



SCOTTISH LAW COMMISSION

MEMORANDUM No: 24
CORPOREAL MOVEABLES

GENERAL INTRODUCTION AND SUMMARY OF
PROVISIONAL PROPOSALS

31 AUGUST 1976

This Memorandum is the introductory volume in a series of Memoranda which are published simultaneously for comment and criticism, and which do not represent the final views of the Scottish Law Commission.

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CORPOREAL MOVEABLES

GENERAL INTRODUCTION AND SUMMARY OF PROVISIONAL PROPOSALS

I. GENERAL INTRODUCTION

1. In terms of section 3(1) of the Law Commissions Act 1965 we have a general duty to examine the law for anomalies and defects; to consider the simplification and modernisation of the law; and to consider proposals for law reform.

2. In the course of our examination of the law of prescription, it was suggested to us that the law on that subject, insofar as it affects corporeal moveables, should be clarified. Prescription is the ultimate determinant of the right of ownership curing all defects of acquisition on onerous or gratuitous title. Accordingly we came to the conclusion that problems relating to the acquisition of title to corporeal moveables merited a comprehensive separate study.¹ In addition, Item 2 of our First Programme, published in 1965, provides for the review of the law of obligations, including the rights of persons acquiring property in good faith after an owner had parted with it as a result of a defective contract. In the context of transfer of rights in moveables the rules of property law and the law of obligations often intersect. Therefore we have undertaken a comprehensive survey of the law affecting title to corporeal moveables, including those areas which are related to the law of obligations. However, we are examining the law relating to security over moveables,² diligence and the law of bankruptcy in separate exercises.

3. We publish, concurrently with this general introduction and summary of provisional proposals, seven Memoranda, each dealing with a separate aspect of corporeal moveables. These are entitled:

¹Reform of the Law Relating to Prescription and Limitation of Actions: Scot. Law Com. No 15 (1970), para. 3.

²See para. 5 infra.

- (1) Corporeal moveables: passing of risk and of ownership (Memorandum No 25).
- (2) Corporeal moveables: some problems of classification (Memorandum No 26).
- (3) Corporeal moveables: protection of the onerous bona fide acquirer of another's property (Memorandum No 27).
- (4) Corporeal moveables: mixing, union and creation (Memorandum No 28).
- (5) Corporeal moveables: lost and abandoned property (Memorandum No 29).
- (6) Corporeal moveables: usucapion, or acquisitive prescription (Memorandum No 30).
- (7) Corporeal moveables: remedies (Memorandum No 31).

4. In these Memoranda we examine a number of problems which are of considerable social and economic importance: in particular the role of acquisitive prescription; the rights of a person who has acquired property in good faith from someone who is not himself the owner; the doctrine of vitium reale attaching to stolen property; and the modes or technical requirements for transferring corporeal moveable property. Since the modes for transferring rights over property differ according to its classification we had necessarily to examine problems of classification of property. In addition, the reorganisation of local government indicates the expediency of considering afresh the somewhat fragmentary statutory provisions relating to lost property which cannot readily be reconciled with common law rules. Related to the law on lost property is that of disposal of unclaimed goods on which services have been carried out, e.g. by repairers. In the course of our study it became apparent that the scope and availability of certain remedies intended to safeguard property rights raised questions which have to be resolved. Some of these questions are of considerable difficulty, when moveable property has been changed into another form, or mixed or united with the property of another with or without the consent of the owner. To all these questions we felt bound to give attention. Some matters of less obvious practical

importance, such as the law of treasure, protection of the country's archaeological heritage, and acquisition of property sold at statutory auction sales, are also considered, on the view that if there is an opportunity to legislate in this area, the legislation should be as comprehensive as possible, and should eliminate as many anomalies and deficiencies as possible.

5. The Report of the Departmental Committee on Consumer Credit¹ (the Crowther Report) recommended that, in relation to the creation of security interests over moveables, there should be "a legal structure applicable uniformly to all forms of security interest". Subsequently we noted, in relation to the wider issues of lending and security across the whole spectrum of commercial transactions, the expression of official policy in paragraphs 13 and 14 of the White Paper, Reform of the Law on Consumer Credit.² Both we, and the Law Society of Scotland, considered that an examination of the law in Scotland in this field was desirable, and we therefore set up in 1974 a Working Party "to consider the legal and technical problems which would arise or be likely to arise in the creation in Scotland of a system of security over moveable property in regard to all types of loans including consumer loans and to make recommendations in that respect." In the course of the present related series of Memoranda we touch on aspects of security but we do not seek to make separate proposals in advance of the completion of the Working Party's report.

6. In accordance with our normal practice, and indeed our statutory duty,³ we have considered the solutions of other legal systems and have examined current international legal developments. One of our Commissioners has participated as a representative of the United Kingdom at meetings in Rome under the auspices of the International Institute for the Unification of Private Law (Unidroit), where a proposed Uniform Law on the Acquisition in Good Faith of Corporeal Moveables has been prepared. Most systems of law in Western Europe, while they differ in detail, are based on the whole on the same Civilian foundations as is the common law of Scotland, as expounded in the institutional writers. On

¹Cmnd. 4596 (1971), 2 vols.

²Cmnd. 5427 (1973).

³s.3(1)(f) of the Law Commissions Act 1965.

the other hand, mercantile statute law in the 19th and 20th centuries - in particular the Sale of Goods Act 1893, which was in essence a codification of English law, extended with some modifications to Scotland - makes it essential to examine the state of English law relating both to moveable property and to contract so far as it affects the transfer of moveables, and to evaluate proposals for reform of that law.¹ We anticipate that, in the sphere of mercantile law, pressures for harmonisation within the EEC are likely to increase, and it may be that the trend towards further assimilation of Scots law to English law will consequently be checked. It is, therefore, all the more important that in this branch of the law possible solutions for Scotland should be considered solely on their merits rather than according to their provenance.

7. There is the further difficulty that the development of the English law relating to corporeal moveables has tended to be pragmatic and independent rather than systematic, and indeed its categories and classification often do not correspond to those of systems which have taken the Civil law as a guide. Many of the rules on moveables are to be found not in the law of property, but in other branches of law, such as the tort of conversion. Though we have often found works such as Crossley Vaines on Personal Property of great help in attempting to understand English solutions, we have not overlooked the relevance in a comparative context of the assessment of the most recent editor of Stephen's Commentaries of the Law of England who considers that the development of the English law of personal property has not so much been in a recognised category by itself as in the interstices of tort, contract and criminal law: "Haphazard and pragmatic as this development has been, it still remains the chief feature of the law relating to chattels, which must still be looked for in these separate branches of the law rather than as part of the law of property. Nowhere can we find a better illustration of the historical truth that English law has developed rather by the provision of practical remedies than by the assertion of ideal

¹ e.g. the Law Reform Committee's Twelfth Report on Transfer of Title to Chattels (Cmd. 2958 (1966)).

rights."¹ In particular we find that the English law on corporeal moveables is concerned with the better right to possess rather than with the right of ownership, property or dominium. For this reason, though we have considered them carefully, many aspects of English law relating to moveables have proved to be of limited value to us in seeking satisfactory solutions which can be integrated within the framework of principle provided by the Scots law of corporeal moveable property.

8. We have benefited from many helpful comments by Commissioners and staff of the Law Commission, and we would also like to express our gratitude to the following, for the information which they have provided and for the assistance which they have rendered to us in the preparation of these Memoranda:

Professor G Brière de l'Isle, University of Paris

Professor Y A Caron, University of McGill

Dr J M J Chorus, University of Amsterdam

Professor P A Crépeau, University of McGill; President
of the Quebec Civil Code Revision Commission

Professor R Feenstra, University of Leiden

Professor W M Gordon, University of Glasgow

Professor H R Hahlo, University of McGill

Mr H McN Henderson, University of Edinburgh

Sir Ronald Johnson, Chairman of the Working Party on
Civic Government

Professor F H Lawson, University of Lancaster

The Ministry of Justice of the Swiss Republic

Professor J A C Thomas, University of London

Professor D M Walker, University of Glasgow

Professor W A Wilson, University of Edinburgh

¹21st ed., 1950 by A D Hargraves, Book II p.396.

II. SUMMARY OF PROVISIONAL PROPOSALS

A: Memorandum No 25

Corporeal moveables: passing of risk and of ownership

1. The reasons for transferring the incidence of risk of accidental loss or destruction of specific moveables do not necessarily coincide with the reasons for transferring ownership thereof, and we have concluded that our examination of problems regarding passing of ownership need not be controlled by rules regarding allocation of risk. (para. 7).
2. In situations to which the property provisions of the Sale of Goods Act 1893 do not apply, there might be advantages in expressly recognising the abstract theory of "just cause" or "just title" in relation to corporeal moveables, in order to put beyond question the proposition that delivery of moveables with intention to transfer ownership therein by an owner and acceptance of the moveables by a transferee intending to acquire that right should be effective in law to transfer ownership, even though the antecedent transaction which the transfer sought to implement was null or putative. (para. 17).
3. Is clarification of the precise meaning and effect of s.61(4) of the Sale of Goods Act desirable, and have difficulties been encountered in practice in its interpretation and operation? (para. 26).
4. A bona fide purchaser for value at a judicial sale—at least if it is publicly advertised - should acquire a clear statutory right of ownership. The deprived owner's remedy should be against the person who was at fault in causing the goods to be disposed of by judicial sale. (para. 27).
5. Where statute authorises lawful disposal of and acquisition of goods by statutory procedure, the bona fide onerous acquirer should (except possibly where the vitium reale of theft attaches) take clear statutory title, rather than a

defeasible right. In the case of property over a certain value, acquisition of an unchallengeable right of property might be made conditional on public notification of the proposed statutory disposal and the lapse of a short time for adverse claims to be lodged. Protection might be restricted further to bona fide onerous acquisition at public auction. (para. 31).

6. (a) Property should not be deemed to pass by agreement if the contract is illegal, and where the law renders acquisition by a particular category of transferee illegal, purported delivery of goods to a transferee in that category should divest the mala fide transferor and render the goods res nullius.

(b) A second possibility is that, where the transferor is unaware of the illegality affecting the transferee's power to acquire, the transfer should be regarded as wholly inept and property should remain vested in the transferor.

(c) A third possibility is that the illegality should not affect the transferee's acquisition. (para. 56).

7. If the property provisions of the Sale of Goods Act are to remain substantially in their present form, appropriate definitions of the terms "transfer", "owner", "property" and "title" would assist interpretation of the Act in its application to Scotland. (paras. 37 and 57).

8. If the object of the Sale of Goods Act 1893 was to assimilate the law of Scotland to that of England in relation to transfer of property in goods under contracts of sale, this object has only been achieved in part, and important problems do not seem to have been foreseen - in particular those connected with the rights and duties of strangers to the contract and the recognition of a doctrine of reputed ownership in favour of the creditors of a non-owning seller or buyer in possession. (paras. 44, 45, 53 and 57).

9. The so-called "transfer of property in goods" regulated by sections 16-20 of the Act does not convey a true right in re but rather a hybrid right resembling a ius ad rem, but conferring on

buyers priority rights in competition with the seller's creditors in the event of the seller's bankruptcy. This result had already largely been reached by the Mercantile Law Amendment (Scotland) Act 1856 without any doctrine of passing of property by agreement. Though under that Act tradition was the appropriate method of conveying a real right to a buyer, he and subpurchasers from him had a right of priority on the seller's bankruptcy in preference to the seller's creditors. We see no convincing reason for attaching a stipulative meaning to the term "property" in the context of sale which it does not have in the law of moveables generally. (paras. 34, 50, 51 and 57).

10. So far as the 1893 Act provided for risk and ownership of specific goods to coincide, it did not in fact alter the incidence of risk in Scots law. Risk may, however, be associated with the handing over of the goods, especially if the basic approach of the Uniform Law on the International Sale of Goods is preferred to that of the Sale of Goods Act. Risk and transfer of ownership are not necessarily interdependent. (paras. 2-7, 53 and 57).

11. Handing over of possession remains important even in the case of specific and ascertained goods - in particular by determining at what point the seller's remedies exercisable over the goods themselves are cut off, and in safeguarding a buyer against unauthorised disposal of the goods by the seller to a second buyer. (paras. 44 and 57).

12. Pre-1894 policy recognised the unpaid seller's right of retention against a buyer, i.e. the exercise of a right of ownership over what, until delivery, remained his property. Section 62 of the Sale of Goods Act provides that "'lien' in Scotland includes right of retention". To include a right of ownership over the seller's own property in a possessory right over the buyer's property seems infelicitous and confused drafting. (para. 57).

13. It seems anomalous to regulate the transfer of property rights by different modes in the case of sale on the one hand and in the case of other transactions such as exchange and donation on the other. Indeed there seems to be no logical reason why, if it were desirable to transfer the right of ownership by agreement in the case of sale, the same principle should not apply to transfers of lesser real rights over moveables in transactions for security, hire and loan. Moreover, where heritage is treated as a matter of commerce, it is not immediately self-evident that the analogy between transfers of moveables and of heritage is insufficiently close to merit consideration being given to the extension of transfer by agreement to heritage also. (paras. 18, 22, 33 and 57).

14. The legal rules regulating the effects of transfer of ownership of moveables in normal situations do not necessarily affect the rules protecting good faith acquirers of things without the owner's consent. A system which recognises the validity of transfer of ownership of things by agreement inter partes, even in cases of donation, may nevertheless go so far as to protect a good faith gratuitous acquirer a non domino. (paras. 42 and 57).

15. Should ownership in specific moveables be transferred:
- (a) as the law stands at present, but with clarification of the property provisions of the Sale of Goods Act;
 - (b) as agreed by contract between transferor and transferee (with the existing rules under the Sale of Goods Act for ascertaining their intention extended to all transactions);
 - (c) as agreed by contract between transferor and transferee (with rules different from those prescribed by the Sale of Goods Act for ascertaining their intention extended to all transactions);
 - (d) by reintroducing the mode of delivery in sale as it is required at present in other transactions for transfer of real rights in moveables? (para. 63).

We should also welcome suggestions for defining, limiting or extending the scope of the mode of transfer selected, e.g. by prescribing special rules for cases of traditio brevi manu and of "declaration of transfer of possession" (constitutum possessorium). (paras. 66-73).

16. Would it be desirable (and if so, in what specific situations) to reinstate a doctrine of reputed ownership for the benefit of general creditors of a possessor of moveables who has transferred ownership to an onerous acquirer? (para. 76).

17. Is the present law, according to which the seller is free prior to delivery to reserve the right of disposal over specific goods, satisfactory? (para. 81).

18. Should delivery of goods to a buyer (or to a custodier on his behalf) cut off the right of the seller who has reserved ownership to reclaim them - except in a question between himself and the buyer? (para. 84).

19. In sale, despite delivery, should it be permissible for a seller to reserve ownership until a condition (including payment of the price) has been fulfilled by the buyer? (para. 85).

B: Memorandum No. 26

Corporeal moveables: some problems of classification

1. Suggestions are invited regarding clarification or reform of the law relating to classification of property as heritable or moveable depending on the owner's destination. (para. 2).
2. Should industrial growing crops be classified as heritable or moveable? (para. 8)
3. Should industrial growing crops, as may be the case at present, be treated differently from trees and other things attached to or forming part of the land which are agreed to be severed under or before contract? (para. 10)
4. It should be made clear by statute that the same freedom from the contractual formalities appropriate for transfers of heritage, at present enjoyed by contracts of sale of things agreed to be severed from land, should be accorded to other obligations for transfer at common law, for example exchange and agreements for donation which contemplate severance. (para. 13)
5. Should growing trees (or trees which are cultivated commercially for timber) be classified and treated by the law in effect as industrial crops, so that both should be capable of being treated, and actually transferred, as goods while still partes soli? If this solution is preferred, is special protection desirable for third parties' interests in the land? (para. 20)
6. Alternatively, is it desirable to clarify the law to the effect that trees generally (or trees which are not grown commercially for sale) should be regarded as part of the land until severance, but should be capable of transfer as future goods? (para. 21)
7. Should the solution set out in the proposed section 2-107(1) of the United States Uniform Commercial Code, whereby there is a distinction between trees and crops on the one hand and other goods to be severed on the other, be incorporated into Scots law? (para. 23)

8. For the avoidance of doubt, should the principle enunciated by Lord Chancellor Cairns for determining whether fixtures are heritable or moveable be declared in statutory form? (para. 26)

9. Should the law of Scotland give to a person whose moveables have become the property of another by accession the right to claim either severance at that other's expense, or the value of the moveables? (para. 28)

10. The classification of property as heritable or moveable might for registration purposes be considered in relation to its past or future state, as well as with regard to its present classification. (para. 30)

C: Memorandum No 27

Corporeal moveables: protection of the onerous bona fide acquirer of another's property

1. Transfer of title to corporeal moveables should not be invalidated by defects of consent in the agreement to transfer, and until the transaction is reduced such defect should not prejudice third parties who acquire in good faith and for value. (paras. 18-19)
2. Force and fear, and error, should be regarded only as defects of consent. (paras. 18-19).
3. A bona fide third party purchaser of corporeal moveables, without notice of "rescission" or "avoidance" of a contract by virtue of which his transferor acquired the moveables, should not be prejudiced by such "rescission" or "avoidance" unless there has been a judicial decree before the purchase. (para. 23).
4. Section 21(1) of the Sale of Goods Act should be amended to make it clear that it applies to any case in which an owner has voluntarily surrendered control of his goods. (para. 28)
5. However the law regarding protection of good faith acquirers of another's moveable property is ultimately improved, sections 8 and 9 of the Factors Act 1889, as applied to Scotland by the Factors (Scotland) Act 1890, should be repealed. (paras. 29-31)
6. Though we do not ourselves favour such a solution, we invite comment on whether there should be a system of equitable distribution of loss among all innocent parties where a third party in good faith acquires another's moveable property. (para. 37)
7. Is clarification and modification in detail the only reform required in the present law? (para. 39)
8. Should the law provide protection for bona fide onerous acquirers a non domino generally, provided that they had either (a) taken possession in good faith, and the moveables were not infected with a real vice resulting from involuntary dispossession; or (b) bought at a sale by a public authority acting under statutory powers? (para. 40)

9. Should protection be extended further, for example to include purchasers in good faith of stolen property and/or gratuitous acquirers in good faith? (para. 41)
10. The element of good faith should be left untrammelled by specific requirements as to the manner of sale or other transfer. (para. 43)
11. If an acquirer in good faith is to be preferred to the original owner, the onus should be on the acquirer to establish his own good faith and acquisition of possession. (para. 44)
12. Unless he were already in possession on limited title, should the bona fide purchaser be protected only if he acquired from a transferor in possession? (para. 46)
13. Except where a vitium reale infects the goods, the acquirer in good faith and for value should be given a statutory title which would cut off all prior rights of others of which the acquirer did not have notice. (para. 47)
14. In case of conflict between an acquirer of corporeal moveables in possession and the acquirer of a document of title representing the goods in possession, should the former prevail? (para. 48)
15. Should the landlord's hypothec include property of third parties? (para. 49)
16. Judicial sale should divest the original owner and create a clear statutory title in a bona fide possessor, but only if the sale was conducted properly and after advertisement. (para. 50)
17. In cases of coercion there should be a vitium reale only if the coercion amounts to robbery. (para. 52)
18. Should the law recognise vitia realia apart from incapacity and clandestine or forcible dispossession? (para. 52)
19. The vitium reale at present applying in cases of theft should be redefined in terms of violent or clandestine dispossession. (para. 56)

20. Should the vitium reale attach in cases where the owner had parted with physical custody but not with possession, and if so, what limits should be set? (para. 57)
21. Sale in a public sale or market should not cure a vitium reale. (para. 59)
22. If it were desired to give protection to an acquirer in good faith against the owner of moveables to which a vitium reale attaches, a five-year period of acquisitive prescription, rather than a special rule, should apply. (para. 60)
23. Would it be desirable to introduce a general or limited requirement for the owner of stolen property to reimburse a bona fide acquirer in possession as a condition of demanding delivery? (para. 61)
24. Should additional categories of moveables be excluded from the vitium reale attaching to stolen property? (para. 63)
25. Should the doctrine of vitium reale be retained in respect of property of which the owner has been forcibly or clandestinely dispossessed? If so, what changes in the law regarding its scope and effect are desirable? (para. 65)
26. Instead of the previous proposals, should an owner be entitled to reclaim a thing acquired by a third party in good faith and for value, if the owner can prove his title and how he lost possession, unless the thing has been acquired by statutory title, or the possessor can establish that it had been acquired by acquisitive prescription of one year? (para. 74)
27. In addition, if an owner has been dispossessed clandestinely, or by force, or if he was incapax when dispossessed, should he be entitled to reclaim his property unless it has been acquired by statutory title or unless prescription has intervened? (para. 74)
28. In addition, should it be enacted for the avoidance of doubt that the original owner may not reclaim property from an onerous acquirer in good faith by alleging that the contract or transfer by which he had given possession to another was null because of defective agreement or consent? (para. 74)
29. What qualifications or alterations, if any, should be made to the three preceding proposals? (para. 74)

Corporeal moveables: mixing, union and creation

1. Should the scope of the present law of industrial accession be extended? (para. 3).
2. The following two alternative sets of proposals for dealing with problems of industrial accession - of which we tentatively favour Alternative A - cover only those cases where the producer of a new thing using another's materials is not protected by the rules of law applicable to good faith onerous acquisition of another's corporeal moveables (paras. 33 and 34).

Alternative A

(1) Where materials belonging to another are incorporated into a mixture of things or into a new thing in such a way that the original materials cannot be conveniently separated from the mixture or from the new thing, the mixture or thing shall be deemed to be the common property of all persons who had an interest (whether a proprietary interest, a security interest or a possessory interest) in the materials or who have contributed by their skill or labour towards the making of the thing.

(2) The court in an action by the possessor of the mixture or thing or by any person claiming an interest in them may in its discretion -

- (a) award the ownership of the mixture or thing or any part thereof to any person with an interest;
- (b) require the person to whom ownership has been awarded to compensate any other persons in such manner and in such proportions as the court may think fit for the value of the materials they have contributed or for the value of their contribution to the making of the thing;
- (c) ordain the mixture or thing to be exposed for public auction and the proceeds disposed of among the persons having an interest in the thing rateably in accordance with the value of the materials they have contributed or of their contribution to the making of the thing.

(3) In determining the value of a person's interest in the mixture or thing the court may ignore in whole or in part the interest of a person who has acted in bad faith.

Alternative B

(1) Specification

(a) When a person has by skill or labour transformed materials which do not belong to him into a new thing, the producer becomes owner of it if his skill and labour are more valuable than the materials, but otherwise the owners of the materials become owners of the new thing.

(b) Transformation includes writing, printing, engraving, drawing, painting, photography and similar use of the surface of materials.

(c) If the value of the skill and labour and the value of the materials are equal, the producer and owner or owners of the materials become owners in common of the new thing.

(d) If the producer did not act in good faith, the court may award the new thing or its full value to the owner or owners of the materials used in its production.

(e) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

(2) Adjunction and Commixtion

(a) When things belonging to different owners have been intermingled or joined together in such a way that it is not possible to separate them without causing considerable damage or without incurring unreasonable work or expense, the parties concerned become co-owners of the new thing in proportion to the value of their contributions at the time of commixtion or adjunction.

(b) If when things are commingled or united one part can be regarded as principal and the other part or parts accessory or if a part is of substantially greater value than the other part or parts, the owner of the principal part, or of the part of substantially greater value as the case may be, becomes owner of the whole.

(c) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

3. We invite comment on alternative tentative proposals that:

(a) an onerous bona fide acquirer should acquire title derived from the producer of goods who had used another's materials without his authority; or

(b) in the case of such alienations the court should have power to determine disputes regarding ownership over and claims in respect of corporeal moveables produced by mixing, creation or union and thereafter alienated according to principles of natural equity. (para. 38).

4. We propose provisionally:

(a) When moveables have been planted in or affixed to heritage without authority of the owner of these materials, the court should be empowered in its discretion to order their severance from the heritage provided that, if the owner of the heritage had been in good faith, severance would not result in serious damage to the land or the materials.

(b) A claim should be competent at the instance of the deprived owner or his successor in title no later than five years from the date of planting or affixing or six months from the time when the claimant became aware or could reasonably have become aware of the planting or affixing - whichever date is the earlier.

(c) The cost of severance should be borne by the person who had planted or affixed the materials, and by the owner of the heritage jointly and severally if the owner of the heritage was in bad faith.

(d) When severance is claimed by the person whose materials had been attached without his authority to heritage, it should be granted only upon condition that the claimant reimburses a bona fide owner of the heritage

for damage to the heritage caused by severance. Such compensation should, however, be recoverable from the person who planted or affixed the materials.

(e) The power to order severance should not affect existing remedies in recompense or reparation, and the right to claim restitution should revive on severance. (para. 43).

Corporeal moveables: lost and abandoned property

The finding of lost and abandoned property

1. There should be no general legal duty to report the discovery of, or take possession of, or acquire some other form of physical control over, lost or abandoned property. (para. 17).

2. Should there be a duty to report the discovery of (or perhaps, in appropriate circumstances, to take possession of) a limited category of corporeal moveables, where a criterion such as historical, cultural or antiquarian importance is satisfied? (para. 17)

The rights of finders, employers of finders,
owners and occupiers of land

3. The employers of finders, owners of land and occupiers of land should have no legal rights to lost and abandoned property. (para. 18).

4. (a) No finder should have any legal right to unclaimed, lost or abandoned property.
- (b) Where, however, the apparent value of an article found is less than, say, £5, the custodier should be empowered to hand over that article, if unclaimed, to the actual finder in lieu of the appropriate reward.
- (c) The custodier should have a discretion to withhold articles of a kind which he considers unsuitable to be handed over to the finder. There should be no right of appeal to the courts arising out of the exercise of this discretion.
- (d) The custodier should be empowered to pay at his discretion a reasonable financial reward to a finder of claimed or unclaimed property. Any

person who claimed to be a finder of such property should be given a right of appeal to the sheriff, who would determine, if necessary, who was the finder, and what the amount of the reward should be. (para. 24)

5. Alternatively:

- (a) The actual finder should have a right to unclaimed lost and abandoned property, subject in the case of articles above £5 in value to the payment of a reasonable sum to cover the expenses of the custodier.
- (b) This right might be restricted to articles of below, say, £50 in value.
- (c) In assessing these values the apparent value of the article should be taken as the basis for assessment.
- (d) If the finder's right is restricted to, say, articles of less value than £50, he should be entitled to a reward in respect of more valuable articles whether claimed or not, calculated as in para. 6. (para. 25)

6. Alternatively:

- (a) A finder should have a right to a reward.
- (b) The reward should represent a fixed fraction of the value of the property.
- (c) The value should be ascertained at the time when the property is lodged with the custodier, or when it is claimed by the owner, or when it is disposed of by public sale. (Comment is particularly invited as to which tempus inspiciendum is appropriate.) (para 26)

The obligations of finders

7. If an article is found in a public place, the finder who takes possession of it should be obliged to report its discovery, or to hand it over, to its owner or to an authorised custodier, within 48 hours. (para. 33)

8. If an article is found on private premises, the finder who takes possession of it should be obliged to report its discovery, or to hand it over, to its owner, to the occupier of the premises, or to an authorised custodier, within 48 hours. (para. 33)
9. If an article found on private premises is handed over to the occupier of those premises, or if its discovery is reported to the occupier, the occupier should be obliged to report its discovery, or to hand it over (a) to its owner within 48 hours; or (b) to a public custodier after a period of, say, seven full days, if the article has not been claimed by the owner within that time. In the case of (b), the occupier should possibly be obliged to intimate to a public custodier, within 48 hours, that he is in possession of the article. (para. 33)
10. If the existing multiple system for the collection and disposal of lost property is to be retained, the obligation should be to report the discovery, or to hand over the property, to the authority on whose premises or vehicle the property is found. (para. 33)
11. If property is discovered on a form of transport whose destination is in Scotland, the substantive law of Scotland should apply to the property from the time when it is found. (para. 33)

Penalties

12. Comment is invited on the proposal by the Working Party on Civic Government that the penalty for failure to hand in property should be a maximum fine of £10, or the value of the property, whichever is the greater. (para. 35).

The Custodier

13. Should there be a single public custodier? (para 37).

14. If so, should this function be discharged by the police or by some other body? (para. 37)
15. What should be the extent of the responsibilities of a single public custodier? In particular, should he assume the duties of the Queen's and Lord Treasurer's Remembrancer in respect of lost and abandoned property? (para. 37)
16. There should be a general duty on a public custodier to communicate with the owner of a mislaid article if his identity is apparent from the article or its contents, or can reasonably be ascertained from the article or its contents. (para. 38.)
17. Where the identity of the owner of an article cannot be readily ascertained but the article itself, or its contents, indicates the name and address of someone who is likely to trace the owner, there should be a duty on the public custodier to inform that person. (para. 39)
18. Where it is clear that the property, by its nature, does not belong to the person who has lost it, there should be a duty to return the property to the issuing authority or agency, and not to the person to whom the property was issued. (para. 40).
19. The general duties described in proposals 17 and 18 should not arise in a case where the ostensible value of an article is, say, less than £5. (para. 41).

Time for claiming lost property

20. There would be an advantage in introducing categories of lost property, according to which the period of custody would depend upon the value of the property. (para. 46).
21. The custodier would have the power but not the duty to distribute after the elapse of the following periods:
- (a) for property valued at (say) £50 or less when handed over for custody, disposal should be authorised after three months;
 - (b) for property valued at between (say) £50 and £250 when handed over for custody, disposal should be authorised after six months;
 - (c) for property valued at over (say) £250 when handed over for custody, disposal should be authorised after one year. (para. 47)

22. Power should be conferred on a custodier to destroy perishables, or sell them promptly and hold the proceeds as a surrogatum. (para 47)

23. The tariff of valuation should be variable by statutory instrument. (para. 47)

24. There should be a power to make a charge for reasonable expenses, which could be waived at the discretion of the custodier. (para. 47)

25. Unclaimed property in the most valuable category should, if this is practicable, be stored under special centralised arrangements. (para. 47)

26. Should there be a duty on custodiers of property to inform the Crown for such interest as it might have before disposing of property appearing to be worth (say) £2,000 or more, or property of archaeological, historical or artistic value? (para. 47)

Title to unclaimed property after disposal

27. Public sale should divest the original owner and confer a clear title (irrespective of acquisitive prescription) on the purchaser. (para. 50)

28. A compensation fund should be formed from the proceeds of sale, out of which the owner of property which realises more than, say, £250 at the sale, should be entitled to recover the purchase price (less the custodier's reasonable expenses). (para. 50)

29. If the present system of handing over unclaimed property to a finder is continued, the finder should acquire merely possessory title until it has been fortified by 5 years' acquisitive prescription - except possibly in the case of property with an ostensible value of less than £5. (para. 50)

Disposal of surplus funds

30. Should any surplus funds be made over to the regional or islands council (as the police authority)? (para. 51)

Domestic animals

31. The claims of the finder of a dog should be preferred to those of the owner after he has kept the dog for one year. (para. 53)

32. Would it be appropriate to extend the preceding proposal to other domestic animals, such as cats? (para. 53)

Abandoned property

33. Should the appropriator of deliberately abandoned property be entitled to become owner if the original owner has clearly intended to relinquish his right? (para. 54)

34. Alternatively, should it be made clear that the rights of the Crown include all property deliberately abandoned, even if the original owner and his purpose were known? (para. 54)

35. If lawful appropriation by private persons of abandoned property is acceptable, such acquisition should be limited to cases where, in the event of dispute, the appropriator is able to establish that the property has in fact been abandoned by the former owner. (para. 55)

Evicted tenants

36. The existing proceedings available for the disposal of lost property should be extended to include property left by evicted tenants. (para. 58)

Uncollected goods

37. In the case of uncollected goods worth more than (say) £100 after the expenses of services, storage and attempts to trace the owner have been deducted, disposal should be administered by the police or other local authority office. The supplier of services, 6 months after he has twice at monthly intervals sent notice by registered post to the other contracting party at his last known address (if he had disclosed his identity and address) calling on him to pay for the services and collect his property or give instructions regarding it and warning him of the consequences of failure so to do, should (if he received no payment) be authorised to hand over the property to the police (or local authority) as abandoned property on which services had been rendered. The police (or other authority) would then have a duty to advertise for the owner or other person entitled to possession. (The person who ordered the services to be carried out might have had no title to the property at all.) Eventually, after the periods suggested for lost property had elapsed, disposal would be by public sale, the supplier of services being paid his charges with interest, and the balance being applied to the purposes of the local authority or authority administering the scheme. For a limited period the authority might be required to maintain a register of sales and balances held, out of which genuine late claimants might be in part reimbursed. A purchaser at such sale would acquire title as owner. (para. 64)

38. In the case of uncollected goods worth (say) £100 or less, a summary procedure might be appropriate. A period of 3 months after a single notification might suffice, and the police might be given a discretion to allow the supplier of services to retain custody and dispose of property by public sale, accounting to the police (or other authority) for the surplus after his charges had been met. (para. 64)

Objects of historic, archaeological
and cultural value

39. Is there a need for special rules to regulate the disposal of these articles?

40. Should the Crown's rights extend to all such articles, whether or not of precious metal, and whether or not hidden?

41. Are the present arrangements for the disposal of such objects satisfactory?

42. Should the Crown be required to pay compensation when it claims such articles, and if so to whom? (para. 67)

Regalia in udal land

43. Comments are invited as to what Crown property prerogatives regarding moveables should extend where udal law survives, and whether any measures enacted for the reform of the law of Scotland regarding the disposal of found and unclaimed moveables or objects of archaeological, historical and artistic value should extend to Orkney and Shetland. (para. 68)

Public interest in archaeological and
artistic objects

44. Comments are invited whether, and if so what, legislation is desirable to protect certain limited categories of privately owned moveable property which may be regarded as being of public interest from misuse, destruction or possibly disposal. (para. 71).

Corporeal moveables: usucapion, or acquisitive prescription

A Short Period of Usucapion

1. A person should only acquire ownership of a corporeal moveable (when his title thereto is in fact defective) by the short period of usucapion, if the following conditions are fulfilled:

- (a) The moveable must have been possessed¹ openly, peaceably, adversely to the owner and without any judicial interruption for a continuous period of 5 years² by a possessor or possessors who had acquired by title apparently habile (i.e. appropriate) to transfer ownership.
- (b) The moveable must not be a res extra commercium.³
- (c) No rule of law should have disqualified the original acquiring possessor, or his successor in title, from owning a moveable of that particular class.⁴ However, an acquirer from such possessors, if properly qualified to own such a moveable, would not be affected by a disqualification of a preceding possessor.
- (d) The original acquirer must have taken possession of the moveable in good faith by an apparently valid title which, had the transferor been owner or had he been authorised by the owner, would have been effective to vest ownership in the original acquirer -

¹"Possession" would include both natural and civil possession (i.e. possession through another, such as an employee or factor).

²During the period of usucapion the dispossessed owner would retain his rights to claim restitution and delivery.

³Things held inalienably for the benefit of the public (e.g. court records) are extra commercium, i.e. even though they are susceptible of ownership, ownership cannot be transferred, whether by sale or gift.

⁴e.g. if the property could only lawfully be transferred to someone licensed to own it.

e.g. by gift or legacy.¹ If the original owner is to be deprived of his property in favour of a gratuitous² possessor in particular, it seems reasonable that the possessor pleading usucapion should have had reasonable grounds for believing himself to have become owner and that his good faith possession should have been originally taken by a transfer which justified that belief.

- (e) Each transferee must have been in good faith at the time he took possession in the belief that he was acquiring ownership. However, there might be a case for providing that supervening knowledge of a defect in title should not be imputed to him. This is the solution of a number of legal systems. It limits the scope of enquiry and limits disputes regarding ownership. Nevertheless, others might take the view that supervening knowledge should be imputed to a possessor, especially if he learned of the defect soon after taking possession and knew who the dispossessed owner was.
- (f) Singular and other successors to an earlier possessor would be empowered to avail themselves of their author's periods of bona fide possession - provided that such successors themselves acquired in good faith without knowledge of the right of the dispossessed owner.
- (g) Good faith should consist in the reasonable belief that a transferor of the moveable had the right to transfer ownership of the moveable, and that the apparent title of transfer was valid. We have formed no strong view

¹We suggest that putative causa should suffice as a basis for usucapion, so that if the moveable was accepted in the belief that transfer was in implement of a valid legal ground therefor such as a gift, this should be sufficient despite the existence of a defect such as error in that ground.

²If our tentative proposals for giving immediate protection to good faith acquirers by onerous transactions were to be rejected, we envisage that they too should be enabled to fortify title by usucapion.

as to whether a possessor should have the onus of proving good faith in this sense; or whether there should be a presumption in favour of the possessor; or whether there should be no presumption either way. If the question of usucapion could only affect the original acquirer, there is much to be said in favour of putting the onus on him rather than on the dispossessed owner, who ex hypothesi would be ignorant of the circumstances of transfer to the possessor. However, in the case of a series of transfers of possession, this would cause difficulties. The law on the whole presumes good faith but does not divest an owner of his property except for good reason. Taking into account that title by usucapion could only be acquired after 5 years usucapion, we are inclined to leave it to the challenging owner to rebut a presumption of the good faith of intermediate possessors, but to require the original acquirer on defective title who pleads usucapion to establish his own good faith.

A Long Period of Usucapion

2. (a) Possession adverse to the owner enjoyed openly, peacefully, and without judicial interruption for a period of 10 years should confer ownership on a possessor, even though the possession had not been founded originally on any title ostensibly habile to confer ownership.
- (b) This possession should confer ownership on all possessors except
 - (i) those who had acquired possession by theft, or had continued in possession on behalf of a thief; and possibly
 - (ii) those who were aware that the property had been stolen.
- (c) The distinction between good and bad faith is not essential, and a 10-year period should apply in each case.

- (d) Legal incapacity, such as pupillarity, minority and mental illness, should be disregarded in calculating the period of usucapion.
- (e) Where possession has commenced on limited title, such as loan or hire, even for an indefinite period, usucapion should not run unless the original possessor or his successors in title had changed the basis of the possession by making it known to the owner - either expressly or by disregarding claims by him - that continued possession was adverse to him; or, possibly, unless the owner had so acted as to justify the possessor in the belief that the owner had relinquished his right.

G: Memorandum No 31

Corporeal moveables: remedies

1. Does the law on self-help require clarification, and if so should it be extended to permit the use of reasonable force in recovering property from a thief or swindler? (para. 5)
2. No good purpose would be served in allowing an owner to vindicate corporeal moveables in an action in re, or to obtain a decree of declarator of his right of ownership after his right to claim restitution had been cut off, except in those cases where (under the proposals made in our accompanying Memorandum on usucapion, or acquisitive prescription) a long period of usucapion would apply. (para. 8)
3. If the proposals made in our accompanying Memorandum on usucapion for shorter and longer periods of acquisitive prescription are acceptable, it might be expedient to give an owner an action in which he could assert his ownership in certain cases for longer than five years. (para. 8). Three methods are:
4. It might be provided by legislation that the action of vindication should be expressly excluded, but that an action for restitution should be competent against a possessor who had not acquired the right of ownership by bona fide acquisition or usucapion. (para. 8)
5. Alternatively, it could be provided that the real action should survive prescription of a claim for restitution, until cut off by the long negative prescription. (para. 8)
6. A further possibility would be to make vindication and restitution alternative remedies with the same periods of prescription. (para. 8)
7. Where an owner in an action for restitution has received the value of his property from a mala fide former possessor and subsequently concludes for delivery against a third party in possession, that third party should in the same proceedings be entitled to recover from the owner, on principles of recompense, the amount by which the owner would be enriched by recovering his property in addition to the money already received. (para. 9)

8. Alternatively, it might be provided by statute that where an owner has recovered the value of his property from a mala fide former possessor, he should lose his right to claim delivery of the property from the person actually in possession. (para. 10)
9. A further possibility would be to provide that the owner should retain his right to reclaim his property from the person actually in possession, but that his right to do so should be conditional upon his handing over to the latter what he had previously received from the mala fide former possessor (para. 10)
10. Should it be enacted, for the avoidance of doubt, that a thief is liable in an action of restitution for the value of money or negotiable instruments stolen if he is no longer in possession; and that he is liable in an action of restitution concluding for delivery, if he is still in possession, and the money or negotiable instruments can be identified? (para. 11)
11. If the proposals, made in our accompanying Memorandum on mixing, union and creation of moveables, for a new body of rules governing industrial accession are not acceptable, it should be provided that a bona fide specifier who uses another's materials in manufacturing a new species is to be liable only on principles of recompense, and only to the extent that he is lucratus. The time at which his profit should be assessed should be the time of manufacture. (para. 17)
12. No change is needed in the law whereby the repairers of an article who have been instructed, e.g., by the hirer thereof, have no lien for the value of their work against the owners who claim delivery, because a claim in recompense is competent against the owner to the extent that he has benefited. (para 18)
13. Should the delict of spuilzie be expressly abolished? (para. 23)
14. Are the powers of the Court of Session to order restoration of possession under the Court of Session Act 1868, sections 89 and 91, and the powers of the sheriff court under the Sheriff Courts (Scotland) Act 1971, section 35(1)(c), sufficient?

Is there a need to modernise the formulation of the Court of Session's powers? (para. 24)

15. Should the principle of "violent profits", in cases where a possessor has been deprived of or excluded from natural possession by the intentional act of the defender, be restated? (para. 25)