



Scottish Law Commission
promoting law reform

Discussion Paper on Prescription and Title to Moveable Property

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The Commission would be grateful if comments on this Discussion Paper were submitted by 11 March 2011.

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

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Abbreviations

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

1976 discussion paper, or 1976 DP: Scottish Law Commission, *Corporeal Moveables - Usucapion or Acquisitive Prescription* (Scot Law Com Memorandum No 30 (1976)).

DCFR: Christian von Bar and Eric Clive (eds) *Principles, Definitions and Model Rules of European Private Law : Draft Common Frame of Reference (DCFR)* (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.

Q & L T R: The Queen's and Lord Treasurer's Remembrancer, who administers property (moveable and immoveable) falling to the Crown, either as *bona vacantia* or under the doctrine of *ultimus haeres*.

Part 1 Introduction

History of the project

1.1 In 1970 this Commission published its *Report on Reform of the Law relating to Prescription and Limitation of Actions*.¹ This led to the Prescription and Limitation (Scotland) Act 1973, which, much amended, continues to be the foundation of the law of prescription. One topic was omitted: the effect of the running of time on title to corporeal moveable property. Although the 1970 report does not say so, the omission was deliberate. At the time there was a separate Commission project on title to corporeal moveable property, and prescription was part of that project. Several consultation papers were published, one of which, appearing in 1976, was *Corporeal Moveables: Usucapion or Acquisitive Prescription*. This noted that in the 1970 report the Commission had:

"deliberately refrained from making detailed proposals regarding acquisitive prescription of moveables until we had considered problems of title to corporeal moveables more generally."²

1.2 The project on title to corporeal moveable property involved seven discussion papers.³ Of these, only one, on lost and abandoned property, culminated in a final report.⁴ It may be that it should one day be resumed. But whether the law is satisfactory or unsatisfactory, at least it exists: there is a corpus of law on title to corporeal moveables. The problem with prescription is that there is simply a gap, a gap that was intended to be temporary but which has unfortunately proved to be long-term. The revival of the project attracted substantial support from those who responded to our consultation on our Eighth Programme of Law Reform, and accordingly it was included in the Eighth Programme.⁵

1.3 Whilst the principal focus of this discussion paper is the effect of prescription on title to corporeal moveable property, in Part 11 we address an issue concerning the effect of prescription on title to intellectual property rights.

Significance of the subject

1.4 This aspect of the law of prescription is less important than others, such as the negative prescription of obligations, or prescription (both positive and negative) in relation to

¹ Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15 (1970), available at www.scotlawcom.gov.uk).

² Para 3.

³ *Corporeal Moveables - Passing of Risk and of Ownership* (Scot Law Com DP No 25 (1976)); *Corporeal Moveables - Some Problems of Classification* (Scot Law Com DP No 26 (1976)); *Corporeal Moveables - Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com DP No 27 (1976)); *Corporeal Moveables - Mixing, Union and Creation* (Scot Law Com DP No 28 (1976)); *Corporeal Moveables - Lost and Abandoned Property* (Scot Law Com DP No 29 (1976)); *Corporeal Moveables - Usucapion or Acquisitive Prescription* (Scot Law Com DP No 30 (1976)); *Corporeal Moveables - Remedies* (Scot Law Com DP No 31 (1976)).

⁴ 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. The other aspects of the project are mentioned as being on hold in successive annual reports. The last mention appears to be at para 2.14 of Scottish Law Commission, *Twenty-Eighth Annual Report* (Scot Law Com No 146 (1993)).

⁵ Eighth Programme of Law Reform (Scot Law Com No 220, February 2010).

land. The lifespan of most corporeal moveables tends to be short, and during that lifespan the value of the property tends to decline. And whereas land is immovable and so re-identifiable over time, moveables are moveable and thus may be difficult or even impossible to re-identify. So prescription is not often relevant to title to corporeal moveable property.

1.5 Yet in some cases it is relevant. Some corporeal moveable objects have long lifespans, are re-identifiable, and have high values. The public museums and galleries of Scotland have items of this kind in profusion. Countless more are in private hands. The total value must run to billions of pounds. Much of this property is relatively static: it does not enter the market, but either continues in the hands of a public institution, or is passed down the generations within a family. But not all is static; in the marketplace there are valuable works.

1.6 Some of these items have always been in Scotland. Others have come at some stage from furth of Scotland, so that they have been at some stage subject to one or more non-Scottish systems of law. Just as the law of prescription is potentially relevant to every square inch of land in Scotland, so the law of prescription is potentially relevant to all corporeal moveable property. It is therefore curious that there is an almost complete absence of reported cases. That may indicate that real problems are not arising in practice, or it might mean that they are arising, but are being settled without litigation. Even if the former is the case, the gap in the law is plain and should be filled. All it needs is one high-profile case involving valuable artwork or antiquities for the law to be exposed to understandable criticism. When one contemplates the volume of caselaw in this area in the USA⁶ the conclusion must be that it is likely to be only a matter of time before a major case happens here.

1.7 Disputes about who has good title – who is the legal owner – must be distinguished from disputes about who has the best moral right to the item in question. Claims are often made against museums and galleries, in this country and elsewhere, for the return of objects, where the claim is not (or not mainly⁷) based on legal ownership, but on moral considerations. The words "Elgin Marbles" will bring to mind this sort of claim.⁸ The present project is aimed only at establishing a reasonably clear legal regime about the effect of time on the ownership of corporeal moveable property. It does not and could not determine moral claims, for which the legal position is not necessarily conclusive.

1.8 In some cases, the concept of cultural property will be relevant. In such cases the current possessor may be legally bound to return the object, the obligation to do so being based not on private law but on the law relating to cultural objects. This subject is discussed in Part 4.

⁶ On US litigation see such works as Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials* (2nd edn 2008) and Beat Schönenberger, *The Restitution of Cultural Assets* (2009) chapter 4.

⁷ Moral claims are sometimes buttressed by claims to legal title, but the latter are in practice often dubious. One common weakness in title-based claims is that whatever defects may or may not exist in the title of the current possessor, the claimant would lack title to sue.

⁸ One Scottish case that achieved considerable publicity in the art/antiquities world was the "Lakota Ghost Dance" case. (See eg Beat Schönenberger, *The Restitution of Cultural Assets* (2009)). The handling of this case on the part of the possessor, Glasgow City Council, was praised at para 136 of the *Seventh Report of the House of Commons Select Committee on Culture Media and Sport, Cultural Property: Return and Illicit Trade* (18 July 2000) (<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcumeds/371/37102.htm>).

Positive and negative prescription

1.9 The law of prescription divides into two: positive prescription and negative prescription. Positive prescription (acquisitive prescription) is the acquisition of rights by the running of time. Negative prescription (extinctive prescription) is the extinction of rights by the running of time.⁹ For ownership of corporeal moveables, there are logically four possibilities.

(i) To have positive prescription but not negative prescription. That is the position for land, for which the 1973 Act says that the ownership of land cannot be lost by negative prescription¹⁰ but can be gained by positive prescription.¹¹ Of course, if Jack possesses Jill's land for many years, and eventually gains ownership of it, it follows that she loses ownership. She loses ownership by prescription, but not by negative prescription. She loses ownership by force of Jack's (positive) prescriptive title. Jill could be out of possession of her land for a thousand years – if she lives so long – and still not lose ownership by negative prescription: prescription can deprive her of ownership only if the requirements of positive prescription are satisfied in relation to someone else, the possessor. Broadly similar rules could be applied to corporeal moveables.

(ii) Or one could have negative prescription without positive prescription. Suppose Jill loses possession of a gold ring, studded with rubies, sapphires and diamonds, and worth £100,000.¹² On this approach, Jill's ownership would eventually be cut off by a long period of non-possession. But there would be no rule whereby anyone else could acquire ownership by long possession.

(iii) One could have both, operating at the same time. If negative prescription were completed first, there would be a period when the ring would be owned neither by Jack nor by Jill. If positive prescription were completed first, Jack would acquire ownership and Jill would lose it. It might be that the two would work simultaneously.

(iv) Finally, one could have no prescription for corporeal moveables. Regardless of what happens, the non-possessing Jill would continue to be the owner of the ring, and so ownership and possession would be divorced, until the end of time.

Human rights and legislative competence

1.10 Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) protects property rights. Positive prescription takes away property rights and does so without compensation. In *J A Pye (Oxford) Ltd v United Kingdom*¹³ the European Court of Human Rights held that positive prescription in relation to land is compatible with the ECHR. We see

⁹ It is also possible for negative prescription to fall short of extinctive effect, instead merely making the right unenforceable by action. Some legal systems take that approach. But in Scots law negative prescription is fully extinctive: the right ceases to exist. This issue is taken up again below, in connection with the prescription of the obligation of restitution.

¹⁰ 1973 Act sch 3(a).

¹¹ 1973 Act s 1.

¹² We use this as the standard example throughout this paper. The ring is valuable (and so worth fighting over) and capable of lasting for centuries – indeed for millennia – without significant deterioration. This last point is important, because prescriptive periods tend to be substantial.

¹³ (2008) 46 EHRR 45.

no reason to think that the position would be different for corporeal moveable property. We note that positive prescription is routine in the legal systems of the states that are parties to the ECHR, for both land and corporeal moveables. We also note that the DCFR recognises positive prescription.

1.11 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, 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."¹⁴ Something more on this issue is said below.¹⁵

1.12 In Part 11 we note that there is at present some uncertainty as to whether section 8 of the 1973 Act could apply to copyright. We suggest 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.¹⁶ Our preliminary view is that the proposed amendment, being specifically about intellectual property, would probably have to be brought about by legislation at the UK level.

Impact Assessment

1.13 It is important, when considering a law reform project, to have regard to the likely economic impact of any proposed reforms. The arguments for and against the introduction of a rule allowing the positive (acquisitive) prescription of corporeal movables are set out in Part 6 of this paper. One of the arguments in favour of allowing such positive prescription is to increase certainty. Some corporeal movables, such as works of art and antiquities, are long-lived and may be of considerable value and hence economic significance. It may be that the introduction of a clear rule of positive prescription would be of benefit to the good faith possessors of such objects, in so far as clarifying the law might reduce the risk (and, failing that, the complexity and cost) of litigation concerning the ownership of the objects in question. It may also be of benefit in increasing the marketability of objects whose provenance, at a period earlier than the prescriptive cut-off date, cannot be established with certainty.

1.14 We do not presently have enough information to assess the likely economic benefit of the introduction of a rule of positive prescription. We would welcome any information that consultees might be able to provide us regarding the value of the property held by them whose legal title is presently uncertain and of their assessment of the risk and likely cost of dealing with any dispute which might arise as to their ownership of such property. Any such information would be of considerable use in assessing the likely economic impact of our proposals.

¹⁴ 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. 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.

¹⁵ Paras 1.15 to 1.18.

¹⁶ Scotland Act 1998, Sch 5, Pt 2, Head C4.

Crown rights (including treasure trove)

1.15 The Companies Act 2006¹⁷ provides for the case where a company is dissolved without all its assets having been disposed of.¹⁸ Because the law relating to business organisations is reserved,¹⁹ it might be argued that this topic is therefore reserved. Alternatively it might be argued that this is the law of *bona vacantia*, which is devolved.²⁰ Be that as it may, the present project does not propose any alteration to the law in this area. The only qualification to that remark is that under our proposals, the possession of corporeal moveable property could eventually ripen into ownership, and if that were the law, the original owner would lose ownership. That would be as true in relation to the Crown as anyone else. So if the Crown were to acquire corporeal moveable property as the result of the dissolution of a company, but the object was in the hands of someone else, the Crown could, after many years,²¹ lose ownership under our proposals.

1.16 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.

1.17 We do, however, discuss the possibility of cutting back Crown rights in respect of certain types of *bona vacantia*, namely assets falling to the Crown by negative prescription or by abandonment. Such changes would not, however, have a material effect on Crown rights. The estates of those who die intestate without heirs would continue to pass to the Crown, as would the estates of juristic persons that are dissolved.²² So would treasure trove.

1.18 In the Advisory Group a suggestion was made that there might be a case for an express general legislative power to the Q & L T R to disclaim ownership of property falling to the Crown, as already exists in the specific case of company assets falling to the Crown.²³ That is because certain assets are undesirable; we were given the example of a pile of several thousand worn-out tyres. We think that this topic does not belong to the present project. But we take this opportunity to note that there may well be a case for a general review of the law relating to *bona vacantia*, *ultimus haeres* and treasure trove.²⁴

¹⁷ Part 31, Chapter 2.

¹⁸ Normally all of a company's assets are disposed of before the date when it is struck off the Companies Register. But sometimes this does not happen.

¹⁹ Scotland Act 1998 Sch 5, Part II, C1 and C2.

²⁰ Another line of argument would be based on s 29(4) of the Scotland Act.

²¹ For example, twenty years. The question of the right period (or periods) is discussed later.

²² As just mentioned, the Companies Act 2006 has a specific provision to this effect. But this merely replicates, for companies, a common law doctrine that would apply even if the statute were silent.

²³ Companies Act 2006 s 1013.

²⁴ Our work on the project on land registration (leading to our *Report on Land Registration* (Scot Law Com No 222 (2010)), led us to wonder whether the law of *bona vacantia* and *ultimus haeres* is satisfactory in relation to land. But the topic could not be pursued in that project. So far as treasure trove is concerned, a review was conducted by the then Q & L T R, Andrew Normand, in 2003. (Scottish Executive, *Review of Treasure Trove Arrangements in Scotland* (2003) (the "Normand Review").) After a period of consultation, the Scottish Executive indicated that it did not accept the Normand Review's recommendation that the law of treasure trove be set out on a reformed statutory basis: Scottish Executive, *Review of Treasure Trove Arrangements in Scotland: The Scottish Executive's Amended Response to the Normand Review* (2004). The current arrangements are helpfully summarised in the Scottish Government's publication, *Treasure Trove in Scotland: A Code of Practice* (2008).

Overview of the paper

1.19 In Part 2 we review the current law, including the possibility that there exists a forty-year common law positive prescription. In Part 3 we summarise our 1976 Discussion Paper. Part 4 is about cultural objects, a subject about which there is both EU law and international law. In Part 5 we take a look at the law in some other legal systems. Part 6 asks the main question in terms of legal policy: should there be positive prescription for corporeal moveable property? We provisionally take the view – as we did in the 1976 Discussion paper, and as did respondents to that paper – that there should. In Part 7 we look at what the details of such a scheme might look like. In broad terms we suggest that the period should be fairly long: something from fifteen to thirty years. Twenty years might be an appropriate period. In this part we also consider certain special issues. Whilst in general the possessor would of course have to be in good faith, there is a case, in certain circumstances, to allow a prescriptive title even in the absence of good faith. This issue is discussed in Part 8. One possibility would be for such a prescription to be admitted, but with the period being twice that of the ordinary period – so a period of perhaps forty years. In Part 9 we examine the law about the abandonment of corporeal moveable property. Although this topic is in itself separate from the law of prescription, it is intimately connected with it. Part 10 asks whether cultural objects should be subject to a separate regime. The arguments against are, in the first place, that the periods we have discussed earlier in the paper are fairly long anyway, judged by international standards, and, in the second place, that special rules for cultural objects would complicate the law. Finally, in Part 11 we turn from corporeal moveable property, and ask whether the legislation on prescription should be amended to make it clear that where legislation on intellectual property rights provides for certain fixed periods, those periods should be unaffected by the prescription legislation.

Part 2 The current law

Ownership presumed from the fact of possession

2.1 The fact of possession raises a presumption of ownership.¹ This means that the problems of the current law, discussed below, are seldom felt in practice. An owner who has lost possession of an object, and who raises an action to recover it from the current possessor, must offer evidence sufficient to overcome the presumption, arising from the fact of possession, that exists in the defender's favour. (And the owner must first track the object down, itself something that may not be possible.)

2.2 Whilst in practice the presumption is often too high a hurdle for a pursuer, or potential pursuer, to jump, there may always be cases where the pursuer can put before the court sufficient evidence. And the higher the value of the object the more likely that this will be possible, for evidence about high-value objects does often exist.² Hence the presumption, for all its importance, does not exhaust the subject. The question of substantive law as to the effect of the running of time on title to corporeal moveable property remains.

The uncertainty of the current law: introduction

2.3 As was mentioned in Part 1, the 1973 Act does not directly deal with the question of the effect of the running of time on the ownership of corporeal moveable property. The silence was deliberate. Nevertheless, the law, like nature, abhors a vacuum, and rules must be inferred from such materials as are available. There are three main possibilities as to what the law is. The first is that the owner remains the owner, no matter how long someone else has possession. The second is that if there are twenty years of non-possession, then ownership vests, not in the possessor, but in the Crown. The third is that a person who possesses for forty years acquires good title.³ Of these, the second is the most likely. But given that the 1973 Act did not seek to address the issue, and given the absence of case law, the position must be regarded as less than certain.

Negative prescription of the right of ownership⁴

2.4 Section 8 of the 1973 Act is about the negative prescription of rights affecting property. It was aimed at subordinate real rights in private law, such as servitudes, and at public rights of way. Such rights are extinguished by long non-use.⁵ And the opening words

¹ David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) para 1.19; Kenneth Reid, *Law of Property in Scotland* (1996) para 150.

² Sales receipts, photographs, markings on the object and so on. And see the Art Loss Register (<http://www.artloss.com/>).

³ This possibility is not inconsistent with the second. Fred steals Jill's ring and sells it to Innocentia, who is in good faith, and she possesses for forty years. It might be that Jill would retain ownership during the first twenty years. During the next twenty years the Crown would be the owner. After the expiry of that second period, Innocentia would be the owner.

⁴ See generally David Johnston, *Prescription and Limitation* (1999) chapter 18; David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) chapter 7.

⁵ Thus if there is a public right of way across land, or a private right of way (servitude of way), and it ceases to be used, then after twenty years of disuse the right will be extinguished.

are hardly apt to deal with the right of ownership: "If, after the date when any right to which this section applies has become enforceable or exercisable..." But it goes on to say that "this section applies to *any right relating to property*, whether heritable or moveable..." The expression "any right" is unqualified and so presumptively includes the right of ownership itself. And as noted below, paragraph (g) of Schedule 3 to the 1973 Act says that an owner's right to recover from a thief is imprescriptible. That suggests the existence of a more general rule that ownership of corporeal moveables is – in non-theft cases – prescriptible.⁶ A further reason for thinking that section 8 applies is the simple fact that the Act says expressly that ownership of land is negatively imprescriptible. The silence as to moveables suggests that the intention was the negative prescription was to apply. This argument is, however, rather formalistic, given that in reality the 1973 Act did not have the ownership of moveables in its sights.

2.5 An academic consensus has developed that ownership of corporeal moveables is indeed negatively prescriptible under section 8.⁷ Suppose that Jill, out on a seaside walk, loses her ring, and it lies undiscovered by anyone for many years. After twenty years of non-possession, the effect of section 8 would be that she would lose ownership.

2.6 Who would then be the owner, or would the ring be ownerless? The answer is that the common law gives ownership to the Crown. Property that is owned cannot cease to be owned.⁸ If no one else owns it, the Crown does: *quod nullius est fit domini Regis*.⁹ So on the assumption that after twenty years section 8 of the 1973 Act extinguishes Jill's title, at that moment the ring passes into her Majesty's ownership.

2.7 Thirty years later Jill visits the same beach and finds the ring again. To no avail, for the ring (probably) belongs to the Crown. No doubt in practice the Crown would not assert its right against her. But it is better if the law can give a sensible result, rather than giving an unsensible result with the hope that people will sensibly ignore that result.

2.8 Whilst section 8 is about negative prescription, its substantive effect is that of a positive prescription in favour of just one person: the Crown.¹⁰ The Crown is the sole beneficiary of the rule (if there is such a rule) that the ownership of corporeal moveables is negatively prescriptible.

2.9 Loss of possession means complete loss of possession, not merely loss of natural (direct) possession.¹¹ For example, if Jill lends her ring to Kate, Jill still has civil (indirect) possession. Or if Jill runs a business hiring out motor vehicles, she retains civil (indirect)

⁶ See David Johnston, *Prescription and Limitation* (1999) para 3.51. As we note in paras 2.11 to 2.13 below, para (g) of Schedule 3 is, on a literal reading, not about ownership at all, but as will be seen, we think that it should not be read literally.

⁷ Kenneth Reid, *Law of Property in Scotland* (1996) para 675; David Johnston, *Prescription and Limitation* (1999) paras 7.08, 7.14(6) and 18.04; David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) 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).

⁸ That does not mean that there can be no ownerless property. The blackbird pecking in the grass is ownerless.

⁹ There are two separate rules. (i) *Quod nullius est fit domini Regis*. Under this rule (always thus expressed, though at present it should be *quod nullius est fit dominae Reginae*) if ownership of property is extinguished, the Crown acquires ownership - one *scintilla temporis* after the extinction. (ii) *Quod nullius est fit occupantis*. Under this rule if something moveable has never been owned, the person who takes possession of it, with the intention of acquiring it, becomes the owner. The two rules thus apply to different types of case. The second rule applies to the taking of wild animals, birds etc. The term *occupatio* is used for this type of acquisition.

¹⁰ On the assumption that s 8 applies to the ownership of corporeal moveables.

¹¹ For the law of possession see generally Kenneth Reid, *Law of Property in Scotland* (1996) para 114 ff.

possession of the vehicles that have been hired out. If one of her customers were (unlawfully) to sell a hired vehicle, Jill would still be owner, but she would have, for the time being at least, lost possession completely, because the buyer would be possessing as owner.

2.10 It should be repeated that the foregoing represents the modern academic view about the effect of section 8 of the 1973 Act in relation to the right of ownership of corporeal moveable property. But the reasoning is inferential, and the matter has yet to be considered in any reported case. The possibility cannot be excluded that section 8 does not apply, and that accordingly Jill's right of ownership is unaffected by the running of negative prescription.

Negative prescription and theft

2.11 Schedule 3 to the 1973 Act 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.¹² The "privy to" formula is unusual and we do not know exactly what it means.¹³ Perhaps it refers to the doctrine of art and part, but there is no reason why that phrase should have been avoided. (Indeed, even that phrase would have been superfluous, for a person who commits an offence art and part commits that offence.) Perhaps it refers to reset. Perhaps it simply means any *mala fide* possessor of stolen goods.

2.12 A larger difficulty is that it is about "rights to recover", and yet the loss of ownership under section 8 is not – except consequentially – the loss of a "right to recover". It may mean 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)". That would be a rational rule. Another possible meaning would be a more literal one: "The victim of the theft can always recover possession from the thief (or someone privy to the theft)." But such an interpretation would not be an exception to section 8, for it would be about recovery of possession, and not about retention of the right of ownership. The consequence would be that after twenty years Jill could still recover the ring from Fred, but that ownership of the ring would nevertheless have vested in the Crown.¹⁴ We prefer the non-literal reading of paragraph (g) of Schedule 3. The issue is unlikely ever to be settled by a court since it is unlikely that the Crown would ever seek to assert its right against Jill.

2.13 On the non-literal reading of paragraph (g), the following example would illustrate the law. Fred steals Jill's ring in 1975. In 2000 he sells it to Innocentia. At this stage negative prescription starts to run, and Jill will lose ownership in 2020. (Unless within that time she recovers possession.) On the literal reading of paragraph (g), Jill loses ownership, but not the right to recover possession, in 1995, and would lose the right to recover possession immediately on the sale by Fred to Innocentia.

¹² 1973 Act Sch 3 para (g).

¹³ 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).

¹⁴ This outcome would be the converse of a rule that imposes a time-bar on actions to recover possession without altering the ownership of the property in question.

Negative prescription of the obligation of restitution

2.14 The 1973 Act says that the five-year negative prescription applies to "any obligation based on redress of unjustified enrichment, including without prejudice to that generality any obligation of restitution, repetition or recompense."¹⁵ Whether or not this is relevant for the purposes of this project depends upon the sense in which the term "restitution" is used. The term "restitution" is sometimes used to mean *rei vindicatio*, ie where X recovers possession from Y based on the fact that X is still the owner. If that were the meaning here, Jill would suffer her loss in two stages. After five years she would lose her right to recover possession, but she would still be the owner. Fifteen years after that she would lose ownership. And presumably later on the Crown would likewise find itself unable to recover possession from Innocentia. If this were the meaning of "restitution" in the 1973 Act, then negative prescription of the obligation of restitution would be a vital aspect of this project. But "restitution" is also used to mean the recovery of ownership, as well as of possession, where Y *has* the right of ownership, but *should not have* it.¹⁶ The difference between the two cases is that in the first the story begins with X having ownership, not having possession, but having a right to acquire possession, whereas in the second the story begins with X having neither ownership nor possession, but a right to acquire both. The context makes it clear that "restitution" is being used in the second sense, not least because of the use of the expression "unjustified enrichment". Accordingly the five year prescription is not relevant for the purposes of this project.¹⁷

Special rules

2.15 Special rules exist for lost property, wreck and treasure. This project would not touch any of them, but they are mentioned to fill in the background picture.

2.16 As to lost property, the law is governed by Part VI of the Civic Government (Scotland) Act 1982, which applies to corporeal moveables that appear to have been "lost or abandoned".¹⁸ Certain duties are imposed on the finder,¹⁹ and there are rules about the

¹⁵ 1973 Act sch 1 para 1(b).

¹⁶ Example: Adam sells part of his land to Eve and by mistake transfers too much. She is now the owner, but is unjustifiably enriched. She is under an obligation to transfer the land back to Adam. Here Adam is seeking to recover ownership. (And perhaps possession too, though in a case of erroneous transfer it might well be that Eve has not taken possession.) This is not a case of *rei vindicatio*, because Adam is not seeking to recover possession of something he owns. He is seeking to recover ownership. An example of *rei vindicatio* would be the recovery of goods from a thief. The thief has possession but not ownership; the victim has ownership but not possession. The victim's claim is not to recover ownership (for that has never been lost) but possession, the *medium concludendi* being the victim's undivested right of ownership.

¹⁷ Cf David Johnston, *Prescription and Limitation* (1999) para 6.16.

¹⁸ Section 67(1) imposes duties on "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". The use of the term "owner" here in connection with abandoned property as well as lost property is correct because abandoned property has an owner, just as much as lost property does. Abandoned property is the Crown's. A difference between lost and abandoned property is that it may be difficult to discover who owns lost property, whereas it is easy to ascertain who is the owner of abandoned property: the owner is Her Majesty. (But the fact of abandonment may not be easy to determine.)

¹⁹ Section 67(1). To be precise, duties are imposed on the "person taking possession". A person who finds something without taking possession is not subject to the duties. This was deliberate: Scottish Law Commission, *Report on Lost and Abandoned Property* (Scot Law Com No 57 (1980)) para 6.1. But if someone does take possession of an object of little value, such as a £1 coin lying in a gutter, there is no *de minimis* exception, so that the statutory duties apply, and non-compliance is an offence: s 67(6). This offence seems to overlap with the common law offence of theft. In *Kane v Friel* 1997 JC 69 the appellant and his brother were found in possession of low-value copper piping that they had come across. They were about to sell it. The Appeal Court allowed an appeal against conviction for theft, on the basis that there was nothing in the facts established by the prosecution

disposal of such property. Section 78 provides that "rights which the Crown has in lost or abandoned property shall be capable of being extinguished" under the provisions about disposal, but, subject to that, "nothing in this Part of this Act affects the Crown's right of ownership in lost or abandoned property." Section 73 contains a provision which appears to be simply declaratory of the common law, namely that ownership of lost or abandoned property is not acquired by the fact of finding.

2.17 Abandoned property belongs to the Crown.²⁰ Property that has merely been lost is not abandoned and so does not belong to the Crown,²¹ unless and until negative prescription sets in.²² For example if Jill on a seaside walk loses her ring, and comes back next day and finds it again, the ring is still hers.²³ Indeed, even if she had not returned and picked it up, it would still have been hers.²⁴

2.18 Part IX of the Merchant Shipping Act 1995 has a set of rules for dealing with and disposing of wreck, meaning both wrecked ships and the cargo from them.²⁵ These rules are comparable with the 1982 Act.

2.19 The law of what is sometimes called "treasure trove"²⁶ tends to be treated as an autonomous set of rules.²⁷ But the better view is probably that the Crown owns such objects merely as a result of one or other of three other rules, namely (i) negative prescription combined with the rule *quod nullius est fit domini Regis*, (ii) abandonment combined with the rule *quod nullius est fit domini Regis* and (iii) the doctrine of *ultimus haeres*. If someone digging in the garden finds a prehistoric golden torque, there is no conflict between the 1982

which would give the justice a basis for inferring that the appellant must have known that the items were property which someone intended to retain. There was therefore no basis for inferring that he possessed the dishonest intent necessary to a charge of theft. Here the low value of the piping seems to have been a factor. The court expressed regret that neither prosecution nor defence had raised the question of the s 67 offence.

²⁰ See Part 9 below.

²¹ Unless it begins the story as Crown property.

²² Assuming that section 8 of the 1973 Act is applicable, which is probable but not certain.

²³ "The mere loss of property in the sense of mislaying it does not deprive the owner of title." William M Gordon in Kenneth Reid, *The Law of Property in Scotland* (1996) para 568.

²⁴ If it is found by someone else, the Civic Government (Scotland) Act 1982 applies.

²⁵ Section 255(1) of the 1995 Act says that, for the purposes of Part IX, "wreck includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water." Presumably this applies to the limits of the territorial waters, and territorial seabed, but not beyond, so that a sunken ship that lies on the seabed ten nautical miles from the coast would be covered, but not a sunken ship that lies on the seabed twenty nautical miles from the coast. For the limits, see the Territorial Sea Act 1987, s 1(1). See also the Scottish Adjacent Waters Boundaries Order 1999 (SI 1999/1126).

²⁶ "Treasure" in this context is not limited to items of intrinsic high value, such as gold and silver. The objects in question may have no intrinsic value. For example, wooden objects can be "treasure". The leading case is *Lord Advocate v University of Aberdeen* 1963 SC 533. (On this see *inter alia* David Carey Miller "T B Smith's Property" in Elspeth Reid and David Carey Miller, (eds) *A Mixed Legal System in Tradition: T B Smith and the Progress of Scots Law* (2005) at p 192 ff.) See further Kenneth Reid, *The Law of Property in Scotland* (1996) para 553; David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) chapter 2. English common law limits treasure trove to objects of intrinsic high value. The law was modified by the Treasure Act 1996, as a result of *Attorney-General of the Duchy of Lancaster v G E Overton (Farms) Ltd* [1980] 3 All ER 503, decided under English common law, in which it was held that a hoard of 7,811 Roman coins was not treasure trove because the coins were predominantly of base metal. For a comparison of English and Scots law and practice see Derek Fincham, "A Coordinated Legal and Policy Approach to Undiscovered Antiquities" (2008) 15 *International Journal of Cultural Property* 347.

²⁷ As it generally is in other legal systems, including Roman law. (For *thesauri inventio* see eg W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, by Peter Stein, 1963) pp 218 to 221.) For modern systems see, for example, Article 716 of the French Civil Code, § 965 ff of the German Civil Code, Article 932 of the Italian Civil Code, Article 938 of the Quebec Civil Code, Art 13 of Book 5 of the Dutch Civil Code and Art 351 of the Spanish Civil Code.

Act and the law of "treasure trove" because the property is "lost and abandoned", and falls under the 1982 Act. The current owner is readily identifiable: the Crown.

Positive prescription

2.20 So much for negative prescription. Is there positive prescription for corporeal moveables? The 1973 Act has no basis for any such doctrine. It has provisions about positive prescription, of course, but they are limited to heritable property.²⁸

2.21 Might there exist at common law a doctrine of positive prescription, the period being forty years?²⁹ It is sometimes said that a case of 1633, *Parishioners of Aberscherder v Parish of Gemrie*³⁰ established that such a doctrine exists, the case involving a dispute between two parishes about "ane great kirk bell wayand aucht stane wecht or thairby worth the sowme of ffyve hundredth markis."³¹ The defender, the parish that had possessed the bell for more than forty years, prevailed: "in respect of the forty years possession bypast, uninterrupted, no action was sustained for the bell". But the ratio of the case is open to debate.³²

2.22 The views of the institutional writers and other writers of authority are summarised in our 1976 discussion paper³³ and we do not think it necessary to repeat them here.³⁴ Stair's remarks are not wholly clear, but they seem to assert that there is a forty year positive prescription, and the most recent study of the subject supports the view that this was indeed Stair's meaning.³⁵ Although Stair, Bankton and Hume may be cited in favour of positive prescription, their discussions are not wholly satisfactory, and Mark Napier's denial of positive prescription has been influential.³⁶ Most modern writers tend to take the view that the law must be regarded as uncertain.³⁷ We agree.

2.23 If such a prescription exists, it would operate separately from the extinctive prescription of section 8 of the 1973 Act.³⁸ In the example given above,³⁹ Jill would lose ownership of her ring after twenty years.⁴⁰ For the next twenty years the owner would be the Crown. And then after a further twenty years, ie forty years from the day when Innocentia bought the ring, ownership would pass to her. (Or to her successors, for in positive

²⁸ Part 1 of the 1973 Act.

²⁹ This raises the broader question of whether prescription is in our law purely statutory. We cannot here delve into this difficult question of legal history.

³⁰ (1633) Mor 10972. A copy can be found on the last page of the 1976 discussion paper. (available on the SLC website at www.scotlawcom.gov.uk.) In modern orthography the parishes are Aberchirder and Gamrie.

³¹ See Andrew R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445 at 452.

³² See Simpson's article.

³³ In the appendix.

³⁴ See also David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) chapter 7 and Andrew R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445.

³⁵ Andrew R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445. Napier doubted whether Stair meant to assert positive as opposed to negative prescription: Mark Napier, *Commentaries on the Law of Prescription in Scotland* (Vol 1, 1839) p 38 ff.

³⁶ Mark Napier, *Commentaries on the Law of Prescription in Scotland* (Vol 1, 1839, Vol 2, 1854).

³⁷ David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005); Kenneth Reid, *The Law of Property in Scotland* (1996), para 675; David Johnston, *Prescription and Limitation* (1999) para 19.01. Andrew R C Simpson, "Positive Prescription of Moveables in Scots Law" (2009) 13 EdinLR 445, tends to the view that there is no positive prescription, but the article has as its focus legal history rather than current law.

³⁸ On the assumption that s 8 is applicable.

³⁹ Fred steals Jill's ring and then sells it to a good faith purchaser, Innocentia.

⁴⁰ On the basis that prescription does not run while the thief is in possession (for discussion of this issue see above), it would begin to run when Fred sells to Innocentia.

prescription the period can be totted up through a series of successive possessors: *successio in possessionem*.)

Animals

2.24 There are two statutory provisions establishing positive prescription for animals, in both cases the period being two months. One is about stray dogs. The other is about animals other than (i) stray dogs and (ii) livestock. The overall concept is comparable to, though not precisely the same as, a pet. These provisions are not aimed at protecting good faith possessors. The possessors who gain ownership under these provisions are aware of their lack of title.⁴¹

2.25 Section 4(4) of the Dogs Act 1906⁴² 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.

2.26 The other 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 livestock⁴³ ... 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. "

International private law

2.27 Prescription in relation to corporeal property applies on the basis of the *situs* of the property.⁴⁴ Thus for goods in Scotland it is the Scots law of prescription that is relevant. That is so at present and we would not suggest any change. The purpose of this discussion paper is to consider what the Scots law should be, leaving it to international private law to determine when Scots law does or does not apply.

Current law: summary

2.28 It may be helpful to set out briefly what the current law probably is. (i) It is likely, but not certain, that ownership is lost by non-possession for a period of twenty years. This prescription is negative. At the end of the period ownership passes not to the possessor but

⁴¹ This is the main difference from the otherwise strikingly similar provisions of Swiss law mentioned in Part 5.

⁴² As inserted into the 1906 Act by the Civic Government (Scotland) Act 1982.

⁴³ "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. "

⁴⁴ A E Anton with PR Beaumont, *Private International Law* (2nd edn, 1990) p 612; David Johnston, *Prescription and Limitation* (1999) para 21.07; Elizabeth Crawford and Janeen Carruthers, *International Private Law: A Scots Perspective* para 8-07; Lawrence Collins (ed), *Dacey, Morris and Collins on the Conflict of Laws* (14th edn, 2006) Vol. 2 para 24-010. It may be noted that no EU legislation appears to touch upon the question. Section 24A of the 1973 Act deals with international private law, but only in relation to the law of obligations.

to the Crown. There is a qualification for stolen property, which is that prescription probably⁴⁵ does not run so long as the object is in the hands of the thief (or someone "privy to" the theft). (ii) It is uncertain whether the law says that someone who possesses for forty years acquires ownership.

Assessment of the current law

2.29 That the current state of the law is unsatisfactory, at least in theory, is evident from what has already been said. We say "in theory" because in practice problems do not often arise. The fact that there has been such a dearth of caselaw over the centuries is evidence of that fact. There are several reasons why problems seldom arise. One is that most corporeal moveables are short-lived. A second is that their value tends to decline with time. A third is that corporeal moveables, unlike land, are difficult to identify uniquely. Even if Jill happened to meet Innocentia and see the ring on her finger, it would not be straightforward to prove that that particular ring, though identical in appearance with the ring that Jill had lost, was in fact the selfsame ring. A fourth reason is that land, being immovable, can always be found. A corporeal moveable object, even if it can be uniquely identified, such as a painting by a famous artist, may not be findable. Lastly, there is the principle that possession gives rise to a presumption of ownership.

2.30 Hence, whilst the law is in theory in an unsatisfactory state, it may be argued that in practice there is no problem. A better view would be that the current law must inevitably throw up practical problems, but only occasionally. The conclusion would be that whilst reform is not urgent, it is nevertheless desirable. To put matters in perspective, most countries have a system of positive prescription.⁴⁶ Scotland is thus out of step.

⁴⁵ For this interpretation of Sch 3(g) of the 1973 Act see paras 2.11 to 2.13 above.

⁴⁶ See Part 5.

Part 3 The 1976 discussion paper

The 1976 discussion paper

3.1 The 1976 discussion paper¹ had little to say about the desirability of positive prescription for corporeal moveables, other than that "the role for usucapion² is largely to foster certainty as to rights over and title to property".³

3.2 The paper followed some continental systems in proposing two periods, a short one and a longstop one. These two periods would apply to different types of cases.⁴ The short period would be five years, and there would be a requirement that:

"The original acquirer must have taken possession of the moveable in good faith by an apparently valid title which, had the transferor been owner or had he been authorised by the owner, would have been effective to vest ownership in the original acquirer - eg by gift or legacy."⁵

3.3 This approach follows the Roman law with its requirements of (i) good faith (*bona fides*) and (ii) *justa causa*, ie a transaction which is valid in every respect other than a lurking defect in the transferor's title.⁶ The reference to "original acquirer" is because successive possession would be recognised. So if Innocentia after a year sells to Job, who then possesses in good faith for four years, Job would acquire ownership. Innocentia would be "the original acquirer." This is the same rule as for land.⁷ What if two years after he bought from Innocentia, Job discovered that Jill was the true owner? Would that stop prescription from running? This issue was discussed but no definite view was taken.⁸

3.4 The longstop period would be ten years.⁹ The key difference would be that the longer period would run "even though the possession had not been founded originally on any title ostensibly habile to confer ownership."¹⁰ The longstop prescription could not operate in favour of a thief or anyone who knew the property to be stolen property.¹¹ But, subject to

¹ Or memorandum, to use the terminology of the time. A copy is available at <http://www.scotlawcom.gov.uk>.

² That is to say, positive (acquisitive) prescription. The Latin *usucapio* is sometimes rendered into English as "usucapion" and sometimes as "usucaption". In Part 6 we ask whether this term should be adopted, provisionally suggesting a negative answer.

³ 1976 DP para 4.

⁴ Later on in the present discussion paper we refer to these as the "standard case" (which is where the 1976 discussion paper would apply the short period) and the "non-standard case" (which is where the 1976 discussion paper would apply the long period).

⁵ 1976 DP para 9(d).

⁶ For Roman law see Part 5.

⁷ It is the Roman rule of *successio in possessionem*. Other legal systems generally have the same rule.

⁸ 1976 DP para 9 (e).

⁹ 1976 DP para 10.

¹⁰ 1976 DP para 10; para 14(a).

¹¹ This is the approach taken in 1976 DP at para 14(b)(ii). But in para 10 the approach seems somewhat different: only thieves and those who possess "on behalf of a thief" would be excluded from prescription. But the next sentence is also worth noting: "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."

that, bad faith would not be a bar.¹² The discussion paper noted that bad faith is irrelevant to the prescriptive acquisition of title to land.

3.5 Where possession began "on limited title such as loan or hire" prescription "should not run unless the original possessor or his successors in title had changed the basis of possession."¹³ This is the same general principle as applies to prescription of land. For example, if Matthew owns land and leases it to Mark, prescription could not run in Mark's favour, because he does not possess as owner.¹⁴ The discussion paper then specified that the change in the basis of possession would be "by making known to the owner – either expressly or by disregarding claims made by him – that continued possession would be 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."¹⁵ If Ulpiana lends her ring to Victoria and Victoria wrongfully sells it to Winifreda, Winifreda would be a "successor in title" and so this passage would ostensibly apply to her as it would to Victoria. But of course if Winifreda buys in good faith, she possesses as if owner from the beginning, and the short prescriptive period would operate in her favour.

3.6 For both the short and the long periods, the possession would have to be open, peaceable and without judicial interruption¹⁶ – the same requirement as for the positive prescription of title to land.¹⁷ There was no discussion of the question of whether possession of corporeal moveables can be "public" in any sense analogous to the possession of land.

3.7 The 1976 discussion paper raised the question of whether the incapacity of the true owner should delay the running of prescription. It concluded that it should not, because "the object of ... usucapion is to achieve certainty."¹⁸ This is the same approach as that taken by the 1973 Act in respect of land.

3.8 Finally, the issue of cultural objects was not considered.¹⁹ At that time, of course, its profile was lower than it is today. Though the UNESCO Convention was in place, the UK had not yet acceded. The UNIDROIT Convention and the EU Directive still lay in the future, as did such journals as the *International Journal of Cultural Property*²⁰ and *Art Antiquity and Law*.²¹

Responses to the 1976 discussion paper

3.9 Those who responded were generally supportive of the proposals. Neither the Faculty of Advocates nor the University of Glasgow liked the term "usucapion". In relation to the long prescription, the Faculty thought that prescription should begin to run if the owner so acted as to lead the possessor to believe that ownership was being relinquished. Harry

¹² That is the position taken in 1976 DP para 14(c), but para 11 is less definite on the point.

¹³ 1976 DP para 14(e).

¹⁴ For land there is the double requirement of possession as owner, and an ostensibly good registered title. The example presupposes that Mark has the latter, though in practice that would happen only in unusual circumstances. For moveables there is no exact equivalent to the latter. Arguably *justus titulus* has a comparable role.

¹⁵ 1976 DP para 14(e).

¹⁶ 1976 DP para 9(a); para 14(a).

¹⁷ 1973 Act s 1.

¹⁸ 1976 DP para 12.

¹⁹ For cultural objects, see Part 4 and Part 10 below.

²⁰ Which began publication in 1992.

²¹ Which began publication in 1996.

Silberberg noted that if the owner so acted as to lead the possessor to believe that ownership was being relinquished then personal bar might operate. The University of Aberdeen Law Faculty approved of the discussion paper without reservation. COSLA took the view that "there are no circumstances in which a party who has acted *mala fide* should be allowed to obtain an indefeasible title." The Court of Session judges approved of the discussion paper without reservation. The Law Society of Scotland was in general agreement with the discussion paper. The Society of Antiquaries of Scotland made this interesting comment, to which we revert in Part 8:

"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...?"

Part 4 Cultural objects

Introduction

4.1 As noted in para 3.8 above, one issue not discussed in the 1976 discussion paper, or in the responses to it, was the issue of "cultural objects", which had not then the prominence it has today. This part of the discussion paper outlines the law on this subject. The question as to whether the fact that an object is "cultural" should affect the way that the law of prescription applies to it is taken up in Part 10.

4.2 There is EU law, and there are two international conventions that are potentially relevant for present purposes.¹ One is the UNESCO Convention, to which the UK is a party, and which is discussed below, and the other is the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The UK is not a party to the latter and accordingly the discussion of it in this part is brief.

4.3 Cultural property law touches on criminal law, export control law and so on. Much of it is thus irrelevant to the present project, which is limited to private law.²

The EU Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State

4.4 The relevant EU legislation is the Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC).³ This is transposed into UK law by the Return of Cultural Objects Regulations 1994.⁴ A cultural object is an object which:

"is classified, before or after⁵ 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

¹ There are others, such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954, plus protocols) and the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001). See generally Craig Forrest, *International Law and the Protection of Cultural Heritage* (2010).

² Thus the Export Control Act 2002 is not relevant to this project. (At the time of writing, the Museums, Libraries and Archives Council administers export controls for cultural objects and its website is of interest: <http://www.mla.gov.uk/what/cultural>. See also <http://www.culturalpropertyadvice.gov.uk/about>.) Nor is the subject matter of the Dealing in Cultural Objects (Offences) Act 2003. (Though in fact that Act does not apply to Scotland.) Likewise, Part 6 of the Tribunals, Courts and Enforcement Act 2007, which protects "cultural objects" from outwith the UK that are on loan within the UK, is not within the scope of this project. Other examples could be cited, such as the Iraq (United Nations Sanctions) Order 2003, forbidding dealing in "illegally removed Iraqi cultural property".

³ As amended by Directive 96/100/EC and Directive 2001/38/EC. Also to be mentioned is Regulation 116/2009 on the export of cultural goods. This has its own definition of "cultural goods" which is very similar to the definition in the Directive, but not the same.

⁴ SI 1994/501, as amended by the Return of Cultural Objects (Amendment) Regulations, SI 1997/1719, and by the Return of Cultural Objects (Amendment) Regulations, SI 2001/3972.

⁵ The possibility of *subsequent* classification raises issues which cannot be discussed here.

- 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."

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."⁶

⁶ We omit the financial figures.

4.5 The aim of the Directive is to require the return of cultural objects that have been "unlawfully removed from the territory of a member state." It is about repatriation. It does not presuppose theft. (Here the Directive differs from the restitution provisions of the UNESCO Convention, which apply only to stolen goods.⁷) For example, an owner of a cultural object might sell it to a foreign buyer who then takes it abroad without the necessary export licence. The Directive applies regardless of where ownership lies. It is not about ownership. Nor is it about possession. It is about location. It is aimed at ensuring that cultural objects that have been wrongfully removed from the territory of a member state are returned to that territory.

4.6 It follows that national rules about conferring title on *bona fide* buyers, or conferring title on long-term possessors, are irrelevant. It also follows that the time bar periods specified in the Directive (see below) are not related to title: they are merely rules about when the obligation of return created by the Directive ceases to bind.

4.7 The Directive provides for compensation to be paid to the *bona fide* possessor, the amount to be determined according to the facts and circumstances of the case. Thus suppose that a cultural object is stolen from an Italian museum. It is clandestinely taken to London where it is bought by Serafina, who is in good faith. She takes it home to Scotland. She is not the owner. Ownership remains with the Italian museum.⁸ Yet when she has to give it up, she is entitled, under the Directive, to compensation.⁹ The Directive leaves intact ordinary rights of recovery based on rights in private law.¹⁰ So in such a case it would presumably make sense for the Italian museum to take action under general Scots law rather than under the Directive.¹¹ In other words, the museum would act in the same way as any other victim of theft: demand the return of the object (*rei vindicatio*), without having to pay compensation.

4.8 The Directive has time limits within which claims must be made. The standard period is 30 years. This period runs from the date of the illegal exportation. In certain special cases¹² the period is 75 years.¹³ There is also a third period, of one year running from the date when "the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder."¹⁴ These time limits are relevant only to the right of return under the Directive. They have no link with private law. Thus if private law were to

⁷ The UNESCO Convention as a whole is not limited to stolen goods, but Article 7(b)(ii) is so limited.

⁸ In this example the *bona fide* purchase happens in London. If Serafina had bought the object in Italy then she would have become the owner, for Italian law is more generous than English or Scots law to *bona fide* buyers. Cf *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496.

⁹ Article 9: "Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object." This seems muddled, in that it seems to presuppose that there must have been something wrong with the acquisition of the object. But the acquisition may have been unimpeachable. The issue is not about acquisition but about unlawful export. See para 4.10 below.

¹⁰ Article 15: "This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen."

¹¹ Action under the Directive is by the Member State seeking the return. Action under general law would be by the true owner. Thus the pursuer would be different in each case, unless the Member State happened also to be the owner.

¹² Article 7 says: "In the case of objects forming part of public collections, referred to in Article 1 (1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law".

¹³ Article 7 says: "a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit." The UK has chosen 75 years.

¹⁴ Art 7(1).

give the possessor good title by prescription, the right of return under the Directive would be unaffected.¹⁵ Conversely, if the right of return under the Directive is time-barred, that would not affect any right of recovery under private law.

4.9 Article 12 provides that "ownership of the cultural object after return shall be governed by the law of the requesting Member State." The operation of that rule might cause difficulties. For example, suppose that a cultural object is stolen in that most attractive of EU member states, Utopia, and eventually bought in Scotland by a good faith buyer, Brendan. Under Scots law a good faith buyer of stolen goods does not acquire ownership. Utopian law is to the contrary. Does Article 12 mean that the effect of the return of the object to Utopia is that Brendan acquires ownership? That would be a surprising result.

4.10 The return may involve no more than the movement of the goods back to the country of origin, with no change in the identity of either the owner or the possessor. So if Jack lawfully buys a cultural object in Italy and unlawfully takes it home with him to Scotland, and he is compelled to return it, he will still be the lawful owner and lawful possessor when the goods arrive back in Italy. Presumably in such a case compensation would be small or non-existent.

The UNESCO Convention

4.11 The purpose of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 is indicated by its title.¹⁶ The UK acceded in 2002. The definition of "cultural property" differs from the definition of "cultural object" in the EU Directive:

"Property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

¹⁵ And likewise, if the Italian museum's title had been extinguished under s 8 of the 1973 Act, that would be irrelevant to the right of return under the Directive. It would also be irrelevant for the question of compensation, for the Directive says that compensation is payable to the possessor, not to the owner.

¹⁶ See further Craig Forrest, *International Law and the Protection of Cultural Heritage* (2010) and Patrick O'Keefe, *Commentary on the UNESCO Convention* (2nd edn, 2007). Paul M Bator, "An Essay on the International Trade in Art" (1982) 34 *Stanford Law Review* 275 explains much of the background. (Merryman describes Bator's article as "canonical": John H Merryman, *Thinking about the Elgin Marbles* (2nd edn 2009) p 6.)

- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

4.12 In relation to "cultural property stolen from a museum or a religious or secular public monument or similar institution ..."¹⁷ Article 7(b)(ii) imposes on the states involved an obligation:

"At the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices."

4.13 There has been no legislation in the UK to transpose Article 7. Without such legislation it is not clear what would be the basis for a civil action by the Crown.

4.14 Like the EU Directive, the Convention is concerned not with title but with location - with repatriation. And again like the EU Directive, it is not even concerned with possession, except in so far as a transfer of possession may be necessary to effect repatriation. The issue is not who the property belongs to, or who the possessor is, but where the property is. Article 7 declares that the right of return is valid against "a person who has valid title". Hence national rules that say that a valid title to stolen goods can be acquired by *bona fide* purchase or long-term possession are irrelevant, for they deal with title, and the Convention deals with location. Indeed, were that not the case, Article 7 would be rather pointless because a person who possesses stolen property without a valid title is obliged to give it back anyway. Nevertheless UK accession was subject to this declaration: "The United Kingdom interprets Article 7(b)(ii) to the effect that it may continue to apply its existing rules on limitation to claims made under this Article for the recovery and return of cultural objects."¹⁸ Presumably this means that claims made under the Convention are subject to the same limitation rules as other claims are subject to, which is to say six years for England and

¹⁷ This is a narrower category than the illegally exported property with which the Convention is mainly concerned.

¹⁸ The declaration was as recommended in para 61 of the *Report of the Ministerial Advisory Panel on Illicit Trade* (report of the Palmer Committee) (2000), but the report contains no explanation.

Wales. This would seem to take away most of the force of Article 7 as far as the UK, or least England and Wales, is concerned.

4.15 The effect of the declaration in relation to Scotland is unclear. We cannot identify any "rules on limitation" which could be relevant to a Convention claim.¹⁹ Hence *prima facie* the declaration does not extend to Scotland. But it seems likely that the declaration was made without detailed consideration of Scots law and it accordingly seems likely that there was no intention for the declaration to have differential effect. In other words, it seems reasonable to add, by implication, a reference to prescription. Presumably only negative prescription could be implicitly included in the declaration. If this line of reasoning is sound, the question arises as to whether the relevant period is five years, under section 6, or 20 years, under section 7 of the 1973 Act. We can offer no confident answer. At all events, we incline to think that section 8 is inapplicable, because that deals with the extinction of property rights, and a Convention claim is not the assertion of a property right.

Cultural objects: the UNIDROIT Convention

4.16 The UK is not a party to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995,²⁰ so little will be said about it here. It applies both to stolen cultural objects and to illegally exported cultural objects. "Cultural object" is defined in almost the same way as in the UNESCO Convention. Like the UNESCO Convention and the EU Directive it operates regardless of the location of ownership. Like the EU Directive, but unlike the UNESCO Convention, there are time limits for claims to be made.

Discussion

4.17 This project is about the effect of the running of time on ownership of corporeal moveable property. The two conventions and the Directive have no direct bearing on that issue. They are not about rights of recovery in private law, but about rights of repatriation, and are primarily of a public law nature. They are not about the "whose?" question but rather the "where?" question. If Scots law were to be changed so that ownership of cultural objects is conferred by one hour of *bona fide* possession, that would be consistent with the Directive, and the conventions.²¹

4.18 The fact that the Scottish Parliament is unfettered by the Directive and by the UNESCO Convention as to the subject of the present project means that the category of "cultural object" or "cultural property"²² does not have to be employed in the future law of moveable prescription. But at the same time, the Directive and the conventions show that it is a concept that is not too elusive to be used for legal purposes, and also that concerns exist about cultural objects that did not exist in quite the same way in the past. It may be that the law of moveable prescription should have special rules for cultural objects – rules that would be separate from the rules discussed in Parts 7 and 8 of this paper. The DCFR adopts such an approach. In the DCFR, the basic rule is that prescriptive title is acquired after a

¹⁹ Limitation applies only to reparation for personal injuries. See Parts II and IIA of the 1973 Act.

²⁰ Notwithstanding that accession was recommended in the Seventh Report of the House of Commons Select Committee on Culture Media and Sport, Cultural Property: Return and Illicit Trade (18 July 2000) (<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcmumeds/371/37102.htm>).

²¹ And that would be true in relation to the UNESCO Convention even if the UK Government had not made the declaration about Article 7.

²² "Cultural object" is the term used in EU law and by the UNIDROIT Convention. The UNESCO Convention speaks of "cultural property".

defined period (either 10 or 30 years according to circumstances), but if the object is a cultural object then the defined period is longer (30 years or 50 years).²³ And some national laws have special rules about prescription where the property in question is cultural property.²⁴ We return to this issue below.²⁵

²³ DCFR VIII-4:101 and 4:102.

²⁴ See Part 5.

²⁵ Part 10.

Part 5 Some comparative law

Introduction

5.1 In this part we outline the rules of a sample of other systems: Roman and canon law, Austria, England, France, Germany, Italy, the Netherlands, South Africa, Spain, Switzerland and the USA.¹ In addition to these we outline the DCFR approach. The selection is to some extent arbitrary but is aimed at giving a reasonably broad view of European systems. The USA is included because of its role in the world of art and antiquities – including the fact that so much litigation has taken place there. South Africa is included because it is so often a useful comparator for Scots law. In the systems selected (except for Roman and canon law, and the DCFR) there are major museum and gallery collections and important markets for art and antiquities.

5.2 The rules we discuss are solely those about prescription. Many legal systems also have rules that give *immediate* ownership to a *bona fide* buyer, in defined circumstances, but such rules are not discussed here. In some countries this is conceptualised as instant positive prescription – positive prescription in which the prescriptive period is a single *scintilla temporis*. That is not the conceptualisation we adopt here. It is evident that the more extensive the protection that a legal system gives to a *bona fide* buyer, the less significant are rules conferring a prescriptive title after a defined number of years. Despite that fact, legal systems that are more protective of the good faith buyer than is Scots law nevertheless still tend to have rules about positive prescription for moveables. The absence of clear provisions on this subject in our law is all the more surprising to the international observer.

5.3 It may well be that there is a case for reviewing the Sale of Goods Act 1979 in relation to the position of a good faith buyer from a seller with bad title. But that cannot be undertaken in the present project.² Apart from other considerations, the policy issues involved are different. We do, however, touch on the issue again, in Part 6.³

Roman law and canon law

5.4 Roman law had acquisitive prescription for both land and moveables. We deal here only with the law as reformed under Justinian.⁴ (i) The object had to be of a type susceptible to prescription (*res habilis*). (ii) The possessor had to acquire the object in a way which would have conferred good title if the transferor had had power to transfer. This was the

¹ For further up-to-date comparative material see DCFR commentary Vol 6; Wolfgang Faber and Brigitta Lurger (eds), *National Reports on the Transfer of Movables in Europe*. The two volumes that have so far appeared cover Austria, Estonia, Italy, Slovenia, England & Wales, Ireland, Scotland and Cyprus. See also Beat Schönenberger, *The Restitution of Cultural Assets* (2009) chapter 4.

² As mentioned in Part 1, among the discussion papers issued in 1976 was *Corporeal Moveables - Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com DP No 27 (1976)). But this, like the other discussion papers on corporeal moveable property, went no further.

³ Para 6.3.

⁴ The law changed considerably in its long history. A valuable account can be found in Chapter 1 of David Johnston, *Prescription and Limitation* (1999). For fuller accounts see W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, by Peter Stein, 1963) pp 241 to 252; Max Kaser, *Das Römische Privatrecht* (2nd edn 1975, Vol 2) section 243.

requirement of *justa causa*,⁵ or *justus titulus*. (iii) Good faith (*bona fides*) was required. The rule was that good faith was necessary only at the time of acquiring possession, and that subsequent bad faith was irrelevant: *mala fides superveniens non nocet*. (iv) Possession was necessary, and had to be peaceable, open and not "precarious" (*nec clam, nec vi, nec precario*⁶). (v) The possession had to be for the requisite period – three years. (For immoveables the period was ten years, or, in some cases, twenty years.) *Successio in possessionem* was recognised, so that the period could be accumulated as between successive possessors: the same is generally true in modern legal systems. Where goods had been stolen, the three-year period did not apply, but rather a period of either thirty or forty years. Details on this point are, however, obscure.⁷

5.5 The canon law⁸ required good faith throughout the prescriptive period, ie it rejected the principle of *mala fides superveniens non nocet*.⁹ On this issue modern European systems have divided, some accepting the Roman approach and some accepting the canon law approach.

Austria

5.6 Austrian law¹⁰ has a positive prescription based on possession for three years,¹¹ or, in certain cases, six years.¹² Possession must have been acquired on the basis of a *justa causa* and must be in good faith throughout the prescriptive period.¹³ There is also a prescriptive period of thirty years (or forty in certain cases), for which good faith and *justa causa* are not requirements.¹⁴

England

5.7 English law has a period of six years. For example, if Jill's ring is stolen by Fred in 2010, and in 2011 he sells to Innocentia, who is in good faith, Jill's right to recover the ring is cut off in 2017.¹⁵ The six years begin to run from the date of the "conversion" (an English tort concept) but Fred's act of conversion does not count: it is the innocent conversion that

⁵ Whether this term is to be understood in exactly the same sense as *justa causa* in the distinction between "causal" as against "abstract" systems of transfer is not a point that needs to be discussed here.

⁶ *Dig.* 43, 17, 1, 5.

⁷ On this see *Codex* 7,39.8. Some sources also mention a *praescriptio immemorialis*.

⁸ We refer here to the original *Corpus Juris Canonici* of the Roman Catholic Church, whose compilation began with Gratian and which was essentially complete with the promulgation of the *Clementinae*. Canon law in this sense had an immense influence on the development of national laws in Europe. Within the Roman Catholic church the original *Corpus Juris Canonici* was superseded by 20th century recodification, first in 1917 and again in 1983. The *Liber Extra* quoted in the next footnote is a part of the *Corpus Juris Canonici* that dates to the papacy of Gregory IX.

⁹ *Corpus Juris Canonici X (Liber Extra)* 2, 26,20: "*Quoniam omne, quod non est ex fide, peccatum est, synodali iudicio diffinimus, ut nulla valeat absque bona fide praescriptio tam canonica tam civilis, quum generaliter sit omni constitutioni atque consuetudini derogandum, quae absque mortali peccato non potest observari. Unde oportet, ut qui praescribit in nulla temporis parte rei habeat conscientiam alieni.*" (Because everything that is not of the faith is sinful, we decree by synodical decision that no prescription, whether canonical or civil, is to be valid in the absence of good faith, for any enactment or customary rule that cannot be observed without sin is not to be followed. Hence it is requisite, that a prescriptive possessor must during no part of the time (*in nulla temporis parte*) have any consciousness of the title of another person.) For valuable discussion see Hans J Wieling, *Sachenrecht (Band 1): Sachen, Besitz und Rechte an beweglichen Sachen* (1990) pp 405 to 407.

¹⁰ See eg Wolfgang Faber, in Wolfgang Faber and Brigitta Lurger, *National Reports on the Transfer of Movable in Europe Volume 1: Austria, Estonia, Italy, Slovenia* (2008).

¹¹ ABGB (Austrian Civil Code) § 1466

¹² ABGB § 1472.

¹³ ABGB § 1462.

¹⁴ ABGB § 1477.

¹⁵ Limitation Act 1980.

counts.¹⁶ Though the legislation is couched in terms of "limitation", the result is not merely that Jill's right is time-barred but that "the title of that person [= Jill] to the chattel shall be extinguished."¹⁷ The legislation does not then complete the story, ie does not say who *does* own the ring after Jill ceases to own it. But the effect seems to be that Innocentia owns it on the basis that she possesses it and nobody else has a better title.

France

5.8 French law¹⁸ has a period of acquisitive prescription of three years.¹⁹ The rules about possession are the same as for those for land, including the requirement that the possession must be "public".²⁰ The legislation mentions good faith only in connection with the prescriptive acquisition of land.²¹ Nevertheless we understand that the general view is that good faith is necessary in the case of moveables as well, though whether supervening knowledge is relevant is unclear. The legislation on the national heritage provides that certain French cultural property is imprescriptible.²²

Germany

5.9 German law has a period of acquisitive prescription of ten years.²³ Good faith is necessary not only at the time when possession is acquired, but thereafter too. So if Innocentia buys the ring in good faith, but some months later discovers that she had bought it from a thief, prescription would cease to run in her favour.²⁴ If the conditions of prescriptive acquisition are not satisfied (for instance if there is bad faith) there is also the negative prescription of thirty years.²⁵ This cuts off the true owner's right but does not seem to confer ownership on the possessor, thus leading to the possibility of a perpetual separation of ownership and possession. The negative prescription seems to operate even in favour of a thief.²⁶

¹⁶ Limitation Act 1980 s 6.

¹⁷ Limitation Act 1980 s 3(2).

¹⁸ There have been substantial changes to French law in recent years.

¹⁹ Code Civil, Article 2276: "*Celui qui a perdu ou auquel il a été volé une chose peut la revendiquer pendant trois ans à compter du jour de la perte ou du vol, contre celui dans les mains duquel il la trouve.*" A buyer at a market or public auction obtains a degree of protection immediately, for the true owner who recovers the property before prescription has run has to compensate the buyer: "*Si le possesseur actuel de la chose volée ou perdue l'a achetée dans une foire ou dans un marché, ou dans une vente publique, ou d'un marchand vendant des choses pareilles, le propriétaire originaire ne peut se la faire rendre qu'en remboursant au possesseur le prix qu'elle lui a coûté.*" (Article 2277.)

²⁰ Code Civil, Article 2261: "*Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire.*"

²¹ Code Civil, Articles 2274 and 2275. The latter says that "*il suffit que la bonne foi ait existé au moment de l'acquisition*", ie *mala fides superveniens non nocet*. Good faith is needed to acquire a prescriptive title in ten years, but there is also a thirty year prescription that does not require good faith: see Article 2272.

²² Code du patrimoine 2004. See in particular L 451-3 protecting "*les collections des musées de France.*"

²³ German Civil Code (BGB) § 937(1): "*Wer eine bewegliche Sache zehn Jahre im Eigenbesitz hat, erwirbt das Eigentum (Ersitzung).*"

²⁴ German Civil Code (BGB) § 937(2): "*Die Ersitzung ist ausgeschlossen, wenn der Erwerber bei dem Erwerb des Eigenbesitzes nicht in gutem Glauben ist oder wenn er später erfährt, dass ihm das Eigentum nicht zusteht.*"

²⁵ German Civil Code (BGB) § 197.

²⁶ For an English case turning on this aspect of German law see *City of Gotha v Sotheby's* (1998, High Court, unreported: see Norman Palmer, *Museums and the Holocaust* (2000) p 222 ff). For a summary see Beat Schönenberger, *The Restitution of Cultural Assets* (2009) pp 7 to 8.

Italy

5.10 Even though Italy is the most favourable of all European systems to the good faith buyer, there are nevertheless provisions for positive prescription for corporeal moveables. The period is ten years with good faith, or twenty years without it.²⁷

Netherlands

5.11 Dutch law has a period of acquisitive prescription of three years, extended to ten years for registered moveable property, which is to say ships and aircraft.²⁸ There is an exception for certain Dutch cultural property.²⁹ If the conditions are not satisfied (for instance if there is bad faith) there is also the negative prescription of twenty years.³⁰ The legislation does not state what happens to the title in this event, but it seems that the possessor at that time acquires ownership, even in the case of a thief.³¹

South Africa

5.12 Section 1 of the Prescription Act³² says:

"A person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

5.13 This applies equally to land and to corporeal moveables. There is no requirement for *bona fides* or for *justa causa*.³³

Spain

5.14 Ownership is acquired by a good faith possessor after three years, and by any possessor after six.³⁴ Thieves and their accomplices, and also reseters, are excepted, though even they may acquire ownership prescriptively after the offence, its penalty, and the period for delictual recovery have prescribed.³⁵ A possessor is in good faith who has acquired the object from a person who was believed to be its owner and was capable of

²⁷ Italian Civil Code, Article 1161.

²⁸ Dutch Civil Code (BW) article 3:99. For a discussion of the Dutch law see Arthur F Salomons, "National Report on the Transfer of Ownership of Movables in The Netherlands" in Wolfgang Faber and Brigitta Lurger (eds) *National Reports on the Transfer of Movables in Europe* vol 6 (2011) pp 116 to 119.

²⁹ Dutch Civil Code (BW) article 3:99(3).

³⁰ Dutch Civil Code (BW) article 3:306.

³¹ See DCFR commentary p 4910.

³² Act 68 of 1969.

³³ For discussion of the South African law see C G Van Der Merwe, "Things" in W A Joubert (ed), *The Law of South Africa* vol 27 (2002, reissued volume) paras 344 to 355; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) paras 8.6.1 to 8.6.9.

³⁴ Código Civil article 1955. For a discussion of the Spanish law see I V González Pacanowska and C M Díez Soto, "National Report on the Transfer of Movables in Spain" in Wolfgang Faber and Brigitta Lurger (eds) *National Reports on the Transfer of Movables in Europe* vol 5 (2011) pp 642 to 656.

³⁵ Código Civil article 1956. The period of prescription of offences is governed by the Código Penal.

transferring ownership.³⁶ Good faith is presumed.³⁷ As in canon law and German law, *mala fides superveniens nocet*.³⁸ Possession must be as owner, public, peaceful and without interruption.³⁹

Switzerland

5.15 There is a positive prescription of five years, provided that there is good faith.⁴⁰ For pets the period is two months.⁴¹ For cultural objects the period is thirty years, and "cultural objects" are not only Swiss cultural objects but any cultural objects within the meaning of the UNESCO Convention.

USA

5.16 Title to moveable property is a matter for state law, and there exists no uniformity. But in most states the matter is regarded as being one of the limitation of an action in respect of a tort, with the general limitation period applying, which is typically fairly short, such as three or four years. To that extent the approach is comparable to the English approach. But there has been much dispute as to the date when the clock begins to tick. At least three rules seem to be in the field. One is that the clock begins to tick when the owner loses possession. The second is that it begins to tick when the owner demands the return of the property from the possessor, a demand which is not complied with. This is called the "demand-and-refusal rule"⁴² and appears to be accepted in New York, a point of significance because of New York's position in sales of art and antiquities. The third is that the clock begins to tick when the owner discovers where the property is, or could with reasonable diligence have discovered it. This is called the "disclosure rule" or "discovery rule" and seems to be adopted in the majority of states.⁴³ The latter two rules make it very difficult for a possessor to acquire title by the running of time, and those who favour the long-term possessor reject them for that reason.⁴⁴ By contrast, those who favour one or other of these

³⁶ Código Civil article 1950.

³⁷ Código Civil article 434.

³⁸ Código Civil article 435.

³⁹ "La posesión ha de ser en concepto de dueño, pública, pacífica y no interrumpida." Código Civil article 1941.

⁴⁰ See generally Article 728 of the Swiss Civil Code.

⁴¹ "Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, beträgt die Frist zwei Monate." "Lorsqu'il s'agit d'animaux qui vivent en milieu domestique et ne sont pas gardés dans un but patrimonial ou de gain, le délai est de deux mois." (In the case of domestic animals that are not kept as part of a business, or for profit, the period is two months.) This provision was inserted by an amendment of 4 October 2002. We have not enquired as to whether the reform was influenced by Scots law. For the Scottish two-month rule for animals see Part 2.

⁴² The leading case is *Menzel v List* 24 NY 91, 246 NE 2d 742, 298 NYS 2d 979, 6 UCC Rep Serv 330 (1969). This concerned a painting by Marc Chagall, seized by the Nazis.

⁴³ The leading cases are *O'Keeffe v Snyder* 83 NJ 478, 416 A 2d 862 (1980) and *Kunstsammlungen zu Weimar v Elicofon* 536 F Supp 829 (1981), affirmed 678 F 2d 1150 (2nd Circuit, 1982). The former concerned paintings by the plaintiff herself, stolen from her studio. The latter concerned works by Dürer stolen from Weimar in 1945. Another significant case applying the rule is *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts, Inc* 717 F Supp 1374 (SD Indiana, 1989), affirmed 917 F 2d 278 (7th Circuit, 1990). This arose from the Turkish occupation of northern Cyprus as a result of which extensive looting from Christian places of worship took place. The litigation was about mosaics dating from about the time of Justinian. (Whilst the possessor lost under the Indiana rule, the court also held that, if foreign law were applicable, the result would be the same because the possessor was not a good faith purchaser. The court noted that Ms Goldberg had paid the price of \$1,080,000 in cash, in two bags.) For cases where the claim failed because of lack of due diligence, see the two "Martha Nathan" cases, namely *Toledo Museum of Art v Ullin*, 477 F Supp 2d 802 (ND Ohio, 2006), and *Detroit Institute of Arts v Ullin*, No 06-10333, 2007 US Dist LEXIS 28364 (ED Michigan, 31 March 2007). These cases concerned works by Gauguin and by van Gogh.

⁴⁴ For instance Patty Gerstenblith, "The Adverse Possession of Personal Property" (1989) 37 Buffalo Law Review 119.

latter two rules do so because otherwise an owner's right of recovery may be cut off before it is possible to exercise it.⁴⁵

5.17 In those states such as New York that apply the "demand and refusal" rule, a failure by the owner to pursue the claim with due diligence may result in the claim being barred by the doctrine of "laches". This is inapplicable in those states that apply the discovery/disclosure rule, for due diligence is inherent in that rule. Laches seems to correspond fairly closely to what we would call a personal bar defence.⁴⁶

5.18 In California successful lobbying led to legislation in 2002 to prevent limitation running against claims for possession of property taken by the Nazi authorities. This legislation has, however, been struck down on constitutional grounds.⁴⁷

DCFR

5.19 The DCFR has acquisitive prescription.⁴⁸ There is a "basic rule" plus a special rule for cultural property. The basic rule itself has two periods: a standard period of ten years (which presupposes good faith) and a longer period of thirty years (which does not presuppose good faith). The special rule applies to cultural property as defined in the EU Directive. Here again there are two periods: a standard period of thirty years (which presupposes good faith) and a longer period of fifty years (which does not presuppose good faith).

5.20 There is an express presumption that the possessor is in good faith. The good faith must continue throughout the prescriptive period, rather than simply existing at the outset. In this respect the DCFR follows German law.

5.21 The possessor must be what the DCFR calls an "owner-possessor", a perhaps not very transparent expression which is defined to mean "a person who exercises direct or indirect physical control over the goods with the intention of doing so as, or as if, an owner."⁴⁹ Thus someone who is in possession under a hire contract would not be an "owner-possessor".

5.22 The running of prescription is suspended if the owner is incapax and without a representative.⁵⁰ It is also suspended if "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."⁵¹

Discussion

5.23 The picture that emerges from this comparative study is that other legal systems generally do have the possibility that possession can, by the running of time, mature into

⁴⁵ For instance John G Petrovich, "The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations" (1980) 27 UCLA Law Review 1122.

⁴⁶ Indeed, there are a couple of nineteenth-century Scottish uses of the term in this sense: see Elspeth C Reid and John W G Blackie, *Personal Bar* (2006), para 1.20.

⁴⁷ *Von Saher v Norton Simon Museum of Art at Pasadena* 592 F 3d 954, 959 n 2 (9th Circuit, 2010). The case concerned two works by Lucas Cranach the Elder, taken by Hermann Göring.

⁴⁸ On the choice of periods in the DCFR see Wolfgang Faber, "Book VIII of the DCFR" (2010) 14 EdinLR 498 at 502 to 503.

⁴⁹ DCFR VIII-1:206.

⁵⁰ DCFR VIII-4:201.

⁵¹ DCFR VIII-4:202.

ownership. In England and the USA this is not expressly formulated in terms of acquisitive (positive) prescription, but rather in terms of cutting off the original owner's rights. But in practical terms the effect is much the same as a rule of acquisitive prescription.

5.24 We have previously noted that the more a legal system favours a good faith buyer, the less need there is for positive prescription. Conversely, the less that a legal system favours the good faith buyer, the more that positive prescription is needed. It is striking that legal systems such as Germany and Italy, that are more favourable to the good faith buyer than is Scots law, nevertheless see a need for positive prescription. From an international perspective the position in Scotland is thus unmistakably odd.

5.25 The details vary considerably between the national systems. Periods run from three years (eg the Netherlands) to thirty years (South Africa).⁵² Some systems require good faith only at the outset, while others require continuous good faith. Some systems have a longer period that is available in the absence of good faith, while others do not. Some systems have exceptions for cultural property, while others do not.

⁵² The lowest period is in fact two months, for Swiss pets.

Part 6 Should there be positive prescription for corporeal moveables?

Introduction

6.1 The core question is whether positive (acquisitive) prescription for corporeal moveables is desirable. If it is, a scheme needs to be devised. This part of the discussion paper considers the core question. The next part considers possible schemes *if* it is thought desirable that there should be positive prescription.

6.2 We begin with a background issue: good faith acquisition. Thereafter we consider the arguments for and against having positive prescription for corporeal moveable property. There are good points to be made on either side of the debate, and it comes down to a balancing exercise. On balance we think that positive prescription should be introduced.

Good faith acquisition by purchase

6.3 Scots common law follows Roman law: *nemo plus juris ad alium transferre potest quam ipse habet*.¹ If Gaius is not the owner of something, he cannot transfer ownership to Julia. The fact that she gives value and acts in good faith makes no difference. Whilst the basic Roman rule remains in place here and elsewhere in Europe, almost everywhere exceptions have been established in favour of *bona fide* buyers. Where these exceptions apply, the effect is that Julia acquires ownership immediately. These exceptions vary in their scope. Italian law goes very far in protecting Julia,² German law not quite so far,³ and so on. Our law keeps nearer to the Roman rule than most European systems, with only one or two rather limited exceptions, notably section 25 of the Sale of Goods Act 1979.⁴

6.4 The further a legal system goes in protecting the *bona fide* acquirer the less the need for a rule protecting the long-term possessor. That is because the main case where someone possesses without a good title is where there has been a purchase in good faith from a non-owner. Yet even in legal systems, such as the Italian and the German, where the *bona fide* acquirer has a much higher level of protection, there are rules whereby long-term possession can ripen into ownership. That is because rules protecting good faith acquirers, however generous, do not cover all cases. There may be a case for Scots law to follow the continental systems, and thus away from Roman law, in enhancing the protection given to the *bona fide* acquirer. We express no view on this matter. It is outwith the scope of this project. For the purposes of the present project, two points are worth bearing in mind. The first is that rules protecting long-term possession should not be regarded as a substitute for

¹ Dig. 50, 17, 54 (Ulpian).

² Codice civile art 1153.

³ BGB §932 to 935.

⁴ An exception more limited than is sometimes supposed: see s 25(2)(a). For a discussion of the exceptions to the common law, see David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) chapter 10. Another exception is in s 24 of the 1979 Act.

protection of *bona fide* acquisition. The issues are distinct, and in this project we are dealing solely with the former. The second is that, just as the former is not a substitute for the latter, so likewise the latter is not a substitute for the former. Even if Scots law were to adopt more generous protection for *bona fide* buyers, that would not foreclose the issue of protecting long-term possessors.

Two arguments against the need for positive prescription

6.5 Two arguments have sometimes been advanced for the view that, even if it is accepted that long-term possession should be protected, positive prescription is simply unnecessary, so that the current law is, in substance, acceptable. Erskine writes:⁵

"There is no statute establishing a positive prescription in moveable rights ... nor indeed was one necessary; for since the property of moveables is presumed from possession alone, without any title in writing, 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."

6.6 This contains both arguments. The first is that possession raises a presumption of ownership. Likewise it has been argued that "[positive] prescription is scarcely necessary as a basis of acquisition of ownership of corporeal moveables in Scots law because, at least as a general rule, possession in itself presumes ownership."⁶ The second argument is that negative prescription cuts off the right of challenge. The running of prescription means that Jill cannot demand the ring back. So *Innocentia* is safe.

6.7 Although each argument has some force, neither is conclusive. As to the first, the presumption is simply that: a presumption. As such it can be rebutted if satisfactory contrary evidence can be adduced. It may be added that the principle that for corporeal moveables "possession presumes ownership" is not a peculiar principle of Scots law, but is accepted by other systems too.⁷ And nevertheless other systems do not regard it as making prescription an irrelevant issue.

6.8 As to the second argument, *Innocentia*'s immunity to suit by Jill is not the same as ownership. *Innocentia*'s liability to be sued by Jill is merely replaced by a liability to be sued by the Crown for wrongfully detaining Her Majesty's ring.⁸ One could of course abolish the rule that, when Jill loses ownership, the Crown acquires it. But that would, in itself, merely have the result that the ring would become ownerless. So, for example, if Fred were to reappear and take it from *Innocentia*, that would not be theft, for if the ring is ownerless, Fred would not be taking *Innocentia*'s ring. Indeed, Fred would become the owner, under the principle *quod nullius est fit occupantis*. An alternative analysis would be that when the ring becomes ownerless, *Innocentia* herself would immediately become owner under the doctrine of *occupatio*.⁹ That would be in practical terms identical with a doctrine of positive prescription. If the policy of the law is that a time should come when Jill should cease to be

⁵ Erskine, Inst, 3,7,7. Erskine's view differs from Stair's.

⁶ William M Gordon in Kenneth Reid, *Law of Property in Scotland* (1996) para 565.

⁷ For example § 1006 of the German Civil Code.

⁸ In our example the ring is worth £100,000. This is deliberate, because if the ring were of low value the Crown would be unlikely to assert its rights. (But the Crown may assert its rights to lower-value property in certain cases, such as archaeological material that is of low financial value, but of significant scholarly or cultural value.) We return to the question of Crown rights in Part 7.

⁹ If a moveable object is ownerless, a person can acquire ownership of it by taking possession of it. This is called *occupatio*. Property is not ownerless merely because it has been lost or abandoned.

the owner, and if the policy of the law is that the new owner should be *Innocentia*, it seems more rational to choose the direct route and say that the latter has acquired ownership by positive prescription rather than the indirect route of negative prescription plus *occupatio*.

An argument against introducing positive prescription: unfairness to the owner

6.9 The previous section was about whether a system of positive prescription would bring with it any real benefit. But there is also the argument that positive prescription would be the opposite of beneficial, because it would take away ownership without compensation. In short, it would be unfair to the owner. Such unfairness is undeniable. But such unfairness exists in the current law (section 8 of the 1973 Act) and it also exists for land. There is a balancing exercise to be carried out: the undoubted unfairness to the owner, weighed against factors that point in the other direction, to which we now turn.

Four arguments for positive prescription

6.10 There are (at least) four arguments in favour of positive prescription for corporeal moveables.¹⁰ The first is the fairness argument (it is unfair for someone who has possessed goods for a long period to be dispossessed). The second is the certainty argument (uncertainty of title is inconvenient, interferes with commerce and generates litigation). Both of these arguments have a long history.¹¹ The 1976 discussion paper adopts the latter but not the former. And in the third place there is the fact that positive prescription for corporeal moveables exists in most of the world's legal systems. We know of no European legal system, other than – perhaps – Scots law,¹² without such a rule. This third argument is not conclusive – majorities can be wrong – but it is suggestive. Scots law does appear to be out of step. The fourth argument is that positive prescription protects not only buyers but sellers. For without prescription, a seller remains indefinitely open to a claim from the buyer based on bad title. This argument also makes its appearance in connection with the question of what the length of the period should be (assuming that there is to be such a period) because the shorter, the less the seller's exposure.

6.11 Below we consider the first two arguments (fairness and certainty) in a little more detail.

The fairness argument

6.12 The fairness argument is that it is unfair that true owners should be able to sit twiddling their thumbs as the years pass by and still expect the law to support their claims as and when they finally bestir themselves to act. To countenance such extended inactivity is, so it may be argued, unfair to the possessor. This is what is called in the DCFR commentary a "sanction" for "inactivity".¹³ There are two difficulties with this approach. The first is that in the typical case the true owner does not know where the property is. The second is that if the true owner in fact *does* know where the property is, the inactivity is likely to be the basis

¹⁰ For a most valuable account of justifications for prescription, going back to the Roman era, see David Johnston, *Prescription and Limitation* (1999) chapter 1. The passage from John Stuart Mill quoted at para 1.61 is a good expression of the fairness argument.

¹¹ Cornelius van der Merwe surveys the older authorities in Vol 27 of W A Joubert (ed) *The Law of South Africa* (2002, re-issued volume) para 344.

¹² As noted earlier, the law is uncertain: the possibility that a forty-year positive prescription exists cannot be excluded.

¹³ DCFR commentary p 4892.

of a defence of personal bar as and when the claim is finally advanced. But these two difficulties are themselves not conclusive. Personal bar is all very well but it still does not make the possessor the owner. And one could have a rule that positive prescription runs only when the true owner does know where the property is. (Something comparable to this rule is adopted by the Directive in relation to the duty of restitution.¹⁴)

6.13 The difference between land and moveables is nowhere more apparent than in this connection. Land cannot be hidden. If Malcolm considers land to be his, unlawfully possessed by Macbeth, Malcolm has no difficulty in identifying the land and its possessor. But moveables are commonly lost to sight. The prescription legislation says that possession of land cannot count as prescriptive possession unless it is "open", but such a requirement is problematic for moveables. A painting hanging in the National Gallery of Scotland might constitute open possession, but such cases are not common. The openness of possession is central to the fairness argument, and is an important element in prescriptive title to land. But for moveables open possession is a problematic concept.¹⁵

Certainty

6.14 The other argument in favour of positive prescription is certainty of title. Thus the 1976 discussion paper said that "the role of usucapion¹⁶ is largely to foster certainty as to rights over and title to property."¹⁷ The DCFR takes the same view: "the most important underlying policy consideration for acquisition of ownership by continuous possession is the promotion of legal certainty. This includes the protection of individual interests.... The idea ... extends to the protection of commerce as such."¹⁸ In addition to protecting individual interests, a rule of prescription could prevent wasteful litigation and the associated costs to parties, witnesses and the court system.

6.15 How strong this argument is may be debatable. In the case of land, a high degree of certainty as to title is in practice attainable and is in almost all cases actually attained. And it is expected by buyers. But it is arguable that buyers of moveables expect less by way of certainty. There is always the risk that a seller's title may be bad, and there is seldom much that can be done about that risk, though all buyers know that it makes a difference who the seller is. A respectable seller is less likely to have a bad title and is more likely to pay compensation if the title does prove bad. Given that buyers of moveables have to put up with some uncertainty anyway, would positive prescription help much?

6.16 Moreover, it might be argued that a system of positive prescription, far from enhancing certainty, would do the opposite. If an owner can always demand the return of property, that is, it may be argued, a clear and simple rule. But any system of prescription must have threshold rules, for example about good faith¹⁹ and about the intentions of the

¹⁴ This is the rule that once the Member State knows where the property is, it must act within one year, which failing the right is lost. See Part 4.

¹⁵ The issue is considered further in Part 7.

¹⁶ In other words, positive/acquisitive prescription.

¹⁷ Para 4.

¹⁸ DCFR commentary p 4893.

¹⁹ Though one could have a rule making good faith unnecessary. As will be seen below, some systems take that approach, though generally they have two rules: one requiring good faith and a short prescriptive period and another, with a longer period, dispensing with good faith. In such systems there is always scope for debate about whether there has been good faith in cases where the shorter period is in question.

possessor, so that in practice it must often be uncertain whether the possessor has acquired title, thus giving rise to the possibility of litigation.

6.17 On balance we incline to think that a system of positive prescription would indeed have a net effect of increasing certainty. Prescription would in practice matter only for longer-lived and higher-value assets. For such assets buyers are indeed concerned about title, and because such goods are often re-identifiable over time and often leave a paper trail, investigation of title has some practical meaning. Provenance matters, and provenance can be investigated. If prescriptive possession can be established, that enhances marketability.²⁰

1. **Do consultees agree that the introduction of a system of positive prescription would increase certainty?**
2. **Do consultees agree that the introduction of a system of positive prescription would increase the marketability of long-lived moveable assets?**

The economic resources issue

6.18 One reason in favour of positive prescription for land is that land is a finite resource and is of economic importance. Positive prescription cleanses titles and buries old claims. If title to land is uncertain that has negative economic consequences: uncertainty of title makes properties hard to sell and hard to use as collateral for loans. The same considerations do not apply to moveables to anything like the same extent: the likely effect upon marketability is not as great, and moveables are not as commonly used as collateral as is land. But while the likely benefits are not as great as for positive prescription of title to land, we do not think that they can be dismissed entirely.

3. **What economic benefit (if any) do consultees consider likely to arise as a result of such an increase in certainty and / or marketability?**

6.19 The core question is, therefore, whether Scots law ought to have positive (acquisitive) prescription for corporeal moveable property. On balance we consider that there should be positive (acquisitive) prescription for corporeal moveable property. If right and possession are separated, so that there is an owner who does not possess²¹ and a possessor who does not own, for that separation to exist without limit of time is unacceptable.²² A system of property law that allowed that would be unsatisfactory. In the shorter term the reunion of title and possession can often be achieved by the return of the property to the true owner. But the greater the number of years that pass, the less likely is that result, and the time must arrive when it is better – because of the need for certainty and because of the need for fairness to the long-term possessor – to end the separation by giving title to the possessor – which is something the law can actually do – rather than

²⁰ Although some might argue that it is undesirable to enhance the marketability of goods which might be stolen: see, for instance, Steven A Bibas, "The Case against Statutes of Limitations for Stolen Art" (1993-1994) 103 Yale Law Journal 2437.

²¹ As mentioned elsewhere, an owner, X who lends or leases an object to Y, still possesses. The parties have, respectively, indirect and direct possession. So such a case does not involve the separation of ownership and possession. (But matters can change, as where Y, acting without X's consent, sells the object.)

²² We are not here speaking of cases where the owner voluntarily gives possession to another person, for example by way of hire or pledge. In such cases the owner still has possession, ie civil (indirect) possession.

waiting for the Greek Kalends when the true owner will track down and repossess the property.

4. **Do consultees agree that there should be some form of positive (acquisitive) prescription for corporeal moveables?**

Terminology

6.20 In the 1976 discussion paper, the term "usucapion" was proposed.²³ The reason was that negative and positive prescription are different beasts and it would be preferable to have separate terms. The University of Glasgow and the Faculty of Advocates did not like "usucapion". Other respondents did not discuss the point. The impression is that they were content with the proposal. The argument for having separate terms is a strong one, but current law does have separate terms, through use of the adjectives "positive" and "negative".²⁴ Moreover, if a new noun is needed, it should be applied to land as well, but that would be outwith the scope of this project. Finally, "usucapion" is a term little known either here or elsewhere.²⁵ That in itself is not a fatal objection; occasionally unfamiliar terms have to be introduced. But it is still an objection. On balance we incline to think that the term "positive prescription" should be used in any legislation that may flow from this project. We propose:

5. **The term "usucapion" should not be adopted.**

²³ Para 2.

²⁴ There is a stateable case for replacing the terms "negative" and "positive" with "extinctive" and "acquisitive". Their meaning would be clearer. Moreover, our terms are used nowhere else, whereas "extinctive" and "acquisitive" have a certain degree of international currency. But this would be beyond the scope of the present project.

²⁵ For example, in French law positive prescription is *prescription acquisitive*. In German law it is *Ersitzung*. Italian law, with its *usucapione*, is an exception.

Part 7 Reform options: (A) The standard case

Introduction

7.1 In this part we look at how a scheme of positive prescription might work in what we call the "standard case", which is to say the case when someone, acting in good faith, purports to acquire something, but in fact does not obtain a valid title, and thereafter possesses the property for a number of years. In the next part we consider whether a prescriptive title should be possible in special cases. This division corresponds to the distinction made in the 1976 discussion paper.

Justa causa

7.2 The 1976 discussion paper defined the standard case as one that presupposed that there had been a process of acquisition of ownership that was wholly valid other than the transferor's lack of power to transfer:

"The original acquirer must have taken possession of the moveable in good faith by an apparently valid title which, had the transferor been owner or had he been authorised by the owner, would have been effective to vest ownership in the original acquirer - eg by gift or legacy."¹

7.3 This requirement of *justa causa* followed Roman law, and also a number of modern European systems.² It is also, in effect, the rule that Scots law has for land.³ The DCFR does not adopt this approach, because "it would exclude too many situations from the scope of acquisition by continuous possession".⁴ A further argument against the adoption of either requirement is that the possessor may no longer have evidence to show the manner of acquisition. On balance we think that the approach of the DCFR is right, but we nevertheless ask:

6. Should an ostensibly valid act of acquisition be a requirement (in addition to the requirement of good faith)?

Good faith: general

7.4 Some legal systems require good faith for the prescriptive acquisition of immoveable property, while others do not, Scots law being among the latter. The latter approach is workable and in Scotland is generally regarded as acceptable. But most legal systems require good faith as a condition for the prescriptive acquisition of moveables, either in all

¹ Para 9(d).

² Some systems require something less, namely "putative title" (*causa putativa*) which means a transaction which has the *subjective* appearance of validity.

³ 1973 Act s 1. The statement in the text is perhaps an oversimplification, but the issue does not need to be delved into here.

⁴ DCFR commentary p 4907. Nor does it accept the broader "putative title" approach because "a 'putative title' does not add much to the criterion of good faith." DCFR commentary p 4907.

cases or at least in the standard case.⁵ The 1976 discussion paper proposed that good faith should be required in the standard case, and we remain of the same view. Given that good faith should normally be required, should the requirement be one of simple subjective honesty, or should there also be a "no negligence" requirement? The DCFR says 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*."⁶ The 1976 discussion paper has a similar requirement.⁷ This approach seems to us sensible and we propose:

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

7.5 The DCFR says that good faith is presumed.⁸ We do not think that necessary in any Scottish legislation, for we think that Scots law has a general presumption of good faith.⁹ Of course, in practice that presumption can often be rebutted.¹⁰

And for value?

7.6 Should the possessor have acquired for value? The answer to this has to be negative. The giving of value would be relevant to a rule about protecting good faith acquirers, but it is not relevant to prescription. It is not required for prescription for land.¹¹ As for moveables, neither Roman law nor any modern system that we have examined requires value.

Good faith: should supervening knowledge affect the possessor?

7.7 We return to the case where 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 from Jill. Should the prescriptive clock continue to tick in her favour? As was mentioned earlier, Roman law took the view that it should, ie that the test should simply be whether she was in good faith at the time when she bought the ring: *mala fides superveniens non nocet*. And we also mentioned that the modern European systems differ on this issue, some following the Roman approach and others not. The DCFR does not follow Roman law on this point. The 1976 discussion paper left the question open.¹² We do not think that there exists a clearly right answer to this question. It may be that if Innocentia learns of the truth she comes under a moral obligation to return the ring to Jill,¹³ but not all moral obligations ought to trigger legal obligations. It may be added that if such a moral obligation exists it arguably exists regardless of title. For example, it could be argued that even after a prescriptive title is acquired, a conscientious possessor may be – depending on the circumstances – under a moral obligation to hand the property over to the (ex-)owner.

⁵ In Part 8 we discuss the possibility of dispensing with good faith in non-standard cases.

⁶ DCFR VIII-4:101(2)(a). Emphasis added.

⁷ Para 9(g).

⁸ VIII- 4.101(2)(b). There is some discussion of this issue in the 1976 discussion paper, para 9(g). Some national legislation states that good faith is presumed. Spain is an example: see para 5.14 above.

⁹ We are not aware of any express authority. But the law could hardly presume bad faith.

¹⁰ We quote from Professor Carey Miller's *Corporeal Moveables in Scots Law* (2nd edn 2005) at para 7.05: "That the circumstances of acquisition may give grounds for concern ... is illustrated in the criminal case of *Latta v Herron* (1967) SCCR Supp 18, where a lawyer who acquired firearms in a late-night transaction in an alleyway, despite his protests of innocence, was found guilty of reset on the basis that he had 'wilfully blinded himself to the obvious.'"

¹¹ 1973 Act s 1. The same was true of earlier legislation.

¹² Para 9(e).

¹³ We express this tentatively, because if she paid a fair price the existence of the moral obligation is open to question.

(Just as there may be cases where a conscience will require someone to pay a debt that has been extinguished by negative prescription.)

7.8 It is noteworthy that in the criminal law a person who takes possession of stolen goods in good faith, and later learns that they are stolen, and who retains them, is guilty of reset.¹⁴ This is a significant point but not in itself conclusive as to what the rule should be in property law.

7.9 If prescription is to be interrupted by supervening knowledge, there is a further question to be considered; should the fact of knowledge merely interrupt prescription, with the prescriptive clock beginning to tick once again at that date, or should it exclude prescription altogether? This question belongs to the broader question of whether prescription should ever be able to run in favour of a bad faith possessor. That issue is considered in Part 8 below, and we leave it on one side for the present.

7.10 We ask:

8. Should supervening knowledge (actual or constructive) on the part of the possessor interrupt prescription?

How long?

7.11 Bankton remarked that it would be "absurd" for the period of moveable prescription to be longer than for the period for land.¹⁵ He does not say why. If it is because land is worth more than moveables, that reason is unconvincing because it is not clear why value should make a difference, and in any event the types of moveables to which prescription is likely to be relevant are often high value items, sometimes worth millions. The 1976 discussion paper suggested a period of five years in the standard case (on the footing that such a period would tie in with that of the short negative prescription¹⁶) and ten years in the non-standard case. As indicated in Part 5, there is considerable variation among legal systems. The DCFR has ten and thirty years. (In the case of cultural property, thirty and fifty.) In England the period is six years, in France three and in Germany ten. Occasionally significantly longer periods are encountered, such as thirty years in South African law.

7.12 For land a fairly short period may be justified because the owner knows where the land is. By contrast for moveables the location may be unknown, thereby making it impossible for the owner to recover possession. As was mentioned above, according to one line of authority in the USA, prescription does not run while the owner is excusably unaware of the location of the goods, the justification for this being that it would be unacceptable for an owner to lose the right of recovery before it is possible to exercise it. The problem with that approach is that it makes the prescriptive acquisition of title almost impossible, no matter how many years have passed. There may, however, be a case for drawing a distinction between (i) cases where the owner knows where the goods are and (ii) other

¹⁴ Gerald Gordon, *The Criminal Law of Scotland* (3rd edn, 2001, ed Michael Christie) Vol II para 20.03. This aspect is not discussed in the 1976 discussion paper.

¹⁵ Inst. 2,12,1.

¹⁶ Para 8. The 1976 discussion paper does not explain why alignment with the period of the five-year negative prescription would be desirable; cf our discussion of the five-year negative prescription in Part 2 above.

cases, with a shorter prescriptive period for the former than for the latter. We consider this idea below.¹⁷

7.13 In the law of negative prescription, reparation claims are normally subject to the five year prescription.¹⁸ But this does not run while the victim "was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage ... had occurred..."¹⁹ But the longstop prescriptive period of twenty years is not subject to this rule. The point is that the longer the period, the more the case for "repose" (to adopt an American term) as against issues of fairness to the victim. There may be a lesson here for title to moveable property. If a short period were to be adopted (such as the five years suggested in the 1976 discussion paper), the case for saying that prescription should not run against an excusably ignorant owner would be a strong one. But the longer the period, the weaker is the "excusably ignorant" argument, as the need to attain an eventual "repose" gradually outweighs the unfairness to the owner.

7.14 Hence it seems to us – disagreeing with Bankton – that the prescriptive period for moveables should, at any rate where the goods cannot for the time being be traced, be rather long, and certainly longer than the prescriptive period for land, which is ten years. Moreover, the need for prescription for moveables is weaker than the need for prescription for land. We think that the period should be at least fifteen years. Thirty years, as in South Africa, seems to be within the range of reasonable possibilities. We are unaware of any system with a longer period and would tentatively suggest that thirty years is the maximum period worth considering, at least in ordinary types of case.

7.15 A period of something between fifteen and thirty years would mean that for a majority of corporeal moveable objects, positive prescription would be effectively irrelevant, because such objects seldom last so long, or, if they did so last, would have by then lost any substantial value they might once have had. We do not think that this is an objection.

7.16 It may be that in special cases the period should be longer or shorter. The case for a longer period would be in relation to "cultural objects". The issue of cultural objects is considered later.²⁰ And a case for a shorter period could be made in certain cases, such as where the owner knows where the goods are. This is discussed below.²¹ For the moment we leave all such cases on one side, and deal, for the moment, only with what might be called the "default" period.

9. In the ordinary case, what period of possession should be required for the establishment of a prescriptive title?

How long? A note about the prescription of reparation claims

7.17 One feature of the current law that might perhaps be regarded as curious is that whilst the proprietary claim for the recovery of stolen goods (*rei vindicatio*) from the thief never dies, even after twenty years,²² the delictual claim against the thief dies after just five

¹⁷ Paras 7.20 to 7.23.

¹⁸ But for reparation claims in respect of personal injury see Part II of the 1973 Act.

¹⁹ 1973 Act s 11(3).

²⁰ Part 10.

²¹ Paras 7.20 to 7.23.

²² 1973 Act para (g) of Sch 3.

years. Whether that is reasonable in cases where the victim knows who the thief is, may be argued, but the five year period applies even when the victim is unable to sue because the thief's identity is unknown. We have recommended that prescription should not run in such a case but our recommendation has not been implemented.²³ Even if it were, the twenty year prescription would still apply, so that a thief who kept out of the way for twenty years would be free of any delictual claim. We mention these points because there might be a case for aligning the rules about prescription of delictual claims against thieves with the rules for recovery of stolen property. Such an alignment could, of course, run in either direction: for example one could argue "a five year delictual prescription implies a five year limit on the recovery of stolen property" or, again, one could argue "imprescriptibility of the right to recover stolen property implies imprescriptibility of the right to damages against the thief". And so on. The present project is, however, not a general review of the law of prescription. Under the circumstances it is not possible here to attempt a rapprochement between the law about the prescription of reparation claims, on the one hand, and the law about the prescription of claims for the recovery of moveable property.

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

7.18 The DCFR provides for the running of prescription to be suspended during the owner's incapacity.²⁴ The 1976 discussion paper took the view that incapacity should be irrelevant, as it is for prescription in relation to land.²⁵ It is evident that the longer the prescriptive period, the less significant is the question of incapacity. Since we propose a longer period than was proposed in the 1976 discussion paper, we see no reason to change our view that incapacity should be left out of account.

7.19 As well as suspension for incapacity, 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."²⁶ We think that this *vis major* idea stands or falls with the question of incapacity.

10. Do consultees agree that incapacity, or other inability to act, should not suspend the running of prescription?

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

7.20 It would be possible to have two periods, a shorter one where the owner has actual or constructive knowledge about where the goods are, and a longer one for other cases. The UNESCO Convention has a three year time bar where the location of the goods is known, or where the possessor can be traced.²⁷ In the EU Directive the time bar in such a case is just

²³ Scottish Law Commission, *Report on Prescription and Limitation of Actions (Latent Damage and other Related Issues)* (Scot Law Com No 122 (1989)), para 2.44. Lack of knowledge of the wrongdoer's identity is a factor stopping prescription from running in personal injury cases: 1973 Act s 17.

²⁴ DCFR VIII-4:201.

²⁵ The rejection of incapacity is implied for the shorter period, but is express for the longer period: para 12 and para 14(d).

²⁶ DCFR VIII-4:202.

²⁷ These are not quite the same tests. It might be known that a certain person is the possessor, without knowing where the object is located. Example 1: the possessor has made a loan of the object to someone whose identity is not known to the owner. Example 2: the possessor has retained natural (direct) possession, but has multiple locations at which the object might be.

one year. Though neither of these is a private law rule about prescriptive title, there is evidently an argument that where the owner knows where the goods are, the prescriptive period should be curtailed.

7.21 Against such an idea is the fact that, as far as we know, 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..."²⁸ It could be argued that owners who sit on their hands may find that the law of personal bar will be engaged.

7.22 But in the USA, as was mentioned above, one can find traces of such a rule.²⁹ Such a rule has also been recommended for Scotland and England, the suggested period being three years.³⁰ We have come to the provisional view that the longer period – twenty years or whatever figure is settled on – is inappropriately lengthy, and so unfair to the possessor, for cases where the owner is free to act but fails to do so. In such cases a period of perhaps half the length of the standard period, which might thus work out at around ten years, might be reasonable. Ten years is the period for land, and cases where the owner knows where the goods can be found are comparable to land cases, for the owner likewise knows where the land is. Or a case could be made for a period of five years, which is the period of the short negative prescription.

7.23 A separate rule to cover the case where the owner can trace the goods would complicate the law and we are doubtful whether that complication would be justified by any benefits that such a rule would bring.³¹ Nevertheless, to test the views of consultees, we ask:

11. Should there be a shorter prescriptive period in cases where the owner is reasonably able to trace the goods? If so, how long?

Possession: general

7.24 There is no need to define possession and indeed it might be dangerous to attempt to do so.³² No attempt is made in the 1973 Act to define it for positive prescription in relation to land, except that it includes civil possession.³³ The 1973 Act says that for positive prescription the possession must have been had "openly, peaceably and without any judicial interruption".³⁴ The first of these terms ("openly") seems inappropriate for moveables for the reason given earlier: open possession of land is straightforward, and indeed it is not easy to possess land other than openly, but, by contrast, it is difficult to possess moveables openly, at least in any useful sense of that term. The DCFR commentary gives the example of a painting, and notes that one would have to ask whether it makes a difference whether the

²⁸ DCFR VIII-4:202.

²⁹ *O'Keeffe v Snyder* 83 NJ 478, 416 A 2d 862 (1980).

³⁰ David L Carey Miller, David W Myers and Anne L Cowe, "Restitution of Art and Cultural Objects: A Re-assessment of the Role of Limitation" (2001) 6 *Art Antiquity and Law* 1 at 17. The statutory text that the authors suggest begins: "Any action for the recovery of stolen works of art or artefacts ..." Thus the scope is much more limited than the scope of the present project. Moreover, the proposal is not one for prescriptive acquisition by the possessor, but only for barring an action by the owner. The three-year period would apply where the possessor is a good faith buyer. In other cases (including cases of bad faith) the action would be barred after twenty years.

³¹ 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.

³² As Javolenus says, "*omnis definitio in jure civili periculosa est.*" Dig 50.17.202.

³³ 1973 Act s 15.

³⁴ 1973 Act s 1.

painting hangs in a bedroom or a living room, whether it could be seen through a window by a passer-by, and so on.³⁵ But whilst in general the "open" requirement does not make much sense for moveables, the position is in fact rather more complicated than might at first appear, for it is sometimes said, truly or untruly, that where a museum or gallery has doubts about provenance, it is not unknown for it to decide not to display the item for many years, with a view to increasing the probability that the title will be fortified by limitation or prescription.³⁶ Should such deliberate concealment (if it can be proved) suspend prescription?³⁷

7.25 The 1973 Act requires that for land the possession be continuous. The DCFR does the same and also has detailed provisions about the effects of a temporary loss of possession.³⁸ We think that any new legislation should follow the current legislation, but in the interests of simplicity the DCFR should not be followed in relation to issues about temporary loss of possession. If our law can manage without such provisions for land, it can manage without them for moveables. The 1973 Act says that for land the possession must be without judicial interruption, and it makes sense for the same to apply to moveables.

12. **Do consultees agree that the possession should be, as for land, continuous, peaceable and without judicial interruption?**
13. **Do consultees agree that, unlike land, there should be no requirement that the possession be "open"? If so, should deliberate concealment nevertheless bar prescription?**

Online notice?

7.26 One possibility would be to provide that prescription could not begin to run in favour of the possessor unless and until the possessor had uploaded details – including images – of the object in question to a special online register. That would ensure that the possession was truly public possession. It would enable those who had lost possession to search periodically to track down their lost property.

7.27 Whilst the idea is not without merit, on balance we do not favour it. There would be costs involved. There would be difficulties about accurate searchability. Those with valuable property might not like the idea of advertising the fact to all and sundry, including criminals. Those who acquired objects in good faith would typically not think of registering the objects, because they would assume that they had good title anyway, so that the very class of person whose interests are most worthy of protection would be the least likely to gain that protection.

7.28 A converse approach has been suggested by one US scholar, namely that there should be an official art loss register, and that if someone registered details of a lost work,

³⁵ Page 4908. As applied to our running example of a ring, the question would be whether the ring was worn on the finger or kept in a jewellery box, etc. In *Parishioners of Aberscherder* (see Part 2) the object in dispute was a bell in a parish church, which is to say about as public as is possible for moveables.

³⁶ If a museum or gallery has serious doubts *at the time when the object is accessioned* that would exclude good faith from the outset.

³⁷ If this should be the policy, it could be achieved by covering the point in the definition of good faith. The issue could, therefore, have also been raised above, in the discussion of good faith.

³⁸ DCFR VIII-4:103.

the effect would be to bar anyone else from obtaining a prescriptive title.³⁹ In fact there is already an online unofficial Art Loss Register,⁴⁰ and no doubt if an item is entered there, that fact may (depending on the circumstances) be a relevant fact if, thereafter, a question arises as to whether someone had acquired that item in good faith and without negligence. But we doubt whether a strong case could be made for an official register. There would be issues of cost and there would be difficulties about accurate searchability. And whilst the sort of pro-prescription online registry described in the previous paragraph could work on a national or sub-national level, an anti-prescription online register would not work well unless set up at a transnational level.⁴¹ Finally, it is not clear that the idea would necessarily give fair results.

Possession: intention

7.29 A prescriptive title presupposes that the possessor possesses as owner – the *animus domini*. For example, someone who has property on hire has possession,⁴² but does not possess as owner. For land, the 1973 Act does not spell out this requirement, but it is implicit in the requirement that the possession must be "founded on" the invalid act of transfer. For example, suppose that Jack has a lease of land from Jill, paying her rent each Martinmas, Candlemas, Whitsunday and Lammas. He later receives a conveyance from Tim. The conveyance is invalid because Tim is not the owner. So long as Jack carries on paying rent to Jill, he can never acquire a prescriptive title, because that means that his possession is not "founded on" the invalid conveyance.⁴³

7.30 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 perfect 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".

7.31 The DCFR includes this requirement by providing 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".⁴⁴ Indeed, the requirement is imposed twice, because only an "owner-possessor" can prescribe a title,⁴⁵ and that term being defined as "a person who exercises physical control over the goods with the intention of doing so as, or as if, an owner".⁴⁶

7.32 How this requirement should be made apparent would be a matter of legislative technique. Here we simply propose:

³⁹ Steven A Bibas, "The Case against Statutes of Limitations for Stolen Art" (1993-1994) 103 Yale Law Journal 2437.

⁴⁰ At <http://www.artloss.com/>.

⁴¹ If set up on a national level, the dispossessed owner would in practice need to register in every national anti-prescription register, which would be rather unworkable, if only because so expensive. By contrast, in a pro-prescription register, registration would be needed only in one register, namely the register of the place in question.

⁴² In some legal systems, there would be mere detention, not possession.

⁴³ The analysis would be the same even if Jill were not the owner either. The fact that Jack continues to possess as tenant is fatal to any claim of prescription, and this is so regardless of the quality of the landlord's own title. (We would add that we here disregard certain complications arising out of the Keeper's "Midas touch" under s 3 of the Land Registration (Scotland) Act 1979. For discussion, see Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222 (2010)) Part 13.

⁴⁴ DCFR VIII-4:101(2)(a).

⁴⁵ DCFR VIII-4:101(1).

⁴⁶ DCFR I-1:108. The term is perhaps an awkward one. The reader who supposes it means someone who is both an owner and a possessor would be mistaken.

14. Positive prescription would presuppose an intention to possess as owner.

Successors

7.33 All legal systems that have positive prescription allow *successio in possessionem*, so that if X transfers to Y, X's period of possession is added on to Y's. In Scots law that is true for land. We take it for granted that it should also be true for moveables.⁴⁷ Of course, all the requirements for prescriptive possession would need to be present at each stage. For example, if good faith were to be a requirement and X were a *mala fide* possessor, the period of X's possession would not count.

Compensation of ex-owner

7.34 Positive prescription confers good title on the possessor. The former owner is thereby expropriated. In neither Scots law nor in the laws of other countries does the former owner have a right to be compensated by the acquirer.⁴⁸ This is true not only for land, but also for moveables in so far as title is lost by *negative* prescription. As mentioned above, this is compatible with the ECHR. Even if it were to be regarded as desirable that compensation be introduced, it would make little sense to do so for moveables and not for land. Any new scheme for positive prescription would not be on the basis of compensation.

15. Do consultees agree that the legislation should not provide for compensation for a person who loses title by the running of positive prescription?

Effect of prescription on subordinate real rights

7.35 The question of the effect of positive prescription on any subordinate real rights that may exist in the property in question is one that has not been developed in Scots law. The 1973 Act, in dealing with positive prescription for land, is silent on the issue, as was previous legislation. Elsewhere in Europe the law is more developed and the DCFR has a provision.⁴⁹ Whilst we think that this might be an area where Scots law needs to move forward, we do not think that the present project is a suitable vehicle. The law would need to be considered in the round, ie both land and moveables, and that cannot be done in this project.

7.36 There is also the question of whether possession should be able to validate a subordinate real right. Thus in the case of land, possession of land under a lease that is ostensibly valid but latently invalid can lead eventually to the validation of the lease.⁵⁰ And servitudes can be validated by usage.⁵¹ But for moveables, subordinate real rights are far less common than for land, and cases where the issue might be relevant would be extremely rare or perhaps even unknown. We do not think that there is a need for legislation to deal with this matter.

⁴⁷ The DCFR so provides: DCFR VIII-4:206.

⁴⁸ There may be a right to be compensated by someone else. If Fred steals Jill's ring and sells it to Innocentia, and she eventually acquires a prescriptive title, Jill may still have a claim against Fred.

⁴⁹ DCFR VIII-4:301(2).

⁵⁰ 1973 Act s 1.

⁵¹ 1973 Act s 3.

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

7.37 As was seen above, it is possible, though far from certain, that at common law there exists a forty year positive prescription for corporeal moveables. Clearly, if a new statutory scheme is introduced, any such common law rule would be superseded and should be formally abrogated. We propose:

16. **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.**

Negative prescription and Crown rights

7.38 If positive prescription is introduced, what should happen to negative prescription, in section 8 of the 1973 Act, in so far as it relates to the right of ownership?⁵² In principle it could be left unchanged. For example, suppose that a new positive prescription of twenty years is introduced. In 2020 Fred steals Jill's ring and in 2025 he sells it to Innocentia. Jill would lose ownership in 2045,⁵³ by force of negative prescription, and at the same time Innocentia would acquire ownership, by positive prescription. But this seems artificial. If there is to be positive prescription, it is difficult to see any point in negative prescription. There is no negative prescription for the ownership of land.

7.39 Indeed, it is arguable that there is no need for negative prescription of title to moveables even if positive prescription is *not* introduced. For negative prescription under section 8 is really a positive prescription in disguise, for it operates to give ownership to the Crown.⁵⁴ And it is not clear that the Crown really stands in need of that quasi-positive prescription. The reason is that the doctrines of *bona vacantia* and of *ultimus haeres* may in any case give the Crown everything it can legitimately expect. In particular, these doctrines are probably in themselves a sufficient basis for treasure trove. These doctrines – *bona vacantia* and *ultimus haeres* – also operate in land law.⁵⁵

7.40 On the other hand it might be argued that a specific doctrine of prescription is a useful means of confirming Crown rights: belt and braces. If section 8 of the 1973 Act is unsatisfactory in relation to title to moveables, then something should be devised to replace it. Without expressing any definite view on this argument, we think it would be worth developing, for the consideration of consultees, a substitute scheme of prescription in favour of the Crown.

7.41 If there is to be a special prescriptive regime in favour of the Crown, it would be more straightforward to express the rule as such, ie as a positive prescription, and not, as it appears in section 8, as a negative prescription.⁵⁶ After a certain number of years during

⁵² The role of s 8 in extinguishing, by long non-use, such rights as servitudes and public rights of way, would be unaffected.

⁵³ This assumes that prescription against her does not run while the ring is still in the thief's possession. The alternative interpretation of Sch 3 para (g) of the 1973 Act is that her title would be lost to the Crown in 2040. See paras 2.11 to 2.13 above.

⁵⁴ It extinguishes the existing right of ownership. At that instant the object becomes the Crown's under the principle that *quod nullius est fit domini Regis*.

⁵⁵ They were unaffected by feudal abolition: Abolition of Feudal Tenure etc (Scotland) Act s 58.

⁵⁶ Section 8 is only the first of two legs: loss of ownership by force of negative prescription, and acquisition of ownership by the Crown by force of the doctrine of *quod nullius est fit domini Regis*.

which the owner is out of possession, ownership would pass to the Crown. That would also avoid the theoretical absurdity whereby the Crown itself would lose ownership every twenty years and promptly regain it.

7.42 The new positive prescription in favour of the Crown would not be based on possession. Of course, if the Crown possesses something for the requisite period, it would acquire good title, just like anyone else. What is being suggested is a distinct rule, in favour only of the Crown, which would replace the logically unsatisfactory mechanism in section 8.⁵⁷

7.43 How long should this new prescription be? Earlier we pointed out that if Jill loses a ring at the seaside and finds it thirty years later, it is no longer hers. That result seems unacceptable. Positive prescription is needed to give a title to long-term possessors, but the ring lost in the sand has no such possessor. Moreover, if Jill's ring is stolen, under current law prescription probably does not run against her so long as the stolen property remains in the thief's possession,⁵⁸ and if that is a sound principle one would wish not Jill's rights against the thief to be undermined by a right emerging in the Crown.

7.44 These arguments would point to a long period or even an infinite period, which is to say that the Crown would never acquire ownership, at least through the operation of prescription. (Though there would still be the doctrines of *bona vacantia* and *ultimus haeres*.)

7.45 A period of about a hundred years, or perhaps a little longer, would seem to achieve about the right balance, which is to say to preserve the Crown's right of treasure trove but at the same time to allow lost goods to be retrieved within a human timescale. A hundred years is the criterion used in the UNESCO Convention and in the EU Directive.

7.46 Of course, all treasure today in the ground, not yet discovered, must *already* belong to the Crown, so that any prospective change in the law of prescription would not matter. But tomorrow's treasure is today's lost property.

7.47 We ask:

17. (i) **Do consultees agree that the ownership of corporeal moveable property should, like land, cease to be subject to negative prescription?**
- (ii) **At present, the sole beneficiary of negative prescription of title to moveables is the Crown. If this prescription is abolished, should a new non-possessionary positive prescription be introduced in favour of the Crown?**
- (iii) **If so, is a period of one hundred years appropriate?**

Animals

7.48 The rules about animals⁵⁹ are outlined in Part 2. As was noted there, these provisions are not aimed at protecting good faith possessors in the sense of possessors who believe

⁵⁷ Section 8 would remain intact for all other purposes.

⁵⁸ Para (g) of Sch 3 of the 1973 Act. See paras 2.11 to 2.13 above.

⁵⁹ Dogs Act 1906 s 4(4) (as inserted by the Civic Government (Scotland) Act 1982) and Civic Government (Scotland) Act 1982 s 74.

themselves to have good title. The provisions resulted from a recommendation of this Commission.⁶⁰ The reason was stated in our report thus: "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."⁶¹ 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. Similar considerations no doubt underlie the parallel Swiss rule mentioned in Part 5. 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.

7.49 If the proposals in this discussion paper were to be adopted, then animals in general would be capable of being acquired by positive prescription. But the period we provisionally have in mind – about twenty years – is a long one. Few animals live as long as that. Hence in practice little would change for animals, for the new general rule would seldom apply, while the special rules in the Dogs Act 1906 and the Civic Government (Scotland) Act 1982 would simply continue as before.

7.50 We are conscious that animals raise special issues and that there exists to some extent a distinct corpus of law about animals, and accordingly we hesitate to enter upon this topic. Nevertheless it cannot be ignored. It might be that consultees have views about the special rules just mentioned. It might also be that consultees would wish to see something like the Swiss rule introduced. To test views, we ask:

18. (i) Are the special rules about animals (Dogs Act 1906 s 4(4) and Civic Government (Scotland) Act 1982 s 74) satisfactory? If not, how should they be changed?

(ii) Should the general period of positive prescription be shorter in relation to animals than in relation to other property, for example along the lines of Article 728 of the Swiss Civil Code?

Transitional issues

7.51 New legislation may give rise to questions as to the temporal reach of the law. That is so in relation to changes in the law of prescription. Suppose, for example, that in 2020 legislation introduces a twenty-year positive prescription for corporeal moveable property. If that applies 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

⁶⁰ Scottish Law Commission, *Report on Lost and Abandoned Property* (Scot Law Com No 57 (1980)).

⁶¹ Para 8.2 of the report. 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, *Consultative Memorandum on Lost and Abandoned Property* (Scot Law Com Memorandum No 29 (1976)) paras 52 and 53.

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.)

7.52 It might well be that the only person prejudiced would be the Crown. For example, if Fred steals Jill's ring in 2012 and in 2013 sells it to Innocentia, it may well be that, because of section 8 of the 1973 Act, the owner as from 2032 is the Crown, so that if the law makes Innocentia the owner as from 2040, the person losing ownership is not Jill but the Crown.⁶² But this, while it may be probable, is not certain. The possibility that the ring is still Jill's cannot be wholly excluded.

7.53 It would not be difficult to establish 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,⁶³ but at the same time it delayed the commencement of the new provisions for three years after Royal Assent,⁶⁴ thus leaving a reasonable amount of time for anyone wishing to assert a right under the existing law to do so.

7.54 We ask:

19. (i) Do consultees agree that it would be appropriate for commencement of any new provision establishing a rule of positive prescription to be delayed by a period of years following Royal Assent to allow dispossessed owners a reasonable opportunity to assert their claims?

(ii) If so, would a period of three years be appropriate?

⁶² See Part 2 above.

⁶³ 1973 Act s 14.

⁶⁴ 1973 Act s 25.

Part 8 Reform options: (B) The non-standard case

Non-standard cases: introduction

8.1 The standard case is where someone acquires moveable property in the ordinary way, such as purchase, or inheritance, but unknown to the acquirer the title is bad. We have already proposed that in this standard case, positive prescription should run. Most legal systems have rules covering the standard case.

8.2 But some legal systems also allow a prescriptive title to be acquired in non-standard cases. In this part we canvas the merits of this idea. The way it works is simply that after a certain additional length of time has passed, good faith ceases to be a requirement for prescriptive title. Thus suppose that the standard prescriptive period is twenty years. If Innocentia possesses Jill's ring for that period and does so in good faith she will, at the end of that period, acquire ownership. If she does not possess in good faith, she will not. But suppose she possesses for fifty years. In that case some systems would award her ownership, even in the absence of good faith. Such systems generally make an exception in the case of a thief, so that Fred (the thief), if he possessed the ring for fifty years, would not acquire ownership.

8.3 To reward such a possessor in this way may seem surprising. But this was proposed in the 1976 discussion paper. It is also the approach adopted in the DCFR. In the 1976 discussion paper the proposal was that in such cases the prescriptive period should be either ten or twenty years, with a preference for the former.¹ In the DCFR the period is thirty years (or fifty years for cultural property).²

8.4 The 1976 discussion paper does not give examples, but what it had in mind were cases where the possession began lawfully, "such as loan or hire"³ and the possessor "changed the basis of 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."

8.5 The DCFR gives the example of "a warehouse company which, during or after the expiry of the contract period, decides to retain the stored goods for itself."⁴ A key difference from the 1976 discussion paper is that the DCFR does not seem to require any external manifestation of this change of *animus*.

¹ In standard cases the 1976 discussion paper proposed a period of five years.

² In David L Carey Miller, David W Myers and Anne L Cowe, "Restitution of Art and Cultural Objects: A Re-assessment of the Role of Limitation" (2001) 6 *Art Antiquity and Law* 1 at 17, mentioned at para 7.22 above, it is proposed, for Scotland and England, that there should be a longstop prescription of twenty years, regardless of good or bad faith.

³ 1976 discussion paper para 14(e).

⁴ DCFR commentary p 4895.

8.6 In their response to the 1976 discussion paper, the Society of Antiquaries of Scotland wrote:⁵

"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...?"

8.7 This case (or set of cases) is analogous to the warehouse case. The museum's initial possession was as some sort of custodian or depositary. Comparable cases can happen in non-institutional circumstances. An object may be taken by a friend or relative to keep for someone who has no room for it. The arrangement may well be undocumented, and may carry on for decades. Memories may fade. In one case we were told about the object was a painting that was of little value at the time. But the painter's name gradually became better known and eventually the painting was of very considerable value. By this time both the artist and the person who had given it attic space were dead. The widow of the latter wished to sell it, whereupon a dispute with the artist's family took place.⁶

8.8 Another special case is where a case begins as a standard case but there is supervening knowledge. Thus Fred sells Jill's ring to Innocentia, who buys in good faith. Two years after the purchase, Innocentia discovers that the ring was stolen from Jill. If the rule is that such supervening knowledge makes no difference, the case raises no special issues. But if the rule is that supervening knowledge does interrupt prescription, the question arises whether the clock should begin once more to tick in Innocentia's favour, as from the date of knowledge. We mentioned this issue earlier.⁷

The problem of the changed intention

8.9 It may be that someone who initially possesses as a custodian (etc) should never be allowed to acquire prescriptive ownership, on the footing that this would be to reward bad faith. We leave that question on one side for a moment, in order to consider another issue. *If* such a person *is* allowed to prescribe a title, it would be necessary for such a person to be possessing "as owner". And in practice it would be difficult to know whether that had happened. The DCFR commentary does not discuss that issue. The 1976 discussion paper does, albeit briefly. In some cases the changed intention would be apparent, as where the possessor writes to the owner, asserting title. In the case of a lessee of goods, discontinuation of payment of rent would have some evidential weight.⁸ But we incline to think that to establish the "as owner" criterion would commonly be difficult in non-standard cases. The conclusion to be drawn seems to be that even if positive prescription is applied to such cases, there will in practice not be many such cases in which the "possession as owner" hurdle could be surmounted. Nevertheless, there is an issue to be discussed.

⁵ We quote this also in Part 3.

⁶ For a discussion of the relevance of death, see the end of this Part.

⁷ Paras 7.7 to 7.10.

⁸ But non-payment of rent can be attributable to other reasons, such as inadvertence and impecuniosity.

Three possible approaches

8.10 We think that there are three possible approaches to the non-standard case. The *first* is to have no special rule. If a person is not a good faith possessor, prescription should not run. The law may wish to reward those who act in good faith, but it should not reward those who act in bad faith.

8.11 The *second* approach would be to follow the DCFR and certain national laws, in allowing prescription, even in the absence of good faith, but subject to a longer qualifying period. If the longer period were to be twice the standard period, and if the standard period were to be twenty years, the non-standard prescriptive period would be forty years. Where this sort of approach is adopted, the law generally excepts thieves and reseters.

8.12 The *third* approach would be a targeted one, identifying specific situations in which it seems reasonable to allow a prescriptive title. In other situations, prescription would be unavailable. It seems to us that two such situations can be identified.

(i) The owner knows (actually or constructively) where the goods are and knows (actually or constructively) that the possessor is possessing as owner. (If this exception were to be accepted, and if a shorter prescriptive period should apply where the owner is able to track down the goods,⁹ this exception would benefit from that shorter period. Thus in contrast to the 1976 discussion paper and the DCFR, this would not only not be a "long period" case, but would actually be *shorter* than the default period.)

(ii) The possessor, even if willing to do so, could not contact the owner, because the owner's identity, or contact details, are not known to the possessor, and are not readily discoverable. The example or examples given by the Society of Antiquaries of Scotland would be an example. (But there should be no prescription in favour of a thief.)

8.13 We think that each of the three possible approaches is reasonable. We ask:

20. (a) Do consultees think that possession in good faith should always be required for a prescriptive title?

(b) Or do consultees think that there should be a longer prescriptive period (twice the standard period) which would run without the requirement of good faith, but which would be unavailable to thieves or reseters?

(c) Or do consultees prefer the third approach, namely that prescription should be capable of running, notwithstanding the lack of good faith, in the following two cases?

(i) Where the owner knows (actually or constructively) where the goods are and knows (actually or constructively) that the possessor is possessing as owner;

⁹ See paras 7.20 to 7.23 above.

- (ii) **Where the possessor, even if willing to do so, could not contact the owner, because the owner's identity, or contact details, are not known to the possessor, and are not readily discoverable. But there should be no prescription in favour of a person who acquires possession by theft or in the knowledge that the property has been stolen.**

Death

8.14 Where property is kept for the sort of periods in question, such as twenty years, and the possessor is a natural person, death may easily come into the picture, as noted earlier.¹⁰ Linda keeps a painting in the attic that belongs to her friend Archie. Although many years pass she does not think of it as her own. Hence Archie remains in (civil, indirect) possession of the painting. That in turn will mean that negative prescription could not run against him under section 8 of the 1973 Act. Nor could positive prescription run in Linda's favour because she is not possessing as owner. If Archie dies, the position would seem to remain the same. Suppose that Linda now dies, and that the house, together with the contents of the attic, are now possessed by her son, Fergus. Whether negative prescription could begin to run against Archie or his successors, or whether positive prescription could begin to run in favour of Fergus, would depend on whether Fergus possesses as owner. In practice that may be a difficult question to answer. But two points may be made. The first is that it is doubtful whether death in itself makes any difference to the way the case falls to be analysed. Both before and after Linda's death, the question is whether the person directly possessing the painting possesses as owner or not. And likewise it is doubtful whether Archie's death makes any real difference. In the second place, it can in practice be difficult to know – whether in the example just given or in other cases – who can be said to have possession, and, if so, what sort of possession. That is something that cannot be looked at here. It may be that the law of possession – an area of law that is not limited to moveable property – would merit review. But that cannot be done within the scope of the present project. For present purposes, we take the law of possession as it stands. What a project on prescription *can* do is to provide that *if* there is the right sort of possession for the right number of years *then* certain consequences follow.¹¹

¹⁰ Para 8.7.

¹¹ The 1973 Act does not seek to address the law of possession, but takes it as a datum. The only thing it says (s 15) is that "possession includes civil possession".

Part 9 Abandonment

Introduction

9.1 The law of abandonment strictly speaking lies outwith the scope of this project. But in practice the law of abandonment is intimately connected with the subject matter of this project, and it was suggested to us by the Advisory Group that it should be included, in relation to the rule of current law that corporeal moveable property passes, on abandonment, to the Crown.

The current law

9.2 Ownership of corporeal moveable property can be disclaimed. This is known as abandonment. Under our law abandoned property passes automatically and immediately to the Crown.¹ The commonest example is the discarding of litter. Each day Her Majesty becomes the proprietor of countless cigarette ends, crisp packets, drinks cans, chewing gum blobs, and numerous sagging sofas, worn-out washing machines and defunct cars.

9.3 The law of abandonment is not well developed, perhaps because abandonment, though common, seldom affects items of value. In practice it can be difficult to know whether abandonment has in fact taken place. Someone sitting on a park bench gets up, and leaves some object on the bench. That may be abandonment or it may be forgetfulness. It can also be difficult in practice to distinguish abandonment from donation. The householder who puts out rubbish on the pavement in a wheeliebin may be abandoning it, or may be donating it to the local authority. It can also be difficult to distinguish abandonment from *traditio incertae personae* in which an owner gives something to whoever chances to take it.²

9.4 Where an owner is in direct possession, the act of abandonment requires both a physical and a mental act. But where the owner is not in direct possession, abandonment has no physical aspect. If someone forgetfully leaves a book on a park bench, and an hour later remembers, but decides not to bother to try to recover it, that may be abandonment. (Or it might be *traditio incertae personae*.)

Reform?

9.5 In most legal systems, abandoned corporeal moveable property becomes ownerless and hence available for appropriation by *occupatio*.³ (*Occupatio* is the acquisition of an ownerless moveable object by taking possession of it.) There may be a case for the same approach in Scots law. Though the issue is not in itself an aspect of the law of prescription, it is so closely related that we think it appropriate to consider it in the context of the present project. The current law, like other legal systems, allows ownerless corporeal moveable

¹ Hence it seems that there is one person who cannot abandon: the Crown. An exception can be found in Companies Act 2006 s 1013.

² See William M Gordon in Kenneth Reid, *The Law of Property in Scotland* (1996) para 568.

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

property to be taken by *occupatio*,⁴ but undermines that principle by ensuring that little moveable property is ownerless. Because in Scots law abandoned corporeal moveable property does not become ownerless (and so cannot be taken by *occupatio*), there is a stronger need for a law of positive prescription than elsewhere – yet ironically in Scotland prescription is weaker than elsewhere. Indeed, if the rule were in Scotland, as it generally is elsewhere, that abandoned corporeal moveable property became ownerless, the result would be that it would become open to *occupatio*, and the consequence of that would, in turn, be that less weight would have to rest on the possibility of a prescriptive title. Indeed, one member of our Advisory Group⁵ has suggested that if the law were to be changed in this way, it would not be necessary to have a rule for the "non-standard" case discussed in Part 8. Thus if, for example, a museum had possession of an item and the owner had abandoned it, the museum could acquire ownership simply through *occupatio*.

9.6 Moreover, the current law, by generating latent Crown titles to many moveables that are in the possession of others, creates a variety of difficulties. For example, in Part 8 we suggested as one policy option that a possessor who was unable to trace the owner could prescribe a title. But under current law the property might be the Crown's and the Crown can always be tracked down.

9.7 If the current law were to be changed so as to harmonise it with the predominant rule elsewhere, the Crown would to some extent suffer, but only to a minimal degree. One of the aims of the present project is to reduce the frequency of cases where possession and title live separate lives. We ask:

21. Should corporeal moveable property that is abandoned become ownerless, and thus susceptible to appropriation under the doctrine of *occupatio*?

9.8 For clarity, it should be stressed that such a rule would leave the Crown's right to treasure trove unimpaired. If an old precious object is dug up from the ground, then even if it had originally been abandoned it would not now be available for appropriation by *occupatio*. That is because of the rule we propose in Part 7 to secure the protection of Crown rights.

Theft by finding?

9.9 In theory, the change we here suggest might cause a problem for someone who chances across an object which seems abandoned. It might in fact merely be lost, not abandoned. And in that case the act of appropriation would potentially constitute the offence of theft by finding. We do not think that this difficulty is a real one. *Mens rea* would, we suggest, be absent.⁶

Civic Government (Scotland) Act 1982

9.10 The Civic Government (Scotland) Act 1982, briefly discussed in Part 2 above, sets out rules for the handling of lost and abandoned property. There is a difference between lost property and abandoned property in that in the former case the identity of the owner may be

⁴ David Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) chapter 2; Kenneth Reid, *The Law of Property in Scotland* (1996) paras 540 ff.

⁵ Professor Reid.

⁶ *Kane v Friel* 1997 JC 69.

difficult to determine, whereas the ownership of abandoned property is easy to determine, for all such property belongs to the Crown. However, that distinction presupposes that property has first been successfully sorted into two piles, the lost and the abandoned, which is seldom possible. If it is uncertain whether property has been abandoned then it follows that its ownership is uncertain. Of course, the 1982 Act seldom bites on abandoned property, because property of any value is seldom abandoned (as opposed to being lost).

9.11 If the law is changed so that abandoned property is ownerless, and hence available for appropriation by *occupatio*, then the 1982 Act would have to be revised, for it presupposes that the person who hands the property in is not the owner. Yet a person who takes possession of abandoned property could, under the suggested new rule, become owner of it by the fact of possession. The 1982 Act would have to recognise that the person handing the object in might be already the owner through *occupatio*. But that would be so only in the rare case where the object had been abandoned.

9.12 There would be no inconsistency in the idea of Part VI of the 1982 Act applying to a finder of abandoned property, in a legal regime where abandoned property can be appropriated by taking possession. In the first place, a finder may take possession but not assert title. (*Occupatio* requires not only possession but also intention.⁷) In the second place, a finder will in practice seldom know whether an object is lost property or abandoned property. In the third place, even if a finder knows the property to be abandoned, and even if there is an intention to acquire title, there is no reason why public law should not, in the interests of public order, require the finder to go through the proper process of handing in, or reporting. Finally, legal systems that allow finders to acquire abandoned property do nevertheless subject finders to this obligation. Having gone through the process, the finder can then claim the object on the basis of ownership, though in practice the finder may not be able to show that the item had been abandoned rather than lost.⁸

⁷ This is a general truth about taking possession, whether for the purpose of *occupatio* or otherwise. "*Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.*" (Possession is acquired by physical act and mental act, not by physical act on its own or by mental act on its own.) Dig 41, 2,3,1 (Paulus).

⁸ This in theory raises the question of whether, in the absence of evidence, a bachelor object is to be presumed abandoned or to be presumed lost. But we do not propose to enter into that question here.

Part 10 Should cultural objects be treated differently?

Cultural objects

10.1 As was pointed out earlier, the UNESCO Convention and the EU Directive apply regardless of how national law has allocated ownership of the cultural object in question. Hence there is no need to shape the law of prescription in such a way as to conform to the Convention or Directive. Scots law would be compatible with both even if it allowed a prescriptive title to be acquired in just one month.

10.2 Nevertheless there may be a case for having a longer period for cultural objects than for other types of object. The issue is not about value in a financial sense. The issue is about objects that have a high non-financial value – a cultural value. The loss of such items is a double violation. If, for example, "night hawkers" (robbers of archaeological sites) dig up antiquities in Egypt and sell them to smugglers, then there is a double patrimonial loss to the owner, the Egyptian State.¹ There is the patrimonial loss in the sense of a loss that could in principle be compensated in money. But there is the loss to Egypt's cultural patrimony. In some cases this loss could be cancelled by return: that would be the position where, for example, a painting is stolen from a gallery and later recovered.² But looting of archaeological sites typically causes irreparable non-financial loss, such as loss of archaeological data.³ It is true that some critics consider that laws protecting antiquities often make the problems worse.⁴ But that is more an issue about the law of export licences, of the law (and practice) of rewarding finders,⁵ of international conventions, and so on. We accept that legislation about private law needs to accept, as one informing factor, the need to discourage the illicit trade in art and antiquities, including the looting of sites.

10.3 The DCFR accepts that cultural objects should be subject to higher threshold conditions. In the DCFR the standard prescriptive period is either ten years or thirty years, depending on the circumstances, but the period applicable to cultural objects is either thirty

¹ Egyptian law, like Scots law, vests the ownership of archaeological objects in the State. One of the highest-profile cases in recent years in relation to antiquities has been *United States v Schultz* 333 F3d 393 (2nd Circuit 2003) involving a prosecution for dealing in Egyptian antiquities. For the issue of the recognition by the UK of national vesting legislation, see *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22.

² The Sale of Goods (Amendment) Act 1994 abolished the "market overt" rule in England and Wales. It is generally thought that this was a response to the theft of paintings from Lincoln's Inn in 1990. The stolen paintings were sold at a London market (Bermondsey), thereby depriving Lincoln's Inn of ownership. Whilst the paintings did have a high commercial value, they also had a great non-financial value to Lincoln's Inn. We mention this case as showing that it is not only financial considerations that are important in questions of title to moveable property.

³ On this, see Colin Renfrew, *Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology* (2000).

⁴ An example: "As a result of its stringent anti-export laws ... Italy has one of the highest instances of looting in the world." Janene Marie Podesta, "Saving Culture, But Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations" (2008) 16 *Cardozo Journal of International and Comparative Law* 457 at 478. Such criticisms tend to concern stolen antiquities rather than stolen art.

⁵ Night hawking is more likely where a robust rewards system is not in place. Whether that rewards system is a matter of law or practice is secondary. (In Scotland it is a matter of practice, not law.)

years or fifty years, depending on the circumstances. We suggest that a period of at least fifty years would be appropriate.

10.4 If a longer period were to be required for cultural objects, the question of definition would arise. All definitions are somewhat arbitrary, but for simplicity it would make sense to adopt one of the existing definitions, and like the DCFR we would suggest that the definition in the EU Directive should be used. Were such an approach to be adopted, we think that all cultural objects should be included, not only those that had been subject to unlawful export and not only those originating in a Member State. Thus Scottish cultural objects (eg an object many years previously stolen from a Scottish museum) and, say, Sri Lankan cultural objects would be covered.

10.5 As noted earlier, some legal systems have a rule of imprescriptibility in some types of case. Suppose that a letter written by William Wallace in his own handwriting were to be discovered and placed in the National Archives of Scotland. Suppose that it were stolen by Villain and later bought in good faith by Honestius. Should a time ever come when the latter would obtain a good title, and hence be able to withhold it from the National Archives of Scotland?

10.6 Finally, if a longer period is to apply to cultural objects – or possibly even imprescriptibility – there might be a case for compensation to the possessor once the standard prescriptive period had passed. For example, suppose that the standard prescriptive period is twenty years, and the period for cultural objects is fifty years, and a cultural object is recovered by the owner thirty years after its loss. Such a rule would preserve the policy objective of returning the object to its proper home, while not penalising the possessor for the distinction between cultural and other objects.

10.7 On balance we incline to think that to have a special regime for cultural property would complicate the law without sufficient countervailing benefits. It may be noted that if the proposals in this Discussion paper were to be adopted, the period for positive prescription would be longer in Scots law than in any legal system in Europe which we have researched. The longer the period is, the less need is there for exceptions. (This is the same reason for rejecting special rules for cases where the owner is unable to act.) Nevertheless to test the views of consultees, we ask:

- 22. (i) If a system of positive prescription is introduced, should cultural objects be subject to a longer period than the standard period?**
- (ii) If so, do consultees agree that the definition in the EU Directive be adopted, but applying to all cultural objects, including those from outwith the EU and also those that have not been unlawfully removed?**
- (iii) How long should the period be?**
- (iv) Should there be any cases where positive prescription should be excluded altogether?**
- (v) Where a cultural object is recovered *after* the standard period has elapsed, should the owner have to compensate the possessor?**

Part 11 Intellectual property and negative prescription

11.1 This discussion paper is chiefly about the effect of the running of time on title to corporeal moveable property. But in 2009 a House of Lords case, *Fisher v Brooker*,¹ showed that some uncertainty existed in relation to the effect of the running of time on title to intellectual property rights – rights that can be of high value. The case identified what can be regarded as a gap in the 1973 Act – parallel to the gap discussed in the previous parts of this paper. When preparing our Eighth Programme, we therefore decided that it would make sense to include this issue in the project.²

11.2 In *Fisher v Brooker*, the claimant Matthew Fisher succeeded in the lower courts in establishing that he was a joint author of the famous popular music work, "A Whiter Shade of Pale", recorded by the band Procul Harum and released in 1967. Fisher's contribution to the work was the composition of the organ solo at its outset and the organ melody which forms a counterpoint throughout most of the rest of the work. The other author of the music was Gary Brooker, like Fisher a member of Procul Harum at the time; the lyrics were written by the band's manager, Keith Reid. The copyrights in this work were however claimed by Brooker and Reid, and although Fisher from time to time made inquiries about his rights, he in effect let his claim to a share in the copyright (and the resultant royalties) lie dormant until 2005. At that point Fisher began serious moves to claim his entitlement, leading to the litigation of which the House of Lords' judgment was the climax.

11.3 Before Blackburne J at first instance, Fisher's claims were successful. It was also held, however, that any rights to a share of the royalties more than six years before he began actively to make his claims were time-barred,³ while that specific period of inactivity meant that he must be also taken to have gratuitously licensed the exploitation of his contribution by the others involved. The judge further refused to grant Fisher an injunction against further exploitation of the work. But he held in Fisher's favour on an argument that the latter had lost his interest in the copyright as a result of estoppel, laches or acquiescence.⁴ Overall, then, what this judgment gave Fisher was an enforceable interest in his copyright taking effect from 2005. But this was substantially over-turned by the Court of Appeal in a majority decision holding that it was unconscionable for Fisher to have revoked the implied licence in 2005 and that the defences of acquiescence and laches operated to prevent him exercising his rights as joint copyright holder in "A Whiter Shade of Pale".⁵ The

¹ [2009] UKHL 41; [2009] 1 WLR 1764.

² Eighth Programme of Law Reform (Scot Law Com No 220, February 2010).

³ Claims to the payment of royalties should be distinguished from claims to the copyright itself. The former, it is thought, would fall under the quinquennial prescription in Scots law, with the prescriptive period beginning when the royalties fell due. This paper is concerned only with claims to the copyright.

⁴ *Fisher v Brooker* [2006] EWHC 3239 Ch, [2007] FSR 12.

⁵ *Fisher v Brooker* [2008] EWCA Civ 287, [2008] FSR 26.

House of Lords in its turn unanimously reversed the Court of Appeal on acquiescence and laches, and more or less re-instated the first instance judgment.⁶

11.4 Lord Hope's speech in the House of Lords contains some obiter remarks on the possible application of negative prescription in this case had it fallen to be dealt with under Scots law, in particular section 8 of the Prescription and Limitation (Scotland) Act 1973 on the extinction of rights of property which are not exercised or enforced for a period of twenty years.⁷ While this expressly does not apply to imprescriptible rights such as the ownership of land, the Act does not make clear whether or not it applies to the ownership of corporeal moveables, or to incorporeals such as copyright and other forms of intellectual property right. Lord Hope quotes, seemingly with approval, the views of commentators that the Act does apply to claims for the recovery of corporeal moveables based on ownership,⁸ but also states that "there is much to be said for" the same commentators' views that "section 8 of the 1973 Act should not be read as extending to the ownership of incorporeal property the duration of which has been prescribed by another enactment".⁹ Copyright is a property right under the Copyright, Designs and Patents Act 1988, the duration of which is laid down by the same Act: 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.¹⁰ Lord Hope's view that this statutory term could not be abbreviated by the operation of prescription was reinforced by the express dis-application of the equivalent English legislation (the Limitation Act 1980) to copyright by section 39 of that Act, which reads:

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.

11.5 "It would be anomalous," suggested Lord Hope, "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."¹¹

11.6 Amongst intellectual property rights the issue is probably limited to copyright and performers' rights (which exist in relation to recordings of performances and last until fifty years from the end of the calendar year in which the performance took place or in which the

⁶ For commentary on how the case might have been treated under the Scots law of personal bar, see Hector MacQueen, "Abandoned, orphaned or property for ever? Copyright, prescription and personal bar" (2010) 14 EdinLR 97.

⁷ [2009] UKHL 41; [2009] 1 WLR 1764, paras 3 to 4. Lord Neuberger, giving the main speech in the case, also refers to the Prescription and Limitation (Scotland) Act 1973 and the "considerable difficulties" with which it would have confronted the claimant (para 78), but does not go into any detail about these difficulties.

⁸ Those cited are D Johnston, *Prescription and Limitation* (1999) para 7.08; K G C Reid, "Property", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993) para 567 and D M Walker, *Prescription and Limitation of Actions*, 5th edn (1996) 85. (The Reid citation is the same as the work cited in this discussion paper as Kenneth Reid, *Law of Property in Scotland* (1996).)

⁹ Para 4.

¹⁰ Copyright, Designs and Patents Act 1988, s 12.

¹¹ [2009] UKHL 41; [2009] 1 WLR 1764, para 4.

recording was released¹²). The twenty-year length of the negative prescription means that it is not likely to arise in the case of patents, the term of which is also twenty years from their filing date.¹³ Registered trade mark rights are of ten years' duration but the registration may be renewed indefinitely for further periods of ten years.¹⁴ It should be noted that the relevant legislation for both patents and trade marks has "use it or lose it" provisions by which non-use of the right by the holder will cost the holder its rights or, in the case of a patent, make them the subject of a compulsory licence.¹⁵ Registered designs have a term of five years, renewable up to a maximum of twenty-five years.¹⁶ With both registered designs and registered trade marks the renewal of a registration would be enough to interrupt any prescriptive period long before its twenty years were up. Unregistered designs have protection for a maximum period of fifteen years, which is also the period of protection under the sui generis database right, so neither lasts long enough to bring a twenty-year prescriptive period into play.¹⁷

11.7 The issue of unused copyrights – often known as the problem of "orphan works" – has been the subject of considerable public debate in recent years. Since copyright does not depend upon public registration, there is often uncertainty about who the present holder of the rights may be if they are not being actively exercised; and there may even be uncertainty about whether or not the right still exists if the original author's date of death is unknown. Authors' identities may also be cloaked in anonymity or pseudonymity. This presents particular problems for projects involving the mass digitisation of potentially copyright works such as books, which cannot be lawfully carried out without the licence of the copyright holders. There seems no reason to doubt that similar issues could arise with performers' rights.

11.8 While it is accepted that there is a potential public benefit in the creation of digital libraries accessible online, it is also reasonably clear that the barrier to their complete realisation posed by the existence of copyright in orphan works is not to be surmounted by sweeping that copyright away altogether.¹⁸ Thus, for example, the Digital Economy Bill presented to Parliament in November 2009 contained provisions which would have empowered the Secretary of State to make regulations under which a licensing body could either do, or grant licences to do, acts in relation to an orphan work which would otherwise require the consent of the copyright holder. (These provisions were eventually abandoned in order to enable the Bill to pass through the "wash-up" procedure and become the Digital Economy Act 2010 just before the General Election in May 2010). The continuing existence of a copyright was taken as read. We do not understand that there is any likelihood of a shift of policy in this regard in either the United Kingdom Government or the European Union.

11.9 There has been little or no awareness in the debate that, at least in Scotland, there was room for an argument that the non-exercise of the copyright in an orphan work for a period of twenty years could lead to the extinction of that right. But there would be no scope for such an argument in other parts of the United Kingdom as a result of section 39 of the

¹² Copyright, Designs and Patents Act 1988 s 191(2).

¹³ Patents Act 1977, s 25.

¹⁴ Trade Marks Act 1994 s 42.

¹⁵ Patents Act 1977 ss 48, 48A, 48B; Trade Marks Act 1994 s 46.

¹⁶ Registered Designs Act 1949 s 8. An unused registered design could be made the subject of a compulsory licence until 2001: Registered Designs Act 1949 s 10, repealed.

¹⁷ Copyright, Designs and Patents Act 1988 s 216; Copyright and Rights in Databases Regulations 1997, reg 17.

¹⁸ See Hector MacQueen et al, *Contemporary Intellectual Property: Law and Policy* (2nd edn, 2010), chapter 7.37.

Limitation Act 1980. It seems to us that it would indeed be anomalous if the problem of copyright in orphan works was resolved differently in different parts of the United Kingdom as a result of legislation drawn up with quite distinct objectives in mind. The problem is one which could quite simply be resolved by an amendment of the Prescription and Limitation (Scotland) Act 1973 along the lines of section 39 of the English Limitation Act 1980, viz a provision that the 1973 Act did 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 the amendment.

11.10 We therefore propose:

- 23. 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.**

Part 12 List of proposals and questions

1. Do consultees agree that the introduction of a system of positive prescription would increase certainty?

(Paragraph 6.17)

2. Do consultees agree that the introduction of a system of positive prescription would increase the marketability of long-lived moveable assets?

(Paragraph 6.17)

3. What economic benefit (if any) do consultees consider likely to arise as a result of such an increase in certainty and / or marketability?

(Paragraph 6.18)

4. Do consultees agree that there should be some form of positive (acquisitive) prescription for corporeal moveables?

(Paragraph 6.19)

5. The term "usucapion" should not be adopted.

(Paragraph 6.20)

6. Should an ostensibly valid act of acquisition be a requirement (in addition to the requirement of good faith)?

(Paragraph 7.3)

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

(Paragraph 7.4)

8. Should supervening knowledge (actual or constructive) on the part of the possessor interrupt prescription?

(Paragraph 7.10)

9. In the ordinary case, what period of possession should be required for the establishment of a prescriptive title?

(Paragraph 7.16)

10. Do consultees agree that incapacity, or other inability to act, should not suspend the running of prescription?

(Paragraph 7.19)

11. Should there be a shorter prescriptive period in cases where the owner is reasonably able to trace the goods? If so, how long?

(Paragraph 7.23)

12. Do consultees agree that the possession should be, as for land, continuous, peaceable and without judicial interruption?

(Paragraph 7.25)

13. Do consultees agree that, unlike land, there should be no requirement that the possession be "open"? If so, should deliberate concealment nevertheless bar prescription?

(Paragraph 7.25)

14. Positive prescription would presuppose an intention to possess as owner.

(Paragraph 7.32)

15. Do consultees agree that the legislation should not provide for compensation for a person who loses title by the running of positive prescription?

(Paragraph 7.34)

16. 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.

(Paragraph 7.37)

17. (i) Do consultees agree that the ownership of corporeal moveable property should, like land, cease to be subject to negative prescription?

(ii) At present, the sole beneficiary of negative prescription of title to moveables is the Crown. If this prescription is abolished, should a new non-possessory positive prescription be introduced in favour of the Crown?

(iii) If so, is a period of one hundred years appropriate?

(Paragraph 7.47)

18. (i) Are the special rules about animals (Dogs Act 1906 s 4(4) and Civic Government (Scotland) Act 1982 s 74) satisfactory? If not, how should they be changed?

(ii) Should the general period of positive prescription be shorter in relation to animals than in relation to other property, for example along the lines of Article 728 of the Swiss Civil Code?

(Paragraph 7.50)

19. (i) Do consultees agree that it would be appropriate for commencement of any new provision establishing a rule of positive prescription to be delayed by a period of years following Royal Assent to allow dispossessed owners a reasonable opportunity to assert their claims?

(ii) If so, would a period of three years be appropriate?

(Paragraph 7.54)

20. (a) Do consultees think that possession in good faith should always be required for a prescriptive title?

(b) Or do consultees think that there should be a longer prescriptive period (twice the standard period) which would run without the requirement of good faith, but which would be unavailable to thieves or reseters?

(c) Or do consultees prefer the third approach, namely that prescription should be capable of running, notwithstanding the lack of good faith, in the following two cases?

(i) Where the owner knows (actually or constructively) where the goods are and knows (actually or constructively) that the possessor is possessing as owner;

(ii) Where the possessor, even if willing to do so, could not contact the owner, because the owner's identity, or contact details, are not known to the possessor, and are not readily discoverable. But there should be no prescription in favour of a person who acquires possession by theft or in the knowledge that the property has been stolen.

(Paragraph 8.13)

21. Should corporeal moveable property that is abandoned become ownerless, and thus susceptible to appropriation under the doctrine of *occupatio*?

(Paragraph 9.7)

22. (i) If a system of positive prescription is introduced, should cultural objects be subject to a longer period than the standard period?

(ii) If so, do consultees agree that the definition in the EU Directive be adopted, but applying to all cultural objects, including those from outwith the EU and also those that have not been unlawfully removed?

(iii) How long should the period be?

(iv) Should there be any cases where positive prescription should be excluded altogether?

(v) Where a cultural object is recovered *after* the standard period has elapsed, should the owner have to compensate the possessor?

(Paragraph 10.7)

23. 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.

(Paragraph 11.10)

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