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Recovery of goods by a non-owner

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Introduction

Each year, some time in late January, this writer stands at the front of a lecture theatre to describe to the new class of property law students the fundamental distinction between real rights and personal rights. This distinction, which was developed in Roman law, has rarely been explained better than in Barry Nicholas' account (*An Introduction to Roman Law* (1962), p. 100):

> "Any claim is either *in rem* or *in personam*, and there is an unbridgeable division between them. An action *in rem* asserts a relationship between a person and a thing, an action *in personam* a relationship between persons."

This distinction has, of course, been adopted in Scots law. Indeed, in *Burnett's Trustee v Grainger* 2004 SC (HL) 19, Lord Rodger quoted the above passage as reflecting Scots law (para 87).

If then I have a real right, such as ownership, I can enforce that right against anyone. By contrast, a personal right can only be enforced against some specific person or persons. Thus, for instance, a contract gives rise to personal rights, which cannot therefore be enforced against someone who is not a party to that contract. Suppose, for example, that A contracts to sell his house to B. A then receives a better offer from C, who knows nothing of the previous agreement with B, and so A transfers ownership to C instead. B's only remedy is against A for breach of contract. As B's right is only a personal right, it gives no remedy against C, who was not a party to the contract.

For all the elegant simplicity of the real/personal model, from time to time a case comes along that does not readily fit. These will be cases where justice appears to require the person with possession or custody of

the property to hand it over to someone with neither a real right in that property nor any apparent personal right against the possessor/custodier. The purpose of this article is to explore some of the issues arising in such circumstances. Four reported cases falling into this category have been identified, including one in 2015.

First, though, we need to be clear about the scope of this article. We are not concerned here with any case where the party seeking to recover the property has a real right in it, whether ownership or any other real right. Nor are we concerned with any case where the pursuer is a former possessor, seeking recovery of the property from a dispossessor, by means of an action for spuilzie.

Pride v St Anne's Bleaching Co* and *Caledonian Railway Co v Harrison & Co

The first two of these cases are very similar. In both, a party with custody of goods belonging to another accidentally delivered them to someone else. In *Pride v St Anne's Bleaching Co* (1838) 16 S 1376, the pursuer was a bleaching company, which held yarn belonging to two different customers. The pursuer accidentally delivered too much of this yarn to one customer (the defender) and too little to another. The pursuer paid the value of the difference to the customer who had received short delivery, and then sought to recover the excess yarn from the defender. In *Caledonian Railway Co v Harrison & Co* (1879) 7 R 151, the pursuers held goods belonging to a firm called Carruthers & Co, who had contracted to sell the goods to another firm, called Banks & Stewart. These being the days before the Sale of Goods Act 1893 (now the Sale of Goods Act 1979), delivery was required for the transfer of ownership of the goods. No delivery took place, the pursuers continuing to hold the goods for Carruthers & Co. Banks & Stewart then agreed to sell the goods to the defenders. In error, the pursuers accepted an instruction to deliver the goods to the defenders. When the error was discovered, the pursuers paid Carruthers & Co the value of the goods and then sought to recover the goods from the defenders.

In both cases, the pursuer was successful. In neither case, however, is the basis of the decision explained. This is not to criticise the justice of the outcome. On the contrary, the outcome seems entirely appropriate. Why, after all, should the owner of the goods have to bear the costs and hazards of litigation to recover them? It is better, surely, that these should fall on the party who handed the goods over to the wrong person. This is especially so where, as in these cases, that party has compensated the owner for his or her loss. To deny recovery of the goods in these circumstances would be to give a windfall to the third party.

At the same time, though, it is not easy to see a basis in legal principle for the outcome reached. Professor Reid has suggested that the pursuers' claims in these cases were based on unjustified enrichment, specifically the *condictio indebiti* ("Unjustified Enrichment and Property Law" 1994 Jur Rev 167 at pp. 192-193). As Professor Reid acknowledges, though, the term *condictio indebiti* does not appear and the nature of the pursuer's right in each case is not discussed. It is unfortunate that the court in neither case took the time to explain the basis of its decision.

A final point may be noted in passing about the decision in *Pride*. The pursuer in *Pride* had spindles of yarn belonging to two customers. We are told that these spindles were effectively identical, being of the same make and quality. Arguably, therefore, when they were brought together in the same hands, *commixtio* operated, rendering the yarn common property of the two customers (Stair, *Inst.* 2.1.37). If that was the case, the yarn delivered to the defender was in fact common property of the defender and the other customer, rather than belonging partly to one and partly to the other. It is perhaps fortunate that this issue was not raised, as it would potentially have complicated matters significantly.

McArthur v O'Donnell

In *McArthur v O'Donnell* 1969 SLT (Sh Ct) 24, the pursuer had entered into a contract to acquire goods on a hire purchase arrangement. As is well known, hire purchase involves goods initially being supplied on a hire basis, with ownership only being transferred when the final payment is

made. The supplier of the goods therefore retains ownership until that point.

The complication in this case was that the pursuer acquired the goods, not for herself, but for her daughter and prospective son-in-law, the defender. Although the pursuer was the hire purchaser, it was found on the evidence that the pursuer's daughter had actually paid the deposit and most or all of the instalments. The marriage took place in October 1965, but was short-lived, the spouses separating in or around April 1966. Shortly afterwards, payment for the goods stopped. The defender retained custody of the goods. The pursuer, as hire purchaser, sought the return of the goods.

In the event, the pursuer was successful. It is difficult, though, at least for this writer, to find the sheriff's reasoning convincing. The sheriff's starting point was that it was "clearly settled that something less than ownership entitles a person to sue for recovery of goods." However, the two cases cited do not support this contention. Both *McBride v Caledonian Railway Company* (1894) 21 R 620 and *Main v Leask* 1910 SC 772 are concerned with title to sue in delict if the property is damaged. It is certainly well established that a hirer has such title to sue, although neither case was actually concerned with that specific point. *Main v Leask* was concerned with a fishing boat operated on a profit-sharing basis by the owners and others; *McBride v Caledonian Railway Company* with the title to sue of the granter of an *ex facie* absolute disposition of heritable property, transferring ownership as security for a debt while remaining in occupation. *North Scottish Helicopters Ltd v United Technologies Corporation Inc* 1988 SLT 77, though, gives more recent, direct authority for the proposition. It has been argued by this writer (2008 SLT (News) 257) that the hirer's title to sue is based on being in possession of the property. If this is correct, the hirer's title to sue does not arise simply because of the existence of the hire contract. The hirer must also show possession, which would only be present in *McArthur v O'Donnell* if it could be shown that the defender in some sense held the goods on the pursuer's behalf. It is not clear that this was the case.

Be that as it may, however, the point is that the existence of title to sue in delict does not obviously imply a right to possession of the goods.

There is nothing inconsistent in the law of delict allowing someone to be compensated for losses arising from damage to property of which that person has no right to recover possession. The two rights *may* – and often will – go hand in hand, but they need not.

The sheriff goes on to say that that pursuer's "right under the hire purchase agreement is to have the use of the goods during the period of hire." Clearly she did have such a right. Equally clearly, though, the right of a hirer of goods is a personal right, arising under the contract entered into with the owner, and so by definition enforceable only against the owner. If I have a right under a contract, I may certainly enforce that right against the other party to the contract. It does not follow from that that I may enforce the right against anyone else. Indeed, the very nature of personal rights precludes any such enforcement.

There is another way of approaching this case, from which point of view the hire purchase element is a distraction. Take a hypothetical case, where the facts were identical but the pursuer was in fact owner of the goods when she handed them over to her daughter and the defender. The marriage then broke down, and the spouses separated. Could the pursuer have recovered the goods in those circumstances and, if so, on what basis?

In answering this question, it would be necessary to consider first the basis on which the goods were handed over to the pursuer's daughter and son-in-law. If the goods had been handed over as an outright gift, it is difficult to see any basis on which the pursuer could have recovered them. The possibility is excluded by the very nature of a gift. It is also difficult to see that the pursuer's position would have been improved by being, as in the actual case, hire purchaser rather than owner: either way, she handed the goods over without reserving any right to return of the goods. As the sheriff held that she did have the right to get the goods back, that suggests that the sheriff did not consider *McArthur v O'Donnell* to be a case of outright gift. Accordingly, an alternative must be considered.

We look again then at our hypothetical case, of goods handed over by an owner to her daughter and son-in-law, the owner then claiming the goods back when the married couple separate. If the party handing over

the goods is entitled to them back, there are two obvious possibilities for the basis of that decision. First, the intention might have been to make a loan. Second, there might have been a gift made conditionally on the continuation of the relationship. Either way, the party handing over the goods would have been entitled to get them back. That right, though, would not have arisen from any general right to possession, such as arises from ownership. Rather, the right to the return of the goods would have arisen from a contractual relationship between the parties.

The same must be true on the actual facts of *McArthur v O'Donnell*. Either the pursuer simply lent the goods to her daughter and the defender; or else she made a gift subject to a right to recover the goods if the spouses separated. It is not necessary to determine which one, although the first seems more likely given that, as a non-owner, the pursuer was in no position to make a successful gift. Either way, the pursuer would have had a right to recover the goods based on a contractual relationship with the defender. There was accordingly no need to consider whether, in the abstract, a hire purchaser has a right to possess the goods that may be enforced against third parties.

Canning v Glasgow Caledonian University

The final case raising this issue is a more recent one, *Canning v Glasgow Caledonian University* [2015] SC GLA 75, 2016 SLT 56. This case has involves complex facts and the consideration of a variety of interesting legal points. These have already been the subject of a recent article by Malcolm Combe (2016 SLT (News) 34), and so this article will not go into them in detail. A brief summary of the facts is necessary, however.

The case involved a large quantity of material called the William Gallacher Memorial Library ("the library"), originally collected by Willie Gallacher, a founding member of the Communist Party of Great Britain ("CPGB"). Following his death in 1965, the library came into the ownership of the CPGB, and was kept in premises in Glasgow occupied by them. In 1979, the pursuer took on a part-time, volunteer role as librarian in 1979, having sole responsibility for the library from 1980. When the CPGB had to vacate its Glasgow premises in 1987, the pursuer arranged

for the library to move to the headquarters of the Scottish Trades Union Congress. In 1997, the library was moved again, to the special collections department of Glasgow Caledonian University ("GCU"), where it has remained ever since. Throughout all of this, the pursuer continued to manage the library. This arrangement lasted until around May 2013, when GCU denied the pursuer access to the library pending resolution of the dispute that had arisen over its ownership.

Ownership was claimed by the pursuer, primarily on the basis of abandonment. This claim was rejected by the sheriff, and correctly so. As is well known, abandoned moveable property falls to the Crown. Accordingly, even if the pursuer had proved abandonment (which she failed to do in any case) it would not have helped her. The library was also claimed by an organisation called Democratic Left Scotland, the second defenders. The basis of the second defenders' claim was that they were a successor organisation to the CPGB, which dissolved in 1991. The second defenders were also unsuccessful, failing to show that ownership had ever been transferred to them. Neither party having succeeded in demonstrating ownership of the library, the sheriff allowed the pursuer to resume her management of it.

It is not intended here to criticise the sheriff. Given the parties' failure on the ownership question, and given that the owners of the library did not come forward to assert their rights, it seems appropriate to allow the pursuer to resume her management of the library and to make arrangements for its future care. The sheriff's decision has the benefit of providing a pragmatic solution to the problem, allowing it to be resolved in an obviously appropriate way in the absence of the owners. With the greatest respect to the sheriff, however, it is not at all easy to understand the basis in principle for that decision. Let us consider the sheriff's final two findings in fact and law:

> "(12) The pursuer *qua* depositary was and remains obliged to take reasonable care in the safe keeping of the library and to restore it to the owner upon demand.

> "(13) The pursuer *qua* depositary was and remains entitled to exercise sole care, control and custody of the library."

Finding (12) is fair enough as far as it goes. The pursuer is under the obligation described. That, however, is an obligation owed to the owners of the library and to them alone. It is enforceable by them but, as a personal right, it is irrelevant to the pursuer's relationship with anyone else. The fact that I may owe an obligation to one person does not, without more, imply that anyone else has an obligation to allow me to facilitate that obligation.

Finding (13), again, is unexceptionable as far as it goes. However, the nature of the pursuer's entitlement is not explored. Certainly the pursuer is "entitled to exercise sole care, control and custody of the library" in the sense that she has the authority of the owners to do so. As long as that authority lasts, she cannot be criticised by the owners for any action she takes, as long as it is within that authority. She therefore has a defence in any action based on a claim that she is acting wrongfully by taking on the management and care of the library. It does not follow from that, however, that she has an active right to defend the library itself against third party interference or to recover it from a third party. To adopt a metaphor that has been used elsewhere, a legal entitlement may be a shield rather than a sword. That is to say, it may form the basis of a defence but not an active remedy. Any right that the pursuer had that was based on the owners' authority was purely a personal right against the owners. By definition, a personal right is not enforceable against third parties.

On the conventional view of things, she would seem only to have a remedy against a third party interfering with the property in three circumstances. The first is where she could show ownership of the property, or some other real right affecting the property. The sheriff, though, rejected the pursuer's claim of ownership, and seems clearly correct to have done so. No other recognised real right seems to be present.

Secondly, a possessor of property has a remedy if that possession is interfered with. This remedy is known as spuilzie (see K G C Reid, *The*

Law of Property in Scotland (1996), paras 161-166). The pursuer did not however have possession, lacking the necessary intention to hold for her own benefit, and so the sheriff held (*Canning*, paras [96]-[100]).

Thirdly, she might have some separate right against the party interfering with the property. Certainly, if GCU should continue to deny the pursuer access to the library, they would appear to be committing a wrong, albeit one against the owners through their agent rather than against the pursuer personally. It is notable that it was with GCU that the pursuer made arrangements for the custody of the library. Perhaps there is room for implying into the agreement between the pursuer and GCU an obligation on the part of GCU not to deny the pursuer access to the library. This, though, formed no part of the sheriff's decision.

Conclusions

It is not intended here to question the distinction between real and personal rights. That distinction has proved its value over the centuries that divide us from the Roman jurists, and is perhaps the most fundamental idea in our property law. All the same, a full account of this distinction must take into account those marginal cases that do not readily fit. An attempt has been made here to give possible explanations or justifications for four such cases.

It is readily admitted that these attempts are open to criticism for artificiality, given that they depend on reasoning that does not appear in the actual cases. The response to that, though, is that the task is a necessary one. If these decisions are not given some kind of principled basis, it is difficult to know what to make of them in cases that are similar but are not quite in point. In all of these cases, the successful pursuer was the person who handed over the disputed property to the defender or at least, in *McArthur v O'Donnell*, arranged for that to happen. What, though, if the goods had passed into the hands of a third party? If, as has been tentatively suggested here, the explanation for these cases lies in the law of obligations, the conclusion would be that the goods could not be recovered from the third party. On the other hand, if the pursuer in these cases had some form of proprietary right, then (at least potentially) the

goods would have been recoverable from a third party. In that case, though, the nature of that right would need to be worked out. If such a case should arise in the future, it would be better if some thought had been given to the problem in advance. This article has been an attempt at least to contribute to that process.