisian Law of the 17th and 18th Century* (2003) 104-114 and on French law see A G Pos, “Meubles n'ont pas de Suite: Le sens Originnaire de Cette Règle en Droit Française” (1973) 41 *Tijdschrift voor Rechtsgeschiedenis* 45. At some points Bankton appears to use the maxim in this sense, for example *Institute* 1.17 Observations on the law of England 10: “If the creditor does not possess the goods, but leaves the owner in the possession, a purchaser from him is safe, by the rule that *Mobilia non habent sequelam*”; see also 3.1.32. H Home, Lord Kames, *Principles of Equity* (1760) 278 is consistent with this. At 1.10 65 the maxim seems to amount to a restatement of the rule that personal exceptions are not enforceable against *bona fide* purchasers: “nor will the deceit of the seller be good against a purchaser of moveables, *Quae non habent sequelam*”. This is also the case at 4.24.37: “whereas if a claim is founded on a personal obligation, a purchaser is safe against it, on the principle, that *mobilia...*”

(d) *Kames*

Kames' account of the development of rules protecting ownership reflects his theories about the relationship between law and society,⁵¹⁷ with a settled agricultural society naturally involving a stronger nexus between person and thing which required legal protection:

Property, it is certain, is a very great favourite of human nature, and is frequently the subject of a very strong affection. In the fluctuating state of human affairs, before regular governments were formed, property was seldom so permanent as to afford great scope to this affection. But in peaceable times, under a steady administration of law, the affection for property becomes exceedingly strong, which of course, fortifies greatly the relation of property.⁵¹⁸

Property is further necessary to encourage "labour and industry"⁵¹⁹ in relation to objects we consider our own. Kames notes that the affection that we bear for things we consider our own often "enhances the Value of it in our Imagination above Reality, and above the value we attribute to any other Thing,"⁵²⁰ prefiguring the work of modern economists and psychologists on the psychological aspects of ownership.⁵²¹ Perhaps influenced by David Hume,⁵²² Kames argues that this "consciousness of property", which makes the object particularly valuable to the owner, can be lost over lapse of time.⁵²³ On the other hand, a *bona fide* possessor, over time, will also develop affection for the thing.⁵²⁴ In this situation it is "against nature and reason" to return the thing to the original owner.⁵²⁵

⁵¹⁷ On Kames' conjectural history generally, see Stein, *Legal Evolution* 25-29. See also A Rahmatian, "The Property Theory of Lord Kames (Henry Home)" (2006) 2(2) *International Journal of Law in Context* 177.

⁵¹⁸ H Home, Lord Kames *Historical Law Tracts* (1758) 143.

⁵¹⁹ H Home, Lord Kames, *Essays Upon Several Subjects in Law* (1732) 100.

⁵²⁰ Kames, *Essays* 101. See also *Elucidations Respecting the Common and Statute Law of Scotland* (1777) 230.

⁵²¹ See ch 5 C(3).

⁵²² D Hume, *A Treatise of Human Nature*, 2nd edn rev and ed by P H Nidditch and L Selby-Bigge (1978) 509: "property being produced by time ... is the off-spring of the sentiments, on which alone time is found to have any influence." See generally Buckle, *Natural Law* ch 5.

⁵²³ Kames, *Essays* 102.

⁵²⁴ Kames, *Essays* 104-105. See also *Elucidations* 230.

⁵²⁵ Kames, *Essays* 103.

Kames recognises, however, that both the *bona fide* purchaser and the original owner may make a persuasive case for their right; “[b]etwixt pretensions so equally balanced, how can a judge otherwise interpose than by pronouncing, quod potior est conditione possidentis?”⁵²⁶ He argues that early laws tend to favour the possessor, referring to a number of German sources including Johann Gottlieb Heineccius⁵²⁷ account of the Germanic “hand wahre hand” rule,⁵²⁸ David Mevius⁵²⁹ commentary on the law of Lubeck⁵³⁰ and Benedict Carpzov’s⁵³¹ work on the law of Saxony.⁵³²

Kames is of the opinion that the ancient law of Scotland did not allow recovery of stolen goods from a *bona fide* purchaser due to the fact that, according to a statute of 1661, the whole estate of a convicted thief was forfeited to the Crown.⁵³³ It is true that this statute claimed to tackle the problem of “lords of regalities and other justiciars pretending right to [...] goods stolen”, but in light of the sources discussed in Chapter 2 it is conjectured that this problem would only arise where the owner of the stolen property was unable to recover it before the thief was executed and his or her property seized by the Crown. More substantial evidence would be necessary to support Kames’ proposition that an owner could never recover stolen goods.⁵³⁴

The “borgh of haim-hald” also had the effect, according to Kames, of

⁵²⁶ Kames, *Law Tracts* 131.

⁵²⁷ (1681-1741). For a detailed discussion of Heineccius’ writing on this topic see W Hinz, *Die Entwicklung des gutgläubigen Fahrnisserwerbs in der Epoche des usus modernus und des Naturrechts* (1991) 177-188.

⁵²⁸ *Elementa Iuris Civilis secundum Ordinem Pandectarum* (1728) Part 2 §86.

⁵²⁹ (1609-1670).

⁵³⁰ *Commentarius in Ius Lubecense* (1642) 4.1.2. Mevius’ work in many ways laid the foundations for the contemporary German jurisprudence on *bona fide* purchase, see Hinz, *Entwicklung* ch 2; A Völkl, *Das Lösungsrecht von Lübeck und München* (1991) 55-59.

⁵³¹ (1595-1666).

⁵³² *Jurisprudentia forensis Romano-Saxona* (1638) Part 4 Constitutio 32 Definitione 23.

⁵³³ Kames, *Law Tracts* 136, citing RPS 1661/1/295.

⁵³⁴ Kames also cites a regulation prohibiting buying and selling except in open market (this is perhaps a reference to the rule set out in Balfour, *Practicks* 528, discussed in ch 2 C(4)), but it does not logically follow from this that a *bona fide* purchaser in open market was protected against recovery.

rendering a purchaser in open market “secure against all the world”,⁵³⁵ with the seller or the “borgh” liable to the original owner in damages. He admits, however, that judges would now be “in hazard” of permitting a *rei vindicatio* against a purchaser in open market. While there is some doubt⁵³⁶ over the effect of obtaining a “borgh”, the evidence cited by Kames⁵³⁷ does not fully resolve the issue. In *Macpherson v Grant*, the borgh did not protect a buyer of stolen goods and indeed, was even argued by the pursuer to be an indication that the defender had engaged in a suspicious transaction and was accessory to the theft.⁵³⁸

Defending prescription, rather than instantaneous *bona fide* acquisition, Kames points out that the cause of security of property can actually be served by a system of cutting off claims: possessors secured in their possessions are more likely to make industrious use of them, and pleas “pernicious to society” such as claims of fraud or forgery in the distant past will be eliminated.⁵³⁹ Moreover, it is often impossible to evidence original acquisition.⁵⁴⁰ Although it is a “sacred” rule that no person’s property should be taken from him or her without consent, security of property is a complex notion and the purposes served by a system of property law may require exceptions to be made.⁵⁴¹ Indeed, the English rules on market overt are contended to be, not for the promotion of commerce, but to “secure property” and protect individuals from “frequent forfeitures.”⁵⁴²

Kames’ comments here reflect his view of property as a system which has developed to serve certain ends of human society. It is “a principle of the law of nature, and [...] essential to the well-being of society, that men be secure in their possessions, honestly acquired. The right of an individual yields here to public utility...”⁵⁴³ This does not mean that property law rules can be assessed using a crude utilitarian calculus, but rather that legal doctrines cannot be detached from the

⁵³⁵ Kames, *Law Tracts* 143.

⁵³⁶ See in particular the discussion of *Gordon v Menzies*, above A(3)(b)(iii).

⁵³⁷ *Ancient Laws* 161, Fragment 4, discussed at ch 2 B(2)(e).

⁵³⁸ (1755) Mor 11671.

⁵³⁹ Kames, *Essays* 109. See also *Elucidations* 232.

⁵⁴⁰ Kames, *Elucidations* 232.

⁵⁴¹ Kames, *Essays* 106.

⁵⁴² Kames, *Law Tracts* 137.

⁵⁴³ Kames, *Elucidations* 233.

contexts in which they are required to serve, an insight equally applicable to contemporary debates.

(e) Erskine

Erskine's account is strongly Romanist, with little scope available for the protection of good faith possession. He makes clear at several points that an owner may always recover his or her property, even from a *bona fide* purchaser: "No person, though he should possess *optima fide*, is intitled to retain a subject, not his own, after the true owner appears and makes good his claim to it; for the strongest *bona fides* must give way to truth."⁵⁴⁴ This is seen as a consequence of the right of ownership itself.⁵⁴⁵

In his discussion of whether the *bona fide* purchaser should be entitled to fruits, Erskine argues that "the loss ought [in the case of fruits percepti by the *bona fide* purchaser] to fall on the owner, who had all the while neglected to look after his property"⁵⁴⁶ This interesting statement implies that the extent to which the owner may be thought to have been negligent is a factor which should be taken into account in the balancing of the interests of the owner and the *bona fide* purchaser. Although it is made only in the context of fruits, it suggests that in appropriate circumstances, the *bona fide* acquirer might actually be the more deserving party. As regards the importance of sale in a public market, it is further described as "contrary to both equity and public policy" that, according to the old Scots practice, the landlord could recover corns subject to his or her hypothec from a purchaser in a public market.⁵⁴⁷

(f) Case law

Contemporary judicial decisions, consistent with the Romanist approach, do not evidence much sympathy for the position of the *bona fide* purchaser. In *Leslie v Hunter*,⁵⁴⁸ despite the lack of *vitium reale* (i.e. theft) the presumption of ownership

⁵⁴⁴ Erskine, *Institute* 2.1.25, perhaps a reference to D 50.17.136.

⁵⁴⁵ Erskine, *Institute* 3.1.10.

⁵⁴⁶ Erskine, *Institute* 2.1.25. See also Forbes, *Great Body* 357.

⁵⁴⁷ J Erskine, *The Principles of the Law of Scotland: in the Order of Sir George Mackenzie's Institutions of that Law*, 5th edn (1769) 2.6.27. See also J Stewart, *Dirleton's Doubts and Questions in the Law of Scotland, resolved and answered*, 2nd edn (1762) 222.

⁵⁴⁸ (1752) Mor. 2660.

from possession was held to yield to the “truth”⁵⁴⁹ of the pursuer’s ownership. Counsel in *Robertson v MacGowan*⁵⁵⁰ referred to Voet’s *Commentarius*⁵⁵¹ to support the contention that a seller without right could transfer no right to another: “Nothing could give more encouragement to fraud on the one hand, and to a supine indifference in purchasers on the other”.⁵⁵² *Nemo plus* was also cited as a general principle in argument in *Benton and Fowler v Brink*,⁵⁵³ in which the disputed ship was nevertheless found to have been lawfully captured and auctioned as a prize.⁵⁵⁴

(3) Recovery of Moveables

(a) *The presumption of ownership from possession*

(i) Case law development

The eighteenth-century cases in which the presumption is referred to add little to Stair’s account of the doctrine. In *Pringles v Irvine of Gribton*,⁵⁵⁵ a question again arose between the holder of jewellery pledged by a non-owner, and the heirs of the original owner.⁵⁵⁶ On proof that the pledgor was not the owner the presumption was held to be displaced and the defender’s arguments rejected.⁵⁵⁷ Despite the fact that the presumption could be overcome, proving the *modus quo desit possidere* undoubtedly made recovery more difficult for an owner, as for example in a case where goods alleged to have been taken without consent were presumed to have been pledged to the defender in the absence of contrary evidence.⁵⁵⁸

(ii) Institutional accounts

⁵⁴⁹ Again perhaps a reference to D 50.17.136.

⁵⁵⁰ (Unreported. See *Information for Robert Robertson*, April 24th 1788. Available via Eighteenth Century Collections).

⁵⁵¹ At 4.3.3. See *Information (ibid.)* at 22.

⁵⁵² *Information (ibid.)* at 22.

⁵⁵³ (n 487) at 11954.

⁵⁵⁴ On the law relating to prize, see Bankton, *Institute* 2.2.11-2.2.20.

⁵⁵⁵ (1710) Mor 9123.

⁵⁵⁶ The jewels had originally belonged to the pursuers’ mother who had apparently been beheaded for adultery and conspiracy to falsely accuse her lover’s wife of poisoning; see A Alison, *Principles of the Criminal Law of Scotland* (1832) 369-370.

⁵⁵⁷ For another case in which the presumption was overturned, see *Warrander and Stirling v Alexander and Thomson* (1715) Mor 10609.

⁵⁵⁸ *Hariet [Hariot] v Cuningham* (1791) Mor 12405. For a further example in which it was not established beyond doubt how the pursuer parted with possession of the property, see *Fergusson v Officers of State* (1749) Mor 11618.

Whatever dissenting views had existed, Stair's account of the presumption was accepted by the jurists of the eighteenth century. In an extensive discussion, Forbes sets out the presumption in very similar terms to Stair, citing the same authorities along with additional references to the Civil and Canon law.⁵⁵⁹ "Because movables passing in commerce without writ, and often without witnesses perhaps thro a thousand hands, it were impracticable to instruct a progress of rights to them"⁵⁶⁰ He also cites Stair's comments that the property of fungibles and current money are transferred with possession.⁵⁶¹

Bankton mentions the presumption in a number of places, to the effect that a dispossessed owner of moveable property must libel not only that he was once owner, but that he lost possession otherwise than by voluntary alienation.⁵⁶² Erskine gives a similar account, referring to "the natural connection between property and possession."⁵⁶³ Again, the important role played by the presumption in moderating the dogmatic account of ownership to fit social circumstance is obvious: "Commerce could not have a free course, if it behoved the possessors of moveables, which often pass from hand to hand without either witnesses or writing, to prove the titles of their possession."⁵⁶⁴

(b) The owner's action for recovery

(i) Case law development

By this point, the distinction between an allegation of spuilzie, based solely on non-consensual⁵⁶⁵ dispossession, and a claim for restitution based on ownership, seems firmly established.⁵⁶⁶ The civil process for recovery of moveables was also clearly distinguished from a criminal proceeding, although an allegation of theft in the

⁵⁵⁹ Forbes, *Great Body* 353. Reference is made to D 41.2 and to the triennial prescription applicable to ecclesiastical benefices. See also 778-780.

⁵⁶⁰ Forbes, *Great Body* 378.

⁵⁶¹ Forbes, *Great Body* 352.

⁵⁶² Bankton, *Institute* 1.8.41, 1.8. (Observations upon the law of England) 25; 2.1.25; 2.1.32; 2.1.34.

⁵⁶³ Erskine, *Institute* 2.1.24.

⁵⁶⁴ Erskine, *Institute* 2.1.24.

⁵⁶⁵ Bankton refers to "Violent seizing or unlawful taking of possession of goods...without...consent": *Institute* 1.10.124.

⁵⁶⁶ See Bankton, *Institute* 1.10.126.

course of such an action was still treated extremely seriously.⁵⁶⁷ It remained the case, however, that in the course of a trial for theft, a Justiciary court (dealing usually with criminal cases) could order restitution and damages.⁵⁶⁸

Regarding the nature of the action for recovery, Roman terminology remains in evidence, but frequent reference is also made to restitution.⁵⁶⁹ In one fascinating case, *rei vindicatio* was found to be competent in respect of a collier who had moved to an alternative employer based on the pursuer's right of property in the collier.⁵⁷⁰ In theory, as in Justinianic law the action for vindication/ restitution was competent against the possessor, or one who had disposed of property in bad faith. This was acknowledged in *Scot v Low*⁵⁷¹ (in which case, however, no fraud was proved). If the defender had parted with possession in good faith, recovery was held in *Scot* only be available to the extent that the defender had been enriched (*lucratus*).⁵⁷²

Scotland's relationship with its *ius commune* heritage during this period is a complex one,⁵⁷³ but at least in the early eighteenth century, Dutch jurists such as Johannes Voet were particularly influential.⁵⁷⁴ Several references have been found to

⁵⁶⁷ In *Ogilvy v Forbes* (1685) Fountainhall, *Decisions* vol i 362, an allegation of theft in the course of a vindication gave rise to a defamation claim. It was accepted that although the action was "was only *civilis rei vindicatio*" it had involved an accusation which impugned the honour of the defender.

⁵⁶⁸ See for example J Imrie (ed), *Justiciary Records of Argyll and the Isles 1664-1742 Vol II: 1705-1742* (1969) 261-275 in which the accused were ordered to make restitution of a cow belonging to another found in their possession and compensate them for damage sustained as well as being fined. See also 376, entry 331.

⁵⁶⁹ In *Scot v Low* (1704) Mor 9123, reference is made both to the *vindicatio* and restitution, the same is true of *Pringles* (n 555); *Benton and Fowler* (n 487); *Allan, Steuart and co v Stein's Creditors* (1788) Mor 4949. *Walker v Spence and Carfrae* (1765) Mor 12802 refers to restitution, as does *Liddel v Davidson* (1711) Mor 11589. *Hunter v Captain Keith Stewart* (1764) Mor 11957 refers to the *vindicatio*.

⁵⁷⁰ *Dundas v Macleod* (1754) Mor 2355, see also *Lockhart v Peck* (1725) Mor 2350 (a claim for restitution.) On the position of colliers, see B F Duckham, "Serfdom in Eighteenth Century Scotland" (1969) 54(181) *History* 178.

⁵⁷¹ (1704) Mor 9123.

⁵⁷² See also *Walker* (n 569), in which the defender had slaughtered and disposed of the sheep in question but as he had not been enriched was found not to be liable.

⁵⁷³ See Cairns, "Historical Introduction" 162-168.

⁵⁷⁴ See J W Cairns, "Importing our Lawyers from Holland: Netherlands' Influences on Scots Law and Lawyers in the Eighteenth Century", in G Simpson (ed), *Scotland and the Low Countries 1124-1994* (1996) 136; R Feenstra, "Scottish-Dutch Legal Relations in the Seventeenth and Eighteenth Centuries", in T C Smout (ed), *Scotland and Europe 1200-1850* (1986) 128.

Title 6 of Voet's *Commentarius ad Pandectas*;⁵⁷⁵ for example, discussion of the scope of the *vindicatio* in *Robertson's Creditors v Udnies and Patullo* is based around Voet's title *De rei vindicatione*.⁵⁷⁶ Stair's account of restitution does not appear to have displaced a fundamentally Romanist understanding of the owner's action,⁵⁷⁷ finding most significance in cases concerning recovery of value rather than of the thing itself.⁵⁷⁸

(ii) Juristic accounts

The modern doctrinal confusion regarding how to reconcile Stair's moral obligation of restitution with Romanist property principles is evident in the eighteenth-century accounts. Forbes' treatment of the action for the recovery of moveables is based upon that of Stair. He mentions the obligation to restore the property of others under the title "Obligations arising from quasi contract", stating that it gives rise to an action for exhibition and delivery on the part of the owner.⁵⁷⁹ Following Stair, he distinguishes the Scots action for recovery based on the personal obligation of restitution from the Roman *vindicatio* based in property, a move which, to the extent that it denies the existence of a right to recover based in ownership, is inconsistent with both earlier case law and later doctrinal development.⁵⁸⁰

Bankton devotes a substantial title to restitution, which he classifies as a natural (as opposed to a conventional) obligation.⁵⁸¹ His structure draws upon that of Stair, covering lost and strayed goods, goods acquired from thieves and pirates, things acquired *bona fide* and then things given for a cause that fails and payments

⁵⁷⁵ Kenneth Reid describes the *Commentarius* as the "indispensable stand-by of eighteenth-century pleaders in Scotland": "Banknotes and Their Vindication in Eighteenth-Century Scotland", in D Fox and W Ernst (eds), *Money in the Western Legal Tradition* (Forthcoming, 2014), available at SSRN: <http://ssrn.com/abstract=2260952> at 13.

⁵⁷⁶ (1757) Mor 4941. See also the reference to *Commentarius* 6.1.14 in *Robertson* (n 550) at 20. Argument in *Crawford v The Royal Bank* (1749) Mor 875 cited *Commentarius* 6.1.8: Reid, "Banknotes" 13.

⁵⁷⁷ A similar pattern is observed by Carey Miller in South Africa, where Voet was also extremely influential: *The Acquisition and Protection of Ownership* (1986) 264.

⁵⁷⁸ Reference is made to *Institutions* 1.7.10 in *Walker* (n 569). A relevant passage in the *Institutions* seems to have been ignored in litigation regarding vindication of banknotes in *Crawford* (n 576), see Reid, "Banknotes" 15, although the relevant text was not in the title on restitution.

⁵⁷⁹ Forbes, *Great Body* 905.

⁵⁸⁰ Forbes, *Great Body* 1688-1689.

⁵⁸¹ Bankton, *Institute* 1.8.

made in error.⁵⁸² However, his characterisation of the owner’s right to recover is grounded in civilian learning and seems more overtly Romanist in outlook. He makes reference to a rich range of continental jurists,⁵⁸³ including the Belgian Paulus Christinaeus (1553-1681),⁵⁸⁴ Dutch jurists Simon van Groenewegen (1613-1652),⁵⁸⁵ Johannes Voet (1647-1713)⁵⁸⁶ and Simon van Leeuwen (1626-1682),⁵⁸⁷ as well as to Coke’s *Institutes*.⁵⁸⁸

As with Stair, the obligation to restore is based upon present possession: if the defender is no longer in possession, he or she will only be liable “as to the overplus of the price”.⁵⁸⁹ From the “right of restitution” (which is presumably correspondent to the obligation to restore) arises the action of exhibition and delivery, “which concerns all moveables, but especially writings in another’s possession.”⁵⁹⁰ Unlike Stair, Bankton does not criticise the Roman law’s lack of provision for specific recovery by the pursuer. *Rei vindicatio* is mentioned as an action which may be brought for the recovery of moveable property; if the defender does not restore the property in question, he or she will be denounced as a rebel.⁵⁹¹ A (probably interpolated)⁵⁹² passage from the Digest is cited as authority for the proposition that if the defender does not restore the thing, it may be seized by force.⁵⁹³

In terms of classification, the owner’s action for recovery is ascribed a dual

⁵⁸² As well as covering the same topics, Bankton draws often on the examples and citations given by Stair, for example the citing the same Digest passage and chapter of Deuteronomy as Stair and Grotius: 1.8.1; 1.8.2.

⁵⁸³ On particularly the role of the Netherlands in the development of eighteenth-century Scottish legal education, see Cairns, “Netherlands’ Influences”.

⁵⁸⁴ Reference is made at 1.8.2 to his *In leges municipales civitatis ac provinciae [Mechlinensis] commentaria ac notae* (1625), but the citation appears to be wrong and cannot be identified.

⁵⁸⁵ At 1.8.30. The reference is presumably to the *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (1649).

⁵⁸⁶ 1.8.4, although the work is not cited the reference is presumably to the *Commentarius*.

⁵⁸⁷ His *Censura forensis* is referred to at 1.8.5 and 1.8.18.

⁵⁸⁸ Bankton, *Institute* 1.8.5.

⁵⁸⁹ Bankton, *Institute* 1.8.11, citing *Dick v Oliphant* (1677) Mor 1757.

⁵⁹⁰ Bankton, *Institute* 1.8.41.

⁵⁹¹ Bankton, *Institute* 4.41.15.

⁵⁹² See ch 2 A(2)(b).

⁵⁹³ Bankton, *Institute* 4.41.15.

nature close to the modern understanding:⁵⁹⁴ “[a]n action for the delivery of moveables, is either a Personal Action, or a Real, as it is founded on the defender’s obligation, or on the pursuer’s right of property; but the defender is decreed to deliver the thing, tho’ the pursuer’s claim be founded in his right of property in the same.”⁵⁹⁵ The precise relationship between the action for exhibition and delivery and the *rei vindicatio* is unclear, but, to the extent that a claim for delivery is also founded on the pursuer’s right of property, bringing one action will preclude bringing the other.⁵⁹⁶

Erskine discusses the duty placed upon possessors to restore goods belonging to another under the heading of obligations.⁵⁹⁷ His brief account is clearly based on that of Stair,⁵⁹⁸ and does not make any substantial additions. Later he refers to actions declaratory of property, which “conclude nothing against the defender.”⁵⁹⁹ These may be distinguished from petitory actions, in which “some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer.”⁶⁰⁰ An action for restitution of moveables, following Stair, is thus a petitory action.⁶⁰¹ It is unclear whether a declaratory action in respect of moveables (as Erskine and Stair would classify the *vindicatio*) is in use in Scots law. It is stated that declarators for heritable property are seldom brought;⁶⁰² presumably, if available at all, declarators in respect of moveable property were even more infrequent.

C. THE NINETEENTH CENTURY

(1) Possession and Ownership

⁵⁹⁴ See Reid, *Property* para 158. On understandings of the “real obligation” to restore in German law (the “Dingliche Ansprüche”), see C K Sliwka, *Herausgabeansprüche als Teil des zivilrechtlichen Eigentumsrechts?* (2012), esp at 534-535.

⁵⁹⁵ Bankton, *Institute* 4.24.2.

⁵⁹⁶ Bankton, *Institute* 4.24.36.

⁵⁹⁷ Erskine, *Institute* 3.1.18.

⁵⁹⁸ Stair’s division of obligations is expressly mentioned at 3.1.9 and 3.1.11. Like Stair, Erskine bases the obligation to restore on present “power or possession”. His Digest references, however, are not taken from Stair.

⁵⁹⁹ Erskine, *Institute* 4.1.46.

⁶⁰⁰ Erskine, *Institute* 4.1.47.

⁶⁰¹ Erskine, *Institute* 4.1.47.

⁶⁰² Erskine, *Institute* 4.1.46.

(a) *Separation of ownership and possession*

A recurring problem in nineteenth-century case law was the proliferation of credit devices separating possession and ownership such as hire purchase.⁶⁰³ These divided judicial opinion. In *Acme Machine Co v Scanlan*, the owner of a wringing machine was criticised by Sheriff-Substitute Guthrie for “enabling their customers to commit frauds on themselves and others” by delivering the machines on terms of hire purchase.⁶⁰⁴ It was opined that the defender pawnbroker should not have to take “extraordinary precautions” to ensure that customers owned pledged property.⁶⁰⁵ The pursuers were not allowed to recover their machines without repaying the sums advanced by the pawnbrokers.

It was (and is) difficult to distinguish a valid sale and subsequent lease back to the original owner from a sale *retenta possessione*⁶⁰⁶ (then not a valid means of transferring ownership in Scots law).⁶⁰⁷ In *Shearer v Christie*, Lord Mackenzie referred to “the danger of holding that by a mere secret agreement, whether oral or written, without any act of delivery or change of possession, a husband may transfer all or part of the moveables belonging to him to his wife, so as to exclude the diligence of his creditors, and that post contractum debitum, seems very considerable.”⁶⁰⁸ In *Orr’s Tr v Tullis* a distinction was drawn by Lord Justice Clerk Moncreiff between cases where the seller simply continues to detain the thing and

⁶⁰³ The use of contracts of hire with an option or obligation to purchase at the end of a specified period seems to have become widespread in the UK during the mid-nineteenth century. It was principally used in respect of specific large items such as furniture, pianos, sewing machines and musical instruments. By 1891 there were perhaps 1 million hire-purchase agreements in existence. See *Consumer credit: Report of the Committee* (Cmnd 4596: 1971) at paras 2.1.37-2.1.50. As a wider variety of consumer goods became available in the first half of the twentieth century its use changed. Another important factor was the invention of the motor vehicle, which became increasingly widespread from the 1920s on.

⁶⁰⁴ (1887) 3 Sh Ct Rep 148 at 149. See A J M Steven, *Pledge and Lien* (2008) paras 6-43-6-47

⁶⁰⁵ *Acme*, *ibid.* at 149-150.

⁶⁰⁶ See G J Bell, *Commentaries on the Municipal & Mercantile law of Scotland: Considered in Relation to the Subject of Bankruptcy* (1804) 236; *Orr’s Trs v Tullis* (1870) 8 M 936 especially at 950-951 per Lord Neaves; *Robertson and Another v M’Intyre* (1882) 9 R 772.

⁶⁰⁷ See for example *Carse v Halyburton* (1714) Mor 9125; *Sim v Grant* (1862) 24 D 1033; *M’Arthur v Brown* (1858) 20 D 1232; *Hewat’s Tr v Smith* (1892) 19 R 403. In *Scott v Scott’s Tr* (1889) 16 R 504, the provisions of the Mercantile Law Amendment (Scotland) Act 1856 regarding sales not yet completed by delivery were held to protect the purchaser.

⁶⁰⁸ (1842) 5 D 132 at 141.

where a “new title of possession, specific and determinate” is acquired.⁶⁰⁹ In such situations although there is not a transfer of natural possession there is a transfer of civil possession. There seems to have been a presumption that such a transaction was not a genuine one, but this was rebutted if it was shown to have been conducted in good faith.⁶¹⁰

It was not always the case that moral evaluation of the act involved was negative. For example, Lord Cuninghame opined in *Shearer* that the deed concerned was an “onerous and praiseworthy act”.⁶¹¹ In *Anderson v Buchanan*, Lord Moncreiff (dissenting) referred to the purchase of a bankrupt’s furniture by a friend as “fairly and openly transacted, and... so just, humane and right.”⁶¹² In *Thomson v Scoular*, Lord Young found the sale to a friend of the bankrupt to be an “honest” transaction which had actually benefited the creditors.⁶¹³

(b) “Reputed ownership”

(i) Basis

Perhaps as a response to these tensions, the concept of “reputed ownership” developed to protect acquirers relying on the apparent ownership of a possessor. This doctrine seems to have emerged from the work of Bell, who bases it in “collusion, or gross negligence” on the part of the owner.⁶¹⁴ According to Lord M’Laren’s notes to the 7th edition of Bell’s *Commentaries*, the doctrine of “ostensible ownership” is a form of “estoppel” based in fraud and collusion.⁶¹⁵ Lord Gifford in *Marston v Kerr’s Tr* describes it as applying to cases “where the true owner allows another to assume publicly the appearance of ownership, and to do acts which imply ownership, and so to deceive and mislead creditors by raising a false ground of credit”⁶¹⁶ Fraud and

⁶⁰⁹ (n 606) at 946. See also comments by Lord Blackburn in *M’Bain v Wallace* (1881) 8 R (HL) 106 at 112-113.

⁶¹⁰ *Orr’s Trs* *ibid.* at 947.

⁶¹¹ (n 608) at 142.

⁶¹² (1848) 11 D 270 at 283.

⁶¹³ (1882) 9 R 430 at 433.

⁶¹⁴ Bell, *Commentaries* (1804) 232.

⁶¹⁵ Notes to Bell, *Commentaries*, 7th edn (1870) vol 1 305. The doctrine is described as based on personal bar in *George Hopkinson Ltd v Napier and Son* 1953 SC 139 per Lord President Cooper at 147.

⁶¹⁶ (1879) 6 R 898 at 901.

holding out are also mentioned in *Dougall v Marshall*.⁶¹⁷ Some of the earliest cases reported under the heading of reputed ownership concern agents.⁶¹⁸

There is some doubt about the extent to which the doctrine was “borrowed from the law and practice of England”.⁶¹⁹ Bell describes a “rule of the common law, grounded on the principles of justice and equity” equivalent to the English statutory rule.⁶²⁰ In *Anderson* Lord Moncreiff referred to a principle borrowed from English law based on fraud and unfair collusion.⁶²¹ In *Marston v Kerr’s Tr.* the English law is treated as relevant but not determinative of the Scottish position.⁶²² Mungo Brown describes the English statutory reputed ownership⁶²³ under s 10 of the Bankruptcy Act 1623 causing “perplexity and confusion of principle.”⁶²⁴

The doctrine may also reflect confusion about the role of the presumption of ownership from possession.⁶²⁵ In *Anderson*, Lord Justice Clerk Hope relies on what appears to be a form of irrebuttable presumption of ownership from possession of domestic goods.⁶²⁶ This has been criticised.⁶²⁷

(ii) Effect

Where the doctrine applied, it appears that it prevented the true owner from recovering the thing: “reputed ownership has the effect of causing moveable property, that really is transferred *habili modo*, to be held, in a question with creditors, as the property of the disponent, their debtor, in whose possession it had

⁶¹⁷ (1833) 11 S 1028.

⁶¹⁸ *Attwood v Kimiears* (1832) 10 S 817; *Fleming v Findlay & Co* (1832) 10 S 739.

⁶¹⁹ *Shearer* (n 608) per Lord Cuninghame at 146.

⁶²⁰ Bell, *Commentaries* (1804) 230.

⁶²¹ (n 612) at 281.

⁶²² (n 616).

⁶²³ This was originally introduced by s 10 of the Bankruptcy Act 1623 (21 Jac. I 19), see J de Lacy, “The evolution and regulation of security interests over personal property in English law”, in J de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (2010) 3 at 13-14.

⁶²⁴ M P Brown, *A Treatise on the Law of Sale* (1821) 537.

⁶²⁵ W M Gloag and J W Irvine, *Law of Rights in Security* 237.

⁶²⁶ (n 612) at 276-277. See also the comments of Lord Cockburn at 284.

⁶²⁷ Gloag and Irvine, *Rights in Security* 237; *Orr’s Trs v Tullis* (1870) 8 M 936 at 951 per Lord Neaves; *Marston* (n 616) at 900 per Lord Ormidale.

been allowed to remain.”⁶²⁸ As with the later doctrine of personal bar there is some doubt as to whether the effect was to confer a fully valid right on those relying on the reputed ownership.⁶²⁹

The scope of the acquirer’s protection was, however, limited; “there is hardly [...] any doctrine in law which admits of more qualifications and exceptions.”⁶³⁰ Even in 1882 reputed ownership was “no longer of much importance”.⁶³¹ Possession alone was not enough for the doctrine to apply,⁶³² and allegations of fraud had to be assessed in each separate case.⁶³³ If property was held on some legitimate contract no question of reputed ownership could arise:⁶³⁴ “[n]o one is entitled to attribute possession to a title which would carry the property, where there is a subordinate title to which it may be ascribed”.⁶³⁵ It was further settled that the owner could recover property pointed while in the possession of another.⁶³⁶

(2) The Position of the *Bona Fide* Purchaser

(a) Case Law development

During the nineteenth century, Scots law saw an increasing focus on the judicial decision as a means of legal development. It has been suggested that this enhanced the importance of links with the English legal system, which already placed great

⁶²⁸ *Shearer* (n 608) at 141 per Lord Mackenzie.

⁶²⁹ See ch 4 D(2)(b).

⁶³⁰ *Shearer* (n 608) per Lord Cuninghame at 146.

⁶³¹ *Robertson and Another* (n 606) at 778 per Lord Justice Clerk Moncreiff.

⁶³² *Shearer* (n 608) per Lord Cuninghame at 146.

⁶³³ *Shearer* (n 608) per Lord Ivory at 149.

⁶³⁴ *Scott v Price* (1837) 15 S 916; *Anderson* (n 612) at 275 per Lord Justice Clerk Hope; *Marston* (n 616); *Duncanson v Jefferis’ Trustee* (1881) 8 R 563; *Hogarth v Smart’s Tr* (1882) 9 R 964 at 967 per Lord Justice Clerk Moncreiff, although Lord Rutherford Clark reserved his opinion as to the position of a creditor doing diligence or a trustee in sequestration at 969; *The Distillers Co Ltd v Russell’s Tr.* (1889) 16 R 479 per Lord Shand at 498; *Glen v Cameron & Cameron* (1896) 3 SLT 231. Gloag and Irvine, *Rights in Security* 237 accept this view.

⁶³⁵ *Hogarth ibid.* at 967. See also *Shearer* (n 608) per Lord Cuninghame at 146 and *Marston* (n 616) 898 at 901 per Lord Gifford. In *Edmond v Mowat* (1868) 7 M 59, property sold but remaining in the custody of a bankrupt was held to form part of his estate on a second sequestration, but the exact justification for this is not clear.

⁶³⁶ *Hamiltons v Sheriff-Depute of Perthshire* (1564) Mor 10505; *Cotts v Harper* (1675) Mor 10513; *Harkies v Welsh and Cuming* (1789) Mor 14077.

emphasis upon precedent.⁶³⁷ In several cases it was argued that there was, or should be, increased protection for the *bona fide* purchaser in Scots law. An especially interesting debate took place in *Henderson v Gibson*.⁶³⁸ Numerous reasons for the judicial development of a rule protecting *bona fide* purchasers were given; Scottish society was argued to have advanced so much that it would be unjust to apply the former rule.⁶³⁹ The custom of purchasers obtaining security by demanding a *borgh of haimhald* was argued to have fallen into desuetude, so that anyone now attempting to demand a *borgh* would be “looked upon as a madman”.⁶⁴⁰

Blackstone’s account of the English doctrine of market overt was also cited,⁶⁴¹ and although it was recognised that Scots law differed on this point, it was implied that it would be beneficial to commerce to adopt the English position:

[I]t is impossible to suppose that the fair trader has been left without that security which is absolutely essential to commerce...in the same manner as in England, from which we have borrowed most of our commercial regulations...the altered state of the country calls for a rule which is more applicable to its present situation.⁶⁴²

Although the arguments in *Henderson* were not successful, there are several points about them which are worthy of attention. The concerns expressed reflect a number of broader nineteenth-century debates, for example in the emphasis on harmony between English and Scots law, particularly in commercial matters.⁶⁴³ Further, not only is it recognised that law should adapt to the state of society, but it is implied that the judiciary can, and should, update the law where necessary. Indeed, it is contended that, in other cases, it has been expedient to discard the existing Scots law in favour

⁶³⁷ J W Cairns, “Droit écossais”, in A Wijffels (ed), *Le Code civil entre ius commune et droit privé européen* (2005) 117-149 at 134. On precedent in nineteenth-century Scots law, see Maher and Smith “Judicial Precedent” para 252.

⁶³⁸ (1806) Mor App. Moveables 1.

⁶³⁹ *Henderson v Gibson*, *Hume’s Session Papers* vol 91 36 at 5.

⁶⁴⁰ *Henderson*, *ibid.* at 7.

⁶⁴¹ See W Blackstone, *Commentaries on the Laws of England* (1765-1769) II 449, cited in the arguments for Gibson at 11.

⁶⁴² *Henderson* (n 639) at 9.

⁶⁴³ It was this emphasis on harmonisation of commercial law that eventually led to the enactment of the Sale of Goods Act, discussed in ch 4 D(3)(a).

of an English rule.⁶⁴⁴

In *Dunlop and Co v Earl of Dalhousie*,⁶⁴⁵ the Scottish doctrine protecting *bona fide* purchasers in public market from the landlord's hypothec was likened in the House of Lords to the English doctrine of market overt.⁶⁴⁶ The Lords ultimately held that the hypothec was enforceable against purchasers at a sale by sample; the publicity caused by "open exposure" of the goods was seen by the judges in the Inner House as a crucial factor in determining whether a purchaser should be able to take free of the hypothec.⁶⁴⁷ Lord Alloway, dissenting, echoed Adam Smith⁶⁴⁸ in referring to the "unprecedented advance of this country in commerce" and its "particular [geographical] situation" as factors advocating protection of purchasers.⁶⁴⁹

(b) *Bell's Commentaries*

(i) Context

Perhaps the closest Scots law has come to adopting a general rule protecting the *bona fide* purchaser of moveable property is the suggestion of George Joseph Bell that such a purchaser acquired ownership, unless a real vice such as theft was involved. The 1804 and 1810 editions of Bell's *Commentaries* do not explicitly detail such a rule.⁶⁵⁰ A clear distinction is made between real and personal rights;⁶⁵¹ "[t]he direct right which we have in a thing; that by which we call it ours, [...] which entitles us, by every means in our power, to defend it, or, if violently carried off, to recover it; is called "jus in re".⁶⁵²

⁶⁴⁴ *Henderson* (n 639) at 10.

⁶⁴⁵ (1830) VII Bligh NS 422.

⁶⁴⁶ *Dunlop ibid.* at 429.

⁶⁴⁷ *Earl of Dalhousie v Dunlop* (1828) 6 S 626 at 630. In the House of Lords it was eventually held that, in the case of a sale by sample, the protection for *bona fide* purchasers of goods subject to the hypothec did not apply.

⁶⁴⁸ See for example A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 5th edn (1904) I.I.3.

⁶⁴⁹ *Earl of Dalhousie* (n 647) at 632.

⁶⁵⁰ Bell, *Commentaries* (1804) vol 2 165 emphasises the necessity of the owner's consent to transfer. See however, the statement at 187 that "[A] depositary may indeed fraudulently sell the deposit, and a purchaser in market may be safe against the claim of the proprietor for restitution..." Bell, *Commentaries on the Laws of Scotland: and on the Principles of Mercantile Jurisprudence*, 2nd edn (1810) 151 refers to a principle that "goods, in the hands of factors and others, may no doubt be effectually sold to persons who have no notice of the want of title of the vendor."

⁶⁵¹ See for example Bell, *Commentaries* (1804) vol 2 38.

⁶⁵² Bell, *Commentaries* (1804) vol 2 38.

However, there is evidence throughout these works of a concern with the impact of legal doctrine on commercial life, and it is opined that “[i]t would clog the wheels of commerce, were purchasers exposed to continual and latent challenges of bargains, which at the time they regarded as perfectly fair and unquestionable.”⁶⁵³ Presumably in reference to Stair’s comments regarding fraud, Bell states that “the very existence of commerce requires that latent exceptions shall be unavailing against the purchaser. Commerce flourishes by the rapid circulation of commodities...”⁶⁵⁴

Reference is made to Simon van Leewin (van Leeuwen)’s account of the “lösungsrecht”: the right afforded to a *bona fide* purchaser in open market to demand refund of the price paid before vindication was permitted to take place.⁶⁵⁵ Several comments made by Voet regarding the introduction of *bona fide* purchase protection for the facilitation of commerce, and the avoidance of litigation are also quoted.⁶⁵⁶

(ii) Scope of Bell’s rule protecting good faith purchasers

It is in the third edition of the *Commentaries* in 1816, however, that Bell’s proposed doctrine is set out explicitly:

As possession presumes property in moveables, the purchaser of moveables at market or otherwise, in bona fide, acquires the right to them, although they may have been sold by one who is not the owner. This rule, of course, suffers the exception [of property affected by *labes realis*] but there are many cases in which persons intrusted with moveables may dispose of them, so as to raise this sort of question.⁶⁵⁷

⁶⁵³ Bell, *Commentaries* (1804) vol 2 42.

⁶⁵⁴ Bell, *Commentaries* (1804) vol 2 42.

⁶⁵⁵ Van Leeuwen, *Censura forensis* 2.11.4. On the history of the “lösungsrecht” see R Feenstra, “Revendication de meubles et ‘Lösungsrecht’ de tiers acquereurs (droit romain, droit wisigothique, droit coutumier médiéval en Espagne et dans le Midi de la France)”, in *Histoire du droit savant (13e-18e siècle)* (2005) 87.

⁶⁵⁶ Voet, *Commentarius* 6.1.8 and 6.1.12.

⁶⁵⁷ Bell, *Commentaries* (1816) vol 1 186.

The rule hence does not apply where the thing in question is affected by “radical defect” in title. (Examples of the types of problem covered by this term include incapacity⁶⁵⁸ and property obtained by theft or force and fear and or at “deathbed.”)⁶⁵⁹ Contradictory accounts are given as to whether property delivered under a contract for temporary possession such as deposit or lease falls within the scope of the rule.⁶⁶⁰

It seems significant that protection is not limited to property bought at public market (as was the case in England at this point). Perhaps in order to emphasise that this was not simply an adoption of the English position, Bell attempts to ground his account in the previous Scots sources (such as Stair’s doctrine that possession presumes ownership).

(iii) Reasons for introduction

One of the interesting things about Bell as a jurist is his sensitivity to the complex relationship between legal doctrine and economic and social life. Throughout his writings, he attends to any “difference of manners or change of principle which materially affects the rule of law, or the qualifications it receives by the opposition of contending rights.”⁶⁶¹ In this, he is perhaps influenced by the stadial theories developed during the eighteenth century by figures such as Adam Smith and Lord Kames, and their ideas about the differing role of law in different stages of human society.⁶⁶²

The primary justification advanced by Bell for the protection of *bona fide* purchasers is the need to safeguard trade and commerce. Indeed, the “the very existence of commerce” is said to be threatened by the availability of “latent exceptions” against such purchasers.⁶⁶³ Changing economic conditions require property law to facilitate the “rapid circulation of commodities” on which markets

⁶⁵⁸ In Bell’s terminology, pupillarity, lunacy or idiocy.

⁶⁵⁹ Bell, *Commentaries* (1816) vol 1 179.

⁶⁶⁰ See Bell, *Commentaries* (1816) vol 1 149; 187. Compare, however, statements at 186, which indicate that the owner may be prejudiced by a fraudulent depositary.

⁶⁶¹ Bell, *Commentaries* (1804) 130.

⁶⁶² On which see Stein, *Legal Evolution* ch 2.

⁶⁶³ Bell, *Commentaries* (1804) vol 2 42.

are now based.⁶⁶⁴ To place the burden of investigating title on the purchaser of such commodities is “inconsistent with the spirit and necessities of trade.”⁶⁶⁵

The view that the lack of protection for *bona fide* purchasers failed to meet the needs of contemporary society would have been given force by the critique of the insecurity of purchasers in *Henderson*,⁶⁶⁶ in which it was argued:

As this custom [of demanding a *borgh of haimhald*] has now gone into disuse, the purchaser at a market has no means of security; and it is highly expedient that the old law, adapted to this state of matters, should be modified to the existing circumstances of the country, in the same manner as has been done in other cases, when the ancient law was deemed incompatible with the present state of commercial transactions.

Finally, Bell advances an argument based on fairness to the buyer in good faith, who may be unable to protect himself against defects in the seller’s right. By contrast, the original owner of the goods will suffer some hardship, but “has himself to blame for choosing an unfaithful factor or depositary[.]”⁶⁶⁷ As the original owner is in a better position to guard against the risk of the goods being fraudulently disposed of, it is he or she who should bear the cost if this occurs.

(iv) Authority cited

The key authority cited by Bell in support of his claim that protection of *bona fide* purchasers already formed part of Scots law is a passage from Stair already quoted, the crux of which is that “the buyer [of moveables] is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes realis*”.⁶⁶⁸ As has been mentioned, however, Stair considered appropriation without the consent of the owner (for example by a depositary) as tantamount to theft. It seems likely that the statements in question were only intended to cover personal

⁶⁶⁴ Bell, *Commentaries* (1804) vol 2 42.

⁶⁶⁵ Bell, *Commentaries* (1804) vol 2 42.

⁶⁶⁶ (n 639).

⁶⁶⁷ Bell, *Commentaries* (1816) vol 1186.

⁶⁶⁸ Stair, *Institutions* (1693) 4.40.21.

defects affecting the seller's contract of acquisition, and not cases where the seller had no right to transfer at all.

The other authority quoted is Erskine:

There was also a necessity for extending [the doctrine that purchasers shall not be affected by the fraud of their authors, if they themselves have not been *participles fraudis*] to purchasers of moveable subjects, and to onerous indorsees in bills, to give a free course to commerce...⁶⁶⁹

This passage again deals only with fraud, a personal exception. It was certainly well established that a transfer tainted by fraud nevertheless conferred ownership on the acquirer.⁶⁷⁰ To permit a non-owner to transfer ownership is, however, an entirely different case; the original owner has not given any kind of consent to transfer. Such a radical extension would be contrary to how Bell himself understood the effect of fraud. The cited passages from Stair and Erskine do not, therefore, convincingly support a rule protecting *bona fide* acquirers based only on the voluntary transfer of possession.

(v) Influences

To what extent did English law provide a stimulus for these developments in Scots doctrine? Bell was clearly cognizant of the English doctrine of market overt, and makes reference to Blackstone and Coke.⁶⁷¹ He quotes, presumably approvingly, Coke's comment that the market overt rule is necessary so that "fairs and markets overt should be replenished, and well furnished with all manner of commodities vendible in fairs or markets, for the necessary substantiation and use of the people."⁶⁷²

⁶⁶⁹ Erskine, *Institute* 3.5.10.

⁶⁷⁰ For example, Bell describes fraud as an "unjustifiable means of inducing consent" which will not "annul the right" (in the sense of rendering it void from the outset): *Commentaries* (1816) 180, see also 189. See also Hume, *Lectures* vol 2 17 regarding comments in Erskine, *Institute* 3.3.8 and vol 3 238.

⁶⁷¹ *Commentaries* (1816) vol 1 186, citing Blackstone, *Commentaries* II 449 and Coke, *Institutes* II 713.

⁶⁷² Coke, *Institutes* II 713.

However, Bell also refers to Voet's *Commentarius*, which discusses various markets in the Netherlands in which stolen property could be acquired *bona fide*, subject to the original owner's right to buy it back.⁶⁷³ Voet reasons that this is to assist commerce, and protect buyers who are not in a position to assess the condition of their seller's title.⁶⁷⁴ He also discusses the arguments for and against allowing vindication of misappropriated entrusted property (promotion of commerce and fairness to buyers versus the interests of the original owner).⁶⁷⁵

What does this choice of sources say about Scots law and its relationship with the *ius commune* tradition? Bell seems to have chosen English and Dutch jurists in this instance not primarily because the law of either jurisdiction is persuasive in a Scottish court, but because they are both examples of successful trading nations, the laws of which face similar demands from the commercial arena. Rather than referring to a well of shared principle, as Scots jurists might have done in the past, Bell uses the laws of Holland as a useful comparator, a source for ideas which might be adapted to fit Scots law.⁶⁷⁶

(vi) Reception

How was this innovation received by the Scottish legal community? Just prior to the publication of the third edition of the *Commentaries* it had been held in *Alexander v Black*,⁶⁷⁷ in which George Joseph Bell appeared for the defender, that recovery was, in principle, possible where cattle were sold by a custodian to a *bona fide* purchaser. The pursuer had argued that there was no meaningful distinction between property which had been stolen, and that merely sold by a non-owner.⁶⁷⁸ It would place an unfair burden on an owner to allow the actions of a custodian to affect his or her

⁶⁷³ Voet, *Commentarius* 6.1.8 and 6.1.12.

⁶⁷⁴ Voet, *Commentarius* 6.1.8.

⁶⁷⁵ Voet, *Commentarius* 6.1.12.

⁶⁷⁶ This interpretation would be consistent with Cairns' description of a decreasing reliance on the civil law as a source of law in Scotland in the third quarter of the eighteenth century, see "Historical Introduction" 166-168.

⁶⁷⁷ 17th Jan 1816 FC.

⁶⁷⁸ *Patrick Alexander v John Black* (1815) *Hume's Session Papers* Vol 124 No 25 at 6.

right.⁶⁷⁹ Although the laws of other jurisdictions might provide for exceptions to the *nemo plus* rule, it remained the general principle.⁶⁸⁰ The English doctrine of market overt was also considered, but criticised as outdated.⁶⁸¹ Moreover, the doctrine should not be introduced to Scots law unless by statutory authority, as the existing law was sufficient.⁶⁸²

The defender argued for the commercial expediency of the English solution,⁶⁸³ but from the decision in the case, which appears to turn on the validity of the pursuer's acquisition of ownership, it seems that these contentions were ultimately rejected.⁶⁸⁴ Bell reports that this case was decided on special circumstances,⁶⁸⁵ but it is obvious that the idea that Scots law should follow English law in adopting special protection for *bona fide* purchasers did not meet with judicial favour.

The point is not specifically mentioned in Bell's *Principles*, in which proof of ownership along with how possession was lost (e.g. theft, loan, hire) is admitted to overcome the presumption of ownership from possession.⁶⁸⁶ That Bell remained in favour of protection for good faith purchasers is apparent from the ambiguous statement that "if one in lawful possession of a thing sell it to another without notice, the sale is good."⁶⁸⁷ However, his treatment in the *Commentaries* had been subjected to substantial criticism.

As set out above, there is little evidence supporting the previous existence of such a rule, which was contrary to the weight of institutional and judicial

⁶⁷⁹ Alexander *ibid.* at 4.

⁶⁸⁰ Alexander *ibid.* at 6-8.

⁶⁸¹ Alexander *ibid.* at 14.

⁶⁸² Alexander *ibid.* at 6.

⁶⁸³ Alexander *ibid.* at 9-11.

⁶⁸⁴ A note at the beginning of the session papers refers to Lords as finding that the delivery was "*dicis causa*" only; the sale to the pursuer and subsequent retention of possession by the fraudulent custodian was therefore an invalid attempt to create a non-possessory security, an issue discussed in much greater detail in subsequent chapters.

⁶⁸⁵ Bell, *Commentaries* (1816) vol 1 186.

⁶⁸⁶ G J Bell, *Principles of the Law of Scotland*, 4th edn (1839, repr 2010) paras 1314; 1315; 1320.

⁶⁸⁷ Bell, *Principles* (1839) para 529. It is unclear whether this refers to validity of the contract or of the transfer of ownership.

authority.⁶⁸⁸ Comments by Baron Hume in his *Lectures* contradicted the theory put forward by Bell, which Hume suggested was not supported by the Scots “practice”.⁶⁸⁹ Hume pointed instead to the presumption of ownership from possession as a means of protecting commerce and reducing the burden on purchasers of moveables.⁶⁹⁰ Bell was further criticised by Mungo Brown, who attacked the doctrinal coherence of his treatment, pointing out that in the case of a transfer affected by fraud, ownership passed to the fraudulent purchaser, albeit the conveyance was challengeable.⁶⁹¹ In the case of a depositee who transferred the property without consent of the owner, however, the depositee had never acquired any right of ownership in the property, and therefore, applying the *nemo plus* principle, could not transfer such to a third party.⁶⁹² For these reasons:

[the rule] appears to be not only inconsistent with the principles of law which regulate the transference of property, but is contrary to the doctrine laid down by our institutional writers and to the decisions of the Court in a series of cases.⁶⁹³

Brown’s concerns were shared by Lord M’Laren, who attacked Bell’s position in his notes to the seventh edition of the *Commentaries*. M’Laren also points out that the existence of such a rule was not justified by the sources cited, and that Bell had expanded the presumption that possession of moveables presumes ownership far beyond its intended scope:

[Bell] confounds the maxim that possession of moveables presumes property with the doctrine of ostensible ownership. The maxim alluded to is merely a rule of evidence- a *prima facie* presumption regulating the *onus probandi* in

⁶⁸⁸ As set out in this chapter generally and also in Brown, *Sale* 423-427.

⁶⁸⁹ See Hume, *Lectures* vol 3 232-233; 238.

⁶⁹⁰ Hume, *Lectures* vol 3 229.

⁶⁹¹ Brown, *Sale* 421.

⁶⁹² Brown, *Sale* 421. See also J S More, *Lectures on the Law of Scotland* (1864) vol 1 297.

⁶⁹³ Brown, *Sale* 420.

any case where moveables are claimed by a non-possessor from a possessor:
but it is nothing more.⁶⁹⁴

During this period, the English rule of market overt had itself not been without criticism. In the Mercantile Law Commission Report of 1855, it was recognised that interests of commerce may actually require that buyers bear the risk of defect in title.⁶⁹⁵ “As a matter of public policy”, the rule in Scotland was thought to be preferable, due to the ease with which stolen goods may be transferred to a third party.⁶⁹⁶ Abolition of the market overt rule was therefore recommended, and a provision to accomplish this was included in Mercantile Law Amendment Bill of 1856. It is significant that in comments submitted to the Commission the Faculty of Advocates, the Society of Writers to the Signet and the Faculty of Procurators were all against the introduction of the market overt rule in Scotland.⁶⁹⁷

In *Todd v Amour*,⁶⁹⁸ a stolen horse had been bought in market overt in Ireland; recovery was then (unsuccessfully) sought from the purchaser in Scotland.⁶⁹⁹ The Scots doctrine of *vitium reale* attaching to stolen property was argued by Lord Justice Clerk Moncreiff to be preferable, presumably on the grounds that none should benefit from theft. Interestingly, the question of whether the original owner had the right to buy back the property from the purchaser in open market was mentioned, but no opinion expressed. By the time that *Mitchell v Heys*⁷⁰⁰ was decided in 1894, Bell’s doctrine had been conclusively abandoned. In that case, the owner was allowed to recover loaned property which had been transferred to a good faith third party. In *Murdoch and Co v Greig*⁷⁰¹ a harmonium obtained on hire purchase and

⁶⁹⁴ Bell, *Commentaries* (1870) vol 1 305.

⁶⁹⁵ Royal Mercantile Law Commission, *Second report* (1855) 7.

⁶⁹⁶ Royal Mercantile Law Commission, *Second report* 8.

⁶⁹⁷ Royal Mercantile Law Commission, *Second report* 53-54. The Society of Solicitors in the Supreme Courts of Scotland, however, disagreed.

⁶⁹⁸ (1882) 9 R 901.

⁶⁹⁹ Although private international law issues are, in general, outside the scope of the thesis it is worth noting here that the outcome in the case reflects a general rule that a transfer of moveable property validly effected in accordance with the *lex situs* will confer a real right upon the transferee. See A E Anton, P R Beaumont and P E McEleavy, *Private International Law*, 3rd edn (2011) at para 21.63 and *Winkworth v Christie, Manson and Woods Ltd* [1980] Ch 496.

⁷⁰⁰ (1894) 21 R 600.

⁷⁰¹ (1889) 16 R 396.

sold at public auction before ownership had passed was also held to be recoverable by the seller.

(c) *Hume's Lectures*

Hume's influential⁷⁰² treatment is founded on the Romanist distinction between real and personal rights.⁷⁰³ His application of this doctrine to the problem of good faith purchase is worth quoting at length:

if therefore, it should so happen that this right of his is infringed, and that thing is violently, surreptitiously or even casually taken from him, the title to vindicate and recover it attaches upon and follows the thing itself, [...] , pursues it into the hands of any possessor, the most innocent of wrong on any occasion, and recovers it from him equally as from the person who by force or stealth took it away from the owner. The reason is obvious. The owner's right was not founded on any relation, contracted to this or t'other individual. It was founded on a connection with the thing itself, independent of all personal considerations, and without regard to the will, consent or situation of anyone. This class of rights, which follow and are exerted over their ultimate objects everywhere, without respect of persons or circumstances, are therefore with propriety termed real rights.⁷⁰⁴

Following the logic set out in this passage, a *bona fide* purchaser has no defence against an owner wishing to reclaim his or her thing. It is only when a conveyance, albeit challengeable, has taken place that the owner is divested of his or her right, and ownership of the thing can be conveyed by the fraudster/ transferee to a good faith third party.⁷⁰⁵

Several factors, therefore, combined to consolidate the influence of the *nemo plus* principle; Romanist logic and Stair's moral theology played an important role

⁷⁰² See ch 4 C(2).

⁷⁰³ Hume, *Lectures* vol 2 2. Reference is made to the formula of the *vindicatio* at 3.

⁷⁰⁴ Hume, *Lectures* vol 2 2.

⁷⁰⁵ Hume, *Lectures* vol 3 238.

but security of property and protection of ownership were also central philosophical and political concerns of the eighteenth- and nineteenth-century jurists.

CHAPTER 4: THE MODERN LAW

A. INTRODUCTION

This chapter explores the current doctrinal understandings of the *nemo plus* rule as it applies to the transfer of rights in corporeal moveable property, and the nature and extent of the exceptions recognised to the rule. Based on a mixture of common law and statutory provisions, these exceptions do not reflect a coherent set of principles.

An important consideration is the relationship between Scots and English law, particularly in light of the Sale of Goods Act 1893 and its successor the Sale of Goods Act 1979. Despite the differences in understandings of ownership between the two jurisdictions⁷⁰⁶ affecting the interpretation of terms such as “title”, both are united in their fundamental adherence to the *nemo plus* rule.

A further point of focus is the interaction with the law of security. In relation to goods held on hire purchase or some other limited title, reported cases often involve what is essentially a competition between a creditor who has attempted to create a non-possessory security and an unsuspecting third party. It is argued that it is in this respect, rather than as a general protection for good faith purchasers, that the relevant provisions of the Sale of Goods Act 1979 have gained most importance.

B. DERIVATIVE ACQUISITION OF MOVEABLES: AN ABSTRACT OR A CAUSAL SYSTEM?

There is some debate in Scotland about whether, at common law, transfer of ownership takes place only on the basis of a valid *causa* (the causal system), or whether an independently valid conveyance may be sufficient (the abstract

⁷⁰⁶ On the difference between unititular and multititular systems in general, see A M Honoré, “Ownership”, in A Guest (ed), *Oxford Essays in Jurisprudence* (1961) 106 at 136-141. On relativity of ownership in English law, see M G Bridge, *Personal Property Law* (2002) 28-30. Compare Reid, *Property* para 531 (Gordon), although the accuracy of the parts of this paragraph relating to the action of restitution can be questioned.

system).⁷⁰⁷ It is well established that Scots law recognises a separation of contract and conveyance.⁷⁰⁸ Contemporary academic opinion appears to favour an abstract system.⁷⁰⁹ In relation to immoveable property, the abstraction principle also seems to be accepted.⁷¹⁰ However, the common law is to some extent usurped by the Sale of Goods Act 1979, which provides that, in respect of transfers to which the Act applies, ownership will pass when the parties intend it to pass.⁷¹¹ Unlike at common law, there is no requirement of delivery;⁷¹² the Act thus significantly narrows the scope for transfer without a valid *causa* (in this context, contract of sale).⁷¹³ Nevertheless, to some extent at least, the Act preserves a distinction between contract and conveyance.⁷¹⁴ Gordon has argued that, where there is transfer of possession, the presumption of ownership from possession implies that theft or forcible dispossession must be shown in order to argue that ownership has not passed.⁷¹⁵ Certainly if delivery combined with intention to transfer ownership was enough to transfer ownership at common law, it seems that the provisions of the Act would not affect this.⁷¹⁶

⁷⁰⁷ On the causal/ abstract distinction, see Reid, *Property* para 608 (Gordon); Carey Miller, “Systems of Property” and Carey Miller, *Corporeal Moveables* paras 8.06-8.10. For a comparative and historical overview, see L P W van Vliet, “Iusta Causa Traditionis and its History in European Private Law” (2003) 3 *European Review of Private Law* 342. On the principle of abstraction in German law, see F C von Savigny, *System des heutigen römischen Rechts: vol 3* (1840, repr 1981) 312-313; 354-358. For a discussion in English, see B Häcker, *Consequences of Impaired Consent Transfers* (2009) 57-98.

⁷⁰⁸ See Reid, *Property* para 606. In German law, this is known as the “Trennungsprinzip” or separation principle.

⁷⁰⁹ See Reid, *Property* para 609 (Gordon); Carey Miller, *Corporeal Moveables* para 8.10.

⁷¹⁰ See Reid, *Property* para 611.

⁷¹¹ Sale of Goods Act 1979 (hereafter “SOGA”) s 17. Rules for ascertaining intention are set out in s 18.

⁷¹² See SOGA s 18, Rule 1. On the extent to which the Act is compatible with Scots common law, see D L Carey Miller, “Scots and South African Property: Problem Transplants”, in E Cooke (ed), *Modern Studies in Property Law* (2001) 295.

⁷¹³ Under s 1(1) of the Act, it only applies where there is a contract of sale. Where there is no contract, no conveyance can take place under the Act. See Reid, *Property* para 610.

⁷¹⁴ Section 17 of the Act requires an act of intention which, although ascertained with reference to the contract under s 18, is in principle separate. See Reid, *Property* para 610.

⁷¹⁵ Reid, *Property* para 609 (Gordon) citing T B Smith, *A Short Commentary on the Law of Scotland* (1962), Carey Miller, *Corporeal Moveables* and *Corporeal Moveables: Passing of Risk and Ownership* (Scot Law Com CM No 25, 1976). This position seems questionable: the presumption of ownership from possession does not require theft or forcible dispossession to displace it, merely proof of the manner in which the property left the owner’s possession. (Previous possession will presume previous ownership.) If it could be shown that there was no intention to transfer ownership, the presumption would be displaced.

⁷¹⁶ See SOGA 1979 s 62(2), preserving the common law so far as not inconsistent with the Act, and Reid, *Property* para 610. Carey Miller also argues for the continued existence of an independently valid conveyance: *Corporeal Moveables* para 8.10. For an argument that the Sale of Goods Act

The system of transfer adopted is relevant to the protection of ownership because it controls whether, in a given set of circumstances, A will be deemed to have transferred ownership to B. The more that is required to render a transfer valid, the more secure A's right.⁷¹⁷ In particular, under a causal system a valid contract between A and B is required before transfer of ownership can take place.⁷¹⁸ Under an abstract system, only the conveyance is required to be valid. Moreover, delivery, in the sense of a transfer of physical control,⁷¹⁹ is usually⁷²⁰ necessary, providing notice to third parties of the transaction. Of course, a causal system may have an express rule protecting good faith purchasers.⁷²¹ Abstract systems may also vary in recognising different exceptions to the principle of abstraction.⁷²² In this respect the difference between an abstract and a causal system may not be very important in practice.⁷²³

Nevertheless, some of the difficulties which may attend a causal system in which good faith third parties are afforded no general protection are illustrated by the complexities of the decision in *Shogun Finance Ltd v Hudson*,⁷²⁴ in which the

“buried the Scots common law of sale”, see S C Styles, “Debtor-to-Creditor Sales and the Sale of Goods Act 1979” 1995 *Juridical Review* 365.

⁷¹⁷ On the protection of third party purchasers through the principle of abstraction in German law, see Häcker, *Impaired Consent* 216-217.

⁷¹⁸ For a description of the causal/ abstract distinction, see L P W van Vliet, *Transfer of movables in German, French, English and Dutch Law* (2000) 24-25. Van Vliet notes at 203-204 that a consensual system in which a single transaction functions as contract and conveyance may nevertheless be abstract.

⁷¹⁹ On the various forms of delivery recognised in Scots law, see Reid, *Property* paras 619-623 (Gordon).

⁷²⁰ The recognition of an independently valid conveyance does not logically necessitate that such a conveyance should be by means of delivery. However, especially in respect of moveables for which no registration system exists, the reasons (in particular the publicity principle) which might lead a system to adopt an abstract system of transfer might also lead such a system to require delivery. See Carey Miller, *Corporeal Moveables* para 8.13 and, for example, the translated extract from the *Motive for the BGB* in S van Erp and B Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (2012) 797-798.

⁷²¹ Although it is not entirely clear that the French system is indeed a causal system, it is (like English and Scots law under the Sale of Goods Act 1979) a consensual one; see Art 1138 Code Civil. Good faith purchasers are protected by art 2276 (formerly Art 2279) Code Civil. See Van Vliet, *Transfer* 89.

⁷²² See comments and sources referred to by Van Vliet in Van Erp and Akkermans, *Property Law* 837-843.

⁷²³ See comments by Eduard Meijers, one of the drafters of the 1992 Dutch Civil Code, collected in Van Erp and Akkermans (eds), *Property Law* at 832.

⁷²⁴ [2004] 1 AC 919. See in particular the criticism by Lord Millett at 954 F.

validity of the contract⁷²⁵ between a fraudster and a finance company determined the extent to which a good faith purchaser of a motor vehicle was protected. The *nemo plus* principle was used to justify protection of the finance company, which had contracted on the basis that the fraudster was a different (creditworthy) individual.⁷²⁶ It appears to have been the decision in *Ingram v Little*,⁷²⁷ and the criticism in that case by Lord Devlin, then Lord Justice, of “theoretical distinctions” which “stand in the way of doing practical justice,”⁷²⁸ that prompted the English Law Reform Committee Report of 1966.⁷²⁹ As T B Smith has commented in relation to *Ingram*, the English law relating to transfer of moveable property might be seen as “largely secreted in the interstices of contract law”⁷³⁰ in the sense that the possibility of a conceptually separate conveyance of property rights is often ignored.⁷³¹ The effect of error on the validity of transfer of ownership is, however, also controversial in an abstract system such as German law, so the importance of the system of transfer adopted should not be overestimated.⁷³²

At common law in Scotland, it is well established that, in the absence of real vice, contractual defects do not usually affect a third party purchaser in good faith.⁷³³ It is only where intention to transfer ownership has been entirely lacking that no right will be acquired (and thus none can be transferred to third parties.) This rule may be justified on the basis of the publicity principle: third party purchasers have no means of investigating the intricacies of previous transactions.⁷³⁴ Although the consent to

⁷²⁵ The case turned on whether a contract of hire purchase had been concluded between the parties, triggering the good faith purchaser protection of the Hire Purchase Act 1964. However, the case dealt generally with validity of the contract (and by implication the transfer of ownership under SOGA) in cases of mistaken identity. See further D L Carey Miller, “Plausible Rogues: Contract and Property” (2005) 9(1) *Edinburgh Law Review* 150.

⁷²⁶ See for example the comments of Lord Hobhouse of Woodborough at 947.

⁷²⁷ [1961] 1 QB 31.

⁷²⁸ A case in which the facts were similar to those in *Shogun*: [1961] 1 QB 31 at 73.

⁷²⁹ *Transfer of Title to Chattels* (Cmd 2958: 1966). The issue is described at para 6 as leading to the “greatest dissatisfaction with the present state of the law.” See E(2)(a) below.

⁷³⁰ T B Smith, *Property Problems in Sale* (1978) 170.

⁷³¹ For some exceptions, see T Weir, “Taking for granted—the ramifications of *nemo dat*” (1996) 49 *Current Legal Problems* 325 at 340-343; W Swadling, “Rescission, property, and the common law” (2005) 121 *LQR* 123; B Häcker, “Rescission of Contract and Revesting of Title: A Reply to Mr Swadling” (2006) 14 *Restitution Law Review* 106; L Gullifer, “Title Conflicts: Nemo Dat and its Exceptions”, in M Bridge *et al.*, *The Law of Personal Property* (2013) paras 13-034-13-035.

⁷³² See Häcker, *Impaired Consent* 62-63 and references given there.

⁷³³ See ch 3 C(2)(b)(iv).

⁷³⁴ T B Smith, “Error and Transfer of Title (1967) 12 *JLSS* 206 at 207.

transfer may be in some way challengeable, until reduction of the transfer third parties should be able to rely on the appearance of validity. The statutory incarnation of this principle in section 23 of the Sale of Goods Act is discussed below, as is the status of defects such as theft as exceptions to this rule.

C. THE RELEVANCE OF THE *NEMO PLUS* PRINCIPLE

(1) Doctrinal Basis

In the modern era, the *nemo plus* maxim is cited by the leading academic texts as one of the fundamental principles governing derivative transfer.⁷³⁵ Although the challenges raised by new social situations, such as the increasing use of consumer credit devices separating possession and ownership, have raised questions about the scope of its application, its general relevance has not been contested.⁷³⁶ The hardship that this may visit on an innocent acquirer is, for the most part, accepted.⁷³⁷ As Reid notes, of the two innocent parties involved, the policy of the law is that the loss should fall on the transferee and not on the original owner.⁷³⁸

A further means by which the exclusivity of the owner's power of alienation is fortified is the understanding that non-consensual transfers may be affected by "real vice" (*vitium reale*). In *Malaney v Union Transport Finance Ltd*⁷³⁹ it was accepted that a *vitium reale* attaches not only in the case of property taken from the owner's possession without his or her consent, but also to property possession of which has been transferred on some limited title such as hire. This was on the basis of the decisions in *Helby v Matthews*⁷⁴⁰ and *Morrisson v Robertson*,⁷⁴¹ reflecting the view that where possession is on the basis of a void contract of sale (or a contract

⁷³⁵ See Reid, *Property* para 669; Carey Miller, *Corporeal Moveables* paras 8.03-8.04. On the general principles governing derivative transfer, see Carey Miller, *Corporeal Moveables* para 8.03 and Reid, *Property* paras 597-618.

⁷³⁶ For discussion of the approach taken by the Scottish Law Commission in its Consultative Memorandum, see E(1)(a) below.

⁷³⁷ See Reid, *Property* para 669, commenting that "good faith on the part of the transferee is irrelevant, as it usually is in property law"; Carey Miller, *Corporeal Moveables* para 8.04.

⁷³⁸ Reid, *Property* para 669.

⁷³⁹ 1959 SLT (Sh Ct) 37.

⁷⁴⁰ [1895] AC 471.

⁷⁴¹ 1908 SC 332.

imparting some lesser right), such a possessor is not able to transfer ownership to a third party.⁷⁴² Reference was also made in *Malaney* to the fact that, according to the criminal law, the crime of theft had come to include appropriation of entrusted property (for example in *O'Brien v Strathern*).⁷⁴³

This raises the somewhat troublesome issue of the relationship between the criminal and the civil law in this area: to what extent is the owner's civil law remedy for recovery linked to the criminal law's assessment of his or her conduct? Are the requirements for the crime of theft distinct from those regulating the type of conduct which will lead to a transfer being affected by a *vitium reale*? The answer to this question is arguably yes: the modern law sharply separates criminal and civil procedure. In particular, the concepts of guilt and wrong necessary to the criminal law are not relevant to the problems of property transfer, which involve consideration of different principles such as the need to facilitate commerce and ensure legal certainty.⁷⁴⁴ Property law rules are not equipped to evaluate wrong, but rather whether an owner has consented to transfer. Although both branches of law are ultimately concerned to ensure a just and peaceful society, each has an internal doctrinal logic which will not necessarily yield helpful results when applied in other contexts.⁷⁴⁵ Similar arguments apply in relation to the law of delict: the question of whether ownership has been validly transferred is independent from that of whether the actions of the transferee may incur delictual liability.⁷⁴⁶

On this basis, although *Malaney* is correct that a *vitium reale* attaches to any property transferred without the owner's consent,⁷⁴⁷ explanation of this fact does not

⁷⁴² See Reid, *Property* para 617 (Gordon). If an abstract theory of transfer of accepted, this leaves open the possibility of intentional transfer of ownership despite the contract being void: Carey Miller, *Corporeal Moveables* para 10.05.

⁷⁴³ 1922 JC 55.

⁷⁴⁴ The issues surrounding ideas of blame and punishment in the criminal law are complex, but for an overview see C S Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 26 *Annual Review of Criminal Procedure* 775.

⁷⁴⁵ For example, the judgments in *Folkes v King* [1923] 1 KB 282 were premised on the argument that the intention behind the Factors Act 1889 was to provide protection to *bona fide* purchasers; in this context the question of criminal wrongdoing was "immaterial" (per Scrutton LJ at 306).

⁷⁴⁶ Although certain delicts such as *spuilzie* will negate the possibility of transfer having taken place: Carey Miller, *Corporeal Moveables* para 10.19.

⁷⁴⁷ Subject to some exceptions, for example where property is transferred by statutory authority.

require reference to the criminal law but reflects the fundamental tenet of property law that the dispositive intent of the owner is necessary for derivative transfer. Application of the *nemo plus* rule further implies that, where the initial transfer has been ineffective, no right of ownership will normally be acquired by subsequent transferees. Although the reasons underlying the identification of unauthorised transfer as a criminal wrong may be the same as those leading the transfer to be deemed ineffective in civil law,⁷⁴⁸ the conceptual separation between the two domains should be maintained.

As regards other defects which may affect the owner's consent to transfer, such as error, it is outwith the scope of the thesis to give an exhaustive account of the factors which may affect transfer.⁷⁴⁹ Broadly, it is only those factors which involve a total absence of intention to transfer ownership⁷⁵⁰ which should be treated as giving rise to a *vitium reale*; it is questionable whether all instances of error and force and fear fall into this category.⁷⁵¹

(2) Justification?

Ultimately, it is the understanding of ownership as entailing an exclusive power of alienation⁷⁵² which doctrinally fortifies the status of the brocard. Given this

⁷⁴⁸ Both criminal and civil law are based on the principle that to deprive a person of his or her property without his or her consent is to wrong them in some meaningful way.

⁷⁴⁹ The factors which may affect intention under the contract are generally assumed to be the same as those which may affect intention to transfer ownership. See for example Carey Miller, *Corporeal Moveables* para 10.17. Reid, *Property* para 607 notes, however, that, on the basis of the abstract theory, the conveyance may be affected by factors which do not affect the validity of the contract such as offside goals. McBryde, however, characterises bad faith as also affecting the contract: W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 17-24-17-26. For an account of the effect of force and fear on intention, see W M Gloag, *The Law of Contract*, 2nd edn (1929) 488-492. See also McBryde, *Contract* chs 13-17.

⁷⁵⁰ As opposed to intention to transfer possession, the solution suggested by the Scottish Law Commission: *Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com CM No 27, 1976) para 56.

⁷⁵¹ The Scottish Law Commission suggested that the position should be clarified by statute, and it should be expressly stated that error and force and fear do not affect good faith third parties: *Corporeal Moveables: Protection* para 19 and also Smith, *Property Problems* 170-171. On force and fear, see J du Plessis, *Compulsion and Restitution* (2004). On error, see McBryde, *Contract* paras 15-01 ff; J Macleod, "Before Bell: The Roots of Error in the Scots Law of Contract" (2010) 14(3) *Edinburgh Law Review* 385-417; M Hogg, "The Continuing Confused Saga of Contract and Error" (2009) 13(3) *Edinburgh Law Review* 286.

⁷⁵² See for example Stair, *Institutions* (1693) 3.2.3; Erskine, *Institute* 2.1.1.

assumption, it may seem merely a matter of logic to conclude that a non-owner cannot transfer a right which he or she does not hold. The accounts of ownership given by the institutional writers continue to influence the work of modern scholars such as Reid and Carey Miller, and indeed, the fundamental principles of derivative acquisition appear to be so widely accepted that they are rarely debated by judges.⁷⁵³

In particular, Baron Hume's vivid depiction of the distinction between real and personal rights and the strong protection afforded to owners may be argued to set the tone for the current doctrinal position.⁷⁵⁴ With the exception of the work done by T B Smith and the Scottish Law Commission,⁷⁵⁵ Bell's contention for a general rule protecting good faith purchasers has received little support from modern academics and judges.⁷⁵⁶ Indeed, the courts have been accused of a tendency to interpret the provisions of the Sale of Goods and Factors Acts narrowly, so as to favour the original owner.⁷⁵⁷ The protections afforded by the Acts are treated as exceptions, to be narrowly construed.⁷⁵⁸ This perhaps reflects the importance placed in property law upon the stability and certainty of property rights. On the other hand, the existence in various historical periods and across numerous different jurisdictions⁷⁵⁹ of some form of protection for *bona fide* purchasers indicates that property law is never entirely inflexible. Why, then, does the *nemo plus* principle continue to find such favour in Scotland?

⁷⁵³ There are some exceptions, see for example the judgment of Lord Hope in *Sharp v Thomson* 1995 SC 455. (The decision was subsequently reversed in the House of Lords: see 1997 SC (HL) 66.) On *Sharp*, see further *Report on Sharp v Thomson* (Scot Law Com No 208, 2007) and (among many comments) K G C Reid, "*Sharp v Thomson: A Civilian Perspective*" 1995 10 SLT (News) 75. *Sharp* deals, however, with immovable property, substantial judicial commentary seems particularly lacking in relation to moveables.

⁷⁵⁴ Hume, *Lectures* vol 3 231-233. Hume is cited by Reid (*Property* para 669) and Carey Miller (*Corporeal Moveables* para 8.04).

⁷⁵⁵ Discussed below E(1)(a).

⁷⁵⁶ It is described by Reid (*Property* para 669) as "unfounded".

⁷⁵⁷ See for example Denning LJ (dissenting) in *Central Newbury Car Auctions Ltd v Unity Finance Ltd and Another* [1957] 1 QB 371 at 381. See also his comments in *Pearson v Rose & Young Ltd* [1951] 1 KB 275 at 286. Although these comments could be argued to be addressed to the English courts, and there are fewer reported Scottish cases, the Scottish decisions that do exist could also be argued to give great weight to protection of ownership.

⁷⁵⁸ See e.g. *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 at 574G.

⁷⁵⁹ For a comparative overview, see Lurger and Faber, *Principles* 890.

In some cases, the emphasis placed on institutional authority reflects an attempt to prevent unthinking⁷⁶⁰ assimilation of Scottish property law to that of England by asserting its distinctive and civilian character.⁷⁶¹ The defence of a distinctively Romanist approach to the law of moveable property may, in the context of legal nationalism, be an ideologically motivated move.⁷⁶² However, it is not the general recognition of the *nemo plus* principle which differentiates the law of England and Scotland, but rather the underlying conceptions of ownership.⁷⁶³ The principle also interacts in different ways with the remedies afforded to the owner.⁷⁶⁴ In fact, the links between English and Scots law may have served to fortify the status of the *nemo plus* rule in both jurisdictions.⁷⁶⁵ If harmonisation in the area is not to be jeopardised, cooperation would be required in order to make any substantial changes to the current law. Despite both Law Commissions reporting on the issue and making broadly compatible recommendations,⁷⁶⁶ this has not been forthcoming. The unity imposed by the Sale of Goods Act may thus explain why the recommendations of the Scottish Law Commission⁷⁶⁷ appear to have had little practical impact.⁷⁶⁸

D. EXCEPTIONS TO THE *NEMO PLUS* PRINCIPLE

(1) General Position

⁷⁶⁰ Prominent defenders of the idea of a distinctively Scottish tradition such as T B Smith were not opposed to English influence *per se*, but rather “forced and ill considered “anglicisation”” (T B Smith, *Studies Critical and Comparative* (1962) 117).

⁷⁶¹ The Institutional period is characterised by T B Smith as a period where English influence was particularly weak: Smith, *Studies* 118-119. One of the main concerns of the Scottish Law Commission Memorandum, which Smith was instrumental in drafting, is to formulate a rule “more apt to harmonise with the common law of Scotland.” See *Corporeal Moveables: Protection* para 34.

⁷⁶² See N Whitty, “Civilian Tradition and Debates on Scots Law” (1996) 3 *TSAR* 442 at 445-446.

⁷⁶³ See n 706 above.

⁷⁶⁴ On the differences between the owner’s remedies in Scots and English law see S Green and J Randall, *The Tort of Conversion* (2009) 56-58.

⁷⁶⁵ As J H Dalhuisen (*Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (2013) vol 2 375) comments, it is “surprising” that the Common law is so close to the Roman approach.

⁷⁶⁶ See E(1)(a) below.

⁷⁶⁷ In *Corporeal Moveables: Protection*.

⁷⁶⁸ The memoranda produced on corporeal moveables were not mentioned by the former Chairman Lord Davidson in a 1995 review of the work of the Commission: see C K Davidson, “The Scottish Law Commission 1965-95” (1995/6) 1 *SLPQ* 18.

The application of the *nemo plus* rule means that all subsequent transferees will, in theory, be affected by an initial defect. In order to purge a *vitium reale* what is required is not merely a legitimate transfer, but some (preferably explicit) rule conferring ownership anew. It has been held, for example, that sale by a pawnbroker is not sufficient for this purpose.⁷⁶⁹

There is no general principle of Scots law protecting *bona fide* purchasers from an unauthorised seller, and hence no overarching role for good faith.⁷⁷⁰ However, “[i]n a settled and industrial state some amount of genuine doubt as to ownership and title must unavoidably follow upon the complexity of men’s affairs.”⁷⁷¹ The increasing tendency for possession and ownership to be separated in modern commercial life and the potential for this to prejudice third parties has led to the recognition of a number of exceptions to the *nemo plus* principle.

(2) Exceptions at Common Law

(a) Sale of poinded goods

Poining was a diligence exercised by a creditor against the corporeal moveable property of his or her debtor.⁷⁷² In general, unless stated otherwise by statute,⁷⁷³ it was only competent against the property owned by the debtor.⁷⁷⁴ Possession by a debtor was not enough to allow diligence on the basis of a reputed ownership.⁷⁷⁵ However, in respect of poinded goods subsequently sold at roup, a rule was, until overturned in *Hopkinson v Napier*,⁷⁷⁶ recognised that the true owner could not recover goods poinded while in the possession of a third party. Apart from the desire

⁷⁶⁹ *Hyslop v Anderson* 1919 1 SLT 156.

⁷⁷⁰ It might be argued that Scots property law tends, in general, to penalise bad faith rather than reward good faith. See D L Carey Miller, “Good Faith in Scots Property Law”, in A D M Forte (ed) *Good Faith in Contract and Property Law* (1999) 103, in particular at 123-126, and argument in *Mitchells v Ferguson* (1781) Mor 10296.

⁷⁷¹ F Pollock and R S Wright, *An Essay on Possession in the Common Law* (1888) 3.

⁷⁷² See J Graham Stewart, *The Law of Diligence* (1898) 274-275.

⁷⁷³ See for example *Glasgow Corporation v Midland Household Stores Ltd* 1967 SLT (Sh Ct) 22.

⁷⁷⁴ Stewart, *Diligence* 341. In relation to goods held on contracts of hire purchase or conditional sale, it was therefore necessary to ascertain whether ownership had passed to the debtor. See e.g. *Marston* (n 616); Stewart, *Diligence* 341.

⁷⁷⁵ *Glen* (n 634).

⁷⁷⁶ (n 615).

to protect competing creditors from arrangements which amounted to non-possessory securities, a general discomfort at the expansion of relatively new credit arrangements⁷⁷⁷ seems to have played a role in the attitude of the courts:

I have seen a good deal of these contracts of hire and sale in the Sheriff Court, and I am far from being persuaded that they are a blessing to the poor, or deserving of any exceptional respect...I have no idea that the law is going to step in for the protection of the Singer or other such company, and place them and their wares and contracts on any different plane from the world in general.⁷⁷⁸

The doctrine seems to have its origins in the case of *Singer Manufacturing Co v Beale and MacTavish*,⁷⁷⁹ in which sheriff officers who had poinded the property of the pursuers were sued for its value. The case did not concern the recovery of the actual goods; Lord Johnston emphasised that the poinding sheriff officer had relied on the statutory process, and that the owners must rely on the honesty of those to whom they had entrusted their property. It is understandable that the sheriff officers should not be liable for the value of the property (which was no longer in their possession), as there was no suggestion that they had acted negligently.⁷⁸⁰

However, the Sheriff in *Grant v Napier*⁷⁸¹ refused to allow the owner to vindicate poinded goods sold at auction, even where the debtor had pointed out that the goods were held on hire purchase. This was supposedly on the basis of the inference of ownership arising from possession and the clean statutory title given by

⁷⁷⁷ Compare the decision in *Anderson* (n 612), in which ownership was thought to be the “natural cause and concomitant of possession” of moveables for personal and household use.

⁷⁷⁸ *Singer Manufacturing Co v Beale and MacTavish* (1905) 8 F (J) 29 per Lord Johnston at 32. See also the comments in *Benton and Co v Rowan* (1895) 11 Sh Ct Rep 144 at 145 that hire purchase is “a bad system, leading to deception, imposition and litigation, and, worst of all, involving the ignorant and improvident of the poor.” Compare the more favourable approach taken by the Lords in *Helby* (n 740) at 482.

⁷⁷⁹ *Ibid.* See also *Benton ibid.* at 145.

⁷⁸⁰ It seems that the fact of the debtor’s possession was usually seen as enough to allow the officer to presume ownership: *Stewart, Diligence* 351. Compare *Macleod v Aitken* (1881) 25 J of J 387 in which officers ignoring the pursuer’s written evidence of title were found liable in delict.

⁷⁸¹ 1944 SLT (Sh Ct) 2.

the relevant legislation⁷⁸² (the terms of which, however, were not discussed.)⁷⁸³

These are two very different arguments: the fact that sheriff officers might presume ownership does not exclude subsequent vindication by the owner,⁷⁸⁴ but a statutory conferral of ownership upon a purchaser certainly must. In general, the sheriff felt that the owners had failed to protect their interests and therefore should suffer; “[e]ntrusting the safeguarding of their interests to the honesty or alertness of [the possessor], they relied upon a broken reed.”⁷⁸⁵

It was only when the issue arose again in *Hopkinson v Napier*⁷⁸⁶ that the Inner House took the opportunity to clarify the law in this area. It was pointed out that the Acts in question did not, unlike for example the Sale of Goods Act, introduce an exception to the general law.⁷⁸⁷ Under the relevant legislation, notification of the true owner was inadequate and outdated, amounting to “three “oyesses” of the town crier.”⁷⁸⁸ Moreover, the desire to protect society from the expansion of dubious means of credit was not enough to justify such a doctrine which “would operate not only against the hire-purchase firm, but against the citizen who had left his watch to be repaired by a jeweller or had sent his clothes to the laundry”.⁷⁸⁹

Although *Hopkinson* laid down a clear rule regarding the position of the owner before the property had been sold,⁷⁹⁰ the judges in the case reserved their opinion as to the position of a *bona fide* purchaser for value at a judicial sale.⁷⁹¹ The Scottish Law Commission suggested that, in the interests of clarity, ownership should be conferred by statute on purchasers at judicial sale.⁷⁹² However, in the subsequent Sheriff Court decision in *Carlton v Miller*, recovery was allowed from

⁷⁸² Presumably, given the reference to *Singer*, the Small Debt (Scotland) Act 1837.

⁷⁸³ *Grant v Napier* (n 781) at 4.

⁷⁸⁴ In *Macleod v Aitken* (n 780), as well as pursuing a claim in delict against the officers involved the pursuer seems to have recovered his furniture.

⁷⁸⁵ *Grant v Napier* (n 781) at 5.

⁷⁸⁶ (n 615).

⁷⁸⁷ *Hopkinson* (n 615) at 151.

⁷⁸⁸ *Ibid.* at 148.

⁷⁸⁹ *Ibid.* at 148.

⁷⁹⁰ See for example *Second Memorandum on Diligence, Poindings and Warrant Sales* (Scot Law Com CM No 48, 1980) at 6.11.

⁷⁹¹ *Hopkinson* (n 615) at 148.

⁷⁹² *Corporeal Moveables: Protection* para 50.

such a purchaser.⁷⁹³ This was on the basis that to hold otherwise would be a “startling injustice to the true owner whose property would be confiscated behind his back”.⁷⁹⁴ Purchasers at judicial sale who may be acquiring the property at undervalue may also not be true “purchasers for value”.⁷⁹⁵ On returning to the issue, the Scottish Law Commission expressed concern about the adequacy of their proposed procedures for providing notification to the owner.⁷⁹⁶ The idea that purchasers at judicial sale should have more protection than other categories of *bona fide* purchaser was rejected.⁷⁹⁷

Poining has now been abolished, and replaced by the diligence of attachment.⁷⁹⁸ The situation of a third party whose goods are attached under the Debt Arrangement and Attachment (Scotland) Act 2002 is, presumably, intended to be the same as where the goods had been poided.⁷⁹⁹ Attachment is exigible only over the property of the debtor.⁸⁰⁰ However, an officer executing an attachment may assume that the debtor owns any property in his or her possession.⁸⁰¹ The officer is not prevented from relying on such an assumption only because the property is of a type which is commonly held on hire purchase or an assertion is made that the debtor is not the owner.⁸⁰² Subsequent to attachment, where property is sold by auction, there is no express provision conferring ownership on a purchaser. A third party’s claim of ownership, if made before the auction takes place and apparently valid, will end the attachment,⁸⁰³ but the position if the auction has already taken place is not mentioned. Extra protection for the owner was considered during the Debt

⁷⁹³ 1978 SLT (Sh Ct) 36.

⁷⁹⁴ *Carlton ibid.* at 37.

⁷⁹⁵ *Carlton ibid.* at 37.

⁷⁹⁶ *Second Memorandum on Diligence* 6.11.

⁷⁹⁷ *Second Memorandum on Diligence* 6.11. This was on the assumption that a Report would follow the Memorandum on *Protection of the Onerous Bona Fide Acquirer*. The subsequent Report on *Diligence and Debtor Protection* (Scot Law Com No 95, 1985), as there was no dissent from consultees, maintained this approach.

⁷⁹⁸ See Part 2 of the Debt Arrangement and Attachment (Scotland) Act 2002.

⁷⁹⁹ Compare the (now repealed) s 40(3) of the Debtors (Scotland) Act 1987 and s 34(2) of the Debt Arrangement and Attachment (Scotland) Act 2002. On the position under the 1987 Act, see G Maher and D Cusine, *Law and Practice of Diligence* (1990) 184-185; W A Wilson, *The Scottish Law of Debt*, 2nd edn (1991) paras 16.2; 16.8.

⁸⁰⁰ Debt Arrangement and Attachment (Scotland) Act 2002 s 10(2).

⁸⁰¹ Debt Arrangement and Attachment (Scotland) Act 2002 s 13(1).

⁸⁰² Debt Arrangement and Attachment (Scotland) Act 2002 s 13(4).

⁸⁰³ Debt Arrangement and Attachment (Scotland) Act 2002 s 34(1).

Arrangement and Attachment Bill's passage through the Scottish Parliament, but it was felt that the Bill provided sufficient safeguards.⁸⁰⁴

Presumably, therefore, in the absence of any further authority the decision in *Carlton*⁸⁰⁵ will also be applicable to attachment. There may be sound reasons for allowing purchasers at judicial sale extra security; the issue is discussed further in Chapter 6.⁸⁰⁶ Whatever view is taken, an explicit rule on the question would be preferable to the current position.

(b) Personal bar?

Personal bar⁸⁰⁷ has an uneasy relationship with the law relating to transfer of moveables because, as a doctrine, it is concerned with what Party A may assert in a question with Party B.⁸⁰⁸ Property law, on the other hand, is usually concerned with what Party A can assert against any party who challenges him or her.⁸⁰⁹

At common law personal bar was recognised where representations had been made by an owner that another was entitled to sell or burden property, and there had been reliance on those representations.⁸¹⁰ Unlike section 21 of the Sale of Goods Act, personal bar at common law does not require a completed sale, but will operate to bind the owner to any contract made in reliance on the representations.⁸¹¹ As discussed in Chapter 3, the doctrine of reputed ownership may have been a manifestation of personal bar;⁸¹² possession in itself is, in this context, not a

⁸⁰⁴ See the proposed amendment to allow for time for third parties to prove ownership, Scottish Parliament, Official Report cols 12236-12237 (13 Nov 2002). See also Scottish Parliament, Official Report cols 2966-2967 (6 June 2002), where the difficulties of establishing ownership are also raised.⁸⁰⁵ (n 793).

⁸⁰⁶ See ch 6 F(1)(c).

⁸⁰⁷ For the history of the term "personal bar" in Scotland, see E C Reid and J W G Blackie *Personal Bar* (2006) ch 1.

⁸⁰⁸ See for example the definition by Reid and Blackie, *Personal Bar* at 2.01-2.03

⁸⁰⁹ See Reid, *Property* para 3.

⁸¹⁰ See *Mitchell* (n 700) per Lord Kinneir at 610, followed in *M'fadyean v Shearer Bros* 1952 SLT (Sh Ct) 12; J Rankine, *The Law of Personal Bar in Scotland* (1921) 215-216, although Rankine characterises the doctrine of "holding out" as "commonly confined" to the law of agency.

⁸¹¹ Assuming, of course, that the general conditions for the application of bar are met, on which see Reid and Blackie, *Personal Bar* chs 2-4.

⁸¹² See ch 3 C(1)(b); Gloag and Irvine, *Rights in Security* 237.

representation as to ownership,⁸¹³ especially where it can be ascribed to a legitimate (non-collusive) contract.⁸¹⁴ As to whether negligence could operate to bar recovery by the owner, there is some indication that this is accepted as a theoretical possibility but, in the absence of a special duty to take care of one's property, negligence is difficult to establish.⁸¹⁵

The effect of the bar would certainly be to prevent the owner recovering his or her property. Whether it could operate to transfer ownership is less certain.⁸¹⁶ To hold that the original owner retains a property right which he or she could potentially assert against subsequent transferees would be "curious and unprincipled".⁸¹⁷ However, to deprive an owner of his or her right on the basis of inconsistent conduct could, in some circumstances, seem overly harsh.⁸¹⁸ In other areas of property law, such as encroachment, personal bar does not operate to create new rights.⁸¹⁹ The position under the Sale of Goods Act 1979 is discussed later, but the better view appears to be that, at common law, personal bar does not confer proprietary rights and is accordingly not a true exception to the *nemo plus* principle.

With regard to the creation of subordinate real rights, what of rights (such as lien) which arise through operation of law rather than the consent of the owner?⁸²⁰ In general, a rule which allows ownership to be asserted by a non-owner will also allow

⁸¹³ *Mitchell* (n 700).

⁸¹⁴ *Marston* (n 616); *Hogarth* (n 634); *Robertson and Another* (n 606); Bell, *Principles* 1315.

⁸¹⁵ For example, in *M'Kellar v Greenock and Port-Glasgow Loan Co Ltd* (1918) 34 Sh Ct Rep 93, a servant stole a watch but it was held that, in the absence of a special reason to doubt the honesty of the servant, there was no duty upon the owner to take precautions against the theft.

⁸¹⁶ The Sheriff in *Peggie v Rex & Co (Falkirk) Limited* 1945 SLT (Sh Ct) 25 seems to have assumed that reputed ownership could operate to transfer ownership to a purchaser. See at 26-27. However, Reid and Blackie, *Personal Bar* 5-23 argue that personal bar is not constitutive of proprietary rights. Reid, *Property* para 670 at fn 3 and at para 680 (Gamble) states that personal bar could not confer ownership.

⁸¹⁷ K G C Reid and C G van der Merwe, "Property Law: Some Themes and Variations", in Reid *et al.* (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 637 at 661-662.

⁸¹⁸ Particularly given the general reluctance of the courts to impose a duty on the owner to take care of his or her property, see D(3)(c) below. Gloag and Irvine state that the principle will "very rarely be applied" to prevent recovery by the true owner of moveables: *Rights in Security* 203.

⁸¹⁹ See generally Reid and Blackie, *Personal Bar* ch 6. On encroachment, see paras 6.22-6.25.

⁸²⁰ As the *nemo plus* rule applies to lien, it is however, to some extent a consensual security. On this difficult question, see Steven, *Pledge* paras 13-35-13-49.

the assertion of subordinate real rights.⁸²¹ In *Lamonby v Foulds*⁸²² the Inner House accepted the possibility that, in appropriate circumstances, a representation by the owner that a possessor was entitled to create subordinate real rights would prevent the owner from denying that a lien had been created.⁸²³ Merely entrusting a third party with possession is not enough, however, to bar the owner from recovering his or her property.⁸²⁴

(c) *Tacit Securities*

The topic is outwith the scope of the thesis, but there also are a few special cases where, although the possessor could not transfer ownership, a subordinate real right will arise by operation of law. These may include an innkeeper's lien⁸²⁵ and possibly a delictual lien.⁸²⁶

Prior to its restriction by s 208(4) of the Bankruptcy and Diligence etc. (Scotland) Act 2007, the property of a third party in the possession of a tenant could be subjected to the landlord's hypothec.⁸²⁷ This rule was traditionally justified by reference to the implied consent of the owner, rather than a reputed ownership due to the tenant's possession;⁸²⁸ notification to the landlord should thus have been enough to rebut this presumption.⁸²⁹ Whether the property was held on some kind of limited

⁸²¹ So for example personal bar could (in theory at least) bar the owner from denying the pledge: Gloag and Irvine, *Rights in Security* 204-207; Steven, *Pledge* para 6-48.

⁸²² 1928 SC 89. See further Steven, *Pledge* para 13-50.

⁸²³ Presumably in the case of a change of ownership a successor would not be affected. See Reid and Blackie, *Personal Bar* 5.04-5.05.

⁸²⁴ Steven, *Pledge* para 13-50.

⁸²⁵ *Bermans & Nathans Ltd v Weibye* 1983 SC 67. This is due to the "onerous obligations and strict liability" placed by law upon innkeepers. See the judgment of Lord President Emslie at 72. See further Steven, *Pledge* paras 16-82-16-85.

⁸²⁶ Steven, *Pledge* para 13-36 is of the view that the law relating to a delictual lien is uncertain.

⁸²⁷ On the law prior to the 2007 Act, see A McAllister, *The Scottish Law of Leases*, 3rd edn (2002) 5.46-5.62; J Rankine, *Treatise on the Law of Leases in Scotland*, 3rd edn (1916) 374-379; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 203-206; A J M Steven, "The Landlord's Hypothec in Comparative Perspective" (2008) 12(1) *Electronic Journal of Comparative Law*.

⁸²⁸ *Jaffray v Carrick* (1836) 15 S 43. This seems to have been accepted in *Nelmes v Ewing* (1883) 11 R 193. Compare *Adam v Sutherland* (1863) 2 M 6 at 8; *Pulsometer Engineering Co v Gracie* (1887) 14 R 316; *Dundee Corporation v Marr* 1971 SC 96. For a critique of the idea that the hypothec is based in personal bar in South African law, see J S McLennan, "A Lessor's Hypothec over the Goods of Third Parties – Anomaly and Anachronism" (2004) 16 *SA Merc LJ* 121 at 123.

⁸²⁹ See *Dundee Corporation* *ibid.* at 101-102.

contract such as hire purchase⁸³⁰ or had been gratuitously deposited with the tenant⁸³¹ made no difference to the application of the hypothec. Much depended, however, on the particular circumstances of each case.⁸³²

With regard to future development, the debates surrounding the landlord's hypothec provide an excellent example of the wider politics of the law in this area. The distributional effects of private law rules on creditors and debtors cannot be ignored;⁸³³ judges, however, often declare themselves ill-equipped to deal with issues of public policy. The argument that fundamental changes in economic and social conditions had rendered the existing law obsolete met with little judicial favour in *Dundee Corporation v Marr*,⁸³⁴ with several judges commenting that development should take place by means of legislation.⁸³⁵

(d) Money

An important area not covered in the thesis is the law relating to *bona fide* acquirers of money. This is partly for reasons of space; there is also an argument that money is in some sense not "true" corporeal moveable property.⁸³⁶ There is an important distinction between "money" used in reference to circulating currency and other forms of note and coin the value of which may be principally historical or due to the materials contained therein.⁸³⁷ In relation to currency, under the Sale of Goods Act this cannot be sold.⁸³⁸ Understood as promissory notes, banknotes are incorporeal moveable property.⁸³⁹

⁸³⁰ See *Rudman v Jay and Co* 1908 SC 552; *Nelmes v Ewing* (n 828).

⁸³¹ See Rankine, *Leases* 376-377.

⁸³² See comments in Rankine, *Leases* 374-375.

⁸³³ On this topic, see further I Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State" (1995) 15(2) *Oxford Journal of Legal Studies* 177.

⁸³⁴ (n 828).

⁸³⁵ See the comments by Lord Migdale at para 103 and Lord Cameron at paras 109-110.

⁸³⁶ Carey Miller, *Corporeal Moveables* para 1.02. See further L Crerar, "Banking, Money and Commercial Paper", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2000) para 143. For comprehensive analysis from an English perspective see D Fox, *Property Rights in Money* (2008) ch 1.

⁸³⁷ For an account of the legal and economic functions of money see Fox, *Money* paras 1.19-1.58.

⁸³⁸ SOGA 1979 s 61(1). Compare coins and notes of historical value: *Moss v Hancock* [1899] 2 QB 111.

⁸³⁹ See Crerar, "Banking" para 143.

Due to this special status, it seems that currency provides an exception to the owner's right to recover his or her property. This is probably on the basis of original, rather than derivative, acquisition, but the doctrinal basis for this and the relationship to other cases of original acquisition are obscure.⁸⁴⁰ The fact that it is usually difficult or impossible to distinguish one coin from another seems to be a factor. However, the requirements of commerce are also cited by Stair as justifying his view that currency "doth so far become the property of the possessor, that it passeth to all singular successors without any question of the knowledge, fraud, or other fault of the author."⁸⁴¹ There may be a distinction between marked and unmarked money,⁸⁴² but in general it seems that currency cannot be vindicated from a good faith party.⁸⁴³ It may, however, be the subject of an enrichment claim.

(3) The Sale of Goods Act 1979

(a) History of the Act

In respect of English law, "[p]rotection of purchasers for value without notice as against the legal owner is a principle well known in both law and equity."⁸⁴⁴ In particular, the Sale of Goods Act 1979 provides a number of exceptions to the *nemo plus* principle. How are these to be understood and justified? The provisions of the 1979 Act have their origins in a statute codifying the English common law of sale, the Sale of Goods Act 1893, which is in turn based on the Factors Act 1889 and a series of earlier English Acts regarding factors.

In nineteenth-century England at least,⁸⁴⁵ the factor played an "increasing financial role...in the provision of trade credit"; provision of credit to the principal often necessitating the raising of funds from finance houses.⁸⁴⁶ The lack of legal

⁸⁴⁰ See *Crawford v Royal Bank* (1749) Mor 875; Reid, "Banknotes"; Crerar, "Banking" para 144. For the English position, compare Fox, *Money* ch 8.

⁸⁴¹ Stair, *Institutions* 2.1.34.

⁸⁴² See Bell, *Principles* § 1333.

⁸⁴³ See, however, *Henry v Morrison* (1881) 8 R 692 at 693. In that case, "the object of obtaining possession of these vouchers may be something very different from the recovery of the money."

⁸⁴⁴ *Curtis v Maloney* [1951] 1 KB 736 at 742 per Somervell LJ.

⁸⁴⁵ The 3rd edition of Bell's *Commentaries* (1816) contains a new title (vol 2 326-324) on the law regarding mercantile agents and factors, indicating the topic also had relevance in Scotland.

⁸⁴⁶ See R Munday, "A Legal History of the Factor" (1977) 6 *Anglo-American Law Review* 221 at 260.

protection for a purchaser or pledgee where an agent sold or pledged goods in his possession without authority was attacked by some in mercantile communities as an impediment to the circulation of capital.⁸⁴⁷ The English Factors Acts were thus based on the principle that, “when one person arms another with a symbol of property... he should be the sufferer when a fraud ...takes place, rather than the person who ...is misled by the position in which the person is placed who is trusted by the owner of the property, and by that means is enabled to commit a fraud”.⁸⁴⁸ The Acts were originally aimed at mercantile agents entrusted with documents of title, but were extended to buyers or sellers in possession of the actual goods by the consolidating Act of 1889, a consequence which was perhaps not intended by the original drafters.⁸⁴⁹ The 1889 Act was described by Mackenzie Chalmers as a partial application of the French maxim “En fait de meubles...”⁸⁵⁰ Indeed, French law is mentioned several times during his commentary on the Sale of Goods Act.⁸⁵¹

Although during the nineteenth century the applicable Scots law was perceived as more friendly to commerce,⁸⁵² the Factors (Scotland) Act 1890 applied the provisions of the English Factors Act 1889 to Scotland.⁸⁵³ It seems that this Act was passed rather hurriedly, without adequate opportunity for comment by the Scottish legal and mercantile communities.⁸⁵⁴ It was certainly already the case that Scots law had developed rules to prevent defrauding of third parties by those

⁸⁴⁷ For a description of the campaign which led to the passing of the Factors Act 1823, see S Thomas, “The Origins of the Factors Acts 1823 and 1825” (2011) 32(2) *Journal of Legal History* 151 at 156-159. The recognition of the strength of commercial feeling in the report of the parliamentary select committee is noted at 161. However, others pointed to the security of property as a cause of British commercial success; see 184.

⁸⁴⁸ *Vickers v Hertz* (1871) LR 2 Sc 113 at 115, quoted in *Brown v Marr, Barclay & Co* (1880) 7 R 427 at 436.

⁸⁴⁹ See A Moody Stuart, “Securities over Moveables in the Debtor’s Possession” 1894 6 *Juridical Review* 210 at 213.

⁸⁵⁰ M D E S Chalmers, *The Sale of Goods Act 1893* (1894) 118. On the history and scope of the rule in France, see J-L Bergel *et al.* (eds), *Traité de Droit Civil: Les Biens*, 2nd edn (2010) 268-280; F Zenati-Castaing and T Revet, *Les Biens*, 3rd edn (1998) paras 230-231.

⁸⁵¹ Chalmers, *Sale of Goods Act* 50; 54; 118.

⁸⁵² See Thomas, “Origins” 159 for an example of a petition by Bristol merchants comparing English law unfavourably with that of Scotland. See also J J Gow, *The Mercantile and Industrial Law of Scotland* (1964) 101-109.

⁸⁵³ See the Factors (Scotland) Act 1890. The provisions of the Factors Acts had already been applied in Scotland in *Vickers* (n 848).

⁸⁵⁴ See Hansard HC Deb 04 August 1890 vol 347 col 1774; HC Deb 06 August 1890 vol 348 cols 16-17.

possessing on some the basis of some limited right.⁸⁵⁵ Both English and Scots case law recognised a principle that, of two innocent parties, the one who had enabled the fraud to be committed should suffer.⁸⁵⁶

It is these concerns of nineteenth-century English law which were ultimately reflected in the drafting of what became the Sale of Goods Act 1893. The Act replicated sections 8 and 9 of the Factors Act 1889, again aiming to solve some of the problems arising from separation of possession and ownership. The Scottish Law Commission identifies three main norms governing the exceptions provided by the Act: the principle of publicity, the principle that the party who has facilitated the wrong must suffer and convenience and commercial necessity.⁸⁵⁷

Rodger has depicted the extension of the 1893 Act to Scotland as enjoying substantial Scottish support.⁸⁵⁸ This would seem to accord with the general tone of the era: “No one, I presume, doubts the desirability of a gradual assimilation of the laws of England, Ireland, and Scotland.”⁸⁵⁹ It has been argued that the Act was based in a particular “jurisprudential ideology”:⁸⁶⁰ a set of beliefs regarding the value of codification and in particular its importance to commercial interests.⁸⁶¹ A code would allow deductive, rather than inductive, reasoning, and was therefore seen as providing a more certain foundation on which the affairs of businessmen could be managed.⁸⁶² Codification can also be linked to the politics of empire: not only should the nations within the United Kingdom be united by a common code, but the states at that time British colonies. “We should also [then] have done

⁸⁵⁵ For example, a sale and return contract: see *Brown* (n 848) and the discussion at ch 3 C(1)(b) of the doctrine of reputed ownership.

⁸⁵⁶ *Babcock and Others v Lawson and Another* (1879) 4 QBD 394; *Pochin v Robinow and Marjoribanks* (1869) 7 M 622; *Vickers* (n 848).

⁸⁵⁷ *Corporeal Moveables: Protection* para 11.

⁸⁵⁸ A Rodger, “The Codification of Commercial Law in Victorian Britain” (1992) 108 *LQR* 570 at 583.

⁸⁵⁹ J K, “On the Codification of Commercial Law” (1880) 24 *Journal of Jurisprudence* 638 at 638.

⁸⁶⁰ R Ferguson, “Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes,” (1977) 4(1) *British Journal of Law & Society* 18 at 22.

⁸⁶¹ Ferguson, “Legal Ideology” 22.

⁸⁶² See for example the statement of the drafter of the Sale of Goods Act, Mackenzie Chalmers, that “Codification... is the only remedy which can arrest the decay of legal principles, and render law again an exact science, by means of which men may know their rights beforehand, and be able to adjust their conduct accordingly”: M D E S Chalmers, “Trial by Jury in Civil Cases” (1891) 7 *LQR* 21.

something tangible towards drawing together the various parts of our vast Empire.”⁸⁶³

The Factors Act 1889 remains in force,⁸⁶⁴ so litigants can, in theory, choose whether to rely on sections 8 and 9 of that Act or Sections 24 and 25 of the Sale of Goods Act 1979.⁸⁶⁵ Discussion focuses on the text given in the Sale of Goods Act, but where the provisions of the Factors Act provide wider or different protection, this is mentioned.

(b) Good faith under the Act

(i) General concept

Due to the diversity of the situations in which norms of good faith are applied, it is difficult to construct a unified concept of good faith in Scots property law.⁸⁶⁶ In the context of acquisition *a non domino*, the closest thing to a general definition is that in s 61(3) of the Sale of Goods Act which, in presumed reference to the subjective state of mind of the acquirer,⁸⁶⁷ states that a thing is done in good faith when it is in fact done honestly. “In good faith and without notice” seems to include both objective and subjective elements: subjective good faith is required, but the notice requirement implies the possibility of constructive notice.⁸⁶⁸ Scots law generally utilises both objective and subjective criteria.⁸⁶⁹ From an objective perspective, Carey Miller describes the role of good faith in certain contexts as a “control device”⁸⁷⁰ and also a

⁸⁶³ J Dove Wilson, “The Proposed Imperial Code of Commercial Law-A Plea for Progress” 1896 *Juridical Review* 329.

⁸⁶⁴ It was originally intended to repeal the replicated sections of the Factors Act, but this was postponed for consultation with the original draftsman and subsequently not pursued. See Chalmers, *Sale of Goods Act* 55; S Thomas, *A Comparative Analysis of the Rule of Nemo Dat Quod Non Habet and its Exceptions in the Law of England and Wales and the Law of the United States of America* (PhD Thesis, University of Manchester 2008) 142-143.

⁸⁶⁵ For an example of a case in which both provisions were cited see *P4 Ltd v Unite Integrated Solutions Plc* [2006] BLR 150.

⁸⁶⁶ Carey Miller, “Good Faith” at 123-124.

⁸⁶⁷ J S Ulph, “Good Faith and Due Diligence”, in E McKendrick and N Palmer (eds), *Interests in Goods*, 2nd edn (1998) 403 at 408.

⁸⁶⁸ See M G Bridge, *The Sale of Goods*, 3rd edn (2014) paras 5.113-5.115. Bridge opines, however, that even if a doctrine of constructive notice were thought to exist it would have little impact given the informal nature of many sale of goods transactions.

⁸⁶⁹ Reid, *Property* para 132.

⁸⁷⁰ Carey Miller, “Good Faith” at 103.

“norm of honest conduct”.⁸⁷¹ In one of the few Scottish cases to deal with the issue, both objective and subjective elements are referred to:

In order relevantly to aver *mala fides*... the pursuers must aver facts and circumstances from which the defender’s fraudulent or dishonest dealing with the vehicle may reasonably be inferred. If it cannot be averred that the defender knew that the car had been stolen, it must at least be averred...that he deliberately shut his eyes to circumstances which were indicative of this possibility.⁸⁷²

In terms of factors which may be taken into account, sale at undervalue in itself does not lead to an inference of bad faith.⁸⁷³ Sale of a car without the registration documents may be enough to raise suspicion and suggest that further investigation should be undertaken.⁸⁷⁴

(ii) Justificatory role

Although the importance of good faith is recognised in both English and Scots law through sections 23-25 of the Sale of Goods Act, there is reluctance to give a wider role to good faith in English law by extending the operation of these provisions further than the terms of the Act necessitate.⁸⁷⁵ However, it would be “misleading” to deny a positive function to good faith.⁸⁷⁶

Carey Miller argues that, following the general principles of derivative acquisition, bad faith will lead to a defect in the acquirer’s intention to acquire ownership (*animus domini*) both at common law and under the Sale of Goods Act.⁸⁷⁷

⁸⁷¹ Carey Miller, “Good Faith” at 103.

⁸⁷² *Mercantile Credit Co Ltd v Townsley* 1971 SLT (Sh Ct) 37. Compare Bridge, *Sale* para 5.114.

⁸⁷³ *Jarvis v Manson* 1953 SLT (Sh Ct) 93 at 94. This may of course depend on the circumstances; see *GE Capital Bank Ltd v Rushton* [2005] EWCA Civ 1556 at paras 42-47.

⁸⁷⁴ *Wilkes v Livingstone* 1955 SLT (Notes) 19 at 19-20; *Heap v Motorists’ Advisory Agency Ltd* [1923] 1 KB 577 at 590-591.

⁸⁷⁵ *Pearson* (n 757) at 291 per Vaisey J.

⁸⁷⁶ Carey Miller, “Good Faith” at 125.

⁸⁷⁷ Carey Miller, “Good faith” 110-111; 120-121.

It is not clear what authority exists for this view in Scots law.⁸⁷⁸ The thesis is asserted to be based on principle rather than policy,⁸⁷⁹ but if intention to transfer is assessed objectively, it seems to amount to a policy decision. *Animus domini* may equally be argued to amount to a will to acquire, rather than a belief in being owner.⁸⁸⁰ There are sound reasons to exclude bad faith parties from acquisition (they did not trust in appearances, they may not have followed the appropriate market norms), but it is submitted that this does not justify conflating these two concepts.

(iii) Proving good faith

The burden of proving good faith will usually lie on the party seeking to assert a right, except, it seems, in the case of section 23.⁸⁸¹ This has been criticised,⁸⁸² but may arguably be justified by reference to the existence of an apparently valid consent by the original owner to transfer and the strong need to protect third parties relying on this.⁸⁸³

(c) *Preclusion by conduct: Section 21*

(i) "Title"

Section 21 states:

Where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had

This is, *prima facie*, a fairly clear restatement of two fundamental principles of derivative acquisition shared by Scots and English law: the rule that the owner's

⁸⁷⁸ No case law or institutional authority is cited by Carey Miller. For an overview of the position in civilian doctrine, see F Zenati, "Revendication mobilière" (1998) *Revue Trimestrielle de Droit Civil* 408 at 413.

⁸⁷⁹ Carey Miller, "Good faith" 111.

⁸⁸⁰ On the differing doctrinal conceptions of *animus* see Zenati, "Revendication" at 413.

⁸⁸¹ See *Whitehorn Brothers v Davison* [1911] 1 KB 463; J S Ulph, "Conflicts of Title and the Obligations of the Seller", in E McKendrick (ed), *Sale of Goods* (2000) 165 paras 5-101-5-102.

⁸⁸² For example by the Law Commission in *Transfer of Title* para 25. See Bridge, *Sale* para 5.59.

⁸⁸³ As Ulph points out, the third party must also prove that he or she acquired prior to reduction of the transfer: Ulph, "Good Faith" at 407.

consent is necessary to transfer property, and its corollary the *nemo plus* maxim.⁸⁸⁴ One problematic aspect from a Scots perspective is the meaning of “no better title”. One may speak of “title to” a right or an interest,⁸⁸⁵ or “title to” do something (e.g. possess land),⁸⁸⁶ but what does “title to” goods refer to: title to possess the goods or title to a right in the goods? To speak simply of “title to” a thing elides the distinction between the two.

It may be that the term “title” has a different import in Scots than in English law. Great significance is attributed to possession in English property law, indeed a principal concern is with competing rights to possess.⁸⁸⁷ To have a “title” to moveable property has been described as entailing a right to possess.⁸⁸⁸ Such a title might derive either from the right of ownership, or from the fact of possession. “Title to goods” is therefore a relative concept, with multiple titles possible to the same object.⁸⁸⁹ On this interpretation, Section 21 states that the buyer will not acquire a better right to possess the goods than that held by the seller.

In the Scots context, however, although one may be concerned with who has the best right to possess, the fact of possession gives rise only to the right not to be dispossessed except by process of law.⁸⁹⁰ In respect of owned objects all rights to possession, whether real or personal, are derived from the owner of the thing.⁸⁹¹ To have “title to” an object is therefore better understood as having a title to a right in the object, rather than a title to do something with it. Although multiple titles to the

⁸⁸⁴ See Carey Miller, *Corporeal Moveables* para 8.04 and Bridge (ed), *Benjamin's Sale of Goods* para 7-001.

⁸⁸⁵ This will usually be the basis on which someone claims to hold a right, normally a juridical act.

⁸⁸⁶ A title to do something will usually be a right, e.g. a lease gives a title to possess. For an overview of the English scholarship, see L Rostill, “Relative Title and Deemed Ownership in English Personal Property Law” (2014) 34(2) *Oxford Journal of Legal Studies* 1 at 2-7.

⁸⁸⁷ See e.g. Bridge, *Personal Property* 28-29.

⁸⁸⁸ See for example the definition by F H Lawson and B Rudden, *The Law of Property*, 3rd edn (2002) 65.

⁸⁸⁹ See for example the statement in *Waverley Borough Council v Fletcher* [1996] QB 334 per Auld LJ at 345: “The English law of ownership and possession, unlike that in Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement.” The importance of relativity of title is emphasised by G Battersby and A D Preston, “The Concepts of “Property”, “Title” and “Owner” used in the Sale of Goods Act 1893” (1972) 35 *MLR* 268. For discussion from a Scots perspective, see Smith, *Property Problems* 43-47.

⁸⁹⁰ See Reid, *Property* paras 5; 115.

⁸⁹¹ See Reid, *Property* paras 140-141.

same right may be possible, only one will be valid: there is only one right of ownership in the thing.⁸⁹² A “title to goods” (singular) might thus be best explained as a “right in the goods”. To say that the buyer acquires “no better title” is to say that the buyer’s right will be no higher, his or her claim to hold the right of ownership will be no better, than the seller’s.

(ii) Preclusion by conduct

Section 21 continues by providing an exception: “unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.” At common law, an owner who had acted to clothe the seller or pledger with apparent authority was prevented from denying, in a question with a *bona fide* purchaser or pledgee, that he or she had given that authority.⁸⁹³ As Lord Herschell put it in *The London Joint Stock Bank v Simmons*,⁸⁹⁴ quoted and applied by Lord Kinnear in the case of *Mitchell v Heys*:⁸⁹⁵

The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner... unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so.

Did the drafter of section 21 intend it to be interpreted by reference to the English rules of estoppel (estoppel by negligence or estoppel by representation)?⁸⁹⁶ The authors of *Chitty on Contracts* argue that this was the intended effect of the provision, with the term “precluded” being used in an attempt to render the provision

⁸⁹² In the case of common ownership, each co-owner has a separate share in the right of ownership of the thing, but there is not more than one right of ownership. See Sharp (n 753) at 469 per Lord President Hope.

⁸⁹³ See *Cole v North Western Bank* (1875) LR 10 CP 354 at 362.

⁸⁹⁴ [1892] AC 201 at 215.

⁸⁹⁵ (n 700).

⁸⁹⁶ On the question of the relationship between these two forms of estoppel, and indeed, whether they are distinct forms at all, see P S Atiyah, J Adams and H MacQueen, *Atiyah’s Sale of Goods*, 12th edn (2010) 364-365; Ulph, “Conflicts” at para 5-032.

comprehensible to Scots law.⁸⁹⁷ As T B Smith highlights, however, Scots law knows the (in some circumstances at least) equivalent doctrine of personal bar.⁸⁹⁸

The formulation used raises further questions. The “conduct” relied on must be some conduct of the owner, rather than a fraudulent third party⁸⁹⁹ and on the basis of the English doctrine of estoppel by representation, it was held in *Debs v Sibec Developments Ltd*⁹⁰⁰ that such representations must have been voluntarily made. They must also have been such as to create a false impression as to the transferor’s entitlement to sell.⁹⁰¹ Simply handing over possession is certainly not enough,⁹⁰² nor is handing over vehicle registration documents.⁹⁰³ Section 21 does not appear to place a duty on the owner to, for example, register his or her interest with Hire Purchase Information Ltd⁹⁰⁴ as this does not amount to a “representation”.⁹⁰⁵ It seems obscure exactly what kind of conduct might thus be held enough to preclude the owner from asserting his or her right; perhaps the most that can be said is that something must have occurred which tips the balance of equities in favour of the innocent acquirer.

⁸⁹⁷ J Chitty and H G Beale (ed), *Chitty on Contracts*, 31st edn (2012) vol 2 43-226. See also Bridge (ed), *Benjamin's Sale of Goods* para 7-008; Atiyah, *Sale* 364. Previous English case law seems to have applied a form of estoppel by which a person might through their own actions be barred from questioning the ownership of the defendant; see *Woodley v Coventry* 159 ER 68 and *National Mercantile Bank v Hampson* (1880) 5 QBD 177.

⁸⁹⁸ Smith, *Property Problems* 162

⁸⁹⁹ *Farquharson Brothers v King* [1902] AC 325 at 341-343. There is no Scottish authority directly on the point, but see *M'fadyean* (n 810) and *M'Phater v Smith Premier Typewriter Co. Ltd.* (1917) Sh Ct Rep 301 at 303, in which the representations of a fraudster had enabled the deception rather than the actions of the owner in placing the fraudster in possession.

⁹⁰⁰ [1990] RTR 91 at 97.

⁹⁰¹ Atiyah, *Sale* 368-369 points to a distinction between cases where there is a representation that the seller is entitled to sell as owner, and those where it is represented that the seller is an agent with authority to sell. In relation to the latter, it is implied that the authority will only extend to sales in the ordinary course of business.

⁹⁰² See *Mitchell* (n 700) at 610-611. However, an innocent purchaser may be protected where the owner knows that the goods will be exposed for sale: see *Bryce v Ehrmann* (1904) 7 F 5; Reid and Blackie *Personal Bar* at 11-22. For English authority, see *Farquharson* (n 899); Bridge (ed), *Benjamin's Sale of Goods* para 7-009; Atiyah, *Sale* 367.

⁹⁰³ *Central Newbury* (n 757).

⁹⁰⁴ Hire Purchase Information Ltd is a private company which maintains a database of outstanding finance agreements. It holds information from the police, insurers and finance houses. See www.hpi.co.uk. There is apparently no obligation on the finance houses providing data to register details of any given agreement with HPI, see Atiyah, *Sale* 370 fn 52.

⁹⁰⁵ *Industrial and Corporate Finance Ltd v Wyder Group Ltd (t/a Ducati)* (2008) 152 (37) SJLB 31, applying *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890. Even a deliberate decision not to register a particular agreement will not bar a finance company from asserting its ownership: R Goode and E McKendrick, *Goode on Commercial Law*, 4th edn (2009) 452. For criticism, see Bridge, *Sale* para 5.85.

According to the English doctrine of estoppel by negligence,⁹⁰⁶ in some circumstances negligent conduct may also preclude the owner from denying the seller's authority;⁹⁰⁷ it seems that the general principles of tort will apparently apply.⁹⁰⁸ However, the courts are reluctant to impose a duty upon owners to take care of their property, or to safeguard others against loss.⁹⁰⁹ It is therefore difficult to establish liability where an owner has carelessly entrusted the possession of goods or documents of title to an unreliable party.⁹¹⁰ The authors of *Benjamin's Sale of Goods* describe the reported cases as providing "no reliable affirmative guidance" on when such a duty is to be imposed.⁹¹¹

There is no requirement that the buyer be in good faith, or act reasonably, but it has been argued that the courts would imply this.⁹¹² In general, the courts appear to interpret section 21 so as to favour the protection of the original owner; several scholars have pointed to the perceived reluctance of courts to apply the estoppel based exception in English law.⁹¹³ There are unfortunately no reported cases in Scotland applying the provision.

(iii) Effect

It was argued earlier that personal bar at common law is a personal exception, which does not operate to remove the right of ownership but merely bars its assertion

⁹⁰⁶ In Scotland, the leading text on personal bar states that "bar by negligence" should not be elevated into a category of its own. See Reid and Blackie, *Personal Bar* para 2-24.

⁹⁰⁷ See Atiyah, *Sale* 369-372.

⁹⁰⁸ *Mercantile Credit Co Ltd v Hamblin* [1964] 2 QB 242 at 271. For criticism of this view, see Ulph, "Conflicts" para 5-032, citing *Saunders v Anglia Building Society* [1971] AC 1004 at 1038 per Lord Pearson. In Scotland, however, it seems that a person pleading personal bar will not be required to establish a duty of care in the delictual sense. See Reid and Blackie, *Personal Bar* paras 2-24 and 2-43.

⁹⁰⁹ See *Moorgate Mercantile Co Ltd* (n 905) at 919; 925 and Atiyah, *Sale* 372. See also *Central Newbury* (n 757) per Morris LJ at 394: "It cannot be that ownership is lost on the basis of enduring punishment for carelessness."

⁹¹⁰ See Atiyah, *Sale* 370. Even where there are steps (such as registration of a hire purchase agreement with H.P.I Ltd) that could be taken to protect the property, this does not place a duty on the owner to take such steps, see *Moorgate Mercantile Co* (n 905); *Dominion Credit and Finance Ltd v Marshall (Cambridge) Ltd* 1993 WL 13725833.

⁹¹¹ Bridge (ed), *Benjamin's Sale of Goods* 7-016.

⁹¹² Reid and Blackie, *Personal Bar* 11-23.

⁹¹³ See e.g. Gullifer, "Conflicts" para 13-040; A Foster, "Sale by a non-owner: striking a fair balance between the rights of the true owner and a buyer in good faith" (2004) 9(2) *Coventry Law Journal* 1 at 4

against a particular party.⁹¹⁴ Section 21, on the other hand, implies that if the owner is precluded from denying the seller's authority to sell the buyer will gain a "better title" than the seller. English case law has interpreted this to mean that the owner gains a "real title" (i.e. one that is good against the world) rather than the "metaphorical title" that would be acquired through estoppel.⁹¹⁵ In Scots law, which is not concerned with competing titles (rights) to possess, the best interpretation of "better title" seems to be "better claim to hold the right of ownership".⁹¹⁶ This would mean that, where the owner is precluded by his or her conduct from denying the seller's authority, section 21 would operate to confer ownership by statute on the acquirer, providing a clear exception to the *nemo plus* rule.⁹¹⁷

If ownership was not conferred on the acquirer, it is unclear how section 21 would affect third parties coming into contact with the property in question. For example, if A is precluded by his or her conduct from denying B's authority to sell to C, can he or she nevertheless enforce his or her right against a subsequent *mala fide* transferee, D? On the basis of the comments above, A's ownership would have been extinguished and C would acquire a valid right. Carey Miller points out that acquisition by a *mala fide* party would be an exceptional case; it is undesirable as a matter of legal policy that the owner should be bound in a question with B, but not later acquirers.⁹¹⁸ Although it is somewhat anomalous that a doctrine based on personal exception should have such severe proprietary consequences, it is important that it is clear who holds the right of ownership at any given point. Of course, where the owner is precluded from denying the transferor's authority to sell but there has been no completed transfer under the terms of the Act, section 21 will not confer ownership on the buyer.⁹¹⁹

⁹¹⁴ Reid and Blackie, *Personal Bar* 11-24. Carey Miller (*Corporeal Moveables* para 10.19 at fn 5) cites Rankine, *Personal Bar* as authority for the proposition that personal bar may operate to transfer ownership, but the passages quoted do not seem to include any substantial discussion of the issue.

⁹¹⁵ See *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 at 611, approved in *Moorgate Mercantile Co Ltd* (n 905) at 918. See also Bridge (ed), *Benjamin's Sale of Goods* at para 7-008 and Atiyah, *Sale* 372.

⁹¹⁶ The term "title" is not unknown in Scottish legislation, see for example ss 4 and 5 of the Conveyancing (Scotland) Act 1924. The reference to "better title", however, seems to imply a concept of relativity of title not applicable in Scotland.

⁹¹⁷ This view is accepted in Reid, *Property* para 680 (Gamble).

⁹¹⁸ Carey Miller, *Corporeal Moveables* para 10.20 at fn 29.

⁹¹⁹ *Shaw v Metropolitan Police Commissioner* [1987] 3 All ER 405.

Where a rule of law or evidence (for example personal bar)⁹²⁰ prevents an owner from asserting his or her title, clear rules of positive (as well as negative) prescription are desirable in order to clarify the legal position.⁹²¹ On the interpretation above, however, positive prescription would not be necessary as section 21 may operate not only to extinguish A's ownership but to confer ownership on B. Conversely though, it will not purge all potential defects from the title, merely those connected with the lack of authority of the transferor in question. No original statutory title is provided.⁹²²

(iv) Statutory powers of sale

A further exception to the *nemo plus* principle is contained in section 21(2), which states that the provision does not affect "the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction." For a Scots audience, the reference to "contract of sale" is best understood as connected to the validity of the transfer of property (which, of course, under the Act is dependent on the validity of the underlying contract).

There are a number of Scots statutes authorising transfer without the consent of the owner.⁹²³ According to Stuart-Smith LJ in *Bulbruin Ltd v Romanyszyn*⁹²⁴ "there is no universal rule that the matter should be dealt with expressly either to give or to exclude title. Nor is there any presumption in favour of the principle of *nemo dat quod non habet*".⁹²⁵ This is a surprising statement; where ownership is being, in effect, expropriated it seems desirable that there should be legislative clarity on

⁹²⁰ The question as to whether personal bar is a rule of evidence or of substantive law is controversial. Rankine, *Personal Bar* at 1 characterises it as a rule of evidence, but Reid and Blackie argue that it is best understood as a rule of substantive law (*Personal Bar* 5-20.)

⁹²¹ For an argument that the presumption of ownership from possession will suffice as a defence to the claim of the Crown in a case where the owner is barred from recovery by negative prescription, see D L Carey Miller, "Lawyer for All Time", in A Burrows *et al.* (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* 383 at 387-389. Whatever the merits of these arguments, it seems that a rule clearly conferring ownership would still be preferable.

⁹²² See comments by Smith in *Short Commentary* 162.

⁹²³ For fuller discussion see Reid, *Property* paras 664-667.

⁹²⁴ [1994] RTR 273.

⁹²⁵ *Bulbruin Ltd* *ibid.* at 277.

whether this is the case. Moreover, it is submitted that in both England and Scotland the default rule of the common law is indeed *nemo dat*.

(d) Section 23

(i) “Voidable title”

Section 23 gives a “good title” to a buyer in “good faith and without notice” where the seller has a “voidable title” which has not yet been avoided at the time of sale. Although it is considered here along with exceptions to the *nemo plus* principle, section 23 itself does not provide such an exception but merely confirms the common law position that certain contractual defects create only personal rights to avoid the transfer, which are not exigible against third parties.⁹²⁶

The meaning of the term “title” in the Act, and in juridical discourse in general, is somewhat obscure. Section 23 is usually assumed to apply when the underlying contract of sale is voidable.⁹²⁷ This indicates that “title” is being used in the sense of a “title to a right”;⁹²⁸ understood as the chain of juridical acts on which a claim to hold a right is based, a “voidable title” refers to the presence of a voidable juridical act in this chain. Although under an abstract system a separate juridical act such as delivery is necessary to transfer the right to the property (and must thus be avoided separately e.g. by redelivery), under the arguably causal scheme of the Act, a voidable contract is probably enough to render the title to ownership voidable.⁹²⁹ However, reduction of the contract will not necessarily act to reconvey the property to the seller; as the terms of the Act would not apply to such a transaction, where relevant the common law requirement for redelivery may continue to apply.⁹³⁰

⁹²⁶ See ch 3 C(2)(b)(iv); Carey Miller, *Corporeal Moveables* para 10.18; Reid, *Property* para 601 fn 4. Compare, however, Bell’s comment in *Principles* para 529 that “[i]f one in lawful possession of a thing sell it to another without notice, the sale is good.” Some leading English authors accept section 23’s status as an exception to the *nemo plus* rule: e.g. Goode, *Commercial Law* 459-460.

⁹²⁷ See for example Bridge (ed), *Benjamin’s Sale of Goods* para 7-022.

⁹²⁸ Of course, a contract of sale may also be in itself a title to possess, but it is primarily a means of transfer of rights.

⁹²⁹ Compare for example *Morrison v Robertson* 1908 SC 332 and *Macleod v Kerr* 1965 SC 253.

⁹³⁰ See Reid, *Property* para 692; Smith, “Error”. Reid is cited by Carey Miller (*Corporeal Moveables* para 10.17). An alternative view would be that failure of the contract renders the conveyance void, although the question is not discussed fully this appears to be McBryde’s position: *Contract* para 13-15.

(ii) Avoiding the contract

In transactions to which the terms of the Act apply, transfer of ownership requires a contract of sale.⁹³¹ If the contract is void, it is therefore implied that there will be no transfer of ownership, at least under the Act, and the buyer's title will be void rather than voidable.⁹³² The distinction between defects which will render a contract merely voidable and those which will render it void are largely outwith the scope of this study.⁹³³ However, in cases of mistake as to identity (typically a dishonest rogue impersonating a creditworthy person to obtain possession of goods), there is some confusion as to whether the result is a void or a voidable contract.⁹³⁴ From the point of view of property law, it seems desirable that such mistakes should be treated in the same way as other cases of fraud⁹³⁵ as third parties will usually have no access to the terms on which the seller acquired.

Given this problematic interface between contract and property, it seems particularly important that, when rendering a voidable contract void, there should be adequate notification to third parties. There are differing approaches in England and Scotland to what is necessary to annul a contract.⁹³⁶ In the context of property law, given the importance of the publicity principle, it is submitted that a court decree, or at least notification to the party concerned,⁹³⁷ should be required in order to produce third party effects.⁹³⁸ There is English authority to suggest, however, that notification to the police has been effective against third parties.⁹³⁹

⁹³¹ SOGA 1979 s 1(1).

⁹³² Scots law probably recognises a transfer of ownership where the *causa* has failed at common law. See B above. Intention to transfer ownership would always be required. In relation to English Law, see above n 728.

⁹³³ See McBryde, *Contract* chs 13-17; Gloag, *Contract* chs 26-29; H A Holstein, "Vices of Consent in the Law of Contracts" (1938-1939) 13 *Tulane Law Review* 362.

⁹³⁴ See discussion of *Shogun* at B above. In Scotland, compare *Macleod* (n 929).

⁹³⁵ I.e. as giving rise to a voidable contract.

⁹³⁶ For example, English law recognises equitable rescission, see Bridge, *Sale* para 5.55. On the position in Scotland, see McBryde, *Contract* paras 13.21-13.22; Gloag, *Contract* 532.

⁹³⁷ Notification would not perhaps operate to prevent transfer of title to the third party but would render his or her title reducible on the same basis as the first acquirer.

⁹³⁸ See *Macleod* (n 929) at 257-259. Although reference is made to rescission of the contract, this is treated as sufficient to return ownership to the original seller. Arguably that would require reduction of the conveyance by redelivery. See Reid, *Property* para 610. See also the comments in Carey Miller, *Corporeal Moveables* para 10.18.

⁹³⁹ See in particular *Car and Universal Finance Co Ltd v Caldwell* [1965] QB 525. W A Wilson, "999 for Rescission" (1966) 29 *MLR* 442 at 444 described the decision in *Car* as more in accordance

Moreover, in English law it has been held that where an original owner seeks to recover goods in the possession of somebody who is not a party to the voidable transaction the onus is on the possessor to show that he or she has a good title derived from a sale before the title was avoided.⁹⁴⁰ However, arguably in Scots law the application of the presumption of ownership from possession would amount in such a case to a presumption that the sale to the possessor had happened before the title was avoided, and the onus would be on the original owner to show that this was not the case. As mentioned above, even if the contract is successfully avoided it is not clear that this is enough in Scots law to reconvey the property to the former owner. Professor Diamond's *Review of Security Interests in Property* recommended that, in order to protect third parties, repossession by the seller should be necessary to avoid the transfer.⁹⁴¹ This would be consistent with the doctrinal logic of the Scots separation between possession and ownership.

“Good title” under section 23 presumably means a title free from the defects which made the title voidable. Could the provision transfer title to stolen property? A title derived from a thief is not a “voidable” title but a void one. Although on a narrow reading of title to mean immediate “title of acquisition” or *causa*, a person acquiring stolen property on the basis of a contract induced by fraud would possess a voidable title, when title is considered on a historical basis the *nemo plus* principle will mean that the title acquired is void rather than voidable.⁹⁴²

(e) “*Seller in Possession*”: Section 24

(i) Persons “having sold goods”

Section 24 of the Sale of Goods Act 1979 sets out that where a person “having sold goods”⁹⁴³ either “continues or is in possession of the goods”, the “delivery or transfer

with “justice and reality”; Ulph, “Conflicts” para 5-052 argues that the current law encourages “diligent and swift” action by sellers.

⁹⁴⁰ See *Thomas v Heelas* 1986 WL 407651 at 4. Compare *Whitehorn Brothers* (n 881), distinguished in *Thomas* on the basis that that case was concerned with the onus of proof as between the parties to the voidable transaction.

⁹⁴¹ A L Diamond, *A Review of Security Interests in Property* (1989) para 13.6.6.

⁹⁴² See Gullifer, “Conflicts” para 13-037.

⁹⁴³ See Bridge, *Sale* para 5.123.

by that person, or by a mercantile agent acting for him” of the goods “under any sale, pledge, or other disposition thereof”⁹⁴⁴ to any person “in good faith and without notice of the previous sale” will have effect “as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.”

It is assumed that the effect of the phrase “as if he were expressly authorised by the owner of the goods” is to render an otherwise ineffective transfer valid and effective.⁹⁴⁵ It might be thought that, given the section’s origins in the Factors Acts, the intention was to place the seller in the position of an authorised mercantile agent. However, this cannot explain the difference in terms between sections 24 and 25 (discussed below).⁹⁴⁶ It has been argued on the basis of detailed scrutiny of the section’s legislative history that it is only where documents of title (rather than solely goods) remain with the seller that he or she can transfer ownership.⁹⁴⁷ This is clearly inconsistent with the way that section 24 has been interpreted by the courts.⁹⁴⁸ An alternative explanation is that the seller was (or has been assumed to have been) at one point the actual owner, justifying reliance by a purchaser even if the transaction is not in the ordinary course of business. The situation is otherwise under section 25, where a purchaser is transacting with someone who is not (and has never been) owner.

One obvious question raised is whether the person “having sold goods” must have owned them at the time of the first sale. It seems that, on the basis of the general policy and scheme of both the Sale of Goods and the Factors Acts, this is indeed the correct interpretation.⁹⁴⁹ Although not logically necessary under the wording of the section, such a view would accord with the Acts’ general adherence

⁹⁴⁴ On the meaning of “other disposition” see Bridge, *Sale* para 5.128; Atiyah, *Sale* 386; Goode, *Commercial Law* 467-468; *Worcester Works Finance Ltd v Cooden Engineering Ltd* [1972] 1 QB 210. Section 8 of the Factors Act extends to a delivery or transfer “under any agreement for sale, pledge, or other disposition thereof”.

⁹⁴⁵ See Bridge, *Sale* paras 5.149-5.150.

⁹⁴⁶ This was the view taken in *Newtons* (n 758) at 578B. In that case it was held that there was no requirement in s 24 that the seller act as a mercantile agent (i.e. in the ordinary course of business).

⁹⁴⁷ See L A Rutherford and I Todd, “Section 25(1) of the Sale of Goods Act 1893: The Reluctance to Create a Mercantile Agency” (1979) 38 (2) *Cambridge Law Journal* 346.

⁹⁴⁸ For criticism, see Bridge, *Sale* 5.149-5.150.

⁹⁴⁹ See *National Employers’ Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24, per Lord Goff at 62. These comments were, however, obiter.

to the *nemo plus* rule. As T B Smith has commented, the policy of the Act to transfer the (possibly defective) title of the original seller, rather than confer a clean statutory title may be less satisfactory in some situations.⁹⁵⁰ However, the Act arguably does not contemplate a general protection for the good faith purchaser. As the Scottish Law Commission have commented, the provision in sections 21-25 is “somewhat fragmentary” and no clear general principle is articulated.⁹⁵¹

The provision should be understood in the context of sections 17 and 18 of the Act regulating transfer of ownership, which establish that (contrary to the Scots common law)⁹⁵² ownership will pass when the parties intend, despite postponement of delivery or payment or both. A seller may thus retain physical control over goods that he or she no longer owns. To protect third parties, who might be misled by the appearance of ownership created by physical control, section 24 provides that acquirers from such persons take as if the owner had consented to transfer. It is (along with what is now Section 25) described by Brown as creating a “statutory reputed ownership”.⁹⁵³

(ii) Continuing in possession

Further, the seller must either “continue [...], or be in possession of” the goods. The meaning of this phrase is contested. “Possession” here includes civil possession through a tenant.⁹⁵⁴ In the Australian case of *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd*,⁹⁵⁵ the Privy Council held that “continues... in possession” in the equivalent New South Wales legislation refers to continuous physical possession, and is not interrupted by an alteration in the title on which the goods are held.⁹⁵⁶ Physical possession has been praised as a simple and equitable

⁹⁵⁰ Smith, *Short Commentary* at 151.

⁹⁵¹ *Corporeal Moveables: Protection* para 38.

⁹⁵² See Carey Miller, “Problem Transplants”.

⁹⁵³ Brown, *Notes* 124.

⁹⁵⁴ Atiyah, *Sale* 385, but see also Ulph, “Conflicts” para 5-061 referring to *Anglo-Irish Asset Finance v DSG Financial Services* [1995] 2 CLY 4491.

⁹⁵⁵ [1965] AC 867.

⁹⁵⁶ The previous English authority, *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 KB 305, was said to be wrongly decided, although this comment was *obiter*. See paras 888-889 of the judgment. *Pacific Motor Auctions* was followed in *Worcester Works Finance* (n 944), but again these comments were *obiter*. It was again assumed by the Court of Appeal in *Mobil Oil Company Limited v*

basis for allocating risk.⁹⁵⁷ However, *Pacific Motor Auctions* has attracted criticism on the basis that the possession in question should be attributable to the sale, rather than on an entirely unconnected ground.⁹⁵⁸ Where there is no continuity of physical control (for example if the seller has handed over the goods but then regained possession as repairer)⁹⁵⁹ third parties will not benefit from section 24's protection.⁹⁶⁰

The main justification for protecting good faith acquirers under section 24 thus seems to be reliance on the seller's physical control.⁹⁶¹ Section 24's first appearance was as section 3 of the Factors Act 1877, which was passed in reaction to *Johnson v Credit Lyonnais*.⁹⁶² In that case, tobacco had been sold to the plaintiffs, but after the sale pledged to the defendants using dock warrants as evidence of title. It was held that the plaintiffs could recover the value of the tobacco from the defendants, and this apparently caused "great alarm" among merchants and led to the passing of the 1877 Act.⁹⁶³ The application of section 3 was extended by section 8 of the Factors Act 1889 to goods, rather than only documents of title. Originally, however, its purpose was to protect those trading with someone bearing "symbols of ownership".⁹⁶⁴ To protect anyone trading with a former owner in physical possession is a very different thing; physical possession does not necessarily imply ownership. The restriction of the provision to sellers retaining physical control can seem arbitrary, as in other cases where an innocent third party buys from a non-owning

John Alan St. Pier 1986 WL 1255623 that the approach in *Pacific Motor Auctions* and *Worcester Works* was correct.

⁹⁵⁷ Atiyah, *Sale* 384-385.

⁹⁵⁸ See L Merrett, "The Importance of Delivery and Possession in the Passing of Title" (2008) 67(2) *Cambridge Law Journal* 376 at 388-389.

⁹⁵⁹ Bridge argues that where possession is regained as seller s 24 should continue to apply: *Sale* 5.134-5.135.

⁹⁶⁰ See *Mitchell v Jones* [1905] 24 NZLR 932, 935, applied in *Halfway Garage (Nottingham) v Lepley*, and *Olds Discount Company, Limited v Krett and Another* [1940] 2 KB 117. In *Fadallah v Pollak* [2013] EWHC 3159 (QB) the seller did not possess prior to the sale but only after as bailee of the first buyer, this was not sufficient. Bridge, *Sale* para 5.34 suggests that, where the buyer should have appreciated the risk of the seller regaining possession, it is justified to continue to apply s 24.

⁹⁶¹ See for example *Mobil Oil* (n 956) at 5; Bridge, *Sale* para 5.127. It is difficult to reconcile this with the requirement in *Fadallah* (n 960) that possession be as seller.

⁹⁶² (1877) LR 3 CPD 32. See para 58.

⁹⁶³ See A Beilby Pearson, *The New Factors Act Annotated* (1890) 58.

⁹⁶⁴ J W Smith, *The Law of Contracts*, 7th edn (1878) 453.

possessor, for example a fraudulent lessee who has never owned the property, no good faith protection will be available

Different considerations may be applicable when the party who may lose ownership is a creditor who has what is essentially a monetary, rather than proprietary interest in the thing concerned. One situation in which the application of section 24 seems to be justified is in the case of a “sham sale”. This is essentially a device for a creditor to gain a non-possessory security through “ownership” of the debtor’s moveables. Although such a transaction is excluded from the scope of sale under s 62(4) of the Sale of Goods Act,⁹⁶⁵ in cases such as *Michael Gerson Leasing v Wilkinson*⁹⁶⁶ sale and leaseback arrangements have not been exposed to particularly critical scrutiny.⁹⁶⁷ It seems unfair that a good faith third party should be prejudiced by such an arrangement.

(iii) “Delivery or transfer”

Finally, what is the meaning of the requirement that there is a “delivery or transfer” by the seller in possession? Section 61(1) states that “delivery” means voluntary transfer of possession from one person to another. The question that arose in *Michael Gerson*⁹⁶⁸ was could such a transfer be a constructive, rather than an actual one?

Michael Gerson concerned an action for conversion. A company, E Ltd, had entered into a sale and leaseback agreement with the plaintiff finance company, G Ltd, in respect of certain heavy plant and machinery. E retained physical control over

⁹⁶⁵ Bridge, *Sale* para 5.125 criticises this, suggesting that s 62(4) should be denied application to three-party title problems.

⁹⁶⁶ [2001] QB 514.

⁹⁶⁷ On the validity of sale and leaseback used as a means of security in Scotland, see G L Gretton, “The Concept of Security”, in D J Cusine (ed), *A Scots Conveyancing Miscellany* (1987) 126; Styles, “Sales” (giving a contrary view as to when a sale is “intended to operate by way of... security”); Scottish Law Commission, *Moveable Transactions* (Scot Law Com DP No 151, 2011) paras 6.37-6.44. In *Wood v Gillies* (1904) 20 Sh Ct Rep 141 s 62(4) was held to exclude a sale and leaseback of furniture from the scope of the Sale of Goods Act 1979 but the authority of this decision is questionable. The reasoning in the decision is that of the Sheriff-Substitute; the views expressed do not appear to have been referred to in later cases and persuasive arguments have since been made to the contrary. R B Wood, “Sale and Leaseback” (1982) 27 *Journal of the Law Society of Scotland* (W) 267 at 286 argues that if there is no provision for redemption (retransfer of the thing to the original owner), a sale and leaseback is not a sale intended to operate by way of security.

⁹⁶⁸ (n 966) followed in *Fadallah* (n 960).

the goods. Subsequently, despite having transferred ownership to G under this agreement, E entered into a second sale and leaseback transaction with the defendant finance company, State (St), in respect of some of the items. As payments had not been maintained under the agreement, St sold these goods to S Ltd, who sold them to W, the first defendant. The case is complicated by the fact that, between the sale and leaseback agreement with St and the subsequent transfers by St to S Ltd, G had contracted to sell all the goods to S Ltd, who sold them to W around the same time as the goods it had obtained from St. G sued St for conversion in respect of the items sold to it by E, and W in respect of all the goods.

G's action against W was successful in part, but the main import of the decision was the finding that the second sale and leaseback transaction with St engaged the protection of section 24 of the Sale of Goods Act, meaning that although St never had physical control over the goods, "delivery or transfer" had taken place. St could thus pass ownership to S Ltd and W.

Interestingly, full argument was not made on whether "delivery" in section 24 could include constructive delivery. Clarke LJ opined that, on the basis of the High Court of Australia's decision *Gamer's Motor Centre (Newcastle) Pty v Natwest Wholesale Australia Pty Ltd*,⁹⁶⁹ which he had followed in *Forsythe International (UK) Ltd v Silver Shipping Co Ltd*,⁹⁷⁰ this was the correct analysis.⁹⁷¹ As he himself acknowledged though, his comments on this are *obiter dicta*.

On the assumption that "delivery" could include constructive delivery, the case turned on whether, on the facts, such constructive delivery had occurred.⁹⁷²

⁹⁶⁹ (1985) 3 NSWLR 475. This case concerned constructive delivery by a "buyer in possession" under the equivalent legislation (s 28(2) of the NSW Sale of Goods Act 1923). Mason CJ thought that to allow delivery to be constructive would enhance the protection given to innocent purchasers (para 27. See also para 19 of Dawson J's judgment.)

⁹⁷⁰ [1994] 1 WLR 1334. Clarke J referred to *Gamer's* case and s 1(2) of the Factors Act 1889, which states that a person may possess goods where they are "held by any other person subject to his control or for him or on his behalf." Having accepted that possession could be constructive, he focussed on the meaning of "voluntary transfer" under s 61(1) SOGA. See paras 1345-1347 of the judgment.

⁹⁷¹ Para 10. Compare *Nicholson v Harper* [1895] 2 Ch 415 and *Bank of New South Wales v Palmer* [1970] 2 NSWLR 532 (Overruled by *Gamer's Motor Centre*) and *NZ Securities & Finance Ltd. v Wrightcars Ltd.* [1976] 1 NZLR 77.

⁹⁷² Para 11.

Clarke LJ's arguments were strongly influenced by the fact that, under the leaseback agreement, St was obliged to deliver the items to E Ltd. On his view, such delivery would only be possible if there had been a prior delivery (albeit constructive) to St.⁹⁷³ The terms of the lease were only consistent with the ownership of St.⁹⁷⁴ There had been a change in the character of E Ltd's possession; the sale and subsequent lease agreement were thus sufficient to constitute a "voluntary transfer of possession" under section 61(1).⁹⁷⁵

Clarke LJ argued that this approach made "commercial sense" and "make[s] sense in modern conditions."⁹⁷⁶ Pill LJ declined to comment on this view, but agreed the question was whether a constructive delivery had occurred. He opined that the fact that the sale and leaseback were instantaneous should not exclude the possibility of delivery from E Ltd to St having taken place.⁹⁷⁷ He remarked, somewhat ironically, that such an approach would "produce further artificiality and fine distinctions in sale and leaseback."⁹⁷⁸

One of the justifications usually cited for derogation from the *nemo plus* rule is commercial convenience. It is not clear, however, that Clarke LJ's appeal to "commercial sense" provides a convincing reason for his decision. Although State was successful in defending its title against Gerson, the logical implication of the decision is that, had there been a third sale and leaseback transaction, this would have defeated its claim. Such an interpretation of section 24 may end up making purchasers under such agreements less, not more, secure.⁹⁷⁹ The finance industry may be more interested in the security of the original financier in the case (Gerson) than protection of a subsequent party.⁹⁸⁰

⁹⁷³ See paras 16-19.

⁹⁷⁴ Para 20.

⁹⁷⁵ Para 32.

⁹⁷⁶ Para 36.

⁹⁷⁷ Para 92.

⁹⁷⁸ Para 92.

⁹⁷⁹ See J S Ulph, "Sale and Lease-Back Agreements in a World of Title Relativity: *Michael Gerson (Leasing) Ltd v Wilkinson and State Securities Ltd*" (2001) 64(3) *MLR* 481 at 488.

⁹⁸⁰ See "New danger in sale and leaseback", Briefing by Bermans LLP, available at <http://www.bermans.co.uk/publications.php?10.articles.view.410>.

From the point of view of doctrinal coherence, academics have pointed out that the decision raises several apparent inconsistencies. Nikki McKay has commented that constructive delivery to the first buyer (G Ltd) does not seem to have the effect of preventing the seller from being a seller “continuing... in possession” under section 24.⁹⁸¹ It seems logically undesirable that two different concepts of “delivery” and “possession” should be used in the same provision. It is therefore somewhat problematic that the relevance of constructive delivery to whether the seller has continued in possession was not considered.⁹⁸² Finally, it was not thought necessary in the decision to identify a specific moment when “delivery” took place. This has been criticised as unsatisfactory, particularly in relation to insolvency situations.⁹⁸³

What import, then, does *Michael Gerson* have for Scots law? The objective of the Sale of Goods Act was harmonisation of the laws of Scotland and England,⁹⁸⁴ so in respect of the meaning of section 24, English case law may well be persuasive. In the past, however, some scholars have suggested that, insofar as not entirely irreconcilable with the provisions of the statute, Scots judges should attempt to carve their own interpretation of the Act based on “indigenous” Scots tradition.⁹⁸⁵ As full argument was not made on the question of whether “delivery” could be constructive, this could be seen as leaving the question open for future consideration. It can be assumed that, in such an instance, the reasoning in *Gerson* would nevertheless be influential.

As regards the general principles of Scots property law, the requirement of publicity might be argued to favour an interpretation of “delivery” as transfer of physical possession. Hume, for example, comments that:

⁹⁸¹ N McKay, “Case Comment: Seller in possession- Constructive Delivery of the Goods on Site” (2000) 5(2) *Coventry Law Journal* 122 at 125-126.

⁹⁸² See Merrett, “Delivery” at 392-3. Goode, *Commercial Law* 467 also raises this issue.

⁹⁸³ See Ulph, “Sale” at 487.

⁹⁸⁴ See D(3)a).

⁹⁸⁵ See for example Gow, *Mercantile Law* 108-109.

Without delivery, the buyer does not form any real connection to the thing, to make his claim attach on it. And possession is a substantial and overt circumstance, an outward evidence of right to guide and direct third parties conveniently, easily and safely in these transactions with the possessor. It is the only ready, practicable and suitable and patent criterion of right.⁹⁸⁶

He reports a case of a sale and leaseback transaction in which delivery had been held to have occurred, but only because there had occurred “real and patent” possession by the buyer, the carts in question having been marked with his name.⁹⁸⁷

On the other hand, the logic underlying the presumption of ownership from possession may favour protection of a third party acquirer, regardless of whether delivery has been made.⁹⁸⁸ Lars van Vliet has argued that, as long as the buyer has relied on the appearance of ownership created by the seller’s possession, it is “arbitrary” to distinguish between those who have taken physical delivery and those who have not.⁹⁸⁹

To what extent does accepting that a transfer of possession under s 61(1) may take place without a change in physical control cause doctrinal problems for Scots law? In Gow’s view, Scots law should not allow third parties to be affected by “a secret change in the quality of the possession”, so a buyer from a lessee in a case of sale and leaseback should be protected.⁹⁹⁰ From a broader civilian perspective, however, Van Vliet notes that allowing the seller to change unilaterally what would otherwise be mere detention into possession sufficient to pass ownership may cause difficulties in other areas, such as prescription. He therefore argues that such an understanding should be confined to situations of third party protection.⁹⁹¹

⁹⁸⁶ Hume, *Lectures* vol 3 245. Hume’s comments were made, however, in the context of the law prior to the Sale of Goods Act 1893, under which delivery was required to complete transfer of ownership.

⁹⁸⁷ *Young v Eadie* (1815) Unreported, *Hume’s Session Papers* vol 123 no 21 and 121 no 12. See Hume’s discussion in *Lectures* vol 3 252.

⁹⁸⁸ Atiyah, *Sale* 386.

⁹⁸⁹ L P W van Vliet, “Case Comment: *Michael Gerson (Leasing) Ltd v Wilkinson*” (2001) 5(3) *Edinburgh Law Review* 361 at 368-9. See also Atiyah, *Sale* 386.

⁹⁹⁰ Gow, *Mercantile Law* 112.

⁹⁹¹ Van Vliet, “Michael Gerson” at 371.

There are strong arguments, however, for restricting third party protection to those who have acquired physical control of the thing.⁹⁹² The original provisions of the Factors Act 1877 did not require delivery, but when the section was applied to goods this requirement was introduced. *Gerson* implies that, in a case involving multiple constructive deliveries, section 24 would protect the latest party to be constructively transferred possession. It is questionable whether the provision was ever intended to regulate such situations, it may be plausibly interpreted as designed to prioritise those who have fortified their claim to ownership with physical possession.⁹⁹³ Indeed, Chalmers in 1890 suggested that the effect of section 24's forerunner in section 8 of the Factors Act 1889 was to harmonise the laws of England and Scotland by postponing passage of ownership until delivery.⁹⁹⁴ From this perspective, physical delivery is not merely incidental but crucial to the operation of the section. The most reliable indication of the seller's ownership may not be his or her physical possession, but his or her ability to transfer this possession to a buyer.

Usually in cases of competition between claims to a right, the earliest will prevail: *prior tempore, potior jure*. Strong justification is needed for departure from this rule. Given two innocent claimants, neither of whom are in possession and both of whom may have paid for the item, there does not seem any good reason for protecting the second acquirer at the expense of the first. It might be thought that the first buyer should be penalised for not taking physical possession, but given that the second buyer has not done this either, this is not a convincing explanation.

On the facts of *Gerson*, section 24 is being used to solve what is essentially a problem of the law of security. The aim of the sale and leaseback transactions in question was to create what was, in effect, a non-possessory security.⁹⁹⁵ Reform of the law of security in this area may well be overdue, but it is doubtful whether rules protecting *bona fide* purchasers should be used to determine the outcome of a dispute between two parties whose respective interests in the thing are best characterised as

⁹⁹² Or that a third party (rather than the original seller) holds the thing.

⁹⁹³ Goode, *Commercial Law* 467.

⁹⁹⁴ M D E S Chalmers, *The Sale of Goods: Including the Factors Act 1889* (1890) 74.

⁹⁹⁵ See e.g. the comments in Ulph, "Sale" at 488.

rights in security rather than ownership. The fact that neither party was concerned to take possession is one indicator of this fact.⁹⁹⁶ As one of the problems with non-possessory securities is precisely the risk that third parties will be misled, it is somewhat ironic that the holder of such a security should use rules designed to protect third parties to enforce their own security at the expense of a prior creditor.

It has been argued that the reasoning in *Michael Gerson* does not justify the application of section 24 in cases where the necessary “delivery” to the buyer has been constructive, rather than actual. The questions raised by the decision demonstrate that the terms “possession” and “delivery” in sections 24 and 25 require further judicial and academic attention. Given the complexities of defining either, it is unlikely that a coherent account will be immediately forthcoming; the most recent judicial consideration in *Fadallah*⁹⁹⁷ has not clarified matters. Careful thought should be given to who the provisions are trying to protect, and why. Reform of the law of securities might also help to prevent the issues in *Gerson* arising in future.

(f) *Buyer in possession: section 25*

(i) Persons having “bought or agreed to buy”

Section 25 of the 1979 Act covers the opposite scenario: possession by a buyer who has not yet obtained ownership.⁹⁹⁸ It allows acquisition by a party “in good faith and without notice” where there is a “delivery or transfer...under any sale, pledge, or other disposition”⁹⁹⁹ from a “buyer in possession”: i.e. someone who “having bought or agreed to buy goods [who] obtains, with the consent of the seller, possession of the goods or the documents of title to the goods.”¹⁰⁰⁰ The typical situation in which

⁹⁹⁶ The fact that there is no transfer of physical control is not, of course, always evidence of a sham transaction.

⁹⁹⁷ (n 960).

⁹⁹⁸ Under the Act, ownership may pass although the time of payment has been postponed: SOGA Act 1979 s 17.

⁹⁹⁹ The parallel provision in section 9 of the Factors Act 1889 also protects an acquirer to whom there is a delivery or transfer under “any agreement for sale, pledge or other disposition thereof.” It seems acquisition under an agreement for sale will still not be enough to confer ownership on the buyer, see *Re Highway Foods International Ltd* [1995] BCC 271; A Tettenborn, “Reservation of Title - Nemo Dat and Double Sale” (1996) 55 *Cambridge Law Journal* 26. Although the point was not addressed fully in the case, it seems logical that an agreement to sell will only transfer ownership when it becomes a completed sale and there is no reason for s 9 to depart from this.

¹⁰⁰⁰ On the confusing reference to “bought” here, see Bridge, *Sale* para 5.154.

this provision will be applicable is sale subject to a retention of ownership clause.¹⁰⁰¹ Before full payment is made, and ownership transferred, the buyer resells the goods. On the insolvency of the first buyer, the original seller wishes to vindicate his or her property from the second buyer.

To protect the second buyer from this risk, section 25 attempts to compensate for the first buyer's lack of right. The effect of such a transfer by the first buyer is "as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." The precise scope and meaning of this phrase are somewhat obscure,¹⁰⁰² but according to a decision of the Inner House of the Court of Session, this means that the buyer has "the ostensible authority of a mercantile agent to pass property in the goods."¹⁰⁰³ A good faith purchaser may hence acquire ownership.¹⁰⁰⁴

One anomalous aspect of the way section 25 has been interpreted is that, where the "agreement to buy" is a hire purchase contract, it is only where there is an obligation to acquire ownership under the contract that section 25 will protect an innocent transferee.¹⁰⁰⁵ In a (relatively) recent case, the overall aim of protecting third parties misled by the buyer's possession did not impress the judge, who referred to the existence of registers of hire purchase agreements and the fact that purchasers might reasonably be aware of the potential risks.¹⁰⁰⁶ Acquirers from a buyer under a consumer credit agreement within the meaning of the Consumer Credit Act 1974 are

¹⁰⁰¹ There must be a contract of sale within the meaning of the Act: Atiyah, *Sale* 388. On retention of ownership clauses generally see Scottish Law Commission, *Moveable Transactions* paras 518-5.21; 6.28-6.31 and sources cited there; Carey Miller, *Corporeal Moveables* paras 12.01-12.05.

¹⁰⁰² The provision would seem to require reference to s 2(1) of the Factors Act (discussed below). It was argued in *Newtons* (n 758) that the phrase imports the general requirement that the transaction be in the ordinary course of business. However, it is difficult to see how a seller who is not a mercantile agent can be expected to act in the ordinary course of business of such an agent. See Bridge (ed), *Benjamin's Sale of Goods* paras 7-082-7-084; Atiyah, *Sale* 396-398 and Goode, *Commercial Law* 472 who describes the decision in *Newtons* as "erroneous". Carey Miller argues that a Scottish court should follow the interpretation of s 25 in *Thomas Graham and Sons v Glenrothes Development Corporation* 1967 SC 284 (which did not refer to *Newtons*) rather than *Archivent Sales and Development Ltd v Strathclyde Regional Council* 1985 SLT 154 (which did): *Corporeal Moveables* para 10.22.

¹⁰⁰³ *Thomas Graham* *ibid.* at 293-4 per Lord President Clyde. On agency, see further D(4)(b) below.

¹⁰⁰⁴ See Carey Miller, *Corporeal Moveables* para 10.22.

¹⁰⁰⁵ *Helby* (n 740); *Close Asset Finance v Care Graphics Machinery Limited* 1999 WL 1400070.

Compare, however, *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All ER 90.

¹⁰⁰⁶ *Close Asset Finance* *ibid.* at 6 per Buckley J.

also excluded from the protection of the section.¹⁰⁰⁷ Such fragmentary provision again adds to the uncertainty faced by acquirers.

Section 25 refers to the consent of the “owner”,¹⁰⁰⁸ in a case where the original seller is not the true owner, it seems that the provision will not compensate for this lack of right. It will hence not serve to confer ownership of stolen property.¹⁰⁰⁹ Although obtaining such a result requires a somewhat strained interpretation of the Act,¹⁰¹⁰ the situation which the provision clearly contemplates is the creation of a non-possessory security (through a retention of ownership clause) and protection of third parties from its effects, rather than a broader exception to the *nemo plus* principle. This is consistent with the Act’s general approach.

(ii) “Delivery” and “Possession”

When considering the meaning of the terms “delivery” and “possession” in section 25, it is desirable that there should be some coherence with the interpretation of these terms in section 24. Constructive possession through a third party (or the original seller) on the buyer’s behalf will hence be sufficient,¹⁰¹¹ so that delivery by the custodian directly to the acquirer will be sufficient for protection under the section. The fact that the seller’s consent to possession was obtained by fraud will not negate

¹⁰⁰⁷ SOGA 1979 s 25(2). For the meaning of “conditional sale agreement”, see s 25(2)(b) and Part II of the Consumer Credit Act 1974. The same restriction is applied to s 9 of the Factors Act 1889. See Atiyah, *Sale* 390.

¹⁰⁰⁸ Consent given then subsequently withdrawn is effective for this purpose: *Newtons* (n 758); Atiyah, *Sale* 391; Goode, *Commercial Law* 470.

¹⁰⁰⁹ See Lord Goff’s opinion in *National Employers* (n 949). This is discussed by Carey Miller, *Corporeal Moveables* para 10.22. The topic has long been a controversial one, for comments see Battersby and Preston, “Concepts of “Property””; D G Powles, “Stolen Goods and the Sale of Goods Act 1893 section 25(2)” (1974) 37 *MLR*. 213; G Battersby and A D Preston, “Stolen Goods and the Sale of Goods Act 1893 section 25(2) - A Rejoinder” (1975) 38 *MLR* 77; D G Powles, “Stolen Goods and the Sale of Goods Act 1893 section 25(2) - A Surrejoinder” (1975) 38 *MLR* 83.

¹⁰¹⁰ See criticism by T B Smith, “Property Problems in Sale: Three Footnotes” 1987 *SLT* (News) 241 at 242.

¹⁰¹¹ *Four Point Garage Ltd v Carter* [1985] 3 All ER 12. It is surprising that the decision in *Four Point* did not mention section 1(2) of the Factors Act, which states that a person may be in possession of goods when they are “in his actual custody or are held by any other person subject to his control or for him or on his behalf”. See further R Goode, “Possession and Delivery Under the Sale of Goods Act 1979” (1985) *Journal of Business Law* 496.

the consent,¹⁰¹² nor does it matter that the possession was on the basis of a loan rather than the agreement to buy.¹⁰¹³

A good example of a case where it is difficult to determine who is in possession is that of a builder using materials on a site owned and controlled by someone else.¹⁰¹⁴ An Outer House decision on those facts favoured an interpretation of possession as “actual custody”.¹⁰¹⁵ It seems that physical control of the goods is more important than physical control of the land on which the goods are located.¹⁰¹⁶

The question of constructive transfer of possession (i.e. constructive delivery) has already been mentioned in relation to section 24. In *Archivent* it was also held that the requirement for “delivery or transfer” under section 25 could be met by acts of appropriation such as measurement by a surveyor.¹⁰¹⁷ Although the builder had presumably continued to use the materials until its subsequent insolvency, these actions were apparently enough to transfer “real control”. The question of the relationship between delivery and possession is not fully explored in the judgment, but the reference to transfer of “real control” may indicate that possession was deemed to have been transferred. Whether or not this is the best interpretation of the situation, it is one which may create difficulties for third parties as there is very little external sign of this change in legal position. If the builders had subsequently purported to transfer the materials again, it would not be evident to third parties that they were not in possession as they would still appear to have physical custody.

In *Forsythe International*,¹⁰¹⁸ it was accepted that delivery could be constructive but that “some voluntary act” amounting to delivery was still necessary. Where the transfer took place because of the termination by ship owners of a charterparty, this was not a sufficiently voluntary action on the part of the

¹⁰¹² *Blythswood Motors Ltd. v Lloyds & Scottish Finance Ltd* 1973 SLT (Sh Ct) 82. There are English cases to the same effect, see *Bridge, Sale* 5.156.

¹⁰¹³ *Marten v Whale* [1917] 2 KB 480.

¹⁰¹⁴ This was the situation in *Archivent* (n 1002).

¹⁰¹⁵ *Archivent* (n 1002). at 157.

¹⁰¹⁶ *Archivent* (n 1002). at 157. This is consistent with the approach of English law in *Parker v British Airways Board* [1982] QB 1004.

¹⁰¹⁷ *Archivent* (n 1002). at 157.

¹⁰¹⁸ [1994] 1 WLR 1334.

charterers.¹⁰¹⁹ The meaning of “disposition” is also controversial: in order to give the broadest possible protection to innocent acquirers it has been held to extend to repossession by a former owner,¹⁰²⁰ but this risks creating incoherence with the requirement for voluntary transfer.¹⁰²¹

(4) Other Statutory Exceptions

(a) Hire purchase vehicles

Motor vehicles present particular problems for the law; they are a prime example of valuable, highly mobile property which is frequently transferred and also often subject to quasi-securities.¹⁰²² Different rules apply to vehicles compared to other types of moveable property held on hire purchase or other conditional sale agreement.¹⁰²³ This is because the “hardship” that afflicted *bona fide* buyers of hire purchase vehicles was felt to be so rare in other cases that the introduction of similar protection was unnecessary.¹⁰²⁴

As identified by Lord Wilberforce in *Moorgate Mercantile Co v Twitchings*,¹⁰²⁵ the issues raised are inextricably linked to the law regulating securities over corporeal moveable property. Given the value of motor vehicles, and the ease with which they can be moved from one place to another, where they are used as security for debt the risk of sale to a party unaware of the security may easily arise. It has often been commented that some exterior indication of the hire purchase

¹⁰¹⁹ Compare, however, *Angara Maritime Limited v Oceanconnect UK Limited* [2010] EWHC 619 (QB), in which the charterers voluntarily terminated the contract and it was held that s 25 could apply. For criticism see Bridge, *Sale* 5.168.

¹⁰²⁰ *Worcester Works Finance* (n 944), esp. per Lord Denning at 218G.

¹⁰²¹ See further R Goode, “The Dispositive Effect of a Seller’s Repossession” (1972) 35 *MLR* 186.

¹⁰²² Under s 29(1)(b) of the Hire Purchase Act 1964 “motor vehicle” means “a mechanically propelled vehicle intended or adapted for use on roads to which the public has access.” The argument for distinguishing motor vehicles from other types of vehicle also held on hire purchase (e.g. boats) has been questioned: I Davies, “Ostensible Ownership and Motor Vehicle Financing in England: A Dilemma for Legal Reform?” (1994) 2 *Journal of Asset Protection and Financial Crime* 211 at 213.

¹⁰²³ Usually property held under a conditional sale agreement within the meaning of the Consumer Credit Act 1974 is exempted from the provisions of s 25 SOGA and s 9 of the Factors Act 1889. The “patchwork” effect of the different legislative provisions is criticised by Ulph, “Conflicts” para 5-080 for not giving sufficient protection to consumers.

¹⁰²⁴ *Final Report of the Committee on Consumer Protection* (Cmnd 1781: 1962) para 537. This assumption can be questioned, see I Davies, “Sales Law and the Negotiability of Motor Vehicles” (1995) 15 *Legal Studies* 14 at 21.

¹⁰²⁵ (n 905) at 901.

agreement would be desirable.¹⁰²⁶ One obvious solution would be a compulsory and comprehensive registration system of such securities.¹⁰²⁷ Another option would be for the hire purchase company to retain the vehicle's registration certificate and issue a certificate stating the terms on which it was held.¹⁰²⁸ However, the cost of administering such a system was apparently felt by finance houses to be disproportionate to the benefits gained.¹⁰²⁹

The current system has been described as “radical in the sense that it constitutes a drastic departure from the traditional common law position but... on the other hand, restrictive in terms of its scope.”¹⁰³⁰ The relevant provisions are found in Part III (ss 27 to 29) of the Hire Purchase Act 1964.¹⁰³¹ They apply where a purchaser under a hire purchase or conditional sale agreement¹⁰³² (“the debtor”¹⁰³³), before ownership of the property has vested in him or her “disposes of”¹⁰³⁴ the vehicle to another person.¹⁰³⁵ The debtor's ability to dispose of the vehicle is not

¹⁰²⁶ See the examples discussed in “Sale of Motor-Vehicle by Hire-Purchaser. A Legislative Proposal” (1954) 17(3) *MLR* 238; *Western Credit Services v Pasco* [1950] WN 444; *R v Thomas* [1947-51] CLY 4450.

¹⁰²⁷ An argument made by Davies, “Ostensible Ownership”. See Scottish Law Commission, *Moveable Transactions* ch 13 for discussion of some alternative systems.

¹⁰²⁸ The solution originally proposed in the Bill which became the 1964 Act was to make the vehicle registration book (the “logbook”) to some extent a document of title: Hire-Purchase (No. 2) Bill [HL] 1963, clauses 22-26, or clauses 27-31 after amendment in Standing Committee F of the House of Commons. For criticism of this idea, see I Davies, “Wrongful Dispositions of Motor Vehicles in England: A US Certificate of Title Solution?” (1994) 23 *Anglo American Law Review* 460 at 480-481.

¹⁰²⁹ By comparison with the loss of about £140,000 on wrongful dispositions in 1963, the estimated cost of administering such a system was estimated at £700,000 in the first year: see Hansard HL Deb 21 January 1964, vol 264 col 914; HL Deb. 6th July 1964, vol 259 col 819 and Davies, “Wrongful Dispositions” 482-483.

¹⁰³⁰ Davies, “Sales Law” at 23.

¹⁰³¹ As modified by s 59(4) of and Schedule 5 to the Hire Purchase Act 1965 and s 63 of and Schedule 2 para 4 to the Sale of Goods Act 1979. Part III was re-enacted with terminological changes by para 22 to schedule 4 of the Consumer Credit Act 1974.

¹⁰³² On the meaning of “hire purchase agreement” and “conditional sale agreement”, see s 29(1) The agreement must be concluded before the disposal, see *Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69. Where the agreement is void, the protections afforded by the Act will not apply: see *Shogun* (n 724).

¹⁰³³ Section 29(4).

¹⁰³⁴ “Disposition” is defined in s 29(3) to include transfer by contract of sale and by way of hire purchase agreement, but not for example, pledge, donation or exchange. It has been interpreted restrictively so as not to broaden the exception to the *nemo plus* rule, see *VFS Financial Services Ltd v JF Plant Tyres Ltd* [2013] EWHC 346 (QB).

¹⁰³⁵ Section 27(1).

linked to his or her possession.¹⁰³⁶ Even where the hire purchase company has sought to terminate the contract and require redelivery of the car, a good title can still be passed by the former hirer under s 29(4).¹⁰³⁷ As regards what is sufficient for rescission, the comments made earlier¹⁰³⁸ apply. To ensure the protection of purchasers, a court decision ought to be necessary.¹⁰³⁹

The fact that termination will not affect the hire purchaser's ability to transfer has led the authors of *Benjamin's Sale of Goods* to question whether a debtor could transfer a vehicle of which the creditor has recovered possession.¹⁰⁴⁰ Assuming such a transaction could be conducted in good faith,¹⁰⁴¹ it is submitted, in agreement with these comments, that to allow this would be contrary to the purpose of the statute. Although the basis for protecting a good faith party is not entirely clear (is it the fact that the hirer's possession might mislead, or an idea that the hire purchase company is holding the debtor out to be owner?), the provision is clearly intended to prevent third parties from being misled. The interaction of the Hire Purchase Act with the relevant provisions of the Sale of Goods and Factors Acts has been described as anomalous.¹⁰⁴²

Where the disposition is to a private purchaser in good faith without notice of the relevant agreement, it will have effect "as if the creditor's title to the vehicle has been vested in the debtor immediately before that disposition."¹⁰⁴³ Assuming that the creditor is indeed the owner, the effect will thus be that a valid transfer of ownership can take place to the acquirer. There is no requirement that the disposition should include delivery to the purchaser and protection is not restricted to the first private

¹⁰³⁶ All that is required is that the vehicle has been "hired under a hire-purchase agreement" to the debtor, not that he or she remains in possession.

¹⁰³⁷ *McGroarty v Lloyds Bowmaker Ltd* 1999 GWD 4-170 (Sh Ct). A similar result was reached in *Chartered Trust Plc v Conlay* [1998] CLY 2516. Compare the situation where the contract is held to be void ab initio on the grounds of mistake as to identity: *Shogun* (n 724).

¹⁰³⁸ D(3)(d)(2).

¹⁰³⁹ Notification of the police was not thought to be enough in *Cawston v Chartered Trust PLC* [2000] CLY 2602.

¹⁰⁴⁰ Bridge (ed), *Benjamin's Sale of Goods* para 7-089.

¹⁰⁴¹ Bridge (ed), *Benjamin's Sale of Goods* (para 7-089, fn 566) doubts that this would be possible, which seems a sensible interpretation.

¹⁰⁴² Atiyah, *Sale* 368.

¹⁰⁴³ Section 27(2).

purchaser;¹⁰⁴⁴ it is theoretically open to the debtor to transfer the vehicle numerous times. The fact that a disposition by way of unconditional sale will divest the creditor of ownership means that if there is a second transfer by the debtor him or herself to a good faith private purchaser it will be of no effect. However, if the first “disposition” is a hire purchase agreement but, before transfer of ownership has taken place, the original debtor resells the vehicle to a third party, it would seem that this would operate to transfer ownership to the purchaser and defeat the personal right of the hirer.¹⁰⁴⁵

Where the first disponee is not a private purchaser, but there is subsequently a disposition to a private purchaser in good faith and without notice, the disposition to the “first private purchaser” will have effect “as if the title of the creditor to the vehicle had been vested in the debtor immediately before he disposed of it to the original purchaser.”¹⁰⁴⁶ It is only the first private purchaser (and those claiming through him or her) who are protected; if the first private purchaser is not in good faith subsequent private purchasers will not be protected, whether they are in good faith or not. Also, if the first private purchase is by means of a hire purchase agreement from a trade and finance purchaser and a further disposition to a good faith private purchaser by this second debtor takes place before transfer of ownership under the agreement, it seems that such a purchaser could not gain ownership.¹⁰⁴⁷

Section 27(4) deals with the situation when the first disposition to a good faith private purchaser is by way of hire purchase agreement (the purchaser thus not immediately acquiring ownership.) Provided that the initial disposition (conclusion of the hire purchase agreement) is in good faith, a subsequent transfer from the creditor under the agreement to the private purchaser will also have the effect set out

¹⁰⁴⁴ Compare ss 27(3) and 27(4).

¹⁰⁴⁵ Bridge (ed), *Benjamin's Sale of Goods* para 7-097 describes this as “anomalous” compared to the position under s 27(3), under which only the first private purchaser (i.e. the purchaser under the hire purchase agreement) could obtain ownership.

¹⁰⁴⁶ Section 27(3).

¹⁰⁴⁷ The second private purchaser would gain the title of the creditor under the second hire purchase agreement, which would arguably be no title at all. See discussion in Bridge (ed), *Benjamin's Sale of Goods* para 7-098.

in s 27(3), even if the private purchaser is no longer in good faith and without notice of the agreement.

Section 28(3) benefits only a good faith private purchaser who did not buy from the debtor.¹⁰⁴⁸ It provides for a presumption that there was a good faith private purchase from the debtor, and that the good faith private purchaser in question claims under this original purchaser. The authors of *Benjamin's Sale of Goods* suggest that, where s 28(3) does not apply, the burden of proving good faith may lie on the purchaser.¹⁰⁴⁹ This would accord with the recommendations of the Law Commission.¹⁰⁵⁰

Good faith is not defined in the Act. There is some authority to suggest that it should be interpreted in line with s 61(3) of the Sale of Goods Act as actual honesty, whether negligent or not.¹⁰⁵¹ It seems that extensive investigation into vehicles' ownership history is not routine, even in the case of costly classic cars.¹⁰⁵² Sale below market value is not, of itself, enough to place a party in bad faith.¹⁰⁵³ The expression "without notice" in section 27(2) means without "actual notice that the vehicle is or was the subject of any such [hire purchase or conditional sale] agreement".¹⁰⁵⁴ It has been held that, despite the reference to "any" agreement, only notice of the relevant agreement that will be taken into account. Moreover, notice that the vehicle was subject to an agreement which was said to have been discharged will not constitute notice for this purpose.¹⁰⁵⁵

A car registration book (now form V5C) is not a document of title,¹⁰⁵⁶ and indeed it is clearly stated on the document that it is not proof of ownership.¹⁰⁵⁷ At

¹⁰⁴⁸ See *Sonoco v Barcross Finance Ltd* [1978] RTR 444.

¹⁰⁴⁹ Bridge (ed), *Benjamin's Sale of Goods* para 7-099, citing *Mercantile Credit co Ltd v Waugh* (1978) 32 2 *Hire Trading* 16.

¹⁰⁵⁰ *Transfer of Title* para 33.

¹⁰⁵¹ *Dodds v Yorkshire Bank Finance* [1992] CCLR 92.

¹⁰⁵² *Gray v Smith* [2013] EWHC 4136 (Comm) at paras 112-117.

¹⁰⁵³ *GE Capital Bank Ltd v Rushton* [2005] EWCA Civ 1556 at 47.

¹⁰⁵⁴ Section 29(3).

¹⁰⁵⁵ See *Barker v Bell* [1971] 1 WLR 983.

¹⁰⁵⁶ *Beverley Acceptances Ltd v Oakley* [1982] RTR 417, the only Scottish authority (to the same effect) is *West of Scotland Assets Ltd v Mackenzie* 1951 SLT (Sh Ct) 72.

least in theory, therefore, an acquirer of a vehicle sold without the registration documents may still be in good faith.¹⁰⁵⁸ Nor is there any duty on purchasers to perform a check with HPI Ltd in order to be in good faith.¹⁰⁵⁹

Only private purchasers are protected by the provisions of the Act. It was felt that finance houses and car dealers “can and should be on their guard against buying cars which are on hire-purchase.”¹⁰⁶⁰ It seems that the courts take a broad approach to the term “trade and finance purchaser”, with a focus on whether the vehicle was bought for the purpose of a profitable resale as opposed to use.¹⁰⁶¹ This is somewhat problematic; it cannot be assumed that any individual hoping to make a profit from resale possesses the specialist knowledge and resources of those who are routinely involved in the motor trade. The alternate possibility, that of a trade and finance purchaser buying in a private capacity, is likewise not satisfactorily resolved.¹⁰⁶² The restriction of the Act’s protection to private purchasers has also been judicially criticised.¹⁰⁶³ Although both the hire purchase company and the commercial dealer are only interested in the exchange value of the car, the finance company may be better able to protect itself against the loss of its security (for example through higher interest charges.)¹⁰⁶⁴

¹⁰⁵⁷ In 2006, an unknown number of blank registration documents were stolen from a DVLA consignment, increasing the risk that a stolen car would have false registration documents. A new registration document in a different colour has now been issued, but the incident emphasises that theft or forgery of registration documents is always a potential risk. See A Lusher, “Motorists Unwittingly Buy Stolen Cars” *The Telegraph*, 1st Aug 2008.

¹⁰⁵⁸ Ulph, “Conflicts” 5-039 points out that such a purchaser might have difficulty establishing good faith. In *Stadium Finance Ltd v Robbins* [1962] 2 QB 664 at 676, the fact that purchaser had not asked to see registration documents was not treated as inferring notice.

¹⁰⁵⁹ *Mercantile Credit Co Ltd v Townsley* 1971 SLT (Sh Ct) 37.

¹⁰⁶⁰ Hansard: HL Debate, 6th July 1964, vol 259 col 820.

¹⁰⁶¹ In *GE Capital Bank* (n 1053), a purchase “as a business venture with a view to selling... at a profit” was sufficient to render a buyer a trade purchaser (per Moore-Bick LJ at para 40). See also *Welcome Financial Services Limited v Nine Regions Limited (t/a Log Book Loans)* [2010] EWHC 53 (Mercantile).

¹⁰⁶² “Trade or finance purchaser” is defined in s 29(2) of the Act. In *GE Capital Bank* (n 1053) it was assumed (at 39) that a motor trader buying for his or her private use would be protected, but Goode (*Commercial Law* 475) criticises this, citing *Stevenson v Beverly Bentinck Ltd* [1976] 2 All ER 606.

¹⁰⁶³ See comments by Lord Edmund-Davies in *Moorgate Mercantile Co* (n 905) at 922. See also the reference by Lord Fraser of Tullybelton to “honest traders” at 927.

¹⁰⁶⁴ See Hansard: HL Debate, 6th July 1964, vol 259 col 820. See also Lord Denning’s comments in *Stevenson v Beverly Bentinck Limited* [1974] 1 WLR 483 at 486.

Under English law, a good faith trade and finance purchaser may be liable for the value of the car¹⁰⁶⁵ as damages for conversion, even where he or she is no longer in possession.¹⁰⁶⁶ In Scotland such a purchaser would only be liable to the extent that he or she had profited.¹⁰⁶⁷

(b) Dispositions by Mercantile Agents

Although the law relating to agency is largely outwith the scope of the thesis,¹⁰⁶⁸ there are certain circumstances in which a mercantile agent can transfer ownership of property without the authorisation or consent of the owner. Any exceptions relating to agency at common law are preserved by s 62 of the Sale of Goods Act.

At common law, the doctrine of apparent authority operated to prevent the owner challenging an unauthorised transfer by an agent:

Where an owner of property gives all the *indicia* of ownership to another person with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee or pledgee who has no notice of the limit.¹⁰⁶⁹

This doctrine seems to be a result of the owner being personally barred from denying the agent's ability to transfer ownership.¹⁰⁷⁰ There must have been a representation by the principal¹⁰⁷¹ that the agent had the authority to carry out the transaction in question, and reliance on the representation.¹⁰⁷² It may apply where there the agent

¹⁰⁶⁵ Or, if it is less, the amount outstanding under the hire purchase agreement.

¹⁰⁶⁶ See Bridge (ed), *Benjamin's Sale of Goods* para 7-105.

¹⁰⁶⁷ *North West Securities Limited v Barrhead Coachworks Limited* 1976 SC 68.

¹⁰⁶⁸ On agency generally, see L Macgregor, *The Law of Agency in Scotland* (2013).

¹⁰⁶⁹ Rankine, *Personal Bar* 226.

¹⁰⁷⁰ See Reid and Blackie, *Personal Bar* 13-12. The question is, however, a controversial one, see L Macgregor, "Apparent Authority in Agency: *Gregor Homes Ltd v Emlick*" (2011) 15 *Edinburgh Law Review* 442 and comments in Macgregor, "Agency" paras 11-01-11-26, esp. at 11-05; 11-12.

¹⁰⁷¹ See *M'fadyean* (n 810), for a similar English case see *Jerome v Bentley & Co* [1952] 2 All ER 114.

¹⁰⁷² *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd's Rep 194 at 200, per Lord Steyn

was formerly authorised, but ceases to be so.¹⁰⁷³ It is important to distinguish holding out as an authorised agent from holding out as owner: in the former case any transfer must have been in the ordinary course of business for the type of agent in question, whereas an individual held out to be owner will not be subject to such restrictions.¹⁰⁷⁴

It was suggested in *M'fadyean v Shearer Bros*¹⁰⁷⁵ that, at common law, an agent who had fraudulently gained the owner's consent to possession could not pass a real right in the property. However, it seems that an exception was recognised in respect of the ostensible authority of some types of mercantile agent. In *Pochin v Robinow and Marjoribanks*¹⁰⁷⁶ and *Vickers v Hertz*,¹⁰⁷⁷ an agent who deceived the principal to fraudulently transfer the property in security was able to create a valid right in the transferee.¹⁰⁷⁸ As the effect of personal bar would generally not be to create a real right,¹⁰⁷⁹ these decisions are somewhat anomalous, and again illustrative of the difficulties in reconciling the principles of bar with those of property law.

Fortunately, some of the questions regarding the common law are clarified by statute. Under the Factors Act 1889,¹⁰⁸⁰ sale, pledge or other disposition¹⁰⁸¹ by a mercantile agent¹⁰⁸² acting in the ordinary course of business¹⁰⁸³ who is in

¹⁰⁷³ For examples see *M'fadyean* (n 810) and *Jerome* (n 1071).

¹⁰⁷⁴ See *Lloyds and Scottish Finance v Williamson* [1965] All ER 641; Atiyah, *Sale* 368-369.

¹⁰⁷⁵ (n 810)

¹⁰⁷⁶ (n 856).

¹⁰⁷⁷ (n 848). This reference is to the House of Lords decision, but it is noted at 114-115 that the unreported Court of Session decision was based on the authority of *Pochin* rather than the English Factors Acts.

¹⁰⁷⁸ To some extent the decision in *Pochin* seems to rest on the function of delivery orders as analogous in mercantile practice to documents of title, but there are also references to a broader rule, see at 630 per Lord President; 637 per Lord Ardmillan; 639 per Lord Kinloch. For discussion, see Gloag and Irvine, *Rights in Security* 253-254.

¹⁰⁷⁹ See the comments in Reid, *Property* at para 670.

¹⁰⁸⁰ Applied to Scotland by the Factors (Scotland) Act 1890.

¹⁰⁸¹ On the meaning of "disposition", see *Worcester Works Finance* (n 944); Bridge (ed), *Benjamin's Sale of Goods* para 7-041.

¹⁰⁸² For the definition of mercantile agent, see s 1(1) of the Factors Act 1889. A mere custodian is not an agent for this purpose: *Martinez y Gomez v Allison* (1890) 17 R 332. There is some English authority to suggest that person does not require to be a professional agent, but merely someone who sells goods on behalf of another: *Weiner v Harris* [1910] KB 285; *Lowther v Harris* [1927] 1 KB 393. See generally Bridge (ed), *Benjamin's Sale of Goods* para 7-032; Atiyah, *Sale* 376.

¹⁰⁸³ This means "within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the [disponnee] to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make": *Oppenheimer v Attenborough & Son* [1908] 1 KB 221 at

possession¹⁰⁸⁴ of goods or documents of title¹⁰⁸⁵ with the consent¹⁰⁸⁶ of the owner¹⁰⁸⁷ to a third party in good faith and without notice¹⁰⁸⁸ will have the same effect as if the agent had been expressly authorised by the owner.

For current purposes, the most important aspect of the provision is that its protection is based on the owner's consent to the agent's possession. Although there is no Scottish authority directly on the point,¹⁰⁸⁹ in *Folkes v King*¹⁰⁹⁰ it was held that the categories of (English) criminal law were not relevant in deciding whether consent had been given in a commercial transaction.¹⁰⁹¹ Given that the intention of the Factors Acts is to protect unsuspecting third parties,¹⁰⁹² it seems that, where the Act applies, it should not matter that the consent to possession was vitiated by fraud.¹⁰⁹³ On the other hand, a mistake as to identity may negative consent;¹⁰⁹⁴ this

230-231. In *Pearson* (n 757), it was thought that the sale of a car without the registration book would not be in the ordinary course of business. This view has been criticised- see *Astley Industrial Trust Ltd v Miller* [1968] 2 All ER 36 at 42; Bridge (ed), *Benjamin's Sale of Goods* para 7-044. For other examples where it was accepted that the sale was not in the ordinary course of business, see *Heap* (n 874) [generally suspicious transaction], *Stadium Finance* (n 1052) [sale of car without keys or registration documents].

¹⁰⁸⁴ For the definition of possession, see s 1(2) of the Factors Act 1889. There must be possession at the actual time of the sale: *Beverley Acceptances* (n 1056).

¹⁰⁸⁵ Defined in s 1(4) of the 1889 Act. A motor vehicle's log book is not a document of title: *Beverley Acceptances* (n 1056). See Bridge (ed), *Benjamin's Sale of Goods* para 7-036.

¹⁰⁸⁶ Consent is presumed in the absence of evidence to the contrary; see s 2(4) of the Factors Act 1889. Where consent was initially given to agent's possession, but this consent was subsequently withdrawn, purchasers will nevertheless be protected; see s 2(3) of the Act. There is English authority to the effect that a pledgee can be "owner" for the purposes of the statute: *Beverley Acceptances* (n 1056) at 431.

¹⁰⁸⁷ The different understandings of ownership in Scots and English law may lead to some confusion. It has been held in several English cases that a pledgee will in some circumstances be considered the "owner" for the purposes of the statute: *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147; *Beverley Acceptances* (n 1056) at 424 per Lord Denning. Given the more strictly defined concept of ownership in Scots law, it is doubtful that this view would be adopted by a Scots judge.

¹⁰⁸⁸ On notice see Goode, *Commercial Law* 464.

¹⁰⁸⁹ See however, the comments of Lord Gifford in *Brown* (n 848) and Gow, *Mercantile Law* 109.

¹⁰⁹⁰ [1923] 1 KB 282.

¹⁰⁹¹ See in particular the judgment of Scrutton LJ at 306. *Folkes* was mentioned with approval in *Pearson* (n 757).

¹⁰⁹² *Beverley Acceptances* (n 1056) at 425-426 per Lord Denning.

¹⁰⁹³ There is no direct Scots authority but see comments in *Vickers* (n 848) at 118 and Reid, *Property* para 671 (Gamble). In a case under section 25(1) of the Sale of Goods Act, fraud was held not to negative consent: *Blythwood Motors Ltd* (n 1012). For English authority see *Folkes* per Bankes LJ at 297-298; *Pearson* (n 757); *Du Jardin v Beadman* [1952] 2 QB 712; Bridge (ed), *Benjamin's Sale of Goods* para 7-037.

¹⁰⁹⁴ *Du Jardin ibid.* at 718.

would be consistent with the limitation of good faith purchase protection under the Hire Purchase Act 1964 in *Shogun Finance Ltd v Hudson*.¹⁰⁹⁵

It seems clear from the wording of section 2(1) that where the party consenting to possession is not the true owner, its protection will not apply.¹⁰⁹⁶ There is a delicate balance to be struck between the security of the original owner and that of third parties, who will usually find it difficult to ascertain under what circumstances an agent has been entrusted with goods. Similar issues are raised when considering the title on which the agent gained possession. In *Staffs Motor Guarantee Ltd v British Wagon Company Ltd*,¹⁰⁹⁷ it was suggested that there must have been consent to possession as mercantile agent (rather than e.g. as friend or repairer.) As Goode suggests,¹⁰⁹⁸ this is consistent with the position that possession itself is not enough to establish an apparent authority. On this basis, persons possessing under a hire purchase agreement¹⁰⁹⁹ or an agreement for sale or return¹¹⁰⁰ do not possess as mercantile agents.

However, this again reduces the extent to which third parties are protected and has been argued to run contrary to the needs of commerce.¹¹⁰¹ It seems reasonable to require owners to take extra care when entrusting property to a person who acts in some contexts as a mercantile agent, even if the entrustment is for an unconnected purpose.

Unlike under sections 8 and 9 of the Factors Act (replicated in sections 24 and 25 SOGA) there is no requirement that the disposition involve a transfer of possession to the third party.¹¹⁰² As an authorised agent can validly transfer ownership, the effect of the Act will be the acquisition of ownership of the goods by the good faith third party. However, the original owner's rights against the agent for

¹⁰⁹⁵ (n 724).

¹⁰⁹⁶ See comments in *National Employers* (n 949) at 60G.

¹⁰⁹⁷ [1934] 2 KB 305 at 313, approved in *Astley* (n 1083); Atiyah, *Sale* 378.

¹⁰⁹⁸ Goode, *Commercial Law* 455.

¹⁰⁹⁹ See *Astley* (n 1083) at 41-42.

¹¹⁰⁰ *Weiner v Harris* [1910] 1 KB 285.

¹¹⁰¹ See A Cohen, "On the Amendment of the Law Relating to Factors" (1889) 5 *LQR* 132 at 133.

¹¹⁰² See Bridge, *Sale* para 5.103.

breach of authority will be unaffected.¹¹⁰³ It seems that the onus of proving good faith rests on the buyer.¹¹⁰⁴

E. PROPOSALS FOR REFORM

(1) Scottish Law Commission Consideration

(a) “Protection of the Onerous Bona Fide Acquirer” (1976)

One of the few modern instances in which a significant departure from the *nemo plus* principle has been considered is the Scottish Law Commission’s Consultative Memorandum *Protection of the Onerous Bona Fide Acquirer*. While accepting that “there is no manifestly right solution”,¹¹⁰⁵ the Commission advocated a distinction based on the way in which the owner lost his or her property, rather than the way in which the third party acquired. It was suggested that the notion of *vitium reale* should be restricted to cases of involuntary dispossession, whether by forcible or clandestine means.¹¹⁰⁶ Stolen property would thus continue to be excluded from the scope of *bona fide* acquisition, on the basis that the owner had not facilitated the unauthorised transfer.¹¹⁰⁷

Reference was made to numerous other legal systems including England, France, Germany, Switzerland and Quebec, as well as the Unidroit Draft Uniform Law.¹¹⁰⁸ However, in contrast to, for example, the English system, no importance was attached to sale at public market, or on trade premises.¹¹⁰⁹ It was argued that the actions of the owner, rather than the actions of a subsequent good faith buyer or the locus of his or her purchase, should determine whether ownership would be

¹¹⁰³ Factors Act 1889 s 12(1).

¹¹⁰⁴ See D(3)(b)(iii); *Heap* (n 874). The decision was cited approvingly by the English Law Commission (*Transfer of Title* para 25).

¹¹⁰⁵ *Corporeal Moveables: Protection* para 5.

¹¹⁰⁶ *Corporeal Moveables: Protection* para 56. This would roughly replicate the French and German positions under Art 2276 Code Civil and § 932 BGB respectively. The role of a voluntary transfer of physical control in justifying acquisition by a *bona fide* third party is discussed more fully at para.

¹¹⁰⁷ *Corporeal Moveables: Protection* para 56..

¹¹⁰⁸ See the comparative appendix.

¹¹⁰⁹ *Corporeal Moveables: Protection* para 59. The merits of varying a buyers protection according to the circumstances of the transaction are discussed further at ch 6 F.

effectively transferred.¹¹¹⁰ Moreover, the possibility of an insurance claim (or presumably any other form of monetary compensation) could not sufficiently compensate the owner, who might have a very strong emotional attachment to his or her thing.¹¹¹¹

Although not expressly tied to present possession on the part of the seller,¹¹¹² the proposed solution is thus constructed on the premise that by the voluntary “handing over” of a moveable to a deposittee or custodian¹¹¹³ the owner “facilitate[s] dishonest dealing”.¹¹¹⁴ The underlying assumption that an owner who hires to a fraudulent deposittee has somehow enabled the fraud in a way that a careless owner who has negligently allowed his or her property to become lost or stolen has not seems questionable. The adequacy of voluntary transfer of possession as a justification for deprivation of the right to recover is considered further in Chapter 6.¹¹¹⁵

The Memorandum reflects a desire to learn from, and perhaps ultimately harmonise with,¹¹¹⁶ other legal systems, but also a quest to find a solution that would fit well with the common law of Scotland.¹¹¹⁷ At the time the Memorandum was written, the doctrine of market overt still existed in English law and it was suggested that Scots law could adopt its own comprehensive rule protecting *bona fide* purchasers.¹¹¹⁸ The main justifications identified for reform are the obscurity of the existing provisions,¹¹¹⁹ their fragmentary nature¹¹²⁰ and the disjunction between the

¹¹¹⁰ *Corporeal Moveables: Protection* para 59.

¹¹¹¹ *Corporeal Moveables: Protection* para 64.

¹¹¹² *Corporeal Moveables: Protection* para 45.

¹¹¹³ The position of the custodian would require further elaboration: *Corporeal Moveables: Protection* para 57.

¹¹¹⁴ *Corporeal Moveables: Protection* para 57.

¹¹¹⁵ See B(1).

¹¹¹⁶ The main architect of the Memorandum, Professor Sir T B Smith, was also involved in drafting the Unidroit Uniform Law on the Acquisition in Good Faith of Corporeal Moveables. See Smith, *Property Problems* 190-196.

¹¹¹⁷ See for example at para 34. These aims are not necessarily incompatible, see for example Smith, *Studies* at 71 suggesting that Scots academics should look to broader trends in Civilian thought (and in particular to other “mixed” legal systems) in order to produce a restatement of the laws of Scotland.

¹¹¹⁸ *Corporeal Moveables: Protection* para 38.

¹¹¹⁹ *Corporeal Moveables: Protection* para 34.

¹¹²⁰ *Corporeal Moveables: Protection* para 38.

statutory rules and Scots common law.¹¹²¹ On the basis of the discussion in this chapter, it is submitted that the relevant provisions are indeed obscure and fragmentary but, minor inconsistencies aside, no serious conflict with the Scots common law and its general adherence to the *nemo plus* principle has been observed.

(b) A Role for acquisitive prescription?

One alternative to a rule allowing immediate acquisition by a party in good faith is to provide protection in certain cases through a short period of positive prescription. This was, for example, the approach in Roman law.¹¹²² The current law regarding acquisitive prescription of moveables is unclear, but if it does exist, it seems that 40 years possession would be required.¹¹²³ Prescription will therefore be of little benefit to most immediate acquirers. The Scottish Law Commission has recently produced a Report on *Prescription and Title to Moveable Property*.¹¹²⁴ However, the Report did not review the law relating to *bona fide* acquisition in general.¹¹²⁵ The prescriptive period suggested is 20 years.¹¹²⁶ As things stand, particularly in the case of high value goods which depreciate quickly in value (electronic equipment and most motor vehicles for example), acquisitive prescription is unlikely to be of significant assistance to a denuded purchaser.

(2) English Reform Efforts

(a) Consultative exercises

In the context of the Memorandum, mention should also be made of the earlier English Law Reform Committee Report,¹¹²⁷ which recommended protection for good faith purchasers of goods possession of which the owner had parted with under a void contract.¹¹²⁸ It also suggested extension of the market overt doctrine to all sales at auction or trade premises, with the burden of proof placed on the person alleging

¹¹²¹ *Corporeal Moveables: Protection* para 34.

¹¹²² See ch 2 A(3)(b)(ii).

¹¹²³ *Prescription and Title to Moveable Property* (Scot Law Com DP No 144, 2010) paras 2.20-2.23.

¹¹²⁴ (Scot Law Com Report No 228, 2012)

¹¹²⁵ See paras 2.6-2.7.

¹¹²⁶ See section 1(1) of the Draft Bill, in the Report on *Prescription* at 45.

¹¹²⁷ *Transfer of Title*.

¹¹²⁸ *Transfer of Title* para 15.

good faith, or alternatively its abolition.¹¹²⁹ Expansion of market overt was justified with reference to the desirability of protecting commercial transactions, and avoiding the need for protracted litigation between the parties in a chain transaction.¹¹³⁰ In this respect, the Law Reform Committee Report seems to have placed more emphasis on the perceived needs of trade and commerce than that of the Scottish Law Commission, which was concerned with the development of a coherent doctrinal approach. In a Reservation appended to the Report, Lord Donovan questioned the *bona fides* of the apparently *bona fide* purchaser, and argued that stolen property was already too easily disposed of. His remarks were quoted approvingly by the Scottish Law Commission in the Memorandum.¹¹³¹ It is seemingly the inclusion of stolen property within the scope of *bona fide* purchase that led to “insuperable difficulties” regarding the implementation of the Report.¹¹³²

A review of the law relating to rights in security by Professor Aubrey Diamond recommended protection for all purchasers in the ordinary course of business from a seller in possession with the consent of the owner, apart from those who held on “mere loans and short term hiring contracts”.¹¹³³

The Department of Trade and Industry released a Consultation Paper seeking views on an extension of protection for purchasers in the ordinary course of business of entrusted property, including all property held on the basis of a hire purchase contract or conditional sale.¹¹³⁴ Protection for purchasers of consumer goods was also considered.¹¹³⁵ However, perhaps in part due to the impact on motor vehicle financing schemes,¹¹³⁶ no further action was taken on this proposal.

¹¹²⁹ *Transfer of Title* paras 31-33.

¹¹³⁰ *Transfer of Title* para 32.

¹¹³¹ *Corporeal Moveables: Protection* para 64.

¹¹³² *Corporeal Moveables: Protection* para 24.

¹¹³³ Diamond, *Review* para 13.6.3.

¹¹³⁴ “Transfer of Title: Sections 21 to 26 of the Sale of Goods Act 1979” (1994). For criticism of the way the consultation was conducted, see B Davenport, “Consultation - how not to do it” (1994) 110 *LQR* 165.

¹¹³⁵ “Transfer of Title” para 5.3.

¹¹³⁶ See Davies, “Ostensible Ownership” 212.

More recently, seemingly in response to the decision in *Shogun*, the Law Commission¹¹³⁷ stated an intention to begin a project looking at transfer of title by non-owners. However, this was subsequently dropped as “[f]ollowing the Companies Act 2006, there appears to be little enthusiasm within Government or industry for reform at this particular time.”¹¹³⁸

(b) Abolition of market overt

Although the market overt rule was never applied in Scotland, it is described by Brown as having exercised a “reflex influence” upon development of the law.¹¹³⁹ Given that the objective of the Sale of Goods Act 1893 was to harmonise the law of sale in England and Scotland, the fact that the market overt rule was not introduced in Scotland may appear somewhat strange. The doctrine, however, had been subject to attack by the mercantile communities.¹¹⁴⁰ Following its criticism by the Mercantile Law Reform Commission in 1855,¹¹⁴¹ it seems that an attempt was made to abolish the rule entirely.¹¹⁴² It was felt that doing so would endanger the passage of the Sale of Goods Bill, and the rule hence survived,¹¹⁴³ but it was probably for this reason that no attempt was made to introduce it into the law of Scotland.

The rule was subject to attack throughout the twentieth century¹¹⁴⁴ and was finally abolished by the Sale of Goods (Amendment) Act 1994 as a

¹¹³⁷ *Ninth Programme of Law Reform* (2005) para 3.51-3.57.

¹¹³⁸ *Tenth Programme of Law Reform* (2008) para 4.4. This remained the case at the time of the *Eleventh Programme of Law Reform* (2011) (see paras 3.5-3.6) and, unless proposed again, it will not form part of the Twelfth Programme.

¹¹³⁹ R Brown, *Notes and Commentaries on the Sale of Goods Act 1893* (1895) 113.

¹¹⁴⁰ It is recorded in Hansard that “a great meeting was held in the City of London upon the subject; and a most influential deputation waited . . . at the Board of Trade with reference to it”. However, “it is certain that gentlemen of very great influence in the City of London entertain sentiments directly at variance upon the point”. Hansard HC Debate, 10th Feb 1857, series 3 vol 144, col 455.

¹¹⁴¹ See Royal Mercantile Law Reform Commission, *Second Report* 7-8. The Commission argued that the interests of commerce required that owners be protected when they entrusted possession of their property to others and that purchasers were able to bear the risk of defect in title. The Commission’s recommendations were included in Section 11 of the Mercantile Law Amendment Bill 1856, which abolished the market overt rule but was never implemented.

¹¹⁴² A Select Committee of the House of Commons attempted to substitute the following provision: “The buyer of goods in market overt shall not acquire any better or other title thereto than if the sale had taken place not in market overt”. See Brown, *Notes* 112.

¹¹⁴³ See Brown, *Notes* 112.

¹¹⁴⁴ See for example Hansard HC Debate, 24th March 1914, series 5 vol 60, col 214 W. The Law Reform Committee Report (*Transfer of Title* at para 31) described it as “capricious in its application”

“thieves charter”¹¹⁴⁵ after the doctrine prevented the recovery of certain paintings which had been stolen from Lincoln’s Inn.¹¹⁴⁶ Given the decline in the importance of local markets, it was not seen as being of any social benefit.¹¹⁴⁷ Although it was felt that reform of the Sale of Goods Act might be necessary,¹¹⁴⁸ no other protection for good faith purchasers was provided to replace market overt.

With reference to the special protections afforded to good faith purchasers of motor vehicles, the fact that the nineteenth-century equivalent of the motor vehicle, the horse, was excluded from the full scope of the market overt provisions is surprising.¹¹⁴⁹ It is a reminder that ease of fraudulent transfer does not always imply increased protection for the *bona fide* acquirer, but may also be used to justify increased protection for the original owner. The desirability of market overt-type rules protecting those who buy in particular market contexts is assessed further in Chapter 6.¹¹⁵⁰

F. CONCLUSIONS

As Goode has put it, protection for the *bona fide* purchaser in both England and Scotland has been “developed piecemeal and interpreted restrictively.”¹¹⁵¹ There has been some argument for a unified general principle protecting good faith purchasers,

but was undecided whether it should be abolished or extended to cover all retail sales at trade premises. There continued to be a “marked diversity of opinion” surrounding the best solution.

¹¹⁴⁵ Hansard HL Debate, 12th Jan 1994, 5th series vol 551, col 210.

¹¹⁴⁶ The connection between the theft and the subsequent bill to abolish market over was (somewhat unconvincingly) denied by Lord Renton: “Although I am a member of Lincoln's Inn and used to serve on its pictures committee, that is not why I am introducing the Bill.” (Hansard HL Debate, 12th Jan 1994, 5th series vol 551, col 210).

¹¹⁴⁷ Hansard HL Debate, 12th Jan 1994, 5th series vol 551, cols 211-212.

¹¹⁴⁸ Hansard HL Debate, 12th Jan 1994, 5th series vol 551, col 212.

¹¹⁴⁹ Section 22(2) of the Sale of Goods Act 1893, read in conjunction with 2 & 3 Philip and Mary c.7 and 31 Elizabeth c.12, placed a number of extra restrictions upon the sellers of horses, including a requirement that all sales had to be witnessed and registered in the books of the market. The owner was also given six months to prevent ownership passing by informing a magistrate that the horse had been stolen. See further G H H Oliphant, *The Law of Horses*, 4th edn (1882) 55-69. In other jurisdictions increased protection was given to acquirers of stolen horses, see for example Hinz’ discussion of a 1586 law from Lübeck in *Entwicklung* 60-61.

¹¹⁵⁰ F(1)(a).

¹¹⁵¹ Goode, *Commercial Law* 459.

but it has generally been unsuccessful.¹¹⁵² Even throughout the Sale of Goods Act, there is no uniformity of treatment in relation to such basic aspects as the relevant standard of good faith and the location of the burden of proof.

There is an awkward tension between the exceptions contained in the Sale of Goods Act and the general law. In the case of transfer by a fraudulent depository, the owner can recover his or her property, whether or not an innocent third party was misled by the depository's possession. However, this is not the case if one of the exceptions contained in the Act applies. Much of the modern litigation in the area has concerned motor vehicles held on hire purchase, but the strong good faith purchase protection in this area is something of an anomaly, caused by the absence of a registration system for securities.

It is possible to overestimate the relevance of property law doctrine to the practical workings of markets. It seems unlikely that the general public conduct their transactions on the basis of a detailed knowledge of the Sale of Goods Act. It has been argued that it has often been the ideas of lawyers about what would be beneficial to commerce, rather than the views of the commercial community, which have shaped the direction of law reform projects. This does not mean, however, that economic activity is not founded upon clear and comprehensible rules of property law.

Particularly in respect of transactions involving consumer credit devices such as hire purchase, or enforcement of debt, it is difficult to ignore the distributional effects (at the local level) of judicial decision making.¹¹⁵³ In the case of attachment by creditors of a third party's property, the balance of equities may change depending on whether the true owner is a competing creditor, an unsuspecting family member, a *bona fide* third party or one in collusion with the debtor.

¹¹⁵² See for example the dissenting judgment of Lord Denning in *Beverley Acceptances* (n 1056) at 426.

¹¹⁵³ For discussion of the distributive aspects of private law decision making in this area, see Ramsay, "Credit Law", especially at 183-189.

There is also the question as to whether the strong protection afforded to the owner against third parties by the vindicatory action should be extended to those holding ownership for the purposes of security (for example a hire purchase company.) One of the major criticisms of the then-current law by the Crowther Committee on Consumer Credit was the “unfair and irrational” set of rules governing conflicts between the secured party and third party rights.¹¹⁵⁴ Goode cites “the needs of those selling on credit to take security for the price” as a reason for denying protection to the *bona fide* purchaser.¹¹⁵⁵ In the case of motor vehicles, it has, however, been seen as appropriate to limit the owner’s remedy. The need for security could be met in other ways (such as a registration system).

The final part of the thesis draws on this discussion of the current law to explore the justifications for protecting acquirers and the possibilities for reform.

¹¹⁵⁴ *Consumer credit: Report of the Committee* (Cmnd 4596: 1971) para 4.2.8.

¹¹⁵⁵ Goode, *Commercial Law* 451.

CHAPTER 5: JUSTIFYING GOOD FAITH ACQUISITION

A. THE NEED FOR NORMATIVE EVALUATION

This chapter explores the different justifications which have been advanced for protection of *bona fide* purchasers, and the values which property law rules should seek to uphold. It proceeds on the basis that there is an inherent normativity in the relationship between original owner and possessor. By “normativity” it is meant that property law rules provide reasons for action.¹¹⁵⁶ If I know that a book is owned by Beth, I understand that I should obtain her consent before using it. Legal rules moreover provide what Joseph Raz terms “exclusionary reasons” i.e. reasons which prevent other potentially relevant reasons from being taken into account.¹¹⁵⁷ The fact that Beth’s book may be vital to my research is, at least from the point of view of a court called on to determine who may use the book, irrelevant. When assessing the adequacy of property rules, some attempt should therefore be made to investigate the normative considerations which may justify the adoption of one approach (protection of purchasers) over another (protection of the original owner).

The first part of the thesis outlined the historical development of Scots property doctrine, with a focus on doctrinal concepts of ownership and possession. The good faith acquisition problem, however, may also be employed to challenge the classical doctrinal narrative as incapable of giving a satisfactory account of the normative choices inherent in legal reasoning. For example, it has been suggested by those working within the Law and Economics tradition that economic analysis, rather than doctrinal reasoning, is the best way to assess the various policy options.¹¹⁵⁸ The methodological debate over the appropriate way to justify a given solution reflects the tension that exists within legal scholarship between focus on the formal concepts

¹¹⁵⁶ This definition is that used by Joseph Raz in *Practical Reason and Norms* (repr 1990).

¹¹⁵⁷ See Raz, *Practical Reason* 132-148. Raz’s work is useful here in exploring the way in which institutionalised normative systems such as legal systems pre-empt individual deliberations about how to act; from the point of view of a court, legal rules are exclusionary reasons. Of course, such judgements are only possible within any given legal system’s sphere of influence, and are dependent on respect for and the proper functioning of legal institutions. The question of what makes an institution a legal one will not be discussed here.

¹¹⁵⁸ For further discussion of the Law and Economics perspective, see C(3).

of an autonomous, logically closed property doctrine and attention to “external” considerations such as economic efficiency. While the present thesis has adopted what may be termed an “internal approach”¹¹⁵⁹ to property doctrine, other perspectives can contribute to understanding of the values at stake.

It is not intended to provide a comprehensive theory regarding the justification of property, or more generally legal, doctrine. Discussion is therefore limited to the arguments used most frequently in the context of *bona fide* purchase. However, it is claimed that there are a number of internal values currently reflected in Scots property law regarding transfer of moveables which should be the foundation for any future reform, including coherence and certainty of rights. In addition, the distributive implications of property doctrine must be taken into account. As *bona fide* purchase rules are often justified by reference to furtherance of the ease and rapidity of transactions, a central concern is the market impact of legal policy. The relation between private law doctrine and “external” goals such as promotion of economic efficiency is controversial,¹¹⁶⁰ but it is necessary to expose the idea that *bona fide* purchase rules encourage commerce to proper scrutiny. To this end, the contribution of non-formalist perspectives such as the Realist and Law and Economics approaches is considered.

B. DOCTRINAL VALUES

(1) Epistemological Considerations

¹¹⁵⁹ An internal account “deals with private law on the basis of the juristic understandings that shape it from within”: E Weinrib, *The Idea of Private Law*, revised edn (2012) 13. On the various debates surrounding the distinction between an internal and external perspective, see B Tamanaha, “The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociolegal Studies” (1996) 30 *Law and Society Review* 163.

¹¹⁶⁰ For a particularly prominent attack on the role of “functionalism” in doctrinal scholarship, see Weinrib, *Private Law*. Compare R A Posner, *Economic Analysis of Law*, 8th edn (2011) ch1. Other scholars adopt a more nuanced approach, see H Dagan, “The Limited Autonomy of Private Law” (2008) 56 *American Journal of Comparative Law* 809.

The means by which we acquire knowledge about property rights is in some respects as significant as the facts of their distribution.¹¹⁶¹ A key value in property law doctrine is that of certainty; it is necessary for property rules to provide some measure of clarity regarding the nature and allocation of proprietary rights.¹¹⁶² As a real right may be enforced against third parties, it is important that the public are able to comprehend its content and have a reliable means of ascertaining if and when it exists. This need for some kind of external signifier of right is sometimes known as the “publicity principle”.¹¹⁶³ Linked to it is the need for property rights to maintain a degree of stability; where the characteristics or distribution of rights are constantly changing it is difficult to achieve certainty.¹¹⁶⁴ In terms of the law relating to transfer of corporeal moveable property, it should be as clear as possible to both the owner him or herself and to all third parties where ownership lies at any given time. In the case of transfer by a non-owner, it should be foreseeable by the owner under what circumstances his or her right may be at risk.

Although this description may appear more suited to Romanist systems, with their emphasis on the location of a unitary right of ownership, concerns of stability and clarity will apply, at least to some extent, to any system of private property rights. There is an inescapably public dimension to private law in the sense that the internal, private will can only be given effect to through external, public interactions. Regardless of whether there is an ethical basis for recognising individual property rights prior to the state and civil society,¹¹⁶⁵ it is only through collective organs such as courts that these rights are upheld and actualised. Property rules may, therefore, focus on what is publicly knowable (e.g. the state of possession) rather than facts

¹¹⁶¹ For an argument that well-defined (and hence enforceable) property rights are crucial to economic development, see H de Soto, *The Mystery of Capital* (2000) ch 2.

¹¹⁶² For example, legal certainty is frequently cited in the context of prescriptive acquisition, see Lurger and Faber, *Principles* 956.

¹¹⁶³ See for example Scottish Law Commission, *Moveable Transactions* ch 11 for a discussion of the significance of the publicity principle in the law relating to security rights.

¹¹⁶⁴ Dalhuisen, *Trade Law* 370 refers to the need for finality.

¹¹⁶⁵ Kantian theory, for example, although maintaining that external private property rights can exist only in the civil condition, posits the origin of such rights as prior to civil society in the innate freedom of human beings and their right to bodily integrity. See I Kant, *Metaphysics of Morals*, trans M J Gregor (1996) paras 238; 250-256. See also B Sharon Byrd and J Hruschka, “The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right” (2006) 56 *University of Toronto Law Journal* 217.

which may be difficult or impossible to investigate (the history of the ownership of a moveable.) Such epistemological concerns arguably underlie the Scots law presumption of ownership from possession.

A further aspect of the maintenance of certainty and avoidance of arbitrariness is the aspiration to doctrinal coherence. When evaluating individual rules, “coherence” is intended here to refer to integration within a unified structure.¹¹⁶⁶ It involves the minimisation of conflict between rules and also some element of consistency at the level of systemic values and justifications.¹¹⁶⁷ The element of systematicity in doctrinal reasoning is necessary for the public knowability of law, without which it would lose part of its justificatory force.¹¹⁶⁸ A coherent system of property law also contributes to the certainty and predictability of dispute resolution as each particular case may be subsumed within a broader doctrinal logic.¹¹⁶⁹ In relation to transfer of ownership, in Scots law at least, *nemo plus* is one of the most important systemic principles, along with the requirement that the owner’s consent is generally necessary for derivative transfer.¹¹⁷⁰

The *bona fide* purchase problem illustrates the importance of these concerns, but also evidences the potential for conflict between the two values. Where ownership passes without written record, the public verification of a claim to ownership becomes difficult or impossible. Rules protecting *bona fide* purchasers, therefore, are often advocated as a means of increasing certainty and knowability by

¹¹⁶⁶ One view of coherence in private law doctrine is that set out by Weinrib (*Private Law* 32 ff.) Weinrib argues that coherence requires a “single integrated justification”: *Private Law* 32. For a critique, see K Kress, “Coherence and Formalism” (1993) 16 *Harvard Journal of Law and Public Policy* 639. Although Weinrib’s discussion of the justificatory role of coherence is valuable, the term “coherence” is used here in a wider sense than in his work.

¹¹⁶⁷ The difficulties which may arise when the need for coherence is not met are illustrated by the concern over the decision in *Sharp* (n 753). See Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) paras 2.3-2.14.

¹¹⁶⁸ See E Weinrib, “Private Law and Public Right” (2011) 61 *University of Toronto Law Journal* 191 at 197-198.

¹¹⁶⁹ This is not to suggest of course, that in practice any given system is entirely coherent, or that rules are always applied in a consistent manner. The claim is merely that this is an aspiration of doctrinal reasoning.

¹¹⁷⁰ See ch 4 C(1).

providing that acquisition under certain conditions confers a valid right.¹¹⁷¹ In some systems, possession is adopted as an indication of ownership on which good faith transferees may rely.¹¹⁷² This is at the expense of doctrinal logic which suggests that, at least where acquisition is by derivative transfer, a non-owner cannot transfer ownership. How should this tension be resolved?

The extent to which *bona fide* purchase rules, particularly those permitting reliance on possession, actually address the difficulties in substantiating ownership of moveables is discussed further in Chapter 6, where it is argued that such rules do not actually decrease overall uncertainty.¹¹⁷³ As regards doctrinal coherence, it is hoped through clarification of the reasons for protecting purchasers to provide a foundation for a clear and consistent approach to *bona fide* purchase.

(2) Corrective and Distributive Justice

(a) *The argument from corrective justice*

Apart from coherence and certainty, what other principles are relevant in justifying private law doctrine? Weinrib argues that coherence in private law has no external referent.¹¹⁷⁴ This is due to his separation of his preferred justificatory rationale for private law (corrective justice) from distributive justice and the broader realm of politics.¹¹⁷⁵ According to Weinrib, corrective justice provides a single, integrated justification.¹¹⁷⁶ As private law is the actualisation of corrective justice, it justifies itself without need for reference to any further norm or principle. Weinrib's account of the normative self-sufficiency of private law is based on his situation of corrective

¹¹⁷¹ For example, Kant, *Metaphysics* para 303 argues that courts should rely on what can be adjudicated most readily and surely (am leichtesten und sichersten abgeurtheilt werden kann), and therefore substitute formal (the acquisition was carried out in the proper manner) for material (the transferor was the actual owner) conditions of the transfer's validity.

¹¹⁷² Most obviously in French law, for which see Art 2276 Code Civil, but also in the importance attached to possession under ss 24 and 25 SOGA 1979.

¹¹⁷³ See B.

¹¹⁷⁴ Weinrib, *Private Law* 14.

¹¹⁷⁵ See generally Weinrib, *Private Law* ch 8. On the origins and historical usage of the terms "corrective" and "distributive" justice, see I England, *Corrective and Distributive Justice: From Aristotle to Modern Times* (2009). The adoption of the terms by modern private law scholars and the identification of corrective justice with private law are covered in ch 7.

¹¹⁷⁶ Weinrib, *Private Law* 37.

justice within Kant's philosophy of right.¹¹⁷⁷ Rather than arising through an antecedent distribution, property rights are seen as arising out of the innate freedom of persons to use objects that belong to no one.¹¹⁷⁸ Rules protecting *bona fide* purchasers are a consequence of the need to publically enforce private rights, rather than a means of promoting some external goal such as commerce.¹¹⁷⁹ Such rules should therefore be limited in the extent to which they interfere with property rights, for example by affording the original owner an opportunity to repurchase the property from the good faith acquirer.¹¹⁸⁰

Leaving aside here a fuller exploration of the Kantian account,¹¹⁸¹ the claim that property law can be understood without reference to the politics of distribution is not convincing. It is certainly possible to identify aspects of the *bona fide* purchase problem which appear to involve corrective justice. Following a transfer by a non-owner, a decision must be made between the claims to ownership of the original owner and the good faith purchaser.¹¹⁸² In a society in which entitlements are distributed in the form of private property rights, to deprive someone of his or her property rights without consent is generally recognised as a wrong.¹¹⁸³ This is reflected in the current default rules of Scots property law favouring the original owner, and indeed in the protections afforded by national constitutions¹¹⁸⁴ and international conventions such as the European Convention on Human Rights.¹¹⁸⁵ Weinrib's view draws on the Kantian idea of the will, and hence the belief that to sell

¹¹⁷⁷ *Private Law* ch 4.

¹¹⁷⁸ Kant, *Metaphysics* paras 246-247.

¹¹⁷⁹ Weinrib, "Public Right" 202.

¹¹⁸⁰ Weinrib, "Public Right" 202.

¹¹⁸¹ See for example M J Gregor, "Kant's Theory of Property" (1988) 41 *The Review of Metaphysics* 757; H Williams, "Kant's Concept of Property" (1977) 27 *The Philosophical Quarterly* 32; S Meld Shell, "Kant's Theory of Property" (1978) 6 *Political Theory* 75; W F Buck, "Kant's Justification of Private Property", in B den Ouden (ed), *New Essays on Kant* (1987) 227.

¹¹⁸² At least in a system such as Scots law with a unitary concept of ownership. In a system based on relativity of title such as English law, all that the court may be required to decide is which party has the best right to possess, see Bridge, *Personal Property* 28-29.

¹¹⁸³ The various justifications for and historical explanations for the existence of a system of private property rights are not explored within the thesis. For a prominent exploration of some of the justifications available, see J Waldron, *The Right to Private Property* (1988).

¹¹⁸⁴ See for example s 25 of the South African Constitution of 1996.

¹¹⁸⁵ On the human rights aspects, see ch 6 A(2)(b).

the property of another without authorisation is to impose oneself in his or her sphere of freedom.¹¹⁸⁶

The classical Aristotelian account of corrective justice involves giving to each his or her own; where one party has unjustly gained at the expense of another, the judge must right this wrong by restoring the parties to their original position.¹¹⁸⁷ *Prima facie*, this logic would seem to justify recovery by the original owner. A wrong has been committed, and the purchaser has gained possession of the thing whilst the original owner has lost. Usually the recovery of possession by an owner requires a particular kind of justification, the establishment of a connection between that person and that particular thing. There must also be a correlation between the loss suffered by the owner and an unjust gain on the part of the possessor; obviously if the owner has consented to the possession, the possessor's gain will not be unjust. The restoration of equality is the basis of Thomas Aquinas' influential doctrine of restitution, which takes place within the ambit of corrective/ commutative justice.¹¹⁸⁸

(b) The relevance of distributive justice

However, there is also a sense in which, if recovery is permitted, the original owner might be thought to be gaining at the expense of the acquirer. As both the original owner and the purchaser are "innocent" parties (neither has deliberately¹¹⁸⁹ caused the wrong), the direct link between wrong and restoration¹¹⁹⁰ is broken. There is hence insufficient correlativity between the purchaser's gain and the owner's loss. The problem hinges on how the purchaser's claim is understood: does his or her connection with the thing merit the law's protection? And if it does, what kind of

¹¹⁸⁶ Weinrib, *Private Law* 80 ff. Following Kant, however, Weinrib does recognise that the public nature of law requires an external aspect to the transfer of property which may in some cases justify good faith acquisition. (*Private Law* 107 and "Public Right" 198). For a fuller account of Weinrib's view of the relation between property and distributive justice in Kantian thought, see E Weinrib, "Poverty and Property in Kant's System of Rights", in *Corrective Justice* (2012) 264.

¹¹⁸⁷ Aristotle, *Nicomachean Ethics*, trans and ed S Broadie and C Rowe (2002) Bk 5 IV.

¹¹⁸⁸ Aquinas, *Summa* II.ii. Q. 61, 62; Hallebeek, *Unjust Enrichment* 10-13. Aquinas distinguishes the obligation of restitution based on the having that which belongs to another from that which arises from an unjust taking (*Summa* II.ii. Q.62 Art. 6). When the purchaser realises that the thing belongs to another, it seems that he or she would therefore be obliged to return it. See also Aquinas, *Summa* II.ii. Q.100. Art. 6.

¹¹⁸⁹ According to Aristotle, a person acting without knowledge as to the nature of his or her actions does not act unjustly: Aristotle, *Ethics* Bk 5 VIII.

¹¹⁹⁰ I.e. the link between doing and suffering: Aristotle, *Ethics* Bk 5 IV.

protection should this be? The claim to recovery of the actual thing, as opposed to a demand for financial compensation, is a special one; some owners (for example those holding ownership for the purposes of security) may find a monetary claim satisfactory, whilst others have an emotional or practical connection with the specific thing.

Corrective justice in itself does not seem to provide a satisfactory way of answering these questions. At the level of individual interests, it is difficult to find a reliable means of distinguishing the claim of the original owner and that of the acquirer. Both may have acted in an entirely blameless manner, and both may suffer in various ways if deprived of their alleged right in the thing. Insofar as restitution is seen as protecting the subjective freedom of the original owner, either the owner or the acquirer may be a corporation, with no personhood-related interests in the thing.

Even where it is possible to reach an adequate solution in a given instance, a calculus based on the respective qualities of one particular original owner and one particular acquirer does not provide a secure basis for a general rule. Rather, it is a principle of distribution which is best equipped to determine whether the purchaser's actions in honestly purchasing are sufficient for him or her to acquire ownership. By this is meant that there are distributive choices inherent in the private law rules regulating acquisition and transfer of ownership; such rules allocate power to particular sets of persons who act in certain ways.¹¹⁹¹ A dual moral significance is attached to the person-thing connection, which can be understood both as a matter of the individual relationship concerned but also as a way of organising society. In the case of *bona fide* purchase, it is not only a matter of restoring a previously existing equality to the relationship between the parties, but of deciding which class of persons in society (original owners or acquirers) should be required to bear a given risk. It is necessary to consider the possibility of trade-offs, and the acceptability of sacrificing the interests of one person or group in favour of another. This implies that

¹¹⁹¹ An argument along these lines is made by C Michelin, "The Virtuous Circularity between Positive Law and Particular Justice", *University of Edinburgh School of Law Working Paper No 2011/11* at 15. Available at SSRN: <http://ssrn.com/abstract=1791807>.

a different kind of reasoning, involving attentiveness to societal impacts and the broader public good, is appropriate.

(c) Distributive justifications for bona fide purchase

The question of what sorts of concerns may justify a given distribution of resources, and when such a distributive theory can call itself a theory of justice is vast, and is not addressed here.¹¹⁹² There are a variety of different (and potentially incompatible) principles which might be suggested as a basis on which to allocate gains and losses. Jeremy Waldron differentiates justifications which focus on property rights as for some reason worthy of recognition in themselves (rights-based),¹¹⁹³ and those which treat property rights as only deserving of protection insofar as they serve some further end of general utility (utilitarian).¹¹⁹⁴ More broadly, one could talk of deontological versus consequentialist arguments.¹¹⁹⁵

For present purposes, it is sufficient to identify two kinds of distributive criteria which are especially relevant to the debate about good faith acquisition. One variety relates to the qualities and actions of the persons involved- for example who has acted in a deserving or undeserving manner. Another focuses on the creation of a particular sort of society, e.g. which approach will lead to maximum circulation of goods? Both types of justification are often employed in the context of rules protecting *bona fide* purchasers. It is impossible to examine fully here the precise relationship between property law and these “external” values or justify comprehensively the adoption of one particular normative scheme,¹¹⁹⁶ so, without excluding the possibility of other, potentially reasonable, distributive schemata, the remainder of the thesis concentrates on two aims: the facilitation of economic activity and the encouragement of honest and careful trading.

¹¹⁹² For a flavour of the various debates see J Lamont and C Favor, “Distributive Justice”, in E N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition) available at <<http://plato.stanford.edu/archives/spr2013/entries/justice-distributive/>>.

¹¹⁹³ For example, an argument based around the idea of ownership as an extension of individual subjectivity.

¹¹⁹⁴ On which see Waldron, *Private Property* 12-16; ch 3.

¹¹⁹⁵ On deontological arguments see L Alexander and M Moore, “Deontological Ethics”, in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition) available at <<http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/>>.

¹¹⁹⁶ To answer this question would require the construction of a theory of law and the respective roles of legislation and adjudication.

Does either of these adequately justify the adoption of protection for good faith purchasers? And are they compatible with one another? These specific concerns have been selected because they are, either implicitly or explicitly, already reflected in property doctrine, which in general penalises those who act in bad faith or intentionally or carelessly mislead others about ownership.¹¹⁹⁷ Although Scots law has never adopted the doctrine of market overt, expedition and simplification of transactions is commonly cited as a justification for such protections for *bona fide* purchasers as currently exist, for example by the authors of the Scottish Law Commission Memorandum mentioned in Chapter 4.¹¹⁹⁸

How are the claimed economic benefits of good faith acquisition to be verified? It has been argued by, for example, those working in the Realist tradition that conventional “black letter” doctrinal analysis does not allow proper assessment of the real-world implications of legal policy.¹¹⁹⁹ In order to test the claim that protecting good faith purchasers promotes commerce, Part C examines alternative methodological approaches, focussing on the evaluation of market impacts and the extent to which economic analysis is useful in determining an appropriate distribution of risk.

As regards the encouragement of honest and fair trading, at an abstract level this does not seem to be of much assistance in distinguishing between the claim of original owner and acquirer, both of whom may have acted in an entirely prudent or, conversely, negligent manner. The extent to which doctrine can take into account the behaviour of the parties and encourage fair and open transactions through inclusion of factors such as good faith and negligence is considered in Chapter 6.

(d) Retributive justice and prevention of theft

¹¹⁹⁷ For example, s 21 of the Sale of Goods Act 1979 bars original owners whose conduct has implied that another party had authority to sell from recovery, while ss 23-35 of the Act protect only those acquirers who are in good faith.

¹¹⁹⁸ *Corporeal Moveables: Protection* at para 11.

¹¹⁹⁹ See C below.

In most European legal systems the case of stolen goods is distinguished from that of entrusted ones.¹²⁰⁰ In order to explain this tendency, it seems that (at least in part) one requires to refer to ideas of retribution and punishment of theft. There is some debate regarding the nature of retributive justice, and its relationship to corrective and distributive justice.¹²⁰¹ Retribution may on one view involve corrective justice,¹²⁰² whereas looked at in another way it may reflect distributive reasoning.¹²⁰³

In order to explain the higher protection often afforded to an owner of stolen property, it is initially tempting to view this as in some way recognising the moral wrong which has been inflicted on him or her. In light of the social disapprobation occasioned by theft, retributive justice may be thought to require that the thing should be restored to the owner. However, this does not seem a satisfactory justification for the doctrinal assimilation of theft to other cases of involuntary loss of possession,¹²⁰⁴ which do not involve a comparable wrong.¹²⁰⁵

Given that retribution is usually associated with punishment for the individual committing a wrong, it is unclear that it justifies the imposition of liability upon a blameless third party. One explanation is that, although by definition a good faith purchaser must be innocent as regards the initial theft, there is distaste at the idea that a later party could obtain a benefit from the thief's wrong. On this view the moral fault involved constitutes an inherent vice, which creates a sort of presumption of bad faith and prevents subsequent transferees from acquiring ownership.¹²⁰⁶ It is difficult to see how this clarifies the distinction between voluntary and involuntary dispossession: is it not also dishonest to benefit from fraud or even loss?¹²⁰⁷ Does the

¹²⁰⁰ For a survey, see Lurger and Faber, *Principles* 925-931.

¹²⁰¹ For a historical overview, see Englard, *Justice*. For discussion of contemporary scholarship, see D Wood, "Retributive and Corrective Justice, Criminal and Private Law" (2005) 48 *Scandinavian Studies in Law* 541.

¹²⁰² Reparation may be seen as restoration of equality between the parties.

¹²⁰³ Redistribution of goods between parties may be seen as promoting distributive aims in removing property from those who do not deserve it.

¹²⁰⁴ As for example under in the case of "lost or otherwise missing" property under § 935 BGB.

¹²⁰⁵ R Saleilles, *De La Possession Des Meubles: Études De Droit Allemand Et De Droit Français* (1907) 140-141. A similar argument is made by F Guisan, *La Protection de l'acquéreur de bonne foi en matière mobilière* (1970) 236.

¹²⁰⁶ This type of argument is criticised by Saleilles, *Possession* 146.

¹²⁰⁷ Saleilles, *Possession* 147.

wrong in theft differ from the wrong in any other unauthorised transfer, and if so, how? Indeed, should property law involve itself in moral assessment of theft?

It is not certain whether property law should seek to further retributive ends at all. In Chapter 4 it was argued that, although property law may reflect the same basic concerns as the criminal law, it has a different internal logic and structure.¹²⁰⁸ This chapter argues that property law serves public purposes, but this is not to say that these are the same as those served by the criminal law.¹²⁰⁹ For example, an involuntary dispossession often involves a breach of social order, whereas a voluntary one does not.¹²¹⁰ However, criminal law sanctions are available precisely to keep the public peace,¹²¹¹ whereas property law contributes to social order in alternative ways, for example by providing clear rules on acquisition. Property rules must also take account of the need to facilitate transactions, and ensure security and certainty of rights, concerns which are less relevant to the criminal law. In the case of good faith acquisition of stolen property, these imperatives may well outweigh the need to seek redress for the wronged party.

Rules distinguishing stolen property are also justified on the grounds that they make it more difficult for purveyors of stolen property to sell it.¹²¹² It is not clear, however, that civil law rules are actually useful in preventing the sale of stolen property, as there may be many other factors involved in market functioning. (This point is discussed further below in the context of law and economics scholarship.) Moreover, even if the market for goods of dubious origin is reduced, thieves may disguise or otherwise make identification of the property as stolen difficult. Unless the thief him or herself is allowed to acquire the thing, he or she will remain indifferent to the legal rule adopted as there will always be someone with a claim against him/her.¹²¹³

¹²⁰⁸ See ch 4 C(1).

¹²⁰⁹ A similar point is made by Guisan, *Protection* 236.

¹²¹⁰ F Vinding Kruse, *The Right of Property*, trans D Philip (1953) vol 2 275.

¹²¹¹ Guisan, *Protection* 237.

¹²¹² See Saleilles, *Possession* 147-8; Vinding Kruse, *Property* vol 2 283.

¹²¹³ Guisan, *Protection* 210.

C. NON-FORMALIST PERSPECTIVES

Whilst much of the thesis is concerned with doctrinal accounts of *bona fide* purchase, this perspective has some inherent limitations. This section evaluates the contribution of non-formalist arguments to the debate, and the extent to which alternative methodological approaches may be helpful in elucidating satisfactory justifications for protection of the good faith acquirer.

(1) The Realist Challenge

(a) Critique of conceptualism

Within the Common Law tradition, some of the strongest attacks upon the application of the *nemo plus* principle have been inspired by the Legal Realist movement in the United States.¹²¹⁴ The Realist critique of classical property doctrine focusses on exposure of the substantive battle of interests often obscured by legal formalism. On such a view, the abstract logic of *nemo plus* does not correspond to the “real” world of business and commerce but is rather a manifestation of juridical idealism.¹²¹⁵ In order truly to understand legal doctrine, it is necessary to consider the underlying factual context, and the interests of the different groups affected.¹²¹⁶

A good example of the kind of abstraction complained of is the doctrinal approach to transfer induced by fraud.¹²¹⁷ In English and Scots law the protection of a *bona fide* purchaser varies depending on whether there has been a juridical act sufficient to confer ownership upon the transferor.¹²¹⁸ Usually a transfer induced by fraud will be sufficient for this purpose, and an innocent third party transacting with

¹²¹⁴ The history of the Realist movement, and the extent to which there can be said to be a unitary “Realist” perspective is outwith the scope of the thesis, but for a historical survey see W Twining, *Karl Llewellyn and the Legal Realist Movement*, 2nd edn (2012) and the foreword by Frederick Schauer.

¹²¹⁵ Rouiller, *Nemo plus* 499.

¹²¹⁶ On the functionalist aspects of Realist thought, see generally L Kalman, *Legal Realism at Yale, 1927-1960* (1986) ch1.

¹²¹⁷ Cited for example by D B King, “New Conceptualism of the Uniform Commercial Code: Ethics, Title and Good Faith Purchase” (1966-1967) 11 *St Louis University Law Journal* 15 at 39.

¹²¹⁸ See ch 4 D(3)(d).

the fraudster may thus acquire ownership.¹²¹⁹ Notwithstanding this, there is some confusion in both English and Scots law regarding cases of error due to mistaken identity.¹²²⁰ In relation to English law, the House of Lords has held that in cases of fraudulent misrepresentation a voidable title¹²²¹ will usually only pass to the rogue where there has been physical impersonation.¹²²²

The oddities produced by these seemingly fine distinctions have led to numerous scholarly criticisms of classical common law property discourse, in particular the use of the abstract idea of “title”¹²²³ to regulate disputes between original owners and good faith purchasers. Those inspired by the work of the influential Realist scholar Karl Llewellyn have been especially critical of the vagaries of the application of the concept in practical disputes.¹²²⁴ As one commentator put it:

The question whether a thousand angels could dance on the head of a pin would hardly seem more meaningless than the questions of intent [to transfer title] that were debated by both scholars and practicing lawyers.¹²²⁵

Llewellyn’s main argument was that the “static” nature of title is inappropriate in the context of contemporary sales transactions, which rarely feature a single action which may be said to pass “title”, but are rather an on-going and potentially lengthy process.¹²²⁶ Regard should instead be had to the type of transaction and circumstances of the parties.¹²²⁷ As property disputes were actually disputes between different groups of social interests, focus should be on exposure of the interests

¹²¹⁹ As for example in *Macleod* (n 929).

¹²²⁰ See further Carey Miller, “Plausible Rogues” and *Corporeal Moveables* para 8.11.

¹²²¹ I.e. one that is valid until challenged. For fuller discussion of the meaning of the terms “title” and “voidable”, see ch 4 D(3)(d).

¹²²² See *Shogun* (n 724).

¹²²³ On the notion of “title” see ch 4 D(3)(c)(i).

¹²²⁴ See K N Llewellyn, *Cases and Materials on the Law of Sales* (1930) 561-574, esp. at 561-562.

¹²²⁵ King, “New Conceptualism” at 39.

¹²²⁶ K N Llewellyn, “Through Title to Contract” (1938) 15(2) *New York University Law Quarterly Review* 159 at 168.

¹²²⁷ Llewellyn, “Through Title” at 170.

involved to critical scrutiny.¹²²⁸ It is necessary to pay attention to the particular attributes (geographical, temporal) of the market concerned,¹²²⁹ and also the status of the parties, drawing a distinction between merchant and non-merchant sellers, and also merchant and non-merchant buyers.¹²³⁰ The routine separation of ownership and possession in the service of credit makes focus solely on the location of ownership an unhelpful way of approaching disputes.¹²³¹

In relation to *bona fide* purchase, if two parties have both acquired in good faith from a rogue, why should the law create artificial distinctions between them? For example, Franklin compares the case of a transfer by B, who has acquired by fraud but can still pass title to C, and an unauthorised transfer by a bailee (hirer), who has no title to pass to C. He argues that:

It should be sufficient that A voluntarily gave the movable to B, whether or not the disposition was blessed with “title,” as in no event does A envisage the risk to which B exposed him, a risk from which A is made to suffer only in the case where he is most worthy of protection.¹²³²

The standard Scots doctrinal answer to this objection would be that in the former case there has been (defective) consent to transfer of ownership, but in the latter there has not.¹²³³ There is some validity, however, in the point that the layperson may find the distinction between the two cases of wrongdoing baffling and perhaps unfair.

¹²²⁸ M Franklin, “Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase” (1931-1932) 6 *Tulane Law Review* 589 at 591.

¹²²⁹ “If then our law and its understanding are not to be set in empty cloud, we must struggle ourselves to see what sort of thing was there for the courts to see, and what sort of reaction a judge or lawyer of the time and place might have to it”: K N Llewellyn, “The First Struggle to Unhorse Sales” (1939) 52 *Harvard Law Review* 873 at 880.

¹²³⁰ See Llewellyn, “First Struggle” at 879.

¹²³¹ “[T]he reference to the location of “the property” in chattels as a key to determine issues is a farmer’s reference, suited to [...] a world of farming not yet trenched upon by industry; a world where use and control and possession and risk and power of disposition sit comfortably in the same fist, and neither reapers nor sewing machines nor trucks and tractors have thrust in, along with their technical complexity, a financial and legal complexity almost as baffling”: K N Llewellyn, “Across Sale on Horseback” (1939) 52 *Harvard Law Review* 725 at 732.

¹²³² Franklin, “Security” at 595.

¹²³³ See Carey Miller, *Corporeal Moveables* para 8.11.

Indeed, it is not only those working in the Realist tradition who have criticised the state of the law in this area.¹²³⁴

(b) The UCC approach

As one of the principal drafters of the UCC,¹²³⁵ Llewellyn's views have naturally influenced the way that the code is understood.¹²³⁶ Indeed, the official comments to the code attempt to minimise the importance of title in determining rights and obligations, stating that:

The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.¹²³⁷

This approach is exemplified in the Code's stipulation that:

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.¹²³⁸

¹²³⁴ For example, the English Law Reform Committee Report of 1966 was inspired in part by criticism of the proliferation of "theoretical distinctions" in the case law relating to mistaken identity: ch 4 B.

¹²³⁵ Llewellyn held the position of "Chief Reporter" from 1942 until his death in 1962.

¹²³⁶ See for example G G Glaser and W C Kelsch, "Notes: Title Theory and the Uniform Commercial Code" (1954) 30 *North Dakota Law Review* 211; E R Latty, "Sales and Title and the Proposed Code" (1951) 16 *Law & Contemporary Problems* 3.

¹²³⁷ Official comment to UCC Art 2-101.

¹²³⁸ UCC Art 2-401. For discussion of the use of the term "title" in the UCC, see W L Tabac, "The Unbearable Lightness of Title under the Uniform Commercial Code" (1991) 50 *Maryland Law Review* 408 and King, "New Conceptualism".

Despite this attempt to avoid reference to the passing of title, the UCC itself continues to adhere to a form of the *nemo plus* rule,¹²³⁹ with an exception for those who buy from a commercial seller of goods of that kind. Under UCC § 2-403(2), the underlying principle is that “any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.”¹²⁴⁰ The emphasis here is evidently on protection of commerce and facilitation of transactions rather than any moral preference for the honesty of the acquirer.¹²⁴¹

Some scholars have maintained that the very concept of title is not useful in regulating sales transactions, and rather than look at “arbitrary” movements of an abstract “title”, emphasis should be placed on the overall setting and relationship of the parties, and an analysis of which party would be best placed to guard against certain risks.¹²⁴² In the case of transfer by a non-owner, it is contended that regard should be had to “non-artificial” factors such as facilitation of commerce to determine who should be allowed to keep the disputed thing.¹²⁴³ The continuing differentiation of void and voidable titles under the UCC (for example, a purchaser from a thief can only acquire the void title of the seller)¹²⁴⁴ is criticised as unhelpful in determining which party ought to prevail.¹²⁴⁵

It is not only American legal theorists who have expressed a preference for a more functionalist approach to transfer of ownership. In part inspired by Scandinavian legal realism,¹²⁴⁶ Swedish legal doctrine also analyses the problem of

¹²³⁹ UCC Art 2-403(1). It is also explicitly stated that a person with a voidable title has the power to transfer. See further Tabac, “Unbearable Lightness”, where it is argued that traditional ideas of title and ownership still provide the framework for the provisions of the UCC.

¹²⁴⁰ For a general overview of § 2-403(2), see Thomas, *Comparative Analysis* 167-200.

¹²⁴¹ The “good faith” purchaser thus becomes the “commercial” purchaser. See G Gilmore, “The Commercial Doctrine of Good Faith Purchase” (1954) 63 *Yale Law Journal* 1057 at 1057.

¹²⁴² King, “New Conceptualism” at 36-37.

¹²⁴³ King, “New Conceptualism at 42.

¹²⁴⁴ Art 2-403(1).

¹²⁴⁵ King, “New Conceptualism at 43-44.

¹²⁴⁶ C Martinson, *Transfer of Title Concerning Movables Part III- National Report: Sweden* (2006) 12-13. See also C Martinson, “How Swedish Lawyers Think about Ownership and ‘Transfer of Ownership’ – Are We Just Peculiar or Actually Ahead?”, in W Faber and B Lurger (eds), *Rules for the Transfer of Movables: A Candidate for European Harmonisation or National Reform?* (2008) 62 at 71.

good faith acquisition in terms of the different interests involved, and how deserving they are of protection. Rather than the location of ownership, the question becomes (as in English law) who, in the immediate dispute, has the “better right” to the thing.¹²⁴⁷ Conflicts are settled in the context of the relation between the individual parties, rather than on an abstract and formal level.¹²⁴⁸

(c) Evaluation

Is the Realist approach helpful in understanding the *bona fide* purchase case?

Attempts to justify protection for good faith acquirers using formal doctrinal logic alone¹²⁴⁹ have difficulty explaining the economic and social aspects of the problem, in particular the development of special rules in particular market contexts such as “markets overt” or the law of factors. Concepts of ownership and possession in themselves can only perform limited justificatory work. It was argued in Chapter 4 that the impacts of legal doctrine on specific groups in society (for example lenders, those holding on hire purchase contracts) should not be obscured when undertaking doctrinal analysis. Nor should it be forgotten that property law rules are a product of the material conditions of a particular time and place. In Chapter 6, the arguments for applying different norms in different market contexts are discussed, as well as the importance of various “non-artificial” factors such as carelessness and fair allocation of risk.

However, following the arguments made earlier in this chapter, stability and certainty of property rights are also important concerns. A weighing up of interests at the level of the particular case may risk rendering the outcome even more unpredictable than application of the established doctrinal concepts. Moreover, conceptual structures are not meaningless; it is the abstract, non-empirical concept of ownership which distinguishes a legal right to control a thing from brute force. Although internal logical coherence may seem an “artificial” value, it was argued earlier that it also plays an important role in giving doctrine justificatory force. Of course, some doctrinal distinctions (such as those in the law relating to mistaken

¹²⁴⁷ Martinson, *Transfer* at 85-86. On English law, see ch 4 D(3)(c)(i).

¹²⁴⁸ Martinson, “Swedish Lawyers” 75-78.

¹²⁴⁹ Such as that by Weinrib, discussed above B(2)(a).

identity) are indeed esoteric and in need of modification, but, as the continuing adherence to the *nemo plus* principle in the UCC demonstrates, even ancient concepts may remain reasonable and practical.

The Realist critique then, is valuable insofar as it encourages courts and legislatures to articulate clearly which parties the law is trying to protect and why, but attention to the “facts on the ground” will not by itself resolve doctrinal or real-world conflicts such as that between owner and acquirer. This requires a more detailed articulation of goals and policies. The next section thus turns to one of the most frequently cited extra-judicial explanations for good faith acquisition, that relating to its economic impact, and asks whether the functionalist methods advocated by realist scholars are useful in assessing its justificatory force.

(2) Economic Justifications for Good Faith Acquisition: Dynamic Versus Static Security

The person that the law will tend to protect is no longer the landed proprietor, but the businessman.¹²⁵⁰

Facilitation of transactions has been identified as one of the most important policy reasons for *bona fide* purchase, and is cited by scholars across numerous jurisdictions as a key factor in doctrinal development.¹²⁵¹ Comparative and historical research demonstrates that good faith rules were often established in a mercantile context, whether in mediaeval market centres such as Lübeck¹²⁵² or through custom in trade centres such as Paris.¹²⁵³ Although Scots law does not exactly fit this pattern,

¹²⁵⁰ “Le personnage que le droit va tendre à protéger n’est plus le propriétaire terrien, mais l’homme d’affaires” : Rouiller, *Nemo plus* 502. See also e.g. *R & J Dempster v Motherwell Bridge and Engineering Co* 1964 SC 308 at 332 per Lord Guthrie.

¹²⁵¹ See for example E Karner, *Gutgläubiger Mobiliarerwerb: Zum Spannungsverhältnis von Bestandschutz und Verkehrsinteressen* (2006) 2; Kruse, *Property* 269; Rouiller, *Nemo plus* 498-503.

¹²⁵² See Hinz, “Entwicklung” 400-401; Völkl, *Lösungsrecht*; Karner, *Gutgläubiger Mobiliarerwerb* 96-100.

¹²⁵³ See Bourjon, *Droit commun*, although for a critical perspective on the pedigree of good faith acquisition in pre-code French jurisprudence, see W Dross, “Le singulier destin de l’article 2279 du code civil” (2006) *Revue Trimestrielle de Droit Civil* 27 at 32-34.

arguments advanced for increased protection for purchasers often made reference to the needs of commerce, for example those made by George Joseph Bell.¹²⁵⁴

More recently, English judges have sometimes been criticised for a perceived inclination to take too narrow an approach to the Factors Acts and the Sale of Goods Acts, and to prefer the original owner over the innocent purchaser.¹²⁵⁵ “The courts, in favouring the original owner at the expense of the innocent purchaser, have run counter to the needs of a commercial country.”¹²⁵⁶ Given this continuing appeal to economic considerations, this section focusses on the basis of the economic argument, and the extent to which tools of economic analysis may be helpful in assessing it.

Trade in moveable assets forms an important part of an economy based on consumption of commodities and services.¹²⁵⁷ Division of labour entails that raw materials must reach the person best placed to turn the materials into products for consumption, and then the resulting commodities must be allowed to circulate freely from person to person without need for laborious investigations of title.¹²⁵⁸ Once commodified, it is not the particular qualities of the particular thing which matter, but its ability to be exchanged for another thing or fungibility.¹²⁵⁹ Fundamental to our understandings of what it means for an object to be “property” is the object’s marketability, its status as an object of exchange.¹²⁶⁰

In the case of transfer by a non-owner, there is a clear tension between stability of property rights and the need to secure commodity circulation. The view is often expressed that the development of rules protecting purchasers represents a

¹²⁵⁴ See ch 3 C(2)(b).

¹²⁵⁵ See for example Goode, *Commercial Law* 459.

¹²⁵⁶ Denning LJ (dissenting) in *Central Newbury* (n 757) at 381. See also his comments in *Pearson* (n 757) at 286.

¹²⁵⁷ Data on private consumption as a share of GDP in the UK and other economies can be found at <http://data.worldbank.org/indicator/NE.CON.PETC.ZS>.

¹²⁵⁸ Rouiller, *Nemo plus* 501.

¹²⁵⁹ For discussion of the concept of the commodity, and the distinction between use value and exchange value, see K Marx, *Capital Vol 1*, trans B Fowkes (1976) ch 1.

¹²⁶⁰ For example, according to the influential account of G W F Hegel, *Philosophy of Right*, trans S W Dyde (1996) para 71 it is only through the process of commercial exchange that contracting parties recognise one another as persons and owners.

historical movement motivated by the needs of capitalist exchange in which “[c]ommercial interests finally outweighed concepts of legal logic.”¹²⁶¹ To some extent such forces could be contended to have been at play in Scotland, the move away from the use of “borgh and hamehald” seems very likely to have been motivated by the need to promote the rapidity and ease of commerce.

The problem is often articulated as a clash between static security and dynamic security, or security in acquisition and security in transaction. Static security may be characterised as concerned with the protection of rights that have already been acquired. It would generally prevent a right holder from being deprived of his or her rights without consent. It can be linked to ideas of absolute and unlimited rights, and the sphere of freedom accorded to the individual subject.¹²⁶² It may be contrasted with dynamic security, which would tend towards the protection of an acquirer’s reasonable belief in the entitlement of the transferor. To do otherwise is argued to risk a paralysing effect on transactions, which might result from a requirement for detailed investigations of title. The concept of dynamic security is dominated by a vision of economic life as based around movement and of producing more, manufacturing more, selling more.¹²⁶³

Although superficially attractive, it is not clear that these general concerns inevitably justify the adoption of protection for *bona fide* purchasers. Implicit in the appeal to dynamic security is a practical claim that, if every purchaser was required to trace the origin of his or her title, that commerce would be impeded or perhaps even become impossible. From a functional point of view, however, there is nothing about this particular problem that necessitates conferring ownership on a purchaser from a non-owner. A presumption of ownership may be all that is required to ensure the “rapid circulation of commodities”.¹²⁶⁴ There is moreover a risk that the idea of security will turn on itself: what one gains as a purchaser one risks losing as an

¹²⁶¹ Sauveplanne, “Protection” at 652. See also for example Kozolchik, “Transfer” esp. at 1511; Goode, *Commercial Law* 458.

¹²⁶² R Demogue, *Les notions fondamentales du droit privé* (1911) 64.

¹²⁶³ Demogue, *Notions* 72.

¹²⁶⁴ Bell, *Commentaries* (1804) vol 2 42.

owner.¹²⁶⁵ It is impossible and undesirable to eliminate all risks from commercial life; this would require an unattainable stasis.

(3) The Law and Economics Analysis

(a) Calculating efficiency

The Law and Economics movement builds on the Realist willingness to look behind doctrinal rules to understand and assess law using the tools of economic analysis.¹²⁶⁶ Insofar as normative recommendations are made,¹²⁶⁷ the legal rule which produces the most efficient distribution of costs and benefits between the parties involved will be preferred. This may either involve making at least one person better off and none worse off (Pareto efficiency) or benefitting at least one person more than any third parties are harmed (Kaldor-Hicks criteria).¹²⁶⁸ The overall goal is “social wealth maximisation”.¹²⁶⁹

For example, according to Calabresi, the best¹²⁷⁰ reason not to replace a property rule (the holder of the entitlement to the thing must consent to transfer)¹²⁷¹ with a liability rule (another party may destroy the entitlement upon payment of a collectively ascertained sum) is the economic inefficiency of a transfer by theft.¹²⁷² Deterrence of theft is taken to be a net social good because of this inefficiency.

¹²⁶⁵ Demogue, *Notions* 73.

¹²⁶⁶ On the importance of the Realist heritage to contemporary commercial law scholarship, see D G Baird, “Llewellyn’s Heirs” (2002) 62 *Louisiana Law Review* 1287 at 1288.

¹²⁶⁷ On the divergent understandings of the role of economic analysis in different “schools” within law and economics, see F Parisi, “Positive, Normative and Functional Schools in Law and Economics” (2004) 18(3) *European Journal of Law and Economics* 259 at 263-266.

¹²⁶⁸ There is a voluminous literature on the topic, but for a brief overview see Posner, *Economic Analysis* 17-18 and Parisi, “Schools” 266-269.

¹²⁶⁹ See for example W Landes and R Posner, “The Economics of Legal Disputes Over the Ownership of Works of Art”, *Chicago Working Papers in Law and Economics*, July 1996.

¹²⁷⁰ The authors accept that in some instances normative considerations other than economic efficiency are more relevant: G Calabresi and A Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 *Harvard Law Review* 1089 at 1125-1126.

¹²⁷¹ Calabresi and Melamed, “Property Rules” 1092.

¹²⁷² An efficient transaction would transfer an entitlement to the buyer who will derive maximum utility from it and thus values it most highly. In the case of theft, there is no accurate valuation by the owner: Calabresi and Melamed, “Property Rules” 1125. For a detailed discussion, see R L Hasen and R H McAdams, “The Surprisingly Complex Case Against Theft” (1997) 17 *International Review of Law and Economics* 367.

What can economic analysis contribute to our understanding of the *bona fide* purchase problem? Various scholars have constructed different models, with emphasis upon diverse variables, but in essence all seek to identify the quantifiable costs and benefits attached to particular archetypal rules. This may be in relation to the individual parties, or in terms of overall market function. For example, some seek to achieve a reduction in transaction costs while some seek to determine who is the most efficient risk bearer¹²⁷³ by examining, for example, risk appraisal and risk pooling (i.e. insurance) costs.¹²⁷⁴ The extent to which it is possible to identify a “best” rule is disputed,¹²⁷⁵ but many scholars proceed on the basis that, given sufficient data, an optimum solution will emerge.¹²⁷⁶

(b) Deterrence of theft

One point of focus has been the extent to which protection for purchasers will encourage a market in stolen goods.¹²⁷⁷ Rules allowing recovery by the original owner are commonly thought to impose at least some extra cost on thieves, who may find potential purchasers more wary.¹²⁷⁸ On the other hand, it would only be those who had a reasonable prospect of demonstrating good faith that a good faith rule would benefit (and who therefore might be encouraged to spend more.)¹²⁷⁹ It seems difficult to say with precision how much the market would increase; there are other factors which may affect the price a buyer is willing to pay for stolen goods. If the seller of the goods is solvent and appears unlikely to disappear, a buyer may decide that the seller’s warranty is enough to outweigh any risk that the property might be stolen. Moreover, if the market for stolen goods decreases this may cause owners to

¹²⁷³ B Medina, “Augmenting the Value of Ownership by Protecting It Only Partially: The “Market-Overt” Rule Revisited” (2003) 19 *Journal of Law, Economics and Organisation* 343 at 344.

¹²⁷⁴ H R Weinberg, “Sales Law, Economics, and the Negotiability of Goods” (1980) 9 *Journal of Legal Studies* 569 at 585.

¹²⁷⁵ A F Salomons, “On the Economics of Good Faith Acquisition Protection in the DCFR”, in A Somma (ed), *The Politics of the Draft Common Frame of Reference* (2009) 199 at 204.

¹²⁷⁶ For example, C Rose, “The Transfer of Property Rights by Theft - An Economic Analysis” (2010) 30 *European Journal of Law and Economics* 247.

¹²⁷⁷ See for example Weinberg, “Negotiability”.

¹²⁷⁸ See for example Landes and Posner, “Economics” 9-10, 22-23; S Shavell, *Foundations of Economic Analysis of Law* (2004) 53.

¹²⁷⁹ This point is made by Weinberg, “Negotiability” 576. Depending on the standard of good faith adopted, there might, however, be a substantial number of untrustworthy acquirers in respect of whom it is difficult to prove bad faith.

take fewer precautions, making theft less costly.¹²⁸⁰ The complexity of the problem makes reliable calculation difficult.

(c) *The “least cost avoider”*

A useful review of the economic literature has been undertaken by Arthur Salomons.¹²⁸¹ He argues that economic analysis suggests a clearer rule when it comes to entrusted property than in the case of stolen property.¹²⁸² When considering which party is able to avoid the risk of unauthorised transfer most cheaply (the “least cost avoider” approach),¹²⁸³ it may be thought that in the case of entrusted property the owner is in a better position to avoid the risk of fraudulent transfer. This is because he or she is in a good position to assess the trustworthiness of the person to whom he or she is to entrust the property, whereas an acquirer may find obtaining information about ownership history costly or impossible.¹²⁸⁴ One problem with this analysis is that it fails to take account of the fact that the owner may not be able to avoid entrusting his or her property in some circumstances, for example if urgent repairs are needed, and therefore cannot always take measures to reduce his or her risk. Investigating the trustworthiness of a potential trustee might turn out to be as expensive as it would be for the buyer to investigate the reliability of the seller.

Moreover, the idea that increased protection for purchasers necessarily reduces the sum that a buyer invests in title investigation has been criticised by Medina, who points out that good faith rules may prescribe high and costly standards of care.¹²⁸⁵ As Baird and Jackson argue, legal rules themselves affect the amount of information that is available (for example through requiring registration or other public notification of transactions).¹²⁸⁶ In relation to some types of moveable property, transfer and ownership of which is not recorded in any manner, it will be impossible for an acquirer to undertake any meaningful investigation into its

¹²⁸⁰ Landes and Posner, “Economics” 14.

¹²⁸¹ Salomons, “Economics”.

¹²⁸² Salomons, “Economics” 213.

¹²⁸³ See for example Posner, *Economic Analysis* 99; R Cooter and T Ulen, *Law and Economics*, 6th edn (2012) 153-154.

¹²⁸⁴ Salomons, “Economics” 213; Weinberg, “Negotiability” 589.

¹²⁸⁵ Medina, “Market Overt” 355-357.

¹²⁸⁶ D Baird and T Jackson, “Information, Uncertainty and the Transfer of Property” (1984) 13 *Journal of Legal Studies* 299 at 301.

provenance and therefore no saving will be made by placing the burden on the original owner. Overall, even in the case of entrusted property the “cheapest cost avoider” approach does not, on closer examination, provide a clear-cut solution.

In terms of stolen property, it is more difficult to assess who may be the least cost avoider. Owners may be better able to reduce the risk of theft than purchasers.¹²⁸⁷ On the other hand, Rose has suggested that good faith rules both encourage buyers to waste resources attempting to verify the ownership of goods, and impose higher costs on owners who must safeguard their property against theft.¹²⁸⁸ However, this is based on a model rather than empirical data. Property law rules are clearly not the only factor in rates of property crime. In addition, encouraging owners to search for stolen property¹²⁸⁹ may lead to increased litigation costs.¹²⁹⁰ Some authors, however, doubt that this will have a significant impact upon trade.¹²⁹¹ There appear to be numerous contrasting views, with the literature on the topic producing no consensus position.

(d) Valuing ownership

Medina has criticised the least cost avoider approach, and argued that the optimal rule is one which will maximise the expected value of the ownership right.¹²⁹² The most appropriate rule may vary depending on whether the aim is to protect the reservation value of the right or the liquidation value. Reservation value is the value to the owner, whereas liquidation value reflects what a buyer would be willing to pay.¹²⁹³ To some extent, this may correlate to the previously mentioned concepts of use value and exchange value. The reservation value is better protected by protection of the original owner, as there is a cost in terms of the risk of loss to a *bona fide* purchaser.¹²⁹⁴

¹²⁸⁷ Weinberg, “Negotiability” 586.

¹²⁸⁸ Rose, “Transfer” 255-264.

¹²⁸⁹ Argued by Landes and Posner, “Economics” 14 to be the effect of rules allowing recovery by the original owner.

¹²⁹⁰ Salomons, “Economics” 209.

¹²⁹¹ E.g. Shavell, *Foundations* 54. Contrast Medina, “Market Overt” 345.

¹²⁹² Medina, “Market Overt” 347-349.

¹²⁹³ Medina, “Market Overt” 348.

¹²⁹⁴ Medina, “Market Overt” 359.

In some circumstances, or in relation to some types of asset, increased liquidity may be preferable to an increased reservation value.¹²⁹⁵ One explanation that is put forward for the difference in the protection offered when a seller's title is void as opposed to when it is voidable is that, in the case of the voidable title, the owner may well have demonstrated at least some willingness to contract and may therefore be more interested in the thing's liquidation value.¹²⁹⁶ Although this argument does not in itself justify a social preference for liquidity, it is helpful in clarifying the values at stake and in articulating the root of the *bona fide* purchase dilemma.

(e) The "best self-insurer"

If property disputes are constructed as a question of the distribution of risk, it follows that the at least some ownership disputes may be resolved equally well by a system of insurance. The risk of loss of the thing would be placed on the party who, in the circumstances, turned out to be the "best self-insurer".¹²⁹⁷ Unless 100% of all stolen or embezzled items are assumed to be eventually traced by the original owner, the probability of a buyer requiring to make a claim will logically be less than the probability that that the object will be stolen or embezzled from the original owner. This might imply that it will cost less for a buyer to obtain insurance and hence original owners should be allowed to recover in all circumstances, while buyers use insurance (or indeed contractual mechanisms such as warranties) to guard against the risk of loss.

Such a picture is, nevertheless, complicated by several factors. As original owners have control over the object in question, and can take measures to prevent theft or embezzlement, they may be able to reduce their costs of insurance. Indeed, as it is difficult to calculate with the requisite actuarial precision the risk that an object may turn out to be stolen or embezzled, it is likely that many insurance companies

¹²⁹⁵ Noted by B Lurger, "Political Issues in Property Law", in M Hesselink (ed), *The Politics of a European Civil Code* (2006) 33 at 49.

¹²⁹⁶ Medina, "Market Overt" 359. See also C Paz-Ares, "Seguridad jurídica y seguridad del tráfico" (1985) 175-176 *Revista de derecho mercantil* 7 at 24.

¹²⁹⁷ For discussion of insurance (and contract law) as mechanisms for the distribution of risk, see Posner, *Economic Analysis* 130-134. See also Weinberg, "Negotiability" 585-586.

would not be willing to offer insurance to buyers at all.¹²⁹⁸ Even with the promise of financial compensation, some acquirers might continue to be unhappy with the possibility of having to give up the property. Insurance would moreover add extra costs, and therefore would not be practicable for many categories of low-value moveable property. The growth of title insurance in the art market is discussed below, but it seems reasonable to conclude that for most types of moveable property, insurance is not a viable risk distribution mechanism.¹²⁹⁹

(f) Conclusions

A full analysis of the general merits of the Law and Economics approach is beyond the scope of the thesis, as is detailed assessment of some of the economic models put forward. However, the methodological approach adopted faces two serious criticisms, one theoretical and one empirical.

The functionalist thesis implicit in the Law and Economics approach has been attacked, for example by Weinrib in *The Idea of Private Law*. Weinrib argues that private law is not the “juridical manifestation of a set of extrinsic purposes”.¹³⁰⁰ To this may be added the view that the relationship between law and economy should be seen as one of “structural coupling” rather than law as a dependent variable.¹³⁰¹ There exist numerous varieties of capitalism and different production regimes, even within European countries.¹³⁰²

There is further the question as to whether efficiency, in itself, can justify a private property regime.¹³⁰³ Weinrib has criticised this approach from the point of

¹²⁹⁸ Insurance companies moreover face the problem that, unless insurance is made compulsory, those buyers who choose to insure may be those with the riskiest titles.

¹²⁹⁹ For further general criticism of the idea that insurance costs are an appropriate way of determining liability rules, see M Trebilcock, “The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules” (1988) 4 *Journal of Law, Economics and Organisation* 243 at 257-258.

¹³⁰⁰ Weinrib, *Private Law* 5.

¹³⁰¹ See G Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” (1998) 61 *MLR* 11 at 28.

¹³⁰² Teubner, “Legal Irritants” 31. Compare for example the position of Estonia: P Kama, “Evaluation of the Constitutionality of Good Faith Acquisition” (2012) 19 *Juridica International* 23 at 24.

¹³⁰³ For example, Waldron, *Private Property* is devoted to the possibility of finding a rights-based justification for private property.

view of corrective justice.¹³⁰⁴ It can also be attacked from the point of view of distributive justice.¹³⁰⁵ Efficient rules may favour a particular distribution of costs between buyers and sellers, but ignore other relevant moral and political concerns e.g. the need to protect consumers.¹³⁰⁶ The identity of those who gain and lose is important; some groups may be better able to bear losses.

From an empirical perspective, it is doubtful whether the economic confidence of the European businessperson is seriously affected by the property law rule adopted. The little empirical research that exists suggests that the differing rules regarding the transfer of moveables are not seen as relevant in border-crossing commercial practice.¹³⁰⁷ Although differences in legal rules may increase transaction costs, the importance of this to overall market functioning can be overestimated.¹³⁰⁸ Shifting the burden of proof may work to reduce transaction costs whilst allowing the owner to maintain his or her rights. At least as regards good faith acquisition, the drive for harmonisation at the European level, like that which led to the enactment of the Sale of Goods Act, is less obviously motivated by actual business demands for a unified law than pursuit of a juridical and political ideal. Despite referring to the need to protect commercial transactions, one of the drafters of Book VIII of the DCFR has noted the lack of empirical data and a lack of consensus about how to measure economic welfare and indeed whether economic welfare is the only relevant

¹³⁰⁴ Weinrib, *Private Law* 5.

¹³⁰⁵ See for example C Edwin Baker, "The Ideology of the Economic Analysis of Law" (1975) 5 *Philosophy & Public Affairs* 3.

¹³⁰⁶ In some cases, it may be that efficiency and distribution-based analyses may produce the same results. For discussion of the relationship between the two, see R Craswell, "Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships" (1991) 43 *Stanford Law Review* 361. Problems arise, however, where the group which it is intended to benefit is not homogenous, or has a different evaluation of a rule's costs and benefits.

¹³⁰⁷ C von Bar and U Drobniq, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (2004) para 487.

¹³⁰⁸ U Drobniq *et al.*, *Divergences of Property Law: An Obstacle to the internal Market?* (2006) 26. The historical differences between Scots and English law do not seem to have been detrimental to the functioning of a free market in goods between the two jurisdictions: Cairns, "Droit éccosais" 144. It is interesting to compare the United States, in which the lack of diversity in the treatment of the good faith acquirer has been attributed to market integration: Levmore, "Variety" 60. Compare B Akkermans, "Property Law and the Internal Market", in J H M van Erp *et al.* (eds) *The Future of European Property Law* (2012) 199, where it is suggested that property law rules may indeed affect the functioning of the internal market and therefore attract the attention of the Court of Justice of the European Union.

consideration.¹³⁰⁹ It is acknowledged that the issue is “not an everyday problem”¹³¹⁰ of consumers and businesses.

It is moreover difficult to quantify factors such as the cost of self-protection and the cost of title investigation by an acquirer. As rules on *bona fide* purchase interact with many other factors,¹³¹¹ it is almost impossible to attribute behaviour (such as an increase in theft) to the effect of such rules alone.¹³¹² Although, all other things being equal, a rule allowing recovery by the original owner may reduce the value of stolen goods and thus the incentive for theft,¹³¹³ in the real world the price of goods is affected by so many variables that such an assumption is very difficult to empirically verify.¹³¹⁴ As will be argued later, neither protection of *bona fide* purchasers nor of original owners will entirely eliminate uncertainty, in this sense perhaps neither is optimal.

Levmore has argued that it is precisely the complexity of assessing the behavioural effects of different legal rules which has led to widespread variety in the treatment of the *bona fide* purchaser.¹³¹⁵ The difficulty of constructing an adequate model and the lack of empirical data in many areas means that bias towards one’s own system and preferences may unconsciously emerge.¹³¹⁶ Schwartz and Scott have gone so far as to argue that it is fundamentally impossible to construct a system that

¹³⁰⁹ B Lurger, “Transfer of ownership of movables in Book VIII of DCFR 2009-with and without the transferor’s right to transfer ownership”, in J H M van Erp *et al.* (eds), *The Future of European Property Law* (2012) 47 at 60.

¹³¹⁰ Lurger, “Political Issues” 47.

¹³¹¹ Including the wider regulatory and social environment, e.g. crime rates and law enforcement policies. See further Rose, “Transfer” 20 and Weinberg, “Negotiability” 574.

¹³¹² For an initial attempt to take into account social variables such as the nature of the existing legal institutions, culture and quality of public enforcement of property rules, individualism, religion and political governance, see G Dari-Mattiacci *et al.*, “The Good-Faith Purchaser: Markets, Culture and the Legal System” Working Paper, 2012. Available at http://portal.idc.ac.il/he/schools/law/progs/legalworkshops/documents/dari-mattiacci_gfp_026_-_with_appendix.pdf. It is submitted that this work only highlights the extreme complexity of the issues.

¹³¹³ See for example Landes and Posner, “Economics” at 9-10.

¹³¹⁴ Recognised, for example, by Cooter and Ulen, *Economics* 154.

¹³¹⁵ Levmore, “Variety”.

¹³¹⁶ For example, Salomons identifies a general (if probably insignificant) tendency for American authors to favour the original ownership rule (“Economics” 208.) He also points to the complexity of the macro-level variables, see “Economics” 215.

provides optimal incentives to both owners and good faith purchasers to exercise care in their transactions.¹³¹⁷

Finally, many of the assumptions made in such models rely on actors exhibiting a rational preference for the lowest cost solution. However, these assumptions are not always borne out by psychological studies of how people actually reason about property rights. For example, an existing right is valued more highly than the chance to acquire a right.¹³¹⁸ This may indicate that, even where it is more cost-effective for the owner to take precautions to avoid loss than for an acquirer to investigate title, there may be a social preference for placing the burden on the acquirer. Social antipathy towards theft and thieves may influence the owner's willingness to spend on theft protection more than a rational cost-benefit analysis such as that suggested by Posner and Lander.¹³¹⁹ Although the chances of the owner being able to recover (and thus his or her incentive to search) will diminish under a rule protecting *bona fide* purchasers, there is often little that private individuals can do to trace their property.

Overall, therefore, although economic calculus is particularly helpful in analysing notions of value, it faces cogent moral and political objections and does not at present offer a clear or verifiable solution.

D. IMPLICATIONS FOR PROPERTY DOCTRINE

One implication of this understanding of good faith acquisition as involving publicly-orientated deliberation and justification is a shift in attention towards the role of

¹³¹⁷ A Schwartz and R E Scott, "Rethinking the Laws of Good Faith Purchase" (2011) 111 *Columbia Law Review* 1332 at 1339.

¹³¹⁸ On this phenomenon, sometimes described as the "endowment effect, see R Korobkin, "The Endowment Effect and Legal Analysis" (2003) 97 *Northwestern University Law Review* 1227. It may be the case that physical possession, rather than legal ownership, increases the value attached to a thing. See J Reb and T Connolly, "Possession, Feelings of Ownership, and the Endowment Effect" (2007) 2 *Judgment and Decision Making* 107.

¹³¹⁹ Landes and Posner, "Economics" at 14. The authors do acknowledge that an owner always has a strong incentive to prevent theft (presumably on cost-benefit grounds) whatever the rule on good faith acquisition. Other scholars assume that the right to recover will negatively affect the owner's incentives to take precautions, for example Schwartz and Scott, "Rethinking" 1348-1349.

collective organs such as legislatures in delineating and enforcing property rights.¹³²⁰ The question as to when proprietary rights may be limited or extinguished in the public interest is one of obvious political and social concern. Caruso has argued that it is these profound public, rather than the private, implications of property law which have given rise to resistance to harmonisation at the European level which has not been encountered in relation to, for example, contract law.¹³²¹ While detailed consideration of the relationship between property and the state is outwith the scope of the thesis,¹³²² the governmental power to create or destroy particular interests poses a challenge to absolutist conceptions of individual subjective rights¹³²³ and implies a potential contingency to the original owner's right. It is necessary to reconcile the cardinal status of the *nemo plus* principle with the recognition that it may be departed from in the public good.¹³²⁴ It might even be argued that what appears to be a derivative transfer of ownership from owner to acquirer is merely simultaneous state-backed divestment of the owner and conferral on the acquirer.¹³²⁵

Exploration of the distributive aspects of property doctrine further leads to an enriched appreciation of property rules as facilitative of public as well as private ends. The distributive rationales identified will often serve all parties to the transaction: original owners will also benefit from facilitation of commerce whilst acquirers still hope not to be deprived of their property without consent.¹³²⁶ When considering, for example, the extent to which an owner has a duty to ensure that others are not misled as to another's authority to transfer, there is a move from a

¹³²⁰ Contrast Weinrib, *Private Law* ch 8 where it is argued that the private law relation is primarily structured around adjudication, rather than public political deliberation.

¹³²¹ See generally D Caruso, "Private Law and Public Stakes in European Integration: the Case of Property" (2004) 10 *European Law Journal* 751. One of the drafters of the DCFR has cited the public policy implications of property rules as one reason why they are not suitable for inclusion in an optional European instrument: Lurger, "Transfer" at 64.

¹³²² See further M R Cohen, "Property and Sovereignty" (1927-1928) 13 *Cornell Law Quarterly* 8; R Michaels and N Jansen, "Private Law beyond the State? Europeanization, Globalization, Privatization" 54 *American Journal of Comparative Law* 843.

¹³²³ For an overview of the challenges to the idea of a unitary ownership based in the autonomy of the individual subject in contemporary property theory, see A J van der Walt, "Unity and Pluralism in Property Theory - A Review of Property Theories and Debates in Recent Literature: Part 1" (1995) *TSAR* 15; "Subject and Society in Property Theory - A Review of Property Theories and Debates in Recent Literature: Part II" (1995) *TSAR* 322.

¹³²⁴ On the implications of different conceptions of subjective rights for justification of exceptions to the *nemo plus* rule, see Rouiller, *Nemo plus* 508-511.

¹³²⁵ On this strand of thought in French jurisprudence, see Rouiller, *Nemo plus* 18-21.

¹³²⁶ This is pointed out by Karner, *Gutgläubiger Mobiliarerwerb* 64-65.

view of ownership as providing a domain in which the owner can exercise individual freedom to an idea of certain duties towards others as intrinsic to ownership.¹³²⁷ The owner's right is never absolute, but is inherently limited by the need to respect the rights of others. Indeed, by establishing public norms of acceptable behaviour, rules for the transfer of moveables may be seen as substantiating mutual respect among all parties concerned in a transaction.¹³²⁸ Requirements of publicity and good faith contribute not simply to the welfare of the individual parties but to the trust and confidence required for successful social and economic life.

The arguments outlined in this chapter do not amount, however, to a claim that distributive justice should always be privileged over corrective justice, or that *bona fide* purchase represents a straightforwardly public limitation on private rights. A person's interest in continuing to own his or her thing cannot simply be opposed to a general interest in protecting acquirers; rather a multiplicity of interests, both individual and collective, require to be taken into account. The need for coherence must also be taken seriously; in the case of Scots law this requires careful consideration of the current position and justification of any proposed changes in terms of existing norms and concepts. The challenge for property theory and doctrine is to find an acceptable means of acknowledging and balancing these various imperatives whilst ensuring that any solution fits with fundamental doctrinal structures such as the separation of possession and ownership and the *nemo plus* principle.

¹³²⁷ U Bälz, "Fundamental Changes in the Protection of Property- Some Comparative Reflections." (1997) 13 *Tel Aviv University Studies in Law* 221 at 225-226.

¹³²⁸ This point is made regarding private law more generally by C Michelon, "The Public Nature of Private Law?", in G Clunie *et al.* (eds), *The Public in Law* (2011) 10.

CHAPTER 6 A NEED FOR REFORM? FOUNDATIONS FOR FUTURE DEVELOPMENT

A. A NEED FOR REFORM?

This chapter considers whether Scots law should provide increased protection for the *bona fide* purchaser of corporeal moveables from an unauthorised party. It is concluded that, particularly in relation to costly moveables such as motor vehicles, possession does not provide an adequate system for publicising property rights. In terms of security and certainty of rights, good faith acquisition is not a panacea for the problems associated with highly mobile property such as vehicles. However, in light of the deficiencies of the current Scots law rules, a clear doctrine explicitly conferring ownership in more precisely defined circumstances would be preferable.

(1) Weaknesses in the Current Law

In the preceding chapters, several difficulties have been identified with the current position. Further analysis is needed regarding the function of possession, either in relation to an unauthorised transferor or on the part of the transferee. Although the current rules protect acquirers from a non-owner in a number of cases, it is not necessarily evident to a third party whether a seller falls under one of the protected categories. Rather than subtle distinctions, there is an argument for a broad general rule protecting all who buy in good faith from a party in possession.¹³²⁹ Further clarity is also desirable regarding the necessity for possession on the part of the acquirer: there has been some controversy over whether physical delivery is required for protection under sections 24 and 25 of the Sale of Goods Act 1979, while in the case of hire purchase vehicles no transfer of possession is required. This chapter suggests that the transferor's physical possession is not a sufficient justification for

¹³²⁹ See for example the recommendations of the Scottish Law Commission in *Corporeal Moveables: Protection* (these proposals excepted stolen property) and the model rule proposed in the DCFR Book VIII.-3:101. See also E M Swartz, "The *Bona Fide* Purchaser Revisited: A Comparative Inquiry" (1962) 17 *Boston University Law Review* 403 at 411.

protecting a transferee, but that good faith protection may sensibly be limited to those who have actually taken physical control of the thing.

Questions moreover exist about the relevance of good faith in property law, and the role that a clear and uniform standard of good faith might play in facilitating markets, particularly in the case of second hand vehicles. Special protection is currently available to purchasers of hire purchase vehicles transferred without authorisation, but it is argued that with the possible exception of “cultural property”, there should be a uniform rule offering equal protection to all categories of seller of any type of corporeal moveable.

Finally there is the matter of the relationship between Scots law and English law, and indeed Scots law and the laws of other European legal systems. Although not a “weakness” as such, comparative research both contributes to understanding of the current Scots position and indicates possibilities for future development. Some scholars have argued that there is a “fundamental difference in methodology” between the civil law and the common law in relation to transfer of moveables by a non-owner.¹³³⁰ In English law, the extent to which the original owner may have contributed to potential transferees being misled about another’s right or authority to transfer is usually considered on a case-by-case basis under the rules on estoppel, a version of which is codified in section 21 of the Sale of Goods Act.¹³³¹ In accordance with the idea of relativity of title, section 21 does not refer to who will acquire ownership but rather who will have the better title. Although the *nemo plus* rule is broadly accepted as the default position, there is a patchwork of exceptions in particular circumstances.¹³³² In civil law jurisdictions such as France and Germany, by contrast, an owner who voluntarily transfers possession to another is understood to assume the risk of fraudulent transfer. This is accomplished by means of a broad general rule, which (at least in the case of German law) explicitly confers ownership upon the *bona fide* transferee.¹³³³ This approach may be more consistent with the

¹³³⁰ See for example, L Ellis, “Louisiana Property Law Revision: Transfer of Movables by a Non-Owner” (1980) 55 *Tulane Law Review* 145 at 166.

¹³³¹ See ch 4 D(3)(c).

¹³³² See generally ch 4 D.

¹³³³ In terms of a clear conferral of ownership upon the transferee, § 932 BGB is the best example.

unitary Scots understanding of ownership, and the emphasis in a civil law property system on certainty as to who is the owner at any particular point (rather than which of the given parties has the better title).

Another “mixed” jurisdiction,¹³³⁴ Louisiana, has (relatively) recently¹³³⁵ attempted, unsuccessfully,¹³³⁶ to “re-align Louisiana law with modern civil law and the Uniform Commercial Code”¹³³⁷ through adoption of a rule conferring ownership on a transferee “in good faith for fair value” from an authorised possessor.¹³³⁸ It is submitted that Scotland should consider adopting a similar general rule. Further questions in this respect are raised by the publication of the Draft Common Frame of Reference (DCFR),¹³³⁹ which also contains broad protection for good faith acquirers.¹³⁴⁰ Although at present there is no prospect of the introduction of mandatory rules governing transfer of moveables in Europe, there would be benefits for Scotland (and perhaps also England) in reform of the current piecemeal approach.

(2) Harmonisation and the European Dimension

(a) *The internal market*

Future Scots doctrinal development will not take place in isolation. As markets become increasingly integrated within the European Union, it seems likely that this will add to pressure to, for practical reasons, adopt a unified approach to transfer of moveables.¹³⁴¹ Where one jurisdiction grants more extensive protection to an acquirer from an unauthorised seller than its neighbour, there is a risk that stolen or embezzled goods may be “laundered” by means of sale under the most favourable

¹³³⁴ For discussion of the nature and history of the idea of the mixed jurisdiction, see K G C Reid, “The Idea of Mixed Legal Systems” (2003) 78 *Tulane Law Review* 5. For a discussion of some of the difficulties that may be associated with the term, see V Palmer, “Mixed Legal Systems and the Myth of Pure Laws” (2007) 67 *Loyola Law Review* 1205.

¹³³⁵ 1980, as part of a revision of the Property sections of the Louisiana Civil Code: see 1979 La. Acts, No. 180, S 1 (effective Jan 1 1980).

¹³³⁶ It was almost immediately suspended (See La. S. Con. Res. No. 172, 6th Reg. Sess. (1980)) and repealed by 1981 La. Acts, No. 125, § 1. See further M B Stroud, “The Sale of a Movable Belonging to Another: A Code in Search of a Solution” (1988) 4 *Tulane Civil Law Forum* 41.

¹³³⁷ *Exposé des Motifs* (1980), quoted in Ellis, “Transfer” 159.

¹³³⁸ Civil code Art 520, quoted in Stroud, “Sale” 56.

¹³³⁹ The provisions relevant to transfer of moveables are collected in Lurger and Faber, *Principles*.

¹³⁴⁰ Lurger and Faber, *Principles* 887.

¹³⁴¹ This may not be justified; see ch 5 C(3)(f).

law.¹³⁴² Although the thesis is not concerned with problems of private international law, the dismantling of border controls within the EU and in particular the Schengen area adds to concern about illicit cross-border traffic in stolen goods.¹³⁴³ A uniform rule would help to counter these difficulties.

From the point of view of European Union law, harmonisation of property rights is sometimes argued to be necessary for the facilitation of commerce and the development of the internal market. While there is, as yet, little jurisprudence on the issue, it has even been suggested that divergences in property law may breach Art 34 TFEU.¹³⁴⁴ In the case of transfer by a non-owner, it is not clear that differing protection for *bona fide* purchasers can be seen as presenting an obstacle to cross-border trade. The case law of the ECJ regarding free movement of goods is complex,¹³⁴⁵ however, it is submitted that property law rules in this area do not amount to measures hindering market access.

In some instances, the ECJ has appeared to regard any measure negatively impacting on consumer demand as potentially obstructing market access.¹³⁴⁶ Although the rules determining the security afforded to purchasers may have some economic implications,¹³⁴⁷ it is unlikely that these effects would, in themselves,

¹³⁴² For example, the problems caused by import and export of stolen vehicles into and from the UK are identified in Design Council UK, *A Report on Designing Out Vehicle-Related Crime* (2011), available at <http://www.designcouncil.org.uk/our-work/challenges/security/design-out-crime/vehicles/> at 29-31.

¹³⁴³ The Schengen *Acquis* (OJ L 239, 22.09.2000) principally concerns movement of persons, but also contains a commitment to reduce “[t]he number and intensity of checks on goods carried by travellers when crossing internal borders ... to the lowest level possible” (Convention Implementing the Schengen Agreement, Art 124). On the attempts to regulate the EU market in stolen and illegally exported cultural property, see Council Regulation (EEC) n° 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State; K A Short, “Preventing the Theft and Illegal Export of Art in a Europe Without Borders” (1993) 26 *Vanderbilt Journal of Transnational Law* 633; *Reports from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) n° 3911/92 and Council Directive 93/7/EEC: COM* (2000) 325; COM (2005) 675; COM (2009) 408 and COM (2013) 310.

¹³⁴⁴ For example B Akkermans and E Ramaekers, “Free Movement of Goods and Property Law” (2013) 19 *European Law Journal* 237.

¹³⁴⁵ For a fuller discussion, see E Ramaekers, *European Union Property Law: From Fragments to a System* (2013) 53-74 and Akkermans and Ramaekers, “Free Movement” at 243-248.

¹³⁴⁶ Case C-110/05 *Commission v Italy* [2009] ECR I-519 at paras 56-57 and case C-142/05

Åklagaren v Percy Mickelsson and Joakim Roos [2009] ECR I-4273 at paras 26-28.

¹³⁴⁷ See ch 5 C.

operate to make market entrance more difficult for cross-border sellers.¹³⁴⁸ This can be asserted regardless of whether such rules are understood as concerning product characteristics,¹³⁴⁹ selling arrangements¹³⁵⁰ or some other type of measure which might impact market access.¹³⁵¹ To illustrate, a hypothetical company, Alpha Ltd, sells used cars, some of which it knows may turn out to have been stolen. Although it may be more appealing to Alpha Ltd to sell such cars in Italy, where ownership can be transferred to a purchaser in good faith,¹³⁵² there is insufficient evidence¹³⁵³ of a significant decrease in consumer demand in jurisdictions where the *nemo plus* rule is applied. Unlike in *Commission v Italy*¹³⁵⁴ or *Mickelsson*¹³⁵⁵ there is no restriction on the use of cars, which are still an attractive commodity in the affected markets.

Even supposing that rules governing the case of transfer by a non-owner were deemed an obstacle to trade,¹³⁵⁶ they are indistinctly applicable requirements (i.e. measures applying to both imported and domestic goods) which could be justified as “mandatory requirements”¹³⁵⁷ aimed at the protection of consumers or, where the *nemo plus* rule was applied, prevention of theft.¹³⁵⁸ A mandatory requirement must comply with the proportionality principle,¹³⁵⁹ and not be achievable by means of any

¹³⁴⁸ Unlike in the case of recognition of security rights, in which instance the treatment of his or her security does affect the terms on which the cross-border seller can enter the market, and moreover may disadvantage such parties compared to purely domestic sellers.

¹³⁴⁹ It is unclear whether uncertainty as to ownership counts as a “characteristic” of a particular product. If it does, products with uncertain ownership are (presumably) equally likely to be domestic products, and may still freely enter the market.

¹³⁵⁰ If rules for transfer of ownership are considered to be “selling arrangements”, they will not breach Art 34 as they “apply to all relevant traders operating within the national territory and ... affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States” (Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097 at para 16).

¹³⁵¹ It is difficult to classify property rights in terms of the distinction made in *Keck (ibid.)* between rules relating to product characteristics and rules relating to selling arrangements. In *Commission v Italy* (n 1340) the ECJ also referred to “[a]ny other measure which hinders access of products originating in other Member States to the market of a Member State” (at para 33).

¹³⁵² See Art 1153 *Codice Civile*.

¹³⁵³ The impact of good faith rules on markets for stolen goods was discussed in ch 5 C(b).

¹³⁵⁴ (n 1346).

¹³⁵⁵ (n 1346).

¹³⁵⁶ For example because they could be shown to reduce the volume of trade in a given product in a particular member state.

¹³⁵⁷ See Case 120/78 *Rewe-Zentral* [1979] ECR 649 (*Cassis de Dijon*).

¹³⁵⁸ The judgment in *Cassis* (ibid. at para 8) defines mandatory requirements as relating in particular to “...the fairness of commercial transactions and the defence of the consumer”.

¹³⁵⁹ Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607 at para 34.

measure having less impact on intra-community trade.¹³⁶⁰ Where national laws pursue a legitimate aim and attempt to balance security for purchasers with protection for the original owner, it is unlikely that any solution adopted would be argued to be disproportionate. Moreover, there is a lack of evidence that any barriers to trade are sufficiently serious to warrant intervention. Like differing recognition of security rights, it seems that the effect on trade would be thought too “uncertain and indirect” to constitute a breach of Art 34.¹³⁶¹

(b) Human rights

A further potential influence on the development of Scots doctrine is the body of supranational rules safeguarding human rights.¹³⁶² Could rules protecting good faith acquirers be subject to challenge under Article 1 Protocol 1 of the European Convention on Human Rights (ECHR)? The protocol establishes an entitlement to peaceful enjoyment of property,¹³⁶³ adding that “No [natural or legal person] shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...”¹³⁶⁴

Does a dispute between a *bona fide* purchaser and an acquirer fall within the scope of this provision? Where the matter is a civil dispute between persons (or a person and the state acting as a party in civil litigation), the European Court of Human Rights (ECtHR) has held in a number of decisions such as that in *S.Ö., A.K., Ar.K. and Y.S.P.E.H.V. v Turkey* that rules for the transfer of ownership, in themselves, do not engage the second sentence of Art 1 Protocol 1:

¹³⁶⁰ Case C-319/05 *Commission v Germany (Garlic)* [2007] ECR I-9811 at para 87.

¹³⁶¹ See Case C-69/88 *H. Krantz GmbH & Co v Ontvanger der Directe Belastingen en de Staat der Nederlanden* [1990] ECR I-583 at para 11, discussed in Akkermans and Ramaekers, “Free Movement” 253-255; Ramaekers, *Property Law* 67-74.

¹³⁶² For an initial view of the effect of human rights legislation on Scots property doctrine, see A J M Steven, “Property Law and Human Rights” 2005 *Juridical Review* 293.

¹³⁶³ The term used in the legislation is “possessions” rather than property, but it is accepted that both expressions may be used almost interchangeably and are, in any event, given a wide meaning. See *Marckx v Belgium* (1979-80) 2 EHRR 330 at para 63; R Reed and J Murdoch, *Human Rights Law in Scotland*, 3rd edn (2011) at 994-995. For criticism of the incoherence of the provision and a linguistic analysis of the different texts of the ECHR, see G L Gretton, “The Protection of Property Rights”, in A Boyle *et al.* (eds), *Human Rights and Scots Law* (2002) 275, esp. at 276-277 and 293-285.

¹³⁶⁴ On the confusing relation between “peaceful enjoyment” and “deprivation”, see Gretton, “Protection” at 278.

The passing of property, resulting from legal limitations inherent in private property and succession rights, should not be considered as constituting a deprivation of possessions...¹³⁶⁵

However, this is subject to the caveat that the law must not “create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another.”¹³⁶⁶ It is clear from judgments such as that in *J A Pye (Oxford) Ltd v United Kingdom*¹³⁶⁷ that where the state, acting as legislator,¹³⁶⁸ causes a party to be unfairly deprived of property through application of particular legislative provisions, this may also amount to a breach of Art 1 Protocol 1.

As to whether either the original owner or a *bona fide* purchaser has an interest which qualifies for protection under the section, the Convention does not refer to deprivation of ownership, but deprivation of possessions. “Possessions” has an autonomous meaning from any concept in domestic law,¹³⁶⁹ although this does not imply that domestic law will be irrelevant. The term covers both “existing possessions” or assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right.¹³⁷⁰

An original owner has (at least initially) a property right in the object which would seem to qualify as a “possession” under Art 1 Protocol 1. Where, under domestic law, a *bona fide* purchaser does not acquire ownership, does he or she have any interest that may entitle him or her to protection? Physical control of an object

¹³⁶⁵ *S.Ö., A.K., Ar.K. and Y.S.P.E.H.V. v Turkey* (dec.) no. 31138/96 14 September 1999 at para 1, cited along with *Kuchař and Štis v. Czech Republic* (dec.) no. 37527/97 21 October 1998 in *Zhukovskiy v Russia* (23166/04) January 13, 2011.

¹³⁶⁶ *Bramelid and Malmström v Sweden* (8588/79 and 8589/79) October 12th 1982 at 82. The point is argued by A Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights* (2004) 185-186.

¹³⁶⁷ (2008) 46 EHRR 45.

¹³⁶⁸ *Pye* turned on the provisions of the Limitation Act 1980 and the Land Registration Act 1925. In relation to common law doctrines, judges must also apply and develop the law in a way which is consistent with the ECHR under the s 6 of the Human Rights Act 1998.

¹³⁶⁹ See *Gasus Dosier und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403 at para 53; Reed and Murdoch, *Human Rights* paras 8.08-8.13.

¹³⁷⁰ *Prince Hans-Adam II of Liechtenstein v Germany* (42527/98) July 12th 2001 at para 83.

that one does not own is unlikely to qualify as a “possession”.¹³⁷¹ What the purchaser has been deprived of is not merely detention of the thing (it seems unlikely that the owner’s right to recover from a detentor without right is contrary to Art 1 Protocol 1), but the expected acquisition of the right of ownership. On this basis, does the purchaser have something amounting to a “legitimate expectation” that he or she will be able to acquire a proprietary right? A “legitimate expectation must be “of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision”.¹³⁷² Where a *bona fide* purchaser’s claim has no basis in domestic law, it is therefore unlikely that it would amount to a deprivation of possession for the purposes of Art 1 Protocol 1.

Assuming, then, that it is only an original owner who will be protected in the enjoyment of his or her possessions, could a hypothetical rule depriving him or her of ownership when an unauthorised transfer is made to a good faith party amount to the type of deprivation which will breach Art 1 Protocol 1? Where such a provision is sufficiently clear and precise, the deprivation will certainly be “subject to ... conditions provided for by law”. As to whether good faith protection could be argued to be in the public interest, there is a wide margin of appreciation for the contracting states to make their own assessment as to what the general interest might require.¹³⁷³ This is a part of the freedom of states to regulate the use and transfer of property in different ways in accordance with different social policies.¹³⁷⁴ In *Pye*, the Court underlined that the margin of appreciation in respect of settlement of such private disputes is particularly wide.¹³⁷⁵

¹³⁷¹ In *Durini v Italy* (dec.) no 19217/91 12th January 1994, the Commission held that the right to live in a property that one did not own was not a “possession”. See also *Öneryildiz v Turkey* (2005) 41 EHRR 20 at para 126, in which occupation of land in the hope of eventually acquiring a property right to it was not sufficient to constitute a “possession”. In *Beyeler v Italy* (2001) 33 EHRR 52 at para 106, however, the ECtHR declined to decide whether a physical possessor who had acquired through a sale null under Italian law had suffered a deprivation of possessions, it being enough that his peaceful enjoyment had been disturbed.

¹³⁷² *Gratzinger and Gratzingerova v Czech Republic* (39794/98) July 10th 2002 at para 73. See Reed and Murdoch, *Human Rights* paras 8.11-8.12.

¹³⁷³ *Broniowski v Poland* (2005) 40 EHRR 21 at para 149; Reed and Murdoch, *Human Rights* paras 8.26; 8.35-8.37.

¹³⁷⁴ See *Pye* (n 1367) at para 74. See also *James v UK* (1986) 8 EHRR 123 at paras 40-41 and discussion in Riza Çoban, *Protection* 200-204.

¹³⁷⁵ *Pye* (n 1367) at para 82. See also *James, ibid.*

In *Gladysheva v Russia*, the ECtHR found that, where a privatisation of state property had been affected by fraud, it was disproportionate *not* to protect the *bona fide* purchaser of the property from deprivation without compensation and eviction.¹³⁷⁶ In that case, however, the state was a beneficiary of the deprivation, and could have prevented the initial fraud; it is not clear that the same result would be reached in a dispute between private parties.

Moreover, where an owner is not in physical possession but retains ownership under a retention of title clause the Court has held in *Gasus* that a state may legitimately distinguish between this quasi-security interest and other forms of ownership.¹³⁷⁷ Given the comment that “whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price”, some limitation of the owner’s right to vindication¹³⁷⁸ in these circumstances appears to be accepted by the Court as justifiable. On this basis, the protection afforded to a buyer in possession under section 25 of the Sale of Goods Act 1979 also complies with Art 1 Protocol 1. Following that reasoning, it could also be argued that a more general distinction between the protection afforded to an owner in physical possession and an owner who has voluntarily parted with it would be ECHR compliant.

However, a fair balance must still be struck between the different interests involved, and a deprivation without compensation is likely to be particularly problematic:

There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.... Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and notably, whether it does not impose a disproportionate burden...¹³⁷⁹

¹³⁷⁶ *Gladysheva v Russia* [2011] ECHR 2021 paras 79-83.

¹³⁷⁷ *Gasus* (n 1369) at para 68.

¹³⁷⁸ As opposed of course to a monetary claim against the buyer.

¹³⁷⁹ *Bruncrona v Finland* (2005) 41 EHRR 28 at para 67. See Reed and Murdoch, *Human Rights* 8.39–8.44.

Where ownership is awarded to a good faith purchaser, it is usually the case that the original owner will have some form of monetary claim¹³⁸⁰ against the thief or fraudulent trustee. Although this claim may well be worthless,¹³⁸¹ Gretton has argued that it is nevertheless sufficient for ECHR purposes.¹³⁸² On the other hand, the Court in *Gladysheva* appeared to suggest that, where there was little prospect of a fraudulent third party actually compensating the applicant for her loss, a right to sue was insufficient compensation.¹³⁸³ In that particular case the applicant lost her home, with little prospect of being allocated alternative housing.¹³⁸⁴ It is submitted that, at least in some circumstances, loss of ownership of a moveable without any realistic prospect of compensation could also place a disproportionate burden on the original owner. In many instances this burden will be justified by the aim pursued, but it is the actual impact on owners that should be taken into account.

The fact that the owner does not receive any notification (unlike in the case of prescriptive possession of land)¹³⁸⁵ before loss of his or her thing is another factor that may suggest unfairness. The more clarity that can be provided to the owner about the circumstances in which his or her right may be at risk, the more likely it is that a provision will be compatible with Art 1 Protocol 1. As uncertainty regarding property rights may also place an excessive burden on the original owner,¹³⁸⁶ exceptions to the *nemo plus* rule should be clearly defined.

A final point to address is whether a rule protecting purchasers could be not a deprivation but a control on use, in which case the jurisprudence regarding compensation would not apply.¹³⁸⁷ Although acquisition of a right through adverse possession and deprivation of the former owner was held by the Grand Chamber in

¹³⁸⁰ Such a claim could be either delictual (in the case of a thief) or contractual (in the case of a fraudulent hirer).

¹³⁸¹ The thief may be untraceable, or the hirer bankrupt.

¹³⁸² "Protection" at 286.

¹³⁸³ *Gladysheva* (n 1376) at para 81.

¹³⁸⁴ *Gladysheva* (n 1376) at para 80.

¹³⁸⁵ See s 45 of the Land Registration etc. (Scotland) Act 2012.

¹³⁸⁶ *Almeida Garrett, Mascarenhas Falcão and Others v Portugal* (2002) 34 EHRR 23 para 54. See D J Harris *et al.*, *Law of the European Convention on Human Rights*, 2nd edn (2009) 670-671.

¹³⁸⁷ *Pye* (n 1367) at para 79.

Pye to be a control on use,¹³⁸⁸ the court's reasoning is not altogether clear.¹³⁸⁹ *Prima facie* rules regarding transfer of moveables, although having obvious implications for entitlements to use property, regulate the existence of property rights rather than use and therefore do not fall under the second paragraph of the protocol. The decision in *Pye*, however, implies that the Court might by analogy treat deprivation through good faith acquisition as a control on use, meaning that good faith acquisition would be easier to justify.

Overall, it seems probable that as long as some attempt is made to balance the interests of the acquirer and the original owner this will be enough for compliance with the ECHR. Although a heavy burden may be placed upon an original owner deprived without consent, the question as to who should bear the risk of unauthorised transfer is one on which reasonable legislators may differ. Unless the state chooses to guarantee all transactions,¹³⁹⁰ someone must lose out. Certainly unfairness may be created in individual cases, but this may be necessary in light of what is understood to be in the general societal interest.¹³⁹¹

(c) *A new ius commune?*

The impetus towards greater economic and political integration has also led jurists to search for shared principles on which a new European legal framework might be constructed. Numerous references have already been made to the Book VIII of the DCFR, the aims of which have been described by one of the drafters as being “rational discussion of the various effects, advantages and disadvantages of different property law rules in the field of loss and acquisition of ownership of movables.”¹³⁹² At the time of writing the proposals in the DCFR are principally of scholarly interest. Due to the mandatory nature of property law rules, the provisions on transfer of

¹³⁸⁸ *Pye* (n 1367) at para 66.

¹³⁸⁹ For discussion, see G L Gretton, “Private Law and Human Rights” (2008) 12 *Edinburgh Law Review* 109 at 111-112; E Cooke, “A postscript to *Pye*” 59 *Northern Ireland Legal Quarterly* 149.

¹³⁹⁰ This would represent a radical public policy departure in the case of moveables and potentially place a heavy burden on the state.

¹³⁹¹ *Wilson v First County Trust Ltd* (no 2) [2003] UKHL 40 at para 74G per Lord Nicholls of Birkenhead.

¹³⁹² Lurger, “Transfer” at 63.

moveables have been determined not to be suitable for inclusion in the planned future optional instrument (Common European Sales Law).¹³⁹³

What is the significance of these developments for the present discussion? Is it possible to envisage some shared European rule on unauthorised transfer of moveables, perhaps based upon the research reflected in the DCFR? And what can Scots jurisprudence learn from comparative law on this topic when even other European legal systems take such seemingly divergent approaches?

It is not possible to address in detail here the debates surrounding the desirability of harmonisation initiatives such as the DCFR,¹³⁹⁴ but the fact that no obvious majority principle emerges from the extensive comparative research carried out implies that drafting a mutually satisfactory European rule would not be easy. Salomons notes that that the area of good faith purchase is one of the few where the drafters of the DCFR have adopted a solution only followed in a minority of jurisdictions, perhaps because the lack of a consensus position left more freedom to take a novel approach.¹³⁹⁵

Are there any common doctrinal roots which could be built upon in future reform efforts? The historical research detailed in Chapters 2 and 3 does not disclose, at least in respect of Scots law, an obvious shared foundation for the protection of good faith purchasers. Although many mediaeval market centres adopted some form of protection for purchasers, this seems to have occurred on a localised and piecemeal basis. The influence of Roman law means that *nemo plus* is recognised as a basic tenet of the modern law of most European jurisdictions,¹³⁹⁶ but there is a wide variety in the scope of and rationales of exceptions.

¹³⁹³ Lurger, “Transfer” at 63. On the proposed optional instrument, see further COM (2011) 635 *Proposal for a Regulation on a Common European Sales Law*.

¹³⁹⁴ For a flavour of the debates, see A S Hartkamp *et al.* (eds), *Towards a European Civil Code*, 4th ed (2011); Caruso, “Private Law” at 755-758; J H M van Erp, “European property law: A methodology for the future”, in R Schulze and Hans Schulte-Nölke (eds), *European Private Law - Current Status and Perspectives* (2011) 227. Possibilities for harmonisation, including optional and binding instruments, are discussed by Ramaekers, *Property Law* ch 5.

¹³⁹⁵ See A F Salomons, “Comparative Law and the quest for optimal rules on the transfer of moveables for Europe.” (2013) 2 *European Property Law Journal* 54 at 70.

¹³⁹⁶ For an overview, see Lurger and Faber, *Principles* 531-542.

However, the fact that numerous reasonable resolutions are possible does not imply that critical comparative analysis is unproductive. Rather than reflecting the revival of a historical *ius commune*, Dalhuisen suggests that the modern search for broader concepts and transnational principles represents a return to the natural law methods of Grotius and Pufendorf.¹³⁹⁷ It is his opinion that the globalisation of finance and commerce requires this denationalisation.¹³⁹⁸ While some scepticism about the argument that the needs of capital justify protection for good faith purchasers was expressed in Chapter 5, Scots law can certainly benefit in various ways from the research contained in the DCFR. Articulation of the principles on which the current law is based, and a deeper appreciation of the factors which unite and divide different legal systems is undoubtedly valuable, whether or not this eventually results in a uniform rule at European or international level.

B. POSSESSION AS A BASIS FOR ACQUISITION

The most important jurisdictional divide in the area of good faith acquisition is not necessarily a common law/ civil law divide, but a divergence in the function attributed to possession¹³⁹⁹ and the extent to which it can give rise to the acquisition of rights good against the original owner.

The role of possession in acquisition can be distinguished from its evidentiary function;¹⁴⁰⁰ many European legal systems recognise a rebuttable presumption of ownership based on possession.¹⁴⁰¹ Several theories have been developed to explain how the voluntary transfer of possession may further justify an acquisition of right by

¹³⁹⁷ J H Dalhuisen, "European Private Law: Moving From a Closed to an Open System of Proprietary Rights" (2001) 5 *Edinburgh Law Review* 273 at 277.

¹³⁹⁸ Dalhuisen, "Private Law" at 295-296.

¹³⁹⁹ "Possession" here is used primarily in the sense of immediate physical control rather than possession through another. It also covers those who hold for another, e.g. hirers, who in many civil law systems would be recognised only as detentors. (On the intention required for possession in Scots law, see Reid, *Property* para 125.)

¹⁴⁰⁰ See Saleille, *Possession* 81-82.

¹⁴⁰¹ See for example, in German law § 1006 BGB.

a *bona fide* transferee,¹⁴⁰² placing the burden of loss upon the original owner. Taking into account the importance of certainty, as well as the need to promote distributive ends such as furtherance of commerce and encouragement of fair and honest trading, what role should possession play in the protection of acquirers from a non-owner?

(1) Possession on the Part of the Transferor

(a) Potential to mislead

In German jurisprudence, where the owner has allowed the property to leave his or her possession, he or she is often understood to have contributed to his or her own loss; this is referred to as the “Veranlassungsprinzip”.¹⁴⁰³ The principle has its basis in the view that, in transferring possession, the owner has voluntarily acted to create the appearance of ownership in the possessor. For example, the *Motive* for the BGB state that the owner carries more blame than the acquirer for the latter’s mistake as to ownership.¹⁴⁰⁴ In awarding the property to the acquirer there is an element of punishment of the owner, who is seen as creating the situation in which the third party was defrauded.¹⁴⁰⁵

This idea is also reflected in the dictum from *Lickbarrow v Mason*¹⁴⁰⁶ that where one of two innocent persons must suffer for the wrong of another, the loss should fall on him who placed it within the power of the wrongdoer to perpetrate the fraud.

Estoppel (and its homologue in section 21 of the Sale of Goods Act) operates to prevent a party who has contributed to a wrong benefitting from his or her misdeed; there may be some cases in which the owner’s conduct has played an obvious role in

¹⁴⁰² This is not to imply that transfer takes place on the basis of possession alone; German law for example requires in addition good faith and a valid *causa*. See § 932 BGB.

¹⁴⁰³ For an overview see Karner, *Gutgläubiger Mobiliarerwerb* 233-236. See also the “legitimation doctrine” (*legitimatieleer*) formerly recognised in the law of the Netherlands, discussed by A Salomons, “National Report on the Transfer of Ownership of Movables in the Netherlands”, in W Faber and B Lurger (eds), *National Reports on the Transfer of Movables in Europe Vol 6* (2011) 1 at 109.

¹⁴⁰⁴ *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (1888, repr 2000) vol III 344.

¹⁴⁰⁵ Guisan, *Protection* 228.

¹⁴⁰⁶ (1793) 2 ER 39 at 44.

misleading the acquirer.¹⁴⁰⁷ In the modern law, however, it is settled that parting with possession is not enough to preclude an owner from recovery.¹⁴⁰⁸

Given current doctrinal and social trends, it is unrealistic to maintain that an owner who has merely parted with possession should be penalised for contributing to a subsequent wrongful transfer. Property law plays an important part in instilling the trust and confidence required for economic life and commerce often involves circumstances in which it is desirable for possession to be transferred without a power to transfer ownership. The use of moveables as collateral, combined with the growth of forms of secured credit in which the owner parts with possession (such as hire purchase) only reinforces the practical necessity for this. These social changes which have led to the routine separation of possession and ownership show no signs of reversal; against this background it is difficult to see why the law should always permit a transferee to assume that the possessor is owner.¹⁴⁰⁹ Whether it is the debtor or the creditor who is in possession, physical control in itself cannot be taken as a sufficient indicator of ownership.¹⁴¹⁰ Indeed, this would cause the idea of possession as a legal rather than an empirical concept to break down, as legal possession does not necessarily coincide with physical detention.¹⁴¹¹

Focussing on the transferor's possession also neglects the limited physical contact between buyers and sellers in many sales transactions. The value of web sales in the UK retail sector alone was estimated at £23.4 billion in 2012.¹⁴¹² Where the transaction is conducted at a distance, the buyer cannot be said to have been misled by the transferor's possession. Rather, reliance is placed upon other indicators

¹⁴⁰⁷ For example, where the owner knows that the goods are to be exposed for sale, see *Bryce* (n 902).

¹⁴⁰⁸ See ch 2 D(3)(c).

¹⁴⁰⁹ Zweigert, for example, criticises the idea that physical possession can give rise to an appearance of ownership, praising the more nuanced approach of the English doctrine of estoppel: K Zweigert, "Rechtsvergleichend-kritisches zum Gutgläubigen Mobiliarerwerb" (1958) 23 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 1 at 14.

¹⁴¹⁰ Reliance on possession has also been heavily criticised in the German debates, see Karner, *Gutgläubiger Mobiliarerwerb* 167-173.

¹⁴¹¹ This is pointed out by U von Lübtow, "Hand wahre Hand: historische Entwicklung, Kritik und Reformvorschläge", in *Festschrift Der Juristischen Fakultät Der Freien Universität Berlin Zum 41. Deutschen Juristentag in Berlin Vom 7.-10. September 1955* (1955) 119 at 214-215.

¹⁴¹² Office for National Statistics, *E-Commerce and ICT Activity, 2012* (2013), available at http://www.ons.gov.uk/ons/dcp171778_342569.pdf.

such as the seller's reputation. Online marketplaces such as eBay have developed their own particular norms and practices for assessing seller reliability and dispute resolution. The ability of the transferor to make delivery to the transferee, i.e. to put the transferee in possession, may still be of some importance and is considered later.

As regards the owner's fault in causing the acquirer's mistake, an acquirer may equally be "blameworthy" in the sense that, although in good faith, he or she could also have carried out more detailed enquiries into the title and authority of the unauthorised seller.¹⁴¹³ In fact, both the entruster and the acquirer have relied on the trustworthy appearance of the fraudulent trustee.¹⁴¹⁴ It is therefore preferable to accept, as does current Scots law, that transfer of possession does not equal a representation as to ownership by the owner.¹⁴¹⁵

(b) Fair allocation of risk

Turning again to the German debates, the idea that the owner is best placed to avoid the danger of unauthorised transfer ("Prinzip der Gefahrenbeherrschung") provides a further reason as to why he or she should bear the risk of loss.¹⁴¹⁶ By placing in the hands of a third party, the owner has "adventured" (risked) his or her thing.¹⁴¹⁷ For example, the *Motive* for the BGB assume that in choosing to part with possession the owner acts to place him or herself in danger, and must bear the risk of loss to a good faith third party.¹⁴¹⁸ Müller-Erbach¹⁴¹⁹ reasons that the owner is better able to manage the risk of loss than the acquirer as he or she can assess the trustworthiness

¹⁴¹³ Of course, in relation to many low-value moveables meaningful investigation of title will be impossible. This does not imply, however, that the law should react by investing all possessors with an owner's power of disposal.

¹⁴¹⁴ Noted e.g. by Demogue, *Notions* 78; von Lübtow, "Hand wahre Hand" at 215-216.

¹⁴¹⁵ This argument is made in relation to the law of Louisiana by P M Herbert and J M Pettway, "Sale of Another's Movables - History, Comparative Law and Bona Fide Purchasers" (1969) 29 *Louisiana Law Review* 329 at 360.

¹⁴¹⁶ For an overview, see Karner, *Gutgläubiger Mobiliarerwerb* 240-246.

¹⁴¹⁷ See for example Atiyah, *Sale* 385; Rouiller, *Nemo plus* 977; Saleilles, *Possession* 152.

¹⁴¹⁸ *Motive* III 344. See also Hans Brandt's account of the "Prinzip der Risikoübernahme" in *Eigentumserwerb und Austauschgeschäft* (1940) 263.

¹⁴¹⁹ R Müller-Erbach, "Gefährdungshaftung und Gefahrtragung" Part I (1910) 106 *Archiv für die civilistische Praxis* 309 at 442-445; Part II (1912) 109 *Archiv für die civilistische Praxis* 1 at 129 ff. As Karner points out, however, Müller-Erbach does not claim that good faith acquisition is based solely on the owner's ability to manage risk: *Gutgläubiger Mobiliarerwerb* 241.

of those that he or she gives his or her thing to, while the acquirer can only assess the true legal situation with difficulty.

Although ostensibly based in fairness, there is also some congruence with arguments based on simple practicality or, as discussed earlier, economic efficiency. In the absence of a system of registration, reliance on possession becomes a proxy means of affording security to acquirers.¹⁴²⁰ If buyers cannot place confidence in the seller's possession, they may be forced to undertake costly and time consuming verifications of ownership, which would be detrimental to the rapidity of commerce, or, where this is not possible, protect themselves by abandoning the sale.

A final point that is relevant is the relationship between possession and remedies. It is possible to argue that, by voluntarily relinquishing his or her possession, an owner should give up at least the right to obtain specific recovery of the thing, as opposed to a claim for damages. This would be on the basis that there is a separate interest that the formerly immediate possessor has in specific recovery, as opposed to the mediate possessor.¹⁴²¹ Historically, this was the position where the "hand wahre hand" principle was applied in mediaeval German law,¹⁴²² and it is also reflected in the structure of the modern English law governing interference with moveables, which do not guarantee restitution of the thing.¹⁴²³ For a system based on Roman law, which recognises a sharp distinction between possession and ownership, it is, however, incongruous for a temporary relinquishment of possession to amount to a permanent forfeiture of the right to regain the thing itself.

An obvious criticism of the idea that it is fairer to place the risk on the owner is that this approach may not always precisely reflect the equities of the concrete case: the owner may have investigated carefully the trustworthiness of the trustee, while the acquirer may have been reckless as to the transferor's authority to

¹⁴²⁰ See for example the comments in the *Motive* III 344, for a critique see von Lübtow, "Hand wahre Hand" 208-215.

¹⁴²¹ The immediate possessor may be more likely to have a closer attachment to, or some personhood-related interests in, the thing.

¹⁴²² See von Lübtow, "Hand wahre Hand" 177-186.

¹⁴²³ See s 3 of the Torts (Interference with Goods) Act 1977.

transfer.¹⁴²⁴ For reasons of certainty and predictability, however, it may well be preferable to adopt a general rule allocating the risk to the one party or the other. The inefficiency of requiring courts to assess the blameworthiness of the particular parties under a negligence-based rule is seen as an advantage of comprehensive protection for all good faith acquirers of entrusted property.¹⁴²⁵

However, it is more problematic to assert that this principle can account for a distinction, such as that recognised in German law, between lost or stolen and entrusted property;¹⁴²⁶ an owner may be equally “at fault” in the case of a loss or theft which has occurred due to his or her negligence. An owner is further able to take precautions against loss and theft, while sometimes there may be no option but to entrust the property to another temporarily.¹⁴²⁷ In modern urban commercial life, it is not reasonable to assume that one can have confidence in every person to whom it may be necessary to entrust possession of one’s things. Although an entrustment may superficially appear to be a voluntarily engaged transaction, it is not always voluntary in the sense that realistic alternative options existed.¹⁴²⁸ It is not necessarily the case that the owner obtains any benefit from parting with possession.¹⁴²⁹ Nor does the owner always have more time than the acquirer to investigate the credentials of the trustee.¹⁴³⁰

Allowing the original owner to recover lost and stolen property moreover generates a conflict between the need to allow acquirers to rely on appearances and the idea that the owner is responsible only for risks associated with entrusted property. From the point of view of the acquirer, his or her principal concern is that there should be an unambiguous rule as to whether he or she can rely on the transferor’s possession. It is impossible for him or her to distinguish between property which may have been embezzled and that which has been stolen; while an

¹⁴²⁴ Zweigert, “Rechtsvergleichend-kritisches” at 12-13. See also comments in *Farquharson* (n 899) at 335.

¹⁴²⁵ Ellis, “Transfer” at 160.

¹⁴²⁶ § 935 BGB exempts property which has been lost or stolen or is otherwise missing from the scope of Art 932.

¹⁴²⁷ See for example Guisan, *Protection* 227; von Lübtow, “Hand wahre Hand” 215-219.

¹⁴²⁸ Demogue, *Notions* 78.

¹⁴²⁹ Lurger, “Political Issues” at 49.

¹⁴³⁰ For example in the case of urgent repairs: Zweigert, “Rechtsvergleichend-kritisches” 13.

entrustment-based doctrine may provide increased certainty for original owners, the security of acquirers is correspondingly diminished.

Overall, it is difficult to say that these arguments regarding possession on the part of the transferor justify a uniform preference for the *bona fide* acquirer. In order to provide certainty for acquirers, one could advocate a rule validating any acquisition from a party in possession, but to treat physical possession alone as giving authority to transfer would risk the collapse of the distinction between possession and ownership. Even if it is desirable to protect acquirers, the significance afforded to the transferor's possession should therefore be limited.

(2) Possession on the Part of the Transferee

The acquisition of physical possession already has a probative function in Scots law.¹⁴³¹ This may to some extent serve to protect the celerity of transactions by reducing the need for lengthy investigations of the transferor's authority. What are the justifications for also affording it an acquisitive function? And should these justifications extend to constructive possession?¹⁴³²

In other jurisdictions, physical possession is often required before a *bona fide* purchaser is protected. For example in French law *possession réelle* is necessary, meaning that the goods should not remain under the control of the seller.¹⁴³³ This can be connected to the idea of acquisitive prescription, and the requirements of prescriptive possession. In the Code Civil, Art 2276 (formerly Art 2279) is categorised as a rule of acquisitive prescription.¹⁴³⁴ Although the doctrinal consensus

¹⁴³¹ See ch 3 A(3)(c).

¹⁴³² Transfer of possession by mere agreement without any change in physical control, in civil law terminology, *constitutum possessorium*. The most common example is probably the sale and leaseback transaction, the treatment of which under the Sale of Goods Act 1979 was discussed in ch 4.

¹⁴³³ This is not expressly stated in the text of Art 2276, but it explicitly mentioned in the context of double sales under Art 1141. See for example *Cour de Cassation* civ. 1re, 27 November 2001: Bulletin 2001 I N° 295 p186 and *Cour de Cassation* com., 13th February 1990: Bulletin 1990 IV N° 45 p30.

¹⁴³⁴ Articles 2276 and 2277 appear under the heading "De la prescription acquisitive en matière mobilière."

is now that Art 2276 does not represent a mode of acquisitive prescription,¹⁴³⁵ the requirement in Art 2261 that prescriptive possession should be “without interruption, peaceable, public and non-equivocal” influences by analogy the interpretation of Art 2276.¹⁴³⁶ In German law, not only physical possession but *Eigenbesitz*¹⁴³⁷ is a prerequisite.¹⁴³⁸ The DCFR also restricts good faith protection to those who have acquired physical control of the object.¹⁴³⁹ These provisions are usually justified with reference to two broad aims.

(a) *Publicity of transfer*

Insofar as possession gives rise to a presumption of ownership, physical control provides a material and public¹⁴⁴⁰ indication of right.¹⁴⁴¹ To some extent, this is also true in relation to acquisitive prescription; protection of long-held possession allows all parties to rely on the appearance of ownership thus created.¹⁴⁴² Where there is no physical possession on the part of the transferee, possession can no longer be said to have this probative or “signalling” function relative to the world at large. In relation to the original owner, there will be no external manifestation of the change in the legal position.¹⁴⁴³ As it is empirically investigable, attaching legal consequences to physical control may seem an attractive means of connecting the noumenal world (ownership, legal rights) to phenomena.¹⁴⁴⁴

¹⁴³⁵ For a brief overview of the views on this topic, see M Dubertret, *Négociabilité et Possession: Essai sur l'inopposabilité des vices de la propriété mobilière* (2010) 241-243.

¹⁴³⁶ See for example *Cour de Cassation* civ. 1re, 30th October 2008: Bulletin 2008 I, n° 242. For criticism, see Zenati, “Revendication” 408. As Zenati asserts, the instantaneous acquisition understood to result from Art 2276 does not logically require either publicity or continuous possession.

¹⁴³⁷ Possession as one’s own, see § 872 BGB.

¹⁴³⁸ See § 933 BGB requiring that the thing be “übergeben” (handed over).

¹⁴³⁹ Lurger and Faber, *Principles* VIII.-3:101 Comment 12 and 13. For criticism, see L P W van Vliet, “Acquisition and Loss of Ownership of Goods - Book VIII of the Draft Common Frame of Reference” (2011) *Zeitschrift für Europäisches Privatrecht* 292 at 316-321.

¹⁴⁴⁰ The extent to which possession of moveables in, for example, a private dwelling house can be said to be “public” is debateable.

¹⁴⁴¹ This may make it an appropriate factor in allocating the burden of proof, see Lurger and Faber, *Principles* 433. In relation to French law, Dross argues that affording a probative function to possession is more rationally justifiable than giving it a role in acquisition: “Singulier destin” 45.

¹⁴⁴² Of course, acquisitive prescription usually requires a continuous period of possession whereas good faith protection is generally instantaneous. For a comparative overview of rules on acquisitive prescription of moveables, see Lurger and Faber, *Principles* 973-981.

¹⁴⁴³ See for example *Motive* III 345. For criticism of this view, see Van Vliet, “Acquisition” at 318.

¹⁴⁴⁴ For the distinction between noumenal and phenomenal (empirical) possession, see Kant, *Metaphysics* para 249.

It is not desirable, however, to reduce noumena entirely to phenomena, abandoning the distinction between ownership and possession.¹⁴⁴⁵ As things currently stand, physical control is often only a weak indicator of ownership.¹⁴⁴⁶ In terms of promotion of commerce and ease of transaction, it is not particularly important whether an acquirer enters into possession but rather simply that he or she has relied on some appearance of ownership.¹⁴⁴⁷ From this perspective, good faith is more important than possession in justifying protection of the acquirer.

A further problem with understanding good faith acquisition as a type of instantaneous acquisitive prescription is that no lapse of time is necessary to complete the right of the acquirer. This means that some of the traditional justifications for acquisitive prescription (rewarding potentially productive use and penalizing original owners who make no effort to recover possession)¹⁴⁴⁸ do not apply. Unlike acquisitive prescription, favouring any party in instant physical control does not promote social and legal stability; a party who has only just acquired possession will prevail over an original owner with a long-term connection to the thing. It is true that the aim of producing certainty as to rights is relevant to the case of good faith acquisition. It seems doubtful, however, that requiring possession on the part of the transferee would resolve the difficulties surrounding publicity in transfers of moveables. Although acquirers would be afforded increased security, as owners who may sometimes wish to entrust others with possession of the thing they would face a greater risk of loss. The choice lies not between “more” and “less” uncertainty but between the kinds of uncertainty various people must bear.¹⁴⁴⁹ Regardless of other economic or social reasons for favouring the acquirer, a short

¹⁴⁴⁵ Indeed, as Kant argues, legal rights in property exist precisely for the benefit of those owners who are not in physical possession; physical possession is already protected by our right to physical integrity. See Kant, *Metaphysics* paras 246-248.

¹⁴⁴⁶ For further strong criticism of the idea that possession provides a reliable indication of right see von Lübtow, “Hand Wahre Hand” 208 and Lurger and Faber, *Principles* 432.

¹⁴⁴⁷ This point is made by Van Vliet (“Acquisition” 319) and Dross (“Singular destin” 45).

¹⁴⁴⁸ See generally D Johnston, *Prescription and Limitation*, 2nd edn (2012) ch 1, for discussion of the role of fault/ negligence on the part of the original owner see paras 1.36-1.37.

¹⁴⁴⁹ F I Michelman, “Ethics, Economics and the Law of Property” (2004) 39 *Tulsa Law Review* 663 at 682. A similar point is made by Baird and Jackson, “Information” at 300.

period of possession is not a particularly persuasive justification for placing the burden of uncertainty on the original owner.

On the other hand, the simplicity of a possession-based approach means that, although not increasing overall certainty, it may be a clear and comprehensible way to settle disputes. Decisions on a case-by-case basis will only add to insecurity; there are hence strong arguments for adopting a broad general rule, despite the fact that this may produce injustice in a small number of individual cases. Indeed, a semi-absolute protection of either all owners or all acquirers appears in many ways preferable to a system with many distinctions between different categories of owner and acquirer, which may increase insecurity for all parties. Guisan, for example, praises the straightforwardness of the Italian solution of protecting all acquirers in good faith, regardless of whether the property is entrusted or stolen.¹⁴⁵⁰ However, despite providing a useful rule of thumb, possession in itself does not explain why it is acquirers rather than original owners who should be protected.¹⁴⁵¹

In the case of certain types of moveable property, some form of registration or recording of property rights may be the most effective way to ensure publicity and security of rights. It is unlikely that there are many categories of moveable property for which it would be cost-effective to introduce a register of title, but there are already a number of different, privately-run, systems for recording information about thefts.¹⁴⁵² Factors that may indicate the suitability of a registration system include the desirability of separating use and ownership of and/or recognising multiple property rights in the same object, identifiability, infrequent transfers of property of that type and high value.¹⁴⁵³ The particular cases of motor vehicles and cultural property are discussed below, but there may be other examples (e.g. electronic equipment) which would benefit from introduction of a more formal means of recording information about events such as creation of a security or theft.

¹⁴⁵⁰ Guisan, *Protection* 256-257.

¹⁴⁵¹ Guisan for example justifies this choice by reference to protection of commerce: *Protection* 256.

¹⁴⁵² Albeit with the support of police and other government agencies. A notable example is the Immobilise database, www.immobilise.com. For further information about this system and the others available see n 1478.

¹⁴⁵³ See Baird and Jackson, "Information" 304.

Unfortunately, however, many moveables are of low value (or depreciate in value quickly) and often functionally indistinguishable from others of the same type. They can also be quickly moved from place to place. It therefore seems unlikely that a registration system would be practicable for many sorts of moveable goods. Indeed, entirely fungible goods have traditionally not been subject to vindication, which requires the item to be identifiable.¹⁴⁵⁴

(b) Preventing fraudulent and bad faith transactions

It is at least sometimes the case that where a buyer fails to take possession, this is indicative of a sham transaction in which the aim is not actually to transfer ownership but to create a non-possessory security right. Although such transactions are excluded from the scope of the Sale of Goods Act¹⁴⁵⁵ (and therefore the protections for good faith purchasers available under the Act), there exists a fear that protecting acquirers who do not take possession will favour one set of creditors at the expense of other creditors and innocent third parties.¹⁴⁵⁶ There may be a need for reform of the law relating to security over moveables, but penalising all acquirers who are not in possession is not the only or necessarily the best way of preventing such transactions.¹⁴⁵⁷ Rules differentiating transfers in security from other sales could be enforced aggressively by courts dealing with good faith acquisition. Where there has been a demonstrably genuine transfer, the risk of sham sales thus appears only a weak justification for according such importance to possession.¹⁴⁵⁸

The commentary to the DCFR further suggests that a failure to take possession may facilitate embezzlement and is in itself an indication that something

¹⁴⁵⁴ Baird and Jackson point out that even traditionally fungible goods such as grain may, with the aid of technology such as radioactive tracers, be distinguishable, but that the costs of this would far outweigh the benefits. “Information” 306 fn 17.

¹⁴⁵⁵ See s 62(4) and also Art IX.-1:202(3) and (4) of the DCFR, noted by Van Vliet, “Acquisition” 319.

¹⁴⁵⁶ This risk is illustrated by the facts in the *Gerson* case, discussed in ch 4 D(3)(e)(iii). In the German context, the historic fear of sham transactions is discussed by P Heck, *Grundriß des Sachenrechts* (1930, repr 1960) 250 and Van Vliet, *Transfer* 54-55.

¹⁴⁵⁷ See Van Vliet, “Acquisition” 318-319.

¹⁴⁵⁸ Heck, *Grundriß* 250.

about the transaction is suspicious.¹⁴⁵⁹ Although not explicitly stated, it seems that this view is probably linked to the idea discussed above that a transfer of possession will warn the original owner about the fraudulent transfer. Allowing good faith acquisition without possession is seen as enabling fraudulent trustees to hide their unscrupulous actions from the original owner, and rewarding buyers who should have had doubts about the transaction. Leaving aside the question of the acquirer's good faith, this argument neglects to consider whether requiring possession is actually effective in protecting original owners from fraud. While the owner may discover the embezzlement at an earlier stage, he or she will only be notified at the point when the thing is lost; recovery remains impossible.¹⁴⁶⁰ Perhaps it is more likely that a successful claim for compensation can be brought against the fraudster, but this is by no means clear.

This type of argument also raises questions about the relationship between the criterion of possession and that of good faith and the extent to which they can be separated. It is tempting to link the quality and character of the possession to the presence or absence of bad faith; a possessor who does not believe him or herself to be owner may not form the requisite¹⁴⁶¹ *animus domini*. In the development of the requirement that possession be “unequivocal”, French jurisprudence has been criticised for blurring the distinction between the will to acquire and the belief that one is in fact the owner.¹⁴⁶² One of the drafters of the DCFR has argued that if the transferee does not take possession, this in itself should be presumed to demonstrate a lack of good faith as failure to obtain physical control should automatically arouse the suspicion of the transferee.¹⁴⁶³ Should possession be treated then as a necessary but insufficient condition for the establishment of good faith?

It is submitted that a sharp demarcation of possession from good faith is desirable: where a transaction is conducted in dubious circumstances, the public

¹⁴⁵⁹ Lurger and Faber, *Principles* 892.

¹⁴⁶⁰ See Van Vliet, “Acquisition” 321.

¹⁴⁶¹ Requisite in French law under Art 2276, but also in Scots law in relation to the intention to acquire ownership; see Carey Miller, “Good faith” 110-111; 120-121 and discussion in ch 4 D(3)(b)(ii).

¹⁴⁶² See Zenati, “Revendication”.

¹⁴⁶³ Lurger, “Transfer” at 61-62.

policy reasons for holding that there is a lack of *animus domini* are better considered in the context of good faith. The justifications for protecting good faith are discussed later, but the reasons for favouring physical possessors are distinct from and not reducible to these considerations. The previously mentioned problems with attributing a “signalling” function to possession mean that is not a reliable measure of good faith; it has been argued that property doctrine should allow separation of possession and ownership and buyers must take this into account when considering what investigations of the seller are appropriate. Other factors, such as the norms and practices of in the market in question, will often be of equal or greater weight in identifying suspicious transactions. Although, therefore, possession may sometimes provide a useful default indicator of ownership, especially in the case of low value and rapidly traded goods, it should not be seen as a sufficient or even necessary condition of good faith.¹⁴⁶⁴

(c) Importance of the physical connection to the thing

Perhaps those who have physical control over a thing have a special connection which is worthy of recognition. Whatever the importance of good faith, it seems reasonable to suggest that only those with a physical link to the thing should be entitled to retention of the thing at the expense of the original owner. The interest of a party who has never possessed is liable to be the sort of interest best described as an interest in the exchange value of the thing, rather than its use value: an interest which can be adequately acknowledged with monetary compensation. Where an acquirer does not have unmediated possession, he or she should therefore have no greater claim to the object than the original owner.¹⁴⁶⁵ Where there is a competition between parties none of whom are in possession (as for example in *Michael Gerson*),¹⁴⁶⁶ there is no reason to override the usual rules of property law; no party has a special need for a proprietary (as opposed to a personal) claim. Although the

¹⁴⁶⁴ Guisan, *Protection* 218-220.

¹⁴⁶⁵ See for example J Oeschler, “§§ 929–936 BGB”, in F J Säcker and R Rixecker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 6th edn (2013) vol 6 §933 para 1.

¹⁴⁶⁶ (n 966).

acquirer may be in good faith, this is not sufficient to distinguish him or her from other good faith acquirers or the original owner.¹⁴⁶⁷

Further, before leaving the thing in possession of the seller it does not appear overly onerous to say that acquirers should consider the possibility of retransfer¹⁴⁶⁸ or a vindicatory claim.¹⁴⁶⁹ The *Motive* for the BGB express the view that the trust an acquirer places in the transferor can be equated with an acceptance of risk;¹⁴⁷⁰ whatever the merits of this argument it is not obviously inequitable to link the availability of specific recovery to previous possession. This is not to suggest that physical possession alone justifies protecting an acquirer from vindication, but rather that it can play a role in determining which of several equally deserving parties should be awarded the thing itself, as opposed to a financial claim. An analogy may be made with the special protection afforded to the “proprietor in possession” under s 9 of the Land Registration (Scotland) Act 1979.¹⁴⁷¹

Overall then, it has been argued that the acquirer’s possession does not provide an adequately accurate system for assessing good faith or signalling ownership. Protection of all (good faith) parties in possession has the advantage of clarity and simplicity, but further justification is required for the choice to prefer acquirers over original owners. As an indicator of a particular type of connection with the thing, however, it is reasonable that possession should be a necessary but not sufficient condition for protection.

C. THE ACTIONS OF THE OWNER

(1) Diligence in Protecting Assets

¹⁴⁶⁷ The reluctance of the courts to prefer a second (non-possessing) buyer over a first is demonstrated by the result in *Fadallah* (n 960).

¹⁴⁶⁸ Of course, on this argument the retransfer would have to be accompanied by a transfer of possession in order to be valid.

¹⁴⁶⁹ Heck, *Grundriß* 250.

¹⁴⁷⁰ *Motive* 345.

¹⁴⁷¹ Although see now s 80 of the Land Registration etc. (Scotland) Act 2012, which does not give special protection to a transferee in possession.

Another means of justifying good faith acquisition is as counterpart to a limitation on the original owner's right to recover in particular circumstances.¹⁴⁷² There are several reasons why such an approach might be advocated. There is the idea that the owner is the better risk bearer;¹⁴⁷³ some scholars have further argued that in circumstances where the original owner could have done more to prevent the loss, he or she may bear more moral culpability. Penalising negligent behaviour would give owners increased incentives to take care of their property. For example, Schwartz and Scott have suggested basing the owner's ability to recover entirely on the absence of negligence (rather than a property rights-based calculus.)¹⁴⁷⁴ This would have the advantage of placing the owner in control of the risk of deprivation of ownership; a clearly defined negligence standard might also be a more appropriate measure of culpability than whether there had been a voluntary transfer of possession.

However, concerns about predictability equally apply to the case of verifying negligence and it is not clear that the "proxies" Schwartz and Scott propose for evaluating negligence,¹⁴⁷⁵ which include utilisation of customary theft prevention systems and measures such as anti-theft tagging, will provide sufficient certainty for owners. Who is to decide whether the owner has invested in a sufficiently robust security system, and, given that individual circumstances may vary widely, will it be foreseeable to the owner precisely what is in his or her case required? As Schwartz and Scott suggest that the law need not evaluate the buyer's behaviour,¹⁴⁷⁶ this will also reduce certainty for the buyer who has no means of ascertaining whether or not the owner will be permitted to recover, and no way to influence the eventual outcome.

A negligence based rule may also be criticised for its unduly harsh treatment of a careless owner, which, as is evident from judicial comments in cases such as

¹⁴⁷² If the original owner is to be deprived of the right to recover, it is logical to provide in this circumstance for ownership to be formally transferred to the most appropriate party. This avoids the possibility of an owner who has no right to recover possession, and a possessor who cannot acquire ownership.

¹⁴⁷³ See ch 5 C(3)(e).

¹⁴⁷⁴ Schwartz and Scott, "Rethinking".

¹⁴⁷⁵ Schwartz and Scott, "Rethinking" 1361-1362.

¹⁴⁷⁶ Schwartz and Scott, "Rethinking" 1364.

Moorgate Mercantile Co v Twitchings,¹⁴⁷⁷ may be viewed as an interference with the owner's perceived liberty to act in a careless manner. If owners neglect to use, say, an adequate burglar alarm, does this really warrant depriving them of the right to recover their property? As even slight negligence may be exploited by a thief or a fraudster, is it really possible to say that it was this negligence (rather than the actions of the fraudster or thief) which was responsible for the loss of the thing?¹⁴⁷⁸ Moreover, where neither party is negligent, a fault-based analysis does not help to justify protection of the owner over the good faith acquirer, who may have acted in an equally praiseworthy and efficient manner.¹⁴⁷⁹

Should the manner in which the owner lost possession of the goods affect assessment of his or her culpability? It has already been suggested that voluntary transfer of possession by the owner is not a sufficient reason to treat him or her as more blameworthy than the acquirer. In contrast to the traditional distinction in German law between lost or stolen and entrusted property,¹⁴⁸⁰ the DCFR proposes a rule which would protect all acquirers in good faith where acquisition is in the ordinary course of business.¹⁴⁸¹ It has been argued by one of the drafters that there are no convincing reasons for treating stolen property in a different manner from things which have been entrusted.¹⁴⁸² The owner should be expected to take precautions both against loss and theft and the possibility of fraud by trustees.

In general then, the actions of the original owner do not provide a robust justification for allowing good faith acquisition. A negligence-based standard would be complex to apply to individual cases, and if applied too strictly could place an

¹⁴⁷⁷ (n 905) at 919; 925.

¹⁴⁷⁸ For example, in *Hamblin* (n 908) at 275 per Pearson LJ, it was accepted that it was the actions of a fraudulent car dealer, rather than the actions of the buyer in signing documents without reading them, which were responsible for the plaintiff finance company's loss.

¹⁴⁷⁹ Schwartz and Scott, "Rethinking" 1365 argue that the owner would then have no incentive to search for his or her property, meaning that the party which valued the object most highly might not have a chance to obtain it and hence creating inefficiency. This point is, however, relatively briefly argued and it is difficult to conclude from it that good faith acquisition will necessarily lead to an inefficient allocation.

¹⁴⁸⁰ § 935 BGB excludes good faith acquisition under § 932 where the property is lost, stolen or otherwise missing.

¹⁴⁸¹ Art VIII.-3:101(2).

¹⁴⁸² Lurger, "Political Issues" at 49-50.

unfair burden on victims of fraud. Nor does the fact that an entrustment of possession has taken place reliably indicate negligence.

(2) Diligent Search

Where recovery by the original owner is permitted, should this be conditional upon reasonable and prompt attempts to search for the property? In terms of prescription/limitation of the owner's claim, some judicial authority in the US has suggested that failure to take steps to publicise the loss of the property and to actively search for it indicates a culpable lack of diligence on the part of the owner which should not be allowed to prejudice a good faith purchaser.¹⁴⁸³ With the increasing availability of electronic databases recording details of ownership and instances of loss or theft,¹⁴⁸⁴ it is frequently possible for owners to take actions which might deter thieves and warn potential purchasers. A rule penalising those who failed to report a theft or loss to police (or register it in an appropriate electronic database)¹⁴⁸⁵ would presumably encourage information sharing and thereby increase the protection available to original owners. Purchasers would also be better able to conduct meaningful investigations into provenance of goods.

However, such an obligation could be seen as an unwarranted imposition on the owner's freedom to conduct his or her affairs as he or she wishes. As it has been

¹⁴⁸³ See for example the judgment of the United States Court of Appeals for the 2nd Circuit in *DeWeerth v Baldinger*, 836 F.2d 103 (2d Cir. 1987). The judgment in *DeWeerth* also reflects, however, the operation of New York's "demand and refusal" rule under which limitation of the owner's claim does not occur until the return of the property has been requested. The "diligent search" rule reflects concerns about unreasonable delay in making a demand extending the limitation period indefinitely. A different result was subsequently reached by the New York Court of Appeals in *Solomon R Guggenheim Foundation v Lubell* 77 N.Y.2d 311 (N.Y. 1991) (discussed below), this was however held not to affect the result in *DeWeerth* (*DeWeerth v Baldinger*, 38 F.3d 1266 (2d Cir. 1994).

¹⁴⁸⁴ For example, the Immobilise database (www.immobilise.com) can be used by members of the public and businesses to register valued possessions or company assets and report theft or loss. Police can then access the database to check if a recovered item has been reported stolen. See also <https://www.reportmyloss.com/> (a website for report lost property in the UK) and <http://www.checkmend.com/uk/> (website providing information about used electrical equipment including whether it has been recorded as lost or stolen, is a counterfeit, has been cloned, has had any insurance or warranty claims made against it and the number of previous owners).

¹⁴⁸⁵ Penalties for those who do not register stolen art in an electronic registry set up for the purpose have been proposed by some scholars, see for example A Hawkins *et al*, "A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art" (1995) 64 *Fordham Law Review* 49 at 88-95.

argued that the issue of whether a crime has been committed is not, in Scots law, relevant to transfer of ownership,¹⁴⁸⁶ it would not be logical to tie recovery to informing the police. Given the existing separation between civil and criminal remedies, surely failure to bring a civil action timeously should be the only relevant bar to recovery. The existence of the registries of lost or stolen moveables mentioned above does not mean that such registries are sufficiently developed to play such an important role in determining property rights; further, in the absence of publicly run registries it is problematic effectively to force owners to use private and potentially unaccountable private databases.

Moreover, to limit the owner's power to recover would not entirely resolve the problem; it is submitted that an explicit conferral of ownership on the *bona fide* purchaser is necessary in order to bring greater clarity to the law. When the issue is approached as one of transfer of ownership, the diligence of the owner's enquiries does not seem a satisfactory basis on which to determine the validity of a transfer to a *bona fide* purchaser: this is not predictable by an acquirer and indeed, where it is only the after the acquisition has taken place that a theft is discovered, should the original owner's subsequent actions retrospectively determine the validity of the transfer?

A prominent judgment of New York Court of Appeals has also highlighted the practical difficulties that would attend a rule of this type:

All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property... [I]t would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into

¹⁴⁸⁶ See ch 4 C(1).

account all of these variables and that would not unduly burden the true owner.¹⁴⁸⁷

Although it would be possible for a court to assess on the facts of every case whether an owner had acted reasonably in the circumstances, this would add an extra level of cost and uncertainty to legal proceedings. Unless clear rules were set out in advance, it might be impossible for an owner to ascertain exactly what actions would be found to be appropriate. The case of stolen or embezzled art is discussed later, but, in relation to other moveables, even a minimum requirement that stolen property be reported to the police might be problematic. How long would the owner have to make the report? Where the owner has not discovered the theft, it obviously will not be reported, but what if the failure to discover is due to negligence by the owner? A duty to monitor one's property is more onerous than a duty to search if it is discovered to be stolen.

Moreover, where the property has already reached the hands of the good faith purchaser at the time the (non-negligent) owner discovers the theft (a potentially common occurrence), such a "diligent search" rule would be of no benefit in warning the purchaser. Placing an obligation on the owner to inform particular parties could also inadvertently lead to an expectation that acquirers should make particular checks prior to purchasing. Finally, the operation of such a rule in relation to embezzled property would be problematic, as where the owner is not in possession of the thing it is usually only after the unauthorised transfer that the loss will come to light and recovery will be attempted.

D. THE ROLE OF GOOD FAITH

(1) Nature and General Concept

In order to investigate its justificatory role, it is first necessary to explain what is meant by the term "good faith". At the most intuitive level, good faith indicates a

¹⁴⁸⁷ *Guggenheim* (n 1483) at 320. For criticism of the decision, see Hawkins "Tale".

genuine belief in the authority of the seller on the part of the acquirer. Actual knowledge of the transferor's lack of title will logically exclude good faith.¹⁴⁸⁸ However, as well as the mental state of the acquirer legal doctrine will often have regard to the external circumstances of the transaction. Differing understandings of the term "good faith" may therefore involve either or both of an objective and a subjective (ethical and psychological) component.¹⁴⁸⁹ Jurisdictions vary in the extent to which anything other than actual knowledge¹⁴⁹⁰ can be taken into account.¹⁴⁹¹ Presumably in order to ensure prudent and careful behaviour on the part of potential transferees, some objective criteria are usually incorporated.¹⁴⁹² For example, the DCFR refers to what the transferee knew or could reasonably be expected to know.¹⁴⁹³ There is some ambiguity in the Scots jurisprudence, but, on the basis of the discussion in Chapter 4,¹⁴⁹⁴ it is submitted that Scots law takes into account both actual and constructive knowledge.

What is the relationship, if any, between good faith and negligence? The Sale of Goods Act 1979¹⁴⁹⁵ refers to actual honesty on the part of the acquirer, regardless of any negligence that may have occurred. This is presumably to ensure that the standard imposed on buyers is not too onerous; it is difficult to define precisely what would amount to negligence in the case of an ordinary consumer transaction. Is some specific knowledge of the other's right required, or simply carelessness in investigating the transferor's authority? As virtually any moveable object could, in theory, be held on hire or loan it might be difficult or impossible for an acquirer to argue that a purchase was entirely free from doubt. In German law, where the acquirer is not aware due to "gross negligence"¹⁴⁹⁶ that the thing does not belong to the transferor, no acquisition is possible. An "obligation to inform" may arise based on the subject of the transaction, the identity of the transferor and the circumstances

¹⁴⁸⁸ For example, the jurisdictions surveyed in Faber and Lurger, *Principles* at 910- 917.

¹⁴⁸⁹ See S Litvinoff, "Good Faith" (1997) 71 *Tulane Law Review* 1645 at 1649.

¹⁴⁹⁰ E.g. presumed knowledge or negligence.

¹⁴⁹¹ For a survey of European jurisdictions, see Faber and Lurger, *Principles* at 910-917.

¹⁴⁹² Almost all the jurisdictions surveyed by Faber and Lurger, *ibid.* make some provision excluding good faith where the behaviour of the acquirer is seen to be particularly unreasonable or negligent.

¹⁴⁹³ Art VIII.-3:101 1(d).

¹⁴⁹⁴ Ch 4 D(3)(b).

¹⁴⁹⁵ Section 61(3).

¹⁴⁹⁶ "Grober Fahrlässigkeit" (§ 932(2) BGB). For discussion of the meaning of this term, see Oeschler in *Münchener Kommentar* §932.

in which the transaction was concluded.¹⁴⁹⁷ There is, however, no general duty of enquiry.¹⁴⁹⁸ While most systems will seek to exclude particularly egregious cases of carelessness on the part of an acquirer, it is not clear to what extent “negligence” performs a role that other criteria such as reasonableness do not.

Insofar as some reference to external circumstance is always necessary in assessing subjective belief, good faith is not a neutral concept. As the historical survey in the previous chapters demonstrates, expectations regarding the behaviour of purchasers are shaped by societal and market norms. Although in respect of moveables there are usually no registers of title, the investigations required of a reasonable purchaser will change according to the prevailing market practice. This will also determine whether something about a particular transaction (such as its time or location) is seen as suspicious. It is conjectured that the greater the perceived need for anonymity and rapidity of transactions, the greater will be the law’s emphasis upon the outward circumstances of the transaction rather than the subjective knowledge of the parties. From such a strictly economic (rather than fairness- based) perspective, there is little interest in investigating the innermost workings of the mind of the acquirer. This approach does not necessarily disadvantage buyers, who will also be able to rely on the apparent propriety of the transaction. As was identified when considering the UCC,¹⁴⁹⁹ the eventual result is that in some jurisdictions purchasers are simply required to buy in the “ordinary course of business” following the norms of the market, the acquirer thus becoming the “commercial” rather than the “*bona fide*” purchaser.¹⁵⁰⁰

A further crucial aspect of the establishment of good faith is the rules regarding evidence. The question of where the burden of proving good faith should lie has been the subject of some debate following the suggestion in the DCFR that the party seeking to assert good faith should have to establish the facts supporting his

¹⁴⁹⁷ O Jauernig, *Bürgerliches Gesetzbuch: Kommentar* (2011) § 932 para 17.

¹⁴⁹⁸ BGH 1st March 2013, V ZR 92/12 para 13.

¹⁴⁹⁹ See ch 5 C(1)(b).

¹⁵⁰⁰ As predicted by Gilmore, “Commercial Doctrine”.

or her claim.¹⁵⁰¹ The drafters point out that it is difficult for the original owner to prove anything about the transaction by which the transferee acquired the thing.¹⁵⁰² Moreover, the transferee is the one who benefits from an assertion of good faith, so it is reasonable that he or she should be the one to provide evidence to support the claim.¹⁵⁰³ On the other hand, if good faith is not presumed this could lead to increased litigation, with the attendant uncertainty for original owners over their prospects of recovery.¹⁵⁰⁴ The ideal solution is probably some compromise between the two extremes,¹⁵⁰⁵ but whatever the position adopted, the problem can only be satisfactorily resolved in the light of a broader conception of the good faith doctrine and its justification and purpose. The ultimate issue is what we can know, or presume, about property rights and the extent to which the law should seek to operate on the basis of appearances.

(2) Justificatory Role

What are the reasons for giving special protection to those who act in good faith? The role of good faith as a moral standard, in particular in the Canon law, has been mentioned,¹⁵⁰⁶ but modern norms of good faith do not necessarily demand that the buyer act in a praiseworthy manner.¹⁵⁰⁷ Moreover, even assuming the buyer to have acted with the utmost honesty and rigour, the property may well have left the original owner's possession entirely without fault or carelessness. It is difficult to regard a buyer's good faith as automatically rendering him or her more morally deserving. What follows focuses, therefore, on the potential for norms of good faith to provide social and economic benefits by harmonising public expectations about others' behaviour.

¹⁵⁰¹ See DCFR Art VIII-F3:101(1)(d); Faber and Lurger, *Principles* at 896-897; A F Salomons, "The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the Draft Common Frame of Reference: A Tale of Two Gatekeepers" (2013) 21 *European Review of Private Law* 843 at 854-855; Lurger, "Transfer" at 62-63.

¹⁵⁰² Lurger and Faber, *Principles* 896.

¹⁵⁰³ Lurger, "Transfer" at 62.

¹⁵⁰⁴ Salomons, "Purpose" at 861-862.

¹⁵⁰⁵ See Lurger, "Transfer" at 62-63, citing Salomons' suggestion that the burden of proof on the acquirer should be removed after a short period of time such as 3 years.

¹⁵⁰⁶ See ch 2 C(4)(c)(2).

¹⁵⁰⁷ For example, under s 61(3) of the Sale of Goods Act it is enough for a buyer to act "honestly", even if he or she acted in a risky or careless way.

As emerges from the comments above, good faith rules serve to promote the trust and confidence necessary for the operation of markets. To emphasise the actions of the acquirer, rather than the degree of culpability of the original owner, affords increased predictability to buyers and enables them to mitigate their own risk of loss. By ensuring that contracting parties can act on their (reasonable) beliefs about the other party, it is possible to solve some of the epistemological problems inherent in transfer of moveables which become particularly pressing in large and anonymous markets. In this respect, good faith rules must strike an appropriate balance between protecting an acquirer's trust in the apparent legal position whilst promoting third parties' (such as the original owner's) confidence that the acquirer will obey the norms of the market and act with respect for others' potential rights. It is difficult to achieve this using prescriptive formulae; careful evaluation of the particular facts of the case is required.

Further, norms of good faith can play an important role in regulating the flow of information regarding property rights and establishing a robust duty on the part of the acquirer to investigate ownership. In this respect, good faith may be a more sensitive device than a simple possession requirement.¹⁵⁰⁸ Adjusting the strictness of the standard of good faith adopted has been cited by one of the drafters of the DCFR as one of the most powerful methods for managing potential outcomes.¹⁵⁰⁹ Although it has been argued that the moral praiseworthiness of the acquirer should not automatically outweigh the claim of the original owner, a demanding standard of good faith can be an effective tool for ensuring that the behaviour of the buyer is careful and respectful of others' rights. Where means for investigating ownership (such as registries of stolen property) exist, duties of good faith can encourage their utilisation.

This does not mean, however, that good faith is an unproblematic concept. Good faith has been characterised here as an "open" norm, the implications of which will vary according to the circumstances of the case. However, its flexibility also

¹⁵⁰⁸ See Salomons, "New rules" at 152.

¹⁵⁰⁹ Lurger, "Transfer" at 60.

invites the criticism that it lacks the requisite normative substance to perform a justificatory role. Due to the need for publicity, legal systems are often concerned less with subjective good faith and more with the transferor's possession or other external signs of right. In the absence of any more substantial public indication as to ownership, it is difficult to justify one person's belief alone binding all third parties. Although allowing reliance on reasonable belief may be beneficial for markets, it does not seem in itself a sufficient criterion for deciding between an original owner and an acquirer both of whom may be acting on such honest convictions.¹⁵¹⁰ Indeed, as commented earlier, it is the legal rules themselves which establish what market participants may reasonably expect and not vice versa; reference to the benefits of requiring some level of good faith does not avoid the necessarily difficult choice regarding the standards of care expected of each party.

Moreover, the mutability of what good faith is understood to demand of an acquirer makes it difficult to identify with any precision its core significance. It has been pointed out that notions of good faith will differ across time and place. Even within current Scots law, it is difficult to determine in the abstract whether a particular circumstance should have aroused the suspicion of an acquirer. There is a tension between the objective and subjective elements involved; unless assessed entirely objectively, some reference to the actual subjective state of mind of the transferee will be required. Although certainly some standards of fair dealing are necessary in any market, the essential unpredictability of good faith is such that outside the realm of the individual case it does not provide a coherent foundation for transfer of property rights. Hesselink has contended that its functions should be understood as concretisation, supplementation and correction of the law rather than provision of a freestanding principle or basis for the acquisition of rights.¹⁵¹¹

(3) Role as an Exclusionary Device

¹⁵¹⁰ Karner, for example, comments that the principle of *Vertrauensschutz*, or protection of confidence/legitimate expectations, would apply both to the expectations of the original owner and those of the acquirer: *Gutgläubiger Mobiliarerwerb* 59.

¹⁵¹¹ M Hesselink, "The Concept of Good Faith", in A S Hartkamp *et al.* (eds), *Towards a European Civil Code*, 4th ed (2011) 619 at 627-628; 640-642. Hesselink does not discuss in detail the status of good faith protections in the property law context.

Despite the evident utility of provisions referring to good faith, this characterisation of good faith as a limited and supplementary doctrine appears a more accurate depiction of its importance in practice, at least in the property context. If good faith cannot, in itself, justify acquisition by the transferee, it is certainly the case that it can be productively combined with other factors to act as a “control device”. Rather than grant absolute protection to either the owner or the acquirer, the use of such open-ended norms¹⁵¹² permits a context-specific allocation of rights and duties between the parties.¹⁵¹³ In many systems bad faith is a vitiating factor, but good faith in itself, whether subjectively or objectively assessed, cannot be described as the principal justification for protecting the buyer. For example, in French law good faith is not explicitly mentioned at all in Art 2276,¹⁵¹⁴ and has sometimes been argued not to be required at all in order to benefit from the article’s protection.¹⁵¹⁵ The DCFR also requires the acquirer to gain actual possession before good faith protection will be available.¹⁵¹⁶

Likewise, in England and Scotland, Section 23 of the Sale of Goods Act 1979 simply confirms that a transfer by a party with a voidable title will be valid unless bad faith is present. Sections 24 and 25 of the Act approach good faith as one factor amongst others (possession on the part of the transferor followed by delivery, both of which were discussed above) which will serve to validate a *prima facie* ineffective transfer. Although the acquirer’s genuine belief in the propriety of the transaction is required, it is not the policy of the Act to provide a general protection for all good faith transferees. It is other factors such as possession which are presumed to have induced some form of reliance; good faith is used to exclude those acquirers who were not, in fact, acting under an honest misapprehension.

¹⁵¹² One term that has been adopted for such incompletely-specified norms is “standards”. For discussion, see A Lehari, “The Dynamic Law of Property: Theorizing the Role of Legal Standards” (2010) 42 *Rutgers Law Journal* 81 at 86.

¹⁵¹³ See for example the flexible approach adopted by the drafters of the DCFR: Faber and Lurger, *Principles* 895. On the necessary “incompleteness” of property rights, see Lehari, “Dynamic Law” 105.

¹⁵¹⁴ It is, however, required under Art 1141.

¹⁵¹⁵ See for example R Poincaré, *Du Droit de Suite dans la Propriété Mobilière* (1883) 122.

¹⁵¹⁶ Art VIII.-2:101 read with art VIII.-3:101.

The understanding of good faith contended for here, then, views its function as primarily provision of flexibility rather than normative force. Although the view of good faith advanced does not provide a neat solution to the *bona fide* purchase problem, it clarifies the conceptual role of good faith in property law doctrine. Notwithstanding the need for stability, it is undesirable for property law rules to prescribe every outcome *ex ante* with complete fixity. The criterion of good faith is therefore an attractive way to allow the particular facts of each case to be taken into account.

E. QUASI-SECURITIES AND GOOD FAITH PROTECTION

(1) Policy Issues: Facilitation of Security versus Publicity

The law regarding good faith acquisition may often have a considerable impact on the security interests of creditors. The law of security is in general outwith the scope of the thesis,¹⁵¹⁷ but, particularly in the case of devices such as retention of title which function as securities, conflicts arise between the application of the *nemo plus* rule and protection of good faith third parties. Such situations require what is in essence allocation of the insolvency risk among various voluntary and involuntary creditors. If legal policy is to promote the availability of security,¹⁵¹⁸ there must be some certainty for the secured party that his or her interest will prevail. One of the reasons for the failure of the Louisiana civil code reform seems to have been the fears of those who wished to hold non-possessory, non-registered quasi-securities over moveables that such securities would be extinguished by sale to a purchaser in good faith.¹⁵¹⁹

However, it is also important to ensure that purchasers are protected from the effect of undisclosed and potentially undiscoverable securities. The only recognised

¹⁵¹⁷ For an overview of the Scottish debates, see Scottish Law Commission, *Moveable Transactions*. For English law, see H Beale *et al.*, *The Law of Security and Title-Based Financing* (2012) chs 13-14.

¹⁵¹⁸ Broadly speaking, this is the approach favoured by the Scottish Law Commission: “Moveable Transactions” ch 12.

¹⁵¹⁹ These fears appear to have been unfounded. See Stroud, “Sale” 60-61.

forms of security over corporeal moveables¹⁵²⁰ have traditionally been publicised by means of the creditor's possession, but devices such as retention of ownership clauses and "sale and leaseback" use ownership as a means of protecting the creditor's interest while leaving possession of the thing with the debtor. A new form of non-possessory security publicised by registration has been suggested by the Scottish Law Commission in their Discussion Paper on Moveable Transactions.¹⁵²¹ According to the Commission, any sale to a buyer in the ordinary course of business should be enough to protect a buyer from the effect of such a security;¹⁵²² buyers would in addition be protected where the existence of the security was not evident from the proposed register.¹⁵²³ The extent to which this proposal would affect the treatment of quasi-securities such as retention of title is not yet clear.¹⁵²⁴

(2) Good Faith Acquisition of Ownership for Security Purposes

Where a creditor attempts to acquire ownership for the purposes of security, should he or she be afforded the same protection as other acquirers in good faith? It was argued earlier that, although possession is only an imperfect means of obtaining publicity, it is reasonable for an acquirer who does not take possession to forfeit good faith protection. So, for example, where property held subject to a retention of title clause is purchased by a creditor and immediately leased back to the debtor, the creditor would not be able to argue that ownership had been acquired in good faith. Where it is clear that the sale and leaseback transaction is intended to function as a security, this approach does not seem problematic. There is in effect a competition between two quasi-securities; as argued earlier, there is no convincing reason as to why preference should be given to the second creditor.¹⁵²⁵ Neither promotion of security nor respect for the publicity principle suggests that the second transaction is more deserving of protection. Where the original owner is not another creditor, for example if borrowed property is sold and leased back to the seller, it appears unjust

¹⁵²⁰ I.e. pledge and lien.

¹⁵²¹ See Scottish Law Commission, "Moveable Transactions" ch 16.

¹⁵²² Scottish Law Commission, "Moveable Transactions" para 16.41.

¹⁵²³ Scottish Law Commission, "Moveable Transactions" paras 16.42-16.43.

¹⁵²⁴ See Scottish Law Commission, "Moveable Transactions" ch 21. The initial position of the Commission is against recharacterisation.

¹⁵²⁵ See ch 4 D(3)(e)(iii).

to prevent the original owner from recovering goods which have remained throughout in the control of the borrower. If the creditor does take delivery of the thing, however, it is difficult to distinguish his or her position from that of any other acquirer.

(3) Conflict between Creditor and Good Faith Purchaser.

The recognition of a particular security right, the scope of the right and the position it gives the holder of that right vis-à-vis other secured and unsecured creditors reflects a balance that must be struck by law makers between the parties involved: debtor, suppliers, credit institutions, unsecured creditors, the treasury etc.¹⁵²⁶ Given the wide use of functional securities such as retention of title, and the current lack of alternative non-possessory securities, to allow debtors to evade their creditors by transferring creditors' goods in their possession to a good faith third party might have detrimental impacts on the provision of credit. It is for this reason that property held on the basis of a conditional sale agreement falling under the Consumer Credit Act 1974 is excluded from the scope of s 25 of the Sale of Goods Act 1979.¹⁵²⁷ Hire purchase transactions are moreover excluded as they are not an "agreement to buy" within the meaning of s 25.¹⁵²⁸

While any future reforms in this area will no doubt consider the need for notification and buyer protection in greater detail,¹⁵²⁹ the current Scots position is not at all satisfactory. Some uncertainty is inevitable surrounding ownership of moveables; acquirers must therefore accept a certain amount of risk. However, the distinction between those transactions which are regulated by the Consumer Credit Act 1974 and those which are not is complex and not easily investigable by potential purchasers. The law in this area has been a source of concern at least since the report

¹⁵²⁶ This point is made by Drobnig, *Divergences* 23-24.

¹⁵²⁷ See SOGA s 25(2). There is of course greater protection for purchasers of motor vehicles in the Hire Purchase Act 1964, see ch 4 D(4)(a).

¹⁵²⁸ See *Helby* (n 740); *Close Asset Finance* (n 1005).

¹⁵²⁹ For an initial overview see Scottish Law Commission, "Moveable Transactions" paras 16.30-16.47.

of the Crowther Committee.¹⁵³⁰ The Diamond Review recommended that all good faith purchasers of property entrusted for the purposes of security should be protected; under proposals in a (later abandoned) Consultative Report on Company Security Interests by the Law Commission for England and Wales buyers in the ordinary course of business would also have been protected against undisclosed security interests granted by the seller.¹⁵³¹

Whether or not recharacterisation of quasi-securities is eventually adopted, it is submitted that greater publicity should be necessary before such arrangements can be enforced against good faith third parties. The balance of risk at the moment is strongly in favour of those extending credit, yet, as is evident from the facts in *Michael Gerson*, the proliferation of undisclosed security interests is also prejudicial to later creditors.

F. PROTECTION BASED ON THE NATURE AND CONTEXT OF THE TRANSACTION

(1) Characteristics of the Transaction

In contrast to the focus so far on the actions of the persons involved in the relevant transaction, reference to external circumstances is consonant with an approach concerned with the broader social effects of market regulation.¹⁵³² It was seen in Chapter 4 that in relation to sections 21-25 of the Sale of Goods Act there is currently no (explicit) restriction that the seller should regularly engage in sale in the class of thing sold, or that the sale was in the ordinary course of business. Other jurisdictions such as Germany,¹⁵³³ France¹⁵³⁴ and the Netherlands¹⁵³⁵ recognise a

¹⁵³⁰ See *Consumer Credit* para 4.2.8.

¹⁵³¹ Diamond, *Review 77*; *Company Security Interests: A Consultative Report*, Law Commission Consultation Paper no 176 (2004) at 3.253-3.263, discussed by L Gullifer, "Exceptions to the Nemo Dat Rule in Relation to Goods and The Law Commission's Proposals", in J de Lacy (ed), *The Reform of UK Personal Property Security Law* (2010) 188. The English proposals included recharacterisation of existing quasi-securities.

¹⁵³² This is noted by Salomons, "Economics" 206.

¹⁵³³ § 935(2) BGB allows good faith acquisition of lost or stolen things that are alienated by way of public auction or in an public auction conducted online pursuant to § 979 (1a) BGB.

“market overt” style rule protecting all acquirers in particular markets, even in the case of stolen goods.

From the point of view of the buyer, these formulations are valuable in clarifying the level of security that can be expected in the relevant context. If furtherance of trade is genuinely the most important justification for favouring the *bona fide* purchaser, it follows these protections should be structured so as to benefit those who transact in accordance with the norms of commercial life. As has been seen, this has implications for the standard of good faith adopted, but inferences might also be drawn about the situations in which it is most important that acquirers should be protected. Several different potential bases can be suggested for identifying the relevant transactions.

(a) Geographical location

Under the market overt rule in English law the transactions protected were defined spatially, by reference to them having taken place within a particular local market. This approach faced numerous cogent criticisms,¹⁵³⁶ a particular problem being delineation of the markets affected. In modern urban centres, it is less easy to geographically isolate the focal points of trade; indeed, a substantial number of sales are concluded in homes using the internet or telephone. The anonymity of urban life means that even sale at a public market stall no longer provides much added publicity. To attempt to draw up a list of all locations requiring protection would be time consuming and complex,¹⁵³⁷ and would require buyers to be aware of and able to easily utilise this information. It could also make it attractive for thieves and

¹⁵³⁴ See Art 2277 (formerly 2280) Code Civil, which provides that where a lost or stolen thing is bought at a fair, market or public sale an owner must reimburse the possessor the price that he or she has paid in order to recover it.

¹⁵³⁵ Art 3:86 (3a) Burgerlijk Wetboek provides that, where a stolen object is acquired by a natural person acting in a private (non-trade or business) capacity from a transferor who sells such objects regularly to the public using business premises destined for that purpose and who is acting in the ordinary course of business, the original owner will not be able to recover the item. The only exception is where the transferor is an auctioneer.

¹⁵³⁶ Mentioned in ch 4 E(2)(b).

¹⁵³⁷ For some of the complexities attendant on the definition of market overt, see the overview provided by Davenport and Ross, “Market Overt”.

fraudsters to target particular locations,¹⁵³⁸ although traders at the markets identified would presumably be expected to take extra precautions against these risks. Overall, geographical location is no longer a helpful means of distinguishing between transactions.¹⁵³⁹

(b) “Ordinary course of business” transactions and consumer protection

An alternative way of recognising the importance of certain commercial and business settings is the adoption of a broad protection for those who buy in the “ordinary course of business”. A crucial question is of course how the “ordinary course of business” would be defined. The core idea seems to be compliance with the establish norms and practices of the market in question. Like good faith rules, depending on how restrictively such a criterion was interpreted a high amount of flexibility could be incorporated.

Prima facie, this approach relies on the existence of regulated and well-functioning markets. However, it does not necessarily depend on the idea that legitimate businesses are likely to be regulated or supervised by the state so as to prevent fraud and theft.¹⁵⁴⁰ The drafters of the DCFR argue that stolen goods are simply unlikely to be sold in the ordinary course of business; acquirers can trust a legitimate business in the vast majority of cases.¹⁵⁴¹ An “ordinary course of business” rule aims therefore to protect this lawful trade while excluding irregular and informal markets.

These assumptions can, however, be questioned. There is evidence that, at least in the UK, stolen goods are frequently sold to legitimate businesses.¹⁵⁴² Moreover, according to a (relatively) recent Home Office Report, a substantial percentage (around 20%) of goods such as bicycles, laptops and other electronic

¹⁵³⁸ Prevention of theft was, of course, cited as one of the principal reasons for the abolition of the market overt rule, see ch 4 E(2)(b).

¹⁵³⁹ A similar conclusion is reached by the drafters of the DCFR: Lurger and Faber, *Principles* 899.

¹⁵⁴⁰ Lurger and Faber, *Principles* 899-900.

¹⁵⁴¹ Lurger and Faber, *Principles* 900.

¹⁵⁴² In one study, 78% of the thieves sampled disposed of stolen property to legitimate business owners: J L Schneider, “Stolen-Goods Markets: Methods of Disposal” (2005) 45 *British Journal of Criminology* 129 at 137.

equipment are purchased second hand or informally.¹⁵⁴³ An “ordinary course of business” approach that excluded these markets would therefore leave many buyers unprotected.¹⁵⁴⁴

A more persuasive justification is that those acting in the ordinary course of business should, for purely objective reasons, be allowed to rely on the apparent propriety of their actions. If the aim of protecting purchasers is genuinely to favour commerce, then it is entirely logical to delineate the scope of protection by reference to legitimate commercial transactions. Unlike good faith, which does not necessarily provide a clear reason for preferring acquirer over original owner, protection of purchasers in the ordinary course of business openly favours those who consume.¹⁵⁴⁵ While its actual effectiveness in increasing economic activity can be questioned, an “ordinary course of business” rule would send a clear message about the category of people that the law wishes to protect.

A limited version of this argument would focus on consumers: where an individual consumer is transacting with a seller operating in the ordinary course of business, it is assumed that there will often be an imbalance in economic power and ability to access information regarding the ownership of goods.¹⁵⁴⁶ One possible approach would be to give full protection to any parties purchasing as a consumer.¹⁵⁴⁷ As many purchasers of lower-value moveables may be unaware of the rules regulating property rights in stolen or embezzled goods, this might well be in line with consumer expectations.¹⁵⁴⁸ It could be argued that there is currently a greater need to protect consumers against the risk of buying stolen property, which is not covered by the protections in the Sale of Goods Act 1979.

¹⁵⁴³ A Finney and D Wilson, “Handling stolen goods: findings from the 2002/03 British Crime Survey and the 2003 Offending, Crime and Justice Survey” *Home Office Online Report* 38/05 at 13-14.

¹⁵⁴⁴ Smith, *Property Problems* 187.

¹⁵⁴⁵ Ordinary course of business-based rules are thus not, as Atiyah, *Sale* 379-380 suggests, simply interchangeable with good faith-based protection.

¹⁵⁴⁶ Consumer protection is highlighted by Ulph, “Conflicts” para 5-011 as one of the main concerns in this area.

¹⁵⁴⁷ This was one possibility suggested by the DTI in “Transfer of Title” para 5.3.

¹⁵⁴⁸ For a recent example of the confusion surrounding the law in this area, see M Brignall, “I paid £4,800 cash for a car that turns out not to be mine” *The Guardian*, Aug 1st 2014.

An obvious initial difficulty would be the definition of “consumer” and “consumer goods”.¹⁵⁴⁹ One possibility would be link good faith acquisition to the other protections available under the proposed Consumer Bill of Rights.¹⁵⁵⁰ This might well, however, lead to uncertainty and increased litigation over borderline cases. There are further problems with the notion that a consumer is necessarily more worthy of protection than a business seller. The drafters of the DCFR have criticised a simple consumer/ business distinction as crude.¹⁵⁵¹ Both categories of buyer may have acted entirely properly and in accordance with appropriate commercial norms. While commercial acquirers may often be better equipped to deal with risks, smaller businesses in particular might also benefit from increased protection. To bar business purchasers from good faith protection might even encourage risky or unlawful behaviour on the part of businesses, which would have no incentive to adopt a “best practice” approach.

(c) Sales in which the state is involved.

Public sales or auctions¹⁵⁵² are cited specifically in the French and German provisions mentioned above as providing increased protection to purchasers.¹⁵⁵³ Is there a need for a clearer rule protecting purchasers in situations such as judicial sales and public auctions in Scotland?¹⁵⁵⁴ Although the English market overt rule was justifiably criticised as anachronistic, in these contexts it is not unreasonable for the public to expect a state guarantee of ownership. Particularly where the state has overseen the confiscation of moveables, for example through the use of diligence or the impounding of stolen property the original owner of which cannot be identified, an acquirer might expect to rely on the correct procedures having been followed. Such persons transact on the faith of the authority of state officials and perhaps judicial sale, by protecting the interests of creditors, provides public benefit. In

¹⁵⁴⁹ As Davies points out, some types of property such as motor vehicles may be used for both personal and business purposes and are difficult to classify as “consumer goods”: “Ostensible Ownership” 215.

¹⁵⁵⁰ See HL Bill 29 2014-15 and also the EU Consumer Rights Directive (2011/83/EU).

¹⁵⁵¹ Lurger and Faber, *Principles* 900.

¹⁵⁵² Used here the sense of an auction in which the property to be auctioned is either owned by the state, or sold under the authority of the state.

¹⁵⁵³ See Art 2277 Code Civil and § 935(2) BGB.

¹⁵⁵⁴ There is already some statutory protection for purchasers of lost and abandoned or stolen property disposed of by the police: Civic Government (Scotland) Act 1982 ss 71; 72; 86E.

Gladysheva v Russia, the fact that the state was involved and could have taken action to prevent the fraud was one of the factors that persuaded the ECtHR that a good faith acquirer required some kind of legal protection.¹⁵⁵⁵

The drafters of the DCFR point out, however, that, depending on the procedure adopted, it is by no means the case that a state-backed confiscation should be taken to indicate adequate investigation of the origin of the goods.¹⁵⁵⁶ Nor do the circumstances of such sales necessarily give the owner a better chance of detecting and recovering the goods.¹⁵⁵⁷ Why, therefore, should purchasers be more entitled to trust in an acquisition made in such contexts?

In the end, perhaps no general rule covering all circumstances is possible. In relation to judicial sales in Scotland, statutory clarification of the situation would be desirable. In deciding whether any form of compensation should be available to the original owner, human rights considerations¹⁵⁵⁸ suggest that proportionality will only allow deprivation of property without compensation where there is a very clear public interest and following a well-defined legal process. The position in cases where there is state involvement, however, provides limited assistance in relation to the more general problem of unauthorised transfer.

(2) Type of Property Involved

(a) Motor vehicles

(i) Standard of good faith

Further to the discussion of the Hire Purchase Act 1964 in Chapter 4, it seems worthwhile to consider whether there are any factors particular to the motor vehicle market which might suggest the need for special provision. Such property is obviously mobile and often high value, there is a thriving second hand market (so it is therefore attractive to steal) and vehicles are moreover routinely subject to quasi-

¹⁵⁵⁵ See A(2)(b) above.

¹⁵⁵⁶ Lurger and Faber, *Principles* 899.

¹⁵⁵⁷ Lurger and Faber, *Principles* 900.

¹⁵⁵⁸ See A(2)(b) above.

security devices separating possession and ownership such as hire purchase. This may have implications for the behaviour demanded of a good faith acquirer: the more valuable the property concerned, the greater investigations might reasonably be expected.¹⁵⁵⁹ A stricter standard of good faith would benefit finance company owners and perhaps reduce the risk to purchasers of acquiring a stolen vehicle.

It has been mentioned that, although there must be subjective honesty on the part of a purchaser, Scots law does not currently place any obligation on the purchaser to conduct any particular checks or enquiries. Vehicle registration documents are not evidence of ownership and do not have any private law function as “documents of title”.¹⁵⁶⁰ It is possible that sale without the registration documents may be enough to raise suspicion and suggest that further investigation should be undertaken.¹⁵⁶¹ However, a hire purchase agreement may not be listed on the vehicle registration document. Even knowledge of a prior hire purchase agreement does not constitute notice that such an agreement remains in force.¹⁵⁶²

In German law, it seems that the good faith requirements operate in a stricter manner in regard to sales of motor vehicles. When acquiring a second-hand vehicle, it is expected that the Kraftfahrzeugbrief (vehicle registration document) will be presented, and (unlike the current UK registration document),¹⁵⁶³ this allows the buyer to verify the identity of the person authorised to transfer the vehicle.¹⁵⁶⁴ Possession alone does not create the requisite legal appearance necessary for good

¹⁵⁵⁹ See Davies, “Sales Law” 26 citing Discussion Papers by the Law Reform Commissions of Queensland and Victoria.

¹⁵⁶⁰ See ch 4 D(4(a)).

¹⁵⁶¹ See n 1058.

¹⁵⁶² *Barker* (n 1055).

¹⁵⁶³ There has been harmonisation of vehicle registration documents within the EU: see Directive 1999/37/EC. The UK fulfils its obligations under the directive by the inclusion of a statement that the registration document does not identify the owner of the vehicle. See Annex 1 part V C.4. The German registration certificate, although it does not function as a document of title (and hence, like the UK document, states that the holder of the registration certificate is not identified as the owner) nevertheless identifies the person who is entitled to dispose of the vehicle. The UK document only records the “keeper” of the vehicle, who is the person responsible for the vehicle’s licensing and day to day use on the road and who is answerable to the police and other enforcement authorities in respect of e.g. motoring and parking offences.

¹⁵⁶⁴ See BGH 1st March 2013, V ZR 92/12 para 14 (a case in which false registration documents were used).

faith acquisition.¹⁵⁶⁵ If the vehicle registration document is not presented, there will be gross negligence such as would fall within the scope of § 932(2) BGB and operate to exclude acquisition. A private sale, or a sale from a dealer where there are any circumstances which arouse suspicion, will place a duty on the buyer to investigate the title further. French law is to a similar effect: possession of a vehicle without delivery of the registration document (or at least checking that it is in the seller's possession) is treated as equivocal and insufficient for acquisition under Art 2276.¹⁵⁶⁶

On the basis of current UK registration documents, there is no simple way for a buyer in the UK to investigate ownership of a vehicle. Checks can be conducted with HPI Ltd, a private company which contains data on most thefts and hire purchase agreements. This information may, however, be incomplete or outdated. The cost of a search is at present £19.99 for a single vehicle.¹⁵⁶⁷ To require a check to be conducted with HPI Ltd as a condition of good faith does not seem overly onerous financially, but forcing all purchasers to pay for a privately run service is problematic. There is no indication that there currently any plans to do this. It seems, therefore, that there is limited potential for onerous good faith obligations to play a greater role in identifying stolen and embezzled vehicles.

(ii) Registration systems and availability of information

Some have argued that the use of documents of title to further negotiability of certain types of moveable property indicates the increasing importance that will be attached to recording systems in transfer of title.¹⁵⁶⁸ The Hire Purchase Act 1964 was felt to be necessary in order to alleviate hardship to the purchaser. Introduction of a form of registration system linked to a unique identifier such as the Vehicle Identification Number has been argued to provide the best solution to the remaining problems in

¹⁵⁶⁵ BGH 13th May 1996 II ZR 222/95, approved BGH 1st March 2013, V ZR 92/12. See also BGH 13th Sep 2006 VIII ZR 184/05.

¹⁵⁶⁶ *Cour de Cassation* 30th October 2008, Bulletin 2008, I, n° 242. A photocopy of the registration documents along with other proof of ownership may also be sufficient: *Cour de Cassation* 8th November 2007, no 06-20095. The French registration certificate contains a statement as to whether the holder (*titulaire*) of the registration certificate is the owner.

¹⁵⁶⁷ See https://www.hpcheck.com/hpi_check.html.

¹⁵⁶⁸ Kozolchyk, "Transfer" 1511-1512.

verifying ownership of vehicles.¹⁵⁶⁹ In respect of undisclosed quasi-securities such as hire purchase agreements, some registration systems record only the existence of these securities whereas others purport to record ownership; it is not at the moment proposed that a system recording the ownership of vehicles be introduced in Scotland.¹⁵⁷⁰ The Scottish Law Commission has published a Discussion Paper covering security over corporeal moveable property such as motor vehicles which suggests the introduction of a new non-possessory security over corporeal moveables based on a registration system.¹⁵⁷¹ This might prove an important development: it would be reasonable to require dealers or buyers from private individuals to search a public register in order to be protected against any undisclosed securities.

As regards other developments in vehicle registration and licensing, the motor vehicle finance industry has been reluctant to introduce a more comprehensive recording system.¹⁵⁷² Liquidity is important in the car market; anything which might discourage buyers is thus a matter of concern. Reducing the cost to the buyer (thus encouraging ever more sales) is more important than increasing the amount of information that might be available. It seems unlikely that the protection afforded to purchasers by the Hire Purchase Act 1964 will be amended in the near future. In the absence of a change of practice in vehicle registration or the imposition of a duty to check with HPI Ltd (along with a duty to register in order to obtain protection), it will remain difficult for buyers of motor vehicles to conduct any meaningful investigation into the ownership of the vehicle. This, in turn, leaves owners (whether private individuals or finance companies) facing a slightly higher risk that their right will be lost to a purchaser in good faith.

(iii) Do purchasers need greater protection?

One problem with the current law is that consumers are protected if buying a hire purchase vehicle in good faith, but, although it may be equally difficult for a buyer to discover whether a vehicle has been stolen or embezzled, in that case the acquirer

¹⁵⁶⁹ See Davies, "Wrongful Dispositions" 485-486.

¹⁵⁷⁰ Scottish Law Commission, "Moveable Transactions" para 20.7.

¹⁵⁷¹ See Scottish Law Commission, "Moveable Transactions" chs 16 and 20.

¹⁵⁷² Such as that in New Zealand, see M Gedye, R C C Cuming and R J Wood, *Personal Property Security in New Zealand* (2002) part 6.

faces quite a severe financial loss.¹⁵⁷³ There is an ongoing problem with “cloned” stolen vehicles: it may be impossible for a buyer, even one who runs proper checks, to discover that a vehicle has been stolen and the number plates etc. replaced.¹⁵⁷⁴ The DVLA system is currently paper-based and not designed to detect vehicle crime.¹⁵⁷⁵ The lack of systems integration across the DVLA, insurance companies, servicing organisations and Vehicle and Operator Services Agency (VOSA) prevents cloned and stolen vehicles from potentially being identified.¹⁵⁷⁶

Within the scope of the current research it is difficult to say with certainty what would be the most desirable policy position. It is, at first glance, tempting to argue that purchasers should be protected against all risks, not simply those relating to undisclosed hire purchase contracts. Particularly if a vehicle is presented with forged registration forms, penalising the acquirer will not encourage him or her to make any further enquiries or otherwise operate to reduce the trade in stolen and embezzled vehicles. Given the emphasis on liquidity in the car market, it is perhaps surprising that increased protection has not been demanded. This may be due to a lack of public awareness or low numbers of stolen vehicles being traced, but it supports the view that the availability of extensive good faith protection may well be unimportant in terms of facilitation of commerce. A further complexity is added by the fact that it may often be insurers who, through their right of subrogation, seek to recover the stolen vehicle.¹⁵⁷⁷ Although undoubtedly insurers are not interested in recovery of the physical vehicle, but rather only its economic value, to deny insurers the possibility of some form of recovery would presumably lead to an increase in the cost to the public of car insurance. Further research on the attitudes of purchasers, insurers and other interested parties is necessary to ascertain the most appropriate rule.

¹⁵⁷³ Unless, of course, one of the exceptions in the Sale of Goods Act 1979 applies.

¹⁵⁷⁴ For a narrative describing how this type of theft operates, see Design Council UK, *Vehicle-Related Crime* at 13.

¹⁵⁷⁵ Design Council UK, *Vehicle-Related Crime* 26.

¹⁵⁷⁶ Design Council UK, *Vehicle-Related Crime* 27.

¹⁵⁷⁷ For example, the plaintiffs in *National Employers* (n 949) were the insurers of the car’s original owner. The fact that protection for original owners often benefits insurers is highlighted by Ulph, “Conflicts” para 5-011.

A further gap in the current law is the lack of protection for trade and finance purchasers of vehicles subject to an undisclosed prior hire purchase agreement.¹⁵⁷⁸ According to the idea, discussed in relation to “ordinary course of business” arguments, that those who engage in legitimate economic activity should be safeguarded against certain risks, a dealer acting in accordance with commercial custom should be equally worthy of protection. On the other hand, those who profit most from the maintenance of market liquidity should perhaps be required to bear a greater share of the risk. Lord Denning in *Pearson v Rose & Young Ltd* suggested that a dealer in motor cars, who made substantial (and quick) profits from their resale, should be prepared to “occasionally get[] his fingers burnt.”¹⁵⁷⁹ No simple reconciliation of these arguments is possible, but any future reforms should, at minimum, adopt an approach to the business purchaser which is consistent across all types of moveable property, with the possible exception of objects of cultural or artistic importance.

(b) “Cultural property”

Although the topic can only be explored briefly here, there are several reasons for affording greater protection to owners of objects of recognised cultural value, such as art and antiquities. It is commonly accepted that a prolonged art market boom has led to increased demand for many types of cultural property.¹⁵⁸⁰ This has in turn raised concerns about the trade in stolen and illegally excavated or exported objects and tensions at the international level, where there is a political divide between so-called “art rich” and “art poor” nations.¹⁵⁸¹

¹⁵⁷⁸ See ch 4 D(4)(a).

¹⁵⁷⁹ n 757 at 290.

¹⁵⁸⁰ According to a study by Arts Economics for the European Fine Art Foundation, the global art market has more than doubled in size in 25 years: C McAndrew, *The International Art Market in 2011: Observations on the Art Trade over 25 Years* (2011), available at http://www.tefaf.com/media/tefafmedia/TEFAF%20AMR%202012%20DEF_LR.pdf at 64.

¹⁵⁸¹ See generally N Passas and B Bowman Proulx, “Overview of Crimes and Antiquities”, in S Manacorda and D Chappell (eds), *Crime in the Art and Antiquities World* (2011) 51. On looted and illegally excavated antiquities, see S R M Mackenzie, *Going, Going, Gone: Regulating the Market In Illicit Antiquities* (2005) 10-21. The UK position is discussed in Association of Chief Police Officers, *Heritage and Cultural Property Crime: National Strategic Policing Assessment 2013*, available at <http://www.acpo.police.uk/documents/crime/2013/201311-cba-heritage-cult-prop-strat-assmnt.pdf>. The value of stolen art and antiquities in the UK alone is estimated to be over £300 million annually: *ibid* at 13.

The main problem with establishing a special rule for cultural objects is determining to which property the rule applies.¹⁵⁸² Full discussion of possible definitions is outwith the scope of the present thesis, but an initial overview drawing on relevant international and EU law (discussed below) can be found in the work of the Scottish Law Commission¹⁵⁸³ and the DCFR.¹⁵⁸⁴ For reasons of certainty, it would be desirable to designate items of great national or cultural significance in advance. This might be possible, but is logistically difficult and, on an international level, might be expensive or impossible for some source nations.

(i) Non-economic value

In contrast to other moveables, increased scrutiny of provenance may be appropriate and desirable in the art market; the social and cultural significance of this type of property makes it particularly clear that economic goals are not the only concerns relevant to legal policy. It is difficult to capture the “value” of heritage preservation in solely monetary terms.¹⁵⁸⁵ In terms of some artefacts deemed to be of cultural significance, there may be an argument that good faith acquisition should be excluded entirely or even that the property should be deemed *extra commercium*.¹⁵⁸⁶

¹⁵⁸² The difficulties of reaching an adequate definition of “cultural property” are discussed in the Scottish Law Commission’s report on *Prescription* at paras 3.16-3.20; the Commission in the end reached the view that cultural property should be subject to the same period for positive prescription as other moveables.

¹⁵⁸³ Discussion Paper on *Prescription and Title to Moveable Property* (Scot Law Com DP No 144, 2010) Part 4.

¹⁵⁸⁴ Lurger and Faber, *Principles* 999-1000.

¹⁵⁸⁵ See D Fincham, “Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities” (2010) 37 *Syracuse Journal of International Law & Commerce* 145 at 173-177.

¹⁵⁸⁶ See for example the arguments made during legal debate over the recent controversial sale in France of masks belonging to the Hopi people, noted by A Greenberg, “Update: Amid Protests of the Hopi Nation and Supporters, Auction of Sacred Artifacts Proceeds in Paris.” Available at <http://www.itsartlaw.com/2013/04/update-amid-protests-of-hopi-nation-and.html>. In Italian law, for example, assets which are part of the “*demanio pubblico*” (public domain) such as paintings in state museums and galleries are deemed inalienable: Codice Civile Art 823. Compare, however, the “internationalist” view that a restrictive, nationalist approach to ownership of cultural artefacts does not reflect its importance to the whole of humanity, and that a regulated market in cultural property is desirable. See further J H Merryman, “A licit international trade in cultural objects” (1995) 41 *International Journal of Cultural Property* 13; J M Podesta, “Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations” (2008) 16 *Cardozo Journal of International & Comparative Law* 457. Merryman does, however, accept that there are some objects which should be what he describes as “culturally immovable”, *ibid.* at 23.

It is perhaps for these reasons that the DCFR excludes cultural goods from the scope of the provisions on good faith acquisition of stolen property.¹⁵⁸⁷

As regards the broader idea of sentimental attachment to art, and the possibility that this might imply an unusually strong bond between object and original owner,¹⁵⁸⁸ despite the initial attractions of giving preference to those who can demonstrate sentimental attachment such an approach would seem likely to produce too much uncertainty.

(ii) “Provenance” and availability of information

Making information about property rights in cultural objects available through a register or database reduces the need to protect acquirers against prior theft or embezzlement. Development of databases could play a crucial role in combatting trade in illicit art.¹⁵⁸⁹ Works of art and other cultural objects might be thought to be more suitable for inclusion in such a system than other moveables: they are more readily identifiable than other forms of property, and often have unique individual characteristics. This is, however, not always the case.¹⁵⁹⁰ The extent to which information about provenance is sought by or available to buyers may in addition be limited.¹⁵⁹¹ Although it might be expected that dealers in valuable and unique objects would take care to investigate the origin and history of an acquisition, some may, in practice, not investigate.¹⁵⁹²

¹⁵⁸⁷ DCFR Art VIII.-3:101(2), read in conjunction with VIII.-4:102. The drafters’ discussion states that ownership of cultural property is worthy of stronger protection, but does not explain in detail why this is the case: Lurger and Faber, *Principles* 900.

¹⁵⁸⁸ For an interesting exploration of the broader rhetoric surrounding art and cultural objects, see A Glass, “Return to Sender: On the Politics of Cultural Property and the Proper Address of Art” (2004) 9 *Journal of Material Culture* 115.

¹⁵⁸⁹ See J S Ulph and I Smith, *The Illicit Trade in Art and Antiquities* (2012) 259-262; D L Carey Miller, “Title to Art: Developments in the USA” (1996) 1 *SLPQ* 115.

¹⁵⁹⁰ L M Kaye, “The Future of the Past: Recovering Cultural Property” (1996) 4 *Cardozo Journal of International & Comparative Law* 23 at 26-31, citing *Kunstsammungen zu Weimar v. Elicofon* 678 F.2d 1150 (2d Cir. 1982) in which a potential argument was that the paintings a museum had formerly possessed and sought to recover were fakes, while the defendant had acquired the originals. See also R Dorment, “What is a Warhol? The Buried Evidence” (2013) 60 *New York Review of Books* on the problems of authentication surrounding Andy Warhol’s works.

¹⁵⁹¹ Mackenzie, *Regulating* 34-26.

¹⁵⁹² Mackenzie, *Regulating* 27-29.

In the absence of a more integrated approach to information sharing, it may still be appropriate to impose increased information costs upon dealers due to the social harm created by illegal trade. This is in contrast to other categories of moveables in which a liquid market and quick and easy purchase is a greater priority. It is important both for appreciation of the objects and to ensure their legitimate acquisition that a full history of the origin and previous owners of works of art and antiquities is provided.¹⁵⁹³ For example, it was commented in one US case that:

The [purchaser's] claim that the failure to look into [the seller's] authority to sell the painting was consistent with the practice of the trade does not excuse such conduct. This claim merely confirms the observation of the trial court that "in an industry whose transactions cry out for verification of ... title ... it is deemed poor practice to probe". Indeed, commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art. Commercial indifference diminishes the integrity and increases the culpability of the apathetic merchant.¹⁵⁹⁴

(iii) Standards of good faith

Should a different standard of good faith apply to acquisitions of cultural property? Although the general concept of good faith discussed earlier remains relevant, there is a possible role for the development and use of museum acquisitions guidelines in ascertaining good faith,¹⁵⁹⁵ as well as industry codes of practice.¹⁵⁹⁶ It may moreover

¹⁵⁹³ Fincham, "Rigorous Standard" at 205.

¹⁵⁹⁴ *Porter v. Wertz*, 416 N.Y.S. 2d 254 (1979). See also *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990), where it is noted that art dealers can (and should) take steps to protect themselves such as "a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like." For a case comment highlighting the importance of this duty of consultation, see Q Bryne-Sutton, "The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects" (1992) 1 *International Journal of Cultural Property* 151 at 164-165.

¹⁵⁹⁵ For the UK position, see Ulph and Smith, *Illicit Trade* 190-193. On the role of museum acquisition guidelines in the U.S., see D DeMott, "Artful Good Faith: An Essay on Law, Custom and Intermediaries in Art Markets" (2012) 62 *Duke Law Journal* 607 at 638-642 and J A Kreder, "The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities", (2012) 64 *University of Miami Law Review* 997. In relation to the US, Canada and Mexico, see the standards published by the Association of Art Museum Directors, available at <https://aamd.org/>. For criticism, see N Brodie and C Renfrew, "Looting and the World's

be appropriate for more onerous obligations to be placed upon certain categories of people: well-resourced auction houses can afford to undertake more extensive investigations into provenance.¹⁵⁹⁷

Unlike in respect of other moveables, purchasers of cultural property will in many cases have a means of guarding against the risk of loss. The development of title insurance for valuable art works also provides further scope for well-resourced buyers to protect themselves from the risk of loss.¹⁵⁹⁸

A serious problem with reliance on investigation by the purchaser is that fear of driving thieves “underground” appears to sometimes deter owners of stolen artworks from reporting thefts.¹⁵⁹⁹ Moreover, although private means of title investigation may be available (such as the Art Loss Register), should the state compel purchasers to utilise these private databases (which may, as in the case of Hire Purchase Information, often be incomplete or even inaccurate)?

Overall, the great social and historical importance of some cultural objects means that it is important to provide incentives for the buyer to conduct a full investigation. Should good faith acquisition be excluded in the case of (appropriately

Archaeological Heritage: The Inadequate Response” (2005) 34 *Annual Review of Anthropology* 343, citing the case of the Lydian treasure. (On this case, see A Chechi, *et al.*, “Case Lydian Hoard – Turkey and Metropolitan Museum of Art,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.)

¹⁵⁹⁶ For codes regulating the activities of dealers and auction houses in the UK see Ulph and Smith, *Illicit Trade* 193-194.

¹⁵⁹⁷ In *Tony Shafrazi Gallery, Inc. v Christie's Inc.* 2011 NY Slip Op 33059(U) (see also 2012 NY Slip Op 09184), purchasers (unsuccessfully) sued Christie’s auction house for fraud after being sold a fake Jean-Michel Basquiat painting. On appropriate standards for a buyer of art in the ordinary course of business, see DeMott, “Good Faith” at 629-632, discussing *Lindholm v. Brant* 925 A.2d 1048.

¹⁵⁹⁸ See K Minyard, “Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art” (2007) 43 *Texas International Law Journal* 115 at 132-134; A Gregor, “The latest work of insurance” (2008) *Financial Times* 17th May.

¹⁵⁹⁹ See for example *Solomon R. Guggenheim Foundation* (n 1483) at 315-316, in which the Guggenheim museum claimed that it was a “tactical decision” not to inform other museums and galleries or the police or other law enforcement authorities that a work by Chagall had been stolen from them in case the thieves were driven underground. This point is noted by S F Grover, “The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study” (1992) 70 *Texas Law Review* 1431 at 1436-1437. For a further example, see Landes and Posner, “Economics” at 35.

defined) cultural property, a good compromise might be a rule entitling those who carry out due diligence to compensation.

(iv) International dimensions

Regulation of ownership of “cultural heritage” also involves a significant international dimension. Although problems of private international law are not discussed in any detail, it seems that there is a pressing need for harmony between jurisdictions to prevent “laundering” of valuable artworks. An excellent example is the *Winkworth v Christie's*¹⁶⁰⁰ case, in which Japanese artwork was stolen in England, taken to Italy where it was legitimately acquired in accordance with Italian law, then brought back to England.¹⁶⁰¹ It was eventually held that a valid acquisition under Italian law was sufficient for the acquirer’s ownership to be recognised in England. The abuse of good faith acquisition rules certainly takes place.¹⁶⁰² Contrary to this though, it can also be said that increased protection for original owners does not seem to have made much difference to the functioning of the art market in, for example, America and the availability of stolen or illicitly obtained works.¹⁶⁰³

There have been a number of international conventions seeking to control the illicit trade in cultural property.¹⁶⁰⁴ Interesting questions are raised about the respective roles of public and private law, the restoration of stolen art may represent an act of both public and private justice.¹⁶⁰⁵ In *Islamic Republic of Iran v Barakat*

¹⁶⁰⁰ [1980] Ch 496.

¹⁶⁰¹ On choice of law issues, see further L Frey, “Bakalar V. Vavra and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property” (2012) 112 *Columbia Law Review* 1055.

¹⁶⁰² The Scottish Law Commission quotes Julian Radcliffe of the Art Loss Register as commenting that “there is ample evidence of criminals moving stolen art to those countries where the law favours a good faith purchaser with a short limitation period.” Report on *Prescription* para 3.15.

¹⁶⁰³ R M Collin, “The Law and Stolen Art, Artifacts and Antiquities” (1993) 36 *Howard Law Journal* 17 at 40.

¹⁶⁰⁴ For example the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954. This set out the first clear definition of the term “cultural property.” See further C Forrest, *International Law and the Protection of Cultural Heritage* (2010).

¹⁶⁰⁵ See F Francioni, “Public and Private in the International Protection of Global Cultural Goods” (2012) 23 *European Journal of International Law* 719 at 724. One example is the restitution of art looted and stolen by the Nazis, on which see further K D Walton, “Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art” (1999) 9 *Fordham Intellectual Property Media & Entertainment Law Journal* 549.

Galleries,¹⁶⁰⁶ an unsuccessful attempt was made to argue that Iran's claim to illegally exported antiquities was in reality an attempt to enforce Iran's penal or public law. Although the point will not be explored further here, public as well as private international law can also play a role in bridging the gap between differing national laws. Although the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹⁶⁰⁷ has often been criticised,¹⁶⁰⁸ it can also be said to have laid the foundations for international efforts to eliminate the trade in stolen and unlawfully obtained cultural assets.¹⁶⁰⁹

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects proposes a rule favouring original owners of stolen objects,¹⁶¹⁰ with a right to compensation for those who have conducted due diligence.¹⁶¹¹ Its provisions would apply to private persons as well as public institutions. The Convention has currently only been ratified by thirty three states, with important art-trading nations such as the United States, Japan, France, Germany and the UK not having done so.¹⁶¹² Among the reasons cited for the refusal by France and Germany to ratify the treaty is incompatibility with the protection of good faith in their respective civil codes.¹⁶¹³ Although in terms of adoption by states, the Convention cannot (yet) be

¹⁶⁰⁶ [2007] EWCA Civ 1374.

¹⁶⁰⁷ Paris, 14 November 1970. The Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972 is also important in emphasising commitment to protection of cultural heritage.

¹⁶⁰⁸ See for example Podesta, "Saving Culture"; J N Lehman, "The Continued Struggle with Stolen Cultural Property" (1997) 14 *Arizona Journal of International & Comparative Law* 533 at 543. .

¹⁶⁰⁹ For an evaluation of the Convention, see Forrest, *International Law* 195-196.

¹⁶¹⁰ Art 3(1). Unlawfully excavated cultural objects may also, in accordance with national laws, be considered stolen: art 3(2).

¹⁶¹¹ Art 4(1)

¹⁶¹² List of state parties to the Convention, available at <http://www.unidroit.org/english/implement/i-95.pdf>.

¹⁶¹³ For France, see C Hershkovitch, "Causes and consequences of the absence of ratification by France of the 1995 UNIDROIT Convention", paper delivered to the Special Committee to review the practical operation of the 1995 UNIDROIT Convention on 19th June 2012, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1meet-120619/pres-speakers/hershkovitch.pdf>. For Germany, see response of Germany to a questionnaire on the practical application of the Convention (2012), available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1meet-120619/answquest-ef/germany.pdf>.

considered successful, it has been argued that it has had an impact on practices in the art and antiquities markets.¹⁶¹⁴

In the European context, the Return of Cultural Objects Regulations 1994 which implement Council Directive 93/7/EEC are also relevant. These regulations provide for court-ordered removal from the possessor and the return of certain categories of cultural objects which have been unlawfully removed from another member state. Ownership after return is governed by the law of the requesting member state.¹⁶¹⁵ If the possessor exercised due care and attention in acquiring the object, there is a right to compensation. In jurisdictions which recognise good faith acquisition, such as the Netherlands, an exception is required to the normal rule to allow the property to be removed from an owner.¹⁶¹⁶

It is submitted that these international developments add to the arguments already outlined for regulating acquisition of “cultural property” separately from other corporeal moveables.

G. CONCLUSIONS

This chapter began by considering the international context for future developments in the law relating to unauthorised transfer of moveables. It was argued that the ECHR and EU jurisprudence does not help to identify any single obvious solution to the problem of good faith acquisition; there are coherent justifications for protecting both original owners and *bona fide* purchasers. However, it is certainly the case that clear provisions determining ownership which further properly-defined objectives are required in order to ensure compatibility with human rights and free movement of goods principles. This adds to the arguments outlined in Chapter 4 for reform of the current law governing unauthorised transfer.

¹⁶¹⁴ See L. Prott, “The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On” (2009) 26(1) *Uniform Law Review* 215 at 235-236.

¹⁶¹⁵ Directive 93/7/EEC, Art 12.

¹⁶¹⁶ Art. 86a Dutch Civil Code, mentioned in B Akkermans, “The EU Development of European Private Law” *Maastricht European Private Law Institute (M-EPLI) Working Paper 27/2011* at 3.

What are the foundations on which such reform might be constructed? It is submitted that the role of possession in justifying conferral of ownership should be limited. Physical possession is not a sufficiently reliable indicator as to whether the transferor is the owner. A distinction between cases in which the original owner has voluntarily relinquished possession and those in which the property has been lost or stolen is not justified by concerns of fairness. In terms of the possession of the transferee, this does not provide sufficient reason in itself to confer ownership on him or her at the expense of the original owner. Possession in this context should not be used as an indicator of good faith. However, it was argued that a transferee who does not take possession should not qualify for good faith protection. This is because until a buyer takes physical custody, his or her interest in the thing is arguably primarily an economic one which can be met with financial compensation.

With regard to the actions of the owner, it is again difficult to envisage this as a sensible basis on which to allocate ownership. It is not useful to ask whether the original owner has acted to protect his or her assets. Assessing culpability is difficult and it is not clear how the law could set a standard which would not impose a heavy burden on owners. Nor is the good faith of an acquirer a reliable means of deciding whether the interests of acquirer or original owner should be safeguarded. In Scots law, good faith is best understood as an exclusionary device.

Which factors, then, might justify increased protection for an acquirer? Geographical location of the transaction is no longer a helpful basis for determining when to depart from the default *nemo plus* rule. A rule protecting those who transact in the ordinary course of business would, however, link clearly to the perceived need for the law to facilitate markets. There are some arguments for a consumer protection-based rule but this would also have disadvantages; many potentially deserving business acquirers would be left without security. Further protection might be justified on a case-by-case basis in relation to state-backed sales.

With regard to whether different rules may be appropriate for different types of property, it was argued that increased protection for original owners may be

necessary in respect of cultural goods. Due to the special social and political significance of these objects, a good faith rule is more difficult to justify than in respect of other moveables. It would make sense, however, to reward buyers who carry out due diligence; for example, in the event of the object being reclaimed by an original owner recovery of compensation from the seller could be conditional on proper enquiries as to ownership having been made. Motor vehicles often feature in litigation relating to good faith acquisition, but due to the difficulties of establishing ownership the role that a more onerous standard of good faith could play is practically limited. Particularly where it is desired to use a vehicle as security, a system for registering such securities would be desirable. Further research is necessary to establish whether there is a compelling need for increased protection for purchasers of motor vehicles and the impact that this might have on other interested parties such as insurers. Whatever approach is adopted, the current legal distinction between business and private purchasers should also be revisited with a view to reform.

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