SCOTTISH LAW COMMISSION

MEMORANDUM No: 25

CORPOREAL MOVEABLES:

PASSING OF RISK AND OF OWNERSHIP

31 August 1976

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

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A. INTRODUCTION

1. General

1. In our Memorandum No.24[1] we observed that among the most difficult aspects of the law regarding corporeal moveables are the modes of transfer of title to ownership. It has indeed been proposed to us specifically that we should examine the problems associated with the passing of property in corporeal moveables. These problems are very complex and numerous, and affect not only transfer of "title" in implement of contracts such as sale and exchange, but also the rights of creditors in bankruptcy and real rights in security.[2] The law of Scotland regarding transfer of real rights in moveables is internally inconsistent. The general rule at common law is that real rights can only be transferred by tradition (delivery); statutory rules based on English law regarding passing of "property" by agreement have been superimposed in matters of sale of goods. This internal disharmony is probably unprecedented elsewhere and is discreditable in a legal system which prides itself on preferring consistency of principle to merely pragmatic solutions. Though at some time in the future an EEC uniform law regarding sale may be formulated, it would be particularly difficult to reach agreement on the "passing of property", since the different national systems of the EEC countries - though each is internally consistent - differ strikingly between each other so far as the rules regulating passing of property are concerned. Thus in France and Italy "property" may pass by agreement, while in Germany and the Netherlands the rules are comparable with those

[1] Corporeal moveables: general introduction and summary of provisional proposals.

[2] The Commission is considering the problems of bankruptcy and real rights in security in separate but related studies.

recognised at common law in Scotland. For the foreseeable future the rules regarding many aspects of sale of goods in Scotland are likely to continue to be regulated by the Sale of Goods Act 1893 (as amended), and, though some improvement of these rules may be possible, we do not think it realistic at present to consult on the basis of considering total repeal of the Sale of Goods Act so far as it extends to Scotland. However, it might be practicable to reform or clarify the rules regarding passing of property or ownership with a view to achieving a greater degree of harmonisation between the rules which apply in sale and those which obtain in other areas of the law of Scotland, and one of the possible methods of attaining this objective, which we canvass at a later stage in this Memorandum,[1] would be to recommend the repeal of substantial portions of the 1893 Act relating to transfer of property or title. Among our statutory duties are the systematic development and reform of the law and the elimination of anomalies. The statutory rules applicable to transfer of property under the Sale of Goods Act are anomalous by the norms of the common law of Scotland, and have created difficulties even for English lawyers. However, a simple restoration of the pre-1894 common law for sale would by no means solve all problems, as a study of 19th century case law on situations where ownership and possession were separated makes abundantly clear. Some of the matters which we consider are of great complexity, and we have not found it easy to steer a middle way between oversimplification and theoretical abstraction.

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[1] Para. 62, infra.

Property and Risk

2. It has often been assumed in European legal thinking that there is a necessary relationship between the passing of property and risk, and indeed this has been one of the main reasons for the consensual approach to the passing of property, e.g. in French law. English law regarding risk, as now extended to Scotland so far as sale of goods is concerned, is given statutory expression by the Sale of Goods Act 1893 section 20 which provides:

> "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."[1]

In English law (and now in Scots law so far as sale of goods is concerned) "property" may pass by agreement without delivery.

3. The rule of the common law of Scotland as to the incidence of risk in sale and exchange was embodied in the Roman law rule periculum rei venditae nondum traditae est emptoris i.e. the risk of a thing sold but not yet delivered is on the buyer. Though Scots law differed from English law, under which the risk passed with property, by different routes Scots and English law reached practically the same results. When in English law the property passed by agreement to a buyer by bargain and sale, so also did the risk; when in Scots law the contract of sale was perfecta and the buyer had the right to a specific thing, the risk passed to him, though a real right had not been transferred by delivery.

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[1] The section goes on to deal with cases of fault as exceptions. The association of property with risk in earlier English legal thinking probably explains why section 20 is included under the statutory title heading "Transfer of Property as between Seller and Buyer".

4. One plausible explanation[1] advanced for the Roman law rule, which placed the risk on the buyer as soon as the contract of sale was complete and before delivery, was that it encouraged overseas commerce in an era before the law on insurance had been developed. The seller was assured of payment whatever the risks of delivery might be. By contrast, in modern conditions, it might be said that until delivery the vendor knows much better than the buyer the conditions in which goods are kept and is therefore in a better position to effect insurance.

5. Widenmeyer v. Burn Stewart & Co.[2] applied the Roman law and Scottish common law rules regarding risk to a contract for the exchange of barrels of whisky. The order specifying the number of each of the barrels appropriated by the company to the contract was received in Switzerland a few hours before a number of the barrels were destroyed accidentally. The First Division held that the pursuer had acquired a ius ad rem to the barrels specified in the delivery order, and that consequently the risk was on him at latest when the order was received by his agents. No further assent on his part was necessary and accordingly the risk of the barrels destroyed fell on him.

6. A comparative survey of the law of risk in sale of goods in the main legal systems of the world notes that modern legal systems have adopted four principles which, unless the parties agree otherwise or unless a party is in default, determine the incidence of risk in cases of accidental loss of specific things which have been sold.[3] The risk may pass when a contract for specific goods is concluded; or when the "property" is trans-

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[1] H. De Page Traité de Droit Civil Belge VI p.85.

[2] 1967 S.C.85.

[3] International Encyclopedia of Comparative Law vol. 6, ch. 3, s.511.

ferred; or as soon as the seller has done everything necessary for delivery; or when the goods are handed over to the buyer. The survey, however, concludes[1] that:

> "There are only two ... principles which determine the transfer of risk: on the one hand the rule that risk passes to the buyer upon actual delivery .... On the other hand there is the rule that risk passes upon conclusion of the contract; this may be regarded as a direct consequence of the contract, or as an indirect one, effected through the consensual transfer of ownership, which, for all practical purposes is an academic distinction. The contract rule does not really operate for the sales of unascertained goods which constitute the larger part of commercial sales. This is a strong argument against it .... Another argument against the contract doctrine is that it may raise the issue of fault in any given case .... On the whole, the theory of transfer of risk upon the conclusion of contract is a venerable dogma which has been developed and handed down to the present days with little concern for practical considerations .... The passing of risk upon delivery is the modern solution. It conforms with commercial views and practices; it has been adopted by the most recent national and international codifications".

Thus the Uniform Laws on International Sales Act 1967 provides by Article 97 of Schedule 1 that:

> "The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law."

7. We are satisfied that the reasons for transferring the incidence of risk of accidental loss or destruction of specific moveables do not necessarily coincide with the reasons for transferring ownership thereof, and we have concluded that our examination of problems regarding passing of ownership need not be controlled by rules regarding allocation of risk.

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[1] Ibid. s. 532.

B. TRANSFER OF CORPOREAL MOVEABLES AT COMMON LAW

1. The Rights Transferred

8. The term "property" in Scots law, when correctly used, means dominium or "ownership". Thus Stair[1] contrasts "dominion" or "property" with the personal right of obligation, and Erskine[2] observes:

> "The sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction."

However, a transferor of moveables at common law did not necessarily undertake to invest the transferee with the right of "property". The three principal situations in which a transferor intends to convey as extensive a right as he himself enjoys are donation, sale and exchange. A donor only obliges himself to do nothing inconsistent with his grant, and does not undertake that the transference shall be effectual and unchallengeable.[3] Stair held[4] that in sale, delivery and warrandice against eviction were implied duties of the vendor, and the buyer could demand no more than delivery and warrandice. It would not necessarily avail him to show that the seller was not owner. This rule may have continued until the 19th century to apply to sale of corporeal moveables at common law,[5] though in case of heritage good title had to be given. The

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[1] Institutions, II.1.pr.

[2] Institute II.1.1.

[3] Bell Comm. i. p.689.

[4] I.14.1.

[5] Swan v. Martin (1865) 3 M. 851; but sale implied transfer of the full extent of the vendor's right, and transfer brought into operation the rules both of presumptive and reputed ownership. Brown (Treatise on the Sale of Goods pp. 114-5) and Bell (Sale pp. 94-5 and Principles ss. 114-19) seemingly considered that the seller of moveables warranted title. See now Sale of Goods Act 1893, s.12.

obligation of warrandice could of course be varied by agreement. In the case of exchange, each transferor of a corporeal moveable is obliged to transfer "property" in the sense of dominium, and should he fail to do so, a transferee if evicted can reclaim recovery of what he had given in exchange and is not restricted to claiming damages.[1] However, in the interests of commerce, this right is available only against the other party to the contract of exchange who failed to transfer good title, and against those to whom he has transferred the thing gratuitously. The property may not be reclaimed from bona fide purchasers from the party to the exchange. Though tradition did not always transfer ownership at common law, the common law has fostered recognition of the right of "property", "dominion" or "ownership" - rather than merely the better right to possess - in the law of corporeal moveable property. As Bell expressed it[2]:

> "The property of moveables is ... presumed from possession; and this possession, the badge of such property, is conferred by tradition, implying the consent and act of the vendor to confer on the vendee at once possession and the jus dominii."

Lord Neaves expressed the same thought succinctly:[3]

> "Possession in moveables is like sasine in heritage. It is the badge of real right."

2. The Method of Transfer

9. In normal situations a real right is acquired by its lawful transfer from an author by a method appropriate to transfer rights in corporeal moveables. Bell[4] states

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[1] Stair I.14.1; Erskine III.3.13; Bankton I.19.1; and per Lord Fraser (L.O.) in Widenmeyer v. Burn Stewart & Co. 1967 S.C. 85 at pp.89-90.

[2] Commentaries, i. p.178.

[3] Moore v. Gledden (1869) 7M. 1016 at p.1022.

[4] Principles s. 1299 (4th. ed., the last prepared by the author).

succinctly the basic philosophy of the common law of Scotland regarding transfer of corporeal moveables by tradition or delivery:

> "The derivative mode of acquiring property is Tradition, or Delivery, as the *modus* following on a legal *titulus*[1] *transferendi*. Lawyers distinguish in transference, the *Titulus transferendi dominii*; and the *Modus transferendi dominii*: The former being the conventional will to convey; the latter, the overt act by which the real right is transferred."

10. Bell[2] also stresses the importance of distinguishing in Scots law between the regimes of obligations and property law:

> "According to the Roman jurisprudence, which in this matter is followed in Scotland, there are in the transference of the property by sale, two distinct parts: 1. The contract or agreement to transfer, regulated by the law of obligations; and, 2. Tradition, by which the transference is completed, which constitutes the right of property, and in its effects is ruled by the law of property. In the language of the Roman law, the contract is distinguished as the *titulus*, the tradition as the *modus transferendi dominii*."

Though the Sale of Goods Act 1893 has, as will be considered later, made drastic changes in the Scottish law of sale, the distinction between the sphere of contract law and property law remains fundamental in other legal relations under which corporeal moveables are transferred, and may even be relevant in such situations as the Sale of Goods Act 1893, s.61(2), leaves to be regulated by the common law of Scotland.

11. The Scots law concerning tradition (with the two elements of *causa* or *titulus* and *modus*, i.e. contract and physical transfer in implement thereof) is derived from Roman law, and

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[1] "*Titulus*" or "title" in this sense has a different meaning from "title" in the sense of the right to the thing.

[2] *Commentaries* i. p.177.

this derivation is supported by all the institutional writers[1] and by other authors. Erskine,[2] for example, writes of tradition:

> "Two things are therefore required ... First, The intention or consent of the former owner to transfer it upon some just or proper title of alienation, as sale, gift, exchange, etc: Secondly, The actual delivery of it, in pursuance of that intention. The first is called the causa, the other the modus, transferendi dominii".

3. The Doctrine of "Just Cause" or "Just Title"

12. Before discussing the effect of traditio to transfer ownership in implement of a valid contract, such as exchange or loan for consumption, which has been concluded between the owner and the acquirer, we deal briefly with a rather specialised aspect of the law of traditio. This aspect is relevant when for some reason or other the contract itself is invalid but there is no doubt that the actual handing over of the thing was intended to transfer the right of ownership. The Scottish common law regulating transfer of corporeal moveables is accepted as having been derived from Roman law, and was influenced at a formative stage by Roman Dutch law, and in those systems[3] the iusta causa (just cause) or iustus titulus (just title) upon which traditio followed certainly did not have to be a valid contract. If an owner had intended to transfer ownership in his corporeal moveable to a transferee who intended to receive that right, and transferred the thing by traditio, then ownership passed and the parties' antecedent agreement (if any) need not itself have been valid. On this view of the law (known as "the abstract theory" of causa) intention to transfer and to receive owner-

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[1] Stair III.2.5; Erskine II.1.18; Bankton II.1.20; Bell Commentaries i. p. 177.

[2] sup. cit. also Hume Lectures III p.245.

[3] See in particular J.E. Scholtens "Justa Causa Traditionis and Contracts induced by Fraud" (1957) 74 S.A.L.J. 280. Cf. B.G.B. (German Civil Code), Art. 929 (tr. Forrester, Goren and Ilgen.)

ship, coupled with traditio, was what was required, and the antecedent agreement might (as equally might other actings of the parties) provide clear evidence of that intention, even though itself a nullity in contractual terms. One party might have thought that he was receiving a loan for consumption (mutuum), the other have intended a gift, but since there was mutual intention to give and receive ownership, the traditio was effective. Similarly, if one party transferred intending sale and the other received contemplating exchange, ownership passed. The other theory concerning the nature of causa (known as "the causal theory"), accepted, e.g., in modern Dutch law[1], is to the effect that before ownership will pass on traditio the antecedent agreement must be itself valid: the intention of the parties to give and receive ownership is of no effect if couched in an agreement which is itself null.

13. Buckland[2] stated the relationship between causa and traditio in Roman law as follows:

> "There must be iusta causa. This however was not a requirement independent of intent: it is the motive or evidence which accounts for the intent. To describe iusta causa as the primary notion, and as covering the conception of intent is to reverse the order of significance. What was material was intent: the causa was the only evidence of it which was wanted or indeed could ordinarily be had. Hence a putative or imaginary iusta causa was enough. If the parties thought the thing was due on a sale and so made traditio, this was valid: ownership passed though there was no sale and the value could be recovered by condictio indebiti."

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[1] Hoge Raad, 5 May 1950, NJ 1951.1.

[2] Textbook of Roman Law 3rd ed. by P. Stein p.228.

This, as will be apparent, differs greatly from one approach of English law, which considers that determination whether property has passed depends upon the law of contract (and so more closely resembles the causal theory of iusta causa). If the contract is void[1] no "property" passes, while if it is voidable the owner's right would revest on repudiation without actual retransfer of the thing by the transferee to transferor. We know of no express decision on the application of the abstract theory of iusta causa traditionis in Scots law, but its recognition may be inferred.[2] In the last edition of the Principles edited by Bell himself[3], the author expressly refers to a passage in Voet[4] which deals with iusta causa. This Roman Dutch author has had considerable influence on Scots law, and the passage referred to has been considered quite recently by a strong Appellate Division in South Africa. In the leading case of Commissioner of Customs v. Randles Bros[5] the Appellate Division, recognising the passing of ownership by traditio, commented on the

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[1]The concept of "void" contracts was developed in the English Common law courts and the doctrine of "voidability" by the Courts of Equity. Though as R. Brown Treatise on the Sale of Goods 2nd ed., p. 148 points out, these "are not Scottish law terms", they have latterly been freely used in Scotland - "void" corresponding to "null a b initio" and "voidable" to "reducible or capable of being annulled" - though there are specialties about "voidability" in particular which make exact translation hazardous for any non-English jurisdiction, especially one derived from civilian principles - see, e.g., R. David Les Contrats en Droit Anglais p.180 et. seq.

[2]Prof. W M Gordon Studies in the Transfer of Property by Traditio p.216 states some of the difficulties. However, quite apart from the question of theft in Morrisson v. Robertson 1908 S.C. 332, there had been no intention to transfer property to the rogue who was in the position of a bogus agent (falsus procurator) and not covered by the doctrine of iusta causa traditionis.

[3]Principles (4th ed) note to s. 1299.

[4]Voet ad Pand. lib. 41, tit. 1, s.35.

[5]1941 A.D. 369; see Scholtens op. cit. supra for further discussion; also H. Silberberg, The Law of Property (1975), p.137 et seq.

passage in Voet referred to by Bell and concluded that by "iusta causa" or "causa habilis" Voet merely meant that a legal transaction preceding the traditio may be evidence of an intention to pass and acquire ownership. There may be direct evidence of intention to pass and acquire ownership, and if there is, there is no need to rely on a preceding transaction to show that ownership has passed.

14. We note that in such Scottish cases as Stuart v. Kennedy[1] - which involved nullity because of dissensus - and Cuthbertson v. Lowes[2] - which involved statutory nullity - there was no suggestion that the transferor could have claimed delivery of the property transferred either from the transferee or from a third party. Though the courts did not expressly apply the abstract theory of iusta causa traditionis (valid transfer despite putative cause) they possibly recognised it implicitly. Moreover, in Scots law, when property has been transferred under a contract induced, e.g., by fraud,[3] the transferee, having taken a real right by tradition, can give good title to an onerous acquirer in good faith until the original owner reduces the original transaction or rescinds and has his title judicially restored.[4]

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[1](1885) 13 R.221: see also Wilson v. Marquis of Breadalbane (1859)21 D.957.

[2](1870) 8 M.1073.

[3]This was one of the main aspects of the doctrine of iusta causa traditionis in Roman Dutch law - though at an early period fraud constituted a vitium reale. C.f. Bell Principles (4th ed.) note to paras. 11-13.

[4]Gloag Contract 2nd ed. pp.532-4; Walker Civil Remedies p.49; Gamage v. Charlesworth's Tr. 1910 S.C. 257 per Lord Johnston at pp. 267-8.

15. Where the provisions of the Sale of Goods Act 1893 do not apply to transfers of corporeal moveables, the abstract theory of *justa causa traditionis* may already be applicable in Scots law and could, in any event, be potentially useful. The situations which are still governed by the common law may include not only loan for consumption, exchange and donation, but also transfers of moveable property pursuant to an invalid contract of sale. In relation to these latter transfers the provisions of the 1893 Act relating to passing of property in accordance with the intention of the parties as expressed in their contract (or as presumed under section 18 of the Act) cannot apply since the contract is a nullity, but it may be (though there is no authority on the point) that acquisition of property by *traditio* under the common law would not thereby be excluded. If a transferor clearly intends to transfer his right of ownership by tradition and delivers to a transferee who intends to accept ownership, the right would pass though the antecedent contract which motivated the delivery might for some reason have been a nullity, e.g. because of error or because of the operation of any other common law or statutory ground of nullity.[1] The rules of property law would prevail over those applicable in the law of obligations. The transfer of ownership, though not prevented by the invalidity of the antecedent contract, would be susceptible to judicial reduction on any ground upon which a contract can be reduced, e.g. fraud or error. But until such steps were taken the property would remain in the transferee and be capable of transfer to *bona fide* subsequent acquirers.

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[1] We note that in English law, at least in some cases, delivery may be effective to transfer a real right despite mistake in the transaction underlying delivery, e.g. gift accepted as loan: *Dewar* v. *Dewar* [1975] 1 W.L.R. 1532; *Standing* v. *Bowring* [1886] 31 Ch. D. 282 esp. per Lindley L.J. at p.290. But cf. *Hill* v. *Wilson* (1873) 8 Ch. App. 888, [1861-73] All E.R. Rep. 1146 esp. *per* Mellish L.J. at p.1150. Moreover, when delivery is given in pursuance of an illegal contract, property passes: *Singh* v. *Ali* [1960] A.C. 167. *Dewar* v. *Dewar* is considered critically by S.Roberts (1975) 38 M.L.R. 700. We revert to the question of the effect of illegality upon *traditio* in paras. 54-6 *infra*.

16. It cannot be said that the abstract theory of iusta causa traditionis has been expressly recognised in Scots law. Its acceptance would, however, be entirely consistent with the sources from which our law on transfer of moveables is derived and recognition seems implicit in certain respects. The principal advantages of the doctrine are (a) that it gives effect to the intention of the parties to transfer ownership and (b) that it protects the position of innocent third parties who acquire rights in the property before "reduction" or annulment of the transfer. In these respects the doctrine in operation bears a close resemblance to the present law relating to the transfer of heritable property, under which a conveyance, once registered, is effective to transfer title to the transferee even though the antecedent contract for the sale of the heritage was null. On the other hand, recognition of the doctrine entails the consequence that the transferee, though vested with ownership of the property, will not, because of the nullity of the antecedent contract, have the benefit of any contractual remedies if the goods to which he has thus obtained ownership are defective or disconform to contract.

17. We are provisionally of the view that in situations to which the property provisions of the Sale of Goods Act 1893 do not apply there might be advantages in expressly recognising a doctrine of "just title" in relation to corporeal moveables, to put beyond question the proposition that delivery of moveables with intention to transfer ownership therein by an owner and acceptance of the moveables by a transferee intending to acquire that right should be effective in law to transfer ownership, even though the antecedent transaction which the transfer sought to implement was null or putative. We should appreciate comment on this provisional view.

4. Sale or Exchange?

18. When at a very late stage it was decided to extend the Sale of Goods Bill to Scotland, Professor James Mackintosh expressed[1] strongly his view that it would be unwise to attempt legislative assimilation of the laws of sale in Scotland to those of England, under pressure from certain interests, unless or until adequate enquiry had been made and mature consideration had followed thereon. This wise counsel was disregarded, and there are numerous instances in which lack of adequate enquiry and mature consideration have created difficulties in applying the provisions of the Sale of Goods Act 1893 in Scots law. At one stage exchange was included with sale in the Bill, but this was later deleted. Accordingly, the law of exchange in Scotland continues to be regulated by the common law - and contracts of exchange can be of substantial commercial importance.[2] The law regarding transfer of "property" therefore differs fundamentally between the two types of transaction.

19. It may consequently be highly relevant in Scots law to determine whether the basic contract is sale or exchange, or indeed possibly both. Brown rightly observes:

> "In Scotland the distinction between sale and barter is of greater importance than in England ..."[3]

If the contract is of exchange, the possibly wider protection for an acquirer given by the common law of Scotland will apply in relation to quality and title. Whether the original owner's or the acquirer's creditors will prevail may depend on whether tradition has taken place so as to transfer a real right.

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[1] J Mackintosh The Roman Law of Sale (1st ed. 1892) Preface.

[2] e.g. Widenmeyer v. Burn Stewart & Co 1967 S.C.85.

[3] R. Brown, Treatise on the Sale of Goods at p. 41; see also Gow, The Mercantile and Industrial Law of Scotland at p.87.

20. In English law there is seemingly no unitary concept regarding mode of transfer of moveables. It seems clear that unless there is either deed or declaration of trust, delivery is essential for donation.[1] Halsbury[2] asserts that: "The property in chattels may be transferred by a contract of exchange ...". However Chalmers states the position more cautiously[3]:

> "[A]part from statute, however, it seems that the rules of law relating to sales apply in general to contracts of barter or exchange; but the question has been by no means worked out."

Presumably in English law the mitigation of the *caveat emptor* rule introduced by the 1893 Act for sale would not apply to barter, where the common law applies. On the other hand, until section 4 of the Act had been repealed, the obstacles to proving sale in transactions worth more than £10 not infrequently resulted in construing contracts to be other than sale. Thus Professor P. S. Atiyah, writing of contracts "where goods on the one hand are exchanged for goods plus money on the other," observes:[4]

> "One view is that the answer depends upon whether the money or the goods are the substantial consideration. The decision in *Robinson* v. *Graves*[5] lays down an elastic test of this nature for distinguishing contracts of sale from contracts for skill and labour, and now that the repeal of section 4 has removed a natural bias against contracts of sale, a similar approach may well be justified here."

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[1] *Crossley Vaines on Personal Property* (5th ed) p.305 *et seq*.

[2] Halsbury, *Laws of England* Vol. 29 p. 387 (3rd. ed. 1960).

[3] Chalmers, *Sale of Goods* 17th ed at pp.79-80.

[4] P S Atiyah, *Sale of Goods* p. 5 (5th ed. 1975).

[5] [1935] 1 K.B.579 (C.A.).

21. In short, difficulties of proof under the Statute of Frauds and Sale of Goods Act 1893 have in the past influenced English lawyers against the identification of a contract as sale, while if there is no difficulty as to proof, the greater protection against defects given to a purchaser under the Sale of Goods Act than to a transferee by barter has attracted judges towards construing a transaction as sale. However, there is a dearth of authority regarding barter in English law, though in recent years "trading in," especially of motor vehicles, has become a familiar transaction. Atiyah considers that there is a sale of the vehicle of less value traded in as part consideration if the parties fix a notional price for it which is set off against the price of the new car.[1] In Dawson v. Dutfield [2] the court construed as sale a transaction wherein the plaintiff sold two lorries for £475, of which £250 was to be paid in cash, and two other lorries were to be given in part exchange provided that they were delivered within a month. Consequently the plaintiff's remedy upon the defendant's failure to delivery the latter was an action for the balance of price and not an action in detinue (i.e. for a tort in respect of property). It would seem that when a money equivalent or element is present in the consideration given for goods, the tendency of English law will be to construe the contract as sale rather than barter. The law as to barter has not been developed, and where possible English lawyers endeavour to take their stance on the familiar ground of sale.

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[1] Atiyah, supra pp. 5-6; cf., however, Flynn v. Mackin [1974] I.R.101 where the Irish court took a different view.

[2] [1936] 2 All E.R. 232.

22. At common law in Scotland, since transfer of real rights was regulated by the same basic principles, it was seldom of importance to distinguish between sale and exchange. R. Brown notes[1] of the older law that

> "[w]here some article was given in addition to money, or where in an exchange of articles the balance of value was adjusted by a money payment, the added article or money was in old times called "to boot" or "to the bargain".[2]

The tendency was seemingly to treat such transactions *in dubio* as sales unless the parties had clearly intended exchange, sale being the more usual type of transaction. It is arguable that since the rules concerning passing of ownership under the Sale of Goods Act 1893,[3] are exceptions to the general law of property in Scotland, the presumption should operate now in favour of exchange. Alternatively, though the reasons against construing a transaction as both sale and exchange are formidable in a system such as French law, they are by no means so cogent in the predicament in which Scots law stands at present. The law of exchange harmonises with the rest of the common law and has not, so far as we are aware, been criticised except possibly in relation to risk - which has been discussed already. The common law possibly imposed higher standards of quality than did the Sale of Goods Act. If mere agreement were to be considered sufficient to transfer property in cases of exchange, it would perhaps be logical for the sake of consistency to apply a like rule to cases of *mutuum* (loan of moveables for consumption) and of donation, to which the common law regarding tradition

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[1] *Treatise on the Sale of Goods*, p. 41 n.5.

[2] e.g. in *Fairiev. Inglis* (1669) Mor. 14231; and *Morison v. Forrester* (1712) Mor. 14236. "Boot" or "buit" in Scots implies the making up of equality of exchange.

[3] We discuss the rules applicable to sale *infra* para. 32 *et seq.*

applies at present. Of course, because of the well-recognised presumption against donation, more cogent evidence of a concluded agreement or a fixed intention would probably be required in the case of donation than in cases of sale, exchange, or loan for consumption. Under present law a gratuitous obligation can be proved, in the absence of the debtor's admission on record, only by his writ or oath. Even if, in law, property in a gift could pass by declaration of will, actual handing over of the article would clearly be an important adminicle of evidence of the existence of an agreement or intention to donate. It would not, however, be a necessary condition of its establishment. Where the agreement was satisfactorily established without proof of handing over, ownership (if the law regarding transfer of property in gifts were altered) would pass to the donee and tradition would not be required.[1]

5. Transactions in the Form of Security

23. Lord Watson, who was largely responsible for the inclusion of Scotland in the Sale of Goods Act 1893, pressed not only for the doctrine of passing of property by contract in sale, but also for the inclusion of s.61(4), which expressly excludes from the operation of the Act "any transaction in the form of a contract of sale which is intended to operate by way of... security". This subsection is of importance, since with the introduction of the rule that property in sale might pass without delivery it would otherwise have been possible, by resort to transactions in the form of sales, to circumvent the rule that a security over moveables may

[1] This is the attitude towards passing of property on donation adopted in the Report on Gifts of the Quebec Civil Code Revision Commission (Report XXXIX, 1975); see Art. 1 and commentary, and introduction, pp. 3, 5.

not generally be constituted without transfer of possession of them. The provision was intended to correct the confusion which had resulted from the alteration of the common law by the Mercantile Amendment (Scotland) Act 1856 as construed in McBain v. Wallace.[1] Benjamin's Sale of Goods[2] comments:

> "Since any transaction coming within these terms will almost certainly be caught by the Bills of Sale Act of 1882, it is not surprising that there is no English decision about the meaning or effect of the section .... In Scotland, however, the section is of real significance, since it is only under the Sale of Goods Act 1893 that there can be a transfer of the ownership of goods without delivery. It is therefore vital for an assignee of goods who has not been given possession to show that there has been a genuine sale, governed by the Act, and not a transaction caught by section 61(4) which would be ineffective under Scots common law."

24. We are currently, in a separate but related study, considering the law relating to securities over moveables, and the implications for, and the effect upon, security transactions of s.61(4) will be examined by us in detail in the context of that exercise. For present purposes we confine ourselves to a brief consideration of the problems to which this subsection gives rise in relation to the transfer of property on sale. Dr J J Gow, who analyses the authorities critically in The Mercantile and Industrial Law of Scotland, observes[3]:

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[1] (1881) 8 R. (H.L.) 106. See discussion in Brown Treatise on Sale pp.414-5, and para. 34, infra.

[2] 1974 ed. para. 58.

[3] pp. 94-97. Gow differs on at least two points from Gloag & Henderson Introduction to the Law of Scotland (7th ed. pp. 173-4).

> "Each case must turn on its own facts, but probably if the buyer obtains possession the transaction will stand as a sale for there is no contravention of the doctrine that a security cannot be created retenta possessione. The adjection of a pactum de retrovendendo is quite consistent with a genuine sale."

The main difficulties arise when possession has not been transferred. In the leading case of Scottish Transit Trust v. Scottish Land Cultivators[1] Lord Russell observed[2]:

> "There is no doubt that in each case the question between genuine or pure sale on the one hand and security on the other hand depends on the circumstances surrounding each particular transaction."

and he quoted with approval a dictum of Lord Moncreiff in Robertson v. Hall's Tr.:[3]

> "This is in effect a statutory declaration that a pledge of or security over moveables cannot be created merely by completion of what professes to be a contract of sale. If the transaction is truly a sale, the property will pass without delivery. But the form of the contract is not conclusive. The reality of the transaction must be inquired into."

25. There is at least one important ambiguity in the statutory provision. Section 61(4) excludes from the application of the Act "any transaction in the form of a contract of sale which is intended to operate by way of security". In Gavin's Tr. v. Fraser[4] the Lord Ordinary, Lord Sands, pointed out[5] that the phrase

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[1] 1955 S.C.254.

[2] At p.263.

[3] (1896) 24R. 120 at p.134; quoted in 1955 S.C. at pp. 262-3.

[4] 1920 S.C.674.

[5] At p.679.

"intended to operate by way of" could mean either "intended to have the legal effect" of, or though falling short of that, "intended to have the practical effect" of. He preferred the latter and wider meaning, but Lord President Clyde disagreed.[1] Gow[2] ventures to doubt whether the Lord President's construction is the more appropriate, since in fact parties usually use the form of sale in the hope that the courts will so construe their agreement. The point is of some importance and might be clarified in any future amendment of the Act.

26. We invite comment on whether clarification of the precise meaning and effect of s.61(4) is desirable, and whether difficulties have been encountered in practice in its interpretation and operation.

6. Common Law Powers of Sale

27. The various common law powers of sale by one who is not owner - e.g. the rights of a negotiorum gestor, agent of necessity, pledgee, holder of a right of hypothec, or poinding creditor need not be discussed in detail. Though it seems reasonable that those exercising these powers should not themselves acquire any higher right than the owner, for reasons which we discuss in an accompanying Memorandum in the context of sale after poinding, we consider that a bona fide purchaser for value at a judicial sale - at least if it is publicly advertised - should acquire a clear

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[1] At pp.686-7.

[2] The Mercantile and Industrial Law of Scotland, p. 96.

statutory right of ownership, and that the deprived owner's remedy should be against the person who was at fault in causing the goods to be disposed of by judicial sale.[1] We invite comment.

C. TRANSFER OF "PROPERTY" AND "TITLE" UNDER STATUTE

1. General

28. It seems reasonable to regard the effect of the exercise of statutory powers of disposal by trustees in bankruptcy and liquidators or receivers of companies' property as properly restricted to transferring rights which the bankrupt or the company could have conferred.[2] The same principle would seem to apply to disposal by an unpaid seller of a buyer's goods under the Sale of Goods Act 1893, sections 39 and 48 (2). We do not intend to consider these powers separately, but would take account of comments on difficulties encountered in connection with statutory powers of transfer. We consider in some detail statutory powers of disposal of lost property and uncollected goods in an accompanying Memorandum.[3] Other statutory powers of disposal are conferred by the Merchant Shipping Act 1894 ss. 497-8; the Innkeepers Act 1878 s. 1; and by the Consumer Credit Act 1974 ss. 120(1)(a) -121 (to replace the Pawnbrokers Act 1872 s.19). Though the statutory language could be interpreted to mean that an onerous acquirer would become owner with clear statutory title, these British or United Kingdom statutes have been interpreted in England at least as subordinated to the nemo dat quod non habet rule. Thus

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[1] Memorandum no. 27: Corporeal moveables: Protection of the onerous bona fide acquirer of another's property; also Hopkinson v. Napier 1953 S.C. 139 in which the First Division reserved their opinion as to the effect or purchase by onerous third parties at a judicial sale.

[2] See statutory powers of disposal listed in Walker Principles of Scottish Private Law (2nd. ed.) p. 1614.

[3] e.g. under the Burgh Police (Scotland) Act 1892; see Memorandum no. 29: Corporeal moveables: Lost and abandoned property.

though the Pawnbrokers Act 1872 s.19 (as amended by the Pawnbrokers Act 1960) provides that a pawnbroker who purchases at auction a pledge pawned to him "shall be deemed the absolute owner" of the pledge purchased, it has been held in England that he acquires no right in competition with an owner who had let the article on hire.[1] Discussing statutory powers of sale in English law, Crossley Vaines comments:[2]

> "In the first place it is quite clear that the rule nemo dat prevails in the absence of overriding provisions, and the statutory powers only validate the immediate transaction and do not give to the bona fide purchaser a good title as against the whole world; thus most of the Acts listed above[3] merely divest the property (if any) in the person apparently entitled to possession had not the cause of sale arisen."

29. Whereas the trend in many contemporary systems and to some extent that of the common law of Scotland is to foster the acquisition of the right of ownership by bona fide onerous acquirers, the policy of the law of England in respect of corporeal moveables is, for historic reasons, to protect a hierarchy of better rights to possession. This is reflected in, for example, the Consumer Credit Act 1974, Schedule 4, paragraph 22 (restating with variations the Hire-Purchase Act, 1964 ss. 27-9). This legislation provides that the disposition of a motor vehicle by a debtor in a hire-purchase transaction to a private purchaser

> "shall have effect as if the creditor's title to the vehicle has been vested in the debtor immediately before that disposition."

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[1] Burrows v. Barnes (1900) 52 L.T.721.

[2] Personal Property (5th ed.) p.204.

[3] At pp. 199-200; they include the Innkeepers Act 1878 and the Pawnbrokers Act 1872.

In short, the purchaser does not acquire clear statutory title but only such title as the creditor had. The Unsolicited Goods and Services Act 1971, s.1(1), provides that in certain circumstances

> "a person who ... receives unsolicited goods, may as between himself and the sender, use, deal with or dispose of them as if they were an unconditional gift to him, and any right of the sender ... shall be extinguished."

30. Again, the Eighteenth Report of the Law Reform Committee (Conversion and Detinue) recommended[1] that the Disposal of Uncollected Goods Act 1952 should be replaced by provisions whereby the purchaser of uncollected goods sold by statutory authority would acquire a good title against the bailor - but not clear statutory title as would be the case in English law in the case of sale in market overt (Sale of Goods Act 1893, s.22), or seemingly as proposed in the major recommendation of the Twelfth Report of the Law Reform Committee on Transfer of Title to Chattels.[2] The reason for giving only defeasible statutory title in the examples cited is presumably that the goods may have been stolen or disposed of without the authority of the true "owner" or person having a better right to possession than the transferor whose right is extinguished. Moreover, the statutory title may be conferred without such requirements of publicity as are characteristic of public sale or auction,[3] though even public auction may not give

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[1] Cmnd. 4774 (1971); Recommendation 17 (paras. 103-9). This result would even follow disposal under direction of the court.

[2] Cmnd 2958 (1966) paras. 32-33. The recommendation seems to have concentrated on the issue of stolen property, but could be contrued to recommend a general remedy for curing defects in title to goods.

[3] e.g. Consumer Credit Act 1974 s.121 (cf. Pawnbrokers Act 1872 s.19) and Sch. 4, para. 22.

clear title. Most of the unsatisfactory results of perpetuating uncertainty regarding title to goods would be eliminated by adopting policies discussed in two accompanying Memoranda for protecting good faith acquisition of ownership of another's property and disposal of lost and abandoned property.[1] Nevertheless, whatever general solutions may be adopted, we are concerned at the proliferation of statutory titles to moveables which continue indefinitely in limbo until prescription has run, and we are not convinced that (except possibly in certain cases of stolen property when a vitium reale attaches) the statutory policy described is desirable in the context of Scots law. The approach of English common law may be different from that of the Scottish common law, but we note with interest Denning L J's observation in Curtis v. Maloney[2]:

> "This is yet another instance of a contest between the common-law rule, that no man can give a better title than he has got and the statutory exceptions in favour of innocent purchasers. I do not think that we ought to whittle down the protection which Parliament has given to innocent purchasers. In a commercial community it is very important that their title should be protected."

31. We suggest for consideration that where a statute authorises lawful disposal of and acquisition of goods by statutory procedure, the bona fide onerous acquirer should (except possibly where vitium reale of theft attaches) take clear statutory title, rather than a defeasible right. In the case of property over a certain value, acquisition of an unchallengeable right of property might be made conditional on public notification and the lapse of a short time for adverse claims to be lodged. Protection might be restricted further to bona fide onerous acquisition at public auction.

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[1] Memoranda nos. 27 and 29.

[2] [1951] 1 K.B. 736 at p. 745.

2. Sale of Goods

(a) The development of Scots Law

32. By far the most difficult and important problems relating to the transfer of "property" or "title" arise in the context of sale of goods. Though these problems are considered in the context of statute law, the Sale of Goods Act 1893, section 61(2), preserves the provisions of the common law of Scotland

> "save in so far as they are inconsistent with the express provisions of this Act."

Therefore, Dr Gow argues[1]:

> "The task of the Scots courts is ... to bring the statutory provisions into harmony with the ... common law as developed to meet the needs of the community."

There are possibly no provisions of the Act which create greater difficulty in achieving that result than those concerned with "property" or "title". In our examination of these problems we have derived most assistance from Bell's Commentaries, M. P. Brown on Sale, R. Brown's Treatise on the Sale of Goods and Gow's The Mercantile and Industrial Law of Scotland, as well as the standard works on the English law - notably Benjamin, Chalmers and Atiyah as well as the articles in learned journals which in recent years have raised controversies regarding the construction of sections of the Sale of Goods Act relating to title and property. Among the most helpful comparative materials which we have consulted are the Danish work translated into English as The Right Property (2 vols. O.U.P. 1939 and 1953) by Fr.V. Kruse; Le Transfert de la Propriété dans la Vente d'Objets Mobiliers Corporels en Droit Comparé by M Waelbroeck, 1961, (with summary in English); and The Law of Property by H. Silberberg, 1975.

[1] The Mercantile and Industrial Law of Scotland p.76.

33 The Scottish common law on sale was a unitary system comprehending heritage and corporeal and incorporeal moveables. Sale was an aspect of the law of contract only. To transfer a property right the mode of conveyance appropriate to the subject matter had to be used - as is still, for example, the case in transfers of heritage in implement of a contract of sale. At common law transfer of a real right in moveables required tradition or delivery. In this respect Scots law followed one branch of European thought which is retained by modern systems such as those of the Netherlands and Germany.[1] On the other hand the natural law school of jurists thought that "property" of specific moveables should pass by consent without delivery if the parties so intended - so that the risk would pass to the buyer and he would have power of disposal. Instant effect would be given to the fact of agreement. This is the solution of Article 1583 of the French Civil Code - which, however, refers only to "ownership" between the parties to the contract of sale and does not affect third parties without notice. The doctrine of conferring "real" rights without delivery does not operate - subject to certain qualifications, e.g. where registration is possible - to the creation of real rights in security. Moreover, the doctrine that possession has the effect of title makes delivery a factor of fundamental importance. The so called 'ownership' governed by Article 1583 is consequently a precarious right until delivery takes place, and certainly does not correspond to the meaning of "ownership" in the normal sense. It is significant that, though Napoleon imposed his Civil Code on the Netherlands and it was in large measure retained after his overthrow,

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[1] Waelbroeck op. cit. studies the solutions of the legal systems of the original six EEC countries on this matter.

the Netherlands Civil Code of 1838 restored the requirement of traditio for transfer of real rights in corporeal moveables. Moreover, the draft revision of the Netherlands Civil Code Article 3.4.2.5. preserves this general rule, with special provisions for cases where the transferor or transferee has to remain in physical possession on limited title. The draftsman of the revision points out that the French approach is controversial even in France and Belgium, and quotes from a leading Belgian authority[1] - which can be freely translated as:

> "The passing of ownership by contract should be discarded. It does not make sense, creates a nest of problems and most modern legislation has wisely not borrowed the doctrine from the French Civil Code."

De Page points out that there is something absurd in the idea that a buyer should be deemed "owner" from the time of contract, but only owner quoad risks - for historical reasons which are no longer relevant and are indeed in modern conditions inappropriate. He concludes that a buyer should become owner with regard to the seller when he becomes owner with regard to third parties - thus restoring the ordinary manifestation of ownership in corporeal moveables. The Belgian's analysis would have commended itself to many eminent Scottish judges of the 19th century, and, as has been pointed out, the most modern British legislation on property and risk, the Uniform Laws on International Sales Act 1967 by Schedule 1, Art. 97 links risk to delivery, not to contract.

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[1] H de Page Traité de Droit Civil Belge VI p.86.

34. The Mercantile Law Amendment (Scotland) Act 1856 did not affect the passing of property in goods, but made provision for conferring priorities upon buyers and sub-purchasers in certain circumstances. It was provided by section 1 that goods sold but not yet delivered should not be "attachable" by creditors of the seller; and by section 2 that a seller should not be entitled to use a general right of retention against a buyer so as to affect the interests of a subpurchaser. However, the second provision was so loosely drafted in relation to the common law as to fail in its probable purpose in the circumstances of Wyper v. Harveys,[1] which was a decision of the Whole Court regarding the meaning of "arrestment" and "intimation". The effect of construing these expressions according to the common law resulted in the right of a subpurchaser, who had paid for the goods, being defeated as a result of the bankruptcy of the first purchaser who owed a general balance to the seller. However, the 1856 Act, which was intended to remedy some of the inconveniences of the common law rules regarding the interests of creditors in the property sold, without impinging on the general law affecting delivery and its consequences, was invoked by the House of Lords[2] in the context of a "sale", the motive of which was to secure advances made, thus according to Brown creating complication and uncertainty regarding delivery in the context of security.[3] Since, as has been discussed,

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[1](1861) 23 D.606.

[2]McBain v. Wallace (1881) 8R. (H.L.) 106; cf. (1881) 8 R.360 in the Court of Session.

[3]Brown Treatise Preface p.xx. and p.415: "The disturbing element in McBain's Case was that the grounds of judgment suggested that it was not necessary to look to the whole transaction to ascertain whether it was in its essence a security, and that it was sufficient if a form of a sale was adopted."

it is not necessary in modern conditions to link risk with ownership, and the conferring of priority rights over the seller's creditors upon certain buyers and subpurchasers can be achieved (and was achieved by the 1856 Act) without invoking a notional "passing of property", the justification for extension to Scotland of the "property" - and certain other provisions - of the Sale of Goods Bill 1892 is not self-evident.

35. In 1892 James Mackintosh[1] warned:

> "The application to Scotland of a Bill based exclusively on English case law with a few saving clauses interjected would be productive of more confusion than advantage. If the legislative desire of the mercantile community for an assimilation of the law of sale in the two countries is to be given effect to in a satisfactory manner, it is essential that there should be adequate enquiry and mature consideration before a consolidating statute is passed."

This was not to be. There was never even considered the possibility of creating a new law of sale for the United Kingdom after a comparative evaluation of solutions of Scots and English law, nor was adequate time given for considering the full implications of extending (with modifications) the English Sale of Goods Bill to Scotland.[2] Lord President Inglis, who had opposed the concept of transfer of real rights by agreement without traditio, died in 1891. In the same year Lord Watson, a Lord of Appeal in Ordinary, seemingly organised and ultimately pressed through the policy of assimilating

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[1] J. Mackintosh The Roman Law of Sale (1st ed 1892) p.vi.

[2] The prefaces to Chalmers, Sale of Goods (1st ed) and R. Brown's Treatise and contemporary contributions to the Juridical Review give an outline - through the eyes of those principally associated with the drafting and extension of the Bill.

the law of Scotland to that of England as far as transfer of property rights in sale of goods was concerned. As Richard Brown wrote at the time: [1]

> "The primary difficulty in adapting the bill to Scotland meets us at the very threshold ... 'When there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.' This is clearly at variance with the principle of Roman and Scottish law, 'traditionibus dominia rerum non nudis pactis transferuntur'. Our habit in Scotland has been to view the distinction with satisfaction. We have been told by the heads of our Court that 'the expediency of the rule derived from Rome cannot be disputed,' and that our system is 'simple', and the other 'inextricable'. Our Scottish doctrine is spoken of as 'wholesome', while the English rule is termed a 'labyrinth', and a 'mass of refinements from which we are fortunately saved'. It may therefore shock some legal prejudices to find that Lord Watson proposes to assimilate by yielding the Scottish principle."

36. Lord Watson was successful in extending to Scots law the English rules regarding passing of "property" in specific goods. It may be expedient to stress that despite the extension to Scotland of the English doctrine regarding passing of property in specific moveables by agreement, no attempt was made to impose on Scots law English tort doctrines of conversion, which provide the context for most disputes in England regarding who has the better right to possession of goods.[2] In Scotland the common law is retained to the effect that a person who deals bona fide

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[1] "Assimilation of the Law of Sale" (1891) 3 Jur. Rev. 297-8.

[2] See generally Twelfth Report of the Law Reform Committee (Transfer of Title to Chattels) Cmnd. 2958(1966), and in particular Ingram v. Little [1961] 1 Q.B.31 and Newtons of Wembley Ltd v. Williams [1965] 1 Q.B.560; Worcester Works Finance v. Cooden Engineering Co. [1972] 1 Q.B.210.

with another's goods is bound only by the obligation of restitution while he is actually in possession, and possibly by that of recompense if he has made a profit when disposing of them. He is not liable for damages in the absence of fault. In English law wilful (though innocent) dealing with the goods of another grounds liability for damages in tort. After the Sale of Goods Bill had been enacted with Scottish provisions formulated with his cooperation, R. Brown wrote[1]:

> "In the case of a sale of specific moveables the principles of the law of Scotland ... have been entirely subverted by the importation into Scotland of the English principle of the property being passed by the contract of sale without necessarily waiting for delivery, but the old law of Scotland still holds in regard to other kinds of property, and in regard to any other contract than sale."

In the same Preface he also wrote[2]:

> "(T)he term ownership is used as less ambiguous than the English term 'general property'. The latter phrase, though now imported into Scotland by the Act of 1893 (Sect. 62(1)), itself requires definition, which in its turn can only be supplied by reference to the English common law. In England the 'general' or 'absolute' property in goods means ownership ...".

37. Though the Sale of Goods Act 1893 uses in various contexts the terms "property", "title" and "owner", of these terms only "property" is defined, and that exclusively in terms of English law.[3] While it would seem surprising in the

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[1] Treatise, Preface p.xix.

[2] p.xii.

[3] The term "general property" in s.62 was used to exclude, from the application of the property provisions of the Act, certain subordinate rights (referred to somewhat confusingly as "special property" in English law) which are not recognised in Scots law. Hayman v. McLintock 1907 S.C.936.

circumstances that Scottish collaborators in the extension of the Sale of Goods Bill to Scotland should deliberately have left so important a matter as the meaning of "property" to be worked out by Scots lawyers - including country practitioners - by reference to pre-1894 English decisions, Brown himself seems to accept this interpretation, which we venture to doubt. The extension of the Bill to Scotland was pressed on with undue haste and too little deliberation, and even English lawyers differ as to the interpretation of the "property provisions" of the Act. It seems to us highly desirable that doubts and ambiguities should eventually be resolved by amendment or replacement of the Sale of Goods Act 1893 - at least in so far as these provisions are concerned.

(b) The Background to the English Law Regarding Passing of Property

38. The English law regarding corporeal moveables is seemingly not so much concerned with ownership as such - in the sense of "property" or "dominium" - as with relative title. It has been asserted that the notion of relative title is fundamental in English law and is the main key to understanding the property provisions of the Sale of Goods Act. So far as English law is concerned, Battersby and Preston state[1]:

> "The fundamental rule of the English law of property affecting title is nemo dat quod non habet. Its effect is that, although a transfer may comply with the legal formalities required for the transfer of the interest in question, it may yet fail to take effect because the transferor has no title to transfer. It is equally possible, however, that the transferor may have a title, but one which is less than perfect. This follows from the elementary proposition of our law that title to tangible property ... is relative .... This

[1] G Battersby and A D Preston '"Property", "Title" and "Owner"' (1972) 35 M.L.R. 268, at p.269.

> notion of relative title permeates our law, and is one of the key concepts in the law of property .... Given such a concept, the phrase 'owner of property' assumes significance only in relation to a particular issue with a particular person."

By "owner" English law seems to mean the person with the best right to dispose of the "general property". In rare cases, e.g. purchase in good faith and for value in market overt, clear statutory title may be acquired.

39. Benjamin's Sale of Goods[1] puts in proportion the contemporary position from an English legal viewpoint of the relationship between "property", possession and risk:

> "A contract of sale of goods contemplates transfer of the general property in the goods sold from the seller to the buyer. The question whether and at what time the property passes to the buyer is in theory dependent upon the intention of the parties .... The property in the goods is to be distinguished from the possession of them. The property in the goods may be transferred to the buyer before or after the goods have been delivered to him or to his agent, or it may be transferred at the time of delivery. In commercial practice, however, the location of the ownership of the goods is in itself of minor importance compared with the location of the risk and the transfer of ownership of less significance than the delivery of the goods or of the documents of title to the goods. The approach of the modern commercial codes is therefore to divorce questions of risk from the passing of property. But the passing of property has a number of effects in English law, although some of these may be negatived where there has been no delivery of possession."

40. The subordinate importance of the doctrine of passing of property by agreement is further put in perspective in English law by Diplock L.J. (as he then was) who observed[2] that

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[1] 1974 ed. paras. 291-2.

[2] Ward v. Bignall [1967] 2 All E.R. 449 at p.453; see also Watts v. Seymour [1967] 1 All E.R. 1044; Lacis v. Cashmarts [1969] 2 Q.B. 400.

> "in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment."

It is also relevant to observe that in modern times most commercial contracts for goods are not for specific goods, and that the issues which so concerned Lord Watson in the early 1890s are possibly not of the same significance in property transfer transactions today.

41. In an article referred to by Benjamin, Professor F H Lawson traces the very different approach of English law to the effects of sale on passing of property from that of legal systems derived from Roman law. He observes[1]:

> "Thus English law reached its present state by the hard way of trial and error. As I have already suggested, what seems to have been in the mind of the legislature was a notion that third parties should not be adversely affected by anything agreed on by the parties inter se in the contract of sale or in the manner of carrying it out, unless they had notice of it .... [I]n the common law the treatment of the contract of sale as passing the property in goods preceded in time the recognition of its obligatory effect, debt and detinue being in origin proprietary rather than contractual remedies; hence the difficulty has been to see that later developments have limited the effects of the passing of property to the relations between parties."[2]

If we understand him correctly it would seem that, whereas in systems derived from the Roman law the emphasis was on the law of obligations, in English law the property effect of sale originally took precedence and affected third parties, but was later mitigated in their favour. This may

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[1] "The Passing of Property and Risk in Sale of Goods - A Comparative Study". (1949) 65 L.Q.R. 352 at p.356.

[2] At p. 361.

in part explain why the provisions of the Sale of Goods Act 1893, which were mainly concerned to formulate the English common law, leave so considerable a legacy of unsolved, and possibly from a Scots lawyer's viewpoint almost insoluble, problems. Professor Lawson's article makes clear the distinction between the French and the English approaches. In French law Article 1583 of the Civil Code provides that as soon as there is agreement on the object and the price "the sale is complete between the parties and the property passes to the buyer, as against the seller", even though delivery has not yet been made. However, this is balanced by Article 2279 which protects comprehensively the title of bona fide acquirers from a party in possession. English law, on the other hand, while recognising that property in specific goods may pass by agreement, admits only a number of exceptions to the nemo dat quod non habet rule, and therefore gives less protection to a third party. Lawson thinks that though the draftsman of the Sale of Goods Act had in mind the practical limitations on the doctrine of passing of property inter partes by agreement as contrasted with the conferring of title in rem - e.g. the effects of bankruptcy, of the seller's lien and of sale by a seller in possession to a bona fide second purchaser - these considerations are not developed in the sections dealing with the passing of property and risk. They seem to be hinted at in the little remarked heading "Transfer of Property as between Seller and Buyer" and before the next group of sections headed "Transfer of Title".[1] But these hints, he observes, are not followed up in the actual sections which speak of "property" generally and the "passing of title by a person who is not the owner". He concludes that[2]:

[1] Ss. 16-20; ss. 21-26. Some English authors consider that "property" and "title" in the section headings indicate a contrast of meaning: others that they mean the same, but regulate the legal relationship from different viewpoints.

[2] (1949) 65 L.Q.R. 352 at p. 360.

"It is therefore very difficult to conceive of any practical consequence as flowing from the transfer of property as between seller and buyer other than the passing of risk, with its corollary, the right of the buyer to receive any benefits accruing after the completed sale."

(c) Passing of Property and Title under the Sale of Goods Act 1893

42. Transfer of "property" is effected both in normal and abnormal situations - the former when the seller intends to transfer his proprietary rights, and the latter when an owner is deprived of his goods by one who is not the owner nor acting with his authority. The main problems of acquisition from one who is not the owner are considered in the accompanying Memorandum on protection of the onerous bona fide acquirer of another's property.[1] We repeat that we do not intend to deal in this Memorandum with problems of "commercial paper" or negotiable or non-negotiable documents of title. We do of course recognise that in commerce documents of title may be of as great importance as the goods themselves, and that in the United States "negotiable paper" is probably of even greater importance in practice. However, "commercial paper" may be more appropriately studied when policy decisions have been made in relation to rights over the goods themselves.

(i) General Analysis

43. When an owner or one who believes himself to be owner is divested of his right without his consent, an onerous bona fide third party, e.g. a buyer in market overt in English law, may not, properly speaking, have the owner's title transferred to him. The law extinguishes the previous owner's title and creates a new title in the acquirer. Though the antecedent contract in good faith provided the justification for the law protecting the ultimate acquirer, the acquisition is not a true exception to the rule nemo dat quod non habet. The

[1] Memorandum no. 27.

law rather than the mediate possessor conferred the right of "property". Indeed the new "property" acquired is immune from challenges which might have been made to the title of a bona fide earlier possessor who believed himself to be owner. In other cases, however, a mediate possessor may transfer only the owner's title (such as it is) against that owner's will to an onerous bona fide acquirer, e.g. sale by a vendor who holds on a voidable title which has not been reduced.

44. On close analysis "transfer of property" is not a unitary concept. What may purport to be a sale passing property from seller to buyer by agreement, while the seller remains in possession, may operate only to "transfer property" as between the parties, but has no effect on third parties, including the seller's creditors, e.g. if the true purpose of the transaction was to provide security for the buyer.[1] In short the buyer has merely a ius ad rem. When the Act refers to "transfer of property" by agreement in sections 16-20, "transfer of property" implies a priority right. From the time that goods are made specific (and if the parties so intend) "property" will pass from seller to buyer, even while the seller remains in possession, in the sense that the rights of the buyer and parties claiming through him will be protected from the seller's creditors in the event of his bankruptcy, and the buyer and those claiming through him will acquire remedies against those who act in disregard of their rights. However, these rights may be defeasible by bona fide second purchasers from the seller in possession in ignorance of the first buyer's prior

[1] The Bills of Sale Act 1882 and the Sale of Goods Act 1893 s.61(4) approach this problem in different ways for England and Scotland.

interest. Moreover, the problem of "passing of property as between seller and buyer" can only properly be considered in perspective in the context of the rights of an unpaid seller who, even after "property has passed", has remained in possession. The rights of lien, rescission, resale and stoppage in transitu can, except in so far as risk is concerned, reduce the "transfer of property" to the buyer to a notional concept. The determining factor as to whether (after "property" has passed by agreement) the seller or his creditors have lost all real rights over the goods is the handing over of possession to the buyer or his representative and loss of the right of stoppage in transitu.[1] The ultimate test is probably the case where "property" has passed to a buyer, the seller remains in possession but is unpaid, and both parties become bankrupt. The insolvent seller's estate is not obliged by law to hand over to the insolvent buyer's estate specific goods of which "property" had passed, unless the price is paid in full. The extinctive effect of passing of property, i.e. divesting a seller of all his rights over the goods themselves, normally depends upon tradition, i.e. delivery or handing over of possession. It is at that stage that the buyer secures protection for his real right as such.

45. "Property" in moveables may mean "absolute ownership" as it does in the common law of Scotland, or the sum of a seller's proprietary interests in goods. Such "property" is a ius in re, not a mere ius ad rem. In English law, some

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[1] If the "passing of property" is to take effect subsequent to delivery, e.g. on payment in the case of sales on credit, the seller's right after delivery may be defeated through the disposition of a dishonest buyer.

authors observe[1] with justification that the term "property", when used by the Act in the context of "passing of property as between seller and buyer", does not confer a title against third parties in general, which is an anomalous meaning for the word "property" since the distinguishing feature of property rights is that they affect third parties. Others hold that "property" or "title" in the case of tangible things is always a relative notion[2] and merely implies that a party has a better right to possess than a particular challenger in the context of an actual claim.[3] English law

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[1] e.g. Atiyah, The Sale of Goods 5th ed p. 141. It may be observed that sections 16-20 of the Sale of Goods Act 1893 are headed "Transfer of Property as between Seller and Buyer" and sections 21-26 are headed "Transfer of Title". The expression "title"is undefined, and it is unclear whether "property" and "title" are to be read as synonyms or as distinct concepts. The use of different expressions would seem to imply the latter and that "title" is more close to a right in re than "property". Atiyah comments:"(T)he Act talks of a transfer of property as between seller and buyer, and contrasts this with the transfer of title. It is trite learning, however, that the distinguishing feature of property rights is that they bind not merely the immediate parties to the transaction, but also all third parties. How, then, can there be such a legal phenomenon as a transfer of property as between seller and buyer?"

[2] e.g. Battersby & Preston (1972) 35 M.L.R. 268, at e.g. p. 269: "This notion of relative title permeates our law, and is one of the key concepts in the law of property, though in sale of goods, unlike conveyancing of land, it is frequently forgotten. Given such a concept, the phrase 'owner of property' assumes significance only in relation to a particular issue with a particular person."

[3] In Rowland v. Divall [1923] 2 K.B. 500 Atkin L.J. at pp. 506-7 while considering s.12 expressed the view that there can be no sale at all of goods which the seller has no right to sell. For arguments against this view see Battersby & Preston (1972) 35 M.L.R. 268 at pp. 272-75. The problem does not seem relevant to Scots law - see Gow The Mercantile and Industrial Law of Scotland pp. 144-5.

distinguishes further between a "special" and "general" property.[1] It is no doubt justifiable for the law to attach for certain purposes a special statutory meaning to a word which has a recognised general meaning - but to attempt to attach a special meaning without clear definition is calculated to cause confusion. The expression "property" in the Sale of Goods Act is susceptible of different meanings in different contexts.

(ii) Sections 16-20

46. The heading to this group of sections is "Transfer of Property as between Seller and Buyer". Section 17(1) provides that: "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred." Section 18 Rule 1 provides: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

47. The history of the doctrine of passing of "property" in specific goods by contract, if the parties so intend, (now incorporated in the Sale of Goods Act 1893 s.17) is somewhat obscure.[2] Parke B. observed[3]:

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[1] Concepts which - because of their remoteness from generally accepted meanings attributed by other legal systems to the term "property" - confused 19th century Scottish writers.

[2] See Cochrane v. Moore (1890) 25 Q.B.D. 57 - however delivery has been held essential for gift in English law, and the position in barter is uncertain.

[3] Dixon v. Yates (1833) 5 B. & Ad. 313 at p.340.

> "The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

Chalmers[1] observes:

> "Whether this is an appropriate explanation or not, the rule is undoubted, and is as old as the year books. The section (scil. s.17) is thus declaratory. Channell J's comment on it was: 'It is impossible to imagine a clause more vague than this, but I think that it correctly represents the state of the authorities when the Act was passed.'"

In short, the background to the English section depends upon the specialities of English historical development.

48. We find it easier to accept Channell J.'s dictum than that of Parke B. Moreover, we do not consider that the Scottish courts have a duty to find the meaning of the Act in pre-1894 English case law. Section 61(2) of the Act preserves the common law of Scotland unless this is inconsistent with the express provisions of the Act. Even if Scottish common law were doubtful, we think that a Scottish court would not seek the meaning of the word "property" in the Act in earlier English case law. Rather than consider pre-1894 English case law to ascertain the meaning of "property" in the context of sale, a Scottish court might we think be disposed to accept Dr. J. J. Gow's formulation of the nature of the right which is to be transferred:[2]

> "The purpose of the contract is that sooner or later the seller will divest himself of all his proprietary interests in the goods by transferring them to the buyer who is bound to accept such transference .... Ex hypothesi the seller is or is deemed to be the owner of the goods at the time such

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[1] Sale of Goods p.146.

[2] The Mercantile and Industrial Law of Scotland p. 100.

> transference is made. He sells his quality of ownership in the goods, otherwise and generally known as his 'title'. [12]. Thus the statutory definition of a seller stipulates for one who at the material time has the capacity to clothe his buyer with an indefeasible title to the goods. It does not follow, however, that every seller has such capacity."

49. Indeed the Sale of Goods Act 1893, section 12(2), deals with situations where it is clear that the seller purports to sell only a limited title. Gow's statement of the law would have been equally acceptable in the pre-1894 common law of sale - when, of course, "property" could only be transferred by tradition. However, it is not clear that the term "property" is always used in the Act in the sense of a right in re. Why the Act uses the heading "Transfer of Property" in one context and the heading "Transfer of Title" in another is certainly not explained in the Act itself.

(iii) The Effect of "Transfer of Property"

50. If the "Transfer of Property" as between the seller and the buyer affects only these parties, it is difficult to discern how such a "property" right differs from an obligation or ius ad rem. It is not self-evident that the conferring of a priority right on the buyer in preference to the seller's creditors converts a ius ad rem into a ius in re. However, after "property" in goods has passed to a buyer who has not had them handed over to him in English law, provided that he has an "immediate right to possession", he has the tortious remedies of detinue or conversion.[1] These remedies are not based on fault, and have no real counterpart in Scots law. We can envisage that, according to the circumstances, a buyer in Scots law might have a delictual action

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[1] He has these remedies against seller and third parties: Benjamin para. 1353.

against the seller or a third party based on fraud, culpa[1] or intentional interference with contractual relations: but these remedies would not depend on whether "property had passed" to the buyer. He might also have a claim against a third party based on the obligation of recompense (unjustified enrichment). We do not think, however, that when "property" had passed only "as between buyer and seller", the buyer could competently found on the obligation of restitution in an action against a third party who had taken possession of the goods. Though restitution is not solely an effect of property, it only obliges the possessor of another's property to restore it to its owner, and the buyer could not assert a right in re.[2] For example, if goods sold in circumstances covered by Rule 1 of s.18 of the 1893 Act had, through a carrier's mistake, been delivered to the warehouse of a stranger to the transaction, instead of to the seller's warehouse where the parties had agreed the goods should be kept pending collection by the buyer, we think that the stranger's duty of restitution would be owed to the seller as owner quoad all third parties whose rights and duties were not derived from the sale. For them the sale is res inter alios acta.[3] In the situation described, the warehouse

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[1]We think that even in English law the right to possess goods without actual vesting of title would support an action for negligent damage to them. Margarine Union v. Cambay Prince Steamship Co. [1969] 1 Q.B. 219 per Roskill J. at p. 250.

[2]Bell Principles (4th ed) s.1320 would still seem applicable.

[3]In English law the position might well be different if the buyer had "an immediate right to possess" sufficient to found an action in tort for detinue. Benjamin para. 293; Chalmers p.241. So far as we are aware the "possessory torts" and the concept of "right to possession" are distinctive aspects of English law which have no counterpart in systems not derived from English law: see Pollock & Wright Possession in the Common Law p.145 et seq.

keeper who was bound to make restitution might well have incurred expenses as negotiorum gestor, and would accordingly have a claim against the owner. This claim would, we think, be against the seller as owner, even though "property" had passed "as between buyer and seller".[1]

51. If the buyer of specific goods "to whom property had passed" wished to claim them from the seller, he would normally rely on his right to specific implement under section 52 of the 1893 Act. The section seemingly adds nothing to the common law of Scotland, under which property passed only by tradition, and the remedy is available whether or not the property has already passed.[2] It is unlikely that a buyer would consider founding a claim against a seller based on restitution, unless perhaps the seller had disposed of the subject (which had increased in value since the time of contract) to a third party mala fide, and the buyer wished to rely on the doctrine that a possessor who has ceased to possess mala fide is to be treated as if he were in possession. We doubt whether an action by the buyer based on restitution would be competent against the seller in possession or against the seller who had ceased to possess in bad faith. Restitution relates, we think, to possession of property in the sense of a right in re, and we know of no instance in which a buyer whose "property" is merely "as between buyer and seller" has endeavoured to assert that such "property" would justify a competent action based on restitution. In short the effect of "passing of property" before delivery does not seem to affect the remedies available to a buyer under Scots law.

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[1] We note incidentally that if the warehouseman were to hand over the goods to the buyer, this would defeat rights which the seller might have exercised against the buyer before delivery in accordance with their contract.

[2] Gow, The Mercantile and Industrial Law of Scotland, pp. 218-9.

52. We note also an anomaly which could arise in the context of ius quaesitum tertio. If A and B contracted for the acquisition of moveables which were to be transferred to C as third party beneficiary, no question of transfer of property as between seller and buyer would arise. Though A and B might agree that the goods should become C's before tradition or delivery, this agreement would seem to be ineffective to give C more than a ius ad rem or claim to have the goods handed over to him.

53. Benjamin lists[1] among the other effects of "passing of property" under the 1893 Act, insurance, prize, criminal offences, risk and insolvency. However, a buyer to whom risk has passed has an insurable interest even if property has not passed. The jurisdiction of the Scottish Courts in matters of Prize was vested solely in the Court of Admiralty in England by the Court of Session Act 1825, section 57. In any event, legal title is not the sole factor in determining whether prize should be condemned. So far as statutory criminal offences are concerned, it is a matter of construction whether the statute embraces agreements to sell as well as sale and delivery. The usual intent is to prevent transfer of possession to an unsuitable transferee, but this is not necessarily so. In any event the mischief at which such statutes strike may well have little relevance to the purposes with which the Sale of Goods Act is concerned. We do not know what mischief the Edinburgh Corporation Order Confirmation Act 1967 section 139 was intended to suppress, but in construing the section, the decision of the High Court of Justiciary seemingly disregarded as irrelevant in the circumstances the question of passing of property.[2] The passing of risk

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[1] Paras. 295-300.

[2] A. K. Stoddart Ltd v. Scott 1971 S.L.T. 98.

we have already discussed[1] in general terms, and we have noted that the Uniform Laws on International Sales Act 1967, Schedule 1 Art. 97, has provided that, unless the parties to a contract of sale agree otherwise, risk should attach to the handing over of goods rather than to ownership. The consequences of insolvency are not identical in Scotland and England. Acquisition or retention of possession may be relevant in England because of the "reputed ownership" provision of the Bankruptcy Act 1914, section 38(c) - which does not, however, extend to the liquidation of companies. The provision in the Bankruptcy Act has no counterpart in Scottish statute law. Whereas the doctrine of "reputed ownership" formerly created in Scots law - subject to limited exceptions - a right in favour of creditors of the possessor which was not affected by proof of a latent contrary right, the effect of the Sale of Goods Act is to erode the doctrine. R.Brown observes[2]:

> "Thus it may be doubted if, in consequence of the new doctrine of the passing of the property by the contract without change of possession, the just rights of creditors are sufficiently protected by the ordinary common-law rules .... The general creditors of the seller or buyer are not protected, and the question therefore arises whether it may not be expedient to extend to Scotland the statutory reputed ownership which for centuries has formed part of the English bankruptcy code."

54. It seems to be accepted[3] in English law that property can pass even under an illegal contract of sale. Where goods have been delivered in pursuance of such a contract they cannot be recovered back by the seller, and the buyer may assert his proprietary rights both against the seller and against a stranger. These proprietary rights are

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[1] Para. 6 supra.

[2] Treatise on the Sale of Goods, p. 117.

[3] Benjamin, para. 230.

asserted in tort actions for detinue or conversion. In Singh v. Ali[1]. Lord Denning, giving the advice of the Privy Council, observed:

> "[T]he transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality."

Though earlier English authorities seem to have stressed the importance of delivery to the buyer to secure his title, the Court of Appeal, in a case[2] in which Lord Denning M.R. again presided, extended the doctrine to cover situations where property had passed by agreement but without transfer of possession. Benjamin concludes,[3] however, that if transfer of property was absolutely forbidden by statute there would be no room for application of the doctrine.

55. We are not convinced that Scottish courts would necessarily follow Lord Denning's reasoning, and we consider that it may be desirable to clarify the law for the avoidance of doubt. In the first place, we can see no adequate justification for recognising the transfer of property without delivery by an illegal contract of sale, if the law would refuse to recognise the contract itself because of illegality. If, however, the moveables have been actually handed over, the appropriate solution seems less easy to determine. The common law of Scotland recognises tradition as the normal mode of transfer of rights in corporeal moveables, and may give effect to it even though the cause of tradition was itself a null contract.[4] This solution would seem

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[1] [1960] A.C. 167 at pp. 176-7.

[2] Belvoir Finance Co. v. Stapleton [1971] 1 Q.B.210.

[3] Para. 230; Amar Singh v. Kulubya [1964] A.C. 142.

[4] See paras. 8 et seq supra; Cuthbertson v. Lowes (1870) 8. M.1073.

appropriate where the illegality affected only the contract itself. Where, however, the law itself prohibits transfer of a particular kind of property, we are inclined to think that attempted transfer by tradition would be null and ineffective to convey a real right. The illegality would nullify the conveyance itself. In cases where the illegality consisted in attempted transfer of goods to a buyer who was disqualified from acquiring, e.g. because he was not licensed to acquire goods of that kind (as, for example, dangerous drugs or heavy goods vehicles), we are inclined to think that, though the seller may by tradition have divested himself of his proprietary rights, he should not be regarded as having invested the buyer with any real right at all. In short, the goods should be regarded as ownerless, and, as is the case with other ownerless property in Scots law, should be regarded as belonging to the Crown. An alternative solution, which we regard as attractive, if at all, only where the transferor is unaware of the illegality affecting the transferee's acquisition, is to regard the transfer as wholly inept. The consequence of this would be that property remains vested in the transferor, who would be entitled to recover possession of the article from the transferee by an action for restitution, while the transferee would have to rely upon an action for repetition to attempt to recover what he had paid for it.

56. Our provisional view is that property should not be deemed to pass by agreement if the contract is illegal, and that where the law renders acquisition by a particular category of transferee illegal, purported delivery of the goods to him should divest the mala fide transferor and render the goods res nullius. A second possibility is that the transfer should be regarded as wholly inept, and property should remain vested in the transferor, where the transferor is unaware of the illegality affecting the transferee's power to acquire. A third possibility is that the illegality should not affect the transferee's acquisition.[1]

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[1] See para. 54 supra.

(iv) Conclusions

57. The problems discussed in the preceding two paragraphs are special and severable from the issues raised by the concept of "Transfer of Property" by agreement and without delivery under the Sale of Goods Act 1893. Regarding these more general issues we have reached certain provisional conclusions, namely that:

(a) If the provisions of the Act are to remain substantially in their present form, appropriate definitions of the terms "transfer", "owner", "property" and "title" would assist interpretation of the Act in its application to Scotland.

(b) If the object of the Sale of Goods Act 1893 was to assimilate the law of Scotland to that of England in relation to transfer of property in goods under contracts of sale, this object has only been achieved in part, and important problems do not seem to have been foreseen - in particular those connected with the rights and duties of strangers to the contract, and the recognition of a doctrine of reputed ownership in favour of the creditors of a non-owning seller or buyer in possession.

(c) The so-called "transfer of property in goods" regulated by sections 16-20 of the Act does not convey a true right in re but rather a hybrid right resembling a ius ad rem, but conferring on buyers priority rights in competition with the seller's creditors in the event of the seller's bankruptcy. This result had already largely been reached by the Mercantile Law Amendment (Scotland)

Act 1856 without any doctrine of passing of property by agreement. Though under that Act tradition was the appropriate method of conveying a real right to a buyer, he and subpurchasers from him had a right of priority on the seller's bankruptcy in preference to the seller's creditors. We see no convincing reason for attaching a stipulative meaning to the term "property" in the context of sale which it does not have in the law of moveables generally.

(d) So far as the 1893 Act provided for risk and ownership of specific goods to coincide, it did not in fact alter the incidence of risk in Scots law. Risk may, however, be associated with the handing over of the goods, especially if the basic approach of the Uniform Law on the International Sale of Goods is preferred to that of the Sale of Goods Act. Risk and transfer of ownership are not necessarily interdependent.

(e) Handing over of possession remains important even in the case of specific and ascertained goods - in particular by determining at what point the seller's remedies exercisable over the goods themselves are cut off, and in safeguarding a buyer against unauthorised disposal of the goods by the seller to a second buyer.

(f) Pre-1894 policy recognised the unpaid seller's right of retention against a buyer, i.e. the exercise of a right of ownership over what, until delivery, remained his property. Section 62 of the Sale of Goods Act provides that "'lien' in Scotland includes right of retention". To include a right of ownership over the seller's own property in a possessory right over the buyer's property seems infelicitous and confused drafting.

(g) It seems anomalous to regulate the transfer of property rights by different modes in the case of sale on the one hand and in the case of other transactions such as exchange and donation on the other. Indeed there seems to be no logical reason why, if it were desirable to transfer the right of ownership by agreement (*solo consensu*) in the case of sale, the same principle should not apply to transfers of lesser real rights over moveables in transactions for security, hire and loan. Moreover, where heritage is treated as a matter of commerce, it is not immediately self-evident that the analogy between transfers of moveables and of heritage in that context is insufficiently close to merit consideration being given to the extension of transfer *solo consensu* to heritage also.

(h) The legal rules regulating the effects of transfer of ownership of moveables in normal situations do not necessarily affect the rules protecting good faith acquirers of things without the owner's consent.[1] A system which recognises the validity of transfer of ownership of things by agreement *inter partes*, even in cases of donation, may nevertheless go so far as to protect a good faith gratuitous acquirer *a non domino*.

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[1] Nevertheless, Professor F.H. Lawson, the General Editor of volume 6, *Property*, in the *International Encyclopedia of Comparative Law*, responding to an enquiry on *traditio*, observed: "I do not think there is any obvious virtue in a rule that property in goods ought not to pass without delivery, or the parallel rule that real security over moveables ought not to be constituted without delivery, unless you match it with a rule that a possessor can transmit a good title to a *bona fide* buyer. You are merely requiring delivery without giving it its full efficacy."

D: POLICY OPTIONS

58. The courses open for reform of the law relating to transfer of ownership of corporeal moveables are at least fourfold, though we should also be interested to have the views of those who consider that no change should be made in the present law. In all cases we exclude from consideration moveables the ownership of which can at present be transferred only by registration.

1. No Change except Clarification

59. In favour of this solution it may be said that the law in operation has not, so far as we are aware, caused serious difficulties in practice. It is anomalous that the common law of traditio should regulate transfers of moveables while the sale of goods is a statutory exception. The "property sections" of the Sale of Goods Act are not easy to construe. Perhaps for that reason there has been little litigation concerning their meaning in Scotland, and commercial men have presumably preferred to settle their own differences or to resort to arbitration rather than to the courts. Even those who favour a policy of "no change" may take the view that the provisions of the Sale of Goods Act should be supplemented with definitions to make clear the meaning of, e.g., "property", "title" and "owner".

2. Transfer by Agreement, with existing rules under the Sale of Goods Act for ascertaining intention extended to all transactions.

60. As we have seen, in contracts of sale, under section 17 of the Sale of Goods Act 1893, "property" in specific or ascertained goods is transferred to the buyer at such time as the parties to the contract intend it to be

transferred. Section 18 provides five rules for ascertaining the intention of the parties in cases where no contrary intention is expressed, the first of which is to the effect that in the case of specific goods in a deliverable state "property" passes to the buyer when the contract is made. To extend the doctrine of transfer of ownership of specific moveables by agreement (consensu solo) to contracts generally would, in the views of some, introduce a desirable flexibility in commercial transactions, even though third parties unaware of these contracts might be prejudiced. Thus, for example, if an undercapitalised manufacturer undertakes to make specific articles for use in a building or ship, a concern commissioning the production and prepared to pay in advance wishes to be sure that, if the manufacturer goes into liquidation, the articles produced will belong, not to the manufacturer's creditors, but to the party who ordered them as soon as they are produced and before delivery. It may be noted that if goods are made specifically for a customer they are likely to be of much more value to him than they would be to the creditors in a liquidation. An obvious example would be suits made for customers but not delivered by a bespoke tailor. If it was thought appropriate that ownership in specific things could pass as a result of contract without actual delivery, it might seem appropriate to apply the principle to transactions generally - including sale, exchange, donation[1] and possibly security. Indeed some might think that section 61(4) of the 1893 Act (transactions in the form of sale intended to operate by way of security) is an undesirable restriction. If two neighbouring farmers sell equipment to a financier and, without delivering, hire their own equipment back, the sales

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[1] The passing of property by bare agreement without delivery is the solution adopted in the Report on Gifts (Report XXXIX), 1975, of the Quebec Civil Code Revision Commission. See Art. 1 and commentary, and Introduction pp. 3 and 5.

are not effective to pass ownership to the buyer - but apparently if the farmers hired each other's equipment after sale this would be a valid transaction. Another matter on which we should welcome views is whether - esto ownership should pass at the parties' option by agreement without delivery - the doctrine of reputed ownership should be reintroduced into Scots law. By the (English) Bankruptcy Act 1914, section 38(c), goods which at the commencement of bankruptcy are in the possession of the bankrupt with the consent or possession of the true owner, under such circumstances that the bankrupt is the "reputed owner", are available to the creditors. This provision does not apply in the liquidation of companies, but if the doctrine of reputed ownership in favour of creditors were thought appropriate for reintroduction into Scots law, the English distinction might seem superfluous.

3. Transfer by Agreement with rules different from those prescribed by the Sale of Goods Act for ascertaining intention extended to all transactions.

61. Those who take the view that transfer of ownership by agreement provides a desirable measure of flexibility in commercial transactions, and should consequently be extended to contracts other than sale, may nevertheless be of opinion that the rules for ascertaining the intention of the parties in cases where they have made no specific agreement on the matter[1] might beneficially be altered. We understand that it is increasingly common in commercial sales for the contract to contain a term to the effect that, even after delivery,

[1] Sale of Goods Act 1893, s.18.

ownership shall remain vested in the seller until the price has been paid.[1] If this is indeed the case, there might be an argument for bringing the law more into step with commercial practice by making the first rule for ascertaining the intention of the parties that, irrespective of delivery, ownership shall pass only when the quid pro quo bargained for in the contract has been supplied. Alternatively, while retaining and extending to contracts other than sale the overriding principle that property passes when the parties intended it to pass, it might be thought that the first rule for ascertaining that intention should be to the effect that property passes to the transferee on delivery (traditio), irrespective of the time of payment. Such a regime could be argued to combine the element of flexibility with the equally desirable consequence for the protection of third parties that in the majority of contracts contemplating the transfer of corporeal moveables the party in possession of the goods would in fact be the owner of them. Were this possibility provisionally to find favour with those whom we consult, they would wish to study paragraphs 64 et seq., in which we discuss certain special rules which have been grafted onto the requirement of traditio by those legal systems in which this method is necessary for the transfer of ownership of moveables. Although under the system which we have just outlined traditio would be essential for the transfer of property only where the parties expressed no contrary intention, it would clearly become the normal means by which ownership passed, and the special rules mentioned would in many cases be both relevant and important.

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[1] We consider such terms in more detail in paras. 78-85 infra.

4. Transfer of Ownership by Delivery

62. Transfer of ownership could be made dependent on traditio in cases of sale as in other transactions at common law. This might take the form of substantially repealing the Sale of Goods Act as far as its property provisions apply to Scotland and restoring the common law generally, or combining traditio with statutory provisions protecting a buyer of specific goods (and a subpurchaser from him) from the seller's creditors even before delivery had taken place. This was, in effect, the result of the Mercantile Law Amendment (Scotland) Act 1856. To give this protection full effect, and enable the buyer to obtain specific implement, it would be necessary to provide that the seller's trustee in bankruptcy would not be free to repudiate the contract and leave the buyer to a remedy in damages.[1] It has been suggested[2] that so-called passing of property or title is in fact a complex of rules rather than a single concept. It is possible to give an acquirer priority rights in specific goods before they are handed over, but also to preserve the transferor's real rights over goods at least until the right of stoppage in transitu is lost, and even to reserve ownership after transfer. Though traditio in the sense of handing over the moveables agreed to be transferred is the normal culmination of a transaction for transfer of ownership, all legal systems which require traditio have grafted onto this requirement special rules for particular cases, e.g. when the transferee is already in possession, or the transferor wishes to transfer ownership while retaining use or custody of the thing after transfer. These special considerations, which do not affect the basic principle,

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[1] Cf. in heritage Gibson v. Hunter Home Designs 1976 S.L.T. 94.

[2] V. Kruse, The Right of Property, vol. 2, pp.64-5.

are discussed in paragraph 64 and following paragraphs. Those consulted will probably wish to consider them before advising us as to which of the four courses set out above seems most desirable to adopt.

63. We invite comment as to whether ownership in specific moveables should be transferred:

(a) as the law stands at present, but with clarification of the property provisions of the Sale of Goods Act; or

(b) as agreed by contract between transferor and transferee (with the existing rules under the Sale of Goods Act for ascertaining their intention extended to all transactions); or

(c) as agreed by contract between transferor and transferee (but with rules different from those prescribed by the Sale of Goods Act for ascertaining their intention extended to all transactions); or

(d) by reintroducing the mode of traditio in sale as in other transactions for transfer of real rights in moveables, (with or without statutory priority rights in favour of onerous contracting parties).

We should also welcome suggestions for defining, limiting or extending the scope of the mode of transfer selected.

E. THE PROBLEMS OF TRADITIO

1. Constructive and Symbolic Delivery

64. Traditio normally involves an actual transfer of physical possession of the goods to the transferee. It has, however, been held sufficient to hand over to the transferee the key

of the repository in which they are stored.[1] Similarly, when goods are in the store of an independent third party and are sufficiently ascertained and distinguishable from other like goods in the store, traditio may be effected by handing to the transferee a delivery order addressed to the storekeeper and intimating this fact to the latter, or by endorsing in the transferee's favour and delivering to him the storekeeper's warrant and giving notice thereof to the storekeeper.[2] Where goods are regarded by mercantile custom as symbolised by a document of title, endorsation and delivery of that document is sufficient to transfer property in the goods. The only document clearly recognised as falling within this category in Scotland is a bill of lading.[3] Apart from this isolated case the drawing up or handing over of a document which narrates the transfer of ownership of moveables to the transferee, or which purports itself to be a transfer of them, is ineffective to pass the ownership of the goods without actual physical delivery of them.[4] Thus Bell states:[5]

> "Writing is commonly used in complicated transactions, involving a transfer of moveables; or where the conveyance is of a universitas ... But such conveyance is not held effectual without delivery to exclude purchasers or creditors poinding. And momentary delivery of possession, together with an instrument of possession, will not be sufficient if the actual possession be returned to and left with the owner."

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[1] Maxwell v. Stevenson (1831) 5 W. & S. 269; Liquidator of West Lothian Oil Co. v. Mair (1892) 20 R. 64; see also Bell Commentaries i p.186, Principles para. 1302.

[2] Black v. Incorporation of Bakers (1867) 6 M. 136; Hayman v. McLintock 1907 S.C. 936; Price & Pierce v. Bank of Scotland 1912 S.C. (H.L.)19.

[3] Bell Principles para. 1305; Bogle v. Dunmore (1787) Mor. 14216; Young v. Stein's Creditors (1789) Mor.14218; cf. Gow, pp.106-8.

[4] Thomsone v. Chirnside (1558) Mor.827; Corbet v. Stirling (1666) Mor.10602; Stiven (Watson's Tr.) v. Cowan (1878) 15 S.L.R.422 esp. per Lords Curriehill and Deas (notarial instrument).

[5] Principles para. 1458.

2. Problems of Separation of Possession and Ownership

65. In a system under which title is transferred by tradition, ownership and possession will more frequently coincide than in a system under which "property" is transferred by agreement. In the normal contract of sale the handing over of the goods by transferor to transferee is the usual and expected culmination of the contract agreed between the parties. However, under either system the law has to resolve a number of problems which arise when ownership and possession do not coincide, and where physical transfer of possession is inappropriate. The Scottish courts have had to grapple with these problems before and after 1894, and indeed the introduction of the Sale of Goods Act provisions regarding "passing of property" has not of itself altered fundamentally the nature of the problems or of their solutions.

3. Transferee already in Possession (Traditio Brevi Manu)

66. One of the simpler situations encountered is where one party who is already in possession of goods on limited title - e.g. hire or loan - contracts to acquire ownership from the owner of the goods. Only a primitive and formalistic system of law would require the goods to be restored to the owner so that he could thereafter retransfer possession by tradition. In Roman law traditio brevi manu was recognised in such situations. The existing possession provided a foundation for the passing of ownership by agreement. In modern times, the draft uniform law prepared under the auspices of Unidroit for the protection of good faith acquirers of rights in corporeal moveables proposed to give that protection both to acquirers to whom goods had actually been handed over in implement of contract, and also to acquirers who, having already been in possession, acquired further rights by

contract. Since in most Western European legal systems a possessor is already regarded as owner so far as persons dealing with him in good faith are concerned, the Unidroit solution[1] merely recognised generally accepted doctrine. As Professor W M Gordon has pointed out,[2] traditio brevi manu has been accepted from an early date in Scots law. Citing Hope Major Practicks and a case in 1621, he observes:

> "An everyday example of traditio brevi manu today is acquisition on making the final payment in a hire-purchase transaction."

We are not aware of any reason for interfering with the common law, which does not in this context seem to be affected by the Sale of Goods Act 1893.

4. Transfer of Ownership: Retention on Limited Title (Tradition by "Declaration of Transfer of Possession" or Constitutum Possessorium)

67. Where the seller in possession contracted to retain natural possession on qualified title or mere custody, logically convenience would recognise in a limited context a form of tradition or delivery without physical handing to, and then handing back by, the buyer of the subject of sale. Consequently, legal systems which require tradition for transfer of title (as does the common law of Scotland) have developed for this limited purpose doctrines of "declaration of transfer of possession" which are usually regarded as special cases of traditio - but are regarded by some systems as exceptions to the general rule - justified by the desirability of retaining the general rule for normal transactions without requiring

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[1] i.e. the draft Uniform Law discussed in the accompanying Memorandum on the protection of onerous bona fide acquirers of another's property.

[2] Studies in the Transfer of Property by Traditio, p.216.

an absurd formalism in the special situations here considered.[1] Tradition by "declaration of transfer of possession" or constitutum possessorium is the converse situation to traditio brevi manu. In German law the Civil Code provides:[2]

> "If the owner is in possession of the thing, there may be substituted for delivery an agreed legal relationship between him and the purchaser, whereby the purchaser obtains indirect possession."

68. In legal systems which have developed the Roman-Dutch law, with which Scots law had affinities, it is recognised that though physical transfer of possession may in certain special circumstances be dispensed with - though not to create security rights - the necessity for a legal equivalent of delivery remains. Delivery may exceptionally take place when the possessor agrees to hold the thing in future for the new owner who has acquired it. The transferor who retains control for an agreed purpose has changed the quality of his intention to possess, and the agreement to transfer ownership takes effect without physical handing over:

> "Traditio by constitutum possessorium denotes a form of delivery in which the transferor retains possession of the thing in which he has agreed to transfer a real right to the transferee, and only his mental attitude towards it undergoes a change. In other words, the owner of a thing retains possession of it, but acknowledges that it shall henceforth be owned by the transferee and that he will keep it in his possession on behalf of the latter."[3]

Lord de Villiers C.J. said of constitutum possessorium:[4]

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[1] See H. Silberberg The Law of Property, p.163.

[2] B.G.B. Art. 930. (tr. Forrester, Goren and Ilgen).

[3] Silberberg, loc. cit.

[4] Payn v. Yates 9 S.C. 497; Orson v. Reynolds 2 Buch. A.C. 105.

"That doctrine applies where a person who is already legal possessor undertakes to become possessor for someone else"; and:

"No principle is more clearly established than that a constitutum is not to be presumed unless its existence necessarily follows from the other circumstances of the case."

69. Since this device might provide an opportunity for a debtor to defraud his creditors, the courts investigate most searchingly the circumstances of every case where delivery of this sort is alleged.[1] Chief Justice Innes stressed the importance of requiring a definite ground for retaining control (causa detentionis) on the part of the transferor:[2]

"There must be a clearly proved contractual relationship under which [a seller] becomes the detentor for the purchaser. Only in such a case would the doctrine of constitutum possessorium operate to pass the property by a kind of fictitious delivery."

70. Because the Scottish courts attached great importance to the fact of possession, traditio brevi manu was readily acceptable. However, in the converse situation, where a possessor contracted to transfer his right of ownership to another but remained in natural possession on limited title, the courts were hesitant to accept that there had been a sufficient handing over of the rights of ownership and of civil possession. A might sell his furniture or moveable factory machinery to B, yet continue to possess on loan or hire; or A, a jeweller, might sell a watch to B but retain it to engrave an inscription ordered by the customer. The transfer of title would not be apparent to third parties who might consequently

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[1] Wille and Millin, Mercantile Law of South Africa, 16th ed. p. 150.

[2] Goldinger's Tr. v. Whitelaw and Son 1917 A.D. 66 at p. 75.

continue to deal with the non-owning possessor as if he were still owner. Such transactions might have an entirely legitimate purpose, but might also be used in an attempt to defeat the reasonable expectations of general creditors.

71. Bell considers[1] that the only cases in which a constructive delivery is recognised as sufficient to pass property in a specific subject to a new owner after payment of the price, without manifest change of custody, are those of "declaration of transfer of possession" (constitutum possessorium). He relies largely on Roman law authorities and on Pothier. He instances the case of a man buying a mass of silver which he wishes to be made into a vase:

> "...(I)t would be absurd to carry away the materials ... when it was to be instantly returned for manufacturing."[2]

Hume also thought[3] that at common law there was room for the doctrine of constitutum possessorium in some situations:

> "Put the case that I buy a horse from a horse hyrer, or the keeper of a livery stable, and that, after buying, I find it convenient to let the horse remain at livery in the same stable."[4]

He refers also to the case of Young v. Eadie[5] in which a sale was held effective when the seller, as had been pre-arranged, became hirer of the carts and horses which he had sold. In this case elaborate steps had been taken to signify the change of ownership. For constructive tradition to be effective Hume considered that, though it would be unreasonable "to exact a transportation, a change, of situation to the inconvenience and trouble of the buyer" - yet "still a case would need to be qualified by circumstances of a decisive nature, and clearly indicative of an alteration of the

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[1] Bell Commentaries i, pp. 188-9.

[2] p.189.

[3] Lectures III pp. 251-2.

[4] p.251.

[5] June 1815 unreported: at p.252.

property to make way for such a construction in any case where the price had not been paid". These authors thus recognise a doctrine of "declaration of transfer of possession" provided that there is clear evidence of a new subordinate possessory title created by contract (causa detentionis). Professor W.M. Gordon in a perceptive comment observes,[1] however,

> "but there is evident in the cases a reluctance to recognize a delivery in any case where the transferor retains goods in his own hands and the test applied is not whether there is a causa detentionis, but whether it is, or ought to be, clear to third parties that there has been a change of ownership, despite the fact that there is no change in the physical situation of the goods. The difficulty felt by Scottish judges over constitutum possessorium has been that there is a rule of law that in the case of corporeal moveables possession creates a presumption of ownership.[2] Given this rule, delivery is of less importance than possession; the fact of possession is of more importance than the method by which it was acquired. Furthermore, the fact of possession is one readily accessible to the knowledge of third parties and one reason alleged for the rule requiring delivery in Scots law is that the transfer should be made apparent to third parties."

72. We doubt whether it would be helpful to analyse the mass of conflicting case law on the problems of constitutum possessorium and the consequences of separating possession and ownership at common law[3] - which is still applicable in situations not regulated

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[1] Op. cit. pp.218-9.

[2] We should add also "the doctrine of reputed ownership".

[3] See R. Brown Treatise on The Sale of Goods esp. p. 114 et seq and Appendix II; also Gordon loc. cit.

by the Sale of Goods Act. The courts were seemingly more concerned with protecting the interests of general creditors than with the possibility of dishonest disposal by a non-owner in possession. Eventually in Orr's Tr. v. Tullis[1] earlier conflicting authorities were distinguished. Lord Justice-Clerk Moncreiff quoted with approval Lord Ivory[2]:

> "Creditors are bound to know that many honest occasions of possession may arise in the daily complication of human affairs, without any radical title of property in the mere possessor on which they would be safe to rely as a ground of credit."

He distinguished between cases where a seller merely remained in possession after sale[3]

> "and those in which a new title of possession, specific and determinate, with known rights and limits, is acquired by him."

In these situations the court was prepared to recognise transfer of ownership by constructive delivery of machinery to a purchasing landlord while the seller remained in possession on the subordinate title of hirer. The landlord was preferred to the seller's trustee in bankruptcy.

73. Other systems which require delivery (traditio) to constitute a real right over corporeal moveables recognise both traditio brevi manu and constitutum possessorium. In German law,[4] which has particularly strict rules regarding

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[1](1870) 8M. 936.

[2]Shearer v. Christie (1842) 5D. 132 at p.136.

[3]Orr's Tr. at p. 946.

[4]B.G.B. Art. 930: "If the owner is in possession of the thing, there may be substituted for delivery a legal relationship between him and the purchaser, whereby the purchaser obtains indirect possession". See also Schuster, Principles of German Law (1907), p.396; Cohn, Manual of German Law, vol. 1 (1968), p.181; A Wacke, Das Besitzkonstitut als Übergabesurrogat in Rechtsgeschichte und Rechtsdogmatik: Ursprung, Entwicklung und Grenzen des Traditionsprinzips im Mobiliarsachenrecht, (Cologne, 1974) esp. pp.48-51. See also the South African authorities cited in paras. 68 and 69 supra.

traditio, it appears that ownership will pass to a buyer without delivery even though the seller's continued possession is merely under a contract of safe custody for the buyer. There must, however, be a contractual causa detentionis (legal ground for retaining possession). Mere continued possession will not suffice. This is comparable to the common law situation in Scots law - which presumably explains why, though constructive delivery may be effected by a delivery order directed to an independent third party who has custody of the goods, such an order is ineffective if directed to a possessor who is the transferor's agent or servant.[1] However, "declaration of transfer of possession" (constitutum possessorium) is not recognised if the purported transfer is truly by way of security. If such transactions take the form of sale they are excepted from the provisions of the Sale of Goods Act 1893 regarding transfer of property and are regulated by the common law.[2] Provided that the legitimate interests of third parties are adequately protected, we can at present see no objection to the recognition of a doctrine of constitutum possessorium in Scots law as a limited and clearly defined exception to the normal rule which requires an actual physical handing over to transfer a real right in corporeal moveables. Situations in which the transferor remains in possession on limited title held from the new owner are relatively rare. In the usual case, were tradition in sale to be reinstated, there would be a change of custody and a natural coincidence of ownership and possession. Only in exceptional cases would a real right be transferred by "declaration of transfer of possession". In short the policy question for consideration is whether

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[1] Gordon op. cit. p.217.

[2] See supra paras. 23-26.

it is preferred that physical handing over should be required for transfer of title in normal situations, i.e. the substantial majority of transactions, with special rules for exceptional situations which are relatively rare; or whether it is preferred that the general rule should be that "property" can pass by agreement - with rather numerous exceptions to that rule, such as those set forth in the Sale of Goods Act 1893, the Factors Acts and other legislation.

74. The third party interests which might be affected by constitutum possessorium are those of creditors and of bona fide third party acquirers from a possessor who acted in disregard of the owner's right. As we have noted, the Scottish courts formerly attached considerable importance to the doctrine of "reputed ownership":

> "Reputed ownership, where it was recognised, created a right in favour of the creditors of the possessor which was not affected by proof of a latent contrary right[1]."

However, by 1882 Lord Justice-Clerk Moncreiff concluded[2] that the doctrine of reputed ownership "is no longer of much importance". Though the doctrine has importance in the context of our exercises concerning bankruptcy and security over moveables, it is also relevant to any study of transfer of title to corporeal moveables. "Passing of property" by contract under the Sale of Goods Act 1893, section 17, creates an analogous situation to constitutum possessorium at common law - except that the seller in possession after "property" has passed does not normally hold under a contractual right to possess. R. Brown observed[3] that though section 25 of the Act protected subsequent purchasers or pledgees from the

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[1] Brown, Treatise on the Sale of Goods, p. 115.

[2] Robertsons v. McIntyre (1882) 9R. 772 at p.778; see also the opinions of Lords Cowan and Neaves in Orr's Tr. v. Tullis (1870) 8.M. 936.

[3] Op. cit. p.117. He regarded s.25 as a statutory form of reputed ownership.

non-owning seller or buyer in possession:

> "The general creditors of the seller or buyer are not protected, and the question therefore arises whether it may not be expedient to extend to Scotland the statutory reputed ownership which for centuries has formed part of the English bankruptcy code."

75. He considered that the interests of creditors seemed to require further protection, not only because of the provisions of section 17 of the Act, but also in other situations in which ownership and possession were separated. This is a problem on which the views of those experienced in the world of commerce and finance (including legal advisers) should have particular weight. Without the advantage of their views, and to focus issues for consideration, we should venture to assume that in consumer transactions today creditors would rely on more sophisticated methods of assessing a debtor's creditworthiness than by assessing it from his lifestyle and possession of moveables. If that is so, the doctrine of "reputed ownership" would not need resuscitation in that context. So far as limited companies are concerned, we doubt whether unsecured creditors rely on an assumption that the company owns the moveables in its possession. Here again there might seem to be no role for reviving the doctrine of reputed ownership. Paradoxically it is situations such as Orr's Tr. v. Tullis[1] - where an unincorporated printer sold plant and remained in possession as hirer - that we find more difficult.

76. We should welcome views as to whether - and in what specific situations - it would be desirable to reinstate a doctrine of reputed ownership for the benefit of general creditors of a possessor of moveables who has transferred ownership to an onerous acquirer.

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[1] Sup. cit.

77. The other class of third party interests which most merits consideration in the context of "declaration of transfer of possession" (constitutum possessorium) is that of onerous third party acquirers from a possessor on limited title who has abused the trust on which the goods were left with him. In other systems this situation is dealt with according to the general rules which protect bona fide onerous acquirers from non-owning sellers. The problems created by such acquisition are discussed in our accompanying Memorandum no.27,[1] and need not be developed at this stage. We only observe at this point that we are inclined to consider that in any event a second buyer from a non-owning seller in possession should be entitled to protection, whether the seller has continued in possession as such or on some limited title such as hire. This is the conclusion reached by the Privy Council and by the Court of Appeal in England when construing section 25(1) of the Sale of Goods Act.[2] The same reasoning would seem relevant in the context of constitutum possessorium.

5. Reservation of Ownership after Delivery

78. We have been asked specifically to consider when ownership of goods should pass, with particular reference to provisions negativing transfer of ownership until payment is made. This problem again is closely linked with rights in security, and we envisage that it will be considered in detail in that context. The Report of the Crowther Committee on Consumer Credit stated:[3]

> "Our proposed new legal framework rests on two fundamental points:
>
> i. Recognition that the extension of credit in a sale or hire-purchase transaction is in reality a loan, and that the reservation

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

[2] Pacific Motor Auctions Pty Ltd v. Motor Credits (Hire Finance) Ltd [1965] A.C. 867; Worcester Works Finance v. Cooden Engineering [1972] 1 Q.B. 210.

[3] Cmnd. 4596 (1971) at para. 1.3.8.

of title under a hire-purchase or conditional sale agreement or finance lease is in reality a chattel mortgage securing a loan."

Though the concept of chattel mortgage is not recognised in Scots law, we appreciate the force of the reasoning which would recognise the transactions as simulated securities, and authors of Scottish legal treatises from Brown[1] to Gow[2] have suggested that, if the rights of owners in hire-purchase transactions are to be effective against third parties, they should be registered. Because we are inclined to regard the transactions mentioned in the Crowther Report as security transactions, we forbear to consider them in this Memorandum, but will study the conclusions eventually reached by our Working Party which is examining the law on security over moveables.

79. The general problem presented by reservation of ownership is set forth in broad terms in Kruse's[3] comparative study:

"IV. There is another problem closely related to that of the right of pursuit and its termination, the problem of the validity of a reservation of property (used especially in instalment contracts). By this is meant a term in the contract of sale by which the seller of a chattel, security or any other object, expressly retains the ownership in it and hence expressly reserves his right to recover it on default of payment. Between the contracting parties such reservation is of course valid. The law, on the other hand, has to face two problems regarding it - firstly whether the reservation of title shall be valid against subsequent bona fide purchasers from the buyer, and secondly whether

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[1] Treatise on the Sale of Goods, p. 167 n.4. It may be questioned whether Brown appreciated fully the effect of a bill of sale in English law.

[2] The Mercantile and Industrial Law of Scotland p. 116 n.95.

[3] V. Kruse The Right of Property ii p.64.

it shall be good against the buyer's creditors. The former problem is bound up in the question of the validity-effect[1] and cannot be treated differently from any other condition. The second problem - the validity of a reservation of title against the buyer's creditors - must be subject to the attitude which the law takes as regards the termination of the right of pursuit. If the law takes the view that the right of pursuit must be barred in the interest of creditors generally and e.g. that a seller who has handed over the goods to the buyer before the latter's bankruptcy, cannot demand their return and must be content with a dividend on the price, then the system of law cannot regard with indifference a term in the contract which would enable the seller to claim recovery of the goods from the buyer's trustee in bankruptcy despite the fact that they were handed to the buyer before he became bankrupt. For the unpaid vendor who has been denied preference in the buyer's bankruptcy by the rule barring his right of pursuit, would thus regain it by an underhand method. The law will therefore have to tackle these problems together."

80. In some legal systems, termination of the right of stoppage in transitu by handing over to the buyer or his agent puts an end to "pursuit" of the goods. If the seller has not been paid, he ranks merely as a general creditor of the bankrupt buyer. Though the Scottish courts were long suspicious of sales reserving rights of ownership after tradition (delivery) to the buyer, eventually, towards the end of the 19th century, effect was given to contracts reserving ownership in questions with creditors. Brown wrote even before the Sale of Goods Act had been passed[2]:

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[1] By "validity-effect" Kruse means the effect which makes a valid bona fide transaction effective to give good title though founded on an invalid basis, e.g. exceptions to the nemo dat quod non habet rules.

[2] "Assimilation of the Law of Sale" (1891) 3 Jur. Rev. 297 at p.302.

"In other branches of the law of sale the spirit of legal progress has freed itself from the retarding influence of the Scottish doctrine (scil. of tradition). The cases referred to involve suspensive conditions excluding the ordinary effect of delivery as a symbol of change of ownership. Such conditions are fully recognised and explained by our Institutional writers, but they have been looked on with great suspicion by our Courts. Effect has been denied to them because of supposed injustice to the creditors of the buyer, arising from what has been termed a 'conventional hypothec' in favour of the seller for the unpaid price."

81. The Sale of Goods Act 1893, section 19(1), provides generally that:

"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled."

This language applies whether the goods have been delivered or not. If the goods have not been delivered, reservation of the right of disposal prevents "property" from passing notionally to the buyer without delivery. We are unaware of possible grounds of dissatisfaction at this result before delivery has taken place. However, we ask whether there is dissatisfaction with the state of the law, according to which the seller is free to reserve the right of disposal over specific goods.

82. Section 19(1) continues, however:

" ... notwithstanding the delivery of the goods to the buyer, or to a carrier or other ... custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

The purpose of such reservation, if the condition related to payment, is normally to secure the seller against the risk of the buyer's insolvency prior to payment. In modern commerce the need for security is normally met by banker's commercial credits, so that property rights as between buyer and seller have become less important. As already stated, we do not intend to consider in this Memorandum documents relating to goods or security for payment. Where ownership is reserved despite actual delivery, the basic policy considerations are the same in a system which requires tradition to transfer a real right as in a system in which "property" passes when the contracting parties so intend. Brown, commenting on section 19(1), observes[1]:

> "The general effect of this section is to give statutory sanction to conditions suspensive of the passing of the property. In Scotland before this Act, such conditions were necessarily attached to delivery, as it was only by delivery that the property in goods sold could be transferred .... In Scotland, as we have seen, no property passed by the mere contract or by appropriation without delivery, and even in England the change of possession by delivery is so important that it has been thought necessary in this subsection to supplement the general provision by an express statement that even delivery to the buyer ... will not pass the property so long as the conditions are unfulfilled."

83. If the seller reserves his right of disposal after delivery, this right will in Scots law be preferred to the claims of general creditors of the buyer. By section 25 the rights of purchasers or pledgees from a buyer in possession who has not fulfilled a condition (such as that of payment) to acquire ownership are protected - but not the general

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[1] Treatise on the Sale of Goods, pp. 135-6.

creditors of the seller. In English law, however, general creditors of a bankrupt buyer may be preferred to the owner and seller under the provisions of the Bankruptcy Act 1914, section 38(c)[1], because of the doctrine of reputed ownership, and it has been suggested that this doctrine (which had a strong influence on the Scottish courts until the latter part of the 19th century) might be reintroduced by statute. We do not wish to formulate even provisional conclusions until we have studied the views of those whom we intend to consult. It would seem reasonable on first impression that, if a buyer of specific goods who has paid or is willing to pay the price is to be preferred to the general creditors of the bankrupt seller, by like reasoning a seller, who has not been paid and who has reserved ownership, should be preferred to the general creditors of a bankrupt purchaser. If, however, the unpaid owner-seller has allowed the buyer in possession to appear as ostensible owner, it might seem just to deprive the seller of his privilege. If the possession of the buyer provides justification for protecting acquirers and pledgees from him, it might be argued that, by like reasoning, the buyer's general creditors should also be preferred to the seller. In short, loss of the right of stoppage in transitu would extinguish the seller's right to follow the goods.[2] It may be that in modern practice credit is not often given in reliance on a debtor's apparent ownership of moveables. Nevertheless, since reservation of the right of ownership after delivery is a form of security, it may be thought that it should be treated as such explicitly. Section 61(4) of the Sale of Act 1893 deals with associated problems.[3]

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[1]Which does not apply in the liquidation of companies.

[2]The Swiss Civil Code, Art. 715 for example, invalidates reservation of ownership in a moveable after delivery, unless the agreement is entered in a public register and forbids such agreements in dealings with animals.

[3]See paras. 23-26 supra.

84. We invite comment as to whether delivery of goods to a buyer (or to a custodier on his behalf) should cut off the right of the seller who has reserved ownership to reclaim them - except in a question between himself and the buyer.

85. The other aspect of reservation of ownership subject to condition by a seller who has handed over possession to the buyer concerns unauthorised disposal by the buyer by sale or pledge. At present bona fide acquirers are protected by section 25 of the Sale of Goods Act. We are unaware of criticism of the principle underlying such protection, though that principle, as we discuss in our accompanying Memorandum on the protection of bona fide acquirers of another's property,[1] might be expressed in more general terms. Were passing of title by tradition to be reinstated in sale, the problem of non-owning sellers in possession would disappear, but, as was the case at common law, the problem of the non-owning buyer in possession would remain. We think that those whom we are consulting will wish to consider our accompanying Memorandum on the protection of onerous bona fide acquirers of another's property before answering the following question arising out of the present Memorandum, namely:

> In sale, despite tradition, should it be permissible for a seller to reserve ownership until a condition (including payment of the price) has been fulfilled by the buyer?

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[1] Memorandum no. 27.

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

1. The reasons for transferring the incidence of risk of accidental loss or destruction of specific moveables do not necessarily coincide with the reasons for transferring ownership thereof, and we have concluded that our examination of problems regarding passing of ownership need not be controlled by rules regarding allocation of risk. (para. 7).

2. In situations to which the property provisions of the Sale of Goods Act 1893 do not apply, there might be advantages in expressly recognising the abstract theory of "just cause" or "just title" in relation to corporeal moveables, in order to put beyond question the proposition that delivery of moveables with intention to transfer ownership therein by an owner and acceptance of the moveables by a transferee intending to acquire that right should be effective in law to transfer ownership, even though the antecedent transaction which the transfer sought to implement was null or putative. (para. 17).

3. Is clarification of the precise meaning and effect of s.61(4) of the Sale of Goods Act desirable, and have difficulties been encountered in practice in its interpretation and operation? (para. 26).

4. A bona fide purchaser for value at a judicial sale - at least if it is publicly advertised - should acquire a clear statutory right of ownership. The deprived owner's remedy should be against the person who was at fault in causing the goods to be disposed of by judicial sale. (para. 27).

5. Where statute authorises lawful disposal of and acquisition of goods by statutory procedure, the bona fide onerous acquirer should (except possibly where the vitium reale of theft attaches) take clear statutory title, rather than a

defeasible right. In the case of property over a certain value, acquisition of an unchallengeable right of property might be made conditional on public notification of the proposed statutory disposal and the lapse of a short time for adverse claims to be lodged. Protection might be restricted further to bona fide onerous acquisition at public auction. (para. 31).

6. (a) Property should not be deemed to pass by agreement if the contract is illegal, and where the law renders acquisition by a particular category of transferee illegal, purported delivery of goods to a transferee in that category should divest the mala fide transferor and render the goods res nullius.

(b) A second possibility is that, where the transferor is unaware of the illegality affecting the transferee's power to acquire, the transfer should be regarded as wholly inept and property should remain vested in the transferor.

(c) A third possibility is that the illegality should not affect the transferee's acquisition. (para. 56).

7. If the property provisions of the Sale of Goods Act are to remain substantially in their present form, appropriate definitions of the terms "transfer", "owner", "property" and "title" would assist interpretation of the Act in its application to Scotland. (paras. 37 and 57).

8. If the object of the Sale of Goods Act 1893 was to assimilate the law of Scotland to that of England in relation to transfer of property in goods under contracts of sale, this object has only been achieved in part, and important problems do not seem to have been foreseen - in particular those connected with the rights and duties of strangers to the contract and the recognition of a doctrine of reputed ownership in favour of the creditors of a non-owning seller or buyer in possession. (paras. 44, 45, 53 and 57).

9. The so-called "transfer of property in goods" regulated by sections 16-20 of the Act does not convey a true right in re but rather a hybrid right resembling a ius ad rem, but conferring on

buyers priority rights in competition with the seller's creditors in the event of the seller's bankruptcy. This result had already largely been reached by the Mercantile Law Amendment (Scotland) Act 1856 without any doctrine of passing of property by agreement. Though under that Act tradition was the appropriate method of conveying a real right to a buyer, he and subpurchasers from him had a right of priority on the seller's bankruptcy in preference to the seller's creditors. We see no convincing reason for attaching a stipulative meaning to the term "property" in the context of sale which it does not have in the law of moveables generally. (paras. 34, 50, 51 and 57).

10. So far as the 1893 Act provided for risk and ownership of specific goods to coincide, it did not in fact alter the incidence of risk in Scots law. Risk may, however, be associated with the handing over of the goods, especially if the basic approach of the Uniform Law on the International Sale of Goods is preferred to that of the Sale of Goods Act. Risk and transfer of ownership are not necessarily interdependent. (paras. 2-7, 53 and 57).

11. Handing over of possession remains important even in the case of specific and ascertained goods - in particular by determining at what point the seller's remedies exercisable over the goods themselves are cut off, and in safeguarding a buyer against unauthorised disposal of the goods by the seller to a second buyer. (paras. 44 and 57).

12. Pre-1894 policy recognised the unpaid seller's right of retention against a buyer, i.e. the exercise of a right of ownership over what, until delivery, remained his property. Section 62 of the Sale of Goods Act provides that "'lien' in Scotland includes right of retention". To include a right of ownership over the seller's own property in a possessory right over the buyer's property seems infelicitous and confused drafting. (para. 57).

13. It seems anomalous to regulate the transfer of property rights by different modes in the case of sale on the one hand and in the case of other transactions such as exchange and donation on the other. Indeed there seems to be no logical reason why, if it were desirable to transfer the right of ownership by agreement in the case of sale, the same principle should not apply to transfers of lesser real rights over moveables in transactions for security, hire and loan. Moreover, where heritage is treated as a matter of commerce, it is not immediately self-evident that the analogy between transfers of moveables and of heritage is insufficiently close to merit consideration being given to the extension of transfer by agreement to heritage also. (paras. 18, 22, 33 and 57).

14. The legal rules regulating the effects of transfer of ownership of moveables in normal situations do not necessarily affect the rules protecting good faith acquirers of things without the owner's consent. A system which recognises the validity of transfer of ownership of things by agreement inter partes, even in cases of donation, may nevertheless go so far as to protect a good faith gratuitous acquirer a non domino. (paras. 42 and 57).

15. Should ownership in specific moveables be transferred:
(a) as the law stands at present, but with clarification of the property provisions of the Sale of Goods Act;
(b) as agreed by contract between transferor and transferee (with the existing rules under the Sale of Goods Act for ascertaining their intention extended to all transactions);
(c) as agreed by contract between transferor and transferee (with rules different from those prescribed by the Sale of Goods Act for ascertaining their intention extended to all transactions);
(d) by reintroducing the mode of delivery in sale as it is required at present in other transactions for transfer of real rights in moveables? (para. 63).

We should also welcome suggestions for defining, limiting or extending the scope of the mode of transfer selected, e.g. by prescribing special rules for cases of traditio brevi manu and of "declaration of transfer of possession" (constitutum possessorium). (paras. 66-73).

16. Would it be desirable (and if so, in what specific situations) to reinstate a doctrine of reputed ownership for the benefit of general creditors of a possessor of moveables who has transferred ownership to an onerous acquirer? (para. 76).

17. Is the present law, according to which the seller is free prior to delivery to reserve the right of disposal over specific goods, satisfactory? (para. 81).

18. Should delivery of goods to a buyer (or to a custodier on his behalf) cut off the right of the seller who has reserved ownership to reclaim them - except in a question between himself and the buyer? (para. 84).

19. In sale, despite delivery, should it be permissible for a seller to reserve ownership until a condition (including payment of the price) has been fulfilled by the buyer? (para. 85).