SCOTTISH LAW COMMISSION

MEMORANDUM No. 31

CORPOREAL MOVEABLES

REMEDIES

31 August 1976

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

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

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Introduction

1. In the other Memoranda in this series[1] we have considered a number of problems in the substantive law of corporeal moveables, including the question of when and how risk and property should pass; the difficulty of classifying certain types of property as "heritable" or "moveable"; what should be the rights of good faith acquirers of another's property; what the rights of the parties should be in cases of the mixing, union or creation of moveables; how lost and abandoned property should be dealt with by the law; and the role of acquisitive prescription in relation to corporeal moveables. We now turn to the question of remedies - particularly the remedies which are, or ought to be, available to a dispossessed owner. In other words, granted that a party - either under the existing law or under the law as it would be if the proposals made in our other Memoranda were implemented - has the right of ownership in a corporeal moveable, how can that right be enforced?

2. An owner's first remedy - which is rarely invoked in practice - is to follow and recover his property by self-help. The judicial remedies available may comprise, first, (in theory) vindication in an action for declarator of his ownership; secondly, an action, based on the obligation of restitution, in which he concludes for delivery (ius ad rem) or - if the defender is still bound by the obligation but can no longer deliver - for the value of the thing; thirdly, an action of recompense for the unjustified enrichment of the defender through the pursuer's loss; and fourthly, an action of reparation for damages caused by the fault of the defender.

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[1] Memoranda nos. 24-30.

If the remedy for spuilzie is still competent, it is essentially a possessory remedy and is not founded on the pursuer's right of ownership. The Court of Session Act 1868 provides expressly for the reinstating of a complainer in his possessory right by the process of suspension and interdict (section 89), or upon summary petition (section 91); while the Sheriff Courts (Scotland) Act 1971, section 35(1)(c) refers to actions ad factum praestandum and actions for the recovery of possession of heritable or moveable property in the sheriff court.

Self-help

3. Professor D. M. Walker suggests that:

> "A person lawfully entitled to possession of any corporeal moveables, such as an owner, borrower, pledgee, depositary, hire-purchaser, hirer, carrier or onerous custodier is probably entitled at his own hand to take or retake goods unjustifiably in the possession of another, or removed from his possession by another, so long as he can do so without trespass on the other's lands or assault or other physical violence."

These views[1] may be to some extent speculative, since there is a dearth of authority. Most legal systems have been hesitant to define the limits of self-help - since the law itself has largely superseded the fairly wide scope of such redress in ruder societies.

4. It is arguable that Walker may have been overcautious - or, if he states the law accurately, that the present law is overcautious if self-help in recovering, e.g., stolen property does not include justified use of reasonable force. If the law permits the use of force in resisting theft of property, it would be somewhat illogical to deny to the owner the right to use reasonable force to recover his property from the thief if he encountered him with it in his possession on a subsequent occasion. Social peace would probably not be exposed to much

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[1] Walker Civil Remedies p.262; see also Bell Principles s.1320.

danger if the law expressly recognised the right of an owner forcibly to recover property of which he had been deprived by theft or fraud from the thief or swindler, even after a lapse of time from the actual dispossession, and, if necessary, to use reasonable force for that purpose. This right could be conditional on the owner's establishing, if challenged, the culpability of the rogue, the reasonableness of the force used and his own right to the property. The best argument for this form of self-help is probably that of the Danish lawyer, Kruse[1]:

> "The owner's chance meeting with the thief may be his last and only opportunity of recovering his property."

Self-help involving force should not, however, extend to recovering property from third parties who had acquired from the wrongdoer - probably even including resetters. Furthermore, self-help of this kind, even where permitted by the law, should be clearly recognised as being entirely at the user's risk: if the dispossessed owner were in error in identifying the property as his, his mistake - no matter how genuine - should be no defence to a delictual action by the person injured by his conduct.

5. We should welcome comment as to whether the law on self-help needs clarification, and if so, whether it should be extended to permit the use of reasonable force in recovering property from a thief or swindler.

Vindication

6. Scottish treatises and decisions frequently refer to rei vindicatio or "vindication" by an owner of his right to moveables, but in fact it has seldom, if ever, been necessary to examine whether the owner's action was truly in rem. However, recent changes in the law of prescription affecting obligations[2] make

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[1] V. Kruse The Right of Property, p.476.

[2] Prescription and Limitation (Scotland) Act 1973, s.6 and Schedule 1, para.1(b).

it necessary to analyse more closely the foundations of an owner's action for delivery to him of property in the possession of an unauthorised person. There are passages in the institutional writers which might be construed to indicate that an action for vindication of ownership was competent in Scots law, though it is not always clear whether their mention of the Roman law is for the purpose of contrast or analogy with Scots law. Modern writers such as Mackay, M c Laren and most recently Walker do not mention the remedy, while the 1890 edition of Bell's Dictionary and Digest under Vindicatio Rei and the Encyclopaedia of the Laws of Scotland under the heading Restitution give it faint recognition and brief mention. Though some might conclude that in any event the remedy, if it was accepted into Scots law, has lapsed by desuetude, doubt has now been cast by dicta in the House of Lords as to whether a common law remedy can lapse by desuetude.[1] Certainly the remedy is still recognised in South African law based on Roman Dutch sources to which our earlier writers refer.[2] The main explanation for lack of evidence that the real remedy of vindication was in fact invoked in Scotland is probably that in practice it has seldom been needed. This is mainly due to the fact that rights of recovery are conferred on an owner by the law of obligations - i.e. that aspect of the law of unjustified enrichment which Scots law designates "restitution". Stair[3] seemingly stresses that the personal

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[1] McKendrick & Ors. v. Sinclair 1972 S.L.T. 110 esp. per Lord Reid and Lord Simon of Glaisdale. Desuetude both of Scots Acts and of the law developed in the courts was recognised in the 18th century at least: T B Smith "Authors and Authority" (1972-3) 12 J.S.P.T.L. (N.S.) 3 at p.8 et seq.

[2] Hahlo & Kahn Union of South Africa (British Commonwealth Series) p.581.

[3] I.7.2 and IV.30.8; cf. IV.3.45. Bell Principles s.1320 considers that restitution is founded on the ius in re: "It comes in place of the rei vindicatio of the Roman law". Stair and Bell can be reconciled on the basis that the ius ad rem (obligation) is only available to a claimant who has a ius in re.

right of restitution is supplementary to the owner's real right to vindicate. Restitution implies a ius ad rem which can be specifically implemented, but a possessor who has disposed of another's property mala fide will remain subject to the obligation of restitution evaluated in money terms. Discussing actions, Stair writes of the "conclusion"[1] of delivery:

> "the conclusion of delivery doth not properly arise from vindication, which concludes no such obligement on the haver, but only to be passive, and not to hinder the proprietor to take possession of his own."

However, in Scots law, unlike Roman law, he contends, there is an actual obligation on possessors of moveables without legitimate title to make restitution to the proprietor. It is usually this ius ad rem which the courts have in mind[2] when they refer loosely to "rei vindicatio" or "vindication" in an action of restitution concluding for delivery. Indeed Bankton indicates[3] that a pursuer takes an unnecessary risk by bringing a true rei vindicatio, since if he fails to prove his right of property or ownership, non-recognition of that right will be res judicata against him.

7. When a very long period (40 or 20 years) had to elapse before the right to restitution was cut off, in practice the distinction between rights in re and rights ad rem became blurred or unimportant. The Prescription and Limitation (Scotland) Act 1973 now provides[4] for a new short negative

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[1] IV.3.45.

[2] e.g. Todd v. Armour (1882) 9R. 901; George Hopkinson v. Napier 1953 S.C. 139. However, Ramsay v. Wilson (1666) Mor. 9113 was argued as rei vindicatio.

[3] IV.24.36.

[4] S.6 and Schedule 1, para.1(b). Rights to recover trust property from a fraudulent trustee or possessor mala fide or stolen property from a thief or from one privy to the theft are, however, to be imprescriptible - Schedule 3.

prescription of five years to cut off rights arising from unjustified enrichment including restitution, repetition and recompense. Owners of moveables, after their rights correlative to the obligation of restitution have been cut off, might still, however, possibly be entitled to seek vindication in re or declarator of ownership until their real rights are extinguished by the twenty-year prescription of property rights under section 8 of the Act. There may be a gap in the law relating to an owner's right to recover his moveables if vindication is not competent.

8. One of the policies of the 1973 Act was presumably to encourage owners to exercise their rights with reasonable expedition, and, as our tentative proposals regarding usucapion indicate, we think that the possessor in good faith deserves protection in particular. We have therefore reached the provisional conclusion that no good purpose would be served in allowing (if such a remedy is still competent) an owner to vindicate corporeal moveables in an action in re or to obtain a decree of declarator of his right of ownership after his right to claim restitution had been cut off, except in those cases[1] where we would recommend a long period of usucapion (acquisitive prescription)-i.e. in cases where the party in possession had not acquired in good faith by a legal act which, had it been valid, would have transferred ownership. If the scheme which we have suggested for the shorter and longer periods of usucapion seems acceptable, it might be expedient to give an owner an action in which he could assert his ownership in certain cases for longer than five years (the present period of negative prescription of the obligation of restitution). One solution would be to provide by legislation that the action of vindication should be expressly excluded, but that an action for restitution should be made competent against a possessor of moveables

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[1] See our accompanying Memorandum no. 30: Corporeal moveables: usucapion, or acquisitive prescription, paras. 10-14.

who had not acquired the right of ownership by bona fide acquisition or usucapion. Alternatively it could be provided that the real action should survive prescription of a claim for restitution until cut off by the long negative prescription. A further possibility would be to make vindication and restitution alternative remedies with the same periods of prescription. We invite comment on these options, which are summarised at the end of this Memorandum.

Restitution

9. The obligation of restitution continues to bind an interim possessor if he parts with possession mala fide.[1] Though he cannot make delivery he remains liable for the value of the moveable. This is because restitution is a supplementary remedy available to an owner of property against such a possessor, on the principle that he who has parted with possession in bad faith is to be treated as though he still possessed. (The principle was extended in Faulds v. Townsend[2] to comprehend cases where culpa could be equiparated with dolus.) The obligation ceases if the owner succeeds in recovering his property, though he may retain a remedy in reparation for loss caused by the fault of a quondam mediate possessor. A successful claim for value of the property against a mala fide possessor would not seem to bar a subsequent claim for delivery from a third party actually in possession. In this situation the owner

[1] Stair I.7.2; IV.3.45; IV.30.8.

[2] (1861) 23 D. 437.

would have been over-compensated.[1] The bona fide third party in possession would have suffered loss. Even a fraudulent person, in Lord Wright's phrase,[2] "must not be robbed" by unjustly enriching his victim "as he would be if he both got back what he had parted with and kept what he had received in return". We are inclined to consider that if an owner, having received value from a mala fide former possessor, subsequently concludes for delivery in an action against a third party, that party should in the same proceedings be entitled to recover from the owner, on principles of recompense, the amount by which the owner would be enriched by recovering his property in addition to the money already received. Though a claim for a money payment would in effect be set off against a claim for a specific res, we consider that this somewhat novel use of the law of compensation designed to prevent multiplication of lawsuits would be beneficial.

10. Two other possible solutions to this problem may be mentioned. First, the law might provide that if the owner has

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[1] In a successful claim for restitution, the property must be restored or its full value is due as surrogatum. It would seem to be contrary to principle to treat this value as damages which could be reduced, as in the English tort of conversion, e.g. Wickham Holdings v. Brooke House Motors [1967] 1 All E.R. 117 discussed in F.C. Finance Co. v. Langtry Investment Co 1972 S.L.T. (Sh. Ct.) 17; 1973 S.L.T. (Sh. Ct.) 11; North West Securities Ltd. v. Barrhead Coachbuilders 1975 S.L.T. (Sh. Ct.) 34. Cf. A. Rodger "Spuilzie in the Modern World" 1970 S.L.T. (News) 33; F.C. Finance v. Brown 1969 S.L.T. (Sh. Ct.) 40. In the English law the tort of conversion provides a remedy for situations which civilian systems deal with through restitution. Lord McDonald has recently reiterated judicial warnings that it is unsafe to rely in Scotland on English authorities based on the doctrine of conversion: North-West Securities Ltd. v. Barrhead Coachworks Ltd 1976 S.L.T. 99. The Theft Act 1968, s.28, contains limited provisions for making restitution orders of property or money after a thief has been convicted.

[2] Spence v. Crawford 1939 S.C. (H.L.) 52 at p.77.

recovered the value of his property from a mala fide intermediate possessor, he should lose his right to claim delivery of the property from the party actually in possession. This might be thought to be a somewhat harsh result in the case, e.g., of property of sentimental value to the owner, but might have much to recommend it in the more common case of easily replaceable goods. Secondly, it might be provided that the owner should retain his right to reclaim his property from a bona fide possessor, but that his right to do so should be conditional upon his handing over to the latter what he had previously received from the mala fide intermediate possessor. We invite comments on these options, which are summarised at the end of this Memorandum.

11. In Gorebridge Co-operative Society v. Turnbull[1] the pursuers brought an action of restitution of bank notes and coin, which had been stolen from their premises, against the person who was subsequently convicted of their theft. The action was dismissed in the sheriff court, the sheriff holding that, since no vitium reale attaches to bank notes or coin, the obligation of a thief is to make reparation and not to restore specific property.[2] We consider that the reason why a vitium reale does not attach to stolen money is to protect the security of commerce - and that this exception to the general rule has no relevance to a claim by a dispossessed owner against a thief which does not involve third parties who have received the money from him. On the principle qui dolo desiit possidere pro possessore habetur[3] we think that the thief is liable, in an action of restitution for the value of the money or negotiable instruments stolen,

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[1](1952) 68 Sh. Ct. Rep. 236.

[2]Though there was no averment that the defender was in possession, so far as an action of restitution against a person mala fide is concerned this should not affect the competency of the remedy.

[3]Stair I.7.2.

if he is no longer in possession; and - without excluding other remedies discussed in paragraphs 2 to 4 supra - liable in an action of restitution concluding for delivery, if he is still in possession, and the money or negotiable instruments can be identified. We think that a conclusion for delivery is probably competent. This might well be preferred to an action for payment if the thief's debts exceeded his assets and several debtors claimed to share them. If, however, there is doubt on this matter we should be inclined to recommend that the question be put beyond argument. We invite comments.

Specificatio: Restitution or Recompense?

12. In an accompanying Memorandum[1] we consider the substantive law regarding mixing, union and creation of moveables - including specificatio. We there provisionally propose the introduction into the law of a new body of rules to provide solutions to the problems which arise in such situations. However, on the assumption that our proposals for the general recasting of the law on this topic do not meet with approval, we consider separately in the paragraphs which follow one particular problem or area of doubt which exists in the present law.

13. Though an interim possessor is liable only in recompense, and not in restitution, if he transfers possession in good faith to a third party, there seems to be some confusion as to the position when restitution has become impossible in forma specifica, because the res has been destroyed or consumed without the fault of the possessor or when specificatio has taken place. Lord Ardmillan observed obiter in Faulds v. Townsend[2] that quantum lucratus should be the measure of recovery in such a

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[1] Memorandum no. 28: Corporeal moveables: mixing, union and creation.

[2] (1861) 23 D.437.

case: and the First Division agreed with him in holding the defender liable in restitution rather than in recompense, seemingly only because the judge had found proved such culpa as was equivalent to dolus. In Walker v. Spence and Carfrae[1] the defenders, who had purchased and slaughtered stolen sheep in good faith but were not proved to have profited, were held not to be liable. In Findlay v. Monro[2] the defender was held liable for the value of an ox delivered to him in error. He had killed and salted it, "et lautius vixit, looking on it as God's gift, or some friend's who had forgot to write with it." This unquestioning acceptance of divine providence or human benevolence was seemingly regarded as unjustifiable in the circumstances and probably equivalent to culpa. Contrasted with these decisions was the much earlier case of Ferguson v. Forrest[3] which, though primarily concerned to repudiate the doctrine of market overt, also held a bona fide purchaser liable to make restitution of the value of a stolen mare which had died before the hearing of the action.[4] This case was relied on in preference to other authority (including Faulds v. Townsend) by Lord Stormonth Darling in Oliver & Boyd v. Marr Typefounding Co.,[5] who considered the question of the defenders' negligence to be irrelevant and held them liable for the value of type to the pursuers at the time of theft - which type the defenders had bought and melted down in good faith. Although no mention whatsoever of specificatio was made on record, this doctrine was invoked but not fully examined in International Banking Corporation v. Ferguson, Shaw&Sons[6]. In that case the defenders had in good faith

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[1](1765) Mor. 12802.

[2](1698) Mor. 1767.

[3](1639) Mor. 4145.

[4]It is not clear whether the mare died after it had been claimed, which might have been a relevant consideration.

[5](1901) 9 S.L.T. 170.

[6]1910 S.C. 182; see also Bell Principles s.1298.

manufactured lard with their own materials and oil belonging to the pursuers which had been sold without authority. The defenders were held liable for the full value of the oil - apparently assessed as at time of purchase rather than of specification. The consequence was that the defenders who had already paid a fair price for the material in good faith, and had made a profit of a mere £6. 4s. from the sale of the product using the material, had to indemnify fully the original owners. Had they made their profit on resale of the materials before specification, the limit of their liability would have been the amount of profit. Lord Ardwall expressly rejected[1] the view that the ground of liability was that, because the defenders had innocently deprived the pursuers of the right to vindicate their property, the defenders should bear the loss, and he reserved his opinion regarding Lord Stormonth Darling's opinion in the earlier case. This view has recently been adopted by Lord McDonald in North-West Securities Ltd. v. Barrhead Coachworks Ltd[2].

14. We consider that the principles to be extracted from the authorities regarding the remedies available to an owner deprived of his property by specificatio need clarification. Apart from the remedy of reparation, the former owner would have a good claim in restitution against the specificator in bad faith, on the principle that one who has wrongfully ceased to possess is treated in law as if he were still in possession. However, if the bona fide specificator who acquired materials for value is obliged to restore to the original owner the full value of his materials, because the former ownership is destroyed, this is not an aspect of unjustified enrichment but the imposition of liability without fault. This is indeed a characteristic of the English tort of conversion, which imposes

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[1] At p.193.

[2] 1976 S.L.T. 99.

strict liability on innocent possessors who deal with another's property in a manner inconsistent with his interests, and it is significant that the International Banking case has already been invoked outside the proper context of specificatio in an attempt to assert a form of liability in Scotland analogous to the tort of conversion.[1]

15. Generally speaking in Scots law innocent former possessors are not obliged to indemnify original owners of moveables. We are conscious that in such situations as are illustrated by the International Banking case under the present law one of two innocent parties must suffer. The doctrine of specificatio was originally developed to deal with situations in which A got possession of B's goods by accident or with B's consent and made a new thing. The reciprocal rights and duties which resulted did not envisage the consequences of alienation of the nova species before the claims of specificator and owner of materials had been adjusted. A specificator in possession at least retains the materials if he has to pay their value, or has a claim for his labour if he has to transfer the new thing to the owner of the original materials (in cases where they could be restored to their original shape). If, however, the specificator had bought from a rogue another's materials in good faith at the market price, had expended skill and labour on processing them (which might be more valuable than the materials) and had sold the new species at a loss in a falling market, it is not altogether clear why he should pay the full original market price of the materials a second time if the owner claims their value. If their owner is

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[1] In F.C. Finance Co. v. Langtry Investment Co 1973 S.L.T. (Sh. Ct.) 11, the Sheriff Principal of Lanarkshire applied the same principle where a former owner had lost the right to follow his property. We do not regard this as a true case of specificatio, and note that this extension of the doctrine of specificatio has been rejected in North-West Securities Ltd. v. Barrhead Coachworks Ltd. 1975 S.L.T. (Sh. Ct.) 34, 1976 S.L.T. 99.

entitled to their full value, it would seem to follow that the specificator would not be entitled to claim even for the skill and labour which he had expended but from which the original owner of the materials would not have benefited. If the owner cannot found a claim on the ground that the specificator had deprived him of the possibility to claim in restitution (which would be a form of liability without fault), the appropriate remedy might seem to be recompense. If the new species could be reduced to its original form, as the law stands, the claim in restitution would presumably not be extinguished even after the specificator had disposed of the product - though in the case of consumer articles sold at retail the right would in fact be illusory in most cases. Unless it is thought appropriate to introduce a form of liability without fault on analogy with the English tort of conversion, we think that the position outlined in the two preceding sentences - whether or not it represents the existing law - would be a satisfactory one for the law to adopt.

16. We suggest for consideration that if a solution to this problem must be found in remedies provided by the present law, the remedy of the former owner against the specificator should be in recompense and assessed quantum lucratus, as suggested by Lord Ardmillan in Faulds v. Townsend.[1] We further tentatively suggest that in this case the time at which profit should be assessed should probably be the time of manufacture - at which moment the new species comes into being and passes into a new ownership. A rough analogy is available. In cases of specificatio, when a workman has worked on materials which can be restored to their original shape - so that the property remains with the owner of the materials - Bell[2] recognises that the workman has a claim against the owner of the materials on the basis of recompense (quantum lucratus). The tempus inspiciendum for such a claim must, we think, be the time of specification, when the new species was brought into existence, since otherwise the owner could destroy the claim by asserting the right to restore the materials to their original form.

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[1](1861) 23 D. 437 at p.439.

[2]S.1298.

17. We conclude provisionally that, if no new principle is to be introduced into the law,[1] the bona fide specificator who uses another's materials in manufacturing a new species should be liable only on principles of recompense, and only to the extent that he is lucratus. The time at which his profit should be assessed should be the time of manufacture.

Lien, Restitution and Recompense

18. We have received from time to time representations that the law as stated in Lamonby v. Foulds[2] operates unjustly. In that case it was held that repairers of a lorry had no lien for their work against the owners who claimed delivery. They established that the hirer, who had caused the repairs to be executed, was (unbeknown to the repairers) prohibited by his contract from creating a lien, though he was obliged to keep the vehicle in repair. Lord President Clyde observed:[3]

> "[I]n both pledge and lien the principle that the possessor of a moveable can give no better right therein or thereto to a third party than he has himself acquired from the owner applies, unless the owner has personally barred himself, by some actings of his own, from founding on the limited character of the title he actually gave to the possessor".

This decision has been criticised on the ground that the owner had himself benefited - unlike cases where a possessor attempts to borrow by pledging another's property. Whatever conclusions we may eventually reach on security over moveables, we consider that a claim in recompense (quantum lucratus) should at least have been competent against the owner for the repair work from which he benefited. English law has only in quite recent times developed principles of unjustified enrichment, but in Greenwood v. Bennett[4] the Court of Appeal ordered the owner of a stolen car to reimburse the innocent purchaser for extensive repair work he had done upon it, and would not allow the owners

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[1] We consider possible changes in the law regarding specificatio in our accompanying Memorandum no.28 on mixing, union and creation.

[2] 1928 S.C.89.

[3] At p. 95.

[4] [1973] 1 Q.B. 195.

to enrich themselves at his expense. The court considered, moreover, that the trial judge should not have released the car to the owners unless they paid for the work as a condition of taking possession. We shall be considering Lamonby v. Foulds again in the context of rights in security, but do not, as at present advised, consider that any change in the law is necessary to provide the remedy of recompense on the facts of the case. We invite comment, however, on our view that for the time being the law provides a sufficient remedy.

Spuilzie

19. Spuilzie was or is the only possessory action recognised by Scots law in relation to moveables, and it is a matter of controversy as to whether, or to what extent, it has fallen into disuse.[1] An action comparable to the Roman actio vi bonorum raptorum and derived from actio spolii of Canon law, it combines elements of restitution and reparation. It asserts the principle spoliatus ante omnia est restituendus. It is partly penal in that the pursuer can himself estimate the value of the property of which he was deprived, and claim "violent profit", i.e. such profit as could have been made from the moveables by use of utmost industry. Stair considered[2] that spuilzie is

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[1] In the past, much as Scots Acts could be repealed by desuetude and contrary use, so also apparently could common law remedies. This was an aspect of "learned custom", moulded by judges and legal writers, as contrasted with "ancient custom". However, this factor was not discussed in the House of Lords when it had to consider, in McKendrick v. Sinclair 1972 S.L.T. 110, whether the ancient remedy of assythment remained competent. Lord Reid (at p.113) and Lord Simon (at pp. 116 and 117) at least were of opinion that loss of a common law remedy by desuetude would be a novelty in Scots law and a principle which should not be introduced. However, some of the thirty nominate delicts known to earlier Scots law do in fact seem to have fallen into desuetude. (H. McKechnie Encyclopaedia of the Laws of Scotland vol. XII tit. "Reparation" p.494; "Delict and Quasi Delict" in Introduction to Scottish Legal History (Stair Society, vol.20) Chapter 20; see also T.B. Smith "Authors and Authority" (1972-3) 12 J.S.P.T.L. (N.S.) 3 at p.8 et seq.)

[2] I.9.16.

> "the taking away of moveables without consent of the owner or order of law, obliging to restitution of the things taken away, with all possible profits, or to reparation therefor according to the estimation of the injured, made by his juramentum in litem. Thus, things stolen or robbed ... may be civilly pursued for as spuilzie".

Erskine writes:[1]

> "Actions of spuilzie suffer a triennial prescription. Spuilzie is the taking away or intermeddling with moveable goods in the possession of another, without either the consent of that other, or the order of law. When a spuilzie is committed, action lies against the delinquent, not only for restoring to the former possessor the goods or their value, but for all the profits he might have made of these goods, had it not been for the spuilzie."

20. Pre-war and immediately post-war Scottish works dealing with the law of reparation and moveable property either do not discuss spuilzie at all or considered the remedy to be obsolete. Sheriff McKechnie regretted the supposed situation, and observed:[2]

> "It served a very useful purpose in the past, and there are many cases at the present day in which it would provide the only remedy for pursuers with a defective legal title to property."

21. Professor D.M. Walker considers that the action for spuilzie is still competent and discusses it fully in his treatise on Delict,[3] as to a lesser extent has Dr J.J. Gow in his book on The Law of Hire Purchase.[4] Walker believes[5] that the action of damages for spuilzie is in substance a remedy against a person who comes to be in possession of goods, the possession of which he is

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[1] III.7.16.

[2] Encyclopaedia of the Laws of Scotland vol. XII (1931) p. 535.

[3] esp. Chapter 28; see also Principles of Scottish Private Law, 2nd ed., p.1170; Civil Remedies p.1039. He gives more weight to recent sheriff court decisions than we should ourselves.

[4] 2nd ed. pp. 232-3.

[5] Walker Delict p. 1001 et seq.

not entitled to retain, who fails to implement his quasi-contractual obligation to restore them to the person truly entitled thereto. Professor Walker's examples[1] range from instances of violent interference with possession to virtually any act which denies the complainer's right to own or possess. In recent years there have been several efforts, especially in connection with wrongful disposal of goods possessed on hire-purchase, to invoke the remedy of spuilzie in the sheriff courts - or to describe the owner's remedy as a modern version of spuilzie.[2] Moreover, since Scots law recognises that possession may be either "civil"[3] or "natural", it has been suggested that hire-purchase companies may find in spuilzie a remedy as effective as the tort of conversion in English law.[4] By contrast Dr. Gow[5] described spuilzie as

> "a remedy which appears to have been used for the protection of actual possession and maintenance of the public peace in a country more notable for civil unrest and military punitive expeditions than bourgeois placidity".

22. It seems to us, therefore, that the law regarding spuilzie is in need of clarification or reform, and we are provisionally of opinion that radical reform is desirable. If spuilzie as such were to be abolished this would leave unaffected the other remedies available for wrongful appropriation or disposal of moveables - the remedy of restitution against the mala fide former possessor, or a delictual action based on culpa, or an order for restoration of possession under the existing powers of the Court of Session and sheriff court.

23. We are not called on to reconcile or decide between the various views cited, nor to decide whether the action of spuilzie is still competent. Indeed the fact that this doubt exists virtually requires us to consider the adequacy of the law in

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[1] See works cited supra.

[2] F.C. Finance Co. v. Brown 1969 S.L.T. (Sh. Ct.) 40; Mercantile Credit Co. v. Townsley 1971 S.L.T. (Sh. Ct.) 37.

[3] Civil possession is possession through another, such as an employee or factor.

[4] Rodger "Spuilzie in the Modern World" 1970 S.L.T. (News) 33.

[5] Op. cit. p.232.

relation to dispossession of moveables. If all the examples of spuilzie in its original and, according to Professor Walker, in its modern form are considered, we must conclude that the action is protean and of uncertain scope. Had we concluded that the modern law of spuilzie had as wide a scope as some claim, we probably would not have recommended the repeal of the three-year prescription enacted for actions of spuilzie by the Act 1579 c.19 (now repealed by the Prescription and Limitation (Scotland) Act 1973.) We think that the action of spuilzie provided useful redress in promptly restoring a person who had been wrongfully deprived of or excluded from possession, and also in giving violent profits in appropriate cases. However, the invocation of ancient remedies of uncertain scope is not necessarily the ideal solution for modern wrongs. It seems to us that the delict of spuilzie, of uncertain competence and scope, should probably be expressly abolished, and consideration be given to what, if any, action or actions should be introduced in its place.

24. In the Roman Dutch law developed in South Africa the mandament van spolie, the counterpart of the Scottish action of spuilzie, has become the basis of protection of possession in modern law. Before the question of title to moveables can be gone into the despoiled person must be restored. We should value comment as to whether such a remedy is or is not adequately provided under the existing law of Scotland by the powers of the Court of Session to order restoration of possession under the Court of Session Act 1868, sections 89 and 91; and by the powers of the sheriff court under the Sheriff Courts (Scotland) Act 1971, section 35(1)(c). Even if these remedies are adequate, is there a need to modernise the formulation of the Court of Session's powers?

25. We should not favour introducing into Scots law the equivalent of the English tort of conversion, which may involve the defender's liability if he has asserted innocently a right over goods inconsistent with an owner's right, or has dealt with goods in a way inconsistent with that right, even if in ignorance of it. Such situations are, we think, adequately covered by our law of restitution and recompense. However, in view of the difficulty of proving economic loss in actions of

delict, we think that there may well be a case for restating the principle of "violent profits" in cases where a possessor (not necessarily an owner) has been deprived of or excluded from natural possession (as contrasted with civil possession) by the intentional act of the defender. In such cases we are provisionally of opinion that reparation of proved actual loss may not suffice, and that it would not really introduce a doctrine of punitive damages if the defender were obliged to pay to the pursuer the highest amount that the property of which he had been dispossessed could have earned prior to restitution. For such a remedy the nomen iuris "spuilzie" would scarcely be appropriate, since the primary purpose of "spoliation" is to restore possession. We should welcome comment on these tentative views.

SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED

1. Does the law on self-help require clarification, and if so should it be extended to permit the use of reasonable force in recovering property from a thief or swindler? (para. 5)

2. No good purpose would be served in allowing an owner to vindicate corporeal moveables in an action *in re*, or to obtain a decree of declarator of his right of ownership after his right to claim restitution had been cut off, except in those cases where (under the proposals made in our accompanying Memorandum on usucapion, or acquisitive prescription) a long period of usucapion would apply. (para. 8)

3. If the proposals made in our accompanying Memorandum on usucapion for shorter and longer periods of acquisitive prescription are acceptable, it might be expedient to give an owner an action in which he could assert his ownership in certain cases for longer than five years. (para. 8) Three methods are:

4. It might be provided by legislation that the action of vindication should be expressly excluded, but that an action for restitution should be competent against a possessor who had not acquired the right of ownership by *bona fide* acquisition or usucapion. (para. 8)

5. Alternatively, it could be provided that the real action should survive prescription of a claim for restitution, until cut off by the long negative prescription. (para. 8)

6. A further possibility would be to make vindication and restitution alternative remedies with the same periods of prescription. (para. 8)

7. Where an owner in an action for restitution has received the value of his property from a *mala fide* former possessor and subsequently concludes for delivery against a third party in possession, that third party should in the same proceedings be entitled to recover from the owner, on principles of recompense, the amount by which the owner would be enriched by recovering his property in addition to the money already received. (para. 9)

8. Alternatively, it might be provided by statute that where an owner has recovered the value of his property from a mala fide former possessor, he should lose his right to claim delivery of the property from the person actually in possession. (para. 10)

9. A further possibility would be to provide that the owner should retain his right to reclaim his property from the person actually in possession, but that his right to do so should be conditional upon his handing over to the latter what he had previously received from the mala fide former possessor (para. 10)

10. Should it be enacted, for the avoidance of doubt, that a thief is liable in an action of restitution for the value of money or negotiable instruments stolen if he is no longer in possession; and that he is liable in an action of restitution concluding for delivery, if he is still in possession, and the money or negotiable instruments can be identified? (para. 11)

11. If the proposals, made in our accompanying Memorandum on mixing, union and creation of moveables, for a new body of rules governing industrial accession are not acceptable, it should be provided that a bona fide specificator who uses another's materials in manufacturing a new species is to be liable only on principles of recompense, and only to the extent that he is lucratus. The time at which his profit should be assessed should be the time of manufacture. (para. 17)

12. No change is needed in the law whereby the repairers of an article who have been instructed, e.g., by the hirer thereof, have no lien for the value of their work against the owners who claim delivery, because a claim in recompense is competent against the owner to the extent that he has benefited. (para 18)

13. Should the delict of spuilzie be expressly abolished? (para. 23)

14. Are the powers of the Court of Session to order restoration of possession under the Court of Session Act 1868, sections 89 and 91, and the powers of the sheriff court under the Sheriff Courts (Scotland) Act 1971, section 35(1)(c), sufficient?

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

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