



SCOTTISH LAW COMMISSION

MEMORANDUM No. 30
CORPoreal MOVEABLES:
USUCAPION, OR ACQUISITIVE PRESCRIPTION
31 August 1976

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 January 1977. All correspondence should be addressed to:

Mr R Black
Scottish Law Commission
140 Causewayside
EDINBURGH
EH9 1PR

(Telephone: 031-668-2131)

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Introduction

1. Few of those who replied to our Memorandum No.9¹ commented on the law of prescription in relation to moveables. Some, however, favoured the idea of providing by statute for a period of acquisitive prescription to fortify defective title to moveables. Others preferred to leave the law as it is, since problems regarding ownership of moveables rarely arise and the law relating to these problems, in their view, seems to work reasonably satisfactorily. It is certainly the case that such problems do not arise frequently in Scotland. We cannot, however, accept the view that the present state of the law regarding prescription in connection with moveables is satisfactory. The scanty case law on usucapion or acquisitive prescription of moveables in Scots law is inconclusive, and the opinions of institutional writers and other authors also conflict in many respects. The leading text writer, Napier, rejects the existence of the doctrine, but the weight of authority - though for different and sometimes dubious reasons - is unquestionably against this view. The authorities are examined in some detail in the Appendix. Moreover, the Prescription and Limitation (Scotland) Act 1973 repeals some old legislation which some writers considered to provide a basis for usucapion of moveables.

2. Napier in his work on Prescription frequently criticises with justification the assumption that positive and negative prescription interact as though they were, so to speak, two sides of a coin. Some of the confusion may be due to the use of the same word "prescription" to imply both the cutting off of rights and the acquisition of ownership by long possession

¹Prescription and Limitation of Actions (1969).

on defective title.¹ Though in the Prescription and Limitation (Scotland) Act 1973 the long-established expression "positive prescription" was used with reference to heritable rights, we are not convinced that this would necessarily be the most convenient terminology in relation to positive or acquisitive prescription of moveables - as to which there are conflicting opinions. Many codes in the civilian tradition deal with "usucapion" under a different title from "prescription" - treating the former as one of the modes of acquiring property. We are inclined to the view that it would assist clarity of thought to designate the effect of time and possession in acquiring ownership of moveables as "usucapion", and we use inter alia this word in the following paragraphs ~~when~~ we refer to the concept in Scots law. We appreciate that the expression is somewhat old-fashioned, and would welcome alternative suggestions which would distinguish clearly the basic concept from "prescription" in its more generally accepted sense. However, the meaning of the word "usucapion" would be immediately apparent to lawyers - especially to lawyers in the many legal systems of the world which have a background of Roman law, including those of E.E.C. countries. Moreover, a single word such as "usucapion" seems preferable to a term which has to be qualified by an adjective.

3. Our proposals to reform and restate the law of prescription in relation to heritable rights, obligations and negative prescription,² were in general implemented by the Prescription and Limitation (Scotland) Act 1973 - but we deliberately refrained from making detailed proposals regarding acquisitive prescription of moveables until we had considered problems of title to corporeal moveables more generally. However, the Act has already made some changes in the law which affect rights in corporeal moveables. Thus it is

¹ "[I]n the ordinary acceptation, prescription, which is short in moveables, is commonly called usucapion; but we make only use of the name of prescription for both" - Stair II.12.3. However, he himself used the word "usucapion" when reporting Ramsay v. Wilson (1665) Mor.9114-6: Stair's Decisions, vol. 1, p.326.

² Reform of the Law Relating to Prescription and Limitation of Actions: Scot. Law Com. No. 15, (1970).

expressly provided that res extra commercium¹ are incapable of prescription;² that prescription does not run in favour of a thief or person privy to theft; and that the obligation of restitution, which in practice justifies a conclusion for delivery of corporeal moveables, now prescribes in 5 years instead of in 20 years as formerly. While in general the period of negative prescription is 20 years, a period of only 10 years' positive prescription is required to fortify title to heritage. This illustrates clearly the proposition that acquisition of real rights and the cutting off of remedies need not involve identical periods of time. Merely to cut off a remedy without fortifying a right of ownership in anyone would be to create a vacuum and uncertainty as to title - a result which a sound law of prescription or usucapion should avoid.

4. The role of usucapion is largely to foster certainty as to rights over and title to property. In legal systems which give immediate protection to the title of the acquirer or purchaser of moveables in good faith, the need for usucapion to fortify defective title is relegated to a subordinate role; while in those which hold that the acquirer or purchaser has no better title than his author,³ the need for prescription to fortify title is most apparent. Scots law until the 19th century was little troubled with problems of title to moveables. The common law attitude, except in the case of stolen property, was generally favourable to commerce and to a presumption or reputation of ownership based on possession. The role of usucapion was, therefore, subordinate. Today the potential value of usucapion - especially if the solutions provisionally

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Things held inalienably for the benefit of the public (e.g. court records) are extra commercium, i.e. even though they are susceptible of ownership, ownership cannot be transferred, whether by sale or gift. See Presbytery of Edinburgh v. University of Edinburgh (1890) 28 S.L. Rep. 567, per Lord Wellwood at p. 573.

² Prescription and Limitation (Scotland) Act 1973, Sch.3, subpara.(d).

³ Based substantially on the principle nemo plus iuris ad alium transferre potest quam ipse habet (or nemo dat quod non habet).

proposed in Memoranda nos. 27¹ and 29² were to be accepted - would be to fortify the defective title of bona fide gratuitous acquirers from transferors who had no right or only a qualified right to transfer; to fortify the defective title of bona fide onerous acquirers of moveables infected with a vitium reale; and generally to permit the eventual acquisition of unchallengable ownership by an acquirer on ostensibly valid title by transfer inter vivos or mortis causa. Indeed, wherever by common law (e.g. delivery, contract, gift or legacy) or by statute (e.g. a statute regulating public sale) an acquirer took possession with the intent of becoming owner, but his title was in fact defective or subject to challenge by someone with a greater right, usucapion would cure the defect. For example a legatee or donee who accepted in good faith as a legacy a gift of property which had not in fact belonged to the testator or donor, and the purchaser in good faith of stolen property, could become owners by operation of law after the period of usucapion had run.

Comparative survey

5. French law by the doctrine that possession is equivalent to title gives wide and instantaneous protection to the bona fide acquirer of moveables - subject to exceptions in the case of stolen or lost property. Thus lapse of time as a means of acquiring an indefeasible right of defective title has limited scope. The owner of stolen moveable property has 3 years in which to reclaim from an acquirer in good faith,³ while in other cases a long prescription of 30 years operates. In German law the principle of protecting title acquired in good faith from a non-owner likewise leaves usucapion to a subordinate role: the period for positive acquisition is 10 years.

¹Corporeal moveables: protection of the onerous bona fide acquirer of another's property.

²Corporeal moveables: lost and abandoned property.

³This is not a period of usucapion, but a limitation of the owner's right to reclaim.

6. Other systems which give instantaneous protection to good faith purchasers also provide for a period of usucapion in cases not so protected. There are differences in detail and duration of possession. Thus, for example, Swiss law provides for a 5-year period for usucapion; Austrian law - 3 to 6 year periods of usucapion, provided the possessor has acquired by "valid title" (otherwise 30 years); Greek law - 3 years for usucapion; Dutch law - at present 30 years, but the draft revision of the Civil Code proposes 3 years usucapion in the case of the bona fide possessor not protected by the rules regarding instantaneous acquisition of title. In Spanish law the period required for usucapion is usually 3 years.

7. English law recognises a short period of limitation of actions, but not of usucapion. The Limitation Act 1939, section 3 provides that no action shall be brought after the expiration of 6 years from the original "conversion" (i.e. wrongous handling) or detention. This section thus operates to exclude an owner whose property has been stolen but who fails to trace the thief until more than 6 years have elapsed since the theft - R.B. Policies at Lloyds v. Butler.¹ However, in cases where the plaintiff has been the victim of fraud or mistake, section 26 postpones the running of the period of limitation until he could with reasonable diligence ascertain the truth. It will be observed that English law (which places emphasis on the better right to possess rather than on the right of ownership) fortifies rights over corporeal moveables indirectly - through a procedural limitation - while other systems favour usucapion or acquisitive prescription. The latter method seems to us not only to be more consistent with the basic structure of Scots law, but also to promote greater certainty in that it creates an unchallengeable right of ownership.

A Proposed Scheme for Scots Law

8. In our view very long periods of usucapion or acquisitive prescription are of little use in the context of acquisition of

¹[1950] 1 K.B. 76.

moveables, and there is a tendency for legal systems to recognise shorter periods even if they also retain a "longstop". In Scotland today the period of negative prescription for the obligation of restitution is (as a rule) 5 years and rights in general are cut off by a long negative prescription of 20 years. We suggest for consideration that there should be two periods of usucapion - a short period of 5 years and a long period of 20 years (or possibly 10 years).

(i) A Short Period of Usucapion

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

- (a) The moveable must have been possessed¹ openly, peaceably, adversely to the owner and without any judicial interruption² for a continuous period of 5 years³ by a possessor or possessors who had acquired by title apparently habile (i.e. appropriate) to transfer ownership.
- (b) The moveable must not be a res extra commercium.⁴
- (c) No rule of law should have disqualified the original acquiring possessor, or his successor in title, from owning a moveable of that particular class.⁵ However, an acquirer from such possessors, if properly qualified to own such a moveable, would not be affected by a disqualification of a preceding possessor.
- (d) The original acquirer must have taken possession of the moveable in good faith by an apparently valid title which, had the transferor been owner or had he been authorised by the owner, would have been effective to vest ownership

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

²cf. Prescription and Limitation (Scotland) Act 1973, s.1.

³During the period of usucapion the dispossessed owner would retain his rights to claim restitution and delivery.

⁴See supra, para. 3.

⁵e.g. if the property could only lawfully be transferred to someone licensed to own it.

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

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

¹We suggest that putative causa should suffice as a basis for usucapion, so that if the moveable was accepted in the belief that transfer was in implement of a valid legal ground therefor such as a gift, this should be sufficient despite the existence of a defect such as error in that ground. In Roman law and also in modern codes such as the Italian and Greek Codes ordinary usucapion is based, as suggested above, on a foundation of apparently valid title.

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

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

We invite comment on the proposed scheme set out above.

(ii) A Long Period of Usucapion

10. We consider that there is also a case for recognising a longer period of usucapion as a "longstop" to settle doubts as to ownership of moveables even though the possession had not been founded originally on any title ostensibly habile to confer ownership. This longer period of possession adverse to the owner enjoyed openly, peacefully and without judicial interruption might, we suggest, give ownership to any possessor who had not acquired possession by theft, nor continued in possession on behalf of a thief.¹ We might also be inclined to disqualify a possessor who was aware that the property had been stolen in the past, though it could perhaps be said that, if he had possessed openly and his possession had not been challenged, even this possession should ripen into ownership in the interests of certainty. However, in all other cases where a possessor or his author had knowingly acquired on defective title or was ignorant as to the provenance of the moveable, we

¹We would restrict "theft" in this context to the narrow sense of forcible and clandestine dispossession, and would not extend it to cases analogous to swindling.

should be inclined to fortify defective title by usucapion.

11. Stair did not consider bona fides necessary for long usucapion, and of course it is not required for positive prescription of heritage. Rights over heritage are, however, more easily traced than rights over moveables which may be kept in repositories and are not recorded in registers. The object of a long period of usucapion is primarily to secure certainty as to ownership of property rather than to penalise discreditable conduct by possessors. Though an owner should not readily be divested of his property in favour of a possessor who had not acted in good faith, it might be thought that, if an owner is to assert his rights, the longer period of usucapion should normally suffice and that it would be no easy matter to prove his title towards the end of the period. The considerations favouring certainty and good faith are rather evenly balanced. We think that there may be justification for the solution of Italian law which prescribes different periods of usucapion in cases of good faith and bad faith. Tentatively we would suggest 10 years in the former and 20 years in the latter case if a distinction were to be made, but do not think that the distinction is essential. On the question whether a unitary period for the long period of usucapion should be 10 or 20 years we have no strong views, but suggest for consideration a 10-year period - which would be the same as for heritage.

12. Another problem in relation to a long period of usucapion is the extent to which legal incapacity such as pupillarity, minority or mental illness of the deprived owner or his successors should or should not be taken into account. Since the object of such usucapion is to achieve certainty regarding property rights, we suggest provisionally that incapacity should be disregarded in this context - especially if a 20-year period were to be selected.

13. We discuss in the Appendix the case of Parishioners of Aberscherder v. Parish of Gemrie,¹ where the lenders of a

¹(1633) Mor. 10972.

church bell were apparently prevented from recovering it because the borrowers may have usucapted. This is difficult to accept since the loan seems to have been precarious,¹ and we consider that where possession has commenced on limited title such as loan or hire, even for an indefinite period, usucaption should not run unless the original possessor or his successors in title had changed the basis of the possession by making it known to the owner - either expressly or by disregarding claims by him - that continued possession was adverse to him or, perhaps, unless the owner had so acted as to justify the possessor in the belief that the owner had relinquished his right.

14. Our proposed scheme for a long period of usucaption may be summarised as follows:

- (a) Possession adverse to the owner enjoyed openly, peacefully, and without judicial interruption for a period of 10 years should confer ownership on a possessor, even though the possession had not been founded originally on any title ostensibly habile to confer ownership.
- (b) This possession should confer ownership on all possessors except
 - (i) those who had acquired possession by theft, or had continued in possession on behalf of a thief; and possibly
 - (ii) those who were aware that the property had been stolen.
- (c) The distinction between good and bad faith is not essential, and a 10-year period should apply in each case.
- (d) Legal incapacity, such as pupillarity, minority and mental illness, should be disregarded in calculating the period of usucaption.
- (e) Where possession has commenced on limited title, such as loan or hire, even for an indefinite period, usucaption should not run unless the original possessor or his successors in title had changed the basis of the possession by making it known to the owner - either expressly or by disregarding claims by him - that continued possession was adverse to him; or, possibly, unless the owner had so acted as to justify the possessor in the belief that the owner had relinquished his right.

¹ i.e. during the lender's pleasure and terminable at any time. During the period of loan in Scots law the lender retains civil possession, while the borrower has natural possession.

APPENDIX

The State of Authorities

1. The institutional writers on the whole favoured a doctrine of usucapion. Stair¹ apparently recognised it, but it is not altogether clear whether he considered the basis to have been statutory. Forbes,² writing in 1722, observed "Moveables are acquired by 40 years Possession without a title". Bankton³ concluded that there was usucapion "'when a right of heritage, or of moveables, .. is acquired by the uninterrupted possession thereof for the space of 40 years.'" The statute which introduces this prescription mentions only Heritage; but the property of moveables is governed by the same rule, as to this case of prescription by analogy from the statute". Kames⁴ apparently considered that forty years' possession established title in Scotland by usucapion. Erskine⁵ held that "since the property of moveables is presumed from possession alone ... the proprietor's neglecting for forty years together to claim them, by which he is cut off from all right of action for recovering their property, effectually secures the possessor"; but this passage does not expressly support a doctrine of usucapion for corporeal moveables. Napier⁶ criticises Erskine for thinking of positive and negative prescription as "inevitably cooperating". Hume⁷ asserts that an owner's right to recover property "moveable or immoveable" is limited "by the doctrines of the positive prescription ... in virtue of which the possessor gains a right - an absolute and unimpeachable right, in virtue of his 40 years' possession of the thing as his own". Napier⁸ insists that moveable rights are subject only to negative and not to positive prescription, though he concedes that his view is "contrary to authority entitled to the highest respect".

2. Stair⁹ cites Parishioners of Aberscherder v. Parish of

¹II.12.9-13; IV.40.20.

²Institutes 3.5.1.

³II.12.1.

⁴Elucidations, esp. at pp. 240, 259.

⁵III.7.7.

⁶Prescription p. 78.

⁷Lectures, III. p.228.

⁸Prescription pp. 39, 70, 72, 75, 541.

⁹II.12.13

Gemrie¹ as an authority on usucapion.² Morison also enters the case under the rubric Positive Prescription in his Dictionary of Decisions. The facts as disclosed by the report are, briefly, that one congregation lent to another a church bell for use, and when they claimed delivery over forty years later the pursuers failed on grounds of prescription. The report itself could be construed to mean that the obligation to make restitution (and possibly the right to vindicate) were cut off by the long negative prescription - but Stair (in whose lifetime the case was decided) clearly regarded the decision as implying usucapion. It seems of special significance that the authorities relied on by the parties are not the prescription statutes, but Roman and Canon law sources. Longissimi temporis praescriptio (of 30 or 40 years) seemingly in Justinian's time operated both as an acquisitive and as an extinctive prescription, and it seems probable that the Court of Session applied this doctrine.³ The only other case we have traced in which usucapion seems to have been argued in relation to corporeal moveables is Ramsay v. Wilson.⁴ Here the pursuer asserted a real right - rei vindicatio. The defender urged unsuccessfully that he had acquired the property claimed by usucapion, having possessed it between 10 and 12 years. Stair's report of the case states that the Lords found "that there is no usucapion in moveables in Scotland by possession in less than 40 years". In this case again the arguments on either side are based on the Civil and Canon law, and no mention whatsoever was made of statutory prescription. More⁵

¹(1633) Mor. 10972. For convenience a copy of the report is included at the end of the Appendix.

²See, however, Lord Wellwood (Ordinary) discussing this case in Presbytery of Edinburgh v. University of Edinburgh (1890) 28 S.L.Rep. 567 at p. 574.

³An added difficulty about the case is that the report does not disclose a period of adverse possession: cf. Sands v. Bell and Balfour May 22 1810 F.C. However, abandonment may have been inferred, and this in the 17th century would seemingly allow a private citizen to acquire ownership.

⁴(1665) Mor. 9114-6.

⁵Notes on Stair, A A p.cclxxvi.

considered that this case recognised a doctrine of usucapion of moveables by an extension beyond feudal rights of the first part of the Act 1617 c.12. Napier,¹ however, emphatically denies usucapion of moveable rights any place in the law of Scotland. He seems well founded in rejecting a statutory justification for the doctrine. Bankton² may be closer to the truth when he refers to "analogy" with the 1617 Act. However, it would seem probable that, though analogy with statute law may have helped recognition of a doctrine of usucapion of moveables, other influences also operated. Roman and Canon law ideas were particularly influential in developing the Scots law of moveables in the 17th and 18th centuries, and there are indications even in Balfour that Roman doctrines of prescription had been argued at an even earlier date. Such meagre evidence as the reported cases provide indicate a civilian rather than a statutory approach, and it seems likely that the late Roman law doctrine of longissimi temporis praescriptio was at least precariously introduced into Scots law. Under that doctrine, provided an enquirer had possessed bona fide - even though without title - after 30 or 40 years, not only was an action against him cut off, but he actually became owner.³

¹Prescription, esp. pp. 74-76.

²II. 12.1.

³See Sohm Institute of Roman Law, (3rd. ed.) p.321.
Buckland Textbook of Roman Law (3rd ed.) p.251.

SECT. XV.

Effect of the Positive Prescription.—Title of Prescription in Moveables.

1633. December 7.

PARISHIONERS OF ABERSCHERDER *against* PARISH OF GEMRIE.

No 179.

In a pursuit for a church bell, lent by one parish to another, the defence upon the positive prescription was sustained by 40 years possession.

THE minister and session of the kirk of Aberscherder, pursuing the minister and parishioners of the kirk of Gemrie, for restitution of a bell pertaining to the said kirk of Aberscherder, and which was borrowed by one of the parishioners of Gemrie, and ever detained by them since, undelivered again for the space of 40 years, and more, since the borrowing thereof; and they excepting upon prescription of the said action in respect of their possession, uninterrupted for the space of 40 or 45 years bypast, during which time they have possessed the said bell in their kirk, by using the same all manner of ways, as other bells are in use to be used in other kirks in the realm, by convening of the parishioners to sermon, and other exercises of holy action in their kirk, as occasion required, and as are used in other kirks and parishes; and the other kirk *replying* upon their property to the said bell, and that it hung ever in their steeple before the lending thereof to these defenders, and that they only borrowed the same from them; and albeit they had a long lend thereof, yet they ought not to make the pursuers to want their own, and to give the defenders unjustly that which is not theirs, and prescription cannot be admitted in this case, *ubi agitur de causa bonæ fidei ex parte actoris, et ubi intervenit mala fides rei* in a sacred matter, as in this case of borrowing of kirk's gear, especially seeing prescription ought to proceed, conform to a lawful title, but bare possession, *sine legitimo titulo, qui sit probabilis ad transferendum dominium*, ought not to be sustained to induce prescription, neither can prescription have place in favour of one kirk against another, specially *in materia odiosa, nam privilegiatus contra privilegiatum non gaudet privilegio*: Notwithstanding of the which reply, the exception was sustained; and in respect of the 40 years possession bypast, uninterrupted, no action was sustained for the bell libelled.

Fel. Dic. v. 2. p. 112. Durie, p. 695.

No 180.

1634. July 22. FORRESTER *against* FEUARS OF BOTHKENNER.

MARGARET FORRESTER pursued the feuars of Bothkenner, for payment to her of six pecks of oats for every ox-gang of their lands, which was a duty for forest-fee contained in her infestment. *Alleged*, Absolvitor, because they were

