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The protection of possession in Scots law

Craig Anderson¹

A. INTRODUCTION: POSSESSION IN SCOTS LAW

This paper is concerned with how possession is protected in Scots law. Most of the paper is concerned with one possessory remedy in particular, the so-called possessory judgment. To see how this fits into the law of possession more generally, we shall begin with an overview of the Scots law of possession.

Unlike the majority of civilian systems of property law, Scots law is not codified. Except where the law is governed by statute (and the law of possession is largely free from this), we look to the institutional writers of Scots law,² especially Stair, and to the decisions of the courts.

When we look at the Scots law of possession, we find marked similarities to the Roman law.³ For example, we see in Roman law a distinction drawn between possession and ownership, Ulpian saying that the two have "nothing in common",⁴ with the result that possessory questions are not determined by asking who has the right to possess. Possession gives no right to possess beyond a right not to have that possession disturbed without consent or legal process. Certainly, it gives no rights against third party acquirers: the main possessory interdicts, *utrubi* for moveables⁵ and *uti possidetis* and *unde vi* for land,⁶ are not worded to give any right against third parties.⁷ Furthermore, Ulpian makes it clear that, if I acquire possession from one who got it forcibly, my possession is not thereby tainted.⁸

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² The institutional writers are a small group of writers, writing between the seventeenth and nineteenth centuries, whose works are considered to be a formal source of law. In private law, the most important such works are Stair's *Institutions*, Erskine's *Institute*, Bankton's *Institute* and Bell's *Principles and Commentaries*. Craig's *Jus Feudale* is also sometimes included in the list.

³ On the relationship between the Roman and Scots laws of possession, see further K Reid, 'Property Law: Sources and Doctrine' in K Reid & R Zimmermann (eds), *A history of private law in Scotland* (Oxford: Oxford University Press, 2 vols, 2000), pp 210-212.

⁴ D.41.2.12.1.

⁵ D.43.31.1pr.

⁶ D.43.17.1pr (*uti possidetis*); D.43.16.1pr (*unde vi*).

⁷ This must be qualified slightly for the interdict *utrubi* in the classical law, which gave possession to the party who had had possession for longest in the previous year, that possession not being *vi clam aut precario*. In theory, therefore, it could be used in appropriate circumstances to recover possession from someone other than the immediate dispossessor. In the law of Justinian, however, the interdict *utrubi* works in the same way as the interdict *uti possidetis*, awarding interim possession to the current possessor unless that possession was obtained from the other party *vi clam aut precario*: J Inst 4.15.4.

⁸ D.43.17.3.10.

We find the same approach in Scots law. Possession is "a distinct lesser right than property",⁹ giving "the right to continue it against all illegal contrary acts".¹⁰ In Scots law, possession is protected by the remedy of spuilzie,¹¹ more commonly known as ejection¹² when it relates to land.¹³ This gives the right, on being dispossessed without consent or order of the court, to be restored to possession pending consideration of the question of right: *spoliatus ante omnia est restituendus*.¹⁴ However, possession gives no right to possess beyond this, and the remedy is not available against third parties.¹⁵

In addition to the right not to have possession disturbed, in Roman law one possessing in good faith was entitled to the fruits of the property.¹⁶ We find the same in Scots law, Stair expressly drawing this rule from Roman law.¹⁷

In both, possession is said to require that two elements be present, one physical and one mental.¹⁸

In neither, and unlike some modern systems,¹⁹ is there any trace of any requirement to possess property for a particular length of time in

⁹ Stair, *Inst.* 2.1.8. See also Erskine, *Inst.* 2.1.23; Bankton, *Inst.* 2.1.31 and 4.24.50.

¹⁰ Stair, *Inst.* 2.1.22.

¹¹ This is pronounced "spoolly". The z is silent.

¹² Or sometimes intrusion. The distinction between ejection and intrusion is that the former involves dispossession brought about by force, the latter being dispossession by stealth: Stair, *Inst.* 4.28.1. The rules governing these appear to be identical.

¹³ Thus, Stair considers moveables and land separately, at *Inst.* 4.30 and 4.28 respectively. See also Erskine, *Inst.* 4.1.15; Bankton, *Inst.* 2.1.31. The leading modern account of these possessory remedies is K G C Reid, *The Law of Property in Scotland* (Edinburgh: Law Society of Scotland/Butterworths, 1996) ("Reid, *Property*"), paras 161-166. See also W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), paras 14-11 - 14-39; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: Thomson/W Green, 2005), paras 10.24-10.31; D L Carey Miller, M M Combe, A J M Steven, S Wortley, "National Report on the Transfer of Movables in Scotland" in W Faber & B Lurger (eds), *National Reports on the Transfer of Movables in Europe, Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Munich: Sellier, 2009) ("*Scottish National Report*"), para 2.4.2.

¹⁴ Erskine, *Inst.* 4.1.15; *Somerville v Hamilton* (1541) Mor 14737; *Men of Selkirk v Tenants of Kelso* (1541) Mor 14378; *Lady Renton v Her Son* (1629) Mor 14739; *Yeoman v Oliphant* (1669) Mor 14740.

¹⁵ Such at least is implied at Stair, *Inst.* 4.30.3. At *Inst.* 4.28.5, Stair gives a style summons of ejection which is aimed specifically at the dispossessor himself. It is true that at *Inst.* 1.9.16 he says that spuilzied property may be recovered from a third party acquirer, but he appears to be considering only the case where the property has been taken from its owner's possession. It is notable that this immediately follows a definition of spuilzie as a dispossession of an owner. This is also the situation in the case he refers to (*Hay v Leonard* (1677) Mor 10286). For discussion of this point, see D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: Thomson/W Green, 2005), para 10.28; Reid, *Property*, para 165.

¹⁶ *J Inst* 2.1.35; Paul, D.41.1.48.

¹⁷ Stair, *Inst.* 2.1.23. See also Erskine, *Inst.* 2.1.25-26; Bankton, *Inst.* 2.1.32.

¹⁸ Paul, D.41.2.3.1; Stair, *Inst.* 2.1.17-18; Erskine, *Inst.* 2.1.20; Bankton, *Inst.* 2.1.26, 29.

order to qualify for a possessory remedy. The exception to this is with possessory protection of the exercise of apparent servitudes in Roman law, where typically use is required to extend over a particular period of time. Thus, for example, one seeking an interdict to protect use of a servitude right of way would need to show that it had been used for thirty days in the current year.²⁰

Indeed, it is possible to overstate the similarities between the Roman and Scots laws of possession. Both Stair²¹ and Erskine²² adopt the Roman division of possessory remedies into those for obtaining, those for retaining and those for recovering possession.²³ They are followed in this by a number of other authors,²⁴ though it is notable that neither Stair nor Erskine actually identifies a possessory remedy for the obtaining of possession by one who has never possessed before. As Rankine points out,²⁵ such a remedy is not possessory in the strict sense of being based on an individual's possession, and there is no trace of any such remedy in Scots law.²⁶

More specifically, we may identify three key points of difference between the ways in which Scots and Roman law protect possession.

The first is that Scots law takes a broader view of the mental element of possession. There is no space here to explore the different views expressed in the nineteenth century by the German writers Savigny and Jhering on the mental element of the Roman law of possession,²⁷ but suffice it to say that Roman law took a fairly restrictive view of the types of holder that possessed, and one could not determine those types according to any single, general principle. As with German law,²⁸ however,

¹⁹ See e.g. the French *Code de procédure civile*, art 1264, restricting possessory remedies in certain circumstances to those who have possessed for at least one year.

²⁰ Ulpian, D.43.19.1.2. See also e.g. Ulpian, D.43.20.1.4.

²¹ Stair, *Inst.* 4.3.47.

²² Erskine, *Inst.* 4.1.47.

²³ See G.4.143; J Inst 4.15.2.

²⁴ See e.g. A J G Mackay, *The Practice of the Court of Session* (Edinburgh: T & T Clark, 2 vols, 1877-1879) ('Mackay, *Practice*'), I,360

²⁵ J Rankine, *A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland*, 4th edn (Edinburgh: W Green, 1909), ('Rankine, *Landownership*'), p 8.

²⁶ Though see J Spotiswood (ed), *Practical Observations upon Divers Titles of the Law of Scotland, Commonly Called Hope's Minor Practicks* (Edinburgh: Davidson 1734) (hereafter "*Hope, Minor Practicks*"), X.2.

²⁷ For Savigny, the mental element of possession "must consist in the intention of exercising ownership" (F K von Savigny, *Possession*, 6th edn, E Perry (trans) (London: S Sweet, 1848), p 72), with those cases where non-owners are viewed by Roman law as possessors being limited exceptions to this principle. Jhering, by contrast, denies the existence of a separate mental element beyond the consciousness of holding. Instead, In Jhering's theory, a holder is presumed to be a possessor, unless exceptionally that party's opponent can show that the holding is based on a *causa detentionis*, a ground of holding to which the law denies the protection of the possessory interdicts (R von Jhering, *Besitzwille: zugleich eine Kritik der herrschenden juristischen Methode* (Jena, 1889), pp 19-20).

²⁸ *BGB*, s 868. French law achieves the same effect by other means, namely the extension of possessory protection to certain holders falling outside the definition of possessor: *Code de procédure civile*, art. 1264.

Scots law extends possession to certain holders who hold partly on another's behalf. Scots law defines the mental element of possession as "the inclination or affection to make use of the thing detained".²⁹ Thus, any holder of property intending to derive personal benefit from it is a possessor in Scots law. As a result, certain holders not considered to be possessors in Roman law are so considered in Scots law. The obvious example is a tenant or hirer of land or moveables. This is comparable to the definition given in the Draft Common Frame of Reference, which, after defining the category known as "owner-possessors",³⁰ possession is then extended to those who hold:

(a) with the intention of doing so in that person's own interest, and under a specific legal relationship with the owner-possessor which gives the limited-right-possessor the right to possess the goods, or

(b) with the intention of doing so to the order of the owner-possessor and under a specific contractual relationship with the owner-possessor which gives the limited-right-possessor a right to retain the goods until any charges or costs have been paid by the owner-possessor.³¹

If we set aside the unfamiliar terminology of "owner-possessor" and "limited-right-possessor", and remember that one may hold partly on another's behalf on a non-contractual basis,³² this is a fair approximation to the Scottish position.

Secondly, we have seen that in Roman law one could only use the interdicts *utrubi* and *uti possidetis* to protect or recover possession if one had not obtained possession by force, stealth or *precarium* from the other party. No such rule exists in Scots law, where a possessor, even one in bad faith, is entitled not to be dispossessed, even by the owner of the property:

a violent, clandestine, and unlawful possession may not be troubled though there be an evident right.³³

Thus, even a thief is entitled to retain his possession until his victim vindicates his right in the proper manner.³⁴

²⁹ Stair, *Inst.* 2.1.17. See also Erskine's formulation at *Inst.* 2.1.20, where he requires "an *animus* or design in the detainer of holding it as his own property", which appears to require *animus domini*. However, at *Inst.* 2.1.22, he refers to pledgees, liferenters (usufructuaries) and tenants as possessing, possession arising "generally in every case where there are inferior rights affecting any subject distinct from the property of that subject".

³⁰ C von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich: Sellier, 6 vols, 2009) ("DCFR"), VIII.-I:206 (p 4327).

³¹ DCFR, VIII.-I.207 (p 4353).

³² An example would be a possessor who has improved another's property in good faith, holding the property as security for recompense for the improvements. See e.g. *Binning v Brotherstones* (1676) Mor 13401.

³³ Stair, *Inst.* 2.1.22. The same rule is given at *Inst.* 4.28.2.

The third difference lies in the scope of the possessory remedies. Although they are classified as being for the retention of possession,³⁵ *utrubi* and *uti possidetis* could also be used for the recovery of possession. Spuilzie, by contrast, only allows for the recovery of possession.³⁶ The normal Scots remedy "against a wrong in course of being done or against an apprehended violation of a party's rights"³⁷ is known as interdict. On the basis of this definition of the scope of interdict, it would seem reasonable to suppose that it would be available to prevent the occurrence of a spuilzie. So indeed it is assumed by the authors of the Scottish national report on the transfer of moveables.³⁸ Unfortunately, the point is lacking authority: all of the cases that they cite are in fact concerned with the protection of a possessor whose right of ownership is not in dispute.³⁹ It does not in fact appear that the rules governing interdict against dispossession are entirely in accord with those governing the restoration of possession following such dispossession. Thus, a party without any kind of written title may pursue for spuilzie of land (ejection) without having any kind of written title to the land;⁴⁰ yet interdict, as we shall see below, would not have been available to such a possessor before the dispossession. It cannot therefore be safely assumed that an interdict would be available to prevent dispossession of moveable property without the possessor showing at least a *prima facie* case that he has a right in the property entitling him to possess. The only case where such a preventative remedy is certainly available on a purely possessory basis is that known as the possessory judgment.

B. THE POSSESSORY JUDGMENT

(1) Introduction

We see then that Scots law protects a possessor, even one without a right to possess, against dispossession without consent or an order of the court. Such dispossession is known as spuilzie, and the remedy is for the court to order that possession be restored to the party dispossessed. What I want to focus on here is the other possessory remedy recognised by Scots law, the possessory judgment. While spuilzie does differ in various respects from the Roman possessory remedies, there are clearly common underlying principles, in particular the idea that one who is dispossessed without consent or proper legal process is entitled to be restored to possession pending resolution of the question of right. The

³⁴ There is an exception to this rule where one retakes possession immediately after the dispossession: Erskine, *Inst.* 2.1.23; Bell, *Principles*, s. 1319. Erskine's authority for this exception is Ulpian, D.43.16.3.9.

³⁵ J Inst 4.15.4.

³⁶ Thus, for example, Stair defines spuilzie as "obliging to restitution of the things taken away" (*Inst.* 1.9.16).

³⁷ S Scott Robinson, *The Law of Interdict*, 2nd edn (Edinburgh: Butterworths/Law Society of Scotland, 1994) ("Scott Robinson, *Interdict*"), p 1.

³⁸ *Scottish National Report*, para 2.4.3.

³⁹ *Wilson v Shepherd* 1913 SC 300; *Leitch & Co Ltd v Leydon* 1930 SC 41, affirmed 1931 SC (HL) 1; *Phestos Shipping Co Ltd v Kurmiawan* 1983 SC 165; *Shell UK Ltd v McGillivray* 1991 SLT 667.

⁴⁰ Stair, *Inst.* 4.28.2.

possessory judgment does not appear to have such a strong similarity to the Roman possessory remedies. In general terms, the possessory judgment operates to protect possession that has been exercised for seven years on a written title apparently sufficient to support it. While this overlaps with spuilzie and ejection, in that it does allow the recovery of possession that has been lost, it also allows one entitled to it to go to court to obtain an order that existing possession not be interfered with.⁴¹ Unlike spuilzie and ejection, there is nothing to indicate that the possessory judgment is available only against the actual disposessor.

Despite the lack of similarity between them, the possessory judgment has sometimes been said to be derived from the Roman possessory interdicts.⁴² Indeed, in at least two cases, Court of Session judges have taken the Roman interdict *uti possidetis* to be synonymous with the possessory judgment.⁴³ Alternatively, Bankton makes a comparison between the possessory judgment and the *actio Publiciana*,⁴⁴ which gave allowed possessors in certain circumstances to recover or defend their possession as if they were owners.⁴⁵ It is true that a number of legal systems have received the *actio Publiciana* in modified form.⁴⁶ However, there is no further evidence for its reception in Scots law, and Bankton himself does not claim any historical connection, noting only the existence of "some resemblance" between the possessory judgment and the *actio Publiciana*.

An alternative view is put forward by the institutional writers.⁴⁷ According to this view, the reason for the existence of the possessory judgment is twofold. The first part of this is the existence, until its abolition just a few years ago, of the feudal system of land tenure.⁴⁸ Because of this, no-one (except the Crown, in the case of Crown lands) owned land outright. Instead, the land was held by the vassal of a superior, who had a continuing interest in the land. The second part is the importance in Scots law of written titles to land. In Scots law, no-one may acquire ownership of land without some kind of written deed in his favour. This differs from some other systems, where, for example, one may acquire ownership by positive prescription by simply possessing in the

⁴¹ Rankine, *Landownership*, p. 13.

⁴² D M Walker, *The Law of Civil Remedies in Scotland* (Edinburgh: W Green, 1974) ("Walker, *Civil Remedies*"), p 250; H Burn-Murdoch, *Interdict in the Law of Scotland with a Chapter on Specific Performance* (1933, reprinted Collieston, Caledonian Books, 1986) ("Burn-Murdoch, *Interdict*"), para 87; Mackay, *Practice*, I, 360.

⁴³ *Colquhoun v Paton* (1859) 21 D 996, 1001 (per Lord Cowan); *Maxwell v Glasgow and South-Western Railway Co* (1866) 4 M 447, 456 (per Lord Deas). See also *Hume v Scot* (1676) Mor 10644, in which reference was also made to the interdict *uti possidetis*.

⁴⁴ Bankton, *Inst.* 2.1.33.

⁴⁵ For discussion, see W W Buckland, *A Text-book of Roman Law from Augustus to Justinian*, 3rd edn, revd P Stein (Cambridge: University Press, 1975) pp. 191-5.

⁴⁶ DCFR, pp. 5276-8 and 5286-92.

⁴⁷ Stair, *Inst.* 4.22.14, 4.26.3; Erskine, *Inst.* 4.1.50; Bankton, *Inst.* 2.1.33. See also *Winton v Gordon* (1668) Mor 10627

⁴⁸ Abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s 1, which came into force on 28th November, 2004.

required manner for a given period.⁴⁹ In Scots law, for positive prescription to operate, the possession must follow the registration of a written title.⁵⁰ The need for a written title meant that, in a dispute over title to an area of land, the deeds relating to the land would need to be produced. However, some of the deeds needed by the vassal to prove his right would often also be needed by the superior to prove his right, and so would be retained in the superior's hands. To meet this difficulty, the possessory judgment allowed the current possessor, on meeting certain requirements, to defend that possession in the interim, until he could lay hands on the deeds necessary to prove his right. This does appear to be a plausible explanation of the origin of the remedy, although, if it is correct, it is surprising that Craig does not mention it in his *Jus Feudale*, even in his discussion of the recovery of possession.⁵¹

The possessory judgment, as we shall see, operates to protect possession of land, and also protects the exercise of apparent rights in land, such as servitudes, public rights of way and leases. However, it does not extend to moveable property, possession of which is protected only using the remedies already mentioned above.⁵²

(2) Possessory nature

The possessory judgment is genuinely possessory in that it does not determine and is not determined by the question of actual right.⁵³ Instead, its purpose is to preserve the established state of possession until it can be determined where the right lies. Accordingly, the outcome of proceedings for a possessory judgment cannot be taken to determine the question of right. As with the law of Justinian,⁵⁴ the possessory proceedings merely determine who will have to raise the action to determine the question of right. They are not themselves *res judicata* on the question of right.⁵⁵ In numerous cases, the courts have made it clear that the question of right is reserved for later proceedings.⁵⁶ A possessory judgment will even be available when the invalidity of the possessor's title is apparent from the known facts. Thus, in *Porterfield v M'Millan*,⁵⁷ a

⁴⁹ For example, in South Africa, the relevant legislation (Prescription Act 68 of 1969, s 1) does not require registration to begin prescription. Registration will follow the prescriptive acquisition of ownership (P J Badenhorst, J M Pienaar & H Mostert, *Silberberg & Schoeman's The Law of Property*, 5th edn (Durban: LexisNexis Butterworths, 2006), para 8.6.8. In Germany, acquisition is by registration following thirty years' possession (*BGB*, s 927).

⁵⁰ The current law on this point is to be found in the Prescription and Limitation (Scotland) Act 1973, s. 1(1).

⁵¹ Craig, *Jus Feudale*, 2.8.2 and 2.9. At 2.7.27, he says that one who has possessed on an apparent title for a year and a day is entitled to be treated as rightful possessor "until the question of the real state of rights has been brought before the court and determined" (taken from the translation the *Jus Feudale* by J A Clyde (Edinburgh: W Hodge, 1934).

⁵² Reid, *Property*, para 116.

⁵³ Burn-Murdoch, *Interdict*, para 87; Rankine, *Landownership* p. 12; Reid, *Property*, para 145; Walker, *Civil Remedies*, p 252.

⁵⁴ J Inst 4.15.4.

⁵⁵ Hope, *Minor Practicks*, X.1 (Spotiswood's note).

⁵⁶ See e.g. *Macdonald v Watson* (1830) 8 S 584; *Ker v Pringle* (1662) Mor 10619

⁵⁷ (1847) 9 D 1424.

possessory judgment was sought to protect the use of an apparent servitude of pasturage over an area of grazing land owned in common by two neighbouring proprietors. One of these parties was the pursuer, who had previously begun proceedings to have the grazing land divided between the co-owners. These proceedings had, however, been allowed to lapse. In the meantime, the other co-owner had sold part of his own land, granting with it a servitude of pasturage over the grazing land, the extent of the servitude right to be determined when the grazing land was divided. This land then came into the hands of the defender in the present case. The court considered itself bound to grant the defender a possessory judgment on the basis of use for the required period, even though, on the facts available to the court, the servitude was void as being partially *a non domino*.⁵⁸ This is a rather extreme example, and the court was perhaps influenced by the argument that the pursuer should not benefit from his own failure to insist in the action for division, that being the cause of the servitude's invalidity, but it illustrates the present point.

This being the case, the decision in *M'Kerron v Gordon*⁵⁹ seems questionable. That case concerned a claim for a possessory judgment to protect the use of a former road across private land as a public right of way. The majority of the Inner House of the Court of Session rejected the claim, on the basis that the use made was unlawful in origin, the original public road having been shut up some sixty years previously by statutory procedure.

It was questioned in that case whether it was permissible to look back beyond the seven years' possession required for the possessory judgment. The lead opinion was by Lord Ormidale, who expressed his view in this way:

it would be quite competent for the party resisting a possessory judgment to shew that the possession relied on in support of it had been the result of violence, intimidation or other illegal acts; in short, that in place of it having been of a character to indicate that it took place in the exercise of a right, it was truly in persistence of a wrong.

He went on to hold that the initial illegality of the possession tainted the whole of the use made, with the result that it was not possible to establish the required standard of possession thereafter. We shall see below that violence in taking possession is a fatal defect in a claim for a possessory judgment, and Lord Ormidale appears to take the view that the reason for this is that it implies an absence of right. However, strictly speaking, the fact that I took possession through violence or intimidation has nothing to do with whether I have a right to possess. I may do this in full belief of my right. In and of itself, the fact that I took possession through force means only that my taking possession was opposed. It does not mean, or

⁵⁸ A servitude may not be validly granted by a co-owner acting alone. See *e.g.* *Grant v Heriot's Trust* (1906) 8 F 647; *WVS Office Premises Ltd v Currie* 1969 SC 170; *Fearnan Partnership v Grindlay* 1990 SLT 704, affirmed on different grounds at 1992 SC (HL) 38. As Reid points out (Reid, *Property*, para 28), this is an application of the general rule that *nemo dat quod non habet*.

⁵⁹ (1876) 3 R 429.

even imply, that the person opposing my entry was entitled to do so. Instead, sufficient reason to deny me the protection of the possessory judgment lies in the argument that one who does justice at his own hand should be denied any benefit from doing so.⁶⁰

There seems indeed to be no justification for Lord Ormidale's approach in generalising the rule against protecting violently obtained possession into a rule denying the protection of the possessory judgment to any unlawful possession. Given that possessory proceedings are concerned with awarding interim possession until the question of right can be enquired into, it is inevitable that sometimes possession will be protected that turns out to be unlawful in the sense of not being based on any right to possess. Lord Gifford, in his dissenting opinion, observes:

It is true that in determining as to the proof of possession it is competent for the parties, and competent for the Court, to go farther back than seven years, - indeed to go back as far as is necessary. But the object of so going back is not to ascertain the question of right, but merely to ascertain the character of the possession, - that is, to ascertain whether the possessors claimed to possess as matter of right, or whether they did so by special permission or sufferance...The sheriff cannot ask [in possessory proceedings], and cannot decide,^[61] whether they were right or wrong in making the claim. To go back beyond the seven years, in order to ascertain whether there actually existed a permanent right or not, would be to obliterate the distinction between a possessory question and a question of permanent heritable right.⁶²

Lord Gifford's view appears to be more consistent with the nature of possessory remedies, and also with the other authorities referred to above.

If it is not necessary to prove the validity of one's own right in order to obtain a possessory judgment, no more is it necessary to prove the validity of the right of the party from whom one obtained title. Thus, in *Hume v Scot*,⁶³ where a tenant sought the benefit of a possessory judgment, there was no need for proof of the title of the grantor of the lease.

(3) The need for title

No-one, except for the Crown, can own land in Scotland without some form of written title. Accordingly, while a possessory judgment cannot determine the question of right, equally it is reasonable to refuse even an

⁶⁰ For Stair, it is "the main foundation of the peace, and preservation thereof, that possession may not be recovered by violence, but by order of law". (*Inst.* 2.1.22). See also Erskine, *Inst.* 2.1.23. The idea that the protection of possession is based on the law's opposition to violence is also found later in Savigny, *Possession*, p 6.

⁶¹ Jurisdiction in questions of rights in heritable property (*i.e.* land and rights relating to land) was subsequently given to the Sheriff Court in terms of the Sheriff Courts (Scotland) Act 1907, s 5(4).

⁶² (1876) 3 R 429 at 437.

⁶³ (1676) Mor 10641.

interim remedy to one who it is plain has no prospect of proving right. Accordingly, the possession sought to be protected by a possessory judgment must be based on a written title.⁶⁴ This title must be one ostensibly giving a right to possession. Thus, in *Cant v Aickman*,⁶⁵ a right of annualrent⁶⁶ was found not to be sufficient basis for a possessory judgment concerning possession of the land itself. The title must, so far as appears on its face, be valid and apply to the property or right sought to be protected.⁶⁷ Accordingly, a title which has an invalidity patent on its face will not be sufficient foundation for a possessory judgment.⁶⁸ However, as we have seen, it is not necessary for the title actually to be valid.

It appears that, at an earlier period, this title had to be completed by infeftment.⁶⁹ Indeed, even after *Stair*, *Spotiswood* was still giving as the law a requirement for title to have been completed by infeftment.⁷⁰ However, this rule has long since been departed from. In *Glendinning v Gordon*,⁷¹ a title was accepted as sufficient foundation for a possessory judgment even without sasine. In *Knox v Brand and Berry*,⁷² a possessory judgment was given based on possession from the date of the charter apparently granting the right rather than from the date of infeftment.

It is not only apparent owners of land that are protected by the possessory judgment. A lease is sufficient foundation for a possessory judgment,⁷³ including a dispute over right of access, apparently exercised as a pertinent to the lease, over neighbouring ground.⁷⁴ The same applies

⁶⁴ *Bridges v Elder* (1822) 1 S 373.

⁶⁵ (1683) Mor 10633.

⁶⁶ This is a type of payment obligation contained in the title to land. See *Stair, Inst.* 2.5.

⁶⁷ *Stair, Inst.* 2.3.73; *Bankton, Inst.* 4.24.55; *Burn-Murdoch, Interdict*, para 89; *Rankine, Landownership*, p 9; *Reid, Property*, para 146; *W M Gordon & S Wortley, Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-18; *T B Smith, A Short Commentary on the Law of Scotland* (Edinburgh: W Green, 1962), p 466.

⁶⁸ *Watson v Shields* 1996 SCLR 81.

⁶⁹ *Mackay, Practice*, I,200 (b); *Stair, Inst.* 4.26.3; *Erskine, Inst.* 4.1.50; *Johnstone v Erskine* (1668) Mor 10621; *Baird v Law* (1695) Mor 10623.

Infefment means entry of the vassal with the superior: *Reid, Property*, para 93 (Gretton). From 1874 until the abolition of feudal tenure in 2004, it was deemed to occur on recording of the conveyance in the vassal's favour in the Register of Sasines or its registration in the Land Register: *Conveyancing (Scotland) Act 1874*, s 4(2) (now repealed).

⁷⁰ See his note to *Hope, Minor Practicks*, X.1.

⁷¹ (1716) Mor 10610.

⁷² (1827) 5 S 666.

⁷³ *Erskine, Inst.* 2.6.28, 4.1.50; *Bankton, Inst.* 2.1.33; *Hume v Scot* (1676) Mor 10641; *Hepburn v Robertson* (1706) Mor 10644; *St Andrews Ladies' Golf Club v Denham* (1887) 14 R 686; *Innes v Allardyce* (1822) 2 S 93. Note that a lease can, in certain circumstances, be made a real right in Scots law.

⁷⁴ *M'Donald v Dempster* (1871) 10 M 94; *Galloway v Cowden* (1885) 12 R 578; *Little v Irving* (unreported, 25.1.2000, Dumfries Sheriff Court). The court's opinion in the last of these cases is reproduced in *R R M Paisley & D J Cusine, Unreported Property Cases from the Sheriff Courts* (Edinburgh: W Green, 2000), p 120.

to liferenters.⁷⁵ According to the definition of possession noted earlier, these parties are possessors and so are, reasonably enough, protected as such.

We see, then, that the possessory judgment can be used to protect those whose possession is based on apparent rights other than ownership. In fact, despite controversy over whether incorporeal property can properly said to be capable of being possessed,⁷⁶ the possessory judgment can be used to regulate use of land more generally. Despite early authority to the contrary,⁷⁷ the exercise of apparent rights in land can be regulated by the possessory judgment, for example servitudes⁷⁸ and public rights of way.⁷⁹ *Hunter v Maule*⁸⁰ was concerned with a right to fish for salmon, which in Scots law may be owned separately from the land itself.⁸¹ *Loch v Lockie*⁸² was concerned with a right of annualrent. *Knox v Brand and Berry*⁸³ was concerned with a right of ferry.

The need for a written title means that one coming to court without such a title will not be entitled to a possessory judgment.⁸⁴ An example of this can be found in *Neilson v Vallance*,⁸⁵ in which a dispute between two neighbours over an area of garden ground was resolved by a finding that the possession of the neighbour whose occupation was challenged was not supported by the parties' respective titles. Again, in *Hunter v Maule*,⁸⁶ a possessory judgment in relation to salmon fishing rights was denied on the basis that the title relied on had not been produced. By the same token, if the written title is so unclear that it cannot be determined from its face what it includes, the possessory judgment will not be available. Instead, it will be necessary to proceed straight to the question of title.⁸⁷

May a title form the foundation of a possessory judgment if it has been reduced (*i.e.* set aside by the court), or the question of right has

⁷⁵ Stair, *Inst.* 4.22.8.

⁷⁶ The majority view in Scots law seems to be that incorporeal property is not capable of being possessed. See *e.g.* Craig, *Jus Feudale*, 2.7.3; Stair, *Inst.* 2.7.3; Reid, *Property*, para 120; D J Cusine & R R M Paisley, *Servitudes and Rights of Way* (Edinburgh: W Green, 1998) ("Cusine & Paisley, *Servitudes and Rights of Way*"), para 1.70; *Scottish National Report*, para 2.1.3(c). Bankton is prepared to go only as far as recognising "a kind of possession" of incorporeals (*Inst.* 2.1.28). Compare D J Carr, *Possession in Scots Law: Selected Themes* (unpublished MSc thesis, University of Edinburgh, 2005), p 60. The same dispute exists in other systems: see the papers in this volume by Duard Kleyn and Thomas R fner.

⁷⁷ *Grant v Law* (1695) Mor 10644.

⁷⁸ Stair, *Inst.* 2.7.22, 4.17.2; *Stewart v Grant* (1698) Mor 10644; *Carson, Warren & Co v Miller* (1863) 1 M 604; *Liston v Galloway* (1835) 14 S 97; *Porterfield v M'Millan* (1847) 9 D 1424; *Drummond v Milligan* (1890) 17 R 316.

⁷⁹ *Macdonald v Watson* (1830) 8 S 584; *Calder v Adam* (1870) 8 M 645; *M'Kerron v Gordon* (1876) 3 R 429.

⁸⁰ (1827) 5 S 238.

⁸¹ Reid, *Property*, para 210.

⁸² (1628) Mor 10637. Unlike *Cant v Aickman*, referred to above, this case was concerned with exercise of the right of annualrent rather than possession of the land itself.

⁸³ (1827) 5 S 714.

⁸⁴ Rankine, *Landownership*, p 10.

⁸⁵ (1828) 7 S 182

⁸⁶ (1827) 5 S 238.

⁸⁷ *Cruickshank v Irving* (1854) 17 D 286.

been considered in earlier proceedings? It appears not: In *Montgomery v Home*⁸⁸ a possessory judgment was refused even though there had been seven years' further possession following a decree of removing, and in *Anderson v Forbes*⁸⁹ it was held that there could be no possessory judgment on the basis of a title that had been reduced. Again, this was the outcome even with seven years' further possession. In *Lockhart v Meikle*,⁹⁰ a possessory judgment was denied where it was sought in the face of a decree declaring title. These decisions are consistent with Stair's view⁹¹ that, where there has been a declaratory action, no defence may then be put forward in a possessory action that could have been put forward in the declaratory action. Where the question of right is *res judicata* between two parties, the possessory question is superseded. This also explains the different outcome in *Innes v Allardyce*,⁹² in which a lease was held sufficient title for an interdict against interference with possession by parties other than the landlord, even though the lease had been reduced: although the question of the right to possess had been settled between landlord and tenant, it was not *res judicata* against third parties. Even though this case was concerned with a normal interdict, rather than a possessory judgment, there seems to be no good reason for distinguishing the case on this ground.

(4) Rights not requiring writing

It was noted earlier that the possessory judgment required that some form of written title be produced that was at least *ex facie* sufficient to give a right to possess the property. The reason for this was said to be that such a title is a *sine qua non* for the acquisition of ownership and that, accordingly, there was no purpose in allowing interim protection to someone with no chance of proving a right. However, not all rights in land require writing for their constitution. Can someone using land as if by one of those rights obtain a possessory judgment to protect that use? It appears that this is permissible, and that a written title is only required of someone claiming to possess on the basis of a right requiring writing for its acquisition. Public rights of way, for example, may be created in writing⁹³ but invariably are constituted instead by prescriptive possession.⁹⁴ For this reason, the courts have held that no written title is required when a possessory judgment is sought to protect the exercise of an apparent public right of way.⁹⁵ Again, possession on the basis of a statutory provision has been held capable of protection by a possessory judgment. Thus, in *Richmond v Inglis*,⁹⁶ a party on whom the

⁸⁸ (1664) Mor 10627.

⁸⁹ (1696) Mor 10630.

⁹⁰ (1724) Mor 10625.

⁹¹ Stair, *Inst.* 4.3.47.

⁹² (1822) 2 S 93.

⁹³ Reid, *Property*, para 498.

⁹⁴ In terms of the Prescription and Limitation (Scotland) Act 1973, s 3(3).

⁹⁵ *Macdonald v Watson* (1830) 8 S 584; *Calder v Adam* (1870) 8 M 645; *M'Kerron v Gordon* (1876) 3 R 429 at 433, *per* Lord Ormidale.

⁹⁶ (1842) 4 D 769. See also *Maxwell v Glasgow and South-Western Railway Co* (1866) 4 M 447, especially *per* Lord Deas at 454; *Boyd v Kirkcudbright CC* 1937 SLT (Sh Ct) 17.

responsibility for maintenance of a street had been imposed by statute was held entitled to a possessory judgment in defence of the public's possession, against an owner of land adjoining the street claiming to have title to part of the land occupied as a street. The latter was ordered to remove a fence that he had constructed, until the question of right was settled.

We have seen that possession on the basis of an apparent lease is protected by the possessory judgment. Most leases will be constituted in writing. However, a lease with a term not exceeding one year may be constituted orally⁹⁷ (although, in practice, writing will still normally be used). As we shall see in a moment, the possessory judgment requires the longer period of seven years' possession, from which it may be supposed that the issue cannot arise. However, a lease will be automatically renewed by the doctrine of tacit relocation if notice is not given terminating it,⁹⁸ with the result that a lease initially for a year or less may in fact last for a much longer period. The only writer to consider the relevance of the length of the lease does not give a concluded view on the matter, saying only that a lease is sufficient title for a possessory judgment "at least where the tack [*i.e.* the lease] has a longer duration than seven years".⁹⁹ Unfortunately, though, none of the authorities that he cites bear on the present question. However, if it is accurate to say (as it appears to be) that writing is only required for the possessory judgment where writing is required for the acquisition of the right, there seems to be no reason to distinguish an orally-created lease of a term of no more than a year from other rights created without writing. On this basis, it is suggested here that such a lease, which has in fact endured for the required period of possession, provides sufficient title for a possessory judgment. Given that the law allows the term of a lease to be tacitly extended, without the constitution of a new lease, there seems to be no reason to distinguish between a lease initially granted for a term exceeding seven years and a lease granted for a shorter term but which has been extended by tacit relocation.

One claiming a servitude will always have a written title, at least to the benefited property, given that only an owner of land may hold the real right of servitude over neighbouring land.¹⁰⁰ A servitude itself, however, need not be constituted in writing.¹⁰¹ Scott Robinson suggests that, in such a case, a written title to the benefited property will be sufficient.¹⁰² Unfortunately, both of the cases cited by him as authority are in fact

⁹⁷ Requirements of Writing (Scotland) Act 1995, s 1(7), creating an exception to the requirement in s 1(2)(b) for writing in the creation of a real right in land.

⁹⁸ For discussion, see J Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd edn (Edinburgh: W Green, 1916), pp 598-602; G C H Paton, *The Law of Landlord and Tenant in Scotland* (Edinburgh: W Green, 1967), pp 221-227.

⁹⁹ J R Dickson, "Possessory Actions" in *Encyclopaedia of the Laws of Scotland* (vol 11, 1931) ("Dickson, *Possessory Actions*"), para 1189. The additional requirement that he states, that the lease "bears to flow from the heritable proprietor", may be rejected insofar as it appears to raise the question of who the proprietor is runs counter to the possessory nature of the remedy.

¹⁰⁰ See *e.g.* *Cusine & Paisley, Servitudes and Rights of Way*, para 1.37.

¹⁰¹ Thus, for example, a servitude may be created by positive prescription without any writing: Prescription and Limitation (Scotland) Act 1973, s 3(2).

¹⁰² Scott Robinson, *Interdict*, p 14.

concerned with public rights of way,¹⁰³ although in one of these cases, *Calder v Adam*,¹⁰⁴ the rule for possessory protection of apparent servitudes was implied *obiter* by Lords Benholme and Neaves¹⁰⁵ to be in accordance with Scott Robinson's view. In fact, though, there is a division in the caselaw on the point. In *Liston v Galloway*,¹⁰⁶ a possessory judgment was allowed to protect the exercise of an apparent servitude by a party over neighbouring ground, even though her title made no reference to a servitude. On the other hand, in *Carson, Warren & Co v Miller*,¹⁰⁷ the Lord Justice-Clerk stated matters thus:

It is quite true that a servitude right may be acquired by possession for forty years without a title. But seven years' possession will not enable a party to obtain a possessory judgment, unless it be supported by something in the shape of a title.¹⁰⁸

In this case, the owner of an area of ground sought a possessory judgment to prevent the blocking of a nearby street. Unfortunately, the Lord Justice-Clerk did not refer to *Liston v Galloway* (or indeed to any authority at all on this point), and it is difficult to reconcile the two cases. Curiously, only seven years before *Calder v Adam*, Lords Benholme and Neaves both concurred in the decision in this case. In the Outer House, the Lord Ordinary did attempt to distinguish *Liston*. His grounds for doing so are not clear, but seem to be derived from the fact that, while in *Liston* the path was an obvious one leading up to a gate in the pursuer's wall, in *Carson, Warren & Co v Miller* the land over which the servitude was claimed was a street not even adjacent to the supposed benefited property. The decision would perhaps, therefore, have been better founded on a lack of possession, in other words that the use made of the nearby street was not made in the manner of someone exercising a servitude. In any case, though, the Lord Justice-Clerk's view seems difficult to justify in principle, given the authority to the effect that a written title is only required for a possessory judgment if such a title is actually required for the constitution of the right.

(5) Possession

In addition to a written title, one seeking a possessory judgment must also have possessed for a certain length of time. Where the current possessor has not possessed for the required length of time, it is permitted to add together the possession of consecutive possessors.¹⁰⁹ This has been held to be so even where the previous possessor was not a predecessor in title, but the loser in a competition of titles with the party who then took over possession. The latter was then held entitled to add

¹⁰³ *Calder v Adam* (1870) 8 M 645; *M'Kerron v Gordon* (1876) 3 R 429.

¹⁰⁴ (1870) 8 M 645.

¹⁰⁵ (1870) 8 M 645 at 648.

¹⁰⁶ (1835) 14 S 97.

¹⁰⁷ (1863) 1 M 604.

¹⁰⁸ (1863) 1 M 604 at 611.

¹⁰⁹ Hope, *Minor Practicks*, X.1; Stair, *Inst.* 4.22.8, 4.22.14. Erskine, *Inst.* 4.1.49; *Galloway v Cowden* (1885) 12 R 578.

the prior possessor's possession to her own in order to reach the required period of possession.¹¹⁰ There does, however, appear to be an exception to this where the dispute is between the current and previous possessors. In *Matheson v Stewart*,¹¹¹ one party had bought part of a larger estate from the other. It was disputed whether an area of which the purchaser took possession was in fact included in the sale. The purchaser's argument that he should be entitled to a possessory judgment based on the seller's possession, added to his own, was given short shrift by the court.

At an earlier period, the period of possession required for the possessory judgment was ten years.¹¹² During the seventeenth century, however, there seems to have been some doubt about the appropriate period of possession to qualify for the possessory judgment. In *Fuir v Stevenson*,¹¹³ a period of six years was accepted as sufficient. However, in *Hamilton v Tenants of Oversheils*,¹¹⁴ the court expressly stated that seven years was the required period. Stair follows this view,¹¹⁵ which is now universally recognised as correct.¹¹⁶ More precisely, the requirement is seven years of possession, followed by no more than seven years of non-possession,¹¹⁷ allowing the possessory judgment to be used, not just for the protection of possession, but also for its recovery.

This rather seems to overlap with the normal possessory remedies outlined earlier, and we shall return to this point later on. However, it is established in the caselaw. Thus, for example, in *Dalmahoy v Horsburgh*,¹¹⁸ the pursuer raised an action for mails and duties¹¹⁹ as heir to her brother, who had been in possession for ten years up to his death in 1623. In proceedings for a possessory judgment, this was preferred to the defender's possession for the subsequent five years. Again, in *Maxwell v Glasgow and South-Western Railway Co*,¹²⁰ the pursuer sought the removal of certain works established on his land by the defenders for railway purposes either thirteen or sixteen years previously. It was assumed by the court that, had the railway company not had possession

¹¹⁰ *Drummond v Milligan* (1890) 17 R 316.

¹¹¹ (1872) 10 M 704.

¹¹² Rankine, *Landownership*, p. 11; Hope, *Minor Practicks*, 10.1; P G B McNeill (ed), *The Practicks of Sir James Balfour of Pittendreich* (Stair Society volumes 21-22, 1962-3), 31.1; *Provinciall of the Blackfriars v Bervick* (1503) Mor 10597; *Stuart v Lundie* (1632) Mor 10617.

¹¹³ (1637) Mor 10618.

¹¹⁴ (1661) Mor 10618.

¹¹⁵ Stair, *Inst.* 2.3.73, 4.26.4, 4.26.10(7).

¹¹⁶ Erskine, *Inst.* 4.1.49-50; Bankton, *Inst.* 4.24.55; Burn-Murdoch, *Interdict*, para 90; Mackay, *Practice*, I,200; Rankine, *Landownership*, p. 12; W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-18; Walker, *Civil Remedies*, p 251; Reid, *Property*, para 146; T B Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W Green, 1962), p 466; *Watt v Maitland Macgill* (1823) 2 S 289.

¹¹⁷ Stair, *Inst.* 4.26.4, 4.26.10(7); Erskine, *Inst.* 4.1.49.

¹¹⁸ (1628) Mor Supp 55.

¹¹⁹ An action for mails and duties is an action for the rents of lands.

¹²⁰ (1866) 4 M 447.

for more than seven years, the pursuer would have been entitled to be restored to possession until the railway company proved its right.¹²¹

*Wilson v Henderson*¹²² is sometimes cited as authority for the same proposition.¹²³ In that case, attempts made over a period of five years to stop use of a road by challenging users and obstructing and ploughing up the road were held not to bar a possessory judgment to protect that use, where that use had been carried on for many years before that. However, it seems that the attempts to stop use of the road were unsuccessful. Accordingly, this is not a case of the possessory judgment being used to recover possession within seven years of its loss. However, the point is sufficiently made by *Dalmahoy v Horsburgh* and *Maxwell v Glasgow and South-Western Railway Co.*

(6) Standard of possession required

It is not enough simply to possess for the required period. One must possess in a particular manner. This has been said to be the manner required for acquisition of a right in land by positive prescription,¹²⁴ which, according to the present law, is possession that is held "for a continuous period...openly, peaceably and without any judicial interruption".¹²⁵ Thus the requirement has been said variously to be "peaceable possession",¹²⁶ "peaceful and uninterrupted" possession,¹²⁷ possession that is "continuous, without violence, not clandestine, not precarious and not unlawful"¹²⁸ and possession that is "open, peaceful and exercised as a matter of right".¹²⁹ Bankton, following Roman law,¹³⁰ requires possession that is not acquired by force, stealth or licence.¹³¹ In *Calder v Adam*,¹³² Lord Benholme observed that there could be no possessory judgment where the possession was "precarious, or violent", or where there was some other vice. In *Maxwel v Ferguson*,¹³³ it was held that the possessory judgment could not be founded on possession that was acquired by force or stealth. Burn Murdoch states the requirement as possession that is "peaceful, lawful and uninterrupted",¹³⁴ drawing the second of these from

¹²¹ (1866) 4 M 447, at 452 (*per* the Lord President), 454 (*per* Lord Deas) and 456 (*per* Lord Ardmillan).

¹²² (1855) 17 D 534.

¹²³ See Rankine, *Landownership*, p 12; Dickson, *Possessory Actions* para 1192.

¹²⁴ Reid, *Property*, para 146; Dickson, *Possessory Actions*, para 1192.

¹²⁵ Prescription and Limitation (Scotland) Act 1973, ss 1(1), 2(1)(a) and 3(1)(a) and (3). The period in question is ten years for the acquisition of ownership (s 1) and twenty years for other real rights in land.

¹²⁶ Erskine, *Inst.* 2.1.28.

¹²⁷ W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-21.

¹²⁸ Cusine & Paisley, *Servitudes and Rights of Way*, paras 16.19 and 23.09.

¹²⁹ Walker, *Civil Remedies*, p 251.

¹³⁰ Ulpian, D.43.17.1pr (interdict *uti possidetis*); D.43.31.1 (interdict *utrubi*).

¹³¹ Bankton, *Inst.* 2.1.33.

¹³² (1870) 8 M 645 at 648.

¹³³ (1673) Mor 10628.

¹³⁴ Burn-Murdoch, *Interdict*, para 90.

the decision in *M'Kerron v Gordon*,¹³⁵ which was suggested above to be wrongly decided.

None of this is very precise, but the general idea seems to be that the possessor has done so without any occurrence that could be characterised as a challenge to the right to possess, as for example where the possession was only attained through force.

The only dissent from this comes from Stair, who holds that the possessory judgment "will not be elided by an allegiance of its being clandestine, or having a vicious entry".¹³⁶ However, in light of the foregoing, it may be said that this has not been accepted as the law.

(7) Is good faith required?

It is inevitable that a possessory remedy, being based on possession rather than right, will on occasion protect someone whose possession is not in fact legally justified. Does it, however, make any difference whether the possessor knows that his possession is not legally justified? In other words, is there a requirement for good faith? Not all writers on the possessory judgment address this issue at all, and sometimes it is done only ambiguously. Thus, Rankine notes that the holder of a possessory judgment has the rights of a *bona fide* possessor,¹³⁷ but this could mean either that he was in good faith from the beginning of his possession or that he is only deemed to be in good faith from the granting of the possessory judgment. The same is true of Walker's statement that a party obtaining a possessory judgment is "entitled to be considered a bona fide possessor".¹³⁸ Unfortunately, neither cites any authority on the point. Most writers, however, consider good faith to be a requirement.¹³⁹

Reid denies that good faith is a requirement, holding that:

good faith is a consequence rather than a cause of a possessory judgment, for a party who has obtained a possessory judgment is deemed a bona fide possessor until such time as his title is judicially set aside.¹⁴⁰

Unfortunately, he cites no authority in support of the proposition that good faith is not required. He does however, note the case *Countess of Dunfermline v Lord Pitmedden*,¹⁴¹ in which possessory judgment was held to be excluded on the basis that the possession was originally on a lease derived from the same title that the possessory judgment was sought to exclude. Reid argues that this case, "which appears to be an authority to the contrary [of the proposition that good faith is not required], may be

¹³⁵ (1876) 3 R 429.

¹³⁶ Stair, *Inst.* 4.26.10(7).

¹³⁷ Rankine, *Landownership*, p 12.

¹³⁸ Walker, *Civil Remedies*, p 252.

¹³⁹ Burn-Murdoch, *Interdict*, para 89; W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-20; Rankine, *Landownership*, p. 12; Dickson, *Possessory Actions*, para 1192; Cusine & Paisley, *Servitudes and Rights of Way*, paras 16.19 and 23.09.

¹⁴⁰ Reid, *Property*, para 146.

¹⁴¹ (1698) Mor 10630.

explained on the basis of inversion of possession".¹⁴² No doubt it can. However, it is notable that the report of the case has the decision expressly based on a lack of good faith. The point about inversion of possession therefore appears to be merely a specific example of bad faith as a bar to the possessory judgment.

Reid also refers to a passage by Stair in which he says of those obtaining a possessory judgment that:

they do not only secure the profits they have made as *bona fide possessores*, but may continue to enjoy the future profits, till they be put *in mala fide*, by judicial production of a better right, by way of reduction, declarator or competition.¹⁴³

As Reid observes, the word "as" here can be construed in one of two ways, being read either as meaning that the holder of the possessory judgment was in fact in good faith or that he is treated as if he was in good faith. Reid, not implausibly, considers the latter more likely. The point is an important one, because Stair does not otherwise anywhere directly address the question of whether good faith is needed for a possessory judgment.

However, there is good reason to think that Stair did in fact believe good faith to be required. At one point we find him talking about the use of a possessory judgment to protect use of land as if by servitude.¹⁴⁴ He notes that, if use is left off for a time, the apparent owner of the land will be able to resist the use of the apparent servitude. He does not say, unfortunately, what length of time will have this effect, but as we have seen the possessory judgment is still available until seven years' non-possession. It may be taken therefore that this period is the intended one. The apparent owner will then have had seven years' possession without the servitude being exercised, and so will himself be entitled to a possessory judgment. Stair, though, says that the reason he is entitled to a possessory judgment to resist the exercise of the servitude is that he has possessed "*bona fide*, without any such burden". The implication of this is that a possessory judgment is awarded not because one has possessed, but because one has possessed in good faith.

It is accepted that the possessory judgment is not available as a defence to claims based on *debita fundi*, payment obligations attached to the land.¹⁴⁵ In the section immediately following the one referred to in the last paragraph,¹⁴⁶ Stair says that the reason for this is that such obligations are made "notour" by infeftment. They will appear in the

¹⁴² Reid, *Property*, para 146 n 4.

¹⁴³ Stair, *Inst.* 4.26.3, cited Reid, *Property*, para 133 n 5. The account here of the ways in which a person may be put into bad faith is consistent with Stair's general view that this normally requires litigation: Stair, *Inst.* 2.1.24.

¹⁴⁴ Stair, *Inst.* 4.17.2.

¹⁴⁵ Bankton 2.1.33; *Adamsons v Lord Balmerino* (1662) Mor 10645; *Hadden v Moir* (1673) Mor 10648. As we saw in *Loch v Lockie*, noted earlier, the possessory judgment can, however, be used for the enforcement of the *debitum fundi* itself (in that case, an annualrent).

¹⁴⁶ Stair, *Inst.* 4.17.3.

Register of Sasines,¹⁴⁷ and so the public has notice of them. Of course, the same is true of claims based on titles of ownership, so it does not appear that Stair is correct here: the better view appears to be that given by Bankton,¹⁴⁸ that the reason why the possessory judgment is not a good defence to a claim for a *debitum fundi* is that such a claim does not challenge the present state of possession. For present purposes, though, the point is that Stair's view appears to be based on the idea that the possessory judgment is not available as a defence where the possessor ought to have been aware of the contrary claim. In other words, only a possessor who is in good faith will be entitled to the possessory judgment.

It is suggested, therefore, that Stair does consider good faith to be a requirement for the possessory judgment. Supportive of this conclusion is the fact that he refers to the possessory judgment in his account of the rights of the possessor in good faith,¹⁴⁹ giving as the only distinction the requirement with the possessory judgment for a longer period of possession.

Bankton too says that the possession must be "attained *bona fide*".¹⁵⁰ There is also caselaw supportive of this view. For example, in *Ross v Fisher*,¹⁵¹ a party had obtained possession of an area of ground on the basis of a deed which stated that the ground was burdened by a servitude in favour of a third party. He then had the granter of that deed grant it anew without reference to the servitude, considering that the servitude had been included improperly. He then destroyed the original deed. He was denied a possessory judgment against the party asserting the existence of the servitude, apparently on the basis of bad faith. Lord Balgair said in that case:

as it is impossible to refer his possession of the ground in dispute to any bona fide title, he cannot claim the benefit of a possessory judgment.¹⁵²

We saw earlier that one could not normally obtain a possessory judgment in the face of an earlier decree on the question of right. In two of the cases referred to there,¹⁵³ the decisions as reported are expressly based on the possessor being put into bad faith by the earlier decree, going in fact beyond Bankton's view, and implying that good faith must be continued through the whole period of possession.

Finally, in *Boyd v Kirkcudbright County Council*,¹⁵⁴ the sheriff expressly stated that good faith was a requirement. Indeed, he went so

¹⁴⁷ This is a public register of deeds relating to land, established by the Registration Act 1617. It is now being progressively replaced by a newer register, called the Land Register, created by the Land Registration (Scotland) Act 1979. The 1979 is itself prospectively repealed and replaced by the Land Registration etc (Scotland) Act 2012.

¹⁴⁸ Bankton, *Inst.* 2.1.33.

¹⁴⁹ Stair, *Inst.* 2.1.24.

¹⁵⁰ Bankton, *Inst.* 2.1.33.

¹⁵¹ (1833) 11 S 467.

¹⁵² (1833) 11 S 467 at 470.

¹⁵³ *Montgomery v Home* (1664) Mor 10627; *Anderson v Forbes* (1696) Mor 10630.

¹⁵⁴ 1937 SLT (Sh Ct) 17.

far as to suggest that the need for good faith was the reason why it was necessary to show an apparent title to the land.¹⁵⁵

It seems clear, therefore, that good faith is a requirement. However, this is qualified by Rankine, who holds only that:

in a question between the possessor and him from whom it was obtained or his authors, it must be *bonâ fide* possession.¹⁵⁶

If correct, it would explain why in *Montgomery v Home*¹⁵⁷ possessory judgment was refused to the occupier of land following a decree of removing, but in *Innes v Allardyce*¹⁵⁸ interdict was allowed against third parties even though the lease on which the possession was based had been reduced. This would also be consistent with the position in Roman law, in which it was only relevant that possession was obtained wrongfully in a dispute with the person from whom the possession was acquired.¹⁵⁹ However, there is no warrant in the authorities for holding the requirement for good faith to be restricted in this manner. In all authorities requiring good faith, there is no suggestion that the requirement is anything other than general. Indeed, the position is rather to the contrary. In *Ross v Fisher* and *Boyd v Kirkcudbright County Council*, the party seeking the protection of the possessory judgment was in opposition, not to his author or a predecessor in title, but to a successor in title to his author. Nor indeed was it even an immediate successor in title. This cannot be a special factor in these cases: in a feudal system of land tenure, if one traces title back far enough, two owners will inevitably have a common author. Added to this, in all authorities requiring good faith, there is no suggestion that the requirement is anything other than general.

On the other hand, it is a different question altogether whether good faith ought to be required. Arguably, the law is misguided in requiring good faith, as to enquire into that is to begin to enquire into matters that are not the concern of the court in purely possessory proceedings. It is notable that good faith is not required in proceedings for spuilzie or for acquisition of ownership by positive prescription.

(8) Effect of a possessory judgment

The general effect of a possessory judgment is that the holder's title is treated as valid unless and until court proceedings are successfully pursued for the reduction of that title.¹⁶⁰ As we have seen, the possessory

¹⁵⁵ This is because the importance, noted earlier, of written titles means that a possessor without such a title could in the normal case never be in good faith as to the right to possess.

¹⁵⁶ Rankine, *Landownership*, p 11. See also Dickson, *Possessory Actions*, para 1192.

¹⁵⁷ (1664) Mor 10627.

¹⁵⁸ (1822) 2 S 93.

¹⁵⁹ Paul, D.43.17.2.

¹⁶⁰ Stair, *Inst.* 4.22.14, 4.26.1.3; Ersk, *Inst.* 2.6.28, 4.1.50; Bankton, *Inst.* 2.1.33; *Pollock v Anderson* (1663) Mor 10634. Rankine (*Landownership*, p 12) adds "or he is otherwise put in *malâ fide*", but this is not justified by his cited sources.

judgment is a possessory remedy, and so it is not permitted at that time to raise questions of right. Reid's statement, therefore, that the possessory judgment "gives rise to a presumption of validity of title which it is for a challenger to rebut",¹⁶¹ requires to be qualified if it is taken to suggest that that presumption is capable of being rebutted in the possessory proceedings.

As the possessory judgment has the effect of excluding any objections to the validity of the possessor's title in those proceedings, it may be used by either pursuer or defender. Examples in the sources include the possessory judgment being used as a defence to an action of removing,¹⁶² or for the recovery of possession,¹⁶³ or by either party in an action for mails and duties.¹⁶⁴ The possessory judgment also can be used to justify acts ancillary to the right to possession. For example, in *Nelson's Trs v M'Caig*,¹⁶⁵ it was accepted that the award of a possessory judgment on a claimed servitude or public right of way would justify a neighbour in carrying out repair works on the road.

Stair does, however, give one exception to the rule that a possessory judgment may be used for the recovery of possession, in the case of leases. While seven years' possession on a lease is sufficient for the defence of possession, one who has possessed on a lease "cannot recover possession *activè* by a possessory judgment, as an infeftment may".¹⁶⁶ Unfortunately, Stair gives no rationale for this limitation, which is not given by any other institutional writer. It is also contradicted by the decision in *Little v Irving*,¹⁶⁷ in which a tenant was allowed to use the possessory judgment to recover possession, but in which this passage from Stair was unfortunately not cited to the court.

In the case of competing claims to ownership and a servitude over the same land, Stair says that the one possessing the land as apparent owner may have a possessory judgment until the servitude is established by declarator.¹⁶⁸ Walker is surely correct, though, to say that the matter is different when the party claiming the servitude is himself entitled to a possessory judgment.¹⁶⁹ In such a case, seven years' possession by the possessor of the land itself will be no defence to a claim for a possessory judgment by the party claiming the servitude.¹⁷⁰ Indeed, were it not so, it is difficult to see how one exercising an apparent servitude could ever qualify for a possessory judgment unless the burdened property had been left unpossessed through the seven years.

As noted earlier, it is established that a possessory judgment is no defence against a claim for a debt attaching to the land.¹⁷¹ As we have

¹⁶¹ Reid, *Property*, para 146.

¹⁶² Stair, *Inst.* 4.26.10; Hope, *Minor Practicks*, X.1.

¹⁶³ *Richmond v Inglis* (1842) 4 D 769.

¹⁶⁴ Erskine 4.1.49; Stair 4.22.14, 4.22.16, 4.26.4; Bankton 4.24.49.

¹⁶⁵ (1899) 7 SLT 244.

¹⁶⁶ Stair, *Inst.* 4.22.16.

¹⁶⁷ Unreported, 25.1.2000, Dumfries Sheriff Court.

¹⁶⁸ Stair, *Inst.* 4.17.3.

¹⁶⁹ Walker, *Civil Remedies*, p 251.

¹⁷⁰ *Porterfield v M'Millan* (1847) 9 D 1424; *Drummond v Milligan* (1890) 17 R 316.

¹⁷¹ *Adamsons v Lord Balmerino* (1662) Mor 10645; *Hadden v Moir* (1673) Mor 10648.

seen, although Stair based this limitation on the need for good faith, Bankton's view seems preferable: for him, the reason that the possessory judgment is no defence in this case is that these rights do not give any right to possession of the land, and so do not involve any challenge to the existing possession of the land. They are therefore not relevant in possessory proceedings regarding that land.¹⁷²

C. SHOULD THE POSSESSORY JUDGMENT BE ABOLISHED?

(1) Introduction

The possessory judgment continues to be a competent remedy. In practice, however, it is now rarely if ever used. For the defence of possession, the general remedy of interdict is normally used (whether *ad interim* or permanent),¹⁷³ full proof of right not being necessary for such a remedy.¹⁷⁴ For recovery of possession of land, the normal remedies of removing and ejection¹⁷⁵ are generally used.¹⁷⁶ Indeed, so much have the possessory remedies been forgotten - not just the possessory judgment - that one writer was able to write a substantial account of the consequences of possession without mentioning them at all.¹⁷⁷

If a remedy provided by the law is rarely used, that raises the question of whether that remedy is needed at all. The view has certainly been taken that the possessory judgment should be abolished.¹⁷⁸ Of course, it may be that a rarely used remedy still has value. It may be, for example, the only remedy provided in a situation where it is reasonable that a remedy should exist. For example, although *spuilzie* is a rarely used remedy, it is the only protection given to certain possessors, such as hirers of goods.¹⁷⁹ It may also be found helpful where there is a genuine dispute over the scope of a conveyance from a larger area.¹⁸⁰

¹⁷² Bankton, *Inst.* 2.1.33.

¹⁷³ Reid, *Property*, para 145 n 10; W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-31; Dickson, *Possessory Actions*, para 1184. For full discussion of the remedy of interdict, see Scott Robinson, *Interdict*.

¹⁷⁴ Scott Robinson, *Interdict*, p 13; Burn-Murdoch, *Interdict*, para 149.

¹⁷⁵ This should not be confused with the possessory remedy of ejection, which is a response to the ejection of a possessor. Ejection in the present sense is an action seeking the removal of the current possessor.

¹⁷⁶ The distinction between ejection (in the sense meant here) and removing is broadly that the former is used where the possessor never had any right to possess. The latter is used when the possessor did at one time have such a right. See Reid, *Property*, para 153.

¹⁷⁷ R Sutherland, *Possession in Scots Law: A Comparative Response* in E Atwooll (ed), *Perspectives in Jurisprudence* (Glasgow: University of Glasgow Press, 1977).

¹⁷⁸ See e.g. W M Gordon in two commentaries on *Watson v Shields* (1994 SCLR 826G-827A; 1996 SCLR 84F-G).

¹⁷⁹ C Anderson, "Spuilzie today" 2008 SLT (News) 257 at 260. Cf *Scottish National Report*, para 3.1.3(b).

¹⁸⁰ *Matheson v Stewart* (1872) 10 M 704. The court did not base its decision expressly on *spuilzie*, but clearly proceeds on the view that one recently dispossessed should be restored to possession until the question of right is considered.

The principle has been accepted in Scots law that possession of property gives rise to at least some limited protection until the question of right is considered. That principle is reflected in the possessory judgment. There is a problem, however, in that there are other procedures that will often provide the same result.

(2) Protection of possession

Insofar as the possessory judgment operates to prohibit interference with possession, it overlaps with the general remedy of interdict, which is an order from the court prohibiting some particular form of conduct.

When is interdict available to protect possession of land? There are four possible situations, depending on whether the possessor has an apparent written title and whether the challenger has an apparent written title.¹⁸¹ As the possessory judgment requires such a title, we need not detain ourselves with the cases where the possessor has no title. However, briefly, the rule seems to be that a possessor without title will only be entitled to interdict to protect that possession if the challenger also has no title.¹⁸²

For cases in which the possessor does have a written title, *Colquhoun v Paton*¹⁸³ is the leading case. In that case, Colquhoun had built piers on the shore of his land, and charged a fee to daily steam-boats landing there, except on Sundays, when the piers were closed. He was held entitled to interdict against parties trying to use the piers on Sundays. Lord Cowan, giving the judgment of the court, laid down the test for interdict against interference with possession of land.¹⁸⁴ First, he says, an apparent title must be shown. Second, either the challenger will have an apparent title or he will not. Where the challenger has no apparent title, interdict will be granted, provided the normal requirements for interdict are met. Where, on the other hand, both possessor and challenger have apparent titles, the party with seven years' possession will be preferred.

In other words, it is only in this specific situation, where both parties have an apparent title, that recourse to the possessory judgment is necessary for the defence of possession. Even then, possession for under seven years by a previous possessor may be enough to found an interdict, if the present possessor does not qualify for a possessory judgment.¹⁸⁵

¹⁸¹ This can obviously not apply in the case of real rights not requiring writing for their constitution, such as servitudes. For the requirements for interdict in such cases, see Scott Robinson, *Interdict*, pp 17-18.

¹⁸² *Irvine v Robertson* (1873) 11 M 298 (challenger with no title: interdict granted); *Watson v Shields* 1996 SCLR 81 (challenger with apparent title: interdict refused).

¹⁸³ (1859) 21 D 996. See also *London, Midland, and Scottish Railway Co v M'Donald* 1924 SC 835.

¹⁸⁴ (1859) 21 D 996 at 1001.

¹⁸⁵ *Stair, Inst.* 4.26.10(7).

(3) Recovery of possession

As we have seen, the possessory judgment may be used to recover possession. There is thus a potential overlap here with spuilzie. As spuilzie is intended for cases of recent dispossession, it seems appropriate to make a distinction on that ground. We shall consider first cases of recovery of possession following a recent dispossession, and then other cases of recovery of possession.

(a) Recovery of possession following recent dispossession. We have seen that Scots law provides the remedy of spuilzie for cases of dispossession. One who is in possession is entitled not to be dispossessed and, if dispossession does occur, he is entitled to be restored to possession pending resolution of the question of right. This is intended to be a remedy for recent dispossession: formerly, the action had to be brought within three years of the dispossession.¹⁸⁶

Where, then, does the possessory judgment fit in? It may be that the possessory judgment did not at first allow the recovery of possession: Hope, writing in the first half of the seventeenth century, considers spuilzie to be the appropriate remedy for dispossession,¹⁸⁷ with the possessory judgment being only for the preservation of possession.¹⁸⁸ However, as we have seen, it is accepted that the possessory judgment may also be used to recover possession, with the advantage that it may be used for up to seven years of non-possession.

Concerning ourselves for the moment only with the recovery of possession recently lost, we may ask whether the possessory judgment is actually necessary. Thus, for example, we saw that in *Macdonald v Watson*¹⁸⁹ one entitled to a possessory judgment to protect an apparent public right of way was held not to be liable to the landowner for demolishing a wall he had built across the road. This was based on possession for a period exceeding seven years. However, the outcome was the same in *Graham v Sharpe*,¹⁹⁰ in which the facts were in effect identical except that, in the latter case, there had been only three years' possession. The remedy in this case seems clearly enough based on the general right of a possessor not to be dispossessed.

Again, we saw that, in *Richmond v Inglis*,¹⁹¹ a possessory judgment was granted to the effect of reversing a recent dispossession. In *Matheson v Stewart*,¹⁹² the outcome was the same even though the majority of the

¹⁸⁶ Act 1579, c. 81 (APS III, 145, c. 19). Johnston appears to be justified in arguing that, in the current law, the right to pursue an action for spuilzie prescribes in twenty years (D Johnston, *Prescription and Limitation* (Edinburgh: W Green, 1999), para 6.30), a rather surprising result for a remedy of this nature. He further argues (para 7.14) that this occurs under s 7 rather than s 8 of the Prescription and Limitation (Scotland) Act 1973, as the action for spuilzie is concerned with a right against the specific dispossessor rather than enforcement of a real right.

¹⁸⁷ Hope, *Minor Practicks*, X.3.

¹⁸⁸ Hope, *Minor Practicks*, X.1.

¹⁸⁹ (1830) 8 S 584.

¹⁹⁰ (1823) 2 S 540.

¹⁹¹ (1842) 4 D 769.

¹⁹² (1872) 10 M 704.

court took the view that the possessory judgment was inapplicable on the facts of the case. Instead, the decision was based on the principle that, in cases of disputed right, *melior est conditio possidentis*. As a result, the possessor was entitled not to be dispossessed pending resolution of the question of right.

It appears, therefore, that the possessory judgment is unnecessary in the reversal of recent dispossession, the issue being adequately dealt with already by *spuilzie*. More than this, though, the existence of remedies that overlap in this way has the potential to cause confusion. This appears in *Dickson v Dickie*.¹⁹³ In this case, there was a dispute over an outside toilet adjoining subjects belonging to Dickie. Dickson was the owner of neighbouring land. Dickson dispossessed Dickie by changing the lock on the toilet door. Dickie sought a possessory judgment to compel Dickson to restore possession to him. Dickie had a written title, but was not yet *infekt*,¹⁹⁴ and there was some discussion of whether this was a barrier to the granting of a possessory judgment. However, in the event, the court took the view that a possessory judgment was not the appropriate remedy anyway. The Lord Justice-Clerk, giving the leading opinion, said:

It seems to me very clear that the proper remedy of the petitioner [Dickie] was not an interdict [*i.e.* a possessory judgment], but an action of ejection, or rather an action of intrusion.¹⁹⁵

The other judges concurred. The Lord Justice-Clerk appears here to proceed on the assumption that a possessory judgment is not available to bring about the restoration of possession, and that instead the possessory remedies are the possessory judgment to prevent dispossession and ejection or intrusion for the restoration of possession. As we have seen, this is not the accepted position.¹⁹⁶

(b) Recovery of possession otherwise. The same four possibilities exist here as with protection of possession, depending on whether the possessor has an apparent title and whether the party seeking possession has such a title. We are concerned here mostly with possession of land rather than of subordinate real rights. In the latter case, matters will normally proceed by way of action for interdict to prohibit exercise of the right.¹⁹⁷

In the normal case, if the party seeking to recover possession has no kind of title, that will be an insuperable obstacle to success. The one exception to this arises where the possessor's title is derived from the challenger. As Stair says:

¹⁹³ (1863) 1 M 1157.

¹⁹⁴ *I.e.* his right had not yet been made real by *infektment*.

¹⁹⁵ (1863) 1 M 1157 at 1161.

¹⁹⁶ The confusion is not limited to the court in this case. Despite what has been said, Mackay (*Mackay*, Practice I,200(b)) includes this case in his account of the possessory judgment, observing that it "was decided on the special circumstances of that case, and not of possessory judgment being competent without a title". The only "special circumstances" are that this is not a case of possessory judgment at all, according to the court.

¹⁹⁷ See *e.g.* Cusine & Paisley, *Servitudes and Rights of Way*, para 23.08 on interdict against interference with a public right of way.

If the possessor have been introduced by the pursuer, he cannot require any title for the removing at the pursuer's instance.¹⁹⁸

Thus, a squatter has sufficient title to remove a tenant deriving title from him.¹⁹⁹ The reason for this, as Reid says, is that in such a case

the validity of the title of the defender [*i.e.* the party in possession] necessarily supposed the validity of the title of the pursuer.²⁰⁰

As a result, the defender cannot question the pursuer's title without questioning his own.

Where the party seeking possession has an apparent title and the possessor doesn't, the position appears to be that the party seeking possession will obtain it without having to prove the validity of his title. The leading case here is *Mather v Alexander*.²⁰¹ In this case, the pursuer had an apparent title to an area of foreshore. He sought the ejection of the defender, a squatter, who had erected a temporary shelter there. The Court of Session, by a majority decision, held that the pursuer did not have to prove his title. Lord Hunter put it like this:

There are cases where a pursuer, without necessarily having a title good against the world, may say to a defender, 'You, at all events, have no interest to dispute the title I produce, and to put me to an expensive proof of its validity'.²⁰²

This opinion appears doubtful in principle. A title, meaning an apparent real right in the property, must be (to use Lord Hunter's words) "good against the world" or else no good at all. A title is not improved by recording in the Register of Sasines if it is invalid to start with.²⁰³ If it was the case that the pursuer's title was invalid, then he had no more right than the defender to possess the land. The Lord Justice-Clerk's dissenting opinion seems well founded:

the Court is asked to take for granted an essential element of the pursuer's case.²⁰⁴

The pursuer could have been awarded possession and then have it turn out that he had no right to possess after all. Nonetheless, the majority's

¹⁹⁸ Stair, *Inst.* 4.26.8.

¹⁹⁹ *Chisholm v Chisholm* (1898) 14 Sh Ct Rep 146.

²⁰⁰ Reid, *Property*, para 144.

²⁰¹ 1926 SC 139.

²⁰² 1926 SC 139 at 148.

²⁰³ This is because the principle *nemo dat quod non habet* applies in the Register of Sasines. This differs from the Land Register, in which the person registered as owner becomes owner by virtue of that registration: Land Registration (Scotland) Act 1979, s 3. The Land Registration etc (Scotland) Act 2012, s 50 prospectively restores the common law position, subject to protections for good faith acquirers contained in s 86 of the 2012 Act.

²⁰⁴ 1926 SC 139 at 152.

opinion on the matter carries with it the authority of Stair,²⁰⁵ although the situation may be different if the defender is able to point to some specific defect in the pursuer's title,²⁰⁶ or alleges that the property is owned by a named third party.²⁰⁷ However that may be, though, the importance of this point for present purposes is that it is only where both pursuer and defender have apparent titles that the possessory judgment is relevant. In such a case, one seeking to recover possession has the option of either proving title or relying on the possessory judgment, proving seven years' possession on a title apparently valid and sufficient, not more than seven years in the past.

(4) Reasons for abolishing the possessory judgment

When considering whether the possessory judgment should be abolished, we must firstly note that it is of limited scope. As the law stands, the possessory judgment is not necessary in a case of recent dispossession, including recent interference with the exercise of a subordinate real right. Nor is it normally necessary in a case where one party has an apparent title and the other does not.

Of course, the limited scope of a remedy is not sufficient argument in itself for the abolition of that remedy. However, the extent of overlap between the possessory judgment and other remedies is likely to lead to confusion. Adequate remedies exist, even without the possessory judgment, to protect possession that is threatened and to allow the recovery of possession once lost. Given the existence of the general remedy of interdict, no great harm seems likely to result from the removal of the possessory judgment as a remedy for threatened acts or acts falling short of dispossession. This impression is reinforced by the apparent fact that this move to the use of the general remedy of interdict has happened anyway.

In cases of recovery of possession once lost, the existence of the possessory judgment seems to be a positive mischief. As we have seen, it has been stated that the law allows the benefit of the possessory judgment to survive for seven years of non-possession. Thus, in *Maxwell v Glasgow and South-Western Railway Co*,²⁰⁸ the owner of land sought to have removed certain works that were established by the defenders for railway purposes on his land a number of years previously. It was accepted by the court that, had these works been established within the previous seven years, the landowner would have been able to obtain a possessory judgment to the effect of having these works removed. It seems, however, rather startling that an individual should be allowed to stand by for - say - six years, and then require expensive works to be undone which, it may turn out, the other party was entitled to carry out after all. We have seen that there is a remedy for recent dispossession; where, by contrast, the dispossession happened at some much earlier time, it seems little hardship to require one disputing that possession to prove right.

²⁰⁵ Stair, *Inst.* 4.26.15.

²⁰⁶ *Bain v Bain* [2006] CSOH 198 at para [7].

²⁰⁷ *Lock v Taylor* 1976 SLT 238.

²⁰⁸ (1866) 4 M 447.

(5) Reasons for retaining the possessory judgment

Of all writers, only Gordon and Wortley²⁰⁹ provide any reason for retaining the possessory judgment, namely that it may be the only option to protect the possession of one with no completed title. Arguably, however, one who does not complete his title in the manner required by law does so at his own risk, and should not be protected from the results of his own carelessness. As has been said in a different context:

however equity may afford relief, by *undoing* what has been illegally done, it cannot, in a question with third parties, supply the want of those things which, though required by the law, have been left *undone*.²¹⁰

There seems little reason, therefore, to retain the possessory judgment in the interest of those who do not look to their own interest.

The only other argument for retaining the possessory judgment appears to be that, in the case of a person exercising an apparent servitude, often use over an extended period of time will be the only way of distinguishing such a person from a casual trespasser. However, to require seven years' use appears excessive for this purpose.

D. CONCLUSIONS

It is not intended here to deny the usefulness of possessory remedies. Rather, the problem is that Scots law appears to have a surplus of remedies for possessory situations. In addition to the possessory judgment, there is for recovery of possession the remedy of spuilzie, and for the protection of possession the general remedy of interdict. Some simplification seems possible. Given that it appears alternately to over-protect (in allowing one to recover possession for up to seven years) and under-protect (in requiring possession for seven years before it is available), the possessory judgment seems the obvious candidate for removal.

²⁰⁹ W M Gordon & S Wortley, *Scottish Land Law*, 3rd edn (London: W Green/Thomson Reuters, vol 1, 2009), para 14-32.

²¹⁰ *Salter v Knox & Company's Factor* (1786) Mor 14202 at 14203.