



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 228)

# Report on Prescription and Title to Moveable Property

report





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# **Report on Prescription and Title to Moveable Property**

Laid before the Scottish Parliament by the Scottish Ministers

**May 2012**

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

<sup>2</sup> As at 16 April 2012.

# SCOTTISH LAW COMMISSION

*Item No 10 of our Eighth Programme of Law Reform*

## **Report on Prescription and Title to Moveable Property**

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Prescription and Title to Moveable Property.

(Signed)

LAURA J DUNLOP  
PATRICK LAYDEN  
HECTOR L MACQUEEN  
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*  
16 April 2012

# Contents

	<i>Paragraph</i>	<i>Page</i>
<b>Chapter 1 Introduction</b>		
Background	1.1	1
Importance of the subject	1.3	1
Human rights and legislative competence	1.5	2
Business and Regulatory Impact Assessment	1.8	3
Acknowledgements	1.10	4
<b>Chapter 2 Should there be positive prescription for corporeal moveables?</b>		
The current law	2.1	5
Positive prescription contrasted with good faith acquisition	2.6	6
The case for a rule of positive prescription	2.8	7
Consultation	2.12	8
Terminology	2.16	9
<b>Chapter 3 Recommendations for reform: (A) The standard case</b>		
Introduction	3.1	10
<i>Justa causa</i> (proper basis)	3.2	10
Value	3.7	12
Good faith and supervening knowledge	3.8	12
Length of prescriptive period and the question of cultural objects	3.12	13
Special issues about time (a): incapacity and <i>vis major</i> (superior force)	3.23	17
Special issues about time (b): a shorter period based on the owner's knowledge	3.26	18
Possession: general	3.27	19
Possession: intention	3.31	20
Successors	3.32	21
Compensation	3.33	21
Abolition of the common law rule about prescriptive title (if such a rule exists)	3.34	21
Negative prescription and Crown rights	3.35	22
Animals	3.42	23
Transitional issues	3.48	25
<b>Chapter 4 Recommendations for reform: (B) The non-standard case</b>		
Introduction	4.1	27
Consultation	4.4	27
Non-standard cases: lent or deposited property	4.6	28
Lent or deposited property: the period	4.14	30

# Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Lent or deposited property: possession	4.15	30
Lent or deposited property: protections	4.17	31
Lent or deposited property: further issues	4.22	32
Lent or deposited property: a general or specific rule?	4.25	33
<b>Chapter 5 Abandonment</b>		
Introduction	5.1	35
The current law	5.2	35
Reform	5.4	35
Civic Government (Scotland) Act 1982	5.7	36
<b>Chapter 6 Intellectual property and negative prescription</b>		38
<b>List of recommendations</b>		40
<b>Appendix A</b>		
<b>Draft Prescription and Title to Moveable Property (Scotland) Bill</b>		44
<b>Appendix B</b>		
<b>List of those who submitted written comments on Discussion Paper No 144</b>		53



# Abbreviations

**1973 Act:** Prescription and Limitation (Scotland) Act 1973.

**1976 Discussion Paper:** Scottish Law Commission, *Corporeal Moveables: Usucapion or Acquisitive Prescription* (Memorandum No 30 (1976), available at [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/524/125/](http://www.scotlawcom.gov.uk/index.php/download_file/view/524/125/)).

**1982 Act:** Civic Government (Scotland) Act 1982.

**DCFR:** Christian von Bar and Eric Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2010) (This is the six volume edition published in 2010. References to the DCFR "commentary" are references to the commentary in this full edition, and are by page number. The six volumes have consecutive pagination).

**Discussion Paper:** Scottish Law Commission, *Discussion Paper on Prescription and Title to Moveable Property* (Discussion Paper No 144 (2010), available at [http://www.scotlawcom.gov.uk/index.php/download\\_file/view/590/192/](http://www.scotlawcom.gov.uk/index.php/download_file/view/590/192/)).

**QLTR:** Queen's and Lord Treasurer's Remembrancer (see Glossary for further details).

**SAFAP:** Scottish Archaeological Finds Allocation Panel (see Glossary for further details).

**TTU:** Treasure Trove Unit (see Glossary for further details).

# Glossary

***Animus domini:*** Intention to possess property as owner.

***Bona vacantia:*** Certain property which has no other owner and therefore falls to the Crown.

**DCFR:** Draft Common Frame of Reference. A set of draft principles, definitions and model rules in relation to European Private Law. See also under Abbreviations.

***Justa causa:*** Valid legal ground.

***Mala fides superveniens non nocet:*** Supervening bad faith does not matter.

***Occupatio:*** The appropriation of ownerless property by taking possession of it with the intention of becoming owner.

**Positive (acquisitive) prescription:** A rule whereby a possessor of property acquires title to it through possessing it for a certain uninterrupted period of time.

**Queen's and Lord Treasurer's Remembrancer (QLTR):** The Crown office-holder responsible in Scotland for claiming treasure trove and other property on behalf of the Crown. Her website is <http://www qltr.gov.uk/>.

***Quod nullius est fit domini regis:*** What belongs to no-one becomes the property of the lord king (ie the Crown).

**Scottish Archaeological Finds Allocation Panel (SAFAP):** The panel, appointed by Scottish Ministers, which advises the QLTR on the valuation and allocation of items of treasure trove in Scotland.

***Successio in possessionem:*** The accumulation of a prescriptive period through the possession of a series of successive possessors.

**Treasure trove:** Portable antiquities which can be claimed on behalf of the Crown by the QLTR by law.

**Treasure Trove Unit:** The body responsible for the day-to-day administration of the treasure trove system in Scotland.

***Ultimus haeres:*** The Crown as ultimate heir.

***Vis major:*** Impediment which prevents the exercise of rights. More literally, superior force.

# Chapter 1 Introduction

## Background

1.1 The law of prescription provides for the acquisition and extinction of rights through the passage of time. It is regulated primarily by the Prescription and Limitation (Scotland) Act 1973. This legislation is based on this Commission's Report on *Reform of the Law relating to Prescription and Limitation of Actions*<sup>1</sup> which was published in 1970. As the Commission at that time had a separate project on title to corporeal moveable property (ie all physical things except land), the report did not address what the rules of prescription in relation to such property should be. Instead, a separate consultation paper was subsequently issued in 1976 entitled *Corporeal Moveables: Usucapion or Acquisitive Prescription*.<sup>2</sup> But no report was ever published<sup>3</sup> and this is a significant gap in our law.

1.2 When we consulted on our Eighth Programme of Law Reform, there was substantial support for this area to be considered and it therefore appears in this programme.<sup>4</sup> We have also taken this opportunity to look at an aspect of the law of prescription in relation to intellectual property rights, as well as the law on abandonment of corporeal moveables. Our Discussion Paper<sup>5</sup> was published in December 2010 and consultees were generally very positive about the need for a new statutory scheme.

## Importance of the subject

1.3 Rules on prescription in relation to corporeal moveables are arguably less important than for land. The former often have a short lifespan and their value over time is likely to decline. Land has a permanency and identifiability which is not true of most moveable items. Nevertheless, there are corporeal moveables with long lives, which are identifiable and may be of high value. Examples include paintings, jewellery and antiques in general. Often these items are in the permanent possession of museums. Equally, however, they may come onto the market and in this regard a workable set of rules on positive (acquisitive) prescription would benefit prospective acquirers. Unlike with land, there is no register of title to corporeal moveables where the seller's ownership can be checked.<sup>6</sup> The buyer can make enquiries as far as possible, but often reliance has to be placed on the fact that the law

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<sup>1</sup> Scottish Law Commission, *Reform of the Law relating to Prescription and Limitation of Actions* (Scot Law Com No 15 (1970)), available at [http://www.scotlawcom.gov.uk/download\\_file/view/370/](http://www.scotlawcom.gov.uk/download_file/view/370/).

<sup>2</sup> Scottish Law Commission, *Corporeal Moveables: Usucapion or Acquisitive Prescription* (Memorandum No 30 (1976)).

<sup>3</sup> The same fate befell almost all the other consultation papers which were issued as part of the project. The only one which led to a report was Scottish Law Commission, *Corporeal Moveables – Lost and Abandoned Property* (Memorandum No 29 (1976)). See Scottish Law Commission, Report on *Lost and Abandoned Property* (Scot Law Com No 57 (1980)). This was implemented by Part VI of the Civic Government (Scotland) Act 1982, on which see below, paras 5.7-5.8.

<sup>4</sup> Scottish Law Commission, *Eighth Programme of Law Reform* (Scot Law Com No 220, February 2010), available at [http://www.scotlawcom.gov.uk/index.php/index.php/download\\_file/view/48/96/](http://www.scotlawcom.gov.uk/index.php/index.php/download_file/view/48/96/).

<sup>5</sup> Scottish Law Commission, Discussion Paper on *Prescription and Title to Moveable Property* (Discussion Paper No 144 (2010)).

<sup>6</sup> This is essentially correct, but there are public registers of aircraft and ships. (The shipping register records both (a) ownership and (b) mortgages. By contrast, the aircraft register records only mortgages.) And there is also the privately-run Art Loss Register. See <http://www.artloss.com/>.

presumes that the possessor of a corporeal moveable is the owner.<sup>7</sup> While the presumption may be difficult to overcome,<sup>8</sup> it is nevertheless only a presumption. If it turns out that the seller did not own the property, the true owner may come along at a later date and assert title. In such circumstances a rule of positive prescription conferring ownership after a certain period of possession would protect the buyer.

1.4 As the Discussion Paper notes,<sup>9</sup> it is rather surprising that there has not been reported case law in Scotland in relation to recovery of antiquities. But it is probably only a matter of time until a significant case arises and the inadequacy in the current law is then highlighted. The need for reform is therefore a practical one. Moreover, Scotland is very unusual compared with other countries in not having specific rules on positive prescription in relation to corporeal moveables.<sup>10</sup> In contrast there are clear rules in, for example, England, France, Germany, Italy, South Africa and the United States of America. The gap does not serve Scots law well. In Professor David Carey Miller's words, new legislation addressing the issue would give our law "enhanced dogmatic integrity".<sup>11</sup>

### **Human rights and legislative competence**

1.5 Any legislative reform of property rights requires to comply with Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR). It provides:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>12</sup>

The effect of our proposed new rules will be in certain limited cases to deprive natural and legal persons of rights of ownership without the payment of compensation. However, this is the position in most other European countries and the DCFR. In *J A Pye (Oxford) Ltd v United Kingdom*<sup>13</sup> the Grand Chamber of the European Court of Human Rights held that the equivalent rule in relation to land in England was ECHR compatible. What we recommend is a rule which is more favourable to owners than the position in many jurisdictions ie one which requires a relatively long period of possession and insists on good faith and an absence of negligence on the part of the possessor. The period in question would be twenty years, which in fact is the same period after which negative prescription probably operates in relation to ownership of corporeal moveables at present.<sup>14</sup> We recommend a separate rule which will apply where a corporeal moveable has been lent to or deposited with another

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<sup>7</sup> Erskine, *Institute* II, 1, 24; *Anderson v Buchanan* (1848) 11 D 270; *Prangnell-O'Neill v Lady Skiffington* 1984 SLT 282; *Chief Constable of Strathclyde v Sharp* 2002 SLT (Sh Ct) 95; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2<sup>nd</sup> edn 2005) para 1.19 and K G C Reid, *The Law of Property in Scotland* (1996) para 130.

<sup>8</sup> D L Carey Miller, "Positive Prescription of Corporeal Moveables?" (2011) 15 EdinLR 452 at 453-454.

<sup>9</sup> Para 1.6.

<sup>10</sup> Discussion Paper, Part 5.

<sup>11</sup> Carey Miller, "Positive Prescription of Corporeal Moveables?" at 456.

<sup>12</sup> For discussion, see eg Lord Reed and J Murdoch, *Human Rights Law in Scotland* (3<sup>rd</sup> edn 2011) chapter 8.

<sup>13</sup> (2008) 46 EHRR 45. See G L Gretton, "Private Law and Human Rights" (2008) 12 EdinLR 109.

<sup>14</sup> See below, para 2.2.

person for more than fifty years and where its owner is no longer traceable. In these circumstances the holder will be able to acquire ownership. The owner is only deprived of ownership if these conditions are satisfied. Fifty years is a considerable period. We believe that our proposals comply with the ECHR.

1.6 Both the law relating to rights in corporeal moveable property, and the law of prescription and limitation, are within devolved legislative competence. Under the Scotland Act 1998 the law relating to "the hereditary revenues of the Crown" is reserved but an exception to this is the law relating to "revenues from *bona vacantia*, *ultimus haeres* and treasure trove."<sup>15</sup>

1.7 In Chapter 6 we note that there is at present some uncertainty as to whether section 8 of the 1973 Act could apply to copyright. We recommend that this doubt be resolved by amending the 1973 Act to provide that it does not apply to any right for which a fixed time period is provided by any other enactment. The effect of this amendment would be to make it clear that the extinction of copyrights is governed by the Copyright, Designs and Patents Act 1988 and not by the 1973 Act. Whilst the law of prescription is devolved, the law of intellectual property is reserved.<sup>16</sup> Our view is that the proposed amendment, being specifically about intellectual property, would probably have to be brought about by legislation at the UK level.

### **Business and Regulatory Impact Assessment (BRIA)**

1.8 The Scottish Government introduced new requirements in 2010 aimed at achieving enhanced regulatory impact assessments of primary legislation, secondary legislation, codes of practice and guidance. In line with these we have prepared a BRIA in relation to our recommendations. This is published on our website, but we summarise our conclusions here.

1.9 These are that:

- maintaining the status quo, ie the existing law, is not desirable;
- our recommendations can only be achieved by the introduction of new legislation;
- our recommendations will bring benefits to the general public, as well as specific sectors such as the museums/galleries sector;
- the implementation of our recommendations will have little or no additional cost implications;
- our recommendations will have no negative impact on Scottish businesses/firms;
- our recommendations will have no impact upon competition; and

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<sup>15</sup> Scotland Act 1998, Sch 5, Part 1, para 3(3). Property falling to the Crown under these branches of the law is administered by the Queen's and Lord Treasurer's Remembrancer (QLTR). Whilst the law speaks of "Crown" rights, the substantive meaning is "the public interest". Thus Scottish museums are enriched by archaeological discoveries, while items whose retention is not needed for the public interest are sold, the benefit being the taxpayer's.

<sup>16</sup> Scotland Act 1998, Sch 5, Pt 2, Head C4.

- our recommendations will not require enforcement or monitoring by public bodies, and will not introduce any sanctions.

### **Acknowledgements**

1.10 We are very grateful to our advisory group for the help that they have given to us in relation to this project. The group comprised: Andrew Brown, Solicitor, Office of the Queen's and Lord Treasurer's Remembrancer; Professor David Carey Miller, University of Aberdeen; Professor David Johnston QC, Faculty of Advocates; Professor Kenneth Reid, University of Edinburgh; and Jane Ryder. We also thank Catherine Dyer, the Queen's and Lord Treasurer's Remembrancer and Jane Robinson and Joanne Orr of Museums Galleries Scotland for their assistance, as well as our former Commissioner, Professor George Gretton of the University of Edinburgh, who was the principal author of the Discussion Paper. We were also assisted by Professor Janet Ulph of the University of Leicester and AHRC Placement Fellow with the Museums Association. Finally, we are grateful to the Edinburgh Centre for Private Law at the University of Edinburgh which hosted a symposium on the Discussion Paper in February 2011 and the participants who attended this.

# Chapter 2      Should there be positive prescription for corporeal moveables?

## The current law

2.1 Positive (acquisitive) prescription of landownership is regulated by the Prescription and Limitation (Scotland) Act 1973, section 1. As mentioned above,<sup>1</sup> the Act was based on our Report on *Reform of the Law relating to Prescription and Limitation of Actions*<sup>2</sup> and therefore does not have provisions on positive prescription of ownership of corporeal moveables as this was to be the subject of a later project. But no report or legislation resulted from that later project. Nor is there any other existing legislation on the subject. There is some authority in favour of a forty year common law period, but it is slight and doubtful.<sup>3</sup> There is an evidential presumption that the possessor of a corporeal moveable is owner, but ultimately this is only a presumption.<sup>4</sup> It may be rebutted by the actual owner. While that is often difficult to do and the owner has the initial problem of tracking the property down, the presumption remains a matter of procedural rather than substantive law.

2.2 The 1973 Act has rules on negative prescription in relation to both heritable and moveable property. There is a general academic consensus that ownership of corporeal moveables is subject to the twenty year negative prescription rule in section 8.<sup>5</sup> This is subject to an exception in Schedule 3 which provides that "any right to recover stolen property from the person by whom it was stolen or from any person privy to the stealing thereof" is imprescriptible.<sup>6</sup> The "privy to" formula is unusual and we do not know exactly what it means.<sup>7</sup> It may refer to the criminal law doctrine of art and part, but, if so, it is unclear why that phrase was avoided.<sup>8</sup> The exact meaning of the provision as a whole is unclear as the "right to recover" and a "right of ownership" do not necessarily mean the same thing. But we tend to the view that the provision means something like: "Where property is stolen, section 8 prescription does not run against the owner so long as the property is in the hands of the thief (or someone privy to the theft)". Thus if Neil steals Andrew's book negative

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<sup>1</sup> See above, para 1.1.

<sup>2</sup> Scottish Law Commission, *Reform of the Law relating to Prescription and Limitation of Actions* (Scot Law Com No 15 (1970)).

<sup>3</sup> In particular, *Parishioners of Aberscherder v Parish of Gemrie* (1633) Mor 10972. See D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2<sup>nd</sup> edn 2005) chapter 7 and A R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445.

<sup>4</sup> Carey Miller with Irvine, *Corporeal Moveables* para 1.19; K G C Reid, *The Law of Property in Scotland* (1996) para 130.

<sup>5</sup> Reid, *Property* para 675; D Johnston, *Prescription and Limitation* (1999) paras 7.08, 7.14(6) and 18.04; Carey Miller with Irvine, *Corporeal Moveables* para 7.05. And see Lord Hope's remarks in para 4 of his speech in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764. By contrast, the ownership of land is not subject to negative prescription: 1973 Act, Sch 3, para (a).

<sup>6</sup> 1973 Act, Sch 3, para (g).

<sup>7</sup> The expression seems to be a technical term of English law. The only other Scottish statute in which it is used seems to be the Housing (Scotland) Act 2001, Sch 7, para 18(1), but that is not an independent usage, having been merely a copy of the Housing Act 1996, Sch 1, para 24(2).

<sup>8</sup> Even a reference to "art and part" would have been superfluous, for a person who commits an offence art and part commits that offence.

prescription does not run in respect of Andrew's right of ownership for as long as Neil holds the property. If, however, Neil sells to Victoria, who knows nothing of the theft, the negative prescriptive clock begins to run.

2.3 What happens when the negative prescription period of twenty years has elapsed? One might think that the property becomes ownerless. In fact, the property becomes owned by the Crown under the rule *quod nullius est fit domini regis* (what belongs to no-one becomes the property of the lord king)<sup>9</sup> and is administered by the Queen's and Lord Treasurer's Remembrancer (QLTR). Thus if Jill loses her ring in the sand while at the beach one day, after twenty years it will fall to the Crown. If she were to return after thirty years and find it again, in theory it would no longer be hers but owned by Her Majesty. In practice the Crown would probably not claim the ring in a question with Jill but as a matter of law it would be so entitled. While the rule is of importance to the Crown in relation to older items which are classed as treasure trove,<sup>10</sup> a twenty year period seems a relatively short one for Jill to lose ownership, when no other party has possessed the ring in the interim. While cast as a rule of negative prescription, section 8 of the 1973 Act behaves here like a rule of positive prescription in favour of the Crown. Elsewhere we propose its replacement with an actual rule of positive prescription, but with a longer – sixty year – period.<sup>11</sup>

2.4 It is worth stressing that there has not been any case law on the meaning of section 8 of the 1973 Act in relation to ownership of corporeal moveables. As we have said, there is a modern academic consensus on this. Nevertheless, the possibility cannot be entirely excluded that section 8 does not apply here and that therefore a right of ownership in relation to such property cannot negatively prescribe.

2.5 Our assessment of the current law in the Discussion Paper was that it is unsatisfactory.<sup>12</sup> The lack of a clear rule of positive prescription for corporeal moveables is an important gap in the structure of our private law and Scots law contrasts unfavourably in this regard with many other legal systems, as well as the DCFR.<sup>13</sup>

### **Positive prescription contrasted with good faith acquisition**

2.6 In Part 6 of the Discussion Paper we set out the principal arguments which we believe exist in favour of and against introducing a new statutory rule whereby ownership of corporeal moveables could be acquired by positive prescription. We began with a preliminary point which is that Scots law generally favours strong protection of the owner of property. A famous maxim of Roman law is *nemo plus juris ad alium transferre potest quam ipse habet* (no-one can give a greater right than he himself has).<sup>14</sup> Thus if Agatha is not the owner of a particular book she cannot transfer ownership of that book to Ben. It does not matter if Ben thinks that Agatha is the owner and pays for it. While the basic *nemo plus* rule continues to apply here and elsewhere, individual legal systems have varying levels of

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<sup>9</sup> Reid, *Property* para 540; G L Gretton and A J M Steven, *Property, Trusts and Succession* (2009) paras 3.7 and 8.1.

<sup>10</sup> See below, para 3.35-3.41.

<sup>11</sup> See below, para 3.41.

<sup>12</sup> See Discussion Paper, paras 2.29-2.30.

<sup>13</sup> Discussion Paper, Part 5.

<sup>14</sup> Dig. 50, 17, 54 (Ulpian). Another formulation, used in English law and by Professor Reid, is *nemo dat quod non habet* (no-one can give what he does not have). See Reid, *Property* para 669. For law teaching (and no doubt other purposes) the rules can be shortened to the *nemo plus* or *nemo dat* rules.



exceptions to it.<sup>15</sup> For example, in Germany Ben would be protected because he was in good faith and gave value, provided that Agatha was not a thief.<sup>16</sup> In Italy, he would still be protected even if she were a thief.<sup>17</sup> Scots law in general holds fast to the *nemo plus* rule and Ben would not acquire ownership.<sup>18</sup>

2.7 The further that a legal system goes in protecting the good faith acquirer the less important a rule of positive prescription would seem to be. For if Ben becomes owner as a result of his good faith and having given value he does so immediately. He does not need to wait for time to run to give him ownership after a certain number of years of possession. Whether Scots law should be reformed to be more generous to good faith acquirers is outwith the scope of the current project, but it is worth noting that in legal systems such as Germany and Italy where such acquirers are treated more favourably there are still rules of positive prescription. This is also true of the DCFR.<sup>19</sup>

### **The case for a rule of positive prescription**

2.8 In the Discussion Paper we set out four arguments in favour of positive prescription of ownership of corporeal moveables and two against.<sup>20</sup> We reiterate these here, albeit briefly, beginning with the arguments in favour.

2.9 The first argument is one of fairness. It seems unfair for someone who has possessed goods for a long period to be dispossessed. The owner of the property should be getting on and claiming the property back, rather than doing nothing. But matters may not be quite so simple. The owner may not know where the property is or who holds it. In this regard moveables differ sharply from land, because the latter cannot be hidden. The second argument in favour of positive prescription is that it promotes certainty. Uncertainty of title is inconvenient, interferes with commerce and generates litigation.<sup>21</sup> On the other hand, a positive prescription rule itself may not produce an absolutely certain result. It may depend on the possessor satisfying specific conditions such as good faith and intention to possess as owner, which would require to be assessed by a court if the matter came to be litigated. Thirdly, most other jurisdictions have a rule of positive prescription for corporeal moveables. Scotland is therefore currently in an isolated and, in our view, unsatisfactory position. Fourthly, positive prescription not only protects the buyer of property, but also the seller because it removes any claim by the buyer based on bad title.<sup>22</sup>

2.10 Two arguments may be made against positive prescription in relation to corporeal moveables. The first is that possession itself raises a presumption of ownership. But that

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<sup>15</sup> See eg A 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 Reforms?* (2008) 141 at 141-144.

<sup>16</sup> §§ 932 to 935 German Civil Code.

<sup>17</sup> Italian Civil Code art 1153.

<sup>18</sup> The main exceptions are the Sale of Goods Act 1979, ss 24 and 25. See further Carey Miller with Irvine, *Corporeal Moveables* chapter 10.

<sup>19</sup> See DCFR Book VIII. - 3 and - 4.

<sup>20</sup> Discussion Paper, paras 6.5-6.17.

<sup>21</sup> In the words of Bankton, *Institute* II, 12, 76: "Prescription is the great security to people in their rights and possessions ... *Bona publico usucapio introducta est*, (says Gaius) *ne fere semper dominia incerta essent* [Prescription was introduced for the public good for otherwise ownership is always uncertain]".

<sup>22</sup> This depends how long the prescriptive period is. The contractual claim will also normally be subject to negative prescription and that period might be shorter.

presumption can be rebutted.<sup>23</sup> It is notable that other countries have this presumption but also a positive prescription rule.<sup>24</sup> The second argument is that negative prescription under the existing law removes the erstwhile owner's right of challenge. But, as we have seen,<sup>25</sup> ownership then falls to the Crown rather than the possessor. Yet the possessor continues to hold the property. Ownership and possession thus remain divided. A rule of positive prescription brings them back together.

2.11 In the Discussion Paper, having weighed up these arguments, we inclined to the view that a system of positive prescription would have a net effect of increasing certainty of title. Prescription would in practice matter only for longer-lived and higher-value assets such as antiques, jewellery and paintings. It is irrelevant to things such as food and flowers. A painting by a particular artist is re-identifiable over time and may leave a paper trail, so investigation of title has some practical meaning. If prescription can be established, that enhances marketability.

## Consultation

2.12 To test our provisional view, we set out three preliminary questions for consultees, before asking them if they agreed that a new system of positive prescription should be introduced. Our first question was whether they agreed that introducing such a system would increase certainty. All consultees agreed. Dr Andrew Simpson of the University of Aberdeen commented that "[the] proposals [in the Discussion Paper] appear to foster certainty, and as they stand they constitute a rational basis for the reconstitution of an asserted title of ownership." Many consultees commented that the current uncertainty in the law itself demanded attention, although a couple<sup>26</sup> expressed the concern that raising the profile of this area by having a new statute might encourage litigation. While this possibility cannot be ruled out, our countervailing concern is a case coming before the courts under the current law which would expose its uncertainty and the fact that Scotland appears to be out of line with most other jurisdictions.

2.13 Our second question was whether the introduction of a system of positive prescription would increase the marketability of long-lived moveable assets. Most consultees agreed. Professor David Johnston noted that "common sense suggests that certainty of title could only enhance the marketability of moveable property, and it is difficult to see that that could have anything other than positive economic effects." Those consultees who did not positively agree were uncertain, rather than disagreeing.

2.14 Thirdly, we asked consultees what economic benefit (if any) would be likely to arise as a result of such an increase in certainty and / or marketability. Professor Kenneth Reid suggested that the answer was self-evident. The Judges of the Court of Session, while noting that it was "probably for others to address issues such as economic benefit" believed that a system of positive prescription would enhance the level of confidence in markets concerned with high-value moveables. They concluded: "We consider it likely that this would have not insignificant, albeit intangible, benefit to the economy in general." Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums

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<sup>23</sup> Cf D L Carey Miller, "Positive Prescription of Corporeal Moveables?" (2011) 15 EdinLR 452 at 453-454.

<sup>24</sup> For example, § 1006 German Civil Code.

<sup>25</sup> See above, para 2.3.

<sup>26</sup> The Law Society of Scotland and Mr John MacLeod, University of Glasgow.

Federation believed that economic benefits would arise from less convoluted processes for disposing of material if title to that material was made more certain.

2.15 In summary, therefore, consultees agreed that there would be benefits in reforming the law to introduce a new rule of positive prescription for corporeal moveables. Our view more generally is that the current position, whereby a possessor of a corporeal moveable can never acquire ownership<sup>27</sup> no matter how long the property is held, is unacceptable. We then put the question directly and asked whether consultees agreed that such a rule should be introduced. All consultees who responded to this question agreed.<sup>28</sup> These included the Judges of the Court of Session, the Faculty of Advocates, the Law Society of Scotland, Julian Radcliffe of the Art Loss Register and Professors Gordon, Johnston and Reid. Accordingly, we recommend:

- 1. There should be a rule of positive (acquisitive) prescription for corporeal moveables.**

### **Terminology**

2.16 In our 1976 Discussion Paper,<sup>29</sup> we proposed that the Roman law term "usucapion" should be used in any legislation to introduce the new rule. The reason was to make a clear distinction between negative and positive prescription. On reflection, this does not seem to be a very strong argument as the adjectives "positive" and "negative" produce separate terms. Moreover, "positive prescription" is used in the 1973 Act in relation to land. Finally, "usucapion", even it was a more familiar term in 1976, is not very familiar now. For example, the DCFR avoids it.<sup>30</sup> We proposed to consultees that it should not be used. All consultees who responded to this question agreed. We therefore recommend:

- 2. The term "usucapion" should not be adopted.**

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<sup>27</sup> Unless of course the owner transfers this to them.

<sup>28</sup> With one exception, a Court of Session judge who dissented from the submission on behalf of the judges on this point.

<sup>29</sup> Para 2.

<sup>30</sup> DCFR Book VIII. - 4. To be fair, it also avoids the term "prescription".

# Chapter 3                      Recommendations for reform:

## (A) The standard case

### Introduction

3.1     In this Chapter we recommend a scheme of positive prescription which would work in what we call the "standard case". This is the case when someone, acting in good faith, purports to acquire corporeal moveable property, but in fact does not obtain a valid title, and subsequently possesses the property for a number of years. In Chapter 4 we consider whether a prescriptive title should be possible in special (or, in the language of the Discussion Paper, "non-standard") cases. This division corresponds to that made in the 1976 Discussion Paper.

### *Justa causa* (proper basis)

3.2     The 1976 Discussion Paper defined the standard case as one where the possession was grounded on a *justa causa* (proper basis). In other words, there had been a process of acquisition of ownership which was wholly valid other than the transferor's lack of power to transfer. For example, Jill sells Katie a silver plate. There is a valid contract of sale between them. Both have legal capacity to enter into that contract. Jill hands the plate to Katie and Katie pays Jill. In fact, however, the plate belongs to Jill's mother and thus the transfer (in the absence of her mother's consent) is ineffective. The proper basis will typically be a sale, but there are other possibilities such as inheritance, exchange or gift. Such a basis was a requirement in Roman law and is also the position in some modern systems. In effect it is the rule for land in Scotland.<sup>1</sup> The DCFR does not adopt this approach, because "it would exclude too many situations from the scope of acquisition by continuous possession."<sup>2</sup> Another argument against the requirement is that the possessor may not or may no longer have any written evidence to show the manner of the acquisition. We tended to the view that the approach taken by the DCFR is correct, but we asked consultees to comment on whether an ostensibly valid act of acquisition should be a requirement (in addition to good faith).

3.3     Consultees agreed with our view. Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation stated that if a written record of the basis of the acquisition was needed this would be "an unachievable standard to attain for a significant proportion of industrial and social history material." Julian Radcliffe of the Art Loss Register said that "there are too many transactions which have not been recorded". The Judges of the Court of Session argued that a *justa causa* requirement would "give rise to a difficult evidential burden". Professor David Johnston thought that it would "dramatically narrow the scope and efficacy of the new prescription." We recommend:

### **3.     An ostensibly valid act of acquisition should not be required.**

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<sup>1</sup> 1973 Act, s 1. A foundation writ is required on which the possession is based.

<sup>2</sup> DCFR commentary, p 4907.

3.4 Most legal systems require good faith for the acquisition of ownership of corporeal moveables, either generally or in the standard case being discussed here. The 1976 Discussion Paper proposed that good faith should be required in the standard case and this is the view which we continue to hold. Good faith, however, requires careful definition. Should there only have to be simple subjective honesty on the part of the acquirer, or should there also be a requirement of objective good faith? In other words, should the acquirer not be regarded as being in good faith if that party has been negligent? For example, Graeme lives in North Berwick. He buys a distinctive nineteenth century signed painting of North Berwick Law from Horace. Graeme believes that Horace is the owner, but in fact the painting was recently stolen by him from Isla and the theft was reported widely in the local media. Graeme may be regarded as negligent in believing that Horace owned the painting. The level of "due diligence" (or lack of negligence) expected of an acquirer would vary from case to case.<sup>3</sup> Less would be required when buying a second hand push bike for £100 than when buying an antique grandfather clock for £10,000. Even more would be expected when buying an "old master" for £1,000,000. The 1976 Discussion Paper took the view that there should be objective good faith.<sup>4</sup> This too is the approach of the DCFR which provides that "a person possesses in good faith if, and only if, the person possesses in the belief of being the owner *and is reasonably justified in that belief.*"<sup>5</sup>

3.5 Almost all consultees agreed that there should be a good faith requirement. Dr Daniel Carr, however, argued that considerations of certainty should outweigh the moral actions of the possessor, but even he did not believe that a thief or the associates of a thief should be able to benefit from positive prescription. Many of our consultees also agreed with the "no negligence" requirement. These included the Judges of the Court of Session, Professor William Gordon and Professor Kenneth Reid. Professor Johnston, however, thought that such a rule was not needed as the courts could interpret the good faith requirement as encompassing it. The Law Society of Scotland was supportive in principle but preferred the DCFR formulation as it was not cast in the terminology of delict. The Faculty of Advocates, however, stated that "such a requirement would require consideration of what the possessor knew and, more importantly, what they ought to have known. This would not be practicable and to incorporate such a requirement in the new law would diminish its utility." But the requirement of good faith in itself necessitates such consideration.

3.6 We believe that the "no negligence" requirement is justified in order to protect the owners of corporeal moveable property. The law should require more of the possessor than subjective honesty. Thus in the case of a valuable painting, a purchaser might consult the Art Loss Register.<sup>6</sup> Such consultation, although not an absolute requirement, would be good evidence that the purchaser had not acted negligently. Consulting an art expert would be another possibility. We note that legislation already imposes duties on acquirers of high

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<sup>3</sup> See in this regard *De Preval v Adrian Alan Ltd*, 24 Jan 1997, Queen's Bench Division (unreported), discussed in J Ulph and I Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (forthcoming, 2012) para 5.43. This English case concerned antique candelabra and whether the acquirer was in good faith within the meaning of the Limitation Act 1980 s 4(2). It was held on the facts that he was not. The acquirer was an experienced dealer and in the view of Mrs Justice Arden should have had reason to doubt the seller's title.

<sup>4</sup> Para 9(e).

<sup>5</sup> DCFR VIII. - 4: 101(2)(a). Emphasis added.

<sup>6</sup> While the Art Loss Register is a privately-run register, it is widely used in the art world, both in the UK and internationally. See <http://www.artloss.com/>. See eg *Marcq v Christie Manson & Woods Ltd* [2002] EWHC 2148 (QB); [2002] 4 All ER 1005; aff'd [2003] EWCA Civ 731; [2004] QB 286.

value property to inform the authorities (eg the police) where there is the possibility that there has been money laundering.<sup>7</sup> Our proposed requirement of not being negligent is consistent with these duties. We recommend:

**4. The possessor should have acted in good faith and without negligence.**

(Draft Bill, s 1(1)(b)(i) and (c))

**Value**

3.7 The possessor should not have to have acquired for value. This is the rule for land. We can find no requirement for value in other legal systems, nor was there one in Roman law.

**Good faith and supervening knowledge**

3.8 In the Discussion Paper<sup>8</sup> we asked consultees to consider the following case. Fred steals Jill's ring and sells it to a good faith buyer, Innocentia. Six months after she has bought the ring, Innocentia discovers the truth, namely that the ring had been stolen. Should the prescriptive clock continue to tick in her favour? We mentioned that Roman law took the view that it should ie that the test should simply be whether she was in good faith at the time she bought the ring.<sup>9</sup> Modern European systems vary in their approach. The DCFR departs from the Roman law position.<sup>10</sup> The 1976 Discussion Paper left the question open.<sup>11</sup>

3.9 We argued in the Discussion Paper that there was not a clearly right answer to this question. On the one hand it may be argued that Innocentia comes under a moral obligation to return the property if she learns the truth, but on the other, not all moral obligations give rise to legal ones. If Innocentia paid a fair price and was in good faith at the time of acquisition, why should she be penalised now? That said, we noted that in the criminal law a person who takes possession of stolen goods in good faith and later learns that they are stolen, but continues to retain them, is guilty of reset.<sup>12</sup>

3.10 Consultees generally supported a rule that supervening knowledge should stop the prescriptive clock running. This was the view of Professor Reid, the Judges of the Court of Session, Julian Radcliffe of the Art Loss Register, Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation. Professor Johnston, however, while agreeing that there was no right answer, said that his preference was "to disregard supervening bad faith, in the interests of having as simple and straightforward a regime as possible." The Law Society of Scotland too thought a supervening knowledge rule might not be straightforward to apply. The Faculty of Advocates argued that supervening knowledge should only interrupt prescription where value had not been given.

3.11 We reiterate that there are good arguments both in favour of and against allowing supervening knowledge to stop prescription running. On balance, however, we are

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<sup>7</sup> Proceeds of Crime Act 2002 ss 327-330; The Money Laundering Regulations 2007 (SI 2007 No 2157) as amended by The Money Laundering (Amendment) Regulations 2007 (SI 2007/3299).

<sup>8</sup> Para 7.7.

<sup>9</sup> *Mala fides superveniens non nocet* (supervening bad faith does not matter).

<sup>10</sup> DCFR Book VIII. - 4:101(1)(a).

<sup>11</sup> Para 9(e).

<sup>12</sup> G H Gordon, *The Criminal Law of Scotland* (3<sup>rd</sup> edn, 2001, ed M Christie) Vol II, para 20.03.

persuaded that the prescriptive clock should be stopped. This is in line with the rule for reset, the position in the DCFR and the general position in Scots law of seeking to protect ownership. Actual knowledge (ie where the possessor actually discovers that someone else is the owner) should count. Equally, to mirror the position as to acquisition where objective good faith is required,<sup>13</sup> so should constructive knowledge. This would be where the possessor is negligent in not becoming aware of something, for example, the theft of the item being widely reported when the owner discovered it on return from a long holiday. Accordingly, we recommend:

**5. Supervening knowledge (actual or constructive) on the part of the possessor should interrupt prescription.**

(Draft Bill, s 1(1)(b)(i) and (c))

**Length of prescriptive period and the question of cultural objects**

3.12 The appropriate length of time that must run before there is prescriptive acquisition is an issue on which views naturally differ. The 1976 Discussion Paper suggested a period of five years in the standard case and ten years in the non-standard case. The DCFR has ten and thirty years. (In the case of cultural objects, the periods are thirty and fifty years.) In England the period is six years, in France three and in Germany ten. In South Africa there is a much longer period of thirty years.<sup>14</sup>

3.13 In the Discussion Paper we contrasted land with corporeal moveables.<sup>15</sup> With the former, the owner always knows where the land is. With the latter, the location may be unknown. We suggested that this pointed to having a longer period than for land and offered our view that it should be between fifteen and thirty years. We accepted that such a period would mean that for many objects positive prescription would be irrelevant as they would not last as long as this. We did not consider this to be an objection.

3.14 It seems to us now that there is another question which has to be factored in at this stage and that is whether there should be a special rule for cultural objects. We asked this question in another part of the Discussion Paper.<sup>16</sup> It is our view that if a shorter period such as five years is chosen to allow prescription to apply in practice to a wider range of assets, then there would require to be a separate rule with a longer period for cultural objects. That indeed is the approach of the DCFR.<sup>17</sup>

3.15 We received a wide range of views on both the question of what the period should be in the standard case and whether there should be a separate rule for cultural objects. On the first of these, the periods proposed ranged from five to thirty years. Professor Kenneth Reid favoured five years because "unless it is short, prescription is of little value in the case of most moveables, in view of their generally short life." But he suggested a longer period for cultural objects, without specifying a length. John MacLeod of the University of Glasgow suggested seven years for the standard case for much the same reason as Professor Reid. Jane Robinson of Museums Galleries Scotland also favoured a short period because in

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<sup>13</sup> See above, paras 3.4-3.6.

<sup>14</sup> For the comparative law, see Discussion Paper, Part 5.

<sup>15</sup> Para 7.12.

<sup>16</sup> Part 10.

<sup>17</sup> DCFR Book VIII. - 4:101 and 4:102.

relation to donated items this would "increase clarity". Dr Andrew Simpson of the University of Aberdeen argued for ten years on the basis that a relatively short period was necessary to give "greater security of title". The Judges of the Court of Session supported our proposal of a period of at least fifteen years as it seemed "to strike a sensible balance having regard to all competing arguments". One unnamed judge, however, dissented, stating that "the proposed prescriptive period of 15 years was arbitrary and too short". The Faculty of Advocates favoured 20 years in order to give "some protection to owners". Professor Johnston argued for this period too, on the basis that it was already familiar in the Scottish prescriptive regime. Thirty years was proposed by Julian Radcliffe of the Art Loss Register, Tamsin Russell of the Scottish Museums Federation and Rowan Brown of Industrial Museums Scotland. Mr Radcliffe commented 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." Dr Lars van Vliet of the University of Maastricht agreed with our view that the period should be longer than the prescriptive period for land "in order to compensate for the common problem that moveables cannot be traced".

3.16 As to whether there should be a separate longer period for cultural objects, this was supported by a number of consultees including Professor Reid (as noted above), Dr Daniel Carr and the Faculty of Advocates. In contrast, the Judges of the Court of Session believed that "to have a special regime for cultural property would complicate the law without sufficient countervailing benefits ... for reasons of certainty and ease of operation it would be preferable to have only one prescriptive period for all categories of moveable property." Professor Johnston was of the same view. Other consultees, notably Professor David Carey Miller of the University of Aberdeen and Alan Saville thought that cultural objects should be kept entirely outside a new positive prescription regime.

3.17 The inherent difficulty in having a separate rule for cultural objects is trying to define the property that would fall within that rule. The DCFR adopts the definition in the Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC).<sup>18</sup> A cultural object is an object which:

"is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty,

and

- belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of:
- public collections listed in the inventories of museums, archives or libraries' conservation collection...
- the inventories of ecclesiastical institutions."

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<sup>18</sup> This is transposed into UK law by the Return of Cultural Objects Regulations 1994 SI 1994/501, as amended by the Return of Cultural Objects (Amendment) Regulations, SI 1997/1719, and by the Return of Cultural Objects (Amendment) (No 2) Regulations, SI 2001/3972.



The Annex is as follows:

1. Archaeological objects more than 100 years old which are the products of: - land or underwater excavations and finds, - archaeological sites, - archaeological collections.
2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.
3. Pictures and paintings executed entirely by hand, on any medium and in any material
4. Mosaics other than those in category 1 or category 2 and drawings executed entirely by hand, on any medium and in any material.
5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters.
6. Original sculptures or statuary and copies produced by the same process as the original other than those in category 1.
7. Photographs, films and negatives thereof.
8. Incunabula and manuscripts, including maps and musical scores, singly or in collections.
9. Books more than 100 years old, singly or in collections.
10. Printed maps more than 200 years old.
11. Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old.
12. (a) Collections and specimens from zoological, botanical, mineralogical or anatomical collections; (b) Collections of historical, palaeontological, ethnographic or numismatic interest.
13. Means of transport more than 75 years old.
14. Any other antique item not included in categories A 1 to A 13, more than 50 years old.

The cultural objects in categories A 1 to A 14 are covered by this Directive only if their value corresponds to, or exceeds, the financial thresholds under B."<sup>19</sup>

3.18 As can be seen, this definition is lengthy and subjective. Moreover, it was the subject of criticism by consultees. Colin Campbell of the University of Edinburgh thought that it was "perhaps not wide enough to capture the wide range of objects that might be described as 'cultural' in contemporary society." Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation argued that "the EU Directive uses outmoded definitions of cultural property which are out of step with contemporary museum practice. Under that definition, the plant used in the last working fireclay mine in Scotland (which closed in 1980) is not defined as 'cultural property'".

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<sup>19</sup> We omit the financial figures.

3.19 Many of our consultees also commented on the difficulty of defining "cultural objects". The Judges of the Court of Session commented that "no matter what definition of the term cultural property were to be adopted, there would almost inevitably be disputes as to whether a given item fell within that definition or not." The Law Society of Scotland expressed the view that "special treatment for cultural objects raises many problems." John MacLeod commented that "the definition of cultural property is deeply problematic".

3.20 We agree with the comments made about how difficult it is to achieve a satisfactory definition of "cultural objects". Our conclusion is that it is therefore preferable to have the one period for positive prescription, but to have a relatively long period. We think that twenty years is appropriate. It must be remembered that we have already recommended that the possessor must have acted in good faith and without negligence both at the moment of acquiring possession and throughout the prescriptive period. These requirements give further protection to the original owner. We are of the view that they would ensure that Scotland would not become a destination favoured by those dealing in stolen art, a concern expressed by Mr Radcliffe which we refer to above. Moreover, a relatively long time period with these additional requirements is consonant with the traditional Scottish approach of a strong *nemo plus* rule, when contrasted to the position in many other European countries.<sup>20</sup>

**6. The period of possession which should be required for the establishment of a prescriptive title in relation to corporeal moveable property should be twenty years.**

(Draft Bill, s 1(1)(a))

**7. There should not be a separate period for cultural objects.**

3.21 We have a further recommendation, which relates to treasure trove. Under the current law, treasure trove falls to the Crown and is dealt with by the Queen's and Lord Treasurer's Remembrancer (QLTR) and administered by the Treasure Trove Unit.<sup>21</sup> The Crown's entitlement comes from three rules: namely (i) negative prescription combined with the rule *quod nullius est fit domini regis* (what belongs to no-one is the property of the lord king), (ii) abandonment combined with the rule *quod nullius est fit domini regis* and (iii) the doctrine of *ultimus haeres* (the Crown as ultimate heir).<sup>22</sup> There is also a wider more general doctrine of *bona vacantia* which gives the Crown right to certain other ownerless property, but its exact parameters are unclear.<sup>23</sup> The three rules enable the Crown to claim portable antiquities which have been discovered, in particular prehistoric, Roman and medieval items.<sup>24</sup> The finder is normally given an *ex gratia* reward and the property then allocated to a museum. We think that a strong case can be made for excluding treasure trove from the

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<sup>20</sup> See above, paras 2.6-2.7. Cf A Salomons, "The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the European Draft Frame of Reference: A Tale of Two Gatekeepers" (2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1749484](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749484).

<sup>21</sup> See <http://www.treasuretrovescotland.co.uk/>.

<sup>22</sup> Contrast the position in England, where the scope of the right is much more limited. See the Treasure Act 1996.

<sup>23</sup> Thus under the Companies Act 2006, Part 31, Chapter 2 the Crown has the right to the assets of a company which has been dissolved without all its assets being distributed. For the doctrine more widely, see A R G McMillan, *The Law of Bona Vacantia in Scotland* (1936). A modern academic treatment of the law is needed.

<sup>24</sup> See Scottish Government, *Treasure Trove in Scotland: A Code of Practice* (2008), available at <http://www.scotland.gov.uk/Publications/2008/12/04114930/0>.

scope of the new positive prescription rule given its importance to the nation. It would also fulfil a policy which we advanced in the first part of the Discussion Paper:

"Our proposals would not touch the rights of the Crown under the Companies Act, or as *ultimus haeres*. As for treasure trove, our proposals would affect the Crown's rights, but only in a technical manner. As a matter of policy, we consider that Crown rights to treasure trove should remain in substance wholly unaffected. If the substantive law of treasure trove is to be reviewed, that would need to be in a separate project. As far as this project is concerned, Crown rights in treasure trove are taken as sacrosanct."<sup>25</sup>

3.22 There are of course arguments against excluding treasure trove. First, it can be argued that the concept of "treasure trove" is not clear and faces the same objections as trying to define "cultural objects". In terms of what the Crown will actually claim, however, the category is certainly narrower and is normally limited to very old and valuable items.<sup>26</sup> Secondly, a case can be made that someone who acquires property in good faith and holds it for twenty years should not have to worry about a Crown claim being made some time after that. Our view, however, is that in many cases the property will clearly be treasure trove. For example, in the case of a Roman artefact the acquirer would not be able to satisfy the "without negligence" test if enquiries had not been made to check that the Crown has disclaimed it. Where the QLTR considers that someone has acted honestly and made a genuine mistake in not realising that something is treasure trove, an *ex gratia* payment will be made. It must be remembered too that the Crown will also have to overcome the presumption arising from possession that the holder is owner. A final point is to repeat the comment we made in the Discussion Paper that there may well be a case for a general review of the law relating to *bona vacantia*, *ultimus haeres* and treasure trove.<sup>27</sup> We recommend:

**8. Treasure trove should be excluded from the new rule of positive prescription.**

(Draft Bill, ss 1(6) and 3(2))

**Special issues about time (a): incapacity and *vis major* (superior force)**

3.23 The DCFR provides for the running of prescription to be suspended during the owner's incapacity,<sup>28</sup> as does the law in other countries such as France<sup>29</sup> and Germany.<sup>30</sup> The 1976 Discussion Paper took the view that incapacity should be irrelevant, as it is for prescription in relation to land.<sup>31</sup> Clearly, the longer the prescriptive period, the less significant is the question of incapacity.<sup>32</sup> Since we have recommended a longer period than

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<sup>25</sup> Discussion Paper, para 1.16.

<sup>26</sup> See, *Treasure Trove in Scotland, Report by Queen's and Lord Treasurer's Remembrancer 2010/2011* (2011) Appendix 3, available at <http://www.treasuretrovescotland.co.uk/downloads/annualreport1011.pdf>. The highlight find during the period this report covers was a hoard of four Iron Age gold torcs, found at Blairdrummond, Stirling, which were allocated to National Museums Scotland.

<sup>27</sup> Discussion Paper, para 1.18.

<sup>28</sup> DCFR VIII. - 4:201.

<sup>29</sup> French Civil Code art 2235.

<sup>30</sup> § 939 German Civil Code.

<sup>31</sup> The rejection of incapacity is implied for the shorter period, but is express for the longer period: para 12 and para 14(d).

<sup>32</sup> Thus in France and Germany the prescriptive periods are shorter (three years and ten years respectively).

was proposed in the 1976 Discussion Paper, we see no reason to change our view that incapacity should be left out of account.

3.24 The DCFR also provides that "the running of the period is suspended as long as the owner is prevented from exercising the right to recover the goods by an impediment which is beyond the owner's control... The mere fact that the owner does not know where the goods are is irrelevant."<sup>33</sup> We think that this *vis major* (superior force) idea stands or falls with the question of incapacity.

3.25 All consultees who responded to this question were in agreement that incapacity or other inability to act should not suspend the running of prescription. A number commented that adults with incapacity normally have a representative to look after their affairs. We recommend:

**9. Incapacity, or other inability to act, should not suspend the running of prescription.**

(Draft Bill, s 4(2)(a))

**Special issues about time (b): a shorter period based on the owner's knowledge**

3.26 It would be possible to have a shorter prescriptive period which would apply where the owner has actual or constructive knowledge of where the property is. While there is a precedent for this in some international instruments in relation to repatriation of cultural objects,<sup>34</sup> as far as we are aware no European system has adopted a comparable rule for the purposes of positive prescription. The DCFR expressly provides that "the mere fact that the owner does not know where the goods are does not cause suspension..."<sup>35</sup> It could be argued that owners who sit on their hands may find that the law of personal bar will be engaged. A separate rule to cover the case where the owner can trace the goods would complicate the law and we were doubtful whether that complication would be justified by any benefits that such a rule would bring.<sup>36</sup> Consultees generally shared this view. Professor Reid considered that a special rule would "complicate the reform without sufficient corresponding benefit". The Judges of the Court of Session agreed. The Faculty of Advocates argued that such a rule would cause "uncertainty". In contrast, Rowan Brown of Industrial Museums Scotland, Tamsin Russell of the Scottish Museums Federation and Julian Radcliffe of the Art Loss Register favoured a period of 10 to 15 years where the owner knew of the property's location. These consultees, however, all had favoured a longer period of 30 years as the standard rule for positive prescription. We are persuaded that the introduction of a special rule would complicate the law, without bringing sufficient countervailing benefits. We recommend:

**10. There should not be a shorter prescriptive period in cases where the owner is reasonably able to trace the goods.**

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<sup>33</sup> DCFR VIII. - 4:202.

<sup>34</sup> Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC) art 7(1); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 art 3(4).

<sup>35</sup> DCFR VIII. - 4:202.

<sup>36</sup> As well as complicating the legislation, it would bring in practical complications, namely the need for evidence as to the owner's state of knowledge.

## **Possession: general**

3.27 No attempt is made in the 1973 Act to define possession for positive prescription in relation to land, except that it includes civil possession (ie possession held through another party, for example by a landlord through a tenant).<sup>37</sup> Clearly, civil possession should also count under the new scheme for corporeal moveables. For example, an acquirer of a valuable piece of silverware may deposit it in a bank vault for safekeeping. The 1973 Act provides that for positive prescription the land must have been possessed "openly, peaceably and without any judicial interruption".<sup>38</sup> The first of these terms ("openly") is straightforward for land, and indeed it is not easy to possess land other than openly. In contrast, it is difficult to possess moveables openly, at least in any useful sense of that term.<sup>39</sup> The DCFR commentary gives the example of a painting, and notes that one would have to ask whether it makes a difference whether the painting hangs in a bedroom or a living room, whether it could be seen through a window by passers-by, and so on.<sup>40</sup> Of course the possessor may well not want it to be seen by a passer-by in case this tempts a burglar.

3.28 Consultees were agreed that there should be no requirement that possession be "open". We also asked whether deliberate concealment should bar prescription. There was less consensus on this. Professor Johnston was "not much in favour of making specific rules about deliberate concealment, and my inclination would be to leave this out and rely once again purely on the test of good faith". Professor Reid was "not sure that provisions for deliberate concealment would be workable." The Faculty of Advocates considered that deliberate concealment should not bar prescription, but the Judges of the Court of Session took the opposite view. Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation "strongly disagreed with the statement in [the Discussion Paper at paragraph 7.24] that museums might keep items hidden in store if they are unsure about the provenance. Items stored in publicly funded institutions are physically accessible on an appointment basis and are therefore publicly available and 'open'".

3.29 We have concluded that a case has not been made out for a specific rule in relation to deliberate concealment, but that it would be open to a court to regard the possessor as not being in good faith in such circumstances. Thus the acquirer who hides something away because of doubts that title has actually been acquired may fail the "good faith and without negligence test". The result would be that prescription would not operate. We recommend:

**11. Possession should include civil possession.**

(Draft Bill, s 8)

**12. There should be no requirement that the possession be "open".**

**13. There should not be a special rule that deliberate concealment bars prescription.**

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<sup>37</sup> 1973 Act, s 15.

<sup>38</sup> 1973 Act, s 1(1).

<sup>39</sup> The French Civil Code art 2261 requires "public" possession as do other civil codes influenced by it. The DCFR commentary p 4908 describes this as appearing "a little unrealistic".

<sup>40</sup> DCFR commentary, p 4908.

3.30 The 1973 Act requires that for land the possession be continuous.<sup>41</sup> The DCFR does the same and also has detailed provisions about the effects of a temporary loss of possession.<sup>42</sup> The 1973 Act provides that for land the possession must be without judicial interruption,<sup>43</sup> and it makes sense for the same to apply to moveables. Consultees agreed that possession should be continuous, peaceable and without judicial interruption. In the Discussion Paper, we expressed the view that in the interests of simplicity the DCFR should not be followed in relation to issues about temporary loss of possession.<sup>44</sup> We noted that there were no such provisions for land. On reflection, however, we are persuaded that the example of the DCFR should be followed. Imagine that Kirsty is in possession of a painting and that painting is stolen by Louise, but recovered a few weeks later by the police and returned to Kirsty. We are of the view that the period of involuntary dispossession should be ignored when assessing whether Kirsty has been in "continuous" possession for the purposes of positive prescription. In the DCFR the period of dispossession does not count if it is less than one year or proceedings which lead to recovery are raised within that same period of one year. This seems an appropriate period. We recommend:

- 14. Possession should be continuous, peaceable and without judicial interruption.**

(Draft Bill, ss 1(1)(a))

- 15. Possession should not cease to be continuous where the possessor is involuntarily dispossessed, provided that the possessor within one year either (a) recovers possession or (b) raises proceedings which result in the recovery of possession.**

(Draft Bill, s 1(4))

### **Possession: intention**

3.31 Positive prescription pre-supposes that that the possessor intends to possess the property as owner. This is known as the *animus domini*. In contrast, imagine that John borrows a book from Karen. Here he does not possess as owner. This *animus domini* requirement is distinct from the requirement of good faith. Indeed, in land law a person can prescribe a title by possessing "as owner" but in bad faith. Conversely a person may possess in good faith, in the sense of being unaware of a better right held by a third party, and yet not possess "as owner". For example, the party might believe that a valid lease is in place and thus the property is being possessed as tenant. Consultees were agreed that the possessor should possess the property as owner. We recommend:

- 16. Positive prescription would pre-suppose an intention to possess as owner.**

(Draft Bill, s 1(1)(b))

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<sup>41</sup> 1973 Act, s 1(1).

<sup>42</sup> DCFR VIII. - 4:103.

<sup>43</sup> 1973 Act, s 1(1).

<sup>44</sup> Discussion Paper, para 7.25.

## Successors

3.32 Legal systems that have positive prescription allow possession by successors to count. Thus under our proposed twenty year rule, Jane could buy a painting in good faith and possess it for five years. If she then sells to Kenneth who is equally in good faith and possesses for a further period of fifteen years, any defect in title which existed when Jane purchased the property disappears. In other words, Kenneth's period of possession is added on to Jane's. There is *successio in possessionem*, to use the traditional Latin phrase. All the requirements for prescription need to be present at each stage. Thus both Jane and Kenneth must be in good faith. John MacLeod, whose suggestion was adopted by the Law Society of Scotland, argued that bad faith possession should not count against an onerous successor. Thus if Jane had acquired in bad faith, Kenneth would still get the benefit of her period of possession for the purposes of positive prescription if he gave value and was himself in good faith. Mr MacLeod was concerned about the problems of proof in relation to good and bad faith. Our view, however, is that a requirement of good faith throughout the prescriptive period is consistent with our policy of giving appropriate protection to the original owner of the property. We recommend that:

- 17. Possession can include possession by successors, but the other requirements for prescription must be present throughout the prescriptive period.**

(Draft Bill, s 1(2)-(4))

## Compensation

3.33 The result of positive prescription is to confer good title on the possessor. The former owner is expropriated. There is, however, no entitlement to compensation in the case of positive prescription of landownership in Scotland, nor where title to moveables is lost as a result of negative prescription. This is the general position in other jurisdictions and the DCFR takes the same approach. There are good policy reasons to justify prescription without the need for compensation. The Grand Chamber of the European Court of Human Rights has supported this approach.<sup>45</sup> Consultees agreed. We therefore recommend:

- 18. There should no entitlement to compensation in respect of a title lost by the running of prescription.**

## Abolition of the common law rule about prescriptive title (if such a rule exists)

3.34 We saw earlier that it is possible, although doubtful, that at common law there exists a forty year positive prescription for corporeal moveables.<sup>46</sup> Obviously any such rule should be formally abrogated when the new statutory scheme is introduced. Consultees agreed. We recommend:

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<sup>45</sup> *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45.

<sup>46</sup> See above, para 2.1.

19. Any rule that there may be under the common law whereby ownership of corporeal moveable property can be acquired by possession for forty years should be abrogated.

(Draft Bill, s 6)

### Negative prescription and Crown rights

3.35 Our proposed new rule of positive prescription leads to the question of what should happen to the existing rule of negative prescription in respect of ownership of corporeal moveables. As we saw earlier,<sup>47</sup> it is generally accepted that section 8 of the 1973 Act operates after a period of twenty years resulting in the property falling to the Crown. In principle, the negative prescription rule could be kept alongside our recommended twenty year positive prescription period. The example which we gave in the Discussion Paper<sup>48</sup> was as follows. In 2020 Fred steals Jill's ring and in 2025 he sells it to Innocentia. Jill would lose ownership in 2045, by force of negative prescription, and at the same time Innocentia would acquire ownership, by positive prescription. We commented that this seemed artificial. The existence of a rule of positive prescription negates the need for a rule of negative prescription. It is telling that there is no negative prescription for the ownership of land.

3.36 Where there would be an impact, however, is in relation to the Crown. It can be argued that the current rule whereby property falls to the Crown following negative prescription is *functionally* a rule of positive prescription. This is because the result is to give the Crown ownership. It is one of the bases of the Crown's entitlement to treasure trove. An argument can be made that even with the abolition of negative prescription, the Crown is still protected by the general doctrines of *bona vacantia* and *ultimus haeres*. Given, however, that section 8 was a specific rule under which property fell to the Crown,<sup>49</sup> it seems preferable to devise a substitute scheme of positive prescription. This would also have the benefit of ending the theoretical absurdity in the current law whereby the Crown loses ownership every twenty years but automatically regains it.

3.37 Clearly the new positive prescription rule would not require the Crown to possess the property. (But the Crown would be able to use the standard rule of twenty years like any other person if it did possess.) The question then is how long the prescriptive period should be. In the Discussion Paper<sup>50</sup> we gave the example of someone losing her ring at the seaside and finding it thirty years later. Under the current negative prescription rule of twenty years ownership has been lost. Such a period seems too short. Moreover, it must be remembered that under the current law negative prescription does not operate where a thief has possession.<sup>51</sup> We would not want the owner's rights to be defeated in such circumstances by a right emerging in the Crown.

3.38 In the Discussion Paper we suggested a period of one hundred years as appropriate to protect the Crown's right to treasure trove. We received, however, a helpful response

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<sup>47</sup> See above, para 2.2.

<sup>48</sup> Para 7.38. And see also above, at para 3.8.

<sup>49</sup> Although it is doubtful that it was drafted with that specific intention, given the uncertainty discussed above at paras 2.2-2.3.

<sup>50</sup> Para 7.43.

<sup>51</sup> 1973 Act, Sch 3(g).



from the QLTR, who had consulted her advisory committee, the Scottish Archaeological Finds Allocation Panel (SAFAP).<sup>52</sup> She expressed concern that a one hundred year rule would not catch, for example, World War II finds. This is because it is less than a century since such objects had an owner. While the preference of the QLTR and SAFAP was for us to devise a statutory definition of "treasure trove", they were of the view that a sixty year period would be the most appropriate length of time, if we were to proceed with a time-based rule. We believe that defining what types of portable antiquities qualify as "treasure trove" would be best suited to a separate project to review the law of treasure trove and related areas in general. Therefore we gratefully adopt the suggestion of the QLTR and SAFAP. We should make one other point. The new statutory rule is essentially one for the future.<sup>53</sup> World War II portable antiquities which have already fallen to the Crown under the existing law will remain the Crown's. Our new scheme will not disturb this.

3.39 Our other consultees were generally in agreement that the existing rule of negative prescription should be abolished, but that there should be a new non-possessionary positive prescription in favour of the Crown. Professor Reid noted that with a system of positive prescription in place "there would be no need for negative prescription, and it would cause confusion to retain it."

3.40 Where property is acquired by the Crown under the new rule, the QLTR expressed the view that it should be made clear that it can be disclaimed, as under the current law.<sup>54</sup> For example, the Crown may decide to reject an item to which it is entitled under the treasure trove system and pass ownership to the finder.<sup>55</sup> We agree.

3.41 We recommend:

**20. Ownership of corporeal moveable property should cease to be subject to negative prescription.**

(Draft Bill, s 5)

**21. There should be a new non-possessionary positive prescription in favour of the Crown and the period should be sixty years.**

(Draft Bill, s 3(1)(a))

**22. The Crown should have the right to disclaim ownership of property which it has acquired under the sixty year rule.**

(Draft Bill, s 3(1)(b))

## Animals

3.42 Under the existing law there are two statutory provisions establishing positive prescription for animals, in both cases the period being two months. The first is about stray

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<sup>52</sup> See <http://www.treasuretrovescotland.co.uk/html/who.asp>.

<sup>53</sup> Albeit that time which has run before the new legislation will also count. See below, paras 3.48-3.49.

<sup>54</sup> See Scottish Government, *Treasure Trove in Scotland: A Code of Practice* (2008) para 2.5(iii).

<sup>55</sup> See *Treasure Trove in Scotland: A Code of Practice* pp 8 and 9 (definitions of "Disclaim/disclaiming" and "Unclaim/unclaiming").

dogs. Section 4(4) of the Dogs Act 1906<sup>56</sup> provides that "where a person has taken possession of a stray dog, and kept it in accordance with subsection (2)(a) above for a period of two months without its having been claimed by the person having right to it, the person who has taken possession of it shall, at the end of that period, become the owner of the dog." The scope of this provision is limited. It applies only to dogs, and it applies only to such dogs as are stray dogs. A dog owner may lose possession of a dog without the dog thereby becoming a stray dog.

3.43 The second provision applies to certain other animals. It is section 74 of the Civic Government (Scotland) Act 1982: "Where any person who has found any living creature, other than a stray dog or livestock<sup>57</sup> ... has been permitted to have, at his request, care and custody of that creature under arrangements made by the chief constable under section 68(2) of this Act and the creature — (a) has continued to be in his care and custody for a period of 2 months, and (b) has not been claimed during that period, that person shall at the end of that period become the owner of that creature."

3.44 These two provisions are not aimed at protecting good faith possessors. The possessors who gain ownership under these provisions are aware of their lack of title. The provisions resulted from a recommendation of this Commission.<sup>58</sup> The reason was stated in our report as follows: "The information which we received on consultation tends very much to the conclusion that there should be a relatively short period, after which the keeper of an animal should, if he so wishes, be entitled to acquire ownership. There are two reasons for this. One is that if domestic animals are not claimed within a very short time they are usually destroyed or given to new 'owners'. The other reason is that most animals apparently forget their original owners very quickly, in many cases in less than three months."<sup>59</sup> The bond of mutual affection that can develop between an animal and a human being was not referred to, but presumably this was part of the thinking. It might be argued that there is an inconsistency in recognising the "bond of affection" factor in the cases defined in the 1906 and 1982 statutes, but not in cases of good faith possession. We noted in the Discussion Paper<sup>60</sup> that Swiss law has a special prescriptive period of two months for domestic animals which are not kept as part of a business or for profit.

3.45 If the recommendations which we have made in this report are adopted, then animals in general would be capable of being acquired by positive prescription. But few animals live as long as twenty years. We therefore asked consultees whether the existing rules on strays worked satisfactorily and whether a shorter period of positive prescription should apply to animals.

3.46 Only five consultees responded to this question. None regarded the current rules on stray animals as unsatisfactory. The Faculty of Advocates suggested a special prescription period of two months for animals. John MacLeod and the Law Society of Scotland favoured the Swiss rule, but stressed that this should only apply to domestic pets. The Judges of the

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<sup>56</sup> As inserted into the 1906 Act by the Civic Government (Scotland) Act 1982.

<sup>57</sup> "Livestock" is defined in s 129 of the 1982 Act as meaning "cattle, horses, asses, mules, hinnies, sheep, pigs, goats and poultry, deer not in the wild state and while in captivity, pheasants, partridges and grouse."

<sup>58</sup> Scottish Law Commission, *Report on Lost and Abandoned Property* (Scot Law Com No 57 (1980)).

<sup>59</sup> Para 8.2. The three-month period in the report became two months when the bill was enacted as the Civic Government (Scotland) Act 1982. We would add that there had been a brief discussion of the matter in the preliminary discussion paper: Scottish Law Commission, *Corporeal Moveables - Lost and Abandoned Property* (Memorandum No 29 (1976)) paras 52 and 53.

<sup>60</sup> Para 5.15.

Court of Session favoured excluding the ownership of animals from the new scheme. We are not aware of other legal systems taking such an approach.

3.47 While we see some attraction in the Swiss rule, on further consideration we doubt whether there is a real need for it in practice. Such a rule would not apply to strays or other lost animals where the person who takes in the animal knows that it does not belong to them.<sup>61</sup> Individuals buying animals from a reputable pet shop would also not need it, as the pet shop would own the animal. Individuals buying a Crufts champion on a Friday night in a back-street public house for a cheap price would not benefit from it, as they would not satisfy the good faith and without negligence test. It seems to us that if there were to be such a rule, defining the scope of it would be challenging. Thus, for example, would a term such as "household pet" cover rabbits kept in a hutch in the garden or a Shetland pony? Switzerland is the only country of which we are aware that has a special rule and no such rule is to be found in the DCFR. Given the limited response from consultees, there would seem to be no pressing demand for such a rule and therefore we are not persuaded that one should be introduced. We recommend:

- 23. The existing rules about animals (Dogs Act 1906 s 4(4) and Civic Government (Scotland) Act 1982 s 74) should be retained.**
- 24. There should not be a shorter period of positive prescription in relation to animals.**

### Transitional issues

3.48 The introduction of the new legislation raises issues as to what time should count towards the prescriptive period. In the Discussion Paper we gave a number of examples.<sup>62</sup> Suppose, for example, that in 2020 legislation introduced a twenty-year positive prescription for corporeal moveable property. If that were to apply purely prospectively, it would mean that no defective title would be cured by the new legislation before 2040. That might be regarded as a long time to wait. In the meantime, possessors would gain no benefit from the legislation. On the other hand, if the new legislation were to be apply immediately on Royal Assent to cases where the twenty years of possession wholly preceded Royal Assent, the effect would be the sudden expropriation of true owners, who would thus be unable to respond to the legislation. For example, such a person might have been on the verge of raising an action to recover the item in question. Even less acceptable would it be to alter rights with retrospective effect, so that, for example, someone who had completed twenty years of good faith possession in 2035 would be deemed, in 2040, to have been the owner since 2035. (So that the person who was *in fact* the owner from 2035 to 2040 would be deemed, after 2040, not to have been the owner in that period, and this deeming would apply not merely as from 2040, but retrospectively from 2035.)

3.49 In the Discussion Paper we suggested a middle path. For example, the 1973 Act, in changing the law as to prescriptive title to land, provided that time running before the commencement of the Act would be applicable,<sup>63</sup> but at the same time it delayed the

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<sup>61</sup> Thus it would be irrelevant to the recent widely reported case in Stornoway Sheriff Court about a stray cat. See <http://www.bbc.co.uk/news/uk-scotland-highlands-islands-16864497> (2 February 2012).

<sup>62</sup> Paras 7.51-7.52.

<sup>63</sup> 1973 Act, s 14.

commencement of the new provisions for three years after Royal Assent,<sup>64</sup> thus leaving a reasonable amount of time for anyone wishing to assert a right under the existing law to do so. We asked consultees whether the new Bill should take the same approach. Consultees agreed. We recommend:

- 25. Time running before the commencement of the new provision establishing the rule of positive prescription can be counted in reckoning the prescriptive period.**

(Draft Bill, s 4(1))

- 26. The new provision establishing the rule of positive prescription should be delayed by a period of three years following Royal Assent to allow dispossessed owners a reasonable opportunity to assert their claims.**

(Draft Bill, s 9(1))

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<sup>64</sup> 1973 Act, s 25. The Prescription Act 1617 (now repealed) similarly did not take full effect until some years after it was passed.

# Chapter 4      Recommendations for reform: (B) The non-standard case

## Introduction

4.1 In Chapter 3 we outlined how a scheme of positive prescription for corporeal moveable property would work in the standard case. This is the situation where a person acting in good faith purports to acquire a corporeal moveable, typically by purchase, but does not in fact obtain a valid title because the title of the seller or other transferor is bad.

4.2 There are of course other situations which can be considered as "non-standard", for example where a possessor of a corporeal moveable has taken possession of it without necessarily intending to acquire it, or perhaps where a person has deposited a corporeal moveable with another person and neglects to reclaim it or assert ownership of it. The defining characteristic of the non-standard case could be said to be that the possessor does not believe in good faith that ownership is being acquired when possession is commenced. Other legal systems, for example the DCFR,<sup>1</sup> allow for a prescriptive title to be gained in such non-standard cases; a question we posed in the Discussion Paper was whether Scots law should too.

4.3 We outlined three possible ways in which the law could approach the non-standard case.<sup>2</sup> These were (1) to have no special rule and simply allow the standard test to apply in non-standard cases; (2) to allow prescription in non-standard cases but subject to a longer prescriptive period (which would not be available to thieves or reseters); or (3) to identify particular non-standard situations in which prescription could run, but to make prescription unavailable in all other situations.

## Consultation

4.4 Consultee responses were varied, but largely agreed that in principle possession in good faith should always be required for a prescriptive title. The Judges of the Court of Session believed possession in good faith to be the "cornerstone of a robust law of prescription", whilst Dr Lars van Vliet stated that "prescription, negative or positive, running in favour of a *mala fide* possessor is very controversial and hard to accept".

4.5 The second option of having a longer prescriptive period received some consultee support. In particular, Dr Andrew Simpson and Professor David Johnston suggested that in order to achieve legal certainty, the requirement of good faith could perhaps be waived in certain situations. We appreciate that there may be wider public benefit to be gained from a rule which allows prescription to operate in some situations without good faith, in that certainty of title may benefit those in possession of corporeal moveables (and diminish the number of ownerless or "in-limbo" corporeal moveables). However, there is also certainty to be gained from having a consistent rule that good faith should always be required for a

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<sup>1</sup> DCFR commentary, pp 4895-4896.

<sup>2</sup> See Discussion Paper, Part 8.

prescriptive title. Such an approach also has the benefit of simplicity. The danger with prescribing various rules for good and bad faith acquirers in relation to prescription is that the law, instead of being clarified, becomes more complicated. We consider that simplicity and certainty are important objectives and therefore recommend:

**27. There should not be a separate general rule providing for a longer period of positive prescription which applies if good faith is absent.**

**Non-standard cases: lent or deposited property**

4.6 The third possibility canvassed in the Discussion Paper was whether prescription should be capable of running, without a requirement for good faith, in certain prescribed circumstances. There was support for this particularly from consultees in the museums and galleries sector. However, concerns were expressed by Professor Johnston and Dr Van Vliet that the proposal was "too complicated" and "vague". Our view, nevertheless, is that there is much to be said for a focussed rule which could in particular assist museums and galleries as well as being of wider benefit.

4.7 The paradigm situation was outlined by the Society of Antiquaries of Scotland in their response to the 1976 Discussion Paper:

"It sometimes happens...that objects are placed in the museum because there is no certain owner - eg objects left long ago with lawyers, or belonging to defunct societies that might conceivably be revived. At other times objects have been lent to the museum (or just left there) from addresses through which it would be extremely hard if not impossible to find the owner's successors, certainly 40 years later. Further, if the owner does have ascertainable successors, they may not have shown for a very long time any concern with an object originally left on some perhaps vague form of 'indefinite loan' – eg they may not have included it in returns for estate duty purposes. Would the museum be justified in such cases in believing after 40 years (or less) that a previous owner had relinquished his right...?"

One of our consultees last year, Neil Curtis, Head of Museums at the University of Aberdeen, noted:

"The discussion paper helpfully highlights ... the submission made to the 1976 discussion paper by the Society of Antiquaries of Scotland who wrote about items deposited in museums without clear documentation ... There continue to be items which have been deposited on 'indefinite loan', 'permanent loan' or without any clear record. It is to be hoped that the discussion paper can lead to a proposal that will clarify such issues."

4.8 This raises specific issues in relation to lent or deposited corporeal moveables. A museum may not have a record of who the owner of lent property is, and so may not know who to contact to ascertain whether the owner wishes to retain title to the property. Further, even if the museum does have a record of who the owner is, the owner may have moved or died, in which case it may be difficult or impossible to track down the person's successors. A museum would not be able to rely on the new twenty-year rule of positive prescription if it knows that the property is lent, because it cannot then satisfy the test that it must believe in good faith and without negligence that it owns the property.

4.9 As well as being an issue raised back in 1976, this was also a concern raised by other consultees last year in addition to Mr Curtis. The National Archives of Scotland

indicated that the uncertainty of title had an impact in practice on the level of resources which it would invest in that property. This was for fear of spending public funds cataloguing items which it did not own. Rowan Brown of Industrial Museums Scotland and Tamsin Russell of the Scottish Museums Federation also suggested that the above situation can lead to costly disposal processes, ie where a museum wishes to dispose of a corporeal moveable which was lent to it many years previously but whose owner cannot now be traced. There is presumably a fear here of action by the original owner if the museum discards items which it may not actually own. It is important for museums to be able to review their collections periodically and to dispose of items of low educational value which take up storage space and prevent new items from being acquired. In 1999 it was estimated that UK museums had 149 million objects in their possession<sup>3</sup> and it is now generally accepted in the sector that continuous growth of collection is not sustainable. Therefore governing bodies of museums need to have an appropriate level of flexibility in order to manage their collections for the public.<sup>4</sup>

4.10 We are grateful to Jane Robinson of Museums Galleries Scotland for drawing our attention to *Disposal toolkit: Guidelines for museums*, which has been issued by the Museums Association.<sup>5</sup> It provides that where a museum wants to dispose of an item which it holds on loan then it should contact the lender to discuss the item's return.<sup>6</sup> But what if the lender cannot be contacted? A museum may expend resources storing and maintaining lent property, even where it has no interest in keeping such property and it is not in the public interest to do so, simply through concern that the original owner could appear and demand return of the lent property (or compensation if the property has been disposed of already). We consider that a separate rule enabling a party holding corporeal moveable property to acquire it after a relatively lengthy period of no contact with the lender or depositor would provide a solution to the unsatisfactory position outlined above.

4.11 There is, however, a difficulty with casting the new rule as one of prescriptive acquisition which we identified in the Discussion Paper: the problem of the changed intention.<sup>7</sup> Where property is deposited with or lent to someone that person does not intend to possess the property as owner. The intention is to hold the property as deposittee or borrower. At some point in time, if there has been no contact with the owner, the intention may change. But assessing when and if there has been such a change is inherently difficult. The new rule should therefore avoid that difficulty.

4.12 In summary our view is that a rule is desirable to provide persons (in particular museums, galleries and other similar institutions) with certainty of title in relation to corporeal moveables which are lent or deposited, where the lender or depositor can no longer be traced. This will have legal benefits in terms of certainty of title, as well as economic benefits, in particular for museums and galleries. The consultation responses provided us with evidence of this.

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<sup>3</sup> S Matty (ed), *Overview of Data in the Museums, Libraries and Archives Sector* (2004) p 44. We are grateful to Professor Janet Ulph of the University of Leicester and AHRC Placement Fellow with the Museums Association for this reference and also for sight of her paper entitled "The Sale of Items in Museum Collections" presented to the Modern Studies in Property Law Conference at the University of Southampton on 23 March 2012.

<sup>4</sup> See Ulph, "The Sale of Items in Museum Collections" p 2. See also, National Museums Directors' Council, *Too much stuff? Disposal from Museums* (2003).

<sup>5</sup> <http://www.museumsassociation.org/collections/disposal-toolkit-and-training>. See also the Code of Ethics of the Museums Association (2010) available at <http://www.museumsassociation.org/ethics/code-of-ethics>.

<sup>6</sup> *Disposal toolkit*, p 12.

<sup>7</sup> Discussion Paper, para 8.9.

4.13 Equally, we acknowledge that such a rule must sufficiently protect owners of property who lend or deposit it. Without appropriate protections, there would be a real danger of a disincentive effect upon lending. This would be undesirable, not least in the context of museums and galleries, where there is public benefit from items being loaned with the owner secure in the knowledge that ownership is retained. We set out the protections in detail below.<sup>8</sup> We therefore recommend:

- 28. There should be a new rule in relation to lent or deposited property which permits the holder to acquire ownership after a certain period if the person who lent or deposited the property cannot be traced.**

(Draft Bill, s 2)

#### **Lent or deposited property: the period**

4.14 In determining an appropriate period for the new rule we were influenced by three main factors: (1) the length of our recommended standard period of prescription for corporeal moveable property (twenty years);<sup>9</sup> (2) the length of the period of possession required for the new non-possessory positive prescription in favour of the Crown (sixty years)<sup>10</sup>; and (3) ensuring that the period was long enough that original owners were not routinely and unfairly deprived of title, but short enough that the rule could be of benefit to holders of the property. Having considered these factors, we consider that a period of fifty years is appropriate. This period is shorter than the sixty year non-possessory period in favour of the Crown. It is also significantly longer than the standard twenty year period. Thus for the holder of the property to be able to use the rule it would need to be sure that it had held the item for at least fifty years. A museum or gallery would normally be able to do this by means of its cataloguing system. The exact date that the holding began would not need to be known. It is only certainty that the holding has lasted for at least fifty years which would be essential. We therefore recommend:

- 29. For the rule to apply, the property must have been held for at least fifty years.**

(Draft Bill, s 2(1)(b))

#### **Lent or deposited property: possession**

4.15 The rule should be capable of applying in situations where the holder either has possession or custody of the property. The distinction depends on the holder's state of mind. Where the holder has no intention to hold for that party's own use, merely custody and not possession is held.<sup>11</sup>

4.16 Clearly the possession or custody should be continuous. This was the requirement we recommended for the standard case and we can see no reason to deviate from this for lent property. Like the standard case, a period of involuntary dispossession of not more than one year would be ignored. We recommend:

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<sup>8</sup> See below, paras 4.17-4.20.

<sup>9</sup> See above, paras 3.12-3.20.

<sup>10</sup> See above, paras 3.35-3.41.

<sup>11</sup> K G C Reid, *The Law of Property in Scotland* (1996) para 125.



**30. The holder of the property must either have possession or custody of the property and hold it continuously for at least fifty years.**

(Draft Bill, s 2(1)(b))

**Lent or deposited property: protections**

4.17 Where a rule is proposed that can remove a person's title to property they own, and give that title to another, there must be sufficient protections in place for the owner, not least to comply with the ECHR. In addition to the minimum fifty year period of holding, we propose two such protections.

4.18 First, if the lender or depositor (or the owner of the property if that is another person) asserts ownership at any point during the fifty year period then the prescriptive clock will stop running. The requirement for an assertion of ownership would be minimal. All that would be needed is regular (or even irregular) contact with the holder. For example, discussions between the owner and a museum as to relocating the item in a different part of the museum would suffice. So would the giving of permission to lend the item temporarily to another body. We would also expect that where the owner of a painting which has been lent to a gallery dies the need to include the painting in the valuation of the estate for inheritance tax purposes is likely to prompt contact by the executors with the gallery.

4.19 Second, even where fifty years have passed without any assertion of ownership, the holder will not gain title until (1) reasonable diligence has been used to try and contact the owner of the property; and (2) there is an intention to acquire ownership of the property. The first requirement provides the owner with another safeguard in that, even if that party has forgotten to assert title to the property for fifty years, the holder must still attempt to contact that party. At this point the owner can still recover the property. What constitutes "reasonable diligence" will depend on the facts and circumstances of each case. Where, for example, a painting was lent to a gallery in 1960 by the fifth Duke on behalf of his family, it should not be a difficult task to locate the current Duke. Nor should it be difficult given the ease of internet searches for a repository to get in touch with a learned society which has deposited records with it, but not maintained contact since. A greater level of diligence would also be expected in the case of unique high value assets such as an "old master" painting. The requirement under the rule is for the holder to attempt to contact the owner of the property. This may or may not be the lender or depositor or successors of that party, but the starting point for the holder would be to attempt to contact the person who originally handed over the item, or their successors. Thus, in summary, for the rule to apply, there must be no contact between the owner and holder for a substantial period (fifty years) and after the expiry of that period the holder must be unable after exercising reasonable diligence to contact the owner. We consider that these requirements give appropriate protection to the property owner.

4.20 The holder must also elect to acquire ownership of the property. Although writing would not be required, we would expect that museums would update their records to note the election. Acquisition is not compulsory and the holder is entirely free not to exercise the right. If, however, having satisfied all the other requirements, the holder elects to acquire ownership of the property, it is this act which will confer a new statutory title on the holder effective from the date of election. We therefore recommend:

- 31. The lender or depositor (or the owner of the property if that is another person) can interrupt the fifty year period by asserting ownership of the property. Asserting ownership must include communication with the holder of the property.**

(Draft Bill, s 2(1)(c) and (6))

- 32. Once the fifty year period has passed, the holder must exercise reasonable diligence to attempt to contact the owner of the property. If contact cannot be made, the holder may elect to acquire ownership of the property.**

(Draft Bill, s 2(1))

4.21 We have noted elsewhere our policy of attempting to exclude treasure trove from the scope of this project, so far as possible.<sup>12</sup> Thus this new rule in relation to lent or deposited property should not allow a holder to acquire title to property which should have been reported to the Treasure Trove Unit and has not been. Imagine that John discovers a Roman helmet and lends it to a museum, without first reporting it as treasure trove. The museum should not be able to gain title to the helmet after fifty years under the new rule. In practice, we do not think that this exception would be used very often, at least in the case of museums, as the museum itself is likely to contact the Treasure Trove Unit.

#### **Lent or deposited property: further issues**

4.22 Two residual issues remain to be considered. The first is the question of contracting out of the rule. Consultees to the Discussion Paper suggested that, in most cases of lent property, there is no formal agreement. For example, Anne might offer to lend Bethany a corporeal moveable for an undefined period without any written agreement. This is part of the reason that museums have difficulty in contacting owners of lent property, particularly where items were lent some time ago before more accurate, computerised record keeping was introduced. Nevertheless, more diligent lenders will enter into contracts of loan. Our new rule on lent property has no effect, in principle, on these contracts. It would, however, defeat the purpose of the new rule if parties could expressly contract out of it at the outset, rather like contracting out of negative prescription would defeat the purpose of the rules on this subject.<sup>13</sup> The whole point of the rule is to provide a solution where the owner of the property<sup>14</sup> cannot be contacted. That solution is to reunite possession and ownership, by allowing the holder to acquire the property. If the owner of the property has not been in touch for fifty years and the holder cannot contact that person, a contracting-out provision would mean that the item is legally left "in limbo", potentially permanently. The way for the owner to stop the rule from applying is very simple and not onerous. It is to keep in contact with the holder once every fifty years. We recommend:

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<sup>12</sup> See above, paras 3.21-3.22.

<sup>13</sup> This is forbidden by the Prescription and Limitation (Scotland) Act 1973, s 13.

<sup>14</sup> In the normal case, the depositor or lender.

**33. Any provision in a contract which purports to disapply the terms of the lent or deposited property rule will be void.**

(Draft Bill, s 2(8))

4.23 The second issue is that of succession. Where property is deposited or lent to someone, in the absence of express authorisation, that person should not give the property to someone else. If Alex lends his book to Barbara, she should not pass it to Claire. Thus, it might at first sight be thought that Barbara should be the only person to be able to benefit from the lent or deposited property rule and not any successors. In fact, the position is not so straightforward. Fifty years is a relatively long time. What happens if Barbara dies and Alex cannot be traced? Should her executor be able to take advantage of the rule and count the period of time that has already run? Or take the following example. In 1960 Justine lends a painting to a museum owned by the Burgh of Banff. Following local government reorganisation the museum becomes owned by Banff and Buchan District Council and then subsequently by Aberdeenshire Council. Another possibility is a gallery being taken over by another gallery. The foregoing examples can be described as cases of "universal successors", ie where the whole rights and liabilities of one person are taken over by another.<sup>15</sup> Our view is that such successors should be able to count the period that the property has been held by their predecessor.

4.24 In the case of universal successors, the predecessor-holder will no longer be in a position to take advantage of the rule, for example because of death or abolition. Imagine, however, that after forty years Barbara lends Claire the book which Alex has lent to her. Should Claire be able to benefit from the rule and count the period of possession by Barbara? This would let her become owner after only ten years. Here, however, Barbara will still be in civil possession of the book through Claire. In such circumstances, it should be Barbara that can invoke the rule after the final ten years and not Claire. We therefore recommend:

**34. Successors of the original holder should be entitled to use the lent or deposited property rule, but only where the predecessor holder ceases to have possession and custody.**

(Draft Bill, s 2(2) and (3))

**Lent or deposited property: a general or specific rule?**

4.25 One last consideration for the new rule is whether, given that it was created in response to a specific problem in the museums and galleries sector, it should be restricted to that sector or be of general application. We take the latter view. To restrict the rule to a particular class or group would require detailed consideration of who should benefit from such a rule. It would also require definition of the class or group. This is a task where we believe that the difficulties outweigh the benefits. Moreover, we envisage that the rule will be of use to private individuals as well as to museums and galleries (and other entities such as libraries and banks). Individuals lend property to one another on a daily basis. While most items are no doubt either repatriated to the owner or lost or destroyed, holders of more long-lived items will benefit from the new rule. The general policy of certainty of title is therefore

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<sup>15</sup> Reid, *Property* para 598.

promoted. From this the wider public can only benefit. Equally, we believe that the rule is sufficiently demanding in terms of its pre-requisites that the rights of owners are appropriately protected. We recommend:

**35. The lent or deposited property rule should not be restricted to a particular class or group of persons.**

4.26 Finally, it should be remembered that in many cases museums and galleries will be able to take advantage of the new standard twenty year rule, rather than have to wait for fifty years. The fifty year rule only applies where the person who delivers the property makes it clear that ownership is not being transferred. Where property is donated to a museum or gallery, the twenty year rule will apply if its general requirements are satisfied. For example, Gary gifts an antique desk to a museum. There is nothing to suggest anything other than he is the owner. The museum takes possession of it. Twenty five years later Hattie turns up and claims it is hers. The museum's title is now unchallengeable because positive prescription has run in its favour.

# Chapter 5                      Abandonment

## Introduction

5.1     We noted in the Discussion Paper<sup>1</sup> that the law of abandonment strictly speaking lies outwith the scope of this project. Nevertheless, because of its close connection to other issues within the current scope, our Advisory Group suggested that we should consider it with a view to reform. This suggestion has now been supported by consultees too.

## The current law

5.2     Where the owner of corporeal moveable property abandons it, the property falls to the Crown under the rule *quod nullius est fit domini regis*.<sup>2</sup> As a result of the discarding of litter, every day Her Majesty becomes the owner of countless items such as cigarette ends, crisp packets and chewing gum. Furthermore, she acquires larger things such as sagging sofas and defunct cars which have been abandoned by their owners.<sup>3</sup>

5.3     If someone is in direct possession of property, that is to say actually holding it, abandonment requires both a physical and mental act. The corporeal moveable must be left behind with the intention to abandon it. This contrasts with lost property where the owner has forgotten to take something, for example an umbrella left in a restaurant or on the bus. Here there is no intention to abandon. Where the owner is not in direct possession, a physical act is not required. For example, Alison goes abroad to visit her uncle and leaves her car in the long stay airport car park. Her uncle gives her a generous gift of money. When she gets home she buys a new sports car and never bothers to pick up her old car. The abandonment of the old car only requires an act of mind on her part.

## Reform

5.4     The result of the current law is to give the Crown indiscriminately ownership of all abandoned corporeal moveable property, much of which it does not want. The Crown's interest in reality is limited to treasure trove and our proposals elsewhere will continue to protect that interest.<sup>4</sup> A further difficulty is that the Crown is itself unable technically to abandon property because the result of abandonment is that the property becomes the Crown's.<sup>5</sup> We would also add that there is evidence of the current rule not being relied upon by prosecutors. In *Kane v Frie*<sup>6</sup> the appellant claimed to have found copper piping and successfully appealed his conviction for theft on the basis that the Crown had not proved the necessary dishonest intention to appropriate. Lord Justice General Rodger stated:

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<sup>1</sup> At para 9.1.

<sup>2</sup> See eg Bell, *Principles* § 1291; K G C Reid, *The Law of Property in Scotland* (1996) para 547 (W M Gordon).

<sup>3</sup> Property put out for refuse collection is arguably donated to the local authority as a matter of law rather than abandoned.

<sup>4</sup> See above, paras 3.35-3.41.

<sup>5</sup> Where the Crown disclaims its right to treasure trove in respect of an item handed in by a particular person this may be viewed as a transfer of that item to that person. See *Treasure Trove in Scotland: A Code of Practice* pp 8 and 9 (definitions of "Disclaim/disclaiming" and "Unclaim/unclaiming").

<sup>6</sup> 1997 JC 69.

"It is true that at common law most abandoned moveable property belongs to the Crown. The advocate depute did not seek, however, to found on that somewhat technical doctrine when arguing that the appellant had had the necessary *mens rea* for conviction of the crime libelled."<sup>7</sup>

5.5 The Scottish rule differs from that in many legal systems where the effect of abandonment is to make corporeal moveable property ownerless.<sup>8</sup> This means that it becomes available for appropriation by *occupatio* (occupancy) ie the doctrine that an unowned thing may be acquired by taking possession of it with the intention of becoming owner.<sup>9</sup> For example, Lisa lends a book to Megan. She subsequently tells Megan that she has bought a downloadable version for her new electronic book reader and she does not want the book back. Megan can then choose to acquire the book.<sup>10</sup>

5.6 In the Discussion Paper we asked whether corporeal moveable property that is abandoned should become ownerless and thus susceptible to appropriation under the doctrine of *occupatio*.<sup>11</sup> Consultees, including the Faculty of Advocates, the Law Society of Scotland, Professor Johnston and Professor Reid, were generally supportive of this suggestion. The Judges of the Court of Session stated that they had no objection and this too was the position of the QLTR, provided that the Crown's right to treasure trove was preserved.<sup>12</sup> Professor Gordon's preference, however, was for such a rule to await a general Title to Moveable Property Act, rather than be part of a Bill primarily on prescription. We agree, however, with the views of the majority of our consultees and accordingly recommend:

**36. Corporeal moveable property that is abandoned should become ownerless.**

(Draft Bill, s 7(1))

### **Civic Government (Scotland) Act 1982**

5.7 Part 6 of the Civic Government (Scotland) Act 1982 sets out rules for the handling of lost and abandoned property. Section 67(1) provides:

"Subject to subsection (2) below, any person taking possession of any property without the authority of the owner in circumstances which make it reasonable to infer that the property has been lost or abandoned ("a finder") shall take reasonable care of it and shall without unreasonable delay deliver the property or report the fact that he has taken possession of it to a constable or to any of the persons mentioned in subsection (3) below, giving a description of the property and information as to where it was found."

Thus a finder of lost or abandoned property who takes possession of it must normally report it to the police. How would this provision interact with the new rule that abandoned property

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<sup>7</sup> 1997 JC 69 at 71.

<sup>8</sup> Examples: § 959 German Civil Code; Spanish Civil Code art 610; Quebec Civil Code art 935; Austrian Civil Code art 349; Dutch Civil Code book 5 art 4 read with art 18. Roman law was the same: see eg W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3<sup>rd</sup> edn, by Peter Stein, 1963) pp 206 ff.

<sup>9</sup> D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2<sup>nd</sup> edn 2005) chapter 2; Reid, *Property* para 540 (Gordon).

<sup>10</sup> An alternative analysis, depending on the facts, could be that Lisa is gifting the book to Megan.

<sup>11</sup> Discussion Paper, para 9.7.

<sup>12</sup> On treasure trove, see above, paras 3.35-3.41.

becomes ownerless and thus is available for acquisition by *occupatio*? A preliminary point must be made. It may be difficult for a finder to tell whether property has been lost or abandoned. Has the gold ring found in the woods been abandoned as a result of a being thrown away because a relationship has broken down or has it merely been lost in a moment of passion? Where property may be lost the duty to go to the police must clearly remain. We considered whether it would be beneficial to amend the 1982 Act to remove the duty to report where property clearly was abandoned or to develop a *de minimis* rule that would apply to litter such as crisp bags or, perhaps, golf balls. Ultimately we rejected that approach on the basis that it was too difficult to make appropriate definition as to what property should be excluded.

5.8 Moreover, we had a further concern that our new rule that abandoned corporeal moveable property becomes ownerless might invite those charged with theft to come up with a new defence in cases where the owner of the property had no intention of abandonment, for example a car which happened to be left in the same place for some time because the owner was on a long holiday. We believe that the way to prevent such arguments is to make provision that the finders of abandoned property can only acquire ownership by reporting it to the police<sup>13</sup> under section 67 and through the further provisions in Part 6 of the 1982 Act which lets the finder become owner if no-one claims it.<sup>14</sup> Section 73 of the 1982 Act provides that no person finding property which appears to have been lost or abandoned shall by reason only of the finding be able to claim ownership. That provision may remain, but in order to stop a finder relying on the doctrine of *occupatio* we recommend:

**37. Ownership of corporeal moveable property which has been abandoned may only be acquired by a finder under the rules in Part 6 of the Civic Government (Scotland) Act 1982.**

(Draft Bill, s 7(2)).

5.9 This rule will only apply to finders of abandoned property. It would not apply in the example given above in relation to a book being loaned and then the owner renouncing her right to it. In that case, the borrower of the book would not be a finder and would be entitled to acquire it by *occupatio*. Similarly, it would not apply where relatives are tidying out the house of someone who has died and "find" a valuable painting in the attic which they did not know about. The painting here is not abandoned, as keeping something safe in an attic is hardly consonant with abandonment.

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<sup>13</sup> There are a limited number of alternatives to the police under s 67, for example, bus companies or airport authorities.

<sup>14</sup> Sections 68(4), 70(1)(b) and 71(1). The police may decide to sell the property rather than offer it to the finder depending on the circumstances.

## Chapter 6 Intellectual property and negative prescription

6.1 While this project deals primarily with prescription in relation to corporeal moveable property, our Discussion Paper also considered an uncertainty in the law on intellectual property rights. This uncertainty was highlighted by the recent case of *Fisher v Brooker*,<sup>1</sup> the facts of which are set out in the Discussion Paper,<sup>2</sup> and concerns whether such rights are subject to the ordinary rules of negative prescription. In our Eighth Programme of Law Reform it was agreed that we would consider the subject as part of the current project.<sup>3</sup>

6.2 Intellectual property rights are typically governed by statute and have fixed time periods. For example, copyright, which was the subject of the dispute in *Fisher*, subsists for the lifetime of the author plus seventy years from the end of the year in which the author died in the case of literary, dramatic, musical and artistic works and films; and fifty years from the date of release in the case of sound recordings and broadcasts.<sup>4</sup> What is unclear, however, is whether such rights are also subject to the Prescription and Limitation (Scotland) Act 1973, where section 8 has a general negative prescription period of twenty years. In England the equivalent legislation, the Limitation Act 1980, specifically deals with the question:

### *Saving for other limitation enactments*

This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.<sup>5</sup>

6.3 There is no counterpart provision in the 1973 Act and thus the position is uncertain, as Lord Hope of Craighead noted when *Fisher* reached the House of Lords.<sup>6</sup> He went on to state: "It would be anomalous if the period that section 12 of the 1988 Act prescribes for the duration of copyright throughout the United Kingdom (see section 157(1) of that Act) were to be subject to a provision about prescription that applies only to Scotland and the 1988 Act itself does not mention."<sup>7</sup>

6.4 The uncertainty is of greatest importance to copyright (especially for so called "orphan works"<sup>8</sup>) and performer's rights (which exist in relation to recordings of performances and last until fifty years from the end of the calendar year in which the

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<sup>1</sup> [2009] UKHL 41; [2009] 1 WLR 1764.

<sup>2</sup> At paras 11.2-11.3.

<sup>3</sup> Scottish Law Commission, *Eighth Programme of Law Reform* (Scot Law Com No 220, February 2010) para 3.34.

<sup>4</sup> Copyright, Designs and Patents Act 1988, ss 12-14.

<sup>5</sup> Limitation Act 1980, s 39.

<sup>6</sup> [2009] UKHL 41; [2009] 1 WLR 1764 at para 3.

<sup>7</sup> [2009] UKHL 41; [2009] 1 WLR 1764 at para 4.

<sup>8</sup> See Discussion Paper, para 11.7.



performance took place or in which the recording was released<sup>9</sup>). Other intellectual property rights have shorter statutory periods and the danger that the twenty year negative prescription period in the 1973 Act section 8 might apply is less relevant.<sup>10</sup>

6.5 We agree with Lord Hope that it would be anomalous for there to be a different rule in Scotland from the rest of the United Kingdom on this matter and that the position should be made clear by legislation. Consultees generally supported this view. We recommend:

**38. The Prescription and Limitation (Scotland) Act 1973 should be amended to provide that the Act does not apply to any right for which a fixed time period is provided by any other enactment, whether passed before or after the coming into force of this amendment.**

6.6 As this recommendation is a general one in relation to prescription and limitation, on one view it is within the legislative competence of the Scottish Parliament. Nevertheless, as our specific purpose is to clarify the law of intellectual property and this area is reserved,<sup>11</sup> we have not made provision for this recommendation in our draft Bill.

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<sup>9</sup> Copyright, Designs and Patents Act 1988, s 191(2).

<sup>10</sup> See Discussion Paper, para 11.6.

<sup>11</sup> Scotland Act 1998, Sch 5, Pt 2, Head C4.

## List of recommendations

1. There should be a rule of positive (acquisitive) prescription for corporeal moveables.  
(Para 2.15)
2. The term "usucapion" should not be adopted.  
(Para 2.16)
3. An ostensibly valid act of acquisition should not be required.  
(Para 3.3)
4. The possessor should have acted in good faith and without negligence.  
(Para 3.6; Draft Bill, s 1(1)(b)(i) and (c))
5. Supervening knowledge (actual or constructive) on the part of the possessor should interrupt prescription.  
(Para 3.11; Draft Bill, s 1(1)(b)(i) and (c))
6. The period of possession which should be required for the establishment of a prescriptive title in relation to corporeal moveable property should be twenty years.  
(Para 3.20; Draft Bill, s 1(1)(a))
7. There should not be a separate period for cultural objects.  
(Para 3.20)
8. Treasure trove should be excluded from the new rule of positive prescription.  
(Para 3.22; Draft Bill, ss 1(6) and 3(2))
9. Incapacity, or other inability to act, should not suspend the running of prescription.  
(Para 3.25; Draft Bill, s 4(2)(a))
10. There should not be a shorter prescriptive period in cases where the owner is reasonably able to trace the goods.  
(Para 3.26)
11. Possession should include civil possession.  
(Para 3.29; Draft Bill, s 8)

12. There should be no requirement that the possession be "open".  
(Para 3.29)
13. There should not be a special rule that deliberate concealment bars prescription.  
(Para 3.29)
14. Possession should be continuous, peaceable and without judicial interruption.  
(Para 3.30; Draft Bill, s 1(1)(a))
15. Possession should not cease to be continuous where the possessor is involuntarily dispossessed, provided that the possessor within one year either (a) recovers possession or (b) raises proceedings which result in the recovery of possession.  
(Para 3.30; Draft Bill, s 1(4))
16. Positive prescription would pre-suppose an intention to possess as owner.  
(Para 3.31; Draft Bill, s 1(1)(b))
17. Possession can include possession by successors, but the other requirements for prescription must be present throughout the prescriptive period.  
(Para 3.32; Draft Bill, s 1(2)-(4))
18. There should no entitlement to compensation in respect of a title lost by the running of prescription.  
(Para 3.33)
19. Any rule that there may be under the common law whereby ownership of corporeal moveable property can be acquired by possession for forty years should be abrogated.  
(Para 3.34; Draft Bill, s 6)
20. Ownership of corporeal moveable property should cease to be subject to negative prescription.  
(Para 3.41; Draft Bill, s 5)
21. There should be a new non-possessory positive prescription in favour of the Crown and the period should be sixty years.  
(Para 3.41; Draft Bill, s 3(1)(a))

22. The Crown should have the right to disclaim ownership of property which it has acquired under the sixty year rule.
- (Para 3.41; Draft Bill, s 3(1)(b))
23. The existing rules about animals (Dogs Act 1906 s 4(4) and Civic Government (Scotland) Act 1982 s 74) should be retained.
- (Para 3.47)
24. There should not be a shorter period of positive prescription in relation to animals.
- (Para 3.47)
25. Time running before the commencement of the new provision establishing the rule of positive prescription can be counted in reckoning the prescriptive period.
- (Para 3.49; Draft Bill, s 4(1))
26. The new provision establishing the rule of positive prescription should be delayed by a period of three years following Royal Assent to allow dispossessed owners a reasonable opportunity to assert their claims.
- (Para 3.49; Draft Bill, s 9(1))
27. There should not be a separate general rule providing for a longer period of positive prescription which applies if good faith is absent.
- (Para 4.5)
28. There should be a new rule in relation to lent or deposited property which permits the holder to acquire ownership after a certain period if the person who lent or deposited the property cannot be traced.
- (Para 4.13; Draft Bill, s 2)
29. For the rule to apply, the property must have been held for at least fifty years.
- (Para 4.14; Draft Bill, s 2(1)(b))
30. The holder of the property must either have possession or custody of the property and hold it continuously for at least fifty years.
- (Para 4.16; Draft Bill, s 2(1)(b))
31. The lender or depositor (or the owner of the property if that is another person) can interrupt the fifty year period by asserting ownership of the property. Asserting ownership must include communication with the holder of the property.
- (Para 4.20; Draft Bill, s 2(1)(c) and (6))

32. Once the fifty year period has passed, the holder must exercise reasonable diligence to attempt to contact the owner of the property. If contact cannot be made, the holder may elect to acquire ownership of the property.

(Para 4.20; Draft Bill, s 2(1))

33. Any provision in a contract which purports to disapply the terms of the lent or deposited property rule will be void.

(Para 4.22; Draft Bill, s 2(8))

34. Successors of the original holder should be entitled to use the lent or deposited property rule, but only where the predecessor holder ceases to have possession and custody.

(Para 4.24; Draft Bill, s 2(2) and (3))

35. The lent or deposited property rule should not be restricted to a particular class or group of persons.

(Para 4.25)

36. Corporeal moveable property that is abandoned should become ownerless.

(Para 5.6; Draft Bill, s 7(1))

37. Ownership of corporeal moveable property which has been abandoned may only be acquired by a finder under the rules in Part 6 of the Civic Government (Scotland) Act 1982.

(Para 5.8; Draft Bill, s 7(2))

38. The Prescription and Limitation (Scotland) Act 1973 should be amended to provide that the Act does not apply to any right for which a fixed time period is provided by any other enactment, whether passed before or after the coming into force of this amendment.

(Para 6.5)

# Appendix A

## Prescription and Title to Moveable Property (Scotland) Bill [DRAFT]

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### CONTENTS

Section

- 1 Acquisition of corporeal moveable property by prescription: general
- 2 Acquisition of lent or deposited corporeal moveable property
- 3 Acquisition of ownership by Crown
- 4 Computation of continuous period
- 5 Amendment of Prescription and Limitation (Scotland) Act 1973
- 6 Common law as to acquisition of corporeal moveable property by positive prescription
- 7 Abandonment
- 8 The expression “possession”
- 9 Commencement
- 10 Short title

# Prescription and Title to Moveable Property (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make new provision for Scotland as respects the acquisition of ownership of corporeal moveable property by positive prescription; and for connected purposes.

## **1 Acquisition of corporeal moveable property by prescription: general**

- (1) A person (“A”) acquires ownership of corporeal moveable property if—
  - (a) for a continuous period of 20 years A possesses the property peaceably and without judicial interruption,
  - (b) throughout that period A—
    - (i) believes that A is owner of the property, and
    - (ii) intends to possess the property as owner, and
  - (c) A has not been negligent in having so believed throughout that period.
- (2) Where during that continuous period a person (“S”) becomes A’s successor, then S acquires ownership of the property provided that—
  - (a) the provisions of subsection (1) are satisfied in respect of so much of the continuous period as preceded the succession,
  - (b) for the remainder of the continuous period S possesses the property peaceably and without judicial interruption,
  - (c) throughout that remainder S—
    - (i) believes that S is owner of the property, and
    - (ii) intends to possess the property as owner, and
  - (d) S has not been negligent in having so believed throughout that remainder.
- (3) If during that continuous period a person (“SS”) becomes S’s successor, then subsection (2) applies to SS as it applies to S except that for the purposes of that application the reference in that subsection to “the provisions of subsection (1)” is to be construed as a reference to the provisions of subsections (1) and (2); and so on in relation to subsequent successors.

- (4) For the purposes of subsections (1) to (3), peaceable possession of the property is not lost by virtue only of A, S, SS or a subsequent successor being dispossessed of it provided that—
  - (a) the dispossession is involuntary on the part of A, S, SS or the subsequent successor, and
  - (b) within one year after the dispossession, either—
    - (i) the property is restored to A, S, SS or the subsequent successor, or
    - (ii) proceedings which result in such restoration are commenced.
- (5) In subsections (1)(a) and (2)(b), “judicial interruption” has the same meaning as in sections 1 to 3 of the Prescription and Limitation (Scotland) Act 1973 (c.52).
- (6) This section is subject to sections 3(2) and 4(1).

NOTE

**Section 1** implements Recommendations 1 (paragraph 2.15), 2 (paragraph 2.16), 3 (paragraph 3.3), 4 (paragraph 3.6), 5 (paragraph 3.11), 6 and 7 (paragraph 3.20), 8 (paragraph 3.22), and 12 - 17 (paragraphs 3.29 – 3.32).

**Subsection (1)** creates a new rule for the acquisition of ownership of corporeal moveable property (ie physical things other than land). In order to acquire ownership of a thing under section 1, a person ("A") must possess it peaceably and without judicial interruption. A must possess in good faith throughout the prescriptive period: that is, A must believe that he or she is the owner of the object and intend to possess the object as owner. A will not acquire ownership if A is negligent in believing that he or she is the owner: to this extent, the test of good faith is objective (see paragraphs 3.4 – 3.6). The requirements that possession be peaceable and without judicial interruption are the same as for the positive prescription of ownership of land in terms of section 1(1)(a) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"); for the reasons discussed at paragraphs 3.27 – 3.29, and in contrast to the rule for ownership of land, there is no requirement that the possession be "open".

Where an item of corporeal moveable property changes hands during the prescriptive period, successors in possession may benefit from their predecessors' periods of possession. So if SS acquires possession from S, who acquired possession from A, then, provided that between them they satisfied the requirements mentioned in subsection (1), SS will obtain ownership of the object on the expiry of 20 years. **(Subsections (2) and (3)).**

Prescription under section 1 requires a 20 year period of continuous possession. **Subsection (4)** establishes a limited exception where the possessor of an object is involuntarily dispossessed of it (as, for example, by a thief). Any such period of dispossession will not interrupt the prescriptive process provided that possession is restored, or proceedings resulting in the restoration of possession are commenced, within one year.

**Subsection (5)** provides that "judicial interruption" has the same meaning as in sections 1 to 3 of the 1973 Act, ie "the making in appropriate proceedings, by any person having a proper interest to do so, of a claim which challenges the possession in question." (1973 Act, section 4(1)).

**Subsection (6)** notes that section 1 is subject to sections 3(2) and 4(1). The 20 year positive prescription does not apply to any property owned by the Crown by virtue of the rule in section 3(1) or any property owned by the Crown and of which the Crown acquired ownership, prior to the coming into force of section 3, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king) or the doctrine of *ultimus haeres* (section 3(2)). The aim of this exclusion is to protect the Crown's right to treasure trove (see paragraphs 3.21 – 3.22). Where section 1 does apply, the 20 year period may include time which occurs before the commencement of the Act (section 4(1)).



## 2 Acquisition of lent or deposited corporeal moveable property

- (1) Where—
  - (a) a person (“L”) lends corporeal moveable property (whether or not property owned by L) to another person (“M”), deposits it with M or otherwise places it in M’s possession or custody,
  - (b) for a continuous period of 50 years M possesses, or has custody of, the property, and
  - (c) at no time during that period is ownership of the property asserted by—
    - (i) L, or any successor of L, or
    - (ii) in a case where some person other than L or a successor of L owns the property, that other person,

then if M is unable, exercising reasonable diligence, to locate or communicate with the owner of the property, M acquires ownership of the property on electing to acquire it.

- (2) Where during that continuous period a person (“S”) becomes M’s successor, then provided that—
  - (a) the provisions of subsection (1) are satisfied in respect of so much of the continuous period as preceded the succession,
  - (b) for the remainder of the continuous period—
    - (i) S possesses or has custody of the property, and
    - (ii) M does not possess or have custody of it, and
  - (c) at no time during that remainder is ownership of the property asserted by—
    - (i) L, or any successor of L, or
    - (ii) in a case where some person other than L or a successor of L owns the property, that other person,

if S is unable, exercising reasonable diligence, to locate or communicate with the owner of the property, S acquires ownership of the property on electing to acquire it.

- (3) If during that continuous period a person (“SS”) becomes S’s successor, then subsection (2) applies to SS as it applies to S (except that, for the purposes of the application, the reference in paragraph (a) of subsection (2) to “the provisions of subsection (1)” is to be construed as a reference to the provisions of subsections (1) and (2) and the reference in paragraph (b)(ii) of subsection (2) to “M” as a reference to M or S); and so on in relation to subsequent successors.
- (4) Subsections (5) to (7) apply for the purposes of subsections (1) to (3).
- (5) M’s holding the property on behalf of L (or of L’s successors) does not of itself constitute an assertion of ownership by L (or by L’s successors).
- (6) Assertion of ownership must include communication with M (or with M’s successors).
- (7) Possession or custody of the property is not lost by virtue only of M, S, SS or a subsequent successor being dispossessed of it (or of it being taken from the custody of M, S, SS or the subsequent successor) provided—
  - (a) that the dispossession (or taking) is involuntary on the part of M, S, SS or the subsequent successor, and
  - (b) that, within one year after the dispossession (or taking), either—

- (i) the property is restored to M, S, SS or the subsequent successor, or
  - (ii) proceedings which result in such restoration are commenced.
- (8) Any agreement, in so far as it purports to deprive this section of effect, or to limit or otherwise alter its effect, is null.
- (9) This section is subject to sections 3(2) and 4(1).

#### NOTE

**Section 2** implements the recommendations in Chapter 4 by establishing a new rule in relation to lent or deposited property which permits the holder to acquire ownership after a continuous period of 50 years if the owner of the property cannot be traced.

**Subsection (1)** provides that where a person ("L") lends an item of corporeal moveable property to another ("M") or otherwise places it in M's possession or custody, and where M holds that item for a continuous period of 50 years without any assertion of ownership being made by the owner, by L or by any successor of L, then if M is unable, exercising reasonable diligence, to contact the owner, M may choose to become the owner of the property. An assertion of ownership must include communication with M (subsection (6)); this could be something as simple as a letter, an email or a telephone call (see paragraph 4.18). The principal target of this provision is museums and galleries, whose collections may include objects of uncertain ownership (see paragraphs 4.6 – 4.13 and Recommendation 28). Paragraph (b) refers to both possession and custody. The distinction depends upon the holder's state of mind: where the holder has no intention to hold for that party's own use, merely custody and not possession is held (paragraphs 4.15 – 4.16 and Recommendation 30). The original owner of the property is protected by the requirement that 50 years must have passed without any assertion of ownership and by the requirement that the holder of the property exercise reasonable diligence in attempting to contact the owner before acquiring ownership (paragraphs 4.17 – 4.20 and Recommendations 31 and 32). As noted in paragraph 4.19, what constitutes reasonable diligence will depend upon the nature and value of the object: the more unusual and valuable the item, the more diligence will be required in attempting to contact the owner.

**Subsections (2) and (3)** provide for successors of the original holder of the property to benefit from the rule (paragraphs 4.23 – 4.24 and Recommendation 34).

**Subsection (5)** clarifies the meaning of an "assertion of ownership" by providing that M's holding the property on behalf of L or L's successors does not of itself constitute an assertion of ownership by L or L's successors. If this were not the case, then M could never acquire ownership under the rule in subsection (1): subsection (5) merely makes explicit something that would have to be inferred in order for subsection (1) to be effective.

**Subsection (6)** provides that assertion of ownership must include communication with M (or with M's successors) (paragraph 4.20 and Recommendation 31).

**Subsection (7)** provides for a limited exception to the requirement that possession or custody be continuous. Where possession or custody is lost involuntarily (as, for example, where the object is stolen) the running of the 50 year period will not be interrupted provided that the property is restored, or proceedings resulting in such restoration are commenced, within one year. This is substantially the same rule as applies in relation to the 20 year positive prescription established by section 1.

**Subsection (8)** prevents parties from contracting out of section 2. To allow contracting out would be to defeat the purpose of the section, which is to provide a solution to the question of ownership in cases where the lender or depositor can no longer be contacted (and could not, therefore, enforce any provision of the original contract of loan or deposit). The way for the lender or depositor to stop the rule from applying is to keep in contact with the holder at least once every 50 years (paragraph 4.22, Recommendation 33).

**Subsection (9)** notes that the section is subject to sections 3(2) and 4(1). The 50 year rule does not apply to any property owned by the Crown by virtue of the rule in section 3(1) or any property owned by the Crown and of which the Crown acquired ownership, prior to the coming into force of section 3, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king) or the doctrine of *ultimus haeres* (section 3(2)). The aim of this exclusion is to protect the Crown's right to treasure trove (see paragraphs 3.21 – 3.22). Where section 4 does apply, the 50 year period may include time which occurs before the commencement of the Act (section 4(1)).

### 3 Acquisition of ownership by Crown

- (1) The Crown—
  - (a) acquires ownership of corporeal moveable property if a continuous period of 60 years elapses during which no person possesses the property, but
  - (b) may disclaim ownership of the property.
- (2) Neither section 1 nor section 2 applies to property owned by the Crown by virtue of—
  - (a) subsection (1), or
  - (b) (in a case where ownership was acquired before the coming into force of this section) any of the following—
    - (i) negative prescription together with the rule *quod nullius est fit domini regis*,
    - (ii) abandonment together with that rule,
    - (iii) the doctrine of *ultimus haeres*.
- (3) This section is subject to section 4(1).

#### NOTE

Under the pre-existing law, the Crown acquires title to corporeal moveable property which is abandoned, or in respect of which the 20 year negative prescription in section 8 of the 1973 Act has run, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king). Section 5 amends the 1973 Act to prevent rights of ownership in corporeal moveable property from negatively prescribing under section 8 of that Act, while section 7(1) and (3) provide that corporeal moveable property, on being abandoned by its owner, becomes ownerless rather than falling to the Crown under the *quod nullius* rule.

**Section 3** compensates for these changes by introducing a new means by which the Crown may become the owner of lost or abandoned property (paragraphs 3.35 – 3.41). **Subsection (1)(a)** establishes a 60 year period of non-possessory positive prescription in favour of the Crown: where no person possesses an item of corporeal moveable property during a continuous period of 60 years, the Crown acquires ownership (Recommendation 21). **Subsection (1)(b)** makes it clear that the Crown may disclaim ownership of property acquired under paragraph (a) of that subsection, just as it may under the pre-existing law. **Subsection (2)** is aimed at protecting the Crown's ownership of treasure trove against the new rules established by sections 1 and 2. Neither of these rules will enable a person to acquire ownership of property which is owned by the Crown and which the Crown acquired under **subsection 1** or by any of the means listed in paragraph (b). The 60 year period may include time which occurs before the commencement of the Act (section 4(1)).

#### 4 Computation of continuous period

- (1) In this Act, a “continuous period”—
  - (a) may include time which occurs before the commencement of this section, but
  - (b) is not constituted by any such period which ends before the beginning of the day after that commencement.
- (2) In the computation of a continuous period for the purposes of any provision of this Act—
  - (a) any time during which a person against whom the provision is pled was under legal disability is to be reckoned as if the person were free from that disability,
  - (b) if the commencement of the continuous period would, apart from this paragraph, fall at a time in any day other than the beginning of that day, the period is to be taken to have commenced at the beginning of the next following day, and
  - (c) if the last day of the continuous period would, apart from this paragraph, be a holiday the period is (disregarding anything in the provision) to be taken to include—
    - (i) any immediately succeeding day which is a holiday,
    - (ii) any further immediately succeeding days which are holidays, and
    - (iii) the next succeeding day which is not a holiday.
- (3) In subsection (2)(c), “holiday” means a day of any of the following descriptions—
  - (a) a Saturday,
  - (b) a Sunday,
  - (c) a day which is, in Scotland, a bank holiday under the Banking and Financial Dealings Act 1971.

#### NOTE

**Section 4** lays down a number of rules regarding the computation of periods of time.

**Subsection (1)** allows periods of time prior to the commencement of section 4 to be included as part of a continuous period under the Act. So, for example, if a person (“B”) had held an item of corporeal moveable property for 10 years prior to the commencement of section 4, B would (if the requirements of section 1 were otherwise satisfied) acquire ownership of the item 10 years after commencement. If B had held the item for a continuous period of 20 years or more, and continued to hold it on the date of commencement of section 4, B would (again assuming that the other requirements of section 1 were satisfied) acquire ownership at the start of the day following commencement. This is the same approach as was adopted in section 14(1)(a) of the 1973 Act; but we have not adopted the wording of that Act, which was criticised by the House of Lords in *Dunlop v McGowans* 1980 SC (HL) 73. Subsection (1) should be read together with section 9 (commencement), which provides for commencement of the Act to be delayed for a period of three years following Royal Assent (see paragraphs 3.48 – 3.49).

**Subsection (2)(a)** provides that the clock will continue to run towards the completion of a continuous period under the Act, notwithstanding the legal disability of the person against whom the continuous period might be relied upon (paragraphs 3.23 – 3.25 and Recommendation 9). **Paragraph (c)** of subsection (2) prevents any continuous period from ending with a holiday. The purpose of this provision is to ensure that any person who may stand to lose a right by virtue of the completion of a continuous period is not prevented by a holiday from interrupting the period by an application to court.

## 5 Amendment of Prescription and Limitation (Scotland) Act 1973

In Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (rights and obligations which are imprescriptible for the purposes of sections 7 and 8 of, and Schedule 1 to, that Act), for paragraph (g) there is substituted—

“(gg) any real right of ownership in corporeal moveable property;”.

NOTE

**Section 5** abolishes the existing rule of negative prescription in relation to rights of ownership in corporeal moveable property by amending Schedule 3 of the 1973 Act to add those rights to that Schedule's list of imprescriptible rights. (Paragraphs 3.35 – 3.41, Recommendation 20).

## 6 Common law as to acquisition of corporeal moveable property by positive prescription

On the coming into force of this section, any common law rule which enables corporeal moveable property to be acquired by positive prescription ceases to have effect.

NOTE

It is possible, though doubtful, that at common law there exists a forty year positive prescription for corporeal moveables (paragraph 3.34). **Section 6** abolishes any such rule that might exist, implementing Recommendation 19.

## 7 Abandonment

- (1) Corporeal moveable property, on being abandoned by its owner, becomes ownerless.
- (2) Ownership of corporeal moveable property which has been abandoned by its owner and then found can only be acquired by the finder in accordance with—
  - (a) Part 6 of the Civic Government (Scotland) Act 1982 (c.45) (lost and abandoned property); or
  - (b) any enactment—
    - (i) making such provision as is referred to in section 67(2)(a), (c) or (d) of that Act (duty of finder), and
    - (ii) the provisions of which correspond to provisions of that Part.
- (3) The rule *quod nullius est fit domini regis* does not apply to property which becomes ownerless by virtue of subsection (1).

NOTE

At common law, abandoned property falls to the Crown by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king). **Section 7** alters this rule. **Subsection (1)** provides that abandoned property becomes ownerless. **Subsection (3)** makes it clear that abandoned property does not, as a result of becoming ownerless, fall to the Crown. It follows that such property may be acquired by a person who takes possession of the abandoned property with the intent to acquire it (by means of the common law doctrine of *occupatio*) (paragraphs 5.4 – 5.6, Recommendation 36).

**Subsection (2)** places an important limit on the acquisition by *occupatio* of objects which have been found. At present, the finder of an item which may have been lost or abandoned is obliged, in terms of Part 6 of the Civic Government (Scotland) Act 1982, to deliver the property or report the fact that he or she has taken possession of it to the police or another specified person. If the item is then unclaimed, the finder may acquire ownership in terms of section 68(4) of that Act. **Subsection (2)** retains this procedure by providing that the finder of an item of corporeal moveable property may only acquire ownership of abandoned property (which is, in terms of subsection (1), ownerless) by complying with the requirements of Part 6 of the Civic Government (Scotland) Act 1982 or any other enactment making corresponding provision.

## **8 The expression “possession”**

In this Act, “possession” includes civil possession (that is to say, possession through an intermediary or representative); and analogous expressions are to be construed accordingly.

## **9 Commencement**

- (1) This Act, except this section and section 10, comes into force on the expiration of the period of 3 years immediately following the day of Royal Assent.
- (2) This section and section 10 come into force on the day after Royal Assent.

### NOTE

The coming into force of the substantive provisions of the Act is delayed for a period of 3 years following Royal Assent in order to allow time for owners of property which might be affected by the rules in sections 1 or 2 to take appropriate action to assert their ownership. This section should be considered along with section 4 (computation of continuous period). The approach is the same as that taken to the commencement of the Prescription and Limitation (Scotland) Act 1973 (see paragraphs 3.48 – 3.49).

## **10 Short title**

The short title of this Act is the Prescription and Title to Moveable Property (Scotland) Act 2012.

# Appendix B

## List of those who submitted written comments on Discussion Paper No 144

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<sup>1</sup> The response was written by Dr Andrew Simpson and Professor David Carey Miller, with the assistance of Neil Curtis.











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