Should the Right to Abandon be Abandoned? An Exposé of the Illusory Nature of the Common Law Divesting Abandonment of Personal Property

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The common law doctrine of abandonment, while deceptively simple, is fraught with academic debate. Abandoned personal property either remains the property of the abandoner until someone acquires it, becomes res nullius (ownerless property) or it cannot be abandoned at all. Nevertheless, the general consensus is that the common law recognises divesting abandonment in both criminal law and law of the wreck. This article disputes this consensus and contends that divesting abandonment in the res nullius sense is illusory. Rather, the legal process underlying abandonment is transfer to unknown persons, where the abandoner wishes to divest ownership of the chattel and is indifferent as to who acquires it next. The history of abandonment reveals that the common law has never accepted divesting abandonment in the res nullius sense. Judicial opinions of abandonment are confined to resolving competing proprietary interests between a finder and the occupier of land where the chattel was found or the former owner; whether the abandoned chattel was rendered res nullius is never in issue. An approach built upon the common law doctrine of tenure in land law elucidates the underlying process of abandonment. The non-severable nature of land ownership establishes abandonment as a bilateral transfer. A putative abandoner is unable to relinquish physical possession of a chattel without the consent of the landowner on whose land the chattel is to be abandoned. The abandoner is therefore incapable of unilaterally severing their ties of ownership to the

* To my family, thank you for your love and encouragement, without which I would not be here. To my children, Tristan and Milla, thank you for allowing me time away from you to study. To my mother-in-law, Li Yan, I am forever indebted for the monumental contributions and sacrifices you have made for this family over the past four years. To my beautiful wife, Linna, you are the reason for my being.

chattel. As ownership must reside in either the abandoner or the finder, res nullius is rendered impossible.

I INTRODUCTION

The deceptively simple common law doctrine of abandonment of personal property prima facie stands as an unequivocal vindication of individual autonomy serving as the foundation of private ownership.[1] If ownership is "the greatest possible interest in a thing which a mature system of law recognizes",[2] then surely that interest extends to the liberty of alienating the thing by whatever means.[3] This perspective aligns with the ordinary notion that the owner of personal property is at liberty to destroy, transfer or abandon it. Although it is not entirely clear whether the term "abandonment" is a term of art under the common law, its ramifications within certain contexts certainly have a dispositive effect.[4] Succinctly put, abandonment is widely understood to be the principle that an owner of a chattel can unilaterally sever the legal ownership by an unambiguous intention to abandon, which may be manifested by relinquishing physical possession.[5] It is hardly surprising that such an eloquent doctrine has only engendered four dedicated academic articles over the past century,[6] based on the presumption that all related issues must have been resolved long ago.[7] Yet astoundingly, this is not the case.[8]

This article contends that the law of divesting abandonment in the orthodox sense — where the owner of personal property can unilaterally sever ties to their property, thereby rendering it *res nullius* (ownerless property) — is an illusion. A better view of the underlying

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1 Eduardo M Peñalver "The Illusory Right to Abandon" (2010) 109 Mich L Rev 191 at 192.

2 AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, London, 1961) 107 at 108 (emphasis omitted).

3 At 113.

4 Anthony Hudson "Abandonment" in Norman Palmer and Ewan McKendrick (eds) *Interests in Goods* (2nd ed, LLP, London, 1998) 595 at 595.

5 *Columbus-America Discovery Group v Atlantic Mutual Insurance Co* 974 F 2d 450 (4th Cir 1992) at 464–465.

6 See also James W Simonton "Abandonment of Interests in Land" (1930) 25 Ill L Rev 261; Lior Jacob Strahilevitz "The Right to Abandon" (2010) 158 U Pa L Rev 355; Peñalver, above n 1; and Robin Hickey "The Problem of Divesting Abandonment" (2016) The Conveyancer and Property Lawyer 28.

7 Roger Tennant Fenton *Garrow and Fenton's Law of Personal Property in New Zealand Volume 1: Personal Property* (7th ed, LexisNexis, Wellington, 2010) at 147.

8 *Keene v Carter* (1994) 12 WAR 20 (WASC) at 7: "The question whether abandonment of a chattel by an owner results in a divestiture of the owner's interest is unresolved by courts of the highest authority".

legal process during abandonment is one of transfer to unknown persons, where ownership of the property remains with the abandoner until the chattel is found and acquired by a finder.

Part II surveys the authorities of abandonment from Bracton to Blackstone, tracing its origins to Roman law, to establish that the common law was never fully committed to divesting abandonment. Part III establishes the bilateral nature of abandonment. First setting up the parameters for discussion, Part III(A) identifies the common law's treatment of the effect of abandonment, which hinges on the acquisition of title by a finder. Part III(B) charts the legal requirements of abandonment generally. The requirement to relinquish possession is at the heart of the unequivocal intention to abandon. Part III(C) touches briefly on the importance of physical relinquishment in establishing the unequivocal intention to abandon. Upon a dissection of the New Zealand statutory framework and historical analysis, Part III(D) reveals the centrality of land ownership in managing the common law concept of abandonment. Part III(E) dispels the argument that divesting abandonment renders chattels *res nullius*, as without the consent of the relevant landowner, a putative abandoner cannot relinquish possession. Consequently, divesting abandonment that renders the chattel *res nullius* is not possible. Part IV demonstrates that even criminal law, the area of law most affected by abandonment, is entirely consistent with the thesis of this article. Finally, Part V provides justifications to the exceptions on the law of abandonment in relation to the law of the wreck on the high seas.

II HISTORY OF ABANDONMENT

The rudiments of abandonment can be traced back to Roman law.[9] An appropriate starting point is the acquisition of legal ownership, which necessarily precedes abandonment. Ownership in personal property is acquired via original acquisition when the property has no previous owner. When the personal property is acquired from another owner, ownership is acquired via derivative acquisition.[10] The first occupant with an intention to own *res nullius* property acquires ownership via a process called *occupatio*.[11] There is doubt, however, whether property that has already been acquired can be rendered *res nullius* by

9 WW Buckland *A Text-book of Roman Law: From Augustus to Justinian* (3rd ed, Cambridge University Press, Cambridge, 1963) at 206–207.

10 Duncan Sheehan *The Principles of Personal Property Law* (2nd ed, Bloomsbury Publishing, UK, 2017) at 25.

11 Buckland, above n 9, at 207.

abandonment via *derelictio*.[12] The most influential passage on the issue is from Justinian's *Institutes*:[13]

> Accordingly, it is true that if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he ceases immediately to be owner.

Upon first glance, the extract seems to establish that divesting abandonment was possible at Roman law. It sets out the elements of relinquishing possession with intent to abandon as crucial to the modern orthodox doctrine of abandonment. Roman jurists from the Sabinian School considered property to be *res nullius* immediately upon abandonment.[14] This idea is seen in modern Rome where coins tossed into the Trevi Fountain are considered *res nullius*, so fishing them out with magnets does not attract liability for theft.[15]

Bracton

The early English jurist Bracton adopted the superficial position above as the common law position of abandonment, at least in the 13th century.[16] Bracton considered that property that has already been acquired can become derelict and is "likewise said to be *res nullius*".[17] More explicitly, he says:[18]

> [Without livery things pass] to unascertained persons, as money thrown to the populace. A thing taken to be abandoned passes without livery, where the lord at once ceases to be lord; but if it is cast away for lightening ship it is not derelict, for he does not cast it away with the intention of ceasing to be lord or of no longer wishing to be. But if [he disposes of it] with that intention it will be otherwise.

The significance of intention in abandonment is evident in the passage. Additionally, Bracton agrees with the Sabinian School of

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12 Hickey, above n 6, at 30–31.

13 JB Moyle *The Institutes of Justinian: Translated into English with an Index* (5th ed, Clarendon Press, Oxford, 1913) [Justinian's *Institutes*] at 45.

14 JAC Thomas *Textbook of Roman Law* (North-Holland Publishing Company, Amsterdam, 1976) at 168.

15 "Trevi coin thief acquitted" *Italy Magazine* (online ed, 21 March 2009).

16 Samuel E Thorne *Bracton on the Laws and Customs of England* (Harvard University Press, Cambridge (Mass), 1968) vol 2 [*Bracton*] at 129.

17 At 41.

18 At 129.

thought that property becomes *res nullius* immediately upon abandonment.

There is, however, one fundamental divergence from the Roman position in relation to the abandonment of land. Justinian's dereliction applies to both land and chattels,[19] while at common law it applies only to chattels.[20] The very foundation of feudal tenure is built upon the notion that all land belongs to, and emanates from, the Crown[21] and thus cannot become *res nullius*. By the 16th century, this notion influenced English jurists to question whether chattels can become *res nullius* by abandonment.[22]

doctor and student

Christopher St Germain, through his seminal work *Doctor and Student*, was an early opponent to Bracton's views of divesting abandonment.[23] Specifically, St Germain states:[24]

> There is no such law in this realm of goods forsaken: for though a man wa[i]ve the possession of his goods, and faith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seise them after when he will.

St Germain's view on the issue proved persuasive and was adopted by the courts in the 17th century.[25] In *Haynes' Case*,[26] the accused was convicted of petty larceny and felonious taking for digging up graves and taking the winding sheets from the bodies. The court held that "[a] man cannot relinquish his property in goods, unless they be vested in another".[27] Since a dead body is incapable of possessing property, it remains the owner's. As a corollary, it appears the judicial pronouncement on the issue is that already-acquired property cannot become *res nullius* by abandonment. This line of development was followed over the next century and adopted into Charles Viner's monumental *Abridgment*.[28] While citing *Doctor and Student*, it says:[29]

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19 Buckland, above n 9, at 207.

20 Hudson, above n 4, at 598.

21 Robert Megarry and others *The Law of Real Property* (9th ed, Thomson Reuters, London, 2019) at [2-001]. See also *bona vacantia* at Part III(D)(2).

22 Hudson, above n 4, at 599.

23 Christopher St Germain *Doctor and Student: or Dialogues Between a Doctor of Divinity, and a Student in the Laws of England* (16th ed, S Richardson and C Lintot, London, 1761) at 269.

24 At 269.

25 Hudson, above n 4, at 600–601.

26 *Haynes' Case* (1614) 12 Co Rep 113, 77 ER 1389 (Assizes).

27 At 113.

28 Charles Viner *A General Abridgment of Law and Equity* (2nd ed, London, 1745) vol 22.

> If a Man waives his own Goods without Offence, and says that he will not have them any longer, this is no Forfeiture, and he may retake them at his Pleasure.

Upon Viner's passing, the first to hold the endowed Vinerian Chair was William Blackstone.[30]

Blackstone

Prima facie, the common law's rejection of divesting abandonment until this point was reversed by Blackstone in his *Commentaries*.[31] In relation to treasure trove, he says:[32]

> ... by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seise it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder.

This is perhaps the common law's most important passage on divesting abandonment. Yet it discounts contrasting views while locating its doctrinal support in Bracton,[33] whose position had origins in Roman law.

Traditio Incertae Personae

Unlike the Sabinians, Roman jurists from the Proculeian School were strong advocates of the position that the abandoner of property does not cease to have ownership in the property until someone else possesses it.[34] On that basis, not only does the property not become

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29 At 409.

30 Harold Greville Hanbury *The Vinerian Chair and Legal Education* (Basil Blackwell, Oxford, 1958) at 11–13.

31 Edward Christian (ed) *Commentaries on the Laws of England by Sir William Blackstone* (15th ed, Cadell and Davies, London, 1809) vol 2 [*Blackstone Commentaries*].

32 At 9.

33 Hudson, above n 4, at 601.

34 Theodor Mommsen, Paul Krueger and Alan Watson (eds) *The Digest of Justinian* (University of Pennsylvania Press, Philadelphia, 1985) [*The Digest*] at [41.7.2.1].

res nullius immediately upon abandonment, it does not become *res nullius* at all. Consistent with this view, Pomponius interpreted the natural act of abandonment as being a case of transfer from the owner to another person.[35] This interpretation is entirely congruous with Justinian's *Institutes*.

The famed passage from the *Institutes*, which Bracton relied upon as clear authority for divesting abandonment at Roman law, was taken out of context.[36] The *Institutes* raises abandonment during a general analysis on the topic of delivery. In particular, an examination of *traditio incertae personae*, delivery of a gift to unidentified persons, precedes the passage. It begins:[37]

> … in some cases the will of the owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when praetors and consuls throw money to a crowd: here they know not which specific coin each person will get, yet they make the unknown recipient *immediate* owner, because it is their will that each shall have what he gets. Accordingly, it is true that if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner.

When read in context, it is readily apparent that the passage on abandonment is actually an elaboration of *traditio incertae personae*. The word "accordingly" indicates an imminent elaboration on the preceding premise, rather than the introduction of a new concept. Here, the term "abandoned" is not a term of art. It denotes the general proposition for when the owner no longer wishes to have their property and is indifferent as to who the next owner might be. Thus, the coin thrown away is "abandoned" by its owner to be gifted to the first person that picks it up. When this occurs, specifically at the moment a person picks up the coin, the delivery of the coin is "at once" complete. Consequently, the previous owner "immediately ceases to be owner". The elements of relinquishing possession with intent to abandon are simply the requirements for *traditio incertae personae*. Without more, it is entirely unpersuasive to interpret the above passage as indicating that property becomes *res nullius* immediately or at all upon abandonment. That ownership in

35 At [41.7.5.1].

36 Hickey, above n 6, at 30.

37 Justinian's *Institutes*, above n 13, at 45 (emphasis added).

abandoned property is acquired not by *occupatio* of *res nullius* property, but as *traditio incertae personae*, is confirmed in Roman law texts.[38]

Conceivably, a better interpretation of the modern Roman status of the coins in the Trevi Fountain is that, until the coins are taken out, the throwers retain ownership. At least this way their traditional wish of returning to Rome, finding love and getting married[39] has a higher chance of fruition, since the Gods can identify the wishers by tracing them through the ownership of their coins! In any event, *res nullius* or *traditio incertae personae* will result in the same acquittal for theft today, since ownership vests immediately upon the first taker of the coin.

Usucapio Pro Derelicto

Supporting the Proculeians' position is the Roman concept of *usucapio*, acquisition by prescription.[40] A finder acquires ownership of an abandoned property when they have uninterrupted possession for a required period of time. *Usucapio pro derelicto,* acquisition of abandoned things by prescription, occupies the majority of the topic on abandonment in the Digest of Justinian. If the Sabinians' view that abandonment immediately divests ownership was right, then the first taker would acquire ownership via original acquisition by *occupatio*. In such a case, *usucapio pro derelicto* would be entirely redundant as the first taker would acquire ownership immediately, without having to wait for the prescribed period of uninterrupted possession to expire before taking ownership.

The excerpt that "[w]e can usucapt what has been believed to be abandoned … even though we do not know by whom it has been abandoned"[41] and that "[n]o one can usucapt on the ground of abandonment who erroneously thinks the thing to be abandoned"[42] is corroborative of Justinian's *Institutes*' *traditio incertae personae*. When a finder discovers a chattel, it is impossible to know whether the chattel has been abandoned or lost, therefore *usucapio* will always apply.[43] In the Sabinians' view, immediate divestiture of ownership

38 David Daube "Derelictio, Occupatio and Traditio: Romans and Rabbis" (1961) 77 LQR 382 at 382.

39 Wayne Homren "The Origin of the Trevi Fountain Coin Tradition" (28 August 2011) The E-Sylum An electronic publication of the Numismatic Bibliomania Society <www.coinbooks.org>.

40 *The Digest*, above n 34, at [41.7].

41 *The Digest*, above n 34, at [41.7.4].

42 At [41.7.6].

43 Unless the finder was present when the owner unequivocally renounced their ownership and had thrown it away, like the example of throwing coins into the crowd used in Justinian's *Institutes*.

upon abandonment necessarily will occur first in time before any finders discover the abandoned chattel. Thus, according to the Sabinians, the legal status of the abandoned chattel before discovery is *res nullius*. The universal implication is that, regardless of whether the finder knows the chattel to be *res nullius* or not, the moment the finder occupies the chattel with an intention to keep it, the prior legal status of the chattel dictates that ownership immediately vests in the finder via *occupatio*. However, given that *usucapio* will apply in such circumstances,[44] there is an irreconcilable conflict between *occupatio* via *res nullius* and *usucapio pro derelicto*.

Prima facie, the Proculeians' *traditio incertae personae* would also complete the transfer of ownership immediately upon the finder taking possession, resulting in conflict with *usucapio*. However, given the true nature of *traditio* as a bilateral transfer that requires the consent of both parties,[45] the finder cannot, without more, unilaterally decide whether the owner has abandoned the chattel to be transferred to unidentified persons. In contrast, divesting abandonment is a unilateral severance of ownership by the owner. Accordingly, *occupatio* of *res nullius* by a finder is also a unilateral exercise of original acquisition that does not require the consent of the original owner.[46] Thus, when properly understood, *traditio incertae personae* does not immediately transfer ownership upon the first taker if the original owner's intentions are unknown, since the consent of both parties is required. Thus, *usucapio pro derelicto* assists in determining such intentions.

An appropriate view of the role of *usucapio pro derelicto* in Roman law is its ability to resolve the inherent ambiguities in the concept of abandonment generally. Often it is unknown whether a chattel has been unequivocally abandoned by its owner with the intention to transfer to unidentified persons, resulting in *traditio* to the first taker. If the taker has uninterrupted possession, a strong presumption in favour of *traditio incertae personae* arises. Conversely, if the original owner comes forward to contest for the chattel before the prescribed period expires, a strong presumption against *traditio incertae personae* arises. In any event, the existence of *usucapio pro derelicto* indicates that abandonment in the general sense of the word does not render the chattel *res nullius*, available for *occupatio*. It is precisely because divesting abandonment is not possible that *usucapio* exists. This is akin to the common law concept

44 Since it is impossible for the finder to know for certain if the chattel has been abandoned or lost.

45 Justinian's *Institutes*, above n 13, at 45.

46 Buckland, above n 9, at 207.

of adverse possession as a means of resolving abandonment of land issues, as divesting abandonment of land is not possible at common law.[47]

Based on the analysis above, it is clear that the Romans' *derelicto* abandonment was used in the general sense of the word to denote a transfer to unidentified persons. More importantly, the effect of such *derelicto* does not render the chattel *res nullius*. The notion that divesting abandonment existed at Roman law is at best a speculation and at worst an illusion.[48] This has had a profound consequence on the lineage and doctrinal validity of the common law doctrine of abandonment from Bracton to Blackstone.

Common Law

It is possible to interpret Bracton's treatment of abandonment in the quoted passage above consistently with transfer to unidentified persons.[49] However, it is his categorisation of derelict things as items to be considered as *res nullius,*[50] that is indisputably at odds with the Roman law's effect upon abandonment. Perhaps it is this categorisation that influenced Blackstone's opinion that abandoned things are returned to the *publici juris*.[51] In adopting Bracton, Blackstone says:[52]

> Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder…

Blackstone harnessed the concept of "the common stock" as a means of rationalising the basis for the law of all things as he ascribed its roots to holy gift. He says:[53]

> I[n] the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over "all the earth; and over the fish of the sea, and over the "fowl of the air, and over

47 Hudson, above n 4, at 598, n 32.

48 Hickey, above n 6, at 31.

49 See Part II(A) "[Without livery things pass] to unascertained persons, as money thrown to the populace.": *Bracton*, above n 16, at 129.

50 At 41.

51 Common stock.

52 *Blackstone Commentaries*, above n 31, at 402.

53 At 2–3.

> every living thing that moveth "upon the earth." This is the only true and solid foundation of man's dominion over external things … The earth, therefore, and all things therein, are the general property of all mankind … while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

Essentially, Blackstone lays bare the process of original acquisition by occupation. Once acquired, Blackstone considered that it is generally possible to return the stock to nature, resulting in his acceptance of divesting abandonment. Blackstone's example of the cast away jewel in his passage on abandonment portrays his opinion that in order to have divesting abandonment, the stock must be able to be returned to the public stock in a manner that allows a subsequent finder to acquire it via original acquisition in the stock's natural state as God intended. On this theoretical footing, it seems odd to admit the acquisition of a mundane object like a broken wooden cart as original acquisition in the manner contemplated by Blackstone as a holy gift to man. However, Blackstone's own example of a cast away jewel suitably fits the description.

Thus, it appears Blackstone's divesting abandonment is limited to unaltered, natural things. However, even this is questionable as the foregoing illustrates that Blackstone's divesting abandonment was founded on a theoretical, not a doctrinal, basis. In fact, Blackstone himself admits as much in the paragraph immediately following the well-celebrated passage:[54]

> But this method of one man's abandoning his property, and another seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments.

It is clear in the above passage that Blackstone did not concede the possibility of divesting abandonment at common law, at least not for the modern society. More explicitly, while considering abandonment, he says:[55]

> The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to

54 At 9.

55 At 9.

> occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer.

This is entirely consistent with *traditio incertae personae*, or at the very least, Blackstone uses the term "dereliction" in the sense of transferring unwanted property to another, rather than returning it to the common stock. Blackstone confirms this in his discussion on one of the methods of transferring property as "an *abandoning* of the thing by the present owner, and ... occupancy of the same by the new proprietor".[56]

From this perspective, the view that Blackstone has adopted Bracton's concession of divesting abandonment is perhaps precarious and uncertain, and certainly not without significant qualifications.[57]

19th century English jurist Frederick Pollock expressed grave concerns over divesting abandonment.[58] To date, perhaps the most congruent common law authority based on a doctrinal and historic approach on the issue is the one elucidated by Pollock in the following passage:[59]

> We humbly conceive the true doctrine to be that possession of goods is never absolutely vacant in law, and that an express abandonment is, in point of law, merely a licence to the first man who will to take the goods for his own; which taking will be justified and will finally change the property if complete before the taker has notice that the licence is revoked. Compare the authorities as to gifts without delivery ...Whether this doctrine (statutes apart) would apply to a ship on the high seas is another matter. In itself we believe it to be as rational as any other doctrine.

To describe the common law doctrine of abandonment as "obscure and difficult to relate to modern conditions"[60] is a gross understatement. Tracing its development thus far under the weight of the Roman *traditio incertae personae*, *Doctor and Student*, Viner's *Abridgment*, Blackstone and Pollock, perhaps the most legitimate description — in the words of the *Student* — is that common law knows no such law as divesting abandonment.

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56 At 9 (emphasis added).

57 Hudson, above n 4, at 602.

58 See Frederick Pollock and Robert Samuel Wright *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888) at 123–124; and Frederick Pollock "What is a Thing?" (1894) 10 LQR 318 at 320–322.

59 Frederick Pollock "Nature and Meaning of Law" (1894) 10 LQR 293 as cited in Fenton, above n 7, at 148.

60 Michael Bridge *Personal Property Law* (4th ed, Oxford University Press, Oxford, 2015) at 54.

III BILATERAL TRANSFER

Misconception of the Legal Efficacy of Abandonment

Whether common law acknowledges divesting abandonment or not, it is certainly rather late in the day to disclaim the possibility of abandonment all together.[61] Divesting abandonment here is used in the Bractonian sense to denote an owner's ability to unilaterally sever their ownership immediately upon successful abandonment.[62] The alternative view is that an owner cannot unilaterally sever their ownership. Upon successful abandonment, the title remains in the owner until another person consents to the transfer by acquiring possession of the chattel.[63] "Abandonment" here is used in the Proculeian sense to denote a transfer to unknown persons. Thus, for jurisprudential purposes, there are two potential interpretations of the colloquial term "abandonment":

> (a) Abandonment as immediate severance of ownership: When the owner of a chattel relinquishes possession with the intention of not reclaiming it, the chattel becomes *res nullius*, available for the next occupant.
>
> (b) Abandonment as a transfer to unknown persons: When the owner of a chattel relinquishes possession with the intention of not reclaiming it, the owner is gifting the chattel to the next occupant and is indifferent as to whom that might be.

The Oxford Learner's Dictionary definition of abandonment is "the act of leaving a person, thing or place with no intention of returning".[64] This colloquial usage of the term is ubiquitous in society. A departing tenant might leave personal belongings behind, the owner of a rundown vehicle might leave it at a discreet carpark, even a landowner might leave land dwindling with only a dilapidated building. Yet in none of these hypothetical instances is the owner likely to have any express intention of relinquishing legal title. Whether the legal effect of such abandonments is an immediate cessation of ownership, or transfer of ownership when another occupies the chattel, the lay understanding is that the owner no longer wants the chattel. The ability to terminate one's ownership via abandonment is central to the colloquial usage of the term. In order to maintain respect for the law, its operation must correspond with

61 See Strahilevitz, above n 6; Hudson, above n 4; Peñalver, above n 1; and Hickey, above n 6.

62 Hudson, above n 4, at 595–596.

63 Hickey, above n 6, at 29.

64 Oxford Learner's Dictionary (online ed, Oxford University Press) at [abandonment].

common sense morality.[65] Thus, the law should, and in fact does, afford a degree of legal efficacy to abandonment, at least to the extent that the owner's legal title vests in the next occupant.[66] Hence, when a finder acquires possession of an unequivocally abandoned chattel, legal title vests in the finder. Irrespective of occupation of *res nullius* property or bilateral transfer, the previous owner's legal title is terminated in accordance with abandonment's colloquial usage.

Common law has long recognised the legal efficacy of the doctrine of abandonment in the manner described above.[67] Wrangham J acknowledged this in *Moffatt v Kazana*:[68]

> ... the true owners ... must be held to remain the true owners ... unless they ... [have] *divested* ... themselves of the ownership by one of the recognised methods, abandonment, gift or sale.

The term "divested" above does not prove divesting abandonment in the Sabinian sense of rendering the abandoned chattel *res nullius*. It simply denotes the end result of a successful abandonment, like gift or sale, where ownership in the original owner is terminated or divested. Clearly when one gifts or sells one's chattel, the chattel does not become *res nullius* during any part of the transaction. More importantly, occupation of *res nullius* property is not the only way the finder of an abandoned chattel can acquire ownership. Transfer to unascertained persons also vests ownership in the finder. Therefore, although the courts clearly accept the doctrine of abandonment, this by no means settles the controversy in abandonment literature as to which of the above interpretations prevails. A more profound result of the fact that both interpretations present identical outcomes in practice[69] is that the courts do not need to resolve the controversy to reach a decision. Thus, Klebuc J while considering the opposing views of abandonment in *Steward v Gustafson* said:[70]

> The question of whether either of the aforesaid approaches is applicable ... has not been judicially considered to date and need not be in the instant case in order to dispose of the issues before the Court.

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65 Hudson, above n 4, at 606.

66 *Stewart v Gustafson* [1998] SJ No 614 (SKQB) at [12].

67 Hudson, above n 4, at 618.

68 *Moffatt v Kazana* [1969] 2 QB 152 (Assizes) at 156 (emphasis added).

69 If the chattel has been unequivocally abandoned, the first finder will always acquire title either by original acquisition of *res nullius* property or as the transferee of a gift to unascertained persons.

70 *Stewart v Gustafson*, above n 66, at [12].

Hence, as long as abandonment is established, the finder will acquire and the abandoner will divest their legal title, irrespective of whether the transaction was one of transfer to unascertained persons or acquisition of *res nullius*.

A review of the authorities prima facie indicates that the common law may treat the legal effect of abandonment in two different ways:

> (1) Abandonment is a judicially recognised method of terminating ownership of the abandoned chattel by the owner.
>
> (2) Abandonment is a judicially recognised method of terminating ownership by the owner when a subsequent finder has acquired possession of the abandoned chattel.

The legal efficacy of abandonment afforded by the common law has long been misinterpreted by scholars on both sides of the debate. There is unanimity between scholars insofar as conceding (1) is the single, unequivocal judicial pronouncement on the matter, while oblivious to the existence of (2). Proponents of the "*res nullius*" theory utilise (1) as support for unilateral divesting abandonment since abandonment is a judicially recognised method of divesting ownership.[71] Proponents of the "transfer to unknown persons" theory admit (1) as the correct representation of the orthodox judicial position on the matter, albeit an erroneous one.[72] Neither side considers the possibility that ownership can be terminated only when a subsequent finder has acquired possession of the abandoned chattel.

In all the cases of abandonment to ever come before the courts, a finder is always a party to the litigation. The issue is predominately between a finder and the occupier of land where the chattel is found, and at times, although rarely, between the finder and the original owner.[73] The presence of a finder in every case is self-evident in the fact that, but for the finder's discovery of the abandoned chattel, there would be no case. The inherent jurisdiction of the court is to resolve disputes that come before it. Common law's incremental development in reliance on the assortment of cases that come before the courts is one of the judiciary's key distinctions to the legislature. Thus, in all cases of abandonment, the cessation of the abandoner's ownership is contingent on the finder acquiring ownership of the abandoned chattel.

Although upon first glance, there is little difference between (1) and (2), the theoretical distinction is substantial. (1) eliminates the

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71 Hudson, above n 4, at 606.

72 Hickey, above n 6, at 28.

73 Fenton, above n 7, at 149.

possibility of the "transfer to unknown persons" theory, whereas (2) accommodates both theories as discussed above. More importantly, instances of the courts' explicit acceptance of divesting abandonment are obiter dicta. Since (2) encapsulates both interpretations of the term abandonment, the determination of the correct interpretation is unnecessary to resolve the case. Further, as a jurisprudential matter, there is a profound distinction between the questions of:

> (a) What is the legal status of an abandoned chattel before another person acquires it?
>
> (b) Does legal title of an abandoned chattel vest in the first finder upon abandonment by the previous owner?

Hence, in reality, the common law's treatment of the legal effect of abandonment must be and must always have been (2) — that abandonment terminates the abandoner's ownership in the chattel upon the ownership vesting in the finder. However, this leaves the legal status of an abandoned chattel not yet acquired by a finder still to be determined. The following analysis contends that the law of abandonment should be conceptualised as one of "transfer to unascertained persons" based on the common law's treatment of abandonment generally.

General Legal Requirements of Abandonment

At the heart of the common law's treatment of abandonment is the "unequivocal intention to abandon".[74] The Saskatchewan Court of Queen's Bench cited the following *Black's Law Dictionary* definition:[75]

> The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it. … "Abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect.

Abandonment is a question of fact to be proven on the balance of probabilities,[76] with an onerous burden lying on the party alleging abandonment.[77] Undoubtedly, the intentions of the abandoner are key to the determination. However, at times, the courts have expressly

74 *Moorehouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700 (CA) at 706.

75 *Stewart v Gustafson*, above n 66, at [14].

76 *Simpson v Gowers* (1981) 32 OR (2d) 385 (ONCA).

77 *Stewart v Gustafson*, above n 66, at [16].

declined to determine whether the test is purely subjective or can be objectively assessed by the abandoner's words or conduct.[78]

Although the underlying legal principle is unresolved, the legal consequence of abandonment upon a finder taking possession, which is the extinguishment of the original owner's title, is nonetheless straightforward. Thus, in protection of the "greatest possible interest" that common law affords,[79] property interests may only be lost through the unequivocal subjective intentions of the owner. However, a purely subjective test is susceptible to abuse. To take a macabre hypothetical, the owner of a sick pet with distinguishing marks abandons the pet on the side of a freeway. A subsequent finder rescues and expends finances to rehabilitate the pet from certain death. After several failed attempts of locating its owner, the finder embraces the pet as a new member of her family. Numerous years later, the owner coincidentally recognises the revitalised pet via the distinguishing marks and reneges his abandonment intentions, alleging that the pet was never abandoned. Taking this example to its logical conclusion, the lack of a subjective intention to abandon would dictate the return of the pet to the owner. The finder would be considered fortunate if the owner does not allege trespass to property or conversion, let alone any reimbursements for medical expenses, since it was done without the owner's consent.[80] Although morally objectionable, this would be the outcome of a purely subjective test.

This context is akin to the subjective tests of certain mens rea requirements in criminal law. Convicted murderers often allege they did not have the necessary subjective intention to kill, yet they are convicted nonetheless. Generally speaking, the court employs an objective assessment to infer the subjective intentions of the accused. Likewise, when the owner's intention to abandon is ambiguous, "intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance".[81]

From a practical perspective, the courts' usage of factors to infer abandonment is often necessitated by the fact that the owner's express relinquishment of title is absent. The inference addresses the inherent difficulties of abandonment generally, in a similar manner to *usucapio pro derelicto*,[82] albeit with a more sophisticated approach. A

78 *Moorehouse v Angus and Robertson (No 1) Pty Ltd*, above n 74, at 713.

79 Honoré, above n 2, at 108.

80 The common law defence of necessity may afford a defence to trespass or conversion for the finder.

81 *Stewart v Gustafson*, above n 66, at [16].

82 See Barry Nicholas *An Introduction to Roman Law* (Oxford University Press, Oxford, 1975) at 122. In order to acquire ownership by prescription, *usucapio* requires uninterrupted possession of the chattel for one year.

pair of old shoes left at a shoe store may attract different inferences than if the shoes were left at an indoor playground. Likewise, the same pair of shoes left unattended for five minutes may attract different inferences than if the shoes were left for a week. Thus, the factors used to infer abandonment are crucial to the outcome of the case.

> Judicially recognised factors used to infer abandonment are:[83]
> (1) nature and value of the chattel;
> (2) the owner's conduct;
> (3) nature or context of the transaction; and
> (4) passage of time.

No single factor determines the outcome. The common law's sophisticated use of interdependent factors to infer intentions of abandonment is the result of ad hoc development, dictated by the facts of each case. When viewed in this light, the factors logically constitute the evolution of *usucapio* from Blackstone's "rudiments of civil society ... [to] the complicated interests and artificial refinements of polite and established governments".[84]

Relinquishing Possession

One indispensable commonality intrinsic to all the factors used to infer intentions of abandonment is that the abandoned chattel must be physically separated from the owner. The relinquishment of possession is the cornerstone of "abandonment" in any definition of the term, colloquial or otherwise. It is difficult to conceive how an intention to abandon can be manifested while possession of the chattel remains with the owner throughout. Hence, many textbook and legal dictionary definitions of abandonment include "both the intention to abandon and the external act by which the intention is carried into effect".[85] In *Garrow and Fenton's Law of Personal Property in New Zealand* the following definition was provided:[86]

> Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of

83 *Stewart v Gustafson*, above n 66, at [17].

84 *Blackstone Commentaries*, above n 31, at 9.

85 Henry C Black, Michael J Connolly and Joseph R Nolan *Black's Law Dictionary* (5th ed, West Publishing Company, St Paul (Minn), 1979) as cited in *Stewart v Gustafson*, above n 66, at [14].

86 Ray Andrews Brown *The Law of Personal Property* (2nd ed, Callaghan & Co, Chicago, 1955) at 9 (emphasis added) as cited in *Simpson v Gowers*, above n 76, at 711; and Fenton, above n 7, at 149. This definition was adopted by Ipp J in *Keene v Carter*, above n 8, at 12.

> desertion and relinquishment *casts away* or *leaves behind* his property.

As established above, central to the doctrine of abandonment is the intention to abandon,[87] while the relinquishment of possession underpins the factors used to infer such intentions. Thus, the physical separation of the chattel from the former owner serves an evidentiary role rather than as an essential element.[88] The relinquishment of possession serves as the first step towards establishing an intention to unequivocally abandon. Practically, this first step must begin with the former owner placing the chattel on a piece of land, or on or in a fixture that is attached to a piece of land. The following analysis ventures to establish the centrality of land law to the doctrine of abandonment.

Abandonment in the Statutory Context

1 Escheat

The common law doctrine of tenure dates back to the Battle of Hastings in 1066 when Duke William of Normandy became the King of England. William I replaced the prior Saxons' allodial ownership with feudalism in an attempt to preserve absolute power.[89] The King, as the supreme overlord, was the absolute owner of all land of England. Estates in land were granted to tenants in chief, and granted in turn to demesne lords, eventually passing to the tenants in demesne who were in actual possession of the land.[90] As a corollary, since all land can be directly or indirectly traced back to the supreme overlord, the Crown is entitled to the land upon the termination of the estate via escheat. In the case of fee simple estate, this occurs when the owner dies without a will or heir.[91] Thus: "Strictly speaking subjects own not the land itself but merely an "estate" in the land which confers certain rights to use of the land."[92]

By operation of the English Laws Act 1858, the laws of England as they existed on 14 January 1840, as far as applicable to the circumstances of New Zealand are deemed to have been in force in New Zealand since that date.[93] The doctrine of tenure, and by

87 Part III(B).

88 Peñalver, above n 1, at 197.

89 Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [1.2.01].

90 At [1.2.02].

91 John V Orth "Escheat: Is the State the Last Heir?" (2009) 13 Green Bag 2d 73 at 74.

92 *Rural Banking and Finance Corp of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351 (HC) at 356.

93 Toomey, above n 89, at [1.2.08].

implication escheat, was held to have been applicable to the circumstances of New Zealand in *Veale v Brown* where Arney CJ held that:[94]

> The feudal system, long extinct in England itself as a social and political system, is yet the source of all the doctrines of the English law of real property. It is a fundamental principle of that law that all lands are holden of some superior lord— according to the old French maxim, *Nulle terre sans seigneur*. In other words, the doctrine of tenure is a fundamental principle of the English law of real property; and to say that the doctrine of tenure is not to prevail in this colony, is as much as to say that the English law of real property is not in force here. This we may safely treat as an absurdity.

This common law foundation underscores New Zealand's present title by registration, the Torrens system.[95] Although this system secures title upon registration, that title is "to the estate or interest" in the land,[96] not the land itself. Thus, once all estate or interest in land terminates, the use of the land escheat to the Crown. In other words, "the Crown has at all times been the continuous owner of the land itself".[97] Apart from the Land Transfer Act 2017, there are several other statutory overlays to the common law's treatment of real property.

2 Intestacy

The Crown's prerogative right of feudal escheat to the Crown for want of heirs and successors has been supplanted by *bona vacantia* under the Administration Act 1969.[98] Arguably, the concept of *bona vacantia* or "ownerless property" is more encompassing than escheat. Given the lack of persons entitled to succeed upon intestacy, "[a]ll of the estate belongs to the Crown",[99] and estate for the purposes of the Act means "real and personal property of every kind".[100] Apart from intestacy, there are other instances when property might become "ownerless", such as when an Assignee disclaims onerous property in the context of bankruptcy.

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94 *Veale v Brown* (1868) 1 NZCAR 152 at 157.

95 Toomey, above n 89, at [2.1.02].

96 Land Transfer Act 2017, s 51(1).

97 *Rural Banking*, above n 92, at 357.

98 Administration Act 1969, ss 76 and 77 table item 8.

99 Section 77 table item 8.

100 Section 2(1).

3 Bankruptcy

Pursuant to the Insolvency Act 2006, when a debtor has been adjudicated bankrupt, all property, real or personal,[101] belonging to the bankrupt vests in the Assignee automatically and the bankrupt's rights in the property are extinguished.[102] For the purposes of discussion here, the Assignee has an important discretion to disclaim or abandon[103] onerous property.[104]

The effect of the Assignee's disclaimer will terminate the rights, interests and liabilities of the Assignee and the bankrupt in relation to the disclaimed property.[105] The rights, interests and liabilities of any other person in relation to the property are unaffected.[106]

(a) Real property

In the case of real property, given the heritage of the doctrine of tenure, the effect of the disclaimer extinguishes the registered proprietor's estate and interest in the land, while the land reverts to the Crown.[107] Section 121(1) of the Insolvency Act, on the topic of rentcharge, says: "The vesting of land subject to a rentcharge after disclaimer by the Assignee in the Crown …". This indicates the legislative intent of land vesting in the Crown following the disclaimer.

(b) Personal property

In the case of personal property without the pedigree of the doctrine of tenure, the situation is less certain. Only onerous property can be disclaimed by the Assignee, such as:[108]

> (i) an unprofitable contract; or
>
> (ii) property of the bankrupt that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; …

101 Insolvency Act 2006, s 3.

102 Section 101(1). See s 104 for the exception, where property held in trust by the bankrupt does not vest in the Assignee.

103 *Re Mayall (A bankrupt) ex parte Galbraith* [1936] NZLR 270 (SC) at 273 per Blair J, where his Honour held: "There is no virtue in the word 'disclaim': it is the same as 'abandon'."

104 Insolvency Act, s 117(1).

105 Section 118(a).

106 Except to the extent necessary to release the Assignee or the bankrupt from a liability: see s 118(b).

107 *Rural Banking*, above n 92, at 357; and Toomey, above n 89, at [2.15.03].

108 Insolvency Act, s 117(4)(a).

The presence of such restrictions indicates an unwillingness by the legislature to confer a right to abandon and unilaterally sever ownership other than as prescribed. This limitation to onerous or valueless property and the effect of the disclaimer runs counter to the *res nullius* theory.

Further, since the effect of the disclaimer only terminates the Assignee's and the bankrupt's rights, interests and liabilities in the property, the property will not become *res nullius* provided there are rights, interests or liabilities of any other person in the property, even if successfully disclaimed. This is because true *res nullius* is unencumbered by any interests or liabilities in relation to anyone. Any person with an interest in the disclaimed property can apply for an order to vest the property in them, provided that they have suffered loss or damage as a result of the disclaimer.[109]

In the event that the disclaimed property has no successor or transferee due to a complete lack of rights, interests or liabilities in anyone, the property will pass to the Crown via *bona vacantia*.[110]

4 Company liquidation

Similar issues in bankruptcy also arise when a company is in liquidation. Pursuant to the Companies Act 1993, a liquidator may disclaim onerous property, with onerous property having substantially the same definition as in the Insolvency Act 2006.[111]

The position under New Zealand's statutory framework leans heavily against the theory that property becomes *res nullius* once abandoned. Whatever the position may be in relation to abandoning personal property, it is indisputably established that land cannot be abandoned in the sense that it becomes *res nullius*. Given that the doctrine of tenure "precludes the possibility that there could ever be New Zealand land without an owner",[112] even the statutory incidences of disclaimer or abandonment eventually result in land vesting in the Crown.

Consent Required to Abandon

As established by Part III(A) through (D), in order to abandon personal property, whereby it terminates the former owner's title

109 Insolvency Act, s 119.

110 *Rural Banking*, above n 92, at 360.

111 Companies Act 1993, ss 269(1)–269(2).

112 *Rural Banking*, above n 92, at 358.

when a finder has acquired possession of it,[113] the intention of the former owner to unequivocally abandon is key.[114] When the former owner is absent, the intention to abandon can be inferred from the surrounding circumstances of which the relinquishment of possession is fundamental.[115] Practically, in New Zealand at least, the first step towards abandoning personal property is to place the unwanted chattel on a piece of land that already belongs to the owner, another person, or the public, since no land in New Zealand is without an owner.

1 On the owner's land

In a scenario where the owner attempts to abandon property on their own land, before the property is acquired by someone else, the owner remains in actual possession of the property and is responsible for it. Since the intention to abandon is the key requirement, the owner necessarily knows the existence of the chattel and while it is on the owner's land within the dominion and actual control of the owner, he has possession.[116] This type of actual possession is to be distinguished from cases of constructive possession involving a dispute between a finder of a chattel and the owner of the land where the chattel was found.[117] In such cases, the owner of the land has to manifest an intention to control all things found on it in order to have a superior possessory interest.[118]

Accordingly, since the putative abandoner cannot relinquish physical possession of the chattel before someone else voluntarily acquires it, he cannot abandon it. Perhaps the most common incidence of abandonment is when household rubbish is placed in collection bins on the side of the road. *Williams v Phillips* held such an act was not abandonment since the owner intended the local authority to take the rubbish.[119] More simply, the case could have been resolved on the ground that the disposer did not relinquish possession of the rubbish before collection. In the case of inorganic rubbish placed on the side of the road, the disposer is fully responsible for the rubbish until someone has collected it. Upon the moment of collection, the disposer successfully terminates his ownership in the chattel, while the

113 See Part III(A).

114 See Part III(B).

115 See Part III(C).

116 B Paterson *Laws of New Zealand* Meaning of Possession: Personal Property (online ed) at [14].

117 *Parker v British Airways Board* [1982] QB 1004 (CA); *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 (QB); and *Bridges v Hawkesworth* (1851) 21 LJQB 75 (QB).

118 *Parker*, above n 117, at 1018.

119 *Williams v Phillips* (1957) 41 Cr App Rep 5 at 8.

collector obtains ownership in the same. However, the entire transaction is predicated on the consent of the collector in acquiring the chattel. In essence this is a bilateral transfer requiring the consent of both parties. The key feature of the *res nullius* theory is the ability of the owner to unilaterally sever all ties to the chattel. This cannot be achieved when the owner is unable to unilaterally relinquish possession without the consent of the putative finder in this context.

There is one exception to the general difficulty of the owner relinquishing possession of personal property on his land when the property is wildlife. Pursuant to the Wildlife Act 1953, all wildlife, other than an exhaustive list of unprotected wildlife specified in sch 5 of the Act,[120] is deemed to be vested in the Crown unless lawfully taken.[121] Therefore, if the owner acquired a specified unprotected wildlife, such as a dove, and released it in abandonment, the owner could be truly said to have relinquished possession of the property. Further, since the dove does not vest in the Crown, while it is soaring through the sky, it can be truly said to be *res nullius*. This outcome aligns with Blackstone's cast away jewel qualification that only property that can be returned to its natural state before original acquisition can truly become *res nullius*,[122] as chattels of the "artificial refinements of polite and established governments[123] ... could not long subsist in fact".[124] It seems that in New Zealand, *res nullius* is restricted to wildlife, limited only to unprotected wildlife at large since all other wildlife either vests in the Crown or the person who has lawfully acquired it. Further, all other conceivable immovable personal property such as minerals and trees would either belong by default to the landowner as fixtures or part of the land, or vest in the Crown by the operation of statutes.

2 On someone else's land

With the consent of the other landowner, the abandoner may deposit the unwanted chattel on that land while awaiting collection. One plausible setting is when the disposer leaves inorganic rubbish on the neighbour's land that is closest to the roadside when the disposer's land has no access other than a driveway easement. The transaction creates a gratuitous bailment with the bailee and bailor sharing

120 The animals on this list, while at large, could be New Zealand's only *res nullius* personal property.

121 Section 57(3).

122 See Part II(F).

123 *Blackstone Commentaries*, above n 31, at 9.

124 At 9.

possession.[125] The neighbour has actual possession as the bailee, while the abandoner has constructive possession as bailor since he can demand the return of the chattel at any time.[126] When a finder collects the inorganic rubbish from the landowner's land, the bailment terminates[127] and ownership in the chattel transfers from the abandoner to the finder. In the event that the neighbour changes his mind, the owner of the abandoned chattel will have to remove it from the neighbour's land as, without consent, the depositing of unwanted chattel on someone else's land is trespass,[128] even if originally deposited with consent.[129]

In the event that the landowner is willing to accept the abandoned chattel as their property, it becomes a bilateral transfer. The possibilities range from the landowner utilising the abandoned chattel for personal use, resale or charity, to the landowner disposing of it at a junk yard or landfill. Where the landowner intends to deal with the abandoned chattel in one way or another, the bilateral transfer of ownership in the chattel from the abandoner to the landowner is complete at the time of the landowner's acceptance. If this were not the case, all dealings with the chattel would be conversion or trespass to goods.[130] Further, the respective landowners will not always accept all unwanted chattels without restriction or fee. If the intent of the landowner is to exploit the abandoned goods through resale or charity, a minimum level of inherent value must be present in the chattel. Organic refuse would fall below this minimum level. If the landowner is in the business of rubbish disposal, there would nonetheless be restrictions as to either the type of waste or a payable fee before the waste is accepted.[131]

Further, a landowner's rights are not absolute and are subject to non-interference with another person's use and enjoyment of their land.[132] Theoretically, even if a landowner indiscriminately accepts unwanted chattels from anyone at all times, voluntarily turning their land into a dump and rendering their consent artificial, the common

125 J McCartney and R L Fisher *Laws of New Zealand* Meaning and Categories of Deposit (online ed) at [8].

126 Paterson, above n 116, at [14].

127 McCartney and Fisher, above n 125, at [8].

128 S Todd and A Tipping *Laws of New Zealand* Trespass to Land (online ed) at [197].

129 At [198]. See also *Brown v Dunsmuir* [1993] DCR 923.

130 S Todd and A Tipping *Laws of New Zealand* Wrongful Interference with Goods (online ed) at [228] and [278].

131 See, for example, Auckland Council "Otaota me te hangarua Rubbish and recycling" (2021) <www.aucklandcouncil.govt.nz>.

132 S Todd and A Tipping *Laws of New Zealand* Nuisance and Associated Torts (online ed) at [112].

law doctrine of nuisance would abate this,[133] even in the absence of statutory intervention.

Thus, irrespective of the landowner's intentions in relation to the abandoned chattel, the putative abandoner must obtain the landowner's consent before they can relinquish physical possession. In all cases, either by someone else or the landowner, it is a bilateral transfer that completes the acceptance of the abandoned chattel.

3 On public land

Pursuant to the Litter Act 1979, it is a criminal offence to deposit litter — or after depositing litter, to leave it — in or on a public place, or on private land without the consent of its occupier.[134] Where the litter is of a nature likely to endanger any person, the court can impose a term of imprisonment.[135] The court may also order the offender to clear and remove the deposited litter.[136] Litter is defined in the Act as "includ[ing] any refuse, rubbish, animal remains, glass, metal, garbage, debris, dirt, filth, rubble, ballast, stones, earth, or waste matter, or any other thing of a like nature".[137] This encompassing definition would include all kinds of abandoned property since the dictionary definition of rubbish includes "things that are no longer wanted", and garbage includes "unwanted things that you throw away".[138]

Consequently, the default statutory position in New Zealand is that one cannot abandon personal property in or on a public place, irrespective of the difficulties of consent and relinquishing possession inherent with abandoning chattels on private land. The Act, however, imposes obligations on the State to provide litter receptacles in every public place where litter is likely to be deposited.[139] When the disposer places the abandoned chattel into the receptacle, it is a bilateral transfer of ownership from the abandoner to the State. Since the obligation to remove and dispose of the abandoned goods rests with the State,[140] and the presence of the receptable is the State's

133 At [112].

134 Litter Act 1979, s 15(1).

135 Section 15(2).

136 Section 20.

137 Section 2(1).

138 Cambridge Dictionary (online ed, Cambridge University Press) at [rubbish] and [garbage].

139 Section 9(1).

140 Section 9(5).

implied consent to the abandoner, this enables them to relinquish possession of their chattel.[141]

Before the chattel is removed by the public authority and while it is still inside the receptacle, it is possible for anyone to remove the chattel. Given the State's obligation in respect of the contents of those receptacles is "removal and disposal",[142] arguably there is an implied licence to anyone wishing to deal with the contents in a manner consistent with the State's obligation. Hence if the disposer changed his mind and recollected the chattel from the receptacle before the public authority emptied it, the State's implied licence would afford a defence to trespass to goods[143] or theft[144] for the abandoner. However, after the chattel has been collected by the State, the former owner will only be able to regain the chattel with the express consent of the public authority. This position is the same for all instances of abandonment after the finder has acquired possession of the chattel since ownership now vests in the finder.

The above outcomes in respect of where a putative abandoner might abandon his goods in New Zealand irrefutably establishes the bilateral transfer nature of abandonment. This is indicated by the requirement of consent from the finder, landowner or both. Given the abandoner cannot unilaterally sever ties to the chattel, there is no gap in ownership and consequently, no opportunity for the chattel to become *res nullius*. Under such circumstances, the better interpretation of the legal consequences of abandonment is transfer to unknown persons, deeply rooted in the Roman *traditio incertae personae*. Since there is no gap in ownership, the chattel remains the property of the abandoner until the first finder.

In practice, this makes little difference, since all unfound abandoned property remains exactly that. It is immaterial whether it belongs to the abandoner or is *res nullius* while the chattel is at large, for immediately upon acquisition, ownership vests in the finder. But based on the forgoing, the better view is the former.

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141 The State's implied consent to receiving abandoned goods is restricted to the size of the receptacle, and sometimes expressly restricted to the type of abandoned goods, such as a receptacle for recyclables only.

142 Litter Act, s 9(5).

143 *Lloyd v Director of Public Prosecutions* [1992] 1 All ER 982 (QB); and Tipping, above n 130, at [291].

144 Crimes Act 1961, s 219(3).

IV CRIMINAL LAW CONTEXT

Proponents of the *res nullius* theory rely heavily on criminal cases involving theft, where the courts have held that the *actus reus* cannot be established in respect of abandoned property and that abandoned property cannot be stolen.[145] The central thesis of the proponents of the transfer to unknown persons theory is that such criminal cases do not necessitate divesting abandonment in the sense that chattels become *res nullius*. Since the occupant of the abandoned chattel does not possess the necessary mens rea for theft in any event, even if divesting abandonment were not possible, such cases would be decided the same.[146] However, the fact that both sides of the debate rely on the criminal law of theft as support for their construction is infused with the misconception of the legal efficacy of abandonment generally.[147]

In practice, in the context of potential theft cases, both theories are identical. Judicial findings of no *actus reus* in such cases do not eliminate nor substantiate either theory. The common law's treatment of the effect of abandonment has always been to vest ownership in the finder and extinguish it in the former owner. This is assuming that an unequivocal intention to abandon coupled with the physical separation of the chattel has been proven. This transfer will take effect on either the theory that the finder acquired title via occupation or transfer.

Sensibly then, in the case of *R v Peters*, which involved misplaced jewellery, Rolfe B in directing the jury said:[148]

> The only case where a party can be justified in converting it to his own use is, where it has fallen or dropped where a party may fairly say the owner has abandoned it …

Similarly, in a case involving the larceny of a £5 note, Coleridge J in *R v Reed* held that "[i]f the circumstances under which property is found be such that the ownership has been abandoned, the thing is *bonum vacans* and anyone may take it".[149]

Advocates[150] of the transfer to unknown persons theory utilised the leading case on theft by finding, *R v David Thurborn*, for the proposition that theft cases are in fact decided on the mens rea

145 Hudson, above n 4, at 602–606.

146 Hickey, above n 6, at 34–38.

147 See Part III(A).

148 *R v Peters* (1843) 1 Car & K 245 at 247, 174 ER 795 at 795.

149 *R v Reed* (1842) Car & M 306 at 307, 174 ER 519 (Assizes) at 520.

150 Hickey, above n 6, at 36.

ground, based on Parke B's pronouncement of the rule that taking goods while "really believing … that the owner cannot be found" is lawful.[151] Robin Hickey contends that the case was decided on the defendant's beliefs rather than the owner's property rights.[152] Anthony Hudson, on the other hand, employed *Thurborn* for the indisputable proposition that the case was decided on property grounds[153] when Parke B held that abandoned property "could not be the subject of larceny".[154] In fact, both Hickey and Hudson are correct. *Thurborn* was decided on both the actus reus and mens rea elements of the offence. The same approach was taken in a case involving the theft of pig iron, where Lord Alverstone CJ in *R v White* held:[155]

> … if it [pig iron] had been abandoned in fact and the evidence showed that the thief believed that it had been abandoned and belonged to nobody, then he would not be guilty of larceny.

Again, both authors cited *White* for their respective positions.[156] However, Hudson, in support of the *res nullius* theory, notes the difficulty of reconciling *Haynes' Case* [157] with the authorities established thus far, thereby contending that *Haynes' Case* is "no longer good law in this field".[158] The case, discussed above at II(B) involved the felonious taking of winding sheets from bodies dug up from graves. Since the case stands for the proposition that no one can relinquish ownership of their property unless they be vested in another, this is completely at odds with Hudson's perception of divesting abandonment, which renders the chattel *res nullius*. Nonetheless, *Haynes' Case* is perhaps the most precise pronouncement of the common law's treatment of abandonment.

In support of the discussion that consent is required to abandon[159] in the criminal law context, is the well-known case of *Hibbert v McKiernan*.[160] The case involved the defendants collecting golf balls from the hazards of a golf course for resale. In holding the defendants guilty of theft, the King's Bench considered that although the golf balls lodged within the hazards of the course had been

151 *R v David Thurborn* (1849) 2 Car & K 831 at 833–840, 175 ER 349 (Assizes) at 353.

152 Hickey, above n 6, at 35.

153 Hudson, above n 4, at 603.

154 *Thurborn*, above n 151, at 837.

155 *R v White* (1912) 107 LT 528 (CA) at 529.

156 Hickey, above n 6, at 34; and Hudson, above n 4, at 603.

157 *Haynes' Case*, above n 26.

158 Hudson, above n 4, at 604; and *Haynes' Case*, above n 26.

159 See Part III(E)(2).

160 *Hibbert v McKiernan* [1948] 2 KB 142 (KB) at 149–151.

abandoned by the owners, the golf club had a superior possessory interest over the defendants.[161] Taking the earlier analysis, the golf club gave implied consent to the true owners of the golf balls to relinquish physical possession by leaving them on the club's land, thereby allowing the owners to abandon them. After the relinquishment of possession, the moment the owners formed an unequivocal intent to abandon, the balls were vested in the club. Therefore, any subsequent taking without consent from the club would be theft.

Interestingly, Hudson treats *Hibbert* as a:[162]

> … restriction on the full operation of abandonment, since if the property alleged to have been abandoned was left on private property over which the occupier exercises such a measure of control as to show that he intends to possess all chattels on it not specifically in the possession of another, then the apparently abandoned property will not be *res nullius* available to the first taker but the occupier's claim will prevail against all except the true owner.

The qualification of "private property" is congruent with the overall thesis of this article. However, Hudson far underestimated the importance of this qualification as it extends to all lands under the doctrine of tenure. Further, given the owners of the balls had demonstrated an unequivocal intention to abandon and relinquished their possession, it is unclear how this is "apparently" abandoned, especially when the court held the balls were in fact abandoned.[163]

Hence, viewing the underlying process of abandonment as one of transfer to unknown persons is entirely consistent with authority, even in the field of criminal law where it is "most affected by allegations of abandonment".[164]

V WRECK

The thesis of this article is built upon the notion that terra nullius (ownerless land) does not exist in New Zealand, which as a corollary limits a putative abandoner's ability to unilaterally divest ownership of their property without the consent of the respective landowners.

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161 At 151.

162 Hudson, above n 4, at 604.

163 *Hibbert*, above n 160, at 152 per Prichard J: "I agree. In view of the finding of fact that the balls had been abandoned…".

164 Hickey, above n 6, at 32.

This supports the proposition that abandonment is a bilateral transfer to unknown persons. This position is similar to that held in civil law countries without the heritage of the doctrine of tenure.[165] Although abandonment of land is permitted there, the state eventually takes ownership of the land, either by default[166] or through legal right.[167] Technically in New Zealand, by operation of the statute, there is an ownerless area, the common marine and coastal area.[168] Even so, this does not qualify the contention of this article, since the Crown is deemed the owner of any abandoned structure in the area[169] and the common marine and coastal area comes within the definition of public place under the Litter Act 1979.[170] However, when abandonment occurs outside state jurisdictional boundaries, such as the high seas, the abandoner does not require consent to relinquish possession, hence it is a true qualification to this article.

Without the limitation of consent, the theoretical possibility of the chattel becoming *res nullius* upon abandonment remains. However, it does not preclude the transfer to unknown persons theory. Prima facie, the most unequivocal pronouncement on this issue is the leading decision of the House of Lords in *The Arrow Shipping Co Ltd v The Tyne Improvement Commissioners (The Crystal)*.[171] The case involved the demise of a ship in open sea that obstructed the harbour. The shipowners immediately abandoned the wreck to the insurers. The authorities took possession of the wreck under statutory powers to clear it. The issue was whether the authorities could claim compensation from the shipowners for the clearing of the wreck.

Lord Herschell LC rejected the authorities' claim on the basis that, by the time they had incurred the expenses, the shipowners had abandoned the ship in open sea without any intention of resuming possession or ownership.[172] Lord Watson explicitly held:[173]

> … their abandonment of the sunken ship in the open sea, sine animo recuperandi, had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal.

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165 Peñalver, above n 1, at 209.

166 Civil Code of Québec SQ 1991 (CA) c 64, art 936; and Código Civil 2000 (CL), art 590.

167 Bürgerliches Gesetzbuch 2013 (DE), § 928.

168 Marine and Coastal Area (Takutai Moana) Act 2011, s 11(2).

169 Section 19.

170 Litter Act, s 2(1) definition of "public place", para (d).

171 *The Arrow Shipping Co Ltd v The Tyne Improvement Commissioners (The Crystal)* [1894] AC 508 (HL).

172 At 519.

173 At 521.

Properly interpreted, this is consistent with this article's contention that a disposer will divest ownership upon someone else taking that ownership. Since the shipowners have abandoned the wreck to the underwriters, ownership is vested in them. More importantly, for the same arguments made in Part III(A), Lord Macnaghten held the view that in order to resolve the dispute between the former shipowners and the authorities, it was unnecessary to examine whether or not the wreck became *res nullius* upon abandonment[174] since the underwriters were not a party to the litigation.

The same point arose in *Boston Corporation v Fenwick*[175] where the shipowners abandoned the wreck to the insurers. Bailhache J declined to express a view as to whether or not the wreck became *res nullius* upon abandonment since the question was unnecessary to resolve the case.[176] Thus, even in the context of the wreck, the most persuasive authorities still do not resolve the underlying debate in abandonment. Though, the high seas do preserve the possibility of the *res nullius* theory.

Upon alternative doctrinal footing, since the common law operates only within countries that have adopted it, and to the extent preserved by such jurisdictions, as a corollary it can only operate within its jurisdictional boundaries. The old adage that "the British Empire on which the sun never sets" is long gone. The high seas today are regulated by a complex bundle of international treaties and conventions[177] that make it truly apt to describe such regulations as exceptions to the general rule of law within jurisdictional boundaries. In conformity with this view, Pollock was of the opinion that "[w]hether this doctrine (statutes apart) would apply to a ship on the high seas is another matter."[178] Even then, the qualification those exceptions provide is merely the preservation of the possibility of the *res nullius* theory in abandonment.

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174 At 532.

175 *Boston Corporation v Fenwick* (1923) 15 Ll L Rep 85 (KB).

176 At 91.

177 See, for example, the United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994); and the Convention on the Protection of the Underwater Cultural Heritage 2562 UNTS 3 (opened for signature 2 November 2001, entered into force 2 January 2009).

178 Pollock, above n 59, as cited in Fenton, above n 7, at 148.

VI CONCLUSION

This article establishes that even in two of the most seemingly categorical areas of law involving abandonment, criminal law and law of the wreck, the apparent judicial acceptance of divesting abandonment in the *res nullius* sense is an illusion. This illusion originates in Bracton's misconception of Roman law's effects upon abandonment, which in truth was one of *traditio incertae personae*, rather than *res nullius* upon abandonment. The common law's treatment of abandonment in the decided cases does give legal efficacy to the abandoner's divesting intentions, but this is always in the presence of a finder who takes ownership from the abandoner. Thus, the judicial opinions alone are unable to settle the commentators' debate of the underlying legal process of abandonment. By utilising the doctrine of tenure and statutory authorities, this article establishes the central role that land law plays in regulating the abandonment of personal property. A putative abandoner is unable to fulfil the requirement of relinquishing physical possession of the chattel without the consent of the landowner on whose land the chattel is to be abandoned, nor can the abandoner divest his ownership of the chattel without the consent of the voluntary taker. This substantiates the bilateral transfer nature of abandonment. With the weight of doctrinal and historic support, the better view is that abandonment is simply a transfer to unknown persons and the illusion that personal property becomes *res nullius* upon abandonment is dispelled.