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DELIVERY OF GOODS IN THE CUSTODY OF A THIRD PARTY: OPERATION AND BASIS

*Craig Anderson**

A. INTRODUCTION

(1) Significance and basis of delivery of moveables

The common law required delivery for the transfer of ownership of corporeal moveable property. This requirement was, however, abolished for sales of corporeal moveables by the Sale of Goods Act 1893,¹ although a limited role for delivery is retained in certain circumstances.² Accordingly, delivery is no longer required in the great majority of transfers of corporeal moveables. However, delivery is still needed in any transfer for no monetary consideration, such as a gift or an exchange.

Possession remains important in the creation of rights in security over corporeal moveable property.³ This point extends also to any "transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security", such transactions being excluded from the Sale of Goods Act 1979.⁴ Thus delivery retains a role in the law of corporeal moveable property, albeit a reduced one.

* Lecturer in Law, Robert Gordon University. The author acknowledges the helpful comments of Professor George Gretton, School of Law, University of Edinburgh, on a draft of this article. Any remaining errors remain, of course, the author's responsibility.

¹ See now Sale of Goods Act 1979, s. 17. The 1979 Act replaced the 1893 Act, and is in substantially identical terms. Because of the 1893 Act, case law on delivery is generally older.

² See eg ss 20(4), 24 and 25 of the 1979 Act. However, for the case where the goods are in the hands of a third party, s 29(4) gives a definition of delivery that follows the English rule of attornment, outlined below, rather than the general rules of Scots law discussed here, at least in cases where there is no document of title. For discussion, see KGC Reid, *The Law of Property in Scotland* (1996) para 620 (Gordon).

³ Thus the creation of a pledge requires delivery. Of course, some securities, such as a floating charge or the landlord's hypothec do not require the creditor to possess the property, but that arises from the nature of those securities and has nothing to do with the Sale of Goods Acts.

⁴ Sale of Goods Act 1979, s 62(4). For discussion of the scope of this provision, see eg GL Gretton, "Security over Moveables without Loss of Possession" 1978 SLT (News) 107; GL Gretton, "The Concept of Security" in DJ Cusine (ed), *A Scots Conveyancing Miscellany* (1987) 132-38; WJ Stewart, "Sale and Exchange" in *Stair Memorial Encyclopaedia* vol 20 (1992), para 815; SC Styles, "Debtor-to-Creditor Sales and the Sale of Goods Act 1979" 1995 JR 365; DL Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* 2nd edn (2005) paras 11.14, 12.06; Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011) paras 6.37-6.44.

(2) Forms of delivery

In its simplest form, delivery involves simply the handing over of the goods by the transferor to the transferee. However, delivery may take diverse forms.

Fundamentally, delivery means a giving of possession to the transferee.⁵ Possession, as defined by Stair, means "the holding or detaining of any thing by ourselves, or others for our use...[with] the inclination or affection to make use of the thing detained".⁶ As Stair's words indicate, this requirement for holding or detaining can be fulfilled through the acts of another acting on the possessor's behalf. Possession held in this way is known as civil possession, as opposed to natural possession, which arises where possession is held personally.

If delivery means a giving of possession to the transferee, then delivery may be effected by any means by which the transferee may satisfy the requirements of possession. Thus, for example, delivery of goods in a locked store may be made by delivery of the key, this being known in Roman law as *traditio clavium*.⁷ Where the goods are already in the custody of the transferee, the physical requirement for possession is already met, and so delivery requires only the transferee's intention to take possession (*traditio brevi manu*).⁸ It appears also that, in certain circumstances, delivery may be held to have occurred even though the goods are still in the transferor's custody. This is the *constitutum possessorium* of the Civilian tradition.⁹ Its scope is uncertain, but it appears that it may occur when the transferor's continued holding is on some new basis, such as a contract of hire.¹⁰ Delivery occurs here because the transferor's continued holding is now on the transferee's behalf. The transferee thus acquires civil possession through the transferor.

As possession may be held civilly, through another's acts, delivery may be made to the transferee by handing the goods over to someone acting on the

⁵ Stair, *Inst* 2.1.8, 3.2.5; Erskine, *Inst* 2.1.18; Bankton, *Inst* 2.1.26; Bell, *Prin* § 1300. For discussion see C Anderson, *The Physical Element of Possession of Corporeal Moveable Property in Scots Law* (Unpublished PhD thesis, University of Edinburgh, 2014) 48-55.

⁶ Stair, *Inst* 2.1.17. See also Erskine, *Inst* 2.1.20; Bankton, *Inst* 2.1.26.

⁷ Bell, *Comm* I, 186-187; W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 3rd edn (1975) 227.

⁸ Stair, *Inst* 3.2.5; Erskine, *Inst* 2.1.19; Bankton, *Inst* 2.1.23.

⁹ WM Gordon, *Studies in the Transfer of Property by Traditio* (1970) 13-35. The name is derived from D.41.2.17.1, but is not itself classical.

¹⁰ Reid, *Property* (n 2) para 623 (Gordon); Carey Miller with Irvine, *Corporeal Moveables* (n 4) paras 8.23-8.25; GCH Paton (ed), *Baron David Hume's Lectures, 1786-1822* (Stair Society vols 5, 13, 15, 17, 18, 19, 1939-1958) vol 3, pp. 251-252; *Orr's Tr v Tullis* (1870) 8 M 936.

transferee's behalf, such as an employee or an agent. As we shall see, this idea has been extended to allow delivery of goods held in the custody of a third party, on the transferor's instructions, by intimation to that third party custodian.

Those forms of delivery that do not involve a direct handing over of the goods are often collectively known as "constructive delivery".¹¹ It is with the final form of delivery mentioned that this article is concerned, the delivery of goods in third party custody by intimation to that custodian. The purpose of this article is to explore the background and basis of this form of delivery.

B. BACKGROUND

(1) Historical background

It is a common observation that Scots property law is strongly influenced by Roman law,¹² and the law of possession is no exception to this.¹³ Most obviously, we see the use of Roman terminology and authority.¹⁴ Nonetheless, as Carey Miller says, that adoption of terminology does not necessarily mean adoption of substance: "not infrequently, an investigation of the law behind the label reveals a distinctive solution".¹⁵ Indeed, it does seem that, by accepting delivery of goods in the custody of a third party, Scots law goes beyond what Roman law accepted as constituting delivery. There is no sign that this form of delivery was recognised in Roman law,¹⁶

¹¹ See e.g. Carey Miller with Irvine, *Corporeal Moveables* (n 4) para 8.20; AJM Steven, *Pledge and Lien* (2008) paras 6-27 - 6-28.

¹² On this, see e.g. Reid, *Property* (n 2) para 2; K Reid, "Property Law: Sources and Doctrine" and G McLeod, "The Romanization of Property Law" in K Reid & R Zimmermann (eds), *A History of Private Law in Scotland, Volume 1: Introduction and Property* (2000) 192-193 and 220-244 respectively.

¹³ Reid, *Property* (n 2) para 114; Gordon, *Traditio* (n 9) 210 (on delivery specifically); K Reid, "Property Law: Sources and Doctrine" in Reid & Zimmermann, *History of Private Law* (n 12) 210-212.

¹⁴ For example, all of the references in Stair's general account of possession (*Inst* 2.1.17-24) are to Roman sources, except for a number of Scots cases on *bona fide* possession cited at *Inst* 2.1.24. Erskine's account of delivery and possession (*Inst* 2.1.18-30) relies primarily on Roman sources and uses Roman terminology. Bankton's account of delivery (*Inst* 2.1.20, 22-23) refers only to Roman authority, as does his general account of possession (*Inst* 2.1.26-33) except for some Scots cases on the possessory judgment at *Inst* 2.1.33. It is true that, later, Bell's general account of delivery (*Comm* I, 181-223) makes considerable use of English cases, but he does still make use of Roman and more recent continental literature (*Comm* I, 181 n 3; I, 216 n 1, n 2).

¹⁵ DL Carey Miller, "Derivative Acquisition of Moveables" in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 129. See also D L Carey Miller, "Stair's Property: A Romanist System?" 1995 JR 70 at 70-71.

¹⁶ MP Brown, *A Treatise on the Law of Sale* (1821) 393.

nor is it recognised in all modern Civilian systems.¹⁷ Even South Africa, whose law is so often remarkably similar to Scots law,¹⁸ does not accept this form of delivery, instead adopting the English requirement that the custodier "attorn" to the transferee by consenting to hold on the transferee's behalf, this form of delivery being known as attornment.¹⁹

In Scotland, this form of delivery appears relatively late: in all of the institutional writings and other Scots legal literature before Bell, there is only one, doubtful, reference to this form of delivery.²⁰ No doubt, at least part of the explanation for this is that the development of a legal system responds primarily to the practical demands placed on it. If there is no practical demand for the law to accommodate a particular development, then there is a good chance that that development will not occur. In the case of Scots law, R Brown plausibly attributes the impetus behind the development of this form of delivery to the bonding system created in the nineteenth century.²¹ Under this system, goods could be imported without payment of the appropriate excise duty, on condition that they were warehoused under a double lock, one key being held by the revenue officer, the goods only being released on payment of the duty. Physical delivery thus being impossible, it was necessary to develop an alternative method.

There is, however, a theoretical problem with this form of delivery. It is unproblematic that the transferor's possession is held and exercised through the acts of another, the custodier. As we have seen, possession may be held civilly, through

¹⁷ C von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 vols, 2009, hereafter "DCFR") 4539. The DCFR itself makes provision in art VIII.-2:105(2) (page 4536), requiring intimation by the transferor to the custodier.

¹⁸ Thus, in the preface to R Zimmermann, D Visser & K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004), it is observed that "a lawyer from the one jurisdiction feels immediately at home with the law books of the other".

¹⁹ CG van der Merwe & MJ de Waal, *The Law of Things and Servitudes* (1993) para 175; PJ Badenhorst, JM Pienaar & H Mostert, *Silberberg & Schoeman's The Law of Property* 5th edn (2006), para 9.2.3.2(e); DL 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. On the English law, see e.g. F Pollock & RS Wright, *An Essay on Possession in the Common Law* (1888) 73; *Halsbury's Laws of England* (4th edn, 2005 reissue), vol 41 para 170.

²⁰ Stair, *Inst* 3.2.5. From its terms, this text appears to refer to cases where the transferor is not in possession, whether natural or civil.

²¹ R Brown, *Treatise on the Sale of Goods, with Special Reference to the Law of Scotland* 2nd edn (1911) 200 n 2. For an outline of the bonding system and its development, see MP Brown, *Sale* (n 16) 528-29; Bell, *Comm* I, 199-211. It does not seem, though, that this system was a novelty. Boccaccio describes a similar system in operation in Italian port cities in the fourteenth century: G Boccaccio, *Decameron* (c. 1350, J Payne (tr) 1886, revd C Ó Cuilleain 2004) tale VIII.10.

another. Such possession is based on the custodier's consent to holding on behalf on another, in the present case such consent being expressed in the contractual obligations assumed by the custodier with respect to the goods. It is not clear how the custodier then comes to hold instead for another, without the custodier's consent to that. There does not appear to be any other situation in which I can acquire possession merely by instructing the person with custody of my property to hold on my behalf.

The earliest case on this form of delivery appears to be *Main v Maxwell*,²² in which it was held good delivery that goods in a public weigh-house had been weighed out to the buyer and marked as belonging to him. However, the effectiveness of this form of delivery was only firmly established by a series of cases in the nineteenth century.

The first of this series of cases is *Mathie's Tr v Auchie, Ure & Co.*²³ In this case, Auchie, Ure & Co imported a quantity of rum, which was deposited in the cellars of the Sandemans. There then followed a sale to Mathie, which was intimated to the Sandemans, and part of the goods removed. Mathie then became insolvent. It was argued for Mathie's trustee that, when Mathie was entered as owner in the Sandemans' books, the custodier "ceased to be the agent of the importer, and became the agent of the purchaser, whose orders he was bound to obey". The seller could do no more at this point to effect delivery, and could be asked to do no more. The trustee relied on several Scots cases holding indorsement and delivery of a bill of lading to be delivery of goods in transit by sea²⁴ and an English case on stoppage *in transitu*,²⁵ the point being to show that delivery could occur when goods were in the hands of a third party. The argument was that delivery occurred when intimation of the sale was made to the custodiers, and the custodiers then noted the fact in their warehouse books. The trustee was, however, unsuccessful in the Court of Session, although it was not in fact held that delivery had not occurred. Instead, the Court of Session appears to have accepted an argument based on stoppage *in transitu*. As stoppage *in transitu* does not

²² (1710) Mor 9124. This case is accepted by MP Brown, *Sale* (n 16) 527-28 as being a case of this kind.

²³ (1804) Mor 14226.

²⁴ *Buchanan & Cochrane v Swan* (1764) Mor 14208; *Arthur v Hastie & Jamieson* (1770) Mor 14209; *Bogle v Dunmore* (1787) Mor 14216.

²⁵ *Ellis v Hunt* (1789) 3 Term Rep 464; 100 ER 679. Stoppage *in transitu*, more commonly known nowadays as stoppage in transit, is a right on the part of an unpaid seller to instruct the carrier of goods not to hand the goods over to the buyer. It was introduced into Scots law by the House of Lords in *Allan Stewart & Co v Stein's Creditors* (1790) Mor 4951, 3 Pat 191. On the introduction of the doctrine into Scots law, see Bell, *Comm* I, 223-39; MP Brown, *Sale* (n 16) 434. The current law is contained in the Sale of Goods Act 1979, ss 44-46.

depend on whether delivery has occurred,²⁶ the decision is consistent with the idea that delivery may occur by a transfer of civil possession, through intimation to the custodier. Equally, though, the Court did not hold that this form of delivery was competent.

The trustee appealed to the House of Lords. However, before the appeal was determined, a decision was made by the Court of Session in another case, more supportive of this form of delivery. In *Tod & Co v Rattray*,²⁷ a quantity of wine was imported by Tod & Co and stored in a bonded warehouse. There then followed a series of sales, each involving the giving of a delivery order to the buyer, addressed to the custodier, each sale being intimated to the revenue officer.²⁸ The final sale was to Rattray. The question then arose whether there had been delivery to Rattray. The majority held that delivery had occurred. However, the judges' opinions fell into three groups.

The first group held that *Mathie's Tr v Auchie, Ure & Co* was wrongly decided. The present facts, they held, were equivalent to delivery into a cellar in the care of someone hired by the buyer:

the goods remained unmoved, but the right to the cellar, and to the services of the keeper, was transferred, so that they were equally put into the civil possession of the buyer.

This, then, is a decision that delivery may occur where the goods are in a third party's custody.

The second group held that *Mathie's Tr v Auchie, Ure & Co* was correctly decided. However, that case, it was held, could be distinguished on the basis of that in the present case sub-sales had followed on from the original transaction. By granting a delivery order to the first purchaser, Tod & Co had allowed that party to assume the appearance of owner of the goods, and so were now personally barred from denying that ownership.

²⁶ Indeed, it is unnecessary if delivery has not occurred, for then the seller will still be in possession and can retain the goods against performance by the buyer. This will be on the basis of the seller's lien if the seller is still owner. On the seller's lien, see Sale of Goods Act 1979, ss. 41-43.

²⁷ 1 Feb 1809, FC.

²⁸ As we shall see, it has subsequently been held that intimation to the revenue officer was not sufficient, and that intimation should instead be made to the warehousekeeper.

The third group held that *Mathie's Tr v Auchie, Ure & Co* was correctly decided, taking the view that a delivery order gives only a right to require delivery. "Constructive delivery" was considered to be only an "equitable expedient" for the purposes of commerce and not to be delivery in the strictest sense. In reaching this view, this group referred to two cases of, it must be said, doubtful relevance. The first of these was *Viscount of Arbuthnott v Paterson*.²⁹ In that case, tenants of the Viscount of Arbuthnott, who were under an obligation to convey grain to the Viscount, were instructed instead to deliver the grain to a third party to whom the Viscount had sold the grain. However, as the tenants were owners of the grain until delivery,³⁰ this appears to be not a transfer of the Viscount's civil possession - he had no such possession - but rather an assignation of a personal right to get delivery from the tenants. The second case cited was *Collins v Marquis's Creditors*,³¹ which was concerned with stoppage *in transitu* in circumstances where part of a cargo was physically delivered to the transferee and part was still in the hands of the carrier. In other words, neither case was about delivery at all.

Between them, the first and second groups formed a majority. However, the disagreement between them meant that the basis of the decision was unclear until the appeal in *Mathie's Tr v Auchie, Ure & Co* was determined by the House of Lords. In the event, the House of Lords held that delivery had occurred on the facts stated,³² reversing the decision of the Court of Session. This position was quickly accepted. Thus, for example, in *Auld v Hall & Co*,³³ it was said *obiter* by the Lord President that intimation to the custodier was needed to effect delivery when the goods were held by a third party. In *Eadie v Mackinlay*,³⁴ delivery was denied in the absence of proper intimation to the custodier.

²⁹ (1798) Mor 14220.

³⁰ This is because, as "industrial growing crops", *i.e.* crops requiring annual seed and labour, the crops did not accede to the land and thus did not become the property of the owner of the land: Stair, *Inst* 2.1.34; Erskine, *Inst* 2.6.11; Bankton, *Inst* 2.1.10; *Boskabelle Ltd v Laird* 2006 SLT 1079. For discussion, see DL Carey Miller, "Right to Annual Crops" (2007) 11 Edin LR 274.

³¹ (1804) Mor 14223.

³² *Spence v Auchie, Ure & Co* (1810) 5 Pat 291.

³³ 12 June 1811, FC.

³⁴ 7 Feb 1815, FC.

It is settled, then, that delivery of goods may be made while those goods remain in the hands of a third party.³⁵ Before considering the basis of this, however, we must consider how this form of delivery operates.³⁶

C. OPERATION

(1) The role of intimation

(a) Intimation must be made. In this form of delivery, intimation to the custodian is essential:

delivery was held to have taken place upon acceptance by the holding third party of an intimation from the transferor instructing that henceforth the thing be held on behalf of the transferee.³⁷

In fact, in the reported cases intimation is typically made by the transferee by means of a delivery order addressed by the transferor to the custodian. The practical benefit of this approach is obvious:

Where A agrees to transfer the property in goods to B, and the transfer is to be effected by constructive delivery, B is the person who has the interest to intimate to the custodian the change of possession, because to complete his

³⁵ There has been some doubt as to whether this extends to the creation of a right of pledge. In *Hamilton v Western Bank* (1856) 19 D 152 it was held that a pledge could not be created by a transfer of civil possession, the result being in fact an outright conveyance, albeit one subject to an obligation to reconvey. For criticism of this decision, see AJM Steven, *Pledge and Lien* (2008), paras 6-21 - 6-26 and sources cited there. This form of delivery has been held sufficient for the creation of a pledge in subsequent cases: see e.g. *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70; *Dobell, Beckett & Co v Neilson* (1904) 7 F 281; *Hayman & Son v M'Lintock* 1907 SC 936; *Price & Pierce Ltd v Bank of Scotland* 1910 SC 1095.

³⁶ In addition to the cases cited below, see also e.g. *Marris v White & Mackay* (1889) 5 Sh Ct Rep 163, although that case was ultimately disposed of on other grounds.

³⁷ Carey Miller & Pope, "Acquisition of Ownership" (n 19) 696. See also TB Smith, *A Short Commentary of the Law of Scotland* (1962) 539. In fact, it does not appear that any act of acceptance by the custodian is required. As Bell says, it is "the notice to the custodian that operates as a transfer of the property" (*Comm I*, 194). This is the same in another context in which it is necessary to intimate to a third party in order to transfer a right, namely assignation. It is notable here that Carey Miller & Pope state that intimation is to be made by the transferor. Ross Anderson appears to consider it doubtful whether, in assignations in general, it is competent for intimation to be made by the assignor (RG Anderson, *Assignation* (2008), paras 6-30 - 6-33), although he does cite two cases in which this was held to be effective (*A v B* (1540) Mor 843; *Libertas Kommerz GmbH v Johnson* 1977 SC 191).

right of property he must obtain delivery. But the custodier does not know B; he only knows A. Therefore A must enable B to vouch the fact that he is authorised to intimate the change of possession. This might be done by A and B appearing together at the store and verbal intimation, but it is frequently done in writing.³⁸

However intimation is made, though, it must be borne in mind that the function of intimation is to allow the party to whom it is made to know to whom he must perform his obligations. Accordingly, the intimation must refer to the transfer of the goods. Thus, in *Eadie v Mackinlay*,³⁹ where the transferee merely informed the custodier's trustee in sequestration that the custodier held hides belonging to him, this was held insufficient intimation.

Gordon states that the instruction to hold the goods for the transferee must actually be received by the custodier.⁴⁰ Neither of the cases he cites as authority for this⁴¹ actually says anything on this point, but it seems reasonable to suppose that it is the case.

(b) Transferor must not be merely someone with a right to get delivery. Where the goods are in the hands of the transferor, an assignation of the transferee's right to delivery of the goods will not operate as a delivery of the goods to the assignee. We have already seen this point in *Viscount of Arbuthnott v Paterson*,⁴² but the same point is made *obiter* in *Pochin & Co v Robinows & Marjoribanks*.⁴³ In that case, P had agreed to buy from a manufacturer a quantity of iron forming part of the manufacturer's stock. P then engaged C as an agent to find a purchaser for the iron and, on being informed by C that a purchaser had been found, P indorsed the delivery order in C's favour. In fact there was no purchaser, and C subsequently sold to R. It was observed that the transaction between P and C could only have been an assignation of a personal right to delivery of the iron, in part because the iron had not

³⁸ NML Walker & JFG Thomson, "Document of Title" in J Wark (ed), *Encyclopaedia of the Laws of Scotland*, vol 6 (1928), para 61. See also Anderson (n 37) para 6-31, where a similar point is made.

³⁹ 7 Feb 1815, FC.

⁴⁰ Reid, *Property* (n 2) para 620 (Gordon).

⁴¹ *Tod & Co v Rattray* 1 Feb 1809, FC; *Auld v Hall & Co* 12 June 1811, FC.

⁴² (1798) Mor 14220.

⁴³ (1869) 7 M 622.

yet been specifically identified, but also because the custodier was the original seller.⁴⁴

It seems that this must be correct. Suppose that A has agreed to convey goods to B. If delivery is required for transfer of ownership, and delivery has not been made to B, then all that B has acquired is a personal right to get delivery and become owner. He is not yet owner. He therefore cannot directly convey ownership to C: *nemo dat quod non habet*. He can certainly assign his personal right to C, but that would not constitute delivery to C unless there then followed sufficient acts to constitute delivery from A to C. There is thus a distinction to be made between a party who has lodged his own property in the safekeeping of another, and one who has agreed to acquire property belonging to that other. It is true that this distinction has not always been clearly observed.⁴⁵ For example, in *Auld v Hall & Co*,⁴⁶ on facts essentially identical to those just described, it seems to have been accepted that there had been delivery from A to B, the subsequent delivery from B to C failing only for want of intimation. Nonetheless, the point seems clear.

That being the case, it is surprising that it caused such difficulty in *Distillers Co Ltd v Dawson*.⁴⁷ In that case, a distiller had sold a quantity of whisky, but had kept it in its own warehouse. There then followed over a period of six years a number of sub-sales, each intimated to the distiller but in each case the whisky remaining in the distiller's custody. The final purchaser became bankrupt, whereupon ownership of the whisky was disputed. In the Inner House the majority⁴⁸ took the position adopted here that, no delivery having been made to the first purchaser, all that could be conveyed by the first purchaser was a personal right to take delivery and become owner.

However, the Lord Ordinary and, in the Inner House, Lord Mure, took a position that is, with respect, difficult to follow. They both seem to accept that there was no delivery to the first purchaser, but hold that there had been delivery to

⁴⁴ The point is most clearly made by the Lord President, at 629.

⁴⁵ The Scottish courts, it must be said, are not the first to fail to make the distinction clear. See for example S Pufendorf, *De Jure Naturae et Gentium Libri Octo, Volume Two: The Translation of the Edition of 1688* (CH Oldfather & WA Oldfather (trs), 1934) 4.9.9, where it is said that a "fictitious delivery of possession also takes place between three persons by delegation, when, for instance, a man wishes to give me something, or owes it, and I order him to give it to another. For that is the same as if the thing had first been given to me, and then handed over by me to a third party". As it is made clear that delivery must be made to me to make me owner, for this passage to make sense delivery must also have been made to the third party. This, however, is not stated: all we are told is that the order has been given for delivery to the third party.

⁴⁶ 12 June 1811, FC.

⁴⁷ (1889) 16 R 479. For discussion see note by HG at (1889) 1 JR 228.

⁴⁸ The Lord President and Lords Adam and Kinnear.

subsequent purchasers. It is difficult to see how this could be the case, given that, as Lord Kinnear pointed out,⁴⁹ the sub-purchasers had done no more than the original purchasers.

In fact, given that warehouse rent was paid to the distillers by the purchasers and sub-purchasers for storage of the whisky, there was scope for an argument based on *constitutum possessorium*. Although he does not use the phrase, this appears to be the basis of Lord Shand's view as part of the minority:

Constructive delivery is complete by payment, followed by the new contract or arrangement made with the seller, which entirely changes his title to the goods from one of property to one of depositary, hirer, or otherwise.⁵⁰

Unfortunately, there is little analysis of the position, and he appears to consider this to be an exception to the delivery requirement rather than an example of delivery.⁵¹

This requirement, while its theoretical justification is clear, may reasonably be seen as the most problematic aspect in practical terms of this form of delivery, in that it makes the transferee's position depend on matters of which he is likely to have no knowledge. The transferee may not know whether the transferor has actually had delivery or is merely someone with a personal right to get delivery. This is especially so in a case such as *Browne & Co v Ainslie & Co*,⁵² the transferor has sought (for commercial reasons) to conceal the facts on that point.⁵³ Again, where goods delivered in this way are then conveyed to another person, the subsequent acquirer may not know whether the first acquirer himself intimated to the custodian. In such a case, the subsequent acquirer would arguably acquire ownership by accretion on

⁴⁹ (1889) 16 R 479, 501.

⁵⁰ (1889) 16 R 479, 495.

⁵¹ Thus, at 494, he says that "the brocard *traditionibus non nudis pactis transferuntur rerum dominia* [has] no proper application" in cases of this kind. It may also be noted in passing that Lord Shand's view (at 496) that momentary possession by the transferee, followed immediately by return to the transferor on the basis of custody, would sufficient, does not seem to be supported by the authorities. Such attempts to circumvent the delivery requirement have typically been seen as shams and denied effect: *Taylor v Jack* (1821) 1 S 139; *Stiven v Cowan* (1878) 15 SLR 422. Compare *Eadie v Young* (1815) Hume 705, in which such an arrangement was upheld, but which arguably met the requirements for a *constitutum possessorium*.

⁵² (1893) 21 R 173.

⁵³ (1893) 21 R 173 at 176-177. The reason for the concealment was that the purchasers, a London company, wanted to appear to be Scottish in order to assist in the resale of the goods, a quantity of Scotch whisky.

making intimation himself,⁵⁴ assuming the case was one in which delivery was required, but that would still involve the complication that the custodier would not know about the previous conveyance, and so would be reluctant to hand over the goods to the final acquirer. However, the position seems clear.

D. BASIS OF DELIVERY BY INTIMATION TO A THIRD PARTY CUSTODIER

It appears, then, that delivery of goods in the custody of a third party may be made by intimation to that third party. The goods need not be removed from the third party's custody. Unfortunately, while this much is clear, the basis of the recognition of this form of delivery is less clear. Three possibilities have been suggested.

(1) Expansion of rule for bills of lading

Where goods are being transported by sea, delivery of the goods may be made by delivery of a bill of lading issued by the carrier to the shipper.⁵⁵ It has been suggested that delivery by intimation to a third party custodier is a development of this rule.⁵⁶ There is indeed some similarity, with a delivery order addressed to the custodier normally taking the place of the bill of lading. For this view, it may be noted that, in *Mathie's Tr v Auchie, Ure & Co*,⁵⁷ the argument in the Court of Session for the ultimately-successful trustee was largely based on cases on bills of lading. However, this cannot be conclusive. At this point, these cases were almost the only authorities that could be argued to be relevant to the question. As we have seen, there were no cases directly in point, so it is hardly surprising that counsel for the trustee seized on them. This, however, was not the ultimate basis for the decision in the House of Lords.

The argument that this form of delivery is derived from the practice on bills of lading faces the difficulty that no notice to the custodier is required in the case of a bill of lading, contrary to the requirements for the form of delivery with which we are

⁵⁴ Reid, *Property* (n 2) paras 677-678.

⁵⁵ Reid, *Property* (n 2) para 621 (Gordon).

⁵⁶ MJ King, "Moveables (Delivery of)" in J Wark (ed), *Encyclopaedia of the Laws of Scotland*, vol 10 (1930), para 240; R Brown, *Sale* (n 17) 206.

⁵⁷ (1804) Mor 14226.

concerned. For R Brown, the reason for the difference is that a bill of lading is issued by the custodier, the carrier of the goods. In other cases, the custodier is not involved in the issue of a delivery order. The owner may have issued several delivery orders, but the custodier can only be bound to implement the first presented to him:

The custodier cannot be held responsible for loss arising from his acting on the instructions of the only owner he knows - the only person to whom under his contract he has rendered himself responsible.⁵⁸

However, much the same can be said of bills of lading issued in sets, as indeed Brown notes.⁵⁹ He considers, however, that the issue of bills in sets is less likely to lead to fraud on account of three factors.⁶⁰

First, he says, the goods are at sea and so incapable of actual delivery. However, it may be suggested that, if anything, this is more likely to lead to fraud rather than less, as (at least in the days before modern communications) fraudulent multiple sales would be less likely to be prematurely exposed by purchasers contacting the carrier.

Second, Brown notes that a bill of lading also embodies the contract of carriage: "[a] contract to which third persons are parties is not exposed to the same risk of fraudulent duplication."⁶¹ He does not, however, explain why this should be the case.

Third, bills issued in sets state that fact and the number issued, "which, to some extent, puts an indorsee upon enquiry."⁶² This, however, is a weak protection at best. As Brown himself says,⁶³ it is only necessary to present one of a set of bills of lading, performance of which by the carrier cancels the others.

In addition, on Brown's view it ought to be the case that intimation is not required where the custodier has been a party to the issue of the delivery order. Indeed, Brown goes further, appearing to suggest that it should be enough just to intimate the first transfer, "for the custodier knows that he is holding the goods under a delivery order which is still in currency and that it is at his peril if he delivers the

⁵⁸ R Brown, *Sale* (n 21) 199.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid* 198 n 8.

goods to anyone who does not deliver up the order duly indorsed to the presenter".⁶⁴ There is, however, no trace in the case law of such a rule.

(2) *Traditio longa manu*

Roman law recognised a form of delivery, known as *traditio longa manu*, that involved "pointing out the thing to the transferee, and authorising him to take it, in such conditions that it was in his immediate power to do so".⁶⁵ Examples in the texts include delivery of objects too heavy to move⁶⁶ by pointing them out⁶⁷ and the giving of possession of land by pointing it out from a tower.⁶⁸

Gordon suggests that delivery by the transfer of civil possession is a form of delivery *longa manu*, as a "development of the principle implicit in D.46.3.79".⁶⁹ This, a passage from Javolenus, reads as follows:

Should I direct you to put money or anything else which you owe me where I can see it, the result is that you are released at once and that it becomes mine. For in such a case, no one else having physical control of the thing, it is acquired by me, and in a sense, there is deemed to be a delivery by the long hand.

According to Gordon, the principle implicit in this passage is that "there is delivery by giving instructions which put the thing out of the control of the present possessor and into the control of the acquirer".⁷⁰ Carey Miller, although considering the needs of commerce to have been the main factor in the development of this form of delivery, finds Gordon's view:

⁶⁴ *ibid* 199.

⁶⁵ Buckland (n 7) 227. See also JAC Thomas, *Textbook of Roman Law* (1976) 182;; M Kaser, *Das Römische Privatrecht* 2nd edn (2 vols, 1971-1975) vol 1, 391.

⁶⁶ Presumably by this Paul means merely that the item is too heavy to be readily moved, rather than it being literally incapable of movement.

⁶⁷ Paul, D.41.2.1.21. Paul also includes here delivery of wine kept in a locked cellar by delivery of the keys.

⁶⁸ Celsus, D.41.2.18.2. It is questionable whether this would be recognised as sufficient in Scots law, given that there is no actual exercise of control here.

⁶⁹ Reid, *Property* (n 2) para 620 (Gordon); Gordon, *Traditio* (n 9) 217.

⁷⁰ Gordon, *Traditio* (n 9) 217.

plausible on the basis that the giving of the instructions to a third party is an obvious possible extension of the notion of delivery by an act which brings about a shift of control from transferor to transferee.⁷¹

However, although the phrase *manu longa tradita* is used by Javolenus, the example he gives seems more like a normal delivery of direct control if, as Thomas reasonably assumes,⁷² this takes place within the creditor's own premises. In other words, Javolenus seems to be concerned with a quite different situation. The other texts identified as relating to *traditio longa manu* seem to relate to cases where, at best, there is not so much a taking of control by the transferee as there is a permission to take control.

Gordon is not alone in identifying this form of delivery with *traditio longa manu*. In the Netherlands and Belgium, for example, this form of delivery is recognised and is given this name.⁷³ However the situation may be for those countries, though, it is not clear that in Scots law there is any sound basis for believing this form of delivery to be derived from *traditio longa manu*. For one thing, the requirement to intimate to the custodian distinguishes this form of delivery from the *traditio longa manu*. No such requirement appears in the Roman sources, either for the *traditio longa manu* or the *traditio clavium*, which Gordon considers to be a form of *traditio longa manu*.⁷⁴ In the case of a *traditio clavium*, the goods may nonetheless have some sort of custodian, perhaps the keeper of a warehouse containing the area in which the goods are locked. Nonetheless, it does not appear that intimation to that custodian is required in the case of a *traditio clavium*. If both that and the present form of delivery are examples of *traditio longa manu*, there seems to be no obvious reason why, in the former case, the handing over of a delivery order to the transferee should not be enough, without any requirement for intimation. It is also notable that there is no reference in the case law to this form of delivery being based on *traditio longa manu*. Of course, this factor should not be given too much weight: the term *constitutum possessorium* does not seem ever to have been used by a Scottish court, but as we have seen that form of delivery has certainly been recognised at least

⁷¹ Carey Miller, "Derivative Acquisition" (n 15) 150. Indeed, Gordon's position on this point is adopted by Carey Miller & Pope, "Acquisition of Ownership" (n 19) 696.

⁷² Thomas (n 65) 182, referring in error to D.46.3.75.

⁷³ DCFR 4555.

⁷⁴ Reid, *Property* (n 2) para 620 (Gordon); *Traditio* (n 9) 216.

to some extent. Nonetheless, it is a factor that is at least unsupportive of Gordon's view. Nor is there any evidence that, when the present form of delivery came to be recognised, it was seen as being based on *traditio longa manu*. Indeed, M P Brown, writing only a few years after *Mathie's Tr v Auchie, Ure & Co* and *Tod & Co v Rattray*, suggests that *traditio longa manu* is not recognised at all in Scotland, even while referring in the same paragraph to the acceptance of the present form of delivery.⁷⁵

(3) Assignment of custodier's duty

There is an alternative view which, arguably, better explains the position reached by the law on this point. Suppose that I have a personal right against someone, entitling me to enforce a duty owed to me by that person. From my point of view, that right is an asset that normally⁷⁶ may be conveyed to another by the process of assignation. Suppose I want to assign a right to payment of a sum of money. When the assignation is intimated to the debtor, the assignee steps into my shoes and becomes the creditor. The duty to pay is no longer owed to me, but to the assignee.

What if, instead, the duty to be assigned is a duty to hold goods on my behalf? As long as this duty is owed to the party who originally placed the goods in the custodier's hands, the custodier has no authority to deliver the goods to anyone else without consent, even a known purchaser.⁷⁷ The custodier's position is determined by the contract in terms of which he holds the goods, and the possessor retains possession because of the contractual duties owed to him. Does it then follow that, if those contractual duties are assigned to another, the assignee will acquire possession?

Although the Scots law of possession is influenced by Roman law, Roman law did not recognise that delivery could occur when the goods were held by a third party. Nor did Roman law recognise the assignation of personal rights.⁷⁸ From these facts,

⁷⁵ MP Brown, *Sale* (n 16) 392-393.

⁷⁶ There are some restrictions. For example, alimentary rights may not be assigned, nor may rights in respect of which there is *delectus personae*. For discussion, see Anderson, (n 37) paras 10-31 - 10-32.

⁷⁷ *Smith v Allan & Poynter* (1859) 22 D 208.

⁷⁸ An obligation was seen as personal to the parties. It was possible for a creditor to authorise another to enforce a claim in his own name (*procuratio in rem suam*), but in principle the identity of the creditor did not change. Post-classical modifications did, however, give to this arrangement much of the practical effect of an assignation. For a full account of these developments, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 58-67; Anderson (n 37), chapter 4.

we can legitimately draw certain inferences. The first of these is that the form of delivery presently under consideration does not follow obviously from the nature of delivery. If this form of delivery is now recognised (as it is), it is not improbable that this recognition stems from a post-Roman development, which may not be present to the same extent, or at all, in all countries. Assignment of personal rights is, as mentioned, such a development. It operates differently in different countries: not all legal systems require intimation to complete an assignment, for example.⁷⁹ We should therefore expect variation in the rules of different legal systems. Some Civilian legal systems may decline to recognise delivery in these circumstances, while others will have found sufficient justification for the contrary position. Among those legal systems that recognise this form of delivery, different justifications may have been found.

In fact, this is exactly what we find. Some Civilian legal systems do not recognise this form of delivery at all, while its basis and operation differ between those systems in which it is recognised.⁸⁰ Among those systems recognising delivery of goods in the custody of a third party, it appears to operate either by some kind of notice or order to the custodian, or by assignment of the transferor's contractual right against the custodian.⁸¹ Thus, in Germany, when a thing is in the custody of a third party, delivery can take place if the owner assigns his "claim to delivery of the thing".⁸²

The view then would be that this form of delivery operates, not directly by a transfer of control, but by a transfer of personal rights against the person who has that control. There is nothing in this idea that is novel or unique to Scotland, as we have seen. This is certainly the way that Bell appears to see the matter: this form of delivery operates, he says, by a "complete transfer of the custodian's duty".⁸³ In other words, delivery happens because the right to enforce that duty has been assigned to

⁷⁹ For an overview of the requirements of European jurisdictions, see DCFR 1020-24. Along with Scotland, intimation is also required to complete an assignment in France.

⁸⁰ DCFR 4539.

⁸¹ DCFR 4539. In Scotland, of course, the requirement for intimation to complete an assignment of a personal right would mean that, if assignment is the basis for this form of delivery, Scots law would fit into both of those categories.

⁸² BGB, s. 931. See also BGB, s. 870. For discussion, see LPW van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) 55-60, DCFR 4551.

⁸³ Bell, *Prin* § 1305. See also Bell, *Comm* I, 194.

the transferee. Likewise, in *Tod & Co v Rattray*,⁸⁴ the view that was accepted as representing the law was that:

the goods remained unmoved, but the right to the cellar, and to the services of the keeper, was transferred, so that they were equally put into the civil possession of the buyer.

If the seller had demanded access to the goods, the custodier would have been entitled to refuse, but the buyer was entitled to such access, because the personal rights held by the seller had been assigned to the buyer. Just as the seller's continued civil possession had been based on those personal rights against the custodier, the buyer's acquisition of possession was based on those same personal rights.

Again, later, in *Inglis v Robertson & Baxter*,⁸⁵ Lord Watson expressly said that the transferee must make "such intimation of his right to the custodier as will make it the legal duty of the latter to hold the goods for him". The transfer, thus, is not directly of ownership, but of the personal right against the custodier on the basis of which the custodier is under a duty to hold the goods for the owner. This transfer of the personal right changes the identity of the person for whom the custodier holds and, on the argument given above, changes the person who has civil possession. By thus changing who has possession, delivery, and therefore the transfer of ownership, is operated.

McLaren, in a note in the seventh edition of Bell's *Commentaries*, suggests that the idea of delivery by intimation arose by "confounding a delivery order with an assignment."⁸⁶ Although he is critical of this idea, he finds some support for it in the case law,⁸⁷ and holds that otherwise "there appears to be no legal ground for holding that mere notice or intimation to a non-assenting creditor should operate a change of constructive possession from vendor to vendee".⁸⁸ Again, R Brown finds it "natural and proper" that intimation should be adopted as a requirement, by analogy with assignment.⁸⁹

⁸⁴ 1 Feb 1809, FC.

⁸⁵ (1898) 25 R (HL) 70, 74.

⁸⁶ Bell, *Comm I*, 195 (note).

⁸⁷ The cases he refers to are *Pochin v Robinow & Marjoribanks* (1869) 7 M 622 and *Hamilton v Western Bank* (1856) 19 D 152.

⁸⁸ Bell, *Comm I*, 195 (note).

⁸⁹ R Brown, *Sale* (n 21) 208 n 2.

The use of the term "intimation" also suggests a link with assignation. Intimation, at least in the context of assignation, is a somewhat technical term and does not mean simply notification.⁹⁰

All of this is suggestive that the assignation of personal rights against the custodian is the most plausible candidate as the basis for this form of delivery. This avoids the theoretical objections that have led to the rejection of this form of delivery in South Africa. South African law has adopted the English requirement for attornment, referred to earlier, the acceptance by the custodian that he now holds for the transferee. The assignation approach has been rejected in South Africa on the basis that only incorporeals can be assigned, not ownership.⁹¹ In the suggested Scots approach, by contrast, there is no attempt to assign ownership directly. Instead, what is assigned is the personal right forming the basis of the transferor's civil possession.⁹²

The difficulty with this view becomes apparent, however, on consideration of the law on assignation of personal rights. Delivery of this form is most commonly carried out by the delivery to the transferee of a delivery order, addressed by the transferor to the custodian, this delivery order then being intimated to the custodian. It does not seem that there can be any objection to the delivery order as a deed of assignation. Even if the delivery order is not drafted in terms of an assignation, it has been held that the intention to assign a personal right may be implied.⁹³ Even if this has been doubted,⁹⁴ the requirements are not particularly stringent, with no need for particular words.⁹⁵ For example, in *Brownlie v Robb*,⁹⁶ the words "I...hand over my life policy to my daughter" were held sufficient to constitute an assignation. The Lord Justice-Clerk said in *Carter v McIntosh*⁹⁷ that "any words giving authority or directions, which if fairly carried out will operate a transference, are sufficient to make an assignation". A delivery order, being an instruction to the custodian to hold

⁹⁰ P Nienaber & G Gretton, "Assignation/Cession" in Zimmermann et al (n 16) 802.

⁹¹ Silberberg & Schoeman, para 9.2.3.2(f); *Absa Bank Ltd v Myburgh* 2001 (2) SA 462.

⁹² This assumes, of course, that the transferor does have a personal right against the custodian. Normally there will be such a right, on the basis of a contract between transferor and custodian, but this need not be the case. It is doubtful whether this form of delivery would be possible in the absence of such a right.

⁹³ *Lombard North Central Ltd v Lord Advocate* 1983 SLT 361.

⁹⁴ Reid, *Property* (n 2) para 655; KGC Reid, "Unintimated Assignations" 1989 SLT (News) 267.

⁹⁵ Indeed, it appears that writing is no longer required for a valid assignation of a personal right: Requirements of Writing (Scotland) Act 1995, s. 1. For discussion of this point, see Scottish Law Commission, Discussion Paper on *Moveable Transactions* (DP 151, 2011) paras 4.29-4.31.

⁹⁶ 1907 SC 1302.

⁹⁷ (1862) 24 D 925.

the goods henceforth for the transferee, would certainly seem to meet this requirement.

Any objection must therefore be that there is insufficient intimation. Intimation at common law was done notarially.⁹⁸ Section 2 of the Transmission of Moveable Property (Scotland) Act 1862 introduced a less cumbersome form of notarial execution and also an alternative method, involving the posting of a copy of the assignation to the debtor. However, delivery by intimation to a third party custodier was established before the 1862 Act, and so its identification with assignation of personal rights must stand or fall according to what the common law required.

There is no evidence that intimation to the custodier in these circumstances has ever been done by common law notarial intimation. However, while it is not enough for the debtor merely to be aware of the assignation,⁹⁹ the common law has also accepted the effectiveness of various substitutes for formal intimation. Where the debtor acts in such a way as to acknowledge the intimation, there is correspondence between the assignee and the debtor acknowledging the assignation, or where the assignee initiates court proceedings to enforce the obligation, it is accepted that the right has been validly assigned.¹⁰⁰ However, except for the last, which would rarely be relevant in a case of the kind we are concerned with, these require some action on the part of the debtor. Of course, in the case of delivery of goods in the custody of a third party, it would be normal and sensible for the custodier to acknowledge the intimation of the transfer and make a record of it. As we have seen, however, this does not seem to be required. In fact, the requirements outlined above for this form of delivery appear to fall well below the common law requirements for intimation to complete an assignation. On the other hand, with this form of delivery we are concerned with quite a different situation, which falls far outside the normal case of assignation of the right to payment of a debt. In the normal case, assignation will create a legal relationship between assignee and debtor which goes beyond the obligation merely to hold, for safekeeping, goods belonging to the assignee. It is of no great concern to the custodier for whom he holds the goods, and the ownership position is certainly of little concern to the custodier. Regardless of whether

⁹⁸ See Anderson (n 37) paras 6-22 - 6-23 for an account of the procedure.

⁹⁹ *ibid* paras 6-21 - 6-29.

¹⁰⁰ *ibid* paras 7-11 - 7-23.

ownership was transferred, assuming his fee was paid the custodier would have no reason, and no right, to refuse to hand over the goods to anyone presenting a delivery order addressed to the custodier by the party with whom he had originally contracted. Equally, it is quite possible that goods kept under these circumstances may be conveyed to other parties several times before the custodier is finally expected to give natural possession of them. To require formal intimation each time would be unduly cumbersome. It is no great stretch of the imagination to suppose that the courts took the opportunity to create a new form of intimation, to allow delivery in these circumstances in a way that met the needs of commerce. This argument is hardly conclusive. While there is some support for it in the relevant literature and in judicial *dicta*, the issue never seems to have been directly addressed or considered in detail. However, in light of the relevant literature and authorities, it seems at least arguable that this is indeed the basis of this form of delivery.

E. CONCLUSION

It is clear that, according to the common law, delivery of goods may be made by intimation to a third party who has custody of the goods. What is less clear is the basis on which such delivery operates. This article has attempted to outline the operation of this form of delivery, with a view to determining its basis. Suggestions of roots in the law of bills of lading or *traditio longa manu* do not seem to be borne out. Much more promising is the suggestion that this form of delivery is based on an assignation of the transferor's personal right against the custodier. On this argument, the custodier then ceases to hold the goods for the transferor and begins to hold them for the transferee. As a result, the transferee acquires civil possession of the goods and delivery is complete.

This view is, however, faced with the difficulty that the requirements adopted in this form of delivery do not appear to comply with the common law requirements for intimation of an assignation. It is suggested, however, that while this means that the suggestion must necessarily be tentative in the absence of more direct support, this is not necessarily an insuperable objection.

If this is the correct view, a final point may be noted. It has been argued here that intimation to the custodier is needed because intimation is needed to complete an assignation of a personal right (in this case, the transferor's contractual rights against

the custodier). The Scottish Law Commission has raised the possibility of abolition of the intimation requirement in assignments.¹⁰¹ If this change was to be made, it would be undesirable if this made an unintended change to the law on delivery of goods. Regardless of whether the intimation requirement is desirable in this form of delivery, it raises different practical issues and should be considered separately. Accordingly, it is suggested that, in any abolition of the intimation requirement in the assignment of personal rights generally, it should be made clear that delivery by intimation to a third party custodier is not affected.

¹⁰¹ Scottish Law Commission, *Moveable Transactions* (n 95) paras 14.5-14.12.