AUTHOR(S): ANDERSON, C.

TITLE: Delivery of goods in the custody of a third party: the role of the custodier.

YEAR: 2017

Publisher citation: ANDERSON, C. 2017. Delivery of goods in the custody of a third party: the role of the custodier. Edinburgh law review [online], 21(2), pages 143-168. Available from: https://doi.org/10.3366/elr.2017.0408

OpenAIR citation: ANDERSON, C. 2017. Delivery of goods in the custody of a third party: the role of the custodier. Edinburgh law review, 21(2), pages 143-168. Held on OpenAIR [online]. Available from: https://openair.rgu.ac.uk

DELIVERY OF GOODS IN THE CUSTODY OF A THIRD PARTY: THE ROLE OF THE CUSTODIER

Craig Anderson[*]

A. INTRODUCTION

(1) Background

Delivery, formerly a general requirement in the transfer of ownership of corporeal moveables, is nowadays of much more limited application. Since the coming into force of the Sale of Goods Act 1893 (now the Sale of Goods Act 1979), transfer of ownership of corporeal moveables in the case of sale has been governed by the parties' intentions.[1] Nonetheless, delivery still has a role in the law. It is still necessary in cases other than sale, and is also necessary for the creation of a real right of pledge. In addition, the Sale of Goods Acts have preserved a minor role for delivery in sales of goods.[2]

Delivery most often happens by the physical handing over of the goods by transferor to transferee. This, though, is not the only way in which delivery can occur. Delivery, in the technical sense meant here, is a transfer of possession from one person to another.[3] It is no novelty to say that possession may be acquired from another in a number of ways. Not all deliveries take the form of goods being placed by the transferor directly into the transferee's hand. Other possibilities include the delivery of the key to the place in which the goods are kept (the *traditio clavium* of Roman law).[4] Likewise, delivery may occur in the form known as *traditio brevi manu*, where the transferee already has custody of the property being transferred, custody being defined here as the physical holding of property, but without the

[*] Lecturer in Law, Robert Gordon University. I acknowledge the helpful comments of my colleague, David Christie, on a draft of this article, and also of the anonymous reviewers.

[1] Sale of Goods Act 1979 s 17.

[2] See Sale of Goods Act 1979 ss 24 and 25. See also the position on passing of risk in consumer sales, as contained in the Consumer Rights Act 2015 s 29(2). This makes the passing of risk depend on the acquisition of possession by the purchaser.

[3] For discussion of this issue, see C Anderson, *Possession of Corporeal Moveables* (2015) paras 1-45 - 1-57.

[4] Bell, *Comm* I, 186-187; W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd edn (1975) 227.

intention to hold for oneself that is necessary for possession.[5] In such a case, no further act of delivery is required beyond the consent of the parties.[6] Again, delivery may occur by *constitutum possessorium*, where it is agreed that the transferor will continue to hold custody of the property on a different basis, the transferee then having civil possession through the transferor's acts.[7]

Possession may be held either by the possessor directly, or alternatively it may be held indirectly through another holding on the possessor's behalf, as for example where an agent holds the property on behalf of the principal. A possessor who holds personally is said to have natural possession. A possessor who holds through another is said to have civil possession.[8]

We are concerned here with the acquisition of civil possession from another who also had civil possession only. The situation envisaged is that the property is in the custody of a third party - perhaps the keeper of a warehouse[9] - who holds on behalf of the transferor, the intention being that the custodier will instead hold for the transferee. Throughout, the property stays in the custody of this third party. This is a recognised form of delivery, as we shall see. It depends on intimation of the transfer being given to the custodier, normally by means of a delivery order in favour of the transferee and addressed to the custodier. This article looks at the role of the custodier in the process. How do the parties relate to the custodier? What must the parties and the custodier do to effect delivery?

First, a point of terminology must be addressed. There is no name specific to this form of delivery. The term "constructive delivery" is often used for it, but that name extends also to any case of "transmission of title without the necessity of an actual handing over of natural possession to the transferee",[10] thus including also *traditio brevi manu* and *constitutum possessorium*. It has also been used for *traditio*

[5] Anderson, *Possession* (n 3) para 1-13. For example, an employee holding goods in the course of employment has not possession, but custody only, as the employee holds entirely on the employer's behalf rather than for himself or herself.
[6] K G C Reid, *The Law of Property in Scotland* (1996) para 622 (Gordon).
[7] On the effectiveness of *constitutum possessorium* as a form of delivery, see Reid, *Property* (n 6) para 623 (Gordon). For examples, see e.g. *Orr's Trustee v Tullis* (1870) 8 M 936; *Mathieson v Rennet* (1903) 5 F 591 at 596-598 per Lord Young (dissenting); *Park, petitioners* [2009] CSOH 122, 2009 SLT 871 at para [23]. In none of these cases is the term *constitutum possessorium* actually used, however.
[8] See Anderson, *Possession* (n 3) paras 1-18 – 1-22.
[9] This is the most common scenario in the reported cases, but there are other possibilities, such as a creditor holding property on pledge or a workman working on goods belonging to a third party. On the last, see *Eadie v Mackinlay* 7 Feb 1815, FC.
[10] D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* 2nd edn (2005) para 8.20. See also A J M Steven, *Pledge and Lien* (2008) paras 6-27 - 6-28.

clavium.[11] As this article is not concerned with those forms of delivery, a more specific term seems necessary. For this article, therefore, the form of delivery with which we are concerned will be referred to as "delivery by transfer of civil possession".

(2) The assignation theory

In a previous article, this writer considered the nature of this form of delivery.[12] It was seen there that the basis of this form of delivery is unclear. Certainly, it is not universally recognised in systems with a delivery requirement in the transfer of corporeal moveable property. It was proposed in the previous article that transfer of civil possession operates by means of an assignation of the right to enforce the obligations owed by the custodier. The idea is that the transferor's civil possession depends on the obligations owed to him or her by the custodier and that, therefore, if the right to enforce those obligations is transferred to another person then civil possession is also transferred to that person when intimation of the assignation is made to the custodier.[13] This was referred to as the "assignation theory" of transfer of civil possession, and the same term will be used in this article. As we proceed, consideration will be given to whether any further support can be found for the assignation theory.

B. THE ROLE OF THE CUSTODIER

The custodier is an essential participant in the process of delivery by transfer of civil possession. It is, though, easy to see the custodier as simply the passive recipient of intimation. The purpose of this article is to look more closely at the custodier's role in the process, considering both what must be done by the parties to the transfer and also whether any action by the custodier is necessary.

(1) Intimation must be made to the actual custodier

[11] *Gauld v Middleton* 1959 SLT (Sh Ct) 61 at 62, where one of the examples given of constructive delivery is a *traditio clavium*.
[12] C Anderson, "Delivery of goods in the custody of a third party: operation and basis" (2015) 19 Edin LR 165.
[13] For discussion of how the intimation is made, see Anderson, *Delivery* (n 12) at 172-175.

Where the goods to be delivered are in the custody of someone other than transferor and transferee, delivery is effected when intimation of the transfer is made to the custodier. In the standard case of delivery of this kind, the custodier will be someone with whom the transferor has a contractual relationship, in terms of which the custodier is obliged to take care of the goods and hold them on the transferor's behalf. The suggestion is that delivery of this kind involves assignation, in favour of the transferee, of the transferor's personal right against the custodier. Assignation of a personal right, of course, requires intimation of that assignation to the debtor. The assignation is not effective against the debtor until that is done. Before intimation, the transferor has possession based on this personal right against the custodier. After intimation has been made, the custodier holds on behalf of the transferee instead, giving the transferee possession on the same basis as it was previously held by the transferor.

The assignation theory draws support from the fact that there does not seem to be any decided case in Scotland, concerned with delivery of goods in the custody of a third party, where delivery has been held to have occurred without intimation.[14] The question, though, is to whom intimation must be made. Two situations can be distinguished. The first is the straightforward situation where the transferor has dealt directly with the custodier. The second is where arrangements for the custody of the goods have been made, not by the transferor personally, but by an agent acting on behalf of the transferor. These two situations will be considered separately.

(a) Where the transferor has dealt directly with the custodier. This situation is straightforward in principle. Without exception, it has been held that delivery occurs when intimation has been made to the custodier. The only practical difficulty is determining who the custodier is, where there is more than one person with some level of access to or control over the goods.

The difficulty can be seen in *Dobell, Beckett & Co v Neilson (No 2)*,[15] which was concerned with the creation of a pledge through a transfer of civil possession. There is no difficulty with this in principle: civil possession is as good for this purpose as natural possession. The actual decision, however, is problematic on the

[14] For discussion of this requirement, see Anderson, *Delivery* (n 12) at 172-173.
[15] (1904) 7 F 281.

facts of the case.[16] M'Dowall & Co gave to Neilson, as security for a loan, a delivery order for a quantity of timber stored in Connal & Co's timber yard. The delivery order was addressed not to Connal & Co, but to Haggart & Co, timber measurers engaged by M'Dowall & Co to stack timber in the yard and arrange for its removal when sold. The practice of timber yards in the area was to allow measurers complete access to timber stored in the yard. Because rent paid by customers was based, not on the size of the stack, but the extent of the ground covered by it, Connal & Co paid little attention to removals of timber, except for the final removal leaving the ground free. On this basis, it was argued that the timber was in the custody, not of Connal & Co, but of Haggart & Co and that, accordingly, intimation to Haggart & Co gave Neilson possession of the timber. However, the Lord Ordinary, with whose view the Inner House concurred, held that there had been no delivery to Neilson,[17] holding that, although Haggart & Co had free access to the timber, this was "not because they were custodiers, but because they represented and had the authority of M'Dowall and Neilson".[18] Instead, Connal & Co were held to be custodiers. This, though, seems doubtful. One does not have custody of a thing by virtue solely of the fact that the thing is on one's land.[19] If I leave my bike in a friend's driveway, I retain custody of the bike. I am the only person who has carried out possessory acts, and that relationship of possession persists until something happens to make me lose that possession.[20] That this is the case is even clearer where (as in *Dobell, Beckett & Co v Neilson*) the occupier of the land makes no attempt to restrict my ability to remove my property. Similarly, if I am tenant of a flat, it is I who have custody of my items within the flat, not the landlord. Custody is based on physical acts with respect to the property. In *Dobell, Beckett & Co v Neilson*, all of the physical acts with respect to the property were carried out by the measurers rather than by Connal & Co, and so the measurers appear to have been in fact the custodiers. To test this, we may consider what the conclusion would have been had M'Dowall & Co acted without the

[16] See also below, part C(1).
[17] In addition to the ground of decision discussed below, the decision was also reached on the basis that Haggart & Co were servants of the transferors. On this point, see e.g. *Anderson v M'Call* (1866) 4 M 765.
[18] (1904) 7 F 281 at 286.
[19] *Brown v Watson* (1816) Hume 709. For discussion of this issue, see Anderson, *Possession* (n 3) paras 3-30 – 3-39.
[20] Once possession has been acquired, it continues *animo solo* in the absence of further acts: Stair, *Inst* 2.1.19; Erskine, *Inst* 2.1.21; Bankton, *Inst* 2.1.27. For discussion, see Anderson, *Possession* (n 3) para 4-07.

measurers as middlemen. If they had measured and stacked their own timber, and removed it themselves as the need arose, without any interference from Connal & Co except for the need to pay rent for use of the ground, it would be difficult to see any basis for holding Connal & Co to have custody of the timber. Arguably, therefore, this case was wrongly decided on its facts.

A similar problem arose in *Rhind's Tr v Robertson & Baxter*,[21] in which the goods were stored in a bonded warehouse under a double lock, one key being held by the occupier of the warehouse (in fact the transferor) and the other by the revenue officer. There was a purported transfer by the issuing of a delivery order and intimation to the revenue officer. The difficulty here is that there were two parties who potentially had custody of the goods. In the event, it was held that there had been no delivery:

> The excise officer was not a warehouseman; the goods were in no sense whatever in his custody at any time either as being held by him for Rhind or anybody else. He has a key of the warehouse where the goods were stored, but that only for the purpose of enabling him to protect the interests of the excise.[22]

The fact that the goods were actually on the premises of one of the potential custodiers must be influential here. While this is not decisive, it is nonetheless easier to show custody of goods within one's own premises.[23] The practical lesson, though, is that in cases of doubt it is better to intimate to both or all potential custodiers.

(b) Where arrangements for custody made by an agent for the transferor.

Typically, this situation will be as straightforward as the case where the transferor has dealt directly with the custodier. After all, an agent contracts not for himself or herself, but for the principal. The principal therefore has a personal right against the custodier, forming the basis of the principal's possession. The assignation theory holds that the owner of goods in third party custody can make delivery of those goods by assigning his or her personal right against the custodier, and that would seem to hold true just as much here. What, though, if the agent did not disclose, when making

[21] (1891) 18 R 623.
[22] (1891) 18 R 623 at 628-29 per Lord Trayner.
[23] See Anderson, *Possession* (n 3) paras 3-30 – 3-39.

the contract, that he or she was acting as an agent? The issue of undisclosed agency is a complex one, and detailed discussion is beyond the scope of this article. However, the point is that it is not clear that, in such a case, the custodier has any contractual relationship with the principal.[24] This is problematic because, on the assignation theory of transfer of civil possession, the transfer of possession is effected by the assignation of the right held by the transferor against the custodier. If the transferor has no such right, it obviously cannot be assigned. The transferor's possession is only sustained through the relationship between transferor and agent, rather than through any direct legal relationship with the custodier. Arguably, on that basis, intimation should be to the agent (as the one with whom the transferor has a contractual relationship) rather than the custodier.

Case law on the point, however, speaks with one voice, with no distinction made on the basis of whether the agency was disclosed: intimation is to be made in all such cases to the custodier. Thus, in *M'Eachern v Ewing*,[25] a quantity of rum was imported by Grant and lodged in Ewing's warehouse, Ewing then being the custodier. The bills of lading relating to the rum were left in the hands of Grant's agent, M'Eachern. Grant then sold[26] the rum to Menzies, who sold to Gordon. Neither sale was intimated to Ewing, but only to M'Eachern. Only later did Grant intimate to Ewing the sale to Menzies, whereupon Ewing handed over the goods to Menzies. It was held that Ewing was justified in doing so, from which it can be inferred that the intimation to M'Eachern was insufficient. Intimation had to be made to the actual custodier. There was no delivery to Menzies until this was done. The sale to Gordon not having been intimated to Ewing, there was no delivery to Gordon.

In *M'Ewan v Smith*,[27] a majority of the Court of Session reached the same view. In this case, a quantity of goods was imported by the Smiths, and lodged in a warehouse in the name of their agent, Alexander. The goods were then sold to Bowie & Co, who then sold to M'Ewan & Co. Those sales were intimated to Alexander, but

[24] For discussion of the concept of undisclosed agency, see L J Macgregor, *The Law of Agency in Scotland* (2013) paras 12-25 - 12-39). The rule appears to be that the party with whom the agent has transacted has the option of enforcing the contract against the agent or the principal (para 12-25). Macgregor explains this rule by arguing that the contract is formed initially with the agent as a party to it, rather than the principal.
[25] (1824) 2 S 724.
[26] This being prior to the Sale of Goods Act 1893, delivery was required even in a sale.
[27] (1847) 9 D 434 affd (1849) 21 Sc Jur 369.

not to the warehousekeeper. Bowie & Co were then sequestrated. The majority[28] held that the Smiths were not obliged to allow M'Ewan & Co to take the goods, on the basis that without intimation to the warehousekeeper there was no transfer of ownership. The result was that the goods still belonged to the Smiths.[29] The decision in *M'Ewan* was followed in *Melrose v Hastie*,[30] on similar facts.

This poses an obvious problem for the assignation theory of delivery of goods in the custody of a third party, given that the assignation theory is based on the assignation of the transferor's personal right against the custodier. Alternatively, it may be that the view should be taken that a contract made by an undisclosed agent does in fact bind the principal, and thus that the principal (here the transferor) does have a direct legal relationship with the custodier. If this issue should come before the court again, it may be that reconsideration is in order, based on full reflection on the basis of this form of delivery. For practical purposes, though, the lesson is once again this. Where there is doubt as to which one of two parties is the proper person to whom to make intimation, the better course is to make intimation to both. All the same, it may be that the law is overly inflexible here. In a case like *M'Ewan v Smith*, it would seem natural to deal with the importing agent, who has made arrangements for the storage of the goods, rather than the warehousekeeper, who knows only the importing agent and who may therefore be in no position to accept instructions from any other party with respect to the goods.

Finally, for completeness, it may be noted that agency issues could also arise where an agent acts for the transferee or the custodier. Where the agency is disclosed, no difficulty arises (at least on this ground). Where the custodier acts through a disclosed agent, it would be expected that intimation either to agent or principal would be effective. If the custodier acts through an undisclosed agent, then

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[28] The Lord President, the Lord Justice-Clerk and Lords Medwyn, Wood (who was also the Lord Ordinary), Robertson, Murray, Cockburn and Mackenzie, affirming the opinions of the Sheriff and Lord Ordinary.

[29] Notwithstanding the indication to the contrary in the rubric and headnote of the Session Cases report, the majority did not in any way found upon the doctrine of stoppage *in transitu* (the unpaid seller's right to stop goods while in transit, on the buyer's insolvency, now regulated by the Sale of Goods Act 1979 ss 44-46). The Lord Ordinary noted that intimation in such a case "deprives the vendor of his right to stop" (439), but he had already founded his opinion on the question of transfer of ownership. Lord Cockburn made only a passing reference to "stopping delivery" (446). Lord Robertson appears to say that stoppage *in transitu* is irrelevant, as "the goods were never in transitu at all" (445). The only judges who actually base their opinions on this doctrine are those of the minority.

[30] (1850) 12 D 665. Subsequent instalments of the case, reported at (1851) 13 D 880 and (1851) 14 D 268, are concerned with the question of whether the seller could retain the goods for other debts owed by the first purchaser, regardless of the price for the goods themselves having been paid. An appeal to the House of Lords was rejected as incompetent ((1854) 1 Macq 698).

presumably, in accordance with the normal position on undisclosed agency, intimation to the agent would be sufficient.

If the transferor was acting through an agent, and if that agency was not disclosed to the transferor, then naturally the transferor would believe that he or she was transferring the goods to the agent, and the form of intimation to the custodier would reflect that. This raises general issues of the effect of a purported conveyance to an undisclosed agent. As this is a general issue, it is beyond the scope of this article, but it may be that the conveyance would operate in favour of the agent rather than the principal, in accordance with the parties' apparent intention. If the agency was only undisclosed to the custodier, on the other hand, it is not clear that any transfer of ownership would occur at all. After all, the transferor's intention would be to convey to the transferee, but (on the assignation theory) the assignation of the right against the custodier would be in favour of the agent. Perhaps in this case that would be sufficient to give possession to the agent, which could then be ascribed to the principal and intended transferee, thus effecting delivery.

(2) Is any action required on the part of the custodier?

Once intimation has been given to the custodier then, certainly in the case of a commercial warehouse, it is likely that the custodier will make a record of the transfer. This is, of course, sensible practice. However, is it required?

If it is correct that this form of delivery is based on assignation of the transferor's personal rights against the custodier, it would seem to follow that no more is required than for assignation generally. In other words, on this basis, intimation to the custodier should be enough to complete the delivery, just as assignation of a debt is completed by intimation without any action being required of the debtor.

However, the view has been expressed that something more is required. Gordon states that delivery is complete "[o]nce the instructions are accepted".[31] The instructions referred to are the notice to the custodier to hold henceforth for the transferee. The position is thus made to appear rather similar to the English requirement of attornment, which requires the custodier to acknowledge that he holds

[31] Reid, *Property* (n 6) para 620 (Gordon). See also D L Carey Miller & A Pope, "Acquisition of Ownership", in R Zimmermann, D Visser & K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 696.

for the transferee.[32] Of course, there is a difference between the custodier accepting the instructions and the custodier actually acknowledging that he holds on the transferee's behalf, but both imply that action of some sort is required by the custodier.

Nonetheless, although Gordon does not cite them, his position can find support from Bell's *Principles* and Hume's *Lectures*. In Bell's case, when the case of delivery by intimation to a warehousekeeper who has custody of the goods is being considered, "the warehousekeeper's acceptance of notice thereof" is said to be required.[33] Hume states that delivery of this kind is carried out:

> by intimation to [the custodier] and marking the goods or by indorsing his receipt for them..or by an alteration of the entry in the books...[34]

On the face of it, then, there is strong support for the proposition that mere intimation to the custodier is not sufficient for delivery of this kind. Instead, the picture is presented of something being required of the custodier, whatever that something may be. This poses a clear challenge to the assignation theory.

However, examined more closely, the case for this position appears rather weaker. The three cases that Gordon cites for his view do not support it. In the first, in fact, it is expressly said that "the intimation completed the right".[35] In the third, it is stated that delivery is effected by "such intimation of [the transferee's] right to the custodier as will make it the legal duty of the latter to hold the goods for him".[36] Both of these cases, therefore, seem supportive of the assignation theory rather than otherwise. In the only one of the three cases where there is consideration of the idea that the custodier has to do something to effect delivery - in this case, put flour into

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[32] F Pollock & R S Wright, *An Essay on Possession in the Common Law* (1888) 73; *Halsbury's Laws of England* 4th edn (2005 reissue) vol 41 para 170. This rule has also been adopted in South African law: C G van der Merwe, *The Law of Things and Servitudes* (1993) para 175; H Silberberg & J Schoeman, *The Law of Property*, 5th edn, by P J Badenhorst et al (2006) para 9.2.3.2(e); D L Carey Miller & A Pope, "Acquisition of Ownership", in Zimmermann et al, *Mixed Legal Systems* (n 31) 696. It is also adopted by the Sale of Goods Act 1979 s 29(4) as a requirement for delivery where goods are held by a third party.

[33] Bell, *Prin* § 1305.

[34] Hume, *Lectures* III,254.

[35] *Connal & Co v Loder* (1868) 6 M 1095 at 1102 per Lord Neaves.

[36] *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70 at 74 per Lord Watson.

the transferee's sacks - it is rejected.[37] None of the cases appears in any way to support the idea that something is required of the custodier.

Further, while the text quoted above from Bell's *Principles* is found in the tenth edition, the words are not Bell's own. They do not appear in his own, final, fourth edition, and the authorities referred to all appear in earlier editions without the quoted text. None of them at all supports the position that any acceptance of the intimation is required of the custodier. Bell's own view is found in his *Commentaries*, where it is stated that:

> It is not indispensable that there should be a transfer in the books [of the custodier]. It is the *notice* to the custodier that operates as a transfer of the property.[38]

The record made by the custodier is thus for Bell merely evidence of the transfer; it is not constitutive of the transfer. Hume's view therefore stands as the sole basis for the proposition that something is required of the custodier following intimation, and the argument must fall before the uniformity of the authority in opposition to it. The conclusion must therefore be that intimation is sufficient, and that no action on the part of the custodier is required for this form of delivery.

C. RELATIONSHIPS BETWEEN THE PARTIES AND THE CUSTODIER

If the assignation theory were found to be correct, then certain things would follow from that. Among other things, issues would arise with regard to the nature of the relationship between the parties involved, where those relationships were of a nature that they would pose problems in assignation. The purpose of this part is to consider this aspect of this form of delivery. There are three situations to consider. The first is the issues that arise where there is a pre-existing relationship between transferor and custodier. Second, we must consider the case where there is a relationship between transferee and custodier. Finally, we shall look at the situation where there is no pre-existing relationship with the custodier.

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[37] *Black v Incorporation of Bakers* (1867) 6 M 136.
[38] Bell, *Comm* I,194.

(1) Relationship between transferor and custodier

Of course, in the typical case, there will be a contractual relationship between transferor and custodier, in terms of which the latter holds the goods on behalf of the former. What we are concerned with here, though, is relationships other than the standard one of transferor and custodier as independent parties doing business at arms' length. For example, may delivery of this kind operate where the custodier holds the goods in the course of a relationship of employment with the transferor? Gordon considers that:

> In theory, there is no reason why delivery...should not be effectual by giving instructions to a servant of the transferor who has actual custody.[39]

Indeed, in one early case, *Broughton v J & A Aitchison*,[40] it was held that delivery might be effected by intimation to the sellers' storekeeper. The basis of the majority view in that case appears to be that the sellers' employee became in effect the employee of the transferees. Weight appears to have been placed on the payment of a sum of one shilling to the storekeeper for taking care of the goods, a quantity of wheat. The majority rejected the argument, made by the trustee for the seller (the sellers having become insolvent), that the storekeeper could not have become the buyers' employee as he continued to be answerable to the sellers.

The decision was marked, though, by the Lord President's strong dissenting opinion. The Lord President held that, by leaving the goods in the custody of the sellers' storekeeper, the buyers had chosen to trust to the sellers' credit. There was no sign of any basis on which it could be said that the goods were now in the buyers' possession. He also pointed out that, had it been the buyers rather than the sellers that had become bankrupt, it could not seriously be contended that the buyers would be entitled to remove the wheat from the sellers' store without paying for it.

[39] Reid, *Property* (n 6) para 620 (Gordon). This is the position adopted in the Draft Common Frame of Reference (C von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009) art VIII.-2:105(2) (page 4536)), possibly justified by the weaker delivery requirement envisaged.
[40] 15 Nov 1809, FC.

The view of the majority in *Broughton v Aitchison* has been questioned, being described as "uncertain"[41] and as being a decision which "cannot be approved of".[42] It has been said to be "cited by text writers with doubt and hesitancy...[and to be] of value only as [an example] of the historical development of our law of sale".[43] In *Mathison v Alison*,[44] Lord Cowan, whose opinion was concurred in by Lords Wood and Curriehill, said of the case that it was:

> from the first considered of doubtful authority, and latterly...has been held of no weight by judges and lawyers of great eminence, and only valuable because of the opinion of Lord President Blair...

Likewise, in *Boak v Megget*,[45] the Lord Justice-Clerk said that the Lord President's dissenting opinion in *Broughton v Aitchison* was "universally acknowledged to be sound".

Bell in particular criticises the decision in very strong terms as being contrary to the principle that delivery is required. There was nothing, he argued, that could be construed as delivery in the facts of the case. The buyer in this case chose to trust to the seller's solvency, when he could have required delivery, and should not be in any better position than other creditors who had done the same. The majority view, he argues, destroys certainty of title. If the sellers had subsequently sold to a third party who had removed the goods, that third party would have acquired no title even though the goods had been left to all appearances the sellers' property. Equally, a buyer would be vulnerable to a pledge established in the same way.[46]

It is difficult to disagree with Bell's view, in the context of the law as it stood in his time, particularly in view of the strong support found for it in literature and judicial comment. Notwithstanding Gordon's view, there is a very good reason in theory for doubting the effectiveness of delivery by instructions to a custodier employed by the transferor: in law, the acts of an employee in the course of employment are equivalent to acts of the employer. It is notable that, in *Broughton*,

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[41] M P Brown, *A Treatise on the Law of Sale* (1821) 525. His account of the case, at 518-525, is however little more than a reproduction of the report of the case, without discussion.
[42] G Ross, *Leading Cases in the Commercial Law of England and Scotland* (3 vols, 1854-58) 2,386.
[43] H G (1889) 1 JR 228 at 229.
[44] (1854) 17 D 274 at 284.
[45] (1844) 6 D 662 at 669.
[46] Bell, *Comm* I,191 n 1.

the Lord President appears to consider possession through the employee to be natural rather than civil possession. By allowing delivery to have occurred in this case, the law would be allowing delivery to occur while custody remained with the transferor.

In other words, delivery of goods where custody is retained by an employee of the transferor would be a form of *constitutum possessorium*, requiring a new basis for the holding. This does not plausibly appear. As was argued for the sellers' trustee in *Broughton v Aitchison*, the small amount of the payment "rendered it almost ludicrous to plead upon it". A payment of one shilling is more in the manner of a tip.[47] While there may be some attraction in allowing this as facilitating ease of transfer, it is very difficult to reconcile the outcome in this case with the requirement for delivery.

Broughton v Aitchison notwithstanding, in fact, it is accepted that there can be no delivery of goods remaining in the hands of a third party custodier unless that custodier is independent of the transferor. Thus, in *Mathison v Alison*,[48] goods were held not to be delivered when they were left in the seller's own warehouse. It is true that Richard Brown, pointing out that in *Auld v Hall & Co*[49] and *Tod v Rattrays*[50] the goods were in the original seller's own warehouse, argues that this case is "if not wrongly decided...at least a new departure in the common law of Scotland".[51] However, it seems clear that, on the basis of Bell's arguments, it is those cases that are out of step with principle on this point, rather than *Mathison v Alison* representing a new departure. Brown argues that, at least where there is an actual record made of the transfer in the warehouse books of the seller, this should be sufficient for delivery on the basis that this:

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[47] And not a particularly generous tip at that. It is not possible to make an exact comparison of values of money over a period of more than two centuries. However, according to House of Commons Library figures, retail prices increased by slightly over sixty-six times between 1809, when *Broughton v Aitchison* was decided, and 2011 (G Allen, *Inflation: the value of the pound 1750-2011* (House of Commons Library Research Paper 12/31, 2012). Accordingly, one shilling in 1809 had approximately the same purchasing power as £3.31 in 2011. It is a sum of money that might be given to a particularly insistent beggar (see Jane Austen's novel, *Emma*, vol III ch 3, first published in 1816, only seven years after the decision in *Broughton v Aitchison*, where such an event is recounted).

[48] (1854) 17 D 274.

[49] 12 June 1811, FC.

[50] 1 Feb 1809, FC.

[51] R Brown, *Treatise on the Law of Sale* 2nd edn (1911) 216, referring also to *Broughton v J & A Aitchison*. At 216 n 1 he identifies *F Browne & Co v Ainslie & Co* (1893) 21 R 173 as another case of this kind. It is true that in this case the goods remained in the original sellers' warehouse following a sale and subsequent sub-sale. However, the case was decided on the basis that, in terms of s 3 of the Mercantile Law Amendment Act (Scotland) 1856, the original sellers could not arrest the goods in their own hands following intimation of the sub-sale. The case was not concerned with whether delivery had occurred.

> has greater effect in law than mere intimation to the storekeeper ...involving, as it does, not merely intimation, but an agreement on the part of the storekeeper to hold for the buyer.[52]

No doubt the storekeeper's actions could be seen in this way, but it seems more reasonable to see the storekeeper as simply performing the duties of his contract of employment. The actions of the transferor's storekeeper are referable to his relationship with the transferor, to whom he is answerable, and not to any separate agreement with the transferee. In short, unless the storekeeper steps outside the course of his employment, he has no intention separate from that of the transferor. In consequence, what Brown is proposing is, in effect, transfer by intention. This does not represent Scots common law.

Mathison v Alison was followed in *Anderson v M'Call*,[53] in which a firm of grain merchants sold a quantity of grain that was kept in a store under their own management, and issued a delivery order in favour of the buyers, addressed to and intimated to the storekeeper. The Inner House held that there had been no delivery on these facts, even though the store was run as a separate business. The Lord Justice-Clerk said:

> I hold it to be clear, and to be a rule of law, without any exception, that while the seller of the goods retains the goods in his own possession, no entry in his books will operate any delivery of the goods to the buyer, actual or constructive.[54]

The same approach was taken in *Distillers Co Ltd v Russell's Tr*,[55] in which again goods were held to be undelivered while they remained in the transferor's own store. Here we see again a rejection of the idea of delivery with custody retained by the transferor.

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[52] R Brown, *Sale* (n 51) 215.
[53] (1866) 4 M 765. The court's view on this point was adopted in *Pochin & Co v Robinows & Marjoribanks* (1869) 7 M 622 at 629 per Lord President; *Hayman v M'Lintock* 1907 SC 936 at 946 per Lord Ordinary; *Dobell, Beckett & Co v Neilson (No 2)* (1904) 7 F 281.
[54] (1866) 4 M 765 at 769. This may be overstating the case somewhat, given the recognition of *constitutum possessorium* as a form of delivery.
[55] (1889) 16 R 479.

The rule seems, then, to be conclusively established, that delivery by transfer of civil possession is not possible when the custodier is not independent of the transferor. Delivery may not be made in this way, therefore, in the case where the custodier is an employee of the transferor. What, then, is the basis of this rule requiring independence? Gordon suggests that the reason for the requirement is "to reduce the risk of fraudulent entries in the transferor's stockbooks".[56] However, while this may be a factor, it cannot be the whole explanation, for it implies that the rule may be different if there is no risk of fraud. This argument was urged on the court in *Anderson v M'Call*,[57] but found no favour. Nor can the rule be based on the risk that third parties will be misled, by continued custody by the transferor on his own premises, into taking the transferor to be owner: in the same case, it was not found relevant that the goods were kept in a warehouse in which third parties' goods were also stored. In such circumstances, there can be no expectation that ownership and custody will coincide.

A further difficulty is the meaning of independence. How independent is independent? Unless there is no relationship at all between the transferor and the custodier, there will never be a case in which the two are completely independent. If I store my goods in your warehouse, there is a relationship between us, based on our contract. Clearly, then, there are degrees of independence. An employee is, it is established, insufficiently independent, whereas there is sufficient independence in the case of a warehouse-keeper who is not employed by the transferor. What is the basis of this distinction, and where is the line to be drawn?

A way forward may be found in the assignation theory of delivery by transfer of civil possession. This is the idea, considered earlier, that what is happening in this form of delivery is that the right to enforce the duties owed by the custodier to the transferor is being assigned to the transferee. Most rights are freely assignable, but not all are. In particular, in the case of goods held by an employee, those duties, and the employer's right to enforce them, arise from the contract of employment. In the common law of employment, an employer's rights cannot be assigned, due to the existence of *delectus personae*.[58] While an employer may instruct an employee to

[56] Reid, *Property* (n 6) para 620 (Gordon).
[57] (1866) 4 M 765.
[58] P Fraser, *Treatise on Master and Servant, Employer and Workman, and Master and Apprentice, According to the Law of Scotland*, 3rd edn by W Campbell (1882) 122; R G Anderson, *Assignation* (2008) para 2-43; *Forth Estuary Engineering Ltd v Litster* 1988 SC 178 at 188 per Lord Justice-Clerk

hold goods on behalf of another, the employee remains ultimately answerable to the employer for his conduct in so doing, as the Lord President pointed out in *Broughton v Aitchison*. This would be the case, even were an actual assignation of the employer's rights intended.

Delectus personae is not easy to define precisely. However, as a bar to assignation, it is "grounded in the debtor's choice of a particular creditor",[59] and arises "when the parties to the contract have selected each other on the basis of personal qualifications or suitability".[60] As we have seen, *delectus personae* is present in the case of employment contracts. It may also exist in other relationships of similar kind, such as that between partners in a partnership or between a company and its directors.[61] Where a partner or director has custody of goods belonging to the firm or company in relation to his duties as partner or director, arguably intimation to the partner or director would not be sufficient for a valid delivery of the goods.[62] On the other hand, in the standard case of a warehousekeeper storing the goods, it seems improbable that *delectus personae* would be held to exist. In a typical case, it will be the owner who has approached the warehousekeeper, and the latter will have no reason to reject the business unless unable or unqualified to handle the goods in question or doubtful of the owner's creditworthiness. The custodier's only duty is to store the goods in accordance with the contract. It matters little for whom he is storing

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Ross (rev 1989 SC (HL) 96, though not on grounds relating to this point); *Thomas v Inland Revenue* 1941 SC 356 at 361 per Lord Fleming. See also *Berlitz School of Languages v Duchêne* (1903) 6 F 181, although this is concerned with an attempt to assign a restrictive covenant contained within a contract of employment rather than with the assignation of the whole rights of the employer under that contract. The position is partially altered in the modern law: in terms of regs 3 and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246, where there is a transfer of an undertaking or business, employment contracts continue with the transferee as employer, subject to a right on the part of individual employees to object to the transfer. The Regulations would not apply in a case of the present kind, as we are concerned here with the transfer of the duties of an individual employee rather than the transfer of any part of the employer's business.

[59] P Nienaber & G Gretton, “Assignation/Cession” in Zimmermann et al, *Mixed Legal Systems* (n 31) at 806. For general accounts of when *delectus personae* will be held to arise, see W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* 2nd edn (1929) 416-427; W M McBryde, *The Law of Contract in Scotland* 3rd edn (2007) paras 12-36 - 12-45.

[60] Anderson, *Assignation* (n 58) para 2-39.

[61] On *delectus personae* in the relationship between partners, see *Dove v Young* (1868) 7 M 304; J Carmont, "Delectus Personae", in JL Wark (ed), *Encyclopaedia of the Laws of Scotland*, vol 5 (1928) paras 1182-83.

[62] Of course, if an employee, partner or director held goods belonging to the employer, partnership or company for reasons unconnected to that role, the outcome might be different.

them, especially given that the transferor will continue to be liable for the costs of storage, unless otherwise agreed by the custodier.[63]

If *delectus personae* is the basis of the rule, it suggests that one of the grounds of decision in *Dobell, Beckett & Co v Neilson (No 2)*[64] is wrong.[65] In that case it was held that there could be no transfer by intimation to a firm of timber measurers responsible for the storage of the goods, on the basis that the timber measurers were servants of the transferor. It is difficult to see an employment relationship here, or indeed any *delectus personae*. The timber measurers were a distinct firm, and there is nothing in the case report suggesting that they were not accepting business from other customers. This looks much more like a contract for services than a contract of service.[66] It is notable that, in *Price & Pierce Ltd v Bank of Scotland*,[67] no objection was made to the fact that the custodiers were a firm of timber measurers, in this case storing the goods on their own premises.

The suggestion, then, is that delivery by transfer of civil possession will not operate in any case where the contractual relationship between transferor and custodier contains an element of *delectus personae*. This suggestion does, it must be admitted, face the difficulty that it has never been used expressly as a justification in any reported case for the rule requiring independence between transferor and custodier. Instead, the cases talk merely in terms of the independence of the custodier. However, linking this to the concept of *delectus personae* does provide a rationale for distinguishing between different types of custodier, and seems to follow from the idea that this form of delivery is based on assignation of the personal right held against the custodier.

(2) Relationship between custodier and transferee

[63] Obligations cannot normally be assigned, a point sometimes obscured by talk of assignation of contracts rather than of rights, as Ross Anderson points out (Anderson, *Assignation* (n 58) paras 2-36 - 2-38; see also Nienaber & Gretton (n 59) 806-807).
[64] (1904) 7 F 281.
[65] The other ground of decision, that the timber measurers were not the custodiers of the goods, is considered above.
[66] For how a contract of service is distinguished from a contract for services in the common law, see Fraser (n 58) 289. For discussion of the current position, see S Middlemiss and M Downie, *Employment Law in Scotland* (2012) paras 4.16-4.21. The distinction is often important for questions of delictual liability for the acts of others, such liability arising more easily from acts of employees than from acts of independent contractors. On this, see e.g. D M Walker, *The Law of Delict in Scotland* 2nd edn (1981) 134-138; R Black et al, "Obligations", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) paras 247-248 and 251; W J Stewart, *Reparation* (2000) para 3-2.
[67] 1910 SC 1095 affd 1912 SC (HL) 19.

Things are much less problematic in the case of a relationship between custodier and transferee. It is quite in order to hand over goods to someone acting on the transferee's behalf - or, indeed, to the transferee himself - on a basis other than the transfer of ownership. The subsequent intimation to the custodier is, in effect, a form of *traditio brevi manu*.[68]

(3) No contractual relationship

The final situation to be considered is that in which there is no contractual relationship between the custodier and either the transferor or the transferee. As we shall see, there is little or no authority in Scots law directly on this point, which introduces complexity into the question. Consideration of this question is divided here into several parts. The first of these identifies the issue, and the remainder consider whether the issue can be resolved.

(a) Civil possession without a contractual relationship. It has been said of civil possession that "[i]nvariably detentor and possessor stand in a pre-existing legal relationship".[69] In the typical case, this will be true: the standard case of this form of delivery is that of goods held by a warehousekeeper on the basis of a contract with the owner of the goods, the transferor. However, this relationship between the parties need not be a contractual one. Take, for example, an individual retaining possession of another's property on the basis of a lien securing an obligation of recompense for unjustified enrichment, in circumstances where there is no contractual relationship between the parties.[70] Nonetheless, even though the parties' relationship is not contractual, the custodier acknowledges the owner's right in much the same way as does a creditor holding goods on pledge. Arguably, then, the owner in this scenario possesses through the custodier's acts. Even this degree of relationship does not exist in the case of lost or stolen property in the hands of a third party who is not party to any wrongdoing. Can there be delivery by transfer of civil possession in these cases?

[68] It is on this basis that a solicitor acting for the acquirer of heritable property may hold the disposition as undelivered until payment has been made.
[69] Reid, *Property* (n 6) para 121.
[70] As, for example, in *Binning v Brotherstones* (1676) Mor 13401, on which see Steven (n 10) para 10-65. Another possibility might be where the owner owes the custodier an obligation arising from *negotiorum gestio*. See Steven (n 10) paras 11-24 – 11-26.

A situation of this kind arose in a South African case, *Absa Bank Ltd v Myburgh*.[71] In this case, there had been a sale by A (a financing house) to Myburgh of a car, payment to be made by instalments, with a retention of title in favour of A. In terms of this, A was to remain owner until the price was paid. Before the price was fully paid, Myburgh sold and delivered the car to B. It was agreed between Myburgh and B that B would pay to A the remaining sum owed by Myburgh. B did not in fact pay this sum to A, but instead sold and delivered the car to C in terms of an instalment sale entered into with Absa. There then followed an arrangement by which A ceded (assigned) its rights to Absa. Absa then raised an action against Myburgh for the sum outstanding from the price that Myburgh had agreed with A. Myburgh argued that A had repudiated the original contract of sale by transferring ownership to Absa and thereby making it impossible for them to transfer ownership to Myburgh. The court, however, held that there had been no transfer of ownership to Absa, in the absence of attornment. Attornment, as was outlined earlier, requires the acknowledgement by the custodier that he or she holds on behalf of the transferee.

In Scots law, of course, a transfer of ownership to Absa could have been made in such circumstances without delivery, assuming a sale.[72] However, if there was no price in money, it would be necessary to consider the requirements for delivery. Can delivery be made by intimation to a third party custodier who has no relationship with the transferor?

(b) An answer in Stair? It has been suggested[73] that the following passage from Stair refers to this situation:

> possession lawfully obtained by virtue of the disposition, although not delivered by the disponer, will be sufficient; as if the disponer were not in possession himself, and so cannot deliver it; yet the acquirer may recover it from the detainer.[74]

[71] 2001 (2) SA 462.
[72] Sale of Goods Act 1979 s 17. On the facts of the case, ownership would at any event have been acquired by B in terms of s 25 of the Sale of Goods Act 1979.
[73] Carey Miller with Irvine (n 10) para 8.20; D L Carey Miller, "Derivative Acquisition of Moveables" in R Evans Jones (ed), *The Civilian Tradition in Scotland* (1995) 129; D L Carey Miller, "Stair's Property: A Romanist System?" 1995 JR 70 at 70-71; Steven (n 10) para 6-23.
[74] Stair, *Inst.* 3.2.5.

It is not clear, however, that Stair is in fact talking about the form of delivery under consideration here. Certainly, the context of the quoted text suggests that he is not. The quoted text appears in the course of a passage concerned with the role of possession in the creation and transfer of real rights. He begins by observing that possession is required "for utility's sake...that thereby the will of the owner may sensibly touch the thing disponed, and thereby be more manifest and sure". For this reason, "the most proper ways to accomplish dispositions" are delivery and prescription. In this context, Stair poses the question whether delivery is actually required, in the strict sense of a transfer of possession from transferor to transferee, or whether it is enough that the transferee acquires possession in some manner or other. He concludes that this is sufficient. He gives as an example *traditio brevi manu*, where no physical act of delivery is required because the transferee already has custody. The quoted text is another example.

From the context, therefore, it appears that in the quoted text Stair is talking about a very specific situation in which the transferor is not in possession of the goods. Whatever else Stair is talking about, then, it cannot be a transfer of possession, whether that possession be natural or civil. This is a situation where the goods are perhaps lost or stolen, or have in some other manner strayed from the possession of their owner and found their way into the hands of a third party. If the transferee is able to get the goods from the present custodier, that will be sufficient to give the transferee ownership. An example would be where an item belonging to A is lost or stolen, and A indicates to B that the latter may keep the item if he can track it down. B finds the item in the hands of C, and prevails on C to hand it over to B. Stair is saying that, in this situation, B acquires ownership even though there has not been any delivery from A to B. This is quite different from the form of delivery with which this article is concerned. In a transfer of civil possession, the transferee acquires possession when the transfer is intimated to the custodier. Here, though, Stair appears to be saying that the transferee only acquires the property when he or she "recover[s] it from the detainer".

A further objection to reading the quoted text as referring to this situation, although hardly a conclusive one, is that it is arguably anachronistic to read Stair as considering delivery of goods in third party custody. After all, this form of delivery

does not seem to have been firmly established as effective until the early nineteenth century.[75]

Without aid from this passage of Stair, then, the issue to be considered is whether there can be delivery of goods in the custody of a third party, in circumstances where there is no contractual relationship between the transferor and the custodier.

(c) The first difficulty: possession of the transferor. There are two difficulties with this idea. The first is that, given that delivery requires the transferee to get possession, there is the obvious difficulty that in a case like this it is not clear that the transferor necessarily has possession himself. This is not to say that delivery may not occur in any circumstance where the transferor does not have possession. On the contrary, the passage from Stair quoted above is quite clear that it is enough that the transferee acquires possession with the consent of the transferor. Various examples may be conceived of, in which delivery occurs in such circumstances. The present case, though, is quite different. Delivery of goods in the custody of a third party has been argued to operate on the basis of a transfer by the transferor to the transferee of the former's personal right against the custodier. The transferee's possession is based on stepping, in the transferor's place, into the relationship that the transferor formerly had with the custodier. In this context, it seems clear enough that the transferor cannot give to the transferee anything more than the transferor had. In particular, this form of delivery assumes that the transferor's relationship with the custodier gives the former civil possession, because it is the same relationship that will be the basis of the transferee's possession.

In certain cases where there is no contractual relationship, it has already been suggested that there is nonetheless possession. Examples of such cases include one possessing property on the basis of a lien for a claim in unjustified enrichment. However, in other cases there is clearly no possession by the owner, as where the goods have been stolen or on the facts of *Absa Bank Ltd v Myburgh*. In that case, where a car subject to a retention of title was sold by the original purchaser, and then sold on again, the ultimate purchaser held on behalf of either himself or the company who financed the purchase and which, it appears from the facts of the case, was

[75] Anderson, *Possession* (n 3) 168-169.

intended to be owner until it was repaid. In such a case, the custodier cannot be said in any sense to hold on behalf of the owner, and as a result the owner does not possess. Accordingly, it would appear that, in Scots law, there could be no delivery on the facts of *Absa Bank Ltd v Myburgh*, assuming that the reasoning in the last paragraph is accepted.

Lost property is in an intermediate position. If goods have been lost, and then are found by a stranger, does the owner possess through the finder's acts? Bankton gives at least some reason for thinking that the owner does possess through the finder's acts:

> ...he who openly detains things Stray is not presumed to possess for himself, but for the owner, because otherwise it would be esteemed theft.[76]

On Bankton's view, then, the owner of property that has been lost and then found does possess that property. Even if that view is accepted, though, there is a further obstacle to the transfer of that possession.

(d) The second difficulty: what is being assigned? This second difficulty is that it is not clear that, in a non-contractual case, the right against the custodier is capable of being assigned. Clearly the owner's claim to recovery of property from third parties is based on the real right of ownership. This is what gives rise to the difficulty here. How can this claim to recovery be assigned without ownership itself being given up?

The issue turns on the nature of the owner's right to recover the property when it is held by someone else. Unfortunately, the nature of the remedy is not always made clear. An owner seeking to recover goods will raise an action for delivery, but the written pleadings are likely merely to state the factual basis of the claim without spelling out the legal principles involved, which may be considered sufficiently obvious.[77] The action for delivery may be used also when the claim is based on a personal right.[78] No doubt this does provide valuable procedural flexibility, but it does leave the nature of the rights involved unexamined. In particular, it leaves room for

[76] Bankton, *Inst.* 2.1.26.
[77] For a style, see S A Bennett, *Style Writs for the Sheriff Court* 3rd edn (2001) 169-170. This style is a claim for recovery of a car delivered to the defender on the basis of a hire purchase contract that has subsequently been rescinded. The style does not assert that the pursuer is owner, merely that he is entitled to delivery.
[78] D M Walker, *The Law of Civil Remedies in Scotland* (1974) 264-265.

confusion between a right to property based on a real right and a right to property based on a personal right, not assisted by the tendency to use the same word, "restitution", both for claims based on the real right of ownership and also for claims based on unjustified enrichment.[79] We are of concerned here only with the former. Unfortunately, there is little analysis in the Scots literature of the nature of an owner's claim. A detailed investigation of this would be beyond the scope of this article. It is, however, possible to sketch out what is at least arguably the position.

The starting point is still Stair's account. He considers that:

> we make not use of the name or nature of Vindication, whereby the proprietor pursues the possessor, or him who, by fraud, ceases to possess, to suffer the proprietor to take possession of his own, or to make up his damage by his fraud. This part of the action is rather personal than real, for reparation of the damage by the fraudulent quitting possession; yea, the conclusion of delivery doth not properly arise from vindication, which concludes no such obligement on the haver, but only to be passive, and not to hinder the proprietor to take possession of his own.[80]

Stair appears to be making a distinction here between the real right of ownership and the personal rights that arise from interference with that right.[81] The real right of ownership is in itself essentially passive. As Reid has said, "the obligation correlative to a real right is negative in nature. It is an obligation *not* to do something",[82] *i.e.* an obligation not to interfere with the exercise of the real right. This makes sense. A real right imposes a universal obligation on the whole world. When an owner seeks to enforce his or her right, though, enforcement is not against the whole world but

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[79] See e.g. Erskine, *Inst.* 3.1.10, where both are considered as arising from "the natural duty of restitution", without clearly distinguishing between the right to recovery based on a real right and the right to recovery based on a personal right. For discussion of this distinction between "vindicatory restitution" and "enrichment restitution", see K G C Reid, "Unjustified Enrichment and Property Law" 1994 JR 167.

[80] Stair, *Inst.* 4.3.45. The most detailed modern discussion is that of Carey Miller with Irvine n 10) paras 10.01-10.05.

[81] The same distinction is made by Stair at *Inst.* 4.30.8: "by a natural obligation, all men are obliged to restore to the owner that which is his...as well as to permit the owner to intromit therewith by vindication"; and also at *Inst.* 1.7.2: "beside the real action, the proprietor hath to take or recover what is his own...there is a personal right, which is a power in the owner to demand it..." This distinction has not been universally accepted as correct. See e.g. K G C Reid, "Unjustified Enrichment and Property Law" 1994 JR 167 at 169 n. 12.

[82] K G C Reid, "Obligations and property: Exploring the Border" 1997 Acta Juridica 225.

against some specific defender in response to something that (it is alleged) the defender has done, whether it is a delictual claim for damage to the property or a claim for recovery of possession of the property. The claim made by the owner is, therefore, a claim against a specific person or some determinate group of persons, which is, of course, the very definition of a personal right. The separation of the real right of ownership from the personal right for its recovery is further demonstrated by the fact that it is not only enforceable against the current possessor. Instead, it continues to be enforceable, as a claim for damages, against one who has given up possession in bad faith.[83]

We can, then, distinguish these two rights held by the owner of corporeal moveable property. This is not a matter of purely academic interest. As the Scottish Law Commission has pointed out, there is a possibility that the two rights might be subject to different periods of negative prescription.[84]

In fact, matters may go further, with a third right being identifiable. A distinction may be made between the substantive right of ownership on the one hand and, on the other, the procedural right to bring an action to enforce that ownership. It may seem odd to make that distinction. After all, the latter arises from the former.[85] All the same, the idea of such a distinction is no novelty, and is used any time the law recognises that a right exists but puts into place a procedural bar against its enforcement. The result is that the right cannot be enforced (because of the procedural bar). However, if the person obliged by the right complies with it, for example (in the case of ownership) by delivering the property, that person cannot claim the property back (because he or she was in fact obliged to deliver it). The Roman concept of *naturalis obligatio* gives us an example of this.[86] In modern law, gambling contracts formerly fell into this category.[87] The same is true of any right, the enforcement of which is barred by limitation: this "does not involve the loss of any substantive right but is the procedural barring of an action after the laps of a period during which the law insists that it must, if at all, be brought."[88]

We can, then, identify three rights in total that an owner may be said to have:

[83] Stair, *Inst.* 1.7.2; Erskine, *Inst.* 3.1.10.
[84] Scottish Law Commission, *Corporeal Moveables: Remedies* (Memorandum No 31, 1976) para 7.
[85] Although, in historical terms, the procedural right typically arises first, the substantive right only subsequently being recognised as underlying it.
[86] See P du Plessis, *Borkowski's Textbook on Roman Law* 5th edn (2015), para 9.1.2.1.
[87] W W McBryde, *The Law of Contract in Scotland* 3rd edn (2007) paras 19-49 - 19-62. This is no longer the case: Gambling Act 2005 s 335.
[88] D Johnston, *Prescription and Limitation* 2nd edn (2012) para 1.03.

- the real right of ownership itself;
- a personal right against any specific person interfering with that right; and
- the procedural right to enforce the substantive rights arising from ownership.

If the assignation theory of transfer of civil possession is correct then, in cases where there is no contractual relationship between owner and custodier, delivery can only operate if one of these rights can be assigned.

The first of the rights, the real right itself, can be discounted straight away, even though it appears to provide a basis for delivery in such cases in German law.[89] There is no basis in Scots authority for assignation of the right of ownership itself.[90] In any case, even were it possible in principle, presumably the transferee would need to take possession of the goods in order to complete the assignation.[91] The assignation itself would not, therefore, be sufficient to effect delivery.

Can the procedural right be separately assigned? It appears that the relevant provisions in German law may have been drafted on the assumption that this was possible: they refer to assignation of the *Anspruch auf Herausgabe der Sache*, or claim to recovery of the thing, the word *Anspruch* being one that may in different contexts refer to either the substantive right or the procedural right.[92] The modern view, however, is that the procedural right "is an indispensable safeguard of ownership which the owner cannot transfer without simultaneously giving up his right of ownership".[93] The same view would surely be taken in Scots law. In a different context, the Inner House has said that, where a right "is implied in the right of ownership...in principle it cannot be abandoned by an owner in a manner which would bind his successors in title."[94] The same would seem to apply to the right of an owner to recover the property. While, for example, there could be no objection to an owner assigning a delictual claim where the property has been damaged by another's fault,

[89] BGB ss 870 and 931. For discussion, see L P W van Vliet, *Transfer of movables in German, French, English and Dutch law* (2000) 55-60.
[90] Although in *Canning v Glasgow Caledonian University* 2016 SLT (Sh Ct) 56, the sheriff appears to assume that ownership may be transferred by assignation. The sheriff's view on that point, though, seems clearly *obiter*.
[91] Assignation of real rights requires possession of the property or registration of the assignation, rather than intimation: Reid, *Property* (n 6) para 657.
[92] Van Vliet (n 89) 55-59.
[93] Van Vliet (n 89) 59. See also DCFR (n 39) 4551.
[94] *Bowers v Kennedy* 2000 SC 555 at 564. The point was not, however, fully argued in this case.

that money claim is capable of existing separately from ownership. The procedural right to assert ownership necessarily implies a right of ownership underlying it. It is difficult to see how one can be alienated separately from the other without breaking up ownership into fractions, with a relative system of ownership where different people were to be recognised as owner depending on who was asking the question. It need hardly be said that this is not Scots law.[95]

That leaves only the personal right held by the owner against the specific person with custody of the property. The idea of separate assignation of this is open to much the same objection as assignation of the procedural right. Furthermore, of course, any argument that this is possible is dependent on acceptance of the account given here of the rights of an owner. Nonetheless, the idea does attract some slight support from case law. In *Caledonian Railway Co v Harrison & Co*,[96] the pursuers were custodiers of goods belonging to one party, and in error handed the goods over to the defenders without the authorisation of the owners of the goods. The pursuers then paid the owners of the goods their value, and sought to recover the goods from the defenders. They were successful. It is just about possible to construe this case as involving a transfer of ownership by assignation of the owner's personal right against the defenders for delivery of the goods. After all, the payment by the pursuers to the owners seems to presuppose that the pursuers are to obtain right to the goods, especially as this is followed immediately by the pursuers attempting to recover the goods. Moreover, it is difficult to see any basis on which the pursuers could claim the goods other than a real right in those goods. Against this, though, it must be said that the pursuers did not plead on the basis of ownership, founding rather on the error only, and the court gave little explanation of the basis of its decision beyond the (undoubted) doing of justice between the parties.

D. CONCLUSIONS

It is clearly settled, first, that where goods are in the custody of a third party, delivery may be made by intimation of the transfer to that third party; and, second, that this form of delivery is not permitted unless the third party custodier is independent of the transferor. The basis of these rules is, however, obscure. It is not obvious how the

[95] *Burnett's Tr v Grainger* 2004 SC (HL) 19.
[96] (1879) 7 R 151.

transferee can begin to possess merely by instructing the custodier to begin to hold for him. Nor is it obvious why this form of delivery should be excluded by particular forms of relationship between transferor and custodier. It has been suggested here that the response to both of these points is to be found in the law of assignation. It has been suggested that this form of delivery operates by means of an assignation in favour of the transferee of the personal right held by the transferor against the custodier. As that personal right is the basis of the transferor's civil possession, when it passes to the transferee possession also passes and, thus, delivery is made. If indeed this form of delivery is based on assignation, it follows from this that it will not be possible where assignation of the transferor's right is excluded by *delectus personae*. It is suggested that this is the reason why this form of delivery is excluded where the custodier is an employee of the transferor. It is further suggested that the concept of *delectus personae* also allows us to set rational limits to the rule requiring that the custodier be independent of the transferor.

The more difficult question is whether this form of delivery can operate when there is no contractual relationship between owner and custodier at all. In the absence of authority on the point, it has not been possible to reach a firm conclusion on that point. It is hoped, though, that there is at least sketched in outline the shape that an argument to that effect would need to take.