Spuilzie today.

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The doctrine of spuilzie was discussed in the recent case Calor Gas Ltd v Express Fuels (Scotland) Ltd *[2008] CSOH 13, 2008 SLT 123. The writer considers the implications of this case, and asks whether spuilzie still has a place in the law.*

The action for spuilzie is, perhaps, not as well known as it once was. However, it occasionally resurfaces in the courts. *Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] CSOH 13, 2008 SLT 123, is such a case. However, it is not always well understood, with confusion over its nature creeping into many accounts. It is very common for accounts of spuilzie to proceed on the basis that it is designed to protect the interest of an owner of property (see, *e.g.* Thomson, *Delictual Liability* (3rd edn, 2004), p 5). As we shall see, this is a misunderstanding of the nature of spuilzie. No better is confusion between possession and the right to possession (see *e.g.* Walker, *The Law of Delict in Scotland* (2nd edn, 1981), p. 1005, defining spuilzie as "any act in relation to the goods which denies the complainer's title to own or possess them"). Possession and the right to possession are quite different concepts, and one may possess without having any right to possess.

Calor Gas Ltd v Express Fuels (Scotland) Ltd

The case concerned a dispute between a supplier and a retailer of liquefied petroleum gas, or LPG, supplied in cylinders. The pursuers, Calor Gas Ltd ("Calor") were the market leaders in the supply of LPG. The defenders, Express Fuels (Scotland) Ltd and D Jamieson & Son Ltd, were related companies, operated as a single business, which had previously been a retailer of Calor's LPG. In common with other such retailers, the defenders had entered into an agreement with Calor. In terms of this agreement, firstly, the defenders were only to purchase and sell Calor's LPG. Secondly, after the termination of the contract, the defender was prohibited from handling Calor's LPG cylinders. This meant that the defenders could not exchange empty Calor cylinders for cylinders containing a competitor's LPG, with the result that customers with Calor cylinders would be likely to buy replacement LPG from a Calor dealer, which was permitted to handle Calor cylinders. The purpose of the term, therefore, was to preserve Calor's dominance of the market by making it more difficult for dealers to switch to other suppliers.

The agreement was terminated in 2004. In fact, notwithstanding the prohibition in the agreement, the defenders continued to handle Calor cylinders. Calor sought to enforce the prohibition.

For the most part, the case concerned competition law, the defenders arguing that the prohibition was contrary to art 81(1) of the Treaty of Rome. However, the pursuers also put forward an alternative argument

based on spuilzie. To understand why the argument was rejected by the Lord Ordinary, it is necessary to consider the nature of spuilzie.

The right of possession

The basis of spuilzie is possession. As Stair says, the pursuer in an action for spuilzie "needs no other title but possession" (Stair, *Inst.* 1,9,17). The starting point for any discussion of spuilzie, therefore, has to be the concept of possession.

Possession is "the holding of property by ourselves, or by others for our use", and requires "an act of the body, which is detention and holding: and an act of the mind, which is the inclination or affection to make use of the thing detained" (Stair, *Inst.* 2,1,17). This possession can be exercised through another, in which case it is called "civil possession", in contrast to a possessor holding personally, who is called a "natural possessor". However, one who holds entirely on another's behalf, as in the case of an employee, is not a possessor (Stair, *Inst.* 2,1,17).

It is true that Erskine adopts a slightly different formulation of "the detention of a subject, with an *animus* or design in the detainer of holding it as his own property" (*Inst.* 2,1,20), appearing to require the intention to hold as owner (*animus domini*). However, Stair's account appears more consistent with the early authorities (see *e.g. Wishart v Laird of Arbuthnot* (1573) Mor 3605, *Bruce v Bruce* (1628) Mor 3609). In any case, Erskine subsequently qualifies his initial definition by allowing that one could possess on the basis of a subordinate real right (*Inst.* 2,1,22). The vital point to note about possession, however, is that one can possess without in fact having any right to possess.

Protection of possession: spuilzie

The importance of possession lies in the fact that it is a right. A possessor is therefore entitled to protect his position. A possessor who is dispossessed is entitled to be restored to possession pending resolution of the question of who has the right to possess (Erskine, *Inst.* 4,1,15). Damages, in the form of violent profits, may also be payable.

Dispossession of a possessor without consent or order of law is known as spuilzie. In the case of heritable property, the terms ejection and intrusion are sometimes used, the latter referring to the case where possession is taken from one possessing *animo solo* (*i.e.* one maintaining possession by intention alone, rather than through physical presence). Usage is not consistent, however, and the same principle applies to both types of property.

The decision in *Calor Gas Ltd v Express Fuels (Scotland) Ltd*: spuilzie

The pursuers argued, then, that the defenders had committed spuilzie by taking possession of the canisters in breach of the agreement, and therefore unlawfully. They were, therefore, as the argument was

summarised by the Lord Ordinary (at para [51]), "guilty of deliberate unauthorised possession of the pursuers' cylinders".

It should be apparent that this discloses a misunderstanding of spuilzie at the outset. Spuilzie protects possession. The point is the wrongful dispossession of the pursuer, not the resulting possession of the defender. To succeed in an action for spuilzie, the pursuer must show two things. The first is that he was in possession. The second is that the defender wrongfully dispossessed him. It is not difficult to imagine cases where possession is lost through the defender's actions without the defender actually acquiring possession. Thus Stair's definition, quoted by the Lord Ordinary at para [51], of spuilzie as "the taking away of moveables..." (*Inst.* 1,9,16) focuses on the removal of the property from the pursuer's possession. As the Lord Ordinary put it, "unlawful (sometimes called 'vitious') dispossession of the owner is required".

There would appear to be three reasons why the Lord Ordinary rejected the pursuers' arguments based on spuilzie, which will be considered in turn. Before considering these, however, there is one point to note. Although it does not affect the outcome of this particular case, it is better to avoid possible misunderstanding. This point is the Lord Ordinary's reference to spuilzie as protecting the possession of an "owner". As has been indicated, it is a common misapprehension that only owners are entitled to a remedy for spuilzie. Indeed, even Stair describes spuilzie as dispossession "without consent of the owner or order of law" (Stair, *Inst.* 1,9,16). However, in Stair's case, this must be taken to be looseness of language, for he subsequently makes it clear that only possession is required (Stair, *Inst.* 1,9,17). Indeed, he is clear that it is spuilzie, and actionable, for an owner to dispossess without consent or court order someone with no right at all to possess (Stair, *Inst.* 2,1,22).

(i) Possession given voluntarily by someone entitled to possess

The defenders acquired the canisters by means of voluntary delivery from the customers, who were lawfully in possession of them. As the Lord Ordinary pointed out (at para [53]), "spuilzie does not arise if possession is given voluntarily by someone entitled to possess the goods, even if he is not the owner". There is clear authority for this proposition (*e.g.* Stair, *Inst.* 1,9,20), which, indeed, is understandable if, as Stair says, spuilzie is intended to preserve public order (Stair, *Inst.* 2,1,22).

(ii) Defenders' intention to return the goods to the pursuers

The Lord Ordinary noted also (at para [53]) that the defenders took custody of the canisters solely with the intention of returning them to the pursuers. In fact, more could have been made of this point, as it is recognised that voluntary restitution within a reasonable time is a defence to an action for spuilzie (Bankton, *Inst.* 1,10,135), at least insofar as it concerns liability for violent profits, on which see further below.

It is true that Stair considers that this defence requires restitution within twenty-four hours (Stair, *Inst.* 1,9,23), although Bankton considers the

question of what constitutes a reasonable time is a matter for the judge's discretion (Bankton, *Inst.* 1,10,135). However, a person who takes possession of another's property is presumed to do so on their behalf (Bankton, *Inst.* 2,1,27), and so will not disturb their possession. Thus, the defenders' actions would not be considered spuilzie, even without the necessity to rely on a specific defence.

(iii) Pursuers not in possession

Although the points covered above would have been sufficient to dispose of the arguments based on spuilzie, the Lord Ordinary relied on one further ground. This ground was that the pursuers could not succeed as they were not in possession of the canisters in any case.

To demonstrate their possession, the pursuers had referred to an article by Alan Rodger (as was) called "Spuilzie in the Modern World", published at 1970 SLT (News) 33. This was an article commenting on the Sheriff Court case *FC Finance Ltd v Brown* 1969 SLT (Sh Ct) 41, another case in which an attempt was made to apply the doctrine of spuilzie.

The facts of *FC Finance Ltd v Brown* were, briefly, these. A car was hired on a hire purchase agreement. The car was sold by a dealer (who was aware of the hire purchase agreement), on behalf of the hirer, to a third party in good faith. The buyer therefore acquired good title in terms of Part III of the Hire-Purchase Act 1964. The HP company sued the dealer, as the hirer was in liquidation by this time.

The HP company argued that the dealer had spuilzied the car. However, both the Sheriff-Substitute and the Sheriff held that spuilzie was inapplicable, as the HP company was not in possession at the time of the hirer's breach of the HP agreement. In his article, however, Rodger demonstrates that the HP company was in possession. As we have seen, one can possess through another. This is known as civil possession. A familiar example is a landlord, who possesses through the tenant, and indeed a landlord is entitled to the remedy provided by spuilzie when his tenant is dispossessed (*Laird of Durie v Duddingston* (1549) Mor 14735). A lease is, of course, a form of hire, as is hire purchase. It follows, therefore, that the owner of property on hire purchase is entitled to the remedy.

The Lord Ordinary in *Calor Gas Ltd*, however, was not satisfied that the same applied in that case. As he said (at para [53]), "[junior counsel for the pursuers] did not persuade me that any ability of a hire purchase company to possess goods through the hirer could be extended to the pursuers in the circumstances of the present case".

This, however, seems to be incorrect. One possesses civilly when another holds, whether wholly or partly, on one's behalf. This can occur where the person with physical custody acts in such a way as to acknowledge the civil possessor's right (see *e.g. Earl of Fife's Trs v Sinclair* (1849) 12 D 223). In such a case, "the detentor holds on behalf of the possessor because to do otherwise would be to deny the lawfulness of his own

detention" (KGC Reid, *The Law of Property in Scotland* (1996), para 121). This appears to reflect the manner in which the customers held the pursuers' canisters, particularly since they acknowledged their obligation to return the canisters by returning them to the defenders. Although, as has been said, this does not affect the outcome of the present case, it would appear at least arguable that the pursuers did possess through the customers holding the canisters.

The decision in *Calor Gas Ltd v Express Fuels (Scotland) Ltd*: *quantum*

The Lord Ordinary also said that, even had spuilzie been established, the pursuers would not have been entitled to the remedy they sought, which was damages for commercial losses. The Lord Ordinary noted (at para [52]) that the reality of the situation was that "the battle was over the next contract...That has nothing to do with spuilzie" and (at para [54]) that the pursuers were "seeking to protect their commercial interests, not the proprietary interest protected by spuilzie". Indeed, as the Lord Ordinary earlier noted (at para [17]), prohibiting the handling of the canisters by the defenders was likely to increase the risk to the canisters, through theft, abandonment or unsafe use.

This is surely the correct analysis. While spuilzie gives rise to damages, in the form of violent profits, these are calculated according to the profits that the dispossessed party could have made from the property during the period of dispossession (Stair, *Inst.* 1,9,16 and 1,9,27). These damages therefore relate to the property itself, and not to any broader commercial interest.

Does spuilzie still have a place in the law?

Calor Gas Ltd v Express Fuels (Scotland) Ltd is not, then, a case of spuilzie. The question must be asked, therefore, whether spuilzie still has a place in the law. It is true that spuilzie is not widely used as a remedy nowadays, and the Scottish Law Commission has previously recommended its abolition on the grounds that it is "obsolete and superseded by more modern procedures" (Cmnd 5108, 1972, p. 52). It is also true that the possessory remedies have declined in practical importance, no doubt due to social conditions being more settled and, in the case of heritable property, the rise of registration making it easier to prove entitlement to possession. Nonetheless, the Commission's recommendation is misguided for two reasons.

Firstly, spuilzie provides the only protection for lawful possession by a person without a real right other than possession, such as a hirer or hire purchaser. If spuilzie were to be abolished, hirers would have no remedy against anyone who dispossessed them of the goods, other than the person from whom they hired the goods. This would be the case despite the fact that hirers are often functionally in the position of owners of the goods, the actual owner being merely a finance company. Such arrangements are scarcely unknown in practice. For example, in *North Scottish Helicopters Ltd v United Technologies Corporation Inc* 1988 SLT

77, a case to which I shall return shortly, under a contract of hire of a helicopter, the hirer bore the full risk of any damage to the helicopter. Without spuilzie, such a hirer would, in the event for instance of theft of the property, have no right to the return of the property from the thief, and yet would, depending on the construction of the hire contract, be bound to continue paying the hire. Contrary to what the Commission says, it is not at all clear that there are any "more modern procedures" protecting possession in such circumstances. Although true cases of spuilzie are not particularly common, abolition would leave a gap in the law. In suitable cases, there is no reason why possessory remedies should not be available.

Secondly, there is another group of cases which, though not normally classified as examples of spuilzie, appear nonetheless to depend on the right of possession. It is, of course, established law that one can not normally recover damages in delict for loss arising from damage to another's property. For example, in *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221, the pursuers were laying pipes belonging to British Gas. At a time when the pursuers were contractually liable for any damage to the pipes, the pipes were damaged by the defenders' negligence. It was held in the Inner House, reversing the decision of the Lord Ordinary, that the defenders were not liable. This is an example of the broader rule that there is no entitlement to recover damages in delict for what is often termed "pure economic loss".

Nonetheless, there was said in that case (at p 223) that there was an exception in cases where the pursuer had a "possessory right or title" to the goods. *North Scottish Helicopters Ltd v United Technologies Corporation Inc* 1988 SLT 77 is an example of such a case. In that case, a hirer of a helicopter was held entitled to recover for negligently caused damage to the helicopter, on the basis of having a "possessory title" to it. Such a manner of expressing the issue makes it unclear in which cases recovery will be allowed, particularly given that, in *Nacap*, the Inner House persistently refers the pursuers as having been in "possession" of the pipes. Nonetheless, there is a clear ground of distinction between the two cases. Only in *North Scottish Helicopters* was the pursuer in possession of the damaged property in the long-established sense expressed by the definitions referred to earlier. Possession, it will be remembered, is a right. This right extends, as Erskine says, to the prohibition on anyone "intermeddling" with the goods (Erskine, *Inst.* 3,7,16). In *North Scottish Helicopters*, a remedy was permitted on particular facts. In accordance with the well-known maxim *ubi remedium, ibi ius*, where the law affords a remedy, we must seek the right underlying it. The right of possession appears to be the only plausible candidate. For this reason, the present writer would suggest that *North Scottish Helicopters* is an example of spuilzie, that being the remedy that protects the possessor of moveable property.

Viewed this way, one can see that it is seriously misleading to categorise cases such as *North Scottish Helicopters* as examples of recovery for pure economic loss. They are not: rather, they are cases where damages are recovered for loss caused by interference with a real right. There are, it is

true, cases where recovery has been denied notwithstanding that the pursuer is in possession of the property that has been negligently damaged. This is entirely proper, for in many such cases the pursuer will have suffered no loss. *Blackburn v Sinclair* 1984 SLT 368 is such a case. In that case, the pursuer had a taxi under a hire purchase agreement. The taxi was damaged by the defender's negligence. At the time when the case was argued, the pursuer was in dispute with his insurance company over whether the insurer was liable to pay for the damage. In these circumstances, it was held that the defender was not liable to the pursuer for the damage to the taxi, *inter alia* on the basis that this was loss that the pursuer "may in fact never suffer" (at p. 369). Nonetheless, a failure properly to recognise the juridical basis on which such cases proceed does nothing to promote legal certainty and principled development of the law.

Conclusion

This article began by considering the treatment of spuilzie in *Calor Gas Ltd v Express Fuels (Scotland) Ltd*. We have seen that the case was correctly decided on spuilzie point. It is difficult to escape the impression that counsel for the pursuers did not fully grasp the meaning of spuilzie, which is perhaps unsurprising, given the paucity of recent authority on the matter. True cases of spuilzie are indeed rare in the modern era. However, it is the present author's contention that spuilzie nonetheless has a necessary place in the law, and that in appropriate cases there is no reason why the remedy should not be used.