SCOTTISH LAW COMMISSION

MEMORANDUM No: 27

CORPOREAL MOVEABLES

PROTECTION OF THE ONEROUS BONĀ FIDE ACQUIRER OF ANOTHER'S PROPERTY

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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PART A: INTRODUCTION

1. In this Memorandum we examine a number of problems relating to the good faith acquisition of corporeal moveable property from one who is not the true owner. At the outset some general problems may be identified. These involve at least three parties, though goods may in fact have circulated through many hands before an original owner traces his property in the possession of an ultimate acquirer. We are not in this Memorandum concerned with the remedies of an owner against a party with whom he has himself transacted, but only with situations where the law has to decide between the claims of a deprived owner and an honest acquirer from a mediate possessor - who may or may not have acquired in good faith.

2. Without at this stage canvassing the respective merits of the solutions available, it may be helpful to identify a few options as a background for consultation:

(a) A valid title of ownership of corporeal moveables should be recognised only if the acquirer derived title through a chain of unimpeachable legal acts from the original owner.

(b) A transferee in good faith should acquire the title of his transferor's author if the acquirer traced his title through a chain of legal acts, some of which may have been defective or incapable of passing the full right of ownership.

(c) An acquirer in good faith who had taken possession of moveables by a legal act habile (i.e. appropriate) to transfer title should be protected against the original owner notwithstanding the fact that the transfer had not been authorised by the owner and was in violation of his right. The original owner should be divested and the acquirer invested as owner by statutory title.

(d) As in (c), but only if the owner had relinquished control of his own volition - i.e. a vitium reale would attach to stolen property and to property acquired by coercion amounting to robbery or from an incapax.

(e) As in (d), but extending the vitium reale to any obtaining or handling of the goods by an intermediate possessor by conduct which constituted a crime of dishonesty and/or the delict of fraud.

(f) As in (c) or (d), but only if the bona fide acquisition was by an onerous transaction.

(g) As in (f), but only when the sale was to a private purchaser.[1]

(h) As in (f), but only when sale was by auction or in public market, or through a dealer in similar articles.[2]

(i) As in (f), but only when the ultimate contract or tradition (delivery) was valid in all respects between transferor and transferee.

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[1] See e.g. Hire-Purchase Act 1964 Part III, s.27 (and see Consumer Credit Act 1974 Sch. 4, para. 22).

[2] See e.g. the Law Reform Committee's Twelfth Report on Transfer of Title to Chattels (Cmnd. 2958 (1966)), paras. 14 and 33.

(j) As in all cases except, (a) but distinguishing according to categories of corporeal moveables - e.g. (i) (a) works of art or other objects created by the owner, or (b) valued for intrinsic merit or for sentimental reasons, or (c) held as an investment; (ii) fungibles and non fungibles; (iii) raw materials; (iv) consumer goods; (v) motor vehicles.

(k) A dispossessed owner should be entitled to claim back his property but only on paying the onerous bona fide acquirer (i) the amount paid by him; or (ii) the current market price; or (iii) one half of either of those amounts.

(l) In any case under (j), where the acquirer suffered loss by delivering back the property to the original owner, such an acquirer should have a right of relief against the transferor to him, and so back through each link in transfer to the original unauthorised transferor (if traceable).

(m) The extinction of the original owner's rights and the validation of the acquirer's rights should be regulated by periods of prescription varying according to the way in which the original owner lost possession and/or the type of property in dispute.

3. These options illustrate but do not exhaust the possible solutions. Some could be combined. At one extreme, a dispossessed owner is granted the right to claim his property where he finds it, unless he had freely transferred his title to another by a valid act of disposal. At the other extreme an acquirer who took possession animo domini is protected, even though the goods had been stolen and acquisition was gratuitous. Possibly the least complex of the compromises adopted in Western legal systems is to protect the bona fide

acquirer in possession on an onerous title habile to transfer ownership in cases where the original owner had voluntarily parted with possession of his property in the first place - but not in cases of dispossession by forcible or clandestine means. In short, only when the original owner has put it in the power of another to transfer his property ultimately to an innocent third party acquiring for value, should the original owner be divested of title. This solution has been favoured by commercial arguments and also by a tendency to identify the right of ownership in the last resort with actual physical possession. This last consideration has also influenced many systems to reject the creation of real security rights valid against third parties by simulated sales, or without dispossession of the debtor, or other public manifestation of the creditor's right (as by registration or affixing marks of identification on the moveables providing security.)

4. Most legal systems strike a compromise between the extremes in the interests of commerce, although the value of an object to the original owner may be non-patrimonial. The same object, e.g. a work of art, may be valued by different parties in the chain of transmission for sentimental reasons or for artistic reasons or merely as an investment. If the original owner was himself the creator of an artistic object, his moral right to reclaim it from a bona fide acquirer might in theory be thought stronger than that of the deprived owner of a consumer product. Nevertheless the multiplication of fine distinctions and exceptions has few advocates. Economic interests seem to favour protection of the title of the bona fide onerous acquirer of goods, regarding free circulation of goods as the primary consideration: but finance houses which, for example, let goods on hire-purchase, retaining ownership as security, will no doubt

consider whether this device could be dispensed with without serious disadvantage. The arguments for or against protecting the owner or bona fide acquirer where there is no public manifestation of the owner's right (as by registration or possession) may apply more generally to real rights, e.g. security rights, other than ownership over corporeal moveables. A derivative theory of passing title may graft a series of qualified rights onto the right of ownership itself, while an extinctive theory linked to good faith acquisition of possession, with intent to acquire ownership, invests the acquirer with unqualified title by provision of law.

5. The problem of acquisition of corporeal moveables a non domino (i.e. from one who is not the owner or authorised by him) will be mainly examined in the context of sale. However, we do not overlook the probability that solutions acceptable in that context should apply by analogy to other onerous transactions such as exchange, which may be important in commerce.[1] It may be that conclusions regarding the effect of handing over moveables may also be relevant in the context of rights in security over them, upon which we prefer to express no view for the time being. The present Memorandum is not concerned with title to ships, aircraft or other moveables, rights over which are validated and made public by registration, nor with title to money, scrip or negotiable instruments, nor with title to "intellectual property" such as patents, registered designs and copyright. These categories of moveable property are of great importance, but rights over them are in most legal systems regulated by special legislative provisions, distinct from the rules which apply to corporeal moveables which are

[1] Widenmeyer v. Burn Stewart & Co 1967 S.C.85.

transferred from hand to hand, and title to which is not vouched by public registration.

6. Though certain doctrines regarding acquisition a non domino have gained fairly wide acceptance, a historical and comparative examination of the problem makes clear that there is no manifestly right solution. Either the deprived owner or the bona fide purchaser - or both - must suffer loss. The interests of commerce favour the bona fide purchaser, while a deeply rooted sense of justice is offended by the idea that an owner of property should be deprived of it against his will - at least if he has not facilitated the operations of the (usually dishonest) intermediary who has sold to the bona fide purchaser. In various forms the factor of publicity has been stressed in other legal systems - as in the English doctrine of market overt - on the assumption that a deprived owner may more easily trace his property if it is put up for public sale, and because dishonest disposal will be discouraged. In cases where the bona fide purchaser is not given immediate protection of title, many systems provide that he may become owner after possessing for a period of acquisitive prescription.

PART B: EXAMINATION OF EXISTING LEGAL PRINCIPLES

1. Civil law systems

7. The legal systems of the European Continent drew, as has Scots law, on Roman and Germanic customary law sources in formulating their rules on corporeal moveables. Though Roman law recognised a general principle of nemo dat quod non habet,[1] this was tempered in favour of the bona fide acquirer iusta causa [2] by the operation of a short positive prescription (usucapio), except in cases of furtum (theft), which was given a wide meaning and was not restricted to

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[1] Which means in effect that no one can confer a greater right than he has.

[2] i.e. (in Roman law) by virtue of a legal act which, had it been valid, would have been sufficient cause for transferring ownership.

theft in the sense only of clandestine or forcible dispossession. Furtum attached a vitium reale[1] to stolen property which could only be purged by a very long period of prescription - usually thirty years. However, by contrast, Germanic customary law gave general protection to a bona fide acquirer, who had actually taken possession, against an original owner. The owner who had voluntarily relinquished control of a moveable to another was, in competition with a bona fide possessor, left to his remedy against the dishonest party - such as a borrower or hirer - who had abused his confidence and had transferred possession to a third party. However, if the owner had not voluntarily parted with possession of his moveable property, but had been deprived of it against or without his will - as by theft, force or inadvertent loss - he could (as in Roman law) reclaim his property even from innocent third party acquirers, unless they had purchased at a market which was specially privileged. Though there was some revival of Roman influence after the Middle Ages the general Roman law doctrine of nemo dat quod non habet did not prevail, nor did the wide Roman concept of furtum.[2]

8. Most Western European systems accept today, in one form or another, the doctrine that bona fide acquirers of corporeal moveables, at least those acquiring for value, are protected against an owner who has relinquished control by handing over such property of his own volition. It will not avail the owner to show that the person to whom he handed it over received it on a limited right, such as hire, nor that

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[1] Real vice, i.e. tainting the property itself and rendering it incapable of acquisition.

[2] See the Appendix to this Memorandum for a comparative survey of other legal systems in operation, for proposals submitted for reform of the law in this area in Quebec and the Netherlands, and for the Draft Uniform Law on the Acquisition in Good Faith of Corporeal Moveables, prepared under the auspices of Unidroit.

the transfer resulted from error, fraud or intimidation. However, in some systems lost or stolen property is treated exceptionally - theft being strictly construed as forcible or clandestine dispossession. The factor of possession is recognised as important in several contexts. In some circumstances the acquisition of actual possession in good faith a non domino with the intention of becoming owner is effective to protect the acquirer's title; but sometimes such protection is given only when the acquirer had the moveable transferred to him by a transferor who was himself in possession. Moreover, possession raises a general presumption of ownership, as well as supporting the title of an acquirer in good faith.

9. A summary of the basic Western European approach to good faith acquisition, as set out in the Twelfth Report of the Law Reform Committee (of England and Wales), could possibly give a somewhat misleading impression to a reader who was not familiar with systems which do not regard property rights as necessarily ancillary to the law of obligations or contract. It is there stated:

> "Our (scil. English) law differs from continental law in the extent to which it protects the owner of goods who loses them through fraud or other dishonest means. The French law on this subject is commonly summarised in the expression Possession vaut titre, and a similar rule is found in German law ... Neither French nor German law goes to the extent of depriving the owner of the title to goods which have been stolen from him, subject to certain exceptions .... The principal distinction between French and German law on the one hand and our own on the other hand is that under the former an owner of goods who is induced to part with possession of them by fraud or a trick cannot recover them from an innocent third party. In this respect French and German law do not draw the distinction which English law makes between transactions which are void and those which are merely voidable."[1]

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[1] Cmnd. 2958 (1966), para. 5.

In fact both French and German law recognise categories of absolute or relative nullity (approximately "void" and "voidable") in relation to legal acts,[1] but by code provisions applicable to the law of corporeal moveable property - not to obligations - the title of the purchaser in good faith is protected[2] in the interests of commerce. The position is conveniently expressed by Holstein:[3]

> "(T)he French and the Louisiana Code do not construe the dispositive act as a transaction which can exist although the supporting cause has disappeated due to the annulment of the obligation for error, fraud or violence. On the contrary, all dispositive acts emanating from the contract are extinguished by its annulment. Therefore, the way is open for the principle that nobody can transfer a greater right than he himself has. However, in France, this result is forestalled by the intervention of the celebrated principle 'en fait de meubles, la possession vaut titre'. The bona fide acquirer of a corporeal moveable is thereby protected although the transaction upon the strength of which his predecessors took title is subject to being annulled on account of a consensual vice."

The rule of property law-"where moveables are concerned possession is equivalent to title"-overrides all the rules in the law of obligations regarding nullity of contract

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[1]For French law see for basic references, Amos & Walton Introduction to French Law (3rd ed., by Lawson, Anton & Brown) p.157 et seq.; also J.Carbonnier Droit Civil Tome II Les Biens p.259 et seq.; for basic German law see E.J. Cohn Manual of German Law (2nd ed.,) vol.I p. 80 et seq.

[2]Amos & Walton op. cit. p.112 et seq.; Cohn op. cit. p.182 et seq.

[3]H.A.Holstein "Vices of Consent" (1939) 13 Tul. L.R. 560 at p.583. It does not follow, as Lord Denning M.R. assumed in Lewis v. Averay [1972] 1 Q.B. 198 at p.206 that in 18th century French law error in contract would preclude a third party from acquiring a protected title.

or abuse of trust by a transferor holding on limited title. The result therefore is that the acquirer in good faith a non domino neither has transferred to him the title of the original owner, nor takes title by instantaneous prescription, but acquires clear title by statutory provision.

10. In those European systems where a valid contract or delivery is required to support good faith purchase a non domino, the transaction which must be valid is that between the good faith purchaser and the transferor to him - not the transaction between the original owner and the original transferee. Moreover, as the Appendix illustrates, by contrast with the situation in French law, protection is only given by some systems to the acquirer in good faith to whom possession is handed over in implement of an onerous transaction.

2. The English approach

11. The Western European approach to the problem of protecting the good faith acquirer of moveables - except in cases of theft and lost property - is to concentrate on the ultimate transfer and to view the matter as essentially a question of property law. Since the basic principle of English law is nemo dat quod non habet, the problem is on the whole approached through the law of contract and tort rather than as an aspect of property law. Therefore, even if the owner has parted with possession of goods under a void contract, or under a voidable contract which has been avoided before transfer to a bona fide third party purchaser, the owner has a remedy - usually a tort action for detinue

or conversion - against that third party for intermeddling with his property.[1] Moreover, in general, if the owner parts with possession to another on limited title such as hire, the transferee cannot give good title to a third party purchaser. To this rule, however, the Hire-Purchase Act 1964, section 27,[2] provides a statutory exception in certain cases of private sale of motor vehicles possessed on hire-purchase. Denning L. J. (as he then was) observed[3] in Bishopsgate Motor Finance Corp v. Transport Brakes Ltd.:

> "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title."

The many pragmatic exceptions to the general rule nemo dat quod non habet are, as far as may be, clearly analysed in Crossley Vaines on Personal Property.[4] Six apparent exceptions to the rule nemo dat quod non habet are specifically recognised under the Sale of Goods Act 1893.[5] Three considerations seem to operate - the concept of publicity,

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[1] Professor S. F. C. Milsom argues that the historical reason for the severity of the attitude of English law towards good faith acquirers of moveable property is the non-traversable allegation that early came to be made in actions of detinue and conversion, to the effect that the plaintiff had lost the article in question, the defendant had found it (trover), and either refused to return it, or had converted it to his own use: Historical Foundations of the Common Law, pp.231-4, 321-32.

[2] See now the Consumer Credit Act 1974 Sch. 4 para. 22 inserting into the 1964 Act a new Part III, s.27.

[3] [1949] 1 K.B. 322 at pp. 336-7.

[4] 5th ed., chapter 9. See also the Appendix.

[5] Some of which are in effect duplicated in the Factors Acts.

e.g. market overt; the principle that he who has facilitated the wrong must suffer; convenience and commercial necessity. In some cases a new statutory title is created in the third party purchaser[1] in good faith, e.g. purchase in market overt, while in others, e.g. sale on imperfect voidable title, the third party purchaser merely takes as good a title as the original transferor had. Whereas in most Western European systems the bona fide onerous acquirer is protected by a general principle of law - subject to limited exceptions, as in the case of stolen property when the owner has not voluntarily relinquished control - and is invested with title in the sense of dominium or ownership, under English law in principle the original owner is protected subject, however, to many technical exceptions which may depend on factors which the ultimate acquirer could not ascertain. Moreover, even if the right of the ultimate acquirer is preferred to that of the original transferor, he is not necessarily invested with full ownership.

3. Scots law: common law

(a) Bona fide acquisition from unauthorised transferors

12. The main protection for the bona fide onerous acquirer in possession by the common law is the presumption of ownership which arises from possession. Since at common law a buyer acquired a real right only when possession was transferred to him, this presumption was usually efficacious, and favoured by the law in the interests of commerce.

13. Stair stated the general position clearly:[2]

> "In moveables, possession is of such efficacy, that it doth not only consummate the disposition thereof, but thereupon the disposition is

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[1] It would be more appropriate to refer to the "ultimate purchaser", since goods may have passed through many hands before they are traced by the original "owner" or transferor.

[2] III.2.7. See also Bankton I.3.18.

> presumed without any necessity to prove the same .... But restitution of a horse was not excluded, because the possessor offered to prove he bought him from one who then had him in possession, in respect the pursuer then offered to prove, that immediately before he had set the horse in hire for a journey to that person who sold him; Forsyth contra Kilpatrick;[1] so that it will not be sufficient to any claiming right to moveable goods, against the lawful possessor, to allege he had a good title to these goods, but he must condescend quomodo desiit possidere ... the reason whereof is, because in the commerce of moveables ... it would be an insuperable labour, if the acquirers thereof behoved to instruct all the preceding acquirers."

Stair, however, recognised that the presumption of ownership may be displaced by an even stronger contrary presumption on the facts,[2] and an owner who could discharge the onus of proof was entitled to recover his moveables from one who had acquired in good faith a non domino.[3]

14. So effective seems to have been the presumption based on possession in Scotland that there are remarkably few cases in the books in which an owner has succeeded in reclaiming from one who purchased from an unauthorised transferor. By contrast there has been much litigation concerning security rights when the creditor has not had possession. The doctrine of reputed ownership created a right in favour of creditors of a possessor which was not affected by proof of a latent contrary right.

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[1](1680) Mor. 9120; Pringles v. Gribton (1710) Mor. 9123.

[2]Ramsay v. Wilson (1666) Mor. 9113; see also Scot v. Fletcher (1665) Mor. 11616.

[3]See cases summarised R. Brown Treatise on the Sale of Goods 2nd ed., pp.460-1 (True Owner Preferred to bona fide Possessor under Title a non domino); contrast pp. 449-450 (Possession Sustained as against Alleged Ownership Insufficiently Proved.)

15. In his Commentaries[1] Bell went much further than Stair and other Scottish authorities, and expressed in effect the doctrine that possession confers ownership on a bona fide purchaser of corporeal moveables, subject to the exceptions of radical defects such as theft, violence and incapacity:[2]

> "As possession presumes property in moveables, the general rule is, that the purchaser of moveables at market or otherwise in bona fide, acquires the right to them, although they may have been sold by one who is not the owner."

His footnote to the passage relied on Stair IV.40.21, which, as McLaren in his editorial note points out, was concerned with the effect of fraud and not with acquisition a non domino. Bell, he thought, had "pushed a favourite doctrine ... to the extreme of what was warranted" and had confused ostensible ownership with presumption of ownership.

16. In his last reflections on the topic[3] Bell departed from his earlier view and wrote:[4]

> "The legal presumption of property from possession may be overcome by other presumptions, or by proof. In proof of property to counteract the presumption, there must be evidence of right, and also of the loss of possession; - as that the thing was stolen; that it was given in pledge, in loan, etc."

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[1] I. pp. 299 and 305.

[2] I. p.305.

[3] Principles, 4th ed., 1839.

[4] s.1314.

This remains the basic rule at common law, but it is of some significance that Scotland's leading writer on commercial law was prepared in his major work to move so close to the current Western European doctrine which protects bona fide purchasers.[1]

(b) Radical Defects of Title

(i) Vitia Realia; Labes Reales.

17. At common law theft constitutes a radical defect of title, a vitium reale which attaches to the moveables stolen and which cannot be purged by sale even in public market.[2] Spuilzie,[3] at all events when it took the form of taking away moveables without the owner's consent, was, (and no doubt such conduct still is,) a radical defect since, as Stair observed, spuilzie is the civil counterpart of the crimes of theft or robbery, and even a bona fide purchaser has to restore spuilzied goods.[4] Bell[5] considered that the radical defects of title were incapacity (pupillarity or insanity) of the person from whom moveables were taken; theft; violence; and force and fear. He does not include

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[1] Exceptions to the rule that a bona fide purchaser cannot acquire ownership a non domino have also been grafted onto the Scots common law by statute, e.g. by the Sale of Goods Act 1893, by the Factors Acts and by the Hire-Purchase Act 1964. The Sale of Goods Act 1893 s.61(2) preserves the rules of common law except where inconsistent with express provisions of the Act, and in particular with regard to any "invalidating cause".

[2] Bishop of Caithness v. Fleshers in Edinburgh (1629) Mor. 4145; 9112; Ferguson v. Forrest (1639) Mor. 4145; Henderson v. Gibson (1806) Mor. App. Moveables No. 1. The same rule applied to lost property in the older common law: Stair I.7.1. A vice infecting property and rendering it extra commercium is a very different concept from a contractual defect or vice of consent.

[3] An old Scots delict involving wrongful interference with another's moveables, discussed in our accompanying Memorandum no. 31 on remedies.

[4] Stair I.9.16; Erskine IV.1.15, Bankton I.7.126.

[5] Commentaries I.299.

error or fraud among the radical defects of title, and it may well be that he went too far in generalising the effect of force and fear. Not in all cases may this be a ground for a deprived owner reclaiming his moveables. The common law as to the effect of vices of consent is preserved by the Sale of Goods Act 1893, section 61(2).

(ii) Force and Fear

18. The early cases[1] reported in Morison's Dictionary under the heading Vis et Metus reflect the ferocity of barbarous times, and are scarcely comparable with the rare instances in which the plea has been invoked in modern times. Though Stair may have considered[2] that force and fear made deeds and obligations "utterly void" he considered that, in the interests of commerce, title to corporeal moveables might be acquired by bona fide purchasers[3] unless the coercion actually amounted to robbery. Gloag discusses the confusion of the present law regarding the effect of force and fear on acquisition of third party rights,[4] but not in the special context of acquisition of title to corporeal moveables. The trend of the modern law seems to regard force and fear as a vice of consent, and not as a real vice or ground of nullity affecting third party rights.[5] The position, however, in our view requires clarification.

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[1] e.g. Stuarts v. Whitefoord & Hamilton (1677) Mor. 16489.

[2] I.9.8. The reference to annulling suggests doubt as to meaning.

[3] IV.40.21 and 28.

[4] Contract 2nd ed., pp.488 and 492.

[5] See e.g. Stewart Bros. v. Kiddie (1899) 7 S.L.T. 92; Bradford Property Trust v. Hunter Jan 22 1957 (unreported); Bills of Exchange Act 1882 ss. 29 and 38. Walker Civil Remedies p.156 is somewhat ambiguous probably because "force and fear" may cover different types of conduct. In Hislop v. Dickson Motors (Forres) Ltd (10 July 1974, unreported) the Lord Ordinary (Maxwell) reviews the authorities on force and fear, but not quoad the rights of third party acquirers. A brief discussion of the effect of force, fear and coercion in the Scots law of contract - as distinct from the law of property - is also to be found in the Privy Council case of Barton v. Armstrong [1976] A.C.104 at p.118 per Lord Cross of Chelsea.

(iii) Error

19. We intend to consider the effect of defective consent as part of our study of the law of obligations. Error according to some modern authors and decisions operates as more than a vice of consent - in effect as a vitium reale affecting transfer of title to corporeal moveables.[1] The institutional writers[2] and nineteenth century authors do not regard error as a radical defect of title affecting transfer of rights in corporeal moveables to bona fide purchasers. We have some difficulty in construing Morrisson v. Robertson[3] as a true case of error in persona

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[1] e.g. Encyclopaedia of the Laws of Scotland vol. 2 (1927) p.287 sub voce "Bona et Mala Fides"; Gloag Contract 2nd ed., esp. p.531 et seq; M.P. Brown Sale p. 395 et passim. Contra: J.J. Gow The Mercantile and Industrial Law of Scotland p.52 et seq; T.B. Smith Short Commentary on the Law of Scotland p.814 et seq.

[2] Stair IV.40.21, 24 and 28; Bell Principles ss.11, 14 and note (4th ed.,). C.f. Gloag op. cit., p.442, Kames Principles of Equity, 3rd ed., vol. 1, p.281; see also A.M. Bell Conveyancing: Vol. 1 p.167; Craigie Conveyancing: Moveable Rights p.40.

[3] 1908 S.C. 332; (1908) 15 S.L.T. 697. Had the rogue been in fact the son of Wilson of Bonnyrigg should the result have been different? There is, moreover, another explanation for the case. In MacLeod v. Kerr 1965 S.C.253 the Lord President (at p.256) was emphatic that no question of theft arose in Morrison v. Robertson. Admittedly there was no clandestine or violent dispossession - but this is not invariably required in the criminal law. See Gordon Criminal Law, pp. 442-9 - where, after examination of the authorities, the author classifies Morrisson v. Robertson as theft (p.444). In the action itself extract convictions of theft were in process (as appears more clearly from the S.L.T. report). Lord McLaren thought that the rogue had no better title to sell than if he had stolen the cows from the pursuer's byre (p.337); Lord Kinnear observed (p.338): "But the truth is we do not require to go beyond our own books for authority." All his Scottish references are to theft. See on "posing as an agent" and theft W.A. Wilson (1966) 29 M.L.R. 442.

precluding good faith acquisition. The pursuer's mistake was in believing that there was another contracting party at all, and the essential deception was that the bogus agent had the authority of a named principal - who conceivably might have ratified. The pursuer never intended to transfer ownership to an agent but only to the named principal. In any event we doubt whether a single decision[1] by one Division, based on an uncertain ratio decidendi, could settle the law contrary to the consensus of institutional opinion.[2] Error, fraud, and force and fear are seemingly regarded by Stair[3] as similar in effect or as "congenerous allegeances," and are treated alike whatever their effect in the field of obligations. He stated a special rule in property law independent of that applicable in the law of obligations.[4] Of fraud, to which he equiparated the other defects of consent, Stair wrote:

> "Yet, in moveables, purchasers are not quarrellable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as labes reales, following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery."[5]

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[1] The old cases of Dunlop v. Crookshanks (1752) Mor. 4879, Chrysties v. Fairholms (1748) Mor. 4896, or Love v. Kempt's Creditors (1786) Mor. 4948, are not helpful on the effect of error upon the position of bona fide purchasers. In all these cases either claims of creditors were involved, or the original error in persona had not taken effect because delivery had been refused by a person erroneously believed to have been a contracting party.

[2] This, Lord Normand considered, was entitled to almost as much weight as a decision of the House of Lords: "The Scottish Judicature and Legal Procedure" (1941) p.40.

[3] IV.40.21, 24 and 28.

[4] Cf. the European solutions discussed in para. 9, supra.

[5] IV.40.21.

This view is supported by Bell, our principal institutional writer in the field of commercial law,[1] and by a reputable body of non-institutional writers. Though the law is possibly unsettled, we do not, as at present advised, consider error to be established as a vitium reale[2] in the common law of Scotland regarding transfer of corporeal moveable property, and indeed conclude that it is not. We are inclined to think, however, that the law should be put beyond doubt by statutory provision to the effect that transfer of title to corporeal moveables is not invalidated by defects of consent in the agreement to transfer, and until the transaction is reduced such defect shall not prejudice third parties acquiring in good faith and for value. It should further be made clear that both force and fear, and error, are only defects of consent. We invite comment on these provisional conclusions.

(c) Voidable Title to Moveables

20. The common law of Scotland regarding corporeal moveable property has been overlaid - but only in relation to sale - by the Sale of Goods Act 1893, which was primarily intended to codify the English common law. In English law an important aspect of the rule nemo dat quod non habet in relation to moveables is represented by defective contractual situations - either because goods have been handed over as a result of a void contract, or under a voidable contract which has been avoided. Indeed, the remit to the Law Reform Committee which resulted in their Twelfth Report on Transfer of Title to Chattels arose out of that aspect of the law. So far as we can ascertain this aspect has only created problems

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[1] See the last (4th) edition of the Principles compiled by the author, note to sections 11 - 14; and s. 14 in the 5th ed., compiled by his brother-in-law to whom he had entrusted his papers.

[2] In certain cases of "error", where more than defect of consent was involved, it was not thought arguable that ownership had not been transferred by actual handing over (tradition): Stuart v. Kennedy (1885) 13 R.221; Wilson v. Marquis of Breadalbane (1859) 21D.957; cf. statutory nullity Cuthbertson v. Lowes (1870) 8M.1073.

in Scots law since the Sale of Goods Act 1893. Devlin L.J., discussing the effect of section 23 in his judgment in Ingram v. Little,[1] observed:

> "There can be no doubt ... that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? ... Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part?"

In English law, if a contract is void for mistake no title is transferred. The Law Reform Committee recommended that in English law mistake as to the buyer's identity should render a contract voidable and not void.[2] We do not consider it to be established that error constitutes a vitium reale in the property law of Scotland, and the common law of Scotland regarding error is preserved by section 62(1) of the 1893 Act. However, we have suggested that the matter should be put beyond question.

21. Although section 23 of the Act applies to Scotland, it is controlled by section 62(1) and it has not been authoritatively decided that the section regarding "voidable title"[3] alters the common law regarding the rights of onerous acquirers from persons holding on vulnerable title. The institutional writers, and those who base their conclusions on their writings,[4]

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[1] [1961] 1 Q.B. 31 at p.73.

[2] Recommendation 3.

[3] R. Brown Treatise on the Sale of Goods p.148 notes in connection with this section that "void" and "voidable" are not Scottish law terms but they are convenient and now freely used in Scotland. The inconvenience, however, is that they do not correspond exactly with "absolute" and "relative" nullity in the sense these terms are used by civilian systems.

[4] See paras. 15 and 16 supra and footnote references.

would we think conclude that "rescission", reduction or annulment of a contract which had resulted in transfer of corporeal moveables could affect the rights of third parties acquiring in good faith only after judicial decree, though a former owner's intention or attempt to rescind might be relevant, in relation to good faith, if brought to the notice of a third party before he acquired rights to the moveables. Under English law - which the section was intended to codify - it would seem that a third party may be deprived of protection by rescission or "avoidance" of which he could have no possible notice, thus frustrating the objective of protecting bona fide purchasers of moveables. In England it has been held that the victims of a fraudulent sale may even "avoid" the transaction by notifying the police. Thus in the English case of Car & Universal Finance Co. v. Caldwell[1] the defrauded owner was held to have rescinded successfully by notifying the police and Automobile Association of the fraud, so that the innocent third party purchaser was deprived of protection. This form of "avoidance" was held to be ineffective in Macleod v. Kerr[2] so far as Scots law was concerned, but it was not made clear what "avoidance" is regarded as effective. In England the Twelfth Report of the Law Reform Committee recommended[3] that a voidable contract could only be effectively avoided if rescission were communicated to the other contracting party:

> "We think that unless and until notice of the rescission of the contract is communicated to the other contracting party an innocent purchaser ... should be able to acquire a good title. No doubt this will mean that the innocent purchaser will do so in the great majority of cases since it will usually be impracticable for the original owner of the goods to communicate with the rogue who has deprived him of them."

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[1] [1965] 1Q.B. 525.

[2] 1965 S.C. 253; See also W.A. Wilson "999 for Rescission" (1966) 29 M.L.R.442.

[3] Para. 16; Recommendation 4.

22. With respect, we cannot see that this interpretation of section 23 would improve on the pre-1893 common law of Scotland, or do justice to the bona fide onerous acquirer who had no knowledge of the contractual relationship between the party who transacted with him and the original owner. Whatever the scope of rescission in the field of contract, especially where no third party interests are involved, we do not think that in the context of property law a bona fide third party purchaser of corporeal moveables, without notice of challenge to his transferor's right, can be affected by "rescission",[1] unless there had been judicial intervention before that third party purchased. The rescission would be res inter alios acta. Professor D. M. Walker[2] holds that rescission is precluded by third party acquisition of rights, and quotes a dictum of Lord Johnston[3]:

> "The remedy of rescission and recovery of the property is an equitable remedy, and, though as between seller and buyer a brevi manu operation may be effectual, it requires, where other interests are concerned, the interposition of the Court .... The remedy is an equitable remedy and the Court is bound, I think, to look all round, and to consider whether there are not counter equities."

Gloag seemingly supports this view[4]:

> "The right to reduce a voidable contract may ... be barred if third parties have acquired rights under it which would be affected by the reduction. The most obvious application of the rule is where the voidable contract, or some act following upon it, results in the transfer of a real right of property .... In the case of sale of goods this rule is now statutory."

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[1] The use of the word "rescission" to imply a form of self-help is relatively recent in Scotland, though an action of reduction to set aside writings is classified among the "rescissory actions".

[2] Civil Remedies p.49.

[3] Gamage v. Charlesworth's Tr. 1910 S.C. 257 at 267-8.

[4] Contract 2nd ed., p.533; see also L. P. Clyde in MacLeod v. Kerr 1965 S.C.253 at p.257.

23. In our view "avoidance" in relation to the Sale of Goods Act 1893, section 23, so far as Scots law is concerned, probably already requires judicial intervention if bona fide third parties without notice are to be affected. The matter is not, however, free from doubt, and we suggest that this doubt should be removed by statute, to the same effect as we have already suggested when discussing error in para. 19. We invite comment on this proposal.

(4) Statutory Protection of Acquisition

(a) General

24. Though section 61 (2) of the Sale of Goods Act 1893 preserves the common laws of Scotland and England, except insofar as they are inconsistent with the express provisions of the Act, it is not always clear what the effect of that saving is. Since the Act was intended to be in effect a codification of the English common law on sale, there is a greater possibility of harmonising the Act with the English common law than with that of Scotland. The statutory provisions regarding passing of title are in effect English law, and have been considered by the Law Reform Committee in their Twelfth Report. We comment on some of their recommendations in the Appendix.

25. Dr J.J.Gow expresses the effect of the Act succinctly:[1]

> "Subject to the provisions of the Act where goods are sold by a non-owner without the authority or consent of the owner, the buyer acquires no better title than the seller had, unless the owner by his conduct is barred from denying the seller's

[1] The Mercantile and Industrial Law of Scotland pp. 100-1.

authority to sell [21(1)]. Excepted are the provisions of the Factors Acts or any similar enactment [21(2)(a)], or the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction [21(2)(b)]. Section 25 cuts a swath through the general rule."

26. Section 22 of the Sale of Goods Act 1893, (which does not apply to Scotland), authorises the creation of a new statutory title curing all defects in favour of a buyer in good faith in market overt, but the concept of "market overt" is, for historical reasons, somewhat capricious in application.[1] Recommendation 11 of the Twelfth Report of the Law Reform Committee was to the effect that

> "Section 22 of the Sale of Goods Act (which relates to market overt) should be repealed and replaced by a provision enabling a person who buys goods in good faith by retail at trade premises or at a public auction to acquire a good title."

This Recommendation is comprehensive and would include sale of stolen property. The inclusion of stolen property within the scope of the Recommendation has seemingly created insuperable difficulties regarding its acceptance and implementation.

(b) Preclusion by Conduct (Sale of Goods Act, Section 21)

27. The Sale of Goods Act 1893, section 21, provides (in part):

> "(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

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[1] For a history of the law of market overt see, e.g. Reid v. Metropolitan Police Commissioner [1973] Q.B. 551, per Scarman L.J. at pp. 561-4.

Brown comments[1] on the passage underlined:

> "In other words, the owner is prevented by estoppel, or in Scottish phraseology barred personali exceptione, from denying that he had given authority to sell or pledge."

Benjamin on Sale[2] thinks

> "that the terminology used may have been intended to render this principle intelligible in Scots law where the specific term 'estoppel' is unknown."

The language of the section and its subsequent interpretation in England may well be found difficult to understand by Scots lawyers. An English lawyer may construe the statutory language against the complex technical background of estoppel, expounded in case law, which seems of doubtful relevance in a Scottish context. We do not think it appropriate to examine this background.

On section 21 Benjamin comments[3]:

> "It might be supposed that this exception embodies the broad principle enunciated by Ashhurst J in Lickbarrow v. Mason[4] that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it'. But it is clear that this dictum, if too literally construed, is much too wide."

Benjamin adds that for reasons of commercial convenience,

> "the effect of [the application of the principle of estoppel] is to transfer to the buyer a real title and not a metaphorical title by estoppel."

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[1] Treatise on the Sale of Goods, p. 144.

[2] Para. 464.

[3] Ib.

[4] (1787) 2 T.R. 63 at p. 70 (reversed sub nom. Mason v. Lickbarrow (1790) 1 Hy. Bl. 357.)

Recently Lord Denning M.R. reinforced this view[1] that the effect of estoppel is to create a new, statutory title in the bona fide acquirer and by what he described as "proprietary estoppel":

> "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so ... so much so that his own title to the property ... has been held to be limited or extinguished, and new rights and interests have been created therein ... It is held that the true owner cannot afterwards assert they were his. The title to the goods is transferred to the buyer."

28. This construction of section 21 in English law goes far beyond what any Scots lawyer could imply from exceptio personalis, or personal bar, which is an aspect of the law of evidence. The concept of a "rule of equity or justice" as a link in title to property is unknown to our jurisprudence. It is perhaps not surprising that we have been unable to trace any authoritative Scottish decision on the meaning of the part of the section dealing with "preclusion by conduct". If personal bar is given its normal meaning, it could not create a proprietary right, extinguishing title. Someone fully aware from the outset of a defect in title might eventually acquire from a bona fide mediate possessor. Would the original owner be barred personali exceptione from reclaiming his property? It would be open, we think, to a Scottish court to accept the wide formulation of Ashhurst J in Lickbarrow v. Mason[2], and to apply it to any case in which an owner had voluntarily

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[1] Moorgate Mercantile v. Twitchings [1975] 3 All E.R. 314 at pp.323-4. The decision of the Court of Appeal was overturned by a 3-2 majority in the House of Lords on grounds that are not relevant to this discussion. Lord Denning's description of proprietary estoppel was not disapproved: [1976] 2 All E.R. 641.

[2] Sup. cit.

surrendered control of his goods, thus facilitating their dishonest disposal to an onerous and bona fide acquirer. This would go far to protect onerous bona fide acquirers of the property of another - though to found such protection on a rule of evidence rather than on a substantive right would not seem completely satisfactory. The Scottish courts have (as we discussed in paragraph 21) had occasion to construe section 23 of the Act in a divergent sense from that which has been accepted by the English courts. It is possible that, by construing the language of section 21 without reference to English case law, the Scottish courts would again diverge from the interpretation adopted by the English courts against a background of "estoppel"[1] which would seem to have little in common with the concept of personal bar in Scots law. We therefore propose that section 21(1) be amended to make it clear that it applies to any case in which an owner has voluntarily surrendered control of his goods.

(c) Disposition by Persons in Possession of Goods with the Owner's Consent (Sale of Goods Act, Section 25)

29. Further exceptions to the main principle of the Sale of Goods Act 1893, section 21 - broadly nemo dat quod non habet - are introduced by sections 8 and 9 of the Factors Act 1889, and extended to Scotland by the Factors (Scotland) Act 1890[2] and by the Sale of Goods Act 1893, section 25. Section 8 of the Factors Act 1889 provides that when a person has sold goods, and then disposes of them to a person who acquires them in good faith and without notice

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[1] As interpreted by Lord Denning M.R.

[2] The background to this legislation and the inapplicability of some of its provisions to Scots law are noted in Gow The Mercantile and Industrial Law of Scotland p.103 et seq.

of the previous transaction, this is to have the same effect as if it had been expressly authorised by the owner of the goods. This language is substantially reproduced by the Sale of Goods Act 1893, section 25(1), and we can see no good reason for this confusing duplication.[1] When the 1890 Act came into force the situation covered by section 25(1) could not have arisen in the Scots law of sale, since only by tradition would a seller have been divested of his real right.[2]

30. We observe that the expression "owner" is not defined in the Act, and presumably therefore should be construed in its natural sense according to the law of Scotland - that is, the proprietor in the fullest sense. It would seem to follow that if there were any antecedent possibility of challenge to the title of the seller at the time of the original sale, the subsequent bona fide acquirer would nevertheless take an unchallengeable title. Moreover, neither of the statutory provisions regulating the rights of a transferee from the seller requires the acquirer to have taken for onerous consideration. On this a leading authority on American contract law, Williston, comments that it would seem that a donee of the goods from the seller in possession would be preferred to the buyer - a result that can hardly have been intended.[3] So far as we are aware these statutory provisions, which are inconsistent with the common law of Scotland regarding acquisition of title to corporeal moveables, have never been

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[1] See also Twelfth Report of the Law Reform Committee on Transfer of Title to Chattels, Cmnd. 2958 (1966), para 19.

[2] See, generally, our accompanying Memorandum no. 25; Corporeal moveables: passing of risk and of ownership.

[3] Cited in Gow p.113. It may be, however, that construction of the sections might restrict the meaning of "disposition" to onerous transactions.

the subject of authoritative judicial decision in Scotland. Were transfer of title by tradition to be reintroduced for sale,[1] these statutory provisions would be superseded. In any event they clearly merit scrutiny with a view to repeal of section 8 of the Factors Act and revision of section 25(1) of the Sale of Goods Act.

31. The Factors Act 1889, section 9, deals with the situation where a buyer has obtained possession of goods with the consent of the seller, but has not had title transferred to him. Any disposal of goods by him

> "to any person receiving the same in good faith and without notice of any lien or other right of the original seller .. shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods..with the consent of the owner."

This provision again is substantially duplicated by the Sale of Goods Act 1893, section 25(2). It may be thought that, however the law regarding protection of good faith acquirers is improved, section 9 of the Factors Act should be repealed. We invite comment on the proposals that sections 8 and 9 of the Factors Act 1889, as applied to Scotland by the Factors (Scotland) Act 1890, should be repealed.

32. In these provisions regulating the effect of dispositions by a buyer in possession, the word "owner" is again undefined. To give the word its proper legal meaning, the effect would be that once a buyer had gained possession with the consent of a seller, by virtue of section 25(2) he would be in a position to give absolutely clear title, even to property which had at one stage been stolen. This is admittedly a surprising result, and presumably was not intended by the legislators -

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[1] See Memorandum no.25.

though their intention as expressed in the language of the Act seems reasonably clear. To avoid giving effect to that meaning judges in New Zealand and Canada have strained the language of the section to construe the expression "owner" as "seller" - but their efforts may not be altogether convincing.[1] It is not for us to reach a concluded judgment on the meaning of the subsection, but we draw attention to its potentially far-reaching consequences. The Law Reform Committee have drawn attention to the fact that, although section 25(1) protects a second buyer from a seller in possession "as though he was expressly authorised by the owner", section 25(2) protects acquisition from the non-owning buyer in possession "as if he were a mercantile agent in possession of the goods or documents of title with the consent of the owner". They recommend that the second subsection should be brought into line with the first,[2] and quote Pearson L.J.[3] on the artificiality and ambiguity of treating a buyer "as if" he were a mercantile agent - "a hypothetical provision of that kind is likely to cause obscurity and doubt unless it is very carefully defined." Pearson L.J. on the facts under his consideration was able to regard the buyer as acting in the way a mercantile agent would act. It is not clear that the Scottish courts would necessarily require this. Possibly because of the way in which Scottish provisions were inserted at a late stage into an English Bill, there has been apparent reluctance to litigate in Scotland on the property provisions of the 1893 Act. Though in Wilkes v. Livingstone[4] there was an averment that the

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[1] See D.G.Powles (1974) 37 M.L.R.213 and (1975) 38 M.L.R.83; contra G.Battersby and A.D.Preston, ult. cit. 77.

[2] Twelfth Report on Transfer of Title to Chattels, para. 23. We are inclined to agree, if either provision is retained.

[3] Newtons of Wembley v. Williams [1965] 1 Q.B. 560 at p.578.

[4] 1955 S.L.T. (Notes) 19.

fraudulent buyer who sold to a bona fide acquirer was not a mercantile agent (as it seems clear that he was not) Lord Hill Watson did not dismiss the action on the ground that section 25 (2) was not applicable, but allowed proof before answer on other grounds. In Thomas Graham & Son Ltd v. Glenrothes Development Corporation[1] the First Division considered the effect of section 25(2). The buyers under suspensive condition were building contractors, whose activities cannot readily be construed as those of a mercantile agent. Though it does not seem to have been expressly argued that the first defenders were not mercantile agents, the second defenders and ultimate acquirers of plumbing materials delivered on site averred that the pursuers (original suppliers of the materials) had allowed the building contractors to act as if they were their mercantile agents. It would seem to be undecided whether, in Scots law, the words "as if the person making the delivery ... were a mercantile agent" require him to act in that rôle or give effect to delivery as if he had been a mercantile agent.

33. These statutory provisions are further complicated by later piecemeal and uncoordinated legislation. It is provided by the Consumer Credit Act 1974 Sch. 4 paras. 2 and 4[2] that there shall be inserted at the end of the Factors Act 1889, section 9, and in the Sale of Goods Act, section 25, at the end of subsection (2) a provision to the effect that

> "the buyer under a conditional sale agreement shall be deemed not to be a person who has bought or agreed to buy goods."

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[1] 1968 S.L.T. 2.

[2] Which does not apply to transactions over £5000.

A similar "deeming" provision is contained in the Hire-Purchase (Scotland) Act 1965, section 50 - which is to be repealed from a date to be appointed under section 192(4) of the Consumer Credit Act, when the "deeming" provisions of Schedule 4 will be brought into operation. Bona fide onerous acquirers from buyers under conditional sale agreements are thus deprived of protection in these exceptional cases, presumably as a quid pro quo for the legislative fetters imposed on lenders on credit. Paradoxically the Consumer Credit Act 1974, Schedule 4, para. 22, reproduces, with variations in terminology, Part III of the Hire-Purchase Act 1964, section 27 of which provides for protection of private purchasers in good faith of motor vehicles originally transferred under hire-purchase or conditional sale agreements. The origin of this legislation seems to be found in the Final Report of the Molony Committee on Consumer Protection.[1] The Committee recommended protection for innocent third parties but only in the case of acquisition of motor vehicles:

> "In theory the same hardship can arise out of any form of hire purchase business, but its occurrence is so rare in other trades that we do not consider it necessary, even if it were possible, to introduce any corresponding new arrangements."[2]

The original legislative proposals differed greatly from those set out in Part III of the Hire-Purchase Act, and envisaged the issuing of licensing cards to hirers, while log books would remain with finance houses. The ultimate legislative provisions seem to have been introduced to provide a scheme acceptable to finance houses, which may well have envisaged that the losses which they might incur through fraud would be less than the cost of administering the licensing card scheme.

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[1] Cmnd. 1781 (1962), esp. paras. 536-7.

[2] Para. 537.

34. In most jurisdictions the protection accorded to bona fide onerous acquirers of corporeal moveables is provided by broad rules, based upon general principles, which form an integral part of a corpus of property law. In Scotland, on the other hand, such protection as exists in the case of sale derives largely from a series of statutory provisions which are ill-coordinated with Scots common law and the precise meaning and effect of which is uncertain. We therefore conclude that, whatever policy is determined for regulating the conflicting claims of deprived owners and onerous bona fide acquirers, those statutory provisions should be replaced by others which are more apt to harmonise with the common law of Scotland and which are expressed less obscurely than the present provisions. We now consider the options for reform.

PART C: PROPOSAL FOR REFORM

(1) General

35. It may help to focus discussion to state at the outset a pattern adapted from a current proposal submitted to the Quebec Civil Code Revision Commission[1] in response to modern conditions:

(a) Subject to two recognised exceptions, an owner may recover his corporeal moveable property wherever he finds it and may assert his title against an acquirer thereof.
The exceptions are:
(i) A person who can establish that he has acquired a corporeal moveable in good faith and by onerous title acquires ownership of the thing, despite the fact that it did

[1] See Appendix, paras. 21-26.

not belong to the transferor and the transferor had no authority from the owner to dispose of it, unless the owner had lost possession involuntarily. Involuntary loss of possession implies that the owner had been dispossessed forcibly, or clandestinely, or had lacked legal capacity to consent to transfer of property;

(ii) A sale by a public authority acting under statutory powers to dispose of property vests ownership of corporeal moveables in a buyer at such sale.

The proposal endeavours to secure a just solution and to avoid unnecessary multiplicity of rules. It asserts the fundamental right of the owner, but qualifies it by two important exceptions. Whatever views may be held on the justice of the rules applicable in Scotland at present, few would probably maintain that these rules are either clear or based on clear principles.

36. One problem studied by the Law Reform Committee in their Twelfth Report[1] was whether it would be practicable to divide the loss when an owner had been tricked into parting with his goods to a rogue, and these were subsequently bought for value by a buyer acting in good faith. Division of loss could be considered as a solution in other cases in which a dispossessed owner claimed his goods from a bona fide onerous acquirer. Lord Justice Devlin had suggested that where two innocent parties were concerned, it was better to divide the loss than that one alone should bear it. He suggested equitable distribution of loss. We refer to the Appendix to this Memorandum and to the reasons given by the Law Reform Committee for rejecting as impracticable for English law a system of

[1] Cmnd. 2958 (1966).

equitable distribution of loss. The same view which was taken by the Law Reform Committee has subsequently been formed by the Swiss Ministry of Justice after examining the problem with commercial and legal interests.[1] The problem does not necessarily involve only two parties. If a moveable passes through many hands before the owner claims it, apportioning the degree (if any) of carelessness or fault of the various acquirers of moveables (which may well change in value in a rising or falling market) seems to create almost insuperable difficulties in creating rules for equitable distribution of loss among all innocent parties. In cases where the original owner had voluntarily relinquished control of his moveable, he would always to some extent be the ultimate author of his own misfortune, and the chain of actions of relief would stretch back to him. We should hesitate to suggest the solution of "equitable distribution of loss" for Scots law - a solution which would be out of step with legal solutions elsewhere.

37. While we do not ourselves favour such a solution, we invite comment as to whether there should be a system of equitable distribution of loss among all innocent parties where a third party in good faith acquires another's moveable property.

38. Though we should not be inclined to propose the extension to Scotland of section 22 of the Sale of Goods Act 1893 regarding market overt nor to adopt in its present form Recommendation 11 of the Law Reform Committee's Twelfth Report regarding acquisition in good faith at trade premises or at public auction, we recognise that each solution encapsulates a comprehensive principle which contrasts strikingly with the other somewhat fragmentary provisions of the Sale of Goods Act and related sections of the Factors Acts. It might be practicable to enact for Scotland alone

[1] Information communicated to Unidroit by the Swiss Ministry of Justice.

a comprehensive statutory provision for the protection of good faith acquirers in onerous transactions generally, especially because there is already such a special provision for English law in the case of sale in section 22 of the Sale of Goods Act. Comprehensive Scottish statutory provision for the protection of bona fide onerous acquirers could render the fragmentary statutory provisions at present applicable to sale superfluous, and could cover good faith onerous acquisitions of corporeal moveables by purely common law transactions such as exchange, as well as acquisitions by transactions such as hire-purchase which are partially regulated by statute. On the assumption that a comprehensive principle is favoured - though perhaps with certain qualifications - what form should it take?

39. We ask, therefore, should the law remain substantially as it is, and, if so, are there aspects which need clarification or modification in detail only?

40. Or, should the law provide protection for bona fide onerous acquirers a non domino generally, provided that they had either

(a) taken possession in good faith and provided that the moveables were not infected with a real vice resulting from involuntary dispossession; or

(b) bought at a sale by a public authority acting under statutory powers?

This solution would accord with that of many contemporary legal systems, of the Draft Uniform Law on the Acquisition in Good Faith of Corporeal Moveables, and of one of the projects submitted to the Quebec Civil Code Revision Commission.

41. Or, should protection be extended further, e.g. to include purchasers in good faith of stolen property and/or gratuitous acquirers in good faith?

42. We invite comment on these three options and on any alternative proposals.

2. Bona Fides

(a) The nature of bona fides

43. If protection is to be extended to onerous bona fide acquirers in possession, should there be any special requirements as to the public character of acquisition or "guidelines" from which good faith might be inferred? On which party should rest the onus of establishing good faith? Though Scots law recognises categories of public sale by public authorities, we have no tradition of "public market" or "purchase at trade premises" or purchase from a dealer in goods of a particular kind. To introduce such special requirements would be to erect into rules of law presumptions hitherto based on facts in Scots law. A system based upon such factors would be difficult to administer; moreover, we are not convinced that to curtail the protection accorded to acquirers in this way would be socially desirable. Supermarkets deal in a very wide variety of goods, while a mobile shop or a village store may obtain a commodity only experimentally or because there seems to be a likely market, e.g. at holiday time. Private dealings in second-hand goods (often advertised in the press) are widespread and in most cases respectable and socially and economically desirable. We therefore suggest for consideration that the element of "good faith" should be left untrammelled by specific requirements as to manner of sale or other transfer. However, if the consequence of protecting good faith purchasers is to

cut off the owner's rights, we also suggest for consideration that though the original owner should be required to prove any vitium reale, the acquirer whose right is challenged by the original owner should have the onus of establishing his own good faith and acquisition of possession. This would be a very important protection of the original owner's right. The acquirer would be opposing his good faith and possession to the original owner's claim, and some might think he should not be allowed to rely merely on a presumption of good faith. In many cases the taking of a receipt would seem an elementary precaution and (although a rogue could surmount the difficulty) an acquirer might reasonably require a reference, production of a bank card, driving licence or the like. Moreover, especially in second-hand transactions, an acquirer might reasonably ask to see a receipt or invoice held by the seller or other informal indicia of lawful possession. What would be required to establish good faith on a balance of probabilities would differ according to the circumstances of each transaction.

44. We invite comment on the proposal that, if an acquirer in good faith is to be preferred to the original owner, the onus should be on the acquirer whose right is challenged by the original owner to establish his own good faith and acquisition of possession.

(b) Possession of the Transferor

45. Actual acquisition or possession is generally regarded as a prerequisite for protection of the good faith purchaser. However, there is little agreement on the question whether the ultimate transferor to the good faith acquirer should himself have been in possession prior to the transfer. Since by the common law of Scotland possession was regarded for most purposes as the primary indication of ownership or authority to deal with moveables, and since the statutory exceptions to the rule nemo dat quod non habet are mainly based on the fact of the transferor's possession, it might be thought that, to

secure protection, an onerous bona fide acquirer should be protected only if his transferor had been in possession at the time of contract.[1] However, this requirement was rejected by the Unidroit draft law because in international transactions it may be difficult to ascertain who is in possession of moveables at the time of contractual disposal. Moreover, the acquirer may in some cases already be in possession on limited title.

46. We invite comment on the question whether, unless he were already in possession on limited title, the bona fide purchaser should be protected only if he acquired from a transferor in possession.

3. Ownership or Relative Right to Possession

47. If a general rule of law is to provide for protection of onerous acquirers of corporeal moveables in good faith without notice of real rights belonging to third parties we suggest for consideration that the acquirer should become owner by virtue of a statutory provision which would cut off any real rights of others of which the acquirer did not have notice. The alternative would be that, as at present under certain statutory provisions applicable to Scotland, the protected acquirer would acquire only the title of the party who had been barred from asserting his right and whose own title might be defective in some way. Only usucapion (positive prescription) could then fortify the good faith acquirer's title completely. We are on the whole inclined to propose that protection should take the form of creating a new

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[1] If the bona fide acquirer was at the time of sale already in possession on a limited title, it might be required that he should be protected only if his vendor had been in possession when the limited title was given.

statutory title in the acquirer and the cutting off of all prior rights over the moveables (acquired in good faith and for value) of which the acquirer had no notice - except where a vitium reale infected the goods themselves. We invite comment on this tentative proposal.

4. Conflict between Possession of Goods and Document Symbolising Goods

48. We do not intend to investigate the law regarding commercial paper in this Memorandum. However, mention may be made of a bill of lading which actually symbolises the goods themselves. Swiss law, which gives extensive protection to the good faith acquirer who takes possession, provides that in case of conflict between an acquirer of corporeal moveables in possession and the acquirer of a document of title representing the goods in possession, the former should prevail. We suggest for consideration adoption of a similar rule and invite comment.

5. Sale of Another's Property in Execution of Diligence

49. Two aspects of sale of another's property in execution of diligence have been brought to our attention and perhaps merit special consideration. First, it is settled law that the landlord's hypothec over invecta et illata on a tenant's premises comprehends goods in possession of a tenant even though those be only hired from a third party.[1] It has been suggested that the justification for this procedure is that the furniture letter's risk is calculated in fixing the hire.[2]

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[1] Ditchburn Organisation (Sales) Ltd v. Dundee Corp. 1971 S.L.T. 218.

[2] Rankine Leases, 3rd ed., p.375; Wauchope v. Gall (1805) Hume Dec.227.

We doubt if this is a plausible rationalisation in modern conditions. Where the landlord's hypothec is still recognised, the tenant is obliged to plenish the subject to secure the landlord in his rent, and the landlord can secure an order to that effect. We find it difficult to appreciate why, if a landlord can insist on a tenant plenishing the subjects for this purpose, he should be entitled to sell the property of third parties. Though this matter is also of concern to the committee studying security over moveables, we invite comment as to whether the landlord's hypothec should comprehend property of third parties.

50. The second question concerns the effect of judicial sale of a third party's property after poinding and sale, at the instance of a creditor, of effects on the debtor's premises. In George Hopkinson v. Napier & Son[1] the First Division held that a poinding creditor could not acquire a higher right than the debtor had to the goods in his possession, but reserved their opinion regarding the right which would be acquired by a bona fide purchaser at a judicial sale. Such a purchaser may be able to acquire good title, and judicial sale may extinguish the right of the former owner over the property. It seems to us appropriate that this matter should be put beyond doubt. We have formed the provisional view that judicial sale should in certain circumstances divest the original owner and create a clear statutory title in a bona fide purchaser. However, we think that this should only be the case if steps had been taken to conduct the judicial sale properly and after advertisement. We invite comment on this provisional proposal.

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[1] 1953 S.C. 139.

6. Vitium Reale

(a) The scope of vitium reale

51. The pattern solution to the problem of protecting the bona fide onerous acquirer which we have adumbrated in paragraphs 35 to 42 is in accord with the solutions of most legal systems of Western Europe, and is substantially what Bell himself formulated in his Commentaries.[1] It would in effect generalise what Stair said[2] in a more limited context:

> "(M)oveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as labes reales, following the subject to all successors."

Whether it finds acceptance or not, the problems of vitium reale may remain. Therefore we must examine more closely the extent to which the doctrine of vitium reale (labes realis) should continue to operate.

52. The protection extended by most legal systems to an onerous acquirer in good faith is in part justified by considerations of convenience and promotion of commerce, but account is also taken of the extent to which the original owner has facilitated disposal of his property by enabling a dishonest intermediary to gain possession, and subsequently dispose of the moveable to a bona fide acquirer. Though in a sense an owner may facilitate his own dispossession through theft or loss by his own carelessness, the policy of most legal systems has been to prefer the claim of the owner to that of the bona fide acquirer when the owner has exercised no act of will at all in relation to his moveable

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[1] I, p.305.

[2] IV.40.21.

property. In cases of theft or robbery a real vice certainly attaches in Scots law to the thing itself, which bars acquisition *a non domino*. The position regarding lost property is not altogether clear. In early Scots law a *vitium reale* may have attached because of loss, but in modern law there is seemingly no ownerless moveable property. If property has been lost or abandoned by the original owner, it becomes the property of the Crown. Thus appropriation of "lost property" can be classified as theft, and consequently the property is tainted with a *vitium reale* which excludes it from commerce. It would seem that when the owner is incapacitated by law from exercising his will - as in some cases of pupillarity or mental illness - the same principle should apply as in cases of theft. More controversial is the case of force and fear. The will has been coerced, but unless the transaction between owner and intimidator has been altogether a sham, the will has been exercised and a price (however inadequate) has been paid or promised. Whatever solution is appropriate in the law of obligations[1] our immediate concern is with rules of property law. When original owner and *bona fide* third party acquirer are in competition for a moveable which had been extorted from the original owner, should a *vitium reale* attach? The law is not altogether settled, and we are inclined to prefer Stair's view that in the interests of commerce only when coercion amounts to robbery should the *vitium* attach to moveables so as to preclude lawful acquisition.

53. We invite views on this point and also as to whether the law should recognise *vitia realia* beyond incapacity and clandestine or forcible dispossession.

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[1] A brief discussion of the effect of force, fear and coercion in the Scots law of contract is to be found in the Privy Council case of *Barton* v. *Armstrong* [1976] A.C. 104 at p.118 *per* Lord Cross of Chelsea.

54. Scots law has given comprehensive protection to owners deprived of corporeal moveable property by theft. Stair contrasts[1] the effect of fraud with "theft or violence, which the law accounts as labes reales ... otherwise there would be the greatest encouragement to theft and robbery". The basic doctrine is that theft constitutes a vitium reale which cannot be purged even by sale in market overt.[2] As Lord Young observed in Todd v. Armour[3]:

> "By our law the vitium reale attaching to stolen goods is indelible till they return to the original owner."

However, the doctrine does not apply to money, or negotiable instruments, or moveables title to which must be registered.

55. The justification for the doctrine of vitium reale has not been explicitly formulated. For Stair, as for Lord Donovan (in his Note of Reservation to the Twelfth Report of the Law Reform Committee) there seems to be an element of deterrence. It may be that in a simple static society with restricted communications, when the mere possession of superfluous moveable property could raise suspicion, thieves would be discouraged and buyers act more warily because of the vitium reale of theft. However, deterrence of thieves and resetters seems more properly the function of the criminal law. If the policy of the civil law was to discourage crimes of dishonesty as such, a more comprehensive vitium reale would be appropriate, attaching when any crime of dishonesty had been committed in acquiring or disposing of goods. In the criminal law Lord Gifford pointed out (when considering what types of theft should import the vitium reale) that a person guilty of a

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[1] Stair IV.40.21; II.12.10.

[2] Bishop of Caithness v. Fleshers in Edinburgh (1629) Mor. 4145; 9112.

[3] (1882) 9R. 901 at p. 907.

crime of dishonesty is punished according to his guilt and not according to the nomen iuris of his crime.[1] However, he considered that the vitium reale should not be extended to the prejudice of bona fide purchasers. He observed[2]:

> "Nor do I think that these metaphysical distinctions will govern in civil questions when the point is, in whom are the rights of property or of pledge ad civilem effectum tantum, and how far the subject is tainted with a labes realis which will follow it into the hands of all parties, however innocently acquiring rights therein ... Stolen goods are subject to such labes .... The rule about the existence of hidden defect of title which operates penally against innocent third parties, is not easily to be extended."

56. The reason why most legal systems protect the original owner against the bona fide purchaser in cases of theft is not because of the heinousness of the crime but because, unlike other cases of acquisition a non domino, the owner has not voluntarily handed over his moveable to an intermediary and thus facilitated the ultimate disposal. This we suggest is a sound principle upon which to base the doctrine of vitium reale, if it is to be retained. Indeed it would avoid apparent conflict between civil and criminal law if the vice were merely stated to be a consequence of "violent or clandestine dispossession" of the owner. We suggest for consideration that the scope of the vice should be so defined and invite comment.

57. We recognise that there is a "grey area" as to what "dispossession" might imply, e.g. when a traveller entrusts his bag to a porter, or a motor salesman permits an

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[1] The vitium reale has attached in civil actions where the rogue had in a criminal court pleaded guilty to breach of trust and had been sentenced therefor. Criminal courts may accept pleas of guilty to crimes such as falsehood, fraud and wilful imposition even though a conviction for theft might have been appropriate - and conversely.

[2] Brown v. Marr Barclay etc. (1880) 7R. 427 at p.447. See also Gloag Contract 2nd ed., p.534 n1.

apparent customer to drive a car round a block unaccompanied, or an employee drives his employer's car to meet a visitor at an airport. Where third party rights are concerned metaphysical distinctions between possession and custody seem undesirable. Perhaps the main factor to consider is whether the original owner facilitated dishonest dealing by his own act, at least to the extent of not exercising general personal supervision over a person given physical custody of the property. We invite comment as to whether the vitium reale should attach in cases where the owner had parted with physical custody but not with possession, and if so, what limits should be set.

(b) Relevance of Purchase at Market or Trade Premises

58. Most European legal systems have special rules enabling the forcibly or clandestinely dispossessed owner to reclaim his moveables, even from an onerous acquirer in good faith, if certain conditions are fulfilled. Typical is the solution of the French Civil Code[1] which provides that, though in general the acquirer of a moveable with possession has good title, nevertheless he who has lost anything or had it stolen from him (in the sense of forcible or clandestine dispossession) may reclaim it from anyone in possession during three years from the time of loss or theft. However, if the possessor from whom the thing is claimed had bought it at fair or market, or at a public sale, or from a merchant dealing in like articles, the original owner must reimburse the possessor the price which he had paid. English law regards theft - including theft by a bailee - as a defect in title which can be cured by sale in

[1] Arts. 2279-80.

market overt. The Sale of Goods Act 1893, section 22(1)[1], which does not apply to Scotland, provides that, (in England), where goods are sold in "market overt" according to the usage of the market, a buyer will acquire title provided he bought in good faith and without notice of "any defect or want of title on the part of the seller". The scope of the doctrine of sale in "market overt" is reduced in England by the fact that it does not apply to all shops and markets but only to a limited category, comprising, however, all shops in the City of London.[2] The Law Reform Committee in its Twelfth Report on Transfer of Title to Chattels[3] considered that in England the doctrine of market overt has little practical importance today. They therefore recommended[4] that it should be replaced by a rule providing that, where goods have been stolen, the owner should retain his title except where they have subsequently been "bought by a purchaser in good faith by retail at trade premises or at a public auction."[5] Lord Donovan, in a Note of Reservation, dissented strongly

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[1]Though the equivalent clause of the Sale of Goods Bill 1892 was deleted by a Select Committee of the House of Commons, it was restored by a Committee of the whole House, apparently on the grounds that so important a change in English law might endanger the passing of the Bill.

[2]The time of day is also relevant in cases of buying in market overt: Reid v. Metropolitan Police Commissioner [1973] Q.B. 551. Sales of horses, the most mobile of chattels until modern times, were formerly excluded from the scope of the doctrine by s.22(2) - now repealed.

[3]See para. 30 of the Report.

[4]Para. 33; Recommendations 2 and 11.

[5]Recommendation 2.

from this proposal. Against the argument that this rule would encourage commercial transactions, he opposed the hardship of an owner whose valuable picture had been stolen and who could not truly be compensated by money. He further concluded that

> "under the proposed new law purchasers of stolen property would have less to fear than they have at the moment, with the consequence that thieves would be more confident of finding purchasers."

The time was not ripe, in his view, for relaxing the law discouraging thieves. Indeed, he favoured the abolition of the doctrine of market overt in England, even though the Committee had devised no satisfactory compensatory advantage for the truly innocent purchaser. In short, he was in effect recommending the introduction of a vitium reale, corresponding to that of present Scots law - with the difference, of course, that while in England an innocent person dealing with stolen goods would be liable to the owner for the tort of conversion, in Scotland a bona fide possessor of stolen property would only be liable (if at all) on the principles of unjustified enrichment, or possibly in a delictual action based on culpa. We are concerned in the context of private international law with the rules in neighbouring countries regarding acquisition of title to stolen property, since they may effectively defeat the claims of an owner deprived in Scotland even though the property is brought back to Scotland at a later date.[1]

59. We have considered whether, if the vitium reale is to be retained, its effects should be limited by recognising the title of an acquirer in public market, or at trade premises of a dealer in similar things, or by some other special method.

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[1] See Todd v. Armour (1882) 9R. 901; Anton Private International Law p.406. It was decided that the original owner of a stolen horse, sold in market overt in Ireland and later brought to Scotland, could not reclaim it in Scotland. The original owner averred in his pleadings that horses were excluded from the operation of the doctrine of sale in market overt, but he did not attempt to lead evidence of this at the proof, and the case was consequently decided on the basis that horses were not so excluded.

Though purchase in this fashion may justify a slight inference of good faith on the part of the acquirer, the difference, if the vitium reale is to attach, between forcible or clandestine dispossession and other cases of wrongful acquisition is based in Scots law on the way in which the owner lost his property rather than on the way in which the third party acquired. The deprived owner's loss is in no way mitigated by special procedure for disposal. Moreover, when a bona fide purchaser has acquired, e.g., stolen property at market or trade premises, he is normally in a good position to assert a claim against the vendor for breach of warranty of title. We should not ourselves, as at present advised, suggest that sale at public sale or market should cure a vitium reale. We should, however, welcome views on this matter.

(c) Usucapion or Extinction of Ownership

60. If it were desired to give protection to an acquirer against the owner of moveables to which a vitium reale attaches, is it preferable to fortify the title of the acquirer by a period of usucapion (acquisitive prescription) within the framework recommended in our accompanying Memorandum on usucapion[1] or should there be, as in French law, a period running from the date of dispossession during which the owner can reclaim the property from the possessor - leaving to the latter his remedy against his transferor for breach of warranty? Though French law recognises a considerable range of prescriptive periods, the dispossessed owner's right to follow his moveable property is not a period of prescription. An acquirer of, e.g., lost or stolen property is protected even if he has been in possession for only a few days before the owner's right is cut off by the completion of three years' deprivation. While we have no strong

[1] Corporeal moveables: usucapion, or acquisitive prescription (Memorandum no. 30).

views on the matter, if a five-year period of usucapion (acquisitive prescription) were to be recognised to fortify defective title in the case of good faith acquisition on ostensibly valid title, we should be inclined to apply the rule in cases of stolen property rather than introduce a special rule for such property.[1] However, we invite comment.

(d) Restitution Conditional on Compensation

61. The owner's right to follow his stolen property is qualified in French law by requiring him to pay to the possessor the price paid by the latter, if he purchased in public market or by other public dealing. In Swedish law and in the Draft for the Revision of the Netherlands Civil Code the owner may always reclaim his stolen property, but must reimburse to the possessor the value to him. Within their limits these solutions ensure that the bona fide acquirer is given at least some economic protection against loss. This protection may not be complete in times of inflation if reimbursement is related to the price actually paid. Moreover, the possessor may have contracted to resell the property. An argument in favour of the Swedish solution is that the owner can always reclaim stolen property which has special value for him - provided that he is prepared to pay the value which it has for the holder. If he has insured the full value of his property he should not be out of pocket- nor will the bona fide acquirer from whom the moveables are reclaimed. Though these solutions are attractive we are not, as at present advised, inclined to recommend them, partly because of problems created by inflation. We invite comment, however,

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[1] See our accompanying Memorandum no. 30 on usucapion, or acquisitive prescription. In English law the Limitation Act 1939, s.3 provides for a six-year period of limitation in respect of actions of conversion or wrongful detention of chattels, and for the extinction after that time of the title to a chattel of any person whose rights of action for conversion and detinue have been barred.

as to whether it would be desirable to introduce a general or limited requirement for the owner of stolen property to reimburse a bona fide acquirer in possession as a condition of demanding delivery.

(e) Specific Categories

62. If a vitium reale affecting moveables which had been appropriated forcibly or clandestinely is to be retained, should certain categories of moveables be exempt? The policy of the Sale of Goods Act 1893, section 22(2), continuing that of the earlier English law, formerly exempted sales of horses from the protection of market overt.[1] Presumably the mobility of the horse in the era before the motor car justified the exclusion. The Hire-Purchase Act 1964, section 27[2], protects private purchasers of motor vehicles subject to hire-purchase agreements, even though the vehicle may have been stolen. The exception was introduced presumably because such transactions are so frequent as to require special protection of the purchaser. There is a certain paradox in this situation, in that an unofficial register of most vehicles subject to hire-purchase contracts does exist and can be consulted, but the hire-purchase industry possibly considered that an elaborate system to protect their rights would be unacceptably expensive, and preferred the solution enacted. The Twelfth Report of the Law Reform Committee did not recommend any change in the categories of property subject to special rules in England. The Report has been reviewed and criticised by (among others) Professors A.L. Diamond[3] and P.S. Atiyah.[4] Atiyah observed that the one

[1] This subsection has now been repealed by the Criminal Law Act 1967, s.10, Sch. 3, Part III.

[2] See now Consumer Credit Act 1974, Sch. 4, para. 22.

[3] (1966) 29 M.L.R. 413.

[4] (1966) 29 M.L.R. 541.

"hard fact" stated in the Report is in Lord Donovan's Note of Reservation, which states that in London in 1964 some £14 million worth of property was stolen, and only about one seventh of this was recovered. In the rest of England property worth about three times the London figure was stolen. Presumably, much of the stolen property was cash (wages or thefts from houses) - as to which the Law Reform Committee recommended no changes in the existing law of negotiability. Again, Atiyah asks, how much of the stolen goods recovered was represented by stolen motor vehicles? If the subject had been analysed in categories, it was claimed, more realistic conclusions might have been reached as to the impact of insurance on loss by theft.

63. We do not ourselves at this stage suggest additional categories of moveables for exclusion from the vitium reale attaching to stolen property, but would welcome information and comment.

(f) Should the Doctrine of Vitium Reale be Retained?

64. Finally, we are bound to consider whether the doctrine of vitium reale should be retained in respect of moveables of which an owner has been dispossessed. The Italian Civil Code of 1942 already protects the bona fide acquirer of stolen property in the same way as other acquirers a non domino. As we discuss in our accompanying Memorandum on mixing, union and creation of moveables[1], the factors of union and creation of moveables, e.g. in the case of specificatio (the creation of a new thing with another's materials), may result in the extinguishing of the right of an owner whose property has been stolen. There may be a narrow distinction between

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

recognition of a vitium reale in stolen property which has not been changed in form, and rejecting a vitium reale where transformation does not preclude identification. It seems implicit in Atiyah's criticism of the Twelfth Report of the Law Reform Committee that in his view the factor of insurance justifies the extinction of an owner's title to stolen goods which had been sold at trade premises. Lord Donovan in his Note of Reservation considered that facilitation of commercial transactions would be no consolation for the true owner of some valuable picture or heirloom which had been stolen from him and sold - even if he could obtain money damages against the retailer. We believe that thieves normally prefer to steal cash or property that can be transported easily and readily converted into money. It could be argued that if stolen property can easily be transported to and disposed of in England or elsewhere under legal rules which favour the bona fide acquirer of stolen property, to maintain the vitium reale in Scotland only encourages the initial disposal of property stolen in Scotland to a purchaser or resetter furth of Scotland, against whom no plea of vitium reale might be competent.[1] By contrast with the past, consumers today tend to buy mass-manufactured goods new, and often on credit. Such manufactured moveables may have reached the retailer through a chain of subpurchasers, one of whom has acquired from a thief. Some might argue that the owner of consumer goods and of other things which can easily be replaced should protect himself by insurance. However, much corporeal moveable property - some of considerable value - is not sold new. Pictures and antiques are obvious examples of valuable property which is not new but for which there is a very considerable demand. Other important examples are raw

[1] Though petty resetters certainly operate in Scotland, we doubt whether there are resetters on the London scale.

materials and livestock, while there is also an extensive second-hand market in motor vehicles, furniture, and many other articles. Articles of artistic value may be regarded by an owner merely as an investment - an economic asset - or they may be prized as works of art. Though such articles will normally be insured, due to inflation they may well be underinsured. Insurance is small compensation to the collector or to the heir of family treasures. Moreover, articles of no particular economic value may be of inestimable value to an owner, as in the case of a memento of a deceased relative. Those with experience of investigating and prosecuting crime are aware of the prevalence of house-breaking and theft of household goods from people of modest means while they are on holiday or in hospital. Such goods are by no means always covered by insurance. Though in many categories of case the despoiled owner will be content with insurance compensation, and insurance companies will no doubt adjust their premiums to the risks involved, it cannot readily be assumed that insurance has superseded the need for special treatment of involuntary dispossession of property. At present, however, premiums are believed to be based on the principle that the insurers are subrogated to the owner's right to reclaim stolen property. To what extent are they concerned to recover it? We are not at all convinced that abolition of the doctrine of vitium reale attaching to property of which an owner had been forcibly or clandestinely dispossessed is desirable. We think that the owner who had not voluntarily handed over possession of his property has a preferable right to a bona fide purchaser.

65. We would welcome comments - especially from insurance interests and police authorities, and preferably with statistical information - as to whether the doctrine of vitium reale should be retained in respect of property of which the owner has been forcibly or clandestinely dispossessed. If so, what changes in the law regarding its scope and effect are desirable?

PART D: AN ALTERNATIVE PROPOSAL FOR REFORM

66. In paragraph 2 we summarised some of the solutions which could be applied, exclusively or in combination, to the problems of good faith acquisition of the moveable property of a wrongfully deprived owner. The pattern solution which we have outlined in the preceding paragraphs (35 - 65) represents the median of a fairly general consensus of modern codified legal systems. The modern doctrine is, however, laid on historic foundations to which Germanic customary law and Roman law have contributed elements. The rationale is that an owner who has voluntarily relinquished his moveables to another must, in competition with a bona fide acquirer, accept that dishonest disposal was facilitated by the owner's misplaced trust. There may, however, be a case for formulating a new pattern based on a different principle which could attempt to do justice between the deprived owner and the bona fide onerous acquirer. The alternative principle would be to protect the owner if he acts promptly to reclaim. Very recently the Committee on the Contract of Sale of the Quebec Civil Code Revision Commission have in their Report on Sale (No. XXXI, 30 June 1975) put forward such a new pattern for consideration, and we think that its merits should be weighed by those whom we are consulting in this Memorandum.

67. New draft Article 43 (which would, if accepted, replace the present Articles dealing with purchase of the property of another) is as follows:

> "When a thing belonging to another person is sold, the owner may revendicate it back from the purchaser, unless the sale was made by court order or unless the purchaser can set up acquisitive prescription by possession in good faith for one year."

68. The Quebec Committee consider that sale of another's property is rare in commercial circles. Their proposals would, however, adjust interests when such a sale took place. If the purchaser had to restore the subject of sale to the true owner, he would have a claim for damages against the seller based on the warranty of title. If, however, the purchaser had remained in possession for a year he would acquire good title free from all real rights which had not been disclosed to him.

69. As we understand the Quebec legal system, it is free from the problems of void and voidable contracts which have caused such difficulty in English law in particular, and which resulted in the remit to the Law Reform Committee and the Twelfth Report of that Committee on Transfer of Title to Chattels.[1] As we have noted, views have latterly been expressed which would extend these problems to Scotland.[2] The proposed Article 43 would, however, apply in cases where goods were stolen or where a person who held moveables on limited title disposed of them unlawfully.

70. It will be apparent that apart from the shortness of the period of prescription, Article 43 is not dissimilar to the solution of the Scottish common law as set out by the institutional writers. Vices of consent (except force and fear amounting to robbery) did not affect transfer of title,[3] but an owner could reclaim his property from a bona fide acquirer if it was affected by a real vice (vitium reale)

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[1] See para. 20, supra and Appendix.

[2] See para. 19, supra.

[3] See para. 19, supra.

such as theft, or if a possessor on limited title had wrongfully disposed of it in violation of the owner's rights. The onus was, however, on the deprived owner to prove how he lost possession of his goods - as by theft, or that he gave them on loan or in pledge - as well as to establish his title to the goods.[1] We discuss in the Appendix to our accompanying Memorandum on usucapion[2] the scope of acquisitive prescription in Scots law. Since the relevant period would have been 40 years when the institutional writers expounded the law, acquisitive prescription could play only a very minor role in the Scottish law of moveables. In that Memorandum we discuss and propose tentatively two periods of acquisitive prescription of moveables - a short period of 5 years and a longer period of 10 or 20 years. It would be possible to harness the shorter period to a formula such as that of the proposed Article 43 of the Quebec Code on Sale, but it may be thought that so long a period would upset the balance between interests which a one-year acquisitive prescription would achieve. We do not discuss usucapion in one year in our Memorandum on usucapion since it seems relevant only to the problem which we are considering in the present context, but if the solution now discussed were to be adopted, we should consider extending to the one year period of prescription the same rules as we envisage for the five-year short prescription.

71. It seems to us that there would be obvious advantages in giving effect to a solution which would restore and declare the common law but, by shortening the period of acquisitive prescription (usucapion), would produce a clear determination of rights over moveables after an economically realistic period of possession. What period is economically realistic is a

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[1] See Stair III.2.7 quoted para. 12 supra, and Bell Principles s.1314.

[2] Memorandum no. 30.

matter of opinion - which might vary considerably according to whether the object in dispute was (say) an old master or livestock. A balance has to be struck unless some entirely arbitrary solution is preferred - which we ourselves would not recommend. A further consideration which commends this alternative solution to us is that at the end of the period of usucapion (acquisitive prescription) the bona fide possessor would be vested with clear title as owner and not merely with a "better right to possess."

72. The exception in Article 43 of sales by authority of the court seems to us justifiable, but perhaps too limited. Sales, e.g., of lost or unclaimed property by statutory authority should we think probably confer clear title on an acquirer.

73. The formula in Article 43 could be combined with other rules or qualifications which we have discussed already, e.g.:

(1) Should the infection of goods with a vitium reale be an exception, and what scope should that doctrine have?

(2) Should acquisition be protected only if the goods were acquired at trade premises or at a public fair or market?

74. We therefore put forward for consideration an alternative tentative proposal as follows:-

(1) When a thing belonging to another has been acquired by a bona fide acquirer in implement of an onerous transaction, the owner of that thing may nevertheless reclaim it (if he can prove his title thereto and how he lost possession), unless the thing had been acquired by statutory title or the possessor can establish that it has been acquired by usucapion (acquisitive prescription) of one year.

(2) If the owner had been dispossessed clandestinely or by force, or if he was incapax when dispossessed, he may (unless the thing had been acquired by statutory title) reclaim it until barred by prescription.

(3) For the avoidance of doubt, it should be enacted that the original owner may not reclaim property from an onerous acquirer in good faith, by alleging that the contract or transfer by which he had given possession to another was null because of defective agreement or consent.

We invite comment on these tentative proposals, and any suggestions as to how they might be qualified or altered.

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

1. Transfer of title to corporeal moveables should not be invalidated by defects of consent in the agreement to transfer, and until the transaction is reduced such defect should not prejudice third parties who acquire in good faith and for value. (paras. 18-19)

2. Force and fear, and error, should be regarded only as defects of consent. (paras. 18-19)

3. A bona fide third party purchaser of corporeal moveables, without notice of "rescission" or "avoidance" of a contract by virtue of which his transferor acquired the moveables, should not be prejudiced by such "rescission" or "avoidance" unless there has been a judicial decree before the purchase. (para. 23)

4. Section 21(1) of the Sale of Goods Act should be amended to make it clear that it applies to any case in which an owner has voluntarily surrendered control of his goods. (para. 28)

5. However the law regarding protection of good faith acquirers of another's moveable property is ultimately improved, sections 8 and 9 of the Factors Act 1889, as applied to Scotland by the Factors (Scotland) Act 1890, should be repealed. (paras. 29-31)

6. Though we do not ourselves favour such a solution, we invite comment on whether there should be a system of equitable distribution of loss among all innocent parties where a third party in good faith acquires another's moveable property. (para. 37)

7. Is clarification and modification in detail the only reform required in the present law? (para. 39)

8. Should the law provide protection for bona fide onerous acquirers a non domino generally, provided that they had either (a) taken possession in good faith, and the moveables were not infected with a real vice resulting from involuntary dispossession; or (b) bought at a sale by a public authority acting under statutory powers? (para. 40)

9. Should protection be extended further, for example to include purchasers in good faith of stolen property and/or gratuitous acquirers in good faith? (para. 41)

10. The element of good faith should be left untrammelled by specific requirements as to the manner of sale or other transfer. (para. 43)

11. If an acquirer in good faith is to be preferred to the original owner, the onus should be on the acquirer to establish his own good faith and acquisition of possession. (para. 44)

12. Unless he were already in possession on limited title, should the bona fide purchaser be protected only if he acquired from a transferor in possession? (para. 46)

13. Except where a vitium reale infects the goods, the acquirer in good faith and for value should be given a statutory title which would cut off all prior rights of others of which the acquirer did not have notice. (para. 47)

14. In case of conflict between an acquirer of corporeal moveables in possession and the acquirer of a document of title representing the goods in possession, should the former prevail? (para. 48)

15. Should the landlord's hypothec include property of third parties? (para. 49)

16. Judicial sale should divest the original owner and create a clear statutory title in a bona fide possessor, but only if the sale was conducted properly and after advertisement. (para. 50)

17. In cases of coercion there should be a vitium reale only if the coercion amounts to robbery. (para. 53)

18. Should the law recognise vitia realia apart from incapacity and clandestine or forcible dispossession? (para. 53)

19. The vitium reale at present applying in cases of theft should be redefined in terms of violent or clandestine dispossession. (para. 56)

20. Should the vitium reale attach in cases where the owner had parted with physical custody but not with possession, and if so, what limits should be set? (para. 57)

21. Sale in a public sale or market should not cure a vitium reale. (para. 59)

22. If it were desired to give protection to an acquirer in good faith against the owner of moveables to which a vitium reale attaches, a five-year period of acquisitive prescription, rather than a special rule, should apply. (para. 60)

23. Would it be desirable to introduce a general or limited requirement for the owner of stolen property to reimburse a bona fide acquirer in possession as a condition of demanding delivery? (para. 61)

24 Should additional categories of moveables be excluded from the vitium reale attaching to stolen property ? (para. 63)

25. Should the doctrine of vitium reale be retained in respect of property of which the owner has been forcibly or clandestinely dispossessed? If so, what changes in the law regarding its scope and effect are desirable? (para. 65)

26. Instead of the previous proposals, should an owner be entitled to reclaim a thing acquired by a third party in good faith and for value, if the owner can prove his title and how he lost possession, unless the thing has been acquired by statutory title, or the possessor can establish that it had been acquired by acquisitive prescription of one year? (para. 74)

27. In addition, if an owner has been dispossessed clandestinely, or by force, or if he was incapax when dispossessed, should he be entitled to reclaim his property unless it has been acquired by statutory title or unless prescription has intervened? (para. 74)

28. In addition, should it be enacted for the avoidance of doubt that the original owner may not reclaim property from an onerous acquirer in good faith by alleging that the contract or transfer by which he had given possession to another was null because of defective agreement or consent? (para. 74)

29. What qualifications or alterations, if any, should be made to the three preceding proposals? (para. 74)

APPENDIX
COMPARATIVE SURVEY
I CONTEMPORARY SYSTEMS

1. It is possible to divide contemporary legal systems into three broad groups so far as protection of the bona fide acquirer is concerned. At one extreme protection is given irrespective of the way in which the owner was deprived of his property. At the other extreme the rights of the original owner are upheld - subject to limited but important exceptions. The majority of modern systems, however, adopt an intermediate position - attempting to reconcile the legitimate interests of the owner with the commercial interests of the bona fide acquirer.

(a) Comprehensive Protection of the Purchaser
Italian Law

2. The Italian Civil Code of 1942 has eliminated the distinction between voluntary and involuntary loss by the owner, and protects the bona fide acquirer in either case. Protection is given because of the apparent power of the transferor to alienate, and consequently he must have given possession of the moveable to the purchaser on a valid causal title, e.g. a valid sale.

(b) The Middle Way
(i) French Law

3. The protection accorded by French law is based on the possession of the acquirer. Two conditions are therefore necessary: the acquirer must have actual possession, and he must be in good faith - in the sense that he knows of no defects of title. No importance attaches to whether the transferor had possession, nor need acquisition be by an onerous transaction. Where however the property has been lost or stolen, the owner's right to reclaim is preserved, but he loses this right against an acquirer in good faith

after three years - i.e. three years from the loss and not from the date of *bona fide* acquisition. If the stolen or lost property was purchased at a public market, the owner can reclaim it only if he reimburses the purchaser the price which he had paid.

4. Many legal systems now follow the French tradition in these matters.

(ii) German Law

5. The acquirer *a non domino* becomes owner if there has been transfer of possession from the transferor to the acquirer, an agreement between them as to the transfer of ownership, and good faith on the part of the acquirer. Because of the rules of law regarding unjustified enrichment, only onerous acquirers are protected. By contrast with French law, German law attaches considerable importance to the possession of the transferor which justifies the acquirer in regarding him as owner - much as if he were the registered owner of land. Possession *per alium* will, however, suffice. German law, unlike French, Belgian and Italian law, is not a "causal system". Thus, provided there is agreement that ownership should pass at the time of *traditio*, title will pass notwithstanding irregularities in a contract preceding the *traditio*. Property of which the owner was dispossessed involuntarily may be reclaimed, but this right is lost as against the *bona fide* acquirer after ten years (the period of prescription for *bona fide* acquisition) and is extinguished by sale at public auction. Involuntary dispossession does not include error, fraud or *metus*, but would include alienation by an *incapax*.

6. German law has served as a model for other codes.

(iii) Swiss Law

7. Swiss law protects the bona fide purchaser who satisfies four conditions. As in German law stress is laid upon the possession of the transferor and his tradition to the purchaser. There must be an agreement on the transfer of ownership, but, in addition, a valid causal title, e.g. a valid contract of sale between transferor and transferee is required. Finally, the purchaser must have been in good faith as to the transferor's right to alienate. Cases of involuntary dispossession of the owner fall outside the rule, and the dispossessed owner has five years to reclaim his property. If it had been purchased at public auction, from a market, or from a dealer in similar goods, the acquirer who has to restore what he bought must be reimbursed what he had paid.

(iv) Austrian Law

8. The contribution of special interest made by Austrian law is the limitation which it imposes on protection of an acquirer a non domino. In principle, he is protected only if he acquired in good faith on a valid onerous title from someone to whom the owner had entrusted the property - and, if the property has passed through a series of hands, each holder must have been entrusted with it. Apart from acquisition from those entrusted with another's property, a purchaser is protected if he bought from a merchant in the course of business, at public auction, or from a trader authorised to sell similar articles.

(v) Dutch Law

9. Dutch law also protects the acquirer a non domino. Possession must be given by transferor to acquirer on a valid causal title and the acquirer must take in good faith and for value. Dutch law has adopted the causal system

and requires any transfer of ownership to be based on iustus titulus (ostensibly valid title) - which is a separate requirement from good faith. The requirement of onerous acquisition in Dutch law has no counterpart in French or Swiss law and is not expressly demanded by German law - though indirectly, through doctrines of unjustified enrichment, it has gained recognition. The provisions regarding lost and stolen property are as in French law. The project for the new Civil Code for the Netherlands envisages founding protection for a purchaser a non domino not on the situation of the transferor, but on that of the purchaser. Thus the requirement for the transferor himself to pass possession would be eliminated.[1] Moreover, the purchaser's protection would be against actual patrimonial loss, not of continued ownership of the property - which the true owner could reclaim by reimbursing the acquirer all his loss. An acquirer would be protected not only if the owner had voluntarily parted with possession but also if he lost property by gross negligence.

(c) Nemo dat quod non habet - subject to qualifications.

10. In this group may be included the Iberian legal systems, those of Norway and Denmark, Scots law, and systems derived from English law. The non-British systems need not be elaborated here, beyond mentioning that systems derived from

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[1] The Draft Uniform Law prepared by Unidroit would also in its current draft discard the requirement of possession by transferor. It is argued that, especially in international sales, a buyer in Amsterdam buying through a chain of commercial agents cannot possibly know whether raw materials or manufactured articles in Japan have been stolen or not. The most that can be required of him is that he should make a valid contract and be in good faith when he takes delivery. Presumably the deprived owner would have insured himself against loss by theft.

English law (except for Irish law) have not adopted the doctrine of market overt, and that by section 2 - 403 of the Uniform Commercial Code adopted by most States of the U.S.A. the bona fide purchaser who buys goods in the normal course of business from a merchant who deals in similar goods, and to whom the goods were entrusted by another person, acquires all the rights belonging to the person who entrusted the goods to the seller.

11. The phrase "buyer in the ordinary course of business", say Braucher and Sutherland,[1] was introduced to preserve the limitations placed by judicial decision on the earlier formulation:

> "The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense."

"Entrusting" is given a very broad meaning, subsection (3) extending it to "any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties ... and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been larcenous under the criminal law." Thus, in the field of commercial relations, the bona fide purchaser obtains a protection very similar to that afforded by Continental European systems.

English Law

12. The English law regarding title to moveables is clearly based on the principle nemo dat quod non habet with its corollary nemo plus iuris ad alium transferre potest quam

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[1] Commercial Transactions p.126.

ipse habet - but the basic principles have been eroded to a very considerable extent and in ways which may seem somewhat haphazard. Crossley Vaines comments[1]:

> "Obviously the rule nemo dat quod non habet is too restrictive to allow for both freedom and safety in most ordinary commercial transactions and it has been modified in a number of important instances, by the common law and also by Acts of Parliament ..."

The policy of the law and legislature is influenced by the conception of publicity - as in the case of sale in market overt of stolen property; by the principle that he who has enabled the wrong must, within limits, suffer the consequences; and by considerations of convenience and commercial necessity which indeed underlie all the exceptions to the rule nemo dat quod non habet.

13. Denning L.J. has observed[2]:

> "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title."

Scarman L.J. in Reid v. Metropolitan Police Commissioner, holding that protection given to a purchaser in market overt operated only if the sale took place in the hours of daylight, commented[3] that, though the policy of the

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[1] Personal Property 5th ed., p.160.

[2] Bishopsgate Motor Finance Corp. Ltd. v. Transport Brakes Ltd. [1949] 1 K.B. 322 at pp. 336-71.

[3] [1973] Q.B. 551 at p. 564.

law was to encourage commerce while offering certain safeguards to property owners, this was not inconsistent with the warning of Scrutton J. in Clayton v. Le Roy[1], when he said:

> "A custom which takes away one man's property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favoured localities."

14. In English law a transferor of another's property is guilty of the tort of conversion - namely[2] "an act (or complex series of acts) of wilful intereference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it". Furthermore,[3] "a mistake of law or fact is no defence to anyone who intentionally interferes with a chattel". Many of the great issues in English contract and property law have been disputed in the context of the tort of conversion for innocent but wilful interference with another's property rights - e.g. Cundy v. Lindsay[4] (mistake).

15. The Sale of Goods Act 1893, section 21(1), seemingly stresses the importance of deriving title from the owner:

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

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[1] [1911] 2 K.B. 1031 at p.1044.

[2] Salmond Torts 16th ed., p.96-7.

[3] Ibid p.106.

[4] (1878) 3 App. Cas. 459.

However, Crossley Vaines[1] argues that in the case of purchase in market overt, whatever the prior defect in title (including theft), the old title is cancelled completely and a new statutory title is created. In the case of the other statutory exceptions, including sales by a seller holding on voidable title, the rights of the buyer are only such as the party who sanctioned the seller's possession had to pass.

16. Shortly expressed the main exceptions to the rule nemo dat quod non habet are:

(a) estoppel (personal bar): section 21, Sale of Goods Act 1893;

(b) purchase in market overt without notice of defect of title: section 22;

(c) where a seller, having sold goods, continues in possession of them or of documents of title thereto and subsequently sells and delivers possession of the first buyer's goods to a subsequent purchaser who is unaware of the earlier sale: section 25(1);

(d) where a seller, though reserving his title for the time being, delivers the goods or documents of title thereto to the buyer and that buyer disposes of them to an innocent acquirer, such delivery or transfer shall have the same effect as if the first buyer had been a mercantile agent in possession of goods or documents of title with the owner's consent: section 25(2);

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[1] Personal Property, pp. 202-3.

(e) a bona fide purchaser for value from a mercantile agent obtains good title, even though the agent disposes of the goods without the authority of the principal: Factors Act 1889, section 2;

(f) where a private person buys a motor vehicle directly from the original hirer or conditional buyer, or indirectly from a dealer or finance company, without notice of the hire-purchase or conditional sale agreement at the time of his taking, he acquires the owner's title: Hire-Purchase Act 1964, sections 27-29 [1];

(g) moreover, where the seller has an unavoided voidable title when he sells to a buyer in good faith and without notice of defect in the seller's title, by section 23 of the Sale of Goods Act the buyer acquires good title;

(h) statutory and other miscellaneous powers of sale.

II PROJECTS FOR FUTURE REFORM

(a) England

17. The Law Reform Committee in its Twelfth Report[2] made various recommendations regarding the present English law relating to sales a non domino. Certain of their minor recommendations, where they are concerned only with incidental improvements to the existing law, might be thought to be uncontroversial - such as Recommendations (3), (6) and (7):

[1] See now Consumer Credit Act 1974, Sch. 4, para. 22.

[2] Cmnd. 2958 (1966).

Recommendation (3) is to the effect that when goods are sold under a mistake as to the buyer's identity, the contract should, so far as third parties are concerned, be voidable and not void. This would certainly improve the existing law, but some may well think that it is too limited in its scope.

Recommendation (6) proposes repeal of sections 8 and 9 of the Factors Act 1889 and reliance on section 25 of the Sale of Goods Act 1893.

Recommendation (7) proposes that section 25(2) of the Sale of Goods Act 1893 should be amended, making it unnecessary for the buyer in possession of goods to have acted, in disposing of them, as if he were a mercantile agent.

18. More doubt may be entertained regarding other Recommendations:

Recommendation (4) proposes that a voidable contract should be capable of being rescinded only by notice to the other contracting party. This may protect the purchaser from an elusive rogue, but it does not seem to have much practical value, because such notice is seldom known to persons dealing with the party in possession on voidable title.

Recommendation (8) suggests that a buyer who obtains goods under a voidable title which is effectively avoided by the seller should not be regarded as a buyer in possession after sale for the purposes of section 25(2) of the Sale of Goods Act. Here again, no notification of the buyer's change of authority is brought to the notice of those who may deal with him.

Recommendation (5) proposes that no change be made in the law as to the effect of a disposition by a mercantile agent, so that if a vehicle is sent to a garage for repair and disposed of to a purchaser in good faith by the proprietor who also runs a business of selling cars, no title will pass. Here again the bona fide purchaser cannot be aware of the owner's private instructions.

The Committee considered, however, that any hardship would be covered were their main Recommendation (11) to be accepted, i.e. that sale in market overt should be abolished and replaced by a provision enabling a person who buys in good faith by retail at trade premises or at a public auction to acquire good title.

Recommendation (10) proposed that a bailee who is neither a mercantile agent nor a person to whom section 25 of the Sale of Goods Act applies should not be able to pass good title except in the case of sale by auction or a retail sale at trade premises.

The Committee themselves considered that there were strong arguments in favour of the view that bailees should be able to pass good title to purchasers who are ignorant of the exact relationship between owner and bailee, and that to enable them to pass title would be in accordance with the principles underlying the Factors Act and section 25 of the Sale of Goods Act. The Committee feared, however, possible repercussions on a large

variety of transactions of daily occurrence, e.g. sending goods to a laundry, and considered that acceptance of their Recommendation (11) would reduce the scope of the problem.

19. However, successive Governments have declined to give effect to the Committee's main proposals - possibly because of the policy of Recommendation (11) with regard to goods held on defective title, including stolen property. Recommendation (11) might be regarded as both too broad and too narrow - too broad since it would facilitate disposal of stolen property on the same terms as other goods which are sold without the owner's authority, and too narrow because it is restricted to retail transactions.[1]

20. The main object of the Law Reform Committee in the Twelfth Report was to consider the suggestion made by Devlin J. (as he then was) in Ingram v. Little[2], that it would be desirable to give the courts some power of apportioning loss when under existing law one of two innocent parties must suffer for the dishonesty of a third. Accordingly the Committee considered this solution both when the goods had been obtained from the owner with his apparent consent, e.g. by false personation, and when they had been stolen. They concluded that any system of apportionment or contribution would raise practical and procedural difficulties and create uncertainty in an area of law where certainty and clarity are particularly important. If there were a series of transferees before the deprived owner traced his property, enquiry into the degree of fault or good faith of each transferee in line would present formidable difficulties. The Committee rejected a solution on the lines suggested by Devlin J., but regretted the confused state of the present

[1] We ourselves, for reasons stated in the body of this Memorandum, have not proposed this solution.

[2] [1961] 1.Q.B.31. However, on very similar facts the Court of Appeal was able to reach a different result in Lewis v. Averay [1972] 1.Q.B. 198. Lord Denning M.R. in particular considered that mistake as to identity does not render a contract void.

law, under which title to goods in some cases remains in the true owner and in other cases passes to the innocent purchaser. This can lead to fine distinctions which the Committee considered a reproach to the law. It may be thought that, apart from the broad solution of Recommendation (11) which would give good title to any goods (whether stolen or not) bought in good faith by retail at trade premises or at a public auction, the Committee's proposals would not eliminate fine distinctions. With certain exceptions, questions of property law would be overshadowed by the law of obligations.

(b) Quebec

21. By courtesy of the President of the Quebec Civil Code Revision Commission we have seen a study prepared for the Commission on "Sale of Another Person's Property" by Professor H.R. Hahlo, Director of the Institute of Comparative Law at McGill University. This study, by a senior lawyer of eminence with experience of many legal systems has proved most valuable to us. The law of Quebec has been influenced by English law in the past (like the law of Scotland), but is basically of French derivation. The Director observes that there is no such thing as a "right" or a "wrong" answer to the problem of sale of another's property. "Whatever the solution, an innocent party suffers: the original owner of the property; the innocent purchaser; or a merchant who has bona fide dealt with it." The basic question which he identifies is "whether, all things being equal, and apart from special cases, the claims of the original owner or the bona fide acquirer by onerous title are to prevail." Hahlo affirms the principle that the owner's claims must prevail over those of third party acquirers,

including bona fide purchasers. However, he recognises two ways in which that principle can be modified (and these are not mutually exclusive):

> "(1) by protecting the bona fide purchaser where the owner has voluntarily parted with possession; and/or
>
> (2) by refusing the owner's revendication in special cases, from sale by public authority to sales by public traders or in commercial matters generally."

"The differentiation between voluntary and involuntary dispossession goes back to the 'you must find your trust where you left it' rule of early mediaeval law, and forms part of the civilian tradition." Though English law does not recognise the rule which is accepted by civilian systems in general, a number of specific exceptions recognised in English law can be explained by the same idea, e.g. bona fide purchase from a mercantile agent.

22. "The rationale behind the rule is clear. Theft, and to some extent, loss have the unpredictability of lightning, and there is relatively little the owner can do to protect himself against them. It is of his own free will, on the other hand, that the owner parts with the possession of goods of his own to another by way of loan, lease, deposit, pledge etc., and he has every opportunity of investigating the integrity of that person before doing so. It is only fair and equitable, therefore, that the risk should fall on him rather than on the innocent purchaser. The fact that he has in the first instance voluntarily parted with possession swings the delicate balance of equity in his favour." Professor Hahlo has studied with particular respect the relevant sections in the draft for the new Netherlands Code prepared by the late Professor E.M. Meijers. Meijers had recommended that, as a general principle, lack

of title should avail against third party acquirers, but that an exception should be made when the owner had willingly given up possession. Accordingly, Hahlo recommends the adoption of the principle of differentiating between involuntary and voluntary loss of possession. He stresses that "the crucial fact is not whether there has been theft in the technical sense, but whether the owner has been dispossessed against his will or has voluntarily parted with possession." Parting with possession to a rogue in the course of a transaction is voluntary handing over of possession, in Hahlo's view, but not if a servant is allowed to handle his employer's property in the course of his duties. He proposes draft Articles in the following tentative terms:

(I) Subject to the exception in paragraph (II) hereof an owner may recover his property wherever he finds it, and may set up lack of title on the part of a person who had disposed of it without his authority by way of sale, gift, pledge or in any other manner whatsoever, against third party acquirers.

(II) A person who has acquired a corporeal moveable in good faith and by onerous title shall acquire ownership in it despite the fact that it did not belong to the seller and the seller had no authority from the owner to dispose of it, if the owner had parted voluntarily with its possession [or had lost it owing to gross carelessness].

23. Though Hahlo would recognise sales by public authority as an exception to the general rule, and protect a purchaser thereat even if the property was stolen, he would not give special recognition to sales at markets or fairs or at public auctions. Nor does he favour exceptional treatment being given to purchasers "from a trader dealing in similar articles" or in "commercial matters". These doctrines of present Quebec law he considers outdated. He observes:

> "I fail to see why an owner whose thing was stolen should be worse off where it has passed through the hands of a merchant than where it has passed through the hands of a private individual. It has been claimed that a rule protecting buyers from merchants is required in the interest of the security of commercial transactions .... In fact, there is much less need of protecting a purchaser who has purchased from a merchant than one who has purchased from a private individual. The former will in the vast majority of cases be able without difficulty to recover the price paid by him from the merchant who has breached his duty to warrant him against eviction."

24. Professor Hahlo considers the problems of acquisitive prescription of stolen property against the background of the present law of Quebec, which applies a three-year period. He comments:

> "Ideally there should be a shorter period of prescription, say of one or two years, for articles of small value, and a longer period (say five or six years) for articles of greater value, but there is always the problem of uncertainties of valuation. On balance the best thing would probably be to retain the present three year period, short though it be."

25. A somewhat different solution to the problem of the protection to be accorded to good faith acquirers of another's property is recommended in the Report on Sale (No. XXXI, 30 June, 1975) submitted to the Quebec Civil Code Revision Commission

by its Committee on the contract of sale. Unlike the study prepared by Professor Hahlo, the Report merely states the Committee's preferred solution and does not discuss in detail the considerations which influenced it in reaching its conclusion. Article 43 of the Committee's draft is in the following terms:

> "When a thing belonging to another person is sold, the owner may revendicate it back from the purchaser, unless the sale was made by court order or unless the purchaser can set up acquisitive prescription by possession in good faith for one year."

Quebec law does not regard the transferor's defective consent in the transaction pursuant to which a corporeal moveable is transferred as affecting the article with a real vice which would prevent a bona fide third party from acquiring ownership of it. The draft Article would consequently be inapplicable in that situation. However, it would apply where the owner's property had been stolen and then sold, and where a person in possession of an article on limited title (e.g. a hirer or depositary) sold it to a bona fide third party. Until such time as the acquisitive prescription had been completed, the owner would be entitled under the draft Article to recover his property, and would not be required, as he is under Article 2268 of the present Civil Code, to reimburse the price which the purchaser had paid if the latter was in good faith and had bought the article at a fair or market, at a public sale, from a trader dealing in similar articles or in "commercial matters generally". However, as a quid pro quo for the proposed loss of the purchaser's present right to reimbursement, the period during which he must possess the article in order to become owner of it is to be reduced from three years to one year.

26. The Committee took the view that in commercial dealings it rarely happened that a third party's property was sold, but that when it did the present provisions of the Civil Code were

unduly favourable to the purchaser, in requiring the owner generally to reimburse him before he could recover the property. It was thought that the interests of the purchaser would be sufficiently protected, if the owner reclaimed the article before the expiry of a year, by his action against the seller for breach of the warranty of title. It may be inferred (though it is nowhere expressed in the Report) that the Committee considered that, particularly where the seller was a merchant or trader, the likelihood of the purchaser's actually recovering full damages in such an action would be reasonably high - much higher than would be the owner's chances of recovering damages from the (usually dishonest) person who had sold his property, were the owner to be compelled to reimburse the purchaser before claiming the article. It may also be inferred that the Committee took the view that the relatively short period of acquisitive prescription would encourage dispossessed owners to be diligent in searching for their property, and that it would promote the interests of commerce by providing for a free and clear title to the property after one year's possession of the article by the purchaser.

(c) Unidroit Draft Uniform Law

27. In June 1974 the Committee convened by Unidroit to draft the text of a "Uniform Law on the Acquisition in Good Faith of Corporeal Moveables" concluded their task.[1] It is unnecessary to consider the international elements of the draft law. In its essentials its scope extended to acquisition for value by valid contract (such as sale, exchange or pledge) of rights in re over corporeal moveables. Certain categories of moveables were excluded, e.g. those

[1] See Text Established by the Committee of Governmental Experts convened by UNIDROIT Study XLV - Doc. 55 Unidroit 1974; and Report by the Secretariat of UNIDROIT Study XLV - Doc. 56 Unidroit 1974.

required to be registered, and also stolen property. (The question whether to give protection to bona fide purchasers of stolen property had been hotly debated at each meeting of the Committee.) Acquisition of rights in corporeal moveables was otherwise to be valid, even though the transferor had no right to dispose of them, provided that the transferee acted in good faith and the moveables (or a document representing them) had been handed over to the acquirer or to a third party holding unequivocally on his behalf. Limited rights of third parties were to be extinguished under the same conditions. Good faith, it was provided, must exist either at the time the moveables were handed over to the transferee, or at the time when the contract was concluded if it was concluded after the actual handing over of the moveables. Good faith, it was decided, consisted in the transferee's reasonable belief that the transferor had the right to dispose of the moveables in conformity with the contract, and the former was required to have taken the precautions normally taken in transactions of the kind in question according to the circumstances. Guidelines were also prescribed regarding good faith - such as having regard to the nature of the property and of the transferor or his trade, special circumstances known to the transferee, price and provisions of contract and other circumstances generally.

28. It will be apparent that there was a measure of compromise, and that no specific national solution was adopted as model. The law was intended to create a new title in a bona fide acquirer who had actually had the moveables transferred to him in pursuance of a valid contract[1] (i.e. the ultimate transaction must be free from defect and habile to transfer

[1] See III General Note, infra, paras. 29-31.

a real right in the goods in question). The suggestion that the transferor must have had possession was rejected because in international trade it is difficult or impossible to require this as a condition. In view of the Law Reform Committee's remit in the Twelfth Report it is relevant to add that the Swiss authorities had convened a meeting of commercial and legal experts to consider apportionment of loss in cases of bona fide acquisition of stolen property or other property dishonestly obtained or disposed of in breach of confidence. In the event the Swiss authorities rejected the solution of apportionment for substantially the same reasons as the Law Reform Committee.

III GENERAL NOTE : VALID CAUSAL TITLE

29. When continental lawyers talk of "valid causal title" they are concerned with the ultimate, not with the original, transfer. This differs from the English attitude to contractual validity and transfer of real rights in, e.g., Cundy v. Lindsay.[1] To illustrate: if the position is that an owner O has been tricked by a rogue R, such as Blenkarn, into sending him goods, R then sells them to a third party T by a contract which T enters into in good faith and which is objectively valid in all respects:

(a) English law holds that because the first contract is void, no title can pass to T.

(b) Continental systems, requiring valid causa as a prerequisite of protecting the bona fide purchaser, test the contract between R and T. Since this is valid T acquires good title.

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[1] (1878) 3 App. Cas. 459.

30. The Law Reform Committee in their Twelfth Report on Transfer of Title to Chattels seem to have assumed (para. 5) that Continental systems do not recognise the distinction between void and voidable contracts. In so far as "relative" and "absolute" nullity correspond to "void" and "voidable" this view seems to be based on a misunderstanding. Thus H.A.Holstein writes:[1]

> "[A]ll dispositive acts emanating from the contract are extinguished by its annulment. Therefore, the way is open for the principle that nobody can transfer a greater right than he himself has. However, in France, this result is forestalled by the intervention of the celebrated principle 'en fait de meubles, la possession vaut titre'. The bona fide acquirer of a corporeal moveable thereby protected although the transaction upon the strength of which his predecessors took title is subject to being annulled on account of consensual vice."

31. In short, a rule of property law prevails over the rules governing obligations in the case of certain transactions regarding moveables.

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[1] "Vices of Consent in the Law of Contracts" (1939) 13 Tul. L.R. 560 at p.583.