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**THE PHYSICAL ELEMENT OF POSSESSION OF
CORPOREAL MOVEABLE PROPERTY IN SCOTS
LAW**

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2014

ABSTRACT

Possession is a legal concept applying in a variety of legal contexts. In Scottish legal literature, however, there is little in-depth writing on the law of possession, and much of the law is uncertain. This thesis is intended to be a contribution to remedying this deficiency as far as one aspect of the law of possession is concerned, the physical element of possession of corporeal moveable property. As part of this, in the hope that this comparative and historical consideration would shed some light on the issues raised, the law of Rome is considered, along with the law of France, Germany and South Africa, as examples of the Civil Law tradition of legal systems drawing on Roman law. English law is also considered. The thesis is thus able to draw on both of the major traditions influencing the development of Scots law, namely the Civil Law and the Common Law. In this way, the thesis is able to consider the extent to which the Scots law on possession has been influenced by these two traditions.

The thesis begins giving an outline of the law of possession and the place of the physical element within it. The remainder of the thesis considers in detail the physical element and its role in both the acquisition and the loss of possession of corporeal moveable property. One of the difficulties with this is that many different areas of law use a concept called 'possession', and views differ as to the extent to which it is appropriate to talk of a general concept of possession. It is argued in the thesis that a general test can be developed for the physical element of possession, based on control of the property in a manner consistent with the assertion of a right to the property. This test is then developed through consideration of how it applies in a number of specific factual contexts.

I declare:

(a) that this thesis has been composed by me;

(b) that the work is my own; and

(c) that the work has not been submitted for any other degree or professional qualification.

.....

Craig Anderson

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ABBREVIATIONS

Baker, <i>Legal History</i>	Baker J H, <i>An Introduction to English Legal History</i> (4th edn, Oxford University Press 2007)
Balfour, <i>Practicks</i>	Balfour J, <i>The Practicks of Sir James Balfour of Pittendreich</i> (McNeill P G B (ed), Stair Society vols 21-22, 1962-1963)
Bankton, <i>Inst.</i>	M'Douall A, Lord Bankton, <i>An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity Between Them and the Laws of England</i> (first published 1751-1753, Stair Society vols 41-43 1993-1995)
Baur	Baur F, <i>Sachenrecht</i> (J F Baur & R Stürner, 18th edn, C H Beck 2009)
Bell, <i>Commentaries</i>	Bell G J, <i>Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence</i> (J McLaren ed, 7th edn, 1870, reprinted Butterworths 1990)
Bell, <i>Principles</i>	Bell G J, <i>Principles of the Law of Scotland</i> (W Guthrie ed, 10th edn, T & T Clark 1899)
Blackstone, <i>Commentaries</i>	Blackstone W, <i>Commentaries on the Laws of England</i> (4 vols, first published 1765-1769, University of Chicago Press 1979)
Bracton	Thorne S E (tr), <i>Bracton on the Laws and Customs of England</i> (4 vols, Harvard University Press 1968-1977)

Brehm & Berger	Brehm W & Berger C, <i>Sachenrecht</i> (Mohr Siebeck 2000)
Buckland	Buckland W W, <i>A Text-Book of Roman Law from Augustus to Justinian</i> (P Stein, 3rd rev edn, Cambridge University Press 1975)
Bufnoir, <i>Propriété et contrat</i>	Bufnoir C, <i>Propriété et contrat</i> (first published 1924, Faculté de Droit et des Sciences Sociales de Poitiers 2005)
Carbonnier	Carbonnier J, <i>Droit civil</i> (first published 1955, Quadriège/PUF 2004)
Carey Miller, <i>Corporeal Moveables</i>	Carey Miller D L with Irvine D, <i>Corporeal Moveables in Scots Law</i> (2nd edn, Thomson/W Green 2005)
Carey Miller, 'Transfer of Ownership'	Carey Miller D L, 'Transfer of Ownership' in R Zimmermann & D Visser (eds), <i>Southern Cross: Civil Law and Common Law in South Africa</i> (Clarendon Press 1996)
Carr, <i>Possession</i>	Carr D J, <i>Possession in Scots Law: Selected Themes</i> (MSc thesis, University of Edinburgh, 2005)
Cashin Ritaine, 'Transfer of Movables in France'	Cashin Ritaine E, 'National Report on the Transfer of Movables in France' in W Faber & B Lurger, <i>National Reports on the Transfer of Movables in Europe</i> (6 vols, Sellier 2008-2011), vol 4
Craig, <i>Jus Feudale</i>	Craig T, <i>The Jus Feudale, With an Appendix Containing the Books of the Feus</i> (J A Clyde (tr), W

Hodge 1934)

- D. Watson A (ed), *The Digest of Justinian* (4 vols, University of Pennsylvania Press 1988)
- DCFR Bar C von & Clive E (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 vols, Sellier 2009)
- Dias, *Jurisprudence* Dias R W M, *Jurisprudence* (5th edn, Butterworths 1976)
- Domat, *Civil law in its natural order* Domat J, *The Civil Law in its Natural Order, Together with the Publick Law* (W Strahan (tr), 2 vols, London 1722)
- Erskine, *Inst.* Erskine J, *An Institute of the Law of Scotland* (J B Nicolson (ed), 8th edn, Bell & Bradfute 1871)
- Forbes, *Great Body* Forbes W, *A Great Body of the Law of Scotland* (available at <http://www.forbes.gla.ac.uk/contents/>)
- Forbes, *Inst.* Forbes W, *The Institutes of the Law of Scotland* (first published 1722-1730, Edinburgh Legal Education Trust 2012)
- G. Gordon W M & Robinson O F (trs), *The Institutes of Gaius* (Cornell University Press 1988)
- Glanvill Hall G D G (ed and tr), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson 1965)

Gloag & Henderson	Gloag W M & Henderson R C, <i>The Law of Scotland</i> (13th edn, H L MacQueen & Rt Hon Lord Eassie (eds), W Green/Thomson Reuters 2012)
Gordon, <i>Criminal Law</i>	Gordon G H, <i>The Criminal Law of Scotland</i> (3rd edn by M G A Christie, 2 vols, W Green 2000-2001)
Gordon, <i>Land Law</i>	Gordon W M & Wortley S, <i>Scottish Land Law</i> (3rd edn, vol 1, W Green/Thomson Reuters 2009)
Gordon, <i>Traditio</i>	Gordon W M, <i>Studies in the Transfer of Property by Traditio</i> (University of Aberdeen 1970)
Grotius	Grotius H, <i>The Jurisprudence of Holland</i> (R W Lee tr, 2 vols, Oxford University Press 1926-1936)
Grotius, <i>De Jure Belli ac Pacis</i>	Grotius H, <i>De Jure Belli ac Pacis Libri Tres</i> (F W Kelsey tr, 3 vols, Oceana 1964)
Holdsworth, <i>History of English Law</i>	Holdsworth W S, <i>A History of English Law</i> vol 7 (Methuen 1925)
Holmes, <i>Common Law</i>	Holmes O W, <i>The Common Law</i> (M D Howe (ed), 2nd edn, Macmillan 1968)
Hope, <i>Major Practicks</i>	Hope T, <i>Hope's Major Practicks, 1608-1633</i> (J A Clyde ed, Stair Society vols 3-4, 1937-1938)
Hope, <i>Minor Practicks</i>	Hope T, <i>Practical Observations Upon Divers Titles of the Law of Scotland, Commonly Called Hope's Minor Practicks</i> (Edinburgh 1734)

- Huber
Huber U, *The Jurisprudence of My Time* (P Gane (tr), 2 vols, Butterworths 1939)
- Hume, *Commentaries*
Hume D, *Commentaries on the Law of Scotland, Respecting Crimes* (4th edn, 2 vols, first published 1844, Law Society of Scotland 1986)
- Hume, *Lectures*
Hume D, *Baron David Hume's Lectures, 1786-1822* (Paton G C H (ed), Stair Society vols 5, 13, 15, 17, 18, 19, 1939-1958)
- J.
Birks P & McLeod G (trs), *Justinian's Institutes* (Duckworth 1987)
- Jhering, *Besitzwille*
Jhering R von, *Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode* (Jena 1889)
- Jhering, *Grund des Besitzesschutzes*
Jhering R von, *Über den Grund des Besitzesschutzes: eine Revision der Lehre vom Besitz* (2nd edn, Jena 1869)
- Kleyn, 'Possession'
Kleyn D, 'Possession' in R Zimmermann & D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996)
- Kocourek, *Jural Relations*
Kocourek A, *Jural Relations* (2nd edn, Bobbs-Merrill 1928)
- Lee, *Roman-Dutch Law*
Lee R W, *An Introduction to Roman-Dutch Law* (5th edn, Clarendon 1953)

Malaurie & Aynès	Malaurie P & Aynès L, <i>Les biens</i> (2nd edn, Defrénois 2005)
McGuire, 'Transfer of Movables in Germany'	McGuire M, 'National Report on the Transfer of Movables in Germany' in W Faber & B Lurger, <i>National Reports on the Transfer of Movables in Europe</i> (6 vols, Sellier 2008-2011), vol 3
Mostert et al	Mostert H, Pope A, Pienaar J, van Wyk, J & Freedman W, <i>The Principles of the Law of Property in South Africa</i> (Oxford University Press Southern Africa 2010)
<i>Münchener Kommentar</i>	Rebmann K, Säcker F J & Rixecker R (eds), <i>Münchener Kommentar zum Bürgerlichen Gesetzbuch</i> (4th edn, 9 vols, C H Beck 2003-2004)
Paton, <i>Jurisprudence</i>	Paton G W, <i>A Text-Book of Jurisprudence</i> (G W Paton & D P Derham (eds), 4th edn, Clarendon Press 1972)
Pettit, 'Personal Property'	Pettit P H, 'Personal Property' in Lord Hailsham of St Marylebone (ed), <i>Halsbury's Laws of England</i> , vol. 35 (4th edn reissue, 1994)
Planiol	Planiol M with Ripert G, <i>Treatise on the Civil Law</i> (3 vols, Louisiana State Law Institute (tr), 1959)
Pollock & Maitland	Pollock F & Maitland F W, <i>The History of English Law Before the Time of Edward I</i> (2nd edn, 2 vols, Cambridge University Press 1923)
Pollock & Wright, <i>Possession</i>	Pollock F & Wright R S, <i>An Essay on Possession in the Common Law</i> (Clarendon Press 1888)

Pothier, <i>Contrat de vente</i>	Pothier R J, <i>Traité du contrat de vente: selon les règles, tant du for de la conscience que du for extérieur</i> (Barnardi (ed), Letellier 1806)
Pothier, <i>Possession</i>	Pothier R J, <i>Tr</i> <i>: suivis de</i> <i>titre XIV de la prescription et du titre XXII des cas</i> <i>possessoires du commentaire de la coutume d'Orleans</i> (Hutteau (ed), Letellier 1807)
Pothier, <i>Propriété</i>	Pothier R J, (Hutteau (ed), Letellier 1807)
Pufendorf, <i>De Jurae Naturae et Gentium</i>	Pufendorf S, <i>De Jure Naturae et Gentium Libri Octo</i> (C H Oldfather & W A Oldfather (trs), Clarendon Press 1934)
Pufendorf, <i>Elementorum Jurisprudentiae Universalis</i>	Pufendorf S, <i>Elementorum Jurisprudentiae Universalis Libri Duo</i> (W A Oldfather (tr), Clarendon Press 1931)
<i>Quoniam Attachiamta</i>	Fergus T D, <i>Quoniam Attachiamta</i> (Stair Society vol 44, 1996)
<i>Regiam Majestatem</i>	Cooper, Rt Hon Lord, <i>Regiam Majestatem and Quoniam Attachiamta Based on the Text of Sir John Skene</i> (Stair Society vol 11, 1947)
Reid, <i>Property</i>	Reid K G C with Gretton G L, Duncan A G M, Gordon W M & Gamble A J, <i>The Law of Property in Scotland</i> (Butterworths/Law Society of Scotland 1996)

- Salmond on Jurisprudence* Fitzgerald P J, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966)
- Savigny, *Possession* Savigny F C von, *Von Savigny's Treatise on Possession; or the Jus Possessionis of the Civil Law* (E Perry tr, S Sweet 1848)
- Schwab & Prütting Schwab K H & Prütting H, *Sachenrecht: ein Studienbuch* (24th edn, Beck 1993)
- Silberberg & Schoeman* Badenhorst P J, Pienaar J M & Mostert H, *Silberberg & Schoeman's The Law of Property* (5th edn, LexisNexis Butterworths 2006)
- Smith, *Lectures* Smith A, *Lectures on Jurisprudence* (R L Meek, D D Raphael & P G Stein (eds), Clarendon Press 1978)
- Smith, *Short Commentary* Smith T B, *A Short Commentary on the Law of Scotland* (W Green & Son 1962)
- Spotiswoode, *Practicks* Spotiswoode R, *Practicks of the Laws of Scotland, Observed and Collected by Sir Robert Spotiswoode* (J Spottiswoode (ed), Edinburgh 1706)
- Stair, *Inst.* Stair, James Viscount of, *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations* (D M Walker ed, Edinburgh University Press/Glasgow University Press 1981)

Steven, <i>Pledge and Lien</i>	Steven A J M, <i>Pledge and Lien</i> (Edinburgh Legal Education Trust 2008)
Swadling, 'Property'	Swadling W, 'Property: General Principles' in A Burrows (ed), <i>English Private Law</i> (2nd edn, 2007)
Terré & Simler	Terré F & Simler P, <i>Droit civil: Les biens</i> (8th edn, Dalloz 2010)
Thomas	Thomas J A C, <i>Textbook of Roman Law</i> (North Holland Publishing Co 1976)
van der Merwe, <i>Law of Things</i>	Merwe C G van der & Waal M J de, <i>The Law of Things and Servitudes</i> (Butterworths 1993)
van Leeuwen	Leeuwen, S van, <i>Simon van Leeuwen's Commentaries on Roman-Dutch Law</i> (J G Kotzé tr, 2 vols, Stevens & Haynes 1881-1886)
Voet	Voet J, <i>The Selective Voet, Being the Commentary on the Pandects</i> (P Gane tr, 6 vols, Butterworth 1955-1957)
Wieling	Wieling H J, <i>Sachenrecht, Band 1: Sachen, Besitz und Rechte an beweglichen Sachen</i> (2nd edn, Springer 2006)
Wilhelm	Wilhelm J, <i>Sachenrecht</i> (4th edn, De Gruyter 2010)
Windscheid	Windscheid B, <i>Lehrbuch des Pandektenrechts</i> (T Kipp, 9th edn, Rütten & Loening 1906)

Wolff & Raiser

Wolff M & Raiser L, *Sachenrecht: Ein Lehrbuch* (10th edn, J C B Mohr 1957)

Zenati-Castaing & Revet

Zenati-Castaing F & Revet T, *Les biens* (3rd edn, Presses Universitaires de France 2008)

FOREWORD: SCOPE OF THE THESIS AND GENERAL APPROACH

The nineteenth century German jurist Savigny begins his book on possession by noting that works on the subject usually begin:

...with complaints as to the extraordinary difficulty of the subject. Some, indeed, have been so serious with their complaints, as to have been driven by it into a sort of despair.¹

This thesis examines the acquisition and loss of the physical element of possession of corporeal moveable property. However, before embarking on this examination, it is necessary first to consider the general question of what possession means. Part of the difficulty that Savigny mentions lies in the general principles on which possession is based. However, there is a further difficulty. Possession is a concept used in a wide variety of contexts. It is not immediately apparent that there need be such a thing as 'possession' in the first place, if by that is meant a single concept applying to all areas of the law that depend on some concept of possession.

Chapter 1 is concerned with these issues, considering first the meaning of possession. The remainder of chapter 1 will consider the extent to which it is reasonable to treat possession as a unitary concept. This is necessary background to any consideration of a particular aspect of possession. The remainder of the thesis will be concerned specifically with the physical element of possession of corporeal moveable property.

Chapter 2 is concerned with various historical and comparative considerations of the physical element of possession of corporeal moveable property.

Chapter 3 considers the acquisition of the physical element in Scots law, taking account of the historical and comparative sources.

Chapter 4 does the same for the loss of the physical element of possession.

Chapter 5 considers the case where a would-be possessor has established only momentary control of the property.

Chapter 6 considers whether one may acquire possession through symbolical acts.

¹ Savigny, *Possession* 1.

Chapter 7 considers the possession of animals.

Finally, chapter 8 concludes.

Although the focus is on Scots law, it will be apparent from the content of chapter 2 that there will be a historical and comparative element to the thesis. This approach may be justified on two grounds.

First, as a smaller jurisdiction, Scotland has generated only limited literature and authority on the issues to be considered. Accordingly, as long as one is sensitive to the differences between legal systems, it is sensible to expand the net to take in consideration of the issues by those writing in other traditions.

Second, such consideration is especially valuable when it comes from a system of law with a historical relationship with Scots law. A shared tradition increases the likelihood that the solution found in one system will also be correct in another.

On the basis of these points, it seems clearly reasonable to give significant consideration to Roman law, which has had considerable influence over the development of Scots law. Thus, in Stair's general account of possession,² of the six paragraphs referring to authority four³ refer only to Roman sources. Of the two referring to Scots sources, one⁴ replicates the Roman rule that possession of part is possession of the whole.⁵ Of the eleven paragraphs citing no authority, one in fact is following Labeo's etymology of the word *possessio*.⁶ Erskine's account makes more use of authority generally, but uses Roman sources in much the same proportion: in the eleven paragraphs of Erskine's general account of possession,⁷ he refers thirty-five times to authority. Of these, twenty-two are references to Roman sources.⁸ Bankton also makes extensive use of Roman sources in the thirteen paragraphs of his

² This extends to seventeen paragraphs: *Inst.* 2,1,8-24. Other relevant material appears elsewhere, eg 2,1,33 (*occupatio*), 2,1,42 (presumption of ownership arising from possession) and 4,28 and 4,30 (possessory remedies).

³ *Inst.* 2,1,18-20 and 23, on the nature of the physical element of possession (18), loss of possession (19-20) and the *bona fide* possessor's right to fruits (23).

⁴ *Inst.* 2,1,13. The other paragraph referring to Scots authority is *Inst.* 2,1,24, which contains a substantial account of the detailed rules for the *bona fide* possessor's right to fruits.

⁵ Paul, D.41.2.3.1.

⁶ Reported by Paul, D.41.2.1pr. Stair cites this at *Inst.* 2,1,9.

⁷ Erskine, *Inst.* 2,1,20-30.

⁸ Of the other thirteen, ten are references to Scots cases and three are references to Stair's *Institutions*.

general account of possession,⁹ with a majority of references being to Roman sources and with no references to any non-Roman source until the eighth paragraph.¹⁰

As for the law before Stair, it is true that before Stair there existed no general, systematic account of Scots private law. The earlier literature is almost entirely in the form of practicks, largely consisting of the decisions of the Scottish courts.¹¹

However, the fact that earlier writers did not give such general accounts of the law does not however mean that they did not understand the law in that way: Stair's approach does not represent as radical a break with the previous law as at first appears. Reid observes that:

'The absence of [general] literature is itself an important historical fact. The practicks seem almost to presuppose the existence of a literature somewhere else...'¹²

The earlier writers were quite prepared to draw on *Ius Commune* sources, and did so extensively,¹³ and considerable importance was attached to learning in the Civil Law in admission to the Faculty of Advocates.¹⁴ It is clear enough, therefore, that this literature whose existence elsewhere was presupposed was the literature of the *Ius Commune*. Stair, in giving a general account of possession drawing on both native and *Ius Commune* sources, was reflecting the practice of his time. This influence still

⁹ Bankton, *Inst.* 2,1,26-35 (paragraph numbers 31-33 are repeated).

¹⁰ Bankton, *Inst.* 2,1,33.

¹¹ In fact, two types of practicks can be distinguished. One, the decision practicks, is as described here. A later form, digest practicks, supplements this with material from other sources, such as legislation and the medieval treatise *Regiam Majestatem*, and practical observations. Neither form was, however, particularly systematic or comprehensive. On the distinction between decision and digest practicks, see H McKechnie, 'Practicks, 1469-1700' in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 28.

¹² K Reid, 'Property Law: Sources and Doctrine', in K Reid & R Zimmermann, *A History of Private Law in Scotland: Volume I. Introduction and Property* (Oxford University Press 2000) 199. See also H McKechnie, 'Practicks, 1469-1700' in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, vol 1, 1936) 29.

¹³ See eg G Dolezalek, 'The Court of Session as a *Ius Commune* Court – Witnessed by 'Sinclair's Practicks', 1540-1549' in Stair Society (ed), *Miscellany Four* (Stair Society 2000); P Stein, 'The Influence of Roman Law on the Law of Scotland' 1963 JR 205; WM Gordon, 'Roman Law in Scotland' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society 1995); JW Cairns, 'The Civil Law Tradition in Scottish Legal Thought' in DL Carey Miller & R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Duncker & Humblot 1997).

¹⁴ JW Cairns, 'Historical Introduction', in K Reid & R Zimmermann, *A History of Private Law in Scotland: Volume I. Introduction and Property* (Oxford University Press 2000) 126-127.

continues today, with Roman and *Ius Commune* sources being referred to in the courts more often than is sometimes realised.¹⁵

By the same token, it seems reasonable also to consider other systems influenced by Roman law. As their development has been based on the same sources, they may have insights of use in our own system. For this reason, French, German and South African law have been considered as a fair sample of Roman-influenced systems of property law. Occasional reference to other systems has also been made.

Finally, also considered is the Common Law tradition of systems finding their origin in English law. Although the English law of possession is, as we shall see, markedly different from the Scots law, reference to English cases in the absence of Scots authority is a common practice.¹⁶ If they are going to be referred to by the courts, then they also need to be considered. In addition, some statutory uses of the term 'possession' are common to Scotland and England, and so cases on those statutory uses are of clear relevance.

¹⁵ See eg JW Cairns & P du Plessis, 'Ten years of Roman law in Scottish courts' 2008 SLT (News) 191 on the use of Roman authorities in the Scottish courts. For a recent example of discussion of a *Ius Commune* source (in this case Pothier), see the decision of the Supreme Court in *Morris v Rae* [2012] UKSC 50.

¹⁶ See eg Reid, *Property*, para 124, where *Parker v British Airways Board* [1982] 1 QB 1004 is discussed as being likely to be influential in the absence of Scots authority on the same point (possession of items lost within premises).

1 THE MEANING OF POSSESSION

At the outset of a thesis on possession, it seems best to give some idea of the meaning of possession and of its role within the law. We shall see that possession is a concept that is used in a number of different areas of the law. This chapter therefore has two purposes. The first is to show what possession means. The second is to ask whether, given the variety of contexts in which possession is important, it makes sense to talk in terms of a general law of possession.

A. WHAT IS POSSESSION?

(1) Possession and ownership

A comparative approach to possession is immediately faced with the difficulty that the two leading legal traditions diverge in the meaning and role of possession. It is therefore necessary first to explain this distinction.

(a) The Civilian tradition. The Civilian tradition of property law is characterised by, among other things, a sharp distinction between possession and ownership: as Ulpian puts it, 'ownership has nothing in common with possession'.¹ Possession is protected, without regard to who has the right to possess the property.² The point, says Justinian, is merely to determine who must raise the action based on ownership,³ the party in possession normally being entitled to remain in possession until another party proves a right to possess, based on ownership or another real right. This distinction has been received into modern Civilian systems of property law.⁴

In Scots law, too, possession is seen as a 'distinct lesser right than property',⁵ and is given interim protection without determining who has the right to possess.⁶

¹ D.41.2.12.1.

² Paul, D.41.2.3.5.

³ J.4.15.4. See also Ulpian, D.41.2.35.

⁴ See eg *Silberberg & Schoeman*, para 12.1; van der Merwe, *Law of Things*, para 55 (South Africa). The definitions of possession in France and Germany make no reference to any requirement for the existence of a right to possess (*Code civil*, art 2255; *BGB*, s 854(1)).

⁵ Stair, *Inst.* 2,1,8.

(b) The Common Law tradition. In his preface to the *Essay on Possession in the Common Law*, co-written with Wright, Pollock notes the absence of any general, systematic account of the law of possession in England.⁷ Thus, among earlier writers on English law, neither Glanvill, Bracton nor Blackstone has such a general account, nor does Kent's formative work on the law of the United States, the *Commentaries on American Law*.⁸ Indeed, Pollock indicates that it is this lack that separately caused him and Wright to conceive of such a study. The reason for the absence of such a study before Pollock and Wright's book appears to lie in the way English lawyers understand the concepts of ownership and possession.

While, as we have seen, civilian jurists draw a clear distinction between ownership and possession, English law has historically seen ownership as a relative concept,⁹ with no clear distinction drawn between ownership and possession.¹⁰ In English law, the 'mere act of taking possession bestows a right to exclusive possession'.¹¹ The question in a dispute over title in England is not who is objectively owner, but rather which of the parties has a better right, and it would be entirely possible to be held to have a good title as against one person, but not as against another.¹² Such a title may be derived from possession.¹³ Thus, in *Armory v Delamirie*,¹⁴ the finder of a ring was held entitled to retain the ring against anyone except one with a prior right. Even a wrongful possessor is protected against any subsequent holder.¹⁵ Thus, in *Costello v Chief Constable of Derbyshire Constabulary*,¹⁶ the possessor of a stolen car was held to have a possessory title good

⁶ See eg *Somerville v Hamilton* (1541) Mor 14737; *Men of Selkirk v Tenants of Kelso* (1541) Mor 14738; *Lady Renton v Her Son* (1629) Mor 14739; *Yeoman v Oliphant* (1669) Mor 14740; *Porterfield v McMillan* (1847) 9 D 1424.

⁷ Pollock & Wright, *Possession v.*

⁸ J Kent, *Commentaries on American Law* (13th edn, C M Barnes (ed), 4 vols, Little, Brown 1884).

⁹ Pollock & Maitland, vol 2, 153.

¹⁰ Baker, *Legal History*, 439.

¹¹ Swadling, 'Property', para 4.414.

¹² See Swadling, 'Property', para 4.414; Pettit, 'Personal Property', para 1220.

¹³ On this, see generally R Hickey, *Property and the Law of Finders* (Hart 2010).

¹⁴ (1721) 1 Strange 505, 93 ER 664. It has been suggested the case would be better seen as one of contract or tort: D Riesman, 'Possession and the Law of Finders' (1938-1939) 52 *Harvard Law Review* 1105, 1110. For a suggestion that the case was not originally concerned with the rights of finders specifically, see Hickey (n 12) 25-27.

¹⁵ Paton, *Jurisprudence* 554.

¹⁶ [2001] 1 WLR 1437. For discussion of the case, see D Fox, 'Enforcing a possessory title to a stolen car' (2001) 61 *Cam LJ* 27; J Getzler, 'Unclean hands and the doctrine of jus tertii' (2001) 117 *LQR*

against anyone except the party from whom it had been stolen, despite knowing of (and possibly being a party to) the theft. He was therefore entitled to recover the car from the police, by whom it had been seized.

Even with Pollock and Wright's general treatment of the matter available, there appears to be little inclination amongst English jurists to view possession as a general concept and, in modern accounts of English property law, the tendency is to make no link between possession of land and possession of moveable property.¹⁷ Again, the lack of clear distinction between possession and ownership has continued into modern law.¹⁸ An example may be found in Holmes' account of possession. He is talking about how possession comes to an end, arguing that possession need not come to an end just because control of the property is lost. He supports this by reference to a US case, *Clark v Maloney*.¹⁹ In that case, a man found logs afloat in a river, and took possession. The logs then got free and were taken by another. The logs were awarded to the first taker. For Holmes, the justification for this was that the first taker's possession lasted until the second taker interrupted it. No doubt this is correct as a matter of US law, but from the point of view of the Civilian tradition of property law the justification appears to confuse the issues. From that point of view, the first taker's claim would be based on ownership, acquired through possession. As ownership is not dependent on possession for its continuance, there is no need to hold the first taker's possession to continue, despite the loss of control, in order to reach the same result.²⁰

565; JA Coutts, 'Police Rights Over Property Seized as Stolen Goods' (2002) 66 J Crim L 224; G Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603; Hickey (n 12) 128-30.

¹⁷ See eg Swadling, 'Property', paras 4.414-4.420; Pettit, 'Personal Property', paras 1211-1226. Both of these are restricted to moveable property.

¹⁸ *Salmond on Jurisprudence* 279.

¹⁹ (1840) 3 Harrington (Del) 68, cited Holmes, *Common Law* 187.

²⁰ This assumes that the logs were ownerless when first taken. If they were owned at this point, neither taker could in Scots law have acquired any right at all (other than possession itself). Of course, if the logs had grown in Scotland they would have done so as an accessory of land in someone's ownership, and if abandoned would have fallen to the Crown. Accordingly, the logs could only be ownerless in Scotland if they had come in that state from outwith the jurisdiction.

(2) Possession and the right to possess

In England, as we have seen, a possessor by virtue of that possession acquires a right in the property, enforceable against any but one with a prior right. Even a thief becomes, in a sense, owner of the property he has stolen. A person acquires a right to possess, enforceable against the world at large, because he has once had possession.

In the Civilian tradition, on the other hand, the distinction drawn between possession and ownership means that a possessor acquires no right to continue to possess the property beyond the very limited protection afforded by the possessory remedies, considered below. This protection, however, is only an interim one, and gives no right to continue in possession once the question of right has been resolved. Thus, in Scots law, the decision in *Costello v Chief Constable of Derbyshire Constabulary* would be impossible. In Scotland, Costello would have no right to possess the car. He would not even be able to recover the car from the police on the basis of *spuilzie*, because the police took possession on the basis of statutory authority.

This difference of approach between the Civilian and Common Law traditions means that particular caution is needed with English cases on possession. The question of possession is likely to arise in different circumstances in the Common Law and, given the different consequences of possession, it may be that the test for possession will itself be different.

(3) The elements of possession

The everyday idea of possession involves physical holding of the property. However, not all holders are possessors. Paul observes that:

'we take possession physically and mentally, not mentally alone or physically alone'.²¹

²¹ D.41.2.3.1.

On this view, there are two requirements to satisfy before one can be said to possess: one must have some form of physical relationship to the property, and one must have a certain state of mind. These two elements are respectively known as *corpus* and *animus*.

(a) Animus. The nature of the mental element in the Roman law of possession is disputed, the two leading theories being those of Savigny, who considered that the intention to hold as owner was required,²² and Jhering, in whose view every conscious holder was a possessor unless the ground of his holding was one that the law did not allow as a basis of possession.²³ The holder's actual intention is neither here nor there: '*die Rechtsregel, nicht der Wille, entscheidet über Besitz und Detention*'.²⁴ The weakness of this position is that Jhering's theory cannot satisfactorily explain why possession exists on certain grounds but not on others. Equally, Savigny's theory cannot explain adequately those cases where one is held to possess without the intention to hold as an owner, such as the case of a pledgee, a difficulty Savigny attempts to overcome by means of a doctrine of 'derivative possession'.²⁵

Whatever the correct answer may have been for Roman law, there has been a tendency in later law to broaden the scope of possession. This can be done directly, as in Germany, by broadening the definition of the mental element.²⁶ Alternatively, it can be done indirectly, as in France, by extending possessory protection to certain non-possessors.²⁷ Scots law takes the former approach. The mental element is defined by Stair as 'the inclination or affection to make use of the thing detained'.²⁸ This formulation is adopted by Bankton,²⁹ and is also used in Reid's account.³⁰ On this view, all that is required is an intention to hold for one's own benefit.

²² Savigny, *Possession* 72.

²³ Jhering, *Besitzwille* 19-20.

²⁴ Jhering, *Besitzwille* 538 ('the rule of law, not the will, decides between possession and detention').

²⁵ Savigny, *Possession* 79-82.

²⁶ *BGB*, s 868.

²⁷ *Code de procédure civile*, art 1264.

²⁸ Stair, *Inst.* 2,1,17.

²⁹ Bankton, *Inst.* 2,1,26.

³⁰ Reid, *Property*, para 125.

Erskine appears at first to adopt a stricter test of holding by a person 'as his own property',³¹ with the result that Carey Miller considers 'possession proper' to exist only where the property is held with the intention to hold as owner (*animo domini*).³² Certainly, one holding entirely on another's behalf, such as a depositary or a steward, does not possess,³³ and nor does one holding by 'tolerance or bare license [*sic*].'³⁴ However, it does not appear that Erskine intends to restrict possession to those holding *animo domini*, for he allows possession to exist also in the cases of liferenters, tenants 'and generally in every case where there are inferior rights affecting any subject distinct from the property of that subject'.³⁵

It appears, therefore, that it is enough to hold in the manner of one asserting a real right. What is less clear is whether it is enough to hold on the basis of a personal right. Certainly, it appears to be enough in German³⁶ and South African³⁷ law. Stair's test suggests that the same is true of Scots law, as long as the holder holds at least in part for his own benefit. However, while it is not inconsistent with Erskine's approach, all of the specific examples he gives are of holdings on the basis of real rights.³⁸ As we shall see below, however, support for the view that holding on the basis of a personal right may be found in some cases on delictual liability for pure economic loss caused by negligence. What is certainly clear, though, is that one who holds entirely on another's behalf is not a possessor. Such a holder is said to have only custody, and is known as a custodian.

(b) *Corpus*. In addition to the mental element of possession, it is also required that the would-be possessor establish some physical relationship to the property. Without this requirement, as Erskine points out, 'possession would be too vague and uncertain'.³⁹ The physical element of possession may be seen, therefore, as the outward expression of the possessory intention. Its purpose is to convey that

³¹ Erskine, *Inst.* 2,1,20.

³² Carey Miller, *Corporeal Moveables*, para 1.18. For discussion, see also R Caterina, 'Concepts and Remedies in the Law of Possession' (2004) 8 *Edin LR* 267.

³³ Erskine, *Inst.* 2,1,23.

³⁴ *ibid* 2,1,20.

³⁵ *ibid* 2,1,22.

³⁶ *BGB*, s 868.

³⁷ *Silberberg & Schoeman* 283.

³⁸ Although leases are only real by statute: Leases Act 1449.

³⁹ Erskine, *Inst.* 2,1,20. See also Stair, *Inst.* 2,1,18.

intention to the outside world. We may suspect, therefore, that what is required of the physical element is sufficient acts that an objective bystander would infer the mental element to exist. We shall see in this thesis the extent to which this is the case.

(c) Relationship between *corpus* and *animus*. Although this thesis is concerned with the physical element of possession, it must be accepted that it is artificial to view the mental and physical elements in isolation from each other. The two are intimately connected. Although regard may be had to other evidence of possessory intention,⁴⁰ it is clear that the primary means of determining someone's intentions is to look at his actions. The intention may be inferred from those actions and their context. Thus, the intention to possess is presumed 'whenever the profit of the detainer may be to make use of the thing'.⁴¹ The contrary is presumed when to take possession would constitute a crime,⁴² perhaps on the basis of the presumption of innocence of crime.

If the acts of a party are sufficiently unambiguous, it may indeed be impossible to prove an intention contradicting those acts. Thus, for example, in *Henry v Dunlop & Co*,⁴³ the court held that there was a valid delivery of cattle when the seller allowed the buyer's employee to drive them off, even though the seller's employees, who had helped in this, were under secret instructions to retain control until the price was paid. Thus, the seller was held on the basis of the employees' acts to have delivered possession to the buyer, even though this was contrary to the seller's actual intention.

On the other hand, an ambiguity may sometimes be resolved by using extraneous evidence of *animus* to assist in interpreting the physical acts:

Acts which taken by themselves are equivocal and without apparent significance may be treated as good evidence of *corpus* in circumstances where the necessary *animus* is clearly present. One who buys, for example, will be required to show fewer acts of possession than one who finds.⁴⁴

⁴⁰ For example, where custody is taken by the buyer in a contract of sale, the existence of that contract will allow the existence of the possessory intention to be inferred (Reid, *Property*, para 117).

⁴¹ Stair, *Inst.* 2,1,17; Bankton, *Inst.* 2,1,26.

⁴² Stair, *Inst.* 2,1,17; Bankton, *Inst.* 2,1,26; Erskine, *Inst.* 2,1,20.

⁴³ (1842) 5 D 3.

⁴⁴ Reid, *Property*, para 117.

It appears then that both *corpus* and *animus* are to be interpreted according to surrounding circumstances. The significance of this point is that, while this thesis is concerned with the physical element of possession, the mental element cannot be disregarded.

(d) Natural and civil possession. This thesis is mostly concerned with natural possession, which is possession held by the possessor personally. It must be noted, however, that possession may also be held through another's acts, this being known as civil possession.⁴⁵ For example, if a person's property is in the hands of an agent or let to a tenant, that person possesses civilly.

Occasionally there will be some doubt as to which of two (or more) parties is the civil possessor. In such cases, Reid seems justified in suggesting that:

The probable resolution is that possession is attributed to the person from whom the detentor derives his title or, if they are different, to the person whose claim he acknowledges by, for example, the payment of rent.⁴⁶

Thus, in *Birrell Ltd v City of Edinburgh District Council*,⁴⁷ where the former owner was allowed to stay in the property following compulsory purchase, the local authority was held to have entered possession on the basis that the former owner's right to continue in occupation was derived from the local authority. Supporting the alternative given by Reid is *Earl of Fife's Trustees v Sinclair*,⁴⁸ in which acknowledgement by a vassal of one of two parties claiming to be superior was held to demonstrate possession by that claimant.⁴⁹

More difficult is the case where the custodier is not, by the nature of the case, called upon to acknowledge either of the possible civil possessors. This situation arose in *Lubbock v Feakins*,⁵⁰ in which the seller of an extensive area of land claimed

⁴⁵ To hold through others' acts is, of course, the only way in which a juristic person can possess, suggesting that a juristic person may only possess civilly, and never naturally: Reid, *Property*, para 121.

⁴⁶ Reid, *Property*, para 121.

⁴⁷ 1982 SLT 111.

⁴⁸ (1849) 12 D 223.

⁴⁹ In the event, he was not able to show sufficient possession for prescriptive acquisition.

⁵⁰ Jedburgh Sheriff Court, 17th February 2012. For discussion, see R Rennie, 'The lodge with three names: Lubbock v Feakins' (2012) 16 Edin LR 438; KGC Reid & GL Gretton, *Conveyancing 2012* (Avizandum 2013) 157-162, especially 160-161.

that a smaller area containing a house had been wrongly included in the registered title. The buyer argued that the house had been correctly included (which the sheriff ultimately held to be the case), and that in any case he was a proprietor in possession and so the Land Register could not be rectified without his consent.⁵¹ The difficulty with this argument was that the house was occupied by a liferenter, and it is not clear that the liferenter ever acknowledged the buyer as possessor. The sheriff took the view that the buyer was in possession, but his reasoning is not convincing. At paragraph (37) of his opinion, the sheriff lists eleven factors which he considers to be relevant to the question:

1. The buyer was in possession of the rest of the estate.
2. There were other houses or cottages on the estate.
3. The buyer continued the previous insurance cover.
4. The buyer took legal advice on his responsibilities towards the liferenter.
5. On the basis of the advice received, the buyer cancelled the insurance, but otherwise left the liferenter in undisturbed occupation.
6. The buyer subsequently re-insured the liferented property.
7. The 'most prominent natural boundary of [the liferented property] is the hedge bounding the road and the natural boundary of the Estate is the road'.
8. The liferenter was in natural possession, but 'it was never portrayed that she owned it outright'.
9. The sellers had 'no title to the Lodge and [the liferenter] could not have occupied it on their behalf'.
10. The buyer had title to and possession of the road bordering the liferented subjects.
11. The liferented subjects lay 'between the road bounding it and the remainder of the Estate' and the buyer had 'natural possession of both the road and the Estate which surround the Lodge'.

⁵¹ Land Registration (Scotland) Act 1979 , s 9.

No doubt the third, fourth, fifth and sixth of these factors clearly demonstrate the buyer's intention to possess, but as far as the physical element of possession none of the remainder seem relevant to possession of the liferented subjects.

Perhaps the difficulty in *Lubbock v Feakins* can be resolved by an analogy with cases on corporeal moveable property. It is the existence of civil possession that allows delivery of goods to take place without any change of physical control, when the goods are held by an independent third party, by giving notice to that third party.⁵² In the same way, it could be suggested that the buyer in *Lubbock v Feakins* acquired possession when notice of the change of ownership was given to the liferenter.

Civil possession also allows possession to be acquired by *constitutum possessorium*, in which the transferor retains custody but begins to hold on behalf of the transferee.⁵³ However, as this form of delivery appears to undermine the purpose of delivery, it is only permitted where there is a clear justification for leaving the property with the transferor. Hume gives the examples of a horse bought but left at livery with the seller, or a carriage left with the seller for alterations to be made, or a cart left with the seller on hire.⁵⁴ A case of the last kind also appears in *Orr's Trustee v Tullis*,⁵⁵ in which machinery was sold by a tenant to the landlord and leased back to the tenant.

(4) Summary of requirements for possession

There is insufficient space here for a full consideration of the requirements for possession, but a brief definition may at least be attempted. Possession consists in the

⁵² See eg *Anderson v McCall* (1866) 4 M 765.

⁵³ On *constitutum possessorium*, see Reid, *Property*, para 623 (Gordon); Carey Miller, *Corporeal Moveables* 165-168. *Constitutum possessorium* has not been applied in cases since the coming into force of the Sale of Goods Act 1893 and its successor the Sale of Goods Act 1979: see *The Scottish Transit Trust Ltd v Scottish Land Cultivation Ltd* 1955 SC 254; *G and C Finance Corporation Ltd v Brown* 1961 SLT 408; *Ladbroke Leasing (South West) Ltd v Reekie Plant Ltd* 1983 SLT 155. These concerned sale and lease-back arrangements (or, in the last case, sale and hire purchase back) held to be transactions intended to operate as securities in terms of what is now s 62(4) of the 1979 Act, and so put outside the scope of that Act. It would therefore appear to follow that the common law rules on delivery, of which *constitutum possessorium* is a part, should have applied to the transfer in each case. However, the possibility was not considered.

⁵⁴ Hume, *Lectures*, III, 251-252. The last example is taken from *Young v Eadie* (1815) Hume 705.

⁵⁵ (1870) 8 M 936.

physical holding of property, either personally or by another on the possessor's behalf, with the intention to derive benefit from that holding. It does not imply any right to possess, and the question of who has possession does not pre-determine who has the right to possess. Possession is, however, given interim protection until the question of right is determined. As we shall see, possession also gives certain other rights.

B. IS POSSESSION A UNITARY CONCEPT?

The discussion so far has assumed possession to be a unitary concept. However, numerous areas of law make use of this concept. The concern is then whether it makes sense to talk in terms of a general concept of possession. After all, each of the contexts in which possession is used involves different policy objectives to be attained. It is entirely reasonable, therefore, to suppose that the precise requirements for possession will vary depending on the situation.⁵⁶ Equally, differences between different legal systems may lead to different definitions of possession.⁵⁷ Certainly, it would not be appropriate to apply the concept inflexibly across different areas of law where that does not suit the ends of the law. Nor would it be appropriate to adopt uncritically a solution from one system of law, where different conditions may justify a different solution. There is no particular reason why the definition of possession ought necessarily to be the same in all circumstances.

(1) Common Law concerns

This concern has been a particular feature of discussions of possession in the Common Law tradition. Of course, even if in that tradition it should be inappropriate to talk of a general law of possession, it would by no means follow from that fact that the same was true in Scots law. It is notable that the same reluctance to approve

⁵⁶ B Ziff, *Principles of Property Law* (5th edn, Thomson/Carswell 2010) 132; DR Harris, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 78-79 and 102-103; Baker, *Legal History* 607-608; Pollock & Wright, *Possession* 28; Paton, *Jurisprudence* 553 and 581-582; Dias, *Jurisprudence* 371; *DPP v Brooks* [1974] AC 862, 867 (Lord Diplock).

⁵⁷ *Salmond on Jurisprudence* 268.

general theories of possession is not found in the Civilian tradition. All the same, though, it is necessary to pay attention to the Common Law debate, for two reasons. The first reason is that, as has been said, in this thesis Common Law sources will be drawn on where appropriate, and so it seems reasonable first to consider the extent to which writers in the Common Law tradition themselves consider it appropriate to draw general conclusions on possession. The second reason is that it is conceivable that some of the arguments used will be applicable to Scotland.

One of the difficulties in the use of Common Law materials lies in the different way in which possession is understood in that tradition, and the different ways in which it is used. For example, in English law the concept of possession was used in the crime of larceny, this crime traditionally requiring the taking of possession and the dishonest intention to coincide, so there was a tendency to interpret possession to meet this requirement.⁵⁸ Thus, in *The Carrier's Case*,⁵⁹ it was held that a carrier possessed a package but not the individual items within it, so he was guilty of larceny if he 'broke bulk' and took individual items. Again, in *Cartwright v Green*,⁶⁰ a bureau was delivered to a carpenter for repair. It was held that the carpenter committed larceny when he broke open a hidden drawer and appropriated money concealed therein. On the other hand, in *Merry v Green*,⁶¹ a bureau was bought at auction. A secret drawer was found containing money. The court held that the buyer did acquire possession of this, and so was not guilty of larceny, because he had no reason to believe that possession of the money was retained by the seller.

The difference in outcome between these cases appears to turn on the need to achieve justice in the particular case, rather than on any issue of general principles of possession.⁶² For this reason, Dias describes possession as 'no more than a device of convenience and policy',⁶³ and calls for its abandonment as a general concept.⁶⁴ From the point of view of the Civilian tradition, however, a case like *The Carrier's Case* could be explained readily enough by saying that the carrier did not at first possess at

⁵⁸ Baker, *Legal History* 607; Holmes, *Common Law* 177. Paton, *Jurisprudence* 564.

⁵⁹ (1473) 64 Selden Society 30.

⁶⁰ (1802) 2 Leach 952, 168 ER 574.

⁶¹ (1841) 7 Meeson & Welsby 623, 151 ER 916.

⁶² Harris (n 55) 102-103.

⁶³ Dias, *Jurisprudence* 285.

⁶⁴ *ibid* 289.

all, and only took possession when he demonstrated the relevant *animus* by breaking open the containers and appropriating their contents. *Cartwright v Green* and *Merry v Green* can be distinguished on the same ground: in Scots law, at least, a repairer generally does not acquire possession at all,⁶⁵ whereas a purchaser acquires possession on delivery.

Dias is not however alone in rejecting the notion of a general concept of possession. Shartel insists that each instance where the idea of possession is used represents an entirely distinct concept of possession, the question of possession being determined, not only by the physical and mental acts of the intending possessor, but also the best outcome in the particular case.⁶⁶ Kocourek dismisses the larceny cases as not depending consistently on possession at all.⁶⁷ Again, he holds the law on the seller's lien⁶⁸ and lost property⁶⁹ to depend policy decisions regarding who should have the right to possession as between two competing parties: 'The physical situation may be determinative of this question, but when it is, the reason is that the law adopts it as a basis of legal policy'.⁷⁰ His conclusion is that '[t]he idea of possession does not exist because there is no need of such an idea':⁷¹ all that is needed is the 'right of possessing',⁷² which may exist without the fact of physical detention. Hart holds that a search for a general concept of possession risks distortion of the actual rules.⁷³ However, as Paton observes:

[T]he idea, however vague and imprecise, which colours and gives a family relationship to all the uses of the word 'possession' in the law, is the recognition of a relation between persons where one has taken or has control of a thing'.⁷⁴

⁶⁵ An exception would be a repairer exercising a lien over the property, but that would hardly entitle the repairer to appropriate items found within the property under repair.

⁶⁶ B Shartel, 'Meanings of Possession' (1931-1932) 16 *Minnesota Law Review* 611. For a similar view, see D Riesman, 'Possession and the Law of Finders' (1938-1939) 52 *Harvard Law Review* 1105, 1106-1107.

⁶⁷ Kocourek, *Jural Relations* 373-385.

⁶⁸ *ibid* 395-396.

⁶⁹ *ibid* 386-395.

⁷⁰ *ibid* 394.

⁷¹ *ibid* 411.

⁷² *ibid* 411. This appears to be intended to mean the right to possess.

⁷³ HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *LQR* 37, 44 n 9.

⁷⁴ Paton, *Jurisprudence* 584.

The persons referred to here would appear to be the possessor and those subject to rights acquired by the possessor by virtue of his possession. A similar view is offered by Tay:

A living body of law cannot be tied into the strait-jacket of an *a priori* conceptual system; but to insist, *as a matter of principle*, that we should not ask for general conceptions underlying what appear to be specific rules separating one possession from another, is to live in the intellectual Ice Age in which the first forms of action were born.⁷⁵

Indeed, the argument may be made that these divergences in the meaning of possession are in themselves a reason to find a general concept of possession, even if it requires modification in its application to particular cases, because:

[A] multitude of unrelated regulations becomes in due course not only intellectually unsatisfying but for practical purposes unmanageable.⁷⁶

Of course, the desire for law to be intellectually satisfying cannot provide the sole criterion by which the law is to be judged. Conceptually tidy law need not be good law, judged by the ends that the law is trying to achieve. However, the second argument has more weight. It is better for all that the law be kept in some order, for reasons of accessibility and of predictability of outcome. If a concept exists in common between different areas of law, it can surely do no harm to consider different instances of use of a concept of 'possession', as long as the differing policy issues are kept in mind. This allows a central body of principle to be developed, which can then be a starting point for exploration of specific cases of possession. Resistance to this perhaps arises from a particular habit of English legal thought alluded to by Maitland when he commented that '[t]he forms of action we have buried, but they still rule us from their graves'.⁷⁷ This tendency is noted by Tay in the passage quoted above. Of course, there are limits to the extent to which we can rely in any legal system on possession meaning the same thing in all contexts, as we have

⁷⁵ AES Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1963-1964) 4 Melbourne University Law Review 476. See also the reply by DR Harris 498.

⁷⁶ *Salmond on Jurisprudence* 268-69.

⁷⁷ FW Maitland, *The Forms of Action at Common Law: A Course of Lectures* (AH Chaytor & WJ Whittaker (eds), first published 1936, Cambridge University Press 1948) 2.

seen here in relation to the Common Law and as we shall see in Scotland in the rest of this chapter. Nonetheless, we shall also see that there are clear commonalities between different areas in which some concept of possession is used.

(2) The Scots position

The preliminary position is taken here that it is permissible to consider all areas where some concept of possession is used, as long as due regard is paid to the possibility that, in a particular case, possession may have a meaning that is distinct to that area of law. The purpose of this section is to outline the areas where possession is relevant and to consider the extent to which differing policy considerations may lead to different definitions of possession.

The consequences of possession may be divided into two groups. The first is concerned with the protection of possession.

- A possessor is entitled not to be dispossessed without his consent or an order of the court. In Scots law, the main possessory remedy is *spuilzie*, often known as ejection or intrusion in the case of land, allowing for a dispossessed party to be restored to possession pending consideration of the question of right.⁷⁸
- One who has possessed land for seven years on the basis of an apparently good title is entitled to a possessory judgment, with the consequence that that title is taken to be valid until it is reduced in separate proceedings.⁷⁹ The possessory judgment may be used both to protect and to recover possession, in the latter case as long as possession was not lost more than seven years previously.⁸⁰

⁷⁸ On *spuilzie*, ejection and intrusion, see eg Reid, *Property*, paras 161-166; Gordon, *Land Law*, paras 14-11 – 14-39; Carey Miller, *Corporeal Moveables*, paras 10.24-10.31. These remedies are often said to be derived from the canon law: see eg Reid, 'Property Law: Sources and Doctrine', in K Reid & R Zimmermann, *A History of Private Law in Scotland: Volume I. Introduction and Property* (Oxford University Press 2000) 212; R Caterina, 'Concepts and Remedies in the Law of Possession' (2004) 8 Edin LR 267, 270.

⁷⁹ On the possessory judgment, see eg Reid, *Property*, para. 146; Gordon, *Land Law* paras 14-18 – 14-21.

⁸⁰ Stair, *Inst.* 4,26,4, 4,26,10(7); Erskine, *Inst.* 4,1,49.

- As discussed below, it has been suggested that possession may provide a basis for recovery of pure economic loss in delict.

The second group of consequences of possession relates to the various situations in which possession is important, not for its own sake, but because of its contribution to some other legal consequence.

- In certain circumstances, possession is necessary for the constitution or transfer of a real right. Thus, ownership of corporeal moveable property may be transferred by delivery of the property.⁸¹ A real right of pledge is constituted by delivery.⁸² A real right of lien requires possession.⁸³ Ownership of ownerless property may be acquired by taking possession of it, through the doctrine of *occupatio*.⁸⁴ In the case of ownership and certain other real rights in land, acquisition is possible in certain circumstances based on possession for a specified period.⁸⁵
- One who possesses property in good faith is entitled to retain the fruits of the property⁸⁶ and, probably, is also entitled to recompense for any improvements made.⁸⁷
- A proprietor in possession of land is protected against rectification of the Land Register.⁸⁸
- A possessor of corporeal moveable property is presumed to be its owner⁸⁹ and, where the actual owner colludes with another to the effect that, by

⁸¹ The scope of delivery in the transfer of ownership of corporeal moveables is restricted by the Sale of Goods Act 1979, in terms of s 17 of which ownership is transferred by the parties' intention. Delivery has only a residual role in sales of goods: see s 20(4) on the transfer of risk in consumer sales, and ss 24 and 25 on sales by (respectively) sellers and buyers in possession following a previous sale. Delivery is still required in cases falling outside the Sale of Goods Act 1979, namely all cases other than sale.

⁸² Steven, *Pledge and Lien*, paras 6-07 - 6-34.

⁸³ *ibid*, para 13-04.

⁸⁴ Stair, *Inst.* 2,1,33; Erskine, *Inst.* 2,1,9-10; Bankton, *Inst.* 2,1,7.

⁸⁵ Prescription and Limitation (Scotland) Act 1973.

⁸⁶ Stair, *Inst.* 2,1,23-24; Erskine, *Inst.* 2,1,25; Bankton, *Inst.* 2,1,32.

⁸⁷ Hume, *Lectures*, III,171-172. Stair holds this right to exist even in favour of bad faith possessors (*Inst.* 1,8,6), but this is doubted by Erskine (*Inst.* 3,1,11) and has not been followed by the courts (see eg *Barbour v Halliday* (1840) 2 D 1279.

⁸⁸ Land Registration (Scotland) Act 1979, s 9, prospectively repealed and replaced with protection for good faith acquirers from registered proprietors in possession: Land Registration etc. (Scotland) Act 2012, s 86.

leaving the latter in possession without a genuine ground for doing so, third parties are liable to be misled, those third parties will be entitled to treat the possessor as owner.⁹⁰

- In criminal law, there are certain statutory offences based on possession,⁹¹ and theft and reset have also been said to involve possession.⁹²

We shall see a number of other examples as we proceed. The examples given, though, illustrate that in looking at possession we are concerned with a concept that applies across a number of different areas of law. It is, of course, impossible here to give a full account of all of these areas and, as this thesis is concerned only with possession of corporeal moveable property, there will be no further consideration of those areas where possession of land is significant. However, subject to these points, some consideration of the policy behind the different applications of possession may help in considering whether possession is indeed a unitary concept. Although the areas of law that involve possession are diverse, nonetheless there are some common elements. First, whatever one may say about the mental element of possession, there must be some element of physical control. The contrary cannot be the case without doing violence to the meaning of the word. How much control is required may of course vary, and as we have seen the control need not be exercised personally, but something must be present that can be said to constitute control.

Second, we can in some of these uses for possession make some conjecture as to the manner of control that is required. The most straightforward example is the presumption of ownership that arises from possession. It would make no sense to presume someone to be owner on the basis of a physical relationship with the

⁸⁹ For discussion of this presumption, see Reid, *Property*, paras 130 and 148-150; Carey Miller, *Corporeal Moveables*, para. 1.19. There are also certain statutory presumptions of ownership which will, in many cases, lead to the same result: Family Law (Scotland) Act 1985, s 25(1), creating a presumption of co-ownership by married couples of household goods; Debt Arrangement and Attachment (Scotland) Act 2002, s 13(1), creating a presumption (or 'assumption' in the language of that Act) for the purposes of attachment that the debtor owns goods in his possession.

⁹⁰ Bell, *Principles*, ss 1315-1317; *Commentaries*, I,269-274. The doctrine will not apply where there is a legitimate reason for possession by a non-owner (see eg *Marston v Kerr's Tr* (1879) 6 R 898; *Lamonby v Foulds* 1928 SC 89; *Robertsons v McIntyre* (1882) 9 R 772).

⁹¹ See eg Misuse of Drugs Act 1971, s 5 (controlled drugs); Firearms Act 1968, s 16 (firearms).

⁹² See eg Gordon, *Criminal Law*, para. 3.39 on theft. See also Hume, *Commentaries*, I,113; A Alison, *Principles of the Criminal Law of Scotland* (first published 1832, Law Society of Scotland 1989) 328; J Burnett, *Treatise on Various Branches of the Criminal Law of Scotland* (A Constable 1811) 155 (reset).

property that did not bear the appearance of ownership. Thus we can hypothesise that the presumption of ownership requires that the property be held in a manner consistent with ownership of it. This is in fact what we find when we look at the relevant authorities, as in *Warrander v Alexander*,⁹³ in which the presumption was held not to apply to goods in the custody of a ship's master acting in that capacity. The same must certainly be true of the doctrine of collusive possession, the whole basis of which is that the possessor is being held out as owner.

It would seem reasonable to add *occupatio* to this list. As ownership is being acquired, it would seem reasonable to require of the acquirer acts in a way demonstrating a claim to the property.

The rights of a good faith possessor appear also to be consistent with this idea. For Stair, the right to fruits is justified by two considerations. The first is that the possessor, being in good faith, does not deserve to lose out.⁹⁴ As Erskine points out, the possessor may have expended money and effort on the property, and could be impoverished by a demand for the value of the fruits consumed.⁹⁵ Secondly, the right to fruits is justified 'in hatred of the negligence of the other party not pursuing his right'.⁹⁶ It is the owner of the property who has caused the situation by failing to enforce his rights. To these considerations, Hume adds the 'trouble and vexation' of 'a scrutiny into a man's whole affairs and management for a course perhaps of many years'.⁹⁷

It is the second of Stair's considerations that is significant here. If the owner of the property is to be properly blameable for failure to enforce his rights, it seems reasonable to insist that the possessor act in such a way as to give warning that he is asserting a right to the property.

The possession of a thief or, to a lesser extent, of a resetter is unlikely to have the same quality of openness that would be expected of an owner or a *bona fide* possessor. However, to steal property is to act as if one has a right to the property. It

⁹³ (1715) Mor 10609.

⁹⁴ Stair, *Inst.* 2,1,23.

⁹⁵ Erskine, *Inst.* 2,1,25. See also Hume, *Lectures*, III,241.

⁹⁶ Stair, *Inst.* 2,1,23. See also Erskine, *Inst.* 2,1,25.

⁹⁷ Hume, *Lectures*, III,241.

is true that one may be guilty of theft or reset without having the intention to hold for oneself,⁹⁸ but this would be a matter of *animus*.

The suggestion then is that all of the instances of possession considered so far have in common the idea that possession is a manifestation of an intention to assert a right to possess the property. The inference drawn from this is that the physical element of possession will in some way reflect this assertion of a right. This assertion of right requirement is less clear, however, with the possessory remedies. For Stair, the justification for the protection of possession is that:

[I]t is the main foundation of the peace, and preservation thereof, that possession may not be recovered by violence, but by order of law.⁹⁹

Erskine's view is to much the same effect.¹⁰⁰ The only explanation given by Bankton is that of Justinian,¹⁰¹ that the determination of possession is a necessary preliminary to the determination of right. It is not clear that Stair's justification tells us a great deal about what the requirements for possession should be, as it does not explain why (as appears to be the case) one holding entirely on another's behalf does not possess for these purposes. However, although possession does not determine the question of the right to possess, it is nonetheless true that, as Justinian's justification hints, behind every possessory dispute there is likely to be a dispute over the right to the property. The fact that possessory protection is dependent on having the intention to hold on one's own behalf suggests this also. It is of interest to note in this regard that Jhering's view was that possession was protected in order better to protect ownership: possessory protection is '*eine Eigenthumsposition*' or '*ein Vorwerk des Eigenthums*'.¹⁰² On this view, possessory protection is '*eine nothwendige Vervollständigung und Ergänzung des Eigenthumsschutzes*'.¹⁰³ This then appears to be based on some form of presumption of ownership in favour of the possessor.

⁹⁸ See eg *Carmichael v Black; Carmichael v Penrice* 1992 SCCR 709, in which the accused were acting on the instructions of their employer.

⁹⁹ Stair, *Inst.* 2,1,22.

¹⁰⁰ Erskine, *Inst.* 2,1,23.

¹⁰¹ Bankton, *Inst.* 2,1,30, referring to J.4.15.4.

¹⁰² Jhering, *Grund des Besitzesschutzes* 45.

¹⁰³ Jhering, *Grund des Besitzesschutzes* 45 ('a necessary complement and supplement to the protection of ownership').

None of this is conclusive, of course. To reach a conclusion, analysis of the authorities on the question will be required. There are also three areas mentioned above, but not yet considered, that are more difficult to fit into the view that possession requires holding of the property in the manner of one asserting a right to the property. These are the right of a possessor to damages for pure economic loss, statutory offences, and the case of delivery. They will now be considered.

(3) Three difficult areas

(a) Pure economic loss. Normally, there is no remedy in delict when a party has suffered loss as a result of damage to someone else's property, such loss falling into the category of pure economic loss.¹⁰⁴ However, it has been suggested that there is an exception to this rule when the party suffering the loss is in possession of the property.¹⁰⁵ Reid suggests that this possession must normally be founded on a real right to possession, although a contractual right 'may also be sufficient if it confers on the claimant, in a question between the parties, the substance of ownership or other real right'.¹⁰⁶ It is unclear whether this is based on possession in the sense required for the possessory remedies. However, it is at least strongly arguable that it is. Thus, in *Nacap Ltd v Moffat Plant Ltd*¹⁰⁷ and in *Wimpey Construction (UK) Ltd v Martin Black & Co (Wire Ropes) Ltd*,¹⁰⁸ in which the pursuers did not have possession as defined earlier in this chapter, they failed.¹⁰⁹ On the other hand, in *North Scottish Helicopters Ltd v United Technologies Corporation Inc*,¹¹⁰ a hirer of a helicopter was held to have title to sue for damage negligently caused to it by the

¹⁰⁴ See eg WJ Stewart, *Reparation: Liability for Delict* (2003), ch 11 paras 010-022; AB Wilkinson & ADM Forte, 'Pure Economic Loss - A Scottish Perspective' 1985 JR 1.

¹⁰⁵ Reid, *Property*, para 116; C Anderson, 'Spuilzie today' 2008 SLT (News) 257.

¹⁰⁶ Reid, *Property*, para 116. It is interesting to note that, although none of the cases refers to the fact, there is Roman authority for a possessor being entitled to a delictual remedy for damage to the property: Ulpian, D.9.2.17. For discussion, see E Grueber, *The Roman Law of Damage to Property, Being a Commentary on the Title of the Digest Ad Legem Aquiliam* (1886) 239.

¹⁰⁷ 1987 SLT 221.

¹⁰⁸ 1982 SLT 239.

¹⁰⁹ In *Nacap*, the pursuers were laying pipelines on behalf of another company, and so held the property entirely on behalf of that company. In *Wimpey Construction*, damages were sought by three companies engaged in a joint venture for delay resulting from damage to a crane hired by one of them.

¹¹⁰ 1988 SLT 77.

defender. Again, in *Main v Leask*,¹¹¹ a fishing boat was being operated as a joint venture, with profits to be divided between the owners of the boat, the owners of the nets and the crew. When the boat was damaged by the defender's negligence, no obstacle was found to recovery of damages by the crew for loss of profits. In both of these cases, the successful pursuers met the requirements for possession laid down earlier, at least if it is possible to possess on the basis of a personal right.

The suggestion has been made that the different areas where possession is significant have in common the requirement to hold as if by right. The considerations leading to this conclusion clearly do not apply, however, to remedies for damage caused to property by negligence. The policy here has been described as being based:

...not so much on any ground of principle, but because of the dictates of policy or practical expediency.¹¹²

This is the case even though the result is that two equally deserving pursuers are treated differently. Nonetheless, on the assumption that this is an example of the general right of a possessor not to have that possession interfered with, it must be assumed likewise that possession here means the same as possession for the purposes of *spuilzie*.

(b) Statutory offences. Of potentially substantial assistance in a general study of possession are the numerous cases on various statutory offences of possession,¹¹³ assuming that they do in fact represent the same concept. Of course, if the word 'possession' is to retain any connection to its ordinary meaning, its use in one area must bear some relationship to its use in other areas. Thus, Bovey, considering possession in terms of the Misuse of Drugs Act 1971, adopts Stair's definition of possession.¹¹⁴

The assistance provided by these cases is, however, potentially reduced by the well-known principle that, in cases of ambiguity, penal statutes are to be

¹¹¹ 1910 SC 772.

¹¹² *Wimpey Construction (UK) Ltd v Martin Black & Co (Wire Ropes) Ltd* 1982 SLT 239, 243 (Lord Ordinary).

¹¹³ See eg Misuse of Drugs Act 1971, s 5 (controlled drugs); Firearms Act 1968, s 16 (firearms).

¹¹⁴ KS Bovey, *Misuse of Drugs: A Handbook for Lawyers* (Butterworths/Law Society of Scotland 1986) 31, quoting Stair, *Inst.* 2,1,17.

interpreted in favour of the accused.¹¹⁵ According to Bennion, this is based on the 'just principle that a person is not to be put in peril upon an ambiguity'.¹¹⁶

However, this is not a universal rule. There will be circumstances where the policy of an Act requires a broader interpretation, and this possibility must also be taken into account by the court.¹¹⁷ It is not correct to say that in cases of doubt a penal statute must always be interpreted in favour of the accused.¹¹⁸ Thus, for example, in *Smith v Stirling*,¹¹⁹ a private party was held by the licensee in licensed premises, which were also his own home. The licence was in the form provided for by schedule (A) of the Public Houses (Scotland) Acts Amendment Act 1862, which had as a condition that the licensee did not, among other things, 'permit or suffer any drinking in any part of the premises' between 11pm and 8am. Despite the apparently clear words of the statute, an interpretation was adopted to the effect that activities not related to the licensee's business were not affected by it. At first sight, this appears to be an example of the principle that penal statutes will be interpreted in favour of the accused. However, the Lord Justice-Clerk makes it clear that the court is engaged in a balancing of policy objectives:

I should certainly always resist such a construction of this statute as would open a door to the contravention of its spirit though not of its letter. But I should also always resist such a construction being put upon it as would prevent innocent acts being done.¹²⁰

Thus, while the court will interpret the legislation to exclude acts from the scope of the offence which are within the strict letter of the legislation but not its objectives, equally the court is prepared to adopt a broader interpretation to give effect to those objectives where necessary.

We find the same in statutory offences concerned with possession. Where possession of an item is prohibited, the interpretation that is most favourable to the

¹¹⁵ See eg J Fleming Wallace, 'Interpretation of Statutes' in *Stair Memorial Encyclopaedia*, vol 12 (1992), para. 1184. For an example of such a possible interpretation, see Reid, *Property*, para. 114 note 4.

¹¹⁶ FAR Bennion, *Statutory Interpretation: A Code* (5th edn, Butterworths 2008) 826.

¹¹⁷ *ibid* 828.

¹¹⁸ FAR Bennion, *Understanding Common Law Statutes: Drafting and Interpretation* (Oxford University Press 2001) 114.

¹¹⁹ (1878) 5 R (J) 24.

¹²⁰ (1878) 5 R (J) 24, 27.

accused is one restricting the scope of the offence to cases where the item is actually on the accused's person, or at least under his direct control. That, however, is not the interpretation that has found favour with the courts. For example, in *Sullivan v Earl of Caithness*,¹²¹ the accused was held to be in possession of a firearm stored in his mother's flat, where he was not resident.

Indeed, the policy of these statutes may lead to a broader interpretation of possession rather than a narrower one.¹²² Suppose that I find a package containing (to my knowledge) controlled drugs. I decide to hold onto them, not for my own use, but so that I can return them to their owner (if he should appear). On these facts, I am not in possession for the purposes of *spuilzie*,¹²³ but I may be held to possess for the purposes of the criminal law. This seems insufficient basis, however, for distinguishing entirely between possession for the purposes of the criminal law and possession for other purposes.

(c) Delivery. The requirement for delivery to transfer ownership or to create a pledge is, as we have seen, of reduced scope in modern Scots law, though it remains the law in Germany¹²⁴ and South Africa¹²⁵. In the developed Roman law, it was seen as involving an acquisition of possession by the transferee.¹²⁶ Thus, Ulpian, speaking of delivery of property to one co-owner acting on behalf of both, talks of ownership being acquired here through possession.¹²⁷ He also speaks elsewhere of a slave who 'buys and acquires possession'¹²⁸ for his owner. Again, for Ulpian, in a contract of

¹²¹ [1976] QB 966.

¹²² Reid, *Property*, para 123.

¹²³ This is because I do not intend to hold on my own behalf.

¹²⁴ *BGB*, s 929.

¹²⁵ *Silberberg & Schoeman*, para 9.2.1; van der Merwe, *Law of Things*, para 164. In South Africa, a general distinction has been drawn between original and derivative acquisition of possession, giving these the respective names *occupatio* and *traditio* (*Silberberg & Schoeman* 276).

¹²⁶ The position may have been different in earlier law. In the late Republic, it appears that goods were considered delivered when marked as belonging to the transferee: Paul, D.18.6.15(14).1, reporting an opinion of Alfenus. The point seems to have been disputed from an early period: see Ulpian, D.18.6.1.2, reporting a dispute between Trebatius and Labeo. It is not clear that such an act would have been sufficient for possession for the purposes of the possessory interdicts. It is not surprising that there should have been a difference, as delivery and the possessory interdicts must have developed separately and only later come to be identified as relying on the same underlying concept of possession. In fact, delivery appears to predate the possessory interdicts by a considerable period: A Watson, *Roman Private Law around 200BC* (Edinburgh University Press 1971) 64 n 8, read with page 65.

¹²⁷ D.41.1.20.2.

¹²⁸ D.41.2.13.3.

mutuum, ownership is transferred by possession.¹²⁹ Similarly, Celsus speaks of delivery in terms of possession.¹³⁰ Again, in the Digest title on acquisition and loss of possession¹³¹ there is included much on delivery.

Following Roman law, it is typically accepted in the Civilian tradition that delivery involves an acquisition of possession by the transferee through a transfer of physical control in that person's favour accompanied by the necessary intention to possess.¹³² For Scots law, it does appear that Stair, Erskine and Bankton all considered the requirements for delivery to be the same as the requirements for the acquisition of possession for the purposes of the possessory remedies. It is true that Stair does not directly deal with delivery in his general account of possession. However, he does refer at the beginning of this account to possession as 'the way to property',¹³³ and he makes passing reference to symbolical delivery during this account.¹³⁴ He also refers elsewhere to possession as being required for acquisition of ownership.¹³⁵

Erskine is clearer: not only does he define delivery as involving a giving of possession,¹³⁶ he uses his discussion of delivery as an introduction to his discussion of possession. For Bankton, too, his discussion of delivery leads to discussion of possession on the basis that it is 'the ordinary means of acquiring real rights'.¹³⁷

Bell defines delivery as:

...the delivery of possession by the owner, with the design of transferring the property to the receiver.¹³⁸

Elsewhere, having given a definition of possession derived from that of Erskine, he talks of possession as being acquired either originally by *occupatio* or 'derivatively, by tradition'.¹³⁹

¹²⁹ Ulpian, D.12.1.9.9.

¹³⁰ D.41.2.18pr.

¹³¹ D.41.2.

¹³² See eg Pothier, *Contrat de vente*, para 187; van der Merwe, *Law of Things*, para. 79; *Münchener Kommentar*, vol 6, 817 (F Quack).

¹³³ *Inst.* 2,1,8.

¹³⁴ *Inst.* 2,1,15.

¹³⁵ *Inst.* 3,2,5.

¹³⁶ *Inst.* 2,1,18 and 20. Compare though the more equivocal formulation of putting the thing 'into the possession or under the power of the purchaser' (*Inst.* 3,3,8, emphasis added).

¹³⁷ *Inst.* 2,1,26.

¹³⁸ *Principles*, s.1300.

Reference to delivery as involving a transfer of possession is also found in decisions of the courts.¹⁴⁰

That this should be the case is not surprising. It has been suggested earlier that the policy justifications for the use of the concept of possession suggest that the possessor will be required to act in a way consistent with having a right to possess. In the case of the delivery requirement, we see Stair taking the same approach:

For the security of the people, and anticipation of error and fraud, and that evident probation may be had, men do most profitably order deeds to be done in such a palpable and plain form, as it may easily appear, whether false or not...Thus, though the dispositive will of the proprietor be sufficient to alienate anything that is his, and to constitute the right thereof in another, yet by the civil law and custom of most nations, delivery or apprehension of possession for conveying the right of goods is requisite.¹⁴¹

These considerations are suggestive of the same approach as the one already suggested for possession generally, namely requiring that the transferee act with regard to the property in the manner of one with a right to possess.

The difficulty, however, is that there are competing policy considerations which appear to require a more lenient approach to delivery. In accounts of possession, in both the Civil and Common Law traditions, there is a tendency to mark out as a special case possession derived from, and with the consent of, a previous possessor. For example, Bufnoir denies that delivery involves any physical element at all,¹⁴² possession passing to the transferee by the transferor's intention alone. This, it is true, is a fairly extreme view, and may be influenced by the absence of a requirement for delivery to transfer ownership of corporeal moveables in

¹³⁹ Bell, *Principles*, s 1311.

¹⁴⁰ See eg *Orr's Tr v Tullis* (1870) 8 M 936, 945 (Lord Justice-Clerk).

¹⁴¹ Stair, *Inst.* 1,1,15. See also *Inst.* 3,2,5, where he says that possession is required for the acquisition of a real right so that 'the will of the owner may sensibly touch the thing disposed, and thereby be more manifest and sure'. Erskine (*Inst.* 2,1,18) also accepts that in principle intention ought to be enough. Of course, systems of transfer based on intention are open to the criticism that it will often be impossible to prove the parties' precise intentions. Indeed, there will very often have been no particular intention at all as to when ownership is to pass to the transferee. In such a case, the current law on sale of goods requires recourse to the comparatively complex, and wholly artificial, rules in section 18 of the Sale of Goods Act 1979, in order to infer an intention that neither party ever in fact had. Moreover, given that these 'rules' are not in fact rules at all, but merely presumptions, even they do not give a reliable test of when ownership is to pass in the absence of express agreement on the point.

¹⁴² Bufnoir, *Propriété et contrat* 135-136.

modern French law.¹⁴³ However, it is widely held that possession is more easily acquired by delivery than in other situations.¹⁴⁴ In Germany, this rule is statutory.¹⁴⁵

The same tendency is found in Scotland, and is based on the idea that the interests of commerce lie in the direction of ease of transfer. Carey Miller suggests that:

[C]ommercial necessity, rather than adherence to rational form consistent with principle, has been dominant in the development of the law.¹⁴⁶

Normally, this 'necessity' is invoked by the buyer to avoid the consequences of the seller's insolvency before the goods have changed hands. Bell criticises this tendency:

It is by no means uncommon...to find every fancied conveniency or facility to the dealings of traders represented as a case of that sort of necessity which the law has in contemplation in admitting constructive delivery...There is no end to the multiplication of small distinctions, and traders will be found infinitely ingenious in discovering cases in which mere conveniency or facility in the management of their dealings may be made to assume the appearance of necessity, till all the fixed principles of the law shall be unsettled, and a miserable pretence of mercantile usage, varying in every port, and with each new set of dealers, be permitted to usurp the place of those great rules to which it is so easy to conform.¹⁴⁷

Bell singles out *Broughton v Aitchison*¹⁴⁸ for criticism on this head. In that case, a quantity of wheat had been sold, but was kept in a granary under the care of an employee of the transferor. The majority of the court, in holding delivery to have been made, appears to rely on two factors, namely the issuing of a delivery order by the transferor to the employee and the payment of the sum of one shilling by the transferee to the employee for taking care of the wheat. It does seem, however, that it is going much too far to say that this made him the transferee's employee. A sum of this kind seems more like a tip. The discussion above of *constitutum possessorium*

¹⁴³ *Code civil*, art. 1583.

¹⁴⁴ See eg Pollock & Wright, *Possession* 44; *Salmond on Jurisprudence* 287; Kocourek, *Jural Relations* 372; *Silberberg & Schoeman* 276; van der Merwe, *Things*, para 69.

¹⁴⁵ *BGB*, s 854(2).

¹⁴⁶ Carey Miller, *Corporeal Moveables*, para 8.15.

¹⁴⁷ Bell, *Commentaries*, 1,182.

¹⁴⁸ 15 Nov 1809, FC, discussed by Bell at *Commentaries*, 1,191 n 1.

suggests that instead there would be needed some kind of separate storage contract with the transferor.

In other cases, the transferee has been protected by disregarding the requirement for delivery altogether, as in *Lang v Bruce*.¹⁴⁹ In this case, after sale at auction, animals which had been bought were driven back to and left on the seller's land. The seller then became insolvent. After the insolvency was declared, but before sequestration, the buyer attempted to take possession of the animals. However, he was prevented from doing so by a self-appointed committee of creditors. In the view of the majority opinion,¹⁵⁰ where the transferee is only prevented from taking possession by unlawful interference of another, he is to be treated as taking possession:

[A]s the pursuer did what he could to obtain complete possession of the stock, and was only prevented from obtaining it by an interference on the part of interested and unauthorized individuals, the case must clearly be treated in the same manner as if he had actually got possession of the animals.¹⁵¹

As this makes plain, there is here an exception to the delivery requirement. An exception was made on similar grounds in *Crawford v Kerr*.¹⁵² In this case, money was placed by a debtor in an envelope and handed to his own servant to be sent to his creditors the following morning. However, the debtor died unexpectedly during the night. In the morning, a guest in the house took charge of the money, which was not then handed to the creditors. The court held that there had been delivery to the creditors on these facts. This decision seems, however, to go unacceptably further than the decision in *Lang v Bruce*. In *Lang*, there was at least an attempt at delivery. In *Crawford*, on the other hand, there was no more than the formation of an intention to make delivery. Although the court was influenced by a desire not to give effect to the visitor's unlawful act, its reasoning implies the same result even without that interference.

¹⁴⁹ (1832) 10 S 777.

¹⁵⁰ The majority was of 7 to 6, and then only because Lord Craigie agreed not to vote. The majority opinion was by Lords Glenlee, Cringletie, Fullerton and Moncrieff, with whom the Lord President and Lords Balgray and Gillies concurred.

¹⁵¹ (1832) 10 S 777, 786.

¹⁵² (1807) Mor (App Moveables) 2.

We see therefore that, in certain cases, the courts have been prepared to disregard the delivery requirement. In *Lang v Bruce*, at least, this seems justifiable on the basis that delivery would have occurred but for the wrongful interference of those most interested in its failure. More commonly, though, we find the requirement for delivery being leniently applied rather than ignored. There is no doubt a commercial interest in ease of transfer, which may result in the law being more lenient in considering whether a requirement for delivery has been satisfied than would necessarily be the case in other cases where possession is significant.¹⁵³

It may be thought, therefore, that authorities on delivery will be of limited use in considering general questions of possession. Certainly, care must be taken. However, this does not justify disregarding authorities on delivery altogether. For one thing, commercial convenience has not always been decisive. For example, in *Anderson v McCall*,¹⁵⁴ on facts very similar to those in *Broughton v Aitchison*, the Inner House declined to recognise an alleged custom of the grain trade in Glasgow to the effect that a delivery order was sufficient to operate delivery in such cases. In addition, some cases that apparently take a lenient approach to delivery are in fact examples of the parties' acts being construed in light of the surrounding facts rather than being examples of difference of principle. Thus, Savigny explains the more lenient approach to delivery in this way:

[T]he previous possessor is the only person who could prevent me from dealing with the thing at will, but it is expressly said of this very person, that by his conduct he recognises my Possession.¹⁵⁵

This recognition of the transferee's possession by the transferor thus makes it easier to demonstrate that the transferee has in fact taken possession. Facts that might otherwise have been seen as ambiguous are explained by the parties' intentions. It does not follow from this that possession may be held to be acquired without any acts at all that are capable of being construed as possessory acts, in the absence of some special rule. As Savigny says, if there is a difference in outcome, this is 'referable,

¹⁵³ Carey Miller, 'Transfer of Ownership' 739.

¹⁵⁴ (1866) 4 M 765.

¹⁵⁵ Savigny, *Possession* 152, referring to D.46.3.79 (a case of a debtor laying down money, for repayment of the debt, in the presence of the creditor).

not to the principle itself, but to the application of it'.¹⁵⁶ In his view, the requirements of possession are the same in all cases, but the consent of a previous holder makes it easier to infer their existence.

Even in modern German law, where the distinction is statutory, it is accepted that delivery nonetheless requires a transfer of control, the distinction being less a matter of difference of principle and more a matter of applying the same principle to different background facts.¹⁵⁷

Likewise, Pollock & Wright observe:

[A]cts which if opposed would be insignificant are accepted as a sufficient and actual entering on possession when they are fortified by the concurrence of the last possessor.¹⁵⁸

For example, if A hands to B, as part of a sale, the key to the enclosure in which the goods are kept, B may readily be seen as having acquired possession. In the circumstances, B will expect to be able to get access to the goods without difficulty, and it is clear enough on the face of it that he intends to do so. If, on the other hand, B has merely found the key, it is less probable that he would be held to possess. For one thing, in the absence of an underlying transaction justifying his holding of the key, there is nothing as yet to suggest that he intends to take access to the goods. For another, control of the goods is less clear in this case. For example, A may have a duplicate key, or may have changed the locks. B may not even know where the goods are kept. Thus, the significance of the fact of holding the key varies depending on the background facts. In the case of delivery:

[T]here is every reason to think that the acquirer can and will in fact have those contents at his disposal...In the case of a wrongful acquirer the bent of expectation is the other way. The loser of the key may have already missed it; if he has missed it, he will have taken his precautions.¹⁵⁹

¹⁵⁶ Savigny, *Possession* 172.

¹⁵⁷ Brehm & Berger 37; Baur 70; *Münchener Kommentar*, s 858 n 29 (Joost).

¹⁵⁸ Pollock & Wright, *Possession* 14.

¹⁵⁹ *ibid* 61.

So this is not about some technical difference between *occupatio* and *traditio*; it is about deciding whether there is sufficient control on the basis of the specific facts of the case.

On this view, it is an exaggeration to say that the development of the law on transfer of ownership by delivery has been dominated by commercial considerations rather than the general principles of possession. Of course, such commercial considerations have undoubtedly been present. However, what may appear at first sight to be evidence that such delivery is easier than other cases of acquisition of possession may in fact turn out to be the result of the surrounding facts rather than a difference of principle.¹⁶⁰ Certainly, there seems insufficient basis to require the exclusion of the delivery cases from a general account of possession.

(4) Conclusion: is it reasonable to treat possession as a unitary concept?

It cannot be denied that there are difficulties with any attempt to formulate general principles of possession, applying across all areas of the law where possession is significant. Policy issues applying in particular areas may lead to a different conclusion as to possession, even when dealing with the same or similar facts. We see this point particularly strongly where possession is required for the transfer or constitution of a real right and with criminal cases. Another problem, which will become apparent as the thesis progresses, is that all or most of the cases on a particular point will often come from one particular area of law. Thus, all of the cases on possession of very small items arise under the misuse of drugs legislation.¹⁶¹ Likewise, almost all of the cases on possession of animals are concerned with acquisition of ownership by *occupatio*.¹⁶² This makes it more difficult to draw general conclusions.

However, even though there may be differences of application in different areas of law, it has been suggested in this chapter that there are nonetheless

¹⁶⁰ Such surrounding circumstances may indeed on occasion make transfer of ownership by delivery more difficult than acquisition of possession for the purposes of the possessory remedies: compare the South African cases *Mankowitz v Loewenthal* 1982 (3) SA 758 (AD) and *Rosenbuch v Rosenbuch* 1975 (1) SA 181 (WLD).

¹⁶¹ See chapter 3.

¹⁶² See chapter 7.

similarities in how possession is defined in different areas of the law. There must always be some notion of control, however that is defined. We have even been able to go further and hypothesise that this control must normally be exercised in a manner consistent with an assertion of a right to the property. We shall see as we go on whether this hypothesis is supported by the authorities. However, even the common factor of control seems sufficient that authorities interpreting a possession requirement in one area may be of use in interpreting that requirement in another. If a case on *spuilzie* of a wild animal were to arise, it would seem absurd to disregard from the beginning cases on acquisition of ownership by *occupatio*. Of course, it would be open to the court to reach a different conclusion on possession for the *spuilzie* question, but that does not justify a refusal even to consider such authorities. This is particularly true given that Scotland is a smaller jurisdiction than many, and so is limited in the quantity of cases or literature on any particular point that is likely to arise. A small jurisdiction cannot afford to waste authority, and, when considering an issue of possession in one area, the general law gives at least a starting point. Accordingly, the approach taken in this thesis is to draw freely on possession cases from all areas of the law, while remaining aware that the result in a particular case may be influenced by considerations applying only in a particular area of law.

2 HISTORICAL AND COMPARATIVE APPROACHES

A. INTRODUCTION

The approach taken in this thesis is to make use of comparative and historical perspectives drawn from Roman, German, French, South African and English law. Reference will be made to sources from these systems as the thesis proceeds. In this chapter we shall see an overview of the law in these systems, first of acquisition of the physical element, then of loss.

B. THE PHYSICAL ELEMENT IN THE ACQUISITION OF POSSESSION

(1) Roman law

The physical element of possession is generally defined as requiring some degree of control of the property.¹ The requirements for possession will vary depending on the specific circumstances of the case,² but physical control is the fundamental issue. As a result, it is not possible for two or more parties to possess separately the same property.³ There is no need for actual physical contact, if there is sufficient control.⁴ Thus, if I give you the key to the building in which goods are kept, that is an effective delivery of the goods themselves,⁵ at least if the handing over of the key takes place at the building.⁶ Justinian does not mention any requirement for the key to be handed over at the building.⁷ From this it has been taken that he intended to remove this requirement, the key then becoming 'merely the symbol of what is

¹ Buckland 199; Thomas 138; Nicholas 113; M Kaser, *Roman Private Law* (2nd edn, R Dannenbring (tr), Butterworths 1968), 87; M Kaser, *Das Römische Privatrecht* (2nd edn, 2 vols, C H Beck 1971-1975), vol 1, 384 and 391 and vol 2, 253; M Kaser, *Eigentum und Besitz im Älteren Römischen Recht* (2nd edn, Böhlau Verlag 1956) 313.

² Thomas 144.

³ Paul, D.41.2.3.5. This does not prevent co-possession by two or more persons acting co-operatively: see eg Ulpian, D.41.2.42pr.

⁴ M Kaser, *Das Römische Privatrecht* (2nd edn, 2 vols, C H Beck 1971-1975), vol 1, 391.

⁵ Gaius, D.41.1.9.6; Paul, D.41.2.1.21. Of course, there may be multiple keys, but no problem arises if all are handed over. For discussion of the issues arising where a duplicate key is retained, see chapter 3, part F(2).

⁶ Papinian, D.18.1.74.

⁷ J.2.1.45.

delivered'.⁸ However, it is not clear that Justinian in fact intended this.⁹ Nor is it clear that such a change makes the key merely symbolic. After all, we may suppose that, by giving up the key, the transferor has lost possession. Who else but the transferee now has possession? If the key gives control it does so wherever it may be that the key is handed over, unless there is some external factor preventing the exercise of that control. As Gordon observes:

[I]f the principle of acquisition of possession is control of the thing it is probably too narrow to limit the efficacy of a transfer of keys to the case where the delivery takes place at the store.¹⁰

If the point is control, then it hardly seems decisive where the handing over of the key takes place. To require presence at the store is to introduce an additional, purely symbolical, element.

Again, says Javolenus, I gain possession of a pile of logs by placing a guard on it,¹¹ the reference to the guard suggesting that actual control is necessary rather than simply being in a position to take control (as where the pile is merely pointed out to me, but I do nothing actually to take control). Similarly, says Javolenus:

Should I direct you to put money or anything else which you owe me where I can see it, the result is that you are released at once and that it becomes mine. For in such a case, no one else having physical control [*possessio*] of the thing, it is acquired by me, and in a sense, there is deemed to be delivery by the long hand.¹²

Although Javolenus does not say as much, Thomas reasonably assumes that this event is taking place in the creditor's own premises.¹³ Even if this is not the case, however, there would seem to be no reason why this could not work satisfactorily in a public place, providing that sufficient control has been given that it can be said that the money is within the creditor's sphere of control. In the creditor's own house, this

⁸ Nicholas 119; see also Buckland 227.

⁹ Gordon, *Traditio* 81.

¹⁰ *ibid* 81.

¹¹ Javolenus, D.41.2.51.

¹² Javolenus, D.46.3.79. See also Nicholas 113-114, where he gives the similar example of a book placed in my drawer within my sight and under my direction.

¹³ Thomas 182, erroneously citing this text as D.46.3.75. D.46.3.75 is taken from Modestinus, and concerns the extinction of obligations *confusione*.

sphere of control will be extensive, and so anything placed in my house may be said to have been placed within my control. Certainly, viewed objectively, this is how the matter would be viewed by a third party coming onto the scene. On the other hand, in a public place, such a third party would be less ready to draw such an inference. Suppose that I order a drink in a bar. I then return to my table while the drink is poured. The drink is then placed on the bar for me to collect. At this point, it is difficult to see that the drink is under my control. In a busy room, another person may pick up the drink from the bar either dishonestly or in the belief that it is his own. However, once it is in place in front of me on my table, it is patent that I am asserting control over it.

What this may be taken to suggest, at least provisionally, is that what is necessary to satisfy the physical element of possession is to act in such a manner as to give the outward impression of ownership.¹⁴ In other words, stress is placed on the view of a hypothetical objective third party. This, it will be recalled, was the hypothesis developed in chapter 1 based on the policy considerations underlying the various uses of possession. In a sense, therefore, the *corpus* appears to depend on the *animus* of others, or at least of a hypothetical objective onlooker. In a sense this is to be expected, as my intentions are only made known through my actions.¹⁵ As we shall see, this idea has been received also in modern systems. When the drink is on the bar, the objective impression is that it still belongs to the transferor; once it is on my table, a bystander would assume it to be mine. Likewise, I will be readily assumed to be the owner of money lying on a table in my house. Thus, Celsus observes that:

If I instruct the vendor to leave at my house what I have bought, it is certainly the case that I possess it, even though no one has yet touched it.¹⁶

Presumably this instruction has actually been carried out.¹⁷ It appears that the goods have been left at the house without being placed in the hands of anyone acting on the

¹⁴ Of course, if one is possessing otherwise than as owner (eg as a pledgee), this may be taken to influence the necessary acts.

¹⁵ Kaser (n 4) vol 1, 391.

¹⁶ D.41.2.18.2.

¹⁷ Buckland (199) certainly reads the text in this way.

transferee's behalf: we are told that no-one has yet touched the goods. It does not appear that this outcome can be based on the idea that the occupier of a house automatically possesses everything in it, at least if Paul's view is accepted.¹⁸

Similarly, I do not possess an item just because it is buried on my land, if I have not in fact exercised any control over it.¹⁹ The point is rather that, if an item is on my land or in my house, control of it may readily be inferred. On the other hand, I would need a closer control of money placed in a public area, and in the case of buried property I am not able to exercise any control at all without digging it up.²⁰ This being the case, it may be that Celsus's view requires qualification: property left inside the door of a house leads more readily to an inference of possession than property left lying outside in the street. This is an issue considered in more detail in section C(3) of chapter 3.

Both of the examples given by Javolenus are concerned with delivery. However, they would seem to be consistent with the general requirements for interdictal possession. In Roman law, then, we can see that possession depends on some degree of physical control. The suggestion here is that what is required is a holding in a manner that reflects the possessory intention: where one is possessing *animo domini*, in other words with the intention to hold as owner, the acts required for the physical element would be the acts of an owner.

(2) The French tradition

(a) **Pre-codification.** Writing before the *Code civil*, Pothier defined the physical element of possession as '*appréhension corporelle*'.²¹ This appears to be meant literally, stressing that the thing must actually be placed within the possessor's hands.²² Accordingly, I do not possess an object just because it is buried in my land.²³ However, he accepts that exceptions to this will be found necessary in

¹⁸ D.41.2.30pr.

¹⁹ Papinian, D.41.2.44pr; Paul, D.41.2.3.3.

²⁰ Savigny, *Possession* 165.

²¹ Pothier, *Possession*, para 41.

²² *ibid* para 41.

²³ *ibid* para 42.

particular circumstances.²⁴ What does not appear in Pothier's account, however, is any discussion of the significance of the manner in which this control is exercised. There is no talk of a requirement to hold in the manner of one exercising a right. The same is true of Domat, who also writes simply of detention.²⁵

(b) Modern law. In modern French law, the definition of possession is found in the *Code civil*, according to which possession is '*la détention ou la jouissance d'une chose*...'²⁶ This definition is echoed in the civil code of Louisiana, which defines possession as 'the detention or enjoyment of a corporeal thing'.²⁷ In Quebec, the definition differs somewhat from this. Possession is defined as '*l'exercice de fait...d'un droit réel*'.²⁸ This definition draws out more clearly the idea of *corpus* as reflecting *animus*: if one wishes to possess as owner, one must act like an owner.²⁹ In fact, this is the standard that is applied also in French law, where possession is explained as consisting in:

...holding a thing in an exclusive manner and in carrying out on it the same material acts of use and of enjoyment as if its possessor were its owner.³⁰

Danos, too, takes this approach. For him, possession is '*la jouissance effective d'une chose*'.³¹ This means the outward expression of ownership, being the exercise in fact of the rights given by ownership.³² In other words, one possesses not simply through physical detention, but through asserting some form of right to the property. Holders on a basis other than ownership appear, therefore, to be excluded from possession. For pre-Code French law, Domat indeed considers the only true possession to be that of an owner,³³ and for him the reason why there can only be one possession is that

²⁴ *ibid* para 43.

²⁵ Domat, *Civil law in its natural order*, Pt. 1 3.7.1.1.

²⁶ *Code civil*, art. 2255 ('the detention or enjoyment of a thing').

²⁷ Louisiana Civil Code, art. 3421.

²⁸ *Code civil du Québec*, art. 921 ('the exercise in fact of a real right').

²⁹ D Lamontagne, *Biens et propriété* (6th edn, Éditions Y Blais 2009), para 660.

³⁰ Planiol, vol 1 para 2263. In fact, possession in French law extends also to apparent exercise of other real rights, as with the law of Quebec: Carbonnier 1719.

³¹ F Danos, *Propriété, possession et opposabilité* (Economica 2007), para 79.

³² *ibid*.

³³ Domat, *Civil law in its natural order*, Pt 1 3.7.1.1.

there can only be one right of ownership.³⁴ From this it is reasonable to take it that he considers that the possessor must hold in the manner of an owner. As with Roman law, this must mean an objective standard: one holds in the manner of an owner if an objective onlooker would consider that to be the case.³⁵ It is sufficient to take control indirectly, as where delivery is made of the keys to the premises where the goods are kept,³⁶ or where the key of a car is delivered as delivery of the car itself.³⁷ Similarly:

If the possessor has organised a mechanism for receipt of new possessions, like having a letterbox with his name on it, the general intention to possess everything that goes into the letterbox is enough.³⁸

The physical element in such a case would appear to be satisfied by the control over the receptacle.

It is not surprising that French law should make such a strong connection between possession and ownership as it does, given the French doctrine that, with respect to corporeal moveables, *possession vaut titre*.³⁹ By virtue of this doctrine:

*[L]e simple possesseur d'un meuble est dans la même situation, en vertu de sa seule détention, que s'il avait, entre les mains, un titre juridique constitutif de son droit...le possesseur d'un meuble est, de plein droit, propriétaire.*⁴⁰

This is the result as long as the transfer is by one 'to whom the owner voluntarily ceded possession or detention', and as long as the acquirer is in good faith.⁴¹ Thus, one who acquires possession of a moveable in good faith will be able to defeat an action by the '*véritable propriétaire*'⁴² to vindicate. For this reason, it is no doubt

³⁴ *ibid* Pt 1 3.7.1.3.

³⁵ Zenati-Castaing & Revet, para 443.

³⁶ Domat, *Civil law in its natural order*, Pt 1 3.7.2.20.

³⁷ Cashin Ritaine, 'Transfer of Movables in France' 54.

³⁸ *ibid* 64.

³⁹ *Code civil*, art. 2276.

⁴⁰ D de Folleville, *Essai sur la possession des meubles et sur revendication des titres au porteur perdus ou volés* (first published 1869, Elibron Classics 2006), para 8 ('the simple possessor of a moveable is in the same situation, by virtue of his detention alone, as if he had, in his hands, a juridical title constitutive of his right...the possessor is, in plain law, owner').

⁴¹ DCFR 4847. Those acquiring possession otherwise than this would require positive prescription to give a title. The *Code civil* does not, however, currently make any provision for positive prescription otherwise than for land (art. 2272).

⁴² This is the term used by de Folleville (n 40) para 8. In light of the foregoing, it seems contradictory to characterise this person as owner, but the usage is convenient. The usage is comparable to the

appropriate to require that one who is to acquire in this way must first hold in such a manner as to give the objective impression of one holding as of right.⁴³

How, though, does one achieve this impression? We have seen that the *Code civil* requires detention or enjoyment of the property. There is, however, a tendency in the literature to rely on the latter in defining the requirements for possession. We have seen that Planiol and Danos both base their definitions on use and enjoyment of the property. Similar definitions appear elsewhere,⁴⁴ although Terré and Simler do refer also to '*maîtrise de la chose*'.⁴⁵ The emphasis is on active exercise of a right. We see the same in the definition in the Quebec civil code. This, however, is problematic, because the holding of a right is something that is not always expressed through active use. Parents putting outgrown baby clothes in the attic, to store them in anticipation of future offspring, are thereafter exercising no 'material acts of use and enjoyment' of the clothes at all. They may indeed never again do so: their expectation of future offspring may be disappointed. Likewise, if one accepts an unwanted gift solely to avoid causing offence, and the gift is immediately placed at the back of a cupboard to be forgotten, again one is making no use of the gift. Nonetheless, in both cases it would be surprising were it to be concluded that there was no possession. In both cases, there is complete control. In both cases, a right is being asserted, in that the parties involved are acting in such a way as to assume the existence of a right to control the use of the property. Perhaps the better view is to see use and enjoyment as merely factors indicative of an assertion of right. This would be more consistent with the definition in the *Code civil*, which gives *détention* and *jouissance* as alternatives.

tendency in Scots law to refer to someone as 'true owner' of land whose ownership has been extinguished by the effect of s 3 of the Land Registration (Scotland) Act 1979: see Scottish Law Commission, *Report on Land Registration* (Scot Law Com no 222, 2010), paras 21.16-17.

⁴³ de Folleville (n 40) paras 37-38.

⁴⁴ See eg Carbonnier 1714-15; Jourdain 21; Terré & P Simler, para 155; Malaurie & Aynès, para 488.

⁴⁵ Terré & Simler, para 159.

(3) Roman-Dutch and South African law

In their account of possession, the Roman-Dutch writers followed the rules of Roman law as they understood them.⁴⁶ For the physical element of possession, this meant the adoption of a criterion based on control of the property: 'actual holding of a thing'⁴⁷ for Grotius, 'keeping of a corporeal thing'⁴⁸ for Voet and 'corporeal seizure'⁴⁹ for Huber. Despite talk of 'bodily taking hold',⁵⁰ it is clear that physical contact is not required. It is control that is the issue. Thus, 'a taking hold that is done with the eyes, as when I bid a thing which is to be delivered to me to be placed within my vision'⁵¹ is effective despite the lack of physical contact. However it may be manifested, however, control is essential. As Voet says, it is not enough 'that a person should have seen a thing, or should know in what place it is'.⁵²

The idea of possession as based on control has been accepted also in South African law. Thus, Silberberg and Schoeman define the physical element of possession as 'effective physical control'.⁵³ Likewise, van der Merwe defines it as 'effective physical control or custody'.⁵⁴ Similarly, Kleyn gives 'physical control'⁵⁵ as the criterion.

Possession then requires control of the property. The application of this principle can be seen in *Botha v Mazeka*.⁵⁶ That case concerned the sale of a number of heifers. The price was paid and the heifers were branded by the buyer, but they could not be removed until an appropriate permit was obtained. The question was whether delivery had taken place. The court held that branding was at best only ambivalent. It was equally consistent with the simple identification of the particular

⁴⁶ Lee, *Roman-Dutch Law* 158; Kleyn D, 'The Concept and Protection of Possession' in F Feenstra & R Zimmermann (eds), *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Duncker & Humblot 1992) 542-44.

⁴⁷ Grotius, 2,2,2.

⁴⁸ Voet, 41,2,1.

⁴⁹ Huber, 2,10,7.

⁵⁰ Voet, 41,2,10.

⁵¹ *ibid.* Presumably we are to suppose that the thing has in fact been so placed, as in the passage from Javolenus referred to in section B(1) of this chapter.

⁵² Voet, 41,1,9.

⁵³ Silberberg & Schoeman 276.

⁵⁴ Van der Merwe, *Law of Things*, para 57.

⁵⁵ Kleyn, 'Possession' 823.

⁵⁶ 1981 (3) SA 191.

heifers that were the subject of the contract of sale,⁵⁷ but even if branding is unequivocally an assertion of right it does not give any greater control to the transferee. This was the view of such markings that was taken in Roman law.⁵⁸ It was held further that driving the animals into a separate camp was not enough as the buyer had not obtained physical control over, or free access to, the animals.

It can be seen again here that it is control rather than contact that is the point. Thus, following Roman law, the placing of a guard on a woodstack is enough for possession, even without physical contact.⁵⁹ Again:

[P]hysical prehension is not essential if the subject matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure.⁶⁰

Indeed, even physical contact will not be enough if it does not give control: if this were not so, the physical contact would be merely symbolical. Thus, in *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd*⁶¹ there was claim of possessory lien in respect of repairs to ship. Following completion of the work, the repairer attempted to maintain possession by having two employees on board at all times. The court held that, as the master of the ship did not in fact surrender control, the employees' presence was merely symbolic and, as such, insufficient. The employees, by their presence, could no more stop the ship's departure than they could if they had been standing on the dock.

Nor is it necessarily sufficient merely to be in a position to take control. Thus, in *S v Magxwalisa*,⁶² there was a charge of possession of explosives. The accused had been told where the explosives were, and were on their way to take possession. The argument that the giving of the knowledge was equivalent to *traditio clavium* was rejected. The accused were not exercising any actual control. Even though it has been said above that it is sufficient 'if the subject matter is placed in presence of the

⁵⁷ Though for criticism of this view, see Carey Miller, 'Transfer of Ownership' 742.

⁵⁸ Ulpian, D.18.6.1.2. Earlier Roman law seems to have taken a more lenient view, on which see chapter 6, part C.

⁵⁹ Van der Merwe, *Law of Things*, para 58.

⁶⁰ *Groenewald v Van der Merwe* 1917 AD 233 at 239, *per* Innes CJ, quoted by Carey Miller, 'Transfer of Ownership' 741.

⁶¹ 1967 (2) SA 528 (CPD).

⁶² 1984 (2) SA 314 (NPD).

would-be possessor', this is only where such provides exclusive control. This was not present in *Magxwalisa*.⁶³

So control of the property is required. The next question, then is the kind and degree of control required. In *Underwater Construction and Salvage Co (Pty) Ltd v Bell*,⁶⁴ there was a dispute over ownership of propeller blades taken from a wreck which was, in South African law, *res nullius*. Two propellers were actually taken away, and the other two were left lying beside the wreck, with the spot marked by a buoy. The court held that there was sufficient possession for *occupatio* as soon as the propeller blades were blasted loose from the wreck. This is the case here even although the actual control exercised appears fairly minimal. What is clear, though, is that an individual carrying out the acts carried out in this case is making an assertion of a right to the property.

The outcome was different in *Reck v Mills*.⁶⁵ In that case, Mills and Reck had entered into an agreement to salvage pipework from a shipwreck, the pipes being of value for scrap. They had begun working on the ship. However, dissatisfied with progress, Reck then entered into an agreement with a third party to work on the boat and informed Mills accordingly. On appeal, it was held, reversing the decision of the court of first instance, that Mills had not done enough to be in possession, and so did not qualify for a possessory remedy against Reck. At first instance, the court had relied on texts of Voet and Grotius concerning *occupatio* in relation to animals. It is noted in those texts that one who actually captures a wild animal is preferred to one who merely wounds it, even if the latter wounded or pursued the animal first. However, the hunter who takes the animal may in such circumstances be liable to a penalty for hunting in an improper fashion. Given that no such penalty was available to him, the judge at first instance took the view that this translated to allowing possession to the first to pursue. Accordingly, the court at first instance allowed possessory protection on the basis that steps had been taken to acquire possession. This position seems difficult to justify, given that the settled position in South Africa

⁶³ We saw of course in chapter 1 that penal provisions are on occasion interpreted in favour of the accused. This does not appear to have played any part in this decision, the court's view of the requirements for the *traditio clavium* being based entirely on private law sources: see 1984 (2) SA 314, 320H-321F.

⁶⁴ 1968 (4) SA 190 (CPD).

⁶⁵ 1990 (1) SA 751. This report is in Afrikaans with an English summary. The facts appear in the first instance decision, which is in English, at 1988 (3) SA 92.

seems to be that actual capture of a wild animal is necessary to give ownership.⁶⁶ However, if a different conclusion was to be reached, it was necessary for the appeal court to distinguish this case from *Underwater Construction and Salvage Co (Pty) Ltd v Bell*. It has been suggested,⁶⁷ though without considering the decision wrong on the facts, that the court in *Reck v Mills* placed too much focus on the need for constant physical control: as we shall see later, possession may be maintained even where the ability to exercise control is temporarily interrupted. Certainly, work was often interrupted by the weather, as it must be in such circumstances. Another ground for distinguishing the two cases may lie in the fact that Mills had not in fact succeeded in separating the pipes from this ship. No doubt he could, by acts affecting one part of the ship, possess the whole. However, this does not appear to be his intention. Given that he did not appear to have intended to possess the whole ship, he could not possess a part of it only. This argument was put forward by counsel for Reck. The court at first instance instead chose to take a view based on what the court considered to be a just result rather than basing its decision on possession. It appears, however, that the appeal court based its decision on this view, that an individual part of a ship could only be separately possessed once it had been separated from the ship.⁶⁸

It appears, then, that in South Africa the physical element of possession is based on control of the property. This control need not be extensive, depending on the nature of the property, but it is suggested from *Underwater Construction and Salvage Co (Pty) Ltd v Bell* that this control must at least be of a nature that reflects the intention to possess. In other words, an assertion of right is required.

(4) Germany

(a) Pre-codification. Views expressed in Germany before codification reflected the view that possession was acquired by one who was acting as owner of the property. Savigny suggested that what was required was control that was:

⁶⁶ See chapter 7.

⁶⁷ *Silberberg & Schoeman* 277.

⁶⁸ *ibid.*

...such as to place the person who desires to obtain Possession in a position which shall enable him, and him only, to deal with the subject at pleasure; that is, to exercise ownership of it.⁶⁹

Pufendorf wrote to the same effect.⁷⁰ Jhering, similarly, took the physical element to be the outward expression of the intention to hold as owner.⁷¹ In other words, the *corpus* reflects the *animus*.⁷²

Windscheid gives a somewhat different formulation. He defines the physical element of possession as the requirement for a person to have the thing '*tatsächlich in seiner Gewalt*'.⁷³ He expands on this by explaining that this means '*tatsächliche Gewalt über die Sache in der Gesamtheit ihrer Beziehungen*'.⁷⁴ For Windscheid this means that there can only be one possession of a thing at any given time, though this possession may be shared among a number of people.⁷⁵

(b) Modern law. It is this test of factual control (*tatsächliche Gewalt*) that has been adopted in the modern German law.⁷⁶ However, it is not easy to give a precise formulation of the requirement that will fit all cases. While possession in some cases may be clear, such as things carried on the person or shut away such that others are deprived of access,⁷⁷ other things are less clear. Certainly, actual physical handling does not appear to be necessary.⁷⁸

If there is no direct physical control being exercised over the thing, for example as with a woodpile in the open,⁷⁹ recourse must be had to what Brehm and Berger term the '*soziale Anschauungen*'.⁸⁰ Another way of putting the same idea is to say with Wilhelm that the matter is determined, not by any individual's own

⁶⁹ Savigny, *Possession* 142.

⁷⁰ *Elementorum Jurisprudentiae Universalis*, Bk 1, Def 1,11.

⁷¹ *Grund des Besitzschutzes* 45-46; *Besitzwille* 34.

⁷² This may help to explain any apparent lower standard for *traditio*: if the purpose of *corpus* is to explain *animus*, then it may be seen as reasonable to admit also other evidence of *animus* for that purpose.

⁷³ Windscheid, vol 1, 732 ('factually in his control').

⁷⁴ *ibid* 748 ('factual control over the thing in all respects').

⁷⁵ *ibid* 758.

⁷⁶ *BGB*, s 854(1).

⁷⁷ Schwab & Prütting 22.

⁷⁸ Wieling 156.

⁷⁹ This example is given by Schwab & Prütting 22.

⁸⁰ Brehm & Berger 37. Schwab & Prütting 22; T Quantz, *Besitz und Publizität im Recht der beweglichen Sachen* (Duncker & Humblot 2005) 36.

knowledge or intentions, but by the general view of others (*Durchschnittsurteil von jedermann*).⁸¹ One must have the outward appearance of control.⁸² In other words, as appears to have been the case in Roman law, one must press into service the idea of a hypothetical objective onlooker, and take an objective view of the whole circumstance to determine whether the thing appears to be possessed. The idea here is of possession as a *Publizitätsmittel*,⁸³ a means of giving publicity to rights in property. It may be, therefore, that it is necessary to reject the idea that it is enough that an item has been left in an individual's sphere of control, as where a customer in a supermarket accidentally leaves a banknote on a shelf.⁸⁴ It is true that, rather similarly to the Roman view discussed above, Savigny had indicated that the occupier of premises has sufficient *corpus* to possess an item within those premises (though not necessarily sufficient *animus*).⁸⁵ However, there seems to be no actual exercise of control over the banknote by the occupiers of the supermarket, and it seems improbable that anyone seeing the note would assume that the occupiers were asserting any sort of claim to it.⁸⁶ On the other hand, in the case of the woodpile, it is clear from its existence that someone has exercised control over its components, and the effort involved in its construction suggests that someone has an interest in it. It is true that, in this situation, interference by third parties cannot be excluded, but the exclusion of any such possibility does not appear to be required.⁸⁷ This then suggests that, notwithstanding the terms of the *BGB*, it is not control alone that satisfies the physical element of possession. Instead, what is required is control of a kind that indicates to third parties that a right is being asserted. The reason for this, according to Wieling, is that possession is a social fact, *eine soziale Tatsache*, rather than being something having its origin in the intention of a legislator, and so its existence or otherwise is determined accordingly.⁸⁸

⁸¹ Wilhelm, para 457.

⁸² Wieling 156.

⁸³ Quantz (n 80) 35.

⁸⁴ Baur & Stürmer 71.

⁸⁵ Savigny, *Possession* 160 and 162.

⁸⁶ See also Savigny, *Possession* 163 n (e), holding that one is not possessor of an item in one's house unless one knows where it is.

⁸⁷ O Sosnitza, *Besitz und Besitzschutz: Sachherrschaft zwischen faktischen Verhältnis, schuldrechtlicher Befugnis und dinglichen Recht* (Mohr Siebeck 2003) 6. That this is the case is also implied by the example of the banknote given above.

⁸⁸ Wieling 156.

(5) English law

(a) The general position. Possession requires a particular physical relationship with the property as well as a particular state of mind, namely 'effective physical or manual control, or occupation, evidenced by some outward act'.⁸⁹ This outward act is sometimes known as *de facto* possession.⁹⁰ What then is required for this physical element? According to Pollock and Wright, the general position on the physical element is that:

[A]ny of the usual outward marks of ownership may suffice, in the absence of manifest power in some one else, to denote as having possession the person to whom they attach.⁹¹

Holmes, similarly, says that possession is 'a relation of manifested power coextensive with the intent'.⁹² For Pollock and Wright, this is present where:

...a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure.⁹³

It is clear therefore that one with no control does not possess. Thus, say Pollock and Wright, if a box is delivered to someone but the key is retained, there is no acquisition of possession of the contents.⁹⁴ This issue was considered in *Stadium Finance Ltd v Robbins*.⁹⁵ In this case, the defendant had left a car with a dealer with a view to a sale, but without the key and with the car registration documents locked in the glove compartment. Without the defendant's consent, the dealer then agreed a sale to a third party. The question then arose whether the dealer was in possession for the purposes of section 1 of the Factors Act 1889. Having taken the view that there

⁸⁹ Pettit, 'Personal Property', para 1211.

⁹⁰ Pollock & Wright, *Possession* 12; Pettit, 'Personal Property', para 1211.

⁹¹ Pollock & Wright, *Possession* 2.

⁹² Holmes, *The Common Law* 170-71.

⁹³ Pollock & Wright, *Possession* 119.

⁹⁴ *ibid* 68-69.

⁹⁵ [1962] 2 QB 664.

was no possession of the car without the key or the registration documents, Wilmer J held that the registration book was not in the possession of the dealer.⁹⁶

This control can be exercised indirectly, as for example where one receives delivery of a key to premises in which goods are kept.⁹⁷ Pollock and Wright appear to disapprove the apparent Roman requirement that the delivery of the key take place at the premises.⁹⁸

The control required depends in part on the nature of the property. In *The Tubantia*,⁹⁹ a case concerning competing claims to possession of a sunken ship, the requirement was defined as follows:

A thing taken by a person of his own motion and for himself, and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession.¹⁰⁰

A shipwreck is, of course, not susceptible to any great use at all, and so it was held sufficient to send divers down to carry out preliminary salvage work and to mark the position of the wreck with buoys attached to it. If an assertion of right is required, this is found in the work carried out and in the attachment of the buoys.

Although Pollock and Wright refer in the passage quoted earlier to the 'outward marks of ownership', the holding in fact need not be with the intent of an owner, if one is holding on a lesser basis. Thus, in *Pharaoh Scaffolding v Commissioners for Her Majesty's Revenue and Customs*,¹⁰¹ the hirer of scaffolding was held to have acquired possession of the scaffolding.¹⁰² It was held that possession for these purposes meant *de facto* control and exclusive use. Although the owners erected the scaffolding, and would make visits to the site to make alterations

⁹⁶ [1962] 2 QB 664, 673. The other judges did not require to take a view on this issue, having taken the position that the car was possessed by the dealer even without the registration documents and key. They instead reached the same result by holding a sale without registration documents as being not a sale in the normal course of business.

⁹⁷ *Ancona v Rogers* (1876) LR 1 Ex D 285; *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807. In both cases, the goods were kept in a locked room within premises occupied by another.

⁹⁸ Pollock & Wright, *Possession* 61.

⁹⁹ [1924] P 78.

¹⁰⁰ [1924] P 78, 89.

¹⁰¹ [2008] STI 2381.

¹⁰² For the purposes of the Value Added Tax Act 1994, sch 1 para 1(1)(b).

and health and safety checks, this did not amount to control over the use to which the scaffolding was put.

This then is rather similar to the position of Roman, French, German and South African law. The physical element is the reflection of the mental element. No-one will possess whose manner of holding is inconsistent with the assertion of a right. Thus, one whose friend passes to him the friend's bottle, so that he can take a drink from it, may be held not to possess the contents of the bottle: there is no assertion of any right to the liquid that is not drunk.¹⁰³

(b) Exclusivity. A number of writers have said, both in English law and in other systems, that possession must be 'exclusive'.¹⁰⁴ The point appears, though, more prominently in English accounts. Salmond, for example, describes exclusivity as being of 'the essence of possession'.¹⁰⁵ Pollock and Wright say that 'physical possession is exclusive, or it is nothing'.¹⁰⁶ More recently, Lord Hope of Craighead said in an English case that exclusivity 'is of the essence of possession'.¹⁰⁷ It has been said that possession 'involves, by its very nature, a relationship of exclusivity between the possessor and the thing possessed'.¹⁰⁸ It is not clear, however, that this means that exclusivity is a distinct requirement in the English law of possession. From context, it is clear that Pollock and Wright and Lord Hope mean no more than that English law has the same rule as Roman law, that there can be no more than one

¹⁰³ This argument appears to have been successful in a number of criminal cases in the United States from the Prohibition era, concerning unlawful possession of alcohol: W E Seleen, 'The Concept of Possession as Applied to Intoxicating Liquor by the Missouri Courts' (1960) 25 Mo L Rev 295, 306. The argument appears questionable at least as regards the liquid that has been drunk. This point is considered further in chapter 3, part E(2).

¹⁰⁴ For this aspect in the Civil law tradition, see eg Savigny, *Possession* 142; Planiol, vol 1 para 2263; Carbonnier 1714-15; Jourdain 21; Malaurie & Aynès, para 488; *Groenewald v Van der Merwe* 1917 AD 233 at 239, *per* Innes CJ, quoted by Carey Miller, 'Transfer of Ownership' 741. The comment in *Silberberg & Schoeman*, 279, that a 'person claiming to be in possession of a thing need not prove exclusive possession', relates to the fact that two or more people can share possession. Accordingly, this comment does not contradict the general position that possession must be to some extent exclusive.

¹⁰⁵ *Salmond on Jurisprudence* 287. Although this work as a whole has been substantially rewritten by subsequent authors, these words are Salmond's own: see his first edition of 1902, at page 313. See also Holmes, *The Common Law* 170-171.

¹⁰⁶ Pollock & Wright, *Possession* 21.

¹⁰⁷ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, at para. 70. The case is concerned with possession of land, but Lord Hope's comments are in general terms.

¹⁰⁸ J Hill, 'The Proprietary Character of Possession' in E Cooke (ed), *Modern Studies in Property Law, Volume I: Property 2000* (Hart 2001) 27.

person or group in possession at any one time.¹⁰⁹ It does not mean, for example, that two or more people cannot possess together. A distinction falls to be made between shared control - where possession by multiple parties is possible¹¹⁰ - and a competition for control - where it is not. It is true that Gray and Gray's view (concerned with possession of land) is more strongly expressed:

Possession, by its nature, implies exclusion: any claimant to possession necessarily reserves and retains the ability to exclude all others from the land occupied. Even the adjective 'exclusive' adds nothing to an understanding of the phenomenon of possession.¹¹¹

However, given that they rely on Lord Hope's view, noted above, it may be that they mean no more than that there can be no valid competing claims of possession at any given time.

In any case, the extent to which my control may be said to be exclusive must be a matter of degree: it would hardly be workable in practice for the possessor to be required to exclude all others from the property in all circumstances. Indeed, it does not appear to be required to exclude all possibility of interference by others.¹¹² Instead, only 'occupation...which is sufficient as a rule and for practical purposes to exclude strangers' is required, and not even that if there is no 'more effectual act in an adverse interest'.¹¹³ In effect, the position appears to be that, as long as the possessor's control of the property is not in fact subject to any interference, possession is retained.

(c) Items on another's land. The English law on the physical element is complicated by a group of cases concerned with lost items found by one person on land belonging to another. This is an issue in English law because, as we saw in chapter 1, the first possessor of lost property in English law acquires rights to the property that may only be defeated by one with a prior right.

¹⁰⁹ Indeed, in the passage referred to, Lord Hope describes the English position as having been derived from Roman law.

¹¹⁰ As it certainly is in England: Pettit, 'Personal Property', para 121.

¹¹¹ K Gray & SF Gray, *Elements of Land Law* (5th edn, Oxford University Press 2008), para 2.1.10.

¹¹² Pollock & Wright, *Possession* 11-12.

¹¹³ *ibid* 13.

In *Bridges v Hawkesworth*,¹¹⁴ the plaintiff was visiting the defendant's shop, where he found a parcel on the floor containing banknotes. The court held that the plaintiff was entitled to the notes on the owner's failure to claim them. The basis for this was that:

The notes never were in the custody of the defendant, nor within the protection of his house.¹¹⁵

The plaintiff was therefore the first to bring the notes under his control.

It appears that a distinction is made in these cases between items found in and items found on land. In the former case, the owner or occupier of the land is normally preferred, even though, Swadling argues, the object is '*ex hypothesi* not already in the possession of the occupier of the land'.¹¹⁶ For example, in *South Staffordshire Water Co v Sharman*,¹¹⁷ rings were found by a workman embedded in the mud at the bottom of a pool he was engaged in draining. The court held in favour of the occupier of the land. In *Elwes v Brigg Gas Co*,¹¹⁸ an ancient boat was found buried in the land. The court held in favour of the landowner. In *Waverley BC v Fletcher*,¹¹⁹ a medieval gold brooch was found buried in a public park with the use of a metal detector. The court held that the local authority that owned the park was entitled to the brooch. These cases do not in fact appear to depend on possession. In *Elwes* and *Waverley*, the decisions were reached on the basis that a buried item is part of the land, and in *Sharman* express reliance was placed on Pollock and Wright's view that:

The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land.¹²⁰

¹¹⁴ [1843-60] All ER Rep 122. The case has generated copious literature. See eg Holmes, *Common Law* 175; Salmond on *Jurisprudence* 280; DR Harris, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 77; AL Goodhart, 'Three Cases on Possession' in *Essays in Jurisprudence and the Common Law* (Cambridge University Press 1937) 76-84.

¹¹⁵ [1843-60] All ER Rep 122, 124 (Patteson J).

¹¹⁶ Swadling, 'Property', para 4.420.

¹¹⁷ [1896] 2 QB 44.

¹¹⁸ (1886) LR 33 Ch D 562.

¹¹⁹ [1996] QB 334.

¹²⁰ Pollock & Wright, *Possession* 41, quoted [1896] 2 QB 44, 46 (Lord Russell of Killowen CJ).

Accordingly, *Elwes*, *Waverley* and *Sharman* may be disregarded in considering the general law of possession.

As far as lost items found above ground are concerned, the relevant law is now found in *Parker v British Airways Board*.¹²¹ In this case, a bracelet was found in an airport departure lounge by a passenger, the plaintiff. The defendants claimed to have had prior possession on the basis of their control of the premises. The plaintiff was preferred. Giving the lead judgment, Donaldson LJ held that the defendants had failed to show sufficiently the required 'manifest intention to exercise control'¹²² over items in the premises. That intention is, of course, made manifest through the actual acts of control that are carried out. Although some control was exercised over access to the departure lounge, this did not relate to any items that happened to be found there. The intention to exercise control is to be made manifest by acts of control such as restricting access, putting security measures in place and conducting searches for items. It was noted that the defendants had not done the last of these. The place where the item is found is therefore of importance. For example, said Donaldson LJ, in a public park no control at all is exercised over individuals' comings and goings. At the other end of the scale, in a bank vault there is a clear intention to exercise a high degree of control. In places where there are more modest restrictions on access, other factors will need to be considered.

The issue has also arisen in the criminal law, where it appears that a less stringent test is adopted, owing to the need to show that the property belonged to someone before a competent charge of theft can be brought.¹²³ Thus, in *R v Rowe*,¹²⁴ a quantity of iron was found at the bottom of a canal. In order to sustain a charge of larceny for taking the iron, it was held that the iron was in the possession of the canal company. The same approach was taken in *Hibbert v McKiernan*¹²⁵ and *R v Rostron*,¹²⁶ in both of which the accused appropriated lost golf balls found on a golf course. The balls had been abandoned by their owners, but were held to be in the

¹²¹ [1982] 1 All ER 834. As we saw in part A(2) of chapter 1, the possession issue discussed in this case could not arise in the same way in Scotland, the finder of lost property in Scotland acquiring no right to it.

¹²² [1982] 1 All ER 834, 844.

¹²³ Theft Act 1968, s 1(1). As appears from the cases considered here, the position was the same in the previous law.

¹²⁴ (1859) 8 Cox 139.

¹²⁵ [1948] 2 KB 142.

¹²⁶ [2003] EWCA Crim 2206.

possession of the golf club even though they were not aware of the presence of specific balls. In the latter case it was expressly held that this was possession 'for the purposes of theft'.¹²⁷ The decision in a private law dispute over possession might have been different on the same facts. Certainly, the occupiers of the golf courses in these cases do not appear to have been exercising the degree of control that the court in *Parker* indicates is required. Accordingly, as these cases appear to turn on a special rule of English criminal law, it is suggested that they are of limited use in considering general questions of possession.

C. THE PHYSICAL ELEMENT IN THE LOSS OF POSSESSION

(1) Roman law

Once possession has been taken, it appears that less control is required for its maintenance.¹²⁸ For Kaser, possession is retained as long as factual control is not definitely lost.¹²⁹ An example would be where a purse becomes detached and falls from the tunic to which it was attached.¹³⁰ Accordingly, even if one is not presently exercising control, one still possesses as long as a resumption of control is not impossible. Thus, Gaius says that we possess things we leave intending to return to.¹³¹ He says nothing about the likelihood that the items will still be there when we do return to them. Likewise, for Papinian, buried money continues to be possessed even if its location is forgotten,¹³² even though possession of such money could not be acquired initially until it was dug up.¹³³ Things may continue to be possessed even during a protracted absence, as with 'summer and winter pastures, even though we desert them at given periods'.¹³⁴ Paul adopts a distinction made by the younger Nerva:

¹²⁷ [2003] EWCA Crim 2206 para 16.

¹²⁸ Nicholas 114; F Schulz, *Classical Roman Law* (Clarendon Press 1951) 435.

¹²⁹ M Kaser (n 4) vol 1, 394.

¹³⁰ Thomas 138.

¹³¹ G.4.153.

¹³² Papinian, D.41.2.44pr.

¹³³ Paul, D.41.2.3.3.

¹³⁴ Paul, D.41.2.3.11.

The younger Nerva says that, leaving aside a slave, movable things are possessed by us only so long as they are in our keeping, that is, so long as we can, if we so choose, take physical control of them. For once an animal strays or a vase falls, so that it cannot be found, it immediately ceases to be in our possession, even though it is possessed by no one else; this differs from the case of something which is still in our keeping, though not immediately traceable; because the fact remains that it is still there, and all that is necessary is a diligent search for it.¹³⁵

He begins, then, by making possession depend on whether the thing is 'in our keeping'. Presumably the vase that has fallen has done so outside 'our keeping'. On this basis, it is a little difficult to account for Papinian's view that a buried object whose location is forgotten is still possessed, even when it is on someone else's land, unless the point is that the buried item can in principle be recovered, if only its location can be remembered. If there is a problem with continued possession here, it is one of *animus* rather than *corpus*. Of course, a buried item is more difficult for anyone else to interfere with. An item easily accessible to others may be in a different position.

According to Nerva, then, if an item cannot be found, it is no longer possessed. If, however, it is possible to find it, it is still possessed, even if it can only be found by a diligent search, as long as it is still 'in our keeping'. If, however, something is lost beyond all reasonable recovery, it is certainly no longer possessed. Thus, Ulpian says that, if stones are lost in the Tiber in a shipwreck, possession is lost.¹³⁶

(2) The French tradition

As with Roman law, the maintenance of possession requires less than was required for its initial acquisition. All that is required, says Carbonnier, is that the possessor is able to resume control at will.¹³⁷ If, however, the possessor is not in a position to be

¹³⁵ Paul, D.41.2.3.13.

¹³⁶ D.41.2.13pr.

¹³⁷ Carbonnier 1715. Pothier, *Possession*, para 79 gives the same rule for the pre-codification law. So, for example, lost property is not possessed (para 80), although not things temporarily mislaid within the possessor's sphere of control (para 81). Compare Domat, *Civil Law in its Natural Order*, Pt. 1 3.7.2.24, who says that possession continues until it is 'usurped by other persons'.

able to carry out 'the physical acts which form possession'¹³⁸ – in other words, he is unable to exercise control, as for example where the item is lost – possession will be lost. This does not mean that the property must be in constant use. After all, non-use is one of the prerogatives of ownership.¹³⁹ However, it is said that possession *animo solo* is restricted to immoveables.¹⁴⁰ Presumably this means that some degree of control must exist even where use is not at a given moment being exercised. Thus it appears that any lengthy absence will cause a loss of possession unless control is maintained in some other way. For example, possession of a car might be retained by retention of the key. Unfortunately, however, this issue appears to have been little considered in the French literature.

(3) Roman-Dutch and South African law

A stricter test exists for acquisition than for continuation of possession:

[O]nce possession is acquired it will be retained as long as the possessor is capable of exercising physical control over the article.¹⁴¹

Van der Merwe suggests that possession will be lost by:

...mere loss of physical control, for example where a thing has been mislaid and cannot be found after a thorough search even if the thing has been lost within the possessor's orbit of control.¹⁴²

However, the cases he cites in support of this position¹⁴³ are concerned with whether property in such a position is to be considered lost for the purposes of interpreting a contract of insurance for the loss of property. It is not at all clear that these cases have any application to the question of possession. Certainly, the reasoning of the

¹³⁸ Planiol, vol 1 para 2271.

¹³⁹ Terré & Simler, para 161; Domat, *Civil law in its natural order*, Pt. 1 3.7.1.6.

¹⁴⁰ Planiol, vol 1 para 2274; Carbonnier 1716; Terré & Simler, para 161. It has been said that possession of land *animo solo* may continue for up to a year: Cashin Ritaine, 'Transfer of Movables in France' 64.

¹⁴¹ Van der Merwe, *Law of Things*, para 60. See also Silberberg & Schoeman 278.

¹⁴² Van der Merwe, *Law of Things*, para 71.

¹⁴³ *Holmes v Payne* [1930] 2 KB 301; *London and Lancashire Insurance Co Ltd v Puzyna* 1955 (3) SA 240 (CPD).

court in each case does not expressly rely on the concept of possession. It is particularly problematic here to rely on an English case in this context, as van der Merwe does, for as we shall see below English law does not readily hold possession of an item to be lost merely because it has been mislaid. Nonetheless, this position is consistent with the authorities on Roman law referred to earlier.

Even if control is lost, possession will not be lost if the interruption is temporary. In one case, the rule was stated as follows:

The fact that a person cannot for a period of time exercise control over a thing does not necessarily mean that he is not in possession of it. If I park my car at the cable station and take the cable car to the top of Table Mountain I do not lose possession of my parked car while I am up the mountain and thus physically unable for a period of time to exercise control over it. To be in possession of an object does not mean that I have to actually touch it or be with it all the time.¹⁴⁴

This case concerned a charge of possession of an illegal drug. While he was imprisoned for a different offence, the accused sent a letter to his parents asking them to recover packages containing the drugs from their hiding places. Although the statutory definition of possession for the purposes of the offence was broader, the court held that even applying the general definition the appellant was in possession. One can possess even though one is not immediately able to resume physical control, and here the accused could resume control through his parents.

(4) Germany

We saw earlier in this chapter that possession depended to some extent on the impression that would be given to an objective bystander. We see something similar with the retention of possession. Thus, in the case of a car parked outside a building,¹⁴⁵ a continued intention to possess can readily be inferred by the fact of the possessor having locked the car and taken the key with him. It is clear to all that someone is asserting a continuing right to the car. Similarly, Baur and Stürner give

¹⁴⁴ *S v Singiswa* 1981 (4) SA 403 (CPD), 405 (Williamson J).

¹⁴⁵ Schwab & Prütting 22.

the example of a plough left by a farmer lying overnight in a field.¹⁴⁶ The context implies that someone is likely to return for the plough, in a way that perhaps would not be implied in other circumstances.

It appears, therefore, that possession is not lost by virtue of the mere fact that the possessor is not at a given moment exercising direct physical control over the thing, if the facts would lead an objective bystander to expect that someone is continuing to assert a right to the property. For Savigny, even the possibility of someone else taking possession before one can resume control does not interrupt that earlier possession. After all, it can always be envisaged that someone may seize control. The issue for him is whether this is sufficiently probable to take it into account. For example, it is not probable that one's house will be broken into during a particular absence, so this possibility does not affect one's possession.¹⁴⁷ The implication, however, is that possession will be lost if interference is sufficiently likely.

In modern German law, possession is lost if '*tatsächliche Gewalt*' (factual control) is lost.¹⁴⁸ An exception is made, however, where the impediment is of a temporary nature,¹⁴⁹ as long as the possessor retains the capability to resume control.¹⁵⁰ As Joost points out, no-one can exercise control constantly over the things in his sphere of control.¹⁵¹ For one who goes on a journey or has a spell in hospital, possession is not lost,¹⁵² nor is it lost even where the possessor is imprisoned.¹⁵³ Clearly in these circumstances the possessor cannot resume exercise of that possession entirely at will. Nonetheless, these interruptions are temporary in their nature. Even a prison sentence will normally have an end date. On the other hand, lengthy absence would result in loss of possession. Joost gives as an example of this a thirty-year absence.¹⁵⁴ Once absence has reached such a length, it must be seen as

¹⁴⁶ Baur & Stürner 71.

¹⁴⁷ Savigny, *Possession* 170.

¹⁴⁸ *BGB*, s 856(1).

¹⁴⁹ *BGB*, s 856(2).

¹⁵⁰ Wieling, *Sachenrecht* 165.

¹⁵¹ *Münchener Kommentar*, s 856(2) n 12 (Joost).

¹⁵² *Münchener Kommentar*, s 856(2) n 13 (Joost); Wieling 165.

¹⁵³ Wolff & Raiser 47.

¹⁵⁴ *Münchener Kommentar*, s 856(2) n 14 (Joost). Despite the coincidence of duration, this does not appear to be intended to allude to the thirty year negative prescription in *BGB*, s 197, for *inter alia* claims for return of property based on ownership or other real rights. Joost does not refer to that section, which in any case would not apply to the present case. Even if possession is seen as a real

indefinite rather than temporary, and would appear to a third party indistinguishable from abandonment.

(5) English Law

Possession is not lost just because the possessor is not presently exercising control:

If I leave my car unlocked outside my host's house while I dine, I am not in physical control of it nor can I be expected to resist interference with it, yet I do not lose possession of it in the eyes of the law.¹⁵⁵

Furthermore, *The Tubantia*,¹⁵⁶ considered above, suggests that possession is not lost merely because of temporary interruptions to the possessor's control: in that case, possession was held to continue even though salvage work on the sunken wreck was stopped regularly by weather conditions, including for the whole of the winter 1922-23. Indeed, Pollock and Wright go further than that, and hold possession to continue even where control is entirely lost. Considering the case of a coin possessed by one person which is placed in another's pocket, they say:

Probably in point of law the possession of the former possessor has up to that time continued...and continues (just as it does in the case of a thing lost in the street) until the finder knowing of the thing assumes the possession.¹⁵⁷

This view, it has been suggested,¹⁵⁸ is supported by the case of *R v Thurborn*,¹⁵⁹ in which it was held that there was a good charge of larceny when an apparently lost note was picked up in the street with the intention to appropriate it. This, however, appears to be influenced by the particular requirements of the English law of larceny, and may not be applicable in jurisdictions outside the Common Law tradition.

right, negative prescription only begins running when a claim arises based on the real right (*BGB*, s 200). That would occur when some other person interfered with the property being possessed, not merely when the possessor last ceased to exercise possession.

¹⁵⁵ Paton, *Jurisprudence* 580.

¹⁵⁶ [1924] P 78.

¹⁵⁷ Pollock & Wright, *Possession* 211.

¹⁵⁸ *Salmond on Jurisprudence* 289-90.

¹⁵⁹ (1848) 1 Denison 387; 169 ER 293.

If temporary loss of control does not result in loss of possession, it would seem to follow from that that a threatened loss of control does not have that effect either. Holmes gives an example. Suppose that the possessor of a purse leaves it in his house in a remote location. The possessor is then imprisoned 100 miles away. The only person within twenty miles of the house is a burglar, who has seen the purse through a window and intends to break in and steal it. As Holmes says:

The finder's power to reproduce his former physical relation is rather limited, yet I believe that no one would say that his possession was at an end until the burglar, by an overt act, had manifested his power and intent to exclude others from the purse.¹⁶⁰

As long as there is no actual interference with the possession, the fact that interference is probable or even certain does not cause loss of possession. Only when the interference actually occurs is possession lost.¹⁶¹

D. CONCLUSIONS

As has been said, it is not possible here to give more than an outline of the law in the systems considered. However, it is possible to draw some preliminary conclusions.

For acquisition of the physical element of possession, it appears that all of the systems considered require some degree of direct or indirect physical control of the property. Mere physical presence or the power to take control will not normally be enough. There is little evidence, though, that this control must be of sufficient degree to exclude all others. What is more important is that the control must reflect the intention to possess, such that it would appear to an objective third party that a right to the property was being asserted. It appears, primarily from the English material but also to some extent from Roman and German law, that outward appearance of having exercised control may be relevant in the case of things found on land.

The retention of possession does not require continued control, although it appears that France may be more demanding on this point with corporeal moveables. Generally, possession does not appear to be lost unless the thing possessed is not

¹⁶⁰ Holmes, *The Common Law* 187.

¹⁶¹ Pollock & Wright, *Possession* 185; Holmes, *The Common Law* 185; Dias, *Jurisprudence* 287.

reasonably susceptible to recovery; in England it appears that possession may be retained even then. Temporary interruptions to the ability to resume control do not appear to be relevant. As far as the risk of interference is concerned, Savigny has suggested that this may be relevant. It does not, however, appear to be so in the Common Law.

We shall see in the following two chapters the extent to which these views reflect the position in Scotland.

3 ACQUISITION OF POSSESSION

A. INTRODUCTION

The general question, of what is required for the physical element of possession, is not without difficulty. Merely to define possession as requiring control, as we saw in chapter 2, is just the beginning of the difficulty. In part, the difficulty arises from the nature of possession as depending on a continuing state of facts, in particular the fact of control. Control is not easily defined in practice, for there may be more than one person with access to the property. Bentham identifies difficulties of this type:

A street porter enters an inn, puts down his bundle upon the table, and goes out. One person puts his hand upon the bundle to examine it; another puts his to carry it away, saying it is mine. The innkeeper runs to claim it, in opposition to them both; the porter returns or does not return. Of these four men, which is in possession of the bundle?

In the house in which I dwell with my family is an escritoire, usually occupied by my clerk, and by what belongs to him: in this escritoire there is placed a locked box belonging to my son; in this box he has deposited a purse entrusted to him by a friend. In whose possession is the bag – in mine, in my clerk's, in my son's, or his friend's?¹

The factual situation underlying one's possession may well be ambiguous. Added to this is the difficulty that possession differs from the normal position with rights in that it can be lost, and that without great difficulty, without the consent of the holder. Normally ownership, for example, can only be lost with the owner's consent.² Possession, by contrast, is lost simply by a contrary possession.³ In Bentham's first example, therefore, if possession is dependent on control, possession could quite easily pass back and forth among the four men depending on the facts at any given moment.

¹ J Bentham, *General View of a Complete Code of Laws*, chapter XV, in *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring (11 vols, 1838-1843), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1922&chapter=114655&layout=html&Itemid=27.

² There are, of course exceptions to this. Thus, if you make wine from my grapes without my agreement, you become owner by *specificatio* without my consent. However, such situations are exceptional. Certainly, ownership does not normally fluctuate in this manner.

³ Stair, *Inst.* 2,1,20; Erskine, *Inst.* 2,1,21.

A related difficulty is that third parties, whose position may be affected by the outcome of the question of possession, may be unable to determine who possesses from the facts available. For example, in my workplace I have a number of books on shelves. Of these, none is acquired directly from my employer, but some were given to me by third parties because of my employment. Others were acquired by me either before or during my present employment from my own resources; nonetheless, they are all kept at my place of employment and are used for purposes relating to that employment. All of the books, however acquired, are held in the same way. On these facts, both my employer and I could each plausibly argue for our possession: I because I acquired them all myself without the involvement of my employer, my employer because they are kept in my employer's premises and used for the purposes of my employment. Suppose, further, that I lend one of these books to one of my students, who takes it home and forgets or neglects to return it. Now the student also may appear to possess. Of course, it does not follow from this that, as Paton appears to imply,⁴ that we do in fact all possess.⁵ The problem here is a general one in the law, that it is necessarily the case that any person considering a situation from the outside will have more or less limited information. This is why the law of evidence has presumptions and burdens of proof. No doubt a full investigation of the facts will make matters clearer. However, as we have seen in chapter 1, in possessory proceedings there is limited scope for such an investigation, given that such proceedings are not concerned with the actual right to possess. The best that the law can do is to provide a framework within which the issues can be analysed. The particular issue that Paton raises, of an item brought by a guest into premises occupied by their owner and another person, falls within the subject matter of section (3) of part D of this chapter.

Other difficulties may be suggested. Bentham's first example suggests that one of the difficulties with possession is that there may be more than one person in a particular physical relationship with the property, with the result that there may be more than one individual claiming to be in possession. It may therefore be that it will be necessary to demand that, before one can possess, one must show that one holds

⁴ Paton, *Jurisprudence* 582-83.

⁵ Although there in fact may be a shared possession, the student having natural possession and either me or my employer (or both) having civil possession, depending on what the precise rules are.

exclusively, but what does that mean in practice? Does it merely mean that others are in fact excluded, or is it necessary to exclude the possibility of interference by others? If the former is the case, need there be absolute exclusion of others? Either way, how does this relate to the requirement for control? After all, control appears on its face to require some degree of exclusivity, if it is to be control at all.

What does 'control' mean in any case? Are symbolic acts ever enough?⁶ Does it differ by type of property (eg according to the size of the property)?⁷ If I have only brief control of the property, do I possess?⁸ Do I possess a medical implant that has been placed in my body?⁹ Given the possibility of escape, how are animals possessed?¹⁰ Once I have begun to possess property, what level of control is needed to maintain my possession?¹¹

These problems will be considered in this and the following chapters, in light of the comparative and historical discussion in chapter 2. We begin by considering the approach taken by writers on Scots law.

B. INSTITUTIONAL AND OTHER EARLY WRITINGS

Amongst pre-institutional writings on Scots law, there is very little direct discussion of the requirements for possession. Although the possessory remedies are accepted as relying on possession rather than title, the tendency is to consider the possessory remedies in detail without attempting to define possession itself. Certainly, there is no attempt to give a general account of possession, covering the different areas of the law in which a concept of possession is used. Thus, Balfour,¹² Hope¹³ and Spotiswoode¹⁴ give general accounts of the possessory remedies, but no general definition of possession, though in his notes to Hope's *Minor Practicks*,¹⁵

⁶ See chapter 6.

⁷ See part E of this chapter.

⁸ See chapter 5.

⁹ See part E of this chapter.

¹⁰ See chapter 7.

¹¹ See chapter 4.

¹² *Practicks*, 31 and 109.

¹³ *Major Practicks*, VI.15, VI.18; *Minor Practicks*, X.1-6.

¹⁴ *Practicks* 87-95 and 229-31.

¹⁵ At X.1.

Spotiswood¹⁶ defines possession of land as 'effective Detention'. This is in a context where he is linking possession strongly to ownership, with the implication that this is detention in the manner in which an owner detains. In other words, the physical element reflects the existence of an assertion of right which, as we have seen, is consistent with both the *Ius Commune* and Common Law positions.

During the period in which practicks were being written, up to the late seventeenth century, the only attempt at an orderly exposition of any area of Scots law is Craig's *Jus Feudale*. As far as can be determined, Craig is the first writer of Scots law who attempts to give a general definition of possession, although, given his subject matter, he understandably only considers possession of land. He defines possession in the following manner:

...the holding and use of the immoveable possessed in the sense in which a man is said to possess his own home... Possession includes the putting of the property to all those uses of which it is naturally susceptible.¹⁷

In reaching this view, Craig relies on a derivation of the term *possessio* from a term relating to the placing of colonies, *positio sedium*. This derivation is, in fact, probably false.¹⁸ Nonetheless, it is important in that it gives an indication of the standard Craig considers to be required: the holding of the property in a manner reflecting the assertion of a right. However, if the final sentence quoted here is to be taken at face value, it may go too far. It surely cannot be required of a possessor that he exercise all possible uses of the property. To require that would be unrealistic. Perhaps Craig means, instead, to indicate that one may possess in many different ways.

¹⁶ This is the grandson of the author of Spotiswoode's *Practicks*. The difference in spelling reflects the usage in the respective published editions consulted.

¹⁷ Craig, *Jus Feudale*, 2,2,5.

¹⁸ The term *sedium* is the genitive plural form of *sedes* (primarily 'seat', but also 'home'). The term *positio sedium* can therefore be translated as 'placing of homes'. That the second element of *possessio* and the verb *possideo* is derived from the verb *sedeo* ('sit') does not appear open to doubt, and has been long accepted (see Paul, D.41.2.1pr). However, the first element does not appear to derive from *positio*. On one view, the first element derives from the word *potis* (A Ernout & A Meillet, *Dictionnaire Etymologique de la Langue Latine: Histoire des Mots* (3rd edn, 2 vols, C Klincksieck 1951), *possideo* thus referring to the ability to occupy property. For other views, see the entries on *possideo* at T G Tucker, *A Concise Etymological Dictionary of Latin* (M Niemeyer 1931) 191; C T Lewis & C Short, *A Latin Dictionary* (Clarendon Press 1879) 1403.

With the first systematic, general accounts of Scots private law, a new approach emerges. Although some aspects of possession are dealt with in further detail elsewhere in his *Institutions*, Stair provides a lengthy general account of possession, its nature and its consequences.¹⁹ Bankton²⁰ and Erskine²¹ do likewise.

For Stair, the physical element of possession may take 'diverse' forms.²² However, this is against a background of defining the possession of corporeal moveable property as requiring 'holding and detaining them for our proper use, and debarring others from them'.²³ This appears to put forward a two stage test: one must hold and detain the property;²⁴ and one must exclude others. However, this must be read in light of Stair's general view of possession. Using, as did Craig, the derivation of *possessio* from *positio sedium*, Stair holds the original role of possession to be the acquisition of ownership. For land, the role of possession is 'evidencing [the possessor's] affection and purpose to appropriate' the property,²⁵ rather than merely being someone passing through and making casual use of the property. The same principle is applied in the case of corporeal moveables.²⁶ The suggestion therefore would be that what is required to possess is such a degree of control and such a degree of exclusivity as to indicate an assertion of right.

Bankton and Erskine do not mention any exclusivity requirement, but their accounts are otherwise consistent with that of Stair. Bankton refers briefly to the requirement for 'detention'.²⁷ Erskine requires the 'detention of a subject' by the possessor, who must 'hold it as his own right', in other words as if entitled to possess the property.²⁸ This is in the context of the same etymology for *possessio* as that

¹⁹ Stair, *Inst.* 2,1,8-27.

²⁰ Bankton, *Inst.* 2,1,26-35.

²¹ Erskine, *Inst.* 2,1,18-30.

²² Stair, *Inst.* 2,1,18. He supports this by reference to three Digest passages by Paul (D.41.2.3.1, 41.2.3.8 and 50.17.153). However, of these only the first is about the acquisition of possession, giving the rule that possession of part of land is possession of the whole. The second is concerned with the continuation of possession *animo solo* where a slave or tenant in occupation of land departs or dies, and the third puts forward the proposition that, because 'we acquire by the same means as those by which we also lose', possession is only lost when both *corpus* and *animus* are lost.

²³ Stair, *Inst.* 2,1,11. See also Forbes, *Inst.* 76-77, where the same test is adopted.

²⁴ On this, see further Stair, *Inst.* 2,1,17: 'an act of the body, which is detention and holding'.

²⁵ Stair, *Inst.* 2,1,9.

²⁶ *ibid* 2,1,11.

²⁷ Bankton, *Inst.* 2,1,29.

²⁸ Erskine, *Inst.* 2,1,20.

adopted by Stair and Craig,²⁹ again suggesting an association between possession and the assertion of a right.

It may therefore be said that, at least up to the second half of the eighteenth century, it was accepted that there existed such a thing as a general law of possession based, at least as far as the physical element was concerned, on some manner of physical control of the property. The requirements of the possessory remedies, delivery and other areas considered by Stair, Erskine and Bankton under the heading of possession were merely specific applications of that general law. It is likely that the same approach was also accepted as correct before Stair wrote for, as we saw in chapter 1, *Ius Commune* sources were in use in the Scottish courts long before he wrote.

However, the idea of a general law of possession is to some extent lost or discarded in the nineteenth century. Thus, in his *Lectures*, delivered as Professor of Scots Law at Edinburgh,³⁰ Hume has no general discussion of possession, and does not consider the possessory remedies at all, although he does hint that acquisition of possession by delivery, at least, requires that the transferee give an outward impression of ownership: the property must be brought into the same state as 'the other parts of the acquirer's property of that sort'.³¹

Bell, similarly, departs from the earlier approach. His *Commentaries* focus on certain areas of law, rather than providing a general account, and possession is no exception to this. While there is extensive treatment of delivery, there is little on other areas where possession is important. In particular, the possessory remedies are not considered at all. Even his more general *Principles* is structured along radically different lines from works of earlier institutional writers. It does contain a section on possession³² of corporeal moveables, and its position following discussion of *occupatio*³³ and delivery³⁴ suggests a connection between the two. However, even this is a step away from Stair, Erskine and Bankton, who considered *occupatio* and delivery as part of their general accounts of possession. Within his title on possession

²⁹ *ibid* 2,1,20.

³⁰ Hume was Professor of Scots Law from 1787 until 1822. The published edition of his lectures is based on those delivered in his final year in that post.

³¹ Hume, *Lectures*, III,246.

³² Bell, *Principles*, ss 1311-1321.

³³ *ibid*, ss 1287-1290.

³⁴ *ibid*, ss 1299-1310.

of corporeal moveables, Bell's focus differs. The existence of the possessory remedies is only hinted at by an observation that an owner cannot retake possession from someone who has dispossessed him, without the authority of the court, unless this is done immediately.³⁵ There remains the shadow of an idea that there is a general concept of possession: *occupatio* and delivery are said to be cases where possession is acquired,³⁶ and he seeks support for his views on delivery from Stair's general account of possession.³⁷ However, the title on possession of corporeal moveables is mostly concerned with the presumption of ownership arising from it, and the related idea of collusive possession. Certainly, there is no true general account of possession in the *Principles* in the manner of Stair, and no attempt at a definition of possession.

Bell's approach no doubt reflects the nineteenth century trend, of which he was part, to divide property law into the law of heritable property and the law of moveable property, and further to divide the former into heritable property and conveyancing.³⁸ If the law is divided in this way, there is little scope for discussion of general principles applying to all types of property. Of particular importance for present purposes, there is no room for a general account of possession. However, this cannot be the whole story. For one thing, there is nothing in this division that prevents the inclusion of general accounts of possession as it affects particular types of property. As we have seen, Bell did include in his *Principles* a title on possession of corporeal moveables, yet found in it no place for *spuilzie*. For another thing, we have seen also that Hume gave in his lectures no general account of possession, even though he does give a general account of property law.³⁹ It seems probable that at least part of the explanation for the absence of a general account of possession is the decline in importance of *spuilzie* in practice.⁴⁰ If possessory remedies are not

³⁵ *ibid*, s 1319.

³⁶ *ibid*, s 1311.

³⁷ Bell, *Commentaries*, 1,183.

³⁸ Reid, *Property*, para 1.

³⁹ Hume's account of property law is found in Part III and the first thirteen chapters of Part IV of his *Lectures* (forming approximately the second half of volume III and the whole of volume IV of the Stair Society edition). Some preliminary material, such as the distinction between real and personal rights, is found at the beginning of Part II, the remainder of which is devoted to the law of obligations.

⁴⁰ On this decline, see Reid, *Property*, para 161; C Donnelly, 'From Possession to Ownership: An Analytical Study of the Declining Role of Possession in Scottish Property Law' 2006 JR 267. 278-82.

considered in a general account of property law, then there is no obvious place for a general account of possession.

C. LATER VIEWS

Later writings on possession have not tended to explore the physical requirements of possession in detail. Often there is nothing beyond a formulation such as 'having or holding a thing, so that it is subject to the possessor's control',⁴¹ or 'an act of 'detention of the body'',⁴² or 'physical holding or control of a thing'.⁴³ The impression given is that few issues arise in the determination of control of the property. Indeed, Carr is content to dismiss the physical element of possession, at least as far as corporeal moveables are concerned, as 'a matter of little difficulty'.⁴⁴

Some writers have attempted to define the requirement for control in terms of exclusivity. As we have seen, Stair approached the question in this way. Rankine (focussing of course on possession of land, but on this point consistent with other writers) defines the physical element of possession as requiring that the property be 'under the possessor's control, with the power of excluding the interference of all others'.⁴⁵ Reid, writing of possession generally rather than specifically with regard to moveable or heritable property requires 'in initial act of detention of the thing sought to be possessed' and also 'exclusive physical control'.⁴⁶

None of these writers refers to the test that appears to have been developed elsewhere of holding in a manner indicating an assertion of right. TB Smith, however, has attempted a fuller definition applicable to corporeal moveables. For him, the physical element of possession:

'involves an inquiry into the relation between the alleged possessor to [*sic*] other competing claimants and also to [*sic*] the *res* itself'.⁴⁷

⁴¹ JR Dickson, 'Possession' in *Encyclopaedia of the Laws of Scotland*, vol 11 (1931) para 1159.

⁴² Carey Miller, *Corporeal Moveables* 18-19.

⁴³ Gloag & Henderson, para 30.09.

⁴⁴ Carr, *Possession* 16.

⁴⁵ J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, W Green 1909) 3.

⁴⁶ Reid, *Property*, para 119.

⁴⁷ *Short Commentary* 462.

There is more here, then, than simply control. The alleged possessor's relationship with other persons is also of significance. The reference to others could perhaps be taken as a hint at the objective nature of possession that we have seen above. However, Smith appears here merely to mean that the possessor must be in a position to exclude others, for he quotes with approval Pollock and Wright's formulation that:

'occupation...is effective which is sufficient as a rule and for practical purposes to exclude strangers from interference with the occupier's use and enjoyment'.⁴⁸

Thus, for Smith, one possesses if one has established sufficient physical control to exclude others. In the passage from which the quote is taken, Pollock and Wright go on to observe that the level of required ability to exclude varies with circumstances: thus 'we do not lock up tea and candles in a safe; we should call a banker imprudent who used only the same caution as a private householder'.⁴⁹ Curiously, however, although Smith adopts Pollock and Wright's view that possession involves the ability to exclude others, he omits to note that Pollock and Wright do not require this 'in the absence of a more effectual act in an adverse interest'.⁵⁰ Smith therefore appears to require a higher level of exclusivity than Pollock and Wright.

Following Stair, therefore, Rankine, Smith and Reid all expand on the control requirement by requiring that this control be exclusive. The test as stated by these writers is then (i) that control of the property is obtained and (ii) this control is exclusive. Of course, these two requirements are not separate. As Carr points out, some degree of exclusivity is inherent in the very concept of control.⁵¹ However, it may be productive to examine them separately in the first instance. We will begin by considering the question of control generally, and then consider the case where that control is not exclusive.

⁴⁸ Pollock & Wright, *Possession* 13, quoted Smith, *Short Commentary* 462.

⁴⁹ Pollock & Wright, *Possession* 13.

⁵⁰ *ibid.*

⁵¹ Carr, *Possession* 16.

D. CONTROL

(1) The need to take control

As we have seen, the institutional writers defined the physical element of possession in terms of detention and holding. This has been interpreted by the modern writers on the Scots law of possession as meaning that, to possess, one must establish control over the property. The comparative and historical discussion has come to the same conclusion. As is suggested by the South African case *Groenewald v Van der Merwe*,⁵² discussed in chapter 2, acts strongly assertive of a right (in that case branding of livestock) will be insufficient to give possession if control is not in fact acquired thereby. Similarly, in *Reck v Mills*, the attachment of a buoy asserting a claim to machinery forming part of a wrecked ship did not constitute possession where that machinery was still attached to the ship. Likewise, German law requires control (*Gewalt*) over the property. English law has also stated the requirement in terms of control.

Actual definitions of control are, however, rare. By and large, both in Scots law and in the other systems considered in this and the previous chapter, the meaning of the term is left to emerge from specific cases or examples given. Thus we see that one may possess by holding an item in the hand. Equally, though, actual physical contact is not necessary - one may possess an item by having it under lock and key - and nor is it necessary to make use of the property. In one South African case, the requirement was said to be that the circumstances of the property is such that 'the would-be possessor...alone can deal with it at pleasure'.⁵³ This, though, is surely imposing too high a test: as we shall see in this chapter, it is not necessary in Scots law to exclude entirely the possibility of any interference in order to acquire possession. Indeed, the position could hardly be otherwise, for interference is always at least a possibility. However, the ability to 'deal with' the property is surely at least

⁵² 1917 AD 233, discussed by Carey Miller, 'Transfer of Ownership' 741.

⁵³ *Groenewald v Van der Merwe* 1917 AD 233, 239 (Innes CJ), quoted by Carey Miller, 'Transfer of Ownership' 741. The extent to which this statement implies an element of exclusivity will be considered at part F of this chapter.

part of the test for control: in its ordinary meaning, the word implies the ability to direct what happens to the property.

However, left at this, the term 'control' provides too uncertain a test. A person may appear to be in a position to direct what happens to the property, but at the same time there may exist factors known or unknown that prevent the actual exercise of any such control. Alternatively, the law may sometimes wish to allow a person to possess without in fact having carried out any direct acts in relation to the property at all, as where a letter is put into my house through the letter box. We saw in chapter 2 the importance of looking at the matter from the standpoint of an objective third party fully aware of the facts about my present relationship to the property. The suggestion was put forward that an individual satisfies the physical requirements for possession if his relationship to the property is such that it would appear to this objective bystander that the property has come within his control to the required extent: in the case of the letter delivered through my letterbox, the objective bystander does not know whether I have in fact carried out any acts over it, but it will certainly appear that the letter has been brought within my control.⁵⁴ In particular, a distinction may be made between circumstances where, on the one hand, goods have come under a person's control, and, on the other, the goods have merely been made available to that person. If, in a pub, my drink has actually been placed on my table, it has come under my control, and I possess (assuming the mental element of possession is also present). If, by contrast, the drink has merely been left on the bar for me to collect, at this point it has only been made available to me.

That this distinction is observed in Scots law is confirmed in *Brown v Watson*.⁵⁵ Whether the decision is in fact correct on its facts is considered below, in section (3) of this part, but for present purposes we may note that it appears to turn on a distinction between property actually placed within a person's control and property merely made available for possession. In this case, a number of sheep were sold to a farmer. When they were brought to the buyer's farm, there was no-one available to take care of them and so the seller left them in an enclosure on the land.

⁵⁴ On the required extent of control, see section (5), below. The idea of an objective standard may be taken to reflect the general requirement in Scots property law for publicity in the creation of real rights, on which see Reid, *Property*, para 8.

⁵⁵ (1816) Hume 709.

Unknown to the seller, the buyer had at this point declared himself bankrupt and shortly afterwards petitioned for his own sequestration. The buyer then permitted the seller to remove the sheep. The court held that the sheep had not been delivered.

We may perhaps doubt whether the outcome would have been the same if it had been the seller whose estates had been sequestrated after the sheep were left on the buyer's land. Certainly, the court in *Brown v Watson* placed great weight on the fact of the buyer's insolvency, to the extent that they held that there had been no valid delivery even in the case of a number of cattle that had been delivered into the hands of the buyer's employees. The view was taken that, in the circumstances, it fell on the buyer personally to decide whether to accept delivery of the goods.⁵⁶

However, in drawing the distinction between control and the ability to take control, the decision in *Brown v Watson* appears consistent with principle. The same approach as in *Brown v Watson* has been taken in other cases where an insolvent buyer has either refused to accept delivery⁵⁷ or has only accepted the goods for safekeeping expressly on behalf of the seller.⁵⁸ Similarly, where goods have been rejected as not conforming to sample, but have been retained by the buyer pending arrangements for resale, there has been no delivery.⁵⁹ In these cases, delivery has not occurred even though the goods have actually come within the buyer's sphere of control, on the basis that the mental element is absent. It seems very difficult, therefore, to argue that goods have been delivered when they have merely been made available to the transferee.

If *Brown v Watson* is correct in drawing this distinction, then a subsequent case, *Moore v Gledden*,⁶⁰ becomes problematic. In that case, there was a contract to carry out work on land belonging to a railway company. The contract provided that plant brought onto the land by the contractors was to belong to the railway company.

⁵⁶ This seems somewhat inconsistent with the general principle applied in the law of agency, that performance by a third party to an agent counts as performance to the principal, unless the third party had reason to believe that the agent did not have authority to receive performance: *International Sponge Importers Ltd v Andrew Watt & Sons* 1911 SC (HL) 57. It may be supposed that staff of a business would have apparent authority to accept, on behalf of the proprietor of the business, delivery of goods admittedly ordered by him.

⁵⁷ *Robertson's Tr v Port Eglinton Spinning Co* (1842) 4 D 478.

⁵⁸ *Stein v Hutchison* 16 Nov 1810, FC; *Mitchell & Gowans v Phin* 12 Jan 1813, FC.

⁵⁹ *Jowitt v Stead* (1860) 22 D 1400.

⁶⁰ (1869) 7 M 1016.

The issue before the court was whether the plant was in the possession of the railway company.

By a majority of six to one, the Inner House held that there had been constituted in favour of the railway company a valid pledge.⁶¹ This was the case even though the plant remained in the control of the contractors, and indeed the contract envisaged that the plant would 'remain under the care and custody...of, [*sic*] the contractors'.⁶² Steven appears justified in rejecting the view of the majority as giving effect to a 'paper possession'.⁶³ No act of physical control was carried out by the railway company. Its only connection with the goods was that they happened to be on its land, being used in the normal course of business by the contractors. This indeed appears to be transfer by agreement alone, and so is only permissible if it meets the requirements of *constitutum possessorium*. The examples given by Lord Neaves, of situations where delivery is held to have occurred even though the goods remain in the transferor's custody, add nothing.⁶⁴ These examples are the case of an article bought from a tradesman, but left with him for alterations to be made, and the case of a horse bought from a livery stabler but then left at livery with the seller.⁶⁵ In these cases, there is a clear, new basis on which the transferor holds. The transferor holds on a different basis from that on which he held originally, and thus the requirements for delivery by *constitutum possessorium* are satisfied. In *Moore v Gledden*, on the other hand, the contractor continued to hold in exactly the same manner as before, and would have continued to do so on the work being completed, had insolvency not intervened. The decision of the majority must therefore be seen as highly doubtful.

⁶¹ Although the contract was worded in terms of a transfer of ownership, the arrangement was clearly intended to operate as security only. In either case, delivery of possession would be required.

⁶² Quoted (1869) 7 M 1016, 1017.

⁶³ Steven, *Pledge and Lien*, para 6-17. The words used are Lord Kinloch's, at 1024. See further chapter 4 on the question of whether possession may be given in this way.

⁶⁴ (1869) 7 M 1016, 1021.

⁶⁵ Hume gives both of these as examples of valid delivery (*Lectures*, III,251). Bell gives a similar example to the first (*Commentaries*, 1,181). Lord Neaves may have got his examples from Hume's lectures, having been a student in Hume's Scots law class at Edinburgh in the session 1820-1821: see the table of prominent former students at Hume, *Lectures*, VI,411. If this is the case, Lord Neaves would not be alone: judges of the Court of Session have on a number of occasions found it profitable to refer to Hume's lectures. On this, see G C H Paton's biography of Hume in the sixth volume of the *Lectures*, at VI,395-396.

Brown v Watson appears similar to the South African case *S v Magxwalisa*,⁶⁶ discussed earlier, in that both involve the goods being merely made available to the transferee. Indeed, *Brown* is a stronger case for possession, given that the goods in *Brown* were in that case actually delivered onto the transferee's own land. In *Magxwalisa*, by contrast, the accused had merely been told where the goods were.

The conclusion, then, is that Scots law requires more than that the aspiring possessor merely be in the position to take control. Actual control must have been achieved. If possession is to fulfil the functions that it is intended to fulfil, this must be the position. For example, if it is thought desirable that possession should be protected, it would seem reasonable to require that this possession manifest itself in some clear way. The clearest way of doing this is to demonstrate control of the property, either by oneself or through another acting on one's behalf. Similarly, the policy requiring possession for the acquisition of real rights is undermined if there is no need for physical control, as is the presumption of ownership arising from possession. If control was not required, the result would be, as Stair says, that 'possession would be very large and but imaginary',⁶⁷ with the resulting uncertainty that that implies.

(2) Deprivation of another's control

It would appear also to follow from the requirement for control that acts depriving you of possession or control do not in themselves give me possession. Thus, if I cause you to drop an item in such a way that you lose possession, for example if it falls into deep water⁶⁸ or it is spilled out onto the ground in such a way that it cannot be retrieved,⁶⁹ I do not acquire possession by that act, even though you would appear to lose it.⁷⁰ Similarly, there is a class of cases where there is a restriction on your use of the property arising incidentally from my actions. An example of this appears in

⁶⁶ 1984 (2) SA 310 (NPD).

⁶⁷ Stair, *Inst.* 2,1,18.

⁶⁸ As in the example given by Ulpian at D.41.2.13pr.

⁶⁹ As in *Millar v Laird of Killarnie* (1541) Mor 14723.

⁷⁰ On loss of possession, see chapter 4.

Black v Carmichael.⁷¹ In this case, two individuals were charged with theft by attaching clamping devices to a number of cars unlawfully parked on private land. The intention was that the clamp would only be removed when the owner of the car paid a fee. No doubt, of course, the law of theft and the law of possession do not necessarily depend on the same principles, though the Lord Justice-General describes the accused as having been 'charged with taking possession of the car'.⁷² The term 'possession' is not necessarily used technically. All the same, both possession and theft involve some kind of appropriation of property,⁷³ and so they are not entirely dissimilar in their requirements. A distinction is made in *Black v Carmichael* that appears to be relevant to the present discussion. While the clamping of the car was said to constitute theft, it would not be theft merely to close the gate to the land.⁷⁴ This is the case even though the owner's effective control over the car is not materially greater in the latter case, in that he cannot remove the car from the land. The distinction appears to be between acts giving direct control and acts which affect the property only incidentally. The same distinction must hold true for possession. After all, there are many acts that I may perform that may incidentally or temporarily disturb your control over your property. An example would be where I am driving the car in front of yours in a traffic jam. Your ability to move your car forward is impaired by my actions, but to hold my actions to disturb your possession would make possession too unstable to be of very much use as a legal concept. Of course, by acting in this way I am not asserting any kind of right to possess your car. As we shall see below, this may be a relevant factor in determining whether I acquire possession. Certainly, I do not possess just because I have deprived you of possession.

⁷¹ 1992 SCCR 709. For discussion of this case, see PW Ferguson, 'Wheel Clamping and the Criminal Law' 1992 SLT (News) 329 and further below. An English perspective of the same issue, though one (as we shall see below) which has been overtaken by subsequent cases, is found in M Colton, 'Clamping: theft and extortion' (1992) 136 Solicitors' Journal 668 at 677.

⁷² 1992 SCCR 709 at 720.

⁷³ Indeed, Stair (*Inst.* 1,9,16) appears to equate the two. See also Gordon, *Criminal Law*, paras 14.01-14.03, where a link is made between the two.

⁷⁴ 1992 SCCR 709 at 720, *per* the Lord Justice-General.

(3) Items in buildings and on land

Particular issues arise where, in the absence of any direct physical control by me, an item is placed in a building or on land possessed by me.

(a) Items in buildings and on land generally. It was suggested above that it may be possible to make a distinction between cases where, on the one hand, goods are kept within a building possessed by a particular individual and, on the other, items left on open land. This distinction is suggestive of the position developed in England in the line of cases from *Bridges v Hawkesworth*⁷⁵ to *Parker v British Airways Board*.⁷⁶ In *Parker*, English law adopted a test for possession of things on land or in premises that depended on the manifestation of an intention to control. This depends to a great extent on the nature of the subjects within which the item is found. This manifest intention will be fairly easy to show where the premises are locked. Where there is a sole occupant of locked premises, the control of and the intention to assert a right over the contents are so clear that they may readily be held to apply even to items of whose presence the occupier is unaware. A Scots example may be found in *Harris v Abbey National*,⁷⁷ in which a heritable creditor taking possession of the security subjects was held to possess items left within the property. Of course, *animus* may be absent in such a case, but the physical element seems clear. At the other end of the scale, there is insufficient control for possession where the goods are lying on land to which there is no restriction on access. We have seen from the discussion of *Brown v Watson* that Scots law appears to deny possession in those circumstances, and with good reason. Suppose that I have bought a valuable item and arranged for it to be delivered to my house. It would seem unreasonable for the seller to have been held to have fulfilled the bargain merely by leaving it lying unprotected in my driveway, or otherwise accessible, as for example if the item is left in a bin.⁷⁸ This distinction may

⁷⁵ [1843-60] All ER Rep 122.

⁷⁶ [1982] 1 All ER 834. See chapter 2, part B(5)(c).

⁷⁷ 1997 SCLR 359.

⁷⁸ This is particularly the case given that, in consumer sales, risk passes with delivery (Sale of Goods Act 1979, s. 20(4)). If the purchaser had actually agreed to delivery in this way, it seems likely that he would be faced with an argument based on personal bar that this argument was not open to him. For a full account of personal bar, see EC Reid & JWG Blackie, *Personal Bar* (W Green 2006). A useful

also explain the view of Celsus,⁷⁹ considered in chapter 2, that goods brought to my premises under my instructions were to be considered delivered to me, if he is understood to refer to items actually placed inside the building.

(b) Buildings and land with limited access. It is with the middle group in the *Parker* test, premises and other land where there is limited access, that difficulties arise. For example, assuming *animus*, have goods been delivered if they have been left in a locked shed? The difficulty of this case is shown by consideration of the issue in a criminal context, in *Cryans v Nixon*.⁸⁰ In that case, stolen goods were found in an unlocked shed belonging to the accused, to which others had access. The question was whether there should be applied the presumption of guilt arising from possession of recently stolen goods. All three of the judges held that it should not. However, for the Lord Justice-Clerk, this was because the circumstances were not sufficiently criminative, given that others had access to the shed. He accepted that the accused was in possession. Lord Mackintosh, on the other hand, was of the view that it could not 'fairly be said that the goods were found in the appellant's possession'.⁸¹

Another example of land of this kind would be the public part of a shop. TB Smith,⁸² writing before the decision in *Parker*, urges the rejection of the approach taken in *Bridges v Hawkesworth*. He argues that the occupier of premises in which goods are left should always be held to possess, on the basis that that is where the owner is likely to look. However, this seems an irrelevant consideration in Scots law, where the finder of lost property acquires no rights solely by virtue of that finding,⁸³ and appropriation by that finder will constitute theft.⁸⁴ The case he cites in support of his argument, *Corporation of Glasgow v Northcote*,⁸⁵ adds little. In that case, an employee taxi driver found items left in his taxi. The sheriff-substitute and, on appeal, the sheriff preferred the employer. Curiously, in this case, the sheriff-

summary of the requirements appears at paras 2-01 - 2-03. Such an argument could not, however, affect the position of third parties.

⁷⁹ Celsus, D.41.2.18.

⁸⁰ 1955 JC 1.

⁸¹ 1955 JC 1, 6. The remaining judge, Lord Birnam, concurred with both of the others.

⁸² *Short Commentary* 464.

⁸³ Civic Government (Scotland) Act 1982, s 73. The law on this point was the same at common law: Stair, *Inst.* 2,1,17; Erskine, *Inst.* 2,1,20; Bankton, *Inst.* 2,1,26.

⁸⁴ For discussion of theft by finding, see Gordon, *Criminal Law*, para 14.22.

⁸⁵ (1921) 38 Sh Ct Rep 76.

substitute appeared to assume that a finder of property in Scots law has the same rights as a finder in English law. However, the decision was expressly on the basis that the driver was an employee, and in fact was bound by an express term in his contract of employment obliging him to hand lost property to his employer. It was not necessary in that case, therefore, to consider the present issue.

A more helpful authority for Smith's argument is the decision of the sheriff court in *Hogg v Armstrong and Mowat*.⁸⁶ The facts in that case were identical, in effect, to those in *Bridges v Hawkesworth*, the customer of a shop having found a £5 note on the floor of the shop. The sheriff held that the decision in *Bridges* 'really depended upon principles of general jurisprudence which are law in Scotland as well as in England'.⁸⁷ This may very well be the case, as a question of possession. However, to get to this point the sheriff must make an error of law:

The finder of lost goods is undoubtedly entitled, as a general rule, in the absence of special laws or police regulations, to keep them against all except the true owner, upon the principle *quod nullius est fit occupantis*. The right to possession of an inanimate moveable is with the finder, though it rather seems that the property is still with the owner.⁸⁸

It has already been noted that the finder of property acquires no right by that fact alone. As to the remainder of the quotation, it need hardly be said that, if 'the property is still with the owner', the principle *quod nullius est fit occupantis* can scarcely apply: *ex hypothesi*, the property is not a *res nullius*. Moreover, if the owner of the goods retains that right when the property is lost, it is not clear what is the nature of the right of the finder. Certainly, it cannot be ownership, for a right of ownership that is good against some but not others is not a right that can exist in Scots law: one either has a personal right, good against the other party or parties to an obligation, or one has a real right, good against everyone.⁸⁹ The sheriff's meaning must, therefore, remain obscure.

⁸⁶ (1874) 1 Guth Sh Cas 438.

⁸⁷ (1874) 1 Guth Sh Cas 438, 439, this despite the view stated immediately beforehand that English cases had to be viewed 'with great caution, and almost with suspicion', due to the unfamiliarity of Scots lawyers with English legal principles.

⁸⁸ (1874) 1 Guth Sh Cas 438, 438-439.

⁸⁹ *Burnett's Trustee v Grainger* 2004 SC (HL) 19 at para 87 (Lord Rodger).

Notwithstanding these legal errors concerning the consequences of possession in lost property cases, however, on the question of possession these cases appear to reach a reasonable conclusion. The distinction drawn in *Parker v British Airways* appears sound and should be accepted by the Scottish courts. In other words, one should only be held to have satisfied the physical element of possession in such circumstances where the degree of control exercised over the land gives an objective impression of control of items that may happen to be on the land or in the premises. In practice, this will be likely to mean effective measures to exclude others and their property. Only if this is the case can the possessor of the land be said realistically to be exercising control.⁹⁰ Alternatively, measures may be taken to secure direct control of property wandering onto the land. An example of this would be a snare set to catch wild animals.⁹¹ Leaving that possibility aside, however, it is clear that one acquires no control over property that has been left on bare, unprotected land, even if one possesses that land. At most, one is in a position to take control which, as we have seen, is not enough. Even less does one have control over an item buried under the land. The approach taken in such English cases as *South Staffordshire Water Co v Sharman*,⁹² *Elwes v Brigg Gas Co*⁹³ and *Waverley BC v Fletcher*⁹⁴ may be taken not to reflect the Scots law of possession.⁹⁵

Again, there would be insufficient control in the normal case where the public has access to the premises, unless the item is delivered outside opening hours to a place where it would be expected to be found first by the occupier of the premises, as where an envelope is pushed through a letter box. An item left where it would not be expected to be found, on the other hand, is not possessed at that point because an objective bystander would not take it to have been taken into the control of the occupier of the premises.

⁹⁰ Of course, such a level of control may exist without the necessary *animus possidendi*, in which case there will be no possession. Equally, it is not suggested here that possession cannot be retained when property already in an individual's possession is left on unprotected land. That question is considered in chapter 4. For the present, we are concerned only with the physical acts necessary to acquire possession.

⁹¹ See chapter 7.

⁹² [1896] 2 QB 44.

⁹³ (1886) LR 33 Ch D 562.

⁹⁴ [1996] QB 344.

⁹⁵ In any case, as we saw in chapter 2, these cases appear to depend on accession rather than possession.

On the other hand, where an item is pushed through a letter box into a private house, there would be enough control. In such a case access is normally restricted to limited numbers of guests of the occupier, with the result that the objective bystander would take such property to be in the control of the occupier. If there are multiple occupiers of the house, any of them may in fact possess, and the question will depend on the facts of the case. Where the item is within an area exclusively occupied by an individual member of the household, an objective onlooker would be likely to take that individual to possess. Where the item is in a common area, each occupier is likely to appear to have a sufficient relationship to the property to satisfy the physical requirements of possession, in which case the outcome of the question will turn on *animus*. We can see this in *Bell v Andrews*⁹⁶ and *Henderson v Young*.⁹⁷ Both cases are concerned with the application of the landlord's hypothec to property belonging to residents other than the tenant,⁹⁸ in the former case a piano belonging to the tenant's daughter and in the latter furnishings belonging to two lodgers. The cases appear to be decided on the basis that the tenant was not in possession of the items despite their presence in the leased premises.

In cases following short of the level of control provided by locked premises, the outcome will depend on the particular facts of the case. One such case is *Brown v Watson*: given that the items delivered were animals, it may be assumed that the land was fenced off. Fencing around the land does give a little more control but, more importantly, it is likely to strengthen the impression of the objective onlooker that the occupier of the land has taken the item into his control, at least if the item is of a kind that one would expect a possessor might leave it in those circumstances. Still more will this be the case if the enclosure is locked, as it will be assumed that access is restricted to the occupier and those acting under his authority. On the other hand, if the item is not of a kind that it would be expected to be found left by the occupier in the circumstances that it is found, the impression of possession will be correspondingly weakened. An example would be a package 'delivered' by a courier by being left in the recipient's back garden. On the other hand, the animals in *Brown*

⁹⁶ (1885) 12 R 961.

⁹⁷ 1928 SLT (Sh Ct) 30.

⁹⁸ The landlord's hypothec no longer applies to property not belonging to the tenant (Bankruptcy and Diligence etc (Scotland) Act 2007, s 208(4)).

v Watson were left in circumstances in which they would be expected to be left: they were in an enclosure, and not merely left to wander. Accordingly, on the basis of this discussion, it would appear that, while it was correct to draw a distinction between items of which control had been given and items the control of which had merely been made available, the facts in *Brown v Watson* were such that the decision can only be justified as a question of *animus*. This, indeed, is suggested by the court's view that, in the circumstances of the buyer's insolvency, albeit not yet followed by formal sequestration, it lay on the buyer to decide whether to accept or reject the goods.

The consideration here assumes, of course, that the item is not already in the possession of another person when it is brought into the premises. If a guest comes into my house, I do not thereby possess what he brings with him, nor do I possess an item which is brought into the house already possessed by a lodger or one of my children. Nor, if I have in fact exercised sufficient control for possession at some earlier stage, is that possession affected by the fact that my relationship with the property is now more ambiguous, in that it now lies in much the same relationship to any other resident of my house. We are concerned here with the case where property is dropped or left on my land or in my premises, and whether I begin to possess (assuming the necessary mental element) at that point.

(4) Criminal law

The Scots law of possession, then, adopts a test for the physical element of possession that is based on control. We see the same view being taken in criminal cases. Of course, as was discussed in chapter 1, the criminal law has distinct policy objectives and a distinct approach to statutory interpretation, which may mean that in individual cases a different definition of possession is adopted compared with that used in private law. However, any definition of possession is likely to depend on some idea of control, and so in considering the meaning of 'control' consideration of criminal authority may be of some use.

In fact, what we find when we look at criminal cases is that there are commonalities of approach. Thus, in *Mingay v Mackinnon*,⁹⁹ prohibited drugs were found in the common area of a flat shared by the accused. The court held that this was insufficient to justify a finding that the accused was in possession of the drugs. Merely having access to the drugs was not enough. Similarly, in *Lustmann v Stewart*,¹⁰⁰ a police raid on a commune on Islay found drugs in a shared area. Again, it was held that it was insufficient for a finding of possession that the drugs were available to any who wanted them among the accused, who were members of the commune. These cases are consistent with the approach taken in the previous section, where possession requires an objective appearance of control, and is less likely to be established in circumstances where others may have access to the goods.

The requirement for control is again shown in *Black v HM Advocate*,¹⁰¹ in which unlawful explosives were found in a room occupied by the appellant's lodger. It was explained that a person possessed not merely because of mere knowledge of the substance, but only if there was actual control. This required:

...acceptance of the substance into his premises or at least permission for or connivance at its remaining there in the knowledge of its character.¹⁰²

This case is then consistent with the decisions in *Bell v Andrews* and *Henderson v Young*, considered above, so far as they demonstrate that one does not possess just because an item is brought into one's house. If an item in the house is possessed by someone other than the householder, that continues to be so in the absence of some more direct involvement with the property. This is not to say, though, that the test is exactly the same in the criminal law as in private law: we may assume that Miss Andrews' piano was brought into her father's house with his 'permission...or connivance'. Nonetheless, he did not possess, but the idea of permission or connivance is one more readily connected to the mental element of possession than to the physical. In criminal law terms, if I give you permission to keep illegal items in my house, then I am at least art and part liable for the offence of possession of

⁹⁹ 1980 JC 33.

¹⁰⁰ 1971 SLT (Notes) 58.

¹⁰¹ 1974 JC 43.

¹⁰² 1974 JC 43, 52 (Lord Cameron).

those items, whether or not I would be held to possess otherwise.¹⁰³ As far as the physical element of possession is concerned, *Black* is consistent with *Bell* and *Henderson* in holding that one does not possess property that is in one's house, in the absence of some more direct physical acts over the property.

Of course, as we saw earlier with *Cryans v Nixon*,¹⁰⁴ it is easy to figure more doubtful cases. It may be that in particular cases the availability of the item, coupled with the background facts, will be enough to allow the inference that an accused person has in fact exercised control over the item in the past, or that there exists the kind of 'permission or connivance' that Lord Cameron refers to. That indeed has been the outcome in a number of cases. Thus, where drugs are found openly in the living room of a house occupied by a cohabiting couple, it is difficult to escape the conclusion that each at the very least consented to their presence, and an objective bystander would certainly take both to have control. On these facts, the conviction of the accused was upheld in *Hughes v Guild*.¹⁰⁵ The same is the case with a prisoner in a shared cell, who is aware of the presence of drugs underneath his own ashtray.¹⁰⁶ In such circumstances, the inference of control on that prisoner's part is irresistible unless some alternative explanation is found for the presence of the drugs there. These cases, then, in the same way as the private law cases, depend on more than knowledge or availability. It is true that, in *Allan v Milne*,¹⁰⁷ the Sheriff's view was based on findings that the accused knew that the drugs were present in their shared flat and that they had access to them if they wanted, but the Crown's argument on appeal was that these facts proved in the circumstances of the case that the drugs were a 'common pool', which is rather stronger and implies an actual rather than a potential relationship to the drugs. None of this alters the conclusion that availability in and of itself does not amount to possession. This conclusion is also justified by the argument, as far as criminal possession is concerned, that a person should not become criminally liable solely because of another person's acts. If two or more

¹⁰³ Thus, for example, Gordon (*Criminal Law*, para 5.28) argues that a hotelier who agreed to provide a room for the purpose of commission of a crime would be art and part liable for that crime. The present issue seems in point.

¹⁰⁴ 1955 JC 1.

¹⁰⁵ 1990 JC 359.

¹⁰⁶ *Crowe v Macphail* 1986 SCCR 549.

¹⁰⁷ 1974 SLT (Notes) 76.

persons share a flat, none of them can prevent one of the others bringing a prohibited substance into the flat and leaving it in a common area.

(5) Level of control required

Control, then, is required for the acquisition of possession. However, it is not every degree of control that will be sufficient. It has been suggested above, both in the comparative and historical discussion and in the discussion of Scottish writers, that what is required is control of such a kind as to amount to an assertion of right. The mental element is to a great extent revealed by the physical element. This should not, however, be understood to exclude any role for a separate mental element of possession. Many types of holding will be ambiguous, equally as capable of being interpreted as an assertion of right as it is of being interpreted as no such assertion. One may appear objectively to be holding with the relevant *animus possidendi*, but in fact not be so holding. For example, in a legal system where hirers are said not to be possessors, one holding on the basis of a hire agreement may nonetheless appear to an outsider to hold in the manner of an owner. Likewise, Erskine says¹⁰⁸ that one holding entirely on another's behalf, as a depositary or steward, is not a possessor. Again, such a person may appear to an objective bystander to hold in the manner of an owner. However, it is lack of *animus* that prevents such a person possessing. The physical element with which we are concerned appears to be present in such a case, and will benefit the person on whose behalf the property is being held, assuming that there is nothing in the manner of holding the property that indicates that the holder asserts no right to possess.

We may see the role of this assertion of right in *Johnston v Sprott*.¹⁰⁹ In this case, an employer (Douglas) owed money to an employee (Johnston). As security for further advances, there was an attempt to pledge items to the employee that he used in the course of his employment. A creditor of the employer, Sprott, attempted to poind these items. The court held that there was no valid pledge here. This appears not to have been for want of *animus*: there was no reason to doubt the good faith of

¹⁰⁸ Erskine, *Inst.* 2,1,20.

¹⁰⁹ (1814) Hume 448.

the parties or that there was a genuine attempt to create a pledge. Of course, it was intended to give a preferential position to the employee for payment of the debt, but that is the case with any security right. Instead, the pledge failed because of the manner in which the goods were held. The court accepted the argument put forward on behalf of Sprott that:

[N]o outward or visible change took place in the circumstances of his management or possession...For aught the lieges could discover, Johnston continued to possess as a servant, in the name of and for the behoof of Mr Douglas.¹¹⁰

In other words, it is necessary to hold in such a manner as to demonstrate the holder's assertion of a right to possess. One who holds goods ostensibly in the course of employment makes no such assertion. He will appear to an objective onlooker to hold on behalf of his employer.

The same principle was applied in *Pattison's Tr v Liston*.¹¹¹ In this case, there was an attempt to convey the contents of a house to the party with custody of the key to the house. This was held to be ineffective for delivery of these items. Again, the problem was not lack of *animus*, for there is no reason to doubt the genuineness of the transaction. Instead, the problem lay in the fact that the party holding the key did so as the transferor's agent. It can hardly be the law that an employee cannot have the *animus* to possess something just because the employee first held it in the course of employment. If that was the law, what of the waitress entitled to retain cash received in tips? The result would be that there could be no valid delivery of the cash to the waitress when the tips were divided up between staff. That would be an absurd result. It appears, then, that it is not the case that the employment relationship necessarily prevents an acquisition of possession by the employee on the basis of excluding the formation of the necessary *animus*. Instead, the manner of holding must indicate that that *animus* exists, and that manner of holding will generally (but not always) be absent when the employee has taken custody of the item in the course of employment.

¹¹⁰ (1814) Hume 448 at 450. See discussion of the case in Steven, *Pledge and Lien*, para 6-14.

¹¹¹ (1893) 20 R 806.

Therefore, for all that the modern Scots writers are content to define the physical element of possession in terms of control, it appears that there is more to the matter than appears from that. In common with the writers of other jurisdictions considered, what appears to be required in Scots law is not merely control, but control in such a manner as to indicate an assertion of a right to possess the property. It may be that this can be achieved even in the absence of complete control, depending on the right that is being asserted. For example, in *Black v Carmichael*,¹¹² as we have seen, two individuals were convicted of theft for clamping cars parked on private ground by their owners in the face of notices warning of this and indicating that payment would be required for the removal of the clamps. Presumably it may be taken that the accused were, on behalf of their employer, asserting a right to possess the cars in security for payment of the parking charge.¹¹³ It is true that their control over the cars was limited by the fact that, without the keys, they could not drive the cars away, but then nor could the cars' owners drive them away until the clamps were removed. The advantage of the situation appears to be on the clampers' side, as the cars in their clamped state are of little use to the owners but, because of that fact, of considerable help to the clampers in securing payment. If the accused in *Black v Carmichael* are taken to have acquired possession for their employer, it would follow from this that it would be a spuilzie by the owners of the cars if they removed the clamps themselves, unless this was done immediately.¹¹⁴ Given that the decision in *Black v Carmichael* represented a development in the law, this would seem an appropriate outcome. A court could well have decided that the accused were entitled to act as they did. The view has been taken that one does not possess a thing just because it is on one's land. Accordingly, given that a lien will only come into existence where the creditor has possession, or at least custody,¹¹⁵ it appears unlikely that a lien could have been shown: even if the clamping was enough to give possession, a lien could only exist to authorise the clamping if the creditor already had possession or custody. Presumably a decision in favour of the accused would

¹¹² 1992 SCCR 709.

¹¹³ It is doubtful whether such a parking charge is in fact enforceable. In *Black v Carmichael*, the Lord Justice-General took the view that it was not, there being no contract between the parties (1992 SCCR 709, 717). For discussion of the issue, see RM White, 'Parking's Fine: The Enforceability of 'Private' Parking Schemes' 2007 JR 1.

¹¹⁴ Erskine, *Inst.* 2,1,23; Bell, *Principles*, s 1319.

¹¹⁵ Steven, *Pledge and Lien*, paras 13-04 - 13-26.

have been based on the car owners' deemed consent to the clamping of their cars. This would be consistent with authority making it a defence to spuilzie that the dispossessed party had previously given agreement to the dispossession.¹¹⁶ An English clamping case was subsequently decided on the basis of consent to the clamping.¹¹⁷ Of course, that was not the view that was taken in *Black v Carmichael*, but that could not have been known in advance with certainty. In cases of doubt as to the parties' rights, it is appropriate to leave the determination of those rights to the court, rather than permitting individuals to provide themselves with justice at their own hand. However, whatever may have been the basis on which the accused's employers believed themselves entitled to clamp the car, clearly in doing so they were asserting a right to retain the car, in the manner of one entitled to exercise a lien. Accordingly, they can be said to have taken possession through the acts of the accused. Certainly, they could not make use of the property, but there is no need for a creditor to be able to make use of the property retained as security. All that is necessary is that the debtor is excluded from it, and this was achieved in *Black v Carmichael*.

This 'assertion of right' requirement may also be taken to explain the distinction noted above between direct acts of control, giving possession, and acts only incidentally affecting the property, with no possessory consequences. The example of the latter in *Black v Carmichael* was the closing of a gate to the land. By doing this, I do not assert any right to retain the car. I merely assert the right to impede access to my property.

(6) Conclusion

On the basis of the discussion in this part, we can say that the physical element requires, first, that the intending possessor acquire control (either personally or through another acting on his behalf) and, second, that that control be of such a nature that an objective bystander would consider that person taking control to be asserting a right to the property. By 'control' is meant here such a relationship to the

¹¹⁶ *Dewar v Countess of Moray* (1661) Mor 1816.

¹¹⁷ *Arthur v Anker* [1996] 2 WLR 602; [1997] QB 564.

property at a given moment that an objective bystander would consider that person to have taken control or that the property had been brought within that person's control.

As possession may be acquired through another, it can be no objection that the assertion of right is in fact being made by the person taking direct control on behalf of another: in this case, the person with actual custody of the property will not possess, for want of *animus*. All that is needed is that an objective bystander can see that a right is being asserted.

A person does not acquire sufficient control for the purposes of possession just because an item comes into premises or onto land that is possessed by that person. The item may already be possessed by another person, such as a guest or a resident. Equally, I do not control items placed or lost on my land unless the nature of that land is itself enough to give me control. However, where there are direct acts carried out in relation to the property, fairly minimal acts of control may be enough, such as a prisoner placing his ashtray on top of an item, as long as those acts are sufficient in the circumstances to constitute an assertion of right.

E. SUSCEPTIBILITY TO CONTROL

While we may talk of the physical element of possession as involving control of the property, it is self-evident that some items are harder to control than others. Unless some things are to be beyond possession altogether, then one of two things must happen: either the law adopts such a minimal test for control that the same standard may apply to all property; or the test must be adjusted depending on the type of property concerned. The former option appears unworkable in practice, however. The physical nature of different types of property differs so wildly, and there are so many ways of using different types of property, that it seems unavoidable that the requirements will depend on the specific circumstances of the individual case. It may be that one can possess a car by holding the key, but that can hardly be an option for property that does not require a key.

Accordingly, it appears that, in assessing the level of control required, one must take into account the nature of the property and the extent to which it is

susceptible to control. This does indeed seem to be the law, as Hume observes in his account of the requirements for delivery:

[T]he thing must be brought into the same state of custody, safety and command, with the other parts of the acquirer's property of that sort - regard being always had to the nature and description of the subject in question, and the sort of keeping it allows.¹¹⁸

The requirements thus vary accordingly as the level of control varies. One may also note that, if the analysis above is correct, and what is required to possess is control indicating an assertion of right, the level of control required will vary depending on how the property is normally used by persons with such rights.

The most obvious category of items that are difficult to control is that in which the items are large or otherwise unwieldy. This will be considered first. However, an item may also be difficult to control because of its very small size. Again, it may be difficult to control an item – a piece of machinery, for example – because some essential component is missing. Alternatively, the difficulty may be external, as where weather conditions restrict control. Finally, difficulty may arise where the item is within the body. The purpose here is to consider whether, and if so to what extent, these factors present obstacles to possession.¹¹⁹

(1) Large or unwieldy items

The view has been expressed that the level of control required will be influenced by the nature of the property, and in particular how difficult to control it is. If less was not required many items would by that fact be excluded from possession. As has been said by van der Merwe for South Africa:

'A fairly extensive measure of control is required for movables which can be handled, like a watch, a book or a jacket. In the case of movables which cannot be handled easily, like wild animals, a stack of wood, a threshing

¹¹⁸ Hume, *Lectures*, III,246.

¹¹⁹ Animals also provide an example of property that is difficult to control because of its nature. This issue is considered in detail in chapter 7.

machine or a shipwreck, literal physical handling of the article is not always possible and therefore not required.¹²⁰

Paul says the same for Roman law, holding that things of too great weight to be moved may be delivered by agreement expressed in their presence.¹²¹

This view, as expressed, is however problematic. Nothing is of such great weight that it cannot be moved,¹²² even if the operation may be difficult. Nor is it clear what van der Merwe means by distinguishing between items capable or incapable of being 'handled'. By 'handled' he cannot mean merely 'touched with the hand', because by definition this may be done to any item of corporeal property. It does not appear either that he can mean 'held in the hand', because some wild animals are small enough to be held in the hand. What is distinctive about live animals is that their nature makes them difficult to control rather than difficult to handle: they act under their own volition, and may try to escape. Perhaps, then, he means merely to refer to the difficulties of control of certain types of item. Some items cannot easily be brought under direct physical control, meaning control obtained through direct physical contact. In the case of a stack of wood, a threshing machine or a shipwreck, to stay with van der Merwe's examples, this is because of their bulk. In the case of a stack of wood, while I may touch it, it is difficult to see how that touch can of itself increase my control of it. For example, it does not increase my ability to exclude others. If I am in a position to exclude others, that is because of factors other than my direct physical contact. The same must apply to the phrase 'not always possible'. This must be taken to mean merely that it is difficult to exercise control through direct physical contact.

Van der Merwe's view, therefore, appears inaptly phrased. Perhaps it can be summarised as follows: where property is of such a nature that it cannot be brought under control by physical handling alone, physical handling is not required. However, even put like this, it is not clear that it adds much. We have seen nothing to indicate that even very portable items need to be handled to be possessed. Indeed, the position is quite to the contrary: it is control, not physical contact, that is the issue. It

¹²⁰ Van der Merwe, *Law of Things*, para. 58. See also Mostert et al 70.

¹²¹ Paul, D.41.2.1.21.

¹²² As Archimedes is said to have observed, this is true even of the Earth itself, given a long enough lever and a place to stand.

appears, then, that van der Merwe must be taken to mean that, where an item's bulk (or some other characteristic) means that it is capable of coming under complete control, less control will be required to establish possession.

Even this, however, does not necessarily correctly reflect the law. If what is required is that the possessor hold in the manner of someone holding a right to possess, the precise requirement will vary depending on the situation. The use that one would expect an owner to make would be no more than what was reasonable in the circumstances, and it follows from this that only such use as is reasonable will be required. All the same, it is perhaps simplistic to say merely that, the more difficult the item is to control, the less control is required to possess it. Certainly, a watch may be possessed by holding it in the hand. One does not hold a stack of wood in the hand, but all that this tells us is that the watch and the stack of wood are different in nature. They are used in different ways. It has been suggested above that what the law requires, instead, is sufficient acts to qualify as an assertion of right. This will depend on what an objective bystander would consider necessary. In some cases, quite extensive acts may be required to satisfy this test. With a ship, for example, merely being present on the ship is unlikely to be enough in the absence of other factors. After all, that is equally consistent with being a passenger. Thus, the acts required to possess a ship may in fact be extensive, even if they in fact give less control over the ship than one can have over a watch. The guards left on the ship in *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd*,¹²³ in staying on board day and night, performed more extensive actions than would be required for possession of a small, portable item, but nonetheless did not control and so did not acquire possession for their employers. It is suggested, therefore, that the true position is that such acts are necessary for the physical element of possession as suffice to give the outward impression of an assertion of right.

(2) Very small items

An item may also be difficult to control because it is very small. The question has arisen in cases on possession of controlled drugs whether it is possible to possess an

¹²³ 1968 (2) SA 528 (CPD).

item that is too small to be usable. In *R v Worsell*,¹²⁴ it was held that possession of a tube containing a quantity of heroin that was too small to be seen by the naked eye, and which could not be poured out or measured, was not possession of the drug. In effect, the court said, the tube was empty.

The same approach was taken in *R v Carver*,¹²⁵ concerning a quantity of cannabis too small to be seen by the naked eye. That case was decided on the ground that the quantity present was too small to be usable. *Carver*, however, was overruled in *R v Boyesen*.¹²⁶ In that case, following the Scottish case *Keane v Gallacher*,¹²⁷ the House of Lords rejected the usability criterion as reading words into the statute. The statute talks only of possession.

One may note the likelihood that one in possession of a prohibited substance will attempt to dispose of it on the approach of the police. The argument would then be that, from the point of view of enforcement of the criminal law, not to hold possession to exist in such cases would be undesirable. This argument has found favour in the United States in relation to attempted disposal of unlawfully possessed alcohol.¹²⁸

The application of possession to very small, or indeed microscopic, items has been criticised. Earle argues as follows:

It is submitted that before accepting that the possession of minute traces of a drug can constitute possession for the purposes of the Misuse of Drugs Act 1971, courts might bear in mind one inevitable consequence of such an approach. Once a substance has been used in a room, it is possible that minute traces might remain in the dust of the room indefinitely, and it would consequently be impossible for the person occupying the room ever to abandon possession of that drug. This manifestly absurd result can only be avoided by espousing a common sense view of what constitutes possession of a drug; the test of what is visible to the naked eye would appear to be as good as any other and more in accordance with public understanding than most other tests proposed.¹²⁹

¹²⁴ [1970] 1 WLR 111.

¹²⁵ [1978] QB 472.

¹²⁶ [1982] AC 768.

¹²⁷ 1980 JC 77.

¹²⁸ W E Seleen, 'The Concept of Possession as Applied to Intoxicating Liquor by the Missouri Courts' (1960) 25 Mo L Rev 295, 303.

¹²⁹ M Earle, *Stair Memorial Encyclopaedia Reissue*, Medicines, Poisons and Drugs (2000), para 47.

It is not, however, clear that this result is 'manifestly absurd' as Earle states. A search sufficiently careful to reveal traces of the drug in these circumstances would be likely only to occur if suspicion had fallen on the occupier of the room. If traces of drugs were found, that would be evidence of possession at some point in the past. In the absence of any provision for negative prescription of criminal liability, it could hardly be wrong in law to convict of possession of a substance based on evidence of past possession, assuming of course that such evidence was sufficient to satisfy the required standard of proof. There can be no question of abandonment of possession excusing a person from criminal liability, except as a matter of prosecutorial discretion.¹³⁰ Accordingly, whether the occupier of the room is presently in possession of the drug traces is irrelevant. The question is more relevant in the case of a new occupier of the room. Could a new occupier possess the traces, assuming the necessary knowledge of the traces and the intention to possess them? If the traces amount to a sufficient quantity that a person could exercise control over them, there seems to be no reason why possession should not be held to have been established. After all, even very small amounts may be added together to form something more substantial. However, if the quantity is so minimal that it is, in the words of the court in *Keane v Gallacher*, 'so minute that in the light of common sense it amounts to nothing',¹³¹ the outcome would be different. In such a case, possession would not seem to be acquired, because regardless of his intention the new occupier has no control over the traces. The case suggested by Earle, where the traces are so small that it is impossible for a new occupier to get rid of them, would be one such case. If I cannot abandon control, then I hardly seem to have control at all in the first place.

This should not be taken to suggest that very small items can in no circumstances be possessed. This would be a most undesirable result, and not merely for the criminal law. Suppose, for example, that a scientist employed in a laboratory has isolated in a container a particular type of microscopic organism. If the organism is not possessed, it remains ownerless, and so the scientist's employer would appear

¹³⁰ This was said to represent the law in *Hambleton v Callinan* [1968] 2 QB 427, *per* Lord Parker CJ at 432. Although this is an English case, the point is also accepted in AM Cubie, *Scots Criminal Law* (3rd edn, Bloomsbury Professional 2010) 204. In any case, the position could hardly be otherwise. Any prosecution for possession of a controlled substance will be a prosecution for past possession, unless the accused is to be allowed to retain possession until that prosecution begins.

¹³¹ 1980 JC 77, 83 (Lord Justice-Clerk Wheatley).

to have no remedy if the organism is taken by another or damaged by another's fault. The point then is not that very small items may not be possessed, but that special measures may be necessary before they may be said to be under sufficient control that possession may be said to be established. Although the cases here are concerned with criminal possession, they appear to reach a reasonable result for possession generally: the small size of an item is only relevant to the question of possession insofar as that affects the ability to control the item.

(3) Lack of necessary components

May I possess an item when I do not have the necessary components to make it work? The question was raised in *Girdwood & Co v Pollock, Gilmour & Co*.¹³² A part of a spinning machine was delivered to a purchaser. The question arose as to whether there could be valid delivery here in the sense of giving possession, and therefore ownership, to the transferee. Unfortunately for present purposes, it was not necessary to express a concluded view on the matter as it was found proved that the item had been reconveyed to the seller. However, in principle it does not seem that it can be the law that the lack of necessary components can, in and of itself, be a bar to possession. Otherwise, it would be impossible to possess a broken-down car or a shipwreck. It may also be noted that, if the physical element of possession requires an assertion of right to possess, this is not necessarily an assertion of a right to use. For example, a pledgee possesses but does not have a right to use.¹³³ The facts of *Black v Carmichael*,¹³⁴ discussed above, may give another example of a possessor who lacks the ability to use the property. Thus, it cannot be that it is necessarily an obstacle to possession that the holder is not able to use the property. What matters is that the holder appears, from an objective point of view, to be holding in a manner constituting an assertion of right. Whether this test is met will depend on the facts and circumstances of the particular case, and it may be therefore that the lack of an essential component will be a relevant factor in some cases.

¹³² (1827) 5 S 507.

¹³³ Steven, *Pledge and Lien*, paras 7-03 - 7-09.

¹³⁴ 1992 SCCR 709.

As an example, we may consider the decision in *Stadium Finance Ltd v Robbins*.¹³⁵ Although the case is English, the statutory provision with which it is concerned¹³⁶ applies in Scotland, and so if the same issue arose in a Scottish case it is likely that this case would be considered. The provision in question provides *inter alia* that, where a mercantile agent is in possession of goods, any conveyance of those goods in the ordinary course of business will be valid as if authorised by the owner. In this case, the owner of a car had left it with a car dealer under a tentative arrangement to find a buyer. The owner had, however, retained the key to the car. The question was whether the car dealer was in possession of the car. The majority of the court held that the dealer was in possession of the car, even though it could not be moved easily without the key. Although Willmer J dissented on this point, this was on the ground that the retention of the key indicated the owner's intention to control the sale, and so the dealer was not acting in 'the ordinary course of business' by selling the car.

From the perspective of the general law of possession, the problem with cases under the Factors Acts is that the 'possessor' is acting as an agent, and so has no business asserting any kind of right at all to the property.¹³⁷ We must therefore conclude that, if the decision is correct, the meaning of 'possession' for the purposes of the Factors Acts is a specialised one. Certainly, looked at from the perspective of that general law of possession, there appears to be little to justify a finding of possession. The owner of the car had retained the key, and in those circumstances the agent looks from an objective standpoint like, at most, a custodian, unless there are other facts not disclosed in the report of the case, such as a price sticker put on the car, this being an assertion of a right to sell the car. On the facts given, the agents in *Stadium Finance* do not appear to be exerting any more control or asserting any more right over the car than I am over the car which a visitor to my house has parked in my driveway, at least until they took the decision to break into the locked glove

¹³⁵ [1962] 2 QB 664.

¹³⁶ Factors Act 1889, s 2(1), extended to Scotland by the Factors (Scotland) Act 1890. It has been suggested that the provision was unnecessary in Scots law, our common law giving the same result on this point (JJ Gow, *The Mercantile and Industrial Law of Scotland* (W Green 1964) 105-106, quoting Lord Kinloch in *Pochin & Co v Robinows & Marjoribanks* (1869) 7 M 622, 638).

¹³⁷ Although it was noted in part D, above, that the assertion of right could be made on another's behalf, one who does so will not have the *animus* necessary for possession.

compartment of the car to recover the car registration documents. That would appear to constitute the necessary assertion of right.

The matter, then, is one of objective impression, in which the absence of a necessary component plays a part but which is not conclusive. In both *Black v Carmichael* and *Stadium Finance Ltd v Robbins* there was a car on land belonging to a party other than the owner, and in both cases the occupier of the land lacked the key to the car. However, in the former case, clear acts were carried out that constituted an unambiguous assertion of a right to exclude the owner from use of the car, and so the occupier of the land possessed on the view stated here. In the latter case, on the other hand, the lack of the key was part of a general impression of lack of control on the part of agent, which excludes possession: given that the principal retained the key, and was able to drive the car away, the position was much the same as if the principal had merely parked his car on the agent's premises.

(4) External factors

Suppose that the difficulty with my possession is that the item is difficult to control due to external factors, such as the weather. We are not concerned here with supervening events occurring after possession has been acquired: that would be an issue of retention and loss of possession, considered later. What we are concerned with is issues existing at the time of taking possession.

An example of this is possession of shipwrecks. Weather conditions will impose certain restrictions on the control that can be exercised. The discussion above would suggest that what is required is what is reasonable in the circumstances. There appears to be no direct authority in Scots law on the point, at least as regards corporeal moveable property. However, in English law the principle has been accepted. For example, *The Tubantia*¹³⁸ concerned possession of a wreck under water. It was held to be sufficient to carry out acts such as the sending of divers, cutting a hole in the wreck, and attaching a buoy. As far as actual control of the wreck was concerned, these were fairly minimal acts, especially given that weather conditions severely restricted the days on which work was possible. The court

¹³⁸ [1924] P 78.

referred to the Scottish case *Lord Advocate v Young*¹³⁹ for the principle that possession only requires such use as is reasonably possible. That case concerned prescriptive possession of land, specifically foreshore, but the principle seems equally applicable. The point was made that the possessor of foreshore in its natural state will periodically be excluded from the land by the tide, but that this will not prevent that person establishing possession.

(5) Items in the body

A person may have things inside his body: a medical implant, for example. In one of a series of articles of humorous intent in the South African Law Journal,¹⁴⁰ this question is considered. The article is in the form of a report of a fictional case concerning a piece of shrapnel lodged in the body of a former soldier, and asks whether he is in possession of the shrapnel in contravention of a provision of the criminal law regarding possession of ammunition. The article does not explore the requirements for possession, but concludes that the accused did possess. It was not required that any actual use be made of the property.

It is strongly arguable that an individual does not possess items within his body, on the basis of lack of control. A medical implant cannot be removed by the carrier without fairly drastic acts to bring this about. This is the case even with more accessible additions, such as dental fillings. In effect, such implants have become part of the body, and so, it may be supposed, they can only properly be said to be possessed if the human body itself is possessed by the individual occupying it.¹⁴¹ To be possessed separately from the human body, they would need to be removed from it.

An item that has been swallowed may perhaps be recovered by inducing vomiting, at least for a limited time after swallowing, but this again seems a sufficiently serious step as to imply that the item is not presently in the possession of

¹³⁹ The report referred to is at (1887) 12 App. Cas. 544. The case is also reported, as *Young v North British Railway Co*, at (1887) 14 R (HL) 53.

¹⁴⁰ 'Quaint Cases in the South African Law' (1974) 91 SALJ 255, 257-60.

¹⁴¹ On the issue of the extent to which the human body and its components fall within the scope of property law, see N R Whitty, 'Rights of personality, property rights and the human body in Scots law' (2005) 9 Edin LR 194, especially at section D. It appears from the discussion in that article that body parts are outside the scope of property law, at least as long as they remain attached.

the person carrying the item in his body unless, again, the body as a whole is capable of being possessed by its occupant.¹⁴² Something that has been swallowed cannot be considered to have become part of the body, on the basis that the requirements for accession have not been met,¹⁴³ at least unless and until it has been absorbed by the body, and so it cannot be considered to be possessed as part of the body as a whole. Suppose that the substance is illegal, and has been swallowed unwittingly by an individual. If that individual then becomes aware of the nature of the substance, is he then obliged to attempt to bring up the contents of his stomach or face prosecution? This seems rather an imposition on a person who has come into this situation innocently. Furthermore, the individual who has swallowed the item has no control over the physical processes governing whether the item is even recoverable in this manner. It appears that the item is quite out of his control.

In cases of possession of drugs, there is a further issue, that of chemical change. As it passes through the body, the drug will undergo processes that will change its character. It was for this reason that the convictions in *Hambleton v Callinan*¹⁴⁴ were quashed. Although traces of drugs were found in urine samples, these traces had undergone such chemical change that they could no longer be described as being that drug. The accused were therefore not at the time of giving the samples in possession of the drug.

Earle suggests that:

There will clearly be a time following consumption but before excretion or metabolic change when the drug will be present in its original chemical form in the system and might therefore be said to be in the possession of the accused.¹⁴⁵

For reasons already given, it is at least arguable that an individual is not in possession of things within his body. Moreover, the accused does not control the

¹⁴² It may be noted, however, that in *Hambleton v Callinan* [1968] 2 QB 427, 431-32 (Lord Parker CJ), it was said *obiter* that an item whose character is not changed by its passage through the body would still be possessed. The examples he gives are a diamond and a gold ring.

¹⁴³ On accession between moveable items, see generally Reid, *Property*, paras 588-591. Where something has been swallowed, and either is indigestible or has not yet been digested, it and the body will lack the necessary indissoluble union for accession to occur.

¹⁴⁴ [1968] 2 QB 427, [1968] 2 All ER 943, DC.

¹⁴⁵ M Earle, *Stair Memorial Encyclopaedia Reissue Medicines, Poisons and Drugs* (2000), para 48.

metabolic change to which Earle refers, and so it is entirely fortuitous whether the drug can be recovered in its original form. In any case, as was pointed out in *Hambleton v Callinan*,¹⁴⁶ in a prosecution for unlawful possession, it is not necessary to rely on present possession. The traces in the urine samples could be used just as well as evidence of past possession.

(6) Conclusion

We see in this part that the requirements for control will vary according to circumstances. There may be obstacles in the particular case to control of the property and, where the property cannot otherwise be said to be controlled at all, those obstacles must be overcome, as with very small items or items in the body. Subject to that, however, the acts required will be those that are reasonable in the circumstances to give sufficient control to constitute an assertion of a right to possess.

F. EXCLUSIVITY

(1) The need for exclusivity

In this chapter, we have seen that, as does Stair, Rankine, Smith and Reid all define possession as requiring an element of exclusivity. As noted at the beginning of this chapter, Bentham and Paton have observed the problems that arise when more than one person has access to the property, or more than one person attempts to exercise control of the property. We saw in chapter 2 that the same point appears in other systems, especially England.

It is necessary, however, to begin by making three distinctions. The first distinction is that between, on the one hand, interference that is actually occurring and, on the other, potential interference.

¹⁴⁶ [1968] 2 All ER 943, 945 (Lord Parker CJ).

The second distinction is between, on the one hand, interference by right or with the consent of the possessor and, on the other, interference without such right or consent.

The third distinction is between exclusivity at the time of taking possession and exclusivity subsequent to that. Do the requirements differ? The requirement for exclusivity after the taking of possession will be considered as part of the question of continuation and loss of the physical element of possession.¹⁴⁷ We are concerned here with exclusivity at the time of taking possession. That leaves us with three situations to consider: actual interference with neither right nor the consent of the possessor; actual interference with either right or consent; and potential interference. We begin with the case of potential interference.

(2) Potential interference

(a) Potential interference generally. It would be inconvenient if potential interference by a third party prevented the acquisition of possession. Take for example the case where a child picks up a banknote lying on the ground. Even if the banknote is picked up in the presence of another who is well able to overpower the child, if that person does nothing to interfere then it is going too far to hold that person's presence to exclude the acquisition of possession.¹⁴⁸

Cases suggests that the presence of some person who is in a position to interfere with the possession of the property will not, in and of itself, prevent the acquisition of that possession. Thus, in *Mitchell's Trs v Gladstone*,¹⁴⁹ there was a conveyance of household furnishings in the matrimonial home by the husband to a third party, who then conveyed to the wife's marriage trustees. There was held to be good delivery to the trustees through the wife's possession on their behalf. Similarly, in *Adam v Adam's Tr*,¹⁵⁰ it was held that household furnishings, owned by the wife and brought into the matrimonial home on marriage, had not been 'lent or entrusted' to the husband in term of section 1(4) of the Married Women's Property Act 1881.

¹⁴⁷ See chapter 4.

¹⁴⁸ Pollock & Wright, *Possession* 15.

¹⁴⁹ (1894) 21 R 586.

¹⁵⁰ (1894) 21 R 676.

These cases imply that items within the household may nonetheless be separately possessed, even though it may be supposed that the household furnishings were used equally by both spouses.

In *Ross & Duncan v Baxter & Co*,¹⁵¹ a firm of shipbuilders arranged for an engine to be fitted to a ship by a firm of engineers. The shipbuilders brought the ship to a public harbour for this purpose. The Inner House held that, in the circumstances, the acts carried out by the engineers were not sufficient to give them a lien, for two reasons. The first was that an employee of the shipbuilders remained on board at all times in order to maintain their control of the ship. Although this was also the case in *Cooper v Barr and Shearer*,¹⁵² discussed in chapter 4, Lord Shand distinguished that case on the basis that the position of the employee in the present case was 'somewhat more than that of a mere watchman'.¹⁵³ His purpose was not merely to keep an eye on things, but to maintain his employers' natural possession. Secondly, this conclusion was supported by a provision in the contract between the parties that the ship was 'to be throughout in charge of the shipbuilders', ie under their control. There is therefore an element of lack of *animus* on the part of the engineers. Clearly, though, to maintain the ship in their own charge, the shipbuilders needed to maintain some kind of presence during the repair work, and the role of their employee must be interpreted in light of the contractual term. What the case does not decide, though, is that a repairer may not satisfy the physical requirements of possession in the presence of someone who may interfere. The decision in *Ross & Duncan v Baxter & Co* turned on its own special circumstances that the shipbuilders were continuing to carry out acts that were, on the facts of the case, sufficient for the maintenance by them of natural possession.

(b) *Traditio clavium*. This issue of potential interference arises in the case of the delivery of keys. We saw in chapter 2 the idea that possession of goods may be given by delivery of the key of the place in which the goods are kept, and we have seen

¹⁵¹ (1885) 13 R 185.

¹⁵² (1875) 2 R (HL) 14.

¹⁵³ (1885) 13 R 185 at 197. Compare *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1967 (2) SA 528 (CPD), discussed in chapter 2, where a party that had left employees as watchmen were likewise held not to possess, on the same basis that they were merely watchmen exercising no control over the ship.

also in this chapter the idea of possession of items kept under lock and key. Delivery of this kind is known as *traditio clavium*. What, then, if the transferor has a duplicate key, or has some other means of getting at the goods? It appears that, in South Africa, the existence of a duplicate key prevents the operation of *traditio clavium*.¹⁵⁴ The same is true for Germany.¹⁵⁵ On the other hand, for England Pollock and Wright hold that:

[I]f a vendor has delivered the key to the purchaser with the expressed intent that the purchaser may at any time get at the goods, the purchaser will have possession although the vendor really intends himself to get at the goods by means of another.¹⁵⁶

Thus, in *Ancona v Rogers*,¹⁵⁷ in which an individual had been given possession of goods in another's house by being given the key to the locked room in which they were kept, it was observed¹⁵⁸ that the householder could have resumed possession by use of a duplicate key. Evidently the existence of the duplicate key would not, therefore, have prevented delivery in the first place.

It is not clear what approach Scots law takes to this matter. Stair does not consider the matter directly, but what he says about the possession of things under lock and key cannot easily be read to allow the holding of duplicate keys by other parties. He refers to possession of items by:

...having them in fast places, to which others had no easy access.¹⁵⁹

Hume is also unreceptive to the idea:

[T]he delivery of the key must have been made however with the purpose of putting the goods absolutely and fully into the power of the vendee.¹⁶⁰

¹⁵⁴ Van der Merwe, *Law of Things*, para 58; *Silberberg & Schoeman* 182.

¹⁵⁵ McGuire, 'Transfer of Movables in Germany' 57.

¹⁵⁶ Pollock & Wright, *Possession* 68.

¹⁵⁷ (1876) LR 1 Ex D 285.

¹⁵⁸ (1876) LR 1 Ex D 285, 291 (Mellish J).

¹⁵⁹ Stair, *Inst.* 2,1,11.

¹⁶⁰ Hume, *Lectures*, III,251.

It must be said, though, that the context of this is comparison with cases where the key is given for a limited purpose, rather than with cases where the transferor retains the ability to get access to the goods.

Among earlier Scots writers, only Bell has considered the matter directly:

It will not prevent this kind of delivery from having effect, that the seller has a double or master key by which he may open the door, or that he may get access by some indirect and unusual means, or that there is a door of communication with some other part of the premises which the seller may clandestinely open.¹⁶¹

Much of this is certainly unobjectionable. If the other party needs 'indirect or unusual means' to get access to the goods, that in itself implies that a transfer of control has taken place. The same is true where clandestine methods are needed. The question is more difficult in the simple case of duplicate or master keys.

There are unfortunately few cases on possession where others have access to the item possessed. In *Taylor v Ranken*,¹⁶² an individual was held to possess items in containers even though others had access to those containers. The pursuers were the executors of T, who had died while living with the defenders, who were the widow of T's deceased son and her second husband. On T's death, it was held that T was presumed owner of the contents of certain chests on the basis of his possession, as having the key. It was not relevant that the male defender 'had frequent access, by opening the chests, and putting any thing therein he pleased'. This tends to imply that one may possess items in a locked repository, even though there is someone else who may also exercise access.

A bill of lading fulfils a similar role to a key in this regard,¹⁶³ so it may be instructive to consider the position with duplicate bills of lading. In *Meyerstein v Barber*,¹⁶⁴ the House of Lords held that the delivery of one of a set of three bills was enough for delivery of the goods, even though one holding any of the three could have obtained the goods from the carrier.

¹⁶¹ Bell, *Commentaries*, 1,186.

¹⁶² (1675) Mor 9118.

¹⁶³ See further chapter 6, section B(2), on bills of lading.

¹⁶⁴ (1869-70) LR 4 HL 317.

If, then, I give you the key to the repository where the goods are kept, is that good delivery even if I retain a duplicate key? I may well wish to do so, if that repository is in or is part of my premises, for reasons that have nothing to do with the transfer of possession. I may need access for maintenance purposes, for example. A similar case would be a lease of premises and their contents. It would be a surprising conclusion if it were to be held that a tenant of a furnished flat did not acquire possession of the contents simply because the landlord had retained a spare key.¹⁶⁵ It is suggested, therefore, that Bell's view is correct, and that the existence of a duplicate or master key should not prevent the effectiveness of *traditio clavium*. To conclude otherwise would in any case be inconsistent with the view taken above, that it is no bar to the acquisition of possession merely that another person might potentially interfere with that possession.

(3) Actual interference with consent or right

(a) The general issue. It cannot reasonably be an obstacle that others make use of property in my possession with my consent, for by doing so the individual making such use acknowledges my possession. If anything, the fact that I am allowing others to use the property underlines my assertion of a right to possess the property. Thus, in Roman law any access taken to the property by consent will not interrupt possession,¹⁶⁶ possession only coming to an end if the third party actually

¹⁶⁵ The present discussion is concerned with the moveable contents, but the same point could equally be made with regard to the premises themselves. It is at least arguable that possession of a key to premises is enough to satisfy the physical element of possession of the premises themselves. At least, in *Fry's Metals Ltd v Durastic Ltd* 1991 SLT 689, a tenant whose lease was at an end but who still retained the key to the premises was held liable when the premises were broken into, for failure to maintain an alarm system, on the basis that the tenant was still in 'occupation' of the subjects. The idea here seems to be that the person with the key to the premises has control of the premises themselves. In *Royal Bank of Scotland v Macbeth Currie* 2002 SLT (Sh Ct) 128, 133B the sheriff assumes that holding of a key to premises is enough for possession of the premises themselves. In one English case, *Ancona v Rogers* (1876) LR 1 Ex Div 285 at 290-291, it was held that delivery of the key to a room was delivery of possession of the room itself. Pothier (*Contrat de vente*, para 314) is of the same opinion. In *Maxwell & Co v Stevenson & Co* (1831) 5 W & S 269, 279 (Lord Chancellor), delivery of a key of a warehouse was said to be only 'a symbolical delivery of the warehouse, but an actual delivery of the goods in the warehouse'. The case was, however, concerned with delivery of the goods rather than possession of the premises. See further discussion of the issue in A Torr, *Spuilzie* (LLM thesis, University of Aberdeen, 2003), 63-64.

¹⁶⁶ Paul, D.41.2.14.

appropriates the property.¹⁶⁷ This follows also from the quotation from Javolenus given in chapter 2,¹⁶⁸ concerning money placed in my presence. At the moment that my debtor places the money on a table in my room, I am not excluding him from it. Indeed, at that moment he is the one of us that can more readily take physical control.

Even where another interferes with my possession by right, it seems clear that this will not prevent me establishing possession. We saw in chapter 2 that, in *Pharaoh Scaffolding v Commissioners for Her Majesty's Revenue and Customs*,¹⁶⁹ the hirer of scaffolding was held to have acquired possession of the scaffolding notwithstanding that, in the hire agreement, the owners reserved certain rights to inspect the scaffolding. In a Scottish case on similar facts, *R & M Scaffolding Ltd v Commissioners of Customs and Excise*,¹⁷⁰ the same conclusion was reached. Similarly, we saw earlier, in *Cooper v Barr and Shearer*,¹⁷¹ that a ship was still possessed by the repairers notwithstanding that, because it was in a public dock, it was under the authority of the harbourmaster. Indeed, this was the case even though the ship was moved under the instructions of the harbourmaster.

(b) Shared possession. However much exclusivity may be required, this does not prevent more than one person possessing in common. This is permissible, as long as no individual co-possessor holds in a manner inconsistent with shared control.¹⁷²

For Reid, co-possession is restricted to the case of '*pro indiviso* holders of the same right to possession'.¹⁷³ It is not, however, immediately apparent why such a restriction should exist. Take, for example, the case of a married couple, co-habiting in a house in which some items were provided by one spouse or the other, and some acquired by both together. It may be long forgotten which items fall into which category. It is true that, subject to certain exceptions, the spouses will be presumed to

¹⁶⁷ Papinian, D.41.2.47.

¹⁶⁸ D.46.3.79.

¹⁶⁹ 2008 WL 2697127.

¹⁷⁰ 2005 WL 699563. In reaching the decision, reliance was placed on the definition of possession in Reid, *Property*, paras 117-118.

¹⁷¹ (1873) 11 M 651, revd (1875) 2 R (HL) 14.

¹⁷² See eg Reid, *Property*, para 118. The same is true in other systems: Ulpian, D.41.2.42pr; *Rosenbuch v Rosenbuch* 1975 (1) SA 181 (WLD); *Brighton v Clift* 1970 (4) SA 247 (R), 249; Pollock & Wright, *Possession* 20; *Salmond on Jurisprudence* 287.

¹⁷³ Reid, *Property*, para 118.

co-own these items.¹⁷⁴ That, of course, is only a presumption, and may be rebutted, though not easily, given that the presumption is not rebutted merely by the fact of one of the spouses having acquired the item separately from the other.¹⁷⁵ However, such rebuttal may require consideration of disputed evidence, with the result that in practice the rebuttal of the presumption may be no easy matter: it is likely that any couple married for even a few years will have a number of items the manner of acquisition of which is forgotten. Given that both spouses use and benefit from these items in the same way, and given the uncertainty as to ownership, there seems to be no reason why both spouses should not benefit from the same possessory protection. After all, possession is not a matter of what rights people actually have, for if the right to possess is clear then there is no need for possessory remedies. Where, though, it is not clear who has the right to possess, but two parties use the property in the same manner as each other, it is reasonable for the law to hold both to possess so that they may both have the protection that possession affords until the question of right is settled.¹⁷⁶

This situation has been considered in South Africa, and it has been held that more than one person may co-possess even on the basis of different rights. Thus, in *Rosenbuch v Rosenbuch*,¹⁷⁷ property was removed from the matrimonial home by a wife on her separation from her husband. It was held that the husband was entitled to a spoliation order, without enquiry into the question of which of the two was in fact the owner of the property that had been removed.

There is some reason to believe that this is also the position in Scots law. *Maxwel v Maxwels*¹⁷⁸ was an action for spuilzie of goods possessed by the pursuer while she lived in her father's house. The goods were in a chest to which the pursuer had the key. It was held that the having of the keys was sufficient for possession except if the question had arisen with the pursuer's parents. It does not appear from the report of the case what the rights of the pursuer and her father were, but there is

¹⁷⁴ Family Law (Scotland) Act 1985, s 25(1). The exceptions are in subs (3).

¹⁷⁵ Family Law (Scotland) Act 1985, s 25(2).

¹⁷⁶ It may be noted that, if this position is accepted, it rather makes s. 25 of the Family Law (Scotland) Act 1985 redundant, for it means that the spouses, as co-possessors, would be presumed co-owners anyway.

¹⁷⁷ 1975 (1) SA 181 (WLD). This decision was followed in *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (NPD), in which a husband was held entitled to a spoliation order when his wife changed the locks on their shared flat while he was out, even though she claimed to be the sole tenant.

¹⁷⁸ (1676) Mor 14729.

no reason to assume that they were the same. The decision nonetheless appears to imply that the father also possessed.

*Main v Leask*¹⁷⁹ is another example. In this case, there was an arrangement whereby the profits of a fishing venture were to be shared between the owners of the boat, the owners of the nets and the crew. The boat was lost in a collision caused by the negligence of the defenders. In an action for damages for loss of profits arising from this, the defenders argued that only the owners of the boat were entitled to damages. In the Inner House, however, Lord Ardwall, with whom the other judges concurred, gave the legal position as being that:

[I]f anyone is directly interested in the property of goods, houses or ships, he may be entitled to sue in respect of damage to such interest, if it is not too remote.¹⁸⁰

It has been argued that cases of this kind are based on possession.¹⁸¹ If that is correct, this case suggests that it is possible for parties to co-possess on the basis of different rights.

*Reid v Houston*¹⁸² concerned the forfeiture of property used in the commission of an offence and which was in the possession or control of the offender at the time of apprehension.¹⁸³ The property in question was a car used in an attempt to commit theft by housebreaking. The car belonged to appellant's cohabitee, but the sheriff was persuaded that he had free use of the car. Accordingly, the appellant was held to possess, even though he shared his possession with another with a superior right.

On the basis of these cases, it appears arguable that more than one person may possess together, even where different rights underlie their respective holdings. Of course, if I use along with someone who has a superior right to the property, that

¹⁷⁹ 1910 SC 772.

¹⁸⁰ 1910 SC 772, 779 (Lord Ardwall).

¹⁸¹ Reid, *Property*, para 116. For discussion of this issue, see C Anderson, 'Spuilzie today' 2008 SLT (News) 257, 260; W J Stewart, 'The alleged case of the spuilzied helicopter' 2009 SLT (News) 13; C Anderson, 'The alleged case of the spuilzied helicopter: a reply' 2009 SLT (News) 31.

¹⁸² 1992 SCCR 442.

¹⁸³ This power existed in terms of the Criminal Procedure (Scotland) Act 1975, s 436(1). This provision was repealed by the Criminal Justice (Scotland) Act 1995, sch 7, and replaced with s 87(2) of that Act with the formulation 'ownership or possession'. That provision was itself repealed by Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, sch 5 para 1.

may give grounds for holding that I use only by that person's licence. However, possessory protection is not about determining or protecting the rights people have. Rather, it is concerned with maintaining the existing position pending such determination. Accordingly, where two or more people exercise shared use on an ostensibly equal footing, it would seem contrary to that policy to make the consequences of dispossession depend on rights that may be unknown to the dispossessor, and may be uncertain even between the parties sharing use of the property.

(c) Multiple users. Reference to *Bennet Pringle (Pty) Ltd v Adelaide Municipality*¹⁸⁴ suggests that South African law may go further, and allow multiple parties independently to possess the same property. That case concerns possession of land, in this case an abattoir, but there seems to be no reason why the principle should not apply to corporeal moveables. In this case, an abattoir had been leased to a tenant, who was a butcher. In a possessory question, the landlord contended that the tenant was not a possessor, on the ground that other butchers had keys to the premises and used them without supervision by the lessees. To this argument, the court's response was that:

It does not therefore now lie in the mouth of the respondent to say that, because other such persons continued to use the abattoir to slaughter animals, control did not pass to the applicant.¹⁸⁵

It appears to be enough that the lessee 'did exercise rights or carry out activities consistent with the transfer to him of occupation and control of the premises'.¹⁸⁶ That this was so, even though others had access, suggests that more than one person may separately possess the same property, as long as their possession is not antagonistic.¹⁸⁷

¹⁸⁴ 1977 (1) SA 230 (ECD).

¹⁸⁵ 1977 (1) SA 230 (ECD) 236-237 (Addleson J).

¹⁸⁶ 1977 (1) SA 230 (ECD) 237 (Addleson J).

¹⁸⁷ This decision appears to be contrary to the view of Voet, 41,2,5, supported by reference to Paul, D.41.2.3.5.

It is more uncertain whether the decision in *Bennet Pringle (Pty) Ltd* is correct for Scots law, and whether two or more persons may independently possess the same property. It is suggested, however, that this is the correct position. After all, as we have seen, if another makes use of my property, that does not necessarily affect my possession unless the other person's use is antagonistic to my continued possession. If that other person's use is itself sufficient for possession, it is not immediately apparent why that should make any difference to my possession if the use does not interfere with my use. Take, for example, the case of a furnished flat with several bedrooms. The flat is leased to a group of friends, each of whom occupies his own bedroom, but who also use communally certain areas of the flat (the kitchen and bathroom, for example). There can, it must be supposed, be no doubt that these friends possess in common the furnishings in these common areas. Those who say that shared possession cannot arise on the basis of separate rights would presumably say that the tenants co-possess because they share a lease. However, suppose instead that the bedrooms are let as individual bedsits, on separate leases, to tenants who are strangers to one another, but still with shared use of the common areas. The tenants' use of the furnishings in the common areas is scarcely distinguishable from that in the first example. Certainly, to an objective observer they may appear actually identical, especially if in the second example the tenants actively co-operate in the management of the common areas (by setting cleaning rotas, for example). Accordingly, there seems to be no proper basis for holding possession of the furnishings to exist in one case and not the other.

(4) Actual interference without consent or right

The final case to be considered is that which arises where there is actual interference with the attempt to take possession. Where there is contention over this, to the extent that I am not able to establish control, I will not acquire possession. Thus, says Paul:

[S]everal persons cannot possess the same thing exclusively; for it is contrary to nature that when I hold a thing you should be regarded as also

possessing¹⁸⁸] it...For it is no more possible that the same possession should be in two persons than that you should be held to stand on the same spot on which I stand or to sit in the place where I sit.¹⁸⁹

This of course assumes that it is necessary to exclude all others in order to possess. We have seen above that Paul's view may require qualification with regard to shared possession. However, for present purposes, we may accept the principle that, if two or more persons all attempt to possess, they will none of them be successful unless and until one of them establishes sufficient control. Likewise, Pollock and Wright say:

If two men have laid hands on the same horse or the same sheep, each meaning to use it for his own purposes and exclude the other, there is not any *de facto* possession until one of them has gotten the mastery.¹⁹⁰

Unfortunately, except for consideration of the acquisition of ownership of wild animals by *occupatio*,¹⁹¹ there is no Scottish authority on this point. However, it would appear to follow from the principles of possession considered here that, where there is a present competition for control, no individual has as yet acquired control. Accordingly, in such a case, no possession has been acquired.

(5) Conclusion

From the comparative and historical material, it appears that there is no requirement for exclusivity if by that is meant the actual ability to exclude interference with the property. It is suggested here that the position is the same in Scots law, if nothing else because the alternative is unsustainable in practice. An example will illustrate. Suppose that a man visits a supermarket in his car. He places the items he wishes to buy in a trolley, and takes the trolley to the checkout. These items are scanned and placed back in the trolley. He pays and then returns to the car, loads the shopping

¹⁸⁸ The word translated here as 'possessing' is *tenere* ('to hold'), the same verb used in the previous line in the phrase 'when I hold a thing'. A more literal translation would therefore be 'when I hold a thing you should be regarded as also holding it'.

¹⁸⁹ D.41.2.3.5.

¹⁹⁰ Pollock & Wright, *Possession* 20.

¹⁹¹ See chapter 7.

into the car boot and drives off. It is only at the point of driving off that his control is exclusive in the sense that, until he drives away, he cannot prevent someone stronger or faster, or just someone who takes advantage of a moment's inattention, taking an item from the trolley or, when the items are in the boot, opening the boot and making off with them. Until this point, although he has been exercising some control over the items, this control has not been of sufficient degree to allow him to pass TB Smith's test of ability to exclude others.¹⁹² If exclusivity is required, that is problematic, for it would require the conclusion that one could not possess until there was some obstacle to interference by others. On the other hand, from the moment he leaves the till with the shopping, the hypothetical shopper is making an utterly explicit assertion of right. On that basis, it would appear to be enough that others are in fact excluded.

It is going too far to consider exclusivity of control to be a separate criterion for possession. Instead, it is part of the test of control. The holding must be in fact exclusive, and then only to the extent that this is required to reach the level of control expected of one holding as owner (or pledgee, *etc.*), even though there may in fact be someone in the position of being able to end that control. It is not necessary to exclude all possibility of interference. There is no reason why, for example, an owner should exclude all from the property. This appears, then to be required: such exclusivity as is consistent with the existence of the right that is being asserted. This allows the possessor to continue to possess notwithstanding interference with the property by those with the right or permission to do so, as long as the possessor is nonetheless able to exercise the required degree of control of the property. My acquisition of possession is only impeded by want of exclusivity where that required degree of control cannot in fact be asserted against others acting in a manner inconsistent with my possession.

G. CONCLUSIONS

On the basis of the discussion in this chapter, it can be suggested that the physical element of possession of corporeal moveable property is satisfied when a person two criteria are met. First, the intending possessor ('P') must have acquired control of the

¹⁹² See part C of this chapter.

property. This control may be either by P himself or through another acting on P's behalf. Second, that control must be of such a nature that, in the circumstances, an objective bystander would consider P to be asserting a right to the property. In a case of civil possession, that assertion of right would of course be made by the person acting on P's behalf. It is accepted that the objective bystander would not necessarily know whether the person carrying out the acts was intending to possess himself or was merely holding for someone else. To determine that it would be necessary to examine the mental states of the parties. In other words, this would be a question of *animus* rather than *corpus*. In any case, all the bystander needs to know is that a right is being asserted, from which he may take it that the property is possessed by someone. Thus, in the example given in part A, of the book lent to the student, the acts carried out by the student are sufficient to show that someone is asserting a right to the book. Who that person is - either me or my employer - will be determined by a consideration of *animus*.

The two requirements are thus (i) control and (ii) an assertion of right. What is required for control will vary according to the circumstances. The nature of the property to be possessed will be relevant, for example. However, two factors can be identified in determining whether a person has control.

First, a person will only have control if he is controlling the use made of the property to the extent appropriate to the right being asserted, and so the level of control needed may vary according to that right. Thus, for example, a person asserting a lien over a car may only need to immobilise it, while one asserting ownership may actually have to have a power of use. However, acts incidentally affecting control of the property, such as locking the gate to the land on which a car is sitting, will be insufficient in the absence of some act more clearly assertive of a right to possess.

Second, a person only has control if no other person is in fact carrying out any acts with the property that are inconsistent with the right being asserted by the former. Thus, in the first of Bentham's examples given in part A of this chapter, of two or more people putting their hands on a parcel to claim possession, none of individuals appears at that point to have sufficient control for possession. However, it is irrelevant that an individual may be able to interfere with the acquisition of

control, if he does not in fact do so. It must be stressed that, while this exclusivity is necessary, it is not sufficient. Thus, one in a position to exclude others from an item does not possess if he does not in fact control that item. Examples of this are items buried under land possessed by an individual and items within his body.

Finally, to allow for the acquisition of possession in circumstances where a person has carried out no acts directly with the property but it has been dropped or left in premises or on land controlled by him, a person may be said to have control if he would be taken by an objective bystander to have control. Thus, in Bentham's second example, of the box placed in the clerk's *escritoire*, there is sufficient here to hold the clerk to have satisfied the physical requirement of possession. The matter would therefore resolve itself into one of *animus*. If the required intention is present, the clerk's employer will possess through the clerk's holding. More generally, it will often be the case in practice that it cannot be shown at exactly what point, and through which acts, the present holder took possession. Nonetheless, it would seem reasonable to infer from the present acts being carried out by that person that possession has been acquired.

Of course, once the requirements here have been satisfied, it does not follow that the possessor needs to continue holding the property in this manner. We are concerned in this chapter with the moment of acquisition of possession. Once possession has been acquired, it will continue until the facts justify holding that it has been lost.¹⁹³ Thus, for example, where more than one person occupies a house, each may appear to have sufficient control to have possession. However, if in fact the item was brought into the house in the possession of one of the occupants only, it will continue to be in that person's possession only unless some factor arises that changes that. Likewise, while it may be that keeping a car on a large area of ground may be insufficient in itself to satisfy the physical requirements of possession (in the absence of the key) on the part of the possessor of the ground, that will not matter if the car was put there by the possessor of the ground having been seized for unlawful parking. The act of lifting the car onto a larger vehicle and removing it will be sufficient in itself.

¹⁹³ See chapter 4.

It must be borne in mind that, in all of this, the question of *animus* must also be considered before a person may be said to possess. One who appears to an objective bystander to possess may in fact not possess, for example because he holds on another's behalf. Again, the physical relationship between the item and a number of potential possessors may be sufficiently ambiguous that only consideration of *animus* will resolve matters. An example of this will be where there are multiple occupants of premises containing an item the possession of which is unclear.

4 LOSS OF POSSESSION

A. INTRODUCTION

How is the physical element of possession lost? It is not intended here to consider all cases in which possession may be lost, for example where the intention to possess is lost or someone else takes possession. We are concerned here with what is required for the possessor to maintain the physical element of possession.

The comparative and historical discussion suggests a number of possibly relevant factors. The first of these is the level of physical control that is currently being exercised. It has been said that less physical control is required to maintain possession than is required to become a possessor in the first place, but this appears to mean that one need not maintain direct physical control at all times. Clearly one who is exercising such control possesses at that moment, but what is the effect of an interruption in that direct control? To what extent is a temporary absence relevant to the question of continued control?

The second factor that may be relevant to this question is the possessor's ability, following a temporary absence, to resume control. A difficulty here may arise because of some physical inability to resume control. Alternatively, it may arise because the location of the item is forgotten, or because it has become lost. This factor may be considered in two parts: first, the case where there is some difficulty with the item itself preventing the resumption of control, as where the property is lost or in some way inaccessible; second, the case where control over the property is possible, but the possessor is subject to some practical restraint. The standard example of the second arises where the possessor is imprisoned.

The third factor that may be relevant is the likelihood that another may interfere in the continued control.

The relevance of each of these factors will be considered in turn. It should be noted here, however, that we are not concerned with the whole question of how possession is retained and lost. That would require consideration of the mental element of possession that is beyond the scope of this thesis. Nor are we concerned directly with questions of loss of possession through dispossession by another. The

issue presently under consideration is what degree of physical control must the possessor show in order to continue to possess and, therefore, in what circumstances possession will be lost on the basis of loss of *corpus*.

B. THE POTENTIALLY RELEVANT FACTORS

(1) Absence

There is nothing in the comparative and historical material to suggest that possession may be lost merely by virtue of the fact that the possessor is not presently exercising direct control over the property or making actual use of the property. Indeed, such a rule would hardly be feasible in practice: I can hardly be expected to carry around all of my possessions wherever I go. I will inevitably be absent at times.

This, indeed, appears to be the position as accepted by the institutional writers. Stair,¹ Erskine² and Bankton³ all accept that, possession having been acquired, one may then continue to possess *animus solo* while absent. As TB Smith observes,⁴ this suggests a more limited role for *corpus* after possession has been acquired, *corpus* then being overshadowed by *animus*. This is certainly suggested by the use of the term *animus solo*: this implies that the mental element alone continues. However, it is perhaps not necessary to go as far as Smith in order to be able to accept the position that less is required for the physical element of possession after possession has been taken. After all, *animus* too can hardly be constantly exercised. If I acquire possession of an item, at that moment I have the specific intention to possess that item. I can hardly maintain such a specific intention throughout the whole period of my possession. There will be times when I am not directing my mind towards the item. I may even have forgotten that I have it. Still, it would be inconvenient to have a rule for loss of possession that was too quick to hold possession to be lost simply on the basis of forgetfulness. The difficulty is then much the same for both *corpus* and *animus*: while the law may demand that an intending

¹ *Inst.* 2,1,19.

² *Inst.* 2,1,21.

³ *Inst.* 2,1,27.

⁴ *Short Commentary* 463.

possessor show clear control of the property and demonstrate a clear and present intention to possess,⁵ to require the possessor to continue to exhibit these throughout the period of possession would be quite unworkable in practice. Accordingly, some lower standard must be adopted for the continuation of possession.

So much for *animus*; detailed consideration of *animus* is, of course, beyond the scope of the present work, but it seems that this must be the case. As we have seen from Stair, Erskine and Bankton, it is certainly the case for *corpus*. What, then, is the consequence of this? If possession may continue in the absence of present acts of possession, then continuation of possession may be inferred from previous acts of possession.

We can see this in *Reid v Houston*,⁶ a criminal case, but one which appears consistent with this general principle. In this case, the appellant had been convicted of theft by housebreaking. At the time of the offence, there was provision⁷ for the convicting court to order the forfeiture of property, used in committing an offence, which was in the possession or control of the offender at the time the offender was apprehended. The property in question in this case was a car intended for use in the removal of the goods. The car in fact belonged to the appellant's cohabitee, but the sheriff was persuaded that he had free use of the car, and so the sheriff ordered that the car be forfeited. On appeal, it was argued that the sheriff had misdirected himself by considering possession at the time of the offence rather than possession at the time of apprehension, as required by the statute. This argument was, however, rejected. The court held that, given the finding that the appellant was in possession at the time of the offence, and in the absence of any evidence of a change of circumstances, the sheriff was entitled to hold possession to continue to the date of apprehension.

The writer of the commentary on the decision⁸ criticises the respondent's apparent attempt to argue for a presumption of continued possession in cases of this kind, noting that there is nothing in the statute giving authority for this. It is not clear, though that this criticism is justified. Granted that the statute does not say that there

⁵ This is not to say that the law does in fact require such clear control and intention, merely that it could.

⁶ 1992 SCCR 442.

⁷ Criminal Procedure (Scotland) Act 1975, s 436(1).

⁸ 1992 SCCR 442, 445 (Sheriff Gordon).

is a presumption, but we must take into account the fact that the meaning of 'possession' is a matter of general law, unless some special statutory meaning was intended. As we have seen, gaps between periods of actual use of the property are inevitable. Given that, it is difficult to see how any special statutory meaning of possession could work differently from the general law, unless the intention was that the forfeiture provision should only apply to property in the direct physical custody of the accused at the time of apprehension. In *Reid v Houston*, this would presumably mean apprehension while actually driving the car. This interpretation has not been accepted, as shown in *Reid* itself. As we have also seen, as a matter of the general law, once possession has been acquired, it is said to continue until some circumstance indicates that it has been lost. In the absence of any evidence of any such circumstance, it is difficult to see how any court could avoid the conclusion that, on the facts proved in *Reid*, the appellant continued to possess up to the point of apprehension.

Similar issues arose in *Ross's Dairies Ltd v Glasgow Corporation*.⁹ This again was a statutory use of the term 'possession', but in this case too the court applied the general rule. In terms of section 247(2) of the Local Government (Scotland) Act 1947 as it then stood, arrears of rates could be recovered through the pouncing of goods 'in the lawful possession' of the ratepayer. The ratepayer in this case was the tenant of premises. The landlord opposed the pouncing on the basis that possession of the goods, which were the landlord's property, had been abandoned when the tenant left the country a month before the pouncing, leaving debts behind. The sheriff-substitute and, on appeal, the sheriff concluded that possession was not lost by mere absence. In reaching this decision, the sheriff-substitute relied on the view of Stair, noted above, that possession continued in the absence of further possessory acts. It is interesting to note that both the sheriff-substitute and the sheriff talk of a presumption of continued possession; indeed, in the former case, the use of the term 'presumption' is a direct reference to Stair's account.¹⁰ Contrary to the commentary on *Reid v Houston*, therefore, it appears that there is a basis for talking

⁹ 1972 SLT (Sh Ct) 48.

¹⁰ At *Inst.* 2,1,19. The presumption that Stair is referring to is a presumption of continued *animus possidendi*, but this implies that there is no difficulty with the absence of constant physical control.

of a presumption of continued possession, that basis being found in the general law of possession.

One curious point in *Ross's Dairies* was that, following the tenant's departure, the subjects were occupied unlawfully by an individual identified only as 'a Chinese gentleman'. On its face, this fact at least arguably interrupted the tenant's possession of the goods within the premises, at least if the Chinese gentleman had been in occupation without the consent of the tenant. Perhaps surprisingly, however, neither the sheriff-substitute nor the sheriff placed any weight on this circumstance. This is unfortunate because it is a fact that appears to demand an explanation if it is not to be held to interrupt possession. Evidently, however, for whatever reason, the court did not consider the Chinese gentleman's presence to be a relevant factor, and so it is a fact that can be disregarded for the present purpose of determining the significance of a failure to exercise possessory acts for an extended period of time.

We may also note that the presumption of possession that was operated in *Ross's Dairies* appears to have been a strong one. The landlord's solicitor sought to portray the tenant in argument as having 'fled the country'. Indeed, when a tenant leaves the country for an extended period during the currency of the lease, leaving behind substantial debts, such suspicions can scarcely fail to arise. Nonetheless, the sheriff took the view that there was insufficient evidence to establish the tenant's intentions, speculating that the tenant could, for all that was known, have left the country for the benefit of his health.

Such a view of the facts was no doubt open to the court in *Ross's Dairies*. However, it is suggested that there must be limits. There will come a time where, in the circumstances, the length of time between possessory acts has been such that possession will appear to an objective onlooker to have been abandoned. Of course, the possessor may be taken to know whether he intends still to possess, but that knowledge is restricted to him. Unfairness could arise if this private knowledge is allowed to affect the legal position of third parties. This, however, is predominantly a question of *animus*. As far as *corpus* is concerned, all that appears to be required is sufficient acts to reflect that continued *animus*. This is a very low standard to meet, given that the continuation of that *animus* is presumed.

(2) Ability to resume control where there is an obstacle to control of the thing itself

Clearly it is not necessary to continue in direct and active control of the property at all times in order to continue to possess. We have seen that, in Roman law, and in the other systems considered, the continuation of possession was however affected by the question of how readily such control could be resumed. From the discussion earlier, several cases may be distinguished. The first of these arises where the location of the property is not presently known, but the property is 'still in our keeping',¹¹ and which may be found with a diligent search. Something lost within the possessor's own home would typically fall within this case.

Secondly, where something is lost outwith our keeping, which cannot be found, possession is said to be lost. This is the younger Nerva's case of the straying animal or the falling vase. To this, as we have seen, van der Merwe adds for South African law things lost even within the possessor's orbit of control. By contrast, English law appears to allow possession to continue in such a case, even where possession is lost outside the possessor's orbit of control. As we have seen, though, this may be explained as influenced by the requirements for the crime of larceny.

Thirdly, there is the case where the location of the property is known, but it is inaccessible. This is Ulpian's example of items lost at the bottom of the Tiber in a shipwreck.¹² Possession is lost because the items are lost beyond all reasonable recovery, even though the general location of the shipwreck is presumably known. Of course, even here recovery is possible. Divers could be sent down, or the river could be dammed or diverted to expose the river bed, but the need to go to such lengths demonstrates in itself the loss of control. No doubt such strenuous search efforts are more likely with, for example, valuable property, but it does not seem that the likelihood of a search can make any difference: possession, as we have seen, is based on control and, until the search is carried out, the degree of control is the same.

To these may be added a fourth case, namely property lost outside the possessor's keeping, but which may be found. For example, I drop something in the

¹¹ Paul, D.41.2.3.13.

¹² D.41.2.13pr.

street, but am able to retrace my steps and find it again, was my possession interrupted? Ulpian's example of the items lost in the shipwreck may suggest that possession is not lost in this case: if the reason possession was lost in the shipwreck case was the inaccessibility of the items, that implies that items similarly lost, but which are accessible, will continue to be possessed. Of course, it may be that my possession in this example is affected by the likelihood that someone else will get to the lost item before I do, but that issue is considered below. It appears that the loss of the item will not result in the loss of possession in and of itself, on the basis of the discussion so far.

Except for the English authority referred to above, then, the principle seems to be that loss of possession, whether the goods are within or outwith the possessor's keeping, depends on whether the possessor may readily resume direct physical control. In Roman law, at least, it is not a problem that the location of the property is not immediately known, as long as it may be found through a search.¹³ Merely temporary interruptions in the ability to resume control do not interrupt possession.

Scots law appears to take the same approach. As Erskine says, possession can only continue while exercise of possession 'can be reassumed by the possessor at pleasure'.¹⁴ The particular example he gives is property which has been taken possession of by another. However, read broadly Erskine's view appears to exclude from possession property lost within our keeping that cannot be found. For example, a wedding ring lost down the plughole of the kitchen sink is still in the sphere of control of the occupier of the house, but if its location is not known then even a diligent search is unlikely to find it. The conclusion would therefore be that the ring is no longer possessed. Equally, Erskine's test leads to the conclusion that something lost outside the possessor's keeping, as where an item is dropped in the street, is still possessed if it can readily be found again, subject only to the discussion below concerning the possibility of third party interference. Bell appears to accept the idea that a temporary interruption of control will not interrupt possession.¹⁵ The example he gives is of goods kept in an area that is locked overnight, where the key is held by someone else.

¹³ See eg Papinian, D.41.2.44pr; Pomponius, D.41.2.25pr.

¹⁴ Erskine, *Inst.* 2,1,21.

¹⁵ Bell, *Commentaries*, 1,186-187.

We may see Erskine's principle in the facts of *Millar v Laird of Killarnie*.¹⁶ In this case, the pursuer had been winnowing grain on the defender's land. Individuals acting on the defender's behalf interrupted this process such that the grain was spilled onto the ground, whereby a quantity of it was ruined and could not be recovered. The pursuer raised an action for spuilzie, arguing that these actions constituted dispossession of the grain. In the event, although the court held that these actions constituted a wrong in law, only a minority of the court held that this was a spuilzie.¹⁷ The majority view, however, seems difficult to understand on the basis of the discussion above, and in particular Erskine's view that possession ends when it can no longer be exercised at pleasure. The better view, it is suggested, is that of the minority, that the pursuer in *Millar* was dispossessed of such grain as could not be recovered. This is on the basis that he was not then capable of resuming control of that grain. An analogy may be made with Ulpian's shipwreck case. In the same way, if I spill your wine on the floor, you cease to possess, even though the wine's location is known, because you cannot resume control of the spilled wine. In a different context,¹⁸ Gaius holds items that have been spilled out to be in the same position as items that have been destroyed,¹⁹ and with good cause, for the position is the same for all practical purposes. In the same way, your wine that I have spilled is beyond your control just as much as it would be if I was detaining it from you. Indeed, the spilled wine is even more beyond your control, because if I am detaining the wine there is some prospect of recovering it from me.

It is interesting to note, though, that Stair does not include loss of ability to resume control in his consideration of loss of possession. Instead, he considers only interference by third parties and voluntary abandonment by the possessor, the latter being either by simply giving up possession or alternatively by conveying the property to another.²⁰ Carr considers that Stair's view is therefore that 'possession *animo solo* [can] be broken only by contrary actions'.²¹ He also attributes to Reid the

¹⁶ (1541) Mor 14723.

¹⁷ The tone of the report suggests that the reporter's opinion lay with the minority.

¹⁸ Liability under the *lex Aquilia* for damage to property.

¹⁹ G.3.217.

²⁰ Stair, *Inst.* 2,1,20.

²¹ Carr, *Possession* 45.

same view.²² Indeed, the passage of Reid that is referred to by Carr²³ considers only third party interference and voluntary abandonment. However, it is by no means apparent that the correct inference to draw is that these writers intend to exclude loss of ability to exercise control as a ground for loss of possession. As a matter of logic, the exclusion of one thing does not follow from the inclusion of another, unless they are inconsistent. Of course, we need more than formal logic to interpret a legal text, and if all other writers had been silent on the point we would perhaps have been compelled to accept that there was no such rule as the one considered here, unless some ground could be found for it in the general principles of possession. However, as we have seen, Erskine considers the rule to exist, as do the Roman jurists and also writers in other systems. There is nothing in Stair's account that is inconsistent with the Roman rule, and if Stair had intended to depart from the Roman rule it was open to him to do so expressly. We saw in chapter 1 that Stair's account of possession depends strongly on Roman law, so there is all the more reason for him to have departed from Roman law expressly had he wished to do so. Clearly he felt that the Roman texts were to be relied on in this connection, and it would have been expected therefore that anyone considering the point discussed in this section would have made use of them. In the circumstances, the better view of Stair's account is that he simply did not choose to address this issue. We must remember that a book, like Stair's *Institutions*, that attempts to give a relatively concise account of the whole of Scots private law cannot be expected to consider every point comprehensively. It is simply not permissible to infer Stair's view on a point from the mere fact that he failed to consider it. The same may be said for Reid's account. It is suggested, therefore, that Erskine's view on this point should be accepted as representing the law, in the absence of any contrary authority. In any case, as Carr observes, Erskine's approach may be said to 'reflect the factual element of possession more closely.'²⁴ It is one thing to say that the possessor need not exercise physical control at all times: that is an inevitable concession to the practicalities of the matter. It is quite another to hold possession to continue when the possessor is in no position to exercise any control at all. If that is the position, there seems to be scarcely any point in requiring

²² *ibid* 46.

²³ Reid, *Property*, para 122.

²⁴ Carr, *Possession* 47.

any physical element for possession at all. It is suggested here that, possession being based on a physical relationship, at least some semblance of a physical relationship must persist throughout the period of possession. After all, if the purpose of possessory remedies is to protect one apparently exercising a right over the property, they do not appear to have any application to the case where no-one is exercising any such apparent right over the thing because it is in no-one's control.

(3) Ability to resume control where the possessor is under some restraint

The situations considered so far in this section are concerned with the position of the goods themselves. Are the goods in such a position that I can resume control? However, it may be that I am not able to resume control, not because the goods are not recoverable, but because I myself am in no position to do so. Carr gives the following example:

Crispin owns and possesses a castle in Perthshire. After completing University, Crispin decides to go to South America for a 'gap year'. For the first six months Crispin is safe and happy building an orphanage. Unfortunately, he is then taken hostage by Marxist Rebels. They inform him that he will be held until 2018 when he will be executed to celebrate Marx's bicentenary. Crispin is duly held until 2018, and is then executed. Meanwhile, the secluded location of Crispin's castle has meant no-one has set foot on the land since he left. Throughout his ordeal Crispin maintained his intent to possess his castle.²⁵

In Carr's view, Crispin continued to possess for the first six months, on the basis that he could resume control at will. This is despite the long distance he is from the castle. This, however, must be correct, for otherwise one would lose possession any time one went on holiday away from home.

The subsequent period, however, Carr considers more problematic, based on what has been argued above to be a misreading of Stair's account. On Erskine's view, he notes that possession would be lost due to Crispin's deprivation of liberty, as a result of which he is unable to resume direct physical control.

²⁵ Carr, *Possession* 46.

We must remember, however, that possession need not be exercised by the possessor himself. We saw above that, in the South African case *S v Singiswa*,²⁶ an individual was held to be in possession of drugs at his home, even though he was imprisoned, because he was able to exercise control through his parents. Although concerned with possession of heritage, the Scottish case *Beggs v Kilmarnock & Loudon District Council*²⁷ appears to be in point with *S v Singiswa*.

In *Beggs*, the pursuer had become tenant of a council house in April 1990. In July 1991, he was taken into custody and subsequently sentenced to six years' imprisonment. He subsequently, while still imprisoned, sought to exercise the right to buy the council house given by section 61 of the Housing (Scotland) Act 1987. The local authority refused to allow this, on the basis that the pursuer had not occupied the house for the required two years.²⁸ The pursuer argued that one could continue to occupy property even while temporarily absent, provided one still intended to return, and also provided there continued to be physical signs of occupation. This latter requirement counsel for the pursuer termed the '*corpus possessionis*', terminology taken from the English case *Brown v Brash*,²⁹ concerning abandonment of possession by a tenant in similar circumstances to those in *Beggs*. The terminology used appears to suggest that, although the 1987 Act talks of occupation rather than possession, the court took the two to be synonymous for these purposes. The court accepted the pursuer's argument, based on the fact that the pursuer's parents had stayed in the house from time to time during his imprisonment.

The court's reasoning in *Beggs* appears to accept that possession will not be lost where the possessor is absent, as long as there are physical signs of the intention to return. Of course, in *Beggs* the possessor was continuing to exercise control, albeit by proxy. The court in *Brown* went further in its reasoning, making an analogy with a possessor leaving property behind while going on holiday. Indeed, as far as the ability to resume control is concerned, one on holiday may be in a position very little different from one serving a short prison sentence. A person on holiday overseas may find that disruption to transport means that he is entirely unable to return home to

²⁶ 1981 (4) SA 403 (CPD).

²⁷ 1995 SC 333.

²⁸ Housing (Scotland) Act 1987, s. 61(2)(c). The required period is now five years.

²⁹ [1948] 2 KB 247.

resume control of the property. Even without such disruption, in Carr's example quoted above a journey from South America to rural Perthshire is no small matter.

Matters may be different with a longer prison sentence. The possessory remedies are interim remedies only, intended to preserve the existing state of possession until the question of right can be considered. One who is serving a long prison sentence, however, may come home to a possessory situation that is long settled. Possessory remedies hardly seem appropriate to recover property from someone who has enjoyed it peaceably for a number of years, but the availability of such a remedy in these circumstances would be the consequence if a prisoner were held to continue to possess without further acts.

The analogy with the holidaymaker suggests a broader analogy with the general issue of continued possession during absence, discussed above. As we saw, all that is required is that the possessor exercise sufficient acts to demonstrate the continued *animus possidendi*. This is not a high standard to meet. However, the point to be made here is that, from the point of view of a third party, the two cases will be difficult to distinguish. For example, suppose that you have a bicycle in your possession that I believe to be mine. I come across it chained to some railings outside your house. From these facts, I have no idea whether you left it there because you have gone in holiday or whether you have left it there because you have been imprisoned. If you lose possession in the one case but not in the other, the consequences for me of my taking possession of the bicycle will depend on facts outside my knowledge. This seems unsatisfactory. It is suggested, therefore, that cases of this kind should be treated in the same way as cases of absence generally. In other words, possession in cases of this kind will be lost by virtue of the absence only where circumstances are such as to suggest to an objective bystander abandonment of possession, regardless of whether the possessor has in fact abandoned possession.

(4) Likelihood of interference

The final factor to be considered is the likelihood of interference. As we have seen, Savigny suggested that the relevance of this factor is determined by whether the interference is sufficiently likely to require to be taken into account. It has been

suggested, however, by Common Law writers that the likelihood of interference is irrelevant. Even if interference is likely, or indeed even if it is virtually certain, possession continues until that interference actually manifests itself.

Stair,³⁰ Erskine³¹ and Bankton³² all speak in terms of possession being lost by third party interference. This appears on the face of it to imply that possession will not be lost if that interference is merely threatened. It is true that both Stair³³ and Erskine³⁴ talk of possession being lost if an item is thrown away in a place where it is likely to be picked up, but for both this appears to be because such an act implies the abandonment of *animus possidendi*: as Stair says, this is an example of 'evident declaratory acts or circumstances from which abandonment may be presumed'.³⁵

However, interference is always a possibility. If exclusivity is required, as an issue of practicality this can only mean that others are in fact excluded.³⁶ Even if a thief comes into my house in my absence, it would be going too far to ascribe to him possession of the individual objects in the house merely because I cannot at that moment exclude him from taking them. His presence is temporary, and once he is gone anything he did not take will be in much the condition that it was before, at least as far as control is concerned.

This appears to imply that, even if interference with the possessor's control of the property is foreseeable, that will not of itself prevent the establishment of possession. In *Cooper v Barr and Shearer*,³⁷ a ship repairer asserted a lien over a ship. The ship had initially been on the repairer's own premises, and it was accepted that the repairer had had sufficient possession for a lien at that time. However, later on, but while the repairs were still ongoing, the ship was moved for the repairer's convenience into the public dock. It was held in the Inner House, with apparent reluctance, that the lien ended at this point,³⁸ the Lord President relying on a passage of Bell's *Principles* to the effect that the lien:

³⁰ *Inst.* 2,1,20.

³¹ *Inst.* 2,1,21.

³² *Inst.* 2,1,29.

³³ *Inst.* 2,1,20.

³⁴ *Inst.* 2,1,21.

³⁵ Stair, *Inst.*, 2,1,20.

³⁶ Pollock & Wright, *Possession* 15.

³⁷ (1873) 11 M 651, revd (1875) 2 R (HL) 14.

³⁸ A lien ends when possession is lost: see Steven, *Pledge and Lien*, paras 13-27 - 13-34.

...is effectual for repairs made on a vessel in a home port. But ship-carpenters repairing a ship in an open harbour or roadstead have not the possession necessary to retain the right.³⁹

Once the ship had been released into the public dock, the position was as in the latter of Bell's examples. Bell's view here is open to criticism, and was not accepted by the court in *Ross & Duncan v Baxter & Co*,⁴⁰ although as we saw in chapter 3 no lien was held to have been established in that case. The view was taken there that the location of the ship was just one factor to be considered. This must be correct: while it may be easier to establish possession of items in one's own premises, given the higher degree of control that that implies, there seems to be no reason in principle why one may not satisfy the physical element of possession where an item is in a public place.

However, even accepting Bell's view, it is not clear that the Inner House decision in *Cooper v Barr and Shearer* necessarily follows from it. The Lord President's view does not distinguish sufficiently the acquisition of possession from its retention. It may or may not be that repairs made in a public dock represent insufficient acts to give possession, but it does not follow from that that such acts are insufficient to retain possession.

There was, however, a second basis for the decision. Throughout the carrying out of the repair work, employees of the shipowner were present for security purposes and, once the ship had been moved out into the public dock, to supervise any movements of the ship within the dock. Furthermore, once the ship was in the public dock, it came under the authority of the harbourmaster, who could (and indeed did) instruct that the ship be moved within the public dock. The ship, therefore, it was held by the Lord President and Lord Deas, was no longer in the custody of the repairer once it had entered the public dock. Instead, the ship was 'under the orders of her master and the harbour-master'.⁴¹

This decision was, however, reversed by the House of Lords on the basis that the ship was moved into the public dock solely for the convenience of the repairer,

³⁹ Bell, *Principles*, s 1420. The tenth edition has an editorial insertion after the word 'not' ('the ship not being placed in their exclusive charge,'). In addition, the final three words should be 'sustain the right'. See also *Commentaries*, II,94.

⁴⁰ (1885) 13 R 185, 195 (Lord Shand); 197 (Lord Mure).

⁴¹ (1873) 11 M 651, 659 (Lord President).

who did not thereby lose possession. Repairs were still continuing. Unfortunately, no authority is cited by the judges in the House of Lords, except for a single reference to an English textbook. However, the decision seems correct in principle. It does not appear relevant that the ship was under the authority of the harbourmaster, because the same was true of all ships in the harbour. Accordingly, to hold that possession had been lost on the basis of that authority would be to hold the same for any ship in the harbour. In the same way, I do not lose possession of my car just because, while I am driving, my control is subject to directions given by the police and other authorised persons. We see this in *Ross v Earl of Nidsdale*.⁴² Although that case is concerned with possession of land, it illustrates the general point. In that case, the pursuer was excluded from the subjects on account of their being occupied by a military garrison. On their departure, the defender took up occupation. In an action for intrusion, the pursuer successfully argued that he had not lost possession, as he had not left voluntarily, but only 'in obedience of a public order'. The acts of the public authority, therefore, were not a barrier to continued possession. That being the case, it would seem difficult to argue that merely potential acts of a public authority interfere with possession. Again, the presence of the shipowner's employees did not affect the repairer's possession, as they were not exercising control over the ship, any more than were the repairer's employees in the South African case *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd*,⁴³ discussed in chapter 2. It is suggested here that the position of the Common Law writers should be accepted as correct for Scots law, and that the mere likelihood of interference with possession should not result in the loss of possession. The contrary position would create difficulties in practice. Illustration may be found in a different area of law, the law of delict. In *Hughes v Lord Advocate*,⁴⁴ a group of workmen were working on cables beneath a public road, access to which was taken by means of a manhole. The workmen went on a tea break, leaving the open manhole covered by a tent surrounded by four paraffin warning lamps. Two boys took one of the lamps and entered the tent. This was said to be foreseeable, even though the workmen were away for only fifteen minutes. Indeed, this does not seem to have been disputed: the

⁴² (1673) 1 Brown Supp 670.

⁴³ 1968 (2) SA 528 (CPD).

⁴⁴ 1963 SC (HL) 31.

point of dispute was whether the accident that did occur (an explosion of the lamp) was of a type that was foreseeable. Of course, this is a different area of law, in which different standards may apply. Nonetheless, it makes the point that one may almost always foresee interference with the property where it is not actually under direct present control. If foreseeable interference ended possession, possession could hardly exist without constant and direct physical control. As we have seen, any such requirement has been rejected.

C. CONCLUSIONS

Based on the foregoing discussion, it is suggested that the law on loss of possession by loss of *corpus* may be summarised as follows.

First, possession is not lost by mere absence, unless the nature and duration of the absence is such that, in the circumstances, loss of *animus* may be inferred. This is the case even where the absence is caused by some external factor preventing the possessor's return, and even where the *animus* is not in fact lost.

Second, possession is not affected by the likelihood of another's interference in that possession. It is only actual interference with that possession that will affect it.

Third, possession will be lost if the item is lost beyond recovery by normal searching. This will be the case even if the item is lost within the possessor's own sphere of control. Equally, possession will still be lost even if the item is recoverable by extraordinary means.

In all other cases, possession will be retained unless and until another person interferes with the possession or *animus possidendi* is lost.

5 MOMENTARY CONTROL

A. INTRODUCTION

If I have only momentary control of an item, do I meet the requirements for the physical element of possession? The suggestion would be that someone who only comes into momentary contact with an object has exercised no real degree of control over that object. This is an issue to which very little consideration has been given, either in cases or in juristic literature. The issue does not seem to have attracted the attention of the Roman jurists or those of the *ius commune*. Nonetheless, the issue is a real one, particularly where the criminal law penalises possession of a prohibited item. Does merely momentary control justify the application of the prescribed penalty? The issue may also arise in the context of delivery, where the transferee is only given control momentarily. In one American case, considered below, the issue arose in the context of *occupatio*, where there were competing claimants to the property. It does not appear to have come under consideration in relation to the possessory remedies, but it conceivably could: if what I have done is sufficient to give me possession, then as we have seen I remain in possession until possession is lost.

Using a sporting analogy, Kocourek makes a distinction in the following terms:

The player who strikes a ball in motion does not detain the ball, but the player who catches the ball has a momentary detention although he throws it at once to another player.¹

Kocourek appears to be saying that the player who catches the ball has done enough to possess, because he has exercised control ('detention', as Kocourek puts it), even though only very briefly. The batter, on the other hand, has exercised no control.

It is far from clear that Kocourek's example convinces, if he is taken to mean that very brief contact will necessarily be insufficient for possession. The batter in a baseball game is not hitting the ball aimlessly, or at least not if he is an expert. He is

¹ Kocourek, *Jural Relations* 362.

attempting to direct the ball. Of course, the batter in a baseball game, or the batsman in a game of cricket, is not trying to play the ball to a teammate. In a game of football, on the other hand, the ball is played between teammates. A skilled player may direct the ball to a teammate with a single touch. As long as these passes find players in the same team, normal sporting usage would be to say that that team had possession, even though individual players had had no greater contact than does a batter in baseball. Of course, this is not possession in the legal sense, the players lacking the necessary *animus* for such possession. Nonetheless, the sporting usage seems to be based on the idea of physical control of the ball, an idea it shares with the legal meaning of possession. Likewise, suppose that a hunter shoots a bird in the air, which then falls dead at his feet. He has had in fact no direct physical contact with the bird at all, and his interaction with it has lasted only as long as it took for the pellets to pass through the bird's body. Nonetheless, it would not seem unreasonable to hold the hunter to have acquired possession (and therefore ownership, if the bird is ownerless).² Rather than being obliged to discount very brief periods of contact, the better view would appear to be that it is not the duration of the contact that is decisive in and of itself. Rather, the hypothesis here is that the true question is whether enough has been done to establish sufficient control to qualify as a possessor.

The remainder of this chapter will consider the specific contexts in which this issue has arisen. The structure adopted here differs from that in other chapters in that the criminal law is treated separately. The reason for this is that most of the cases in which the momentary control issue arises are criminal cases, of sufficient numbers that it is conceivable that a distinctive approach to the matter has been developed. In order to determine whether this is the case, it is necessary to consider them separately. This contrasts with the other chapters, where the proportion of criminal cases is lower.

The non-criminal consideration of the issue falls into two categories: the transfer or constitution of real rights by delivery and acquisition of ownership by *occupatio*. The latter of these has only been directly considered, so far as can be detected, in a single American case. The uniqueness of this case demands separate

² On possession of animals, see chapter 7.

consideration, so it is reserved for last. No case has been found where a question of possessory remedies has turned on this point.

B. DELIVERY

Hume appears to be the only one of the early Scottish writers to have given attention to this issue, in his case in the context of delivery of corporeal moveable property:

[I]t is not sufficient to have a mere transient or momentary possession, although by corporeal touch of the article, if it is taken for the occasion only...Thus the purchaser of a carriage does not vest the property by getting into it for an instant in the coach-builder's yard, and closing the door on him. The property of a horse does not pass by virtue of laying hold of the halter, or of a cow by seising her by the horn, if no other or farther change ensue.³

Hume does not appear here to exclude entirely the possibility that a brief contact may be enough. What he is talking about is contact made 'for the occasion only', where 'no other or farther change ensue'. In other words, he is considering the situation where the momentary control is taken for the purposes of a fictitious delivery, intended presumably to protect the transferee against the transferor's creditors. A genuine attempt to change possession, even if involving only brief control, will be sufficient as long as it is sufficient to demonstrate the transferee's intention to take possession.

Three cases illustrate this point. In *Taylor v Jack*,⁴ an individual obtained the money necessary to obtain liberation from imprisonment for debt by selling his horses to another. For the purposes of delivery, the buyer briefly took hold of the horses' ears and then left the horses in the custody of the seller. When a creditor of the seller subsequently attempted to pound the horses, it was held that the buyer's actions had been insufficient to constitute delivery.

³ Hume, *Lectures*, III,249. The position appears to be the same in German law, where it will not be sufficient for delivery of a car that an employee of the transferee has taken it for a test drive (McGuire, 'Transfer of Movables in Germany' 58).

⁴ (1821) 1 S 139.

*Stiven v Cowan*⁵ was decided in the same way. In this case, there was similarly an attempt to make delivery from one party to another followed by a return of the goods shortly afterwards. In this case, an individual (W) had acquired a lease of a mill with the assistance of the defenders as cautioners for a loan of part of the purchase price. Intending to give the defenders security for this potential liability, W granted an assignation of the lease to the defenders on 28th April 1873. On 2nd May, W closed the premises and delivered the key to the defenders' solicitor to hold on their behalf. The following day, a Saturday, W, the solicitor and one of the defenders attended the premises. The defender who was present then formally required W to deliver possession. The key was then handed over to the defender. A notarial instrument was drawn up detailing these events. Later that day, the defenders granted a sub-lease to W, to whom the keys were returned on the evening of 4th May. Business resumed as normal on Monday 5th May. This elaborate procedure was designed to operate as a delivery of the moveables within the mill. Nonetheless, on W's subsequent sequestration, it was held insufficient.

We may compare *Eadie v Young*.⁶ This case concerned a conveyance of horses and carts. As with *Taylor v Jack*, the purpose of the sale was to relieve the seller's indebtedness. The transferee only briefly took control before giving custody back to the transferor. The court held that there was a valid delivery here.

How can we distinguish these cases? In all of them, the transferee had only brief contact with the property before returning it to the transferor. In *Eadie v Young* and *Taylor v Jack*, the transaction had the same purpose: not to allow the transferee to have the property, but to relieve the transferor's indebtedness.⁷ Indeed, it is expressly stated in the report of *Eadie v Young* that the transferee had no present use for the horses and carts. In *Stiven v Cowan*, the intention was the similar one of giving a creditor security for a debt owed by the transferor. This was recognised by the court as a legitimate purpose.

We may note that, in *Taylor v Jack*, the court did not in fact reach its decision on the basis of insufficient acts for possession by the transferee. Rather, the ground

⁵ (1878) 15 SLR 422.

⁶ (1815) Hume 705.

⁷ As these transactions had the purpose of creating security, even though in the form of sales, delivery would still be required in the current law, such cases being excluded from the scope of the Sale of Goods Act 1979 by s 62(4) of that Act.

for the decision was that the transaction was collusive, rather than a genuine sale. Again, in *Stiven v Cowan*, the difficulty was not that there had been insufficient acts for a delivery, but that the transaction was 'simulate'. There was no genuine intention for possession to be given to the defenders. It was noted that no rent was paid to the defenders as landlords in the apparent sub-lease. These are therefore cases of the type mentioned by Hume, where the momentary control 'is taken for the occasion only', where there is no 'farther change' in the condition of the property. It is certainly true that, where there is an apparent sale but the property but the transferor is allowed to retain the property, the suspicion is bound to arise that the sale is not a genuine one, unless other circumstances exist that explain the fact.

The most obvious form of 'farther change' will be the property moving into the permanent natural possession of the transferee, with the transferor retaining no further relationship with the property, but there are other possibilities. There were two further circumstances demonstrating the genuineness of the transaction. In the first place, the carts were marked with the transferee's name. As Hume puts it in his commentary at the end of his report of the case, this constituted an 'open and unqualified assertion of [the transferee's] *jus dominii* in these articles, and put all the lieges on their guard in that respect'.⁸ This is consistent with the position taken in chapter 3 that the physical element of possession is constituted by acts constituting an assertion of right to the property. As we shall see in chapter 6, however, it does not appear that marking the goods in this way is sufficient in itself for delivery. Instead, it is to be seen more as an indication of the genuineness of the transaction.

The second point of distinction between *Taylor v Jack* and *Eadie v Young* is that, in the former, there was no apparent basis for handing the property back to the transferor. By contrast, in *Eadie v Young*, the basis on which the property was handed back to the transferor was a genuine hire agreement. In fact, this circumstance would perhaps have been enough on its own for a valid delivery by *constitutum possessorium*,⁹ which means, of course, that there would have been sufficient for delivery without even the brief control that was exercised by the buyer. Indeed, Gordon considers the case as an example of *constitutum possessorium*,

⁸ (1815) Hume 705, 707.

⁹ See chapter 1.

without reference to the fact that the buyer did briefly take actual control.¹⁰ In the case of *Stiven v Cowan*, there was an attempt to create an apparent basis for the handing back of the property, in the form of the sub-lease, but the failure to demand payment of rent showed this not to be a genuine sub-lease.

If, indeed, there was sufficient in *Eadie v Young* for delivery by *constitutum possessorium*, even without the brief contact that the transferee had, then that brief contact added nothing. Accordingly, it is difficult to judge from this case whether momentary control will be sufficient for possession. Likewise, in *Taylor v Jack*, the basis of the decision was not that there had been insufficient physical acts for delivery, but that the transaction was a collusive arrangement rather than a genuine sale. Even leaving aside the physical requirements of possession, the transferee had no *animus possidendi*. Again, therefore, it is difficult to infer from this case any general principle regarding the physical acts required for possession.

If the physical element of possession is based on control, then as long as a person may be said to be in control there seems no reason to deny the effectiveness of that control to give possession, even if the control has been brief. If, as has been suggested, the physical element of possession is intended to give an objective impression of possession to third parties, it must be judged as it appears to third parties. The view taken cannot be coloured by subsequent events. An individual chancing upon the apparent sale in *Taylor v Jack* would see the buyer appear to assert a right to the horses. In the context, no other interpretation would be possible on the outward facts and, if the sale had been genuine, delivery would have been held to have occurred at that moment. It would only be when the seller was allowed to take the horses away, rather than leaving them with the buyer, that this hypothetical onlooker would suspect that the transaction was not genuine and the parties did not in fact have the necessary intention to give possession to the apparent buyer. However, this suspicion would equally arise if the horse was returned an hour or a day later. Nonetheless, it can hardly be contended that one does not possess until one has controlled the property sufficiently long to eliminate any suspicion that the transaction is a sham. It may be noted here that, in *Stiven v Cowan*, the period for which W handed over control of the key was longer, lasting for two days, but this

¹⁰ Reid, *Property*, para 623 n 5 (Gordon). See also Carey Miller, *Corporeal Moveables*, para 8.23.

was nonetheless held to be a sham. The issue is not directly therefore the length of time for which the transferee holds the property so much as what that circumstance tells us about the parties' intentions. In appropriate circumstances, very brief control may be sufficient. For example, in *Gauld v Middleton*,¹¹ it was held sufficient for a gift of a newborn calf by a farmer to an employee for the employee to take the calf briefly in his arms before returning it to its mother. In this case, there were intelligible and legitimate reasons for doing this: the farmer was also making a gift of care of the calf, which it would have been impossible to take advantage of in any other way. Equally, had the employee decided not to accept this second gift, he would presumably not have been prevented from walking away with the calf. This case is therefore unlike *Stiven v Cowan* and *Taylor v Jack*, where the 'delivery' was merely a collusive device.

This leads to the conclusion that one will satisfy the physical element of possession as soon as one has sufficient control to meet the test proposed in chapter 3. Some further examples may assist. Suppose that I am buying an ice cream cone from an ice cream van. As I take hold of the cone, a gust of wind blows it from my hand (without fault on anyone's part) and it is spoiled on the ground. Who bears the loss of this event? In this case, risk passes on delivery,¹² which means in this context a voluntary transfer of possession.¹³ It seems clear in this case that I bear the risk as soon as I take the cone in my hand. At this point, the seller has fulfilled all of his obligations, and the transaction is at an end. In any case, the seller can scarcely be said still to possess once the cone has left his hand and is in mine. This is the case even if the gust of wind occurs a fraction of a second after I take the cone in my hand. During that fraction of a second I appeared to any objective bystander to have taken possession. On the other hand, if the cone is dropped while it is the process of being handed over, I do not have that level of control. Likewise, if an item I am buying is taken from me just after I take it in my hand, it would seem unreasonable to deny me an action for *spuilzie* against the person taking the property. This is especially so on the assumption that the seller has at this point fulfilled his

¹¹ 1959 SLT (Sh Ct) 61.

¹² This is because this is a consumer contract in which I am the consumer: Sale of Goods Act 1979, s 20(4).

¹³ Sale of Goods Act 1979, s 61(1).

obligations, and so I have no remedy against him for failure to deliver the goods to me. Again, suppose that I intend to acquire ownership of an item of ownerless property by *occupatio*. If the property is both small and inanimate, no bystander would expect more of me than merely to pick it up. If it happens that, as I pick it up, I am intentionally or accidentally pushed, with the result that I drop the thing, is my control then ineffective to give possession, even though it would have been sufficient but for the push? This final point is considered further in part D, below.

C. CRIMINAL LAW

(1) Introduction

Most reported cases of this kind arise in the criminal law, in the context of offences of possession of prohibited items. With the criminal cases, there is an additional complication that the cases are concerned with statutes, such as the Misuse of Drugs Act 1971, applying to the United Kingdom in general. Given relative populations, it is always likely that the bulk of such cases will be English in origin. Where such a case is concerned with the definition of possession for the purposes of the relevant legislation, it is likely that an English court will draw on the general English law of possession.¹⁴ Such cases will then be cited before the Scottish courts.¹⁵ No doubt it is desirable for UK-wide statutes to have the same meaning in both Scotland and England, though where the statute draws on a concept of the general law, such as possession, it is not obvious why that meaning need be the one existing in English law. However that may be, though, it does mean that criminal cases require to be used with greater caution when considering what they can tell us about possession generally. Even where a statutory offence is concerned, it has always been open to the Scottish courts to decline to follow an English House of Lords appeal on the

¹⁴ See eg *Warner v Metropolitan Police Commissioner* [1968] 2 AC 256, 309 (Lord Wilberforce), in which reference is made to Pollock & Wright's *Possession*. Every one of the extensive list of cases cited in argument before the court, or referred to by the judges, is English or is from another Common Law jurisdiction, and the list is not restricted to cases concerned with statutory possession offences.

¹⁵ For example, *Warner*, referred to in the previous footnote, was expressly followed by the High Court of Justiciary in *McKenzie v Skeen* 1983 SLT 121.

same point.¹⁶ This was justified in *Dalgleish v Glasgow Corporation*¹⁷ on the basis that the High Court of Justiciary was the final court of appeal in criminal matters, so the House of Lords was not a higher court in this context, capable of binding it.¹⁸ Even were that not so, the different contexts of Scots and English law may reasonably lead to a UK statute being interpreted differently in the two jurisdictions,¹⁹ as for example where the statute relies on a concept of general law, such as possession. This is not to deny that English cases can be of use, but it does mean that it is necessary to consider the Scots cases in this wider context. English cases will need to be considered.

(2) Scottish cases concerning statutory offences

The only Scottish case directly on the issue appears to be *Mackay v Hogg*.²⁰ In this case, the police appeared at a house occupied by a woman by the name of Burn. The purpose of the visit was to search for proscribed drugs. The appellant was found asleep on a couch in the living room, with his clothes on a chair next to the couch. A search of the chair and the clothes revealed nothing untoward. The cushion of the chair was then left on end to indicate that it had been searched. The search then continued. Subsequently, a quantity of illegal drugs was found on the seat cover, in circumstances suggesting that the appellant had moved the drugs there from some unknown place in the room. The court held that, in the context of the facts proved, there was insufficient here to justify a finding of possession. Stress was placed on the fact of the appellant having had the drugs in his hand for at most one or two seconds.

It is not clear that *Mackay v Hogg* justifies the view that acquittal is inevitable in any case where the accused holds the prohibited item for a brief period only.

Suppose that X takes hold of a package that he knows to contain an illegal drug, and which he has paid for, at the same moment that the police make an abrupt entrance. X panics and throws the package away. He may only have had hold of the package

¹⁶ See eg *Ritchie v Pirie* 1972 JC 7, where the High Court chose to follow previous Scots authority rather than an English House of Lords decision on the same point of statutory interpretation.

¹⁷ 1976 SC 32, 52 (Lord Justice-Clerk Wheatley).

¹⁸ This remains the case with the Supreme Court: Constitutional Reform Act 2005, s 40(3).

¹⁹ For discussion, see G Maher & T Smith, 'Judicial Precedent' in *Stair Memorial Encyclopaedia*, vol. 22 (1987), para 282.

²⁰ (1973) SCCR Supp 41.

for a second or two. Nonetheless, the circumstances are such as to appear to demand a conviction for possession of the drug. It would seem strange if X could improve his position by discarding the drug, given that his decision to do so was entirely induced by the entrance of the police. *Mackay v Hogg* does not appear to commit the courts to such a decision, and the case is therefore consistent with the 'assertion of right' theory of *corpus*.

Another Scottish case, *Croal v HM Advocate*,²¹ may appear to be relevant here. The case was concerned with possession of proscribed drugs, the accused having been found in a cupboard in a common stair of a tenement building. Drugs had been found stored in the cupboard in a packet. As police officers were watching the cupboard, the accused could only have had momentary control of the packet before his apprehension. Nonetheless, it was held that there was 'no difference in principle between contact which was prolonged and that which was fleeting'.²² In fact, however, the packet that had contained the drugs had been replaced by the police with a dummy packet. Accordingly, the issue was whether the accused's brief control of the dummy packet could be used as evidence of previous possession of the real drugs. The issue, therefore, was not directly whether brief contact was sufficient for possession. Nonetheless, it was not disputed by the accused that possession of the dummy packet implied possession of the original packet. Accordingly, the statement that there was no difference in principle between prolonged and fleeting contact may be taken to have broader significance, as it appears to amount to a finding that the accused did possess the dummy packet. This is consistent with the view expressed in the previous paragraph.

(3) Non-Scottish cases concerning statutory offences

There are several English cases on this issue. Although the general English law is not necessarily the same as the general Scots law on a given point, these cases must be considered on the basis that they arise under statutes applying both to Scotland and to England. The English case *R v Taylor*²³ has some similarity to *Mackay v Hogg*.

²¹ 1991 GWD 40-2445.

²² *ibid.*

²³ [2011] EWCA Crim 1646.

Taylor was concerned with possession of a prohibited firearm, contrary to section 5(1) of the Firearms Act 1968. In this case, the evidence was that Taylor had noticed the firearm in a friend's bag while visiting the friend's flat, had taken it out briefly from curiosity to look at it, and then had returned it. The court held these facts to be insufficient for possession.

In chapter 3, the suggestion was put forward that possession depended on holding in such a manner as to indicate the assertion of a right to possess. The decision in *Taylor* appears to be consistent with this: it is clear from the court's reasoning that the decision turned on Taylor's intentions. By putting the gun back immediately, and having nothing more to do with it, he had demonstrated that he lacked the necessary intention to exercise any control over the firearm beyond putting it back. The case therefore provides no authority for the view that a momentary holding may in no circumstances constitute possession. If, instead, the accused had taken the same length of time to fire the gun, it is difficult to believe that the outcome would not have been different.

The English case *R v Wright*,²⁴ however, may be seen as going further. In *Wright*, the appellant had been travelling in a car with three other men. On seeing that the car was being followed by a police car, one of his companions gave him a tin and asked him to throw it out of the window. The appellant did so, having the tin in his hands for only a few seconds. The tin contained a quantity of cannabis resin. The appellant's conviction for possession of the drug was quashed on appeal. However, the trial judge's direction to the jury that one could possess, despite having custody only briefly, was not challenged in the appeal. Instead, the decision turned on the requirement for knowledge of what was in the tin and the intention to possess. It was held that the jury ought to have been directed to acquit if they believed the appellant's story that he did not know what was in the tin. Had the jury been properly directed, however, it would have been open to them to convict notwithstanding the brief period of control. If the holding must be such as to assert a right to the property, then that is found in the act of disposal of the container. To dispose of a thing is to assert a right to dispose of it. Of course, in *Wright*, the appellant held entirely on another's behalf, ie on behalf of the companion who gave him the tin for disposal. As

²⁴ (1976) 62 Cr App R 169.

possession in private law requires that the possessor hold for his own benefit,²⁵ the appellant in *Wright* would not possess for private law purposes. It appears that the test for *animus* in the criminal law of possession of unlawful drugs is a less strict one, being merely 'knowledge of the existence of the substance and of its general nature'.²⁶ This lesser test is implicit in *Wright*. However, the problem is in any case with *animus* rather than *corpus*. Even if the physical element of possession requires acts assertive of a right, those acts need not be carried out by the possessor himself, or else civil possession would be impossible.

Arguments based on the assertion of right theory appear to have been successful in a number of cases in the USA from the Prohibition period. These cases concern the unlawful possession of alcohol. It has been held that one whose friend passes to him a bottle, so that he can take a drink from it, is not in possession of the contents of the bottle. The basis for this is that there is no assertion of right to the liquid that is not drunk.²⁷ However, there can surely be no clearer assertion of right to a thing than its consumption. As far as concerns the liquid that has been drunk, possession seems clear, at least at the moment of consumption.²⁸ An acquittal in such a case may reflect a feeling on the part of the court that the accused has not acted in a way that is particularly morally objectionable. However, unless the mere presence of an item is harmful, which is not the case with drugs or alcohol, it is difficult to see why a legislature would prohibit possession of a substance other than that its use was thought to be undesirable. Given that, it is difficult to see any justification for a difference of treatment between one who takes the banned substance from a friend for immediate use, then handing it back, and one who takes a portion for later use. Certainly, it would be open to a court to reject any such distinction.

²⁵ See chapter 1.

²⁶ M Earle, *Stair Memorial Encyclopaedia Reissue*, Medicines, Poisons and Drugs (2000), para 49.

²⁷ WE Seleen, 'The Concept of Possession as Applied to Intoxicating Liquor by the Missouri Courts' (1960) 25 Mo L Rev 295, 306.

²⁸ On items within the body, see chapter 2.

(4) Reset

Another English case, *Hobson v Impett*,²⁹ is similar to *Mackay v Hogg* and to *R v Wright*. In *Hobson*, it was held on appeal that helping a thief to load stolen goods into a car did not justify conviction for receiving stolen goods, even though the appellant knew that the goods were stolen. Bovey refers to this case as 'consistent with' *Mackay v Hogg*.³⁰ It must be noted, however, that the conviction was not quashed for lack of possession. Indeed, the appeal court was fully satisfied that conviction was appropriate on the facts proved. The difficulty was that the offence with which the case was concerned was one of receiving stolen property,³¹ rather than merely possessing it. The view of the lower court, that the accused had sufficient control over the goods to possess them, was not criticised in the appeal court. However, it was held that one could not receive stolen property where, as here, it was still in the possession of another, unless co-possession could be shown. One who merely helps another to move an item does not possess.

If this were the law in the equivalent Scots offence of reset, it would be most unfortunate. In fact, however, it seems that one who has the goods even for a brief moment may properly be convicted of reset.³² Alison refers to an unreported case where fleeing thieves rushed into a lodger's room and hurriedly deposited the stolen goods on her bed. The lodger covered the goods up and immediately jumped from the window, whereupon she was apprehended. It was held that these facts were sufficient to justify the lodger's conviction for reset.³³ Conviction does indeed seem entirely justified, given that the lodger was intending to conceal the stolen goods just as much as if she had taken longer over the matter. The fact that she hurried over the concealment merely means that the concealment was less likely to be successful, but criminal acts are hardly to be excused on the basis that they were incompetently carried out. One who knowingly handles stolen goods impedes the legitimate aims of

²⁹ (1957) 41 Cr App R 138.

³⁰ KS Bovey, *Misuse of Drugs: A Handbook for Lawyers* (Butterworths/Law Society of Scotland 1986) 79.

³¹ In terms of the Larceny Act 1916, s 33.

³² A Alison, *Principles of the Criminal Law of Scotland* (first published 1832, Law Society of Scotland 1989) 333; JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, W Green 1948) 68; CN Stoddart, 'Reset' in *Stair Memorial Encyclopaedia Reissue Criminal Law*, para 385; Gordon, *Criminal Law*, para 20.02.

³³ Alison (n 32) 333-34.

the criminal law, regardless of the duration of the handling. This leads again to the conclusion that, assuming a minimal level of control may be demonstrated, the duration of that control should only be considered relevant for the purposes of the criminal law insofar as it sheds light on the intention with which that control was exercised.

D. *POPOV v HAYASHI*

(1) Introduction

The most in-depth consideration of this issue came in the Californian case *Popov v Hayashi*³⁴ and the literature inspired by it. The case is notable for being what must be almost unique: a case on *occupatio* that is not concerned with animals.³⁵ Its difficulty was such that the court sought the opinion of a panel of professors of property law.

(2) Facts of the case

In *Popov v Hayashi*, P and H were both spectators at a baseball game. It had been anticipated that a particular player would break an existing record for home runs during this game. P and H, as well as others in the stadium, were keen to catch the record-breaking ball, as it was anticipated that the ball would have a considerable resale value, perhaps in excess of \$1,000,000. Both P and H had come equipped with

³⁴ 2002 WL 31833731 (Cal Super). A copy of the court's opinion is available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/bonds/popovhayashi121802dec.pdf>. The issue has attracted considerable discussion: see M Pastrick, 'When a Day at the Ballpark Turns a 'Can of Corn' into a Can of Worms' (2003) 51 Buffalo L Rev 905; P Stoklas, '*Popov v Hayashi*, a Modern Day *Pierson v Post*: A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds' (2003) 34 Loyola University Chicago Law Journal 901; P Adomeit, 'The Barry Bonds Baseball Case - An Empirical Approach - Is Fleeting Possession Five Tenths of the Ball?' (2003-2004) 48 St Louis ULJ 475; J Cieslik, 'There's a Drive...Way Back...It Might Be...It Could Be...Another Lawsuit: *Popov v Hayashi*' (2003) 20 Thomas M Cooley Law Review 605; P Finkelman, 'Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?' (2001-2002) 23 Cardozo L Rev 1609; S Semeraro, 'An Essay on Property Rights in Milestone Home Run Baseballs' (2003) 56 SMU L Rev 2281; G Parchomovksy, P Siegelman & S Thel, 'Of Equal Wrongs and Half Rights' (2007) 82 NYU Law Rev 738.

³⁵ At least it was treated by the court as a case of *occupatio*. The case could not be seen as one of *occupatio* in Scots law, as the property in question was taken to be abandoned. In Scotland, therefore, the property would fall to the Crown. However, it is equally possible to characterise the case as one of *traditio incertae personae*.

baseball gloves to assist them in catching the ball if it should come their way. It was accepted in the court proceedings that, when the ball was hit into the crowd, it was open to acquisition by the first to take possession.

In fact, the record was broken, and the baseball came into the area where P and H were standing. P caught the ball in his glove, where it remained for about 0.6 seconds according to the evidence of video footage. However, at this point P was violently assaulted by other spectators who also wanted the ball. During the struggle, the ball fell from P's glove, and was picked up by H. The parties disputed who had acquired ownership.

(3) The decision

It was agreed by both parties that the ball was ownerless when it entered the crowd. Accordingly, ownership would be acquired by the first to take possession. The court accepted that the appropriate test was 'complete control', based in part on the 'custom and practice' of baseball, it being apparently the case that the view among baseball fans that this level of control was required.³⁶ No doubt the decision on this point could be defended on the basis of reflecting a general rule that possession of things that are easier to control requires a higher level of control. On this view, more complete control of the baseball would be required for possession because its small size makes it easier to control, compared with less portable property. As we have seen in chapter 3, this is a common view of the matter. Indeed, the court did proceed in part on this basis. Where the court's view becomes problematic is in allowing 'the custom and practice of each industry' to influence matters. Given that the custom and practice of a given industry will be known only to initiates of that industry, this is unacceptably vague, especially given that *occupatio* creates real rights, thus affecting third parties. This is not a case of contracts being interpreted according to industry practices which, while it may create difficulties in proving the practices in question, at least only affects those who are in the relevant industry. Where a custom

³⁶ Pastrick (n 34) 929; Cieslik (n 34) 627-28.

potentially affects third parties, that is a good reason for denying legal effect to the custom unless it is generally known.³⁷

On the evidence before the court, the judge felt unable to conclude that P would have kept control of the ball but for the actions of the mob.³⁸ Accordingly, the court was unable to hold P to have acquired ownership. The expected outcome would then be that H would be held to have acquired ownership. However, the court took the view that to award ownership to H would be in some sense to approve the criminal actions of the other spectators, by allowing them to influence the outcome. Accordingly, a different solution was sought. Happily for the court, it found itself able to take the view that, as a 'court sitting in equity', it had 'the authority to fashion rules and remedies designed to achieve fundamental aims'. Accordingly, the court adopted the following rule:

Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessionary interest in the property. That pre-possessionary interest constitutes a qualified right to possession which can support a cause of action for conversion.

It is not clear what the nature of this 'pre-possessionary interest' is.³⁹ Apparently it is a right to possess, but takes us very little of the way forward. One would expect that this right would either be enforceable against H, in which case P would get the ball, or it would not be, in which case victory would go to H. Instead, the court took the view that, both parties having 'a superior claim to the ball as against all the world', the ball should be divided between them.⁴⁰ This outcome, described by one

³⁷ Stoklas (n 34) 928.

³⁸ In fact, an experiment simulating P's attempt to catch the ball (described Adomeit (n 34) 487-94) suggested that someone attempting to catch a baseball in a baseball glove, who managed to hold it for 0.6 seconds, would have almost no chance of then dropping it.

³⁹ A similar notion, however, appears to be behind the decision of the court of first instance in the South African case, *Underwater Salvage Co (Pty) Ltd v Bell* 1988 (3) SA 92, discussed in chapter 2. In that case, the court gave possessory protection to a party who had not yet succeeded in acquiring possession, on the basis that he should be allowed to proceed undisturbed with the taking of possession. This view was rejected by the appeal court (1990 (1) SA 751).

⁴⁰ This decision has been compared to the decision of King Solomon reported at 1 Kings 3:16-28 (Stoklas (n 34) 904; Pastrick (n 34) 908; Cieslik (n 34) 605). This comparison is perhaps unfair to Solomon. In Solomon's case, two prostitutes both claimed to be the mother of an infant child. Solomon ordered that the child be divided in two and half given to each, whereupon one of the women

commentator as representing an 'unabashed disregard of custom and common law precedent',⁴¹ was viewed by the court as the fairest outcome. In reaching this view, the judge was influenced by an article by Helmholz.⁴² Helmholz, however, is concerned with a quite different situation, namely the finding of lost or mislaid property, and in particular the difficult distinction between lost property, to which the finder is entitled, and mislaid property, which is given to the owner of the place in which the property is found. Holding that this distinction is artificial and is applied in a manner that is inconsistent and unpredictable, Helmholz argues that it would be more appropriate to divide the property between them. These considerations do not apply to the baseball in *Popov*, which was neither lost nor mislaid,⁴³ but which was ownerless property free to the first possessor.

(4) *Popov* and Scots law

In *Popov*, the judge took the view that:

An award of the ball to Mr Popov would be unfair to Mr Hayashi. It would be premised on the assumption that Mr Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr Hayashi would unfairly penalize Mr Popov. It would be based on the assumption that Mr Popov would have dropped the ball. That conclusion is also unsupported by the facts.

This seems rather a dereliction of the court's duty to determine the facts. This duty does not cease merely because the job becomes difficult. Part of the court's job is to determine the facts. If a fact cannot be proved to the required standard, then it is regarded as not being proved and it is left out of account. If, after this process is complete, the party bearing the burden of proof has not proved sufficient facts to win the case, then he loses the case. This outcome is only unfair to P if he did in fact have enough control, a fact which *ex hypothesi* is unknowable. We do not, therefore, know

offered to give up her claim to save the child's life. This woman was held to be the mother. In other words, the decision to divide the child was intended to draw out which of the women was telling the truth. It was a test of the evidence, not a decision on the substantive issue of who was entitled to the child. The opposite is true of the decision to divide the ball in *Popov*.

⁴¹ Pastrick (n 34) 907.

⁴² RH Helmholz, 'Equitable Division and the Law of Finders' (1983) 52 Fordham Law Review 313.

⁴³ Pastrick (n 34) 927.

whether an outcome in favour of P would be unfair to H or *vice versa*. No doubt it would be possible to approach uncertain facts on a basis of 'splitting the difference', but this would be a radically different approach from the conventional one in both Civilian and Common Law traditions, and so ought to be introduced only after lengthy debate rather than judicial fiat. If, therefore, a similar issue came before a Scots court, it is recommended that the court not follow *Popov* in dividing the property between the parties.

The same must go for the concept of the 'pre-possessory interest'. Even were it possible to construct a basis for this in Scots law – after all, in Helmholz's article he notes that the 'equitable division' approach was used in Roman law in certain circumstances⁴⁴ – it would create an unacceptable level of uncertainty. This uncertainty exists both in the nature of the pre-possessory interest and what must be done to acquire one, and also in who has one given the uncertainty of the facts. For all that is known, in *Popov* there were others in the scrum who had committed no illegal act, and who had also made sufficient attempt to get the ball to qualify for a pre-possessory interest and, therefore, a share of the ball. Cieslik observes that:

Because of the velocity at which a baseball travels, arguably a fan will rarely catch a foul ball without someone else stopping its momentum first...now it is likely that anyone who puts his hands on a baseball will initiate a lawsuit, claiming that he too has a pre-possessory interest.⁴⁵

This is hardly a satisfactory outcome.

There remains to be considered the test for possession that was adopted by the court in *Popov*. It has already been suggested above that the court's approach involves an unacceptable level of uncertainty in allowing individual groups of people to set their own test. However, even accepting the test adopted in this case is

⁴⁴ The example he gives is the rule given at J.2.1.39 that treasure found on private land be divided between the finder and the landowner (Helmholz, (n 42) 315 n 14). The judge in *Popov* uses this observation to suggest that '[t]he concept of equitable division has its roots in ancient Roman law'. This suggestion is unsupported by the reference to the Helmholz article. Helmholz, who is arguing for the adoption of the same rule in modern US law, merely observes that the Roman rule means that the rule he proposes is not unprecedented.

⁴⁵ Cieslik (n 34) 627-28.

problematic for, notwithstanding the views of certain writers,⁴⁶ the decision does nothing to reduce the risk of violence. One writer has observed that:

Essentially, one million dollars was being thrown into the crowd that day, and reasonable people did what reasonable people do - they put their life and limb in jeopardy for the chance of becoming a millionaire. Thus, anyone who entered into the arcade area that day assumed the risk that this could occur.⁴⁷

The suggestion that the other spectators in *Popov v Hayashi* acted reasonably, which is apparently offered in all seriousness, may strike many as remarkable. Nonetheless, if such conduct is to be expected, it seems to demand the award of ownership by *occupatio* on the basis of as lenient a test of possession as possible. The decision in *Popov* does not do this and, as a consequence, offers incentives to violence: if it is open to A to get some right in the ball even after B has caught it, it is to A's benefit to see B dispossessed. No doubt some way could be found to deny any right to a forcible dispossessor, but this would perhaps be an exception easier to formulate than to apply in practice: the court in *Popov* noted that it was impossible to identify which members of the crowd had intended an assault on P, and which were merely carried with the crowd's momentum. Moreover, as Adomeit points out,⁴⁸ it does not address the possibility of an arrangement between two or more spectators to divide the job: one or more will attack the initial catcher, and the remainder will attempt to get the ball.

The view taken here, therefore, is that in the circumstances of *Popov* a person should be held to satisfy the requirements for the physical element of possession as soon as he has established sufficient control to demonstrate that he claims the ball. This would require that it be possible to say that the ball has been caught: otherwise, the ball could not be said to be controlled at all. If the ball immediately bounces from the catcher's hand, it has not been caught and is not controlled.⁴⁹ On the facts of *Popov*, this test would give possession and therefore ownership to P, especially given that violence was required to remove the ball from P's hand. It is accepted that this

⁴⁶ Pastrick (n 34) 931; Cieslik (n 34) 611.

⁴⁷ Cieslik (n 34) 632. A large proportion of this article (613-625, 628-637) is devoted to an attempt to demonstrate that such violence is common at sporting events and that, accordingly, anyone who attends such an event consents to the risk of injury.

⁴⁸ Adomeit (n 34) 495.

⁴⁹ *ibid.*

approach comes at some cost to certainty. After all, as Stoklas points out,⁵⁰ it will be rare that the events are caught on camera. However, at least this approach ensures that the dispute will be resolved in a civilised manner. If the choice is between a society in which disputes are resolved with difficulty but peacefully, and one in which they are resolved swiftly through violence, the former is the only rational choice. The decision in *Popov* promotes the undesirable aspects of both choices, by introducing uncertainty to the resolution of disputes and also by encouraging violence. A decision in favour of H would have promoted the second of the choices, encouraging violence but at least promoting certainty by giving ownership to the individual who emerged as clear winner from the struggle. It must be said, though, that the same demand for certainty that favours the final possessor over the initial taker must equally be balanced by an acceptance that it cannot be certain that that final possessor was not himself a party to the assault on the initial taker. Accordingly, even if a rule is adopted that prevents acquisition by a violent taker, the effectiveness of that rule in practice cannot be guaranteed. Stoklas suggests⁵¹ that a rule of the kind proposed here would not have the effect of discouraging violence, as it is human nature to attempt to seize control of that which appears open to seizure:

In the *Popov* case, stating that a fan 'should have...the opportunity to try to complete his catch unimpeded by unlawful activity' will not cause fans to sit back and allow someone else to catch a ball hit out of play.⁵²

If the rule is reinforced by proper security arrangements, however, it may indeed have that effect.

E. CONCLUSION

It may be seen that, where an individual has only had direct control of the property for a brief moment, there may be difficulty in demonstrating that he has had sufficient control to be held to be in possession. However, there is insufficient in any of the areas looked at to conclude that this represents an insuperable obstacle to the

⁵⁰ Stoklas (n 34) 934.

⁵¹ *ibid* 938-39.

⁵² *ibid* 938 n 288.

establishment of possession. The hypothesis put forward earlier therefore appears justified. The length of time one has had control for is only one factor to be considered. Certainly, in the criminal law and in any case where there is a competition to acquire possession there appears to be good reason to require very little in this regard. In the former case, the aims of the law may be frustrated if one is not held to possess who has clearly intended to exercise control and has acted on that intention. In the latter case, the risk of violence as in *Popov v Hayashi* appears to demand an early award of ownership. Any other solution encourages continued contentiousness. In the case of delivery, it is true, a momentary delivery followed by return may not be given effect to, but the problem there is not so much the momentary control but the suggestion that the delivery is not genuinely intended. As a question of principle, it is suggested that, where the control exercised has been such as to indicate a clear assertion of right, possession should not be denied solely on the basis that that control was momentary.

6 ACQUISITION OF POSSESSION THROUGH SYMBOLICAL ACTS

A. INTRODUCTION: THE SCOPE OF THE CHAPTER

We have seen in chapter 2 what, as a general proposition, is required for the physical element of possession of corporeal moveable property. Specifically, we have seen that a certain degree of control is required before the property may be said to be possessed. However, it cannot be doubted that this will sometimes prove inconvenient. This is particularly likely to be the case with the common law requirement for delivery in the transfer of ownership of corporeal moveables. Where delivery is required, then until the goods are in my possession I am, of course, vulnerable to the transferor's insolvency or a conveyance to a third party.¹ Sometimes, however, it is necessary to leave the goods with the transferor for a time: if alterations have to be made, for example. Alternatively, it may merely be found convenient to do this. If possession is required in particular circumstances for the constitution or transfer of a real right, then it is likely that an attempt will be made to argue that possession is held by a party other than the one appearing to possess, if the alternative is that the property will be caught up in the insolvent estate of that party.

One way in which this may be attempted is the delivery of a symbol representing the property, in the place of the property itself, or through other acts that in some way symbolise a change of possession. For present purposes, symbolical acquisition of possession may be defined as involving a symbolical act as a substitute for actual physical control of the property. In the Scots authorities, as we shall see, the possibilities that have been considered involve a transferor retaining physical custody of goods but the goods being identified symbolically as the transferee's, either by the giving of a sample, the recording of the transfer in a document (with the document then being a symbol of the goods), or the marking of the goods.

The purpose of this chapter is to consider whether Scots law accepts such methods as effective for the acquisition of possession. It must be said from the

¹ This assumes that the third party is in good faith. If the third party is in bad faith, the conveyance to that party will be voidable as an 'offside goal': *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Marshall v Hynd* (1828) 6 S 384. If the third party is in good faith, the conveyance will be beyond challenge: *Hewat's Tr v Smith* (1892) 19 R 403. This last case is considered further on a different point below.

outset, however, that the consideration that has previously been given to this issue has been exclusively, or almost exclusively, directed at delivery for the purposes of transfer of ownership or (to a lesser extent) the creation of a right of pledge. There has been no attempt to consider how discussion of symbolical acquisition of possession fits into the law of possession generally. To some extent, this is understandable: one who dispossesses me of a mere symbol has dispossessed me of something of no intrinsic value; the property the symbol represents is unaffected. Even if the symbol is valuable in and of itself, it is clearly possessed and so can be recovered on that basis. However, one can conceive of situations where questions of possession by symbolical means would become relevant outside of the context of transfer of ownership by delivery. For example, suppose that there is an agreement to sell a cow. Some attempt at symbolical delivery to the transferee is made, perhaps by the transferee branding the cow, but actual custody of the cow is retained by the seller until payment is made. In the interim, the cow becomes pregnant and gives birth to a calf. It then emerges that the transferor was not the owner of the cow. Assuming *bona fide* belief in ownership, the possessor of the cow will be entitled to the calf as a fruit of the cow,² but who is the possessor of the cow? The answer to this question will turn on the effectiveness of the symbolical delivery in giving the transferee possession. Again, is someone in possession of a substance whose possession is prohibited by the criminal law where only symbolical acts have been carried out, such as marking the substance as belonging to a particular individual? Some consideration must also, therefore, be given to whether the conclusions to be reached on symbolical delivery hold true likewise for the acquisition of possession generally.

It will become apparent below that the term 'symbolical delivery' has on occasion been used fairly broadly. The first task is to determine the meaning of the term. For present purposes, possession is said to have been acquired symbolically where it has been acquired by symbolical means alone, without any physical relationship with the property, either direct or indirect. In other words, the symbolical acts operate as a substitute for the normal requirement for physical control. This does

² On the right of a possessor in good faith to the fruits of the property, see chapter 1. Stair, *Inst.* 2,1,24 makes it clear that this applies equally to fruits of corporeal moveable property (such as the young of animals) as to the fruits of heritable property.

not include any case where the 'symbol' gives of itself actual control, either to the holder of the symbol or through another person. We are not concerned with any case where the acts carried out would be sufficient for *constitutum possessorium* if the symbolical element were removed. Nor is symbolical acquisition of possession to be taken to include any case where the law allows a symbol to be given as a substitute for possession. In particular, it is necessary to exclude several areas where confusion may arise on this point. These areas will be considered in the following section, so that the remainder of the chapter may consider, on a basis of clarity as to the meaning of the term, whether symbolical delivery is accepted in Scots law.

It should be stressed also that we are concerned here only with the means of acquiring possession. Possession can only be acquired through symbolical acts to the same extent that the consequences of this are the same as with possession acquired by conventional means. The result of a successful symbolical acquisition of possession will be that the acquirer will possess either naturally or civilly, depending on whether custody or natural possession is retained by another, with all the consequences entailed thereby. An example of an acquisition of civil possession by symbolical means would be the case of a transferor retaining goods but marking them with the transferee's mark, because possession would then be held by the transferee through the transferor's act. An example of natural possession would be animals branded with the acquirer's mark but left to roam, because in this case possession would have been acquired by the acquirer's own act.³ This assumes, of course, that these are valid methods of acquiring possession, which remains to be seen.

B. EXCLUSIONS FROM THE SCOPE OF THE PRESENT CHAPTER

Symbolical acquisition of possession has been defined as possession taken by symbolical means rather than through actual physical control, whether by the possessor himself or through an agent. As we shall see in this section, there are several cases where there may in some sense be said to have acquired possession symbolically, but which do not in fact fit within the present definition. This will

³ This latter example will be considered, in light of the discussion in this chapter, in chapter 7.

either be because the 'symbolical' acts are in fact sufficient to give actual control of the property, or because the symbol is in fact being allowed as a substitute for possession itself. Alternatively, it may be that a particular rule allows symbolical acquisition of possession for some special purpose. We are not concerned here with such matters. We are concerned only with the question of whether, as a general point in the law of possession, the requirements of the physical element of possession may be satisfied by symbolical means. As we shall see, the definition of symbolical acquisition of possession that is adopted here is narrower than is sometimes found. Certain cases that have been said to involve symbolical delivery are excluded under the present definition. We begin, therefore, by considering the nature of these exclusions. We shall then be in a position to consider the general question.

(1) Delivery of keys

One of the main examples of alleged symbolical acquisition of possession is that which is acquired by the delivery of keys. The situation is that the goods to be transferred are stored in some locked repository, such as a warehouse. Instead of removing the goods from the repository for delivery directly into the hands of the transferee, the transferor hands the key to the transferee. This was a competent form of delivery in Roman law, known as *traditio clavium*.⁴ As we shall see, this form of delivery has also been accepted in Scots law. The same idea could find modern application also in the case of delivery of a car key as sufficient delivery of a car.⁵ On one analysis of the *traditio clavium*, the key is taken to be a mere symbol of the goods transferred. As Pothier puts it, this is delivery of '*non la chose même, mais quelque chose qui la représente*'.⁶

We are concerned then with the argument that the delivery of a key has significance beyond the mere giving of control, that it in some sense represents the goods. If the key is merely a symbol representing the goods, then it is delivery of the key that is the issue. Control of the goods is, at best, secondary.

⁴ Gaius, D.41.1.9.6; Paul, D.41.2.1.21.

⁵ This appears to be sufficient for possession in French law: Cashin Ritaine, 'Transfer of Movables in France' 54.

⁶ Pothier, *Propriété*, para 200 ('not the thing itself, but something that represents it').

As Savigny points out, a key may be a symbol. The example he gives is the delivery of the keys to a city to the sovereign on his entrance.⁷ Such delivery does not suffice to give the sovereign actual control of the city, but merely symbolises that control. There is, however, a more common use for a key, namely to open a lock: in other words, to give access to the property that is protected by the lock.⁸

It is perhaps this double meaning that leads one text to describe *traditio clavium* as a 'symbolical delivery' in which 'the transferor supplies the transferee with the means which will enable the latter to deal with the property'.⁹ This seems to confuse the key's role as a symbol with its role in giving actual control, for the key does, in normal circumstances, give actual control of goods kept locked away, at least if it is the only key.¹⁰ If the key gives the transferee sufficient control for possession, the key ceases to be a mere symbol. Confusion of the same kind may be seen in Pufendorf, where he holds that possession requires:

...physical contact with a thing, or that symbol of it, or an instrument of custody, according as the nature of the thing allows, and with the effect that the thing is so far under his power that he may actually dispose of it.¹¹

For Scots law, Bankton appears to be referring to *traditio clavium* when he talks of:

...symbolical delivery of moveables, when, in place of the things themselves, a symbol is delivered; but, if the deliverer continues in possession, the property, or other real right, does not pass to the receiver...but, if together with the symbol, power and liberty is given to the receiver to take possession, which the owner quits, the property is thereby transferred.¹²

For all of these views, the problem is this: if what has been delivered is merely a symbol, how can it put the property under the transferee's power? Likewise, if the

⁷ Savigny, *Possession* 157-58. This occurs, for example, when the monarch visits Edinburgh: <http://www.royal.gov.uk/RoyalEventsandCeremonies/HolyroodWeek/HolyroodWeek.aspx>.

⁸ Savigny, *Possession* 157-158.

⁹ Silberberg & Schoeman 181.

¹⁰ Bell (*Commentaries*, 1,186-187) allows this as valid delivery even where there is another key allowing the transferor to continue to take access to the goods. For the position in English law see *Gough v Everard* (1863) 159 ER 1, and also Pettit, 'Personal Property', para 1254; *Salmond on Jurisprudence* 287; Pollock & Wright, *Possession* 60-70, especially 68-69, where the same view is taken as Bell of the issue of duplicate keys. See chapter 2 for discussion.

¹¹ Pufendorf, *De Jure Naturae et Gentium*, 4,9,7.

¹² Bankton, *Inst.* 2,1,22.

thing with which the transferee has physical contact gives actual power of the goods, then its delivery is symbolic only in the sense that any act of possession is symbolic: namely, that it represents the mental inclination to take possession. Bell observes that *traditio clavium*:

...differs from symbolical delivery in this, that a symbol is properly nothing more than the sign of the thing transferred – the image by which it is represented to the senses; whereas the delivery of the key gives to the buyer access to the actual possession of the subject, and power over it, while the seller is excluded.¹³

As Savigny points out, if symbolical acquisition of possession just means possession by means other than direct physical control, then such possession is very common indeed.¹⁴ Certainly, this is true for land, where control of one part of a larger area of land is taken to represent control of the whole of the land.¹⁵ This will be less often true for corporeal moveables, which may be portable enough to be held in the hand, but will often be true in the case of bulkier moveables. In fact, looked at in this way, a key will often give its holder more effective control of the property to which it gives access than will actual presence.

If the 'symbol' gives actual control sufficient for possession, to call it a symbol adds nothing but confusion, for it implies that *traditio clavium* is an exception to the general principle rather than a specific application of it. For Scots law, Hume is clear on this: the delivery of a key is not symbolic, as it gives actual control of the goods.¹⁶ Carey Miller observes that this emphasis on requiring that the transferee actually acquire possession is what is behind 'the tendency to identify what could be seen as symbolical delivery as actual delivery'.¹⁷ It is only if the delivery of the key is held sufficient even where there is insufficient control for possession that it is meaningful to talk of *traditio clavium* as symbolical delivery.¹⁸

¹³ Bell, *Commentaries*, 1,186. See also Carey Miller, *Corporeal Moveables*, para 11.09.

¹⁴ Savigny, *Possession* 143.

¹⁵ Stair, *Inst.* 2,1,13.

¹⁶ Hume, *Lectures*, III,250-251.

¹⁷ DL Carey Miller, 'Derivative Acquisition of Moveables' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society 1995) 148.

¹⁸ Nicholas 119; Buckland 227; Pollock & Wright, *Possession* 62-68.

(2) Bills of lading

Much the same could be said of bills of lading. It is accepted that delivery of a bill of lading is effective to give the transferee possession of goods on board a ship.¹⁹

Delivery of the bill, then, is delivery of the goods themselves, involving as it does the acquisition of (civil) possession by the transferee. When the goods reach their destination, they will be yielded up to the holder of the bill. Other documents fulfilling similar functions, such as delivery warrants, are accepted as operating in the same way, as far as delivery is concerned.²⁰

This is commonly said to be a form of symbolical delivery,²¹ and it is true that, in a sense, the bill of lading is a symbol of the goods. However, as we have seen, a key may also be seen as a symbol. The question, therefore, is whether a bill of lading is a symbol in a more complete sense than that is a key.

Carey Miller rejects the view that a bill of lading is a mere symbol:

From the manner in which a bill of lading operates, it would appear that the better view is that the transfer of ownership by bill of lading is not an instance of symbolical delivery properly speaking. A bill of lading is not handed over as a symbol of the goods, in the sense of the giving and receiving of a token representing the act of delivery...²²

Instead, in Carey Miller's view, the bill of lading operates as a negotiable document of title.²³ It is not immediately clear, however, what is meant by this term. Gow, for example, first identifies bills of lading as documents of title, by referring to the

¹⁹ A Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 JR 193, 202. Given that the goods are in the custody of another, this means that the transferee acquires civil possession.

²⁰ GL Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' 1990 JR 23, 27.

²¹ Reid, *Property*, para 621; Gordon, *Traditio* 215; Smith, *Short Commentary* 539; JJ Gow, *The Mercantile and Industrial Law of Scotland* (W Green 1964) 107; R Brown, *Treatise on the Sale of Goods, with Special Reference to the Law of Scotland* (2nd edn, W Green 1911) 180; Scottish Law Commission, *Corporeal Moveables: Passing of Risk and Ownership* (Memorandum 25, 1976), para 64; Gretton (n 20) 28 and 29; *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095, 1114 (Lord Johnston); G Ragland, 'The Uniform Sales Act in Kentucky' (1928) 17 *Kentucky Law Journal* 43, 44; F Bobbitt, 'The Concept of 'Possession' in Constructive Adverse Possession in Texas' (1927) 6 *Texas Law Review* 1, 6; WC Rodgers, 'Symbolical Delivery' (1899) 49 *Central Law Journal* 324, 326. See also F Tudsbury, 'Symbolical Deliveries by Documents' (1915) 31 *LQR* 84, criticising the view that delivery of a bill of lading is delivery of the goods themselves, but taking for granted that, if effective in that way, this can properly be called a symbolical delivery.

²² *Corporeal Moveables* 172.

²³ *ibid* 172-73. See also Steven, *Pledge and Lien*, para 6-30, describing this as the 'better view'.

transfer of 'a document of title other than a bill of lading',²⁴ before shortly afterwards²⁵ contrasting bills of lading with documents of title. At the very least, on Gow's view, bills of lading are special forms of documents of title. Merely to define bills of lading as documents of title, therefore, does little to indicate the special nature of bills of lading. Brown, following the usage of the Factors Acts,²⁶ defines documents of title as documents which are:

...intended, by means of indorsation, to operate constructive delivery of the goods represented by the document by the document without requiring intimation of the transfer to the custodier of the goods.²⁷

This certainly describes a bill of lading, subject to the qualification that some bills of lading may be transferred by delivery without indorsation, as we may see from consideration of how the bill operates. The shipper hands the goods over to the carrier for shipping. At this point, the shipper's natural possession ends and the shipper begins to possess civilly through the carrier. In exchange for the goods, a bill of lading is issued to the shipper. This does not change the character of the shipper's possession: he still possesses civilly through the carrier, not because there is any magic in the bill of lading, but because the carrier holds the goods on his behalf as holder of the bill. The shipper may then put someone else in the same position by delivering the bill to that other person. That person then possesses the goods, but again this is not because there is any magic in the bill itself. The person with the bill possesses the goods civilly through the carrier.²⁸ This is because the carrier is bound to give the goods up to the person who holds the bill of lading, because the contractual rights under the bill are transferred along with the bill itself.²⁹ Delivery of

²⁴ Gow (n 21) 105.

²⁵ *ibid* 106-107.

²⁶ Considered below.

²⁷ Brown (n 21) 177. See also JJ Gow, 'Humpty Dumpty and the Whole Court: The Enigma of *Inglis v Robertson and Baxter* (1898) 25 R (HL) 70' 1961 SLT (News) 105.

²⁸ *Bogle v Dunmore & Co* (1787) Mor 14216.

²⁹ Carriage of Goods by Sea Act 1992, s 2(1). This provision replaced the Bills of Lading Act 1855, s 1, which made this transfer of contractual rights dependent on a transfer of ownership. See the joint report of the Law Commissions of Scotland and England on *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No 196/Scot Law Com No 130, 1991), Part II. As Clive points out, the 1855 Act was unnecessary in Scotland, the matter being adequately dealt with by holding the acquirer of the bill to have a *ius quaesitum tertio* arising from the original contract of carriage: EM Clive, '*Jus Quaesitum Tertio* and Carriage of Goods by Sea' in DL Carey Miller & D W Meyers (eds),

the bill of lading thus gives actual (civil) possession to the transferee. It is analogous to the *traditio clavium*,³⁰ and indeed the ship has been referred to, in an English case, as a floating warehouse to which the bill of lading is the key.³¹ It would perhaps be more accurate to say that this is the same as any other situation where goods are held by a third party custodian. In such a case, delivery may be achieved by the giving of notice to the custodian, who then holds for the transferee.³² It is true that, the case of a bill of lading, there is no need to give notice to the carrier, but this may be explained on the basis that such notice would not have been possible in the age in which bills of lading were developed. Unless such has been excluded by the contract of carriage, there can surely be no doubt that such notice properly given to the carrier while the goods were in transit would be effective to deliver possession of the goods, even without a transfer of a bill of lading. Moreover, the reason why notice to a custodian is enough for delivery is that this notice puts the custodian under a duty to yield up the goods to the transferee.³³ The lack of any need for such notice may be justified in the case of a bill of lading, because the carrier knows from the start that he is to hand over the goods to whichever person appears with the bill when the goods arrive, and that that person will not be the same person as the consignor.

Carey Miller talks specifically of 'transfer of ownership by bill of lading'. If the characterisation of the bill of lading as a document of title is to be taken to mean that ownership is transferred by means of the bill itself, it cannot be accepted. In itself, the bill only gives possession, not ownership, and the precise significance of the delivery of the bill in a particular case depends on the *causa* of that delivery. Delivery of the bill on a basis other than the transfer of ownership will not have the effect of transferring ownership.³⁴ This is what leads to the conclusion that it is possible to pledge goods by delivery of a bill of lading.³⁵ Even were that not so,

Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC (Butterworths 1992) 47-56, especially 47-51.

³⁰ Carey Miller, *Corporeal Moveables* 172-173.

³¹ *Sanders Bros v Maclean & Son* (1882-83) LR 11 QBD 327, 341 (Bowen LJ).

³² *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70. Where the transaction is a sale of goods, the seller is not taken to have fulfilled his obligation to deliver the goods until the custodian has acknowledged that he holds on the buyer's behalf, except where the transfer of a document of title is involved (Sale of Goods Act 1979, s 29(4)). This, however, does not appear to affect the general question of how possession is acquired.

³³ *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70, 74, (Lord Watson).

³⁴ A Rodger, 'Pledge of Bills of Lading in Scots Law' 1971 JR 193, 202.

³⁵ On this issue, see Steven, *Pledge and Lien*, paras 6-30-6-33; Rodger (n 34); Gretton (n 20).

possession of the bill of lading would not be conclusive as to ownership, for the property transfer provisions of the Sale of Goods Act 1979 appear to apply as much to goods at sea as they do to goods on land.³⁶

The view taken here therefore is that, while a bill of lading may be said to be a symbol of the goods, and possession of the bill possession of a symbol, this is the same sense in which a key is a symbol. The holder of the bill has actual, civil possession of the goods, and delivery of the bill of lading is a transfer of civil possession of the goods. It operates in the same way as any other transfer of possession where the goods are held by a third party custodian, but with a shortcut (lack of requirement for intimation to the custodian) recognised by mercantile custom. This is not a case where a symbolical act stands in for the physical element of possession. This is not, therefore, a case of symbolical acquisition of possession as that term has been defined for the purposes of this chapter.

(3) Ships

Special rules exist on the ownership of ships. A register of ships exists, and the registered owner of a ship has 'absolute power to dispose of it'.³⁷ This is done by way of a 'bill of sale' in a form prescribed by statute.³⁸ This, followed by registration, is regarded as being sufficient to give ownership.³⁹ These rules appear therefore to override the common law requirement for delivery (and indeed the rules in the Sale of Goods Act 1979) for the transfer of ownership in the case of ships. This transfer by bill of sale could perhaps be seen as a form of symbolical delivery. Indeed, it has been so seen in the United States.⁴⁰ However, it appears that this is better seen as a replacement for the normal rules for transfer of ownership. There is nothing in the relevant legislation to indicate that a transferee taking by bill of sale is to be seen as a possessor without an actual taking of possession in the normal way.

³⁶ Certainly, no exclusion appears in these provisions, which are in general terms.

³⁷ Merchant Shipping Act 1995, sch 1 para 1(1).

³⁸ Merchant Shipping Act 1995, sch 1 para 2(1).

³⁹ C Mackenzie, *Stair Memorial Encyclopaedia Reissue Shipping and Navigation* (2005), para 25.

⁴⁰ Rodgers (n 21) 327.

(4) The Factors Acts

The Factors Act 1889, extended to Scotland by the Factors (Scotland) Act 1890, makes certain provision regarding the authority of mercantile agents. Section 3 of the 1889 Act provides that a pledge of the 'documents of title' to goods is 'deemed to be a pledge of the goods'. The term 'document of title' is defined in section 1(4) to include:

...any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

In the normal course of things, the goods represented by the document of title may be in the hands of a third party. A bill of lading, mentioned in the definition and discussed above, is an example of this. However, there is nothing in the Factors Acts requiring this. The possibility appears to arise, therefore, of the delivery of a document of title creating a valid pledge even though the goods are still in the custody of the party delivering the document. In such a case, there could be said to be a truly symbolical delivery. However, this is a special case, relevant only where the Factors Acts apply. It provides no authority for any general acceptance of acquisition of possession through symbolical acts, and so falls outside the scope of this chapter, which is concerned with that general question. As has been made clear by the House of Lords,⁴¹ this provision only applies to the acts of mercantile agents. There is here no general authority for the creation of pledges by symbolical means, with the result that a mercantile agent has the power to do something on behalf of the principal that the principal could not do himself.⁴²

⁴¹ *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70. For discussion of this decision, see Gow (n 27).

⁴² *Brown* (n 21) 154. Although s 3 itself is worded generally, the House of Lords inferred this limitation from the context in which it is found: *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70, 71 (Lord Chancellor); 75 (Lord Watson); 76 (Lord Herschell).

C. HISTORICAL AND COMPARATIVE APPROACHES

Symbolical acquisition of possession has been defined for present purposes as meaning possession obtained in circumstances where some symbolical act is accepted as equivalent to the physical element of possession. That definition excludes cases where the 'symbol' does in fact give physical control of the property, either directly or through an agent, or where the law dispenses with the requirement for possession altogether. Also excluded from the present discussion is any case where symbolical acquisition of possession is allowed in some special circumstance only. We are concerned with the acceptability of symbols for the acquisition of possession generally.

In Roman law, there were suggestions in the early classical period that a symbolical delivery of goods, by placing markings on them, would be effective. Paul reports an opinion of Alfenus to the effect that ownership of timber beams which had been sold was transferred to the purchaser when the latter put his seal on them.⁴³

Likewise, Ulpian tells us that:

Trebatius says that if the purchaser has sealed a cask, it is deemed to have been delivered to him, but Labeo correctly states the opposite; for sealing is deemed to be for the purpose of preventing substitution, not to indicate delivery.⁴⁴

Both Trebatius and Labeo were jurists of the late Republic. The fact that Labeo is stated to give a different rule from that given by Trebatius suggests that the issue was one that caused disagreement even in their time. However, whichever view was correct in the first century BC, as Ulpian indicates it was Labeo's view that prevailed.⁴⁵

It may be noted, however, that the Codex contains a passage that appears to contradict the position that actual control is necessary for delivery. In an imperial decision of AD 210, it was held that delivery of documents of title to slaves was equivalent to delivery of the slaves themselves. The transferee was accordingly

⁴³ D.18.6.15(14).1.

⁴⁴ D.18.6.1.2.

⁴⁵ A Watson, *Roman Private Law around 200BC* (Edinburgh University Press 1971) 65 n 3.

entitled to maintain an action *in rem* with respect to them.⁴⁶ It should be stressed that this situation is unlike that of delivery of a bill of lading, as discussed above. In the bill of lading case, the goods are in the hands of a third party, whereas here the transferor appears to have retained custody of the slaves.

If the decision is accurately stated, it is difficult to account for, given that the compilers of the Digest required an actual delivery of the property for *traditio* to operate.⁴⁷ Any solution that is consistent with the general law as stated by Justinian requires the reading in of additional facts. Gordon discusses the various interpretations that have been put forward.⁴⁸ For example, Savigny⁴⁹ assumes the presence of the slaves. Gordon's suggestion⁵⁰ is that the decision was originally longer, and was abbreviated, overly hastily, to remove need for *traditio* for the perfection of gifts under the *lex Cincia*.⁵¹ However, as he admits, it is difficult to see how the compilers failed to see difficulty with text as it stands, given its shortness.

Whatever the truth may be about this decision, it is the position as given in the Digest that was accepted in the *ius commune*. Symbolical delivery has not been accepted as effective. In South Africa, for example, delivery by markings has been disallowed, in a case on branding of livestock.⁵² This was on the basis that the purpose of the branding is ambiguous, being equally consistent with the intention merely to identify the animals, although this reasoning has been criticised by Carey Miller, on the basis that it is inconsistent with the clear inference as to intention to be drawn from the existence of a contract of sale.⁵³ Nor does delivery by marking appear to be accepted in Germany. Thus, the attachment of a sign to goods will not be sufficient for delivery.⁵⁴ For France, referring to a passage by Ulpian,⁵⁵ Pothier

⁴⁶ C.8.53(54).1.

⁴⁷ Although it does appear that this requirement was reduced by post-classical developments. An example is the retention by the transferor of a usufruct for a nominal period, transfer then operating by a kind of *constitutum possessorium*: C.8.53(54).28.

⁴⁸ *Traditio* 82-86.

⁴⁹ *Possession* 152-53.

⁵⁰ *Traditio* 86.

⁵¹ A law of about 200BC restricting the enforceability of gifts. See Buckland 254-55.

⁵² *Botha v Mazeka* 1981 (3) SA 191.

⁵³ Carey Miller, 'Transfer of Ownership' 742.

⁵⁴ McGuire, 'National Report on the Transfer of Movable in Germany' 58.

⁵⁵ D.18.6.1.2.

holds that markings placed by a purchaser on goods are not sufficient for *traditio*.⁵⁶ Among modern writers, too, actual control is required. Purely juridical acts, which could only be symbolical in the context of the physical element of possession,⁵⁷ are insufficient.⁵⁸ This being the case, Cashin Ritaine's statement that it is sufficient for possession to receive 'license [*sic*] documents of a boat'⁵⁹ must be taken to be doubtful as a question of general principles.⁶⁰

D. INSTITUTIONAL AND OTHER EARLY WRITINGS

One looking at Roman law and the *ius commune* will therefore find little support for symbolical acquisition of possession. However, among the Scottish institutional writers, Stair is more receptive to this. He allows that possession may be acquired by delivery of a symbol of the goods, as with the following cases:

...delivery of a parcel of corns for a stack or field of corn, or some of a herd or flock for the whole flock, being present; in which the symbols being also parts of the thing possesst, have some affinity to natural possession.⁶¹

Stair then accepts that delivery of a sample of a thing, as a symbol of the whole, is sufficient delivery of the whole thing. In the passage quoted above, he appears to imply by the words 'being present' that the parties must be in the presence of the goods when the sample is given. However, he goes on to say that there may be 'delivery of a thing bought or sold, by a wisp of straw, which ordinarily is in absence of the thing to be possessed'.⁶² Presence, then, does not appear to be required. For Carey Miller and Pope, this passage:

⁵⁶ Pothier, *Contrat de vente*, para 188. He does, however, allow this when it is sanctioned by trade usage: *Propriété*, para 205.

⁵⁷ Though they could assist in inferring *animus*.

⁵⁸ Terré & Simler, para 146; Malaurie & Aynès, para 489; Planiol, vol 1 para 2267; Carbonnier 1715; Jourdain 20. The rule is the same in Quebec: D Lamontagne, *Biens et propriété* (6th edn, Éditions Y Blais 2009), para 658.

⁵⁹ Cashin Ritaine, 'Transfer of Movable in France' 64.

⁶⁰ The reference to delivery of a ship by delivery of licence documents may represent a speciality of the law relating to ships. Cashin Ritaine, however, presents this as an example of delivery generally. See below for the position on ships in Scots law.

⁶¹ Stair, *Inst.* 2,1,15.

⁶² *ibid* 2,1,15.

...may support the notion that delivery of movables can be constituted on the basis of an unequivocal manifestation of mutual intention by any means which can be construed to meet the physical requirements and is associated with a particular point in time.⁶³

While this view does require a physical act of taking possession, it is reduced to a bare minimum and is certainly divorced from any idea of control of the property. There can be no doubt that Stair's view on this point represents a substantial modification of the concepts of delivery and, by extension, possession, compared with the Roman law.

Stair is not alone in allowing delivery of a sample as symbolical delivery of the whole. Forbes⁶⁴ and Bell⁶⁵ both allow this. The latter relies on *Grant v Smith*,⁶⁶ discussed below, a case of delivery of a sample of growing crops.

Bankton holds that '[a]n owner's suffering the buyer to mark the things sold with his sign, is understood thereby to deliver them'.⁶⁷ However, this is perhaps inconsistent with his rejection of symbolical delivery where the transferor has retained custody.⁶⁸ Perhaps the difference is that, in the case of markings, Bankton envisages that this has been done by the transferee, who has therefore performed a clear act of possession of the goods.

Bell also allows symbolical delivery by marking of the goods,⁶⁹ as was accepted by Alfenus and Trebatius but was rejected by Labeo. Bell indeed goes so far as to allow delivery by marking things that are not yet separated from the soil.⁷⁰ However, the case he relies on⁷¹ is concerned with a moveable growing crop.⁷² Its application to things that are heritable by accession is a matter of greater difficulty

⁶³ DL Carey Miller & A Pope, 'Acquisition of Ownership' in R Zimmermann, D Visser & K Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press 2004) 698.

⁶⁴ *Great Body* 350.

⁶⁵ *Commentaries*, 1,187 n 13.

⁶⁶ (1758) Mor 9561.

⁶⁷ *Inst.* 2,1,22.

⁶⁸ *Inst.* 2,1,22. See also *Inst.* 3,2,2, where he denies the effectiveness of a general disposition of moveables without actual delivery of the goods themselves.

⁶⁹ *Principles*, s 1303.

⁷⁰ *ibid.*

⁷¹ *Grant v Smith* (1758) Mor 9561.

⁷² Crops requiring annual seed and labour are moveable: Stair, *Inst.* 2,1,2; Erskine, *Inst.* 2,2,4; Bankton, *Inst.* 1,3,17; *Boskabelle Ltd v Laird* 2006 SLT 1079.

and, as far as those are concerned, Bell's approach has been rejected in subsequent case law.⁷³

Erskine observes that the law permits symbolical delivery 'if the thing sold does not admit of real delivery'⁷⁴. He does not explain what is meant here, but could be taken as referring, for example, to bulky items. However, elsewhere he says that symbolical delivery is used for heritage and incorporeal property.⁷⁵ Accordingly, there is no foundation in Erskine for accepting symbolical acquisition of possession of corporeal moveable property as part of Scots law.

Most strongly opposed to the acceptance of symbolical acquisition is Hume. He rejects symbolical delivery as a way of acquiring possession, even in the case of bulky items,⁷⁶ though he accepts that this may be inconvenient.⁷⁷ In particular, there is no delivery by marking goods,⁷⁸ and no delivery of the whole by delivery of a sample.⁷⁹

There is therefore no consensus among the earlier writers on Scots law on this point. On the one hand, Stair, Forbes, Bankton and Bell give at least some recognition to the possibility of symbolical acquisition of possession. On the other hand, Erskine and, particularly, Hume reject it.

E. CASE LAW

The next step is to consider how the notion of symbolical acquisition of possession has been received by the courts. It may be noted at this point that the tendency

⁷³ *Paul v Cuthbertson* (1840) 2 D 1286.

⁷⁴ *Inst.* 3,3,8.

⁷⁵ *Inst.* 2,1,19. It may be taken that the reference to symbolical delivery of heritable property is a reference to the giving of sasine. This, however, does not seem to be an acquisition of possession in the general sense of the creation of a state of affairs protected by possessory remedies. Certainly, no case has been detected in which sasine has been relied on as giving possession for those purposes. Indeed, by the sixteenth century possession was required in addition to sasine to complete the right: see *Cunynghame v Logane* (1534) Balfour's Practicks 166. This distinction between sasine and possession was confirmed in the Act 1540, c. 23 (APS ii,375). Thus, in *Earl of Mar v Laird of Pittarro* (1567) Balfour's Practicks 167 the last infeftment of several, with first possession, was preferred to earlier infeftments. For general discussion, see L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (William Hodge 1942) 86-87.

⁷⁶ *Lectures*, III,248-249.

⁷⁷ *Lectures*, III,249. He concludes, however, that symbolical delivery should not be permitted, as giving an insufficiently sure guide to third parties.

⁷⁸ *Lectures*, III,248-249.

⁷⁹ *Lectures*, III,250.

among modern writers on possession has been to ignore symbolical acquisition of possession or to disallow it,⁸⁰ or at least to restrict its application to the context of bills of lading⁸¹ which, for reasons considered above, do not fall within the scope of this discussion. As we shall see, it is understandable that they should do so, given that there is a considerable body of authority rejecting the idea that possession may be acquired in this way. Nonetheless, the role of symbolical acquisition of possession in delivery is an issue that has been controversial since at least Stair's time. In two cases decided in the late seventeenth century, within a short period from each other, symbolical delivery was first allowed⁸² and then disallowed,⁸³ though it is not stated in either case what form the symbolical delivery took.

The approach taken here is to consider first those cases rejecting the acquisition of possession by symbolical means, before moving on to those apparently more supportive of the idea. Conclusions will then be drawn.

(1) Rejection of symbolical acquisition of possession.

In the cases on this issue, three different forms of symbol may be identified, as we shall see. Two of these are mentioned by the institutional writers: a sample of goods delivered to represent the whole, permitted by Stair and Bell; and markings made on the goods, allowed as sufficient by Bankton and Bell, or otherwise making the goods separately identifiable within the transferor's premises. The third is not mentioned by these writers, though it is rejected by implication by Hume by his reference⁸⁴ to *Arbuthnott v Paterson*,⁸⁵ considered below. This third form is symbolical delivery by the giving of written documents. These shall be considered in turn. No doubt others could be conceived that have not been considered by the courts. These can, however, be considered by analogy.

⁸⁰ See eg Steven, *Pledge and Lien*, para 6-29. Compare, though, MP Brown, *A Treatise on the Law of Sale* (W & C Tait 1821), para 545, following Stair's account on this point.

⁸¹ See eg Reid, *Property*, para 621 (Gordon).

⁸² *Gray v Cowie* (1684) Mor 9121.

⁸³ *Ker v Scot* (1695) Mor 9122.

⁸⁴ *Lectures*, III,250.

⁸⁵ (1785) Mor 14220.

(a) Possession by giving of sample. The only reported case clearly concerned with whether possession can be given by the giving of a sample appears to be *Hill v Buchanan*.⁸⁶ In *Hill*, the court held that there was no delivery where the property, a quantity of tobacco, remained in the transferors' custody except for the giving of samples.⁸⁷ The court appears to have accepted the argument that the purpose of the giving of samples was 'merely to make known the respective qualities of the different parcels'.⁸⁸ This, then, represents a rejection of Stair's view.

(b) Possession by marking item. As noted above, this category covers cases where the goods are in some way set apart as well as those where they are physically marked as pertaining to a particular person.

This method of acquiring possession was held ineffective in *Salter v Knox & Company's Factor*,⁸⁹ in which the goods had been measured out and set aside in the transferor's own premises. One of the judges is reported to have observed that:

[H]owever equity may afford relief, by *undoing* what has been illegally done, it cannot, in a question with third parties, supply the want of those things which, though required by the law, have been left *undone*.⁹⁰

It is clear here that the concern is not that the leaving of the goods in the transferor's custody suggests some scheme to defraud the transferor's creditors. On the contrary, it is accepted by the court that the transaction is a genuine one and that the outcome is unfortunate for the transferee. The difficulty is simply that delivery is a requirement for the transfer of ownership, and what has been done does not constitute delivery.

That case concerned goods identified by being set aside. Another case, *Smith v Alan & Poynter*,⁹¹ involved goods physically marked. In this case, the goods had been placed by the transferor, marked with the transferee's name, in a warehouse kept

⁸⁶ (1785) Mor 14200, affirmed (1786) 3 Pat 47. No opinions are reported as having been given by the House of Lords, and so it must be taken to have accepted the view of the Court of Session.

⁸⁷ There was in this case a failed attempt to argue, on the basis of English authorities, that delivery was not required at all.

⁸⁸ (1785) Mor 14200 at 14201.

⁸⁹ (1786) Mor 14202.

⁹⁰ (1786) Mor 14202 at 14203.

⁹¹ (1859) 22 D 208.

by a third party. When the warehousekeeper released the goods to the transferee without the transferor's consent, the transferor sought damages.

Strictly, this case is not direct authority on the question of whether the marking of goods is sufficient for delivery. The *ratio* of the decision was that the contract between the transferor and the custodian was one of deposit,⁹² which is a contract 'to hold, and not to deliver'.⁹³ In fact, even if the marking had been sufficient to transfer ownership, this would still not have entitled the custodian to hand over the goods to the transferee. The custodian's contract was with the transferor, and to hand over the goods to anyone else without the transferor's consent would have represented a breach of that contract.⁹⁴

Nonetheless, there is comment in this case on the purpose of the marking of goods, which is said to be identification.⁹⁵ This is, in effect, the same reasoning as that of *Labeo*, reported with approval by Ulpian,⁹⁶ and the South African case *Botha v Mazeka*.⁹⁷ The decision is therefore supportive of a conclusion that this form of symbolical delivery is ineffective.

(c) Possession by writing. By far the most common form of alleged symbolical acquisition of possession that has been considered has been the written document. In *Arbuthnott v Paterson*,⁹⁸ a number of tenants were under an obligation to deliver grain to their landlord. They were instructed instead to deliver the grain to the landlord's granary for a third party. When the third party became insolvent before payment it was held that neither acceptance of the instruction nor delivery to the granary was enough for delivery to the third party.

Arbuthnott v Paterson was a fairly weak case for recognition of symbolical delivery, though as noted above it was treated as such by Hume. After all, the

⁹² Presumably the custodian here received payment for the custody. As Erskine (*Inst.* 3,1,26) and Bell (*Principles*, s 210) point out, the contract of deposit is properly gratuitous. However, this does not appear to affect the proper outcome of the case.

⁹³ (1859) 22 D 208, 211 (Lord Justice-Clerk).

⁹⁴ Erskine, *Inst.* 3,1,27. Although Erskine is talking here specifically about deposit, the point is the general one that one holding on another's behalf may not question that other's title: *Gelot v Stewart* (1871) 9 M 957, 960 (Lord Neaves).

⁹⁵ (1859) 22 D 208, 211 (Lord Justice-Clerk).

⁹⁶ D.18.6.1.2.

⁹⁷ 1981 (3) SA 191.

⁹⁸ (1785) Mor 14220.

document was delivered, not to the transferee, but to the transferor. Perhaps this would be better seen as an intimation of an assignation to the third party of the landlord's right to delivery of the grain.

There are, however, cases where the role of the document as an attempted symbol of possession is clearer. In *Thomson v Chirnside*,⁹⁹ a conveyance of moveables in this way was held ineffective where the transferor retained possession. In *Anderson v Anderson's Tr*,¹⁰⁰ there was a written conveyance by a husband to his wife of the household furnishings, ostensibly in return for previous payments made by the wife to the husband from her own income. On the husband's insolvency shortly afterwards, it was sought to include the furnishings in the husband's bankrupt estate. The court held that the furnishings could be so included. Unfortunately, however, the case has no clear *ratio decidendi*: of the four judges considering the matter in the Inner House, two (Lords Young and Rutherford Clark) thought that the transaction between the spouses was not *bona fide* and so no effect should be given to it. The other two judges (the Lord Justice-Clerk and Lord Trayner) held that the case fell within section 1(4) of the Married Women's Property Act 1881, in terms of which property that the wife had 'lent or entrusted to the husband' was available to the husband's creditors. It does seem probable, though, that there was some element of question of the spouses' *bona fides* even with the latter two judges, given that the 1881 Act appears in other cases to have been interpreted fairly restrictively, and effect given to conveyances between spouses even where they have continued to share use of the property in the same way as before. Thus, in *Adam v Adam's Trustees*,¹⁰¹ the 1881 Act was held not to apply where the furniture had been owned by the wife before the marriage. In *Mitchell's Trustees v Gladstone*,¹⁰² there was a conveyance of household furnishings by a husband to his creditors, who then conveyed to marriage trustees for the wife. Even though the furnishings remained in the house as before, on the husband's once again falling into insolvency it was held that there had been good delivery, possession being held by the marriage trustees through the wife. Unlike in *Anderson*, in these two cases there was no attempt to

⁹⁹ (1558) Mor 827.

¹⁰⁰ (1892) 19 R 684.

¹⁰¹ (1894) 21 R 676, 679.

¹⁰² (1894) 21 R 586.

convey property with the intention to defeat creditors. For present purposes, however, the point is that the written conveyance in *Anderson* did not cure the problems that existed with the transaction. *Anderson* was explained by Lord Young in *Adam v Adam's Trs* as being a case of symbolical delivery: 'No change had been made in the possession of the furniture; there was nothing but the document to shew that the furniture had become the property of the wife'. This was a 'sale on paper' only. Accordingly, effect could not be given to it.

As noted, in *Anderson* the issue arose that the purpose of the symbolical delivery was to defeat the transferor's creditors by giving title to the transferor's wife. It is, of course, the case that a debtor's power to prefer one creditor to the body of creditors is restricted.¹⁰³ This seems to have been the issue in *Anderson* distinguishing it from other cases of conveyance by one spouse to another of items within the matrimonial home. However, it appears that recognition will not be given to symbolical delivery of this kind, even where the transaction would otherwise be legitimate as a means of giving preference to a particular creditor. Thus, in *Stiven v Scott & Simson*,¹⁰⁴ delivery was made of invoices for goods in respect of apparent sales, but this was in fact an attempt to create a security over these goods for accommodation bills drawn on the 'buyers' by the 'sellers'. The goods remained in the latter's premises. This was held not to be valid delivery for the creation of a pledge.

In *Fraser v Frisby*,¹⁰⁵ an attempt was made to give a creditor security for debt, by the making of inventories of goods which, however, were left in the custody of the debtor. This was held insufficient for the creation of a security excluding other creditors.

Again, *Carse v Halyburton*,¹⁰⁶ the delivery of instruments of possession was held to be insufficient for delivery where custody was retained by the transferor. On the defender's arguments, the purpose of this arrangement was to give the defender security for debts owed to him by the transferor. The pursuer, a creditor of the transferor attempting to poind the goods, argued that the symbolical delivery was merely a device to defraud the transferor's creditors, but even were that not the case

¹⁰³ For the current law, see Bankruptcy (Scotland) Act 1985, ss 34 and 36, respectively restricting gratuitous alienations and unfair preferences by insolvent persons.

¹⁰⁴ (1871) 9 M 923.

¹⁰⁵ (1830) 8 S 982.

¹⁰⁶ (1714) Mor 9125.

there was no effective delivery. The reports of the case¹⁰⁷ appear to suggest that it was this lack of delivery that the court founded on in reaching its decision.

Thus, it does not appear that the difficulty with cases of this kind is the desire not to allow an unfair preference to be given to particular creditors, for it is disallowed even where other forms of delivery would be recognised as effective. The problem is the shortcomings of written documents as a method of giving possession. Indeed, symbolical delivery of this type has been held insufficient to give effect to a trust deed for creditors, a device intended to protect the interests of the body of creditors from being prejudiced by the claims of individual creditors. Thus, in *McCaul's Trs v Thomson*,¹⁰⁸ it was held that a trust deed for behoof of creditors did not constitute delivery of household furniture to the trustee,¹⁰⁹ so likewise a third party taking an assignation from the trustee acquired no title where the property was left in the bankrupt's hands. Accordingly, a grant of a trust deed for creditors, not followed by delivery of the goods, will not defeat the landlord's hypothec in respect of rent arrears subsequently arising,¹¹⁰ subsequent sequestration of the grantor's estates,¹¹¹ or a subsequent pointing.¹¹² Again, In *Grant's Tr v Grant*,¹¹³ an inventory was made of goods and an attempt made to give effect to it through an assignation to a trustee for behoof of creditors. This was held to be ineffective where the goods were left in the debtor's custody.

The motivation for refusal to recognise symbolical acquisition of possession by writing does not, therefore, appear to arise from the need to protect the body of creditors from a sacrifice of their interests to that of an individual creditor. Indeed, the courts have refused to give effect to such attempts at delivery even where no issue of insolvency is present. In *Hewat's Tr v Smith*,¹¹⁴ it was held that a written conveyance to marriage trustees of the matrimonial home and its contents did not

¹⁰⁷ Morison's Dictionary gives reports by both Dalrymple and Forbes.

¹⁰⁸ (1883) 10 R 1064.

¹⁰⁹ This appears still to be the law, there being nothing in the current legislation (Bankruptcy (Scotland) Act 1985, sch 5) providing the contrary. See W W McBryde, *Bankruptcy* (2nd edn, W Green/Sweet & Maxwell 1995), para 20-40.

¹¹⁰ *Gibson v May* (1841) 3 D 974.

¹¹¹ *Mess v Sime's Tr* (1898) 1 F (HL) 22. In this case, some stress was placed on the fact that the deed was not a trust deed in normal form. Instead, it was a form of hybrid appointment as both trustee and factor for the grantor. Such possession as had taken place was held to be in the latter capacity.

¹¹² *Spratt's Tr v Wells* (1906) 14 SLT 299.

¹¹³ (1829) 7 S 420.

¹¹⁴ (1892) 19 R 403.

bind a third party taking delivery of a number of pictures as security without knowledge of the prior agreement.

There appears, therefore, to be strong authority denying effect to written documents as a means of giving possession. Even where the transaction is otherwise a legitimate one, the need for clear physical acts, demonstrating possession, is seen as indispensable. This position may be justified, as Brown suggests,¹¹⁵ by the need to protect creditors and the general public from a wrongful appearance of ownership. However, it is clear that it is not merely where there is potential prejudice to creditors that delivery of this kind will be denied effect.

(2) Cases apparently allowing symbolical acquisition of possession

There is, then, clear authority for the rejection of the idea that one may acquire possession by symbolical means. This is perhaps surprising given the support given to the idea by certain earlier writers. However, cases also exist where some apparent receptiveness to symbolical delivery may be found. As we shall see, though, the strength of this receptiveness is not always entirely clear. We shall consider these cases under the same headings as were used for the cases rejecting symbolical acquisition.

(a) Possession by giving of sample. In *Grant v Smith*,¹¹⁶ there was 'a sort of symbolical delivery' of growing corns. It is not made clear in the report in Morison's Dictionary what form this symbolical delivery took, but the most obvious way of accomplishing this is to give a handful of corns as a symbol for the whole crop. Carey Miller assumes that this is what occurred, and sees this case as an instance of symbolical delivery.¹¹⁷ However, as Gordon points out, the report of the case states that 'servants were appointed to look after' the crops.¹¹⁸ Accordingly, while this case could be seen as a case of symbolical delivery by delivery of a sample, the case is sufficiently explained as a taking of possession by placing a guard on the property.

¹¹⁵ Brown (n 21) xix n. 2.

¹¹⁶ (1758) Mor 9561.

¹¹⁷ *Corporeal Moveables* 169.

¹¹⁸ *Traditio* 217.

This is a method of taking possession that was recognised in Roman law¹¹⁹ and, given that this does give effective control, there is no reason to doubt its effectiveness in modern law. Accordingly, this case is at best a weak authority for the acceptability of this form of symbolical delivery.

The only other case that appears to give support to the idea is *Gauld v Middleton*,¹²⁰ discussed in chapter 5. In this case, the sheriff observed that, in the case of a retiring judge gifting his collection of Session Cases to his son, living in the same house:

[T]hat would seem to me to require no delivery as the head of the household is the natural custodian of his son's books, but it would no doubt be desirable that the father should make symbolical delivery of 1 Shaw and 1958 *Session Cases*.¹²¹

From the cases considered in this chapter on acquisition of possession by delivery of writings, it may be doubted whether it is in fact so easy to make a gift to someone living within the same household.¹²² However, given the sheriff's view that delivery can be made, in effect, by intention alone in such a case, it appears that he does not intend the symbolical delivery to have any additional effect other than, presumably, making clear the parties' intentions. If interpreted to the contrary, as giving effect to the symbolical delivery, this comment runs into the difficulty of contradicting *Hill v Buchanan*,¹²³ considered above. In any case, the comment is *obiter* and made without full consideration of authority, and so does not provide a firm basis for recognition of acquisition of possession in this way.

(b) Possession by marking. It is in the case of possession by marking the goods or in some way separating them within the custodian's stock that most case law favourable to symbolical acquisition of possession is to be found.

¹¹⁹ Javolenus, D.41.2.51.

¹²⁰ 1959 SLT (Sh Ct) 61.

¹²¹ 1959 SLT (Sh Ct) 61, 63. Given the date of this case, this is to say the first and last volumes of the *Session Cases*.

¹²² See also *Johnston v Sprott* (1814) Hume 448, discussed in chapter 3, which seems inconsistent with the view taken by the sheriff that delivery may be made to an employee of items used in the course of employment without any outward change.

¹²³ (1785) Mor 14200, affd (1786) 3 Pat 47. No opinions are reported as having been given by the House of Lords, and so it must be taken to have accepted the view of the Court of Session.

In *Main v Maxwell*,¹²⁴ the weighing and marking of goods was held sufficient. However, in that case the goods were left in the public weigh-house, where they were weighed and marked in the presence of the buyer's wife. This is not, therefore, a clear case of possession by marking alone.

*Eadie v Young*¹²⁵ concerned the conveyance of horses and carts. The carts were marked with the transferee's name. However, the conclusion that delivery had occurred was supported by two additional factors. The first of these was that the transferee had in fact taken momentary custody of the property before returning it to the transferor. Secondly, the property was returned to the transferor on the basis of a genuine contract of hire. This case, therefore, is perhaps better interpreted as a case of *constitutum possessorium*, the role of the marking of the goods being more to demonstrate the genuineness of the transaction than to give possession in and of itself.¹²⁶ The same approach was taken in *Orr's Trustee v Tullis*,¹²⁷ where it was said that:

[T]he marking of the initials of Tullis on the articles, although of little use as symbolical delivery, is a fact of importance as indicating the intention of the parties.¹²⁸

In *Lang v Bruce*,¹²⁹ after sale of livestock at auction, the animals were driven back to and left on the seller's land. While the animals remained on the seller's land, the seller became insolvent. After the seller declared his insolvency, but before sequestration, the buyer attempted to remove the animals from the seller's land, but was prevented from doing so by a committee of the seller's creditors, acting on their own authority without the consent of the seller. A court of fourteen judges was evenly divided on the question of whether there had been delivery to the seller, a decision only being made possible by the agreement of one judge (Lord Craigie) not to vote. What then became the majority opinion (Lords Glenlee, Cringletie, Fullerton

¹²⁴ (1710) Mor 9124.

¹²⁵ (1815) Hume 705.

¹²⁶ Certainly, Gordon (Reid, *Property*, para 623 n 5 (Gordon)) gives this as a case of *constitutum possessorium*. Carey Miller (*Corporeal Moveables* 166), however, considers the symbolical acts also to have weighed in favour of a decision that delivery had occurred.

¹²⁷ (1870) 8 M 936.

¹²⁸ (1870) 8 M 936, 947 (Lord Justice-Clerk).

¹²⁹ (1832) 10 S 777.

and Moncrieff, with whom the Lord President and Lords Balgray and Gillies concurred) was to the effect that, as the buyer had only been prevented from taking possession of the animals by the unlawful interference of the creditors, the buyer was to be treated as having taken possession. The majority opinion therefore was that there had been no delivery but, owing to a reluctance to see the creditors profit by their own unlawful act, the buyer was to be treated as if he had taken possession.

It is the minority opinion of the Lord Justice-Clerk and Lords Meadowbank, Corehouse, Medwyn and Newton that is of interest for present purposes. Their view was that there had been no delivery in this case. However, they suggest that there might have been delivery if the animals had been marked by the buyer's mark. This would have been 'a symbolical taking of possession', meaning by this that the property 'remains [with the seller], not as his property, but as a deposit, or the subject of location'.¹³⁰

This then appears to give some support to the idea that marking of goods may be effective as a form of symbolical delivery, and on that basis Carey Miller is certainly prepared to accept the possibility that marking 'of an enduring nature' may be enough.¹³¹ However, there are three points to bear in mind. The first is that this is a minority opinion, albeit one acceded to by six judges including the Lord Justice-Clerk. The majority did not consider this point. Secondly, the comment is plainly an *obiter dictum*, and one put forward tentatively at that. Thirdly, the final quoted words appear to assume that the seller's continued holding is on some new basis, those specifically mentioned being deposit or hire. In other words, the marking is not treated as effective in and of itself, but as evidence of this new basis for the seller's continued custody, as with *Eadie v Young*. In other words, the suggestion appears to be that marking only operates as part of a *constitutum possessorium*, and perhaps would be ineffective if the goods were left with the transferor out of mere convenience.

Another possible example of recognition of this form of symbolical delivery is *Gibson v Forbes*,¹³² yet even this case is not without difficulty.

¹³⁰ (1832) 10 S 777, 790.

¹³¹ Carey Miller, *Corporeal Moveables*, para 8.17.

¹³² (1833) 11 S 916.

The facts in *Gibson* were as follows. The defender had agreed to buy a quantity of wine from a firm of wine merchants. The wine was left on the sellers' premises. However, the wine was stored separately from the sellers' general stock, and it was noted in the sellers' stock records as belonging to the defender. Several years later, within the sixty day period before sequestration, with the wine still on their premises, the sellers without instructions forwarded the wine to the defender.

The pursuer in *Gibson* was the sellers' trustee in sequestration, and had to succeed on two issues. First, the pursuer had to show that the wine was not delivered to the defender while it remained in the sellers' premises. Second, it was necessary to show that, when delivery was made, this represented a fraud on the body of creditors, and was accordingly reducible in terms of the Act 1696, c. 5, then in force, as being an unfair preference given to one creditor within the six months leading up to sequestration. Failure on either count would result in the defender being held to have an unchallengeable title.

The court held by a margin of nine to four in favour of the defender, but divided differently on the two questions. On the second issue, concerned with the 1696 Act, six judges¹³³ were in favour of the defender and four¹³⁴ against. On the first issue, with which we are concerned here, five judges expressed opinions on each side.¹³⁵ The remaining three judges¹³⁶ merely concurred in holding that the defender was entitled to be assoilzied, without giving detailed opinions. There is therefore no indication of the basis on which these three judges reached their view. It is entirely possible, therefore, that a majority was of the view that there was no delivery while the goods remained in the sellers' premises.

If it is assumed that the view of the majority was that the wine was delivered while it remained in the sellers' premises, the decision is unsatisfactory. The joint opinion of the five judges expressing this view proceeds on the basis that the wine was left 'for the convenience and accommodation' of the defender.¹³⁷ However, if delivery is to be a requirement, Lord Mackenzie's view is surely the better one that

¹³³ The Lord Justice-Clerk and Lords Glenlee, Cringletie, Meadowbank, Moncrieff and Fullerton.

¹³⁴ Lords Mackenzie, Medwyn, Corehouse and Craigie.

¹³⁵ The votes were the same as on the second issue, except that here Lord Fullerton was with the pursuer.

¹³⁶ The Lord President and Lords Balgray and Gillies.

¹³⁷ (1833) 11 S 916, 923.

the law cannot 'bend to any difficulty of giving delivery'.¹³⁸ The majority view threatens to destroy delivery for all practical purposes. Perhaps the majority view is influenced by an understandable reluctance to see the defender lose the benefit of an actual possession obtained, in complete good faith, and paid for several years previous to the sellers' financial difficulties. Certainly, the Lord Ordinary notes the point.¹³⁹ Be that as it may, though, the important point for present purposes is that there is no indication in the majority opinion that it is based on a symbolical delivery by marking the goods out as belonging to the defender.

All in all, then, the basis in the case law for recognition of symbolical delivery of this kind appears exceedingly slight.

(c) Possession by writing. As with the other two possible forms of symbolical delivery considered here, the idea that the delivery of a written document can constitute an effective symbolical delivery, as that term has been defined for the purposes of this chapter, has not met with wide acceptance. In *Thompson v Aktien Gesellschaft für Glasindustrie*,¹⁴⁰ the pursuer raised an action against the defender for wrongfully using diligence against her property for her husband's debts. The property in question was the furnishings of the house occupied by both. The furnishings had previously belonged to the husband, but he had purported to convey them to her by means of a written document. However, the issue of the validity of the conveyance itself was not discussed. Instead, the Lord Ordinary focussed on whether the gift to the wife was valid to the effect of excluding creditors of the husband, even though, under the law as it then stood, the gift was revocable as a *donatio inter virum et uxorem*. However, in holding that the gift did have this effect, the Lord Ordinary is evidently assuming that there has been effective delivery.

As the issue was not directly addressed, it is difficult to judge the significance of this decision. The Lord Ordinary could have founded on the fact that the matrimonial home was occupied on the basis of a lease in favour of the wife, although the rent was paid from the husband's resources. It has been held previously that, where occupation of premises is shared, the contents are presumed to be

¹³⁸ (1833) 11 S 916, 925-926.

¹³⁹ (1833) 11 S 916, 920.

¹⁴⁰ 1917 2 SLT 266.

possessed by the party with the right to possess the premises.¹⁴¹ However, this was not done in this case. Instead, the Lord Ordinary relied on the fact that the husband was solvent at the time of making the gift, even though it appeared that the gift was a device to shield assets from potential creditors. Accordingly, the Lord Ordinary took the view that the gift was valid. To make the jump from this proposition to one holding that there was then valid delivery of the goods is perhaps to proceed on a common-sense view that, where there is a gift between spouses of items within the matrimonial home, a clear change of physical control is hardly to be expected. Yet, as the Lord Ordinary observes, it is hardly to be contended that a husband cannot make a gift to his wife. In such a case, on this view, delivery will practically be by intention alone, in *Thompson* this intention being evidenced by the written document. On this view of *Thompson*, therefore, the role of the written document is not to serve as a substitute for the physical element of possession. Accordingly, the decision gives little support to the idea that possession may be taken by the delivery of a document representing the property, especially when it is read alongside other decisions which do consider the matter directly.

F. CONCLUSION

Of the three forms of possible symbolical delivery that have been identified, rejection is clearest in the case of possession by writing. None of the institutional writers says that it is an acceptable means of acquiring possession and it is all but universally rejected in the case law.

The other two forms, possession by marking and possession by sample, are less easily rejected, given that they have some institutional support and also apparent support from case law, although, as we have seen, these cases can largely be explained on other grounds. Considered on the basis of a general law of possession, however, the acceptability of possession by sample must be questionable. The party receiving the sample has done nothing to exercise control over the property from which the sample has been taken (as opposed to control over the sample itself), nor

¹⁴¹ *Breichan v Muirhead* (1810) Hume 215; *Macdougall v Whitelaw* (1840) 2 D 500. For an English case on the same point, see *In re Cohen, deceased* [1953] Ch 88.

can the giving of a sample even help to identify the extent of the property to be conveyed, given that that property is still in the custody of the transferor. In short, to recognise the taking of a sample as being sufficient in itself to give possession is to abolish the physical element of possession. Such could only ever operate as an exception to the requirement for physical control. There may indeed be a case for making such an exception - for example, with growing crops, which obviously cannot be delivered until harvest - but there is little foundation for holding that such an exception presently exists. There is in any case the opposing argument that the point of requiring delivery is to ensure that ownership of corporeal moveables is as clear as possible, and the price that must be paid for this clarity is that sometimes the effectiveness of an attempted delivery will be denied when that standard cannot be met.

The strongest case for the recognition of symbolical delivery is with the marking of goods. This form is the one that finds the strongest support in the case law, and indeed if the goods have been clearly marked as belonging to a particular person there is little scope for anyone to be misled by the fact of those goods being in the custody of someone else. This is particularly the case with the marking of animals in circumstances where such markings are widely accepted as denoting ownership of the animal. This is an issue that we shall meet again in chapter 6, which is concerned with possession of animals. For the moment, however, we may note that the case law on the point has been divided. However, given that the cases supportive of this form of acquisition of possession have been open to interpretation on grounds other than symbolical delivery, the balance of the argument appears to be in favour of a conclusion that symbolical delivery of this kind is insufficient for the giving of possession.

7 POSSESSION OF ANIMALS

A. INTRODUCTION

(1) Significance of possession of animals

Animals are in their nature different from other types of property. They can and do act of their own volition, in ways that may be unpredictable. An animal may wander or escape from the place it is kept. It need hardly be said that most types of property stay where they are left, unless they are moved by some outside cause. Animals being therefore more difficult to control, the question of how an animal is possessed gives rise to special issues. The matter is further complicated by the fact that possession of animals has consequences beyond the possessory remedies.

(2) *Occupatio*

Greatest attention in the sources has been given to the acquisition and maintenance of ownership of wild animals by possession, through the doctrine of *occupatio*.

(3) Other applications of possession of animals

The possession of animals has also had consequences other than the acquisition of ownership. For example, the Winter Herding Act 1686¹ imposed a penalty for trespass of livestock on private land, and allowed the owner of that land to take possession of the animals as security for payment of the penalty. Possession of wild animals may also in certain circumstances give rise to criminal consequences.²

¹ Now repealed: Animals (Scotland) Act 1987, sch 1.

² See eg Wildlife and Countryside Act 1981, s 11I(1)(a).

(4) Methods of possessing animals

The most obvious way of possessing an animal is the imposition of some sort of physical restraint on it, to prevent its coming and going as it pleases. However, as we shall see, the law also holds possession to continue when an animal has the habit of returning. Marking or branding animals in some way or other is also common, so it will be necessary to consider the efficacy of that with regard to possession. Finally, it will be necessary to consider how possession is acquired when an animal is pursued by one wishing to seize it.

B. POSSESSION BY PHYSICAL RESTRAINT

One can distinguish two ways in which an animal can be restrained. The first is direct physical restraint, as where the animal is chained up or is caught in a trap. The second is indirect restraint, where the animal itself is not directly restrained, but its freedom to roam is restricted by means of a fence or a cage, or some other type of enclosure. Fish kept in an enclosed pond or a fish farm also fall into this category. Alternatively, a legal system could hold that the animal's mere presence on a particular person's land gave that person sufficient control to be considered owner.

(1) Historical and comparative approaches

(a) Roman law. In Roman law, it is clear that a person acquired no right just from an animal being on his land.³ A landowner was entitled to prevent anyone hunting or fishing on his land,⁴ and would possibly be able to sustain an action for *iniuria* against such a trespasser,⁵ but this was on the basis of the landowner's rights in his land, not on any right in the wild animals on that land. Wild animals at large were not owned, nor were they protected in themselves either by private law, as we have seen, or by any public law restrictions on the taking of game or fish.⁶

³ Gaius, D.41.1.5.2, 41.1.3.1; J.2.1.14. For discussion, see Thomas 167; Nicholas 131.

⁴ Ulpian, D.47.10.13.7.

⁵ Ulpian, D.47.10.13.7.

⁶ F Schulz, *Classical Roman Law* (Clarendon Press 1951) 361.

Accordingly, some form of control of the animal had to be exercised before it could be said to be owned. In Roman law, both direct and indirect restraint, as defined above, were recognised as effective.

On direct restraint, a passage in the Digest from Proculus is the main authority. It is worth quoting in full:

A wild boar fell into a trap which you had set for such a purpose, and when he was caught in it, I released him and carried him off... Let us consider whether it be relevant that I set the trap on private land or on public land and, if on private land, whether it was my own or another's and, if another's, whether I set the trap with the owner's permission or without it; furthermore, let us consider whether the boar was so caught that he could not extricate himself or could do so only by lengthy struggling. Still I think that the cardinal rule is that if he has come into my power, the boar has become mine. And if you release my boar into his natural state of freedom and thereby he ceased to be mine, I should be given an *actio in factum*.⁷

As will be seen, Proculus begins by raising a number of questions, on the one hand about the land where the trap was set, and on the other about the animal's ability to escape. Buckland takes from the opening questions that the matter 'seems to have depended somewhat on the position of the trap'.⁸ Voet argues to the contrary:

It is indeed true that all those distinctions and others in addition to them are put forward in that passage. Still it is not equally to be granted that they are approved in the same passage. Nay rather are they obviously enough discountenanced.⁹

It appears that the location of the snare must be relevant to some extent, if *occupatio* is based on possession. If an animal is caught in my snare, but on land to which guards prevent my access, I can hardly be said to possess that animal. It is not in my control. Equally, however, it is clear that Proculus considers the location of the snare not to be conclusive. It is merely part of the factual background to the question of whether the animal has come into my power. In principle, it seems clear that, if a poacher sets a snare on private land, he possesses any animal caught in that snare as long as he can be said to possess the snare itself. Certainly, if for some reason he is

⁷ Proculus, D.41.1.55.

⁸ Buckland 206.

⁹ Voet, 41,1,4.

unable to recover it, he may be held no longer to possess. If the snare were to be left for a lengthy period, the question would perhaps become more difficult, in that the possessor might be judged to have abandoned possession. However, although Gaius implies that possession may be lost by neglect,¹⁰ this will not be too readily assumed. Thus, one may continue to possess items one has buried for safekeeping, even on another's ground, even for a lengthy period.¹¹ As for a snare left on another's land, the conclusion would seem to be that abandonment would only be presumed following a period of neglect of such length that it clearly suggests a loss of intention to return.¹²

Likewise, the possibility of escape cannot be conclusive. Indeed, it will not always be certain at a given moment whether the animal will be able to escape. As Voet says, discussing this passage:

[S]ome sort of disentanglement from the snare could happen through one effort and twist, and an entanglement which could never be undone through another effort and twist.¹³

Instead, the issue seems to be whether, at any given moment, the animal is so entangled that it can be said to have lost its natural liberty.

In Roman law, wild animals could also be possessed through indirect restraint, ie through keeping the animal in some kind of enclosure, such as a pen.¹⁴ The same rule applied to bees in a hive,¹⁵ birds in a cage¹⁶ and fish in a tank.¹⁷ The inclusion of bees here represents a slight qualification on the rule, in that bees must be allowed to come and go to collect pollen and nectar. It may be taken, therefore, that the enclosure need not necessarily prevent all escape, if the nature of the animal is such as to render that inappropriate. While the bee is in the hive, it may be said to be controlled: as we have seen in earlier chapters, the required level of control is not high, and the possessor of the hive can in any case prevent escape by closing the

¹⁰ D.41.3.37.1.

¹¹ Papinian, D.41.2.44pr.

¹² This appears also to be the position in modern law: Stair, *Inst.* 2,1,20.

¹³ Voet, 41,1,4.

¹⁴ Paul, D.41.2.3.14.

¹⁵ Gaius, D.41.1.5.2.

¹⁶ Paul, D.41.2.3.15.

¹⁷ Paul, D.41.2.3.14.

entrance to the hive. As we shall see, while the bee is out of the hive it is in any case possessed as long as it has the habit of returning.

There is a difficulty, however, with large enclosures. Paul, reporting the opinion of the younger Nerva, observes:

[W]e possess those wild animals which we have penned up or the fish which we have placed in tanks. But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty.¹⁸

Lord Rodger notes¹⁹ that, in Nerva's account, a distinction is made in the language between animals in man-made enclosures, such as fishponds and pens, and animals in fenced woods or natural bodies of water. The animals in the former were placed there, and so were presumably possessed at least at one time. In the latter case, however, the animals were there all along – they have been 'left in their natural state of liberty'. In either case, however, as is made clear in the Digest passage, the point is control or lack thereof. As Lord Rodger says:

An owner might have difficulty finding, far less taking, a fish or animal in these circumstances.²⁰

The rule appears to be, therefore, that an animal in an enclosure is possessed only if the enclosure is such as to impose sufficient restriction on the animal's freedom that it can be said to have passed out of its natural state of liberty, and into the control of the possessor of the enclosure itself. There is insufficient evidence in the texts to justify the view that the question depends on whether the animal has been placed in the enclosure or whether an existing habitat has been enclosed.

Before leaving this point, it is appropriate to take note of two Digest passages, both taken from Ulpian, that may at first sight appear to have some relevance to the question. In the first,²¹ Ulpian notes that 'fish which are in a pool are not part of a building or a farm'. However, the context makes it clear that he is

¹⁸ D.41.2.3.14.

¹⁹ Lord Rodger of Earlsferry, 'Stealing Fish' in RF Hunter (ed), *Justice and Crime: Essays in Honour of the Right Honourable the Lord Emslie, MBE, PC, LLD, FRSE* (T & T Clark 1993) 8-10.

²⁰ *ibid* 10.

²¹ D.19.1.15.

talking, not about the ownership of the fish, but about the parts of the building or farm that are carried by a sale, as Pomponius' continuation – 'no more than the chickens or other animals on a farm'²² – makes clear. In the second,²³ Ulpian notes that 'I can prohibit anyone from fishing in a lake which I own'. However, it is clear, again, from the context, that he is concerned with the *actio iniuriarum*. In other words, he is concerned with trespass to the land, not ownership of the fish.

(b) France. Pre-Codification French law took a very restrictive approach to the acquisition of wild animals by *occupatio*, reserving hunting rights to the Crown and Crown grantees²⁴ and excluding acquisition by those without such rights.²⁵ The French Civil Code appears to follow this in leaving no role for acquisition by *occupatio*:

*Les biens qui n'ont pas de maître appartiennent à l'État.*²⁶

Although this appears to exclude *occupatio*, modern French law does in fact recognise it. The basis for this is that the original draft Code contained an express exclusion of *occupatio*. However, following consultation, the wording quoted above was used instead. Therefore, it is taken that *occupatio* is intended to be permitted,²⁷ in effect ignoring the actual words of the Code. Clearly, the current wording is still seen as unsatisfactory, if that was the intention.²⁸ It is notable that the Louisiana Civil Code, although influenced by French law, has expressly permitted *occupatio* since its first manifestation, following closely the position of Roman law.²⁹

²² D.19.1.16.

²³ D.47.10.13.7.

²⁴ Pothier, *Propriété*, paras 27-40.

²⁵ Domat, *Civil Law in its Natural Order*, Pt 1 3,7,2,8.

²⁶ Code Civil, art 713 ('Things which have no owner pertain to the State'). See also art 539, in similar terms.

²⁷ Planiol, vol 1 para 2565; Bufnoir, *Propriété et Contrat* 19.

²⁸ Planiol, vol 1 para 2565 suggests that the wording is still 'perhaps too general'. Carbonnier, para 902 suggests that art 713 ought to be read to restrict its scope to land.

²⁹ DV Snyder, 'Possession: A Brief for Louisiana's Rights of Succession to the Legacy of Roman Law' (1991-1992) 66 Tul L Rev 1853 at 1858-68, especially the textual comparison at 1858-1861 of the 1808 Louisiana Civil Code and the Justinian's *Institutes*.

Having allowed acquisition by *occupatio*, if only by implication, the *Code Civil* provides that hunting and fishing are to be regulated by special legal rules.³⁰ However, these special rules say nothing about the acquisition of ownership,³¹ and there is little in the *Code Civil* itself on the matter, so it is largely left to the courts to develop the relevant rules.³²

Opinion is divided as to the rights of a landowner over the animals on his land. Planiol allows to the hunter ownership of game that he has taken,³³ even where he is a trespasser or the taking is otherwise forbidden by law.³⁴ However, where confiscation is imposed by the law as a penalty, Planiol argues that ownership is not acquired.³⁵ He describes and responds to the contrary argument:

[S]uch a provision established confiscation, that is to say a penalty, and that it assumes the previous acquisition of the game. The concept is subtle. Is not the non-acquisition of the game by the hunter the practical outcome?³⁶

A response to this would be that there is a clear practical difference if the trespasser has conveyed the game to a third party, or has become insolvent. Planiol also notes a provision in legislation of 1829 to the effect that one who fishes illegally should pay the value of the fish caught to the person with fishing rights:

Such payment cannot be reconciled with the right of occupancy, which is necessarily gratuitous.³⁷

In the case of confiscation as a penalty, Bufnoir responds that confiscation:

*...ne se produira pas au profit du propriétaire. C'est donc bien la preuve que le gibier avait été acquis par voie d'occupation.*³⁸

³⁰ *Code Civil*, art 715.

³¹ Planiol, vol 1 para 2577; Carbonnier, para 903; Bufnoir, *Propriété et Contrat* 20; Terré & Simler, para 403.

³² Planiol, vol 1 para 2577; Carbonnier, para 903.

³³ Planiol, vol 1 para 2569.

³⁴ *Ibid.* See also Terré & Simler, para 402.

³⁵ Planiol, vol 1 para 2570.

³⁶ *ibid.*

³⁷ *ibid.*, para. 2574.

³⁸ Bufnoir, *Propriété et contrat* 21 ('does not profit the owner [ie the person entitled to take the animal]. It is this therefore that proves that the game had been acquired on the basis of occupation').

One could argue along similar lines in the case of compulsory compensation to the holder of the fishing rights. At any event, no restriction applies to fish caught at sea.³⁹

It does not appear from this that the owner of land has any immediate right to wild animals on his land by sole virtue of their presence there. Some degree of restraint will be required. Planiol says that:

Fishes in ponds or canals whose waters are private property, are not animals without a master.⁴⁰

Nothing is said here about the significance of the size of the enclosure or the level of restraint necessary. Reference to canals, however, suggests that very little restraint is required indeed. Presumably, on this basis, it will be enough to possess the land on which the body of water lies.

(c) Roman-Dutch law. As with Roman law, Roman-Dutch law gave no-one ownership of wild animals for the mere fact of their presence on the land.⁴¹ Accordingly, in principle one could acquire ownership even if trespassing.⁴² However, the general position was complicated by the existence of extensive restrictions on the acquisition of certain animals to particular types of person or to certain times or methods of taking animals,⁴³ and the rule appears to have been that ownership was not acquired if one was acting in breach of such a restriction.⁴⁴

Voet confirms that, in Roman-Dutch law, direct restraint is legally effective, and a snared wild animal is possessed.⁴⁵ This is the case even if escape is theoretically possible. After all, escape is always at least theoretically possible, even if highly unlikely. The point is that, while caught in the snare, the animal is in the power of the person who set the trap. As Voet says:

³⁹ Planiol, vol 1 para 2573.

⁴⁰ *ibid*, para 2575.

⁴¹ Grotius, 2,4,15.

⁴² Grotius, 2,4,9; Voet, 41,1,4; Huber, 2,4,26.

⁴³ For the detail of these restrictions, see Grotius, 2,4,7; 2,4,10-12; 2,4,19; 2,4,26-30; van Leeuwen, 2,3,1-8; Voet, 41,1,6; Huber, 2,4,3-36.

⁴⁴ Grotius, 2,4,5; Voet, 41,1,7.

⁴⁵ Voet, 41,1,4, referring to Proculus, D.41.1.55, discussed above.

if a bear has actually fled from his owner, or a wild animal shut up in a live park has broken through the fences and escaped in due course, shall we therefore say that before flight the bear was not at all in the power of the taker, or that the wild animal shut up before his escape was not in the possession of the owner of the live park?⁴⁶

The view of Grotius,⁴⁷ that escape must be impossible, accordingly seems contrary to principle.

On indirect restraint, it is again settled that enclosing an animal in a hive,⁴⁸ tank or pool,⁴⁹ warren⁵⁰ or other enclosure⁵¹ as appropriate is effective as a means of retaining possession, and therefore ownership. However, in the case of large enclosures, there is a difference of opinion. Grotius points out that 'fish in a private lake are no less shut in than in a fishpond'.⁵² However, if (as Grotius himself has said⁵³) *occupatio* is based on possession, it must be necessary to show some level of control over the animal. In the case of an individual fish kept in such a large body of water that it can only be found again by chance, any such control appears negligible. Accordingly, the opinion of Voet, that such animals are unowned as having been 'left to their natural freedom',⁵⁴ seems preferable.

In modern South African law too, it is settled that no right in animals on land is acquired solely by virtue of owning that land.⁵⁵ Thus, in *S v Mnomiya*,⁵⁶ it was held not to be theft to take honey made by bees swarming in trees, as the bees were ownerless until hived. Bees, being wild animals, are ownerless until reduced to someone's possession. Their presence on the land was entirely fortuitous, they being still in their natural state. Accordingly, ownership of a wild animal is acquired when it is captured, even if that happens in circumstances where such taking is prohibited, as where an animal is taken by a trespasser.

⁴⁶ *ibid* 41,1,4.

⁴⁷ Grotius, *De Jure Belli ac Pacis*, 2,8,4.

⁴⁸ Grotius, 2,4,15.

⁴⁹ *ibid* 2,4,24.

⁵⁰ *ibid* 2,4,29.

⁵¹ Van Leeuwen, 2,3,1.

⁵² Grotius, *De Jure Belli ac Pacis*, 2,8,2.

⁵³ Grotius, 2,4,1.

⁵⁴ Voet, 41,1,5.

⁵⁵ Van der Merwe, *Law of Things*, para 133; Silberberg & Schoeman 138; CG van der Merwe, 'Original Acquisition' in *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 717.

⁵⁶ 1970 (1) SA 66 (NPD).

Unlike the apparent position in Roman-Dutch law, however, ownership is acquired even where the animal is taken in contravention of legislation on game or fisheries. Thus, in *S v Frost; S v Noah*,⁵⁷ there was legislation prohibiting fishing during particular times of the year. Nonetheless, it was held that the legislation did not prevent the acquisition of ownership. As Steyn J observed in this case, '[i]f the person who captures a wild animal which is *res nullius* does not acquire the ownership of the animal, to whom does it belong?'⁵⁸ To exclude the common law rule, he went on to say:

[O]ne would have to infer that the Legislature intended to reserve to the State (or some other person...) the ownership of the wild animal concerned.

South African law does not appear to make any such inference.

(d) Germany. In pre-codification Germany, as with Rome, the general rule was applied that a landowner had no right, by virtue of that ownership alone, to any wild animals that happened to be on his land.⁵⁹ However, in practice this rule was severely restricted in its application by exclusive rights of hunting and fishing in almost all of Germany. Where such rights existed, ownership of the animal went not to the taker but to the person with the right to take the animal.⁶⁰ This follows Pufendorf, who holds⁶¹ that animals caught by us on another's land are ours, but rejects⁶² the argument that this applies even where taking is forbidden. As reported by Pufendorf, the argument runs:

⁵⁷ 1974 (3) SA 466. See discussion in MD Blecher, 'Law of Property (Including Mortgage and Pledge)' 1974 Ann Surv S African L 204 at 209. See, though, Mostert et al 163, where it is suggested that the decision turns on a point of statutory interpretation. This does not, however, appear to reflect the reasoning of the court in the case in question, which decided only that the legislature could exclude that result if desired.

⁵⁸ 1974 (3) SA 466 at 472.

⁵⁹ Windscheid, vol 1,942.

⁶⁰ *ibid.*

⁶¹ Pufendorf, *De Jure Naturae et Gentium*, 4,6,5.

⁶² *ibid* 4,6,7.

For a prince cannot be called the owner of wild animals before he has seized them, and so a man who has hunted despite a decree to the contrary has not committed theft nor taken away what is in another's possession.⁶³

He however considers it contradictory to say that only princes have the right to hunt, but that others can acquire ownership of what they catch. His view is that 'the hunter himself...has by his capture made the game the property of the prince'.⁶⁴

It is, however, not at all clear that there is any contradiction here. To have the right to take an animal does not imply a right to the animal itself. To say that the taking is forbidden does not imply that taking must be punished by a denial of acquisition of ownership. Indeed, there are other situations in which one can acquire ownership even where there is no right to have the property, such as positive prescription and *specificatio*.

For acquisition by direct restraint of the animal, Pufendorf held that a snare set on my land does not give you possession of a trapped animal, 'as I could have forbidden you entrance when you wished it'.⁶⁵ This, however, must be read in the context of his general view, favouring the landowner over the trespasser. The right of the landowner allows Pufendorf to deny possession to the trespasser. However, this appears contrary to the established principles governing possession, which do not allow resort to consideration of who is actually entitled to possession. Possession is not a question of who has a right to the property, because possessory proceedings cannot determine who has a right to the property. Possession is simply a question of who is in fact in control with the necessary mental element at a given moment. This is not to say that the law is not capable of adjusting the precise physical requirement to meet particular policy objectives, but that is a different issue. In the type of case under consideration here, you could have forbidden me entrance, but you did not, and if I am standing over the animal caught in the snare I set, it is difficult to escape the conclusion that I am in possession of that animal. The policy of the law may be to deny me ownership of the animal, as a trespasser, but possession seems clear.⁶⁶

⁶³ *ibid.* The final seven words are a very loose translation of the Latin *auferre rem alienam*. A more accurate translation would perhaps be '...taken away another's property'.

⁶⁴ *ibid.*

⁶⁵ *ibid* 4,6,9.

⁶⁶ The position in Roman law was certainly to hold possession to have been acquired even though the attempt to acquire ownership had failed. See Paul, D.41.2.3.5: 'on the issue of possession, it is

On indirect restraint, Savigny follows the view of Nerva, discussed above, that wild animals in a park or fish in a lake are not possessed. Their keeper:

...has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them as he wishes.⁶⁷

A distinction is drawn between large and small enclosures, therefore: in the former, there is no guarantee of being able to find any specific animal. This implies a lack of control, and therefore a lack of possession. Pufendorf further supports this position, in opposition to Grotius, on the basis that such animals:

...have not yet been stripped of their natural liberty, even though they have been so limited in their movements that they cannot wander any place they will. For it is one thing to capture an animal, and another to set up an enclosure so that one may be caught more easily.⁶⁸

In other words, enclosing the animal is merely to make it easier to catch; it does not imply that the animal is already caught.

In modern German law, the position is taken that animals are not property, being protected by special laws.⁶⁹ However, the *BGB* treats animals as property for practical purposes, and provides detailed rules for the acquisition and loss of the ownership of wild animals. Ownership of wild animals is dependent on possession of them in the manner of an owner (*Eigenbesitz*).⁷⁰ However, ownership is not acquired if the taking is forbidden by law or it infringes the right of another to take wild animals on the land.⁷¹ The view has been taken that this is appropriate in the interests

irrelevant whether a person is in lawful or in unlawful possession'. See also Paul, D.41.2.1.4; Ulpian, D.41.2.16, both texts allowing a wife to acquire possession of a gift that was void on account of being from her husband.

⁶⁷ Savigny, *Possession* 257. See also Pufendorf, *De Jure Naturae et Gentium*, 4,6,8: 'merely to have seen a thing, or to know its location, is not held to be sufficient to establish possession'.

⁶⁸ Pufendorf, *De Jure Naturae et Gentium*, 4,6,11.

⁶⁹ *BGB*, s. 90a.

⁷⁰ *BGB*, s. 958(1).

⁷¹ *BGB*, s. 958(2).

of orderly management of wildlife.⁷² The person entitled to hunt may require the taker to hand over the animal.⁷³ The taker is nonetheless a possessor.⁷⁴

All that appears to be required is that the animal is confined on private land or in private waters.⁷⁵ No great degree of restraint appears to be required.

(e) England. In early English law, it is broadly the case that the Roman rules of *occupatio* were applied. Bracton's account is strongly influenced by Roman thinking, especially through Azo. Indeed, his treatment of *occupatio* is 'almost in the words of Azo'.⁷⁶ Thus, wild animals were acquired through *occupatio*, regardless of where they were taken.⁷⁷ There is 'no reason to think' that the Crown had any special rights to wild animals.⁷⁸ The law was based on control of the animal,⁷⁹ not ownership of land, so a landowner had no particular right to a wild animal that happened to be on his land.⁸⁰

In later law, however, the Roman rules were largely superseded by the rights of the Crown and individual landowners.⁸¹ Subject to Crown rights, the landowner had a 'limited property'⁸² in wild animals on his land which, while not amounting to full ownership, gave the landowner the exclusive right to take such wild animals. Full ownership was only acquired on capture, except for animals too young to move themselves from the land. Such animals were said to be owned *ratione impotentiae*.⁸³

The consequence of this is that game chased and killed by a trespasser is owned by the landowner.⁸⁴ Thus, in *Blades v Higgs*⁸⁵, a number of rabbits had been taken by trespassers. The court held that

⁷² Baur, *Sachenrecht* 365.

⁷³ Schwab & Prütting 208.

⁷⁴ This at least appears to be the view of Schwab & Prütting 208, given that they refer to the taker as *Besitzer*.

⁷⁵ *BGB*, s 960(1).

⁷⁶ TE Scrutton, 'Roman Law in Bracton' [1885] 1 LQR 425, 434.

⁷⁷ Bracton, vol 2, 42.

⁷⁸ Holdsworth, *History of English Law* 491.

⁷⁹ Bracton, vol 2, 42.

⁸⁰ *ibid* 43.

⁸¹ Blackstone, *Commentaries*, vol 2, 403. See also Holdsworth, *History of English Law* 488; Baker, *Legal History* 430.

⁸² Baker, *Legal History* 429. See also Holdsworth, *History of English Law* 492.

⁸³ Holdsworth, *History of English Law* 493; Pollock & Wright, *Possession* 231; J Palmer, 'Animals' in *Halsbury's Laws of England* (5th edn, 2008-2010), para 713.

⁸⁴ Holdsworth, *History of English Law* 493-94.

⁸⁵ (1865) XI House of Lord Cases (Clark's) 621; 11 ER 1474.

If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrong doer, should divest the owner of the soil of his qualified property in the game, and give the wrong doer an absolute right of property to the exclusion of the rightful owner.⁸⁶

The same conclusion is thus reached as was reached by Pufendorf above. However, the reasoning of the House of Lords gives no support to Pufendorf, depending as it does on the idea of a landowner having 'qualified property' in the animals on his land. It need hardly be said that no such distinction between 'absolute' and 'qualified' ownership is known to the Civil Law tradition. The distinction is nonetheless significant in the English law, as a wild animal at liberty, even on private land, cannot be stolen.⁸⁷ What the English rule amounts to, then, is 'in substance an exclusive right to reduce the wild animal into possession',⁸⁸ rather than a right of ownership in the strictest sense. For such acquisition, some level of actual possession will be required.

There appears to be authority in the United States regarding the extent of confinement necessary for such possession as will give full ownership. In one case,⁸⁹ fish had been placed in an area of water with a surface area of about two acres, the maximum depth being about eight feet. There was an outlet from the area into a river, but this had been cut off by a wire net. Even though the fish could not escape, they were held to be ownerless. They had been restored to their natural environment and could only be recaptured in the same way they were originally caught. There was thus no possession of the fish.

(2) Scotland

(a) Institutional and other early writings. Since early times, there have been restrictions on the taking of wild animals on certain types of land, such as royal

⁸⁶ (1865) XI House of Lord Cases (Clark's) 621, 632; 11 ER 1474, 1480 (Lord Westbury LC).

⁸⁷ Pollock & Wright, *Possession* 231.

⁸⁸ J Palmer, 'Animals' in *Halsbury's Laws of England* (5th edn, 2008-2010), para 711.

⁸⁹ *Sollers v Sollers* 77 Md 148, 26 Atl 188, 20 LRA 94, 39 Am St Rep 404, discussed in E C Arnold, 'The Law of Possession Governing the Acquisition of Animals *Ferae Naturae*' (1921) Am L Rev 393, 400.

forests, or at certain times of year.⁹⁰ However, there is no evidence to suggest that this has ever prevented the operation of *occupatio*. Hope,⁹¹ Stair,⁹² Erskine,⁹³ Bankton,⁹⁴ Hume⁹⁵ and Bell⁹⁶ all state that ownership is acquired even by a trespasser who takes an animal, although the law may order confiscation as a penalty.⁹⁷ Thus there can be no conviction for theft in such a case.⁹⁸ This appears to have been a long-standing rule in Scotland.⁹⁹ Stair and Erskine both further state that this is also true where the right to take animals is reserved to the Crown (or, presumably, someone deriving right from the Crown).¹⁰⁰ The position of English law, and of *ius commune* writers such as Pufendorf, is thus rejected. Only Forbes implies a different rule, stating that a person acquires by 'Hunting, Fowling or Fishing in Places where he hath a right to do so'.¹⁰¹

It is not enough, then, simply to have the animal on one's land. One must actively confine it in some way. Even if the animal habitually remains on one's land, it is not owned unless it is confined in some way. Thus, Stair notes of bees that they

...are not proper though they hive in trees, more than fowls who set their nests thereupon, but if they are in a skep,^[102] or work in the hollow of a tree, wall, or in a house, they are proper.¹⁰³

The final part of this is somewhat obscure. It is difficult to see how bees are any more in my possession if they make their hives in a hollow in my wall than they are if they are in my tree. Even leaving aside the apparent contradiction, there seems to be no real element of confinement here, and there seems to be a lack of *animus possidendi*. The matter becomes clearer, however, if one considers Stair to be talking

⁹⁰ *Regiam Majestatem*, ch 87; *Quoniam Attachiamenta*, ch 34; Balfour, *Practicks* 542-545.

⁹¹ *Major Practicks*, 3,15,3.

⁹² *Inst.* 2,1,33.

⁹³ *Inst.* 2,1,10.

⁹⁴ *Inst.* 2,1,7.

⁹⁵ *Commentaries*, 1,81. He does not address the point in his *Lectures*.

⁹⁶ *Principles*, s 1288. The point is not considered in his *Commentaries*.

⁹⁷ Stair, *Inst.* 2,1,33; Erskine, *Inst.* 2,1,10; Bell, *Principles*, s 1288.

⁹⁸ Hume, *Commentaries*, 1,81.

⁹⁹ *Fragmenta Collecta*, APS 1,749 c 5.

¹⁰⁰ Stair, *Inst.* 2,1,33; Erskine, *Inst.* 2,1,10.

¹⁰¹ *Inst.* 126.

¹⁰² A skep is 'an inverted *basket* used as a hive' (E Crane, *The Archaeology of Beekeeping* (Duckworth 1983) 91 (emphasis in original)).

¹⁰³ *Inst.* 2,1,33.

of something quite different. A practice appears to have existed in northern Europe, and indeed still exists in some areas into modern times, of cutting hollows for beehives in the trunks of living trees.¹⁰⁴ Again, there was a practice of building walls with cavities, called 'bee boles', for the accommodation of bees.¹⁰⁵ This latter practice was found almost entirely in the British Isles, especially Scotland and England, with the greatest number of surviving examples being from the seventeenth and eighteenth centuries.¹⁰⁶ There is thus no reason to suppose that Stair would have been unaware of the practice. It seems reasonable to suppose, then, that when Stair talks of bees working in the hollow of a tree or a wall he means a hollow made by man specifically for that purpose. Although the additional control given by this is minimal, the positive act of creating a place for the bees provides a clear assertion of right.

Wild animals that are confined, such as fish in ponds, are owned.¹⁰⁷ With the exception of Hume, none of the early Scots writers directly addresses the issue of the size of the enclosure. This could be taken to indicate that the size of the enclosure or structure that the animal is in is unimportant. Indeed, as van der Merwe and Bain note,¹⁰⁸ Stair refers at one point to 'deer in parks' as owned.¹⁰⁹ Erskine does so also.¹¹⁰ This would, however, be contrary to the position in Roman law, and to the general view in the civilian tradition, that the enclosure must be such as gives real control of the animal within it. Indeed, elsewhere Stair refers to,¹¹¹ and impliedly adopts, a Digest passage discussed above to that effect.¹¹² For Erskine, the reason that animals under restraint are owned is that they 'cannot be said to retain any longer their natural liberty'.¹¹³ Accordingly, it may be suggested that there is no acquisition of ownership unless there is a real loss of liberty. Similarly, for Hume, wild animals in confinement are only owned if they are so restrained that

¹⁰⁴ Crane (n 102) 79.

¹⁰⁵ *ibid* 118.

¹⁰⁶ *ibid*.

¹⁰⁷ Hope, *Major Practicks*, 3,15,3; Stair, *Inst.* 2,1,33; Erskine, *Inst.* 2,1,10; Hume, *Commentaries* 1,82; Bell, *Principles*, s 1290.

¹⁰⁸ CG van der Merwe & D Bain, 'The Fish that Got Away: Some Reflections on *Valentine v Kennedy*' (2008) 12 *Edin LR* 418, 424 n 31.

¹⁰⁹ Stair, *Inst.* 2,3,76.

¹¹⁰ *Inst.* 2,1,10.

¹¹¹ Stair, *Inst.* 2,1,33.

¹¹² Paul, D.41.2.3.14, reporting an opinion of the younger Nerva.

¹¹³ *Inst.* 2,1,10.

...they cannot escape, and may easily and at any time be caught; such as deer in a pen, rabbits in a house, or *young* pigeons in a dovecot: They are then in nearly the same condition as their carcasses after slaughter.¹¹⁴

The larger the enclosure, the more difficult it will be to catch the animal. The possibility exists, therefore, that an animal left to wander at effective liberty in a very large enclosure may remain unowned, as with the view given above of Pufendorf, Savigny and Voet. If *occupatio* is based on possession, and possession requires control of the property, then there will come a point at which the enclosure is so large that the owner of the land cannot be said to have any control of the animal, and so the animal must be considered ownerless. A fish in a loch would perhaps fall into this category. The only one of the older Scots writers to raise this question, however, expressly declines to give an opinion, as this area was early regulated by statute,¹¹⁵ as discussed below.

Curiously, none of these writers appears to address directly the question of direct restraint. However, it can hardly be doubted that an animal sufficiently restrained by a restraint of this kind is possessed.

(b) Statutory intervention. The Theft Act 1607¹¹⁶ imposes a penalty of forty pounds Scots on anyone convicted, *inter alia*, of theft of 'fisches in propir stankis and loches'. Lord Rodger suggests that the term 'stank' here means the same as *stagnum* meant for the Roman jurists, ie an area of standing water.¹¹⁷ The significance of this Act for present purposes is its interaction with the law of property. Given the low value of an individual fish, it seems probable that the question of whether a fish is owned or is *res nullius* is most likely to arise, not in a private law dispute over ownership, but in criminal proceedings for theft of the fish. For this reason, the common law on ownership of fish has been overshadowed by the provisions of the Theft Act.

¹¹⁴ *Commentaries* 1,82. See also A Alison, *Principles of the Criminal Law of Scotland* (first published 1832, Law Society of Scotland 1989) 280 referring to 'deer in a pen or *limited* enclosure' as owned (emphasis added).

¹¹⁵ Hume, *Commentaries*, 1,82.

¹¹⁶ Act 1607, c 3, partially repealed by Scotland Act 1998 (River Tweed) Order 2006/2913 sch 4(2) para (1).

¹¹⁷ Rodger (n 19) 11.

In *Pollok v McCabe*,¹¹⁸ Lord Ardwall expressed the view that fish in a reservoir were owned by the owner of the reservoir.¹¹⁹ However, the point at issue was one of statutory construction of the 1607 Act, and so was *obiter*. In any case, as Lord Rodger points out,¹²⁰ the 1607 Act says nothing about ownership, and is not so interpreted by the institutional writers.¹²¹ If the 1607 Act had been intended to change the ownership position, the result would have been that taking of fish would have been common law theft, with no need for the special statutory penalty provided for by the 1607 Act. That penalty, however, now having become nominal through changes in the value of money, it is to be supposed that future prosecutions based on facts of the same type as those in *Pollok v McCabe* would rely on common law theft. Accordingly, it remains necessary to know the common law position on ownership of fish kept in private waters.

(c) Modern consideration. It does not appear to be open to dispute in modern Scots law that the owner of land does not, by virtue of that ownership alone, acquire any right to wild animals on the land. As the position was stated in *Leith v Leith*:¹²²

The rule of law is *res nullius cedit occupanti*. True, if the captor, in the exercise of this legal right he trespasses on land not belonging to himself, may be liable in damages to the owner of the lands; but the reparation which would be claimable by the latter would be only for such damage as might be done to the lands themselves, and not for the capture of the wild animals thereon.

Thus, in *Assessor for Argyll v Broadland Properties Ltd*,¹²³ there was a lease of land for shooting deer. The lease granted the tenant an express right to retain the carcasses of deer shot by the tenant. The tenant was held not to be entitled to deduct the value of the carcasses from the rent for valuation purposes, as the lease term did not add to the rights the tenant had anyway at common law. Wild animals are *res nullius*, and so

¹¹⁸ 1910 SC (J) 23.

¹¹⁹ 1910 SC (J) 23 at 26.

¹²⁰ Rodger (n 19)13-14.

¹²¹ See, for example, G Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678, Stair Society vol 59 2012) 1,19,15, where it appears to be doubted whether this would be theft but for the legislation. Alison, too, appears to assume that wild animals in larger enclosures are only susceptible to theft because of this statutory intervention (Alison (n 114) 182).

¹²² (1862) 24 D 1059, 1077-78 (Lord Curriehill).

¹²³ 1973 SC 152.

belong to the taker. The tenant's right to the carcasses arose not from the lease, but from the fact of having taken them. The whole rent was therefore attributable to the grant of the right to occupy the land, and not to any grant of a right to keep animals that the tenant had shot. In *Wallace v Assessor for Wigtonshire*,¹²⁴ the same reasoning was applied to a lease of oyster fishing rights.

In *Wemyss v Gulland*,¹²⁵ it was accepted that the landowner had no rights in the animals on the land, even though he alone had the right to hunt game there. This was assumed to be true, even though the numbers of game were increased by the landowner's deliberate encouragement. As was said in *Wilson v Dykes*:¹²⁶

[W]ithout specific appropriation a wild animal, although protected and preserved on private land, is not the property of any one.

It may be taken as settled, therefore, that ownership of land gives no right in wild animals on the land, with the result that such animals are open to acquisition by others. This is the case even if the owner of the land has acted in such a way as to preserve the animals on the land and to encourage growth in their numbers. Thus, in *Scott v Everitt*,¹²⁷ one convicted of a breach of game legislation was nonetheless owner, and was entitled to vindicate from the procurator fiscal game that he had caught but which had been seized.

In *Brown v Watson*,¹²⁸ the same principle appears with respect to domesticated animals.¹²⁹ In that case, there was a sale of livestock to a farmer. In pursuance of the sale, sixty-six sheep were brought to the buyer's farm. The buyer being absent, and no-one being found to take care of the sheep, the seller left them in an enclosure on the buyer's farm. The court held that there had been no delivery to the buyer in this case. Although, as we saw in chapter 3, this case may have been

¹²⁴ (1902) 4 F 515.

¹²⁵ (1847) 10 D 204.

¹²⁶ (1872) 10 M 444, 445 (Lord Justice-Clerk).

¹²⁷ (1853) 15 D 288.

¹²⁸ (1816) Hume 709.

¹²⁹ If *occupatio* is based on a general concept of possession, it would seem that the same rules should apply to both tame and wild animals although, of course, the comparative ease of control of tame animals may allow them to be possessed with a lesser degree of restraint. Thus, for example, a herd of sheep would continue to be possessed even though left to range over an extensive area. Of course, no issue of ownership arises with possession of domesticated animals.

wrongly decided on the facts, it is consistent with the other cases here in holding that an animal is not possessed by virtue alone of the fact that it is on a given area of land.

It is clear, then, that some degree of actual control of the animal must be exercised. There is, however, little modern authority on what level of control is necessary to possess, and therefore own, a wild animal. Clifford suggests that bees are owned 'when working in the hollow of a tree or wall'.¹³⁰ This echoes Stair, although no authority is in fact cited, and for reasons given earlier may represent a misunderstanding of Stair's view. The view has also been expressed that:

'Control'...does not mean that the animals must be closely caged. It is enough that they are confined within a particular area such as a deer park or pond and so the animals in a wild-life park or a 'natural' zoo would still be owned while confined.¹³¹

The case of acquisition by direct detention of an animal was considered in *HM Advocate v Huie*.¹³² In that case, it was held to be theft to remove fish from fishing nets which had been placed in the water and which had then drifted to shore. However, there is no indication whether the possibility of escape would have made any difference or, as suggested by Voet, the issue is merely whether the creature is in fact detained at this particular moment.

Similar facts were considered in *Mull Shellfish Ltd v Golden Sea Produce Ltd*.¹³³ In that case, there had been a lease of an area of seabed to the pursuers. The pursuers placed vertical ropes in the water, on which mussel larvae in the water would then settle. They sued the defenders, the tenants of a neighbouring area used as a salmon farm, for introducing a chemical to the water which damaged the mussel larvae before they attached to the ropes. It was accepted that, although the larvae were ownerless and free for any to take while floating free in the water, ownership was acquired by the pursuers when the larvae settled on the ropes. However, this appears to have been considered to be on the basis of accession rather than

¹³⁰ SM Clifford, *Stair Memorial Encyclopaedia Reissue Animals* (1999), para 7. This position is also stated to be the law, though without citation of Stair, by J R Gibb, 'Animals' in *Encyclopaedia of the Laws of Scotland*, vol 1 (1926), para 834.

¹³¹ Reid, *Property*, para 542 (Gordon).

¹³² (1842) 1 Broun 383.

¹³³ 1992 SLT 703.

occupatio, the larvae acceding to the ropes on attachment.¹³⁴ It seems probable, though, that an argument based on *occupatio* would also have been successful. After all, if the mussels are attached to ropes in my possession, and which I have placed for that purpose, they seem to be just as much in my control as the ropes themselves.

As far as indirect restraint is concerned, there appears to be little direct modern authority on what is required. One might have expected the point to be thought relevant in *Valentine v Kennedy*,¹³⁵ which concerned fish that had escaped from a private loch. As the fish were no longer in the loch, the 1607 Act had no application, and so it was necessary to resort to the common law. The sheriff assumed¹³⁶ that fish ceased to be ownerless if they were placed in a confined area such as a reservoir. The question of the size of the loch was not raised. On the other hand, in *HM Advocate v Macrae*,¹³⁷ a number of persons were charged with mobbing and rioting in a deer forest. Their alleged actions involved shooting at deer.¹³⁸ In his charge to the jury, the Lord Justice-Clerk observed that the deer were 'not private property while running wild'.¹³⁹ It is notable that, on the evidence, this particular deer forest, of 30,000 acres in extent, appears to have been entirely surrounded on each side by either water or fencing. If, notwithstanding this enclosure, the deer were unowned, the implication of this is that only closer confinement will be enough to constitute possession in such a case. An animal left running in effective liberty will not be possessed, even if it in fact cannot leave the area.

(3) Discussion and conclusions

French, Roman-Dutch, German and English law have all departed to some extent from the Roman position, that mere presence of an animal on land does not of itself give the landowner any right to the animal. Scots law, however, follows the Roman

¹³⁴ 1992 SLT 703, 706A-B.

¹³⁵ 1985 SCCR 89.

¹³⁶ By reference to GH Gordon, *The Criminal Law of Scotland* (2nd edn, 1978), para 14-40. See now Gordon, *Criminal Law*, para. 14.21.

¹³⁷ (1888) 15 R (J) 33.

¹³⁸ The purpose of the accused's actions was to promote land reform. For a full account of the background to the case, see IMM MacPhail, *The Crofters' War* (Acair 1989) 199-206.

¹³⁹ (1888) 15 R (J) 33, 36.

rule that I acquire a wild animal I take, even if I take it on another's land, without right to do so.

It is clear that possession of an animal by direct restraint is recognised. There is no Scots authority on whether Voet's view, that escape need not be impossible, is accepted. However, for the reasons given above, it is suggested that Voet's view should be accepted as the more consistent with principle. The point is that the animal is at present under control. It may be noted that the rule that ownership is lost with possession takes for granted the possibility that the animal may escape, but this does not prevent acquisition.

Possession by indirect restraint is also clearly recognised although, as suggested above, large enclosures may not be sufficient. As we have seen, I acquire no right to an animal merely from its presence on my land. This must be the case even if the animal makes its home on my land, for this does not give me the necessary control over the animal. If I put a fence around my land, this again makes no difference unless the animal is in fact brought within my power thereby. This may be sufficient for some animals, especially larger animals. However, one can readily conceive of a situation where an animal is no more easily found, because of the size or nature of the land, by the mere presence of a fence. It is suggested that an animal in an enclosed area, or a fish in enclosed water, is not thereby possessed and owned unless the confinement is such as to restrict its liberty to the point that it is brought within the control of the possessor of the land. If that person cannot find the animal at will, he cannot be said to possess it. An animal in such an area would only be possessed if some contrivance such as electronic tagging of the animal were adopted. Alternatively, it may be that an animal, though not fully tamed, could be trained to come to a call. On the other hand, if the animal does not wander, and direct control can readily be reassumed, there seems to be no reason to hold possession not to continue, even in the absence of any restraint.

C. POSSESSION THROUGH THE HABIT OF RETURNING

Some animals have by nature a strong homing instinct, such as bees and pigeons. As long as they continue to return home, the possessor of that home may be said to

possess the animal. For example, when the number of bees becomes too great for the hive, some of the bees will swarm and adopt a new home.¹⁴⁰ At this point, possession will cease unless, as we shall see later, the swarm is pursued.

For other animals, it will be necessary to develop the inclination to return. Where such an inclination has been developed, it may continue even where no positive inducement to return is offered, and in that case too one can readily consider the animal tamed. The question is more difficult where the animal only returns because some inducement is offered, such as food or access to mates. Such would give the offeror of the inducement at best a tenuous hold over the animal, which may indeed receive similar inducements from others: it is not uncommon for pet cats, for example, to be fed by more than one house.¹⁴¹ For possession, it seems reasonable to suppose that there must be some specific person or definable place in the control of the person that the animal returns to, and that this must not be merely because some inducement is offered but because a habit of return has been developed. Thus, for example, if I possess the hive then I possess the bees that return to it; if I have a dog, I will continue to possess as long as it continues to return to me, even if it is allowed to wander to an extent that would otherwise suggest a loss of possession.

(1) Historical and comparative approaches

(a) **Roman law.** The idea that an animal, though naturally wild, could be tamed was one that was certainly familiar to the Romans, and is reflected in their literature.¹⁴² In Roman law, an animal left at liberty to roam, but which had the habit of returning (*animus revertendi*), was held still to be possessed and owned as long as the *animus revertendi* was retained.¹⁴³ If the animal lost the habit of returning, ownership was lost. This was deemed to occur when the animal stopped returning.¹⁴⁴ The rule applied to animals with a natural homing instinct, such as pigeons and bees, and to

¹⁴⁰ See FR Cheshire, *Bees & Bee-Keeping; Scientific and Practical* (2 vols, L Upcott-Gill 1886-1888), vol 1, 27-28; Crane (n 102) 16-17.

¹⁴¹ Of course, cats being domestic animals, this will not affect their *ownership*. It will, however, affect the question of possession.

¹⁴² See eg Virgil, *The Aeneid* (D West (tr), Penguin Classics 2003), 7.490 (a stag); Catullus, *The Poems of Catullus* (P Whigham (tr), Penguin Classics 1966), poems 2-3 (a sparrow), alluded to in *Wilson v Dykes* (1872) 10 M 444, 448 (Lord Neaves).

¹⁴³ J.2.1.15; Florentinus, D.41.1.4; G.2.68.

¹⁴⁴ J.2.1.15; Gaius, D.41.1.5.5.

animals that have been tamed such that, although they are allowed to wander, return.¹⁴⁵

For Nicholas, this involves a 'stretching of the idea of possession'.¹⁴⁶

However, the matter need not necessarily be seen in that way. We have seen in previous chapters that a high degree of control is not required. In particular, I need not have a thing immediately to hand in order to possess it. If an animal is so tamed by me that it returns to me, as long as it continues to do so it may be said to be acting under my control.

(b) France. As we shall see later, the general French law on loss of ownership of wild animals is overshadowed by specific rules for particular types of animal. However, for bees, a rule similar to that of the Roman law has been adopted. Swarming bees will continue to be owned as long as the owner pursues them with a reasonable chance of success.¹⁴⁷ This was also the rule in pre-Code law.¹⁴⁸ The existence of this rule, and a similar rule for pigeons,¹⁴⁹ implies a recognition of possession through *animus revertendi*, at least for animals with a natural homing instinct.

(c) Roman-Dutch law. Voet suggests that loss of *animus revertendi* does not mean loss of ownership.¹⁵⁰ However, Grotius gives the Roman rule that ownership is lost if *animus revertendi* is lost,¹⁵¹ as does Huber.¹⁵² A similar rule is given by van Leeuwen, although he seems to place the emphasis more on the mental state of the owner than on the mental state of the animal – 'they have continued absent, and have been abandoned by us without hope of their returning'¹⁵³ – implying perhaps that

¹⁴⁵ BW Frier, 'Bees and Lawyers' (1982-1983) 78 *The Classical Journal* 105, and D Daube, 'Doves and Bees' in D Daube, *Collected Studies in Roman Law* (2 vols, V Klostermann 1991) 899 suggest that the rule originally applied only to tamed animals, and was subsequently expanded to animals with homing instincts, such as bees. The Digest compilers, however, evidently considered it settled that the same rule applied in both cases.

¹⁴⁶ Nicholas 131.

¹⁴⁷ See below.

¹⁴⁸ Pothier, *Propriété*, para 81 n 30.

¹⁴⁹ Pothier, *Propriété*, para 166.

¹⁵⁰ Voet, 41,1,7. See Lee, *Roman-Dutch Law* 131 for discussion.

¹⁵¹ Grotius, 2,4,13.

¹⁵² Huber, 2,4,24.

¹⁵³ Van Leeuwen, 2,3,1.

ownership is lost by abandonment. Voet in any case appears to contradict himself, elsewhere stating in effect the Roman rule.¹⁵⁴

In modern South African law, the Roman rule is applied.¹⁵⁵

(d) Germany. Savigny says¹⁵⁶ that wild animals are possessed so long as they have 'the habit of returning to the spot where their possessor keeps them'. Jhering¹⁵⁷ calls this psychological taming, where one has control, not of the animal's body, but (as he puts it) of its soul. The animal has apparent freedom, but has *animus revertendi*. Jhering however observes¹⁵⁸ that, strictly, it makes no sense to talk of *animus revertendi*, as an animal's mental state cannot be known.¹⁵⁹ In practice, the test is *consuetudo revertendi*. The point, then, is not *why* the animal is returning. Rather, it is enough that the animal *is* returning.¹⁶⁰

In modern German law, ownership of a tamed wild animal is lost when it loses the habit (*Gewohnheit*) of returning.¹⁶¹

(e) England. Bracton¹⁶² stated the rule to be that wild animals were still owned as long as they had *animus revertendi*, though this appears to have been in doubt for centuries afterwards.¹⁶³

Any remaining doubts were laid to rest in *Hamps v Darby*.¹⁶⁴ In that case, the plaintiff was a breeder of racing pigeons. It was his practice to release them for exercise at certain times, following which they would normally return after about fifteen minutes. On the occasion in question, however, they settled on a crop of peas being grown by the defendant, a farmer. The defendant shot several of the pigeons. At this point the pigeons had been out for more than an hour. The plaintiff raised an

¹⁵⁴ Voet, 41,1,3.

¹⁵⁵ Van der Merwe, *Law of Things*, para 133 n 1.

¹⁵⁶ *Possession* 257-258.

¹⁵⁷ *Besitzwille* 292-293 n 1.

¹⁵⁸ *ibid*.

¹⁵⁹ Indeed, in the case of insects, such as bees, one may question whether it can sensibly be said to have a mental state at all.

¹⁶⁰ Pufendorf, too, talks of the actual behaviour of the animal (in this case, bees) rather than its state of mind (*De Jure Naturae et Gentium*, 4,6,5).

¹⁶¹ *BGB*, s 960(3). See also *BGB*, s 961, which applies the same rule to swarming bees, with a special right (s 962) to follow the bees onto others' land.

¹⁶² Bracton, vol 2, 43.

¹⁶³ Holdsworth 489.

¹⁶⁴ [1948] 2 KB 311.

action for damages, which turned in part on whether the plaintiff continued to own the pigeons when they were off his land. It was held that they continued to belong to him as long as they retained the habit of returning. It is interesting to note that these pigeons were taken still to have the habit of returning, even though they had delayed their return in favour of the destruction of the defendant's pea crop. In fact, in pigeon-racing, very long delays in returning are common. The effect of such a delay is not clear, though in principle it would appear only to be relevant as evidence of whether the bird retains the intention to return. As long as the pigeon cannot be said to have actually abandoned the attempt to return home, it would seem still to be owned. On the other hand, if it has established a permanent nest elsewhere than its previous home, that would be a good indicator of loss of *animus revertendi*.

(2) Scotland

Stair,¹⁶⁵ Bankton¹⁶⁶ and Bell¹⁶⁷ all give as the law that wild animals that have the habit of returning are possessed and owned as long as they continue to return. There is no modern authority on the question, but it seems reasonable to accept that this is the law. If, for example, I have a pigeon that returns to me when it is released, it seems to be acting under my control. It is only if the pigeon loses that habit that I lose control and, with it, possession and therefore ownership.¹⁶⁸

(3) Discussion and conclusions

The rule is universally found in the legal systems examined, that tamed animals are possessed and owned only as long as they retain the habit of returning. The difficulty, however, is in knowing whether the animal retains the habit of returning if it is delayed. Related to this is the question of whether the test is an objective one (is the animal in fact returning?) or a subjective one (is the animal intending to return?), to which there is no clear answer in Scots law, though an early source refers to

¹⁶⁵ *Inst.* 2,1,33.

¹⁶⁶ *Inst.* 2,1,7.

¹⁶⁷ *Principles*, s 1290.

¹⁶⁸ This assumes that the practice of marking out such pigeons by ringing them is ineffective for the retention of ownership. This issue is considered below.

ownership as retained as long as the animal has 'the will and desyr'¹⁶⁹ to return, suggesting that the test is subjective. In practice, it is difficult to know at any given moment whether an animal still has the habit of returning if it is not actually on its way home. Nonetheless, as with the English case of *Hamps v Darby*, discussed above, it is unlikely that loss of *animus revertendi* will be too readily assumed, suggesting that a test that is at least partly subjective is appropriate. One must be realistic about the level of control that can be required. Animals wander, and any account of *occupatio* must accept that animals will not always act entirely in accordance with their owners' expectations. Although the pigeons in *Hamps v Darby* had delayed their return, they did in fact return home when shot at by the defendant. It may be suggested that only a protracted failure to return home should lead to ownership being lost in such a case. How long this must be will, of course, depend on the individual circumstances, and expert evidence may be required on the habits of individual species.

D. POSSESSION THROUGH DISTINCTIVE MARKINGS

An escaped wild animal ceases to be owned, subject to an exception considered later. The obvious justification for this is the need for certainty – an escaped wild animal is not readily distinguishable from other wild animals of the same species that have never been owned.¹⁷⁰ If this is the justification, it raises the question of whether there might be an exception for an animal that can be so distinguished, either by natural markings or by a mark placed by human hand. This could also apply to an animal that is not natural in its present location.¹⁷¹

(1) Historical and comparative approaches

(a) Roman law. Although the marking of animals, and the keeping of non-native animals, was known to the Romans,¹⁷² there is no evidence that the law of property

¹⁶⁹ *Fragmenta Collecta*, APS 1,750 c. 8.

¹⁷⁰ See eg Carey Miller, *Corporeal Moveables* 36.

¹⁷¹ See eg BW Frier, 'Bees and Lawyers' (1982-1983) 78 *The Classical Journal* 105, 106, asking 'Does an African lion, escaping in Central Italy, return to its 'natural liberty'?'.
¹⁷²

made any special provision for them. The normal rule applied, that such animals were only owned so long as they were possessed. If such an animal escaped beyond power of pursuit, ownership would be lost.

Watkin suggests that the law may have set its face against the protection of ownership of exotic animals on their escape for the reason that the keeping of such animals for vulgar profit or as luxury items offended the sensibilities of traditionalists:

[F]rom the disapproving perspective of the Roman traditionalists, those who sought large profit or decadent delights were not pursuing objectives of sufficient moral and civic worth to merit the protection of the law. Thus, if a dispute arose between a keeper of birds and a hunter over, for instance, the ownership of a fieldfare or even a more identifiable bird, such as a peacock, the follower of the revered tradition of hunting succeeded at the expense of the enterprising profiteer.¹⁷³

So strong was this view that even ringing or otherwise marking the animal was insufficient.¹⁷⁴ Certainly, the Roman literary sources referred to by Watkin support the suggestion that such a feeling existed. However that may be, though, it is clear that the law had no special provision for escaped wild animals on the basis that they were identifiable.

(b) France. No trace has been detected of any rule of this kind in French law. Malaurie and Aynès state¹⁷⁵ that tigers are owned when detained, implying that the general rules on *occupatio* apply to non-native species. Nothing to the contrary has been found with respect to marking of animals. It will be noted below that the general rules on escaped animals are of limited application in French law in any case.

(c) Roman-Dutch law. Aside from a hint in a comment by Huber that 'wild and unmarked' swans are ownerless,¹⁷⁶ the only Roman-Dutch writer appearing to give a

¹⁷² TG Watkin, '*Occupatio* and the *Pastio Villatica*' (1990) 11 J Leg Hist 5.

¹⁷³ *ibid* 23.

¹⁷⁴ *ibid* 24.

¹⁷⁵ Malaurie & Aynès, para 591.

¹⁷⁶ Huber, 2,4,21.

rule to this effect is Grotius.¹⁷⁷ His view is that ownership is not lost where the animal can be identified due to the attachment of identification marks or a bell. However, his argument is based on his view that loss of ownership on escape is based on presumed abandonment, rather than the loss of possession. As discussed below, this view seems untenable as it would seem that it ought to apply equally to domesticated animals. Pufendorf also criticises Grotius on this point, suggesting that such marking can only be accepted as an indication that an animal has been tamed.¹⁷⁸

As to animals that are not native in their present location, this does not appear to have been considered by the Roman-Dutch writers, or indeed by any writer on modern South African law.

(d) Germany. There does not appear to be any rule of this kind in German law, although, as we will see below, the consequences of its absence are somewhat mitigated by a lenient attitude to the retention of ownership by pursuit.

(e) England. There is an observation in the *Case of Swans*¹⁷⁹ that swans that are 'not marked' become ownerless on escape, the implication being that marked swans are not subject to the same rule. It appears also that some cases on the point in the USA have been decided on the basis that the fact of the animal being non-native puts a subsequent captor on notice that the animal is an escapee.¹⁸⁰

(2) Scotland

Comparative and historical sources, therefore, provide very little basis for any rule that ownership is not lost if the animal remains identifiable. For Scots law, Bell states that where animals 'are marked for private property, as deer and swans with collars'¹⁸¹ ownership is not lost when the animal escapes. This rule does not appear in

¹⁷⁷ Grotius, *De Jure Belli ac Pacis*, 2,8,3.

¹⁷⁸ Pufendorf, *De Jure Naturae et Gentium*, 4,6,12.

¹⁷⁹ (1591) 7 Coke Reports 15b; 77 ER 435.

¹⁸⁰ Discussed in SM Wise, 'The Legal Thinghood of Nonhuman Animals' (1995-1996) 23 B C Env'tl Aff L Rev 471, 537.

¹⁸¹ *Principles*, s 1290.

the work of any other institutional writer, though it has been copied by modern writers.¹⁸²

It is clear enough that an animal that has escaped beyond realistic hope of recovery is no longer possessed. Accordingly, any rule allowing the retention of ownership of such an animal is contrary to the general principle that ownership of wild animals is dependent on continued possession. Bell himself accepts this principle, but states as exceptions to the principle that ownership is retained if the animal has *animus revertendi* or is marked as private property.¹⁸³ The first of these stated exceptions, however, is explicable on the basis that one still has control over an animal that returns. The proposed exception for marked animals, therefore, stands alone and in need of justification.

It is unfortunate that Bell gives no source for his rule, though it is not entirely surprising given the state of the authorities as they existed in his time. It has already been noticed that the existence of a rule of this kind is not securely attested in the comparative and historical sources considered above, and no other institutional writer gives this rule. If Bell's view is tenable, it is surprising that no-one else gives such a simple way of avoiding the rule requiring continued possession. It is scarcely a difficult matter to mark an animal. Such an exception would remove much of the force of the general rule, so it is barely conceivable that the other institutional writers would give the rule without the exception.

There is good reason to support a rule of the kind stated by Bell, as a practical exception to the requirement for continued possession. It seems harsh to say, for example, to one who has paid a large amount of money for a prize racing-pigeon that ownership will be lost if the pigeon ceases to return home, even if it is marked. As was noted above of the position that has sometimes been taken in the USA, a finder of a marked animal can hardly fail to realise that it has been in someone's possession. However, rightly or wrongly, it has been the policy of the law that ownership of wild animals should be precarious, and last only as long as possession. In favour of this policy, it may be said that it allows one hunting lawfully to do so in the assurance that an animal living apparently wild will not be held to have an owner who may take

¹⁸² Gloag & Henderson, para 31.04; SM Clifford, *Stair Memorial Encyclopaedia Reissue Animals* (1999), paras 8-9; JR Gibb, *Encyclopaedia of the Laws of Scotland*, vol. 1 (1926), para 833.

¹⁸³ Bell, *Principles*, s 1290.

an interest in the matter. It should also be borne in mind that a marking may not always be visible at a distance. No doubt one who shoots at an animal, in the belief that it is wild, bears the risk that it may turn out to be owned,¹⁸⁴ but this should not be pushed too far. A privilege given to markings may be seen as over-protecting a former possessor from whose possession the animal may have escaped some considerable time ago, and who may indeed have given up hope of recovering it. We may also note, therefore, that the markings would not mean that the animal was still owned, for it might have been abandoned. Indeed, the markings do not necessarily indicate that the animal has ever been owned. For example, if a researcher into animal behaviour attaches a tag of some kind to an animal, this seems to be done more so the animal may be identified and tracked than it is to demonstrate any claim of ownership of the animal. Finally, it will be recalled that, in chapter 6, the view was reached that the marking of property was not a sufficient act for the acquisition of possession.

In any case, if the rule that follows from the long-standing policy of the law is thought no longer to be appropriate, the appropriate course is for the policy to be reconsidered by the legislature. To adopt as law the exception stated by Bell would not be a natural development of the principle. Instead, for practical purposes it eliminates the principle altogether. Given these considerations, it appears unsafe to conclude that any such exception to the general rule exists in Scots law. To the argument that injustice arises from this position, the answer is that the reasonable owner will insure against escape of the animal if that is considered appropriate, in the same way as one may insure against the death of the animal.

The related question of the position of non-native species has been considered. Carey Miller, basing the rule that ownership is lost when a wild animal escapes on the fact that such an animal cannot be distinguished from one that has never been owned, suggests that the same rule should not apply to non-native animals. Such animals 'do not have a natural state in Scotland'.¹⁸⁵ Similarly, van der Merwe and Bain suggest that a wild animal cannot be said to have returned to its state of wildness if it cannot fend for itself.¹⁸⁶ They claim to find support for this

¹⁸⁴ *Muirhead v Waugh* (1912) 28 Sh Ct Rep 143.

¹⁸⁵ Carey Miller, *Corporeal Moveables* 37. The example given is a python.

¹⁸⁶ Van der Merwe & Bain (n 108) 425-26.

position in Bell, who talks of the animal becoming ownerless by returning to its 'natural liberty',¹⁸⁷ and Stair, who talks of animals which 'return to their ancient wildness'.¹⁸⁸ For Carey Miller:

The better view is that such a creature must become an unowned thing, vesting in the Crown, on termination of an existing state of possession because, clearly, there can be no question of return to a natural state in Scotland.¹⁸⁹

Presumably the vesting of the animal in the Crown is on the basis of abandonment by the owner.¹⁹⁰ In any case, this may be construing the idea of an animal's natural state too narrowly. When the institutional writers talk of an animal returning to its natural state, the point seems to be that it is then no longer in the power of the (former) owner, whether because it has escaped from confinement or because it has lost the habit of returning. When Stair talks of tamed animals returning to their ancient wildness, he is expressly talking of a loss of tameness, not a return to the animal's natural habitat. The position is likewise with Bell and 'natural liberty'. This is the same whether the animal is native or not, and whether it can survive in the wild or not. No distinction is made between native and non-native animals.

Nonetheless, the idea that non-native species should be treated differently does appear to have influenced the court in one case. In *Valentine v Kennedy*,¹⁹¹ a number of rainbow trout had been bred in a fish farm and then bought to stock a reservoir, from which they escaped. They were caught by the accused, who were then charged with theft. The Sheriff expressly declined to hold that rainbow trout were not *ferae naturae*. Instead, he based his decision on the idea that rainbow trout, being of a non-native species, continue to be owned on escape 'insofar as they can be identified'.¹⁹² The implication of this is that native species become unowned because they cannot be identified.

However, expressed in this way, the significance of identification is surely only an evidential matter, as it assumes that the animal continues to be owned; all

¹⁸⁷ *Principles*, s 1290.

¹⁸⁸ *Inst.* 2,1,33.

¹⁸⁹ Carey Miller, *Corporeal Moveables* 37.

¹⁹⁰ See comment in van der Merwe & Bain (n 108) 425.

¹⁹¹ 1985 SCCR 89.

¹⁹² 1985 SCCR 89 at 91.

that is wanting is the proof that it is this animal that was owned rather than another of the same species. No such rule is mentioned in institutional writers, even though importation of non-native species was known in their time. They clearly consider loss of possession to be the determining factor, not the inability to identify the animal following escape. It may be noted that Lord Deas, in *Sutter v Aberdeen Arctic Co*,¹⁹³ stated that 'a tiger in a jungle' would be open to acquisition. It is true that this form of words assumes the tiger is in its native habitat, but what would be the purpose of mentioning tigers if a different rule applied to them if they were in Scotland? Certainly, Lord Deas is expressing himself in the manner of someone giving an example of a general principle. The tiger is the only animal he mentions that cannot be found other than in captivity in Scotland or the surrounding waters (the others being foxes, eagles, whales and hares), but he makes no reference to that fact and gives no indication that the tiger is a special case. Nor does any such rule appear in the Roman or *ius commune* sources.

Such a rule would also encounter considerable practical difficulty. Some non-native species used to be native (eg wolves) and sometimes a non-native species may become native (eg grey squirrels). The latter category would include also formerly native animals that have been reintroduced to Scotland. Whether a species is native therefore provides too uncertain a test. Perhaps a better test would be whether the animal is capable of surviving in the wild in Scotland, as was not the case with the trout in *Valentine v Kennedy*. However, even then this is uncertain. Genetic variation within the species may mean that some are able to survive, even if the majority cannot. It is suggested, therefore, that such a rule should not be adopted, as it provides no basis for certainty.

(3) Conclusions

It appears, therefore, that in Scotland there is no secure basis for a rule that possession or ownership is retained through distinctive markings alone, whether those markings are natural or artificial. The strongest assertion of a contrary rule in the comparative and historical sources is that of Grotius, but his view cannot be

¹⁹³ (1861) 23 D 465 at 491.

accepted for reasons given above. On the other hand, the view that one cannot retain possession of an animal through its markings is consistent with the position taken in chapter 6, that possession of corporeal moveable things generally cannot be acquired through markings alone.

E. POSSESSION BY PURSUIT

Before it is possible to make use of a wild animal, it must first be caught. There may be competition in the catching of the animal. The question must then be asked, when does one acquire ownership of an animal one is pursuing? Any interference with a hunt in progress is likely in any society to be seen as, at least, bad manners,¹⁹⁴ though the legal response will vary.¹⁹⁵ A legal system basing acquisition of ownership on acquisition of possession may take the view that nothing short of actual capture will be enough. This view could be supported by an argument of economic efficiency, that acquisition by mere pursuit would excessively encourage investment by those lacking the skills or resources to make good on that investment. Posner, for example, talks of 'the ocean blanketed with amateurs good at flinging harpoons but not good at actually killing whales'.¹⁹⁶ Only the acquisition of actual physical control would be enough. It must be said, however, that Posner's argument here is not entirely convincing. To have ownership does one no good at all if one cannot actually make use of the property. If an individual harpoons a whale which then escapes, for all practical purposes he is in the same position whether we say he is owner or not. Thus, even if the law gives ownership to one who is merely pursuing, this provides no greater incentive to anyone who is not confident of actually capturing an animal than would the contrary position.

It must be borne in mind here that, if the law allows ownership of wild animals to be acquired in this way, litigation is most likely to occur where the animal has been pursued by two separate parties, the ensuing litigation being between the one who pursued first and the actual captor. One may indeed with justice consider

¹⁹⁴ For a non-legal example, see for instance the Welsh medieval epic *The Mabinogion* (S Davies (tr), Oxford World's Classics 2008) 3-4.

¹⁹⁵ Smith, *Lectures* 18.

¹⁹⁶ R A Posner, 'Savigny, Holmes and the Law and Economics of Possession' (2000) 86 *Virginia L Rev* 535 at 554.

that one who has expended time and effort, and possibly money, on the pursuit of an animal ought not to be thwarted by one who comes onto the scene later to make the final capture. This is particularly the case where the former's efforts have exhausted the animal to the point that capture is made easy. One who takes an animal in such circumstances seems to be taking an unfair advantage from another's efforts. If, as Posner suggests, it is desirable to exclude the unskilled, that can be achieved easily enough merely by requiring a high degree of probability of capture. Similarly, where the issue arises in criminal legislation concerning the pursuit of game, it is one thing to set out to pursue game on private land, but quite another to continue a pursuit where an animal mortally wounded in one place, where the hunter is entitled to hunt, manages to make its way onto private land before dying. Where one has fatally wounded an animal on land where one is entitled to be, it seems unduly harsh to apply the taint of criminality if that person goes onto the private land to collect the animal, where that trespass would not otherwise be criminal. It is also wasteful, if it means the animal must just be left to rot. Locke's view, however, that the mere pursuit of the animal is enough to remove that animal from its natural state and bring it within private ownership,¹⁹⁷ is less easy to accept, if acquisition of ownership by *occupatio* is to be said in any sense to be based on possession: I do not acquire control just by pursuit, without some clearer indication of control, or at least of the likelihood of acquiring control. Where, however, it appears probable that full control will be acquired unless some other person interferes, it does not seem unreasonable to give ownership of a wild animal to the first to pursue, even though such control as has been exercised is rather minimal.¹⁹⁸

Equally, once caught a wild animal may nonetheless escape. As we have seen, escape will be held to end ownership. If the animal escapes, its owner is likely to pursue it, and the law must consider its response to this. It may be held that ownership can be retained if the animal is pursued; alternatively, the law may insist on actual recapture, without which the animal is held to be ownerless.

¹⁹⁷ J Locke, *Second Treatise of Government* (C B Macpherson (ed), Hackett 1980) 30.

¹⁹⁸ See also on this point the discussion of *Popov v Hayashi* in chapter 5.

(1) Historical and comparative approaches

(a) **Roman law.** It appears to have been disputed in earlier law whether ownership could be acquired before actual capture of a wild animal that was being pursued. Gaius notes the opinion of Trebatius, a jurist of the late Republic, that an animal 'so wounded that it may be captured'¹⁹⁹ is owned by its pursuer as long as pursuit continues. Watson suggests that this was the general view in the Republic.²⁰⁰ Nonetheless, Gaius prefers what he states to be the majority view, that actual capture is necessary, 'because many circumstances can prevent our actually seizing it'.²⁰¹ One may dispute the strength of this argument. After all, the possibility of dispossession cannot conclusively determine possession. I may lose possession of anything I have, but this does not mean that I am not in possession now. Certainly, where the pursuit does not have a high likelihood of success, there is no reason to award ownership to the pursuer. However, things are arguably otherwise where the pursuer is almost certain to take the animal, but for the interference of a third party. Nonetheless, Justinian confirms the view given by Gaius.²⁰²

Gaius is concerned here with the pursuit of a wild animal. As Buckland notes,²⁰³ we are nowhere told in the surviving Roman texts whether it is sufficient to kill the animal. If the initial pursuer kills the animal with an arrow, but another comes in and takes the animal, who is owner?

One text appears at first sight to be of assistance. Ulpian says, of an escaped bear, 'if I kill the bear, the corpse is mine'.²⁰⁴ However, he is concerned not with a competition between two hunters, but with the scope of the *actio de pauperie*, concerning delictual liability for injury caused by animals. The point is that the escaped bear is now ownerless, and so there is no liability in delict on the part of the (former) owner for its actions. The comment on subsequent acquisition of ownership of the bear is a mere aside. Ulpian is not addressing himself to the present question, and is not considering the situation where the killer is prevented from getting his

¹⁹⁹ Gaius, D.41.1.5.1.

²⁰⁰ A Watson, *Roman Private Law Around 200 BC* (Edinburgh University Press 1971) 66.

²⁰¹ Gaius, D.41.1.5.1.

²⁰² J.2.1.13.

²⁰³ Buckland 206.

²⁰⁴ D.9.1.1.10.

hands on the animal by a third party's intervention, and so he cannot be relied on as a guide to the point presently under consideration.

In fact, there is good reason to think that killing the animal was insufficient without further acts. If *occupatio* is based on possession, some act will be needed to supply the *corpus* element. If wounding is insufficient, killing should also be insufficient. The difference between a serious wound and death may be merely chance or, indeed, time. Moreover, it may be impossible for a third party to tell whether the animal is dead or merely incapacitated without examination. If the animal is struck by arrows from both pursuers, it may be impossible to say which killed it. Accordingly, the law should, for practical reasons if for no other, favour either the first to strike or the first to take. Finally, it may be observed that, even with a dead animal, it is nonetheless the case that 'many things can happen to stop you catching the animal',²⁰⁵ which is equally true if the animal is dead – someone may take the carcass before the actual killer can get to it. Accordingly, to hold death to be enough is inconsistent with the general position of Roman law.

Once ownership of a wild animal is acquired, its continued ownership is dependent on continued possession.²⁰⁶ However, Roman law allowed ownership to be retained by pursuit of the escaped animal.

The loss of ownership happened, according to Gaius:

...when they escape from our custody and return to their natural state of freedom.²⁰⁷

There are therefore two requirements for the loss of ownership. The first is escape 'from our custody', meaning presumably escape from actual control or confinement. The second requirement, return to the animal's 'natural state of freedom', is met when the animal 'escapes our sight or, though still visible, is difficult of pursuit'.²⁰⁸

The same rule is applied to swarming bees²⁰⁹ and, presumably, to other animals formerly having *animus revertendi*. It will be noted that ownership is lost,

²⁰⁵ J.2.1.13.

²⁰⁶ J.2.1.12; Proculus, D.41.1.55; Gaius, D.41.1.3.2.

²⁰⁷ D.41.1.3.2.

²⁰⁸ Gaius, D.41.1.5pr.

²⁰⁹ Gaius, D.41.1.5.4; J.2.1.14; G.2.67.

even if pursuit is continued, if recovery is 'difficult'. In the texts referred to on pursuit of bees, the language used is that ownership is only retained if pursuit is not difficult. The implication is that if there is any difficulty at all in pursuit, ownership is lost. It is not enough that success is possible, or even probable, according to the language used in the Roman sources. Buckland suggests that:

[P]erhaps the true account is that the beast ceased to be owned when the chance of recovering him was not materially greater than that of capturing any other wild animal.²¹⁰

However, this does not appear to reflect the Roman texts. An animal may have become difficult to pursue, but still be easier to catch than another wild animal. Only the former is required by the texts.

It is not clear, however, that an escaped animal is still possessed, even if pursued. After all, it can hardly be said to be under the control of the pursuer. It may be, in fact, that loss of ownership here is based on a general rule that ownership of moveable property is lost if the property itself is lost beyond recovery. Ulpian²¹¹ refers to a suggestion of Pomponius to this effect. Pomponius is discussing a case of a pig carried off by wolves and recovered by a third party. A pig is a domesticated animal, not a wild animal. Nonetheless, the rule may be, says Pomponius, that 'the thing remains ours so long as it can be recovered'.²¹² This is essentially the same rule as given above for wild animals, but it is expressly applied here, by analogy with wild animals, to domesticated animals and inanimate property.²¹³

(b) France. Domat's view was that a wild animal being pursued was acquired 'by the bare fact of our laying our hands upon [it]',²¹⁴ actual seizure being necessary.²¹⁵

Pothier, on the other hand, took a view at the other end of the scale:

²¹⁰ Buckland 206.

²¹¹ D.41.1.44.

²¹² Curiously, this rule does not appear to apply to goods jettisoned to lighten a ship. They remain owned until the owner 'has begun to treat [them] as abandoned' (Javolenus, D.41.1.58). See also J.2.1.48; Gaius, D.41.1.9.8; Javolenus, D.41.2.21.1. Again, Ulpian (D.41.2.13pr) notes that stones are still owned when lost in a shipwreck in the Tiber, though they cease to be possessed. For discussion of the issue, see T Finkenauer, 'On Stolen Wine, Fished Fishermen and Drowned Dogs' (2011) 7 Roman Legal Tradition 30.

²¹³ See also Paul, D.41.2.3.13, to very similar effect.

²¹⁴ Domat, *Civil Law in its Natural Order*, Pt. 1 3,7,2,17.

*[I]l suffit que je sois à la poursuite d'un animal, quand même je ne l'aurois pas encore blessé, pour que je sois censé, tant que je suis à sa poursuite, être le premier occupant.*²¹⁶

Thus Pothier rejects any requirement for a serious wound, allowing acquisition by pursuit alone, even without wounding.

The modern position in French law does not allow acquisition quite so easily as is implied by Pothier's statement of the rule. The modern rule appears to be that an animal under pursuit is acquired when it is either wounded such that it cannot escape or under such close pursuit that escape is not possible.²¹⁷ The point then appears to be the inability of the animal to escape. Planiol acknowledges²¹⁸ the difficulty of judging the seriousness of the wound, and the difficulty where the animal is shot by two hunters or is momentarily lost sight of by the first pursuer, but gives no answer to the question.

The position on retention by pursuit is less clear. Malaurie and Aynès state²¹⁹ that wild animals in captivity, such as boars in a park or tigers in a cage, are equated with domesticated animals. Presumably, if they ceased to be in captivity, they would therefore equally well cease to be owned. However, any general rule regarding loss of ownership of wild animals is in French law largely superseded by two specific rules.

One of these is contained in the French *Code civil*, which provides²²⁰ that pigeons, rabbits and fish which pass into another dovecot, warren or fish farm pertain to the owner of that dovecot, warren or fish farm. Ownership is thus lost. This rule is derived from pre-Code law.²²¹

With respect to bees, the French *Code rural* provides:

²¹⁵ *Ibid.* Pt. 1 3,7,2,8.

²¹⁶ Pothier, *Propriété*, para. 26 ('it is enough that I am in pursuit of the animal, even if I have not yet wounded it, in order that I be judged, inasmuch as I am in pursuit, to be the first occupant').

²¹⁷ Planiol, para 2571; Carbonnier, para 903; Bufnoir, *Propriété et Contrat* 21.

²¹⁸ Planiol, para 2571.

²¹⁹ P Malaurie & L Aynès, para 591.

²²⁰ *Code civil*, art 564.

²²¹ Pothier, *Propriété*, para 166.

*Le propriétaire d'un essaim a le droit de le réclamer et de s'en ressaisir, tant qu'il n'a pas cessé de le suivre; autrement l'essaim appartient au propriétaire du terrain sur lequel il s'est fixé.*²²²

Interpreted literally, says Bufnoir,²²³ this would mean that the bees were never ownerless. In practice, however, it is interpreted to mean same as Roman law. The swarm continues to belong to its owner as long as it is within sight. The rights of the landowner on whose land the bees take up residence are unclear, however.

According to Jourdain, the bees automatically become the property of that landowner by accession, unless there is fraud.²²⁴ This was also the view of Pothier.²²⁵ Bufnoir, on the other hand, denies that this is a form of accession and insists that some form of appropriation is necessary.²²⁶

(c) Roman-Dutch law. The position taken in Roman-Dutch law was that it was necessary to catch the animal to acquire ownership,²²⁷ though the first pursuer may have remedy against one who takes first for 'unsportsmanlike behaviour'.²²⁸ Contrary to the position suggested above for Roman law, Van Leeuwen²²⁹ implies that killing is sufficient.

Modern South African law also adopts the view that actual capture is necessary. Mere wounding or close pursuit is not enough. The leading case is *R v Mafohla*,²³⁰ which concerned a charge of theft of a wild animal, specifically a kudu. The animal had been shot and fatally wounded by a hunter, but had escaped sight. When, the following morning, the hunter tried to locate the carcass, it was found that it had been removed by the accused. It was held that the accused had not committed theft. The kudu was ownerless at the time it was taken by the accused, the hunter not

²²² *Code rural*, art L211-9 ('The proprietor of a swarm has the right to reclaim and recover possession of it, as long as he has not given up pursuit; otherwise, the swarm belongs to the proprietor of the land on which it has fixed itself').

²²³ Bufnoir, *Propriété et Contrat* 24.

²²⁴ Jourdain, para 126.

²²⁵ *Propriété*, para 166.

²²⁶ Bufnoir, *Propriété et Contrat* 24.

²²⁷ Grotius, 2,4,31; Huber, 2,4,27-28; Grotius, *De Jure Belli ac Pacis*, 2,8,3.

²²⁸ Grotius, 2,4,31.

²²⁹ Van Leeuwen, 2,3,6.

²³⁰ 1958 (2) SA 373. See discussion in J E Scholtens, 'Acquisition of Ownership of Wild Animals' (1958) 75 SALJ 369. Although this case is from what was then Southern Rhodesia, it is accepted as representing South African law: see eg van der Merwe, 'Original Acquisition of Ownership' (n 55) 717.

having actually captured it. This case may also imply that killing is insufficient without actual capture. The actual charge was of theft of 'the carcass of one kudu', but there appears to have been no discussion of that point. It seems probable that the point would have been raised had it been thought likely to be relevant.

Once the animal has been captured, ownership may be lost when it escapes. Grotius says that ownership is lost when sight of the animal is lost.²³¹ Elsewhere, referring specifically to bees, he says that ownership is lost when there is no hope of recovery.²³² It is not clear whether these requirements are meant to be cumulative or whether they are meant to be alternatives, or indeed whether this is a special rule just for bees. However, Huber²³³ says that ownership of a wild animal is lost when the animal is:

...out of sight, or is indeed still visible, but with little hope of fetching him back.

This suggests that the requirements stated by Grotius are to be taken as alternatives. Ownership is lost when either the animal is out of sight, or there is no hope of its recovery. However, whether the true position is Grotius' 'no hope' or Huber's 'little hope', Roman-Dutch law appears to be more in favour of the pursuing owner than the Roman law, which deprived the pursuer of ownership when pursuit became difficult.

Grotius elsewhere gives a very different approach to the problem. He states that:

[O]wnership is not actually lost because the wild beasts have escaped, but because of the natural inference that we have abandoned ownership on account of the difficulty of pursuit'.²³⁴

It is difficult to see any basis for such an inference, however. The idea that one gives up hope of recovering property merely because it is difficult to find is a surprising one and, even were it sound, the same ought to apply to absconding domesticated

²³¹ Grotius, 2,4,4.

²³² Grotius, 2,4,15.

²³³ Huber, 2,3,18.

²³⁴ Grotius, *De Jure Belli ac Pacis*, 2,8,3.

animals. There appears to be no trace of the application of the rule to domesticated animals.

In South African law, ownership is lost when sight is lost of the animal or it is difficult to pursue, following the first of the two alternatives given by Grotius.²³⁵ This is subject to an exception created by the Game Theft Act of 1991, which provides that in certain circumstances ownership of game is retained even on escape.²³⁶

(d) Germany. On acquisition of animals by pursuit, Pufendorf said that:

[I]f an animal has received a mortal wound or been seriously crippled, it cannot be taken by another so long as we keep up the pursuit of it...while this is not true, in case the wound be not mortal, nor such as seriously to hinder its flight.²³⁷

This view was rejected by Savigny:

When a man wounds a wild animal (*fera natura*) mortally, and follows it up close, he does not nevertheless obtain Possession of it until he actually catches or kills it; for it is possible, in many ways, that it may altogether escape him.²³⁸

For the modern law, the *BGB* gives no direct answer, providing only that the animal is ownerless as long as it is in its state of freedom,²³⁹ but becomes property when it is taken into possession.²⁴⁰ The fact that, as we have seen, German law allows acquisition only by one with a right to acquire, and not by trespassers, severely limits the scope for disputes of this nature. However, it has been suggested that all that is required for these purposes is the likelihood of controlling the animal,²⁴¹ implying that ownership may be acquired at a point short of full physical control.

²³⁵ Van der Merwe, 'Original Acquisition' (n 55) 718; *Law of Things*, para 133 n 1.

²³⁶ For general discussion, see van der Merwe, 'Original Acquisition' (n 55) 718-720; Silberberg & Schoeman 139.

²³⁷ *De Jure Naturae et Gentium*, 4,6,10.

²³⁸ *Possession* 169.

²³⁹ *BGB*, s 960(1).

²⁴⁰ *BGB*, s 958(1).

²⁴¹ *Münchener Kommentar*, s 958 n 3 (Quack).

For retention of an animal by pursuit, Pufendorf followed the Roman rule that it was necessary to pursue 'with the probable hope of recovering it'.²⁴²

Modern German law requires less. In the modern law, ownership is lost if a wild animal escapes, and the owner unduly delays or gives up pursuit.²⁴³ Nothing is said in the *BGB* about the difficulty of pursuit. Accordingly, it seems that any effort to locate the animal will be sufficient, as long as this is done without undue delay and the pursuit is not given up. Indeed, it has been suggested that even such minimal acts as the placing of a newspaper advertisement concerning the missing animal may be enough.²⁴⁴

(e) England. The position stated by Bracton is that:

It is not pursuit alone that makes a thing mine, for though I have wounded a wild beast so severely that it may be captured, it nevertheless is not mine unless I capture it; rather it will belong to the one who next takes it, for much may happen to prevent my capture of it.²⁴⁵

The language used here is strikingly like that of Justinian. Bracton, however, applies this even to extent that no acquisition by me when an animal is caught in my net but carried off by someone else.²⁴⁶

The rule given by Bracton, that actual capture is necessary, was applied in *Young v Hichens*.²⁴⁷ In that case, the plaintiff was fishing, and had nearly encompassed a number of fish in a net, when the defendant sailed into the opening and took some of the fish in his own net. The court held that actual capture was necessary, and that even near certainty of capture was insufficient. It is interesting to note that the views of Stair and Bell, discussed below, were cited to the court, but were held to be inapplicable to an English case.

²⁴² *De Jure Naturae et Gentium*, 4,6,12.

²⁴³ *BGB*, s 960(2).

²⁴⁴ *Münchener Kommentar*, s 960 n 15 (Quack).

²⁴⁵ Bracton, vol 2, 42.

²⁴⁶ *ibid.*

²⁴⁷ (1844) 6 QB 606; 115 ER 228.

The same position, that pursuit alone does not give ownership, has been taken in the United States.²⁴⁸ Thus a person who pursued a fox to exhaustion did not acquire ownership of it,²⁴⁹ although it appears to have been held that one may acquire by such wounding that capture is inevitable, the point being that the animal has thereby been brought within the pursuer's control.²⁵⁰ The position is the same in Canada.²⁵¹

The position of escaped animals, specifically swans, was considered in *The Case of Swans*.²⁵²

[I]f they escape out of his private waters into an open and common river, he may bring them back and take them again...But if they have gained their natural liberty, and are swimming in open and common rivers, the King's officer may seize them in the open and common river for the King: for one white swan, without such pursuit as aforesaid, cannot be known from another.²⁵³

On this point, the case relied on Bracton. It would appear that the pursuit must be such as to allow the swans to be distinguished from wild swans. Presumably, then, only very close pursuit will be enough. This is certainly implied by Bracton, who holds that an escaped wild animal is still owned as long as pursued, until its pursuit is 'no longer possible'.²⁵⁴

The issue was considered more recently in *Kearry v Pattinson*.²⁵⁵ In that case, the plaintiff's bees swarmed and settled on a neighbour's land. The court's view was that the plaintiff owned the bees as long as they were in sight and he had the power to pursue them, but that this power ended if they went onto land where he was not

²⁴⁸ J Kent, *Commentaries on American Law* (12th edn, C M Barnes (ed), 4 vols, Little, Brown 1884), vol 2, 349.

²⁴⁹ E C Arnold, 'The Law of Possession Governing the Acquisition of Animals *Ferae Naturae*' (1921) *Am L Rev* 393 at 395-396, discussing *Pierson v Post* 3 Caines (NY) 175. On this case, see most recently J Blackman, 'OutFoxed [*sic*]: *Pierson v Post* and the Natural Law' (2011) 51 *Am J Leg Hist* 417.

²⁵⁰ Arnold (n 249) 396-397, discussing *Liesner v Wanie* 156 Wis 16, 145 NW 374.

²⁵¹ B Ziff, *Principles of Property Law* (5th edn, Thomson/Carswell 2010) 134, citing *Pierson v Post*.

²⁵² (1591) 7 Coke Reports 15b; 77 ER 435.

²⁵³ (1591) 7 Coke Reports 15b at 16b; 77 ER 435 at 437.

²⁵⁴ Bracton, vol 2, 42. Bracton, vol 2, 43 gives the same rule for swarming bees.

²⁵⁵ [1939] 1 All ER 65. G W Paton, 'Bees and the Law' (1939-1941) 2 *Res Judicatae* 22, is surely incorrect to suggest that the decision implies that any bee that crosses a neighbour's boundary becomes ownerless thereby. Such a bee would still be owned as long as it retained the *animus revertendi*. The bees in *Kearry v Pattinson* had lost this habit.

entitled to go. As the bees became ownerless on entering the neighbour's land, he was entitled to refuse entry to the plaintiff to continue their pursuit.

(2) Scotland

(a) Institutional and other early writings. On the question of when in the pursuit ownership of a wild animal is acquired, the earlier Scots writers do not speak with one voice. At one extreme, Hume implies that actual capture is necessary:

If I wish, for instance, to secure for myself a wild animal in the fields...the means which nature points out to me for that purpose is to bring the thing, if I can, under my natural power and dominion – to form a close and immediate connection with it, such as shall hinder every other person from interfering with me in the use of it, unless by violence and wrong. I pursue and catch the animal therefore.²⁵⁶

The word 'wrong' is presumably meant to be read with the word 'violence' as a word of emphasis here, for the wrong that exists in the taking of my property is a consequence rather than a cause of my right in it. With that in mind, we can see that Hume demands a very close physical connection with the animal. Clearly, pursuit alone will not be sufficient, for another can take an animal I am pursuing without doing any violence to me. Forbes gives the same rule:

Things belonging to no Body are acquired by one's laying Hands upon them, and getting them in his power.²⁵⁷

It must be said, though, that neither Hume nor Forbes is here considering directly the question of a competition between two hunters who have both pursued the animal.

At the other end of the scale, Bell holds that the animal can be acquired at a point before actual capture:

The act of appropriation is effectual to vest the property only when complete. But it is held complete while fairly proceeding towards full accomplishment. So, if one wound an animal to death, or so that it cannot escape, or if one,

²⁵⁶ Hume, *Lectures*, vol II, 1.

²⁵⁷ Forbes, *Great Body* 352.

without wounding it, have an animal in pursuit, and not beyond reach, another coming in and taking the animal does not deprive the first of his right – the first being deemed the lawful occupant.²⁵⁸

This is clearly a much lower standard. Mackenzie gives the same rule.²⁵⁹ The approach is a long-standing one in Scots law.²⁶⁰ It would appear, on Bell's view, that one can acquire ownership without actual capture, or even wounding, as long as, presumably, capture was certain or at least to a high degree likely but for the interference of another. A cornered animal might be an example.

Stair's view is unclear. In his account of the matter, he initially appears to give a similar view to that of Bell:

[I]t is the first seizure that introduceth property, and not the first attempt and prosecution; as he who pursueth or woundeth a wild beast, as fowl or fish, is not thereby proprietor, unless he had brought it within his power, as if he had killed it or wounded it to death, or otherwise given the effectual cause whereby it cannot use its native freedom.²⁶¹

On this view, the animal is acquired once the pursuit has reached the point at which it can be said that the animal is in the pursuer's power. This may happen before actual capture although, unlike in Bell's account, there is no indication that ownership can be acquired by pursuit without wounding. The example Stair gives is of a whale forced onto the shore by its wound. However, he then goes on to give a somewhat different account:

Though the falling in upon another's game when he alone is in prosecution, may be uncivility or injury, yet it hindereth not the constitution of property; though it be a just ground to annul the right of the first possessor, and make him restore to the first prosecutor, if he continue his pursuit with a probability to reach his prey.²⁶²

²⁵⁸ Bell, *Principles*, s 1289.

²⁵⁹ *Inst.* 2,1.

²⁶⁰ *Fragmenta Collecta*, APS 1,749 c 5.

²⁶¹ *Inst.* 2,1,33. As is pointed out by Smith, *Short Commentary* 536 n 3, Stair and Bell thus prefer the opinion of Trebatius to that of Justinian.

²⁶² *Inst.* 2,1,33.

This appears to be the same as the view expressed by Grotius. Bankton gives the same view,²⁶³ subject to capture by the first pursuer being 'certain' but for the interference. Adam Smith²⁶⁴ also gives this view, on the basis of his idea of exclusive privilege, discussed below.

Both Stair and Bankton rely on *King's Advocate v Rankine*.²⁶⁵ This case arose during war with the Netherlands. A prize was pursued by a French ship, but was taken first by a Scottish privateer.²⁶⁶ On analogy with *occupatio*, it was held that the prize went to the French ship unless it would have escaped but for the privateer's intervention. However, it is not clear from the case whether the correct view is that the pursuit was sufficient on its own, or whether the second view expressed by Stair is the correct one. Only a case where the first to capture became insolvent, or conveyed the animal to a third party, before it was handed over to the first pursuer would give a different result depending on which rule was adopted. There has been no such case. If, though, the first to capture is owner, it is difficult to see what the basis for the first pursuer's claim might be. It also seems unduly complex to make the former owner but to make this subject to an obligation to yield up the property to the latter.

If a wild animal escapes (or, if tamed, loses the habit of returning) then, as is true elsewhere, possession can be maintained by pursuit. On this, the institutional writers are more consistent. For Stair, possession is lost, and with it ownership, 'so soon as the owner ceaseth to pursue for possession'.²⁶⁷ For Bankton, ownership of a tamed animal is lost 'after the former owner leaves off prosecution, which is likewise the case of an [*sic*] hive of bees that fly away'.²⁶⁸ Erskine says that an escaped animal is free for acquisition 'after the former proprietor has given over the pursuit'.²⁶⁹ Likewise, for Bell, swarming bees continue to be owned only 'while pursued by the owner'.²⁷⁰ What is notable about these views is not only the striking unanimity between the institutional writers, but also that fact that there is no reference here to

²⁶³ *Inst.* 2,1,7.

²⁶⁴ Smith, *Lectures* 82.

²⁶⁵ (1677) Mor 11930.

²⁶⁶ ie a private ship licensed in wartime by one combatant state to attack enemy ships. See further Bell, *Principles*, s 1295. A 'prize' is an enemy ship taken by a privateer.

²⁶⁷ *Inst.* 2,1,33.

²⁶⁸ *Inst.* 2,1,7.

²⁶⁹ *Inst.* 2,1,10.

²⁷⁰ *Principles*, s. 1290.

the difficulty of pursuit. Only Mackenzie gives a different view, that escaped animals are retained only 'if they be yet recoverable by us'.²⁷¹ Curiously, there is some indication that a rule similar to the Roman rule was followed at an earlier period.²⁷²

Arguably, the majority view is consistent with the suggestion by Grotius that loss of ownership here is based, not on loss of possession, but on deemed abandonment. Certainly, there is no equivalent in Scots law of the Roman rule, discussed above, that ownership of property generally is lost when the property is beyond recovery.²⁷³

(b) Adam Smith and exclusive privilege. Adam Smith comments distinctively on this issue as part of his general discussion of real rights. He identifies four real rights, namely property, servitude, pledge and inheritance.²⁷⁴ The last is included on the basis that an heir has the right of 'excluding all others from the possession until [sic] he determine whether he will enter heir or not'.²⁷⁵

He goes on to argue on this basis that all such exclusive privileges are also real rights, giving as further examples intellectual property rights²⁷⁶ and commercial monopoly rights,²⁷⁷ on the basis that the holder of such a right is entitled to exclude all others from its enjoyment.²⁷⁸ Similarly, he says, a hunter may be said to have a right not to be disturbed in the chase, even though he is not owner until actual capture:

²⁷¹ *Inst.* 2,1.

²⁷² *Fragmenta Collecta*, APS 1,749 c 5; c 6 (bees).

²⁷³ For the general position on lost property, see Stair, *Inst.* 1,7,3; Erskine, *Inst.* 2,1,12; Bell, *Principles*, s. 1291; Bankton, *Inst.* 1,8,4. For general discussion of the modern law, see Reid, *Property*, paras 547-552 (Gordon).

²⁷⁴ Smith, *Lectures* 81.

²⁷⁵ *ibid* 81-82.

²⁷⁶ *ibid* 83. For discussion of Smith's justification of this form of intellectual property rights, see O Bracha, 'The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care' (2004) 38 *Loyola of Los Angeles Law Review* 177, 208; N Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation' (1993) 24 *Rutgers Law Journal* 347, 368-69.

²⁷⁷ Smith, *Lectures* 83-84.

²⁷⁸ This concept of exclusive privilege may be original: N MacCormick, 'Adam Smith on Law' (1981) 15 *Valparaiso University Law Review* 243, 249. Certainly, MacCormick is unable to identify any precursor.

[T]he trespass here is plainly against the exclusive privilege [*sic*] the hunter has to the chase or pursuit of the beast he has started.²⁷⁹

The nature of the hunter's exclusive privilege is, however, unclear. Smith makes clear that it is not based on a breach of a property right.²⁸⁰ On the basis that this exclusive privilege arises in any case of pursuit of an animal, even 'in a state of hunters...before the origin of civil government',²⁸¹ Metzger suggests that:

Smith would presumably class both rights [ie the exclusive privilege of a hunter and that of an heir] as among a man's (natural) right to liberty, or some other right belonging 'to a man, in his person'.²⁸²

The difficulty with this view, however, is that Smith refers specifically to someone with some special right to hunt, rather than to any general public right to take wild animals. The language he uses – 'one who has a right to hunt'²⁸³ – suggests this. Moreover, he elsewhere gives a general position that is contrary to any general exclusive privilege belonging to those in pursuit of wild animals. He states that one chasing a hare, but who has not yet caught it, does not have sufficient power over it that a reasonable observer would consider him to have suffered an injury if another takes it.²⁸⁴ It is true that he is talking here about the earliest age of humanity, his Age of Hunters, in which for him all ownership was based on continued possession.²⁸⁵ However, there is no indication that the rule of acquisition is to be different in later ages. When Smith comes to the next age of humanity, the Age of Shepherds, the only difference that he notes with regard to wild animals is that ownership may now be retained when the animal is 'tamed so as to return back to us after we have let them out of our power, and do thus habitually'.²⁸⁶

²⁷⁹ Smith, *Lectures* 82.

²⁸⁰ *ibid* 82 and 471. It may be merely a slip of the pen that has him say, at 459-60, that 'All agree that it is a breach of property to break in on the chase [*sic*] of a wild beast which another has started'.

²⁸¹ *ibid* 400.

²⁸² E Metzger, 'Adam Smith and Roman Servitudes' (2004) 72 *TvR* 327, 340.

²⁸³ Smith, *Lectures* 82.

²⁸⁴ *ibid* 17-18 and 19.

²⁸⁵ *ibid* 19.

²⁸⁶ *ibid* 20.

Elsewhere, though, Smith does give a view consistent with Metzger's account, dropping the reference to the right to hunt.²⁸⁷ The explanation for this apparent discrepancy appears to lie in the nature of the *Lectures on Jurisprudence* as they have come down to us. The published edition is based on two reports of the lectures by students attending them. The earlier, based on the lectures delivered in 1762-3, takes up the first 394 pages of the published edition. The later, based on the 1766 lectures, takes up the remainder of the book²⁸⁸. The passage referred to as giving the restricted view, that only those hunters with some actual right to hunt have an exclusive privilege to those animals they are pursuing, belongs to the earlier report; that reflecting the broader view belongs to the later report. It seems probable, then, that what we see is Smith's views developing between the two series of lectures. There is, of course, nothing unusual in a lecturer's ideas developing between sessions.

Either way, we see that Smith to some extent allows to hunters in pursuit an exclusive right to the animal pursued which is not based on ownership. As we have seen, this is inconsistent with the majority view of the institutional writers. We shall see, too, that it is not the view followed in case law. Nor is there any indication in the cases that one with a right to hunt is in a better position than one without, as is implied by Smith's view in the 1762-3 report. Where the issue is raised in the cases, it is only as the basis of a defence to a charge of trespassing in pursuit of game. It is never said that a hunting privilege gives any better right to the animals pursued.

On ownership of escaped animals, Smith follows other writers in allowing ownership to be retained by pursuit. However, he differs from the institutional writers in requiring a 'probability of recovering'²⁸⁹ the animal, on the basis that the connection with the animal that was acquired with ownership is lost when the animal has escaped beyond any probability of recovery. The former owner's relationship with that animal is then no different from his relationship with any other animal of the same kind.

²⁸⁷ *ibid* 471.

²⁸⁸ For discussion of Smith's approach in these lectures, see E Metzger, 'Adam Smith's Historical Jurisprudence and the 'Method of the Civilians'' (2010) 56 *Loyola Law Review* 1.

²⁸⁹ Smith, *Lectures* 19.

(c) **Whales.** Whales, of course, will often be caught in international waters, where there is no particular reason to apply Scots law specifically. Instead, customary rules have tended to apply. The most common of these is the 'fast and loose' rule.²⁹⁰ This rule holds that the whale belongs to the ship that first struck it as long as the harpoon is still attached to the ship and the whale or, even if the harpoon has become detached from the whale, the whale is tangled in the line. If, however, the line breaks, or the harpoon becomes detached from the whale, the whale is once more free for acquisition.

In *Sutter v Aberdeen Arctic Co*,²⁹¹ the pursuers were owners of a whaling ship, the Clara. The defenders were owners of another ship, the Alibi. The two ships were engaged in whaling. The pursuers were using an unconventional method of whaling. Instead of wounding the whale with a harpoon attached to the boat by a line, and allowing the whale to drag the boat through the water until it is tired enough to be easily taken, the pursuers had adopted a technique from the natives of the area, known as 'drogging'.²⁹² This involved releasing the line from the boat once the whale had been harpooned, with inflated seal skins, known as 'dregs', attached to the end. The idea was that the whale would exhaust itself by having to drag these dregs through the water, and would thus be easily caught. An employee of the pursuers drogged a whale. However, before the whale could be taken, employees of the defenders moved in and killed the whale. On the basis that both ships were European, and had not accepted the native custom, the Lord Ordinary applied the fast and loose rule and found in favour of the defenders.²⁹³ A majority of the Inner House, however, reversed this decision, and applied the Scots law of *occupatio*, although Lord Curriehill, in the minority, appeared to consider the fast and loose rule to be a specific application of the same principle, compliance with it being 'the test...of a whale in such circumstances being within the power of man'.²⁹⁴ The House

²⁹⁰ Applied in *Hutchison v Dundee Whale Fishing Company* (1830) 5 Murr 162; *Addison & Sons v Row* (1794) 3 Pat 334; *Aberdeen Arctic Co v Sutter* (1862) 4 Macq 355. See Bell, *Principles*, s 1289; Pollock & Wright, *Possession* 125-126. Different customs may apply in different areas: Bell, *Principles*, s 1289; Pollock & Wright, *Possession* 38; Holmes, *Common Law* 167-68.

²⁹¹ (1861) 23 D 465, revd (1862) 4 Macq 355.

²⁹² Although this method is treated as local to the area in question, it appears that similar techniques were in fact used elsewhere: see H Melville, *Moby Dick* (first published 1851, Oxford World's Classics 2008), chapter 87.

²⁹³ (1861) 23 D 465, 471.

²⁹⁴ (1861) 23 D 465, 481.

of Lords, though, considered that the fast and loose rule applied in these circumstances, and not the general Scots law of *occupatio*.

What is problematic about the decision of the House of Lords in this case is that, arguably, the fast and loose rule is inappropriately applied. It is one thing to apply the rule to conventional whaling, using a harpoon fixed by line to the ship. This is what the rule is designed for, and at least has the merit of producing a clear result in a competition between two ships whaling using this method. However, the method used by the pursuers in *Sutter* was an entirely different method. There is no reason why a rule developed for one method should apply to another method.²⁹⁵ The logical result of the reasoning of the House of Lords is that no whale could be acquired in any way other than by the conventional method. The clearest indications of possession would be insufficient, unless the customary rule could be shown not to apply.²⁹⁶ As a result, innovation is eliminated, for no-one is likely to use a method of whaling that is legally ineffective, even if, for all that is known, it may be a superior method. Indeed, the Lord Chancellor acknowledges²⁹⁷ the possible superiority of drogging, eliminating as it does the problem of the pursuing ship being forced to cut the line if the whale dives in water deeper than the length of the line available.²⁹⁸ In addition, the Lord Ordinary noted²⁹⁹ that drogging had the advantage that a single boat could be used to catch a whale, as opposed to the conventional practice of the whale being killed by men on a number of boats belonging to the same ship. Drogging may therefore be seen as superior in terms of both safety and efficiency, yet is excluded by the decision of the House of Lords in this case. In the House of Lords, Lord Chelmsford³⁰⁰ appeared to consider that the operation of two rules would be likely to lead to conflict between the two. However, with all due respect, it

²⁹⁵ See *Sutter v Aberdeen Arctic Co* (1861) 23 D 465, 475 (Lord President); 485 (Lord Deas); 492, (Lord Ivory).

²⁹⁶ Indeed, the decision of the House of Lords is self-defeating, as neither the pursuers nor the defenders complied with the fast and loose rule, the whale being sufficiently disabled that the defenders' employees were able to kill and take it into possession immediately.

²⁹⁷ (1862) 4 Macq 355, 362-63.

²⁹⁸ It is curious also that no significance was attached by the House of Lords to the fact that this method of hunting was in use by the natives of the area, at least for seals. There was conflicting evidence on the question, but the Lord Ordinary indicated that, had he felt it necessary to decide the matter, he would have found it proved that the natives had used this method for the hunting of whales as well as seals ((1861) 23 D 465, 471). One would have thought that local usage would be of at least as much importance as that of visitors in establishing a customary rule.

²⁹⁹ (1861) 23 D 465, 470.

³⁰⁰ (1862) 4 Macq 355, 370.

is difficult to see how such a conflict could arise. The two are simply different methods of acquiring ownership. At any given time, either a given person has acquired ownership, or else he has not. In the latter case the animal is still open to acquisition. In the former, it is not.

It would be unfortunate if the law were so restrictive as to require customary rules be followed to the extent of restricting other methods. In fact, however, in at least one case,³⁰¹ discussed below, the normal Scots law of *occupatio* was applied to whales.

(d) Legislative intervention. The taking of wild animals is now extensively regulated by statute³⁰². The focus of these provisions, however, is not on ownership of animals. Nonetheless, it has been suggested that the common law of *occupatio* may be helpful in interpreting such legislation in appropriate circumstances. Thus, it is an offence to trespass on land 'in search or pursuit of game'.³⁰³ On the basis of cases on this provision, it has been suggested that:

[E]ntry on land to retrieve dead or moribund game or game apparently dead is not a trespass in pursuit of game, which implies that the game has already been taken.³⁰⁴

With respect, however, this is not a necessary implication. To say that an animal is being pursued implies that it is attempting to escape. It could equally form the basis of such a rule as is described here that dead or moribund game is no longer being pursued, due to its inability to attempt to elude capture. Indeed, in one of the three cases cited by Gordon in support,³⁰⁵ it was not in fact proved that the stag removed by the accused had actually been killed by the accused. As the Lord Justice-Clerk said in that case:

³⁰¹ *Stove v Colvin* (1831) 9 S 633.

³⁰² For a general account see GWS Barry & P Birnie, 'Fisheries', and SS Robinson & GWS Barry, 'Game', in *Stair Memorial Encyclopaedia* vol 11, at paras 1-300 and 801-1000 respectively.

³⁰³ Game (Scotland) Act 1832, s 1. This Act was formerly known as the Day Trespass (Scotland) Act 1832: see Short Titles Act 1896

³⁰⁴ Reid (ed), *Property*, para 541 (Gordon).

³⁰⁵ *Macdonald v Maclean* (1879) 6 R (J) 14.

A man trespassing in search or pursuit of game...is a man whose object is to capture or destroy a living wild animal.³⁰⁶

Nonetheless, the question of when ownership was acquired was held to be decisive in one of the other cases cited by Gordon,³⁰⁷ and the same approach is implicit in the other.³⁰⁸ Accordingly, it does appear that some guidance can be obtained from criminal cases on the game laws.

The Game (Scotland) Act 1832 is repealed by the Wildlife and Natural Environment (Scotland) Act 2011. The 2011 Act creates no direct equivalent to the offence of trespassing in pursuit of game. However, section 7 of the 2011 Act inserts into the Wildlife and Countryside Act 1981 a new section 11G, which imposes a criminal penalty on any person who 'intentionally or recklessly kills, injures or takes' a wild hare or rabbit. There is a defence of consent of the person entitled to take wild hares or rabbits³⁰⁹. The issue of acquisition of ownership could arise under these provisions, if 'taking' is taken to be equivalent to acquisition of ownership. If ownership may be acquired by pursuit, the animal may be held to have been taken on one area of land in respect of which permission has been given, even if it is only finally captured on another area of land.

(e) Acquisition of possession by pursuit. The general rule appearing in case law is that ownership may be acquired, in certain circumstances, by pursuit. It is not necessary to catch the animal. Thus, in *Nicoll v Strachan*,³¹⁰ a rabbit was shot on a public road, ran onto private land and then fell dead. In an appeal against conviction for trespassing in pursuit of game, it was held that its retrieval was not a trespass 'in search or pursuit of game', as long as the rabbit was so injured that it couldn't make its escape. This implies that it was the infliction of this wound that gave ownership. A passage in Rankine's *Landownership*,³¹¹ apparently to the contrary, is explained by Lord Guthrie³¹² as referring to the situation where the animal is only slightly

³⁰⁶ (1879) 6 R(J) 14, 15.

³⁰⁷ *Donald v Boddan* (1828) Syme 303.

³⁰⁸ *Nicoll v Strachan* 1913 SC (J) 18.

³⁰⁹ Wildlife and Countryside Act 1981, s 11H(1). The Act does not define who has such a right.

³¹⁰ 1913 SC (J) 18.

³¹¹ No page number appears, but the passage referred to is at page 155.

³¹² 1913 SC (J) 18, 20.

wounded. There is no indication that, despite what Stair, Bankton and Smith say, the hunter acquired any right less than ownership on wounding the animal in this manner. If the first pursuer of a wild animal acquired only an 'exclusive privilege' to the animal pursued, it would have been necessary to conclude that the accused in *Nicoll v Strachan* was still 'in...pursuit of game' when he entered private land to recover the rabbit.

The same principle, that actual capture is not necessary, was applied by the Inner House in *Addison & Sons v Row*.³¹³ In that case, a whale was harpooned but then got loose. It was taken by a ship that had come to assist. The view of the court was that:

[I]f I once seize upon the animal, and it breaks away from me, and I still continue in pursuit, I do not thereby lose my right as first occupant, so long as there are hopes of recovering it.³¹⁴

There is here no indication that the wound must be severe. The question must be asked, therefore, whether there are circumstances in which a lesser wound will be sufficient.

As we have seen, in *Aberdeen Arctic Co v Sutter* the House of Lords applied the fast and loose rule. However, in the Inner House the general common law approach was adopted. The two judges giving substantial opinions for the majority differed somewhat in approach on this question. The Lord President appears to give the pursuer ownership as soon as the whale is struck by the harpoon, which ownership is retained by pursuit,³¹⁵ although he was clear that the whale was disabled when caught. By contrast, Lord Deas stressed the extent of the injuries, implying that ownership was not acquired by the pursuers until the whale's injuries were such as to bring it within the power of the pursuers. For him, the rule is that:

A wild animal mortally wounded or totally disabled by one sportsman, who continues in hot pursuit, cannot be claimed by another sportsman who strikes

³¹³ (1794) 3 Pat 334.

³¹⁴ (1794) 3 Pat 334, 338, (Lord President). The House of Lords reversed, and imposed the fast and loose rule.

³¹⁵ Although in this case the pursuit was rather passive, consisting merely of waiting for the whale to resurface.

in and kills it outright, just as the other is coming up. The first sportsman may have lost sight of the animal for a short time, - that is of no consequence.³¹⁶

When the drog is first attached to the whale, it cannot be said to be in such a condition. Accordingly, it would appear on this view to have been open to acquisition by another even when struck. In his dissenting opinion, Lord Curriehill takes in his account of *occupatio* the same approach. He takes a differing interpretation of the evidence, holding the whale to have been 'in quite a lively state'³¹⁷ just before capture. The one significant point of difference between the statements of the law of Lords Curriehill and Deas is that the former will not excuse any losing of sight of the animal during the pursuit. For him, the whale while submerged was not in the power of the pursuers, however wounded it may have been.³¹⁸

The approach of Lord Deas was the same as that taken in *Donald v Boddan*.³¹⁹ In that case, there was a charge of entering land in pursuit of game. The accused had mortally wounded a hare on land where he was entitled to be, but the hare was actually killed by a dog, under the control of the accused, on neighbouring land. In support of the argument that ownership was acquired on wounding, the views of Pothier and Pufendorf were cited.³²⁰ This argument was accepted, even though there was no continuous pursuit – the accused had left off the pursuit to get the dog, and then returned to the pursuit. The accused had accordingly lost sight of the hare. The significant point may be that the accused only broke off pursuit for a very brief period. A longer delay in carrying through the pursuit may be taken as abandonment of the pursuit³²¹. A distinction may be made, however. In *Donald v Boddan*, the hare was traceable, the pursuer merely having to break off pursuit temporarily to fetch a dog. If, on the other hand, the animal is lost track of altogether, the fact of its being wounded will not give ownership. Some flexibility is allowed on this, however. As we have seen, in *Sutter v Aberdeen Arctic Co*, the whale was under water for extended periods. The expectation was, however, that the whale would be

³¹⁶ (1861) 23 D 465, 490.

³¹⁷ (1861) 23 D 465, 478.

³¹⁸ (1861) 23 D 465, 478-479.

³¹⁹ (1828) Syme 303.

³²⁰ (1828) Syme 303, 309.

³²¹ *Sutter v Aberdeen Arctic Co* (1861) 23 D 465, 476 (Lord President).

forced to come to the surface. If, however, the pursuer had left the fishing ground, that would have been taken to constitute abandonment of the pursuit.³²²

The decision in *Wilson v Dykes*³²³ shows the necessity of carrying through the pursuit. That case concerned a charge of theft. The complaint was that the accused had picked up, on a public road, a pheasant dead or totally disabled by shot. It was held that the natural inference from these facts was that the pheasant was ownerless. It was necessary to libel facts indicating how the pheasant was already private property. The court did not say what facts would be enough, but this implies that wounding alone, without following through pursuit, is not enough.

It will be recalled that Bell allowed acquisition by pursuit even without wounding. This proposition finds little support from case law. The main case on the point is *Stove v Colvin*,³²⁴ concerning ownership of whales captured off the island of Yell, in Shetland. A party of men from the south of the island drove the whales into a bay on the island. They were then joined by a party from the west of the island, who helped in killing the whales and dragging them to the shore. It was held that the West Yell men were entitled to an equal share of the whales. This implies that the driving of the whales into the bay and trapping them there was not enough to give ownership. It was only when the killing started that ownership of the whales was acquired.

It would be going too far, however, to conclude from this that possession can never be acquired by pursuit, without wounding. The point appears to be the level of control that has been exercised. Fatally wounding the animal will normally imply a higher degree of control than mere pursuit, but this need not be the case in all circumstances. A wild animal that has been cornered, for example, may be said to be under the pursuer's control. Indeed, there may be reasons why, in the circumstances, wounding is undesirable. *McArthur v Jones*,³²⁵ for example, concerned an attempt to detain animals under the Winter Herding Act 1686. Five cattle belonging to Jones trespassed on McArthur's land. McArthur sent an employee to take possession but, when he was at about six yards from them, the cattle moved off onto the public road,

³²² *ibid.*

³²³ (1872) 10 M 444.

³²⁴ (1831) 9 S 633. The pursuer's claim was based on *spuilzie*, but the case was argued and decided on the basis of ownership.

³²⁵ (1878) 6 R 41.

where they were turned by the employee and driven back after they had gone about 200 yards along it. The acts that took place before the cattle left McArthur's land were held to be insufficient for possession. As the Lord Justice-Clerk said,³²⁶ acts 'of an overt nature' were required. This would not mean necessarily wounding the animals – that would clearly be inappropriate when the animals were only to be detained as security. However, it may reasonably be supposed that acts more clearly indicative of an intention to possess, and showing clearer control over the cattle, would be required. As it was, the employee's actions were equally consistent with an intention to drive the cattle from the land.

(f) Retention of possession by pursuit. In one modern textbook, the position is stated as follows:

[T]he animal is still owned so long as the owner pursues it and has a reasonable chance of recovering it.³²⁷

It will be noticed that this statement of the law departs from that of the institutional writers in adding a requirement that there be a reasonable chance of recovery of the animal. Unfortunately, there appear to be no modern cases directly considering the retention of ownership of wild animals by pursuit. In only two reported cases does the issue appear of potential relevance.

In *Valentine v Kennedy*,³²⁸ discussed above, a number of fish escaped from a loch, but this point was not considered. It was assumed that the fish continued to be owned on escape, unless they were abandoned, in which case they would fall to the Crown, although as Rodger³²⁹ points out there is no warrant in authority for holding fish to fall to the Crown when abandoned, if fish are truly *ferae naturae*. It is notable that the sheriff in *Valentine v Kennedy* expressly declined to hold that the fish had ceased to be *ferae naturae*.³³⁰

³²⁶ (1878) 6 R 41, 42.

³²⁷ Reid, *Property*, para 542 (Gordon).

³²⁸ 1985 SCCR 89.

³²⁹ Rodger (n 19) 5-6.

³³⁰ 1985 SCCR 89 at 91.

*Lawrie v McArthur*³³¹ concerned a charge under the 1832 Act. A tenant farmer was entitled to snare rabbits, but not hares. The accused, an employee of the farmer, took a hare, apparently dead, from a snare. The hare revived and ran off, but was caught by the accused's dog. This was held not to constitute a contravention of the Act, but not because the hare was owned by the accused's employer, and by pursuing it he was maintaining that ownership. Instead, the basis of the decision was that the accused 'was not a trespasser at all; he was not on the lands for an unlawful purpose'.³³²

Accordingly, although in either case the court might have used this principle as the basis for its decision, in fact it did not. Nonetheless, there seems to be no reason to doubt that the statement of the law given by the institutional writers is accurate. This suggests that any degree of pursuit will be sufficient. It may be supposed also that ownership will be retained even if there is some delay in beginning pursuit, as long as that pursuit is not unreasonably delayed. After all, it is hardly to be supposed that the owner will necessarily witness the escape. It is probably more likely that the owner will only become aware of the escape at some time afterwards. As we have seen, this is the position of German law.

If any pursuit is sufficient for the retention of ownership, regardless of the difficulty of capture, this implies that Gibb is wrong when he suggests that swarming bees are still owned by their former possessor

...so long as he pursues them upon property into which he is entitled to proceed.³³³

Unfortunately, only English authority is given for this suggestion, which does not seem consistent with principle. It may be true that the owner of private land may prevent entry in pursuit of an escaping animal. No doubt, if the landowner does so, ownership of the escaping animal will be lost. However, that does not imply the

³³¹ (1880) 8 R (J) 2.

³³² (1880) 8 R (J) 2, 4 (Lord Young).

³³³ J R Gibb, 'Animals' in *Encyclopaedia of the Laws of Scotland*, vol 1 (1926), para 834. Rights of access to land are greatly increased by the Land Reform (Scotland) Act 2003, Pt 1. However, as the pursuit of bees cannot easily be said to constitute either 'recreational purposes' or 'educational activity', those being the permitted purpose by which in terms of s 1(3) of that Act access may be exercised, it does not appear that the 2003 Act has any application here.

conclusion given by Gibb. We have seen that, unlike the rule in England, even a trespasser becomes owner of any wild animal caught. Equally, it seems reasonable to suppose that, even if it be an actionable trespass to do so, if one in fact pursues an escaping animal onto private land, ownership will be retained.

(3) Discussion and conclusions

On the question of acquisition by pursuit, either view can be justified by principle.³³⁴ It is just a question of how much control is required. The authorities indicate, however, that actual capture is not necessary in Scotland. Of the other systems considered, only France takes the same approach.

In most cases, it is likely that wounding of the animal will be necessary. However, if the point of *occupatio* is possession, then the issue is whether the animal has been brought under the control of the party in question. Wounding can hardly be required in all cases, therefore. A tranquilizer dart, for example, would have the same effect as a bullet as far as ownership is concerned. Equally, an animal that has been cornered such that it cannot readily escape, may be held to be possessed. Likewise, it seems probable that *Young v Hichens*, had the same facts occurred in Scotland, would have been decided differently, the level of control over the fish being much greater than, for example, the level of control of the whales in *Stove v Colvin* before the killing started. Nor, as is indicated by *Sutter v Aberdeen Arctic Co* and *Donald v Boddan*, is it an obstacle that the animal is temporarily lost sight of in the pursuit. On the other hand, wounding or even death will not be enough if capture is not probable. Thus, trace of the mortally wounded animal having been lost, the result in *R v Mafohla*³³⁵ might well have been the same had the facts occurred in Scotland.

As far as retention by pursuit is concerned, in light of the unanimity of the institutional writers, and in the absence of contrary authority, it would appear that the view of the institutional writers should be followed. Accordingly, ownership of a wild animal is retained, even on its escape, as long as the owner continues pursuit. There is no requirement that the pursuit be likely to succeed.

³³⁴ As pointed out for the United States by Holmes, *Common Law*, 172.

³³⁵ 1958 (2) SA 373.

As long as such pursuit is carried on, therefore, the current law is consistent with the policy argument of van der Merwe and Bain,³³⁶ referring to *Valentine v Kennedy*, that:

[T]here seem to be cogent grounds for supporting [the sheriff's] conclusion that wild animals born in captivity and exploited for commercial gain should remain the property of the owner of the stank or game farm from which they escape.

This can be achieved, they suggest, even without actual pursuit, by following Germany or Grotius.³³⁷ However, as we have seen, Grotius's position is based on deemed abandonment of the animal. There is no trace of any such doctrine in the Scots authorities. Equally, modern German law appears to have reached the position where the requirement for pursuit is all but abolished. Even were such a development permissible on the basis of the Scots authorities, it is doubtful whether it gives sufficient notice to a third party who may deal with the animal as if it were ownerless.

All of this raises the question whether this is possession at all. After all, control is an aspect of possession which is entirely absent where the animal has escaped, even if it is pursued. Stair's wording may be taken to suggest that the pursuer is not in possession – 'property thereof is lost so soon as the owner ceaseth to pursue for possession'.³³⁸ To talk of someone pursuing for possession is perhaps to imply that he is not presently in possession.

Moreover, if 'control' in the context of common law liability for animals means the same as possession, further support is added to the view that an escaped animal is not possessed, even if pursued.³³⁹ There is one reported case on liability for animals that may be thought to be of assistance in this regard. In *Stillie v Wilson*,³⁴⁰ a bull belonging to the defender was released from a vehicle to be placed in a field. However, the bull broke free and ran off. The bull ran along the road, where it injured the pursuer. Because the bull had not previously exhibited any dangerous

³³⁶ van der Merwe & Bain (n 108) 425.

³³⁷ *ibid* 425-26.

³³⁸ Stair, *Inst.* 2,1,33.

³³⁹ Although, of course, on the view given above it would be possessed if closely pursued with a sufficiently high probability of capture.

³⁴⁰ 1990 SLT 145.

tendencies, under the law applicable at the time³⁴¹ the defender's responsibility was to take all reasonable care to seek to confine it. It is clear from the reasoning of the court that merely pursuing the bull would not constitute confinement. Clearly, 'confinement' and 'possession' are different concepts. However, equally clearly they are related concepts. Confinement here cannot mean confinement in an enclosed area, or it would be very difficult to move such livestock from one place to another. Presumably, confinement here is to be taken to mean something like 'control'. Accordingly, the reasoning of the court in this case is at least consistent with a view that an escaped animal is no longer possessed, even if pursued. The rule that ownership of an escaped wild animal is retained by pursuit therefore becomes an exception to the general rule that ownership of such animals is dependent on continued possession.

There remains one final point to note. If acquisition by pursuit is based on possession, and ownership may be retained by any pursuit without reasonable prospect of success, there is perhaps a conflict between these rules. Suppose that I am in pursuit of an animal. I have wounded it sufficiently that my success is probable. According to the current rule, I have acquired possession and ownership already. Suppose, then, that contrary to expectation the animal eludes me. It is attempting to escape from my possession and ownership. According to the rule on retention of ownership by pursuit, I ought to be able to retain ownership by continuing my pursuit even without hope of success. Yet this does not appear to be the law. The conflict could be resolved by requiring actual capture for acquisition, or a reasonable chance of success for retention, but neither seems permissible on the basis of the authorities as they stand. Presumably, then, the rule on retention by pursuit only comes into effect when the animal has been fully brought under control. Nonetheless, one can easily envisage borderline cases (perhaps with an animal that has only just been brought under control), leaving the law with an unsatisfactory lack of clarity.

³⁴¹ Now abolished. See now Animals (Scotland) Act 1987, s 1.

F. CONCLUSIONS

As we have seen, *occupatio* in Scots law is broadly based on possession, though some modification is necessary due to the special nature of animals. Thus, for example, even if the animal is not presently confined, possession may still be retained if the animal has the habit of returning. Likewise, special consideration has been given to the question of how possession is acquired – most types of property will not try to run away. In Scots law, as we have seen, pursuit without actual capture may sometimes be enough, though most of the systems considered have a stricter rule.

Policy arguments too, such as the view that ownership of a perhaps valuable animal should not be too easily lost, allow some departures from strict adherence to a rule based on possession. Thus, ownership of a wild animal may be retained by pursuit, even though it is not at all clear that the animal is still possessed in such circumstances. Roman law at least required some probability of recapture, but Scots law appears to be more lenient to the pursuer. There is, however, no secure basis for the efficacy of the marking of an animal in retaining ownership or possession, despite some comments to the contrary.

As far as possession of animals for the purposes of the possessory remedies is concerned, there is no direct authority. The role of possession in the acquisition of ownership by *occupatio* means that disputes over possession of wild animals almost invariably resolve into disputes over ownership, even where *spuilzie* is mentioned.³⁴² However, subject to the exception for animals that have escaped but which are under pursuit, the rules for *occupatio* stated here appear to be consistent with the general requirements for possession of corporeal moveables.

³⁴² As in *Stove v Colvin* (1831) 9 S 633.

8 CONCLUSIONS

The purpose of this thesis was to consider the physical element of possession of corporeal moveable property, in relation both to acquisition and loss of possession. Although the focus was to be on Scots law, the law of Rome, France, Germany, South Africa and England was also to be considered in the hope that this comparative and historical consideration would shed some light on the issues raised.

To acquire possession, it is necessary to satisfy two requirements, one mental and one physical. The mental element in Scots law can be defined as the intention to hold for one's own benefit. The physical element, which is the subject of this thesis, may be exercised by the possessor personally or by another holding on the possessor's behalf. Scots law is very much in the Civilian tradition, and opposed to the Common Law approach, in conceiving of possession as something entirely distinct from ownership and from the right to possess.¹

A further, at least potential, divergence between the Civilian and Common Law traditions arises from the question of whether possession is a unitary concept. As we saw in part B of chapter 1, while Civilian writers seem generally content to consider possession in this way, a number of Common Law writers appear to consider that possession is a term with numerous (albeit related) meanings, varying depending on the area of law in question. It is beyond the scope of this thesis to consider whether this is the case in Scots law as far as the mental element of possession is concerned. However, in relation to the physical element, it is striking that in none of the areas of law considered do the requirements for the physical element appear inconsistent with the requirements in the others. It must be said that certainty on this point is reduced by the fact that particular issues tend to come up predominantly in specific areas of law: for example, possession of animals arises as an issue almost entirely in relation to the doctrine of *occupatio*,² and attempts to possess through symbolical means come up almost entirely as attempted delivery of goods.³ As is suggested below, where there are apparent divergences, this may be attributable more to the effect of differing circumstances rather than to differences of

¹ Chapter 1, part A.

² Chapter 7.

³ Chapter 6, parts C-E.

principle. As far as may be determined, though, it does appear that, at least as far as the physical element of possession is concerned, Scots law is more consistent with the Civilian approach.

In part B of chapter 2, it was suggested from the consideration of comparative and historical material that the physical element of possession required actual control of the property, rather than merely the ability to take control. This control does not have to be of a high level, however. The possibility of interference, for example, need not be excluded. More important is that, as the physical manifestation of the intention to possess, the control exercised be such as to give an appropriate impression to the hypothetical objective bystander. In other words, the physical acts that are carried out must be such as to be consistent with an assertion of a right to the property. What is required depends on the circumstances, with the result that the same acts may be sufficient in some circumstances but not in others. This may in part explain some apparent differences in the way that the concept of possession is applied in different areas of the law. Thus, merely to hold an object in the hand will be enough against the background of an agreement to buy the property, but clearer acts will be needed to establish possession where that would be unlawful.⁴

In chapter 3, Scots law was found to be consistent with this approach. The physical element of possession exists where the property is under someone's control in such a manner as to indicate an assertion of a right to possess the property. It is not necessary to exclude others, unless those others are carrying out acts inconsistent with the possession. Indeed, the level of physical control required is not high. The control requirement may, for example, be satisfied by a merely momentary holding,⁵ and in the case of animals mere pursuit may be enough, normally with the animal having been wounded but in appropriate circumstances without even requiring that much.⁶ Although it may be minimal, however, the control must be genuine. As a result, merely symbolical acts are insufficient.⁷

In chapter 4, we saw that possession is not lost through mere absence or where there is merely the possibility of interference by a third party. In the former case, it

⁴ Chapter 1, part B(3)(c).

⁵ Chapter 5.

⁶ Chapter 7, part E.

⁷ Chapter 6.

was suggested that absence only leads to a loss of possession where this is of a nature and duration that it suggests to an objective bystander that possession has been abandoned, regardless of whether the possessor has in fact intended to abandon possession.⁸ This therefore suggests again an objective approach to possession: from the point of view of the objective bystander, the situation is much the same whether the possessor has intended to give up possession or the possessor is being prevented in some way from returning to resume control. As far as potential interference is concerned, as long as I am in fact continuing to exercise control I continue to possess, even if I could not resist the interference with that possession.⁹ Finally, possession is lost when property is lost beyond recovery by normal searching.¹⁰ Scots law appears broadly consistent with the other systems considered, except on this last point, in relation to which it appears that English law may allow possession to be retained even when the property is not recoverable.¹¹

An exception to this general approach is found with animals. As we saw in part E(2)(F) of chapter 7, ownership of an escaped wild animal is lost only when the owner ceases to pursue. Unlike the other systems considered, Scots law does not appear to hold ownership to be lost even where continued pursuit is difficult and is unlikely to succeed. If it is accepted that ownership of wild animals is dependent on continued possession, this implies that an escaped wild animal continues to be possessed as long as it is pursued, however unlikely that pursuit may be to succeed. The alternative and, it is suggested, better view is to see the rule on retention of ownership of escaped wild animals as a special rule applicable only in this context, rather than being a rule of the general law of possession. As is noted above, this represents an exception to the view that possession is a unitary concept.

⁸ Chapter 4, part B(1), (3).

⁹ *ibid*, part B(4).

¹⁰ *ibid*, part B(2).

¹¹ Chapter 2, part C(5).

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