

# **Bona Fide Acquisition of Cars and other Motor Vehicles**

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## 1 Introduction

Statistics from the National Council for Crime Prevention show more than 60,000 cars to have been stolen in Sweden in 2001. The number of car thefts has fallen steadily since then, and in 2010 totalled a “mere” 21,300. Thefts from cars have also declined heavily.<sup>1</sup> One reason for the drop in theft figures is that new cars are fitted with immobilisers, i.e. electronic devices which preclude hot wiring, which makes them far more difficult to steal. Another reason for fewer cars being stolen may be that it is now much harder for a person acquiring a car to allege bona fide purchase if the car is subsequently found to have been stolen. Statutory amendments introduced on 1st January 1999 and on 1st July 2003 in the Good Faith Acquisition of Chattels Act (1986:796, reprinted as 2003:161) have heightened the demands on an acquirer seeking to assert bona fide acquisition. This may have reduced the market for stolen cars, especially as receiving offences have at the same time been given a wider purview. A purchaser who ought to have suspected that the car was stolen now risks also committing the offence of receiving stolen goods in the event of resale, and this is a potentially custodial offence.<sup>2</sup>

Statute law prescribes a particularly high level of vigilance in the acquisition of property, e.g. motor vehicles, which are often sold on credit and subject to a lien.<sup>3</sup> The amendment of 1st January 1999 to the then Section 3 of the Good Faith Acquisition of Chattels Act therefore entailed an intensification of the bona fide requirement to be met by the acquirer, to the point where he ought not to have suspected that the vendor had no right of disposal over the property. Every circumstance making the acquirer suspicious concerning the vendor’s right of disposal over the property requires the acquirer to take investigative measures, e.g. by asking additional questions or getting in touch with previous owners. Following the amendment of 1st July 2003 to the present Section 3, bona fide acquisition of stolen property and other misappropriated property is no longer possible.<sup>4</sup> A person whose property has been stolen is entitled to recover it from the acquirer without paying for it. This applies regardless of whether or not the person acquiring the property was acting in good faith. The purpose of the amendment was to strengthen the victim’s legal position and to counteract dealing in stolen property.<sup>5</sup> In this way, then, a clear signal was to be given of zero tolerance where trading in stolen property is concerned. A person must never be able to count on being allowed to keep what they have purchased if it proves to have been stolen.<sup>6</sup>

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1 See Ernbo, M. & Petterson, L. *Kriminalstatistik 2010, BRÅ Rapport nr 2011:11*, Stockholm, 2011, pp. 25, 31.

2 See Millqvist, G. *Sakrättens grunder*, 5 ed., Norstedts juridik, Stockholm, 2009, p. 62.

3 See prop. 1997/98:168 pp. 11, cf. prop. 1985/86:123 pp. 21.

4 See SFS 2003:161. Earlier provisions apply to acquisitions made before the new ones entered into force. See also prop. 2002/2003:17 and SOU 2000:56.

5 See SOU 2000:56 p. 39 and prop. 2002/2003:17 p. 12.

6 See prop. 2002/2003:17 p. 16.

Another purpose of the amendment was to harmonise Swedish law with the legislation of comparable countries. Thus the introduction of a right of vindication (see below) regarding stolen property has established uniformity of law in the Nordic countries, extinctive acquisition of stolen property being impossible in the rest of the Nordic area.<sup>7</sup>

The Good Faith Acquisition of Chattels Act is based on what is termed the extinction principle, whereby a bona fide purchaser becomes the owner of the property despite acquiring it from a person who had no right of disposal over it. The original owner then has to pay a price in order to retrieve the property. The extinction principle will continue to apply, but the new rule has the effect of introducing a special dispensation for cases where the owner has been deprived of the property through certain types of crime, e.g. theft.<sup>8</sup> In such cases the vindication principle will instead apply, meaning that the owner's title endures and that he is entitled to recover the property from a bona fide purchaser without having to render payment. Swedish law, however, does not include any rules of limitation concerning title in personal property.<sup>9</sup> Thus the new rule would mean the original owner having a perpetual right of vindication regarding stolen property. Since this order of things would not only be at variance with free-flowing commerce but would also mean property being for all time a potential object of receiving offences, a rule of continuous possession has also been introduced whereby the owner's right of vindication ceases after ten years.

Following the statutory amendments, the Supreme Court has had occasion in several cases to examine the implementation of the new provisions of the Good Faith Acquisition of Chattels Act with regard to motor vehicles. Some of those cases will be presented here, but first of all a description will be given of the substance of the Good Faith Acquisition of Chattels Act.

## 2 The Good Faith Acquisition of Chattels Act

The Good Faith Acquisition of Chattels Act applies only to bona fide acquisition of personal property, i.e. physical objects such as things and goods. Section 1 of the Act, then, does not apply to bona fide acquisition of other

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7 See Lilja, M. *National Report on the Transfer of Movables in Sweden*, in Faber, W. & Lurger, B., *National Reports on the Transfer of Movables in Europe*, Vol.5 Sweden, Norway and Denmark, Finland, Spain, Sellier European Law Publishers GmbH, Munich, 2011, p. 123.

8 Millqvist, however, argues that the amendment may in time very well result in the main rule being taken to be the vindication principle, with the extinction principle as the exception, given that cases of "stolen property being returnable to the rightful owner are probably far more numerous than unauthorised dealings in instalment purchase goods." See Millqvist, G. *Sakrättens grunder*, 5 ed., Norstedts juridik, Stockholm, 2009, p. 51.

9 See Håstad, T. *Preskription av lösenrätt*, Festskrift till Kurt Grönfors, Norstedts, Stockholm, 1991, p. 261.

personal property for which provision is made in some other enactment.<sup>10</sup> The prerequisites of bona fide acquisition are laid down in Section 2 (1), which lays down that a party acquiring a chattel by transfer (i.e. purchase, exchange or gift) from another party who had the property in his possession but was not the owner of it and was not entitled to dispose of it as happened acquires the title in the property if he has had it in his possession. One vital precondition for a bona fide acquisition being possible is for the acquirer to be acting in good faith. Section 2 (2) sets forth the definition of good faith, namely that an acquirer shall be deemed to have acted in good faith only if it is likely that the nature of the property, the conditions under which it was offered and the circumstances generally were such that he ought not to have suspected that the transferor had no right of disposal over the property. If all the requirements of Section 2 are met, the acquirer has made an acquisition in good faith. But the original owner is entitled to recover the property in return for payment. An owner wishing to buy back his property must reclaim it from the possessor within six months of the acquirer's possession having come, or presumably having come, to his knowledge; Section 5. Failing this, he will lose his right to recover the property.

Section 3, however, makes clear that bona fide acquisition is not possible if the owner has been deprived of the property through some type of crime. That section lays down that, even if the requirements for bona fide acquisition as per Section 2 are met, the owner's title in the property endures if he has been deprived of the property as a consequence of any person unlawfully taking the property from him or forcibly obtaining it through violence against the person or through a threat that entails, or is understood by the person threatened to entail, a danger constituting duress. "Unlawfully taken" refers to an unlawful taking of possession. Thus the property must have been taken without the consent of the owner or possessor.<sup>11</sup> If the owner has consented to surrender the property but the consent was invalid at civil law by reason of deceit, coercion or exploitation of a usurious situation by the other party, this provision will not apply.

It is primarily crimes of misappropriation that preclude bona fide acquisition. The crimes enumerated in Chap. 8 of the Penal Code (1962:700), BrB, and relevant here are:

- Theft of various degrees (theft (Section 1), petty theft (Section 2), gross theft (Section 4),
- Misappropriation offences constituting various degrees of robbery, *viz* robbery (Section 5) and gross robbery (Section 6),
- Vehicle theft (Section 7), and
- Unlawful dispossession (Section 8).

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<sup>10</sup> See, e.g., 11 § lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, 26 § Kommissionslagen (2009:865) and 2 kap.10 § Sjölagen (1994:1109).

<sup>11</sup> See SOU 2000:56 p. 170, prop. 2002/2003:17 p. 36.

It makes no difference if the acquisition has occurred in regular commerce or in some other form of sale, e.g. street vending.<sup>12</sup> In all these instances, the person deprived of their property is entitled to turn to the person acquiring it in good faith and demand its return without payment.

On the other hand, neither fraud nor other forms of dishonest conduct under Chap. 9 of BrB or crimes under Chap. 10 of BrB such as embezzlement (Chap. 10, Section 1) or unlawful disposal (Chap. 10, Section 4), come under the special provision in Section 3. In cases of this kind, therefore, the possibility of bona fide acquisition remains. Thus, if the owner has, for example, been defrauded of his property (Chap. 9, Section 1), he can only recover it from the possessor in return for payment.

For the purposes of Section 3, it should be noted that a request by the owner for restitution of the property by the acquirer can be made quite informally. Furthermore, no one need be subject to criminal liability in order for the rule in Section 3 to be applicable. Thus it is sufficient for the rightful owner to present proof of the property found belonging to him and of his having been unlawfully deprived of it. According to the *travaux préparatoires* of the amendment to the Good Faith Acquisition of Chattels Act, the burden of proof concerning the misappropriation ought in many cases to be deemed fulfilled by reference to a police complaint concerning the theft.<sup>13</sup> But, since the property is in the acquirer's possession, the original owner incurs a burden of proof concerning his ownership of the property.<sup>14</sup> Furthermore, Section 3, sentence 2 requires the owner to present his demand for restitution of the property by the possessor<sup>15</sup> within six months of becoming aware, or of the time when he ought to have become aware, of the possession being exercised by the acquirer. Failing this, the owner loses his title in the property. Instead the acquirer then acquires title in the property if the prerequisites of bona fide acquisition under Section 2 are satisfied. The owner will then no longer have any right under Section 3 of recovering the property from the acquirer or from any subsequent acquirer of the property.<sup>16</sup>

It should be added that, although the provision in Section 3 takes criminal acts as its starting point, the rule here is one of civil law. The *travaux préparatoires* of the Good Faith Acquisition of Chattels Act make clear that the rule should be framed in such a way that implementation can evolve independently and not be bound by criminal case law. Thus the rule should be given what is considered the most reasonable interpretation in civil law.<sup>17</sup>

As has already been mentioned, a new rule of continuous possession has been introduced whereby the original owner's right of vindication lapses after ten years. This provision has a bearing above all on cases where Section 3 is

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12 See prop. 2002/03:17 p. 20.

13 See SOU 2000:56 p. 170, prop. 2002/2003:17 p. 36.

14 See SOU 2000:56 p. 154.

15 Cf. NJA 1992 p. 892 and prop. 1985/86:123 p. 24.

16 See prop. 2002/2003:17 p. 36.

17 See prop. 2002/2003:17 p. 19.

applicable, i.e. when it is not possible for the acquirer to obtain a right of ownership in the property through bona fide acquisition.<sup>18</sup> Section 4, first and second sentences, lays down that a person with a claim to ownership who has possessed a chattel for ten years after acquiring the property through transfer from a party who was not the owner of it and had no authority to dispose of it in the manner which occurred acquires title in the property by reason of continuous possession. The acquirer does not acquire title, however, if, at the time of acquisition or during his possession, he ought to have suspected that the transferor had no right of disposal over the property. Continuous possession, then, is conditional on the acquirer having acted in good faith regarding the transferor's right of disposal over the property, both at the time of the transfer and throughout the ten-year possession period. On the other hand it is not necessary for the possessor to have had physical possession of the property: it is sufficient for him to have made the arrangements normally devolving on an owner. Nor is the invocation of continuous possession made expressly dependent on the transferor having had physical possession of the property at the time of the transfer, which is a prerequisite of bona fide acquisition under Section 2. Even so, the circumstances of possession can still make a difference. The *travaux préparatoires* of the Good Faith Acquisition of Chattels Act make clear that if the transferor does not have physical possession of the property at the time of the transfer, this may give cause to question the possessor's good faith concerning the transferor's right of disposal over the property. Thus the sole import of the statutory text lacking the said requirement is that the circumstances of possession need not always be investigated.<sup>19</sup>

If the requirements as per Section 4, first and second sentences, are met, the possessor acquires title in the property, even if the original owner has been deprived of the property in a manner referred to in Section 3. The same rules also apply if several persons have had possession of the property during the ten-year possession period. This is made clear by Section 4, third and fourth sentences, where it is laid down that the same rules apply if, following such transfer, the property has been possessed, with claim to ownership, by two or more persons in succession by reason or transfer or inheritance, bequest, estate partition or some comparable mode of acquisition. Unlike the first acquisition, which has to be through singular acquisition (purchase, exchange and gift), subsequent acquisition can also take place through universal acquisition (inheritance, estate partition and suchlike modes of acquisition). The good faith condition, however, applies to all possessors and it is for the original owner to prove that the possessor was not acting in good faith at the time of the acquisition or that he came to be acting in bad faith in the course of possession. Thus it is incumbent on the owner to indicate the circumstances which, in his opinion, should have prompted the possessor to suspect that the person transferring the property was not authorised to do so. The burden of proving that the circumstances existed also devolves on the owner.<sup>20</sup>

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18 See prop. 2002/2003:17 pp. 37, SOU 2000:56 pp. 172.

19 See prop. 2002/2003:17 p. 38, SOU 2000:56 pp. 124, 172.

20 See prop. 2002/2003:17 p. 38.

If, then, none of the parties possessing the property during the ten-year period had any reason, whether at the time of their acquisition of it or during their possession of it, to suspect that the transferor had no right of disposal over the property, the latest acquirer gains title in the property by virtue of continuous possession when the acquirers' combined length of possession reaches ten years. The original owner, however, is entitled to recover the property in return for payment; Section 5 (1). If, however, the original owner wishes to redeem the property, he must – exactly as with bona fide acquisition under Section 2 – demand its restitution by the possessor within six months of the point in time when that party's possession came, or must be presumed to have come, to his knowledge. Failing this, his right to recover the property will lapse; Section 5 (2).

### 3 Recent Case Law from the Supreme Court

As mentioned earlier, the Supreme Court has tried several cases involving implementation of the new provisions of the Good Faith Acquisition of Chattels Act with regard to motor vehicles.<sup>21</sup>

In NJA 2004 p. 633, A had bought a moped which subsequently proved to have been stolen. The owner from whom it had been stolen had transferred the moped to an insurance company which now filed a claim against A, based on the transfer of title by the original owner. The point at issue was whether the deprived owner's right of demanding restitution of the stolen property by A was limited in such a way that the safeguard against bona fide acquisition lapsed when he transferred the property. The Supreme Court found that, given the purpose of the provision – rendering the bona fide acquisition of stolen property impossible – no such implication could have been intended. If, therefore, the deprived owner transferred the property, the transfer should also include the protection against bona fide acquisition. This being so, the demand for restitution of the property could also be presented by the new owner who had entered into the deprived owner's stead. The insurance company was therefore entitled to recover the moped.<sup>22</sup>

In NJA 2005 p. 502 a firm of car dealers had purchased a used car from another firm of car dealers. The two firms had been doing business together for several years, with the result that internal routines existed between them, as well as established trade practices which they were both familiar with and complied with. A creditor, however, had a valid retention of title clause concerning the car which had now been sold and asserted a right of vindication in it against the purchaser. The purchaser was not deemed to have acquired the car in good faith, because no enquiry had been made concerning the vendor's right to dispose of the car. The Supreme Court ruled that a party dealing commercially in motor vehicles should incur an especially strict duty of care,

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21 Cf. also NJA 2005 p. 425, NJA 2007 p. 501, and NJA 2008 p. 282.

22 See Millqvist, G. *Sakrättens grunder*, 5 ed., Norstedts Juridik, Stockholm, 2009, p. 62.

which means that in order for bona fide acquisition to exist, the conditions of ownership must be investigated, regardless of the vendor's identity.<sup>23</sup>

In NJA 2006 p. 45 A had sold a car to C. In the sale transaction, A was represented by his son, B. A debt for the car was owing to a finance company. C sold the car to D before discharging his liabilities to A. D, not having discharged his duty of investigation, was not deemed to have acquired the car in good faith. D, who was a businessman and professional car dealer, had failed in his duty of care as regards obtaining reliable information about the rightful ownership of the car. A, accordingly, was entitled to compensation from D for the value of the car.

In NJA 2008 p. 668 a company, A, had sold a car to a purchaser, B, on hire purchase and with a retention of title clause. That same day A assigned all rights under the contract of sale to a finance company, C. After B, the purchaser, had failed to pay the full cash deposit and the first monthly instalment and had omitted to insure the car, C repossessed the car by agreement with the purchaser. Before any settlement had been effected between B and C under the Consumer Credit Act<sup>24</sup>, the car was stolen while in C's possession. The point at issue was whether C could obtain compensation for the theft from his insurance company, D, given that C had a theft insurance policy for vehicles owned by the insuree and a residual liability policy applying to vehicles which had been sold in credit with a retention of title clause. C argued among other things that the theft insurance was applicable because C must be deemed to be the owner of the car by reason of his repossession of it. D, however, maintained that ownership was vested in the credit purchaser and, accordingly, C's theft insurance policy could not apply. The Supreme Court found the question to be, not who "owned" the car in any abstract sense on a particular occasion but who incurred the risk of theft. The car having been repossessed, C bore the risk. C's theft insurance policy was therefore applicable and compensation for the car was paid to C by D.<sup>25</sup>

In NJA 2009 p. 889 the point at issue was whether A had acquired a motorcycle in good faith. A, wishing to buy a motorcycle, had approached a firm of car dealers, B, which was also instructed to sell A's car. B knew that another company, C, had a suitable motorcycle for sale. A therefore had the motorcycle collected from company C's premises by a representative of that company. After the transaction had been concluded, however, company D demanded restitution of the motorcycle by A, because the company C representative (company C being a subsidiary of company D) had not had authority to effect the sale in the way in which it proceeded. The representative had said that his live-in partner had bought the motorcycle but had had second

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23 See Millqvist, G. *Sakrättens grunder*, 5 ed., Norstedts Juridik, Stockholm, 2009, pp. 56 and Millqvist, G. *Omsättningsskydd - inte bara en fråga om godtroshärvär*, JT 2005-06 pp. 142.

24 See the then Consumer Credit Act, SFS 1992:830, superseded by SFS 2010:1846.

25 See Millqvist, G. *Om begreppet äganderätt i svensk rätt*, Infotorg 18th of November 2008. See van der Sluijs, J. *När är en försäkringstagare "verklig ägare" till en bil i försäkringsvillkorens mening?* JT 2010-11 pp. 153, especially p. 159.

thoughts. In fact the partner had not bought the motorcycle from C, because no payment had been rendered to that company. D did not know what had become of the motorcycle until it was successfully traced to A through the national vehicle register. The transaction had instead proceeded in such a way that company B paid the representative's partner the purchase price of SEK 180,000 by bank transfer and A paid the representative of C SEK 30,000 in cash, for which he was given a receipt. Company B then, deducting the price of the car it had sold on A's behalf, had to demand the remainder from the person concerned. D now demanded restitution of the motorcycle by A, but he objected, claiming bona fide acquisition. After analysing the requirement in Section 2 of the Good Faith Acquisition of Chattels Act, the Supreme Court found A to have made an acquisition in good faith. Among other things, the Supreme Court ruled that the circumstances of the purchase were not of such a kind that A ought to have become suspicious regarding B's ownership of the motorcycle. A had bought the car from an established firm in the business which dealt in used vehicles. A private person making an acquisition in regular trade cannot normally be deemed to have any duty of investigation unless there is special cause to suspect that the vendor had no right of disposal over the property. A had therefore made an extinctive bona fide purchase.<sup>26</sup>

In NJA 2010 p. 227, a person who had bought a car on hire purchase subject to a retention of title clause resold it before the debt had been paid off. The new purchaser, however, took out a car damage insurance policy for the vehicle. Since the hire purchase customer's debt was not settled, the hire purchase vendor cancelled the credit and demanded restitution of the car by the new buyer. The hire purchase vendor then filed proceedings against the buyer concerning superior title to the car. The buyer contested the claim, partly on the grounds that he had made an acquisition in good faith. In the judgement, however, the buyer was ordered to surrender the car to the vendor without payment or, in the event of the car no longer being in his possession, to pay the sum of SEK 171,000 plus interest. The car, however, was destroyed by fire while still in the new buyer's possession, whereupon a dispute arose between the insurance company with whom the vehicle damage insurance policy had been taken out and the purchaser, concerning entitlement to insurance compensation for the car. The purchaser was deemed unentitled to insurance compensation, since he was not deemed the real owner of the car in the sense of the insurance conditions.<sup>27</sup>

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26 See Millqvist, G. *Godtrosförvärv av HD enligt HD - en analys*. Infotorg 14 januari 2010.

27 See van der Sluijs, J. *När är en försäkringstagare "verklig ägare" till en bil i försäkringsvillkorens mening?* JT 2010-11 pp. 153, and Håstad, T. *Vem är den verkliga ägaren till bil köpt med äganderättsförbehåll? Om konsten att bedriva lönsam försäkringsrörelse genom att vid försäkringsfall bara betala tillbaka premien*. Festskrift till Torkel Gregow, Norstedts Juridik, Stockholm, 2010, pp. 125. See also Martinsson, C. *Vem ägde egentligen BMW:n?* Dagens juridik, 2010-04-22.

#### 4 Concluding Remarks

In connection with the genuinely bona fide acquisition of a motor vehicle, there are two rival owners. Both of them have done the right thing. How is the conflict to be resolved? There are many possible ways of settling the issue, as is reflected by different countries' legislation on the subject.<sup>28</sup> In a Swedish perspective, the legislature has chosen to protect the owner of the stolen property, since, prior to the statutory amendment, it had proved impossible for the owner to recover his stolen property or obtain compensation for it once it had been sold, because the buyer could always claim to have made an acquisition in good faith. Since the amendment was passed, the buyer has had to assume greater responsibility for verifying that the person selling the property really is the rightful owner or at all events is entitled to sell the property. If the buyer does not check up on the vendor and what he has purchased later proves to have been stolen, he will have to return the property to the rightful owner without receiving any payment in return. Instead the buyer will have to try to recover his money from the vendor. This can be both troublesome and financially harmful to the buyer where expensive articles such as motor vehicles are involved. Due to the impossibility of bona fide acquisition of stolen property, auto tracking devices for cars are becoming increasingly common.<sup>29</sup> Transmitter and GPS tracking devices make it possible for most cars to be pinpointed, even when hidden away in a garage. A person finding the car, however, is not entitled to repossess it personally. By unlawfully disrupting another party's possession in this way one is guilty of what is termed self-repossession (Chap. 8, Section 9, BrB). Interesting new legal issues which have prompted debate because of the statutory changes described above are continuing to appear, however, for example, the inability of a purchaser of stolen goods at a compulsory auction to obtain compensation from the Swedish Enforcement Authority in the event of the rightful owner demanding restitution of what has been stolen.<sup>30</sup> Furthermore, the Supreme Court has granted a review dispensation in a very interesting case involving a stolen picture.<sup>31</sup> Thus the discussion as to when a person has made an acquisition in good faith bids fair to continue.

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28 See Lurger, B. & Faber, W. (ed.) *Acquisition and Loss of Ownership of Goods. Principles of European Law*. Study Group on a European Civil Code, Sellier European Law Publishers GmbH, Munich, 2011, pp. 887.

29 See Stjerna, M. *Jakten på den försvunna bilen*, Teknikens värld, no. 10, 2005, pp. 58.

30 See Svea Hovrätt's (Svea Court of Appeal) judgement of 24th February 2011 in case T 2079-10. See also Sveriges Television, Rapport 5th June 2011.

31 See Svea Hovrätt's (Svea Court of Appeal) judgement of 18th March 2010 in case B 6454-09. Högsta domstolens protokoll (Minutes of the Supreme Court), 2011-03-02, case no. T 5213-10.