NOTHING SO PRACTICAL AS A GOOD THEORY

Festschrift for George L Gretton

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CONTENTS

Professor George Lidderdale Gretton

FOREWORD

May I have the claret?

Between 1976 and 1978 three law students could be found most days having morning coffee in the unprepossessing little café that used to exist at the back of the Royal Scottish Museum. I was one. Susan O'Brien QC (as she then wasn't) was another. George Gretton was the third. We were all in our early- to mid-20s, engaged in what John Blackie has described as the old lags' degree, the two-year graduate LLB at Edinburgh University. I was finding the law degree dull and uninspiring, something to be endured but hardly enjoyed. Susan, I think, was of much the same mind. But for George, law was love at first sight. He could hardly get enough of it. His enthusiasm was relentless, on occasions insufferable. When Susan and I wanted to talk about literature or politics, or merely to gossip, George kept turning the conversation back to law and to the latest topics on which we had been lectured. Sometimes, though not very often, he succeeded in engaging our interest.

Since our days together as students, George's professional life and my own have been curiously intertwined. We were law apprentices together, though in different offices. I bought my first flat from George and still have the file in which we conducted the conveyancing transaction, exchanging professional jibes from the safe haven of our respective law firms. (Reid: "The testing clause is in the singular when it should be in the plural"; Gretton: "*Falsa demonstratio non nocet dummodo constat de corpore*".) We became lecturers at Edinburgh University in consecutive years (me in 1980, George in 1981) and professors in the same year (1994). George succeeded me as a Scottish Law Commissioner and completed two of my projects before embarking on projects of his own. We have talked law incessantly and productively for four decades. We have written together to an extent that is unusual in academic life. For more than a quarter of a century we have travelled round the country every January lecturing to the legal profession on conveyancing. Even our literary styles are similar. In our early years, we were often confused with each other – fellow trouble-makers, *enfants terribles* or, in the dismissive words of Lord Ross in *Deutz Engines Ltd v Terex Ltd* 1984 SLT 273 (at 275), "two individuals whom I understand to be academic lawyers". Today, no longer an *enfant* nor even particularly *terrible*, the Lord President Reid Professor of Law Emeritus is the reason for this marvellous collection of essays contributed by his peers, colleagues, pupils and – I choose the words carefully – his fans.

Formidably well-read and boundlessly curious, George has influenced all of those who have contributed to this volume as well as countless people who have not. By example he has shown us how to live the scholarly life. There is a brilliance and vitality to his writing and a distinctiveness of voice that mark it out as work of exceptional quality.

But George inspires affection as well as admiration. His wit is legendary though hard to reproduce on the printed page. I once saw a solicitor in Glasgow fall off his seat with laughter when George, with the timing of the born comedian, launched some firework on the unpromising topic of the money-laundering regulations. I wish I had written down some of the jokes from our conveyancing tours. "That brings me to the neglected topic of mora and taciturnity", I recall him once saying, slowly and deliberately, relishing the sound of every word; and then, after a pause of just the right length, and rather quickly: "That sounds like a firm of Aberdeen solicitors." Humour, for George, is inseparable from the exposition of law. We have been fortunate that it is so.

This volume is put together by three of George's pupils. The range of topics shows the breadth of George's own scholarly interests. It is a fine tribute to a remarkable scholar.

I end with a characteristic piece from the *enfant terrible* himself but one which today is hardly known. Back in the 1980s, the idea that parts of Scots private law might usefully be assimilated to English law was still a matter of debate. In the issue of the *Journal of the Law Society of Scotland* for February 1988 the editor (at p 42), responding to a letter that had appeared in the *Glasgow Herald*, offered "a bottle of claret to the reader who can, in 250 words, best explain in plain and non-technical language understandable to our lay friends and clients, why we should cling to the concept of two legal systems in this little island". George took up the challenge. His letter, which appeared in the April issue of the *Journal* (at p 127), is short and I reproduce it in its entirety. Its deliberate misunderstanding of the question could hardly be bettered:

> Sir: I was most interested in the editorial in your February issue (p 42) canvassing the possibility of merging English law with Scots law. I think that we should hesitate before we take such a step.
>
> (1) It would be highly inconvenient for English people, especially those in southern counties, to find their highest courts moved to Edinburgh. English barristers would likewise be inconvenienced by having to move north.
>
> (2) English lawyers, both solicitors and barristers, would not be pleased to find that they were suddenly unqualified to practise in their own country. Nor would they be pleased to find that most of their libraries had become worthless.
>
> (3) Although it is no doubt true that insofar as Scots and English law differ, it is the former that takes the laurel, yet there are perhaps a few respects in which English law has approached nearer to the ideals of justice, rationality, coherence and simplicity than has our own system. Of course, the idea would be that in the process of merger the best features of English law would be preserved, but I fear that this intention would be overlooked in practice.
>
> (4) Lastly, there is a question of national pride. Why should the English lose their law merely to avoid the inconveniences of a small minority? Would there not be something tragic in the thought that Coke and Blackstone would become strangers in their own land?
>
> May I have the claret?

The satire is Swiftean. Only George could have written this letter, and only George could have made an important argument with such wit and lightness of touch. And George really did win the claret.

Kenneth G C Reid

EDITORS' PREFACE

Professor George Gretton retired from the Lord President Reid Chair of Law in the University of Edinburgh in 2016. Over the last 40 years his contribution to legal scholarship both in Scotland and internationally has been profound. As a teacher, George is remembered with affection by generations of Edinburgh law students for his intellect and humour. His work in the University of Edinburgh to maintain and enhance the holdings of its Law Library has been unparalleled. From 2006 to 2011 he served as a Scottish Law Commissioner and made a significant contribution to law reform.

We are very grateful to all those who have contributed essays to this volume in George's honour. It is fitting that there are contributors from both home and abroad, including practitioners as well as academics. We wish to record our gratitude – and apologies – to those who generously offered to contribute but who, due to limitations of space, we could not include.

The Clark Foundation for Legal Education, Millar & Bryce and DUAL Asset Underwriting have provided generous financial support. Our thanks are due to them and to the many subscribers. We appreciate too the assistance of Margaret Cherry at Avizandum Publishing in guiding the book to publication.

We thank George's close friend and colleague, Professor Kenneth Reid, for contributing a foreword, and George himself for his short reflective essay, which appears towards the end of the volume.

On behalf of all who have benefited from his immense contribution to legal education, scholarship and practice, we dedicate this volume to George with gratitude and affection.

Andrew J M Steven
Ross G Anderson
John MacLeod
October 2017

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Part 1:
Case Law

WHY SCOTS LAWYERS SHOULD READ SIXTEENTH AND SEVENTEENTH CENTURY EUROPEAN CASE LAW

John Blackie

A. INTRODUCTION

Why, in considering the law of Scotland in the context of the European tradition, is more attention not given to case law from other jurisdictions in the sixteenth and seventeenth centuries? As briefly discussed below, it is not that such references cannot be found in Scottish reports of the period. It is well recognised that case law was an important source of legal doctrine in Civilian jurisdictions. References to case law from other jurisdictions have been noted in them, likewise.[1] The existence of this continental case law has been pointed to as one aspect of the international nature of the world of the *ius commune* in this period.[2]

There are several factors that explain why this type of material has not been considered much in Scotland today. One is that, except in Mackenzie,[3] it does not really appear in Scottish writers of the period. Stair's *Institutions of the Law of Scotland* seem to be a continental European case-free zone. Whether he had any particular view on the usefulness of foreign case law cannot be determined from his work, although an important study has now explored the continental material used by him, and has demonstrated that in some cases his references to it are second hand.[4] Stair's reason for not including cases from elsewhere cannot, however, have been the sort of lofty disdain for studying cases found in a few "big name" continental jurists, since their view applied to cases just as much in their own jurisdictions. For instance, Cujas considered the "science des arrêts" ("cases") was "dangerous", and the work of

1 E.g. A Wijfels, "Orbis exiguus. Foreign legal authorities in Paulus Christianaeus's Law Reports" in S Dauchy, W H Bryson and M C Mirow (eds), *Ratio Decidendi: guiding principles of judicial decision*, vol 2: "Foreign Law" (2010) 37–62; C C M Cabral, "Case law in Portuguese decisiones in the early modern age: Antonio da Gama's Decisiones Supremi Senatus Lusitaniae" (2015) Forum Historiae Iuris (available at http://www.forhistiur.de/2015-06-machado-cabral/).

2 D Ibbetson, *Common Law and Ius Commune* (2001) 18–19.

3 See O F Robinson (ed), Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (2nd edn, 1699), Index of Sources, 435–453. For an example in Mackenzie's *Observations on the Acts of Parliament* (1687) see J Blackie, "Unity in Diversity: the History of Personality Rights in Scots Law" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009) 31 at 73 n 64.

4 A L M Wilson, *The Sources and Method of the Institutions of the Law of Scotland by Sir James Dalrymple, 1st Viscount Stair, with Specific Reference to the Law of Obligations*, unpublished PhD thesis, University of Edinburgh (2011).

his countryman Papon[5] was "pernicious".[6] How different to this the attitude of Scottish courts may perhaps have been may be gauged by the number of references to Cujas and Papon in Scottish reported case law of the seventeenth century. A digital search of Morison's dictionary indicates that there are more references to the latter in that period than to the former. In one case[7] they are both cited for opposing views on the question of whether a provision in a will was impliedly revoked by the birth of a posthumous child of the testator.

The principal reason why the (very large) body of published case law from European jurisdictions has not been looked at in modern Scotland is very probably the linguistic problem that it has not been translated into English. It is mostly in Latin. The linguistic challenge is the greater, because typically the reports of cases from continental jurisdictions of the period are longer than contemporary Scottish reports.

This short essay is a journey to the continent to indicate some ways in which our thinking can be illuminated by looking at case law there in this period. It does not take as its starting point references to such in Scottish material and then follow these up to classify them, look at their context, analyse their use where cited and so on. That would result in a very long essay, and is for someone for another day.

There are several grounds for thinking this brief visit may be worth making. One is already apparent: to draw attention to the fact that this material exists. A further one is that it is often an easier read than the works of contemporary jurists. As every teacher of law knows, cases are stories, and stories engage the human mind in a special, immediate way.

There are also more intellectual reasons. First, reading this sort of material assists to reveal the range of different solutions on many points of detail on a topic where in the contemporary Scottish case law the general topic is not considered at all, or, where it is, some detailed issues are not.

Secondly, contemporary continental case law throws into relief the variety of different points of view available in the European tradition(s) in the period on points of law. It thus underlines that on points where lawyers were faced with uncertainty as to what the law was there were competing views elsewhere too. The routine diet of courts' work on the law was, and is, much more generally one involving fine-tuning than one of dealing expressly with the big taxonomic structures of the law in any area. Within the European sources there was a whole smorgasbord of approaches to deal with the kind of detailed questions that courts typically had before them. The choice from that was not one that could only, or even often, be made by asking, is this approach from the *ius commune* and that one from a local municipal law. There were on many points of detail lots of different *ius commune* views, and the municipal law of other places, including the learned custom developed by their courts, was, likewise, of interest.

5 *Recueil d'Arrests Notables des Cours Souveraines de France, Ordonnés par Titre* (Lyon, 1556). The Advocates Library has a 1607 edition in French published in Paris, that was owned by "J Hunter 1618". More than one Latin translation appeared in the first third of the seventeenth century.

6 G Cazals, "Jean Papon Humaniste – La Mise on Ordre du droit et les enjeux du renouvellement de la pensée juridique moderne" in M Delmas-Marty, A Jeammaud and O Leclerc (eds), *Droit et Humanisme – Autour de Jean Papon Juriste forézien* (2015) 15 at 17.

7 *Christy v Christy* (1682) 3 Brown's Supplement 444 (Fountainhall): "the Lords being much divided"; (1682) Brown's Supplement 26 (Harcarse) suggests the point was never decided.

Thirdly, while it is recognised that modern comparative law techniques can be a tool for legal history work, a ground here for this short essay is rather to help towards an understanding of the kind of comparative law that a lawyer in the past with access to what courts elsewhere had decided on the matter might carry out to determine the answer to a point of detail.

Finally, even where a lawyer did not have access to that material it suggests what alternative approaches to a point might have been taken.

B. FRIESLAND, THE PAPAL STATES, AND THE NATURE OF THE LAW IN COURTS

I focus on two collections of case law from the 1630s, one from Friesland in the Netherlands and the other from the Papal States. The work from Friesland is the *Decisiones Frisicae* put together by Johan van den Sande (*Ioannis à Sande*). The second edition was completed by him just before he died and was published shortly after that in 1639.[8] The work from the Papal States is the *Sacrae Rotae Romanae Decisiones Novissimae* compiled by Paulus Rubeus.[9] It covers the years 1635 to 1637.

Choosing to focus on material from nearly the same point in time is not in any way to suggest that courts and writers ever confined themselves to material that was immediately contemporary. This temporal limit has been adopted in part for reasons of practicality. It is also adopted to consider what the possible answers might have been given on a detailed point of law had come before a Scottish court at that time. A line taken by a court elsewhere might be more likely to have been a candidate for the approach of a Scottish court, irrespective of whether it knew of it or not. Furthermore, without a temporal limit it would have been necessary to consider the historical development in these jurisdictions that lay behind the rules and principles being adopted and applied in the cases in these collections. That, too, is for someone for another day.

Why choose the 1630s? The answer is it is by this time that publication of case law had become extensive in a wide range of European jurisdictions. Why choose Friesland and Rome rather than any two other places? One answer is that these two collections, like others, were put together by judges. A further answer is that Sande's work can be found quite often cited in Scottish seventeenth century reports (and that goes on being the case up to the late eighteenth century[10] but, as emphasised above, we are not working from a starting point in cases decided in Scotland, nor back to such cases).

Awareness of some of these citations was what first brought the existence of continental case law to my attention a long time ago. The choice of a collection from the Papal States was not prompted at all by finding a reference in a Scottish case. But there is a single instance happily coupled with a reference to the position

8 *Decisiones Frisicae sive Rerum in Suprema Curia Iudicatarum Libri V, Author & Collector Joanne a Sande eiusdem Curiae Senator, Editio Secunda ab ipso Authore multis in locis locupletati aucti et correcti* (Leovardiaae) (Leeuwarden) (1638).

9 The edition used here is *Sacrae Rotae Romanae Decisiones Novissimae a Paulo Rubeo Tertio Loco Selectae* (Rome, 1652).

10 E.g. *Kerr v Earl of Hume* (1771) Mor 4522.

in Frizeland (*sic*).[11] The main reason for choosing the case law of these two jurisdictions was a hypothesis that it might differ in significant ways because of their contrasting geographical and religious positions. The Netherlands province of Friesland in the north of Europe, was small in physical area, and in population, with a Scottish sort of climate, and Protestant. The Papal States were geographically quite large and populous, sun-drenched for much of the year, and Roman Catholic. It might be thought that the case law would reveal some significant divide intellectually as well. The modern scholarly literature on the *ius commune* often refers to a difference between a *mos italicus* and the approaches north of the Mediterranean. Distinguishing the *mos italicus* from other approaches is, however, done at the level of determining what hierarchy of sources of authority was recognised in European legal systems.[12] The *mos italicus* gave primacy to the *ius commune* as derived from Roman Law and local laws were to be interpreted as variants of it. It turns out, however, that this is hardly visible in the material looked at here.

Occasions for such an issue to arise in a court case would be rare given the detailed points of law typically discussed.

There are some formal differences between the two collections. Both contain comment by the author/collector as well as a report of the arguments and decisions in the cases. There is, though, very much more of that in the *Decisiones Frisicae*. Another difference is the *Rotae Romanae Decisiones* are chronological (though with an excellent index). In Sande's work the material is grouped together under topic headings that are arranged alphabetically, and the way it is presented may indicate that he has added material beyond what was cited. Sometimes he covers two decisions together.

A view that there is some fundamental dividing line between a *mos italicus* and approaches elsewhere in Europe is posited differences of approach to legal reasoning, and on the sources used. The approach of sixteenth and seventeenth century continental European jurists that are the most familiar names to scholars may support this picture. But this material suggests what was happening in courts was different.

First, as already noted, courts were mostly engaged in fine-tuning when it came to questions of law. This was, and is, inevitable. They addressed whatever was put before them by litigants. They rarely needed to go into what we might think of as the big taxonomic questions of law, such as the structure of unjustified enrichment, or contract law, or whether the real rights are a closed category, or whether general principles should guide the development of nominate crimes and delicts and so on. These two collections are totally dominated by detail questions not by such issues. They deal with questions of statute law, as well as variants of the *ius commune* and municipal law developed by courts.

Secondly, the material referred to in these two collections does not suggest any bright-line divide between the world of southern and northern Europe. Certainly, this is so when the view point is Friesland. The material in Sande is no way confined to material from Protestant countries. It includes numerous references both to jurists

11 *Sir John Cochran v Earl of Buchan* (1698) Mor 4544.

12 For an excellent exposition and analysis see A R C Simpson, "Legislation and Authority in Early-Modern Scotland" in M Godfrey (ed), *Law and Authority in British Legal History 1200–1900* (2016) at 94–98.

and to case law elsewhere. It is true that references to material from Protestant jurisdictions are uncommon in cases in Paulus Rubeus' collection. But they are not totally absent. There are two references[13] to the work of the Saxon, Lutheran, jurist, Matthias Berlich, both considering the question at what point in procedure is it too late to challenge evidence. He is also not the only Berlich to be mentioned. There is a reference in a case on whether women could be tutrices[14] to his obscurer nephew Burchard Berlich, who wrote on the law of step-mothers. His work had recently filled a gap in the available literature, having been published just seven years before the decision in which it is mentioned.[15] These two references suggest that the view[16] (based on library holdings as evidence) that Italians never used material from Protestant countries requires qualification. Matthias Berlich, an exact contemporary of Sande, is cited 13 times in the *Decisiones Frisicae*.

The general form of legal reasoning used in judgments in both the courts in Friesland and those in the Papal States is very much the same. There is consideration of the practice of the court, reference to its previous decisions, reference to competing views of writers on a point of law, and on occasion reference to other jurisdictions. The question is not whether there was a unified *ius commune* throughout Europe. What is shared across Europe is not that every jurisdiction applies the same rule on every point of law, nor uses the same authorities to assist in deciding cases, nor has identical statute law. It is the common way of going about deciding legal questions that made the case law, and juristic writing, readily helpful in deciding detailed points of law, particularly, indeed, where there were a range of possible different approaches. This fits with what is becoming the new orthodoxy on law on the ground in Europe in this period: "The *ius commune* tradition is no longer understood to be an all-encompassing legal system. On the contrary, legal historians emphasize a plurality of individual legal identities which arguably interact with a common legal culture."[17]

C. THREE OF THE ASPECTS THAT ILLUMINATE SCOTS LAW

(1) Scots terminology

It is well recognised that much of the terminology in Scots law is Civilian. But case law from elsewhere reveals that there were variants in various places, and sometimes a vernacular word might be used. Take three routine procedural terms in Scotland: "pursuer", "defender" and "irrelevant".

Scotland seems distinctive in using the term "pursuer". Any Latin term for the party raising a civil action, derived from the term "prosecutor", which is used once

13 Rubeus, *Sacrae Rotae Romanae* (n 9), decisio 41 paras 11 and 21. Rubeus expressly states it was the new edition that is referred to.

14 Rubeus, *Sacrae Rotae Romanae* (n 9), decisio 61 para 3.

15 B Berlichius, *De Novercarum Jure, Statu et Affectu Novus et Utilis Tractatus* (Leipzig, 1628). That Matthias Berlich was his uncle is referred to in the Foreword (np) by Johannes Suevius, a Professor at Jena, who describes Matthias as his old friend.

16 D J Osler, "The Fantasy Men" (2007) 10 Rechtsgeschichte 169.

17 S Dauchy, "Legal Interpretation and the Use of Legal Literature in 18th Century Law Reports of the "Parlement" de Flandre" in Y Morigiwa et al (eds), *Interpretation of Law in the Age of Enlightenment* (2011) 45 at 46.

in Justinian's Digest,[18] or "persequor" ("I pursue"), is typically marked by its absence in reports of cases from continental European jurisdictions. The most commonly used term was "actor". Paulus Rubeus avoids using any term. He heads each case with the name of the diocese of origin and then very briefly with what it was about, e.g. "Romana scutorum 4000" ("Rome in a case concerning 4000 scudi").[19] The case index is by diocese of origin with a separate index by one word taken from its brief descriptive heading. In the body of the report he refers to parties simply by name, usually by Christian name only. In Friesland, though Sande's work is in Latin, the person raising the case is always referred to using the Dutch, "impetrant" (male) or "impetrante" (female). Likewise, for the defender he uses "ghedaeghde" (in later Dutch spelled "gedaagde"). "Impetrant(e)" has a Latin etymology. "Ghedaeghde" has a Dutch etymology, meaning summoned. But the verb "persequi" ("to pursue") is used in one of Sande's reports when considering whether an action could be abandoned or, as was held to be the case, must be carried on to the extent that the other party could obtain a decree.[20]

"Irrelevant" is a translation into Scots (and now English) of "irrelevans". Much more common in contemporary continental literature is "impertinens". But the Scottish dialect for procedure is in this respect like the Roman, and different from that in many other places in northern Europe. Rubeus uses "irrelevans". On one occasion we find it in combination with two other terms: "irrelevantes, inverisimiles et impossibiles".[21]

These differences of terminology present no difficulty to the reader and would not have done at the time. That there are local dialects of Civilian terminology mixed with words of local vernacular origin would present no problem to the reader with a knowledge of the law or the issue. These local dialects are not divided between Protestant and Roman Catholic Europe. They vary all over the place.

Here and there in these collections one comes across a word or a phrase that as an antonym, not found in Scotland, puts into relief an important Scots law concept. One found in a case in the Papal States does this for "patrimony". One from Friesland does it for "pro indiviso".

The former is particularly fitting to highlight here, as one of George Gretton's signal contributions to Scottish private law analysis has been the reintroduction of the term "patrimony". We do not think of "matrimony" as in any sense an antonym for it. Finding it as contrasted with "patrimony" in case law from the Papal States, considering a property law question, is at first sight startling. Its classical Latin meaning is "marriage" and that survives in Scots law today. This other use, therefore, is as a term coined at some time to provide a shorthand where a distinction between a father's assets, "patrimony", and a mother's assets was relevant to a question of succession. In this case the issue was who would count as having the right to succeed to the mother's property as being the more proximate relation. A distinction was made between those "consanguinei proximiores ex parte patris in patrimonio, et proximiores consanguinei ex parte matris in matrimonio".[22]

18 D 48.3.7.
19 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 69.
20 Sande, *Decisiones Frisicae* (n 8) 1.18.1.
21 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 128.
22 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 102.

Pro indiviso, is, of course, not a gendered term. However, coming across its direct antonym, *pro diviso* in a Friesland decision in 1633[23] suggests that it would be useful to use that to draw the contrast to highlight the meaning.

(2) The importance of legislation

There was a quite a lot of legislation on "lawyers' law" in sixteenth- and seventeenth-century Scotland. It is possible, naturally, to throw light on this material by reading contemporary legislation from elsewhere. But a much easier way to appreciate that other places had this sort of legislation, and sometimes on the same topic as a Scottish provision, is to look at continental European cases. That way, too, one goes beyond the bare provisions to questions of their interpretation. It is cases that explore the details of statutes. The examples in these two collections are too numerous to list. However, a consideration of some also throws light on what might have been on the menu of possible approaches even where there was no legislation on a topic in Scotland.

A telling example is the law on the delict of stuprum (the predecessor of the now doubtful delict of seduction). Were chaste widows covered? What factors were to be considered in determining the quantum of an award? A decision in Sande[24] reveals that in Friesland both questions were at one time determined by a *specialis consuetudo* (a local non-statutory rule, created by the court). That had been "approved" by being put into statutory form.

The same sort of development is apparent with some contemporary Acts of Sederunt and Adjournal in Scotland, and possibly some statutes, too. There was, however, no Scots legislation on stuprum. Once a *specialis consuetudo* comes to take a statutory form any further consideration of the detailed law becomes a question of statutory interpretation. The title of this Friesian statute was "van Concubynen" (cf "concubines). The relevant provision used "maeghdeken" (cf the German, *Mädchen*, i.e. young woman or girl) to define the nature of the class of women who could claim. As the statute was "penal", dealing as it did with delict, the technique of interpretation applied was restrictive. In the language of modern statutory interpretation there was a presumption for freedom. Thus, even though the pursuer was young and, it would seem, chaste, it was held that the term did not cover widows. There is no Scottish decision on that and there was a view in some places in Europe that they were covered.[25] As to how to calculate the amount due to a victim the court considered the matter in much more detail than is apparent in Scotland, where there was no legislation. The statute required specific consideration of what hypothetically the victim's dowry would have been, and what was "hare qualiteit" ("her quality"). In interpreting that, it developed a list of factors to be considered. The Scottish reported case law by contrast is unrevealing on how the court determined the sum due.[26]

Sande includes a table of statutes that underlines just how relatively frequent cases involving interpretation of legislation were in the court. There are 26 pieces of legislation in it. Paulus Rubeus, likewise, has an index of statutes. There are 36

23 Sande, *Decisiones Frisicae* (n 8) 4.11.3.
24 Sande, *Decisiones Frisicae* (n 8) 2.1.10.
25 Blackie, "Unity in Diversity" (n 3) at 66.
26 Blackie, "Unity in Diversity" (n 3) at 92–93.

statutes included in this *Index Declarationum sv Statuta*.[27] Given that this set of cases covers only three years, it may be that the incidence of questions of statutory interpretation is higher than in Friesland. If so, geographical difference explains it. Not only was the population much larger, but the Papal Sates consisted of several states, often cities, with their own legislation in addition to the general papal legislation. An example is a statute of Orvieto (Urbevetana) dealing with succession to land considered in the case, mentioned above, where the term "matrimonio" is used in a property law sense.[28]

(3) Matters not dealt with in Scottish cases at all

Another way in which reading cases from European jurisdictions at this period may help in developing an understanding of Scots law is where there is no Scottish material at all on even the general topic. European cases can throw light on the approach taken when material does later emerge in Scotland. When that happens, the Scottish cases may not refer to any foreign case law. Furthermore, foreign case law may suggest that the absence of an earlier Scottish case or cases, may have resulted in modern Scots law having taken a path on some point that would have surprised a Scots lawyer if a case had arisen in that earlier period. A case on marine insurance in Paulus Rubeus' collection illustrates the former proposition; a case on the law of division and sale in Sande illustrates the latter.

The marine insurance case from the Papal States[29] suggests that what has been characterised as an instance of Anglicisation of the law in Scotland in the eighteenth century was nothing of the sort. When cases on marine insurance appeared for the first time in Scotland the court adopted a procedure of consulting on the practice in London. But this Roman case shows that the practice of consulting experts in another jurisdiction was itself long part of the Civilian approach in this area of insurance law. The court would consult those who could throw the most reliable light on the question before it.

The facts were that a cargo of grain being carried by ship from one of the Italian islands to Genoa was insured before it sailed, and, it appears, was lost at sea. Two questions of law had to be decided. The first was whether the amount due was the value if the cargo had arrived or whether it was its value when it was insured, that is before it set sail. The answer was the latter, the standard approach in Europe at that time. It was based on reasoning first that an insurer would not be able to assess the risk as he could not reasonably estimate what the value on arrival might be. It is notable, however, that the reasoning is further supported by considering the "commune stilum seu consuetudinem" ("common style or custom") and the rule was to follow what "praecipue inter mercatores attenditur" ("is particularly followed amongst merchants").[30]

The second question in this case was whether a different approach should be taken in working out the liability of each insurer who had insured a part. The answer was "no". On this the court took evidence of the two insurers themselves, one being in Genoa, the other in Terra Liburni (the area around Livorno, known in England and Scotland until the twentieth century as Leghorn, and a major port, which came

27 Rubeus, *Sacrae Rotae Romanae* (n 9) starting at 787–788.
28 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 102.
29 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 47.
30 Rubeus, *Sacrae Rotae Romanae* (n 9) decisio 47 para 5.

to have a resident English-speaking community). Additionally, it obtained evidence of practice from insurers as experts from Venice, Florence, Ancona and the bank of the Tiber on the Rome side. The opinion of the last, and most local, was out of line with the others and was disregarded as having misunderstood the question.

What this shows for Scots law is that when a Scottish eighteenth century court took evidence of practice elsewhere it was doing something that was standard in seventeenth century Europe. That it chose to consult English insurers is no different from this Italian court choosing to consult experts in other Italian states, (and on this occasion to reject that of those nearest to the court in Rome). That Scottish courts should choose London in the eighteenth century reflects the trading strength of that insurance market at that time, not necessarily a preference for English law. Very recently it has been shown that there must have been marine insurance in Scotland in the seventeenth century.[31] (In one small way this case from the Papal States additionally supports an aspect of argument in that essay, namely that throughout the case Latin terms are those for "assuring" and "assurance"). Should any cases have come to the Court of Session it is very likely that even in the early seventeenth century the court would have taken the opinion of English experts, but possibly along with the opinion of ones from elsewhere.

The absence of a rich reported case law in Scotland from the sixteenth and seventeenth century can for better or worse effect aspects of law which remain of great practical importance today. Reading European case law of the period reveals things might be different today if there had been such a Scottish case law available.

A striking example of this is in the approach to division and sale. The current situation in Scotland is that the right of a co-owner is to division and where that is not practicable to sale. The right to the remedy has been described as "absolute".[32] There is an important question, however, where the remedy is sale. This is whether the court can require that sale, following a valuation, to be to a co-owner who wishes to buy the other party's or parties' share(s). There is a conflict of authority here.[33] The difference of view is about whether there is role for equity (in the broad sense) in determining what form sale should take. Both the view that there is no power and the view that that there is if it is equitable contrast with that taken in a case in Sande[34] where the dispute was between three sisters and a brother. It held there was a rule. The court was required to decide what was "commodius et utilius" ("the more convenient and of more utility") considering the position of the parties. The authority cited for it was a case from Burgundy.[35] It applied both to whether there should be physical division and to a question of any other remedy, including that of sale. "Equity" was not mentioned though the rule was capable of being applied in an

31 S C Styles, "Scottish Marine Insurance before the Mid-Eighteenth Century" in A R C Simpson, S C Styles, E West and A L M Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016) 237.

32 *Upper Crathes Fishings Ltd v Bailey's Executors* 1991 SC 30. This is subject to certain exceptions. For example, for matrimonial homes and family homes of civil partners the court is given a discretion by statute. See the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 19 and the Civil Partnership Act 2004 s 110.

33 Authorities for there being no power are: *Collins v Sweeney* 2014 GWD 12-214, *Berry v Berry (No 2)* 1989 SLT 992 and perhaps *Campbells v Murray* 1972 SC 310. Authorities for there being a being a power are *Gray v Kerner* 1996 SCLR 331 and perhaps *Scrimgeour v Scrimgeour* 1988 SLT 590.

34 Sande, *Decisiones Frisicae* (n 8) 4.11.3.

35 Nicolaus Boerius [Nicolas Bohier], [Decisiones Burgadalenses], decisio 46.

appropriate situation to prevent an open market sale. The house in the Friesland case was an ancestral one; the sisters upkept it.[36] Experts reported to the court that the house could not be physically divided *commode* ("conveniently and comfortably"). It was held that the sisters were entitled to keep it. The Court ordered a valuation of the brother's share and held that the sisters could elect whether to pay him that or transfer some of the land with the same value to him. It was also possible to apply a further rule that a majority had a right to purchase the share of a minority. Cases from Leipzig and Wittenberg were cited for that.

That courts in at least two jurisdictions applied the same general rule, and courts in at least three jurisdictions applied a rule that a majority had the right to buy the shares of a minority, raises a question whether the Court of Session would have done the same at that time. That two of these jurisdictions influenced other aspects of Scots law at this period[37] makes it the more likely that Scotland would have taken the same approach at that time. Perhaps with respect to either, or both, of these rules there were other jurisdictions, or jurists who took a different approach. Only reading a yet wider range of continental European case law and writing could the position be known for certain. It is true that the case concerns siblings. Neither husband and wife, nor other forms of domestic arrangement between unrelated parties living together, would be likely to have involved co-ownership in the seventeenth centuries. But had these questions been considered in another situation the rules adopted would in the course of time have been able to give spouses at common law a right in certain circumstances to take over the other party's share, to deal with other contexts and provide rules capable of adjusting the law as social circumstances changed over time.

D. CONCLUSION

There are a vast number of other topics on which these two collections of case law, and all the others available from continental European, can throw light. Access to them is now readily available in digital versions. The diet of courts all over Europe was very similar. For instance, detailed questions of feudal land law are discussed just as frequently as they are in Scots cases of the period, and cases on the question of fruits are legion. A retirement certainly is not long enough to do more than scratch the surface. But there is huge pleasure in doing even that, and significant intellectual reward.

36 The verb used is "sustinere", which may or may not mean that it included paying money to do that.

37 See e.g. J Skene, *De Verborum Significatione* (1631) sv "*Adjurnatus*" referring to "Praeceptor meus Matthaeus Wesenbechius". (Wesenbechius [Wesenbeek] held a chair at Wittenberg). See Mackenzie, *Matters Criminal* (n 3) 31.10: "which custom we have borrowed from Saxony with most of our other forms".

Part 2:
The Law of Evidence

THE LOGIC OF BURDENS OF PROOF

Gerry Maher

A. INTRODUCTION

One of the earliest, if not indeed the first, of George Gretton's voluminous contributions to the literature of Scots law was an article published in the 1977 volume of the *Scots Law Times*.[1] This paper was written at a time when George had finished his studies of one of his great intellectual loves, philosophy, and during his studies of the second such love, law. But the paper shows a lucid bringing together of these two disciplines.

The paper is short, only just over 1,000 words in length, but its argument is deep. It starts with the – then recent – five-judge decision of *Lambie v HM Advocate*.[2] This case concerned so-called special defences in criminal law. It had been thought that where an accused raised such a defence he or she had the burden of proving it on the balance of probabilities. In *Lambie* the Court held that, with the exception of the defence of insanity, there was no burden of proof on an accused in respect of special defences. Rather the sole purpose of the other three special defences – namely self-defence, alibi and incrimination – was that an accused must give prior notice of his intention of raising such a defence.

Gretton noted that this decision was based on logic. The presumption of innocence required the prosecution to prove the accused's guilt beyond reasonable doubt. Requiring an accused to prove a defence could have the effect that a conviction could follow where the accused failed to prove the defence but nonetheless created a doubt about his being guilty.

But Gretton also pointed to a defect of logic in the *Lambie* decision itself. To place the onus on an accused to prove the special defence of insanity could also breach the presumption of innocence. For where the evidence for an accused established a state of insanity as a reasonable possibility, but not on a balance of probabilities, there would not be an acquittal despite there being a reasonable doubt about his guilt.

So how to get out of these logical puzzles? One possible solution was to have the same rule for all special defences: the accused should have no burden of proving his special defence and leave it to the Crown to show that the defences did not apply. But Gretton pointed to a problem with this approach. For why should an accused be acquitted where the Crown could show that he or she committed the *actus reus* of the crime, but could only disprove on a balance of probabilities, but not beyond reasonable doubt, that the accused was not insane or had acted in self defence?

1 G L Gretton, "The burden of proof in special defences" 1977 SLT (News) 97–98.
2 1973 JC 53.

Gretton favoured what he referred to as the use of jurisprudential considerations to categorise the four special defences in a different way. He pointed out that with insanity and self-defence the accused is not denying that he committed the criminal act in question. Rather there are circumstances surrounding that act that absolve the accused of criminal responsibility for it. Things are different with the defences of alibi and incrimination. Here the accused is denying that he committed the act. These defences require the prosecution to prove beyond reasonable doubt what they would always have to prove, that the accused committed the criminal act, but the prosecution would also have to negative any suggestion that someone else did or that the accused was somewhere else at the time. Accordingly, with alibi and incrimination, the prosecution should have the burden of proof in showing that the defences should not apply. By contrast, where an accused accepts that he committed the act but that there are the particular circumstances of insanity or self-defence that remove his guilt, the onus of proving these circumstances should rest with him.

This argument clearly draws upon philosophical insight but it is also a remarkably sophisticated argument for someone new to the study of law. But how are we to assess the argument it presents? Gretton does not seem to have returned to the topic of burden of proof in his academic writings, so we must assess the paper as it was presented some 40 years ago. To do so, we need to examine other aspects of the law of evidence, both as it stood at that time and against some major subsequent developments. It will also be of value to consider how burdens of proof have featured in that other area of the legal system that Gretton holds dear, namely law reform and the work of the Scottish Law Commission.

B. THE NATURE OF SPECIAL DEFENCES

The 1977 paper is limited to the particular category of special defences, which were the focus of the *Lambie* decision, and, understandably, does not examine the burden of proof in respect of all criminal defences. But *Lambie* seems to be authority for two distinct propositions. One is that, apart from the case of insanity, an accused bears no burden of proving a special defence. The other is that the *sole* function of a special defence is to give notice that an accused wishes to raise the defence in question. There seems to be a tension between these two propositions but this is resolved once it is recognised that the rule on the burden of proof of insanity as a defence is nothing to do with it being a special defence. The point is not made clear in the judgment in *Lambie*, as the court did not give any detailed consideration to the reasons for the rule about the burden of proof of insanity, apart from referring to a "presumption" of sanity that an accused had to rebut. If an accused has the burden of proving insanity it must be for some reason other than its being a special defence. The merit of Gretton's paper is in arguing that it is a particular feature of the defence of insanity as such that explains and justifies allocating the burden of proving it to the accused, namely that the defence involves the accused admitting that he committed the act with which he or she is charged.

Special defences are a problematic category of Scots criminal law, and the fact that they still exist is surprising. Not all defences, of course, are special defences.

Their introduction stemmed from a very different system of criminal procedure in the seventeenth, and earlier, centuries.[3] As the court observed in *Lambie*:[4]

> Special defences in our law derive from the requirements of the law in earlier centuries for written defences in answer to a criminal libel when accused persons were limited in their defence to evidence in support of these defences, the relevancy of which had to be affirmed by a court before the matter was remitted to an assize. The "special defence" of today is the vestigial survivor in modern criminal practice of the written defences of our earlier criminal procedures.

It is worth noting that developments since *Lambie* make clear that the sole function of a special defence is to give notice. The current law is set out in the Criminal Procedure (Scotland) Act 1995, which requires that an accused cannot found on a special defence unless prior notice has been given.[5] However, the Act does not specify which defences are special in this sense. It was generally understood that at common law there were four such defences, namely insanity, self-defence, alibi and incrimination.[6] Furthermore, the courts took the view that they could not extend the list of special defences.[7] As a consequence, other defences were added to the list in the 1995 Act of defences which required notice.[8] These defences are not special defences but are treated "as if" they were special defences.[9] However there is no obvious reason why these defences were not simply added to the category of special defences. The common law defence of insanity was abolished by the Criminal Justice and Licensing (Scotland) Act 2010 and replaced by a defence of lack of criminal responsibility due to mental disorder.[10] Section 51A(3) of the 1995 Act specifically states that the new defence is a special defence.

A more recent development, which reinforces the point that the sole function of special defences is to give notice, is the introduction of defence statements.[11] These statements must be lodged prior to a trial.[12] The statement specifies various matters about the nature of the accused's defence. If the statement contains a special defence, there is no need to follow the requirements about giving notice of the defence. It

3 For a useful discussion of the historical background of special defences, see G H Gordon, "The burden of proof on the accused" 1968 SLT (News) 29 at 29–30.

4 1973 JC 53 at 57.

5 1995 Act s 78 (solemn cases) and s 149B (summary cases). In solemn cases the defence is lodged with the court and intimation made to Crown Agent and any co-accused. In summary cases notice is given to the prosecutor.

6 The Act, however, treats the defence of incriminating someone who is a co-accused as separate from special defences.

7 *HM Advocate v Cunningham* 1963 JC 80; *Thomson v HM Advocate* 1983 JC 69; *Ross v HM Advocate* 1991 JC 210.

8 These are diminished responsibility, automatism, coercion, and consent of the complainer in respect of certain sexual offences. The consent defence is discussed later.

9 The use of this expression may suggest to the philosophically-minded such as George Gretton, an invocation of the influential *Die Philosphie des Als Ob* (1911) by Hans Vaihinger. This work was used by Hans Kelsen to explain his notion of the basic norm as "fiction", a move that has baffled Kelsen scholars: see H Kelsen, "On the pure theory of law" (1966) 1 Israel Law Rev 1 at 6–7.

10 Criminal Justice and Licensing (Scotland) Act 2010 s 168, which added a provision on the new defence in s 51A of the 1995 Act.

11 1995 Act s 70A and 2010 Act s 125.

12 In solemn cases the statement must be lodged at least 14 days before the first diet or preliminary hearing. In summary cases an accused need not lodge a defence statement but if he does it can be lodged at any time during the proceedings.

may be noted that defence statements are concerned only with giving information to the Crown in respect of its duty to provide disclosure, and cannot be used for any other purpose, such as evidence against the accused.[13]

Special defences, then, have nothing to do with burdens of proof. There is thus no need to distinguish these defences from other defences in discussing that topic. Accordingly we can reinterpret Gretton's argument as applying more generally. Defences can be logically divided into those in which the accused accepts that he committed the criminal act and those which involve no such admission. And the logic of burdens of proof follows from that distinction. In the first category of defence the burden of proof should lie with the accused and in the second it should fall on the prosecution.

C. BURDENS OF PROOF: SOME LOGICAL DISTINCTIONS

An important issue not raised in *Lambie*, and not discussed by Gretton, is what is meant by a burden of proof. Macphail notes that, in the late nineteenth century, the American writers on evidence, Thayer and Wigmore, had argued that the expression had two distinct meanings, which were developed in later writings and by the courts in various legal systems, including England.[14] One sense of burden of proof has been called the legal or persuasive burden. Where a party bears such a burden he or she must produce evidence to prove a fact to the appropriate standard of proof and failure to do so has the effect that that fact must be held not to have been established. The second type of burden is an evidential one. In this case the onus is on a party to bring forward enough evidence to make a particular fact an issue that the court or jury must consider in its overall assessment of the evidence. Often where a party satisfies an evidential burden on some matter, the other party then has a legal burden of disproving it.

At the time of Gretton's paper there was very little consideration of this distinction by the courts or in academic literature.[15] But the existence of the distinction is based on logic and does not depend on legal authority. Moreover, there had been an important discussion by Gerald Gordon in an article published before Gretton's paper, which examined the distinction and used it to explain certain aspects of the Scots law of evidence in criminal cases.[16] Gordon's article is especially important in clarifying a possible misunderstanding of what an evidential burden of proof involves. This concerns the notion that there is a third type of burden of proof, a so-called tactical burden, and the related idea that, during a trial, burdens of proof may shift from one party to another. He illustrates this point by referring to the doctrine of recent possession of stolen goods, which holds that where the prosecution shows that an accused had been found in the possession of recently stolen goods in incriminating circumstances, an inference can properly be drawn that the accused

13 See *Barclay v HM Advocate* 2013 JC 40, which held that the provisions on defence statements were compatible with Article 6 of the ECHR.

14 I D Macphail, *Evidence* (1987) paras 22.01–22.03.

15 The only direct discussion was in *Brown v Rolls Royce Ltd* 1960 SC (HL) 22, a Scottish appeal to the House of Lords, in the speech of an English judge, Lord Denning, who referred to an article he had written some years earlier: "Presumptions and burdens" (1945) 61 LQR 379.

16 G H Gordon, "The burden of proof on the accused" (n 3) at 29–34 and 37–43.

had stolen or resetted the goods. In a leading case on this doctrine the court said that where it applies it has "effect in shifting the onus from the prosecution to the accused and raising a presumption of guilt which the accused must redargue or fail".[17]

Gordon points out that this statement is confused and lacking in principle. The tactical issues facing an accused in this situation on what evidence to present are not in themselves burdens of proof. The legal burden of proof of theft or reset is with the Crown and where it has produced the evidence required for the application of the recent possession doctrine, then it will have satisfied that burden if there is no evidence to contradict it. If an accused cannot, or does not, produce any evidence contrary to the Crown evidence, then the court or the jury can make the inference that the accused is guilty. There is no question of any burden of proof, legal or evidential, being transferred between the parties.

Confusion may have arisen because where an accused bears an evidential burden on some point, as in establishing a defence, then if there is enough evidence to make that point an issue for consideration, the prosecution has the legal burden of disproving it. But this does not involve shifting the same sort of burden of proof between the parties. The Crown has the legal burden of proving the guilt of the accused; but that legal burden, on a particular matter such as a defence, may not come into play unless and until the accused has met the evidential burden of making it an issue.

The allocation of burdens of proof is not based on what occurs in the course of a trial but is determined by legal rules. A crucial question therefore is: if there is to be a burden of proof placed on an accused is that burden a legal or evidential one? A particular consequence of placing a legal burden on an accused in respect of a defence, and one noted by Gretton, is that if the accused produces some evidence in support of the defence but not enough to satisfy the standard of proof of balance of probabilities, the defence is not an issue at the trial and the prosecution has no burden of disproving it. But if the evidence of the defence has been accepted by the trier of fact, then it would appear that the Crown has not proved the accused's guilt beyond all reasonable doubt.

A further point is that to satisfy a legal burden of proof a party must produce evidence required to meet the required standard of proof, which is also determined by legal rules. It seems clear that in the Scots law of evidence there are only two standards of proof: (1) beyond reasonable doubt and (2) on the balance of probabilities.[18] But an evidential burden requires evidence that is "sufficient" to make an issue, which calls for a decision by the trier of fact. But if "sufficient" here does not mean meeting either of the two standards of proof, then what is the test for determining whether an evidential burden has been met?

D. THE PROBLEM OF REVERSE BURDENS

The question for consideration, therefore, is to discover when, and for what reasons, the law imposes a "burden of proof" on an accused (or, as they are often referred to in more recent discussion, "reverse burdens"). For a long time Scots law did not take account of different types or levels of burden of proof. However, in

17 *Fox v Patterson* 1948 JC 104 at 108.
18 *Sereshky v Sereshky* 1988 SLT 426; *B v Kennedy* 1987 SC 247 at 251.

respect of common law defences, principle suggests that an accused bears an evidential burden of making a defence an issue for consideration but that he has a legal burden only in respect of defences of insanity and diminished responsibility.[19] It may be observed that this position applies whether or not the defence is one that requires notice.

The position of reverse burdens under statute is more complex. The first point to note is that there is a very large number of statutory offences that have provisions on defences. Consider two statutory offences in an area of particular interest to Gretton, namely insolvency. Section 218 of the Bankruptcy (Scotland) Act 2016 sets out a list of offences on bankruptcy frauds. Subsections (1) and (2), for example, make it an offence for a debtor to make a false statement concerning his assets or financial or business affairs "unless the debtor shows that the debtor neither knew nor had reason to believe that the statement was false". Section 210 of the Insolvency Act 1986 makes it an offence for an officer of a company that is being wound up to make a material omission in any statement relating to the company's affairs but it is a defence for that person "to prove that he had no intent to defraud".

It is to be noted that these provisions contain a contrast in the description of the task facing an accused: is the accused to show or prove the defence? It could be argued that, since an evidential burden has no standard of proof recognised by the law of evidence, it does not involve any question of proof.[20] Accordingly, a requirement to "show" indicates an evidential burden, and that a need to "prove" attracts a legal burden. However, there has been little sign, as a general rule, that the courts interpret statutory provisions in this way. Certainly there are instances of an undoubted imposition of a legal burden on an accused by express mention of a standard of proof.[21] Similarly there can be clear statements of imposition of evidential burdens.[22] However, in many cases there is no such direct indication, and the issue calls for statutory interpretation.

Indeed, for a long time, whilst Scots law lacked any explicit recognition of the distinction between legal and evidential burdens and before the enactment of the Human Rights Act 1998, the sole task facing the Scottish courts was one of statutory interpretation. *Buchanan v Price*,[23] for example, concerned a provision of the Education (Scotland) Act 1980, which created an offence for a parent where his child had failed to regularly attend school without reasonable excuse. The High Court held that the onus of proving reasonable excuse lay on the accused parent

19 Both of these defences have been replaced with statutory defences: Criminal Procedure (Scotland) Act 1995 ss 51A–51B. But in each case the accused has a legal burden of proving the defence.

20 In *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 289, Lord Bingham commented that an "evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact."

21 1995 Act s 51A(3) states that the defence of lack of responsibility because of mental disorder (which replaced the common law defence of insanity) is a special defence. Section 51A(4) provides that the "special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities".

22 Terrorism Act 2000 s 118(2) states in relation on various specific provisions in the Act which require an accused to prove a defence: "If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or the jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

23 1982 SCCR 534.

rather than the Crown having to disprove it. Although nothing was said about a standard of proof the implicit position of the court was that proof had to be on the balance of probabilities. In that case, evidence had been given by the accused which the trial judge said had created a reasonable doubt but the Appeal Court held that this evidence had not discharged the burden on the accused.

The situation changed dramatically with the coming into force of the Human Rights Act 1998. The question arose whether a burden of proof on an accused was compatible with Article 6(2) ECHR, which provides that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Two key cases which have influenced how the Scottish courts have approached this issue are decisions of the House of Lords in English appeals: *R v Lambert*[24] and *Sheldrake v Director of Public Prosecutions*.[25]

Lambert concerned provisions of the Misuse of Drugs Act 1971,[26] which criminalise the possession of a controlled drug with the intention to supply it to someone else. The prosecution had to prove that what the accused had in his possession was in fact a controlled drug but it was a defence for the accused to prove that he did not believe or suspect that the substance in question was a controlled drug. The House, by a majority, held that the burden of proving the defence was a legal burden and, as such, was not compatible with Article 6(2); to remove this incompatibility, however, the provision could be read down under section 3 of the Human Rights Act[27] as imposing only an evidential burden.

Sheldrake and the *Attorney General's Reference* concerned two statutes. The Road Traffic Act 1988 makes it an offence for a person to be in charge of a vehicle when his alcohol level exceeds a prescribed limit. It is a defence for an accused to prove that at the relevant time there was no likelihood of his driving the vehicle.[28] The Terrorism Act 2000 creates an offence of belonging to a proscribed organisation but adds a defence that the accused may prove that he had not taken part in the activities of the organisation while it was proscribed.[29] The House held that the imposition of a legal burden was justified in the case of the road traffic defence but that a legal burden of proving the terrorism defence was not and that the defence in that case should be read down as only an evidential one.

A three-stage test emerges from these decisions. The first is a question of statutory interpretation in order to discover, by the normal methods of interpretation, whether the provision imposes a legal or evidential burden. It seems implicit in some of the judgments that an evidential burden will pose no difficulty in terms of Convention compatibility. But that view is questionable and is examined below.

The second stage is finding a justification for the provision. That requires an examination of the general aims of the legislation in question. In these cases the House could identify such a justification without much difficulty. In the case of the

24 [2002] 2 AC 545.
25 [2005] 1 AC 264. At the same time the House heard an appeal in *Attorney General's Reference (No 4 of 2002)*.
26 Sections 5(3) and 28(2) and (3).
27 Human Rights Act 1998 s 3(1): "so far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights".
28 Road Traffic Act 1988 s 35(1) and (2) respectively.
29 Terrorism Act 2000 s 11(1) and (2) respectively.

Road Traffic Act, for example, there was the legitimate object of preventing death, injury or damage by unfit drivers. In respect of the Terrorism Act, the legitimate aim was that of deterring people from becoming members, and taking part in the activities, of terrorist organisations.

Once a general justification of the statutory provision has been identified, the third stage is that of judging the proportionality of the imposition of a burden of proof. This step has proved more problematic. Different and conflicting considerations are advanced as relevant to this issue. In *Lambert* especially, much emphasis was placed on the need to avoid the paradox identified by Gretton in his 1977 paper, namely that where an accused, in order to satisfy a legal burden of proof, had adduced some evidence in support of it though not on a balance of probabilities, the defence would fail; the accused would then be convicted despite the existence of doubt about his guilt.[30]

Indeed, in *Lambert* there is a suggestion that since the introduction of the Human Rights Act all reverse legal burdens may have to be interpreted as imposing evidential burdens.[31] However, in *Sheldrake*, the House stated that there was no such general principle or trend and that the issue of compatibility called for an examination of all the facts and circumstances of the particular provision in question.

Other factors used in deciding on proportionality include whether the defence was aimed at negativing some constituent element of the offence or, by contrast, whether it concerned something that was extraneous to the offence.[32] Another factor is the extent to which the defence involved some matter about which the accused had special or particular knowledge.[33] If a burden was to be held as evidential in nature, would the accused satisfying it place the prosecution in a difficult position to disprove it? The identification of what is required to satisfy an evidential burden gave rise to disagreement in the *Lambert* judgments. Lord Hutton was of the view that it was easy to discharge such a burden;[34] whereas Lord Hope stressed that the burden was not illusory and required an accused to produce evidence that a reasonable jury would hold as supporting the defence.[35]

Where a provision imposes a legal burden but it is found to be incompatible with Article 6(2) ECHR a court, where it can do so, should use its power under section 3 of the 1998 Act to read down the provision as imposing only an evidential burden. Lord Bingham in *Sheldrake* was quite explicit that this involved disregarding the intention of Parliament in respect of the statute that provided for the reverse burden, but that this was required to give effect to Parliamentary intention in the Human Rights Act itself.[36]

30 [2002] 2 AC 545 at 572 per Lord Steyn and at 609 per Lord Clyde.
31 [2002] 2 AC 545 at 573 per Lord Steyn.
32 In *Sheldrake* [2005] 1 AC 264 at 320, Lord Rodger gave considerable emphasis to this point in respect of the Terrorism Act. However, in *Lambert* [2002] 2 AC 545 at 572, Lord Steyn questioned the very nature of the distinction, calling it arbitrary.
33 In *Sheldrake* [2005] 1 AC 264 at 308–309, Lord Bingham argued that the defence in the Road Traffic Act on likelihood to drive was closely conditioned by the accused's knowledge and state of mind at the relevant time. However, an accused faced with the defence in the Terrorism Act would face practical difficulties in showing that he had not taken part in the activities of the organisation (312–313).
34 [2002] 2 AC 545 at 622.
35 [2002] 2 AC 545 at 588.
36 [2005] 1 AC 264 at 303 and 314.

The Scottish courts have attempted to apply the guidance provided by these decisions but no clear pattern has emerged. In *Henvey v HM Advocate*,[37] the High Court followed the *Lambert* decision that section 28(2) of the Misuse of Drugs Act 1971 imposed only an evidential burden, though the court emphasised that this burden would require evidence on each of the elements of the defence (namely that the accused neither knew of, nor suspected, nor had reason to suspect the existence of, the fact which the prosecutor had to prove for the accused to be guilty of the offence charged against him).

In *Maclean v Carnegie*,[38] the court considered the offence of supplying alcohol to a person under the age of 18, contrary to the Licensing (Scotland) Act 1976.[39] It is a defence under a separate section of the Act that the accused proves that he used due diligence to prevent the occurrence of the offence.[40] The court held that the burden on the accused was a legal burden of proof. There was little by way of discussion of the general test laid down in *Lambert* and *Sheldrake* and instead the court focused on the nature of the defence in this case as being something extraneous to matters that the Crown had to prove for a conviction.

By contrast, in *Glancy v HM Advocate*,[41] the court expressly applied the general *Lambert/Sheldrake* test in holding that in respect of the offence of having a bladed article in a public place, the burden of proving a defence that the accused had a good reason or lawful authority for having the article was a legal burden. However, little was said about the particular elements required to satisfy the proportionality criterion.

The decision in *Urquhart v HM Advocate*,[42] however, added a further element to the process of determining whether a statutory burden is legal or evidential in nature. That case concerned a charge of behaving in a threatening or abusive manner, an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which provides a defence for an accused to show that the behaviour was, in the particular circumstances, reasonable. The Appeal Court held that the burden in relation to this defence was an evidential one. It mentioned various factors as pointing to this conclusion: the 2010 Act uses the term "show" rather than "establish" or "prove"; the purpose of the statute was not to deal with serious mischief or activities likely to lead to physical harm; proof of conduct being reasonable did not involve matters known only to the accused.

This reasoning is a fairly standard application of the relevant test, but the court's judgment is of interest for two further comments it makes. One is that it describes the correct approach to applying the test as one set out in in an earlier case, *Adam v HM Advocate*.[43] But the passage in that case consists of three long quotations from *Sheldrake* and *Glancy v HM Advocate* without adding any further analysis or comment. In *Urquhart*, the court also mentioned, though with little by way of explicit discussion, the issue of burden of argument.[44] This type of burden is

37 2005 SLT 384.
38 2006 SLT 40.
39 Contrary to the Licensing (Scotland) Act 1976 ss 67 and 68.
40 1976 Act s 70.
41 2012 SCCR 52.
42 2016 JC 93.
43 2013 JC 221 at paras 19–22.
44 2016 JC 93 at para 19.

concerned with making submissions to justify a conclusion of law, and is different from a burden of proof, which deals with establishing facts. In *Urquhart*, the court stated that, where it is contended that a defence attracts a legal burden of proof, it is for the Crown to show justification for imposing that type of burden. This is not a matter that earlier cases had dealt with and a more detailed consideration of it would have been useful.

E. BURDENS OF PROOF AND THE SCOTTISH LAW COMMISSION

It is worth considering two projects of law reform by the Scottish Law Commission that involved burdens of proof and defences. The first was the project on the law of rape and other sexual offences.[45] Gretton had been appointed to the Commission whilst this project was in progress, and signed the final Report. The project considered various issues on burden of proof. One was in respect of offences involving sexual activities with a child under the age of 13.[46] Here the Commission recommended that these offences should involve strict liability on the question of the accused's knowledge of the child's age at the relevant time.

Strict liability is generally regarded with disfavour. In *Sweet v Parsley*,[47] Lord Reid argued that there were instances of using strict liability about *mens rea* that had unfair or unjust outcomes for an accused. One method of avoiding strict liability without placing on the prosecution too onerous a burden would be a statutory provision that, once the necessary facts about the offence have been established by the prosecution, the accused must prove on the balance of probabilities that he lacked the requisite knowledge or intention.

However, the Commission did not favour introducing the imposition of a legal burden on an accused to prove that he did not know that the child was under the age 13 instead of making this a matter of strict liability. It preferred the position that the law should clearly reflect as a matter of social policy the view that young children should not be involved in sexual activity.

A different approach was taken for offences involving a person having sexual activity, which was consensual in nature, with children aged between 13 and 16. The Commission recommended that it should be a defence to these offences that the accused believed on reasonable grounds that the child was aged 16 or older at the relevant time. In the Discussion Paper, the Commission had proposed that the onus of proving this defence should be a legal burden. It identified a clear social objective for the provisions on sexual activities with children aged between 13 and 16, namely protecting such children from sexual exploitation, and argued that imposing a legal burden was not a disproportionate measure. The Commission's final recommendation on this last point, however, was that the defence should involve only an evidential burden. The change of view was based on two considerations. One was that an evidential burden would still require the accused to produce evidence of the reasons for his belief about the child's age. In addition, the Commission had reconsidered the *Lambert* and *Sheldrake* decisions and was now of

45 Discussion Paper on *Rape and other Sexual Offences* (Scot Law Com DP No 131, 2006); Report on *Rape and other Sexual Offences* (Scot Law Com No 209, 2007).

46 Scot Law Com No 209 (n 45) paras 4.32–4.39.

47 [1970] AC 132 at 150.

the view that that a case for a legal burden of proof could not be made out. Accordingly it recommended that an accused should have an evidential burden of establishing this defence.[48]

There was a further recommendation in its Report that was not implemented by the Sexual Offences (Scotland) Act 2009. It was noted earlier that one of the "as if" special defences is the consent of the complainer in respect of various sexual offences.[49] The Commission traced the curious history of this provision, which was introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. During the time when this Act was going through the parliamentary process, the crime of rape did not include the lack of consent of the complainer as a constituent element of the crime. However, consent was a defence to a charge of rape, and the obvious purpose of the provision in the 2002 Act was to ensure that the Crown received notice that an accused intended to raise this defence.

But as the Act was completing its progress through the Scottish Parliament, an important decision of the High Court redefined rape as including the complainer's lack of consent as part of the offence itself.[50] In the sexual offences project, the Commission recommended that a similar approach should be taken in the proposed new definitions of rape and many other sexual offences. As lack of consent was a matter that the Crown had to prove to establish the accused's guilt, there was no longer any need for the Crown to be given prior notice of this issue. The Commission accordingly recommended that consent as one of the "as if" special defences should be removed from the 1995 Act. Nonetheless, consent remains as such a defence. The Commission's rationale for its recommendation was that the provision was redundant but there is a deeper problem that it did not discuss. If consent is a defence then the question arises as to the required burden of proof. There is little to suggest that this could be a legal burden but imposing even an evidential burden would lead to troublesome consequences, for there would be no requirement on the Crown to lead any evidence that the complainer had not given consent unless and until the accused had adduced sufficient evidence to make consent, or the lack of it, an issue for the jury to decide. It is difficult to see any policy objective in having this issue as a defence at all, and placing any burden of proof on an accused, legal or evidential, would likely be incompatible with Article 6(2) ECHR.

An earlier Commission project was an examination of the law on insanity and diminished responsibility,[51] and is of interest to this discussion because it dealt with the question considered by Gretton in his 1977 paper, namely the burden of proof for the defence of insanity. A key proposal by the Commission was that the common law defence should be replaced by a statutory defence of lack of criminal responsibility based on mental disorder. In its Discussion Paper, the Commission looked at the common law authorities on the burden of proof and failed to find any convincing

48 Indeed the Commission recommended that this should be the appropriate burden for all the defences set out in its Report (n 45) at para 4.74. In the Sexual Offences (Scotland) Act 2009, which implemented the Commission's recommendations in the Report, none of the defences are set out as requiring a legal burden of proof.

49 Criminal Procedure (Scotland) Act 1995 ss 78 and 149. The relevant sexual offences are those set out in s 288C of the Act.

50 *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466. The judgment in this case was made after the 2002 Act had been passed by the Parliament but before it had received the Royal Assent.

51 Discussion Paper on *Insanity and Diminished Responsibility* (Scot Law Com DP No 122, 2003); Report on *Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004).

justification for the imposition of a legal burden on the accused. Of course, Gretton's paper had set out such a justification and, in retrospect, it is a matter of regret that the Commission had not considered his arguments. The Commission did note that there was a practical requirement that the accused would have to produce evidence, usually expert medical evidence, to support his case but were of the view that this requirement did not justify going beyond imposing an evidential burden as opposed to a legal one. The need for the accused to produce medical evidence also applied to the defence of automatism, but for that defence it was clear that the burden was an evidential one.[52]

The Discussion Paper was drafted at a time between the *Lambert* and *Sheldrake* decisions, and was heavily influenced by the former case in moving towards the position that to remove any possible incompatibility with the ECHR, a legal burden on an accused to prove a defence would usually be disproportionate. It recommended that an accused should have an evidential but not a legal burden in respect of the new statutory defence.

However, after consultation, the Commission had changed its views in its final Report. By this time the *Sheldrake* decision had made clear that there was no general rule on statutory reverse burdens but that each case had to be considered in terms of the relevant specific provisions. There were three main reasons behind the Commission's change of mind. Two were pragmatic in nature. First, if the Crown were to bear the ultimate legal burden of proof how would it obtain the evidence about the accused's mental condition, which would not be that at the time of the trial but the earlier time of the offence? It is not possible for the Crown to compel an accused to be medically examined and the Commission foresaw both principled and practical objections in making a medical examination compulsory. A second problem was that of false claims of mental disorder. If an accused claimed, falsely, that he suffered from mental disorder at the time of the offence and the Crown could not rebut his evidence beyond reasonable doubt, the result would be an outright acquittal without any possibility of a criminal justice or mental health disposal.

But in addition the Commission argued, just as Gretton had done in his earlier paper, that there was an argument of principle for imposing a legal burden on an accused to prove a defence of insanity or its statutory replacement. The Commission identified a feature of the defence itself that had a direct bearing on the question of the burden of proof. This was not, as Gretton suggested, that for this defence the accused was admitting that he had committed the criminal conduct, a feature that it may be noted is true also of a wide range of defences. Instead what distinguishes the mental disorder defence is the absence of any external event or conduct in establishing the defence.[53] In defences such as alibi or self-defence or provocation there is such an event, such as the whereabouts of the accused at the time of the

52 *Ross v HM Advocate* 1991 JC 210 at 221 and 232.

53 The Commission took the view that on the issues about the burden of proof of the plea of diminished responsibility were the same as those for the defence of insanity/mental disorder. Accordingly the Commission did not give any separate justification for its recommendation that the accused should have a legal burden of proving diminished responsibility. In *Foye v R* [2013] EWCA Crim 475, the Court of Appeal considered and approved the Commission's reasoning on burdens of proof in rejecting an argument that a similar rule in English law that a defendant had a legal burden of proving diminished responsibility contravened Article 6(2) ECHR.

crime, or the attack on the accused that caused him to react.[54] If the Crown is required to disprove the defence it can take steps to find evidence in respect of such an external event. However, where insanity has been raised there is usually nothing in a description of the accused's conduct that shows the presence *or the absence* of mental disorder.

F. CONCLUSION

In his 1977 paper, George Gretton argued that an important factor in allocating the burden of proof of a defence depended on the nature and characteristics of each defence. On that basis he concluded that there should be a legal burden of proof on an accused to prove the insanity defence. The current law, following the recommendations of the Scottish Law Commission, reflects that position, though not for the reasons he had advanced. But even if his particular arguments have not been successful, it is nonetheless to George's great credit that he raised the right questions about the logic of burdens of proof.

54 The Commission in its Report (n 51) para 5.23 noted that, even with automatism, which has some similarities to the insanity/lack of responsibility defence, there is the external factor which brings about the accused's loss of reasoning. See *Ross v HM Advocate* 1991 JC 210 at 218.

Part 3:
The Law of Obligations

A WHIMSICAL SUBJECT: *CONFUSIO*

Ross G Anderson[*]

A. INTRODUCTION

My debts to George Gretton are many and deep. They cannot be appropriately recorded here. But what drew me to George as an undergraduate is what draws me to him still: an infectious natural enthusiasm for all areas of the law; an ability to engage listener and reader alike with vivid metaphors and impeccable comic timing; and, in all this, always something new, pithily expressed, providing some incisive insight. I have encountered few, if any, lawyers who can match George either in the breadth or the depth of his thinking on difficult legal positions; and none can match his natural enthusiasm, wit or generosity.

It is well known that one of George's great contributions to European as well as Scottish legal science has been his clear thinking of the nature of patrimonial rights: the concept of the patrimony as distinct from the person in the civil law tradition.[1] In a world where persons may hold more than one patrimony, there thus arises the possibility of inter-patrimonial claims.[2] And with that possibility there is the question of the application of existing rules of law to these questions. One of those little studied subjects is the law of *confusio*. I hope that my superficial dusting-down of a forgotten doctrine, tucked away at the corner of property and obligations – which asks as many questions of the very nature of rights and obligations, and of persons and patrimonies, as it raises "whimsical" practical applications[3] – is a fitting, if inadequate, tribute to a man to whom I owe so much.

B. AMATEUR DRAMATICS

The Scots, it is sometimes unkindly said, have long been as fond of litigation as of drink. But while one may drink by himself, no one can sue himself. The prohibition

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1 I have addressed this aspect of George's work in "Words and Concepts: Trust and Patrimony" in A Burrows, D E L Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Honour of Lord Rodger of Earlsferry* (2013).

2 See e.g. A von Tuhr, *Der Allgemeine Teil des deutschen bürgerlichen Rechts* vol 1 (1910) § 19.VII, 340 ff; D Piotet, "Les effets à l'égard des créanciers de la pluralité de patrimoines d'une même sujet de droit, notamment la question de la subrogation patrimoniale" in W Wiegand et al (eds), *Tradition mit Weitsicht: Festschrift für Eugen Bucher zum 80 Geburtstag* (2009) 561.

3 See n 22 below.

is said to be common sense,[4] but it is not self-evident. For the loner with time to fill may engage in a whole host of juridical and procedural acts. So, in South Africa, someone suing a sheriff's officer can instruct the self-same officer to serve the summons on himself; and, indeed, for such nimble dexterity, the officer may even charge a fee:

> This is a whimsical case about a deputy sheriff who served a summons upon himself as defendant . . . He did not say how he accomplished this dextrous feat, save to aver modestly that "he went through the motions" – thereby no doubt letting his left hand know what his right hand was doing. For this nimble service he charged the plaintiff a fee of 10s 7d, which included a cost of living allowance – an ambidextrous sheriff must live. The return of service indicates that he explained to himself the "nature and exigency of the summons". Doubtless this involved a little auto-suggestion. Thereafter he was prudent enough to enter appearance to defend. But the arrival of the declaration apparently caused him to have some misgivings, and he now applies, as defendant, for the service to be set aside as irregular . . . Well now, what is the court to do about this drollery?[5]

Closer to home, landowners,[6] and non-owners alike,[7] may attempt to transfer ownership of land to themselves. Company "meetings"[8] meanwhile – whether of the board or of the company's members – may be occasions for animated solitary discussion[9] though not a little tiring for a sole participant who must play all the parts in the one-man "pantomime".[10]

The law can tolerate such amateur dramatics only because it is recognised that, while most people, most of the time, wear a single invisible hat, some individuals have to change invisible hats quite regularly. Juristic persons, for instance, can act only through natural persons. Natural persons acting in a representative capacity play a different role than when acting as individuals.[11] "One legal person, one patrimony" is the law's presumption. So different "departments" within the same

4 *Healy & Young's Tr v Mair's Trs* 1914 SC 893 at 899 per Lord Johnston.

5 *Dreyer v Naidoo* 1958 (2) SA 628 (NPD) at 628G–H and 629A per Holmes J. Compare the case of an arrester serving an arrestment in his own hands: R Kelbrick, "Malice in Wonderland" (2003) 66 THRHR 232. In Scots law, with the exception of an earnings arrestment, an arrester cannot, as a general rule, arrest in his own hands. It was not always so: W Ross, *Lectures on the History and Practice of the Law of Scotland, relative to Conveyancing and Legal Diligence* (2nd edn, 1822) I, 452–453 and Mercantile Law Amendment (Scotland) Act 1856 s 3 (repealed in February 1894).

6 In order to evacuate, or to "wash-out", a special destination: K G C Reid and G L Gretton, *Conveyancing 2005* (2006) 73–78.

7 By way of an *a non domino* disposition, in order to bring into existence a deed habile to found positive prescription.

8 A "one person meeting" has been described as a contradiction in terms: *Re Altitude Scaffolding Ltd* [2007] 1 BCLC 199. But a single director must nonetheless keep a "written record" of the proceedings: Companies Act 2006 s 248.

9 Companies Act 2006 s 306(4); *Smith v Butler* [2012] EWCA Civ 314, [2012] BusLR 2836, *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274, and *East v Bennett Bros Ltd* [1911] 1 Ch 163. See too Companies Act 2006 ss 186 and 231.

10 *James Prain & Sons Ltd, Petrs* 1947 SC 325 at 329 per Lord Moncrieff: "[a] meeting at which only one member is present to play multiple parts may be thought to be nothing other than a pantomime."

11 As where a representative concludes a contract on behalf of his principal (in a representative capacity) with himself (in a private capacity): DCFR Art IV.D.–5:101(2). For a Scottish example, see *Inland Revenue Comrs v Tod* (1897) 24 R 934 revd [1898] AC 399.

public authority cannot have legal claims against each other: they are part of the same legal person, which cannot sue itself.[12]

But the position may be different where multiple patrimonies proliferate. So where one person, to change the metaphor for one preferred by George Gretton, must carry the weight of two or more patrimonial suitcases,[13] there is the potential that claims may arise between two patrimonies administered by one person. The trustee's claim (held in the trustee's private patrimony) for indemnity from the trust patrimony is perhaps the classic example.[14] And where a single person carries two or more patrimonial suitcases, numerous questions arise: can that person enter into legal transactions in separate capacities so as to bind only one patrimony or another; and what is the effect of a single person, in different capacities, being apparently both debtor and creditor in the same claim? The answers to these questions are the province of the law of *confusio*.

C. TWO PRINCIPLES

Confusio (confusion) is a general principle of patrimonial law in most western legal systems, apparently applicable to real rights as well as personal rights.[15] The term may be used in a descriptive or a prescriptive sense. In a descriptive sense, it is sometimes used to identify a situation where a single person comes to hold the position of debtor and creditor in the same obligation; or where the holder of a subordinate real right in a physical object also becomes the owner of the object. When used prescriptively, *confusio* may consist of two distinct principles. The first principle may be described as the "Validity Principle". This principle deals with juridical acts that purport to create patrimonial rights, but where the grantee of these rights is the grantor. The Validity Principle determines whether the putative juridical act is valid. The second principle is the "Consequences Principle": the effect on existing patrimonial rights which come to be held by a person which is inconsistent with the continued prestability of the right. The Consequences Principle determines the legal effect of certain juridical facts, rather than the validity of juridical acts;[16] as where a debtor inherits the very claim in which he is the debtor.[17]

12 *Lanarkshire County Council v East Kilbride Town Council* 1967 SC 235 at 254 per Lord Cameron. Cf *Bremer Handelsgesellschaft mbH v Toepfer* [1978] 1 Lloyd's Rep 643 at 650–651 per Donaldson J affd [1980] 2 Lloyd's Rep 43.

13 G L Gretton, "Trusts without equity" (2000) 49 ICLQ 599.

14 *Cuninghame v Montgomerie* (1879) 6 R 1333; *Robinson v Fraser's Trs* (1880) 7 R 694 revd (1881) 8 R (HL) 127; cf *Hendon v Bellios* [1901] AC 118 at 123 per Lord Lindley.

15 For historical and comparative discussion in its application to real rights, see G Knöchlein, *Das Recht an der eigenen Sache* (1991) 21 ff. For England, see W Blackstone, *Commentaries on the Laws of England* (1766) II, 177: "Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned, in the greater." "Merger" is often employed in English for *confusio*: see e.g. DCFR Art III.–6:201. But that meaning of "merger" is separate from the procedural effect of a judgment; that is to say, what, in civil law terms, was once seen as the novatory effect of *litiscontestatio*: cf *Stein v Blake* [1996] 1 AC 243 at 251 per Lord Hoffmann; and *Coutts' Trs v Coutts* 1998 SC 798 at 803–805 per Lord Rodger of Earlsferry.

16 For "juridical facts", see R Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (4th edn, 2016) § 8.

17 D Piotet, "Survivance et exercice de la créance dont le débiteur est devenu créancier en l'absence de confusion" in H Honsell, F Harrer, and F Hasenböhler (eds), *Privatrecht und Methode: Festschrift für Ernst A Kramer* (2004) 605.

It is a general rule of patrimonial law that a person, A, cannot enter into a contract, in the same capacity, with herself.[18] Nor can a person make a legally binding promise to herself. Personal rights may also arise by force of law rather than by a consensual transaction. But, in this case too, no person may have a claim in delict or unjustified enrichment against herself.

A number of transactional cases can be envisaged. Only three simple cases are considered here: (1) A purports to enter into a transaction with himself, as himself; (2) A enters into a transaction with himself in two different capacities;[19] (3) A enters into a transaction with B, where the object of the transaction is inconsistent with A being a party to it. Only in the case of (1), it seems, is the transaction invalid: it is "no transaction at all".[20] The Validity Principle therefore prevents obligations coming into existence.[21] The rationale for such a principle has been said to be to prevent "whimsical" transactions.[22] Cases (2) and (3) will be considered in detail below. Case (2) can be explained because often there are two or more different principals entering into the contract, as where A enters into a contract with company B of which A is the sole director.[23] The juridical act in case (3) is valid, although, in the case of, say, an assignation by B in favour of A, of a claim against A, the question arises as to the legal consequences of that event.[24] The Consequences Principle governs the results.

Apparent breaches of the Validity Principle may often be explained by principles of legal personality. Take a Scottish partnership. A partner may have a claim (in contract or delict) against the firm of which he is a partner, although, ultimately, if the claim has to be enforced, his liability to pay will be reduced *pro rata*.[25] In relation to an unincorporated association, however, it has been held that a member cannot have a claim in delict against an unincorporated association of which he is a member because, since an association is not a person, that would be for the member to sue himself.[26] Despite the decisions just mentioned, however, the law need not prevent an individual holding a claim under the law of obligations against a person of which the claim holder is a member (or patrimony of which he is the holder or beneficiary). The Consequences Principle may then apply in working out the effect or enforcement of the claim.

18 Cf *Henderson v Astwood* [1894] AC 150 at 158 per Lord Macnaghten, quoted with approval in *Kildrummy (Jersey) Ltd v Inland Revenue Comrs* 1991 SC 1 at 6 per Lord President Hope, and at 13 per Lord Sutherland.

19 See e.g. DCFR Art IV.D.–5:101 and 5:102 dealing with self-contracting and double-mandates.

20 *Board of Management of Aberdeen College v Youngson* 2005 (1) SC 335 at para 12 per Lord Menzies. See too *Kenneil v Kenneil* [2006] CSOH 8.

21 *Church of Scotland Endowment Committee v Provident Association of London Limited* 1914 SC 165; *Kildrummy (Jersey) Ltd v Inland Revenue Comrs* 1991 SC 1 at 6 per Lord President Hope; *Kildrummy (Jersey) Ltd v Calder (No 2)* 1997 SLT 186; *Clydesdale Bank plc v Davidson* 1998 SC (HL) 51.

22 *Kildrummy (Jersey) Ltd v IRC* 1991 SC 1 at 14 per Lord Clyde.

23 See n 9 above.

24 B Windscheid, *Lehrbuch des Pandektenrechts* (9th edn, 1906, by T Kipp) § 352, n 5: "[Der] Zession der Forderung an den Schuldner [ist] nicht wirkungslos . . . sondern hebt die Forderung auf."

25 *Mair v Wood* 1948 SC 83.

26 *Harrison v West of Scotland Kart Club* 2004 SC 615.

D. TITLE TO SUE AND SUBSTANTIVE RIGHT

The Consequences Principle generally applies to cases of succession, whether universal or singular.[27] With personal rights the doctrine regulates the consequences of one person becoming debtor and creditor in a single obligation, usually as a result of assignation. With real rights, there are usually two rights: a subordinate real right "merges", "consolidates", or "absorbs" into ownership.[28]

In the context of personal rights, there are at least two traditional rationales for the Consequences Principle.[29] First, where there is a concurrence of debtor and creditor in one person, the obligation has been exhausted or its purpose achieved.[30] Secondly, the law has long recognised the difference between a substantive right and the procedural title to sue to enforce the right. Roman law, for instance, was long concerned with actions rather than rights, whereas modern law, in contrast, tends to focus on rights.[31] But the distinction between procedural title and substantive right remains: so, for example, a court may recognise a pursuer as having a title to sue before he is invested with the substantive right.[32] It could be argued therefore that whenever the factual circumstances of confusion arise, the consequence need not be discharge of the right, but merely suspension, for now, of the *Anspruch* or right of action. The substantive right, meanwhile, remains – albeit in suspended animation and temporarily unenforceable.[33]

As one Austrian writer elegantly describes it, a creditor can hold his claim to performance only with both hands: it is not possible to hold in one hand the claim and, in the other, the liability.[34] This point has been made too in the Scottish sources. Bell, in the last edition of the *Principles* for which he was responsible, perhaps most accurately summarises the Scottish position:

> When the same person becomes both creditor and debtor in an obligation, without any right of relief against another, the *jus crediti* is suspended; and if no interest of the creditor interferes to make it desirable to keep up the debt, it is held to be satisfied and extinguished. Where the creditor has an interest to keep up the debt, it is held to be only suspended, not extinguished.[35]

27 Cf J P Schmidt, "Transfer of Property on Death and Creditor Protection: the Meaning and Role of 'Universal Succession'" in this volume at 323–337.

28 Although in principle it could apply to two subordinate real rights: a tenant under a ground lease could acquire the tenant's interest in an underlease. For leases, see C Anderson, "Extinction of leases *confusione*" 2015 JR 185.

29 For real rights, see text to n 85 below.

30 See e.g. P Klein, *Der Untergang der Obligation durch Zweckerreichung* (1905).

31 The evolution from thinking in terms of actions to thinking in terms of rights took a decisive turn with the publication of B Windscheid, *Die Actio des römischen Civilrechts vom Standpunkt des heutigen Rechts* (1856). For a modern summary of Windscheid's theory, see C Hattenhauer, "§§ 398–413 Übertragung einer Forderung" in M Schmoekel, J Rückert and R Zimmermann (eds), *Historisch–Kritischer Kommentar zum BGB* vol II/2 (2007) §§ 398–413, Rn 24.

32 *Morris v Rae* [2012] UKSC 50, 2013 SC (UKSC) 106 at paras 52–55 per Lord Reed JSC.

33 See e.g. *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 778F–H per Lord Cross of Chelsea. Cf *Motherwell v Manwell* (1903) 5 F 619 at 631.

34 Knöchlein (n 15) 22.

35 G J Bell, *Principles of the Law of Scotland* (4th edn, 1839) § 580(3). This passage can be traced to the 3rd edition of 1833. The passage is reproduced almost verbatim in P Shaw, *A Treatise on the Law of Obligations and Contracts* (1847) § 231(4) at 270.

In other words, the right can remain, albeit in suspended animation, until it comes to be held by a different person to the debtor in the obligation.[36] *Confusio*, in this sense, kicks in when transfer subjects are inconsistent with transfer objects;[37] or, to put that another way, the capacity of the transferee is inconsistent with the nature of the right transferred.[38]

E. *CONFUSIO* COMPARED

Confusio and *compensatio*

When confusion operates on personal rights, the doctrine must be distinguished from compensation. Between 1804 and 2016, the *Code civil*, for instance, appeared to confound the two doctrines in a provision that stated: "where the character of debtor and creditor is united in one person, confusion operates to discharge the two claims".[39] That provision was long recognised as defective, for confusion discharges only one claim.[40] The criticism applies equally to Scottish sources that consider the law of confusion in terms of a *concursus debiti et crediti*: for that expression normally describes mutual debtors and creditors, not the case where one person becomes his own creditor.[41] Where cross-claims are discharged by set-off, it is by way of compensation or contractual set-off, not confusion:

> The basis for discharge is that no one can have a right against himself; the result of the discharge, however, is (as in the case of compensation) that the creditor is, to this extent, liberated: in the case of compensation, the creditor is liberated from a debt which he was liable to pay to another, here [in the case of confusion] the creditor is liberated from a debt which he would have been liable to pay another, had he not himself become the creditor.[42]

36 Cf A A Levasseur, *Louisiana Law of Obligations: A Précis* (2006) § 7.6.1: "It appears from these examples that confusion consists more in an impossibility to perform an obligation against oneself than in a true extinction of that obligation. One could say that as a result of the confusion the obligation is frozen or paralysed. Confusion thus creates an obstacle to legal action by the party involved against himself."

37 But compare the constitution of security rights over personal rights or, indeed, the purported creation of a security right by a creditor over that creditor's own liability: R G Anderson, "Security over bank accounts in Scots law" (2010) *Law and Financial Markets Review* 253.

38 *Motherwell v Manwell* (1903) 5 F 619 at 631 per Lord Kinnear.

39 Art 1300 *Code civil* (in force prior to October 2016) : "lorsque les qualités de créancier et de débiteur se réunissent dans la même personne, il se fait une confusion de droit qui éteint *les deux créances*". In the event, the wholesale reform of the *Code civil* in 2016 has remedied the previously defective provision: *Code civil* Art 1349 (as inserted by Ordonnance n°2016–131 du 10 février 2016, Art 3). See further n 113 below.

40 M Planiol and G Ripert, *Traité pratique de droit civil français* (2nd edn, 1954) vol 7, para 1299, n 5: "La rédaction défectueuse de ce texte a été signalée depuis longtemps." Art 1300 *Code civil belge* remains in original terms and is subject to the same criticism: see H de Page, *Traité élémentaire de droit civil belge*, vol 3 (3rd edn, 1967) para 692(3). Cf Austrian ABGB § 1445: "So oft auf was immer für eine Art das Recht mit der Verbindlichkeit in einer Person vereinigt wird, erlöschen beide . . .". Because this provision distinguishes between the credit claim (*das Recht*) and the obligation (*die Verbindlichkeit*), it is true to say that, on confusion (*Vereinigung*), *both* claim and obligation are discharged.

41 R Thomson, *A Treatise on the Law of Bills of Exchange* (2nd edn, 1836) 395 refers to "that kind of compensation called *confusio*". In *Healy & Young's Tr v Mair's Trs* 1914 SC 893 at 899, Lord Johnston also uses the language of *compensatio*.

42 Windscheid, *Lehrbuch des Pandektenrechts* (n 24) § 352 (my translation).

(2) *Confusio* and *consolidatio*

Consolidatio is sometimes said to apply to real rights as *confusio* applies to personal rights. Subordinate real rights may be consolidated with ownership where the owner of a thing acquires a subordinate real right that he, or a prior owner, granted in the thing.[43] Alternatively the holder of a subordinate real right in a thing may acquire ownership of the thing.[44] On such a merger, the subordinate right is variously described as having been "consolidated" or "absorbed"[45] or "amalgamated"[46] with ownership. And not just in English: compare the French *consolidation*[47] and the German *Konsolidation*.[48] The general principle on *Konsolidation* of real rights contained in the German civil code, however, exists to exclude the operation of the Consequences Principle at all.[49] That provision applies to all subordinate real rights in land and is not limited to registered rights.[50]

F. PERSONAL RIGHTS: SUSPENSION OR DISCHARGE?

"The law on confusion", Professor McBryde tersely remarks, "has many unresolved complexities".[51] And with complexity comes wariness: a general lack of confidence in asserting and applying the blunt Roman rule. There are few clear statements of the law, although Gloag's treatment deserves praise since he brings some coherence to a body of cases that he recognises, on occasion, to be irreconcilable.[52]

The rationale for a law of *confusio* is said to be common sense.[53] *Confusio* also has a good theoretical justification: an obligation, a legal tie, can generally only exist between two legal persons.[54] But with the recognition that, in many cases, one person may hold rights different patrimonies, the question of unity of debtor and creditor in a single person requires more careful consideration. For real rights, some

43 Reid, *Property* para 9(6) and para 443, n 3.
44 There is no consolidation if the holder of a limited real right acquires another limited real right, as where a tenant acquires a heritable security over the landlord's ownership of the land: J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) 525.
45 Land Registration (Scotland) Act 1979 s 2(1)(a)(iv); s 2(4)(a) and (b); and s 8(2)(b) (repealed).
46 *The Howgate Shopping Centre Ltd v Catercraft Services Ltd* 2004 SLT 231 at 246J per the Lord Ordinary (Macfadyen).
47 *Code civil* Art 617 (usufruct). Art 705, meanwhile, speaks of servitudes being "discharged" (*éteinte*), not consolidated.
48 BGB § 889. Both Austrian and Swiss law, however, use the term *Vereinigung*, to describe the effect of confusion on real and personal rights: ABGB §§ 526, 1445 and 1446; OR § 118 and ZGB § 735 (Swiss *Obligationenrecht* and *Zivilgesetzbuch* respectively); in the French text, however, "*confusion*" is used for personal rights; *consolidation* for real rights). The Dutch *Burgerlijk Wetboek* uses *Vermenging* for both real and personal rights: Art 3:81 (limited rights); Art 5:83 (servitudes); Art 6:161 (obligations).
49 BGB § 889 "Ausschluss der Konsolidation bei dinglichen Rechten": "Ein Recht an einem fremden Grundstück erlischt nicht dadurch . . ." For discussion of this principle in English, see B Akkermans, "Concurrence of ownership and limited property rights" 2010 European Review of Private Law 259.
50 K H Gursky, *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch §§ 883–902* (2008) Rn 5.
51 W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) paras 25–31.
52 W M Gloag, *The Law of Contract* (2nd edn, 1929) 725–730.
53 Knöchlein (n 15) 23 and the references in the German language literature there cited.
54 R Zimmermann, *The Law of Obligations* (1990) 759.

attempt has been made to explain the rationales according to the theories of ownership in French and German law respectively.[55]

In the law of obligations, confusion is not a type of performance; on the contrary: confusion renders performance and execution impossible.[56] The debtor who benefits from discharge by *confusio* finds herself so discharged, says Thérèse Vialatte, in spite of herself.[57] Bankton equated Scots law with the civil law and assumed that where debtor and creditor become one, the effect was that the debt was extinguished *confusione*.[58] This rule was applied in two early nineteenth century cases, both of which held that the intention of the assignee/debtor to keep the debts alive was irrelevant.[59] Similarly, there is a nineteenth century Outer House case holding that the effect of the debtor in a bond taking an assignation of the bond was to discharge it *confusione*.[60] And in *Healy & Young's Tr v Mair's Trs*,[61] the Court held that, if *confusio* operates, it operates *ipso iure*, without regard to the intention of the parties, and its effect is to discharge obligations.[62] The view that the effect of confusion is discharge can also be found in the literature.[63] Nonetheless, in *Healy & Young's Tr*, the First Division came to the conclusion that *confusio* equals discharge reluctantly: "*Confusio*", Lord President Strathclyde observed, "is, in my judgement, a highly artificial doctrine and I, for my part, decline to give it any logical extension, or to apply to any case in which it has not hitherto been held to operate".[64] The doctrine ought not to be extended, Lord Johnston held, "out of mere deference to legal logic".[65] Rather than accepting that confusion of debtor and creditor may give rise to suspension, however, the Lord President held that where confusion operates, it operates to discharge; "cases of temporary suspension", in contrast, "are not exceptions to the rule, but are cases to which the doctrine of confusion does not apply".[66] One example given is of "feudal rights", which cannot be extinguished except by the observation of feudal solemnities.

But whether "confusion" is used descriptively – to describe the merger of debtor and creditor in the same person; or prescriptively – to determine consequences of

55 Akkermans (n 49) 268–269.

56 Cf *Motherwell v Manwell* (1903) 5 F 619 at 631 per Lord Kinnear.

57 T Vialatte, "L'effet extinctif de la réunion sur une même tête de qualités contraires et ses limites" (1978) 76 Revue trimestrielle de droit civil 568 at para 2. Cf de Page (n 40) para 691.

58 Bankton, *Inst* I.497.42. For a roughly contemporaneous civil law example, see W X A F von Kreittmayr, *Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem* (1758; repr 1821) IV.15 § 3 "Confusion" (vol IV, 702–704).

59 *Forbes, Hunter & Co v Duncan* (1802) Mor App "Tailzie" No 10; *Codrington v Johnstone's Trs* (1824) 2 Sh App 118.

60 *Balfour-Melville's Marriage Contract Trs v Gowans (Balfour-Melville's Tr)* (1896) 4 SLT 111. The *debitor cessus* took an assignation of the claim in which he was the debtor, and then re-assigned the self-same claim. The result of the court's decision, that confusion equalled discharge, appeared to be that the *debitor cessus* – the putative cedent – became liable to the assignee, not in debt, but in damages: for breach of warrandice *debitum subesse* (since the claim sought to be assigned did not exist at the date of the assignation).

61 1914 SC 893.

62 1914 SC 893 at 899 per Lord Johnston: "I think that such extinction or discharge [*confusione*] takes place *ex lege* and independently of intention."

63 C D Murray (rev R P Morison), "Confusio" in J L Wark and A C Black (eds), *Encyclopaedia of the Laws of Scotland* vol 4 (1927) paras 881–882.

64 1914 SC 893 at 902 per Lord President Strathclyde.

65 1914 SC 893 at 899.

66 1914 SC 893 at 902.

suspension or discharge – the need to decide whether an obligation has been discharged or not remains. Certainly, the idea that "confusion" may lead only to suspension, not discharge, can be traced through the institutional writers. Stair says that "if by different successions, the debtor and creditor should become distinct, the obligations would revive, as in many cases may occur; and so confusion is not an absolute extinction, but rather a suspension of obligations".[67] He continues:

> Confusion doth not always take place, where the same person who is debtor succeeds to, or takes assignation, as is evident in cautioners taking assignation to bonds, wherein they are debtors as cautioners, yet may pursue the principal, or co–cautioners as assignees, and will not be excluded upon alledgance of confusion, which is only relevant when that debtor who hath no relief, becomes also creditor by succession or assignation.[68]

This approach found favour with the Court as early as 1728,[69] in a case approved by William Forbes.[70] Erskine's approach is similar: "when the succession of these rights happens again to divide in two, the obligation or right, which for a while sunk or dormant *confusione*, revives and recovers its first place".[71] Erskine's view has been quoted with approval.[72] The weight of authority in Scots law supports the view that, ultimately, whether or not confusion operates to give rise to discharge of the obligation, depends on the intention of the parties.[73] Intention must, however, be accompanied by a patrimonial interest, such as a right of relief.[74]

Divergence on whether confusion leads to suspension or discharge is, however, not peculiar to Scots law. In German law, the BGB's point of departure is the (uncodified) assumption that confusion equals discharge, from which specific provisions expressly depart:[75] as where there can be seen to be a separation of patrimonies on death (§ 1976); where the deceased leaves to an heir a legacy of a claim owed by that heir, or a legacy of a right which burdens an object owned by their heir (§ 2175); and on the sale of an inheritance by an heir (§ 2377).[76] The rule of discharge, in short, is thus honoured as much in the breach as in the observance.

The approach of the Scottish institutional writers and nineteenth-century case law, that confusion gives rise to suspension, is reflected in the traditional French approach, despite the *Code civil* originally providing that confusion gives rise to an

67 Stair, *Inst* 1.18.9.
68 Stair, *Inst* 1.18.9.
69 *Competition between Murray, Chapel and Lanark* (1728) 1 Kames Rem Dec 196; *sub nom Murray v Neilson* (1728) Mor 3043.
70 W Forbes, *The Great Body of the Law of Scotland* (1707–1742) [GUL MS Gen 1247], vol I, 1091; see too W Forbes, *The Institutes of the Law of Scotland* ([1722–1730]; repr 2012) 245: "extinction is sometimes absolute and sometimes temporary."
71 Erskine, *Inst* 3.4.27.
72 *Colvile's Tr v Marindin* 1908 SC 911 at 920 per Lord President Dunedin.
73 *Fleming v Imrie* (1868) 6 M 363 at 367 per Lord Justice-Clerk Patton; *Dennison v Fea's Trs* (1873) 11 M 392 at 394 per Lord President Inglis; and per Lord Deas (Lord Deas's opinion is reported only at (1873) 10 SLR 246 at 248); *Murray v Parlane's Tr* (1890) 18 R 287 at 290 per Lord Rutherford Clerk; *Macbean's Curator Bonis, Applicant* (1890) 28 SLR 8 at 13 per the Lord Ordinary (Kincairney); cf *Whiteley v Delaney* [1914] AC 132 at 151 per Lord Dunedin.
74 *Fleming v Imrie* (1868) 6 M 363 at 367 per Lord Cowan, at 368 per Lord Benholme.
75 H Prütting, G Wegen, G Weinreich, *Bürgerliches Gesetzbuch: Kommentar* (11th edn, 2016) § 2175, Rn 1 (G Schiemann).
76 The introductory title of BGB § 2377 speaks of "rebirth" (*Wiederaufleben*).

"extinction" of rights.[77] That approach is found in Article 1683 of the Quebec Civil Code: "Where the qualities of creditor and debtor are united in the same person, confusion is effected, extinguishing the obligation. Nevertheless, in certain cases where confusion ceases to exist, the effects cease also." The Swiss Code of Obligations[78] is said to operate similarly: the reference in the Code to "extinction" (*éteinte/erloschen*) is not to be taken literally,[79] for discharge may yet give rise to "rebirth" (*renaissance/Wiederaufleben*), though prescription is not restarted; the obligation, and the prescriptive period, is treated as having been suspended rather than discharged.[80] The DCFR provides that discharge by confusion does not apply if the effect would be to deprive a third person of a right",[81] an approach adopted in the amended provision of the French *Code civil*.[82]

G. SERVITUDES

The operation of *confusio* or *consolidatio* on real rights cannot be fully discussed here. There is a general question as to whether the Validity Principle applies to a transaction seeking to constitute a subordinate real right in an object in favour of the owner of the same object. German law has allowed both an *Eigentümerhypothek* and the *Eigentümergrundschuld*.[83] English law too, in principle, permits a person to convey or vest land in himself.[84] For present purposes, a few words may be said about servitudes. The traditional position is that an owner cannot generally vest a subordinate real right in himself in respect of property that he already owns: *res sua nemini servit*.[85] But, in modern law, there are many exceptions to the traditional rule. A deed constituting a servitude can be registered where benefited and burdened property are owned by one and the same person, although the creation of the servitude is suspended until ownership of each property is held by different persons.[86]

The Consequences Principle may still be applied where the merger of ownership of benefited and burdened property first occurs after constitution. Suppose the owner of property A has a servitude right of way over property B. The owner of A acquires ownership of property B or vice versa. The servitude is unnecessary and one view is

77 Art 1300 *Code civil* (n 39 above) (pre-October 2016).

78 CO/OR Art 118: "(1) Wenn die Eigenschaften des Gläubigers und des Schuldners in einer Person zusammentreffen, so gilt die Forderung als durch Vereinigung erloschen. (2) Wird die Vereinigung rückgängig, so lebt die Forderung wieder auf." A minor amendment is proposed in C Huegenin and RM Hilty (eds), *OR/CO 2020 Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil – Code des obligations suisse 2020: Project relative à une nouvelle partie générale* (2013) Art 138(2) where "Wird . . . rückgängig" in the German text is replaced with "Endet".

79 Piotet (n 17) 614–615.

80 P Tercier and P Pichonnaz, *Le droit des obligations* (5th edn, 2012) para 1452.

81 DCFR Art III.–6:201.

82 Art 1349 *Code Civil* (in force from 1 October 2016): "[confusion] éteint la créance et ses accessoires, sous réserve des droits acquis par ou contre des tiers."

83 See BGB §§ 1163 and 1196.

84 Law of Property Act 1925 s 72(3).

85 *Baird v Fortune* (1861) 4 Macq 127 at 141 per Lord Cranworth, expressly adopting the treatment in Erskine's *Principles* (The relevant passage in the 21st (and last) edition of 1911 is 2.9.21). The principle is also mentioned in institutional writing: Stair, *Inst* 4.15.3; Erskine, *Inst* 2.9.36; and Bankton, *Inst* 2.7.41.

86 Title Conditions (Scotland) Act 2003 s 75(2).

that the servitude is discharged *confusione*.[87] But that view is hard to square with the authorities, which suggest that if, for example, property B is subsequently transferred to a person different from the owner of property A, the servitude may re-awaken.[88] Admittedly, some of the cases, where it has been held that a servitude re-awakens, involve individuals who inherited the dominant tenement as heir of entail, where it was accepted that such successors inherited in a different capacity than as individuals.[89]

Turning to the institutional writers, Erskine followed the civil law rule that confusion leads to discharge of the servitude, which must be reconstituted if it is again to be effective.[90] Bell's point of departure was that "servitudes are extinguished [by confusion], when the dominant and servient tenements come both into one person".[91] As in other passages on servitudes, though he cites only Erskine, Bell's formulation closely follows the text of the *Code civil*.[92] Bell's initial view had been that, "in such case the servitude will revive on separation if it be a positive servitude of which the possession has been continued notwithstanding the union".[93] But this view was short-lived: "wherever a separation or disunion may be anticipated", Bell wrote three years later, "the effect seems to be to produce rather a combination of the two rights, *as if the proprietor had divided himself into two persons*, with a *suspension* rather than an extinction of the servitude". To this, Bell added – expressly departing from Erskine – that if "the owner has indicated no intention of extinguishing the servitude" it would, on a separation of the tenements, revive – without the need for express re-constitution *de novo*.[94] Bell's view received support in a decision that appeared on the eve of the publication of the fourth edition.[95] (The analogy of the proprietor having divided himself into two persons is striking for the general law of *confusio* in the case of personal rights between multiple patrimonies.) But Bell's view of servitudes is probably limited to servitudes constituted by grants that have been recorded or registered. A servitude constituted by positive prescription, in contrast, may be more readily held to be consolidated where benefited and burdened property come to be owned by one person.[96]

87 *Preston's Trs v Preston* (1866) 16 Sc Jur 433; *Union Bank of Scotland v The Daily Record (Glasgow) Ltd* (1902) 10 SLT 71.

88 *Walton Brothers v Magistrates of Glasgow* (1876) 3 R 1130 at 1132–1133 per Lord President Inglis. The statement in D N MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) 145 that ". . . it is a particular feature of servitude rights that they are automatically terminated as such if the dominant and servient tenements both come to be owned by the same person" is too wide.

89 See n 107 below.

90 Erskine, *Inst* 2.9.37 following D 8.2.30pr.

91 This passage first appears in G J Bell, *Principles of the Law of Scotland* (2nd edn, 1830) § 998. Cf 3rd edn (1833) § 997 and 4th edn (1839) § 997, where the bracketed "by confusion" becomes "confusioné".

92 Art 705 *Code civil*. The definition of a servitude, in Art 637 *Code civil*, supposes the owners of dominant and servient tenement to be different persons. For similar statements, see J M Pardessus, *Traité des servitudes* (8th edn, 1834) § 298; and F Terré and P Simler, *Droit civil: Les biens* (7th edn, 2006) para 921.

93 G J Bell, *Principles of the Law of Scotland* (2nd edn, 1830) § 998.

94 Bell, *Principles* (3rd edn, 1833) § 997; 4th edn (1839) § 997.

95 *Donaldson's Trs v Forbes* (1839) 1 D 449 at 452 per the Lord Ordinary (Moncreiff) and at 453 per Lord Glenlee, a decision which appeared in time to be cited in the fourth edition.

96 *Donaldson's Trs* (n 95).

The authors of the leading modern work on servitudes draw attention to the difficulties of confusion having suspensive effect;[97] but they rightly conclude that, where there is a registered servitude and one person becomes owner of both dominant and servient tenements, confusion operates only suspensively; if the tenements are again separated, the servitude revives.[98] This is consistent with the recent provision of the Title Conditions (Scotland) Act 2003 to allow servitudes to be constituted in advance of transfer of the different tenements.[99] The position in South Africa is the same.[100] It is of interest that the Swiss civil code provides only that, if the owner of the dominant tenement acquires ownership of the servient tenement, he *can* have the servitude discharged.[101] Where that right is not exercised and the servitude is not removed from the register,[102] the servitude continues to exist.[103] Analogous provisions are found in Austria.[104]

H. CAPACITIES AND PATRIMONIES

The Consequences Principle may apply in situations that have occurred without reference to intention. The classic example is universal succession on death.[105] It is from the succession cases that one important principle of confusion arises: *confusio* does not operate where the individual, though ostensibly both debtor and creditor, fulfils the respective roles of debtor and creditor in different capacities.[106] One common example involved an heir of entail who, in his individual capacity, paid debts owed by the entailed estate in return for a heritable security on the estate. The individual then inherited as heir of entail. In such a situation it was held that the security was not discharged *confusione*.[107] In England, Blackstone (who was no enthusiast for the entail),[108] explicitly considered entails to be an exception from the

97 D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.23.

98 Cusine and Paisley (n 97) para 17.25 at 697. The authors distinguish this from the case where the "there never has been a proper servitude right".

99 Title Conditions (Scotland) Act 2003 s 75(2).

100 C G van der Merwe, "Servitudes" in W A Joubert (ed), *The Law of South Africa* (First Reissue, 2000) para 461. J E Scholtens, "Merger of servitudes" (1950) 67 SALJ 220, discussing *Du Toit v Visser* 1950 (2) SA 93 (C), considers the case where the merger extended to only part of the servient tenement. On this issue, see too *Gow's Trs v Mealls* (1875) 2 R 729 and *Le Feuvre v Mathews* 1974 Jersey Judgements 49.

101 Swiss ZGB § 735.

102 Under Swiss ZGB § 976.

103 Swiss ZGB § 735 II.

104 Austrian ABGB § 1446 provides that registered real rights are discharged only when they are removed from the register. And although ABGB § 526 provides that, on the owner of the servient tenement acquiring ownership of the dominant tenement, any servitude comes to an end ("hört die Dienstbarkeit von selbst auf"), this is immediately qualified with the proposition that if, before effect can be given to the merger on the register, ownership of the two tenements falls into different hands, the owner of the dominant tenement is entitled to exercise the servitude. For German law see n 49 above.

105 See generally Schmidt (n 27) above.

106 See e.g. BGB § 1976.

107 *Cuming v Irvine* (1726) Mor 3042; *Gordon v Maitland* (1757) Mor 11161; *M'Kenzie v Gordon* (1838) 16 S 311 affd (1839) 1 MacL & Rob 117 and *Lord Blantyre v Dunn* (1858) 20 D 1188 at 1195 per Lord Ivory. See too A Duff, *A Treatise on the Deed of Entail* (1848) 112–113.

108 Cf W Blackstone, *Commentaries on the Laws of England* (1766) II, 116.

general doctrine of merger.[109] A more modern English example is that, where a local authority comes to hold adjoining plots of land for different statutory purposes, this holding does not give rise to merger of the restrictive covenants in favour of one of the plots land against the other.[110] Similarly, in the law of arrestment, the general prohibition on arresters arresting in their own hands is subject to an exception in the case of separate capacities.[111] The description in the older sources of assets being held in a different "character" or "capacity" would, today, often now be considered as rights held in a separate patrimony.

I. THIRD PARTY EFFECT

Confusion operates with relative effect. The doctrine cannot operate to the prejudice of third parties, such as creditors.[112] This is a general principle that is widely recognised in other legal systems.[113] A cautioner is thus discharged if the principal debtor acquires the creditor's claim. Subsequent assignation of the claim cannot prejudice the cautioner. A creditor who holds a standard security over a lease cannot be prejudiced by the acquisition by the tenant of the landlord's interest. But how can the security be said to continue in the absence of the right that is its object?

One solution is found in the idea of relative validity of juridical acts.[114] So, in the case of a personal right, which is the object of an arrestment, the arrestee will remain liable to the arrester, though the arrestee has succeeded to or acquired the common debtor's right against the arrestee. Similarly, irrespective of whether or not a lease is characterised as a real right,[115] where a headlease is consolidated with ownership, a sub-lease remains unaffected.[116] Or suppose plot of land A has the benefit of a servitude over a neighbouring property, B. A creditor takes a standard security over A. Subsequently ownership of plots A and B is united in the same owner. If the standard security holder has to enforce over plot A, plot A must continue to have the benefit of the servitude over plot B.[117]

Matters are somewhat more complicated with personal rights. Suppose Kim is the creditor of Joan. Kim arrests Joan's credit balance with the Caledonian Bank. Joan

109 Blackstone (n 108) II, 177.

110 *University of East London Higher Education Corporation v Barking and Dagenham London Borough Council* [2005] Ch 354 at para 59 per Lightman J.

111 J Graham Stewart, *Diligence* (1898) 105: "an arrester may arrest in his own hands, funds which he holds in a different character to that in which he is pursuer."

112 *Murray's Trs v Trs of St Margaret's Convent* (1906) 8 F 1109 at 1117 per Lord Kinnear. See too *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105 at 110.

113 DCFR Art III.–6:201(2); *Code civil* Art 1349 (n 82); Dutch BW Art 6:161(3) provides that merger takes place, and is effective, against all except third parties whose rights in the underlying claim remain unaffected. Art 3:81(3) BW deals with real rights.

114 Cf *Mitchell v Rodger* (1834) 12 S 802 at 810 per Lord President Hope: "there is no inconsistency in holding a transaction to be good as to one of several parties, and yet not to others". See further A von Tuhr (n 2) § 2.V.

115 See P Webster, "The Continued Existence of the Contract of Lease" in this volume at 119–135.

116 Stair, *Inst* 2.9.22; Erskine, *Inst* 2.6.34; *The Howgate Shopping Centre Ltd v Catercraft Services Ltd* 2004 SLT 231. An analogous old case is *Earl of Galloway v M'Culloch* (1626) Mor 7833, where it was held that the invalidity of the principal lease did not invalidate the sub-lease.

117 This example is given in Akkermans (n 49) 274. This approach should address some of the difficulties raised in Cusine and Paisley (n 97) para 17.29.

then pledges her rights under the account to the bank.[118] The law of arrestment generally provides a solution to this problem: the prohibition contained in an arrestment, which prohibits the bank paying Joan, extends to prohibiting any other juridical act that has the effect of payment, such as discharge. And because the arrestment renders, as the old authorities always say, the arrested claim "litigious", the Bank cannot effect any juridical act which would prejudice the arrester. So the bank cannot discharge Joan; nor can the Bank accept an assignation of Joan's claim against the bank; and nor can the bank accept from Joan a pledge of the account. If the bank does enter into such a juridical act, the act is *ad hunc effectum*: it cannot prejudice the arrester.

It may be observed that confusion often operates as a result of a juridical fact rather than a juridical act. Death of a creditor who bequeaths a claim against a debtor to the debtor himself is the improbable textbook example. But taking that example, suppose a creditor had served on the debtor an arrestment. The arrester may not be prejudiced by any plea that confusion has operated to extinguish the claim.

J. RELATIVE VALIDITY

As has been seen above, the First Division in *Healy's and Young's Tr v Mair's Trs* held that *confusio* operates independently of the intention of the parties and as a discharge. Some support for that view is found elsewhere. In Switzerland, for example, it is emphasised that mere intention cannot prevent the operation of confusion.[119] In French law, the *Code civil*, between 1804 and 2016, was silent on the effect of confusion. Since October 2016, however, the *Code civil* now appears, in a single provision, at one and the same time to adopt the discharge analysis, while also accepting the effect of discharge must be relative.[120] The idea of relative validity – otherwise known in some civil law countries as the doctrine of *opposabilité or relative Wirksamkeit* – and most fully worked out in Scotland in the context of inhibition (transactions *sprêta inhibitione* are said to operate only *ad hunc effectum*) – it is suggested, may thus usefully be employed in applying the Consequences Principle to a situation of *confusion*, even if the improbable view were taken that the decision of the First Division in *Healy & Young's Tr v Mair's Trs* represents the final word on the operation and effect of *confusio*.

K. CONCLUDING REMARKS

For centuries, the law of *confusio* has, to adapt Milton, worse confounded.[121] But serious thinking about such apparently out-of-the-way subjects is the business of

118 For the pledge over a bank account in Scots law, see Anderson (n 37).

119 S Emmenegger, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (9th edn, 2008) vol II § 31, Rn 3191. But cf *Basler Kommentar: Obligationenrecht I* (5th edn, 2011) Art 118, Rn 11.

120 Art 1349 *Code civil* quoted in n 82 above. The same point may be made in relation to DCFR Art III.–6:201.

121 J Milton, *Paradise Lost* (2nd edn, 1674) Bk II, Lines 995–996. Cf J Kent, *Commentaries on American Law* (1830) IV, 101: "There is a difficulty in drawing solid conclusions from cases that are at variance, or totally irreconcilable, with each other."

legal science.[122] For although legal uncertainty makes for academic interest, uncertainty is, on one view, inimical to the rule of law. "I always consider it as desirable", Lord President Campbell once observed, "that, in questions of law, as little as possible should be left to the discretion of the judge. The law should be fixed . . ."[123]

As a matter of transactional validity, Scots law generally enforces what I have called the Validity Principle in order to prevent meaningless transactions. The Validity Principle is one that operates at a common sense rather than a doctrinal level. For where one person enters into a juridical act with himself, but in separate capacities, the Validity Principle will likely give effect to the transaction. The Consequences Principle, meanwhile, is where the controversy between suspension and discharge – and the potential effect of discharge on third parties – has been much discussed. The Scottish sources have in the main preferred an analysis based on suspension rather than discharge. That choice promotes flexibility that a rule based on discharge lacks; and it avoids recourse to the uncomfortable assertion that a case which may be described as confusion is not subject to any consequences. The effect of *confusio* – whether considered as discharge or suspension – is relative as to persons, patrimony and time. These conclusions – in and of themselves interesting enough – are also of wider importance.[124] For where a single natural or legal person is acting as the single titular holder of multiple patrimonies, the law of *confusio* need not confound the development of intra-patrimonial transactions or claims.

122 Cf *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (1896) III, 205: "Wie das . . . Recht an der eigenen Sache juristisch zu konstruiren [sic] ist, entzieht sich der Bestimmung durch das Gesetz. Die Konstruktion ist Aufgabe der Wissenschaft."

123 *Campbell v Scotland* (1794) 1 Ross LC 155 at 161. Cf N R Whitty, "From principles to discretion: changes to the fabric of Scots private law" (2003) 7 EdinLR 281.

124 von Tuhr (n 2) § 6.VI, 157–158 invokes the law of confusion to explain why, in his view, subordinate rights always have the same object as the residual mother right. But discussion of subordinate personal rights must wait for another occasion.

NOTHING SO PRACTICAL AS A GOOD THEORY: THE NOTION OF A REQUIREMENT

Eric Clive

A. INTRODUCTION

You can feel slightly guilty when you get too interested in legal theory – a bit distant from real law and real life. So I loved it when George came out with "There is nothing so practical as a good theory."[1] It made me feel better. There may even be some truth in it.

In this essay, I want to suggest that the theoretical distinction between a duty or obligation on the one hand and a requirement on the other can indeed be useful. I will use the Unidroit *Principles of International Commercial Contracts* (PICC) and the excellent Commentary on them edited by Stefan Vogenauer to illustrate the point.[2] The Commentary is a book of over 1,500 pages by an impressive group of authors from 13 different jurisdictions. It contains highly intelligent, well-informed analysis. It recognises the distinction between a duty and a requirement. In places, however, a readier and more consistent use of the distinction would have been useful.

The nature of the distinction is obvious and well-known. In the case of a duty or an obligation (and I am not here concerned with the difference between them) the law expects compliance. You *should* fulfil your duties. You *should* perform your obligations. The law is not neutral on compliance. In the case of a requirement the law is neutral on compliance. It is up to you whether you comply or not. You will not be ordered by a court to comply. You will not be liable in damages if you do not comply. If you do not fulfil a requirement a specified result will follow or not follow. That is all. So, for example, if formal writing is required for the validity of a certain type of contract, there is no duty or obligation to use formal writing. You do not need to contract at all. Or you can conclude an oral or informal contract. You are free to do so. It is just that if you want the result – formal validity – you fulfil the requirement. Similarly, the notion of procedural requirements is familiar to all lawyers.

The notion of a requirement is similar to the notion of a condition. Indeed, sometimes the words are used interchangeably. The heading to Article 2:101 of the *Principles of European Contract Law* (PECL), for example, is "Conditions for the conclusion of a contract" whereas Article II.-4:101 of the *Draft Common Frame of*

1 G L Gretton, "Trust and Patrimony", in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 182 at 184.

2 S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, 2015).

Reference (DCFR) is headed "Requirements for the conclusion of a contract". However, it seems better to avoid the word "condition" in the present context because it is used in different senses. In the purest and narrowest legal sense, a simple condition typically depends on the occurrence or non-occurrence of an uncertain future event, whereas a requirement in the present context depends on something being done or not done by the party affected by it. Moreover, it is possible, and sometimes useful, to say that a party is required to do something: it is not possible, without changing the meaning, to say that a party is conditioned to do something.

The place in the PICC and the Commentary where the notion of a requirement is most clearly recognised is in the chapter on limitation periods. Article 10.1 of the PICC defines the scope of the chapter. It provides that:

> This Chapter does not govern the time within which one party is *required* under the Principles, as a condition for the acquisition or exercise of its rights, to give notice to the other party or to perform any act other than the institution of legal proceedings. [Emphasis added.]

The link made here between requirement and condition ("required . . . as a condition for") is interesting but the main point to note is that it would clearly have been wrong to talk of the time within which a party had a *duty* to give notice. The commentary on the article by Robert Wintgen helpfully identifies the provisions that set out "such notice requirements".[3] It consistently and correctly refers to requirements and not duties. There are parts of the Commentary where we do not find such consistency.

B. FORMATION OF CONTRACT

The first place in the Commentary where the distinction comes into play is in the discussion of the rules on offer and acceptance. Article 2.1.9(1) of the PICC provides that a late acceptance is nevertheless effective as an acceptance if without undue delay the offeror notifies the offeree to that effect. The word "effective" is typical of a rule laying down a requirement. As the commentary by Ross Anderson correctly notes, this rule "gives the offeror an option".[4] Prompt notification is a requirement of holding the offeree to a contract, but there is no duty or obligation to give such notification. Article 2.1.9(2) then provides as follows.

> If a communication containing such a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Here the author says that the provision "imposes on the offeror an obligation".[5] This is misleading. It is true that a result of the provision could be that the offeror comes under contractual obligations but the provision itself does not impose any obligation to give notice. Again the use of "effective unless" gives the game away.

3 Vogenauer/Wintgen (n 2) Art 10.1 para 7.
4 Vogenauer/Anderson (n 2) Art 2.1.9 para 3.
5 Vogenauer/Anderson (n 2) Art 2.1.9 para 2.

This is just a requirement. It has to be fulfilled if the offeror wants to avoid being bound, but that is all. There is no obligation to give any notice. On the following page, the author correctly refers more than once to the "requirement that the offeror notify the offeree of its decision without undue delay".[6] But then he talks of the "duty to communicate"[7] and of the offeror being "obliged to give the offeree notice without undue delay".[8] There is no such duty and no such obligation.

There is a similar lapse in relation to acceptances that purport to modify the offer. Under Article 2.1.11 minor modifications do not prevent the acceptance from counting as such "unless the offeror without undue delay objects to the discrepancy". The commentary says that, in practical terms, the offeror is "obliged" to peruse the acceptance for discrepancies and to react to any discrepancies immediately.[9] That may be so, but in theoretical terms the offeror is only under a requirement, not an obligation.

I should stress that the commentary here is excellent and full of insight. No reader will be misled by these small inaccuracies in terminology, but inaccuracies they are nonetheless. There are no similar inaccuracies in the discussion by the same author of notice requirements under Article 2.1.12 (writings in confirmation).

C. AVOIDANCE OF CONTRACT FOR MISTAKE, THREATS, FRAUD ETC

Article 3.2.11 of the PICC provides that:

> The right of a party to avoid the contract is exercised by notice to the other party.

The giving of notice is clearly a requirement, and not a duty or obligation, as is recognised in the commentary by Peter Huber. This points out that the article does not "require" express notice or the giving of reasons for the avoidance.[10] There is no difficulty about that. What attracted my attention, however, was the author's interesting account, under the heading "No duty on the other party to reply" of a proposal during the drafting process to insert a provision to the effect that the other party must object to the notice of avoidance within a certain time limit, the sanction for not doing so being loss of the right to contest the avoidance. This proposal came to nothing, but if it had proceeded would it have introduced a duty or a requirement? It seems to me that it would have been a simple requirement.

D. INTERFERENCE WITH CONDITIONS

The next part of the Commentary where the distinction could have been useful is the discussion on interference with conditions. Article 5.3.3(1) of the PICC says that:

6 Vogenauer/Anderson (n 2) Art 2.1.9 paras 4–6.
7 Vogenauer/Anderson (n 2) Art 2.1.9 para 5.
8 Vogenauer/Anderson (n 2) Art 2.1.9 para 12.
9 Vogenauer/Anderson (n 2) Art 2.1.11 para 15.
10 Vogenauer/Huber (n 2) Art 3.2.11 para 5.

> If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.

Article 5.3.3(2) contains a similar provision for the case where a party brings about fulfilment of a condition contrary to the duty of good faith and fair dealing or the duty of co-operation. That party may not rely on the fulfilment of the condition.

The position under Article 5.3.3 is slightly complicated. There are duties involved, but they come from elsewhere – from the duty of good faith and fair dealing and the duty to co-operate. The article itself does not impose any additional duty or obligation. It just contains a requirement. If you want to be able to rely on a condition you do not interfere improperly with its fulfilment. Once that is appreciated it becomes clear that there can be no question of any separate remedies for improper interference.

The commentary by Solène Rowan on this article says that it "imposes obligations on the parties".[11] It does not. Indeed, as the author herself notes, the working group that drew up the article deliberately refrained from imposing any duty on the parties. Nonetheless she says that "the remedial measures available to the innocent party are not entirely clear" and criticises the article for not making explicit the consequences of interference. She goes on to speculate about the measure of damages available and whether the remedy of termination is available and regrets that the article and the Official Comments leave "unanswered questions as to the remedies that the innocent party can claim".[12] In fact, the article is absolutely clear. The consequence under the article is that you cannot rely on the condition. That is all. Whether the article should have imposed a special duty or obligation over and above the duties of good faith and fair dealing and co-operation is another question. Indeed, whether the article is necessary at all given the duties of good faith and fair dealing and co-operation is also a relevant question. What is clear is that the parties could include suitable obligations in their contract and the normal remedies for non-performance would then be available.

There is much good analysis and discussion in this part of the Commentary but it seems to me that a failure to hold firmly to the distinction between a duty or obligation on the one hand and a mere requirement on the other has led to a misdirected criticism.

E. EFFECT OF HARDSHIP

The notion of a requirement might also have been useful in relation to Article 6.2.3 of the PICC on the effect of hardship (as defined) on a contractual relationship. Article 6.2.3(1) provides that:

> In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

Only if the parties fail to reach agreement within a reasonable time may either party resort to the court.

11 Vogenauer/Rowan (n 2) Art 5.3.3 para 2.
12 Vogenauer/Rowan (n 2) Art 5.3.3 para 26.

What is this? The article does not impose an independent duty or obligation to request or enter into negotiations. It just says that the disadvantaged party is "entitled" to request negotiations. The use of "entitled" is strange. Anybody is entitled (in the sense of "free") to request negotiations at any time. There is no need to say that. The strangeness of the provision is clearly seen if we ask whether the other party is free to request negotiations. Of course that party is free to do so. There might be reasons to do so. For example, the non-disadvantaged party might say "We are going to need your services in the future. We don't want this unforeseen change of circumstances to risk putting you out of business. Would you like to negotiate an adjustment of the contract terms?" "Entitled" is simply the wrong word. In fact, the article is laying down a requirement. If you are disadvantaged by hardship (as defined) and you want a court to adjust the terms of the contract, it is a requirement that you request negotiations without undue delay and specify the grounds on which the request is based.

There is an interesting question here which goes to the heart of the distinction between a duty and a requirement. As a matter of policy should a hardship provision of this type contain a duty to enter into negotiations or just a requirement? The PICC, as we have seen, have a requirement in essence, although it uses the notion of an entitlement. The DCFR has a requirement. It says (in Article III.-1:110(3)) that the court's powers to vary or terminate the relevant obligation arise only if, among other things, "the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment . . .". There is no *duty* to enter into negotiations. The PECL, however, have a duty. The comments call it an "obligation" but the Principles use these two terms interchangeably. They provide (in Article 6:111) that if performance of a contract becomes excessively onerous because of a change of circumstances "the parties are bound to enter into negotiations with a view to adapting the contract or ending it . . .". Indeed they even provide that a court may award damages for a loss suffered through a refusal to negotiate. The Common European Sales Law (CESL) provided (in Article 89) that where performance becomes excessively onerous because of an exceptional change of circumstances "the parties have a duty to enter into negotiations".

Which is right here – duty or requirement? The question is not discussed in Ewan McKendrick's commentary on Article 6.2.3 of the PICC although he does mention in a footnote that the PECL and the CESL impose a duty to negotiate and he is surprisingly tentative in suggesting that under the PICC a party would not be liable in damages for refusing to negotiate.[13] There is no need to be tentative. Nobody is liable in damages just for failing to meet a requirement. The essence of a requirement is that you have an option.

To answer the question "duty or requirement" we have to look at the essential nature of the distinction between them. Is the law to be strongly in favour of compliance or neutral as to compliance? Do we want to say to somebody faced with unexpectedly and excessively onerous performance "You *should* enter into negotiations. It is your duty." Or do we just want to say "It is up to you. There is a way in which you can ask a court to vary your contract but if you want to go down that route you are required to try negotiations first." It seems to me that the second approach is the more realistic one. After all, the starting point, as all these instruments recognise, is that contractual

13 Vogenauer/McKendrick (n 2) Art 6.2.3 para 1, n 53.

obligations should be performed even if they turn out to be more onerous than expected. A party who is prepared to perform even when performance becomes excessively onerous should be respected, not subjected to a duty to negotiate. And there may be situations where a party will be quite content to perform even when performance has become unexpectedly and excessively onerous. The party may have enormous resources and may be quite content to absorb the costs. The obligation in question may be trivial in value in comparison to the likely costs and trouble of negotiation or litigation, or trivial in comparison to the benefits of maintaining and increasing the goodwill of the other party, or trivial in comparison to the value of maintaining a hard-won reputation of honouring commitments whatever the cost. There may be many reasons why a disadvantaged party would not want to negotiate and there is no reason to impose any pressure to do so. There is nothing wrong with not trying to negotiate a better deal. It is up to the party concerned.

It might perhaps be suggested that the word "excessively" in the PECL and the CESL saves their provisions from having unwanted effects. It might be suggested that the expression "excessively onerous" should be construed subjectively so that only if the performance in question is excessively onerous in the mind of the disadvantaged party does the duty to negotiate come into being. So a performance that has become objectively excessively onerous will not trigger the duty to negotiate if the disadvantaged party is rich enough to bear the burden or has countervailing reasons for bearing the burden or is, for any reason, quite prepared to bear the burden. However, this cannot be right. The comments to Article 6:111 of the PECL give no indication that a subjective interpretation is intended. They talk of a change in circumstances that has "brought about a major imbalance in the contract".[14] And it would be hard to justify a provision that deprived a party of an option just because it was rich or honourable. More fundamentally, to take a subjective view would come close to saying that only a party that wanted to negotiate was bound to negotiate, which would be nonsensical. The provisions cannot be saved in this way.

So, when the theoretical distinction between a duty and a requirement is kept firmly in view it becomes clear that what is needed here is a requirement, not a duty. The PICC and the DCFR are right: the PECL and the CESL are wrong. The theory turns out to have practical value in pointing the way to the correct solution.

F. SPECIFIC PERFORMANCE

Under Article 7.2.2 of the PICC a party loses the right to enforce specific performance of a non-monetary obligation if that party "does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance". The commentary by Harriet Schelhaas refers to a "duty to inspect"[15] and a "duty to request performance within a reasonable time"[16] but it seems clear that what we have here is a mere requirement, not a duty. If you want to take the risk of losing your right to specific performance then that is up to you. The law has no interest in putting pressure on you to keep your right open.

14 O Lando and H Beale (eds), *Principles of European Contract Law* (2000) Art 6:111, Commentary, paragraph B (1).
15 Vogenauer/Schelhaas (n 2) Art 7.2.2 para 52.
16 Vogenauer/Schelhaas (n 2) Art 7.2.2 para 54.

G. TERMINATION

The distinction between a duty and a requirement comes up incidentally in the discussion on termination of a contractual relationship for fundamental non-performance. Article 7.3.4 of the PICC provides that:

> A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

The commentary by Peter Huber says that it may be argued that the demand for adequate assurance "is not enforceable per se. The failure by the other party to provide such an assurance then simply triggers the aggrieved party's right to terminate."[17] The author notes that this approach has the advantage that it would not impose any obligation on the other party that it had not originally undertaken. This seems to be clearly right. Indeed, it is slightly surprising that the author even contemplates another approach. It would be very odd to impose an obligation on a party to provide an assurance when the whole rationale of the article is that the ability to provide such an assurance is doubtful. Another way of putting it would be to say that the giving of an adequate assurance within a reasonable time is simply a requirement of avoiding the situation where the other party has an immediate right to terminate.

H. MITIGATION OF HARM

Article 7.4.8 of the PICC provides that:

> The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

This is sometimes loosely called the duty to mitigate but, of course, it is not a duty at all. Mitigation is just a requirement. It is entirely up to the aggrieved party to take, or not to take, steps to mitigate the harm. The only consequence of not fulfilling the requirement to mitigate is that damages cannot be recovered to the extent that the harm could have been reduced by the taking of reasonable steps. If you do not want to be out of pocket, you take steps to mitigate your loss, but you can choose to be out of pocket if you want to.

Ewan McKendrick in his commentary on the article correctly notes that it does not impose a duty:[18]

> The difficulty with the language of "duty" is that it is misleading insofar as it suggests that the aggrieved party which fails to mitigate incurs liability in respect of its breach of duty. A failure to mitigate does not in fact attract a liability in damages: the effect of a failure to mitigate is simply to deny to the aggrieved party an entitlement to recover damages in respect of the harm which is attributable to its failure to mitigate.

17 Vogenauer/Huber (n 2) Art 7.3.4 para 11.
18 Vogenauer/McKendrick (n 2) Art 7.4.8 para 1.

This is fine but, having explained that there is no duty, the author seems to lack the language to say what there is. Instead he refers to German law. He inserts a footnote[19] saying:

> German law therefore employs the concept of "incumbency" (*Obliegenheit*) rather than "duty" to deal with such cases.

But why resort to German law when we have the concept of a requirement in our own law and when it is used elsewhere in the PICC and the Commentary? And why use the unfamiliar word "incumbency" when we have the familiar word "requirement"? The Requirements of Writing (Scotland) Act 1995 has been on the UK statute book for 20 years. I was closely involved in the preparation of that Act when I was at the Scottish Law Commission and I can say without fear of contradiction that there was not the slightest temptation to call it the Incumbency of Writing (Scotland) Act. The possibility was never even considered.

A theory is perhaps of some practical value if it provides the language necessary to explain certain legal rules – to explain not only what they are not about but also what they are about.

I. CONCLUSION

George is a master of the pithy expression. Many a pithy expression contains an element of exaggeration. It may be an exaggeration to say that there is *nothing* so practical as a good theory. I would say, for example, that a good set of tools was of more practical value. But I hope the above shows that a good theory can indeed be of some practical value.

19 Vogenauer/McKendrick (n 2) Art 7.4.8 para 1, n 123.

COMING TO THE NUISANCE

Douglas J Cusine

A. INTRODUCTION

George Gretton is an inspiration to all legal academics, practitioners and to students. I have spent many an interesting hour listening to George speaking on Law Society of Scotland courses and on other occasions. He has a confident and amusing style, but is always open to comment, especially when he is airing a subject for the first time and is quite willing to admit that his thoughts are at a preliminary stage only. He enjoys the "to and fro" of discussion and is not dogmatic. It must have been a privilege to be a student of George's, hearing someone whose enthusiasm for and knowledge of his topic would be hard to beat.

George began life as a solicitor and, for me, those who teach students, and have some background in practice, can bring an extra dimension to their teaching that may not be so easy for others. It is the ability to tell students what happens "out there" that I think is important. George's interests are catholic, spanning commercial law, diligence, property, trusts, succession and conveyancing. We are the richer for his publications on a vast array of topics, particularly, for me, in the fields of property law and diligence. It is thus a great honour to be asked to contribute to this volume.

B. DISPUTES BETWEEN NEIGHBOURS

I have long been of the view that many disputes between neighbours, for example about access, excessive noise, etc do not have their genesis in any legal issue, but stem from something else, namely the fact that the neighbours do not get on. I am not alone in this.[1] Thus, when neighbour A falls out with neighbour B, both probably spend some time devising ways of making their respective lives difficult, and then unbearable. "This will not be resolved until one of you leaves", says the legal advisor, only to be met with the riposte: "Well, it won't be me." Lawyers' letters (perhaps even emails) fly back and forth at great cost and often to no avail. For the respective clients, it has become "a matter of principle" – time and money become of secondary, or even, of no importance. In the past, matters of principle have gone to the sheriff court, the Court of Session, and to the House of Lords (now the Supreme Court).

1 See R Rennie, "Boundary disputes" 2001 SLT (News) 115 and R Rennie, "Boundary disputes revisited" 2013 SLT (News) 189. See also Robert Rennie's contribution to this volume at 210–222.

The criminal courts do not escape. For example, it is perhaps unusual to take a dispute about refurbishment of a tenement and available grants so seriously as to take out a "contract" on a neighbour who was "out of step" with the rest, and to plan his murder under the Forth Bridge, presumably to avoid interference with traffic. But this form of alternative dispute resolution, coverage of which is absent from the texts, is the subject of a reported criminal case, as recent as 1998.[2] The neighbour, one assumes, was becoming a bit of a nuisance: "Who will rid me of this troublesome neighbour? – for £5,000."

C. WHAT IS A "NUISANCE"?

For this essay, it is not necessary to define "nuisance," and indeed, it would be prudent not to try. In *Central Motors (St Andrews) Ltd v Magistrates of St Andrews*,[3] Lord Migdale stated: "The next question concerns 'nuisance.' It is not easy to define that term and it may be that it is not capable of exact definition."[4] Bell describes the concept in this way:

> whatever obstructs the public means of commerce and intercourse, whether in highways, or navigable rivers, whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood, whatever is intolerably offensive to individuals in their dwellinghouses, or inconsistent with the comforts of life whether by stench (as the boiling of whale blubber) by noise (as a middy in an upper floor) or indecency (as a brothel next door[5]) is a nuisance.[6]

The most recent and authoritative commentary on the law of nuisance is by Professor Niall Whitty in the *Stair Memorial Encyclopaedia* (Reissue).[7]

However nuisance is defined, there are a number of effectual defences and a number of ineffectual ones,[8] one of which is stated to be that the pursuer came to the nuisance.[9] The authority for the view that this is not a defence comes from a remark made by Lord Halsbury in *Fleming v Hislop*,[10] the facts of which, briefly, were these.

The proprietor of the Kelvinside Estate in Glasgow, having exhausted the minerals, then feued off[11] the estate for houses and streets. But there were 260,000 tons of refuse, i.e. slag heaps, adjoining the development. They were inflammable and the proprietor (now the superior) proposed to set them on fire. If that had been

2 *Baxter v HM Advocate* 1998 JC 219. The case pre-dates the Tenements (Scotland) Act 2004, which generally allows majority decision-making for repairs, which can thus not be blocked by one flat-owner.
3 1961 SLT 290
4 1961 SLT 290 at 295.
5 See Leno, "De lustris" 1979 SLT (News) 73.
6 Bell, *Prin* § 974.
7 N R Whitty, "Nuisance" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001) paras 1–168. The various definitions are discussed in paras 1–6. See also J C C Broun, *The Law of Nuisance in Scotland* (1891).
8 Whitty, "Nuisance" (n 7) para 132; Broun, *Nuisance* (n 7) paras 109–116.
9 See e.g. Whitty, "Nuisance" (n 7) para 132 and Broun, *Nuisance* (n 7) para 109.
10 (1883) 13 R (HL) 43 at 49–50.
11 That is to say conveyed under the feudal system, but retaining the superiority of the properties.

done, the fire would have lasted for several years. The sheriff-substitute (Speirs) upheld a defence of coming to the nuisance. On appeal, that decision was overturned by the Second Division and their decision was upheld by the House of Lords. Lord Halsbury commented:

> there is only one observation which I should like to make, and that is with reference to a phrase which occurs in the judgment of the Lord Justice-Clerk, which I think may give rise to error hereafter. If the Lord Justice-Clerk meant to convey that there was anything in the law which diminishes the right of a man to complain of a nuisance because the nuisance existed before he went to it, I venture to think that neither in the law of England nor in that of Scotland is there any foundation for any such contention. It does not matter whether the man went to the nuisance or the nuisance came to him, the rights are the same.[12]

He quoted a list of English authorities in support of that comment. What exactly was the Lord Justice-Clerk's comment which gave rise to this judicial "slap on the wrist?" He had observed:

> But it is said in answer that this is a mineral district, and that persons coming to the neighbourhood and building residences must have laid their account to being subjected to this discomfort and annoyance, and as being an incident of the district, they have come it is said to the nuisance. I am not prepared to give any countenance to that plea. I think it is inapplicable in an urban suburb such as this.[13]

Whether it was the last sentence which upset Lord Halsbury, we cannot know. That apart, there seems little ambiguity in what the Lord Justice-Clerk said.

D. REFERENCES AND LITERATURE

There is an entry for "Nuisance" in the Index to *The Acts of the Parliament of Scotland*[14] and the legislation ranges from Appendix II to the Acts of Alexander III (1281), the Statuta Gilda, to 1621. As far as can be seen, the first writer to mention "nuisance" is Kames in his *Principles of Equity*. There is no mention in the first edition,[15] but it appears in the second edition onwards[16] in his treatment of "protecting individuals from harm". He says that neighbours in a town must submit to harm from each other and cites from *A New Abridgement of the Law*[17] where the author gives a list of things that might be a nuisance, including the somewhat quaint notion of dividing a house for the occupation of "poor people" as that might cause the spread of infection during any plague. The first reported Scottish case seems to be *Fleming v Ure*.[18]

In his *Lectures*,[19] Hume states:

12 (1883) 13 R (HL) 43 at 49–50.
13 (1882) 10 R 426 at 432 per Lord Justice-Clerk Moncreiff.
14 T Thomson, C Innes and A Anderson (eds), *The Acts of the Parliaments of Scotland*, vol 12 (1875) at 906.
15 See H Home, Lord Kames, *Principles of Equity* (1760) 2 which discusses "protecting individuals from harm" but without referring to nuisance, in contrast to the later editions.
16 E.g. H Home, Lord Kames, *Principles of Equity* (2nd edn, 1768) 59.
17 "A Gentleman of the Middle Temple", *A New Abridgement of the Law*, vol 3 (1740) 686. I am most grateful to Andrea Longson of the Advocates' Library for finding this reference for me.
18 (1740) Mor 13159.
19 G C H Paton (ed), *Baron David Hume's Lectures, 1786-1822*, vol 3 (Stair Society vol 15) (1952) 216.

> No matter how noisome a trade may be, nay noxious and unwholesome even, still, if from time immemorial it has been carried on without complaint or interruption in a certain quarter of the City, there it must remain, or those who think it worthwhile must buy and transact for its removal. This is true in a question even with the old and hereditary inhabitants of that quarter, and much more in a question with the new comers, the owners of houses lately erected there in the course of the increase of the town. Such persons have no title to complain: they have come to the nuisance and not the nuisance to them.[20]

In the 4th edition of Bell's *Principles*,[21] which was the last edited by Bell himself, it is stated: "The doctrine of nuisance must be taken under two qualifications (1) That one is not to complain of a nuisance if he comes to the nuisance. This proceeds on the ground of personal exception (i.e. personal bar.)" However, commenting on that, Guthrie, the editor of the 10th edition says in commenting on the passage just quoted, "but it can hardly be said to be established by the cases cited [*Colville v Middleton*[22] and *Duncan v Earl of Moray*[23]] or later cases in which the plea has been raised". He refers to *Ewen v Turnbull's Trs*[24] and *Cooper v NB Railway Co*.[25] I shall return to these cases later.

In Ivory's Notes to the 6th edition of Erskine's *Institute*, the editor is more cautious:

> Where a nuisance has existed before the party complaining acquired his property so that he came to it, and not it to him; or where the work or manufactory creating the nuisance has been constructed under his eye, the case becomes still more unfavourable, and a shorter period of acquiescence will be required to support it.[26]

The editor therefore has in mind acquiescence, which is a defence to nuisance, but he cites *Duncan v Earl of Moray*[27] in support of that plea. Before turning to the most recent exposition on the subject, it is worth noting what Rankine says about the plea of "coming to the nuisance". He states:

> The plea, when stated most broadly comes to this–that if, at the commencement of the nuisance, no person was in a situation to be injured, or being in such a situation, did not get it abated, no one coming to acquire premises in a situation to be injured, either by succession or singular titles, has a right to complain, however short a time the nuisance has existed before his acquisition. He came to the nuisance not it to him. Before analysing this extraordinary doctrine, it will be well to refer to the authorities in Scots and English law.[28]

The Scottish cases he cites are *Miller v Stein*,[29] *Jameson v Hillcoats*,[30] *Duncan v Earl of Moray*[31] and *Colville v Middleton*.[32] Rankine's statement reads rather oddly in that, if

20 The editor, of course, notes that this is no longer the law. *See Hume's Lectures* (n 19) 216 n 92.
21 Bell, *Principles* (4th edn, 1839) § 977.
22 27 May 1817, FC.
23 9 June 1809, FC.
24 (1851) 19 D 573.
25 (1863) 1 M 499.
26 Erskine, *Inst* (4th edn by J Ivory, 1828) 2.1.3 (editor's footnote).
27 9 June 1809, FC.
28 J Rankine, *The Law of Land-Ownership* (4th edn, 1909) 387.
29 (1791) Mor 12823.
30 24 June 1800, FC.
31 9 June 1809, FC.
32 27 May 1817, FC.

one reads only the passage above, one would conclude that the defence of "coming to the nuisance" was still valid in 1909. Two pages further on, it is clear that it is not a defence.[33]

In the *Stair Memorial Encyclopaedia* Reissue[34] Whitty notes both the valid and the invalid defences to nuisance. He notes that "coming to the nuisance" is not a valid defence,[35] referring to *Fleming v Hislop*,[36] but observes that the statement in *Fleming* was "preferred to" the older Scottish cases. Whether Whitty saw this as a matter of regret, or was simply stating a fact, is not clear.

E. THE OLDER SCOTTISH CASES

(1) General

The three cases cited by Whitty are *Duncan v Earl of Moray*,[37] *Colville v Middleton*[38] and *Arrott v Whyte*.[39] These are discussed below. He states that there are others. The cases on nuisance in Morison's *Dictionary* are primarily under the title "Property", but there are some under the title "Public Police". The various writers cited above mention the following cases: *Charity v Riddell*,[40] *Cooper v NB Railway Co*,[41] *Ewen v Turnbull's Trs*,[42] *Magistrates of Inverness v Skinners Incorporation*,[43] *Jameson v Hillcoats*,[44] *Kinloch v Robertson*,[45] *Miller v Stein*,[46] *Ralston v Pettigrew*,[47] *Robertson v Campbell*[48] and *Thomson, Petitioner*.[49] Of these, the ones most frequently cited in support of the existence of the defence are *Duncan* and *Colville*. Whatever support there may have been in these cases for the defence of "coming to the nuisance" was demolished by Lord Halsbury in *Fleming*, a matter already noted.[50] In my view, his Lordship's comment was *obiter*, but his statement represents the current law.

Before dealing with the main cases, it is worth mentioning the others that have been cited in this connection. In *Charity* the issue was an increase in what was

33 Rankine, *Land-Ownership* (n 28) 389.
34 Whitty, "Nuisance" (n 7) para 132.
35 Whitty, "Nuisance" (n 7) para 132.
36 (1883) 13 R (HL) 43.
37 9 June 1809, FC (cited by Bell, *Prin* in the 4th and 10th edns, § 978; Erskine, *Inst* 2.1.3; Rankine *Land-Ownership* (n 28) 388 and Whitty "Nuisance" (n 7) para 128).
38 27 May 1817, FC (cited by Bell *Prin* 4th and 10th edns, § 978; Erskine, *Inst* 2.1.3; Rankine, *Land-Ownership* (n 28) 338 and Whitty, "Nuisance" (n 7) para 128).
39 (1826) 4 Murr 149 at 159 per Lord Gillies (cited by Whitty "Nuisance" (n 7) para 132).
40 5 July 1808, FC (cited only by Hume, *Lectures* (n 19) vol 3, 213).
41 (1863) 1 M 499 (cited by Bell, *Prin* (10th edn) § 924; Rankine, *Land-Ownership* (n 28) 389 and Whitty "Nuisance" (n 7) para 113).
42 (1859) 19 D 513 (cited by Bell, *Prin* (10th edn) § 978 and Rankine, *Land-Ownership* (n 28) 388.
43 (1804) Mor 13191 (cited by Hume, *Lectures* (n 19) vol 3, 215).
44 24 June 1800, FC (cited by Hume, *Lectures* (n 19) vol 3, 220 and Rankine, *Land-Ownership* (n 28) 388).
45 (1756) Mor 13163 (Kames' report is fuller) (cited by Hume, *Lectures* (n 19) vol 3, 214).
46 (1791) Mor 12823 (cited by Rankine, *Land-Ownership* (n 28) 388).
47 (1805) Mor 12808 (cited by Hume, *Lectures* (n 19) vol 3, 213).
48 2 March 1802, FC (cited by Hume, *Lectures* (n 19) vol 3, 214).
49 18 Dec 1807, FC (cited by Hume, *Lectures* (n 19) vol 3, 214).
50 At C above.

argued to be nuisances and the court held that, even if nuisances existed, that did not authorise increasing them. In *Cooper*, which was a jury case, the issue was whether the pursuers had purchased a house after the erection of works by the defenders. The defenders argued "coming to the nuisance" with reference to *Colville* and *Duncan*, but the basis on which the jury decided the case is not known. *Ewen* was another jury case, but the issue was acquiescence, which is a defence to nuisance. The defence of "coming to the nuisance" was not raised in *Magistrates of Inverness*. In *Jameson*, a minority of the judges were of the view that most of the complaining proprietors had come to the nuisance, but the majority thought that there was a nuisance and that the work giving rise to it should be prohibited until means were found to prevent it. The defence was not raised in the cases of *Kinloch*, *Miller*, *Ralston*, *Robertson* and *Thomson*. As has just been said, the two cases cited by most authors are *Duncan* and *Colville*.

(2) *Duncan v Earl of Moray*[51]

The material facts were as follows. The common sewers of the Old Town of Edinburgh were collected into a stream which flowed through lands belonging to both the pursuer (and others) and the defender, which were in Restalrig. Proprietors of adjoining ground used to irrigate their lands from the stream and they collected the contents in pits and ponds to gather manure. In 1796, Duncan, a Writer to the Signet, purchased a house and grounds in the neighbourhood. He and others alleged that the ponds were increasing in number and becoming more offensive, largely because of the smell. They petitioned the sheriff, averring that this was a nuisance, and a proof was allowed. However, the defender appealed and Lord Cullen reported the case to the court.

It was established that the defender and others had been exercising the "right" for over 50 years.[52] Another purchaser had bought in 1772 and for 32 years did not complain. The defender submitted that none of the houses in the neighbourhood was unoccupied and made five points: (1) the practice had continued since time immemorial; (2) the principal residences had always been occupied; (3) there was no medical support for the view that the smell was adverse to the health of the occupants; (4) on the contrary, witnesses spoke to the healthiness and the longevity of the residents; and (5) the pursuer had had "these things in his eyes" when he bought the property, that he knew that the ponds had been existence prior to the death of one, Ronald Crawford, who had died 46 years previously and the price the pursuer paid reflected the existence of the ponds etc. The main grounds for the decision were that: (1) the contents of the so-called "foul burn" were much more pernicious to health if spread on the ground; (2) the proprietors were entitled to take *alluvio* from the burn as they had done for a period in excess of 50 years; and (3) the pursuers had come to the nuisance. It can hardly be said that this case is authority for the view that "coming to the nuisance" is by itself a defence. Whitty cites this

51 9 June 1809, FC.

52 The report is not very detailed, but much more information was gleaned from the Session Papers. The author is grateful to Mungo Bovey QC, the Keeper of Advocates' Library, for permission to use the Library.

case when dealing with negative prescription and nuisance,[53] as does Broun.[54] In the *Scots Digest*, it is listed under prescription.[55]

(3) *Colville v Middleton*[56]

Salt works had been erected in 1794. They were on Middleton's land, but close to Colville's mansion house "Craigflower". Colville's predecessor in title visited the works, but did not complain, nor did his son who died in 1815, after which the pursuer purchased. He brought an action for nuisance in respect of a salt pan and a smiddy, which he said gave off an offensive and acrid smell. The defender submitted that the pursuer had come to the nuisance, in that he purchased his house after the erection of the salt-pan and smiddy. In the pleadings, as disclosed by the Session Papers,[57] the defender pleaded that the pursuer was in the same position whether he had bought the property after the erection of the nuisance, or had built his house after it. The pursuer commented on the plea of "coming to the nuisance" by saying:

> The words "coming to the nuisance" in one case it is plain, have a different meaning from what they have in the other: and the reason why a person building beside a nuisance is deprived of any remedy, is because the evil to his property is of his own making. But in the case of a purchaser, the evil is not caused either by him or his author but by the erection of the nuisance . . . The petitioner does therefore confidently submit, that this argument of the defenders is sophistical to a degree greater than is usual, even in bad arguments, submitted to your Lordships.

Lord Pitmilly's decision, that the pursuer had come to the nuisance, was upheld, but it is of note that acquiescence was also established. The report states: "in respect of the acquiescence of the former proprietor . . . and that the pursuer made the purchase in the state of matters now referred to [four salt works on the pursuer's property] . . . he is precluded from complaining of the salt works as a nuisance".[58] Again, this decision is not authority for the proposition that coming to the nuisance is a defence. This case is also cited by Whitty under the heading of acquiescence in relation to nuisance[59] and Broun likewise.[60] In the *Scots Digest*, it is listed under acquiescence.[61] In *Macgregor v Balfour*,[62] Lord President Balfour refers to *Kinloch*, but as an example of acquiescing in a nuisance.[63] In connection with *Duncan* and *Colville*, Broun adds the rider that the cases might not have been accurately reported,[64] but, as has been noted, there is more to be gleaned from the Session Papers.

53 Whitty, "Nuisance" (n 7) para 123.
54 Broun, *Nuisance* (n 7) 101.
55 *The Scots digest of Scots appeals in the House of Lords from 1707 and of the cases decided in the Supreme Courts of Scotland 1800–1873*, vol 3 (1911) 295 and 614.
56 27 May 1817, FC. The Session Papers do not have a volume number, but the case number is cvi.
57 The Session Papers do not have a volume number, but the case number is cxvi.
58 This is narrated in the report in the Faculty Collection.
59 Whitty, "Nuisance" (n 7) para 128.
60 Broun, *Nuisance* (n 7) 104–105.
61 *The Scots digest of Scots appeals* (n 55) 292.
62 (1899) 2 F 345.
63 (1899) 2 F 345 at 352.
64 Brown, *Nuisance* (n 7) 109.

(4) *Arrott v Whyte*[65]

This is the third and final case referred to by Whitty. It was a jury case in which Lord Gillies directed the jury that if they were to favour the pursuer's position (who objected to the manufacture of soda and other things that he averred damaged his trees) they had to suspend judgment "as to the injury and damage, till you have made up your minds as to whether the pursuer came to the nuisance, or acquiesced in it for a tract of years".[66] A verdict for the pursuer was returned, with damages of £5. We do not know the basis for the decision, but his Lordship was clearly of the opinion that, "coming to the nuisance" was a defence. That said, an address to the jury is not authority, especially when the reason for the verdict that the jury returned cannot be ascertained and the defence of acquiescence was also in front of them.[67]

F. REFLECTION

The following thoughts are offered. First, in determining whether or not something is a nuisance, each case will have to be looked at on its own facts. In the past, the approach might have been to identify "material harm", or to weigh competing interests, or to draw a distinction between physical damage and personal harm,[68] but the current approach in Scotland is to look at the whole circumstances.[69]

Secondly, as far as can be seen, there is no decided case turning on whether "coming to the nuisance" is a defence in Scots law.

Thirdly, what may be objectionable in one location may have to be tolerated in another. In the early case of *Kinloch v Robertson*,[70] the court stated:

> Neighbours in towns must submit to ordinary inconvenience from each other, but they must be protected against extra disturbances, such as may render their property useless to them, or at least uncomfortable. Close neighbourhood introduces this temperament in equity, but not in such a marker as to deprive his neighbour of the use of his property.[71]

This sentiment was echoed first by Lord President Clyde in *Maguire v McNeil Ltd*[72] where he refers to *Kinloch* and by Lord Cooper in *Watt v Jamieson*,[73] where he said: "It must be accepted that a certain amount of inconvenience, annoyance or disturbance and even damage must just be accepted as the price the pursuer pays for staying where he does in a city tenement." This comment was quoted with approval by Lord Fraser of Tullybelton in *RHM Bakeries v Strathclyde Regional Council*.[74] It is unlikely that someone who buys property next to a pub, chip shop, or night club will be able to object to noise, *per se*, as being a nuisance, but the noise that emanates from such establishments would not be acceptable in the countryside. It might be put in this

65 (1826) 4 Murr 149.
66 (1826) 4 Murr 149 at 159.
67 (1826) 4 Murr 149 at 160.
68 Whitty, "Nuisance" (n 7) para 37.
69 Whitty, "Nuisance" paras 48 and 49.
70 (1752) Mor 13163 (Kames' report).
71 (175) Mor 13163 at 13165.
72 1922 SC 174 at 185.
73 1954 SC 56 at 58.
74 1985 SC (HL) 17 at 43.

way: "You take your property as you find it." That is not the same thing as "coming to the nuisance", because, even if some noise emanating from say a night club has to be tolerated, there may come a point when the noise is a nuisance and it is not a defence to argue: "You have put up with it thus far."

Fourthly, the courts will take a fairly pragmatic approach, if only, because the parties may not have been able, or willing to do so. Such an approach and a refreshing one at that can be seen in the observation of Baron Bramwell in the English case of *Bamford v Turnley*:

> It is as much for the advantage of the one owner as of another, for the very nuisance he complains of, as the result of the ordinary use of his neighbour's land, he will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.[75]

A pragmatic approach was also taken by the court in *Webster v Lord Advocate*.[76] The pursuer was the owner and occupier of a flat in Ramsay Garden in Edinburgh. The property overlooks and is adjacent to the Castle Esplanade. The proprietor raised an action of interdict in respect of various activities in preparation for the Edinburgh Military Tattoo, including the noise associated with the erection of the scaffolding. In the Outer House, Lord Stott granted interdict, but suspended its operation for six months to allow that year's Tattoo to proceed and for the parties to enter into discussions. However, in the Inner House,[77] the only issue was the noise of the scaffolding being put up and interdict was granted. A different method must have been devised as obviously the Tattoo still takes place; alternatively, the pursuer has departed, and such noise as there may be not objected to by the current occupants.

In conclusion, what is not a "nuisance" for lawyers is that neighbours will continue to disagree, in some cases violently, and while some of the parties are a "nuisance" when they come to court, the antics of some of them do help to brighten up what might otherwise be a dull day. The same might go for those who have to listen to university lectures, but George's lectures are never dull.

75 (1862) 3 B & S 62 at 84.
76 1984 SLT 13.
77 1985 SLT 173.

REVISITING OLD LAW: JUDICIAL DEVELOPMENT OF THE LAW OF CONTRACT

Patrick Hodge

A. INTRODUCTION

Robert Burns famously wrote: "Facts are chiels that winna ding, An' downa be disputed."[1] Judicial dicta often do not have that quality.

Judges have to review and update contract law to address problems in the way that the law has developed and to meet current social and economic needs. That process occurs in the context of a particular case. Whether consciously or unconsciously, a judge's expression of the relevant rules is often influenced by the circumstances of the case as the judgment seeks to explain the particular decision. Rulings and dicta are read and applied in other cases by judges and, over time, the law can move in a direction that then needs correction by a senior court. There may be said to be a pendulum, the limits of whose swing are constrained by corrective appellate decisions, which can themselves be controversial.

Five Supreme Court cases on contract, in which I participated, can illustrate the swing of the judicial pendulum. They fall under two main headings. The first is ascertainment of the terms of the contract, and this involves (1) interpretation, (2) the implication of terms and (3) rectification. The second is the regulation of contract by the common law and this involves (1) penalty clauses and (2) the doctrine of illegality.

B. ASCERTAINING THE TERMS OF A CONTRACT

(1) Interpretation

Since the 1970s there has been an increased emphasis on a purposive approach to the interpretation of contracts in order to give effect to the reasonable expectations of honest contracting parties. The celebrated judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)*[2] in 1998 was seen by many to be revolutionary.

References to commercial interpretation, business common sense and fulfilling the reasonable expectations of honest contracting parties have become recurring

1 Robert Burns, "A Dream" (1786).
2 [1998] 1 WLR 896 per Lord Hoffmann at 912.

themes. It has been suggested that Lord Hoffmann's discussion of the use of interpretation to correct mistakes in contracts has shifted the focus of the court from the words that the parties or their legal advisers chose to use to a broader assessment of the commerciality of the deal. Hard-pressed lawyers, who have to negotiate commercial contracts under strict time constraints, whose clients are reluctant to spend, and who may be forced by the vagaries of commercial negotiation to use deliberate ambiguity in their drafting, may have welcomed a regime by which the courts would seek to impose a sensible interpretation on their contracts and on occasion get round infelicities of language.

Even where there are not such pressures in the drafting of contracts, uncertainties are unavoidable, for example where a contract is to remain in force and be applied in the future in circumstances that cannot be foreseen. In large financial transactions, huge sums of money may be at stake when a court has to interpret a contract.[3] There is an important place for the application of commercial common sense. But how far has the law moved from a contextual focus on the language that the parties used in their contract? I suggest it is not far.[4]

In *Rainy Sky SA v Kookmin Bank*,[5] Lord Clarke summarised the modern approach in a much-quoted statement:

> The language used by the parties will often have more than one potential meaning. I would accept the submission . . . that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

In 2015, the Supreme Court in *Arnold v Britton*[6] considered contracts, which with hindsight should never have been agreed. A leisure park near Swansea in Wales comprised 91 chalets, each of which was let for a period of 99 years. In each lease, the tenant entered into a covenant to pay a service charge to the park for maintaining the roads and fences, and other services. In a typical clause the tenant undertook:

> To pay to the Lessor without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the Lessor in repair maintenance renewal and the provision of services hereinafter set out the yearly sum of Ninety Pounds and value added tax (if any) for the first three years of the term hereby granted increasing thereafter by Ten Pounds per Hundred for every subsequent three year period or part thereof.

The apparent effect of the clause was that the initial service charge of £90 per annum was to increase on a compound basis every three years, which is broadly equivalent

3 See, e.g., the recent judgment of the UK Supreme Court in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29.

4 Lord Bingham, "A new thing under the sun? The interpretation of contracts and the *ICS* decision" (2008) 12 EdinLR 374.

5 [2011] UKSC 50, [2011] 1 WLR 2900 at para 21.

6 [2015] UKSC 36, [2015] AC 1619.

to a compound rate of 3% per year. Twenty-one of the leases were significantly more burdensome as they provided for an annual escalator of 10%. If the words of the clauses were given their natural meaning, by 2072 the tenants with an annual escalator would be paying £1,025,004 annually for the limited services.

Unsurprisingly, the tenants sought to escape this ruinous bargain. Their counsel argued that the clause was properly read as providing that each lessee was to pay a fair proportion of the lessor's costs of providing the services, subject to a maximum, which was at first £90 but which escalated thereafter. In other words, they argued that the words "up to" should be read into the clause immediately before the words "the yearly sum of Ninety Pounds".

The majority of the court did not accept this submission. In the leading judgment, Lord Neuberger focused on the meaning of the words in the clauses of the leases in their documentary, factual and commercial context. He gave guidance on the interpretation of contracts, identifying seven factors.[7] It is sufficient to quote from the first, in which he said:

> First, the reliance placed in some cases on commercial common sense and surrounding circumstances . . . should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract . . .

In a strongly worded dissent, Lord Carnwath emphasised the role of interpretation in both resolving ambiguities and correcting mistakes. Having regard to the catastrophic consequences of an annual 10% compound escalator in the long term if general price inflation was well below that level, he thought that it was clear that something had gone wrong with the language that the parties had used to allow the lessor to recoup the cost of the common services.

In a short judgment concurring with the majority, I suggested that the task of the legal construct, the reasonable person, was to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words that the parties used. The question for the court was not whether a reasonable and properly informed tenant would enter into such an undertaking, as that would involve the court in rewriting the parties' bargain in the name of commercial good sense. Before the court could remedy a mistake in the use of language in a contract, it must be satisfied as to both the mistake and the nature of the correction.[8]

Some counsel and commentators have seen the majority's decision in *Arnold v Britton* as a "recalibration" of the rules of contractual interpretation set out in *Rainy Sky* with a greater emphasis on literal interpretation at the price of business common sense. I do not agree. All three judgments in *Arnold* accepted Lord Clarke's presentation of the law in *Rainy Sky* as accurate and authoritative. What differed between the two cases were the terms of the contract and the surrounding circumstances.

7 [2015] UKSC 36, [2015] AC 1619 at paras 17–23.

8 [2015] UKSC 36, [2015] AC 1619 at para 78, citing *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 at para 21 per Lord Neuberger MR.

Rainy Sky concerned an obligation in a shipbuilder's refund guarantee by which the bank, in consideration of the purchaser's payment of pre-delivery instalments for the vessel, undertook as primary obligor to pay "all such sums due to you under the contract". It was unclear whether those sums referred back to the pre-delivery instalments repayable on an insolvency event, or to the same instalments in a prior clause that were repayable only on termination of the contract or on the total loss of the vessel. The words were clearly open to two credible constructions, and that was the context in which Lord Clarke said what he did in the passage that I have quoted.[9]

By contrast, in *Arnold v Britton* the majority of the court considered the clause setting up a fixed sum contribution to the cost of common services with a price escalator was commercially unwise for the tenants to accept but thought that the words of the contract were not unclear. In reaching that view, the majority took account of (a) the high rates of price inflation that prevailed when the leases were entered into, (b) the utility of a clause imposing a fixed monetary contribution in order to avoid disputes over what would be a proportionate share, and (c) the lack of a credible alternative interpretation of the words used in the leases.

The approach summarised in *Rainy Sky* is not a formulaic one of ascertaining the possibility of more than one meaning for the contractual words and treating that discovery as a green light to the court to apply its view of what is fair and sensible as a commercial deal as a preferred interpretation. Such an approach risks both a devaluation of the objective contextual interpretation of the words the parties have chosen and also creating avoidable uncertainty.

I question whether the English courts in *ICS* and *Rainy Sky* really moved far, if at all, from Lord Wilberforce's formulation 50 years ago when he said that "what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were".[10] At the same time I believe that the majority judgment in *Arnold v Britton* did not impose significant constraints on the contextual approach that allows the court to have regard to business common sense. Since *Rainy Sky*, indeed since Lord Wilberforce 50 years ago, the judicial pendulum has not moved far.

(2) The implication of terms

I focus here on what is commonly called "implication in fact". In other words, a term is implied into a particular contract in the light of its express terms, commercial common sense, and the facts known to both parties at the time the contract was made.[11] This form of implication of terms addresses how a contract will operate in circumstances to which the drafter has often not addressed his or her mind.

The traditional approach in both Scots law and English law is a restrictive one. The court implies a term into a contract only where it is necessary to give the

9 There are passages in *Rainy Sky* that could be misapplied out of context. Thus at [2011] UKSC 50, [2011] 1 WLR 2900 paras 29 and 30 Lord Clarke endorsed a dictum of Longmore LJ in *Barclays Bank plc v HHY Luxembourg SARL* [2011] BCLC 336 at paras 25–26 to the effect that where alternative constructions are available, one has to consider which is more commercially sensible. In my view that was not intended to be and is not a licence to override the words that the parties have chosen to use by applying criteria of proportionality or reasonableness.

10 *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 997.

11 *Geys v Société Générale* [2013] 1 AC 523 at para 55 per Lady Hale.

contract business efficacy.[12] An alternative formulation is that if the parties were asked by an officious bystander what would happen in a certain event, they would both reply, "Of course, so and so will happen." [13]

This approach seemed to be called into question by the Judicial Committee of the Privy Council in 2009. In *Attorney General for Belize v Belize Telecom Ltd*,[14] in a judgment written by Lord Hoffmann, the Board described the implication of a term as "an exercise in the construction of the instrument" and supported the contention by reference to authority.[15] The test for the implication of a term, the Board said, was "whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean".[16] The traditional tests that an implied term would "go without saying" or be "necessary to give business efficacy to the contract" were not different or additional tests. In other words, the Board in their advice treated implication as part of the basic process of construction of the instrument and appeared to put the focus on what the reasonable person would understand the contract to mean.

The judgment gave rise to a flurry of academic writing[17] and also criticism from the Singapore Court of Appeal, which refused to follow its reasoning so far as it suggested that the traditional business efficacy and officious bystander tests were not central to the implication of terms.[18]

This apparent liberalisation of the implication of terms into a contract was founded upon by the tenant in a case that reached the UK Supreme Court in 2015: *Marks and Spencer plc v BNP Paribas*.[19] Marks and Spencer were a tenant of retail premises under a detailed and professionally negotiated commercial lease that contained a break clause, giving the tenant the option to terminate the lease early. The break clause required the tenant to do three things: (a) to give six months' prior written notice, (b) to have no arrears of basic rent and value added tax, and (c) to pay a substantial premium. Marks and Spencer duly gave written notice. It then paid its quarterly advance rent on time and only thereafter, shortly before the break date, did it pay the premium, thereby meeting all the requirements of the break clause. The lease was thus brought to an end on 24 January 2012, but Marks and Spencer had paid a substantial sum as the quarterly rent for the period extending until 25 March 2012. The tenant sought to imply a term into the lease that the landlord was

12 *The Moorcock* (1889) 14 PD 64 at 68 per Bowen LJ; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 per Scrutton LJ.

13 *Reigate* (n 12) at 605; *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 per MacKinnon LJ.

14 [2009] UKPC 10, [2009] 1 WLR 1988.

15 [2009] UKPC 10, [2009] 1 WLR 1988 at paras 19–20; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609 per Lord Pearson; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 559 per Lord Steyn.

16 [2009] UKPC 10, [2009] 1 WLR 1988 at para 21.

17 See C Peters, "The implication of terms in fact" [2009] CLJ 513; P S Davies, "Recent developments in the law of implied terms" [2010] LMCLQ 140; J McCaughran, "Implied terms: The journey of the man on the Clapham omnibus" [2011] CLJ 607; R Hooley, "Implied terms after *Belize Telecom*" [2014] CLJ 315; J W Carter and W Courtney, "*Belize Telecom*: a reply to Professor McLauchlan" [2015] LMCLQ 245.

18 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267.

19 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

obliged to refund the apportioned part of the advance rent payment for the period from the end of the lease (24 January) to 25 March.

The obligation to pay the rent in advance gave the landlord a windfall as it was paid rent for two months after the lease had expired. This seemed unfair; and the tenant's position was a reasonable one. But the court unanimously decided that it could not imply into the lease an obligation on the landlord to refund the post-expiry proportion of the advance rent.

The case is of general interest for Lord Neuberger's comments on the law of implied terms in the leading judgment and the comments of Lord Carnwath and Lord Clarke in their separate judgments. Lord Neuberger reasserted the business efficacy test: "a term can only be implied if, without the term, the contract would lack commercial or practical coherence".[20] He emphasised the warning of Sir Thomas Bingham MR in *Philips Electronique*:

> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court to fashion a term which will reflect the merits of the situation as they then appear. Tempting but wrong.[21]

Lord Neuberger warned against reading Lord Hoffmann's formulation, with its emphasis on what a reasonable person would understand the contract to mean, as suggesting that reasonableness was a sufficient ground for implying a term. There was to be no dilution of the test for the implication of a term.

Interpretation involved construing the words that the parties had used in their contract and preceded the consideration of any question of implication. Because Lord Hoffmann's words in *Belize* were open to more than one interpretation and some of the interpretations were wrong in law, Lord Neuberger stated that "those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms".[22]

Lord Carnwath agreed with Lord Neuberger's reasons and argued that *Belize*, properly construed, did not alter the prior law on the implication of terms, remained authoritative and helpfully emphasised that implication involved the court using objective evidence to identify the presumed intention of the parties. Lord Clarke also concurred, acknowledging that Lord Hoffmann had given a wide meaning to "construction", which involved determining the scope and meaning of the contract by both interpreting the words that the parties had used and also implying terms into the contract.

The Supreme Court has thus held that *Belize* did not innovate on the test for the implication of a term into a contract. Implication is not merely an aspect of the interpretation of a contract but is available only if the contract would otherwise lack practical or commercial efficacy. One senses that the pendulum has been pushed back from *Belize*, most clearly in the majority judgment but also in Lord Carnwath's rejection of expansionist interpretations of Lord Hoffmann's words.

20 [2015] UKSC 72, [2016] AC 742 at para 21.
21 *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481.
22 [2015] UKSC 72, [2016] AC 742 at para 31.

(3) Rectification

English case law on rectification is of less interest to a Scots lawyer because our law of rectification is based on statutory provisions[23] while in England it is an equitable remedy. But the Supreme Court's judgment in a "switched wills" case, *Marley v Rawlings*,[24] casts light on the boundary between the correction of mistakes by interpretation on the one hand and rectification on the other.[25]

In May 1999 Alfred Rawlings and his wife, Maureen, were visited by their solicitor to enable them to sign their wills. Their wills were short and mirrored each other. Unfortunately, the solicitor gave each spouse the other's draft will to sign. As a result, Mr Rawlings signed his wife's will and she signed the will meant for him. The problem was overlooked when Mrs Rawlings died, but later came to light on the death of her husband.

The appellant, Mr Marley, who was the beneficiary under the challenged will, sought to win by interpretation. His argument was simple: the two wills, by a cohabiting husband and wife who signed them on the same day, could be read together as part of the factual matrix. When one read them together, it was obvious what had happened: Mr Rawlings intended his will to be in the form of the will that his wife had signed. Thus, it was argued, his will should be so interpreted and read. The respondents' counsel did not challenge the assertion that the two wills could be read together. But he submitted that the exercise was one of rectification, not interpretation.

As the appeal succeeded on the ground of rectification, the court declined to express a concluded view on the scope of the use of interpretation to correct mistakes. But it set out briefly what the issue was.

In his fifth proposition in the *Investors Compensation Scheme* case,[26] Lord Hoffmann recognised a role for interpretation in the correction of linguistic mistakes in formal documents. He revisited the theme in *Chartbrook Ltd v Persimmon Homes Ltd*,[27] in which he spoke of the correction of mistakes by construction and stated:

> [T]here is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

There are examples of the correction of mistakes in case law, as when the court interpreted a date in a notice to terminate a lease as 13 January rather than 12 January as stated, because the recipient would have been in no doubt that the notice would take effect on the former date,[28] or where a clause in a bill of lading, which was modelled on a standard clause, had omitted a line from the standard clause as a result of an error in copying.[29]

Lord Reed, when he was a commercial judge in Edinburgh, held that the classification of mistakes as "patent" or "latent" no longer determined where the

23 See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ss 8–9.
24 [2014] UKSC 2, [2015] 1 AC 129.
25 [2014] UKSC 2, [2015] 1 AC 129 per Lord Neuberger at paras 34–42.
26 [1998] 1 WLR 896 at 913.
27 [2009] AC 1101 at paras 21–25.
28 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
29 *The Starsin* [2004] 1 AC 715.

court could cure mistakes by construction. It was inherent in the contextual approach to interpretation that both forms of mistake could be corrected by a process of construction.[30] But powerful voices have been raised in protest against the incursion of interpretation into the territory of rectification.[31]

While the Supreme Court has not expressed a view on the appropriate border between interpretation and rectification, it recognised in *Marley v Rawlings* that this was not simply a matter of academic categorisation. Lord Neuberger stated:

> If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (e.g. if there had been delay, change of position, or third party reliance).[32]

In my view there is particular weight to be attached to the interests of third parties who may be prejudiced if the court were to rely on a broad factual matrix when correcting a mistake through interpretation.[33]

One might also add that interpretation is a less suitable tool for curing some mistakes, because evidence of prior negotiations is not admissible.[34] While, as I have said, the precise boundary between interpretation and rectification has yet to be fixed, I would venture the prediction that the swing of the pendulum towards interpretation may be constrained and perhaps reversed by these considerations.

C. THE REGULATION OF CONTRACTS BY THE COMMON LAW

(1) Penalty clauses

In 2015 it was 100 years since the senior UK court had examined penalty clauses. In *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[35] the House of Lords had considered the application of the rule against penalties in the context of a liquidated damages clause. In a celebrated judgment Lord Dunedin set out propositions that contrasted penalties and liquidated damages, and distinguished between a genuine pre-estimate of loss on the one hand and a penalty to deter the offending party on the other. Over time, his neat propositions came to be read as if they were a statutory code, which they were not.

Recently, the English courts have sought to escape the apparent straitjacket of a dichotomy between a genuine pre-estimate of loss and a penalty, which is a

30 *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] CSOH 208 at para 22.

31 For example, Sir Richard Buxton, "Construction and rectification after *Chartbrook*" [2010] CLJ 253 and P S Davies, "Rectification versus interpretation: the nature and scope of the equitable jurisdiction" [2016] CLJ 62.

32 [2014] UKSC 2, [2015] 1 AC 129 at para 40.

33 There is much to be said for a general approach that where an instrument will be relied on by third parties who were not involved in the negotiation of the arrangement, its wording should be paramount. See *Re Sigma Finance Corporation (in administration)* [2009] UKSC 2, [2010] 1 All ER 571 at para 37 per Lord Collins.

34 See Lord Hoffmann's third proposition in *Investors Compensation Scheme Ltd* (n 2) at 912–913 and *Chartbrook Ltd* (n 27) at paras 28–42 per Lord Hoffmann.

35 [1915] AC 79.

formulation unsuited for clauses that are not liquidated damages clauses. Thus in one case, Colman J upheld a provision in a loan agreement imposing a 1% increase in interest rate during a default on the basis that it was commercially justifiable.[36] Similarly, the Court of Appeal has drawn a distinction between a reasonable commercial condition on the one hand and a penalty on the other.[37]

The Supreme Court came to review the rule against penalties in two appeals[38] that were heard together and that were, in Lord Mance's words, "at opposite ends of the financial spectrum".[39]

Cavendish Square Holding BV v El Makdessi concerned the purchase by Cavendish, which is a subsidiary of WPP, the world's leading marketing communications group, from Mr El Makdessi and another individual of a majority shareholding in the holding company of the largest advertising and marketing communications group in the Middle East. Much of the value of the group was its goodwill, which depended in large measure on Mr El Makdessi's personal connections. The purchase price of up to $150 million, which depended on the future performance of the group, was payable by instalments. The sale contract contained restrictive covenants by the sellers not to compete with the group in order to protect that goodwill. Breach of the covenants had two serious contractual consequences. First, it stopped the payment of any outstanding instalments of the price, including the earn-out instalments, to the seller in breach. Secondly, it entitled Cavendish to exercise a call option, requiring the seller in breach to sell any remaining shares in the group at a set price which did not allow for goodwill, thereby ousting the seller's put option which was set at a substantially higher price. Mr El Makdessi did not deny his involvement in the business of a competitor but argued that Cavendish could not enforce these contractual rights because they were unenforceable penalties.

The other appeal concerned a parking charge of £85, which would have been reduced to £50, if it had been paid promptly. In *Beavis v ParkingEye Ltd* the appellant parked his car in a car park, which ParkingEye operated under a contract with the owners of the adjoining retail park. There was a contractual limit of two hours on parking, which was imposed by notice. Mr Beavis over-stayed the two-hour limit and was presented with a claim for £85. He challenged it as an unenforceable penalty.

In the *Cavendish* appeal, the court considered three principal issues. First, counsel for the company argued that the rule against penalties was an anomalous instance of the common law interfering with freedom of contract and that it should be abolished or at least restricted to non-commercial cases. Secondly, counsel for Mr El Makdessi argued for the extension of the rule, in accordance with Australian jurisprudence, beyond its scope as a restraint on remedies for breach of contract. In *Andrews v Australia and New Zealand Banking Group*,[40] the High Court of Australia had held that bank charges, which were imposed on customers on the occurrence of events which were not breaches of contract, could be characterised as penalties and were

36 *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752.
37 *Cine Bes Filmcilik v United International Pictures* [2004] 1 CLC 401 and *Murray v Leisureplay plc* [2005] IRLR 946.
38 *Cavendish Square Holding BV v El Makdessi*, *Beavis v ParkingEye Ltd* [2015] UKSC 67, [2016] AC 1172.
39 [2015] UKSC 67, [2016] AC 1172 at para 116.
40 (2012) 247 CLR 205.

unenforceable. If the rule against penalties applied to remedies for breach of contract, the third issue was how to define both its scope and also the appropriate test for its operation.

In relation to the first issue, the court recognised the force of criticisms of the rule against penalties but declined to abolish the rule, which is not only a long-standing rule of both English law and Scots law but also is common to almost all major legal systems in the western world and features in international codifications of the law of contract.[41]

In relation to the second issue, the court held that there was no freestanding equitable jurisdiction to control stipulations that operated as a result of events that did not entail a breach of contract.

In the third issue, in relation to the question of scope, the court held that the rule covered not only liquidated damages clauses but also clauses that enabled the innocent party to withhold payments on breach and clauses requiring a purchaser to pay an extravagant non-refundable deposit. As I read the case, there was a majority for the view that the rule also covered clauses that required the contract breaker to transfer property to the innocent party on breach. As a result, the court would first ask itself whether such a clause offended the rule against penalties, and, if it did not, then consider whether to give equitable relief against forfeiture.

On the question of the appropriate test, the court rejected a simple dichotomy between a genuine pre-estimate of damage and a penalty, which a narrow reading of the *Dunlop* case had encouraged. While the justices differed as to the precise way in which the test should be worded, they were in truth asserting the same test of disproportion or exorbitance. Lord Neuberger and Lord Sumption said that the test was:

> whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.[42]

I suggested that the test was:

> whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.[43]

Lord Mance suggested:

> What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable.[44]

In the result Cavendish succeeded in its appeal: the clauses in its agreement that allowed it to withhold the later instalments of the purchase price and to force Mr El Makdessi to sell his remaining shares at a disadvantageous price did not contravene the rule against penalties. Mr Beavis lost his appeal against the parking charge.

41 See e.g. Discussion Paper on *Penalty Clauses* (Scot Law Com DP No 162, 2016) ch 2.
42 [2015] UKSC 67, [2016] AC 1172 at para 32.
43 [2015] UKSC 67, [2016] AC 1172 at para 255.
44 [2015] UKSC 67, [2016] AC 1172 at para 152.

In the *Cavendish* case, Mr El Makdessi's loyalty was of critical importance to the value of the acquired shareholding. In the *Beavis* case, ParkingEye had a central interest in making sure that the car park spaces were available for use by shoppers in the retail park and its charges were in line with both local authority parking charges and also the range prescribed by the code of practice of the trade association for private car parks.

The adoption of a test of disproportion or exorbitance amounts to a significant recalibration of the law that places the rule on a secure footing by escaping the straitjacket of a narrow reading of the *Dunlop* case. This involves a swing of the judicial pendulum away from an over-rigid application of the rule. Where the pendulum will swing in the future application of the rule will depend on how the courts apply the tests in the circumstances of particular cases.

It has been suggested that the Supreme Court has given the rule only a Pyrrhic victory in part because skilful lawyers will be able to circumvent the rule by imposing penalties that are not triggered by breach of contract.[45] But I am not persuaded that the rule will vanish from legal practice. The equitable origins of the rule will allow the courts to examine critically clauses that are designed to circumvent the rule and ascertain the substance of the clause rather than its form. The underlying rationale of the rule is that the law will not enforce clauses that punish the contract breaker for his breach. The moral for drafters of contracts is to avoid punitive clauses. The future health of the rule may depend on the court's concentration on substance rather than form and its astuteness to recognise disguised penalties. To borrow from Mark Twain, I think that reports of the rule's demise have been greatly exaggerated.

(2) Illegality

My final example concerns the illegality defence, which Lord Mansfield summarised over 240 years ago in *Holman v Johnson*:

> The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted.[46]

The public policy defined by a Latin maxim has given rise to uncertainty, complexity and incoherence. In the leading case, to which I shall shortly turn, Lord Neuberger described the law on illegality as a "vexed topic" and spoke of the "inconsistency of reasoning and outcome in different cases" over the centuries since Lord Mansfield described the defence of illegality.[47]

In 1994 the House of Lords decided an appeal, *Tinsley v Milligan*,[48] the reasoning of which has been subject of much criticism because it appeared to make the availability of the defence depend on the procedural question of whether claimants

45 W Day, "A pyrrhic victory for the doctrine against penalties: *Makdessi v Cavendish Square Holding BV*" [2016] JBL 115. Compare C Conte, "The penalty rule revisited" (2016) 132 LQR 382.
46 (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121.
47 *Patel v Mirza* [2016] UKSC 42 at para 157.
48 [1994] 1 AC 340.

needed to rely on the illegal contract in pleading their claim. The Law Commission for England and Wales published consultation papers on the illegality defence between 1999 and 2009 which highlighted the problems of the law.[49] In its report in 2010 the Commission recommended statutory reform of illegality in the law of trusts but otherwise left it to the courts to develop the law of illegality.[50] It advocated that, in relation to common law illegality, the courts should have regard to the policies underlying the doctrine in evaluating whether to apply the defence as a matter of public policy, and identified a number of potentially relevant factors. It expressed the view that the courts had power to develop the law in this way.

Since then, the courts have been busy and the Supreme Court has heard four cases on illegality. The cases have generated a numerical escalator of the justices hearing the appeals. The first two were heard in 2014 by five justices each; the third was heard in 2015 by seven justices; and, finally, last year a nine-justice bench sought to clarify the law.

Hounga v Allen[51] involved an exploited illegal immigrant who succeeded in her claim of the statutory tort of unlawful discrimination under the Race Relations Act 1976.[52] Lord Wilson, who wrote the leading judgment, did not adopt the analytical framework of *Tinsley v Milligan* but instead asked himself two questions, namely "what is the aspect of public policy which founds the defence?" and, secondly, "But is there another aspect of public policy to which the application of the defence would run counter?" At around the same time, another panel of five justices heard *Les Laboratoires Servier*,[53] a case about a cross-undertaking in damages in an interlocutory injunction in a patent dispute. The Court upheld the decision of the Court of Appeal but the majority criticised that court's reasoning for its adoption of the approach advocated by the Law Commission in pursuit of a just and proportionate response to the illegality. Lord Toulson dissented, pointing out that the Court of Appeal had adopted an approach of weighing public policy considerations that was similar to that of the Supreme Court more recently in *Hounga v Allen*.

A panel of seven justices then faced the question of illegality in *Jetivia SA v Bilta (UK) Ltd*,[54] a case concerning whether a claimant company should be attributed with its directors' knowledge of illegal activity in a tax fraud, thereby barring its claim against them. Lord Sumption favoured a rule-based approach along the lines of *Tinsley v Milligan* while Lord Toulson and I in our joint judgement wanted to adopt a more flexible approach of looking at and weighing the policies that underlay the defence. The majority considered that it was not necessary to resolve that dispute as the appeal could be determined on the basis of the rules on the attribution of knowledge, but Lord Neuberger said that the question needed to be resolved as soon as possible.[55]

49 *Illegal Transactions: The Effect of Illegality on Contracts and Trusts Law* (1999) Consultation Paper No 154; *The Illegality Defence in Tort* (2001) Consultation Paper No 160; and *The Illegality Defence* (2009) Consultation Paper No 189.

50 Report on the *Illegality Defence* (Law Com No 320, 2010).

51 [2014] UKSC 47, [2014] 1 WLR 2889.

52 Miss Hounga did not pursue a *quantum meruit* claim for services performed. Had she done so, it might well have succeeded as it did in the New York case of *Nizzamuddowlah v Bengal Cabaret Inc* (1977) 399 NYS 2d 854, (1979) 415 NYS 2d 685.

53 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.

54 [2015] UKSC 23, [2016] AC 1 (reported as *Bilta (UK) Ltd v Nazir (No 2)*).

55 *Jetivia* (n 54) at para 15.

The opportunity to do so arose soon afterwards. In *Patel v Mirza*,[56] Mr Patel gave Mr Mirza £620,000 to place bets on the share price of The Royal Bank of Scotland with the benefit of insider information that Mr Mirza had represented he would obtain about an expected government announcement that would affect the price of the shares.[57] In the event, Mr Mirza did not obtain the information and the announcement was not made. He did not place the bets nor did he repay Mr Patel despite promising to do so. Mr Patel raised an action to recover the money on grounds which included unjust enrichment, because there had been a failure of the consideration for his payment.

The Supreme Court was unanimous that Mr Patel was entitled to succeed in his claim. But there was a strong disagreement among the justices about the analytical framework that led to the agreed conclusion, with strongly worded dissents by Lord Mance and Lord Sumption with whom Lord Clarke agreed.

Lord Toulson wrote the majority judgment: it stated that there were two closely-related policy reasons for the illegality defence.[58] First, a person should not be allowed to profit from his own wrongdoing, and, secondly, the law should be coherent and not self-defeating by condoning illegality. The court had three considerations to address when deciding whether to allow a claim that was tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system.[59]

The court had, first, to consider the underlying purpose of the prohibition that had been transgressed. Secondly and conversely, it had to consider any other relevant public policies that might be rendered ineffective or less effective by denial of the claim. Thirdly, the court had to assess whether denial of the claim was a proportionate response to the illegality. Lord Toulson quoted Lord Bingham's advice to steer a middle course between two unacceptable positions:

> On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object of agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.[60]

In deciding whether it would be disproportionate to refuse relief to the claimant, the court could consider various relevant factors. It was not possible to identify all relevant factors, but potentially relevant were the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was a marked disparity in the parties' respective culpability.[61]

This majority judgment involved a major movement of the judicial pendulum in the direction recommended by the Law Commission. Lord Toulson's assertion that

56 [2016] UKSC 42, [2017] AC 467.

57 The agreement involved a conspiracy to commit the offence of insider dealing under s 52 of the Criminal Justice Act 1993.

58 Lord Toulson drew on McLachlan J's luminous judgment in *Hall v Hebert* [1993] 2 SCR 159, in which she identified the integrity of the legal system as a central justification of the illegality defence.

59 [2016] UKSC 42, [2017] AC 467 at paras 101 and 120.

60 *Saunders v Edwards* [1987] 1 WLR 1116 at 1134 per Bingham LJ.

61 [2016] UKSC 42, [2017] AC 467 at para 107 per Lord Toulson. He referred to the factors which Professor Andrew Burrows identified as relevant in his *Restatement of the English Law of Contract* (2016) 229–230 but eschewed any definitive list because circumstances of each case are different.

the public interest was best served by a principled and transparent assessment of the considerations identified received strong support in a concurring judgment by Lord Kerr, who praised the "structured approach to a hitherto intractable problem".[62] Lord Neuberger considered that on the specific issue in the appeal there should be a general rule that the claimant is entitled to the return of the money he paid when the contract to carry out an illegal activity does not proceed. On the wider question of the analytical framework for the defence of illegality he agreed with Lord Toulson. But Lord Mance, Lord Sumption and Lord Clarke thought that the majority view involved abandoning basic principles that went back 250 years and replacing them with "an open and unsettled range of factors".[63] Rescission of the unimplemented contract involved no reliance on illegality in order to enforce the contract or profit from it and created no inconsistency in the law.[64] Abandoning the reliance test (which is a rule with certain exceptions) for a range of factors risked opening up the ambit of the illegality defence.[65] There was no need to tear up the law and start again.[66]

I am not persuaded that the majority of the court has torn up the existing law. In my view, the majority judgment has analysed the case law as it has developed over time and rationalised it to reflect the substance of the judicial decisions in the hope of creating greater clarity. I am certainly not persuaded that the majority judgment will extend the scope of the illegality defence. On the contrary, as in cases like *Hounga*, it should prevent the defence giving rise to a serious injustice. But there is no doubt that this swing of the pendulum has been controversial within the court and in large measure the division between the justices reflects differing views on whether the pre-existing law was satisfactory.

D. CONCLUSION

So where have the five cases taken us?

It is not incorrect to use the word "construction" in the broad sense of ascertaining the terms and meaning of a contract so that it covers not only the interpretation of express terms, but also both the implication of unexpressed terms and the rectification of terms resulting from errors of expression. But the three cases, *Arnold*, *Marks and Spencer* and *Marley*, have reasserted that each of those three judicial activities has its own distinctive rules.

Turning to the regulation of contract by the common law, *Cavendish* has released contracting parties from an ill-fitting straitjacket that resulted from narrow judicial interpretations of what Lord Dunedin had said about penalty clauses in the *Dunlop* case. *Patel v Mirza* has reformulated the analytical framework of illegality. I believe that it should bring clarity and should not extend the scope of the defence. But, if the concerns of the minority eventuate through a continued swing of the judicial pendulum, an appellate court can revisit and refine the analytical framework. That is the common law in action.

62 [2016] UKSC 42, [2017] AC 467 at para 123.
63 [2016] UKSC 42, [2017] AC 467 per Lord Mance at paras 187 and 192.
64 [2016] UKSC 42, [2017] AC 467 per Lord Mance at para 199 and per Lord Sumption at para 250.
65 [2016] UKSC 42, [2017] AC 467 per Lord Sumption at paras 239 and 261–262.
66 [2016] UKSC 42, [2017] AC 467 per Lord Mance at para 208.

E. POSTSCRIPT

Since I originally completed this essay, the Supreme Court has returned to the question of contractual interpretation in *Wood v Capita Insurance Services Ltd*,[67] which concerned the interpretation of an indemnity clause in a share purchase agreement. The appellant buyers, Capita, argued that the Court of Appeal had fallen into error by accepting a submission that the Supreme Court in *Arnold v Britton*[68] had "rowed back" from the guidance on interpretation which the court had given in *Rainy Sky SA v Kookmin Bank*.[69] In a unanimous judgment, the Supreme Court rejected both the idea that there had been such a "rowing back" and the submission that the Court of Appeal had decided the case on that basis. The Supreme Court placed emphasis on the continuity of the law in relation to contractual interpretation. The court stated that interpretation was an iterative process in which the court balanced the indications given by a close examination of the language used against those derived from the contractual context and the factual background. The correct approach was summarised thus:

> Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.[70]

The court's judgment in this case, which I wrote, supports my contention in this essay that the pendulum has not swung far on contractual interpretation. But I would say that, wouldn't I?

67 [2017] UKSC 24.
68 *Arnold* (n 6).
69 *Rainy Sky* (n 5) at para 21.
70 [2017] UKSC 24 at para 13.

AUCTOR IN REM SUAM: ROMAN REMAINS IN SCOTLAND

David Johnston

A. INTRODUCTION

This paper originated in curiosity about the expression *auctor in rem suam*. In Scots law it is used to describe generally a conflict of interest between a trustee and the beneficiary of a trust. It may even be broader than that: the Scottish Law Commission note that, "[at] least as far as trustees are concerned, the concepts of breach of fiduciary duty and *auctor in rem suam* seem to have become virtually synonymous."[1] In a paper to celebrate George Gretton's remarkable contributions to the law and legal scholarship, it seems appropriate to touch on an area that he has made his own: trusts. But to avoid disappointment it should be noted at the outset that what follows deals more with Roman law than Scots law. And even those towering figures of the Gretton pantheon, the Pandectists, receive no mention (they do not appear to have discussed this question).

The source of the expression *auctor in rem suam* is not in doubt: it comes from the Roman law of tutor and pupil. For a pupil validly to carry out certain legal acts, the *auctoritas* or authority of his or her tutor was required. The tutor acting in such a way is sometimes described as *auctor*. If he interposed authority in a matter in which he was personally interested, he could be described as *auctor in rem suam*.

Nor is there any real doubt about why in the development of Scots law, in the search for the notion of conflict of interest in the Roman texts, recourse was had to the law of tutors. While there are other contexts in which conflicts of interest may arise – clearly they may for an executor or the "trustee" (*fiduciarius*) of a *fideicommissum* – there do not appear to be any texts from those contexts fertile for developing rules about conflict of interest.

The first traces of what became a general rule appeared in Scots law through disparate decisions about conflict of interest in relation to different offices. Those offices have in common what we might nowadays describe as a fiduciary character. The clearest case is that of the tutor or curator, who cannot act in a way that is incompatible with the interests of his pupil.[2]

1 Discussion Paper on *Breach of Trust* (Scot Law Com DP No 123, 2003) para 4.4.

2 See the valuable article by D Carr, "English influences on the historical development of fiduciary duties in Scottish law" (2014) 18 EdinLR 29 especially at 34–35.

A conflict of this kind in a commercial setting came before the House of Lords in *The York Building Co v Mackenzie*.[3] Mackenzie held the office of common agent. At a public judicial auction he purchased some of the insolvent company's assets. The Court of Session upheld the transaction. But the House of Lords held that it must be reduced, since Mackenzie occupied an office that made it his duty to the insolvent company and its creditors to sell at the highest price. He therefore could not put himself in the position of purchaser, since his interest would then be that the price should be as low as possible.

In the leading case on *auctor in rem suam*, *Aberdeen Railway Company v Blaikie*, the Lord Chancellor commented on the decision in the *York Building* case:

> But this House considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session, and set aside the sale. The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "*Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt.*"[4] In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.[5]

This paper looks at the principle that the Lord Chancellor identified; the main texts from the *Digest* that consider it; and it explores how a principle expressed in the same words in Roman and in Scots law actually plays an entirely different role in the two systems.

B. THE ROMAN TEXTS

The Roman texts that the leading Scottish cases and the writers rely upon are few: one from Justinian's *Institutes*; four from the *Digest*; and one from the *Novels*.[6] They are discussed below, together with others needed to supply the relevant context. Some brief words about each text follow.

(1) *Auctor in rem suam* in Justinian's *Institutes*

Justinian, *Institutes* 1.21.3:[7]

> If there is litigation between tutor and pupil a curator is appointed in place of the tutor for the course of the litigation, because the tutor himself cannot be *in rem suam auctor*.

Here we find the *auctor* principle set out expressly. The rule stated, however, is not a general one but is confined to the case where, owing to litigation between tutor and pupil, their interests are in conflict. In classical law the praetor would have appointed a tutor in place of the one who was party to the litigation with the pupil. Under Justinian a curator was appointed instead. For present purposes it is enough to note

3 (1795) 3 Paton 378 at 399–401.
4 D 18.1.34.7. See below at B.(2).
5 (1854) 1 Macq 461 at 474–475.
6 J Inst 1.21.3; D 18.1.34.7; D 26.8.5 pr and 2; D 27.9 (Stair refers to the whole title without identifying any particular text); Nov 72 c 5.
7 Cf Gai Inst 1.184 states *ipse tutor in re sua auctor esse non poterat*.

that this text is not concerned with the validity of transactions; it is simply concerned to ensure that a person who has no interest in the litigation can give instructions for its conduct on behalf of the pupil.

(2) The general rule stated in D 18.1.34.7, Paul 33 *ad edictum*

This is the text relied upon in the *Aberdeen Railway Company* case:

> A tutor cannot buy a thing that belongs to a pupil: this rule is to be extended to similar cases, that is curators, procurators and those who manage the property of others.[8]

The text comes from Paul's commentary on sale, but the precise context is unclear.[9] The rule is set out in plain terms. The word *auctor* does not appear, and there is nothing in the text to suggest that Paul was concerned with the question of a tutor providing his *auctoritas* in order for a transaction relating to the pupil's property to take place. Instead, this appears to be a general rule prohibiting alienation by a tutor (and certain others) of property belonging to a pupil.

The text is problematic in a number of ways and has been subject to criticism.[10] One oddity is that, in stating that a tutor cannot buy the property of "a" pupil, it is much too broadly expressed; evidently "his" pupil must be intended. A related point is that the text states that procurators and *negotiorum gestores* cannot buy the property of a pupil. Why ever not? Both of these points contribute to the main problem: that the text is in stark conflict with other texts in the *Digest*, which make it clear that there was no such general rule in classical law.[11]

(3) A first qualification on the *auctor in rem suam* rule: direct or indirect?

This is the opening text of the *Digest* title on the authority of tutors:

> D 26.8.1 pr, Ulpian 1 *ad Sabinum*: Although it is a rule of civil law that a tutor cannot be *auctor in rem suam*, nonetheless a tutor can give authority to his pupil to accept an inheritance from a person who is a debtor of the tutor, even though by this means the pupil becomes a debtor of the tutor: the primary reason for giving the authority is that the pupil should become heir, and it happens as a consequence that there is a debt . . .[12]

None of the leading cases or institutional writers appears to cite this text. Yet it is prominently placed, as the very first text in the title; and it states the *auctor* rule

8 *Tutor rem pupilli emere non potest: idque porrigendum est ad similia, id est ad curatores procuratores et qui negotia aliena gerunt.*

9 O Lenel, *Palingenesia iuris civilis* (Leipzig, 1889), Paul no 506.

10 Cf G von Beseler, "Miszellen" (1927) 47 Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Romanistische Abteilung) 355 at 367 (Beseler would delete as interpolated everything after the word *potest*).

11 This was noted already in the *Glossa ordinaria*: gl. *potest* on D 18.1.34.7 which states that it appears that a tutor can buy property belonging to his pupil. It refers to (1) *administratio*; (2) co-tutors; (3) dealings openly and in good faith, all of which are discussed below. D 18.1.34.7 is, however, consistent with the law of Justinian, at least following Novel 72 of AD 538. Clearly, that law is too late to be identified as the basis for an interpolation in D 18.1.34.7, so if there is (as seems most likely) interpolation, the precise legislative reason for it is unclear.

12 *Quamquam regula est iuris civilis in rem suam auctorem tutorem fieri non posse, tamen potest tutor proprii sui debitoris hereditatem adeunti pupillo auctoritatem accommodare, quamvis per hoc debitor eius efficiatur: prima enim ratio auctoritatis ea est, ut heres fiat, per consequentias contingit ut debitum subeat . . .*

crisply, describing it as a rule of the *ius civile*. There is, however, a problem with deploying it to support a general rule of Scots law, namely that it does not stop after the first sentence.

What follows immediately after that is a limitation on the rule of the *ius civile*: a pupil has been appointed as the heir of someone who owes the tutor money. The debtor has died. Can the tutor provide the *auctoritas* for his pupil to accept appointment as the debtor's heir? The issue is this: if the pupil does accept, the effect is that he, as the debtor's universal successor, will become the debtor of his tutor.

There is clearly at the least the germ of a conflict of interest here. Its significance in practice is likely to depend on the solvency of the debtor's estate. But that is a factor that Ulpian (at least so far as preserved in the *Digest*) does not consider. Instead his approach is to consider the reason for which *auctoritas tutoris* is needed. That leads him to draw a distinction between direct and consequential results. Here the reason *auctoritas* is required is for the pupil to become the debtor's heir; it so happens as a consequence of that that the pupil becomes indebted to his tutor.[13]

The general principle reflected in the (modern) *auctor* rule is hardly consistent with Ulpian's analysis. The result, whether or not one describes it as indirect or consequential, is that the pupil ends up indebted to his tutor.

(4) A second qualification on the *auctor in rem suam* rule: *contutores*

> D 26.8.5 pr–2, Ulpian 40 *ad Sabinum*:[14] A pupil cannot become obliged to a tutor on the tutor's own authority. But if there is more than one tutor, and the authority of one suffices, then it must be said that the pupil can become obliged to one tutor on the authority of another, whether he lends the pupil money or the pupil promises him something . . . (1) A pupil who sells without his tutor's authority is not bound: nor is he when he buys, except to the extent of any enrichment. (2) The same tutor cannot play the part of both buyer and seller: but if he has a co-tutor whose authority suffices, there is no doubt that he can buy . . .

The whole of this text is at pains to point out that the legal rules that apply where there is a single tutor are entirely different from those applicable where there is more than one.[15] The basic rule is that a pupil cannot incur an obligation to his tutor on the tutor's own authority. But in the very next sentence Ulpian notes that, if there is more than one tutor, the pupil can incur such an obligation, as long as it is the other tutor who supplies the *auctoritas*. Nor can the tutor at the same time play the role of buyer and seller (one role *in propria persona* and the other as tutor of his pupil). But again, if there is more than one tutor, there is absolutely no doubt that

13 There is a somewhat similar apparent conflict in D 27.9.12, Marcian *liber singularis ad formulam hypothecariam*.

14 (pr) *Pupillus obligari tutori eo auctore non potest. plane si plures sint tutores, quorum unius auctoritas sufficit, dicendum est altero auctore pupillum ei posse obligari, sive mutuam pecuniam ei det sive stipuletur ab eo . . .* (1) *pupillus vendendo sine tutoris auctoritate non obligetur: sed nec in emendo, nisi in quantum locupletior factus est.* (2) *item ipse tutor et emptoris et venditoris officio fungi non potest: sed enim si contutorem habeat, cuius auctoritas sufficit, procul dubio emere potest.*

15 For general discussion, see A Lecomte, *La pluralité des tuteurs en droit romain* (1928).

he can buy. The validity of authorisation by a co-tutor can in fact be found as early as Cicero.[16]

One more case is worth mentioning. It involves co-tutors but also raises issues about good faith: D 26.7.54, Tryphoninus 2 *disputationum*:[17]

> I do not think a tutor who has received a loan through the co-tutors of his pupil and undertaken to repay it at the rate of interest which other debtors of the pupil are also paying is to be compelled to pay the maximum rate of interest. He did not use the money for himself or secretly or freely make use of it as if it were his own; and if the loan had not been given to him by the co-tutors at this rate he would have obtained it elsewhere. It makes a great difference whether he acted openly and as a third party with respect to the pupil or made use of his administration as tutor to advance his own interests with the pupil's money.

The case comes from the wider context of rules requiring certain people such as tutors, *negotiorum gestores* and municipal magistrates, if they employed the money of others for their own purposes, to pay interest not at the interest rate they had agreed to pay but at the maximum legal rate (12%).[18] What is interesting in this text is, first, the fact that once again no reservations are expressed about a tutor borrowing money from his pupil, as long as co-tutors have authorised it; and, second, that the jurist does not regard the case as falling within the penal interest rate regime, because everything has been done openly.[19] It is slightly odd to find reliance being placed on the argument that, if the tutor had not been able to borrow from the pupil at a certain rate of interest, he would have gone elsewhere. One might think it more important to know what rate the pupil would have been able to obtain from a borrower at arm's length. This in itself seems quite a powerful indication of a rather relaxed attitude towards dealings between pupil and tutor.

(5) A third qualification on the *auctor in rem suam* rule: openly and in good faith

Other texts also raise issues about good faith but, unlike the Tryphoninus text, do not make express reference to co-tutors. The following texts continue the discussion by Ulpian cited above in section (4) by considering variants of those facts. A first variant is that the tutor buys the pupil's property by using an intermediary (*interposita persona*): this is said to be of no effect, because it is regarded as acting in bad faith.[20] Ulpian goes on to deal with two further cases:

16 Cicero II *In Verr* 1.132, 135; see the discussion in A Watson, *The Law of Persons in the Later Roman Republic* (1967) 137. Essentially the same principle is found in D 26.8.6, Pomponius 17 *ad Sabinum*, the only difference being that he is concerned with division of responsibility for administration of the pupil's estate between the tutors.

17 [N]*on existimo maximis usuris subiciendum eum qui a contutoribus suis mutuam pecuniam pupilli accepit et cavit certasque usuras promisit, quas et alii debitores pupillo dependunt, quia hic sibi non consumpsit nec clam nec quasi sua pecunia licenter abutitur et, nisi his usuris a contutore mutuum ei daretur, aliunde accepisset: et multum refert, palam aperteque debitorem se ut extraneum et quemlibet faceret pupillo an sub administratione tutelae pupillique utilitate latente sua commoda pupilli pecunia iuvaret.*

18 Cf K Fildhaut, *Die libri disputationum des Claudius Tryphoninus: eine spätklassische Juristenschrift* (2004) 189–191.

19 Contrast perhaps Scaevola D 26.7.58.1, 3.

20 D. 26.8.5.3: Ulpian refers to a rescript of Severus and Caracalla to this effect.

> The sale is valid if he [the tutor] buys openly, even if he gave a name other than his own, not in bad faith but simply because people of higher rank are accustomed not to put their own names to documents; but if he did so deceitfully, the law is the same as if he had bought via an intermediary. (5) And if a creditor of the pupil is the seller, he [the tutor] can equally buy in good faith.[21]

The use of pseudonyms is an interesting reflection on the social mores and the concern for privacy of the upper classes in Roman society. It was sufficiently commonplace that it did not lead the jurist to conclude that the tutor acted in bad faith. Sale by a creditor, evidently of property belonging to the pupil that had been pledged to the creditor, again demanded no more than good faith to be valid.

These texts on their face are puzzling. They say nothing about co-tutors, whereas the cases that immediately precede them in D 26.8.5 make the validity of a purchase by a tutor turn on authority being given by his co-tutor. If it were enough in these cases that the tutor should simply be in good faith, that would undermine the whole requirement to obtain authority from a co-tutor. It therefore appears that the correct interpretation is that, continuing his discussion of the need for the authority of a co-tutor, Ulpian is drawing attention to an additional factor necessary for the validity of a transaction, namely that the tutor be in good faith. If this is correct, the conclusion is that a transaction between the pupil and tutor A is valid provided *auctoritas* is interposed by tutor B, and provided that tutor A is in good faith.

(6) A fourth qualification on the *auctor in rem suam* rule: public auction

D 41.4.2.8, Paul 54 *ad edictum*:[22]

> In an auction of the pupil's property, his tutor bought a thing which he thought belonged to the pupil. Servius says that he can usucapt it. His view has been accepted, because, if there is a buyer for the thing, the pupil's position is not made worse; and if the tutor buys for a lesser price, he will be liable in the *actio tutelae*, just as he would be if he sold the property for a lesser price. A constitution of the emperor Trajan is to the same effect.

The fragment begins with the purchase by a tutor at public auction of property that belongs to his pupil.[23] Paul expresses no reservations about the propriety of the purchase. If the property auctioned did indeed belong to the pupil, then on conveyance to the tutor it would become his own property. The context of Paul's discussion is *usucapio* in order to complete the tutor's title. That suggests that the property purchased did not in fact belong to the pupil, which is why title had to be completed by means of *usucapio*. Here nothing is said about co-tutors, and nothing about good faith. The very fact that the purchase took place openly at a public auction appears to support its validity.

21 *sane et ipse quidem emit palam, dedit autem nomen non mala fide sed simpliciter, ut solent honestiores non pati nomina sua instrumentis inscribi, valet emptio: quod si callide, idem erit ac si per interpositam personam emisset.* (5) *sed et si creditor pupilli distrahat, aeque emere bona fide poterit.*

22 *Tutor ex pupilli auctione rem quam eius putabat esse emit. Servius ait posse eum usucapere: in cuius opinionem decursum est eo, quod deterior causa pupilli non fit, si propius habeat emptorem et, si minoris emerit, tutelae iudicio tenebitur ac si alii minoris addixisset: idque et a divo Traiano constitutum dicitur.*

23 For discussion, see Watson, *The Law of Persons* (n 16) 135.

(7) Legislation by Justinian: Novel 72 c 5[24]

This Novel, of AD 538, is too lengthy to quote. Here is a paraphrase of the key provisions: if a curator attempts to obtain the property of the minor by a transfer by way of gift, sale or any other means, that transfer will be absolutely void, whether it was made directly or through an intermediary; the curator will be considered as having acted for his own benefit and to the destruction of his soul. This applies to curators during their curatorship and afterwards. A curator cannot pursue for his own benefit any right of action assigned against the interest of the person under his charge; and the minor is to have the benefit of any gain resulting from the right assigned, even if the assignation took place for good cause. These provisions are applicable to all curators entrusted with the administration of another's property, such as spendthrifts or the mentally impaired.

As is typical of the *Novels*, the legal propositions are expressed in somewhat extravagant rhetorical terms, and with reference to extra-legal justifications and sanctions (notably the threat to the curator's soul), with the result that their precise scope becomes difficult to identify.

There are two further points to note. The first is that in Justinian's law the role of the curator had to a degree superseded that of the tutor: while classical lawyers insisted on a tutor for those under the age of puberty and recognised the option of having a curator between puberty and age 25, in Justinian's law it was the norm for those under age 25 to have a curator. Second, this Novel is not (it appears) concerned with the issue of *auctoritas* or the question when a tutor or curator has a conflict of interest in interposing *auctoritas*. It is instead a blanket prohibition on transactions between pupil and curator.

(8) Conclusions

What conclusions can we draw from this review? The first is that in classical Roman law there never was a doctrine that resembled in its breadth the Scots law principle of *auctor in rem suam*. The classical principle was much narrower. While the texts state that a tutor could not provide authority for a transaction in which he was himself interested, there were quite substantial qualifications to that proposition. It did not apply if a conflict of interest arose not directly but as a consequence of the tutor's giving authority. It did not apply to transactions that took place at a public auction. And there was no concern about having one tutor authorise a transaction in which another was concerned.

Much broader restrictions on the validity of transactions between tutor and pupil came in only under Justinian in AD 538. Their precise scope is not entirely clear, but what is plain is that the starting point was that a transaction of that kind was invalid. That being so, there was no need for Justinian to embark on analysis of the doctrine of *auctor in rem suam*: the fact that the transaction was between tutor and pupil was conclusive against its validity.

24 Cited by Craig, *Ius feudale* 1.15.24; Bankton, *Inst* 1.7.39; Erskine, *Inst* 1.7.19.

C. SCOTS LAW

At last it is time to turn to Scots law and the conclusions that can be drawn from this review of the Roman material.

(1) Craig

In a discussion of restrictions on alienation, Craig deals with the case of an interdiction from dealing with property that is not absolute but permits alienation provided it is authorised by certain named friends.[25] That raises the question: what if an alienation is made in favour of those very friends? Craig points out that they are in much the same position as tutors and curators, and just as much disabled in law and justice from acquiring the property from the interdicted person: he cites Novel 72. He also notes that, as Justinian admirably says,[26] if tutors and curators cannot turn their office to their own advantage, far less can friends. This appears to be the earliest reference to Novel 72, and it may be that it was from Craig that first Bankton and then Erskine derived the citation.[27]

(2) Stair

Stair has very little to say on this issue. He notes generally that in the law of tutors Scots law follows Roman law. He observes that tutors may do only necessary acts, namely things that the pupil is obliged to do or acts necessary for the management of the pupil's estate. Stair does not discuss *auctoritas* or *auctor in rem suam* at all. The only restriction he notes on tutors' powers is that they cannot sell land without an intervening decree of a judge, and here he refers to Roman law.[28] This, however, has nothing to do with *auctoritas tutoris*: it is instead concerned with the *oratio Severi* of AD 195, by virtue of which the emperor Septimius Severus prohibited tutors from selling rural or suburban land belonging to their pupils.[29]

(3) Erskine

Erskine refers to two texts from the *Digest* (both discussed above) for the propositions: (1) that a tutor cannot lend money to a pupil; and (2) that a deed authorised by a quorum of tutors, by virtue of which an interest arises to a co-tutor who does not concur in the deed, stands good unless lesion is proved.[30] He therefore recognises both the basic Roman rule, that a tutor may not authorise a transaction in which he is interested, and the qualification that for his co-tutor to authorise it is acceptable.

25 *Ius feudale* 1.15.24.
26 J Inst 1.21.3.
27 Bankton, *Inst* 1.7.39 notes that the law presumes that whatever rights a tutor acquires are acquired for the benefit of the pupil; that the tutor will be bound to denude in favour of the pupil; and that this is founded on the civil law: Nov 72 c 5.
28 Stair, *Inst* 1.6.4, 1.6.18; D 27.9.
29 Numerous constitutions in the Code deal with this: e.g. C 5.71.3–17. The rule was extended to other property by Constantine: C 5.37.22 (AD 326). Cf J Voet, *Commentarius ad Pandectas* (2 vols, 1698 and 1704) 26.8.5.
30 Erskine, *Inst* 1.7.19. D 26.8.5 pr and 2.

Erskine goes on to refer to Novel 72 c 5 and says that "in every transaction of a tutor or curator, which hath a natural connection with the minor's estate, it is presumed that he acts as his trustee; which doctrine is borrowed from Roman law".[31]

The reference to acting as a trustee is rather broad, but the meaning is clear enough. What is more striking is that the two strands of Roman authority that Erskine cites are inconsistent. The *Digest* text recognises the validity of a transaction between tutor and pupil, provided that authorisation proceeds from a co-tutor. Erskine himself notes that it is valid, as long as the pupil sustains no lesion. But the Novel makes it quite clear that there are to be no such transactions and that, if there are, they are invalid.

(4) The *York Building Company* case

Here there is just one curiosity to observe. In this case, as noted above, the House of Lords reversed the decision of the Court of Session. It is interesting that among the reasons given by the Lord President in his opinion was this:

> But the case of a judicial sale is very different; for there the common agent, holding him to be a trustee or tutor, in the strictest sense, is not *auctor in rem suam* when he purchases fairly at the judicial sale. His right flows from this Court, and his own authority is out of the question . . . the case of a public judicial sale is very different. *Emere possunt quilibet non prohibiti*. Voet. lib. xxviii., tit. 18.[32]

In drawing this distinction, the Lord President was following faithfully the position on public auctions set out in classical Roman law.[33] In reversing this approach, the House departed from the classical Roman law.

(5) The *Aberdeen Railway Company* case

In this case the Lord Chancellor referred to a general principle that was found in the Civil Law and indeed (to use terminology popular in the nineteenth century) in universal jurisprudence. That being so, it is remarkable how little the case reflects Roman law. First, the Lord Chancellor noted that: "As far as related to the advice he [Mr Blaikie] should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle."[34] There is no room here for the Roman texts on co-tutors.

Second, the only text the Lord Chancellor cited from the *Digest* is D 18.1.34.7, which is in conflict with the nuanced classical law on *auctoritas* in transactions between tutor and pupil. Indeed, it is a text that does not purport to have anything to do with *auctoritas*.

31 Erskine, *Inst* 1.7.19.

32 (1795) 3 Paton 378 at 382. The reference to Voet, *Commentarius* (n 29) book 28 title 18 is evidently incorrect. There is no title 18 in book 28 and that book anyway is concerned with making a will. Perhaps reference is intended to 26.8.5. In 18.1.9 there is reference to the legitimacy of a tutor buying property of his pupil openly in a public auction.

33 See above at B.(6).

34 (1854) 1 Macq 461 at 473.

(6) Concluding comments

The differences between the Roman and the Scots law principle of *auctor in rem suam* are striking. How do they come about? The reason is that the principle in Scots law rests on two entirely different strands of reasoning derived from the Roman texts.

The first is the law relating to tutors and when they could interpose authority in transactions in which they had a personal interest. Here the *Digest* uses the term *auctor in rem suam*.[35] But all that Scots law appears to have taken from this strand is the expression itself. The various qualifications to the rule that the Roman jurists elaborated in detail did not find their way into Scots law.

The second strand is the law prohibiting tutors from acquiring property from their pupils. This is stated in D 18.1.34.7 and more expansively in Novel 72 c 5. It has nothing at all to do with *auctoritas* since, even if that were present, these transactions would be void. In other words, *auctoritas* in such cases is a necessary but not a sufficient condition.[36]

In short: Scots law has borrowed the language of the *auctor* principle from one context and the substance from another. The Roman texts dealing with *auctoritas* in transactions between tutor and pupil were a useful quarry for the germ of the principle of conflict of interest, but the Roman approach to such conflicts was apparently too relaxed to appeal to judges and writers from the seventeenth century onwards. While the Roman texts provided language useful to describe the principle, for the substance it was necessary to look elsewhere.

35 Ulpian D 26.8.1 pr; D 26.8.5 pr. See also J Inst 1.21.3.
36 Cf Voet, *Commentarius* (n 29) 26.8.5.

THE ROLE OF AGENCY IN SCOTTISH PARTNERSHIPS

Laura Macgregor

A. INTRODUCTION

One of Professor Gretton's less well-known articles, "Who owns partnership property?", was published in the *Juridical Review* in 1987.[1] The article is not currently available on the main online research resources, and therefore runs the risk of languishing unread. It was published two years after an earlier article, also focused on Scottish partnership law, written by Peter Hemphill.[2] Although his article was already written in draft by the time Mr Hemphill's was published, that did not prevent Professor Gretton from engaging with Mr Hemphill's controversial argument that separate legal personality in the Scottish partnership was the fifth wheel on the Scottish car. He suggested that legal personality was rather the fourth wheel on the English car. These two articles stand alone (as far as the current author is aware), as the only major articles on Scottish partnership law published in the legal periodicals.

The Law Commission and Scottish Law Commission published a Joint Report on Partnership Law in 2003.[3] Unfortunately, the recommendations of the Commissions were not enacted. This provides significant cause for regret: Scots law could have developed a world-class partnership law on the basis of the recommendations. Now that over ten years have passed since publication of the Joint Report, partnership law has moved on in many ways, some of which will be explored below.

This essay seeks to add to existing scholarship on Scottish partnership law by focussing on the role of agency in partnerships.[4] Partnerships, as separate legal entities, must act through partners as agents. Agency law therefore lies at the heart of the way in which a partnership functions.

1 1987 JR 163.
2 P Hemphill, "The personality of the partnership in Scotland" 1984 JR 208.
3 Report on *Partnership Law* (Law Com No 283, Scot Law Com No 192, 2003).
4 This essay considers only partnerships formed under the Partnership Act 1890. It does not consider limited partnerships (formed under the Limited Partnerships Act 1907), or limited liability partnerships (formed under the Limited Liability Partnerships Act 2000).

B. AGENCY IN PARTNERSHIP LAW

(1) The Partnership Act 1890

The presence of the Partnership Act 1890 on our statute books, largely unchanged, for more than 125 years might suggest a degree of satisfaction with it. This impression might be bolstered by the lack of published criticism of the Act, a fact noted by Professor Gretton.[5] Nothing could be further from the truth, however. The Bill was intended to apply to England and Wales only, the decision to apply it additionally to Scotland being made at a late stage. Whilst English law applies an "aggregate" theory of partnership law, Scots law applies an "entity" theory. In English law, the partnership is understood purely as an aggregation of individuals: the English partnership has no separate legal personality. In Scots law, by contrast, the partnership is a separate legal entity, having legal personality.[6] To seek to apply the same Act to such different legal landscapes was misconceived. This point can be illustrated by discussing the section which expresses in statutory form the partner's role as agent: section 5. Under the heading "Power of partner to bind the firm", the first part of section 5 states (emphasis added):

> Every partner is an agent of *the firm and his other partners* for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners . . .

Focusing on Scots law first of all, it is uncontroversial that, under the pre-existing common law, the partner was the agent of *the firm* as a separate legal entity. Whether the partner was, at common law, the agent of his or her other partners is at least questionable.[7] That partner is unlikely, in performance of agency duties, to seek to bind another partner individually in a legal obligation. Focussing now on English law, again, it is uncontroversial that, under the pre-existing common law, the partner was the agent of the *other partners*. One might question whether it was necessary, in section 5, to make that partner additionally the agent of the firm given that the firm has no separate legal personality. The attempt to cover both jurisdictions in the same section appears to have led to ambiguous drafting. Professor Gretton stated (although not with specific reference to section 5) "it is necessary to avoid reading the Act in a literalistic manner".[8] It is quite remarkable that the terms of an Act of Parliament in force for over 125 years cannot be taken literally.

(2) Contractual or status-based agency, and the role of contract in partnerships

(a) Contractual or status-based agency

The Law Commissions' Joint Report states, immediately under the heading "Existing Law": "[t]he agency of a partner is a special form of agency which arises out of his

5 Gretton, "Who owns partnership property?" (n 1) at fn 9.

6 Partnership Act 1890 s 4(2). For analysis of the aggregate and entity approaches in partnership law see G S Roslin, "The entity-aggregate dispute: conceptualism and functionalism in partnership law" (1989) 42 Arkansas Law Review 395.

7 This issue is considered at B.(4) below.

8 Gretton, "Who owns partnership property?" (n 1) at 168.

status as partner and not out of a contract of agency with his principal."[9] It is worth considering this statement (for which no authority is given). Section 5, whilst expressing the fact that a partner is an agent, does not explain the legal source of the partner's role as agent (and one would not expect it to).

There is no agency contract binding a partner to the firm or to his other partners, and this may explain the choice of status-based rather than contractual agency. But there is, of course, a partnership contract, which may be written or oral.

The choice of status-based agency places partnership outside the norm in Scottish agency law. The extensive body of case law confirms the contractual nature of agency.[10] Usually that contract will be express, but it may be inferred from the conduct of principal and agent. Scottish agency law can be contrasted with English agency law in this respect. In the latter, agency may be created by a contract, but a contract is not needed.[11] Agency is defined instead, as a fiduciary relationship based on manifestations of assent.[12] The definition in the leading English text contains no reference to contract.[13] English law may have eschewed contract in defining agency law because it brings with it the potentially constraining requirement of consideration. In opting for a status-based agency, could the Law Commissions be open to the accusation already levelled here at the drafters of the 1890 Act, i.e. of adopting an uneasy compromise in order to suit both legal systems?

Comparative law may shed light on this issue. Article 2986 of the Louisiana Civil Code states:

> The authority of the representative can be conferred by law, by contract, such as mandate or partnership, or by the unilateral juridical act of procuration.

The focus of this section is the creation of authority rather than of agency. Nevertheless, it recognises that agency contracts are not the only contracts that create authority. Authority can be created by contracts such as partnership, or (an example not noted in Article 2986) employment. Agency can be created by different contracts, not solely agency contracts. It is possible to see the partner's agency as contractual in nature, arising from the partnership contract. As this essay will go on to explore, it may be beneficial to opt for a contractual idea of agency in the partnership context.

(b) The role of contract in partnerships

Lord Millett in an English House of Lords Appeal described partnership as "more than a simple contract . . . it is a continuing personal as well as commercial relationship".[14] Although created by contract, once created, it is subject to the control of the courts of Equity.[15] Noting the absence from the 1890 Act of a doctrine

9 Report on *Partnership Law* (n 3) para 6.3.
10 Numerous examples of judicial emphasis of the contractual nature of agency are provided in L J Macgregor, *The Law of Agency in Scotland* (2013) 16 fn 54.
11 E McKendrick, *Goode's Commercial Law* (5th edn, 2016) 182 fn 16, relying on *Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174.
12 P G Watts and F M B Reynolds, *Bowstead & Reynolds on Agency* (20th edn, 2014) para 1-001.
13 Watts and Reynolds, *Bowstead & Reynolds on Agency* (n 12) at para 1-001.
14 *Hurst v Bryk* [1999] 1 Ch 1, [2002] 1 AC 185 at 194.
15 [2002] 1 AC 185 at 194.

of repudiation[16] he expressed considerable doubt over whether repudiation could cause the automatic dissolution of a partnership contract.[17] The strongest argument against the possibility of automatic dissolution through repudiatory breach was, for him, the fact that it sits uneasily with the court's discretionary power to dissolve the partnership in section 35(d).[18] Although his comments were *obiter*, they have been considered in subsequent cases.[19]

Rescission has the effect of discharging the parties from further performance of the contract, and it is not surprising that this radical solution seems out of place in the context of an ongoing business. Other contractual remedies, by contrast, keep the contract alive, for example retention and specific implement (the latter being available more widely in Scots law than in English law). Whilst one might agree that rescission may be inappropriate in partnerships, this does not necessitate rejection of the whole of the law of contract as a fundamental legal concept playing a central role in partnership law.

Downplaying the role of contract in partnership is dangerous because it fails to recognise the crucial role played by the partnership contract. Indeed, one of the reasons why partnerships are so popular is the ability of the partners, through contractual drafting, to govern their affairs in the way they want to. Arguably a court should not "interfere" with the partners' freedom of contract, using equitable rules. Does it even mean anything to a Scots lawyer to say that partnerships are controlled by equitable rules? Lord Millett's statement, that:

> [b]y entering into the relationship of partnership, the parties submit themselves to the jurisdiction of the courts of equity and the general principles developed by that court in the exercise of its equitable jurisdiction in respect of partnerships[20]

cannot be applied to Scots law. He appears to suggest that partnerships must be governed by one body of law at a time: either contract or equity. This is not the case. Partnerships (like agency relationships) are governed by contractual rules and fiduciary rules,[21] and partnerships are also governed by partnership law, expressed in the Partnership Act 1890.

To conclude this part, it is suggested that it is preferable to equate the partner's role as agent with normal contractual agency in Scots law. More broadly, however, it is conceded that the normal contractual remedy of rescission may not be appropriate in the context of an on-going business, like partnership.

(3) The evolving law of agency as a source of legal rules for partnerships

Agency law suffers from a chronic crisis of identity. Even a professor researching and teaching agency law, Thomas Krebs, has argued that there is no "magic" in agency law.[22] Rather, agency law is a modified form of the objective analysis of consent applied

16 [2002] 1 AC 185 at 194 and 195.
17 [2002] 1 AC 185 at 193.
18 [2002] 1 AC 185 at 196.
19 See, e.g. *Mullins v Laughton* [2003] Ch 250 and *Bishop v Golstein* [2014] EWCA Civ 10, [2014] Ch 455.
20 *Hurst v Bryk* (n 14) at 196.
21 Macgregor, *Law of Agency* ch 6.
22 T Krebs, "Agency law for Muggles: Why there is no Magic in Agency Law" in A Burrows and E Peel (eds), *Contract Formation and Parties* (2010) ch 10.

to the formation of contracts. In the US too there has been reluctance to recognise agency as a subject in its own right, extending as far back as the writings of Oliver Wendell Holmes Jnr.[23] One reason for this reluctance may be the doubt that surrounds the meaning of the word "agent". It can have both technical and non-technical meanings. Indeed, Lord Sumption recently condoned the view of both parties to an English appeal that the word "agents" in a particular commercial contract was *not* limited in its meaning to "agents" in the strict legal sense.[24] Scottish case law exhibits confusion over whether agency is an issue of fact or an issue of law.[25]

Taking into account these ambiguities, it is interesting to note that the Law Commissions did not seek to define what it means to describe a partner as an agent. The Commissions stated:

> we do not think that it would be either necessary or appropriate to try to reproduce within the Bill a full statement of the law of agency as it applies to partnerships.[26]

They explained, "there have been developments in the law of agency since 1890".[27] Thus partnership law must evolve with the evolving law of agency. With the benefit of over ten years hindsight, these statements appear prescient. The law of apparent authority has fundamentally changed. When the Joint Report was published the status of the Court of Appeal case, *First Energy (UK) Ltd v Hungarian International Bank Ltd*[28] was uncertain. In that case, Lord Steyn appeared to extend classic apparent authority, recognising that an agent who had authority to communicate information on behalf of his principal could, as part of the exercise of that authority, communicate the extent of his own authority. The case appeared to come perilously close to recognition of a self-authorising agent, an idea rejected in *Armagas Ltd v Mundogas SA (the Ocean Frost)*.[29] More recently the Privy Council in *Kelly v Fraser*[30] has confirmed that *First Energy* is good authority. Apparent authority will continue to be a wide rather than a narrow concept, operating to protect third parties from unauthorised agents. There is no reason to treat partnerships any differently – partners who act in an unauthorised manner can also cause loss. The wider idea of apparent authority should also apply in the context of partnerships.

(4) Mutual agency, fiduciary duties and good faith

(a) Mutual agency

It is sometimes said that partnership involves mutual agency. Clark stated:

23 "Agency" (1890–1891) 4 Harv LR 345 and (1891–1892) Harv LRev 1.
24 *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20, [2016] 1 WLR 1853 at para 14.
25 See Macgregor, *Agency* (n 10) at para 3-04. Whether agency exists is a question of law. It may require to be answered by considering the facts, and indeed making inferences of the consent necessary to create agency from those facts. In *The Harbro Group Ltd v MHA Auchlochan* [2013] CSOH 8 at 20 it was argued that agency was a question of both fact and law. On appeal ([2014] CSIH 14, 2014 SCLR 555) agency was not argued before the court.
26 Report on *Partnership Law* (n 3) at para 6.11.
27 Report on *Partnership Law* (n 3) at para 6.11.
28 [1993] 2 Lloyd's Rep 194.
29 [1986] AC 717. Lord Steyn in *First Energy* showed judicial creativity by placing the facts of the case within a narrow exception recognised in *Armagas* by both Lord Goff (in the Court of Appeal) and Lord Keith (on appeal to the House of Lords).
30 [2012] UKPC 25, [2013] 1 AC 450.

> Yet where, in any matter of gain or commerce, two or more persons stand *mutually* to each other in the relation of principal and agent, – that is to say, where each of them is capable of binding and being bound by the others, – it is very difficult to escape from the conclusion that the partnership relation has been constituted.[31]

Gordon Brough, in his second edition of J B Miller's *Partnership*, relied on this statement in order to suggest that Scottish partnerships involve "mutual agency", or at least to conclude that the absence of mutual agency is strong evidence that no partnership exists.[32]

Clark's statement may, however, be problematic. The first part: "each of them is capable of binding . . . the others" is true only if we understand "the others" to mean the partnership as a separate legal entity. In Scots law one partner does not bind another partner individually, nor bind partners purely as a collection of individuals. The second part of the statement "and being bound by the others" is also problematic. The statement "an individual partner is bound by the others" is correct only if we mean that he is bound because he is part of the separate legal entity that is the partnership. He is not bound individually. The phrase "mutual agency", if it means that partner A binds partner B, is misleading in a Scottish context.[33] It is also unhelpful because it obscures the existence of separate legal personality. Not surprisingly, the Joint Report concluded "mutual agency is not consistent with separate legal personality".[34]

The expression "mutual agency" may make more sense in English law (although the author makes no claim to expertise in English law). In Lindley & Banks, *Partnership*, mutual agency is referred to as a "normal incident of the partnership relation".[35] A partner is also described as acting in a dual capacity, i.e. as agent for the partners collectively and as agent for each of the other partners in their individual or separate capacities.[36]

(b) Fiduciary and good faith duties

At the risk of further complicating matters, it is worth saying that partners occupy a dual role (rather than Lindley & Banks "dual capacity") in both legal systems. He or she inhabits both the "agent" and "principal" levels of the agency relationship. He or she is an agent, but he or she is also part of the principal, i.e. part of the separate legal entity that is the partnership. Presence at both levels renders more difficult the application to partnerships of other agency ideas. One would find broad agreement to the proposition that a partner (like other agents) is a fiduciary. His or her role as a fiduciary differs, however, from any other agent's role as a fiduciary. The agent's

31 F W Clark, *Partnership* (1866) vol I p 50.
32 J B Miller, *Partnership* (2nd edn, 1994, by G Brough) 153 and n 3.
33 It is true that partners are jointly and severally liable for partnership debts and therefore could be said to "bind one another" (see the Partnership Act 1890 s 9). This is true to a limited extent, namely the partner binds the partnership only where that partner has acted within the scope of his or her authority, whether actual or apparent (see the Partnership Act 1890 s 5). Section 5 is misleading because it gives the impression that one partner can *directly* bind another partner personally in a contract, without making reference to joint and several liability. It is also misleading because it creates an illusion of similarity between Scots and English law.
34 Report on *Partnership Law* (n 3) at para 6.10.
35 R I'Anson-Banks, *Lindley & Banks on Partnership* (19th edn, 2016) para 12-01.
36 I'Anson-Banks, *Lindley & Banks on Partnership* (n 35) at para 12-05.

fiduciary duty requires him or her to act loyally, indeed to act "body and soul" for his or her principal.[37] As Dickerson has pointed out, the partner ". . . does not have to sacrifice for the other partners".[38] His or her personal interests are not entirely subjugated to those of the principal. He or she is part of the principal, and his or her interests are bound up in the principal's interests. To adapt Mr Spock's words, "It's agency, Jim, but not as we know it".[39] To this extent, at least, the agency of partners differs from normal agency.

The Partnership Act 1890 contains expressions of fiduciary-type duties. Whereas under section 29 the partner must account to *the firm* for any benefits derived by him without the consent of the other partners, and, similarly, under section 30 the partner must pay to *the firm* any profits made in competition with the firm, by contrast, his duty under section 28 to render true accounts is expressed to be due to *any partner*. The Law Commissions recommended retention of this difference of treatment.

In addition to the duties expressed in the Partnership Act 1890, sections 28 to 30, one partner owes to another partner a separate duty of good faith in both Scots[40] and English law.[41] This duty is often based on the fact that partners must trust one another in order to function as a business.[42] The duty is not referred to in the Partnership Act 1890, and is sometimes described as an implied term of the partnership contract.[43] The duty may, in Scots law, have its roots in the Roman contract of *societas*. As a consensual contract, each party's obligations in that contract were determined by reference to good faith.[44] *Societas* was "based on the mutual trust of the partners between whom it created a kind of brotherhood".[45] In a modern context, mutual agency may have been emphasised as a potential explanation for, or route to the imposition of, this duty of good faith between individual partners.

Regardless of the historical roots of the partner-to-partner duty of good faith, one might question whether this duty should exist in modern Scots law where the firm is a separate legal entity. A good faith duty owed to the firm as a whole is understandable, but a good faith duty owed by one partner to another is more questionable. The firm itself is the party most likely to be damaged by breach of such a duty. An individual partner is also likely to join the other partners in an action that he or she raises

37 *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 1 Lloyd's Rep 436 at para 6 per Jacob LJ.

38 C M Dickerson, "Bracketed flexibility: standards of performance level the playing field" (2001) 26 J Corp L 1001 at 1017.

39 Apparently, Mr Spock did not say, "It's life, Jim, but not as we know it", see Martin Wainwright, "Beam me up Scotty – and misquote me for better effect", https://www.theguardian.com/uk/2006/oct/25/books.booksnews.

40 Erskine deduces from the underlying basis of good faith that, where the partner acquires rights naturally connected with the partnership with his own money, he is presumed to purchase for the partnership, see *Institute*, 3.3.20, citing *Inglis v Austine* (1624) Mor 14,562. Bell described the contract of partnership as involving "exuberant trust", see *Comm,* II, 508 and 520; and *Prin* § 358. See also Report on *Partnership Law* (n 3) paras 3.12 and 3.13; D A Bennett, "Partnership", in *The Laws of Scotland, Stair Memorial Encyclopaedia*, Reissue (2015) para 27.

41 M Blackett-Ord and S Harden, *Partnership Law* (5th edn, 2015) para 11.1; *Bishop v Golstein* [2014] EWCA Civ 10, [2014] Ch 455 at para 11 per Briggs LJ.

42 *Helmore v Smith* (1885) 35 Ch D 436, per Bacon V-C at 444.

43 Blackett-Ord and Harden, *Partnership Law* (n 41) at para 11.1.

44 R Zimmermann, *The Law of Obligations* (1996) 454; A G M Duncan (ed), *Trayner's Latin Maxims* (4th edn, 1894, repr 1993) "Contracts *bonae fidei, et stricti juris*".

45 J A C Thomas, *Textbook of Roman Law* (1976) 301 citing D 17.2.63 pr; Zimmermann, *Obligations* (n 44) at 451 and 466.

against the partner in breach.[46] Nevertheless, partner against partner actions (as individuals) for breach of a duty of good faith appear to be available in English law.[47] Arguably, such actions should not be encouraged because of their potential to damage the running of the business. Individual partners should prioritise the interest of the firm as a whole over their own personal interests.

The nature, and inter-relation of, fiduciary and good faith duties in Scottish partnerships is a highly complex area, which cannot be fully explored here. For the moment, two conclusions are highlighted both of which follow from the existence of separate legal personality. First, it is not useful to describe partners in Scots law as mutual agents. Secondly, and more controversially,[48] a partner-to-partner duty of good faith may not be useful or appropriate.

(5) Imputation of knowledge

Agency rules govern imputation of knowledge from agent to principal. It is difficult to state the legal position briefly.[49] Broadly, there are four categories or situations in which the knowledge of an agent is imputed to the principal. These have been identified by the authors of *Bowstead & Reynolds on Agency*, and are based largely on Lord Hoffmann's speech in *El Ajou v Dollar Land Holdings Ltd*.[50] They are:

(1) The law may impute to a principal knowledge relating to the subject matter of the agency that the agent acquires while acting within the scope of his authority;
(2) Where an agent is authorised to enter into a transaction in which his own knowledge is material, knowledge that he acquired outside the scope of his authority may also be imputed to the principal;
(3) Where the principal has a duty to investigate and make disclosure, he may have imputed to him not only facts that he knows but also material facts of which he might expect to have been told by his agents;
(4) Knowledge is not attributed to the principal where the principal is claiming in respect of a breach of duty of his own agent, and, perhaps, where the agent is defrauding the principal in the transaction at issue.

The status of (4) has been called into question by the Supreme Court case *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)*,[51] decided after publication of the most

46 The Commissions appear to concede this point. See Report on *Partnership Law* (n 3) at para 11.67.
47 I'Anson-Banks, *Lindley & Banks on Partnership* (n 34) at para 16-01, expresses the general duty of good faith by reference to Lord Lindley's statement: "The utmost good faith is due from every member of a partnership towards every other member", *Blisset v Daniel* (1853) 10 Hare 493. The individual partner's ability to raise an action against another individual partner in breach is not made explicit in chapter 16, entitled "The Duty of Good Faith". The existence of such an action is made more explicit in Blackett-Ord and Harden, *Partnership Law* (n 41) at para 14.50.
48 This suggestion is controversial given that, in the context of the Law Commission Consultation, there was little support for the suggestion that partners should owe duties only to the firm (see Report on *Partnership Law* (n 3) at para 11.25). The Commissions recommended restatement of the partner-to-partner duty of good faith in statutory form and that the duty be impossible to exclude (Report on *Partnership Law* (n 3) at para 3.20).
49 For analysis see P G Watts, "Imputed knowledge in agency – excising the fraud exception" (2001) 117 LQR 300; and D DeMott, 'When is a principal charged with an agent's knowledge?' (2003) 13 Duke J Comp & Int L 291.
50 [1994] 2 All ER 685 and see Watts and Reynolds, *Bowstead & Reynolds on Agency* (n 12) at para 8-207.
51 [2015] UKSC 23, [2016] AC 1.

recent edition of *Bowstead and Reynolds on Agency*. Without exploring the detail of these rules, what is obvious is that there is no rule that all information received by any agent is always imputed to that agent's principal. Clearly a detailed factual enquiry, focussing on the type of agent and that agent's particular role, is necessary before information is imputed.

Turning to this same issue in partnership law, the Partnership Act 1890, section 16 provides:

> Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

This provision is not limited to notice, but applies additionally to knowledge gained by a partner while acting in the partnership business.[52] However, only information that relates to partnership business can be imputed. The section is based on the partner's duties as agent, and it follows that only information received by the partner whilst acting as an agent in the course of partnership business can be imputed. Imputation tends to operate to prevent a firm from claiming ignorance of a particular fact where that fact was known to one of the partners in that firm.[53] Such behaviour should certainly be prevented. The Supreme Court judgment in *Bilta* may curtail significantly the ability of a firm to shield itself from adverse consequences where, unknown to the firm, one of its partners has acted illegally or fraudulently, in an attempt to defraud his or her own firm.

Case law too confirms that imputation in the partnership context is limited. For example, a partnership may, with its clients' express or implied consent, act for different clients while respecting the confidentiality of each.[54] Imputation must be curtailed where the information received is confidential to one client, but could be very useful to another client.[55] So too the courts have sought to draw a distinction between knowledge "relating to partnership affairs" and knowledge relating to a client's affairs.[56] If knowledge of client affairs (rather than partnership affairs) was imputed to all partners in a law firm, it would be impossible for different partners within that firm to act for clients on different sides of a transaction, a practice that is not uncommon. Looking at these partnership rules collectively, imputation will take place only rarely and depends upon the type of information held and the reasons why the partner as agent held that information.

The Insurance Act 2015 recently changed the rules of imputation of knowledge between insurance agents on the one hand, and the insured on the other, in the context of performance of the insured's duty of disclosure. The situation was previously governed by sections 18 and 19 of the Marine Insurance Act 1906 and case law that had developed around those sections. Broadly, these sections imposed a duty on the insured to disclose knowledge that he or she was actually aware of, and knowledge that he or she ought to know in the ordinary course of business, and a

52 Report on *Partnership Law* (n 3) at para 6.16.
53 Brough, *Partnership Law* (n 32) at 221.
54 *Kelly v Cooper* [1993] AC 205, *Bolkiah v KPMG* [1999] 2 AC 222, noted in the Report on *Partnership Law* (n 3) at para 6.17.
55 Report on *Partnership Law* (n 3) at para 6.16.
56 *Campbell v McCreath* 1975 SLT (Notes) 5, *Northumberland v Alexander* (1984) 8 ACLR 882, 904–905, noted in the Report on *Partnership Law* (n 3) Report on *Partnership Law* (n 3) at para 6.17.

duty on the insured's agent to disclose knowledge known to the agent and knowledge that ought to be known to that agent in the ordinary course of business. Admittedly, the law was not easy to understand. Nevertheless, agency provided the rationale for imputation, and it was not the case that the knowledge of every agent was imputed to the principal. It depended upon the type of agent concerned and the activities he or she was involved in when the knowledge was acquired.

The Insurance Act 2015 contains a new duty of fair presentation of the risk. The provisions on actual knowledge are largely the same.[57] What the insured ought to know is now what should reasonably have been revealed by a reasonable search of information available to the insured.[58] "Information" includes information held within the insured's organisation or by any other person.[59] Although this description might include an agent, it is not exclusively aimed at agents.[60] Agency no longer provides the rationale for imputation, nor do agency ideas limit the types and extent of knowledge imputed.

As the author has argued elsewhere,[61] this amounts to a significant enlargement of the amount of information imputed from insurance agent to insured. A limitation in relation to confidential information[62] tempers slightly the effect of the new provisions. The extension of the rules on imputation is curious. The Law Commission publications that preceded legislative reform did not suggest a need to increase imputation.[63] Rather, they emphasised the need to rebalance the obligations in the insurer/insured relationship in favour of the insured.

Reform of partnership law should learn the lessons of the recent insurance reform. Agency law provides the rationale for imputation in partnership law: imputation does not take place in a vacuum. In any reform of partnership law, the existing constraints imposed by section 16 and the case law should be retained.

(6) Ownership of property and dissolution of the firm

It is very difficult to identify general principles governing ownership of property in partnerships because much depends on the way in which title is taken. Where the property in question is heritable, title may be taken in the name of one or more of the partners individually (the partners having agreed that it will be used by the firm), in the name of the firm, or by the partners as trustees for the firm. Thus, the agreement of the partners (express or implied) determines the status of the property.[64] Sections 20 and 21 of the Partnership Act 1890 also provide factors which will be relevant if the parties have failed to express their agreement in the partnership

57 Insurance Act 2015 ss 3(4), 4(2) and 4(3).
58 Insurance Act 2015 s 4(6).
59 Insurance Act 2015 s 4(7).
60 Insurance Act 2015 s 4(7).
61 L Macgregor, "Unwelcome Knowledge: Imputation of the Agent's Knowledge in the Pre-contractual Phase of Insurance" in D Busch, L Macgregor and P Watts (eds), *Agency Law in Commercial Practice* (2016) ch 11.
62 Insurance Act 2015 s 4(4).
63 Issues Paper 3, *Intermediaries and Pre-Contract Information* (March 2007) and Report on *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353 and Scot Law Com No 238, 2014).
64 Bell, *Comm* II, 501–502.

contract.[65] Professor Gretton made the important point that ownership of property must be considered separately from each individual partner's share in the firm, and he identified the latter as an incorporeal moveable right.[66] Questions of ownership, so expertly discussed by Professor Gretton, do not form the focus of this essay. Rather, the focus will lie on the partners' abilities as agents to deal with partnership property during winding up of the firm, when separate legal personality causes particular difficulties.

Partnership contracts involve *delectus personae*, i.e. the individual partners have chosen one another for reasons of special skill or talent. One practical consequence of *delectus personae* is ease of dissolution. Ways in which a partnership may come to an end can be divided into those where there is no need to raise a court action,[67] and those where one or more of the partners must raise a court action.[68] Crucially, where the partnership has been entered into for an undefined period of time (a partnership-at-will) one partner may give notice to the other partners of his or her intention to dissolve the firm.[69] The partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of communication of the notice.[70] If no date of dissolution is mentioned in the notice, dissolution can take the remaining partners by surprise. Whilst their partnership agreement may govern what is to happen to partnership property when such a notice is served, it may not do so, and, of course, many partnerships have no written partnership agreement. On dissolution, partnership property appears to become ownerless, the entity that owned it having been dissolved.

What might otherwise be a practically difficult situation is tempered by section 38 of the Partnership Act 1890. This section continues the agency status of the partners notwithstanding dissolution for certain limited purposes. It states:

> After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution . . .

65 Section 20 in particular is very difficult to understand although thankfully, given the focus in this essay on agency issues, no more need be said about it.

66 Gretton, "Who owns partnership property?" (n 1) at 165. Bell, *Comm* II, 536 states: "The share of each partner is a portion of the *universitas*: it forms a debt or demand against the [partnership], so as to be arrestable in the hands of the [partnership]".

67 Including reduction of the number of partners below two (Partnership Act 1890 s 1), expiry of a fixed term (s 32(a)), termination of the adventure for which the partnership was formed (s 32(b)), notice of intention to dissolve the partnership, where entered into for an undefined time (s 26), death or bankruptcy of a partner (s 33(1)), where one of the partners suffers his share to be charged for his separate debt (s 33(2)), where an event has occurred which makes it illegal for the partnership business to be carried on or for the partners to carry it on in partnership (s 34). Partnerships can also be dissolved by unanimous agreement of the partners, a possibility not referred to in the Act. In *Hurst v Bryk* [1999] 1 Ch 1, [2002] 1 AC 185 at 195 Lord Millett suggested that this possibility could be read into the Act by a combination of ss 19 and 32(a).

68 The statutory grounds upon which a court may dissolve a partnership are found in the Partnership Act 1890 s 35.

69 Partnership Act 1890 ss 26 and 32 (subject to contrary agreement between the partners).

70 Partnership Act 1890 s 32(c).

This section applies what is a common law rule of agency law to partnerships. The rule was recognised in *Pollok v Paterson*,[71] an Inner House decision of a bench of five judges from 1811. The dispute in that case concerned a principal who had suffered both mental incapacity and sequestration. Drawing on the works of both Stair[72] and Erskine,[73] the judgments affirm the general rule that the relationship of mandate terminates on the death of either party, before noting two exceptions. First, the mandatar/agent is entitled to complete any partially performed transactions notwithstanding the death of the mandant/principal. Secondly, an exception "bona fidei" exists which permits the mandatar to carry out transactions where he is unaware of the mandant's death, whether or not those transactions have commenced at the time of death. Both Stair and Erskine cite authorities from Roman law to support their views,[74] and the Inner House also identified Roman law as the source of the rules.[75]

Section 38 usefully continues the partners' agency powers, facilitating dissolution of the partnership. Extension of the partners' authority cannot solve every problem, however. Section 38 focuses only on the mechanics of winding up the partnership. Ownership brings with it responsibilities both under common law and under statute, for example through being occupiers under the Occupiers Liability (Scotland) Act 1960. Exactly who owns partnership property is a highly significant question in circumstances where an individual partner has become bankrupt. To this extent section 38 obscures the underlying problems relating to ownership of property by partnerships.

Section 38 itself is not free from problems. In *Inland Revenue v Graham's Trustees* Lord Upjohn explained that the section will operate in a different manner in Scots and English partnerships because of the differing attitude of those systems to legal personality.[76] In English law

> the remaining partners and the outgoing or the estate of a deceased partner will normally remain both entitled and jointly and severally liable under the general law to complete the bargain.[77]

Not suffering the same radical loss of personality on dissolution, English partnerships (in contrast to Scottish ones) have less need to invoke section 38.[78] In short, section 38 may not be necessary in English law. In Scots law, it certainly is necessary so that partners can continue to have authority to deal with partnership assets (even if the identity of their principal is not entirely clear, the firm having been dissolved).

71 10 December 1811, FC.
72 *Inst* 1.12.6.
73 *Inst* 3.3.41.
74 Both cite J Inst 3.26.10 in support of the two exceptions, and Erskine also cites D 14.3.17.2–3.
75 10 December 1811, FC 369 at 377 per Lord Meadowbank and per Lord Justice-Clerk Boyle at 382, although neither is specific about the Roman authorities they are relying on. Counsel for the pursuer cited D 14.3.17.2-3 (perhaps prompted by the citation of this passage by Erskine, *Inst* III,3,41) and the discussion of this passage by both Pothier and Voet. See R J Pothier, *Treatise on the Law of Obligations* (translated by W D Evans, 1806) para 448; J Voet, *Commentarius ad Pandectus* (1707) 14.3.3 and 17.1.15. See also Zimmermann, *Obligations* (n 44) at 425.
76 1971 SC (HL) 1 at 26–27. See also at 20–21 per Lord Reid.
77 1971 SC (HL) 1 at 26–27 per Lord Upjohn.
78 See also *Duncan v MFV Marigold PD145* 2006 SLT 975, per Lord Reed and *Boghani v Nathoo* [2011] EWHC 2101, 2012 Bus LR 429 at para 27 per Sir Andrew Morritt C.

Is partnership property indeed ownerless once the firm has been dissolved? Professor Gretton answered this question in the negative, suggesting that when a firm is dissolved, "its personality is not actually extinguished until its winding-up is carried out, i.e. until the assets have been realised or transferred".[79] One can understand the motivation behind this suggestion – if this were correct, there would be no doubt about ownership of property following dissolution. It would be possible to identify an owner at every stage during dissolution of the firm and later transfer of the assets. It is difficult to agree with it, however. Partners may have rights following dissolution, including most fundamentally a right to a share in the partnership assets. Logically, legal personality must fall on dissolution. It is very difficult to see how a dissolved firm can continue in existence simply to own partnership assets. Here, the author must respectfully differ from Professor Gretton.

For the sake of completeness, it is worth considering whether partners are trustees of partnership property after dissolution. This might be the case if the partners have taken title to property expressly as trustees for the partnership. It might arise in other ways, however. Agents often hold property in trust, either under statutory rules that create express trusts[80] or under a constructive trust.[81] Applying trust concepts to this particular context causes difficulties, however. The partnership as a separate legal entity cannot be the beneficiary of the trust because it has been dissolved. Nor are partners as individuals necessarily beneficiaries. On dissolution, partnership property is applied in payment of the debts and liabilities of the firm, with surplus assets only being available for the partners.[82] Partners may therefore not necessarily be beneficiaries of any trust which arguably exists. This position can be contrasted with English law where, after dissolution, partners are described as being "beneficially entitled to the assets of the firm remaining after the liabilities have been discharged".[83] In summary on this point, in Scots law trust concepts do not seem to offer an obvious solution to the conceptual problems created post-dissolution of the partnership.

C. CONCLUSION

This essay has sought to discuss the role of agency in partnerships. Having discussed the agency provisions of the 1890 Act in B.(1), it advocated in B.(2) a normal contractual idea of agency in partnerships, rejecting a status-based idea. This allows partnership to take account of the evolving law of agency, and apparent authority was used as a case in point to illustrate this need (B.(3)). It was conceded, however, that the contractual concepts of repudiation and rescission may be inappropriate in the partnership context. It then considered in B.(4) the mutual agency of partners, arguing that the idea is not appropriate in Scottish partnerships. More controversially, it questioned whether it should be possible for one partner to raise an action for a

79 Gretton, "Who owns partnership property?" (n 1) at 178.

80 Certain agents working in financial institutions must hold client money in trust. See the Financial Services and Markets Act 2000 s 137B(1)(a). Solicitors also hold client funds in trust, as noted by the Scottish Law Commission in their Discussion Paper, *Supplementary and Miscellaneous Issues in Trust Law* (DP 148, 2011) paras 5.5 and 5.10, fn 18.

81 Where the agent has retained the property of the principal in breach of fiduciary duty. The law is analysed in Macgregor, *Agency* (n 10) ch 6.

82 Partnership Act 1890 ss 39 and 44.

83 *Hurst v Bryk* [1999] 1 Ch 1, [2002] 1 AC 185 at 197 per Lord Millett.

breach of a duty of good faith against another partner individually. In B.(5) the agency reasoning that underpins imputation of knowledge in partnerships was emphasised. Agency provides the rationale for imputation, and constrains it. Finally, in B.(6), problems relating to the ownership of property post-dissolution were discussed. Agency plays a key role in facilitating the process of winding up the partnership (Partnership Act 1890, section 38). Exactly who owns partnership property post-dissolution remains, however, subject to doubt.

This essay has highlighted issues which remain subject to significant doubt. Reform of Scottish partnership law is required as much now as it was when the Joint Report of the Law Commissions was published in 2003. It should certainly be near the top of the Scottish Law Commission's issues for consideration in a new programme of reform. As long as partnerships remain such a popular choice, the business community deserves a partnership law with a satisfactory and workable legal framework.

DELIVERY OF DEEDS AND VOLUNTARY OBLIGATIONS

Hector MacQueen

A. INTRODUCTION

I first encountered George Gretton in the autumn of 1976 when he turned up in the University of Edinburgh's Old College to begin the second first (or "accelerated") LLB degree just as I was starting the first year of the Honours degree. As senior scholars, Honours students of course ignored the first degree freshers, and no doubt such disdain was fully reciprocated. But one did of course rather notice George, a kenspeckle moustachioed figure even in those salad days of his youth. And I well remember one of my friends in the Honours class (now a distinguished partner in the Glasgow firm of Holmes McKillop) pointing to him on the other side of the Law Library one day in 1978 and whispering to me in rather awed tones, "Do you know he's published an article *already*?"

And sure enough he had – a one-pager in the *Scots Law Times* entitled "Reparation and *Negotiorum Gestio*".[1] It put forward what would still be a very bold argument, to the effect that the doctrine of *negotiorum gestio* (or benevolent intervention, as some of us now prefer to call it[2]) could be used by a person to recover the rather large amount of money he spent to prevent a fire negligently started by his neighbour reaching and damaging his own land. The boldness was because usually in these cases the intervener is intervening for someone else, not himself; while in the law of reparation purely economic or financial loss is not recoverable except in certain special cases of which this was not one. George thought his solution was a principled way to achieving a just outcome in the particular case. Already in that short article he was setting out what became the keynote of his academic contribution to law in Scotland (and elsewhere). Good theory and good practice walk hand-in-hand to good law and good outcomes. In the decades that have followed I have greatly relished listening to George talking about law, reading his writings, debating with him, and working together as colleagues on numerous endeavours, in Scotland and elsewhere. Perhaps, however, we collaborated most in the years together as Scottish Law Commissioners (2009–2011), and this contribution in his honour springs mostly from engagement with each other's work at that time.

1 G L Gretton "Reparation and *negotiorum gestio*" 1978 SLT (News) 145. Much later I discovered that this was George's *fourth* publication on law.

2 Lord Eassie and H L MacQueen (eds), *Gloag & Henderson The Law of Scotland* (14th edn, 2017) paras 24.24–24.28.

B. DELIVERY OF DEEDS IN SCOTS COMMON LAW

Delivery of deeds first arose in our shared Law Commission experience with the land registration project on which George was the lead Commissioner. Its Report was published in 2010.[3] One relatively minor but nonetheless significant aspect of the project was the further enablement of electronic conveyancing, encompassing not only the process for registration of titles to land, but also the use of electronic documents in the formation of the relevant preceding contracts and for the title deeds.[4] It was in the latter context that questions about delivery of the documents in question had to be addressed.

The long-established common law rule was – and is – that a document by which one party (the granter) grants a right of some kind to another (the grantee) cannot be effective as a juridical act before delivery (*traditio*) by the granter to the grantee.[5] A juridical act may be defined as:

> any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.[6]

The principle underlying a requirement of delivery was classically stated in the eighteenth century by the institutional writer, Erskine, as follows:

> A writing, while it is in the granter's own custody, is not obligatory; for as long as it is in his own power, he cannot be said to have come to a final resolution of obliging himself by it.[7]

The famous example with which this is usually illustrated is the late seventeenth-century case known as *Stamfield's Creditors v Scot's Children*,[8] where the granter of an assignation had intimated to the assignee that the document had been signed and awaited collection at his Edinburgh house in World's End Close.[9] But before that could take place the granter's dead body was found in the River Tyne near his house in Haddington, while the subscribed document addressed to the assignee lay on a table in the Edinburgh house.[10] The assignee contended that "it is not so much the

3 See Report on *Land Registration* (Scot Law Com No 222, 2010).

4 See chapter 34 of the Report.

5 See generally W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007) ch 4; J M Halliday, *Conveyancing Law and Practice* (2nd edn by I J S Talman, 1996) para 1.07 and ch 5; R Rennie, "Conveyancing", in *The Laws of Scotland: Stair Memorial Encyclopedia*, Reissue (2005) paras 63–66; also G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) paras 11.28–11.30; G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) para 31.57.

6 Taken from DCFR Art II.-1:101(2); see also its annex of definitions. Cf P Hellwege, "Juridical acts in the Draft Common Frame of Reference – a model for Scotland" (2014) 18 EdinLR 358.

7 Erskine, *Inst* 3.2.43.

8 (1696) 4 Bro Supp 344.

9 Also known then as Sir James Stansfield's Close: see Historic Environment Scotland, *Canmore database*, available at https://canmore.org.uk/site/52328/edinburgh-high-street-worlds-end-close.

10 For the further discovery that the granter (Sir James Stansfield, as his name is most commonly given) had not been drowned or committed suicide, but had died by strangulation; and for the subsequent trial, conviction and gruesome execution of his wayward elder son, Philip, for treason, cursing his father, and parricide, see T B Howell *A Complete Collection of State Trials* XI (1811) no 354; W Roughead, *Twelve Scots Trials* (1913) 63–84. For a contemporary account edited by Sir Walter Scott, see John Lauder of Fountainhall, *Chronological Notes of Scottish Affairs, from 1680 to 1701* (1822) 234–236. The case is frequently cited by Hume: *Commentaries on the Law of Scotland respecting*

traditio de manu in manum [from hand to hand] that makes the delivery, as a rational act of the will, declaring our purpose, design or resolution". For the court, however, this was "a too nice and metaphysical tradition", and it was held that the document had not been delivered to the assignee, and was thus ineffective. Mere intention to deliver still does not meet the requirement of delivery. Delivery instead requires an act by which the granter deprives itself of possession, or custody, of the document. *Halliday on Conveyancing* states that "the ordinary rule is that delivery is made whenever the granter of a unilateral deed has done what he can to complete it"; but adds that "delivery of a deed which imposes obligations on the grantee is completed only when the grantee accepts it".[11]

Delivery is thus a demanding but powerful way by which a granter manifests the intention for a document to have legal effect. But where a mutual contract has been reduced to writing in a single document signed by all parties to it, there is no need for physical delivery of the document between the parties.[12] Erskine once again provides the classic statement:

> Mutual obligations or contracts signed by two or more parties for their different interests require no delivery . . . because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself it must also be effectual to the rest.[13]

The delivery requirement is thus chiefly significant for unilateral documents the form of which is one party (or a group of parties, such as co-cautioners) granting a right of some kind to another. Common examples in the reported case law include, not only assignations and cautionary obligations, but also dispositions (by which the disponer grants title to land to the disponee, who however still must register the document in the Land Register to make the title transfer complete) and bonds (undertakings to pay a sum of money). Documents embodying other unilateral promises will also generally need to be delivered to the promisee to be effective to bind the promisor.

Crimes (4th edn, 1844) I, 287, 291, 325; II, 172, 341. Sir James had previously established as a joint stock company the Newmills cloth manufactory near Haddington: on his military, political and entrepreneurial career, see further W R Scott (ed), *Records of a Scottish Cloth Manufactory at New Mills, Haddingtonshire, 1681–1703* (Scottish History Society 1905) lvi, lxx–lxxi; G Marshall, *Presbyteries and Profits: Calvinism and the Development of Capitalism, 1560–1707* (1980) 136, 140–152, 277–280, 292, 299, 301 and 350 note 15; I D Whyte, *Scotland before the Industrial Revolution: an Economic and Social History c.1050–c.1750* (1995) 289–290. Sir James' papers are held in the National Records of Scotland (call numbers RH15/102/1 and 6). It is possible that Viscount Stair's wife, Margaret Ross, daughter of James Ross of Balneil in Wigtownshire, was also Sir James' sister-in-law: see FMS, *Notes and Queries*, 4th series, ix (1872) 119.

11 Halliday, *Conveyancing* (n 5) para 5.03.

12 McBryde, *Contract* paras 4.44–4.69.

13 Erskine, *Inst* 3.2.44.

C. ELECTRONIC DELIVERY: A CASE FOR LAW REFORM?

(1) Issues identified

A question about delivery began to arise towards the end of the twentieth century, however, thanks to the development, first, of fax and then of email, by each of which electronic copies of paper documents could be transmitted electronically (and generally instantaneously, or nearly so) from sender to receiver while the original remained physically with the former. Did or did not such transmission amount to delivery of the paper document in question? To this question a number of first instance judges gave varying answers, while the Inner House failed to provide much guidance on the subject.[14]

These cases were however distinct from the problem to be addressed in purely electronic conveyancing, in that in all of them a facsimile of a paper document had been transmitted to the recipient. With electronic conveyancing, the documents would have an entirely electronic existence, with even their execution being carried out by the means of the parties' electronic signatures. In 2003 George was one of a group of four professors with expertise in conveyancing who provided the Keeper of the Registers with an opinion on that question during the development of the Automated Registration of Title to Land (ARTL) system finally introduced for electronic dispositions in 2006.[15] The professors took the view that purely electronic documents could indeed be delivered by way of electronic transmission thereof.

It is worth quoting some passages from that opinion, and not just because their phrasing has a Grettonian ring in places:

> Physical delivery of the physical disposition is necessary under current law not in and for its own sake, but only to constitute the juridical act (to use an academic term) whereby the existing owner, by an overt and unmistakable action, irrevocably authorises and empowers the grantee to obtain a real right . . . [*But*] we think that there can be such a thing as digital delivery. We do not see this as a substitute for delivery, or as mere constructive delivery, or as fictional delivery (*traditio ficta*). We see it as the actual delivery (*traditio vera*) of a digital deed. Digital delivery is the pressing of the "enter" key, or clicking of the mouse on the relevant icon, done with the requisite intention (*animus*), and having the effect of transmitting a deed that is itself digital.[16]

The professors argued that physical delivery for physical deeds and digital delivery for digital deeds are closely parallel:

> In both cases a deed is prepared privately. At this stage, in both cases, the deed remains under the sole control of the grantor and is of no legal effect. Then, by ordinary delivery or by digital delivery the deed leaves the control of the grantor and comes under the control of the grantee. In both cases the inner meaning of delivery [*i.e. as the constitution of a juridical act – see the previous quotation*] is manifested.

14 *EAE (RT) Ltd* 1994 SLT 627; *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 444; *Merrick Homes Ltd v Duff* 1996 SC 497; *McIntosh v Alam* 1998 SLT (Sh Ct) 19; *Park, Petrs* 2009 SLT 871.

15 See S Brymer, G L Gretton, R R M Paisley and R Rennie, "Memorial and opinion *intus* re: automated registration of title to land" 2005 JR 201.

16 2005 JR 201 at 224–225.

In this argument, therefore, the common law requirement for delivery was met for electronic documents by their electronic transmission from one party to another. As the Report on *Land Registration* observed, the argument must have been accepted because the ARTL system went ahead in 2006 without any attempt to adjust the common law on delivery.[17] But the Report went on to recommend that, on the grounds of convenience, there should now be an express legislative statement that an electronic document may be delivered electronically.[18]

(2) Electronic documents and the 2012 Act

The legislative statement when it came in the Land Registration etc (Scotland) Act 2012 (as an addition to the Requirements of Writing (Scotland) Act 1995) was however rather more complex than the Commission's recommendation (or indeed discussion) had been. It reads:

> **9F Delivery of electronic documents**
> (1) An electronic document may be delivered electronically or by such other means as are reasonably practicable.
> (2) But such a document must be in a form, and such delivery must be by a means—
> (a) the intended recipient has agreed to accept, or
> (b) which it is reasonable in all the circumstances for the intended recipient to accept.[19]

The explanatory notes to the 2012 Act say very little about this formulation, beyond noting that electronic delivery, for example, over the Internet, is now allowed for electronic documents, while the other reasonable means by which such documents may be delivered include physical delivery of a USB memory stick on which there is a copy of the relevant digital file. Subsection (2), it is said, is "self-explanatory".[20] We will return to it in due course.

(3) Paper documents, execution in counterpart, and delivery to third parties

There was no attempt in the Land Registration Report, or in the 2012 Act, to deal with the problem of whether electronic transmission of copies of paper documents was also to be treated as delivery. That question was taken to be beyond the scope of a project dealing essentially with land registration.[21] The problem was however recognised around the Commission's meeting table, and the opportunity to tackle it was presented within the Contract Law project where I was the lead Commissioner. George had left the Commission by the time the Contract team's Discussion Paper on *Formation of Contract* was published in March 2012, but in so far as it dealt with

17 Scot Law Com No 222, vol 1, para 34.57.
18 Scot Law Com No 222, recommendation 135.
19 Requirements of Writing (Scotland) Act 1995 s 9F, added by Land Registration etc (Scotland) Act 2012 s 97(2).
20 Explanatory Notes, para 224.
21 The recognition of electronic documents compelled a labelling of documents written on paper, parchment or some similar tangible surface as "traditional documents" in the revision of the 1995 Act (see its s 1A). Whether the label can meaningfully endure must be in doubt. For ease of understanding, the phrase "paper document" will continue to be used in the remainder of this paper but should be taken simply to mean non-electronic documents.

problems of delivery, it was much influenced by the consideration of the issue leading up to the *Land Registration* Report, as well as by the provision on electronic delivery in the Land Registration etc (Scotland) Bill which had been introduced in the Scottish Parliament on 1 December 2011.

The particular issue of delivery addressed in the *Formation of Contract* Discussion Paper was the supposed non-recognition in Scots law of "execution in counterpart".[22] This is a method of executing documents intended to have legal effects whereby each party signs its own copy ("counterpart") of the document and then exchanges that copy for the signed copy (or copies) of the other party (or parties) also involved in the document. It was long established in England and the rest of the Common law world, and was of increasing significance and use in commercial transactions where frequently the parties did not physically meet to negotiate, never mind to execute the physical documents embodying their deal. The long-established practice of "signing ceremonies", whereby all the parties to a transaction met physically together in one space in order for each to sign the relevant documentation, was being increasingly left behind. Non-recognition of counterpart execution by modern Scots law was thus a matter that had been pressed upon the Commission by practitioners as a matter urgently requiring reform to make the law better adapted to the realities of contemporary commercial life.

What preliminary analysis of the issue soon made clear was that the law on delivery of deeds was highly relevant to the problem. The absence of a signing ceremony for a single document meant that the mutual contracts exception to the delivery requirement was inapplicable. In the language of the 2003 professorial opinion, signing and handing over to another party a counterpart of a document intended to have a legal effect was itself a juridical act, with the requirement of delivery being met by the handing over of the executed counterpart to the other party or parties involved in the transaction. But what also became clear from early on in the investigation of the issues was that physical handing-over of executed counterparts was no more the norm in practice than signing ceremonies with all parties present. Instead, parties transmitted to each other via fax or email attachment what were in effect copies of the signed counterpart. Indeed, quite often, and especially in multi-party transactions, the counterparties transmitted these copies, not to each other, but to a person nominated for the purpose (generally a solicitor for one of the parties).

Execution in counterpart thus raised, not only the issue of whether electronic transmission of signed paper documents in facsimile was delivery, but also the question of whether delivery to a third party could ever be legally effective. In Professor McBryde's treatment of delivery of deeds, he says that direct transfer to the grantee is not necessary: "there can be delivery to agents or third parties".[23] He then describes as common practice in conveyancing the granter's agent sending a deed to the grantee's agent to be held as undelivered until the granter's agent receives the

22 That this supposition was mistaken was shown in Discussion Paper on *Formation of Contract* (Scot Law Com DP No 154, 2012) paras 6.21–6.29. See also *Review of Contract Law: Report on Formation of Contract: Execution in Counterpart* (Scot Law Com No 231, 2013) paras 2.2–2.10; H L MacQueen, "'It's in the post': Distance contracting in Scotland 1681–1855", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 47–71 at 47–49. The criticisms advanced in J Hardman, "Necessary and balanced? Critical analysis of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015" 2016 JR 177 will have to be addressed on another occasion.

23 McBryde, *Contract* (n 5) para 4.12.

price. But he notes that "judicial authority is elusive" on the matter.[24] He then goes on to describe a number of cases under the heading "Delivery to and by third parties", observing that "[t]here is no reason why a deed may not be delivered by one person on behalf of another [*even*] although the transferor is not in a contractual sense the agent of the granter." So far as concerns delivery *to* a third party, however, McBryde's discussion focuses most on the problem of the common agent for both parties, one of whom puts in the agent's hands a document providing for a right in the other. The cases seem to show that, while placing such a document in the possession of one's own agent is generally not delivery to the grantee, there may be delivery if the agent also acts for the grantee and is used by that party to perform the obligations it has to the granter.[25]

There thus seemed to be a need to clarify the law on this point further if counterpart execution was to be adopted into Scots law. The task is performed by the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, which implemented the Scottish Law Commission's final Report on the matter (published in April 2013).[26] Delivery of each and every signed counterpart to the party or parties to the transaction who did not sign it is a requirement for the execution process to lead to a concluded document with legal effects.[27] The parties may however instead nominate another person to take delivery of all the counterparts.[28] That person may or may not be already an agent of one or more of the parties.[29] Once all the counterparts have been delivered to this nominee, the document becomes legally effective.[30]

Further, in either case it is possible for what would otherwise be delivery of a counterpart to be made with an instruction that the recipient – whether another party or the nominee – hold it as undelivered.[31] The effect of this is that the counterpart is not to be treated as delivered until the sender indicates to the recipient that it should be.[32]

The issue of whether delivery could be constituted by electronic transmission of copies of signed paper documents was initially considered by the Commission only in the context of counterpart execution; but the question was put in more general terms in the Discussion Paper published in March 2012, in order to test the waters on whether a wider approach would be acceptable.[33] This proved to be the case and an appropriate recommendation was accordingly made.[34] This was carried forward into section 4 of the 2015 Act. But a need to define what would constitute delivery by electronic means was apparent from the 2012 Act, and a need for some additional safeguards was also recognised in relation to the post-transmission status of the

24 McBryde, *Contract* (n 5) para 4.13 and n 40, citing *Nabb v Kirkby* 2007 SCLR 65.
25 McBryde, *Contract* (n 5) paras 4.17–4.18 (discussing or citing, inter alia, *Lombardi's Tr v Lombardi* 1982 SLT 81; *Henderson v McManus* 1981 SC 233; *Mair v Thom's Trs* (1850) 12 D 748; *Richardson v MacGeoch's Trs* (1898) 1 F 145)
26 See n 22 above.
27 Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 s 1(4), (6).
28 2015 Act ss 1(5), 2(1).
29 2015 Act s 2(2).
30 2015 Act s 1(5), (6).
31 2015 Act s 1(8).
32 2015 Act s 1(9).
33 Discussion Paper No 154 (n 22) paras 7.8–7.15 and question 41.
34 Scot Law Com No 231 (n 22) paras 2.61–2.66 and recommendation 13.

signed paper document in the hands of the sender and of the electronic version in the hands of the recipient.[35]

D. DELIVERY BY ELECTRONIC MEANS

Defining delivery by electronic means was first a matter of developing the formula already quoted from the 2012 Act, mainly by bringing into the legislative text that which had appeared only in the explanatory notes to the 2012 Act. So specific reference is made in the 2015 Act to email attachments, faxes, and storage on devices such as compact discs (CDs) and memory sticks, with a general sweep-up for other means that are "in a form which requires the use of electronic apparatus by the recipient to render the thing delivered intelligible".[36] This might extend to the sender storing the document file in the Cloud or a facility like Dropbox from which it could be downloaded by the recipient.

More of a lead was taken from the 2012 formula, however, with regard to determining when such electronic forms of delivery might be used. The delivery has to be by a means (and what is delivered must be in a form) that the intended recipient has agreed to accept.[37] Thus electronic delivery, whether of an electronic or a paper document, is not just a matter of the sender pressing the "Enter" key on the computer keyboard or clicking the "Send" icon on its screen, as the professors' 2003 opinion seemed to say. What happens if the attempted delivery is wrongly addressed or, even though correctly addressed, never arrives at its intended destination? Further, no distinction like the one in *Halliday on Conveyancing* is drawn for this purpose between unilateral and other documents.[38] The Scottish Law Commission, however, considered that, in its very nature, delivery of any document in law requires for its completion the assent of the recipient.[39] At the very least the recipient must be entitled to reject an attempted delivery that it is not otherwise bound to accept.

One such scenario emerges from the case of *Dowie & Co v Tennant*,[40] in which a disposition was posted on 12 January from the US (where the seller was domiciled) but did not reach the grantee until 23 January. It was held that the seller remained proprietor of the subjects of the disposition on 21 January and so subject to the jurisdiction of the Scottish courts when served on that date with a summons of payment. The preceding missives were improbative, meaning that under the then law the buyer was under no obligation to take delivery. Lord McLaren observed that "[i]n all cases where something has to be delivered by one person to another in order to effect an alteration of legal rights, there is involved the consent of both parties as well as the outward act which is symbolical of the transference."[41]

But the now statutory requirement of the recipient's *agreement* (presumably with the sender) to the form of the document and the means of its delivery should not be

35 Scot Law Com No 231 (n 22) paras 2.66–2.71, 2.87–2.94; recommendations 14–16, 18–19.
36 2015 Act s 4(9) (quotation at (d)).
37 2015 Act s 4(4).
38 See above text accompanying n 9 above.
39 Discussion Paper No 154 (n 22) paras 2.29–2.31 and 2.69. See too Erskine, *Inst* 3.2.45.
40 *Dowie & Co v Tennant* (1891) 18 R 986.
41 (1891) 18 R 986 at 988–989. Lord McLaren applied this analysis to the giving of sasine by earth and stone: "It would not do for the seller's bailie merely to heave a clod at the purchaser's agent" (at 989).

treated too formally or narrowly. For example, the consent does not have to be stated in the document itself: the recipient might indicate in advance negotiations what it is prepared to accept; or the parties might have an established practice of electronic communication between themselves.[42] Or they may negotiate how delivery is to be achieved once the terms of the document itself have been settled. In the absence of anything else to indicate the contrary (such as an instruction to hold as undelivered), the fact that the recipient has possession and control of an electronic document or an electronic version of the paper document without having made any attempt to refuse it may well be taken to indicate that party's agreement to the document in question being held as delivered.

Further, however, the 2015 Act makes much more elaborate provision than the 2012 Act on when the parties' agreement is not decisive as to when an electronic form of delivery may be used. Whereas for electronic documents electronic delivery is allowed where it is reasonable in all the circumstances for the recipient to accept it, for traditional documents there is provision for three alternative circumstances in which delivery may be of the document in such form and by such means as is reasonable in all the circumstances: (1) there has been no agreement on these matters; (2) there is uncertainty about the agreed method; or (3) the agreed method is impracticable.

This does not provide means by which an agreed electronic method of delivery can be over-ridden by the party attempting to deliver. An example of where the provision is intended to apply is where a party is unavoidably prevented at the last minute from attending a scheduled signing ceremony. There will be no agreement of all the parties to electronic methods of delivery, since mutual contracts signed by all parties do not require to be delivered in order to be effective. But if the absent party emails or faxes a signed counterpart to the person organising the signing ceremony along with an explanation of his or her absence from the signing ceremony, it may well be reasonable to treat that counterpart as delivered for the purpose of completing the execution of the document. Likewise, if the parties agree to electronic transmission in general as the method of delivery, but their agreement does not specify the form of transmission, then that form which is reasonable in all the circumstances may be used by the sender. But the circumstances to be taken into account would include such things as whether or not the sender used appropriate contact details for the recipient. The Scottish Law Commission gave other examples of impracticability: the breakdown of a fax transmission of a lengthier document half-way through, in which case it might be reasonable to recommence transmission at the point in the document reached when the breakdown occurred; or the email transmission which fails because the email system has crashed or the addressee's inbox has become inaccessible, in which case it might be reasonable to use fax instead should it be available.[43]

A final innovation of the 2015 Act on delivery by electronic means is its recognition that the requirement may be met by transmission of part only of the document so long as that part is sufficient in all the circumstances to show that it is part of the document and includes the page on which the sender has subscribed the document.[44] This arose

42 Scot Law Com No 231 (n 22) para 2.70.

43 Scot Law Com No 231 (n 22) para 2.70; H L MacQueen, C Garland and L Smith, "The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015" 2015 SLT (News) 111–119, 114–115.

44 2015 Act s 4(2), (3).

from the practice in transactions using counterpart execution for parties (or their representatives) to transmit only the signed "signature pages". In part this is for speed and ease of execution and completion, especially where the document to be transmitted is very large in both its physical and its electronic forms. But the rule is not limited to the delivery of executed counterparts; it applies to any paper document that is to be transmitted electronically to another.

It is in this wider context that the need for the recipient's assent to the form of what is to be sent as well as to the method of sending becomes particularly important, along with the ability to adopt a form and/or method for delivery that is reasonable in all the circumstances. The law should not stand in the way of reasonable behaviour, not least in the realms of business negotiations and their efficient conclusion. It is useful to remind ourselves of the fundamental aim of a delivery requirement: to confirm the granter's intention that a document have legal effect. In this regard, recognising a power for parties to agree delivery of a document by transmission of its signature page, or for a sender to use it when reasonable in all the circumstances, is close kin to early conveyancing's practical approach to the delivery of land by way of handing over to the grantee on the ground in question symbols such as earth and stone from the land.[45]

Practical difficulties remain, however, if electronic transmission is accepted as delivery of a paper document: in essence, that the sender still has the physical document now to be taken as delivered, and that the recipient has only an electronic facsimile of that delivered document. If the latter wishes to take further steps with the document, such as registration, something more is going to have to be done. The 2015 Act does not specify what must be done, but reminds the parties of the need to take some decisions about what is to happen post-delivery, and act upon them. So the sender must hold on to the paper document in accordance with whatever arrangements it has made with the recipient on the matter,[46] while the recipient cannot treat its electronic copy of the paper document as being the paper document.[47] The document having begun its legally effective life as a paper one, it cannot be treated as an electronic document by virtue of its electronic transmission in facsimile form. Thus if registration is wanted or needed by the recipient, that will have to be carried out under the rules appropriate to paper documents. So the sender will have to send the paper document on to the recipient in these circumstances. The legislation also reminds the parties to take a decision about the position of the nominee who in-gathers physical signed counterparts or their electronically transmitted versions: this person must hold and preserve these documents for the parties' benefit unless they otherwise agree (whether that agreement is made before or after the single document emerging from the execution process takes effect).[48]

45 It is another question again whether the law should recognise the attachment of a collection of signed signature pages to a master-copy of the document, e.g. for the purposes of registration in the court books. The 2015 Act does not prevent this (see s 1(4)), but does not allow the attachment of pre-signed signature pages to a document, or the transfer of a signed signature page from one document to another, or the alteration of a document for which the signature page or pages had been previously signed in whole or in part. See further Scot Law Com No 231 (n 22) ch 3; MacQueen, Garland and Smith, "Legal Writings Act" (n 43) 117; H L MacQueen and C Garland "Signatures in Scots law: form, effect and burden of proof" 2015 JR 107 at 107–108, 119–120 and 125–126.

46 2015 Act s 4(7).

47 2015 Act s 4(6).

48 2015 Act s 2(3), (4).

E. FURTHER LAW REFORM?

The 2012 and 2015 Acts can thus be seen as steps towards the articulation of a modern law on the delivery of documents, albeit primarily driven by the availability and widespread use of digital technology. It is also capable of adapting to new ways of exploiting that technology. But the exercise of getting the law to this point has raised further questions about the state of the law on traditional forms of delivery, and whether, perhaps revised in the light of the rules for electronic delivery, it too should be put in statutory form. It might be helpful, for example, to extend the idea of parties' freedom to agree, expressly or impliedly, what should (and what should not) constitute delivery of a document between them, including the use of a third party in the process, as well as empowering them to act reasonably in the three circumstances set out in the 2015 Act.

If the law on delivery gives such wider recognition to party autonomy, however, there will need to be some rules to stop fraudulent mis-use of this new freedom. It should not extend, for example, to enabling them to agree a date of delivery before the document's execution, or that delivery can be constituted merely by the granter's execution of the document. Delivery is some externalising act beyond execution. There may also need to be rules dealing with how long a document can be held as undelivered by a party, and against simulated delivery, where a granter hands over a document then immediately retakes possession of it from the grantee.[49] But a review of the present law would give an opportunity to see whether some of the recognised exceptions to the delivery requirement are, as Professor McBryde has suggested, otiose in modern conditions: for example, for deeds containing a clause dispensing with delivery, because it only applies to deeds intended to take effect on the granter's death, a matter of construction rather than delivery of the document; or for deeds in which the granter retains any interest; or for a husband as the natural custodian of his deeds in favour of his wife.[50] The exception for mutual contracts, however, seems obviously one that should remain in place.

F. DELIVERY AND FORMATION OF VOLUNTARY OBLIGATIONS

There are also some interesting questions about the relationship of delivery requirements to other branches of the law, in particular contract and other voluntary obligations. Formation of contract is one obvious area of significance. The 2012 Act was about the extension of electronic conveyancing to electronic missives, i.e. the offer and acceptance process by which parties create contracts for the sale of land. The Scottish Law Commission's work on execution in counterpart was carried out in the wider context of a more general review of formation issues, in particular offer and acceptance. But what seemed never to have been properly considered was the application of the requirement of delivery to written offers and acceptances.

49 On the question of regulating the length of time for which a document may be held as undelivered see Scot Law Com No 231 (n 22) para 2.45. On simulation see McBryde, *Contract* (n 5) para 4.13, citing *Buchanan v Buchanan* (1876) 3 R 556.

50 See for discussion McBryde, *Contract* (n 5) paras 4.44–4.68.

In *Park, Petrs (No 2)*,[51] one of the cases raising the difficulty about delivery by fax, the parties were negotiating the sale of a long lease over a restaurant. The contract, being one for the transfer of a real right in land, required to be in writing subscribed by the parties. In early August 2007 the parties initially exchanged a missive of offer to buy followed by one of qualified acceptance which was then adjusted on each side over a period of some weeks. On the early afternoon of 31 August the prospective sellers faxed to the prospective purchaser a subscribed missive of qualified acceptance, to which the purchaser responded also by fax of a subscribed missive of acceptance. Still in business hours, the parties then put their respective letters in the post, with the purchaser's missive (the acceptance) reaching the sellers' office after midnight, and the sellers' missive (the offer) reaching the purchaser's office only on 3 September.

The issue was whether the contract had been concluded before the end of the day. This was because a notice of inhibition had been registered against the sellers on 31 August, which became effective at midnight to prevent the latter dealing thereafter with their heritable property (including the restaurant). It was held that the contract had not been concluded in time to evade the inhibition. The root of that holding was the view that missives required delivery to be effective and that faxing the letters of offer and acceptance did not amount to the delivery of either document to its addressee. Temporary Judge M G Thomson QC also held, however, that the postal acceptance rule, under which the acceptance by post of an offer takes effect to conclude a contract from the moment of posting, did not apply in this case. Although an acceptance had been posted by the sellers, the purchasers' offer, being undelivered on 31 August, was not effective until 3 September and so could not be accepted before that date.

(1) Offer and acceptance, especially postal acceptance

The somewhat artificial analysis of delivery and the result in *Park, Petitioners* would be different now as a result of section 4 of the 2015 Act. But there remains the general question of whether missives – and indeed any written offer, acceptance and revocation or withdrawal therefrom – require delivery to become effective; and where the postal acceptance rule fits in relation to that requirement. It is thought that offers and acceptances are indeed juridical acts as defined earlier in this paper.[52] While an offer does not give the offeree an entitlement to demand performance from the offeror in accordance with the offer terms, the offeree is empowered to affect the offeror's position by making an acceptance; just as a disponee with a delivered disposition is not yet the owner of the property disponed but is in a position to become so (and deprive the disponer of its property right) by registration of the disposition. True, the offer is revocable by the offeror until acceptance unless the offer is declared in some way to be irrevocable; whereas, according to the professors' 2003 opinion, delivery of a disposition creates an irrevocable authority in the

51 *Park, Petrs (No 2)* 2009 SLT 871.

52 See above, text accompanying n 5 and compare Hellwege, "Juridical acts" (n 6) at 369. Note however D Cusine and R Rennie, *Missives* (2nd edn, 1999) para 2.06 (expressing the view that missives require only communication between the parties, not delivery; but conceding the difficulty this creates if there is only oral communication, say on the telephone, between the parties.)

disponee to proceed to acquire its real right.[53] Be that as it may, the offeror's revocation of offer will be another juridical act by that party affecting the position of the offeree; and if written, that writing will require delivery to be effective.[54] Acceptance of an offer changes the legal position of both acceptor and offeror, in that they are from then on bound in rights and duties under a contract. It seems clear therefore that acceptance is a juridical act, and delivery is in principle required when the acceptance is written.

The postal acceptance rule is usually presented in the contract books as an exception, not to the requirement of delivery, but to a general principle by which pre-contractual statements can only be effective when communicated to the other party. Its introduction in the first half of the nineteenth century is generally explained by the expediency of a rule to deal with the problems arising from an increasingly useful and important means of communication between people doing business together but at a distance from each other. One of the crucial factors for the Scottish courts in recognising the postal acceptance rule, however, was the sender's legal inability to retrieve its letter from the Post Office once posted. In other words, the letter as such passed beyond the sender's control on posting: the first stage of delivery in law.[55] Of course the letter was no more in the addressee's control either while in transit, and the Post Office was certainly not the addressee's agent, authorised to bind that party in contract with the sender. But, as we have already noted, delivery may be made to (and indeed by) a third party who is not an agent of either of the parties to a writing.[56] Perhaps then the Post Office (or today the Royal Mail, or indeed any postal or courier service) can be seen as such a third party to the negotiating parties, one that is irrevocably authorised by the sender's act of posting to transmit the acceptance into the offeror's ultimate control (i.e. to its address) if not directly to the person concerned.

The analysis can be taken further. Does the postal acceptance rule only apply when the preceding offer was also made by post? While a postal offer can be taken as an indication of the offeror's assent to a postal acceptance (and so to delivery thereof by posting), Professor McBryde suggests a more general test of whether use of the post for acceptance was within the parties' contemplation: for example, "when an offer is delivered by hand or made on the premises of the offeree, but the parties [live] in different towns".[57] Professor Gloag wrote as follows on the subject (emphasis supplied):

> In the ordinary case a contract is completed at the date when the acceptance is dispatched, by the channel of communication, if any, *expressly agreed upon*; if none, by the ordinary method of communication usual in cases of this particular class. And, *in the absence of any*

53 It is unclear whether a party which has executed and delivered its counterpart may still withdraw until all the counterparties have similarly executed and delivered their respective counterparts. Likewise open to question is the position of a party in an incomplete 'round robin' signing process who has signed the document and sent it on to the next signatory.

54 Written offers may be revoked orally: see *McMillan v Caldwell* 1990 SC 389.

55 MacQueen, "It's in the post" (n 22) at 65–67. Halliday, *Conveyancing* para 5.03 says posting a unilateral deed is delivery thereof; McBryde, *Contract* (n 5) paras 4.19–4.20 is less categorical. The key cases for both writers are *Dowie & Co v Tennant* (n 40) and *Crawford v Kerr* (1807) Mor App "Moveables" No 2 (where the sender was implementing an obligation to pay). Neither addresses the postal acceptance rule in this context.

56 See text accompanying n 21 above.

57 McBryde, *Contract* (n 5) para 6.118(3) (*recte* para 6.119: see *erratum* slip).

> *indication of an intention to the contrary*, it will be assumed that an offerer contemplates a reply by post.[58]

The key point in both statements is that the parties' agreement, whether express, implied or, perhaps, presumed, governs what may constitute delivery of the acceptance.[59] This then also explains the power of the offeror to exclude the postal acceptance rule by provision in its offer;[60] the offeree must comply or seek a change of mind from the offerer.

(2) Objectivity

Other cases well-known in the exposition of offer and acceptance law may throw some light on aspects of delivery, or at least raise questions about them. How objective a concept is delivery? That is to say, must the recipient know that the document is now under its control, or is it sufficient that it ought to know? The question is most sharply focused by cases on revocations of offers. In *Burnley v Alford*,[61] the offeree (B) had been acting through an agent, with whom he met on the morning of 12 September. The agent had left home that day before delivery of the post, while B had been away from home the previous night. Neither was therefore aware at the time of their meeting that the offeror (A) had sent to their respective home addresses a telegram revoking his offer, which had been delivered in the first post that morning. B instructed his agent to send a telegram of acceptance to A, which was duly done in the early afternoon of 12 September. It was held that there was no contract, A's revocation having taken effect upon arrival at the home addresses of B and his agent prior to any acceptance. The Lord Ordinary (Ormidale) reasoned on the basis of the failure of B and his agent to follow sound business practice. Could it be said instead, however, that A had done all he could to deliver his revocation and that it became effective upon reaching a place where it would be within the sole control of B and his agent?

Carmarthen Developments Ltd v Pennington[62] likewise manifests an objective approach based upon recipient control (rather than actual knowledge) to the question whether a postal notice purifying suspensive conditions in a contract took effect before the recipient solicitor, acting on behalf of his clients, sent a fax resiling from the contract. The Lord Ordinary (Hodge) set out what he took to be the general approach in language where it is revealing to substitute "delivery" for "communication" (emphasis supplied accordingly):

> *What amounted to communication depends in the first place on the contract*. Where, as here, the contract did not exclude ordinary postal delivery . . . the delivery by a postman of the letters to the solicitors' office by pushing the envelope containing them through the letter box would have amounted to service of notice whether or not the lawyers promptly

58 W M Gloag, *The Law of Contract* (2nd edn, 1929) 33.

59 Note also Gloag, *Contract* (n 58) 34: "Of the theories propounded to account for this rule . . . the most coherent is that the offerer must be taken as impliedly *contracting* to treat a letter posted as an acceptance and notification to him" (emphasis supplied).

60 See MacQueen, "It's in the post" (n 22) 55, 64, 66; McBryde, *Contract* (n 5) para 6.116.

61 1919 2 SLT 123.

62 *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139. It is remarkable that this case has not been reported.

> opened the envelope. The defender's solicitors would then have had possession of the notices. It is the task of the recipients of mail to arrange for its prompt handling and the sender of a notice cannot be prejudiced by internal delays in so doing . . . Thus it appears to me that the contract envisaged that service would be effected as soon as the mail arrived in the solicitors' office.[63]

The complicating factor in the case was that the notice was not delivered to the recipient's office by the postal service but was instead collected from the sorting office by the recipient solicitor before his own office opened for business. The notice was only one of a collection of letters addressed to the solicitor's firm, gathered by the sorting office in a zipped bag for convenience; the whole process of collection was in accordance with the firm's usual practice. It was also the recipient solicitor's habit to do this as part of the school run with his daughters; pausing en route to the school to leave the mailbag at his office before setting his children down at school and then returning to the office to open the letters in the bag. On the day in question, however, the mailbag had been taken to the school before the solicitor's office and had therefore not been opened before the fax purporting to resile from the contracts took effect. Lord Hodge held that in these circumstances the notice had been communicated before the resiling fax had taken effect, saying:

> In the present case the postman did not have an opportunity to deliver the mail to the offices of the defender's solicitors because it was the practice of [*the recipient solicitor*] and his colleagues to uplift the mail from the Post Office at Jedburgh. In my opinion that practice placed the defender's solicitors in a similar position before the mail bag arrived at their office to that which they would have been in had the envelope fallen through their letter box. I do not consider that the fact that the [*sender solicitor's*] envelope was in a zipped mail bag with other letters prevented [*the recipient solicitor*] from taking possession of the notices when he uplifted the mail on the Monday morning. He would have known that the mail bag contained letters . . . The contracts in this case provided for service on the solicitors and parties would in all probability have expected postal service to be effected by a postman delivering the letters to the solicitors' offices. There is no suggestion that parties addressed their minds to the question of when service would be effected if a partner uplifted the firm's mail from the Post Office. I am satisfied that considerations both of sound business practice and also of the attribution of risk once the letters were in [*the recipient solicitors's*] control point to service of the notices occurring when he uplifted the mail bag . . . Common sense points towards this answer. I recognise that different considerations might apply if at the weekend a member of staff of the defender's solicitors happened to be in the Post Office and chose to pick up a mail bag and leave it in the firm's office for consideration on the next working day, but those are not the circumstances of this case.[64]

This is a strongly objective approach to "communication"; is it equally applicable if we name it instead as "delivery"? There appears no reason to think otherwise.

(3) Grantees to be identified

A final question arises from the established rules of offer and acceptance, unilateral promises and what, at the time of writing, must still be called *jus quaesitum tertio*

63 [2008] CSOH 139 at para 31.
64 [2008] CSOH 139 at paras 32–33.

(third party rights arising from a contract; henceforth: JQT).[65] That question concerns a grantee unidentified or even non-existent at the time the obligation in its favour is constituted. It is well recognised that an offer may be made to "all the world", the classic example being the advertisement of a reward for the performance of some act; and it is widely thought that a promise may likewise be made conditionally without it being necessary to identify a specific promisee.[66] The difference between the two is usually presented in terms of whether or not acceptance is needed.[67] Acceptance is necessary for the offer to lead to a binding contract; but the acceptor must know of the offer in order to accept it. A promise, in contrast, is enforceable by whoever fulfils the condition, regardless of that person's knowledge of the promise at the time.[68] In neither case, however, will there have been delivery by the granter and it would be impractical to make that a requirement for either offer or promise to be effective.

With JQT, there may well be a requirement of delivery to a third party who is specifically named or identified as such in the contract before that third party can enjoy any right. But contracts are commonly made in favour of third parties without specific identification of the actual third party to be benefited and whose right, like those of the offerees and promisees in the previous paragraph, is conditional upon their emergence as a result of their doing something or having something happen to them.[69] Again it is simply not possible for delivery to be made to such third parties before they emerge; and it is an impractical formal barrier to the creation of the third-party right to insist upon a subsequent act of delivery by the granter before the right finally comes into existence.[70] The Contract (Third Party Rights) (Scotland) Bill, which implements the Scottish Law Commission's 2016 Report on the subject, is therefore clear that delivery is not a general requirement for either the creation or the existence of a third-party right, while recognising that it may be necessary in some cases, i.e. the third party identified in the contract.[71]

But in the event of a statutory reform of the common law on delivery of documents in general it would be better to provide for the offer and the promise as well as the third-party right cases as exceptions to the delivery requirement. That might best be achieved by way of a general provision that delivery is not required where a granter undertakes a potential obligation to a person who cannot be specifically identified at the time of the relevant document's subscription but for whose subsequent identification the document makes provision. In such cases it might further be useful to require also some form of externalisation of the granter's intention. One obvious

65 If enacted, when the Contract (Third Party Rights) (Scotland) Bill s 12 comes into force it will abolish the common law doctrine of *jus quaesitum tertio*.

66 See H L MacQueen, "Unilateral promise: Scots law compared with the PECL and the DCFR" (2016) 24 European Review of Private Law 529 at 544–546.

67 See e.g. McBryde, *Contract* (n 5) paras 2.20–2.34; MacQueen, "Unilateral promise" (n 66) 544–546.

68 McBryde, *Contract* (n 5) para 6.75.

69 The classic example is *Love v Amalgamated Society of Lithographic Printers of Great Britain & Ireland* 1912 SC 1078.

70 See *Review of Contract Law: Report on Third Party Rights* (Scot Law Com No 245, 2016) paras 2.39–2.42, 4.17–4.18, and 5.22–5.27, and recommendations 12, 22; and H L MacQueen, "Reforming third party rights in contract: a Scottish viewpoint" in Unidroit (ed), *Eppur si muove: The Age of Uniform Law: Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016) vol 2, 1066–1086 at 1077–1079.

71 Contract (Third Party Rights) (Scotland) Bill s 2(4)(b), (7).

possibility is registration of the document, with appropriate publicity of its content being another. Whether such a formulation of the law would have undesirable wider effects beyond the cases mentioned would, of course, have to be tested by way of consultation in the usual practice of the Scottish Law Commission in which I was for all too short a time honoured and delighted to be George's close colleague as well as old friend.

THE CONTINUED EXISTENCE OF THE CONTRACT OF LEASE

Peter Webster

A. INTRODUCTION

In the English case of *Bruton v London and Quadrant Housing Trust*[1] the House of Lords held that an agreement between Mr Bruton and the defendant housing trust was a tenancy, even though the housing trust was itself only a licensee so did not have title to the land. The point mattered because Mr Bruton sought to rely upon statutory repairing obligations that applied only to leases.[2] If Mr Bruton did not have a lease, he could not rely upon those obligations.

Overturning the Court of Appeal, the House of Lords held that Mr Bruton did indeed have a tenancy.[3] It rejected the argument that there was no lease because the trust did not itself have title to the property. The lead judgment was given by Lord Hoffmann, who reasoned:[4]

> the term "lease" or "tenancy" describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties. A lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a "term of years absolute." This will depend upon whether the landlord had an interest out of which he could grant it. Nemo dat quod non habet. But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest.

Would the approach be the same in Scots law? In order for there to be a contract of lease, is it necessary for the landlord to have title to the relevant property?

This was one of the first issues that I considered when I started working on a PhD in lease law under George Gretton's supervision. When preparing this essay, I dug out copies of some of the papers that I submitted to him at the time. He would print out what I had sent him, bind it with a treasury tag, annotate it and hand it back to me at the end of the supervision. Looking back over these papers reminds me of the

1 [2000] 1 AC 406.
2 Under s 11 of the Landlord and Tenant Act 1985. In order for this to apply, there had to be a "lease of a dwelling house": see s 13.
3 It had the characteristics of a lease required by English law, set down in *Street v Mountford* [1985] AC 809, principally that it grant exclusive possession.
4 [2000] 1 AC 406 at 415A.

enthusiasm and analysis he brought to each of our meetings, for which I remain deeply indebted to him. His comments remind me of what struck me most about George during those supervisions: his passion for Scots law; his concern with structure; his deep knowledge of other legal systems, including English law; his curiosity about whatever topic I had written on (even although, in hindsight, some cannot have been especially stimulating); and, most of all, the support and encouragement he gave to someone finding his feet in the world of academic research. I am grateful for the opportunity to contribute to this collection in his honour.

I would like to use this paper as an opportunity to revisit the question whether a contract of lease entered into by someone who, it turns out, does not have title to the land is a valid contract. The timing is opportune, for it also provides an opportunity to comment upon an important recent contribution to the literature regarding the Scottish law of leases, namely Lord Gill's essay in the *Festschrift* in honour of Professor Rennie[5] and to make some general, but infrequently discussed, points about what happens to the contract of lease when the tenant acquires a right that is effective against singular successors of the landlord.

In his paper, Lord Gill gives a detailed account of the development in status of the tenant's right in Scots law. From that basis, he argues (1) that a lease that is effective against the landlord's singular successors (either because of the 1449 Act or because of registration) is a real right; but (2) now that Scots law recognises leases as real rights, what he describes as the "common law personal lease" does not survive. As I understand the argument, it is that if an arrangement regarding the occupation of land does not qualify as a real right of lease it is not a contract of lease either (though it may be some other form of contract).

I agree with the first part of Lord Gill's argument – namely, that where a lease satisfies the requirements of the 1449 Act or binds successors because of registration, the tenant can properly be said in Scots law to have a real right. However, in this essay I seek to establish that it is not correct to say that if the right is not protected against successors of the landlord there is not a contract of lease at all.

There are, in my view, two levels of analysis: the first is whether the agreement between the purported landlord and tenant is a contract of lease; the second is whether the requirements for the tenant's right to become protected against singular successors of the landlord (whether that be via the 1449 Act or via registration) are met. The criteria for an agreement being a contract of lease and the criteria for the tenant acquiring a real right differ. If the criteria for acquiring a real right are met,[6] the tenant is protected against singular successors of the landlord. If the tenant's right is protected in this way, the tenant does not stop being party to a contract of lease. That contract continues to exist. Indeed, it "runs with the lands" and singular successors to the landlord become parties to it. Nor, in my view, does an agreement cease to be a contract of lease just because the tenant could not acquire a real right. I suggest that the example of an agreement with a landlord who does not himself have a real right in the subjects of the lease is one of the clearest examples of this, but there are others.

5 Lord Gill, "Two Questions in the Law of Leases," in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) 255.

6 To the 1449 Act and registration must now be added the Private Housing (Tenancies) (Scotland) Act 2016 s 45.

Why does this matter? Aside from the inherent importance of legal analysis, the question whether an agreement is a contract of lease may be of significant practical importance to the parties, as the *Bruton* case illustrates. A lease is a nominate contract. Absent agreement otherwise, it gives rise to certain default rights and obligations.[7] In Mr Bruton's case, the question was whether a particular repairing obligation applied. Other instances might be: is the agreement subject to tacit relocation? Is the occupier permitted to sub-let or assign the right (there being particular rules that apply to particular types of lease)? Further, as will be seen below, if the effect of the purported landlord not having title to the land is that the purported contract of lease is not a valid contract at all,[8] that could have potentially significant consequences for the remedies available to both parties and their positions in respect of past performance.

In this essay, I start by summarising Lord Gill's argument and the context in which it arose (section B), before making some general points about the nature and behaviour of leases in Scots law (section C). I then consider the position of contracts of lease where the tenant does not acquire a real right, in particular decisions of the Inner House in two problematic nineteenth century cases which might be thought to support the view that if a landlord does not have title to the land, there is not a valid contract of lease at all (section D). I argue that when they are properly analysed the cases do not support that conclusion.

B. THE RECENT DISCUSSION IN THE CONTEXT OF LEASES BY *PRO INDIVISO* PROPRIETORS

The focus of Lord Gill's essay is the House of Lords' decision in *Clydesdale Bank Plc v Davidson*[9] and comment in a *Juridical Review* article by Bury and Bain[10] on that decision and a later decision of the Land Court.[11] My aim in this essay is not to focus on arguments about whether *Clydesdale Bank* was correctly decided; however, for reasons that will become apparent, a summary of the discussion of that case assists, as it is the context of Lord Gill's discussion.

In *Clydesdale Bank* three *pro indiviso* proprietors entered into a contract that purported to be a lease by three of them to one of their number, Davidson. All three later granted a standard security to the Clydesdale Bank. When the bank sought to enforce the security, the question arose whether Davidson could rely upon the lease (which he maintained was a protected agricultural tenancy) against the bank so as to remain in possession. The House of Lords held that he could not: Davidson did not have a real right that the bank was bound to respect. In the later Scottish Land Court case of *Serup*, the ruling has been applied to justify the conclusion that if a tenant of a subsisting lease became a *pro indiviso* proprietor of the subjects of the lease, the lease ceased to exist.

Bury and Bain's argument, as I understand it, is that (1) an agreement of the type in *Clydesdale Bank* would amount to a contract of lease; (2) the House of Lords in

7 In a system with civilian influence, these might be referred to as the *naturalia* of the contract of lease. Such terms could also be referred to as terms implied at law into the contract.

8 As one reading of the authorities discussed in D below might suggest.

9 1998 SC (HL) 51.

10 C Bury and D Bain, "A, B and C to A revisited" 2013 JR 77.

11 *Serup v McCormack & Others* (SLC/73/10) 2012 SLCR 189.

Davidson is not authority to the contrary – it only decided that such an agreement was not a *real right* of lease;[12] (3) if the contract did qualify as a contract of lease, it would have been a protected tenancy under the Agricultural Holdings (Scotland) Act 1991; and (4) that if the lease was so protected, the tenant could rely upon it in a question with the landlord's singular successors and secured creditors even though it was not a real right.

Before turning to Lord Gill's discussion of whether there can be a contract of lease when the tenant does not have a real right, I briefly note what seem to me to be two key difficulties with Bury and Bain's argument.

First, I suggest the House of Lords in *Davidson did* consider whether the arrangement between the *pro indiviso* proprietors in that case amounted to a contract of lease and concluded that it did not. After analysing the rules of common ownership, Lord Clyde reasoned that Davidson was already entitled to use or occupy the lands by virtue of his status as *pro indiviso* owner – such a person already had the right to use the lands therefore there could be no lease to him. Further, he reasoned that it would not be possible for Davidson to comply with the tenant's obligation in the event of termination of the lease i.e. to remove. Third, a lease must have a rent, but what was paid in this case was not a rent for occupation of the land but rather a compensatory payment to the other proprietors for their not exercising their rights that as proprietors in common with Davidson.[13] Although these points are made in a section in which Lord Clyde states that he is discussing the law of property, in my view they inform a conclusion that the agreement could not qualify as a contract of lease, in particular the second and third points. The ineffectiveness of an obligation on Davidson to remove affects whether there was a *contract* of lease. Lords Goff and Lloyd agreed with Lord Clyde. Lord Jauncey and Lord Hope of Craighead[14] also agreed with Lord Clyde, although each also gave a speech of his own. Lord Jauncey plainly considered the matter from the point of view of whether the agreement was a contract of lease, because he began his opinion by giving the definition of a contract of lease[15] and concluded that it was implicit in that definition that the tenant's right of possession derives entirely from the lease granted to him and terminates on expiry of the lease. Thus, there could not be an agreement of lease with a *pro indiviso* proprietor. Hence the question whether an agreement of the type reached by the parties in *Davidson* amounts to a *contract of lease* has, I suggest, already been determined authoritatively so long as *Davidson* is not reversed.

Second, even if the contract among the *pro indiviso* proprietors could qualify as a contract of lease and an agricultural tenancy under the Agricultural Holdings (Scotland) Act 1991, it is not obvious that that would render the tenancy binding on third parties. The better view is that, even if the tenancy is an agricultural holding, that does not in and of itself render the lease binding on third parties such as disponees or secured creditors: whether the lease binds third parties still depends on property law. In other words, the agricultural holdings legislation does not trump

12 Perhaps their suggestion is that, although the matter was actually decided by the House of Lords, the court's reasoning is open to criticism. In my view the decision is binding on this point and, in any event, is probably right.

13 See 1998 SC (HL) 51 at 59–63.

14 Lord Hope's speech admittedly does focus on whether a *pro indiviso* proprietor could have a *real* right of lease in property which he owned in common.

15 1998 SC (HL) 51 at 53.

property law so as to render the tenancy binding on singular successors where it would not otherwise be. The Agricultural Holdings (Scotland) Act 1991 is to be interpreted against the background of the general law.[16] Clear statutory language would be required to indicate an intention to displace the usual rules of property law, including those of the 1449 Act and the statutory provisions regarding land registration. The definitions section of the Agricultural Holdings (Scotland) Act 1991 (which includes dispones in the definition of "landlord") does not indicate such an intention.[17] In another context, Lord President Cooper said: "Primarily, if not exclusively, the protection thus [afforded] to crofting tenants by amendments of the common law of leases is protection against their landlord, and not protection against the world at large or the State."[18]

Turning back to Lord Gill's essay, his Lordship identifies Bury and Bain's argument as giving rise to two essential issues. One is "whether, despite the Leases Act 1449, the common law personal lease survives in Scots law; and if so, whether it can attract the protection of agricultural holdings legislation".[19] The second was whether the agreement in *Davidson* was such a lease.

It is the first issue that is the focus of this essay. Lord Gill narrates how the protection of the tenant's position in Scots law developed over time. In a detailed study of the (mostly nineteenth century) case law, he demonstrates the frequency with which judges have described a tenant protected by the 1449 Act as having a real right.[20] Building on the conclusion that a lease is now a real right, Lord Gill goes on to conclude that "the common law personal lease is no longer part of the law of Scotland".[21] Lord Gill argues that if a contract meets the essential requirements restated in *Gray v Edinburgh University* for the existence of a lease,[22] it confers a real right on the tenant. However, if the contract fails to meet those requirements, it is not a lease at all. Lord Gill's analysis appears to be that if a contract qualifies as a lease, the tenant has a real right; however, if the tenant does not acquire a real right, there is no contract of lease. I respectfully suggest that the second conclusion is not correct, for reasons I go on to explain.

16 See, e.g., O Jones (ed), *Bennion on Statutory Interpretation* (6th edn, 2013) § 327, which summarises what Bennion calls the "implied ancillary rule of interpretation": unless a contrary intention appears, an enactment by implication imports any principle or rule of law (whether statutory or non-statutory) which prevails in the territory to which the enactment extends and is relevant to its operation in that territory. At § 332, Bennion proposes that there is a presumption that rules of property law apply unless the statute indicates the contrary intention.

17 For English law, see e.g. *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 at paras 138–148. A granted a licence to B and B granted a lease to C. C's lease amounted to a secure tenancy, benefiting from statutory protection, but it did not bind A because B had no title as a matter of property law to grant it. The very notion of a *Bruton* tenancy is that the lease, though good against the landlord who granted it, is not good against a party with a better title.

18 *M'Lean v Inverness-shire County Council* 1949 SC 69 at 75.

19 Gill, "Two Questions" (n 5) at 261.

20 Gill, "Two Questions" (n 5) at 263–272. In addition to the cases Lord Gill cites, see the description of the tenant's right in e.g. *Case of the Queensberry Leases* (1819) 1 Bligh 339 at 458; *Earl of Galloway v Duke of Bedford* (1902) 4 F 851 at 860 and 865; *Gillespie v Riddell* 1908 SC 628 at 644; *Gardiners v Stewart's Trustees* 1908 SC 985 at 990; *Mexfield Housing Ltd v Berrisford* [2011] UKSC 52, [2012] 1 AC 955 at para 75.

21 Gill, "Two Questions" (n 5) 274.

22 1962 SC 157 i.e. parties, subject and rent; there needs also to be provision regarding duration, but if the parties have not agreed, a one year lease is implied.

C. LEASE AS CONTRACT AND LEASE AS A REAL RIGHT

As Lord Gill's analysis emphasises, at common law a lease was a contract.[23] There are certain requirements that an agreement must meet in order for it to qualify as a contract of lease.

Scots law, like many other legal systems, provides that the tenant's right will bind parties other than the original landlord with whom he agreed the contract of lease. That protection is acquired either by possession (via the Leases Act 1449) or registration. Lord Gill's detailed analysis emphasises both the frequency of references in the Scottish case law to the tenant having a "real right" and that the proper characterisation of the tenant's right was the specific subject of argument in some of those cases. There is room for debate about whether a legal system *need* classify a tenant who can rely upon his lease in a question with successors in title to the landlord as having a real right – in French and German law, for example, the analysis is simply that the contract of lease binds successors to the landlord.[24] Lord Gill's analysis, in my view, demonstrates that a tenant whose lease is protected under the 1449 Act or via registration can be said, as a matter of Scots law, to have a real right.

However, that real right is in addition to the contract of lease. If a lease does become binding on singular successors of the landlord, it does not cease to be a contract. Rather, the landlord's successor in title is substituted into the landlord's place in the contract of lease: he is vested in the landlord's rights and bound by his obligations. In respect of obligations, that has been clear certainly since *Arbuthnot v Colquhoun* in 1772.[25] If there was any doubt in respect of the landlord's rights, it was removed by Lord Cockburn in 1847 in *Hall v M'Gill*[26] in which he said "[t]he singular successor is entitled, without any special assignation, to enforce the contract". *Hall* is one of three mid-nineteenth-century Inner House decisions which make clear that the successor becomes party to the contract of lease.[27] When protected by the 1449 Act or by registration, a lease, as the phrase goes, is a contract that "runs with the lands".[28] In *Barr v Cochrane*, Lord Ormidale – albeit in a dissenting opinion – stated:[29]

> The general rule that the purchaser of an estate, or, in other words, a singular successor like the pursuer, comes into the place of his predecessor in all leases existing at the date of his purchase, and is entitled to all the future rents and other benefits of such leases, and liable

23 Gill, "Two Questions" (n 5) 261, citing Stair, *Inst* 1.15.4, 2.9.1–2. See also Mackenzie, *Observations* 188; Bankton, *Inst* 2.9.1; Erskine, *Inst* 2.6.23; Erskine, *Prin* 2.6.9; Bell, *Comm* I, 64; Bell, *Prin* § 1177; J S More (J McLaren (ed)), *Lectures on the Law of Scotland* vol II (1864) 1–2; G C H Paton (ed), *Baron David Hume's Lectures 1786–1822* vol II (1949) 56; Hume, *Lectures* IV, 73; Hunter, *Leases* I, 360; J Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) 1 and 133.

24 There is a considerable literature in respect of other legal systems, referred to in P Webster *The Relationship between Tenant and Successor Landlord in Scots Law*, unpublished PhD thesis, University of Edinburgh (2008) ch 1.

25 (1772) Mor 10424.

26 (1847) 9 D 1557 at 1566.

27 *M'Gillivray's Exrs v Masson* (1857) 19 D 1099 at 1102–1103; *Hall v M'Gill* (n 26); *Barr v Cochrane* (1878) 5 R 877 at 883.

28 Rankine, *Leases* (n 23) 475; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 94.

29 (1878) 5 R 877 at 883.

> in all the obligations[30] prestable against the landlord subsequent to his date of entry, is, I apprehend, undoubted . . .

In *Edmond v Reid*,[31] the Lord Justice-Clerk makes the point that, although the tenant can acquire a real right, upon his doing so the lease does not cease to be a contract: "Without questioning the doctrine laid down in the case of *Hamilton*, that a lease confers a real right on the tenant, it remains notwithstanding a mutual contract".[32]

What, though, if the tenant does not acquire a real right: what is the status of the contract of lease in those circumstances? This situation might occur for various reasons. One is if the lease must be registered in order for the tenant to acquire a real right (because it is probative and is for more than 20 years[33]), but it is not so registered. In those circumstances, there is nonetheless a contract of lease between the parties.[34] Second, the criteria for a tenant acquiring a real right differ in some respects from the criteria for classifying a contract as a contract of lease. Some such differences are not likely to be of practical consequence, but they exist nevertheless. I give two examples. First, in order for a tenant to acquire a real right under the 1449 Act, the rent must not be "elusory" (albeit that this concept has not been defined);[35] the only requirement for there to be a contract of lease, however, is that there be a rent. Second, in order for a contract to qualify as a *contract* of lease in Scots law, it need not have a definite ish (i.e. date on which the lease is to terminate); however, the duration of the lease does need to be definite in order for the 1449 Act to apply to it.[36] Thus, in the well-known case of *Carruthers v Irvine* it was held that the 1449 Act did not apply to a lease that was granted "perpetually and continually as long as the grass growth up and the water runneth down".[37] Though the tenant had no real right, that lease was nevertheless effective between the parties to it. It is not therefore correct to say that a lease is either a real right or nothing at all. Rather, there is room for the continued existence of the contract of lease that has not been made real.[38]

30 It is not correct that the successor landlord becomes party to *all* of the rights and obligations – some may not be real conditions and will therefore not transmit to a successor. I have discussed this at length elsewhere: Webster, *Tenant and Successor Landlord* (n 24).

31 (1871) 9 M 782 at 784.

32 See also *Inglis v Paul* (1829) 7 S 469 at 473 in which the majority stated that "[t]acks, in one respect, are personal; and in another, real rights".

33 Registration of Leases (Scotland) Act 1857 s 1.

34 See, e.g., *Palmer's Trs v Brown* 1989 SLT 128. But note the statement at 131 that, if a lease is registrable but not registered, the tenant cannot recover damages from the original landlord for loss resulting from the fact that the successor owner is not bound by the lease.

35 See, e.g., Rankine, *Leases* (n 23) 144.

36 See, e.g., Paton and Cameron, *Landlord and Tenant* (n 28) 107.

37 (1717) Mor 15195.

38 That was also recognised in the decision of the Sheriff Appeal Court in *Gray v MacNeil* [2017] SAC (Civ) 9. The parties had verbally agreed a 15-year lease. The tenant was forced to stop trading when the landlord cut off the electricity. The tenant claimed delivery of certain equipment on the premises and damages for lost profits. The sheriff held that the lease needed to have been in writing under s 1 of the Requirements of Writing (Scotland) Act 1995 and therefore the claim for damages failed. The Sheriff Appeal Court allowed the tenant's appeal, holding that the verbal lease created personal rights and obligations enforceable between the parties to the verbal lease even though, because of the 1995 Act, this did not create a real right affecting third parties. Whether that decision properly interprets s 1 of the 1995 Act is beyond the scope of this essay. The application of s 1 to leases is problematic and seems not to have been fully considered when the legislation was being drafted. See, generally, A McAllister, "Leases and the requirements of writing" 2006 SLT (News) 254; E C Reid, "Personal bar: three cases" (2006) 10 EdinLR 437; K G C Reid and G L Gretton, *Conveyancing 2006* (2007) 106–109.

There is one other requirement in order for a tenant to acquire a real right that in the following section I endeavour to show need not be met in order for there to be a valid contract of lease: that the landlord have title to the land. Obviously that is a requirement of a tenant acquiring a real right. See, for example, *Tenants of Killilung* in which the court said: "the Act of Parliament which makes tacks a real right supposes that they proceed from one who was in the right himself".[39] Is the requirement that the landlord has title a requirement for the lease to be effective against third parties or does it also affect whether there is a valid contract of lease? Surprisingly, there are some materials that suggest that this is a requirement for there to be a valid contract of lease. In my view, that would be illogical and inconsistent with broader contractual principle. The next section considers this point.

D. THE EFFECT OF THE LANDLORD NOT HAVING TITLE TO THE LAND

It is necessary to consider in some detail two Inner House decisions, with two questions in mind: first, whether it is part of the *ratio* of these cases that if parties agree a contract that purports to be a lease but the purported landlord does not have title from which he could grant a real right of lease, the contract of lease is invalid; second, if that is the *ratio* of these cases, whether that can be right as a matter of analysis?

(1) *Weir v Dunlop & Co*

The first case is *Weir v Dunlop & Co*.[40] Bell had sold lands to Livingston, who concluded missives of lease with Dunlop & Co in respect of minerals. The lease was to run for 19 years from Whitsunday 1859. Dunlop and Co took possession in November 1858 and bored in search of minerals. However, Dunlop & Co discovered that there were (they said) no minerals on the lands worth the expense of working. Further, shortly after they had started searching for minerals, Dunlop & Co's workmen had been ordered by Bell to leave the lands. Livingston was unable to proceed with the purchase.

Bell negotiated a replacement sale of the lands to Weir. After Weir discovered the previous sale to Livingston and the lease by Livingston to Dunlop & Co, the following arrangement was arrived at: (1) Weir and Livingston concluded a minute of agreement by which Livingston consented to a sale by Bell to Weir – the minute narrated the sale by Bell to Livingston and the missives of lease between Livingston and Dunlop & Co; (2) Bell and Weir concluded a minute of agreement providing for sale by Bell to Weir; (3) a disposition was granted by both Bell and Livingston which contained a special assignation of the missives of lease. Weir intimated the sale and assignation of the lease to Dunlop & Co and stated that a formal lease between Weir and Dunlop & Co would be prepared. Dunlop & Co returned the lease and refused to pay the rent. Weir sought implement of the missives of lease against Dunlop & Co. The Lord Ordinary (Kinloch) and the Inner House held that Weir was *not*

39 *Tenants of Killilung* (1760) 5 Br Sup 877.
40 (1861) 23 D 1293.

entitled to implement of the missives of lease, although their reasoning differed in a potentially significant way.

The Lord Ordinary held that Weir was unable to enforce the contract as he was not a party to it.[41] He reasoned that while a landlord may assign his right to rent, Livingston could not, by an assignation of the lease, place the assignee in the position of a proper landlord: that could only be done by a conveyance of the lands, to which the lease would be an incident right.

The Lord Ordinary did go on to canvass some other arguments in his opinion. In the course of doing so he reasoned that even if the landlord's interest could be assigned independently of the lands, Livingston could not transmit to Weir a higher right than he himself had. In that context, Lord Kinloch discussed the position that Livingston had been in prior to the assignation:[42]

> [A]t the date of the assignation, Livingston was not in possession of an enforceable right under the lease in question. He could only enforce against the defenders the obligations of tenants by clothing himself with the character of landlord – that is to say, with a proper title to the lands, by force of which he might give possession to the tenants, and security to their right.

That is not, however, to say that Lord Kinloch viewed there as being no valid contract of lease between Livingston and Dunlop & Co. Indeed, the whole premise of his opinion is that there *was* such a contract: the question was whether it had been transferred to Weir and/or whether Livingston could have enforced his rights under the contract when not himself in a position to perform.

The Inner House refused Weir's appeal, but the judges' reasoning differed from that of the Lord Ordinary. They treated the position of Livingston at the time he and Dunlop & Co entered into the lease as determinative of whether Weir could enforce the lease. Some of the court's discussion might be taken to suggest that there had not been a valid contract of lease in the first place between Livingston and Dunlop. In my view, however, that is not the proper interpretation of the decision. I now review the reasoning in more detail.

The Lord Justice-Clerk said:[43]

> Livingston was not in a position to grant a lease; he was not infeft; he had no title. The right he could grant was not a real right, *and was not an effectual right of lease at all*. But, though *Livingston was not at that time in a position to grant a lease*, he was in such a position that he could have made his own right good, and so made the lease effectual . . . What I mean to say is, that, *till the personal obligation under the lease* and the real right to the subject were combined in one person, the lease was ineffectual.

He also considered what would have happened if Livingston had died: if his personal representative had taken up Livingston's incomplete title to the land, the person "would have combined in his own person the real right to the lands and the *personal obligation* to grant the lease".[44] Ultimately, he stated that "the general proposition on which I rest my opinion is, that this lease can never become effectual until you have

41 (1861) 23 D 1293 at 1297.
42 (1861) 23 D 1293 at 1296.
43 (1861) 23 D 1293 at 1297 (emphasis added).
44 (1861) 23 D 1293 at 1298 (emphasis added).

combined in one person *the personal obligation* and the title of property".[45] He mused on whether the transaction could have been structured in such a way that Weir *could* have acquired title to enforce the lease, but concluded that that had not happened in this case, where, instead, there had been an "awkward and an unsuccessful attempt to transfer to Weir a right which Livingston himself could never enforce".[46]

Lords Wood and Cowan concurred with the Lord Justice-Clerk. Lord Benholme gave a separate opinion in which he also justified the decision on the basis that Livingston would not have been able to enforce the obligation against Dunlop & Co. He said that "Livingston, it is true, offered to grant a lease, but he never had any real right in the property which he could transfer, or by virtue of which he could grant a lease . . . *Livingston was never in a position to execute a valid lease*."[47] Therefore, Dunlop & Co did not become bound to Livingston as lessees. He concluded, "I cannot understand how he could, to any effect whatever, assign an obligation incumbent on them to take a lease from him, *which obligation he never held*." The right to require Dunlop & Co to take a lease was, Lord Benholme stated, a right that Livingston never possessed.[48]

Is it part of the ratio of *Weir v Dunlop & Co* that a purported contract of lease is void and of no contractual effect if the landlord does not have a real right to the land? I suggest that *Weir* is not authority for that proposition. Passages in Lord Beholme's opinion could be relied upon to support that view. However, the Lord Justice-Clerk, with whom two other judges agreed, did not take that approach. There are various references to the lease not being "effectual" and it is perhaps not entirely clear what was meant by that: it seems most likely to mean that, if the landlord did not have title, he could not secure the tenant in the land for the duration of the lease[49] i.e. *not* to mean that there was no contract of lease at all. Indeed, there are various references in the Lord Justice-Clerk's judgment to the personal obligation under the contract of lease,[50] which indicate, in my view, that the majority of the court considered that there *had* been a contract of lease between Livingston and Dunlop that generated personal rights and obligations. The basis for the court's conclusion that Weir was not entitled to implement of the missives of lease was that because Livingston himself (who had no title) could not have obtained implement of the missives of lease, Weir (who claimed to derive his right from an assignation from Livingston) also could not do so.[51]

(2) *Reid's Trustee v Watson's Trustees*

The second case is *Reid's Tr v Watson's Trs*,[52] in which a tenant claimed that he was not bound by a lease after the title of his landlord was reduced. The Inner House held that the tenant was indeed not bound.

45 (1861) 23 D 1293 at 1298 (emphasis added).
46 (1861) 23 D 1293 at 1298.
47 (1861) 23 D 1293 at 1299.
48 (1861) 23 D 1293 at 1299.
49 Stair stated that the landlord's obligation was to make the tack effectual to the tacksman: Stair, *Inst* 2.9.1.
50 And, indeed, the supposition that if that obligation and the real right were combined in the same person, there would be an effectual lease.
51 There are various other points that could be made, such as how the landlord's side of a lease – which is a collection of both rights and obligations – could be assigned at all.
52 (1896) 23 R 636.

The facts were as follows. Hamilton (as landlord) entered into an agreement with Reid (as tenant) in January 1884 for a minerals lease for 12 years from Whitsunday 1884. Reid worked the minerals until 1888. From Martinmas 1888 until Martinmas 1892 he did not work the minerals but continued paying rent. Hamilton's title to the land had been derived from a Walter Whyte, whose will had left the lands to his nephew (James Francis Watson) but had provided that, in the event Watson died without leaving any male heir, the lands were to revert to Whyte's nephew, Hamilton. However, Watson's trustees challenged Hamilton's title and, in July 1893, obtained a decree that the lands had vested in Watson. That case was litigated all the way to the House of Lords. Following decree of reduction of Hamilton's title, Watson's trustees made up title. Reid had meanwhile granted a trust deed for the behoof of creditors. Watson's trustees obtained from Hamilton an assignation of his right and interest in the lease. Watson's trustees intimated to Reid and his trustee that they were in Hamilton's right in the lease and demanded payment of rent. Reid and his trustee refused to pay on the basis that the lease was ineffectual on Hamilton's part, as Hamilton had never had any right to the minerals.

Unlike in *Weir v Dunlop & Co*, in *Reid's Tr* it was the *tenant* that sought declaratory relief: Reid and his trustee brought proceedings against Watson's trustees (i.e. the assignee) and Hamilton (the original landlord) seeking:

> declarator that the agreement to lease of January 1884 was ultra vires of Hamilton and was then and is now ineffectual and that the same is not binding on the pursuers, or either of them and that they from and since the date thereof, or otherwise from and since Martinmas 1892, were freed and relieved of all obligations purporting to be imposed on Reid.

They also sought declarators that the agreement could not be assigned and for reduction of the agreement and the assignation.

Part of the pursuers' argument was that the lease had been wholly ineffectual and that there had never been any valid or binding contract of lease.[53] Part of the defenders' argument was that Reid had been personally bound by the agreement of lease, which had been validly assigned to them.[54] In this case, therefore, the relief sought by the pursuer put in issue the original status of the lease granted by Hamilton and that was a focus of argument by both pursuers and defenders.

The Lord Ordinary (Kyllachy) held, albeit reluctantly, that the pursuer had been freed from all obligations purporting to be imposed on Reid by the agreement, but, importantly, only from Martinmas 1892, some time after the lease was concluded. He granted reduction and declarator in terms of the summons.[55] This was upheld by the Inner House (by majority).

What was the basis of the Lord Ordinary's decision? He viewed the issues as difficult. He began his opinion with the following important passage:[56]

> I am not, I confess, prepared to accept the proposition that the reduction of a lessor's title *per se* puts an end to the contract of lease, so that although the lessor were still able by arrangement with the new owner to secure the tenant in continued possession, the tenant would nevertheless be at liberty to refuse implement of his part of the contract. *On the*

53 (1896) 23 R 636 at 637–638.
54 (1896) 23 R 636 at 638.
55 (1896) 23 R 636 at 638.
56 (1896) 23 R 636 at 639 (emphasis added).

> *contrary, I should think, prima facie, that both parties would in that case still be bound – bound, that is to say, by their personal contract*. If either was liberated, it could only be by the other party being disabled from performance. And, at least in other contracts than that of lease of land, such disablement would not necessarily follow from loss or absence of title. *There may, I apprehend, be a quite valid sale or hire of what is or turns out to be a* res aliena; *nor is there, so far as I know, any legal impossibility in the seller or hirer duly performing such a contract*. He may be able to do so, and may do so quite duly, by arrangement with the true owner. The peculiarity, however, of the contract of lease of land is this – that it is part of the lessor's obligation to give the lessee a title which shall be good against singular successors. And if, under the lease, the rent is or becomes payable to a person other than the proprietor of the lands, the lease cannot, I apprehend, be good against singular successors. That is to say, it cannot comply with the conditions of the Act 1449, c. 18. To secure therefore the lessee, and so perform his (the lessor's) part of the contract, it is necessary for a lessor whose title has been set aside either to reacquire the subjects under a valid title, or effectually to transfer his contract rights to the true proprietor.

He went on to consider whether the pursuers were correct that the assignation to Watson's trustees was ineffective, viewing this as the key issue in the case. He positively stated that "*ex hypothesi*, at the date of the assignation the contracts of lease as personal contracts held good. There had, as yet, been no default".[57] Though he acknowledged the force of the defenders' arguments he viewed himself as bound by *Weir v Dunlop & Co* to reach his conclusion.

There are at least four noteworthy features of this opinion. First, Lord Kyllachy accepted that the contract of lease was valid at the outset, even though the landlord did not have title to the subjects.[58] That is important. Second, Lord Kyllachy's approach was that the key question was whether the landlord could in the circumstances assign the rights and obligations under the lease to Watson's Trustees. He held that the landlord could not, because he considered himself bound on this point by *Weir v Dunlop & Co*.

Third, the Lord Ordinary declared that Reid was freed with effect *from Martinmas 1892*. It is not clear why the Lord Ordinary accepted that Martinmas 1892 was of legal significance. One suspects that the practical reason for the tenant choosing this date was that that was when he had stopped paying rent.[59] However, if the basis for the relief sought was that Hamilton's title was defective, it is not clear why Martinmas 1892 should be of significance.[60] But it emphasises that, even on the Lord Ordinary's view, the lease had effect before then. Fourth, despite the Lord Ordinary's conclusions regarding the lease having been valid at the outset and his focus on *Weir v Dunlop & Co* as mandating a particular decision about the ineffectiveness of the assignation, he also declared that the tenant was freed from that date in a question with Hamilton, i.e. the original lessor with whom he had contracted. The basis for that conclusion is not explained. Hamilton did not appear to defend the claim against him, so one should perhaps not attribute too much weight to it. Given the rest of the Lord Ordinary's findings summarises above, it cannot have been because of a conclusion that the contract was void *ab initio*.

57 (1896) 23 R 636 at 640.
58 As I note below, that was also Lord Young's interpretation of Lord Kyllachy's judgment.
59 It seems that proceedings regarding Hamilton's title began in 1892: see Lord Young at 643.
60 This was another point noted by Lord Young in the Inner House.

In summary, therefore, the Lord Ordinary's decision positively affirmed the contractual validity of a lease granted by someone with no title to the lands. There are some curious aspects of the decision: if the lease was valid, why was Reid freed from paying rent from Martinmas 1892, before Hamilton's title had been set aside? If necessary to do so, this could be rationalised on the basis that the Lord Ordinary must have considered that a challenge to the landlord's title (which began in 1892) was somehow a breach of the landlord's obligations towards the tenant, which entitled to the tenant to withhold the rent. It does not require the conclusion that the lease was not valid.

The Inner House affirmed Lord Kyllachy's decision. This was a majority decision and the reasoning of the majority differed. Lord Justice-Clerk Macdonald and Lord Trayner were in the majority; Lord Young dissented; Lord Rutherfurd Clark was absent.

The Lord Justice-Clerk's judgment is short.[61] The basis for his decision appears to have been that Hamilton was not in a position to fulfil his obligations under the lease, therefore Reid was not bound and the position could not be changed by an assignation by Hamilton to Watson's trustees. *Weir v Dunlop & Co* could not be distinguished. There are passages in his judgment on which one could rely in support of an argument that there was never a valid contract between Hamilton and Reid.[62] However, I suggest that the better reading of the judgment is that this was not the Lord Justice-Clerk's reasoning. He makes various references to the "personal obligation" under the lease and also to the tenant not having anyone "bound by their contract who could effectively keep them in possession".[63] The better reading of the Lord Justice-Clerk's opinion is that the contract of lease existed but that, because Hamilton did not comply with his obligations, the tenants were not bound by theirs and the attempt at assignation could not place Watson's trustees in a better position.

The opinion of Lord Trayner, the only other judge in the majority to give an opinion, was, however, different and did, it seems, take the view that the defect in Hamilton's title meant that there was no valid contract of lease. He also considered that the case was governed by *Weir v Dunlop & Co*.[64] However, he went on to explain that he would have reached the same conclusion independently of precedent. Part of his reasons for doing so did relate to the status of the lease and the effect on it of Hamilton's title.

First, he reasoned that "there was never a valid lease at all – that is, a lease which the lessee could not have challenged during any period of its currency"[65] because of Hamilton's lack of title. Hamilton, in his view, "lacked the qualification necessary to enable him to grant a *valid* and binding lease of Bankhead or the minerals therein . . . the pursuer could at any time during the currency of the pretended lease have thrown it up on the ground that the lessor had no title to the minerals let, and could not competently protect him, the tenant, in his possession under it. He was not

61 (1896) 23 R 636 at 641–642.
62 E.g. the statement that "if the latter [i.e. true proprietor] was not bound, no one was bound": (1896) 23 R 636 at 641.
63 (1896) 23 R 636 at 641.
64 (1896) 23 R 636 at 647.
65 (1896) 23 R 636 at 647.

bound to wait until the real owner came forward to eject him".[66] The lease was "a bilateral contract by which both parties must be bound or neither". This did not, he said, conflict with the principle that a lessee cannot challenge his lessor's title, because that principle supposedly only applies where the lessee is maintaining some right under the lease, not where he is renouncing or repudiating it.[67]

Second, and flowing from that, Lord Trayner reasoned that if the lease was not valid and binding on the pursuer, the assignation to Watson's trustees was to no avail because Hamilton could give no better right than he had. He concluded that the lease was at an end by the time of the assignation because the reduction of the lessor's title extinguished the lease. In his view, arguments based on the validity of a contract for the sale of a *res aliena* did not assist because those arguments did not explain why the tenant could be compelled to contract with Watson's trustees as a new landlord.

Lord Young, as he so often did, dissented. Importantly, his opinion begins with a statement of what he understood the Lord Ordinary to have decided, namely that the lease was valid when it was concluded, and therefore binding on the parties, and that it remained so down to Martinmas 1892.[68] He viewed the Lord Ordinary as having reached the decision that he did about the status of the lease *after* Martinmas 1892 because of *Weir v Dunlop & Co*. But Lord Young thought *Weir v Dunlop & Co* distinguishable. In his opinion:

(1) The tenant had no reason for stopping paying rent after Martinmas 1892. The only reason given by the tenant was that Hamilton's title was subject to litigation. This was not a justification. Litigation challenging a landlord's title does not entitle the tenants to throw up their leases. That proposition must be correct.
(2) Nor was the tenant "freed and relieved" of the obligations imposed on him by the lease upon the termination of the litigation (in June 1894) when Watson's trustees were declared to be owners of Bankhead. Hamilton remained bound to satisfy the tenant's rights. If Hamilton had acquired the property from Watson's trustees, there can be no doubt that the lease would have been good. This reasoning is also correct.
(3) As for the situation between Reid and Watson's trustees, Lord Young considered that, when Hamilton's title was reduced, Watson's trustees took title in the condition produced by Hamilton's ordinary prudent management (i.e. subject to the lease).

66 (1896) 23 R 636 at 648 (emphasis added).

67 Lord Trayner cites no authority for that proposition and, in my view, although it is accepted without criticism in Paton and Cameron, *Landlord and Tenant* (n 28) 253, it is most likely wrong. The paradigmatic application of the rule that a tenant cannot deny his landlord's title is in connection with an action for removing. There, the tenant may not be maintaining a right or claiming any benefit under the lease – he may well be asserting that he is entitled to remain for some other reason. However, he is prohibited from denying the landlord's title. To take another example: what if a long lease contains an onerous obligation upon the tenant upon removing to return the subjects to the condition that they were in at the start of the lease? The tenant fails to do so. He has enjoyed possession even although it turns out that the landlord did not have title. If sued by the landlord, it is hard to see why it should be open to the tenant to deny the landlord's title and rely upon this to argue that the lease was invalid and the obligation not due. See, by analogy, *Elliott's Trs v Elliott* (1894) 21 R 858.

68 (1896) 23 R 636 at 642.

(4) Even if that were not the case, Watson's trustees would have been able to homologate the lease in 1894 (i.e. to ratify it).[69]

Is it part of the *ratio* of *Reid's Trs* that a lease concluded by a non-owner does not have effect as a contract between the original putative landlord and tenant (i.e. is void *ab initio*)? I suggest it is not authority for that proposition. Although that question was put in issue by the relief sought, and the parties' arguments, the declarator granted by the Lord Ordinary (affirmed following the reclaiming motion) declared that Reid had been freed from his obligations *from Martinmas 1892*. i.e. some considerable time into the lease. When the Inner House opinions are properly analysed, it was only Lord Trayner who considered that the lease was "invalid" *ab initio*. The Lord Justice-Clerk expressly referred to whether Hamilton was in the position to "fulfil his part of the obligation of lease", asking how, if Hamilton was not able to do so, he could enforce against the tenant, or transfer the right to do so to Watson's trustees. His view appears to have been that the defect of title rendered Hamilton unable to enforce the lease, not that the contract did not exist at all. Lord Young's dissent demonstrates, I suggest, the difficulties with key elements of decision in *Watson's Trs*. The case should not be given a broad interpretation.

In the result, therefore, properly analysed neither *Weir v Dunlop & Co* nor *Watson's Trs v Reid's Trs* is binding authority for the proposition that a contract of lease concluded with a purported landlord who does not himself own the land leased[70] is invalid *ab initio*. These two cases should instead be treated as authority for a rule that such a landlord cannot (absent the tenant's consent) transfer his rights and obligations under the contract of lease to a third party so as to allow the third party to enforce the lease against the tenant. That view does, admittedly, give rise to certain inconsistencies: it seems odd to have a mandatory rule that if A has granted a lease to B but it turns out that X owns the land, A cannot transfer its rights and obligations under the contract of lease to X given that the same result could be achieved by A and X agreeing that X will transfer the land to A and A then transferring the land back to X. The transfer by A to X would carry with it the landlord's rights and obligations under the lease, achieving the same result as a "transfer" of the lease by A to X in the first place. However, that is a debate about the merits of the decisions in the two cases not about what they actually decided. Further, the rule can be justified as consistent with viewing the contractual transfer that takes place when a landlord transfers ownership of land over which a lease has been granted as a tightly limited exception to the normal rules of contract law. Contracts bind only the parties to them. While contractual *rights* can (unless there is some prohibition) be freely assigned, a party cannot "transfer" an *obligation* nor, therefore, can it "transfer" an entire contract. The fact that the lease "runs with the lands" if an owner grants a lease and then transfers ownership of the land is an exception to that general rule. The decisions in *Weir* and *Watson's Tr* are best viewed as decisions that the landlord cannot transfer his rights and obligations

69 Propositions (3) and (4) are, with respect, doubtful. In respect of (4), Hamilton had not acted as Watson's agent when the lease was concluded. There continues to be debate about whether ratification by an undisclosed principal is possible in those circumstances: see L J Macgregor, *The Law of Agency in Scotland* (2013) 11–47.

70 Or have some other real right in respect of the land sufficient to support the grant of a real right to the tenant, such as a head lease.

under a lease by "assigning" the lease separately from a transfer of the land. It can only be transferred by operation of law consequent upon a transfer of his title to the land.

(3) Other materials regarding leases by those with no title

Before leaving this topic, we should note some other materials which might be thought to support a view that a lease is contractually invalid if granted by a person who does not meet certain criteria. Various Scottish texts contain formulations along the following lines. Sir John Rankine states:[71]

> There is a presumption, arising from the principle of freedom of contract, that every person – individual or corporate – who is the proprietor of a subject or has a right to the use and possession of it may enter into the contract of lease, or into a contract to give a lease, with any person for such period and on such term as may be agreed on, and that such other person may lawfully contract with him.

George Joseph Bell states:[72]

> The granter of a lease must be either the proprietor of the subject let, or one entitled to the full use and possession of the subject, or one in administration of it. The proper title, therefore, of the granter of a lease as heritable proprietor is infeftment. Where the granter is not infeft, the lease does not confer an effectual or permanent right, though it may be made perfect by the granter's subsequent infeftment . . .

These are from sections of the texts discussing leases in general not sections discussing the requirements that must be met for a lease to be protected against a singular successor to the landlord. It might be argued that they are discussing a rule of contractual validity. I suggest, however, that these statements, and passages like them,[73] should not be read as laying down a requirement that the landlord must have title in order to be able to grant a valid *contract* of lease. Both Rankine's and Bell's formulations refer to granters who would *not* have a real right to the subjects: for example, one could have the "use and possession" of a subject without having title to it. Further, Bell's reference to a "proprietor" is *not* (despite what a modern reader might think) a reference to a party with a completed title to the land. At the time Bell and Rankine were writing, a person could be described as a "proprietor" even if he did not have feudal title. The law distinguished between "proprietors" and "heritable proprietors": the distinction was infeftment.[74] Thus, these formulations do *not* say that a landlord must have a real right in order for a contract to be valid. Are they, however, suggesting that if the landlord does not fall within any of the categories listed, that the contract of lease is *invalid*? In my view, for a variety of reasons, the answer must be "no".

71 Rankine, *Leases* (n 23) 4. See also ch 2 of the same work (at 47 ff) headed "Limitation of Title". It discusses various circumstances in which "there may be an incapacity to grant an effectual lease".

72 Bell, *Prin* § 1181.

73 e.g. Stair, *Inst* 2.9.3: "[T]o the constitution of an effectual tack, the setter must not only have all the capacities requisite to contract, but he must have the right to the thing set and the power to administer it". Erskine, *Inst* 2.6.21: "The granter of a lease must be either the proprietor of the subject let, or the administrator of it".

74 *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19 at para 95.

First, at least in the normal case, the tenant faced with a landlord that is unable to give possession of the subjects of which it has promised to give possession has a claim against the landlord: the basis of that claim will be contractual. Second, the idea that the validity of the contract could depend on whether the landlord is able to perform is inconsistent with general contractual principle. Provided that the obligation is not objectively impossible, the fact that it is not possible for the party undertaking the obligation does not affect the validity of the obligation. That was clear as far back as Stair, who provides support for a general principle that contracts concluded in respect of another's property are valid so as to sound in damages if performance is not forthcoming. Stair states:[75]

> though the particular thing be not in our power, and yet it be not manifestly impossible, the contract is obligatory; and albeit it cannot obtain its effect upon the thing, it is effectual for the equivalent, as damage and interest.

As Lord Kyllachy stated in *Weir v Dunlop & Co*, there may be a quite valid sale of a *res aliena*. He stated that the same principle applies to a lease. Pothier – whose writings influenced aspects of the Scots law of obligations – supports that. In his *Treatise on the Contract of Letting and Hiring*[76] he stated:

> Just as what belongs to another can be sold . . . similarly what belongs to another can be let, both that of which the lessor has the right of enjoyment and that of which he has not. Such a contract is valid: not, however, that the lessor can thereby confer upon the lessee a right to enjoy something which he himself has not, but that by such a contract the lessor is bound to the lessee by warranty in case the latter is disturbed in his enjoyment of the thing.

I respectfully suggest that this is also true in Scots law. The requirement for a landlord to have a real right sufficient to support the grant of the lease is a requirement for the lease to be effective in a question with third parties. But in a question between the landlord and tenant, the better view is that the landlord's title does not affect the validity of the contract of lease. The landlord's lack of title may, of course, have very significant consequences for the tenant's remedies pursuant to that contract. But the tenant does have remedies and those remedies are contractual. The "common law personal lease", to use Lord Gill's words, does still exist in Scots law.

75 Stair, *Inst* 1.10.13.
76 R J Pothier, *Treatise on the Contract of Letting and Hiring* (trans G A Mulligan) (1953) § 20.

MANDATES TO PAY, UNJUSTIFIED ENRICHMENT AND THE PANDECTIST DEFICIT

Niall R Whitty[*]

A. INTRODUCTION

George Gretton is deservedly regarded as one of the most respected and influential (and most humorous) teachers and thinkers about Scots private law of his time. He has an unsurpassed capacity to rescue difficult areas of Scots private law from doctrinal muddle and to place them thereafter on a principled and practical footing. This essay focuses on the Scots law on mandates to pay, which he has greatly clarified and brought to the brink of legislative reform, and its relationship with unjustified enrichment. The essay seeks incidentally to support some of the legal values that he has promoted. One is the need in some areas of Scots law to make good "the Pandectist deficit", a name coined by him.[1] Another is the need to resist the fragmentation of our private law into "Scots law" and lower-tier categories such as commercial law.[2] Since the 1980s George Gretton has been the foremost scholar writing on the Scots law relating to cheques, bills of exchange, assignations and mandates to uplift or to pay[3] and has inspired fine work by others in the same field[4] including the Scottish Law Commission's project to reform the law on assignations and mandates.[5]

Where in the course of these transactions something goes wrong so that (say) money is overpaid or paid to the wrong person, then recourse must be had to the law of unjustified enrichment in order to redress one party's unjustified gain at another's

* I gratefully acknowledge the very helpful comments of Danie Visser on drafts of this essay. I am alone responsible for any errors.

1 See R Zimmermann, "Double Cross: Comparing Scots and South African Law," in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 1 at 19, n 128. The influence of the Civilian *ius commune* on Scots private law faded from the mid-eighteenth century and was in full retreat in the nineteenth century at the very time when it reached its zenith as the great German Pandectist jurists, in the absence of a modern German code, systematised the Roman law and adapted it to modern conditions. The phrase "Pandectist deficit" has reference to the lack of a similar neo-Civilian achievement in Scots law.

2 G L Gretton, "The Rational and the National: Thomas Broun Smith" in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 30 at 39.

3 See e.g. G L Gretton, "The stopped cheque" (1983) 28 JLSS 337; "Stopped cheques: the new law" 1986 SLT (News) 25; "Mandates and assignations" (1994) 39 JLSS 175.

4 R G Anderson, *Assignation* (2008).

5 Discussion Paper on *Moveable Transactions* (SLC DP No 151, 2011) chs 4, 14 and 15.

expense. How mandates to pay and assignations do or should synchronise with the law on unjustified enrichment is the subject matter of this essay.

B. THREE TYPES OF JURIDICAL ACT: TERMINOLOGY

(1) Assignations, mandates to collect and mandates to pay

Suppose A is the debtor of B and B is the debtor of C. In general B could personally collect his debt from A and pay the money over to C.[6] Instead of that cumbersome transaction, B has at least three other options.

First, assignation (change of creditor): B may assign his personal right to A's debt to C which assignation C will complete by intimation to A. This effects a change of creditor; C replaces B as A's creditor.[7]

Second, mandate to collect or uplift (also known as procuratory *in rem suam*): B may authorise C to collect or uplift the debt due by A. In the Civilian tradition this form of transfer, which dates from a period when assignations were not competent, is known as a procuratory *in rem suam*. It has a different form but broadly the same function (i.e. change of creditor) as an assignation.[8] The mandatory could be clothed with the powers of an assignee.[9]

Third, mandate to pay (also known as delegation of performance): B (the mandant or delegator) may instruct or request his debtor A (the mandatory or delegate) to pay directly to his (B's) creditor C. Reflecting Roman law,[10] in the Civilian tradition this is called delegation of performance (*delegatio solvendi*).[11] If the mandate is used to pay a debt, in principle B remains C's debtor and A's creditor until A pays C. The recipient C never becomes A's creditor. A cheque or other bill of exchange is *in form* an order or mandate by the drawer to the drawee to pay.

Each of the foregoing differs from the concepts of novation and delegation of debt.[12]

6 Payment using bags of coins was normal until the development of bills of exchange in late mediaeval Italy which only entered commercial practice in Scotland in the late seventeenth century.

7 In an assignation the consent of the debtor is not required; and intimation of the assignation or its equipollent is an essential requirement for completing the transfer.

8 See SLC DP No 151 (n 5) para 4.47. The prevailing historical theory (Anderson, *Assignation* (n 4) ch 4) is that Scots law developed a doctrine of assignation in the mediaeval and early modern period independently, whereas in the *ius commune* assignation developed out of the mandate to collect or uplift *in rem suam*. Judges sometimes assume that Scots law followed the *ius commune* pattern of development.

9 The mandate to collect may include mandates to grant a discharge; if necessary, to sue in the debtor's name; and to retain the proceeds.

10 See M Kaser, *Roman Private Law* (2nd edn, 1968, trans R Dannenbring) 226–227.

11 It involves no transference or conveyance. It requires the acceptance of the mandatory before he becomes bound to pay. It does not transfer any of the mandant's rights against the payee.

12 (1) In an *assignation of the right to a debt* the nature and incidents of the obligation and the identity of the debtor remain unchanged. (2) A *novation of a debt*, in its distinctive, narrow sense, effects the extinction of one obligation by the substitution of another but the identities of the creditor and the debtor remain the same. (3) A *delegation of debt* in its primary and distinctive sense effects a change of debtor, substituting a new debtor for the previous debtor (who is thereby liberated from the obligation) but the identity of the creditor and the nature and characteristics of the obligation remain the same. This was called *delegatio obligandi* in Roman law and was and is distinct from *delegatio solvendi* (delegation of performance).

(2) Double-discharge analysis: identifying the parties to a *condictio indebiti*

Suppose A owes B £100 and B owes C £100. B authorises A to pay C £100. Under the double-discharge analysis, a physical payment from A to C made in B's name as B's mandatory or delegate has the effect of two legal payments from A to B discharging A's debt to B and from B to C discharging B's debt to C. Then suppose that the facts are the same as in the previous example except that both A and B mistakenly think that A owes B £100. In that case the payment by A to C will extinguish the debt owed by B to C. When A discovers that he is not liable to B he cannot recover the payment he made to C. C can plead the defence of *suum recepit* ("he has received what is due to him") considered below. A has a *condictio indebiti* against B who has been unjustifiably enriched at A's expense by A's payment discharging B's debt to C. The *suum recepit* defence is available to C if A has paid C in B's name as B's delegate so as to extinguish B's debt to C. Robin Evans-Jones summarises the core of the relevant law on delegation of performance, money payments and the *condictio indebiti* in the following propositions:[13]

(1) If, without B's instructions, A pays on behalf of B a non-existent debt to C, A has the *condictio indebiti* against C.
(2) If A owes B who owes C, and A pays C at the direction of B, A has the *condictio indebiti* against B if his debt to B did not exist.
(3) Assuming the same facts as in (2), if the debt A–B was good but the debt B–C did not exist, B has the *condictio indebiti* against C.
(4) If neither the debt A–B nor the debt B–C existed, A has the *condictio indebiti* against C but this is possible only as the representative of B.
(5) If A, acting for himself, pays a debt which he thought he owed to B but it was owed by C, A has the *condictio indebiti* against B.

C. REPETITION UNDER ASSIGNATIONS AND MANDATES TO PAY (DELEGATION OF PERFORMANCE): A COMPARISON

(1) Introduction

The relevance to unjustified enrichment of the distinction between assignation and delegation of performance can be illustrated by taking the following case the facts of which are based on *Earl of Mar v Earl of Callander*:[14]

> A owes a debt of £6,000 to B and B owes a debt of £6,000 to C. A pays B £1,000. Overlooking this part-payment, B either purports to assign the whole original debt of £6,000 to C or delegates A to pay £6,000 directly to C in B's name. Forgetting that he has already paid £1,000 to B, A pays £6,000 to C. A then discovers his mistake and wishes to recover his payment of £1,000.

Does A sue B or C? If the transaction is analysed as an assignation, then to recover the overpayment A must sue C, whereas if it is analysed as a delegation of performance, A must sue B. So, the identity of the proper defender in an action of

13 R Evans-Jones, "Identifying the enriched" 1992 SLT (News) 25 at 29. The list is not necessarily comprehensive.
14 (1681) Mor 2927.

repetition, and therefore the allocation of the risk of insolvency, and the outcome of particular cases, may differ significantly depending on what model of triangular relationship is applied.

(2) Analysis as assignation

Suppose the transaction is analysed as an assignation by B to C. Immediately before the assignation A owed B only £5,000 because of his part-payment to B of £1,000. The assignation purports to assign a right to £6,000 but is only valid as to £5,000 and is invalid *quoad* the remaining £1,000. One reason sometimes given is that *quoad* £1,000 the debt does not exist and it is legally impossible to assign a non-existent right to a debt just as it is impossible to convey a non-existent corporeal asset. A more obvious and solid reason is that the assignee (C) cannot have a higher right against the debtor (A) than the assignee's author (B) had: *nemo plus iuris ad alium transferre potest quam ipse haberet*. So A's payment of £6,000 to C includes £1,000 to which C was not entitled, and therefore A may sue C by *condictio indebiti* to recover it. This means that C is out-of-pocket to the extent of £1,000. If, however, C has paid or provided value to B for the assignation of £6,000, C will normally be entitled to sue B in contract for breach of warrandice *debitum subesse* and obtain decree of payment for £1,000.

(3) Analysis as delegation of performance

Alternatively, the transaction may be analysed as a delegation of performance (*delegatio solvendi*) by B to A (B's debtor) to pay C (B's creditor) on B's behalf. In that case, under the double-discharge analysis, the single physical payment of £6,000 by A to C operates not as an assignation, but rather as two legal payments of £6,000 one from A to B and the other from B to C. Since B owed C £6,000, A cannot recover the £1,000 overpayment from C who only received what was due to him by B; *suum recepit*. It was the legal payment from A to B (embodied in the A to C physical payment) that included an overpayment of £1,000 since A had already paid that sum to B. Therefore, A has a title to sue B for repetition of £1,000 based on the *condictio indebiti*.

As Professor Reinhard Zimmermann points out,[15] this double discharge analysis is of fundamental importance for the law of unjustified enrichment. The reason is that in a case of an undue payment involving three or more parties, the analysis is a necessary means of identifying, for the purpose of an action of repetition based on a *condictio indebiti*, which party was unjustifiably enriched by the undue payment and which party suffered the corresponding loss. The practical importance of this analysis can be gauged from the fact that most payments by banks to their customers' creditors involve a delegation of performance (i.e. a mandate to pay) and a double discharge.

The double discharge analysis does not depend on any debt-extinguishing agreement between A and C. As Lord President Inglis remarked:

> a cheque is not necessarily drawn for the purpose of operating payment to the holder. It may be drawn for various purposes, as for instance, it may be given to the porteur for the

15 R Zimmermann, *The Law of Obligations* (1990) 158–160.

> purpose of enabling him to draw the money and hand it to the drawer; nothing is commoner than that.[16]

So a bank commonly makes no assumption, and therefore no error, as to its customer's liability to the holder.[17] It follows that the bank's intention or purpose in paying its customer's cheque is irrelevant in any determination as to whether the cheque has effected a valid payment or discharge. In short, in honouring its customer's cheque the bank acts as a neutral payment mechanism. In Scots law the discharge of the debt by the bank's payment does not flow from the Scottish common law power of a person to discharge another's debt but from the power of the debtor to discharge his own debt using the bank as a neutral payment mechanism.

D. DELEGATION OF PERFORMANCE IN THE INSTITUTIONAL WRITERS

(1) The initial reception of delegation of performance and double discharge analysis

The main source that initially influenced the Scots law is a short text in D 12.6.44 (Paul): "repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est".[18] Relying on this text Stair declared:[19]

> There is this exception against *indebiti solutum*, that it cannot be repeated, when the creditor gets that which is due to him, though not due by that party who paid the same [citing C 4.5.2 and D 12.6.44].

If one ignores Codex 4.5.2 for the moment, Stair's proposition and D.12.6.44 are both elliptical. Shorn of Codex 4.5.2, these texts seem to say that if A pays a debt *in his own name* to C thinking that he is debtor to C when not he, but a third party (B), is debtor to C, he (A) cannot recover from C. That was neither Roman law[20] nor Scots law.[21] It cannot be sufficiently emphasised that Stair had in mind a

16 *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 926. See also *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479 per Lord Justice-Clerk Moncreiff. "The bank makes a special contract with its customer, to hold his money at call, and pay it to him or his hand or messenger, and not otherwise. Whether such messenger holds in his own right or not the bank has no means of knowing and no reason to inquire."

17 The mere delivery of a cheque proves nothing but the passing of money; and the passing of money does not prove or raise a presumption of loan or any other contract: see *Haldane v Speirs* (1872) 10 M 537 at 540; *Williams v Williams* 1980 SLT (Sh Ct) 25.

18 "There is no repetition from a person who has received what was due to him (*suum recepit*) even if it has been paid by someone other than the true debtor." A Schall, "Three-party situations in unjust enrichment epitomised by mistaken bank transfers" [2004] Restitution LR 110 at 128 observes that "the term '*ab alio . . . solutum est*' suggests that the '*alius*' must have transferred intentionally in discharge of the true debtor's obligation" in which case he would not recover. If, for example, the third party paid the debt, mistakenly thinking that he was debtor when not he but someone else was, he would recover: D 12.6.65.9 (Paul).

19 Stair *Inst* 1.7.9.

20 E.g. D 12.6.19.1 (Pomponius); D 12.6.65.9 (Paul).

21 Lord Elchies, *Annotations on Lord Stair's Institutions of the Law of Scotland* (early eighteenth century, published posthumously in 1824) 40, "if a man, believing himself to be debtor, when not he but another is debtor, pays the money, he will have repetition." (Lord Elchies died in 1754.) Bankton, *Inst* I.8.32; Kames, *Principles of Equity* (3rd edn, 1778) vol 1, 306–308; (5th edn, 1825) 199, 200. See Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* (SLC DP No 95, 1993) vol 2, paras 2.163–2.182.

different case, namely, where A pays B's debt to C *in the name of B* as delegate of B mistakenly thinking that he (A) is indebted to B. A cannot recover from C who, after all, only received what was due to him by B (*suum recepit*). A, however, is not without remedy because he can raise a *condictio indebiti* against B. Stair cures his apparent ellipsis by citing Codex 4.5.2, which (using our ABC lettering) states in effect that if a person (A) is delegated (by B) to promise to pay to the delegator's (B's) creditor (C) money that he (A) does not owe [to B], he has a *condictio* against B.[22] Some later commentators seem to have overlooked Stair's citation of Codex 4.5.2 with disastrous consequences for our understanding of this branch of Scots law. However, the true rule of law was clearly recognised by Elchies, Bankton and Hume, as well as Stair.

Lord Elchies' *Annotations on Stair* correctly explained Stair's elliptical statement of the "suum recepit" defence.[23] He stated that Stair's proposition, that the recipient of a just debt, though not from the true debtor, has a defence against repetition "only holds when the money is paid in name of him who was really debtor; or, which is the same, when it is paid by novation or delegation".[24] So, for example, where a debtor draws a bill of exchange on a person, whom he erroneously thought was his debtor, to pay a sum to the creditor, and the drawee accepts the bill:[25]

> In that case the acceptor would not have repetition against the creditor in the bill, because he [the creditor] got no more than what was owing him, and the acceptor payed in name of the drawer, which he might have done whether he had been owing the drawer or not; according to [D 12.6.44 and C 4.5.2].

The qualification of Stair in Bankton is equally clear. Bankton first accepts the rule laid down by Stair:[26]

> It is a certain rule, That he who gets payment of a just debt, tho' not from the true debtor, is not liable to restore. *Repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est.* [D.12.6.44].

Then comes the qualification:

> The meaning is, that where one pays another person's debt, by delegation, believing that he [*scil* the payer] was debtor to the delegator, as to which he afterwards finds he was in a mistake, the creditor who received payment is not concerned, but the payer has only action against the debtor for whom he paid . . . [citing D 12.6.19.1, and *Duke of Argyle v Halcraig's Representatives* (1723) Mor 2929]

22 C 4.5.2 (Severus and Antoninus). "Si citra ullam transactionem pecuniam indebitam alieno creditori promittere delegata es, adversus eam quae te delegavit condictionem habere potes." **"If, without any settlement (***transactio***)**, you were delegated to promise money not owed to someone else's creditor, you can have a claim for restitution against the woman who ordered you." Translation by D P Kehoe in B Frier (ed), *The Codex of Justinian A New Annotated Translation with Parallel Latin & Greek Text* (2016) vol 2.

23 Elchies, *Annotations* 39 to 41, citing D 12.6.44 (Paul); C 4.5.2 (n 22) above.

24 Elchies, *Annotations* 39.

25 Elchies, *Annotations* 40. These passages from Elchies have been cited, in the same breath as Voet, with approval by the Supreme Court of Appeal in South Africa: *Absa Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA) at para 17 per Malan JA.

26 Bankton, *Inst* 1.8.32.

Bankton here uses "delegation" to mean delegation of performance, since he refers to the payer making the payment for the delegator. The statement that "the payer has only action [i.e. of repetition] against the debtor for whom he paid" gives the clearest possible Institutional support for the reception in Scots law of the double-discharge theory of delegation of performance. Hume's short and accurate statement of the law[27] is consistent with Bankton's.

(2) The subsequent failure to understand the delegation of performance and double discharge doctrine

It is painful to record the misleading treatment of this topic by the later Institutional writers. Erskine surmised that the defence of "suum recepit" was grounded on the rule *ignorantia juris neminem excusat*, an explanation that, not surprisingly, he found unconvincing and contrary to equity.[28] Bell's *Principles* were even more negative:[29]

> In the Roman law there was no *condictio*, if the person who received the payment was really the creditor, and entitled to receive it, although the payment had been made by one erroneously supposing himself to be the debtor. This is not the law with us; . . .".[30]

Bell was no doubt misled by the elliptical treatments of the "*nulla repetitio*" text in D 12.6.44 and Stair 1.7.9. It is a striking example of the damage wrought by the Pandectist deficit.

In the late seventeenth and early eighteenth centuries the Roman law texts that formed the building blocks of the double-discharge analysis, delegation of performance and the associated theory of unjustified enrichment, were cited to and by the Court of Session in three-party *condictio indebiti* cases of which the best examples are probably *Earl of Mar v Earl of Callander*[31] and *Duke of Argyle v Halcraig's Representatives*.[32] A full explanation of the analysis was not given until Evans-Jones's article of 1992.[33] Unfortunately in both cases the transaction under which the mistaken undue payment was made was, or seemed to be, an assignation in the strict modern sense of a conveyance of a right to a debt effecting a change of creditor.[34] But as we have seen, the double-discharge analysis only yields the right answer where the transaction under which the mistaken undue payment is made is a mandate to pay otherwise known as a delegation of performance (*delegatio solvendi*).[35] The result was and still is a

27 Hume, *Lectures* III, 17: "The *Condictio Indebiti* does not apply where the creditor only gets what is due to him, though the party who pays truly owed nothing; *if that party paid not in his own name but in that of him who was truly debtor*" (emphasis added).
28 Erskine, *Inst* 3.3.54.
29 Bell, *Prin* (4th edn, 1839), (10th edn, 1899) § 536.
30 Bell, *Prin* (n 29).
31 (1681) Mor 2927.
32 (1723) Mor 2929
33 R Evans-Jones, "Identifying the enriched" (n 13) at 27. See also R Evans-Jones, *Unjustified Enrichment*, vol 1 (2003) paras 8-46–8-52.
34 Including SLC DP No 95 (n 20). This conclusion has been contested by Evans-Jones, *Unjustified Enrichment* (n 33) vol 1 para 8.52, n 61 in a lengthy and closely argued footnote.
35 Which in German law developed into a juridical act distinct from assignation called *Anweisung*: see Anderson, *Assignation* (n 4) paras 3-14–3-18; and 4-41–4-50.

muddle of labyrinthine complexity[36] and the authority of the cases was undermined because, as Gloag (construing the two cases as involving assignations) remarked, "it does not seem obvious why an assignee should be in a better position than the cedent".[37]

E. MANDATE TO PAY RECONCEPTUALISED AS ASSIGNATION: *CARTER V MCINTOSH* (1862)

The slender roots of the double-discharge theory of mandates to pay were crushed by a remarkable common law development in the eighteenth and nineteenth centuries whereby mandates to pay were reconceptualised as assignations.[38] At the same time mandates to uplift were also reconceptualised as assignations but that was less remarkable since such a mandate was and is similar in function to an assignation.[39] The process by which mandates to pay were reconceptualised as assignations in the paradigm case of bills of exchange and cheques[40] is well described by Dr Ross Anderson as follows:[41]

> In Scots law, the "assignment" that was said to operate on [presentment][42] in favour of the holder of a bill was widely recognised to be "rather questionable".[43] And it is of interest that the term "assignation" is usually qualified [by] an adjective such as "virtual"[44] or "implied";[45] or that the effects of transfer of a bill are described merely as "equivalent"[46] or "tantamount"[47] to an assignation; or the term "assignation" is avoided in favour of the English term "assignment".[48] The first mention of a bill (in fact, a cheque) operating as an

36 As indicated by SLC DP No 95 (n 21) vol 2, para 2.180.

37 W M Gloag, *The Law of Contract* (2nd edn, 1929) 65.

38 The following are examples of cases construing bills of exchange, cheques and other mandates to pay as assignations: *Laurie v Ogilvie* 6 Feb 1810, FC; *Watt's Trs* v *Pinckney* (1853) 16 D 279; *Carter v McIntosh* (1862) 24 D 925; *Ritchie v McLachlan* (1870) 8 M 815; *Sutherland v Commercial Bank of Scotland* (1882) 20 SLR 139; *British Linen Co v Carruthers and Fergusson* (1883) 10 R 923; *Allan & Son v Brown and Lightbody* (1890) 6 Sh Ct Rep 278; *Smith v Paterson & Others* (1894) 1 SLT 650; (1894) 10 Sh Ct Rep 171; *Wallet v Ramsay* (1904) 12 SLT 111; *Executive Council for the City of Glasgow v T Sutherland Henderson Ltd* 1955 SLT (Sh Ct) 33; *Krupp Uhde GmbH v Weir Westgarth Ltd* (unreported) 31 May 2002 (OH) paras [30] and [31].

39 SLC DP No 151 (n 5) para 4.47.

40 Cheques may not have become bills of exchange in Scotland until the Bills of Exchange Act 1882 s 73 came into force.

41 R G Anderson, "Scots Law and the UK Codification of Bills of Exchange" in J H A Lokin, J M Milo and A J Smits (eds), *Tradition, Codification and Unification: Comparative-Historical Essays on Developments in Civil Law* (2014) 121 at 134–135 (footnotes in original but shortened and renumbered).

42 The word "presentment" is missing in the original.

43 W Glen, *A Treatise on the Law of Bills of Exchange, Promissory Notes and Letters of Credit in Scotland* (2nd edn, 1824) 238.

44 *Stewart v Elliot* (1724) Mor 1463; *Thorold v Thomson* 14 July 1768, FC; *McLeod v Crichton* 14 January 1779, FC, Mor 16469.

45 For example, *Campbell, Thomson & Co v Glass* 28 May 1803, FC, reported in *Morison's Dictionary of Decisions* under the heading "Implied Assignation", No 2.

46 E.g. *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479 per Lord Justice-Clerk Moncreiff; *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 927 per Lord Shand.

47 *Watt's Trs v Pinkey* (1853) 16 D 279 at 286 per Lord President M'Neill.

48 R Thomson, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes, Bankers' Notes and Checks on Bankers in Scotland* (2nd edn, 1836) 355.

assignation – without words of qualification – is perhaps an opinion of Lord President Inglis in *British Linen Bank v Carruthers and Fergusson*,[49] a case decided post-1882 under pre-1882 law.[50]

Dr Anderson criticises this reconceptualisation on several grounds. First, cheques and bills of exchange are types of mandate to pay that do not involve a change of creditor whereas, by definition, an assignation always involves a change of creditor. Second, a bill or cheque is revocable by the drawer at least until the grantee's presentment of it to the drawee. An outright assignation is intrinsically irrevocable. Third, under section 75(2) of the Bills of Exchange Act 1882, the banker's authority to pay the bill is terminated by the customer's death.[51] But that proposition is inconsistent with an assignation, for a conventional assignee is not affected by the cedent's death, even if the death intervenes before intimation.[52] Fourth, while some of the cases suggest that this "virtual" assignation takes place only on formal protest,[53] other authorities held that the indorsee of a bill that had not yet been presented for acceptance could somehow amount to an assignation.[54] Fifth, as the Scottish Law Commission observes:[55] "It seems to be generally accepted that a mandate cannot operate as an assignation unless it is given for onerous consideration."[56] By contrast, a document that is overtly an assignation does not need consideration.

The present essay ventures another criticism, namely, that reconceptualisation makes it difficult, if not impossible, to apply the double-discharge analysis that is the most principled approach to expiscating the rights of three or more parties following mistaken and other undue payments made pursuant to mandates to pay.

F. ASSIGNATIONS, MANDATES TO PAY AND THE BILLS OF EXCHANGE ACT 1882

The Scottish common law doctrine reconceptualising mandates to pay as assignations had applied to cheques and bills of exchange (which are basically mandates to pay) and this doctrine was introduced into the Bills of Exchange Act 1882 by section 53(2), which applied only to Scotland.[57] The doctrine, which came

49 *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 927: "If that be so, and I am right in what I have said so far, that this cheque is not only equivalent to, but the same as an assignation, and operates to the same effect, then I do not think that the mere words, 'assign, transfer, and make over' are used or not, if something precisely similar is done by a cheque in ordinary form."

50 The First Division advised opinions on 6 June 1883.

51 See *Kirkwood & Sons v Clydesdale Bank* 1908 SC 20.

52 See Anderson, *Assignation* (n 4) para 5-17.

53 *Mitchell v Mitchell* (1734) Mor 1464; *Gavin v Kippen & Co* (1768) Fac Coll No 79, 327; *Spotiswood v MacNeil* (1778) Mor 1464.

54 *Ewing v Geills* (1698) Mor 1460.

55 SLC DP No 151 (n 5) para 4.48.

56 Citing *National Commercial Bank of Scotland v Millar's Tr* 1964 SLT (Notes) 57. SLC DP 151 (n 5) para 69 n 68 states: "More precisely, the doctrine may be that irrevocable mandates are assignations and that a mandate is irrevocable if granted for onerous consideration."

57 The story is well told by Anderson, "UK Codification" (n 41) at 129 and 136–137. It appears that the author and prime mover of s 53(2), Sheriff J Dove Wilson, changed his mind shortly after the Bill became law.

to be known as "the funds attached rule",[58] was the target of two law reform projects supported by pressure groups. In the early 1980s the Scottish Consumer Council contended that section 53(2) prevented consumers from countermanding (under section 75) cheques paid as the price of goods or services that turned out to be disconform to contract. In response, the Act was amended in 1985 by a Government Bill enacting for Scotland a new section 75A on countermands and ensuring that the assignative effect of presentment was "subject to" the bank customer's power of countermand.

The next law reform abolished the funds attached rule so far as it applied to cheques but left the rule in force so far as it applied to other bills of exchange. This was a modified version of a reform recommended by the Jack Report[59] in 1989 but not implemented till 2009.[60] The problem was that where a cheque was presented to a bank for payment, or several cheques were presented simultaneously, and there were insufficient funds to satisfy the cheque or all the cheques, the bank made no payment. Instead the funds were (so to say) "attached", that is, placed in a suspense account until one or other of five events (e.g. expiry of the five-year negative prescription) occurred enabling release of the funds. This caused difficulty for all concerned. The Jack Committee thought that the banks in Scotland should be able to follow the practice adopted by banks elsewhere in the UK.[61] The Jack Report recommended that the abolition of the funds attached rule should extend to "instruments other than bills of exchange (which are not also cheques)". After consultation on a White Paper,[62] however, the Government concluded that abolition of the funds attached rule should be confined to cheques and should not apply to other types of bills of exchange, which were not perceived to present the same problems.

In the result, the assignative effect of cheques on presentment was abolished but the question of the nature of a cheque prior to presentment was not addressed. A cheque is defined as "a bill of exchange drawn on a banker payable on demand"[63] and a bill of exchange is in form a type of mandate to pay.[64] Since cheques no longer operate as assignations on presentment their reconceptualisation should be regarded as reversed, so that they are once again treated in law as mandates to pay. This in turn should pave the way for the application of the double-discharge analysis in three-party cases where an undue payment under a mandate to pay raises an issue of unjustified enrichment.

58 Defined by the Banking Act 2009 s 254(1) as "the rule of law in Scotland by virtue of which a bill of exchange, when presented to the drawee for payment, operates as an assignation of the sum for which it is drawn (or, if the drawee holds insufficient funds, of those funds) in favour of the holder of the bill".

59 Report of the Review Committee on *Banking Services: Law and Practice* (Cmnd 622: 1989) (chairman: Professor R B Jack).

60 Banking Act 2009 s 254.

61 Under that practice, where several cheques were presented simultaneously, the bank would choose which cheques to satisfy in a way which would do the least harm to the customer's interest while ensuring that at least some creditors received payment.

62 White Paper, *Banking Services Law and Practice* (Cmnd 1026: 1990).

63 Bills of Exchange Act 1882 s 73.

64 Bills of Exchange Act 1882 s 3(1).

G. PAPER-BASED MONEY TRANSFER ORDERS AND ELECTRONIC FUNDS TRANSFERS

(1) The nature of a giro money transfer and the meaning of "transfer"

A giro money transfer order, whether it is paper-based or electronic, involves an adjustment of balances in the bank accounts of the payer and of the payee. The payer's bank account is debited and the payee's bank account is credited with the same amount.[65] The right that the payee acquires is not a real right of ownership but "a personal right against his bank to credit and pay out the amount of the transfer to him".[66] The payee does not acquire the payer's right. So, from the standpoint of property law, "transfer" may be a somewhat misleading word, since the original obligation is not assigned; a new obligation by a new debtor is created.[67] On the other hand as Professor Jacques du Plessis observes,[68] from the standpoint of unjustified enrichment law, there is indeed a transfer in the sense of the deliberate conferral of a benefit.[69] In the case of money the *condictio* is simply directed at obtaining repetition of the same amount; and not specific restitution of the same bank notes and coins.

(2) Credit and debit transfer orders directed to banks.

A paper-based money transfer order is a document in which a customer instructs his bank to transfer funds to another's bank account by a giro transfer.[70] There are at least three different categories of UK paper-based giro forms namely, individual money transfer forms; standing orders; and direct debit forms. These paper-based money transfer orders have the following characteristics. First the document used in such a transfer is not a negotiable instrument.[71] Second it is well established that a giro transfer instruction is not treated as an assignation in form or substance. It does not effect a change of creditor.[72] This rule applies both to credit transfer orders[73] and direct debit orders.[74] So, for instance, in *Mercedes-Benz Finance Ltd v Clydesdale Bank plc*, Lord Penrose observed that a direct debit "does not so operate as to vest in the payee any of the rights of the payer under his contract with his banker, whether by mandate or assignation".[75] Likewise the giro-transfer instructing document does not

65 See *Momm v Barclays Bank International Ltd* [1977] QB 790 and *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 both cited with approval in *Scottish Exhibition Centre Ltd v HM Revenue and Customs* [2006] CSIH 42, 2006 SC 702 at para 19.

66 F R Malan and J T Pretorius, "Credit transfers in South African law (1)" 2006 *Tysdkrif vir die Hedendaagse Romeins-Hollandse Reg* 594 at 595.

67 *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 750 per Staughton J approved in *Scottish Exhibition Centre Ltd v HM Revenue and Customs* [2006] CSIH 42, 2006 SC 702 at para [19].

68 J du Plessis, "The cause of action in *Nissan South Africa (Pty) Ltd v Marnitz NO*" in H Mostert and M de Waal (eds), *Essays in Honour of* C G *van der Merwe* (2012) 1 at 11.

69 Cf the full title of R Evans-Jones, *Unjustified Enrichment*, vol 1 (*Enrichment by deliberate conferral*: condictio) (2003).

70 See E P Ellinger, E Lomnicka and C V M Hare, *Ellinger's Modern Banking Law* (5th edn, 2011) 593–630 on the legal nature of money transfer orders.

71 *Ellinger's Modern Banking Law* (n 70) 595–596.

72 That is with the customer as assignor, the payee as assignee and the bank as debtor.

73 *R v Preddy* [1996] AC 815. The authority of this case is not confined to English criminal law.

74 *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905.

75 1997 SLT 905 at 909G–H.

effect a novation.[76] It is generally accepted that a UK form of direct debit mandate may be amended or revoked (cancelled) by the mandant customer without the mandatory bank's consent.[77] In a direct debit "the right to cancel as between the customer and banker remains with the customer, subject only to a requirement for writing".[78] On that basis, the instruction for direct debit cannot be a mandate *in rem suam*[79] because such a mandate operates as an irrevocable transference. A direct debit instruction is in form and substance an example of a mandate to pay, not a mandate to uplift.[80]

Like a direct debit order ("pulling" money through the bank giro system) a credit transfer order ("pushing" money through the giro system) does not have effect as an assignation of a debt owed by the payer by his own bank.[81] In a credit transfer the payee's bank credits the payee's account on the faith of an instruction given to it by the payer's bank and thereafter holds the funds to the customer's order.

The case law in this area is sparse and there is no comprehensive statutory regime. Since it is clear that no question of assignation arises, it is submitted that where an undue payment made in purported implement of a money transfer order raises an issue of unjustified enrichment, the double-discharge analysis, Civilian delegation of performance doctrine and the classical Institutional rules on title to sue an unjustified enrichment action in three-party cases should normally govern the rights of parties.

Suppose B gives a standing order to his bank (A) to pay a fixed sum monthly, by way of a monthly subscription, to the bank account of a club C of which he is a member. On receipt of B's payment order A will debit B's account and forward a payment order to C's bank, which will then credit C's bank account with the specified sum. This transaction effects a double discharge of bank A's debt to its customer B and B's debt to C. If bank A makes a payment to C under B's mandate, which was not owed by B to C (for example B has cancelled his subscription but, by mistake, not the standing order), it is B not A who is impoverished and has therefore a title to sue C to reverse C's enrichment at his (B's) expense.

In a debit transfer the payee C gives an instruction to his bank to collect funds from the payer B or, more specifically, from B's account with his (B's) bank (A). The instruction may emanate originally from the payer B and be transmitted to C who then collects the money from B's bank A. Alternatively the instruction may be given by the payee C acting in pursuance of the payer's (B's) authorisation as for example in the common case of a direct debit in terms of which the payer B signs a mandate authorising his bank A to pay amounts demanded by the payee C.[82] The

76 See Du Plessis, "The cause of action in *Nissan South Africa (Pty) Ltd v Marnitz NO*" (n 68) 6, n 18.

77 See e.g. the BACS Direct Debit Guarantee which recognises the payer's right of amendment and cancellation.

78 1997 SLT 905 at 909F per Lord Penrose. He continued: "It is a characteristic of mandate *in rem suam* that it is irrevocable without the mandatory's consent" citing Bell, *Principles* § 228.

79 See however Lord Penrose's remarks on mandate *in rem suam* in 1997 SLT 905 at 909C discussed in the text to nn 83 and 84 below.

80 Typically, direct debit forms are produced by the creditor on printed forms for completion by the debtor. The example quoted in the *Mercedes Benz* case stated: "Instructions To Your Bank/Building Society To Pay Direct Debits . . . Please complete parts 1 to 5 to instruct your branch to make payments directly from your account. Then return the form to Mercedes-Benz Finance Ltd."

81 Cf *R v Preddy* [1996] AC 815 at 834.

82 The payer's bank will usually debit B's account provisionally which becomes final when the debit to the payer's account becomes irrevocable.

precise legal nature of this direct debit transaction is not immediately obvious. So for example the fact that C is entitled, by virtue of B's authorisation, to collect funds from A for his own benefit might conceivably be analysed as a type of mandate to uplift *in rem suam*,[83] akin to a procuratory *in rem suam*. Since the latter is frequently characterised as a substitute for assignation, that line of argument is apt to mislead. In the alternative analysis, the fundamental element in the whole transaction is the instruction of the customer (B) to his bank (A) to pay sums demanded by C or C's bank and that is undoubtedly a mandate to pay. So for example in the *Mercedes-Benz* case, referring to a standard direct debit form, Lord Penrose observed:[84]

> The authority to present the completed form to the debtor's bank has its legal basis in mandate. But in order to see whether the mandate is exhausted when the administrative arrangements have been made or continues to characterise the relationship thereafter, one must examine the instructions given. The critical issue is whether the creditor is put into a position to operate the debtor's account at his own hand in exercise of a mandate from the account holder. In my opinion it is clear that he is not. The instructions already quoted are the customer's, not the payee's, and they remain so. The intimation of the sum payable is in the hands of the creditor. But the instruction to pay remains the instruction of the account holder.

Again the double discharge analysis applies. Bank A's payment to C reduces its customer B's credit balance (i.e. A's debt to B)[85] and at the same time discharges B's debt (if any) owed to C. If A makes an overpayment to C because C has demanded too much in his direct debit instruction (i.e. more than B has authorised), A need not reverse the debit and having therefore suffered no loss, has no title to claim reimbursement from either B or C. It is B rather than A who has been impoverished and has a title to sue C in unjustified enrichment since C has been enriched at B's expense by exceeding B's authorisation. The devil is in the detail but it is suggested that the combination of double-discharge analysis, delegation of performance and the early Institutional rules (endorsed by Stair, Elchies, Bankton and Hume) on title to sue an unjustified enrichment action in three-party cases, forms a sound point of departure in developing this branch of Scottish banking law.

H. SCOTTISH LAW COMMISSION DISCUSSION PAPER NO 151 ON *MOVEABLE TRANSACTIONS* (2011)

The assault on reconceptualisation of mandates to pay as assignation has gone beyond ad hoc amendments of the Bills of Exchange Act 1882 and extends to calls for legislation abolishing the common law rule under which mandates to pay are automatically treated as assignations. This fundamental critique was initiated by George Gretton's seminal article entitled "Mandates and assignations" published in

83 Cf *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905 at 909C per Lord Penrose: "There is no difficulty in characterising as a mandate *in rem suam* the completion by a debtor of a direct debit form, and the return of that form to the creditor for presentation to the debtor's bank." This seems to mean a mandate to collect rather than a mandate to pay. But see quotation keyed to next note.

84 1997 SLT 905 at 909E.

85 Or increases B's overdraft with A, as the case may be.

1994.[86] The critique was supported by Dr Ross Anderson's monograph on assignation published in 2008.[87] Then in 2011, the Scottish Law Commission's wide-ranging Discussion Paper on *Moveable Transactions*[88] provisionally proposes that the rule that a mandate can constitute an assignation should be abolished. The implications for unjustified enrichment are not discussed. The effect however should be to increase the number of cases in which the delegation of performance and the double-discharge doctrine apply.

I. SUMMARY

To sum up: (a) a bill of exchange is an order to pay and both at common law and under statute it operates as an assignation on presentment. (b) A cheque is a bill of exchange drawn on a banker and as such is an order to pay but by statute it does not operate as an assignation on presentment. It is possible that the combination of double-discharge analysis, delegation of performance and the classical Institutional rules on title to sue an unjustified enrichment action in three-party cases now applies to cheques. (c) A giro money transfer order addressed to a bank is generally framed as a mandate to pay but is not treated as a cheque or bill of exchange. It is suggested above that under the existing law the combination of common law principles mentioned in head (b) above are applicable to undue payments under a giro money transfer order. (d) Wherever the rule of law that a mandate to pay operates as an assignation has been abrogated, and by reason of a void, mistaken or otherwise vitiated undue payment an issue of unjustified enrichment arises in three-party cases, it is suggested that the combination of common law principles mentioned in head (b) above should be held to apply to fill the gap in the common law left by the abrogation.

86 G L Gretton, "Mandates and assignations" (1994) 39 JLSS 175.

87 Anderson, *Assignation* (n 4) para 4-41ff (the influence of Anderson's *Doktorvater* is handsomely acknowledged at viii); see also Anderson, "UK Codification" (n 41) 121 at 125.

88 SLC DP No 151 (n 5) para 3.17. Para 14.2 makes it clear that the Commission did not intend that any legislation of the Scottish Parliament to follow thereon should affect the transfer of negotiable instruments.

Part 4:
The Law of Property

A VIEW OF LAND REGISTRATION LITIGATION FROM SOUTH OF THE BORDER

Elizabeth Cooke

A. INTRODUCTION

In an earlier life, before I became a judge and before I was a Law Commissioner, I was an academic, serving first as a lecturer and eventually as a professor at the University of Reading. Academic life there in the 1990s was wonderfully land-law-flavoured, with the Centre for Property Law and the series of conferences that eventually became the Modern Studies in Property Law series. Reading University was a place where one met academics from other jurisdictions, and it was therefore my privilege to get to know a number of wonderful colleagues from Scotland.

The importance of this to a young academic in England was considerable, because in Scotland is to be found the miracle of a civil law system of property law in an English-speaking jurisdiction. The intellectual window opened by contact with Scotland was huge and the new insights learned by stepping through that window now and then remain very important to me. I am most grateful to George Gretton, and to many Scottish academic friends, for teaching me so much and for so many years of collegiality. George, along with Kenneth Reid, has been particularly special because as well as being an academic colleague he has also served as a Law Commissioner. One of my early experiences at the Law Commission for England and Wales was a day trip to Edinburgh, in 2008, to discuss the Commissions' joint project on level crossings, a project that George embraced with characteristic enthusiasm. He had a high-visibility jacket, for railway visits, emblazoned with the legend "LAW REFORM".[1]

In the light of George's achievements in the field of land law and land registration I hope that it will be entertaining and perhaps informative too if I write about the Land Registration Division of the First-tier Tribunal in England and Wales, of which I am the Principal Judge. The Land Registration Division stands at the intersection of two important areas of interest. One is title registration. The other is the development of Her Majesty's Courts and Tribunals Service (HMCTS) at a crucial point in its history. A little background, and some illustrations from cases that I have had to consider over the past 18 months, will show how those two topics are related to each other and are interacting to form an ever-changing area of work.

In the paragraphs that follow I sketch out first, and very sketchily, the development of the Tribunals service in England and Wales. I then explain how the Land Registration Division of the First-tier Tribunal came to be. Finally, I discuss the

1 See Report on *Level Crossings* (Law Com No 339, Scot Law Com No 234, 2013).

interaction between the courts' and tribunals' jurisdiction, with a focus on the work of the Property Chamber and on the place of property dispute resolution in the current programme of reform in HMCTS.

That may all sound rather dry to the enthusiast in substantive law. But underlying my narrative is access to justice, in the real world where the intellectual landscape of land law meets the constraints of costs, time and emotion. This is a crucial topic; without a realistic approach to dispute resolution the law remains theoretical. Placed in the context of the realities of litigation and the justice system, land law and the law of title registration lose nothing of their fascination.

B. THE ORIGINS OF TRIBUNALS AND THE NEW UNIFIED STRUCTURE

Tribunals were invented and developed in the twentieth century in England and Wales as fora for the resolution of disputes between the citizen and those who made administrative decisions.[2] That is an over-simplification, but it is true at a basic level. Where a government department took responsibility for administrative decision-making in a particular area, that department would also sponsor a tribunal to decide disputes: social security, immigration, rating valuation, parking, school admission, to name but a few. Those who adjudicated in tribunals were known as "members" rather than as judges. Typically they did not sit alone. They were usually experts in the subject area. Generally, lawyer chairs sat with a professional expert and a lay member. Their proceedings were less formal than those of the courts and there was a complete absence of fancy dress. They had no inherent jurisdiction; each tribunal could do only what the statute said it could do.

Alongside the tribunals that focused on administrative justice there grew up a few tribunals that decided disputes between citizens rather than between citizens and bureaucrat, for example the Employment Tribunal and the Lands Tribunal.

By 2001 there were over 70 different tribunals.[3] The Leggatt Report recommended that they become a single tribunals service, characterised by a unified structure, the absence of unnecessary formality and the expertise of its judiciary and members.[4] The Tribunals, Courts and Enforcement Act 2007 established that unified structure, and thereafter the existing individual tribunals were brought into it by means of delegated legislation. They were organised, within the new single tribunal, into chambers within the First-tier Tribunal (for decisions at first instance) and the Upper Tribunal (mostly for appeals from the First-tier Tribunal). A diagram of today's unified tribunal gives a sense of complexity-within-unity.[5]

Among the very last to arrive, in 2013, was the very small tribunal formerly known as the Adjudicator to HM Land Registry.[6] To explain how the Adjudicator came into being we have to go back through a little more legal history.

2 See generally Lord Chancellor's Department, *Tribunals for Users: One System, One Service – Report of the Review of Tribunals by Sir Andrew Leggatt* (2001).

3 Leggatt Report (n 2) at 5. That figure excludes some other bodies under the supervision of the Council on Tribunals. See the Leggatt Report at 17.

4 Leggatt Report (n 2), in particular chs 2 to 5.

5 An internet search for "tribunals structure diagram" yields many colourful and interesting versions.

6 By means of the Transfer of Tribunal Functions Order 2013, SI 2013/1036.

C. THE ADJUDICATOR TO HM LAND REGISTRY AND THE LAND REGISTRATION DIVISION OF THE FIRST-TIER TRIBUNAL

There has been a register of title to land for England and Wales since 1862.[7] But land came on to the register very slowly because it was not until 1989 that the whole of England and Wales became an area of compulsory registration. Until then, there remained significant areas where unregistered land could be dealt with off-register with no requirement of registration on sale or other dispositions. So it was only really towards the end of the twentieth century that it was possible to say that we had a developed system of title registration.

During the final years of the twentieth century the Law Commission for England and Wales worked on a project to update and renew the Land Registration Act 1925. Its remit included resolving issues that had emerged during the preceding three-quarters of a century and adapting the statute for the development of electronic conveyancing – hence the title of the Commission's 2001 Report: *Land Registration for the Twenty-first Century – A Conveyancing Revolution*.[8] Among the recommendations made in that report, and rapidly implemented in the Land Registration Act 2002 ("the LRA 2002"), was a change in the role of the Solicitor to HM Land Registry.

Prior to the coming into force of the LRA 2002 the Solicitor to HM Land Registry had performed a dispute resolution function. When an objection was made to an application to the Registrar, disputes would be referred initially to the Solicitor and often resolved. Proceedings were adversarial. The Solicitor was empowered to make a judicial decision, and there was an appeal to the High Court. The 2001 Report, however, observed that there was potential for a conflict of interest because in some cases the outcome of a dispute had consequences for HM Land Registry's indemnity fund.[9] Accordingly the LRA 2002 created the office of The Adjudicator to HM Land Registry.[10] The Registrar was to be obliged to refer to him[11] all applications to which objection was made where the Registrar did not regard the objection as groundless.[12] The Adjudicator would determine the matter and direct the Registrar either to cancel the application or to give effect to the application as if the objection had not been made.[13] He also had jurisdiction to rectify or set aside documents that

7 Land Registry Act 1862.
8 Law Commission No 271, 2001.
9 See LC 271 (n 8) ch 16.
10 The relevant provisions of the LRA 2002 have now been overwritten by the Transfer of Tribunal Functions Order 2013, SI 2013/1036.
11 For the first and only Adjudicator was a he: Edward Cousins, who was the Adjudicator until 2013 and Principal Judge of the Land Registration Division of the First-tier Tribunal until November 2014. I was appointed Principal Judge with effect from 1 June 2015. Mr Cousins' account of the development of his jurisdiction is, at the time of writing, to be published as "The Land Registration Jurisdiction: Lessons from the First 12 Years" in M Dixon, A Goymour and S Watterson (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (forthcoming, 2017).
12 Land Registration Act 2002 s 73.
13 The Adjudicator could not – and the First-tier Tribunal now cannot – direct the Registrar simply to give effect to the application, because there might be another, valid, objection, or the Registrar might discover an insuperable problem such that the application could not succeed. All that the Tribunal can do is to adjudicate upon the objection referred to it.

were going to be submitted as part of an application for registration,[14] and for that purpose application could be made directly to him rather than having to be referred by the Land Registry.[15]

In the first ten years of the Adjudicator's tenure two unexpected things happened. First, the workload of the Adjudicator was exponentially bigger than had been the judicial workload of the Solicitor to HM Land Registry. The Solicitor had adjudicated in some tens of cases each year. By the late noughties – 2008 or so – the Adjudicator was receiving some 1,800 cases[16] a year. It is not known why this was so. That workload subsequently settled down to about 1,000 cases each year and has remained at that level for three or four years now, perhaps because of the much quieter property market. We can surmise that the increase in workload was a consequence, perhaps unforeseeable, of the *obligation* of the Registrar to refer to the Adjudicator all non-groundless objections. Many of those would otherwise maybe have given rise to court proceedings; some applications and some objections, perhaps, would not have proceeded had they not been referred. The rapid growth in workload necessitated the appointment of Deputy Adjudicators, three salaried and some 28 fee-paid.

The second development is a little harder to define or describe. It is that the Adjudicator, together with his Deputies, became very much like a court. This development has been described elsewhere, with varying degrees of approval.[17] One way of putting it is to say that whereas the Adjudicator was intended to stand, like the Solicitor, as a half-way house between the register and the courts, the Adjudicator instead became a very similar destination to the court, adversarial and almost as formal, offering specialist legal expertise although with, necessarily, a limited jurisdiction. The statute enabled the Adjudicator – but did not oblige him save where his jurisdiction did not go far enough – to refer matters to the court, and the legislator may have expected him to do so in complex matters of fact or law.[18] But in general he retained cases within his own jurisdiction wherever possible. The advantage for the parties was twofold; they were spared a court fee, and their case was decided by a judge with specialist expertise in land law and a true love of land law disputes.

The Adjudicator's procedure became the subject of a book written by two Deputy Adjudicators, now in its second edition as *A Practical Guide to Land Registration Proceedings*.[19] Appeals from the Adjudicator went to the High Court. The few appeal decisions made tended to demonstrate confidence not only in the

14 Land Registration Act 2002 s 108. That is an abbreviated summary of the rectification jurisdiction, but it conveys the essence. The Adjudicator could rectify a mortgage which was, or was going to become, a registered charge ("registered charge" is the statutory term for a registered mortgage or charge of any kind), but could not rectify the discharge of a registered charge since the latter would not give rise to a registration.

15 Land Registration Act 2002 s 108.

16 The vast majority being references under s 73 rather than applications for rectification under s 108 of the 2002 Act.

17 See for example K Harrington and C Auld, "The new Land Registration Tribunal: neither fish nor fowl?" [2016] The Conveyancer 19.

18 LC 271 (n 8) para 16.20.

19 S Brilliant and M Mitchell, *A Practical Guide to Land Registration Proceedings* (2015).

Adjudicator's decisions about the law[20] but also in his judgment about his jurisdiction.[21]

In 2013 major changes took place. The Adjudicator moved into the new unified tribunals service. The office of the Adjudicator became the Land Registration Division of the First-tier Tribunal, and the Adjudicator and his Deputies became "transferred-in" judges of the First-tier Tribunal. The Division – or at least its salaried judges and staff – moved to 10 Alfred Place, London where it continues to share offices and hearing rooms with the London Region of the Residential Property Division of the Property Chamber.[22] It was always intended to be a tribunal, with the Law Commission having recommended that the Adjudicator be under the jurisdiction of the Council on Tribunals.[23] In light of the developments described above there might have been a case for the Adjudicator to become an office of the County Court, but a Tribunal it now is. It is – I believe – unique among courts and tribunals in that the majority of applicants to the Land Registration Division have not made an application to it. but have been referred to it by the Registrar.[24] Once referred, they are directed to serve a statement of case and proceedings are governed by the Tribunals Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.[25]

The Land Registration Division is also distinctive, although not unique, in the expectation of its judges that they will carry out a site visit where that is likely to be useful. For that reason, as well as for the convenience of the parties, they are roving judges, sitting near the location of the dispute in locations throughout England and Wales, from Carlisle to Caernarfon to the Isle of Wight. This is one of the enormous pleasures of the job – as well as being legally essential. No photograph can convey the reality of a boundary, or of the site of an easement[26] or of adverse possession,[27] as effectively as a visit. It is also notable that a significant proportion of cases settle in the period – less than 24 hours between site visit and hearing – perhaps because this is often the first time the parties' representatives have seen the land.

D. THE LEGAL LANDSCAPE IN THE LAND REGISTRATION DIVISION

Today the Land Registration Division comprises a Principal Judge, three salaried judges, 27 fee-paid judges, and an administrative staff of around 18. Accordingly, it is a small division within the unified tribunals service, small even within the Property Chamber. Cases referred here from HM Land Registry can be grouped into two categories.

First are the pure land law cases, where the referred application is for registration of title, or alteration of the register, by virtue of adverse possession, for a prescriptive

20 See *Wilkinson v Farmer* [2010] EWCA Civ 1148 at para 25 as to the "weighed deference" accorded by the courts to decisions made by the Adjudicator and his Deputies on account of their special expertise.

21 *Silkstone v Tatnall* [2010] EWHC 1627 (Ch).

22 The Residential Property Division hears – essentially – landlord and tenant disputes, with over one hundred distinct statutory jurisdictions. It has regional offices and receives around 10,000 applications a year.

23 LC 271 (n 8) para 16.4 (the solicitor to HM Land Registry was not).

24 Not, of course, without notice, nor without the opportunity to take time to negotiate.

25 See n 7 above.

26 The broad equivalent in English law of servitudes in Scotland.

27 The broad equivalent in English law of positive prescription of landownership in Scotland.

easement, for a determined boundary, or even simply for first registration when an objection has been raised. In most such cases a site visit is required.

Second are the cases where the issue is not land law but some other aspect of civil law. These include fraud cases, where a former proprietor might for example apply for alteration of the register on the basis that a transfer from him or her was forged;[28] beneficial interest cases where there is an application to cancel a restriction entered by someone seeking to protect an interest arising under a constructive trust;[29] and cases that turn not upon what can be seen on the ground by a site visit but on the construction of a document.

My own recent case load has included:

- An application to register a 2,000-year lease, said to arise by statute as a result of the grant of a perpetually renewable lease.[30] I decided that, as a matter of construction, the lease was perpetually renewable but that it was to be rectified, on the landlord's application, on the basis of unilateral mistake.
- An application for title by virtue of adverse possession, where possession was admitted but the respondent claimed that not all of it was adverse because during the relevant period the applicant had been the respondent's tenant in respect of part of the land. The decision required the construction of a lease and a decision as to whether the premises was defined by the dimensions of the red line on the plan (which, scaled up, did include the claimed land) or by the description implied by the plan (which showed the premises as extending to the edge of an embankment and, therefore, not including the claimed land – this was the interpretation I preferred).
- A straightforward decision on an application for the determination of a boundary – did it lie where the applicant said it did or where the respondent said it did? I found for the latter, and accordingly the application failed.
- As I write I have just given initial directions in a set of 51 linked references from HM Land Registry where the registered proprietor has applied for the cancellation of notices protecting contracts made with a previous owner of the land, where a single case may have to be designated as a test case. The contracts were each to take a lease of a room in a hotel, which as it turned out was never built.

The mention of a straightforward case on the determination of a boundary begs the question: what is a not-so-straightforward case? This has been a hot topic in the last 12 months (as I write), since the decision of the Upper Tribunal in January 2016 that appeared to say that the Land Registration Division did not have jurisdiction to decide where a boundary lay if the application failed because of the inadequacy of

28 A large proportion of such cases involve an allegation of forgery against a family member.

29 A restriction is an entry on the register which prevents the registration of a sale or other transaction until certain steps are taken. Where land is held on trust, a restriction is used to protect a purchaser from taking the land subject to the trust; the restriction also indirectly protects the beneficiary by ensuring that the sale does not go ahead until steps are taken to resolve any dispute about entitlement. This was the subject matter of *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch). The decision of the High Court on that appeal was that the Adjudicator did have power to conduct a full hearing of the matter referred to him, where the respondent had contended that the Adjudicator should simply authorise the entry of the restriction on the basis that the applicant had a claim, as yet undetermined.

30 Law of Property Act 1922 s 145 and Sch 15.

the applicant's plan.[31] A subsequent Upper Tribunal decision[32] confined that decision to a narrow set of facts; but the decision was nevertheless startling and caused some anxiety.

For it is impossible to ignore the fact that a tribunal's jurisdiction is not inherent. It is limited by statute and there will always be things that it cannot do. At the most basic level, the Land Registration Division can make but cannot enforce orders for costs. More fundamentally, it can determine the position of a boundary, but it cannot support that boundary by making an injunction or hearing an action for damages for trespass. It can decide that an applicant is in part the beneficial owner of the respondent's property, but it cannot bring the dispute between the parties to an end by making an order for sale under the Trusts of Land and Appointment of Trustees Act 1996. None of these restrictions was seen as likely to cause difficulties when the office of the Adjudicator was first conceived. But, with the growth of that office into something much more like a court came frustration as the boundaries of the statutory jurisdiction became more of a hindrance in a confident and highly expert jurisdiction.

It is difficult to regard these jurisdictional boundaries as useful. First and most importantly, they cause expense, delay and frustration for the parties. It is clearly undesirable for a party who has been through a reference to the Land Registration Division of the First-tier Tribunal and established the position of their boundary then to have to issue court proceedings if they need an injunction or damages. True, the boundary dispute could have been referred to the county court at an early stage; but that would have meant delay, and a significant court fee, which could not be justified unless it was already clear that orders outside the Tribunal's jurisdiction would be needed. Similarly, it is unhelpful for an applicant for a restriction to protect a beneficial interest in land, who has succeeded in the First-tier Tribunal, to have to apply to the court for an order for sale of the property.

Secondly, restrictions on jurisdiction cannot really be justified by reference to the supposed ability of the judges. The judges of the Land Registration Division are specialists in land law and equity, and many of them are County Court Recorders or Deputy Judges in the High Court. Indeed, by statute all judges of the First-tier Tribunal are judges of the county court.[33]

E. THE FUTURE: HMCTS REFORM

There will come a day when these issues of jurisdiction become history. HMCTS reform is a process of change throughout the courts and tribunals services.[34] It is premised upon the development of digital communication, and the potential for the tyranny of the paper file – which ties courts to particular buildings – to come to an end. The vision for the future involves online applications, some online adjudication

31 *Murdoch v Amesbury* [2016] UKUT 3 (TCC).

32 *Bean v Katz* [2016] UKUT 168 (TCC). For a commentary on this case and the *Murdoch* case see H Lorriman, '*Murdoch v Amesbury*: Land Registry adjudication and jurisdiction' [2016] The Conveyancer 309–317.

33 County Courts Act 1984 s 5(2)(t) and (u), as amended by the Crime and Courts Act 2013.

34 The principal reference at the moment is Briggs LJ's report, *Civil Courts Structure Review*, available at https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/.

for low-value cases, and a much more flexible, one-stop system for litigants. A situation where a party before a tribunal is obliged also to issue court proceedings is anathema to the new vision. So too is the increasingly artificial distinction between courts and tribunal judiciary.

The reformed vision cannot be achieved without primary legislation. Meanwhile, however, progress is being made indirectly and by means of the creative deployment of the judiciary. A report of a committee of the Civil Justice Council has made recommendations about this. It has become known as the "double-hatting report".[35] It recommends the flexible deployment of judges between the courts and tribunals in order to minimise jurisdiction problems. Following the recommendations made in that report, and building upon the dual tribunal and court judge status of all our judiciary, the Property Chamber of the First-tier Tribunal is engaged in a judicial deployment pilot project the aim of which is both to minimise the duplication of hearings and also to ensure that the judge with the most appropriate expertise hears a particular case.

For the much larger Residential Property Division this could mean an end to the days when entitlement for a leaseholder to purchase the freehold is a matter for the county court while the disputes about the terms of the purchase are for the tribunal, and to the situation where both the court and the tribunal can decide if a service charge (under a lease) is payable but only the tribunal can dispense with service charge consultation requirements.[36] Tribunal and county court judges are now hearing both aspects of the dispute rather than one remitting the dispute to the other.

In the Land Registration Division double-hatting is more complex. A tribunal judge cannot simply don his or her county court hat and make a county court order without a separate application being made to the county court. This is because the powers that the tribunal does not have are conferred upon the county court by statute and depend in each case upon an application being made to the county court.[37] But arrangements have now been made between the Land Registration Division and the Central London office of the county court for cases where there are parallel Tribunal and county court proceedings to be heard by a single judge exercising both jurisdictions, once a county court application has been made. We cannot (without primary legislation) dispense with the need for two separate sets of proceedings. But where there are land registration proceedings and an application is then made to the county court, in a case where judicial expertise in land law is needed, it has been agreed that a judge of the Land Registration Division will sit both as a Tribunal judge and as a county court judge so as to be able to dispose of all matters together.

This is a small-scale project intended to show that with appropriate judicial deployment the duplication of proceedings can be avoided. Details have to be worked out, particularly where the Civil Procedure Rules and the Rules of the First-tier Tribunal do not make identical provisions. The First-tier Tribunal and the county court have different appeal routes. What the double-hatting project is designed to show is that these problems are not insuperable.

35 Civil Justice Council, *Interim Report of the Working Group on Property Disputes in the Courts and Tribunals* (2016) available at https://www.judiciary.gov.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf.

36 See *Interim Report of the Working Group on Property Disputes in the Courts and Tribunals* (n 35) ch 2.

37 See for example the Trusts of Land and Appointment of Trustees Act 1996 s 14.

A discussion of HMCTS reform and the current experiment in judicial deployment is a long way, perhaps, from land registration theory. But for litigants who wish to establish a claim or to protect their land these issues are crucial because they determine the duration, cost and complexity of proceedings.

George in retirement will hopefully enjoy calm waters far from the turbulence of these changing times. Perhaps he will watch us with amusement as we take land law and land registration into the new reformed system of courts and tribunals, which is currently taking shape and slowly improving the experience of litigation for those doomed to participate in it.

TACKING IN A MIXED JURISDICTION

John A Lovett

George Gretton picked me up in front of the red, metal door of Kenneth Mackenzie House on a grey Saturday morning in February. After a short drive through the southeastern suburbs of Edinburgh, George parked the car and we began walking. We walked through forests and fields, over hills and along tree-lined glens. We stopped to admire the medieval architecture of Rosslyn Chapel. At one point, I tripped and fell, soaking my blue jeans in a puddle of mud. But we kept walking and talking, non-stop, until George dropped me back at Kenneth Mackenzie House.

Although a dozen years have passed since that walk and some memories have faded, I remember one theme of our conversation with great clarity – property law. Back then I was a third-year assistant professor at Loyola University New Orleans College of Law and was visiting Edinburgh for the first time. I was flush with excitement about Louisiana's property regime and keen to connect with scholars from Scotland who shared my enthusiasm for mixed legal systems. During that soggy but delightful walking tour, I am certain that I recounted the case of *Bartlett v Calhoun*,[1] and I am equally certain that my walking companion delighted in its facts and in the juicy jurisprudential dilemma it presents. So, to honour George Gretton on this occasion, I return to *Bartlett v Calhoun* to reflect on just how and why that case came to be a cornerstone of contemporary property law in my mixed jurisdiction.

A. TWO PATHS TO ACQUISITIVE PRESCRIPTION AND THE ROLE OF TACKING

From the moment that Louisiana first codified its French and Spanish civil law, Louisiana recognised that a person who possesses an immovable for a lengthy period of time, without the consent or permission of the owner, can become owner of the immovable through acquisitive prescription. The distinction between ten- and 30-year prescription, however, plays a crucial role in this regime. On the one hand, a possessor who possesses an immovable by virtue of a "just title" and in "good faith" can acquire ownership or some other real right in the immovable after just ten years of uninterrupted possession, assuming, of course, the immovable itself is a thing susceptible of acquisitive prescription.[2] On the other hand, a possessor can acquire

1 412 So 2d 597 (La 1982).

2 La Civ Code arts 3473 and 3475 (1982). Initially, a possessor in good faith and with just title could acquire ownership after ten years of possession if the "true proprietor resides in the territory and after twenty years if said proprietor resides abroad". See La Civ Code III XX art 67 (1808). These different

ownership or other real rights – typically a praedial servitude in favour of neighbouring land owned by that person – without a just title or good faith if he can demonstrate 30 years of uninterrupted possession.[3]

This choice to codify the two-tier system of acquisitive prescription that emerged in the *Code Napoleon* has been fruitful in Louisiana. Especially in the first several decades of the nineteenth century, this bifurcated system allowed Louisiana courts to resolve numerous title disputes during the transition from a thinly settled French and Spanish colony, in which land grants from colonial officials were often inchoate and ill-defined, to an emerging US state where certainty of title was essential for agricultural, commercial and industrial expansion.[4] It also aligned formal, paper title with the facts on the ground and community expectations while still taking into account the moral distinction between good and bad faith possession. Even today, after more than 200 years of recorded land transactions, acquisitive prescription continues to play a vital role in resolving boundary disputes and title defects arising from conveyancing and surveying errors, incomplete succession or divorce proceedings and myriad other unforeseen transactional glitches.[5] Finally, despite academic questioning, acquisitive prescription still tends to promote the cultivation, development and stewardship of land.

Acquisitive prescription would be much less useful, however, if a possessor had to prove that he alone possessed the land at issue for the entire statutory period, whether ten or 30 years. To allow acquisitive prescription to achieve more of its salutary benefits, Louisiana, just like France, quickly recognised the importance of "tacking", that is, of permitting a current possessor to connect his possession to that of a predecessor in possession. Louisiana's first codification, the *Digest of the Laws in Force in the Territory of Orleans* (1808), provided for the linking up (or tacking together) of successive possessions between a deceased person and heir, a testator and legatee, a seller and buyer, a donor and donee, and "in the same manner of all those who possess successively, having the right the one from the other",[6] as long as these successive possessions "follow one another without interruption".[7]

Drawing no doubt on Article 2235 of the *Code Napoleon*, the redactors of the 1825 Civil Code (Livingston, Moreau Lislet and Derbigny) confronted tacking even more systematically. Article 3459 of that code provided that "[t]he possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title."[8]

prescriptive periods as applied against resident and non-resident proprietors were retained in Article 3442 of the 1825 Civil Code but suppressed in the 1870 Civil Code in favour of a unitary ten-year period for good faith possessors as against all proprietors. See La Civ Code art 3478 (1870). The source for these early provisions was Article 2265 of the *Code Napoleon*.

3 La Civ Code art 3486 (1982). See also La Civ Code art 742 (1978) (recognising that apparent servitudes can be acquired by ten and thirty-year acquisitive prescription).

4 For discussion of the role of the Louisiana Supreme Court in solving these disputes and filling out lacunae in Louisiana's early possession and prescription regimes, see J A Lovett, "Possession, Prescription and Uncertain Land Titles: 1808–1825" in J Cairns (ed), *Louisiana, The Law of Europe in a US State* (forthcoming, 2017).

5 For a discussion of just some of these disputes and how courts deal with a chronic acquisitive prescription problem, see J A Lovett, "Precarious possession" (2017) 77 La LR 617.

6 La Civ Code III XX art 43 (1808).

7 La Civ Code III XX art 44 (1808).

8 La Civ Code art 3459 (1825).

Article 3460 expanded on key terms, defining "author" as "the person from whom another derives his right, whether by a universal title, as by succession, or by particular title, as by sale, donation, or any other title, onerous or gratuitous", and explaining that "in every species of prescription, the possession of the heir may be joined to that of the ancestor, and the possession of the buyer to that of the seller".[9]

Other articles emphasised that tacking could only occur if the different possessions "succeeded each other without interval or interruption"[10] and that the inevitable delay between the "decease of the testator and the acceptance of the succession by the heir" did not constitute such an interval or interruption.[11] All of these principles were repeated practically verbatim in the 1870 Civil Code[12] and remained the touchstone for Louisiana case law until 1982 when, in a notable feat of rule compression, all of Louisiana's tacking rules were consolidated into two lapidary provisions:

> **Art 3441. Transfer of Possession**
> Possession is transferable by universal or particular title.
>
> **Art 3442. Tacking of Possession**
> The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession.[13]

At this point, tacking looked like a steady though perhaps unexciting cornerstone of acquisitive prescription doctrine in Louisiana.

B. THE JURISPRUDENTIAL PROBLEM: UNITING POSSESSIONS FOR TEN-YEAR PRESCRIPTION

Most acquisitive prescription cases applying these Articles present little difficulty. For example, if one undisputed good faith possessor with seven years of possession is followed by another undisputed good faith possessor with three more years of uninterrupted possession, the second possessor acquires ownership or another real right as long as that party is a universal or particular successor[14] of the predecessor.[15] Innumerable Louisiana judicial decisions have made such a finding with little jurisprudential effort.[16] Likewise, if the possessions of two undisputed bad faith possessors each with less than 30 years of possession are connected by a particular or universal title, the second possessor can acquire ownership or a real right after 30 years of cumulated possession.[17] Judicial decisions recognising this simple calculus are ubiquitous.[18]

9 La Civ Code art 3460 (1825).
10 La Civ Code art 3461 (1825).
11 La Civ Code art 3462 (1825).
12 La Civ Code arts 3493 to 3496 (1870).
13 See also La Civ Code art 3433 (1982) ("One who proves that he has possession at different times is presumed to have possessed during the intermediate period").
14 The Scottish equivalent of "particular successor" is "singular successor".
15 S Symeonides, "One hundred footnotes to the new law of possession and acquisitive prescription" (1983) 44 La LR 69 at 105, n 65(2).
16 See e.g. *Mai v Floyd* 951 So 2d 451 (La App 1 Cir 2006).
17 Symeonides, "One hundred footnotes" (n 15) at 105, n 65(2).
18 See e.g. *Brunson v Hemmler* 989 So 2d 246 (La App 2 Cir 2008).

What about more complicated scenarios? If a bad faith possessor is followed by a good faith possessor, the good faith possessor has options: in some instances, it will be in that person's interest to assert ten-year prescription *without* the benefit of tacking; in others, the person will prescribe more quickly by tacking and using 30-year prescription.[19]

And finally, what result if the roles are reversed? Assume Alan has a just title and begins to possess in good faith and maintains his possession for two years. Then, Ben comes along, acquires whatever possessory rights Alan had by virtue of a particular title but has actual knowledge that Alan is not the owner of the land in question and that, in fact, the real owner is Tamara. If Ben continues to possess adversely for another eight years, can Ben now acquire ownership (or a real right) based on ten-year prescription?

Initially, the answer to that question in Louisiana appeared to be no. Then, for at least 140 years, the answer was definitely yes. And then, oddly enough, in 1982, the Louisiana Supreme Court reversed course and answered in the negative. What accounts for this curious turn of events?

Enter Stella Calhoun!

C. STELLA CALHOUN AND THE THOMPSON HEIRS

On 30 November 1949, an "act of sale" was executed, which recited that W C and Dorothy Thompson, husband and wife, were selling 300 acres of land near the Black River in Catahoula Parish to Stella Calhoun.[20] Eleven days later, on 10 December 1949, another act of sale was executed reciting that Stella Calhoun had sold the same land to Gray Ramone Brown. Brown apparently took possession of the land at that time. But slightly less than two years later, on 1 October 1951, a third act of sale was executed reciting that Brown sold the same property back to Calhoun. Calhoun then took possession and remained in possession until 1977 when the heirs of W C and Dorothy Thompson filed a petitory action against Calhoun, claiming ownership of the 300 acres and seeking an accounting of the revenues derived from the property. The linchpin of their petitory action was the claim that the Thompsons' signatures on the 30 November 1949 act had been forged.[21]

In the district court, Calhoun immediately sought a judgment on the legal basis that she had acquired title to the property by ten-year acquisitive prescription. Though she did not claim that she personally commenced her possession in good

19 Symeonides, "One hundred footnotes" (n 15) at 105, n 65(2) illustrates this with the following formulation in which B signifies a bad faith possessor and G a good faith possessor and the number in parentheses refers to the year the respective possession begins:
(c) B (1960) + G (1967); G prescribed in 1977 without tacking.
(d) B (1960) + G (1983); G will prescribe in 1990 with tacking.

20 *Bartlett v Calhoun* 412 So 2d 597 at 598 (La 1982). In Louisiana conveyancing practice, an "act of sale" is the name of the act by which ownership of immoveable property is typically transferred pursuant to a contract of sale. The term is used to distinguish the formal transfer of ownership from an executory or "bilateral promise of sale" or "contract to sell". See La Civ Code art 2623 (1993). For a discussion of the formal requirements for the transfer of land in Louisiana and for an example of an "Act of Cash Sale", see P S Title, *Louisiana Real Estate Transactions* (2016) ss 7:1–7:53.

21 *Bartlett v Calhoun* 404 So 2d 516 at 517 (La App 3d Cir 1981); *Bartlett v Calhoun* 412 So 2d 597 at 598 (La 1982).

faith, she contended that Brown had been in good faith when he commenced possession in 1949 and that she, therefore, could take advantage of his good faith for the purpose of asserting ten-year prescription. The district court agreed with Calhoun and dismissed the petitory action. After noting that the Thompson heirs had not introduced any evidence calling Brown's presumed good faith into question, the court then relied on a 1970 Louisiana appellate court decision, *Liuzza v Heirs of Nunzio*,[22] which stood for the proposition that a successor by particular title can take advantage of an author's good faith for purposes of tacking to acquire ownership by ten-year acquisitive prescription even if the successor was herself in bad faith.[23]

The Thompson heirs appealed. In a short opinion that reiterated the rule from *Liuzza* and the lack of factual evidence challenging Brown's presumed good faith, the Louisiana Third Circuit Court of Appeal affirmed the district court dismissal.[24] The Thompson heirs then filed an application for writ of certiorari with the Louisiana Supreme Court, which was granted for the express purpose of re-evaluating the "soundness" of the jurisprudential rule expressed in *Liuzza*.[25]

D. THE ROAD TO *LIUZZA V HEIRS OF NUNZIO*

The path that the Louisiana courts followed to reach the position articulated in *Liuzza* was not perfectly linear. In an 1821 decision, *Innis v Miller*,[26] the Louisiana Supreme Court, applying the 1808 Digest and relying on *Pothier*, appeared to state that when the second of two successive possessors seeks to unite the possessions for purposes of meeting the temporal requirements of ten-year acquisitive prescription, both possessions must be characterised as commencing in good faith.[27] The actual holding in *Innis* is not entirely clear, however, because the court also rejected acquisitive prescription on the ground that the claimant's author had sold and delivered possession of some of the land at issue to another person prior to the claimant's entry into possession. In other words, acquisitive prescription might have failed because of an interruption of possession as much as a lack of symmetry between the two possessions.

22 241 So 2d 277 at 281 (La App 1 Cir 1970).

23 *Bartlett v Calhoun* 404 So 2d 516 at 517 (La App 3d Cir 1981).

24 The Third Circuit noted that: "Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor must prove it." See *Bartlett* 404 So 2d at 517. It then found "nothing in the record to rebut that presumption".

25 *Bartlett v Calhoun* 412 So 2d 597 at 599 (La 1982). The Louisiana Supreme Court is generally a court of discretionary jurisdiction. Except in a few narrow instances of original jurisdiction or automatic appeal of right, a party aggrieved by a final judgment of one of the intermediate appellate courts in Louisiana can only obtain review by the Louisiana Supreme Court in a civil matter upon the application for and grant of a "writ of certiorari" by that court. La Code Civ Proc art 2166 (1960 as amended); La Const art 5 s 5(A)–(F) (1980).

26 10 Mart (os) 289 at 291–292 (1821) (Mathews J).

27 In *Innis* 10 Mart (os) at 292, the court stated that the second possessor must show that (1) he, too, "possessed in good faith, and under color of title", (2) the two possessions continued without interruption, and (3) "it must be that which the possessor had at the moment of the tradition". The court's reference to Pothier in *Innis* is obscure, but the rule that both successive possessions must have the same "qualities" for tacking to occur can be found in M Dupin (ed), *Oeuvres de Pothier, Les Traités du Droit Francais, Traité de la Prescription qui Resulte de la Possession*, vol 8 (1825) ss 112–114.

In any event, 20 years later, in *Devall v Choppin*,[28] the Louisiana Supreme Court reversed course. *Devall* was a typical early nineteenth-century title dispute between one party, the plaintiff, who traced his title back to a Spanish land grant made in 1786 and the defendants who traced their title back to an even earlier 1767 land grant from a local French commandant. Importantly, the plaintiff, who was bringing a petitory action in which he confessed his lack of possession of the property in dispute, relied solely on his chain of titles. Although the defendants had a purported chain of title, they also asserted that their ancestors in title had possessed the land between 1774 and 1776 and then more or less continuously from 1807 until the plaintiff brought his petitory action in the late 1830s. The challenge faced by the defendants was that between 1776 and 1807, one of their ancestors in title suffered from insanity and was subjected to a curatorship. During this interval, the land on the west bank of the Mississippi River in West Baton Rouge Parish was left unoccupied and the plaintiff's ancestor in title sought and obtained the Spanish land grant. Interestingly, both sides succeeded in having their respective titles confirmed by US Land Commissioners and an 1823 Act of the US Congress, indicating that the new federal government disclaimed any interest of its own in the land.[29]

In response to the petitory action, the defendants asserted acquisitive prescription, founded primarily on the possession of a man named Alexander Baudin, who began to possess the land at issue in 1813, originally as agent for a woman residing in France, and who thereafter acquired pieces of the land in a series of purchases and repurchases stretching from 1814 to 1827, and who actually paid the taxes on the property from 1814 until 1834.[30]

The Louisiana Supreme Court ultimately upheld the defendants' acquisitive prescription claim. In doing so, the Court assumed for the purpose of argument that Baudin might have been in bad faith when he began to possess in his own name in 1814, but the court found that his predecessors in possession were possessors in good faith. With this factual supposition in place, the court then reasoned, relying primarily on a passage in Troplong's treatise on prescription,[31] that Baudin would have been entitled to prescribe for the purposes of ten-year prescription, despite *his* bad faith, because he was merely continuing the possession of his predecessor. In essence, the court in *Devall* read Article 3448 of the 1825 Civil Code ("It is sufficient if the possession has commenced in good faith, and if the possession should afterwards be held in bad faith, that shall not prevent the prescription") as applying not just to a single possession that begins in good faith but to two or more successive possessions linked by particular or universal title.[32] In this latter situation, one of the subsequent possessors could still prescribe under ten-year acquisitive prescription, even if *his* possession begins in bad faith.

28 15 La 566 (La 1840).

29 *Devall* (n 28) 15 La 566 at 570–572. For discussion of the practice of US Land Commissioners in this era, see Lovett, "Possession, Prescription and Uncertain Land Titles 1808–1825" (n 4).

30 *Devall* (n 28) 15 La 566 at 572–573. Article 3488 of the 1825 Civil Code was an elaboration of La Civ Code of 1808, III XX Art 72 ("It is sufficient to have commenced the possession fairly and honestly"). This was, in turn, derived from Article 2269 of the Code Napoleon.

31 M Troplong, *Droit Civil Explique – Prescription* (4th edn, 1857) paras 432, 937 and 938, quoted in *Devall* 15 La at 578–579. A translation by Patricia McKay, under the auspices of the Center for Civil Law Studies, is provided in T B Burnham, "A restricted application of Civil Code Article 3482: *Bartlett v Calhoun*" (1982) 43 La LR 1221 at 1224–1225.

32 *Devall* (n 28) 15 La 566 at 579.

Before leaving *Devall*, we should note that Justice Simon, in writing the court's judgment, observed that: (1) the defendants may also have been entitled to prevail on the basis of 30-year prescription; (2) Baudin's title might have even become "perfect and final" as early as 1819 as a result of proceedings he brought to settle matters arising during his agency; (3) the 1823 Act of Congress "confirming" Baudin's title weighed in the defendants' favour; and (4) the defendants' chain of actual possession essentially stretched back 65 years to 1774.[33] In short, a number of significant equitable factors weighed in the defendants' favour when the court adopted its expansive reading of Article 3488 in *Devall*. Far from being a decision that sanctioned the scheming of some kind of Holmesian bad man, *Devall* upheld the title of the claimants who had long been in possession of the property and who were likely to be recognised as the owners by the community at large.

Over the next 140 years, this new rule was applied and reaffirmed in a series of subsequent Louisiana Supreme Court decisions, some more notable for the confusing factual scenarios confronted than for the clarity of their doctrinal exposition.[34] In 1949, the Louisiana Supreme Court paused to note that its earlier reliance on Troplong in *Devall* had been criticised by at least one student law review commentator,[35] but nevertheless adhered to *Devall* because it had become "a well-settled rule of property".[36]

When the Louisiana First Circuit Court of Appeal applied *Devall* to uphold a ten-year acquisitive prescription claim in *Liuzza v Heirs of Nunzio*,[37] it met yet another sympathetic claimant. In that case, Mary Brigalla Liuzza sought a declaratory judgment recognising that her title to two tracts of land in Iberville Parish were "valid and merchantable" so that she could sell the land that she and her recently deceased husband, Joseph Liuzza, had possessed for many years.

Mary's claim of title derived from the following: (1) original acquisition of the land at issue by her husband's ancestors in 1895 and 1898; (2) a sale with a right of redemption to George Adams in 1900 (this being essentially a *de facto* lending mechanism confected by the Liuzza family to avoid foreclosure of the family property);[38] (3) acquisition by the plaintiff's mother-in-law, Mary Mussachia Liuzza

33 *Devall* (n 28) 15 La 566 at 579–580 and 573.

34 See e.g. *Brewster v Hewes* 36 La 883 at 885 (La 1904) (observing that when a claimant asserts ten-year prescription, good faith is generally presumed, the party asserting bad faith in a possessor "must prove it", and "that it is sufficient if the possession has commenced in good faith, *the fact that it is afterwards held in bad faith, whether by the original possessor or his successor in title, not affecting the prescription*") (emphasis added); *Liquidators of Prudential Savings & Homestead Soc v Langermann* 100 So 55 at 58 (La 1923) ("yet under Article 3482 of the Civil Code [1870], even if the possession of the plaintiffs from May 26, 1919, be held as in bad faith, yet the plaintiffs' possession having commenced in good faith is sufficient to sustain the prescription of 10 years, as plaintiffs are entitled to tack on to their possession that of their author . . . a possessor in good faith. *Mala fides superveniens non nocet*"); *Jackson v D'Aubin* 338 So 2d 575 at 582, n 8 (La 1976) ("it is sufficient that the possession commenced in good faith, and the fact that is afterwards held in bad faith, does not affect the running of the ten-year acquisitive prescription".)

35 H M Knight, "Tacking of possession for acquisitive prescription" (1947) 8 La LR 105 at 111–112 (arguing that the principle found in Article 3482 (1870) should only apply to successive possessions linked by universal title).

36 *Arnold v Sun Oil Co* 48 So 2d 369 at 380 (La 1949).

37 241 So 2d 277 (La App 1 Cir 1970).

38 A sale with a right of redemption (often referred to as a vente à réméré) is a contract of sale in which the seller reserves the right to "take back the thing from the buyer". La Civ Code art 2567 (1993). It is essentially a sale subject to a resolutory condition – the vendor's right to cancel the sale by

from Adams in 1908, well after the redemptive period had expired, as her separate property; (4) acquisition of the property by Joseph Crucia through an administration sale from the estate of Mary Mussachia Liuzza to satisfy succession debts in January 1941; and finally (5) acquisition of the property by Joseph Liuzza, the plaintiff's husband, from Crucia in September 1941. The plaintiff, Mary Brigalla Liuzza, brought her 1967 declaratory judgment action because an attorney examining title for a bank that was going to finance a purchase of the land from her and her late husband in the mid-1960s had raised doubts about whether her mother-in-law, Mary Mussachia Liuzza, had validly acquired the land in 1908 as her separate property, rather than as community (i.e. marital), property.[39]

I recount all of this only to suggest that the claimant here was hardly a schemer seeking to cloak her bad faith possession in the good faith of a predecessor in possession. If moral suspicion lies anywhere, perhaps it should fall on her opponents, the heirs of Nunzio Liuzza and Mary Mussachia Liuzza, who were seeking a windfall made possible by the paternalistic and, some would say, sexist, community property rules then applicable. These required a wife attempting to acquire separate property during a marriage through a credit transaction to show that she actually had sufficient separate funds to service the mortgage debt.[40] Although the court of appeal held that Mary Brigalla could not overcome the presumption of community property that attached to the 1908 sale with a right of redemption,[41] it used the *Devall* rule to declare:

> it does not matter whether Joseph Liuzza, or his widow after him, was in good or bad faith. He was able to take advantage of his author's good faith acquisition and possession [that of Joseph Crucia] to sustain a finding of ten year good faith acquisitive prescription in the same way as if Crucia had held the property himself for ten years.[42]

In other words, in *Liuzza*, the court used the *Devall* rule to aid a sympathetic long-term possessor who faced difficulties proving a 30-year acquisitive prescription in her own right but who could connect her possession to an undisputed good faith possessor.

redeeming the property. It can be used by someone who needs funds but who, for various reasons, might not want to borrow money and grant a conventional mortgage to a lender. See D Tooley-Knoblett and D Gruning, *Louisiana Civil Law Treatise: Sales*, vol 24 (2012) ss 4:10–4:11.

39 *Liuzza* (n 37) 241 So 2d 277 at 278–280. In Louisiana, property acquired by a spouse during the so called "legal regime of community of acquets and gains" (see La Civ Code art 2334 (1979)) is generally presumed to be "community property". See La Civ Code arts 2338 and 2340 (1979). But not all property acquired by a spouse during the legal regime is necessarily community property. For example, property acquired with "separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used" and "property acquired by a spouse by inheritance or donation to him individually" is that spouse's "separate property". See La Civ Code art 2341 (1979, amended 1981).

40 As the court put it, "[i]f the purchase is a credit transaction the wife must show that she has sufficient separate funds to make it reasonable for her to expect to be able to make the deferred payments": *Liuzza* (n 37) 241 So 2d 277 at 280.

41 As a result of Mary Brigalla's failure to show that her mother-in-law had sufficient funds to pay the debt resulting from the 1908 credit sale, the court characterised the land as "marital community property", and, therefore, recognised as a matter of paper title, that "a one-half undivided interest therein passed to the heirs of Nunzio Liuzza at his death in 1919". See *Liuzza* (n 37) 241 So 2d 277 at 280.

42 *Liuzza* (n 37) 241 So 2d 277 at 281.

E. BACK TO PLANIOL: THE DECISION IN *BARTLETT*

By the time that the Louisiana Supreme Court granted writs in *Bartlett* to reconsider the *Devall* rule, the "Civilian Renaissance" was well underway in Louisiana. Indeed, several of that movement's salient jurisprudential characteristics found expression in the majority opinion of the court.[43] First, to no one's surprise, the court relied heavily on French doctrinal teaching to orient its reasoning. In particular, the court drew on Aubry and Rau, Baudry-Lacantinerie and Tissier, and, above all, Planiol to distinguish between a universal and particular successor. The former, the court explained, continues the possession of the author and, therefore, benefits from the characteristics and rights of the author's possession, including his good faith.[44] In this light, Article 3482 (1870), which states that prescription can accrue after ten years provided the possession is *commenced in good faith*, should be understood as applying to more than one possession only "when property is transferred [from the author] to a universal successor".[45] Conversely, a particular successor "commences a new possession, which is separate and distinct from his author's possession".[46] Crucially, then, although the particular successor "can cumulate his and his author's possessions", the court in *Bartlett* held that "both must have *all* the statutory characteristics and conditions required for the completion of [ten-year] prescription".[47]

The court cited a long list of French doctrinal sources in support of this conclusion.[48] But it quoted most heavily from Planiol, whose two-volume treatise had been translated into English by the Louisiana State Law Institute in 1959.[49] With remarkable confidence in its own rule-making power and Planiol's ability to explain "the restraints placed on a successor's right to join his possession with his author's possession for purposes of acquisitive prescription", the court simply declared "any language to the contrary" in any of its own or other Louisiana appellate court decisions "disregarded".[50]

43 For an insightful summary of that movement and its ties to American legal realism, see K M Murchison, "The judicial revival of Louisiana's Civilian tradition: a surprising triumph for the American influence" (1989) 49 La LR 1. At 26–29 Murchison identifies "four American imprints" in the Civilian Renaissance: (1) the strong role played by judges in reshaping doctrine; (2) the diminishing impact of precedent and the corresponding willingness of judges to overrule prior decisions found to be inconsistent with contemporary social needs; (3) judicial attention to changing social and economic conditions; and (4) the subordination of legal certainty and stability to the achievement of justice and fairness.

44 Indeed, "[because the universal successor's possession is nothing more than a continuation of the deceased's possession, he is bound by his author's good or bad faith and powerless to alter the prescriptive rights transmitted to him": *Bartlett* (n 20) 412 So 2d at 600.

45 *Bartlett* (n 20) 412 So 2d at 600.

46 *Bartlett* (n 20) 412 So 2d at 600.

47 *Bartlett* (n 20) 412 So 2d at 600 (emphasis in original).

48 *Bartlett* (n 20) 412 So 2d at 600 (citing the same sources cited in Knight, "Tacking of possession for prescriptive possession" (n 35)).

49 Perhaps the crucial passage from Planiol quoted by the court was this nugget:

> EXAMPLES: Where the vendor is a possessor in good faith, and the purchaser is in bad faith. If the ten year prescription has not run in favour of the vendor, at the time of the sale, the purchaser cannot prescribe except upon the basis of thirty years, but he can count his author's years of possession.

See M Planiol, *Civil Law Treatise*, Part 2 (12th edn, La St L Ins Trans, 1959) ss 2676 and 2677, quoted in *Bartlett* (n 20) 412 So 2d 597 at 601.

50 *Bartlett* (n 20) 412 So 2d 597 at 601. See also Murchison, "The judicial revival of Louisiana's Civilian tradition" (n 43).

Applying its new rule to the facts it assumed to be true on appeal, the court then noted that Stella Calhoun, as a purchaser from and particular successor of Grey Brown, could *not* automatically take advantage of his presumed good faith for purposes of cumulating her possession with his to achieve ten-year acquisitive prescription. Instead, she would have to prove that she was "in good faith when she re-acquired the property in 1951".[51] If she could not meet this burden, her prescription defence would fail because even though she might have been able to tack her possession to his for 30-year acquisitive prescription, the filing of the petitory action by the Thompson heirs in 1977 interrupted her possession before 30 years had passed. Yet as both the trial and intermediate appellate court had assumed that this particular quality of Stella Calhoun's possession was immaterial, the court remitted the case to the district court for further proceedings.[52]

F. *BARTLETT'S* CRITICS

Despite its reclamation of the dominant doctrinal view in France, the majority opinion in *Bartlett* was not greeted with universal praise in Louisiana. Writing in dissent, Justice Walter Marcus contended that that he saw "no compelling reason" to abandon the long legacy of the *Devall* rule.[53] A student law review commentator acknowledged that the apparent facts in *Bartlett* revealed the potential for abuse inherent in the *Devall* doctrine, but nevertheless criticised the majority opinion for destabilising land titles dependent on its application and for undermining predictability and stability in property law.[54] In particular, this commentator charged that the *Bartlett* holding threatened to erode the utility of *civil* possession in cases involving transfer of possession by implicitly overruling the well-known Louisiana Supreme Court decision in *Ellis v Prevost*,[55] which established that a particular successor can take advantage of his author's corporeal (i.e. physical) possession even if the successor's possession is only civil in nature.[56] In essence, the commentator complained that *Bartlett* destroyed the symmetry of *Devall* and *Ellis*, decided in 1840 and 1841 respectively, as to the transferability of good faith and civil possession:

> Together the two cases stand for the proposition that once possession begins corporeally and in good faith, subsequent lack of either by the original possessor or by his transferee, *whether a transferee by universal title or particular title, is immaterial. Bartlett* destroys the

51 *Bartlett* (n 20) 412 So 2d 597 at 601.
52 *Bartlett* (n 20) 412 So 2d 597 at 601.
53 *Bartlett* (n 20) 412 So 2d 597 at 602 (Marcus J dissenting).
54 Burnham, "A restricted application of Civil Code Article 3482" (n 31) at 1226–1238, especially at 1229 and 1235.
55 19 La 251 (1841).
56 *Ellis* concerned the right of a subsequent possessor to assert a possessory action, but, as Burnham notes, the decision "has been interpreted to mean that the physical possession necessary to begin acquisitive prescription is not required of subsequent purchasers if their vendor or some other ancestor in title corporeally possessed the land." See Burnham, "A restricted application of Civil Code Article 3482 (n 31) at 1230. For a detailed discussion of how the Louisiana Supreme Court moulded French and Roman law sources to produce its seminal decision in *Ellis*, see M G Puder, "Romans reloaded and comparitivists charged – living law in Louisiana: the case of civil possession" (2008) 54 Loy LR 571.

symmetry established by *Ellis* and *Devall* by overruling the latter, and perhaps *Bartlett* undermines the vitality of the former as well.[57]

The commentator was also discomforted by what he perceived to be the implicit emphasis in *Bartlett* on the moral position of the subsequent adverse possession claimant.[58] For all of these reasons, he argued that the new rule advanced in *Bartlett* should be given prospective effect only and, better yet, should be limited in scope to apply only to a bad faith particular successor who has *repurchased* property from a good faith possessor after having previously sold it to that person.[59]

In an important article analysing the comprehensive revision of the Louisiana Civil Code articles on Occupancy, Possession and Acquisitive Prescription that became effective on 1 January 1983, Professor (and later Dean) Symeon Symeonides generally echoed the concerns expressed by the student commentator and explicitly raised the possibility that some day "a possessor who has civil but not corporeal possession will not be allowed to tack the corporeal possession of his ancestor in title".[60] In light of this, Symeonides sought to limit the key statement in *Bartlett* – that for the purposes of cumulating possessions, "both [the author and particular successor] must have *all* the statutory characteristics and conditions required for completion of prescription" – as a dictum that had at least been mildly repudiated in the new Civil Code articles that became effective soon after the decision.[61] Though he sympathised with the desire of the majority opinion in *Bartlett* to realign Louisiana law on tacking with the majority view in French doctrine and with "the law of all systems sharing the Romanist tradition", he still worried about overruling the long-established *Devall* doctrine without a thorough exploration of the polices and reliance interests that might be affected.[62]

If such an exploration were to take place, Symeonides further cautioned, the legislator should balance the interests of fairness and morality served by reserving ten-year prescription for possessors who actually begin their possession in good faith and who, without the aid of the shorter prescription, would suffer an economic loss if they were "justifiably unaware of the defects in their acquisition", against society's interest in discouraging the "prolonged inertia of the record owner",[63] a person for whom "it should not make any difference whether his land was possessed adversely for

57 Burnham, "A restricted application of Civil Code Article 3482" (n 31) at 1231 (emphasis in original).

58 Curiously, the commentator worried most about the vulnerability of a *good faith vendor* who might be sued by a *bad faith purchaser* for breach of warranty against eviction if evicted by the true owner during the ten-year prescriptive period running from the vendor's commencement of possession. Conversely, the commentator characterised the actual proprietor as an absentee owner sleeping on his rights who now, in light of *Bartlett*, would receive a "windfall", even though he has "done nothing warranting better treatment". See Burnham, "A restricted application of Civil Code Article 3482" (n 31) at 1237 and 1234.

59 Burnham, "A restricted application of Civil Code Article 3482" (n 31) at 1235–1238.

60 Symeonides, "One hundred footnotes" (n 15) at 102, n 65 (1983) (quoting *Bartlett* 412 So 2d at 600).

61 Symeonides, "One hundred footnotes" (n 15) at 103, n 65 (discussing La Civ Code art 3441 (1982), and revision comments to La Civ Code arts 3424, 3433, 3442 (1982), and contending that these provisions suggest, contrary to *Bartlett*, that "whenever there is a transfer of possession, the transferee acquires all of the transferor's rights or inchoate rights and, therefore, has "*all* of the statutory characteristics").

62 Symeonides, "One hundred footnotes" (n 15) at 107, n 70.

63 Symeonides, "One hundred footnotes" (n 15) at 107, n 70.

ten years by one good faith possessor or by two possessors (the second of whom was in bad faith)".[64] In other words, in the view of Dean Symeonides, it is the duty of the legislator (and not the judge) to define the fundamental objective of acquisitive prescription. Is it simply a statute of limitation designed to cut off stale claims that could have been asserted in a timely fashion by an out-of-possession owner, as the *Devall* doctrine suggests? Or is it a radical means of original acquisition that must take account of the relative merits or demerits of the possessor claimant, as *Bartlett* implies?[65] In the end, Symeonides took comfort in the fact that the revised Civil Code articles neither confirmed nor rejected *Bartlett* overtly, leaving open the possibility that, in a future case, the Louisiana Supreme Court might rethink the dilemma, reverse itself or just limit the *Bartlett* rule to cases involving similar "double acquisitions".[66]

G. A CONTEMPORARY LOUISIANA PERSPECTIVE

Now that three decades have come and gone, it is fair to ask whether the fears of the *Bartlett* critics have materialised. As far as I know, no Louisiana appellate court decision has ever interpreted *Bartlett* as overruling *Ellis*. Further, it appears that Louisiana courts have been untroubled by the potential *asymmetry* presented by the two decisions. Indeed, when questions of tacking do arise, courts generally focus on questions such as whether the initial juridical act was sufficient to constitute a "just title",[67] or whether there was a sufficient juridical link to constitute a valid transfer of property interests between the successive possessors, be it through a particular or universal title.[68] In this sense, both the student law review commentator and Symeonides might have overstated the value of preserving a symmetrical approach to good faith possession and civil possession or just overestimated the impact that *Bartlett* would produce for ten-year acquisitive prescription claimants.

At the same time, though, both of these commentators were right to note that something significant had transpired in *Bartlett*. After all, the court put aside legitimate concerns about stability of title and legal certainty and embraced its own power to overturn 140 years of judicial precedent because it was convinced that fundamental principles of civil law doctrine were on its side and that considerations of justice and fairness supported its conclusion.[69] Although this is not the place to explore this latter subject in depth, recent decisions confirm the crucial role that moral considerations play in acquisitive prescription cases, even at the expense of legal certainty.[70] Finally, it must be admitted that by now *Bartlett* itself has acquired

64 Symeonides, "One hundred footnotes" (n 15) at 107, n 70.

65 For discussion of these eternal questions and how Louisiana's choice to adopt a two-tier structure reveals its policy choice, see Lovett, "Precarious possession" (n 5).

66 Symeonides, "One hundred footnotes" (n 15) at 107, n 70.

67 *Meyers v Marmet* 985 So 2d 315 at 320 (La App 3 Cir 2008) (holding that an act of donation by which a predecessor began to possess land could not constitute a "just title" because it was not in the form of an authentic act and thus could not serve as the founding basis for ten-year acquisitive prescription via tacking).

68 *Dunbar v Benoit* 494 So 2d 341 at 346 (La App 3 Cir 1986) (noting absence of juridical link for ten-year prescription and insufficient possession for 30-year prescription).

69 See generally Murchison, "The judicial revival of Louisiana's Civilian tradition" (n 43).

70 See generally Lovett, "Precarious possession" (n 5), discussing *Boudreaux v Cummings* 167 So 3d 559 (La 2015).

a certain undeniable stature as it has never been questioned by another court and has been studied by literally thousands of Louisiana law students, thus taking its place in the Louisiana property law canon.

H. STELLA'S REVENGE

One might easily conclude from all that has been said that Stella Calhoun was nothing more than a scoundrel who had forged the 30 November 1949 act of sale at issue in *Bartlett*.[71] After all, why else would she have fought with so much tenacity to rely upon the *Devall* doctrine as a matter of law? Well, it turns out that Stella was not necessarily such a villain.

After the Louisiana Supreme Court decision in *Bartlett* holding that Calhoun's status as a good faith possessor was a "material fact" and remitting the case to the district court for further consideration, the district court next granted *her* a summary judgment based on its determination that there was no genuine issue that Stella was anything other than a good faith possessor.[72] The Thompson heirs appealed this decision and managed to get it reversed on the narrow ground that the district court erroneously failed to consider the affidavit of a handwriting expert submitted by the plaintiffs questioning the authenticity of the signatures on the 1949 deed.[73] In reviewing the background of the dispute, however, the court of appeal disclosed additional facts that begin to alter our perceptions.

It turns out that one week *after* W C and Dorothy Thompson first acquired their interest in the Catahoula Parish land in question in October 1943, the Thompsons mortgaged the property to secure a loan from J L Calhoun, Stella's husband. Six years later, the disputed act of sale was passed from W C and Dorothy Thompson to Stella Calhoun. In the opinion of the court of appeal, this 30 November 1949 transaction "was more in the nature of a dation en paiement, as the record appears to reflect that the transfer was made in payment of the mortgage indebtedness of October 7, 1942".[74] Far from a bad faith forger, it appears that Stella Calhoun may have been trying to *help* the Thompsons satisfy a debt owed to her and her husband in community.[75]

But there is more. After this court of appeal reversal and remand, the district court finally held a complete trial on the merits. Now the district court judge ruled

71 Burnham noted that the district court on remand eventually found that Calhoun was in good faith at the time of her purchase from Brown, but he did not explain the basis for this finding or discuss further developments. See Burnham, "A restricted application of Civil Code Article 3482" (n 31) at 1226, n 26.

72 *Bartlett v Calhoun* 430 So 2d 1358 at 1360 (La App 3 Cir 1983), *writ denied*, 438 So 2d 575 (1983).

73 *Bartlett* (n 72) 430 So 2d at 1362. At 1361–1362, the court of appeal noted that plaintiffs did not attach any of the documents referenced in the handwriting expert's affidavit but that this defect did not warrant the district court's decision to ignore the affidavit altogether. On the other hand (at 1362) the court of appeal did not fault the district court for disregarding an affidavit submitted by Eula Bartlett Thomson, one of the plaintiffs, because it was clearly not based on personal knowledge.

74 *Bartlett* (n 72) 430 So 2d at 1359. A "dation en paiement" is a "giving by the debtor and a receipt by the creditor of something in payment of a debt, instead of a sum of money", and resembles "accord and satisfaction" in common law. See *Black's Law Dictionary* (6th edn, 1990) 395.

75 The community of acquets and gains resulting from Stella and her husband's marriage would include not only corporeal things but also incorporeal rights, such as the mortgage granted to J L Calhoun by the Thompsons and J L's right to collect on the underlying debt.

that the 30 November 1949 deed was "not a forgery but rather an authentic conveyance which divested [the] plaintiffs' ancestors of title to the property".[76] The plaintiffs appealed this decision, but the Louisiana Third Circuit Court of Appeal, hearing the case for the *third time*, concluded, after a final review of the record and the district court judge's reasons, that the decision was "amply supported by the evidence".[77] Summing up, the court of appeal acknowledged that the plaintiff's handwriting expert offered not completely unsubstantiated testimony supporting the Thompson heirs' forgery allegation, but it held that the district court judge was equally, if not more, impressed by the testimony of Calhoun's lay witnesses, including the notary public and one of the witnesses before whom the 30 November 1949 act was passed.[78] At the end of the day, Stella Calhoun prevailed and retained possession of her contested Catahoula Parish bottomland.

I. A FINAL VIEW FROM SCOTLAND

What should readers in Scotland make of this curious acquisitive prescription story? A jurist like George Gretton might well observe that this entire drama reinforces the wisdom of Scotland's approach to "positive", as opposed to acquisitive, prescription.[79] As Scottish readers will realise, *Bartlett v Calhoun* would never arise in their country for several reasons. Not only is just one positive prescription period applicable to almost all forms of heritable property under the Prescription and Limitation (Scotland) Act 1973,[80] but there is also no requirement of good faith.[81] Furthermore, although Scotland clearly recognises the possibility that one adverse possessor might need to connect her possession to that of a predecessor to satisfy the statutory period,[82] the fact that possession must be based on an ostensible deed registered in the Land Register or recorded in the Register of Sasines (the deed being usually referred to as a "foundation writ")[83] indicates that the crucial Scots law requirement is possession by what Louisiana lawyers would call a just title and not the *bona fides* or *mala fides* of the possessor. As Johnston explains, when it is necessary to link

76 *Bartlett v Calhoun* 491 So 2d 791 at 792 (La App 3 Cir 1986), *writ denied*, 496 So 2d 328 (1986).
77 *Bartlett* (n 76) 491 So 791 at 792.
78 *Bartlett* (n 76) 491 So 791 at 792.
79 D Johnston, *Prescription and Limitation* (2nd edn, 2012) para 16.06–16.07 takes the view that *positive* prescription and *acquisitive* prescription are distinct. In contrast K G C Reid, *The Law of Property in Scotland* (1996) para 674 views positive prescription as being a form of original acquisition. The Reid position is affirmed by a new s 5(1A) in the Prescription and Limitation (Scotland) Act 1973, which was added by the Land Registration etc (Scotland) Act 2012 Sch 5 para 18(4).
80 Prescription and Limitation (Scotland) Act 1973 s 1(1). But when the heritable property consists of foreshore or salmon fishings and prescription is being pled against the Crown, the period is 20 years: s 1(5).
81 See G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) para 6.14.
82 Notice the language in Prescription and Limitation (Scotland) Act 1973 s 1(1) ("If land has been possessed by any person, *or by any person and his successors* ") (emphasis added). Johnston, *Prescription and Limitation* (n 79) para 18.05 notes there is nothing in the Act to suggest that successors must be "universal" and that case law preceding the Act often "allowed singular successors to continue a prescriptive period".
83 Prescription and Limitation (Scotland) Act 1973 s 1(1). See Gretton and Steven, *Property, Trusts and Succession* (n 81) para 6.10. The Register of Sasines (a register of deeds) is the older Scottish land register, which is being superseded by the Land Register (a register of title). See generally K G C Reid and G L Gretton, *Land Registration* (2017).

successive possessions, what matters in Scotland is that "a successor who pleads prescription can demonstrate his own connection with the foundation writ, by proving that he is the successor of the person who first possessed following upon and founding on the deed".[84]

So, at first glance it appears that a claimant like Stella Calhoun would have been on much firmer ground in pleading positive prescription in Scotland, except for the inconvenient fact that the 1973 Act exempts a forged deed from the category of deeds that qualify as foundation writs in the Register of Sasines.[85] This exception would have produced the perhaps desirable effect of speeding up resolution of the dispute. In other words, Scottish law would have required the courts to address the crucial factual issue in dispute – the authenticity of the 30 November 1949 deed – right from the outset. As a result, the dispute might have been resolved after just one evidential hearing and perhaps one appeal, and not, as was the case in Louisiana, nine years of protracted litigation.

No doubt George Gretton would draw attention to the admirable efficiency and moral impartiality of Scots law on positive prescription that this brief comparison reveals. But he might also acknowledge that its tidiness has a cost – at least in dramatic terms. A Scottish lawyer would never have as much fun regaling a Louisiana lawyer with tales of positive prescription as I had in recounting *Bartlett v Calhoun* to George Gretton on the hills of Midlothian.

84 Johnston, *Prescription and Limitation* (n 79) para 18.06. In Louisiana registration is not required for an act affecting immoveable property to be effective as between the parties. Registration is only required for the act to have third party effect. See La Civ Code arts 517 (1979), 1839 (1984), 3338 (2005).

85 Prescription and Limitation (Scotland) Act 1973 s 1(2)(a). For registration in the Land Register, a forged foundation writ is only excluded where the registered proprietor whose title is based on the deed was aware that it was a forgery at the time of registration. See 1973 Act s 1(2)(b). See also Gretton and Steven, *Property, Trusts and Succession* (n 81) para 6.14.

THIRTY YEARS AFTER: THE CONCEPT OF SECURITY REVISITED

John MacLeod

One of George Gretton's most remarkable characteristics is the ability to elucidate the practical relevance of theoretical questions and, conversely, to see the theoretical interest in everyday legal transactions. It is a big part of what makes him such an engaging teacher and enables him to bridge the gap between academia and practice with such *élan*.

A relatively early example is "The Concept of Security", a contribution to the Festschrift for Professor J M Halliday.[1] There he asked how we know a right in security when we see one. The question is an important and practical one because, in many systems, significant formal and publicity requirements flow from that characterisation.[2] It also raises interesting and tricky analytical issues.

Elsewhere in this volume, Lionel Smith argues that proper rights in security are, strictly speaking, not rights at all but sets of Hohfeldian powers and privileges rather than rights.[3] This view flows from Hohfeld's restriction of the scope of the word "right" to claim-rights and the point that a right in security is not a claim is an important one.

It is, however, possible to consider the term "right" as denoting an umbrella category encompassing the positive end of each of Hohfeld's jural correlatives: claims, powers, privileges and immunities.[4] Such an umbrella term is useful for those times when we want to refer to all such concepts together and is more closely aligned with the Civilian notion of the subjective right. One of the things that George impressed most forcibly upon me was the virtue of seeking to be a good Civilian, so I will therefore keep with that, particularly since the focus of this chapter is on the later rather than the former half of the phrase "right in security".

Gretton began "The Concept of Security" by reflecting on "the current movement for radical reform" of the law of moveable security, the law of heritable security having undergone significant chance not many years previously. He returned to the subject in the Scottish Law Commission's Discussion Paper on *Moveable*

1 G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126.

2 E.g. Companies Act 2006 s 859A; Uniform Commercial Code § 9–109(1) (adopted in all US states); Personal Property Securities Act 1999 (New Zealand) s 36.

3 L Smith "Powership and its Objects" 223 at 229.

4 W N Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 Yale LJ 16 at 30.

Transactions,[5] this time at the helm of another attempt to bring radical reform to moveable security, with reform of heritable security also on the Commission's agenda.[6] *Plus ça change, plus c'est la même chose*.

"The Concept of Security" starts by offering a tentative definition:

> [A] right in security, in its strict or narrow sense, is a right in the property of another person which secures the performance of an obligation.[7]

In turn, the discussion paper uses Gloag and Irvine's classic definition:

> [A]ny right which a creditor may hold for ensuring payment or satisfaction of his debt, distinct from, and in addition to, his right of action or execution against the debtor under the latter's personal obligation.[8]

In contrast to Gloag and Irvine's definition, Gretton's own suggestion alerts us to the fact that security has a broad and a narrow sense: on the one hand, a class of rights which any law student would identify as security rights; on the other, a somewhat amorphous shadowland where rights in question may be clear but there is much less certainty about whether they should be classified as security.

A. DEFINING RIGHTS IN SECURITY PROPER

(1) A fractured approach

At first sight, the definitions used by Gretton and by Gloag and Irvine appear relatively straightforward. We generally seek to define rights in terms of the benefit or entitlement that they confer on the right-holder: the buyer's right under a contract of sale entitles that person to transfer of the goods conform to the contract; a right of way allows the holder to pass across the burdened property; a liferent allows the liferenter to possess and use property *salva rei substantia* for life; a negative real burden allows the holder to prevent some activity on the burdened property.

This apparent simplicity, however, masks the particular difficulty of defining "right in security". A hint at this difficulty is given by the paucity of general discussion of security in the places where a Scots lawyer would usually look when seeking to define a concept. Security does not fit easily within the scheme used in most institutional writing in Scotland. It covers moveable as well as heritable property and, if caution is included, personal as well as real rights. Furthermore, the Roman classification of pledge as a real contract[9] often led to its being discussed as part of the law of obligations. Since Scots lawyers typically regard pledge proper as being restricted to moveables, this also implies a separation of

5 Scot Law Com DP No 151, 2011, ch 5. Although George Gretton left the Commission prior to the publication of the discussion paper, he was its author: para 1.46.

6 Scottish Law Commission, *Eighth Programme of Law Reform* (Scot Law Com No 220, 2010) para 2.3.

7 Gretton, "The Concept of Security" (n 1) at 127.

8 W M Gloag and J M Irvine, *The Law of Rights in Security, Heritable and Moveable, including Cautionary Obligations* (1897) 2. On Gloag and Irvine's definition see G Gretton, "Ownership and its objects" (2007) 71 RabelsZ 802: "This seems to me better than any definition I have seen in any system."

9 That is, a contract for whose constitution delivery of a thing is required: J Inst 3.14.

moveable and immoveable (heritable) security. As a result, Scots institutional writers tend to discuss the particular rights in security rather than rights in security as a unitary institution.

Stair treated pledge first as a real contract (following the Roman institutional scheme in this respect)[10] and then briefly in Book II when enumerating the subordinate real rights.[11] Wadset (the main heritable security of his day) was discussed much later in Book II alongside the other real rights in land.[12] Bankton also treats pledge as part of his discussion of the real contracts and, while he also discusses other rights in security in this section, he proceeds by analogy or contrast with it rather than setting out a general concept of security into which the particular security rights may be fitted.[13] Erskine is similar, dealing with pledge as a nominate contract and rights in security in land as redeemable infeftments.[14]

Hume (not, of course, an institutional writer in this area but influential nonetheless) did not follow either the Roman institutional scheme or Stair's structure but he still treats security over moveables and heritable property in separate chapters,[15] organising his material according to whether the property was moveable or heritable rather than using security as an organising category.

None of this means that these writers were unaware of security as a general concept. Stair, for instance, expressly casts wadset as a pledge of land[16] and Erskine uses the language of pledge and security to trace the development of wadset from a true right in security (or "proper pledge" as he puts it) to *fiducia cum creditore*.[17] It did mean, however, that these writers were not forced to articulate the hard boundaries of the concept of security.

(2) Forbes

Aside from Gloag and Irvine, and Gretton, two Scottish writers did essay a global account of the nature of rights in security more or less directly. One, unsurprisingly given the significance of debt and insolvency to his work, was George Joseph Bell; the other was William Forbes.

In his *Institutes*, Forbes treats pledge and caution successively, in his chapter on "Accessory Obligations", alongside interest, bonds of corroboration, letters of credit and oaths.[18] Forbes defines pledge as "an appropriation to a Creditor, of the Good or Estate of his Debtor, moveable or immoveable, for Security of the Engagement he lies under, till it be fulfilled or acquitted" and goes on to subdivide it into pledge

10 Stair, *Inst* 1.13.11, J Inst 3.14.4.
11 Stair, *Inst* 2.1.28.
12 Stair, *Inst* 2.10.
13 Bankton, *Inst* 1.14.
14 Erskine, *Inst* 2.8.2–37, 3.3.33–34. In this he follows Mackenzie's example: G Mackenzie, *Institutions of the Law of Scotland* (1694) 108 and 154.
15 D Hume, *Baron David Hume's Lectures 1786–22 Vol IV* (ed GCH Paton) (Stair Society vol 17, 1955) 1ff and 370ff.
16 Stair, *Inst* 2.10.1.
17 Erskine, *Inst* 2.8.4.
18 W Forbes, *The Institutes of the Law of Scotland* (1722 and 1730, repr 2012) 230–255 (new page numbering). Little of interest is added in the equivalent part of the *Great Body* (http://www.forbes.gla.ac.uk/contents/, 1013–1030).

"properly so called" and wadset, admittedly postponing the latter for discussion along with the rest of heritable property.[19]

The continuing influence of the Roman characterisation of pledge as a real contract is evident in Forbes' insistence on treating pledge as an obligation but his approach is striking in two respects. First, Forbes uses the term "accessory" with respect to rights in security and deploys the concept of accessoriness as an organising category.[20] Secondly, his first step in analysing pledge is not to consider the detail of what the creditor is entitled do but the idea that the property is in some way dedicated to ensuring performance of the obligation. The two ideas are not unconnected: if a right in security is fundamentally about designating an asset to ensure that an obligation is fulfilled, the designation is meaningless without the obligation. Thus, accessoriness flows from the nature of pledge, as understood by Forbes. In recognising these two features, Forbes made a significant contribution to the conceptualisation of security rights in Scotland.

(3) Bell

Bell's principal treatment of rights in security comes in his *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, a work that even in later editions bears the evidence of its initial focus on bankruptcy.[21] Reflecting that priority, Bell's general discussion of real security comes when he turns his attention to "Preferences by Securities, Voluntary or Judicial, over the Heritable Estate".[22] This context shapes the treatment and may explain why he gives less prominence to the accessory nature of rights in security or to a programmatic statement of what rights in security are for than Forbes does.

His primary interest here is enumerating rules that affect the distribution in any competition between creditors:

> Preferences arise either, 1. From Securities constituted by voluntary grant or by legal diligence, or resulting from possession, or resting on some right of exclusion; or, 2. From Privileges conferred on particular claims from motives of humanity, or by special statute.[23]

Bell's privileges are what modern Scots lawyers would call "preferred debts" but his account of security rights is of more interest for present purposes, partly because it is so radical. Forbes can be seen as taking a moderate step along the road to the definitions which we find from Gretton and from Gloag and Irvine. Bell seems to go beyond both definitions.

Bell's understanding of real security is broader than Gloag and Irvine's because he includes rights constituted by diligence, recognising them as judicial securities, something which Gloag and Irvine expressly exclude. This aspect of Bell's treatment accords with Gretton's view. In "The Concept of Security", Gretton argues for the

19 Forbes, *Institutes* (n 18) 230–231.
20 On accessoriness in Scots law, see A J M Steven, "Accessoriness and security over land" (2009) 13 EdinLR 387.
21 The first edition was published as *A Treatise on the Law of Bankruptcy in Scotland* (1800–1804).
22 Bell, *Comm* I, 711.
23 Bell, *Comm* I, 711.

recognition of the so-called seize diligences (adjudication, poinding[24] and, somewhat coyly, arrestment) as judicial rights in security.[25]

It is tempting to suggest that Gloag and Irvine's restriction had a good deal to do with the fact that their definition came at the beginning of a book that did not cover diligence.[26] Be that as it may, Bell and Gretton's approach is clearly preferable. The diligences in question serve to secure performance of obligations, they operate in competition with each other and with "normal" rights in security according to the *prior tempore potior iure* rule applicable to rights in security and are discharged by satisfaction of the debt.

While Bell's approach to diligence accords with Gretton's, Bell's third category of rights in security, rights of exclusion, is more problematic. Bell enumerates these in Book V: rights arising from consent to a preference (i.e. a ranking agreement), inhibition, litigiosity, and rights to challenge in insolvency.[27] To many modern readers, characterising these as rights in security would seem surprising.

First, the very essence of the distinction between freeze and seize diligence is based on the idea that some forms of diligence do not give the user a right in security, a view that Gretton endorses, suggesting that an inhibition can only be characterised as a right in security "in a loose sense".[28]

Gretton excludes inhibition from the catalogue of rights in security because it "confers on the inhibitor no real right".[29] This is also true of Bell's other rights of exclusion.[30] However, the argument might surprise those who are better acquainted with Gretton's later work.

In his seminal article, "Ownership and its objects"[31] Gretton teases out the implications of thoroughgoing rejection of the idea that rights are things. One of the challenges posed by this analytical move is accounting for subordinate rights in rights: among the most significant of which is a security right over a right. If a right is not a thing, then a right in security over it cannot be a *ius in rem alienus*. As is well known, Scots law only allows voluntary security over incorporeal moveables by assignation in security but many other systems do recognise such rights and Scots law may do so in the future.[32] Furthermore, a standard security can be granted over almost all heritable property including rights such as registered leases.[33]

Gretton accounts for such rights by suggesting that the law can recognise limited personal rights as well as limited real rights.[34] He suggests that limited rights take their nature from the right that they encumber: a normal standard security encumbers ownership of a piece of land; a standard security over a lease

24 Now attachment.
25 Gretton, "The Concept of Security" (n 1) 140–142.
26 The publisher (W Green & Son Ltd) published J Graham Stewart's *Treatise on the Law of Diligence* the following year.
27 Bell, *Comm* II, 133.
28 Gretton, "The Concept of Security" (n 1) at 141.
29 Gretton, "The Concept of Security" (n 1) at 141.
30 Bell, *Comm* II, 132. I have made this argument in detail elsewhere, under the invaluable supervision of Professors Gretton and Reid: "Fraud and Voidable Title" (PhD Thesis, University of Edinburgh, 2013) chs 4 and 5.
31 Gretton, "Ownership and its objects" (n 8).
32 It was one of the options canvassed in the Discussion Paper on Moveable Transactions: (n 5) ch 18.
33 Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2). The exceptions are the right to enforce real burdens and unregistrable rights such as short leases: s 9(8)(b).
34 Gretton, "Ownership and its objects" (n 8) 838–844.

encumbers that. The ownership is real and therefore so is the security right. The same analysis might be applied to a lease over which a standard security was granted. If, on the other hand, a security was to encumber a personal right, the security right would be personal.

This suggests that, for Gretton, there are two kinds of personal rights in security: rights like caution, on the one hand, and security rights over other personal rights on the other. The latter, but not the former, could be considered proprietary (if not real) security.[35] Proprietary rights in security (whether real or personal) burden an object in the legal world (the real or personal right); in the other the security burdens a subject in the legal world, the cautioner. The distinction between them matters because it explains why a cautioner is obliged to satisfy the debt secured whereas the debtor in the burdened personal right is not. She is merely obliged to satisfy the burdened right, the value of which may be used to satisfy the secured obligation.

Gretton's position in "Ownership and its objects" suggests that the fact that exclusionary rights were personal rather than real rights would not lead him to consider them to be outwith the category of rights in security proper. Can the positions taken in 1987 and 2007 be reconciled?

It is the prerogative of an academic to change his or her mind and it is undoubtedly true that by 2007 Gretton had drunk more deeply from the Pandectist well. Were he to write it today, the sentence might not be worded in quite the same way. However, that does not mean that his view on whether the inhibitor has a right in security has changed. This is shown by thinking a little about why Bell wanted to recognise them as such.

Bell seems to have been aware that some would object to his characterisation of rights of exclusion as rights in security. He begins his discussion of them a touch defensively:

> Rights of exclusion have in themselves no character of a Real Right, but operate merely in the way of Prohibition or Exclusion against claims which otherwise would be entitled to a preference. When such a prohibition is general, it scarcely can be said to operate as a security . . . It is only where the exclusive diligence or contract belongs to individual creditors, allowing full effect to their securities, and excluding others, that it can be regarded as a ground of preference.[36]

Why does Bell want to include them? There is a clue in the equivalence that he draws between a security and "a ground of preference". The right to exclude only counts as a security where it does not benefit the general body of creditors. Again, this reflects the context of Bell's discussion: he is thinking of rights in security in terms of ranking. An exclusion improves the rightholder's position when the assets are divided in a way that privileges that person over other creditors. That is essentially what a right in security does too.

Similar arguments were made recently by Lord Drummond Young in *MacMillan v T Leith Developments Ltd.*[37] Strikingly, he takes Gloag and Irvine's definition as the starting point for his argument and suggest that it applies "to all the common forms

35 On Gretton's view, rights are not things but they are property.
36 Bell, *Comm* II, 132–133.
37 [2017] CSIH 23.

of diligence on the dependence, and in particular to inhibition and arrestment". The justification for this is that they:

> create rights over the debtor's property which can be enforced in such a way that the payment or satisfaction of his debt is made more secure, and such rights are additional to the standard right to raise an action for payment of the debt, to proceed to decree and to enforce that decree.[38]

There is perhaps room for some doubt about whether diligence, the primary means of execution that the law provides, can meaningfully be said to be additional to the right of action and execution. It might be argued that a strong distinction is being drawn here between diligence on the dependence and diligence in execution, and that the former but not the latter is additional to any right of execution. That, however, sits rather uneasily with the comment later in the paragraph that "diligence on the dependence is invariably treated as a particular form of security, and the same is generally true of diligence proceeding on a document of debt".

Be that as it may, the heart of the argument is clear. Inhibition, like arrestment, improves the inhibitor's chances of getting paid and therefore it counts as a right in security. Whatever doubts might be entertained about whether inhibition in included in the right of execution, it is clear that, were it not for the words after "additional", inhibition would meet Gloag and Irvine's definition.

So why might Pandectist-Gretton want to exclude such rights from proprietary security? The answer might lie in the way that the preference is achieved: the rights of exclusion protects their holders by "allowing full effect to their securities". A right of exclusion is only of use to a creditor who has another right in security that would otherwise be outranked or rank alongside the excluded right. An inhibition only helps someone who had adjudged or otherwise acquired a real right in the relevant property and it only helps if there is another person whose right needs to be struck down.

This tells us that the right of exclusion gives no right in the property of another. It does not, in fact, "create rights over the debtor's property". It creates rights against the inhibited debtor and third parties that relate to the property but they cannot be said to be rights in or over it any more than a buyer's right under a contract of sale is a right over the property being sold. To put the matter in terms of the distinction between cautionary and proprietary security drawn above, the right of exclusion does not burden a right but a person directly, namely the person holding the right subject to exclusion, so it is more like caution than pledge.

B. WHY DO YOU ASK?

We have seen that Gloag and Irvine's definition is probably broad enough to cover rights of exclusion. This difference between Gloag and Irvine, and Gretton may be accounted for by the fact that, unlike Gretton, they were not seeking to define proprietary security but security *tout court*. Their definition is broad enough to cover caution so perhaps there is no reason why it should not also extend to rights of exclusion.

38 [2017] CSIH 23 at para 78.

After all, some important rules that we would associate with rights in security apply to such rights of exclusion: they are extinguished by satisfaction of the debt and their operation is limited to what is necessary to satisfy the debt due to their holder.[39] In these respects, they could be said to reflect the principle of accessoriness. However, rules that we might expect in relation to proprietary security such as those for the preservation of the value of the asset or ranking would make no sense when applied to rights of exclusion or caution.

That might be taken to imply that the appropriate breadth of the term right in security may vary to some extent depending on the consequences that the person asking the question can be expected to attach to a positive answer. This is particularly important in the context of functional securities, a point to which we will return below. First, however, it is necessary to look to see if there is some element that can be said to be essential to rights in security.

C. A PURPOSE-DRIVEN RIGHT

As discussed above, part of the reason for the lack of general statements on security in older Scottish writing is the absence of an obvious single locus for discussion in the organisational schemes which they used. Another is that not all rights in security entitle the holder to do the same thing.[40] Most subordinate real rights, perhaps even most rights, confer some core capacity on the holder: a tenant or a liferenter is entitled to possess, the holder of a servitude is entitled to make certain use of the burdened property and so on.

With rights in security things are less simple: the holder of a pledge has always been entitled to possess before default but not necessarily to sell after default;[41] the holder of a standard security has no right to possess prior to default but a distinct right of sale;[42] the holder of a floating charge can often appoint an administrator over the debtor company;[43] if we extend to caution, the right is to demand payment from a third party, not a right over any property.

Do these institutions really have much in common at all? Yes, but the key is not what the right-holder can do but why that person can do it. Generally speaking, a liberal legal order does not concern itself with motives. Part of the autonomy that private rights guarantee is the freedom to use the right or not as you wish. What matters is what holders are entitled to rather than why they want to claim. The holder of a personal right may choose to enforce that right because of dire necessity or because he or she does not like the debtor but that makes little difference to the law.

However, there are certain cases where a right can only be exercised for a certain purpose. Take a servitude right of way: the holder is entitled to pass across the

39 Subject to s 154 of the Bankruptcy and Diligence etc (Scotland) Act 2007, whatever it may mean. See further MacLeod, "Fraud and Voidable Title" (n 30) ch 5.

40 For further discussion of the range of capacities which a right in security (or perhaps security interest) may confer, see Part D of Smith "Powership and its Objects" (n 3).

41 A J M Steven, *Pledge and Lien* (2008) paras 8-04–8-10; L Steyn, "Protection against forced sale of a debtor's home in the Roman context" (2015) 21 *Fundamina* 119 at 128.

42 Conveyancing and Feudal Reform (Scotland) Act 1970 s 11 and Sch 3.

43 Insolvency Act 1986, Sch B1 para 14(1).

burdened property, but only for the purpose of accessing the benefited property.[44] Both what you are allowed to do and why you are allowed to go to its essence. It is clear that a right that allowed the holder to do something other than pass across the property would not be a right of way, but it must also be accepted that a right that allows the holder to pass across property for some reason other than accessing the benefited property would not be a servitude right of way.

This is the idea behind Forbes' talk of appropriation for security and, in this respect, Forbes represents a strain of the European tradition. It is that purpose that binds those disparate institutions that we call rights in security together and that goes a long way towards explaining many of the rules which govern them. Windscheid put the matter particularly clearly when discussing pledge:[45]

> *Das Pfandrecht steht in einem wesentlichen Gegensatz zu allen andern Rechten an fremder Sache . . . Zuerst durch die Unselbständigkeit seiner Natur. Alle andern Rechte an fremder Sache find um ihrer selbst willen da, das Pfandrecht hat einen außerhalb seiner selbst liegenden Zweck; alle andern Rechte an fremder Sache gewähren dem Berechtigten eine Willensherrschaft schlechthin, das Pfandrecht gewährt ihm eine Willensherrschaft nur zu dem Ende, damit ein anderes Recht seine Befriedigung erhalte.*
>
> [Pledge stands in fundamental contrast to all other subordinate real rights . . . First because of its dependent nature. All other subordinate real rights find their end (*willen*) in themselves, the pledge has an end outside itself; all other subordinate real rights secure for the right-holder some entitlement (*Willensherrschaft*) pure and simple, the pledge secures for him an entitlement only in order that another right will be satisfied.]

The essence of the right in security then, is its purpose.

(1) Purpose or effect?

It might be objected that Gloag and Irvine, and Gretton write not of the purpose of the right but its effect. Gretton refers to a right that "secures the performance of an obligation" not one that is intended to. Similarly, Gloag and Irvine say that it is "any right which a creditor may hold for ensuring payment".

Gloag and Irvine's definition might be considered to be satisfied provided (1) that a creditor is able to hold the right alongside the right which is secured and (2) the right can be used in some way that protects the creditor's entitlement under the principal right.

It might further be suggested that it is better to focus on what rights do rather than what they are for because the effect, unlike the purpose, is clearly attested by particular legal results and because a focus on purpose, inevitably leads to the question of whose purpose is determinative: the granter, the grantee, or someone or something else. Since some rights in security are governed by common law rather than statute, it is not possible to use the supposed intention of Parliament to fill the void.

The difficulty with focussing on effect is that is has the potential to be radically over-inclusive: suppose the creditor, Alan, happens to hold another right to payment

44 *Irvine Knitters Ltd v North Ayrshire Co-operative Society Ltd* 1978 SC 109.

45 B Windscheid, *Lehrbuch des Pandektenrechts* (4th edn, 1875) Vol I, §224. The translation is mine (and I was tempted to omit it in tribute to George's undergraduate handouts).

against the debtor's (Barbara's) brother, Colin, which, if enforced, would bankrupt him. The two rights can be held together and, provided that Barbara quite likes her brother, the threat of bankruptcy for her sibling is likely to give her additional motivation to perform and thus to render performance more likely, not unlike the pressure exercised by the holder of a possessory right in security. Such a right might be considered to satisfy Gloag and Irvine's definition. Very few would want to characterise the right against the brother as a right in security though.

Similarly, retention of title or *fiducia cum creditore* and any commercial trust would count as a right in security on this reading of Gloag and Irvine's definition. The creditor has a right, either of ownership or as beneficiary of the trust and that right protects her in the case of non-performance by the debtor.

There are many who would welcome the absorption of such functional securities into the general class of rights in security, as the success of the Uniform Commercial Code, Article 9 model for security over moveables bears witness. But there is an intelligible argument about whether such a move is a good idea. The reason that the argument is intelligible is that there is a discernible difference between these institutions and the rights in security that everyone accepts to be rights in security like pledge or the standard security. The most obvious distinction is that rights in security in the latter category exist in order to secure obligations rather than merely being capable of serving that end.

(2) *Iura in re aliena*

Gretton excludes retention of title, *fiducia cum creditore* and commercial trusts from rights in security proper but he does not do so by referring to purpose. Rather, he distinguishes these cases (and could also distinguish the unfortunate brother) by invoking the requirement that the right in question is a *ius in rem alienus*, i.e. a subordinate real right in the property of another.[46] The functional securities mentioned either involve the creditor as owner or without a real right (as the beneficiary of a trust). Therefore, none of them involve a right in another's property.

Aside from the terminological challenge of rearticulating this argument to take account of proprietary rights in security over personal rights, there are perhaps two drawbacks to this approach. The first is that it is not obvious how it might be extended to cover caution in order to build an account of proprietary security nested within a broader account of security as a whole. If one of the conditions for qualifying as a proper right in security depends on the presence of property, caution could not be considered a proper right in security.

The second is that it would pose problems where the holder of a right in security temporarily became owner of the property (or holder of a right) over which there was a right in security. Of course, such a problem would not arise if *confusio* operates to extinguish the right in security in such cases, but it is not obviously desirable that this should be the case. If the right survives (perhaps being unenforceable) when held by the owner, there is the question of what it is in the owner's hands and of why its nature or classification should depend on who holds it.[47]

46 Gretton, "The Concept of Security" (n 1) 129–130.

47 See further, R G Anderson, "A Whimsical Subject: *Confusio*" in this volume at 37–42.

These are not, perhaps, great difficulties but, when taken together with the intuitive appeal of a purposive element, it seems worthwhile to explore the viability of a purposive approach.

But why can the purposive approach be said to have intuitive appeal? The argument is perhaps best made by a thought experiment. How would a lawyer explain a right in security to a non-lawyer over dinner? The explanation is very likely to rest heavily on what rights in security are for, because that is the easiest way for people to get a handle on how they work. Of course, there may sometimes be good reasons for the technical boundaries of a legal concept to differ from the popular gist but it is surely an advantage in terms of the law's clarity and accessibility for them to be as close together as possible unless there is a good reason not to.

(3) Whose purpose?

As noted above, one of the major issues for the purposive approach is identifying the source of the purpose. If the parties' intention governs classification, then the distinction between functional and proper rights in security would collapse.

Can any other purpose be identified? As noted above, rights in security do not all derive from legislation, so the legislature's purpose cannot necessarily fill the gap. Rather, something a little more abstract is needed: the purpose not of the parties nor of the legislature but of the law as such. Is it possible to make sense of such an idea without an unduly mystical view of the law?

First of all, it is worth bearing in mind that this is not the only situation where definition of a legal institution turns on the law's putative purpose in recognising it. Consider the difference between the law of promise and the law of assault. Both a promise and an assault can give rise to an obligation to pay money but one is considered a juridical act and the other is not. It might be tempting to attribute this to the difference in the intention of the actor: the promisor intends to confer a right to payment whereas the assailant does not. That, however, is not quite the whole story: it is in theory conceivable that someone could punch someone else with the avowed intention of conferring a right of payment on the latter. Even in those circumstances, however, the assault would not be a juridical act. What is the difference between this punch and a promise? The difference is not in the actor's intention but in the law's reason for attaching the relevant legal consequence, the purpose of the two legal institutions.

Similarly, a right of way remains such and remains validly exercised even if the right-holder has no particular need to reach the benefited property and is motivated by desire to enjoy the scent of the roses on the burdened property as he passes by. What matters is not the particular purpose of the right-holder but the law's purpose in recognising the institution.

There may well be other examples. For instance, it might be argued that the discomfort around the commercial trust was linked to a sense that the purpose of the trust had been perverted.[48] On such a view, the purpose of the institution of the trust might be said to allow property to be dedicated to certain ends (i.e. the trust purposes) and rules such as that which protects trust assets where the trustee is

48 E.g. *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 308 at 115–116 per Lord President Emslie, giving the opinion of the court.

insolvent exist to facilitate that purpose. Where a trust is used as a security device, the concern is that trustee and beneficiary are only interested in the insolvency effect and therefore the institution is being used for something other than its proper purpose: rather like a servitude right of way being used to access something other than the benefited property.

(4) Let's get metaphysical?

There seem to be a number of legal institutions that are best understood in terms of the purpose for which they exist, even while we recognise that they may sometimes be used for some end other than their purpose. If asked whose purpose determines their nature, we must simply say "the law's".

The idea that the law has a purpose might feel a bit uncomfortable. Good positivists are uncomfortable with the idea of irreducible moral characteristics in law to say nothing of assuming it has some kind of capacity for intention or purpose.

Some help may be found in Stair's characterisation of law as "the dictate of reason".[49] In order to understand law as system and to pursue the values of clarity and coherence that characterises so much of Gretton's scholarship, we need to approach law as a rational system. What does that mean? Part of what it means is surely that legal rules are not arbitrary but rather serve certain ends. This in turn suggests that the rules and their relationships with one another can helpfully be understood in light of these ends.

Further help might be found in the idea that the development of law is a collaborative human endeavour, pursued by individuals in society rather than in isolation. The fact that an action is collective does not mean that no purpose can be attributed to it. As MacCormick points out, we can sensibly attribute action and thus intention and purpose to an orchestra performing a symphony or a theatre troupe performing a play.[50] In some cases, the collective action is highly institutionalised and thus the purpose is easily determined; but MacCormick also shows, through the example of a spontaneous queue, that some forms of collective action have no direct institutional framework or overarching decision-making process directing them but nonetheless are intelligible in terms of their ends or purposes.[51] Common law development might be said to exist somewhere on the spectrum between fully institutionalised collective action and more spontaneous activities like queuing. There are relatively clear rules about whose decisions matter and those taking them do so with reference to the existing body of law relevant to the point in question and, in doing so, they can be expended to attend, consciously or not to the ends to which the relevant area of law can be said to be directed.

In light of these considerations, it makes sense to invoke the principle of publicity to bring together and to understand the requirement that the creation or transfer of a real right in land generally should be registered, the delivery requirement for transfer of corporeal moveables at common law and the requirement of intimation (or, as proposed by the Scottish Law Commission in its Discussion Paper on *Moveable Transactions*, registration) for assignation of incorporeal personal rights. Similarly, it

49 Stair, *Inst* 1.1.1.
50 D N MacCormick, *Institutions of Law* (2007) 83–84.
51 MacCormick, *Institutions of Law* (n 50) 13–16.

makes sense to understand rights in security (and for that matter juridical acts) in terms of their purpose. That purpose is not that of the parties as such or of some mystical legal being but of the law as a whole, understood as an instance of collective action.

D. IMPLICATIONS

(1) Accessoriness

Understanding the proper right in security as a right whose purpose is securing payment of the secured debts explains the operation of a number of rules connected with rights in security, particularly those connected with the principle of accessoriness. Accessoriness matters because it ties the right in security to the claim whose protection is the purpose of the right in security. To put it more bluntly, the point of the principle of accessoriness is to ensure that the right in security operates in line with its purpose. Thinking in these terms may help to clarify our understanding of the principle.

Andrew Steven has unpacked the principle of accessoriness in some detail.[52] In doing so, he identified a number of rules of accessoriness: (1) there must be a present debt (for constitution); (2) there must be a specific debt; (3) the security follows the debt; (4) extinction of the debts ends the security; (5) enforcement requires indebtedness.

Steven demonstrates that Scots law does not have a perfect record in terms of adherence to these rules and it is by no means alone in this. This, in turn, raises the question of whether any one of Steven's rules can be elevated above the others as a *sine qua non* of rights in security. The argument made here supports Steven's view that rule (5) is the most important.[53] Deviations from the other rules do not mean that a right in security can stray beyond its purpose. Deviation from rule (5) does. In light of this, we might go further and say that a right that does not adhere to the principle of accessoriness in this narrow sense is not a right in security. Conversely, it might be argued that provided that a right complies with rule (5), it can properly be considered accessory. This implies that, after the recent reforms, a *Grundschuld* created to secure an obligation is accessory, since it is subject to defences that may be raised against the creditor in the obligation.[54]

If value can be extracted or use can be made of the burdened property without reference to the satisfaction of an obligation, the right in question is not a right in security in the narrow sense. It is more akin to a profit-à-prendre or a use right: defined simply by what the holder is entitled to do rather than by what the right is for. It might be possible to use such a right to ensure satisfaction but that is not why the law recognises it and the rules relating to that right will reflect the broader purpose.

If a right is intended to work without reference to an underlying obligation, it is questionable whether it makes sense to subject it to security rules that presuppose such an obligation. Further, trying to craft security rules to take account of such

52 Steven, "Accessoriness and security over land" (n 20).
53 Steven, "Accessoriness and security over land" (n 20) at 413.
54 BGB § 1192 Ia.

institutions is liable to be a difficult exercise and perhaps one that is harmful to the coherence of rules on rights in security.

(2) Functional security

It might be objected that the account presented here leaves no room for functional securities to be considered as security rights. At one level, that is completely true and, for the reasons set out above, not necessarily a problem. The difference between functional securities and rights in security proper is intelligible and therefore potentially significant. People may repurpose other devices to secure obligations and that might trigger particular rules but those rules would apply to legal institutions that are distinct from rights in security property. However, it must be acknowledged that a great deal of modern thinking on security focuses on the "functional approach".[55] Does an account of security that focuses on purpose have anything to say to debates around functional security?

In "The Concept of Security", Gretton spends a significant amount of time considering the extent to which various "rights of retention" can be considered functionally equivalent to rights in security.[56] Before turning to the classic retention of title clause, he considers the *ex facie* absolute disposition, sale and lease-back, sale and hire-purchase-back, and sale and lease-back with the option to repurchase.[57] All these cases involve a transferor transferring an asset to a transferee in return for payment and a right on the part of the transferor to retain possession and/or to recover the asset by means of periodic payments.

Gretton proposes three tests to determine this question: the correspondence test (whether the price agreed corresponds to the value of the asset in question); the accountability test (whether a transferee who sells the asset on must account for the proceeds to the transferor); and the extent to which the contract between transferor and transferee includes an equivalent of a loan.[58] The last of these is rather complex but essentially it comes down to whether either or both of the parties has a right and is under an obligation to restore the pre-transfer *status quo*: recovery of the asset by the transferor in return for payment. As with the definition of security in the narrow sense, Gretton's tests focus on the effect of the transaction: if the arrangement essentially does what a debt and a right in security would have done, then it can be considered a security device. The extent to which it approximates this effect determines how close to a right in security it is.

The discussion of these tests is subtle and fascinating. They represent one of the most sophisticated attempts at identifying functional securities in Scots law. Gretton's conclusion is that there is a spectrum of security-like devices from the clear functional equivalent to those with a "marginal kinship with security".[59] Naturally, any attempt to draw a cut-off line on that spectrum would be somewhat arbitrary, therefore, "the idea that we can be confident that we can recognise which a transaction is a security strikes [Gretton] as wrong".[60] If true, this poses significant

55 E.g. *UNCITRAL Legislative Guide on Secured Transactions* (2007) 23.
56 Gretton, "The Concept of Security" (n 1) at 130–140.
57 Gretton, "The Concept of Security" (n 1) at 134–135.
58 Gretton, "The Concept of Security" (n 1) at 132–133.
59 Gretton, "The Concept of Security" (n 1) at 139.
60 Gretton, "The Concept of Security" (n 1) at 140.

problems for the dominant international model of security over moveable property, which imposes rules, particularly surrounding publicity on all functional securities. Parties really need a bright line so that they know whether to comply with the publicity requirements or not. These concerns were at least part of the reason for Gretton's tentative rejection of a functional approach to security over moveable property in the Discussion Paper on *Moveable Transactions*.[61]

So how do functional systems of security law approach this issue? One recent example is Article 2 of the UNCITRAL Model Law on Secured Transactions. It defines "security right" as:

> (i) A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; and (ii) [t]he right of the transferee under an outright transfer of a receivable by agreement.

This seems to suggest that the determinative factor here is not the effect of the transaction but why the parties created it. What matters is why the right was created. However, it is difficult to be confident about this conclusion since the glossary in the *UNCITRAL Legislative Guide on Secured Transactions*, on which the Model Law is based, defines "Security right" as:

> a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right.[62]

In contrast to the Model Law, the focus here is on the effect of the right: namely that it secures an obligation, without reference to whether that was why it was entered into. It counts as a security right provided that it "secures" performance rather than requiring to have been created "to secure" that performance. Later in the *Legislative Guide*, the discussion of its "Functional, integrated and comprehensive approach" suggests that the parties' purpose is relevant:

> [A]ll transactions that create a right in any type of asset *meant to secure* the performance of an obligation (that is, to fulfil security functions) should be considered to be secured transactions.[63]

In the text of the relevant recommendation, however, it says:

> The law should adopt a functional approach, under which it covers all rights in movable assets that are created by agreement and secure the payment or other performance of an obligation.[64]

That places the emphasis on the effect rather than intention or purpose. The same tension is evident in the Spanish texts. The Model Law says *garantía mobiliaria* are rights "*que se constituya . . . por el que se garantice el pago u otra forma de cumplimiento de una obligación*", while the *Legislative Guide* defines *garantía real* as

61 Discussion Paper on *Moveable Transactions* (n 5) paras 21.15 and 21.26.
62 *UNCITRAL Legislative Guide on Secured Transactions* (n 55) at 13.
63 *UNCITRAL Legislative Guide on Secured Transactions* (n 55) at 23 (emphasis supplied).
64 *UNCITRAL Legislative Guide on Secured Transactions (n 55)* at 62.

un derecho de propiedad sobre bienes muebles que se constituya mediante un acuerdo y que garantice el pago u otro tipo de cumplimiento de una obligación, independientemente de que las partes lo hayan calificado o no de garantía real.[65]

The French text, on the other hand, refers to rights "*constitué par convention en garantie du paiement ou d'une autre forme d'exécution d'une obligation*" in both the Model Law and the *Legislative Guide*.[66] Consultation of the other official versions was beyond my linguistic capacity but this examination shows some doubts as to whether the key element is the effect of the transaction or the parties' intention. The slightly better view seems to be that the parties' purpose in creating the rights matters since that is in the later instruments.

What is clear, however, is the absence of consideration of how difficult it might be to determine whether a transaction has security effect in the *Legislative Guide*.[67] It must be acknowledged that this functional approach represents the dominant approach in recent law reform. This may suggest that whatever difficulties of definition may arise, functional systems are at least broadly workable.

One possible reason for this is that a degree of ambiguity is resolved by focussing on the parties' intention or purpose rather than simply on the effect of the transaction. While the effect of a transaction may fall somewhere between a security and something else, it remains possible to ask whether the parties' purpose was to create and secure a loan or (to make it more precise) whether this was one of the purposes which that parties had in mind. Gretton's three tests would be very useful in that endeavour but they would be indicative rather than conclusive: providing evidence of the parties' mindset.

On this approach, the relationship between functional and proper security might be expressed thus: with a proper right in security, satisfaction of a right is the law's purpose in recognising it; with a functional security, satisfaction of a right is merely the parties' purpose in employing it.

That account provides a relatively neat distinction but it also highlights reasons to share Gretton's scepticism about rules that target functional securities. Parties who use a functional security deploy an institution that has some other purpose and that has rules that reflect that purpose. These rules, be they those of transfer, trust or something else, will define the effect of what is being done. Further, it will be necessary to comply with whatever rules the law sets down for transfers, trust or whatever else in order to secure that effect. If a transaction has effect X and is only effective if the rules designed with effect X in mind are complied with, that should be enough for the law in most cases. The parties' motives make no difference to anyone else, the transaction which they undertook was lawful and so it is difficult to see why the law should seek to make a window into their souls.

E. CONCLUSION

Attentiveness to what a security is assists in understanding and communicating ideas about security because it forces clear articulation of what it is that we are

65 *Guía Legislativa de la CNUDMI sobre las Operaciones Garantizadas* (2007) 10.
66 *Guide législatif de la CNUDCI sur les opérations garanties* (2007) 13.
67 The functional approach is discussed at 34–35, 51–53 and 55–58.

dealing with. This conceptual discipline is of particular importance when efforts are being made towards reform. The account presented here suggests that proper rights in security are rights that the law recognises in order to facilitate satisfaction of other rights and that proper rights in security may be divided into personal rights in security (cautionary and exclusionary) on the one hand and proprietary (personal and real) on the other hand according to whether the security right is primarily a right over another right or a right against a person. It is hoped that a conceptual framework along these lines will help to ensure that like situations are treated alike and that false equivalences are avoided. It will thus reflect something of George Gretton's immense contribution to conceptual analysis of private law in Scotland and beyond.

BENEFICIAL INTEREST AND THE LAND REGISTRATION ACT OF 1979

Kenneth G C Reid

A. MR GRETTON'S LETTER

(1) The letter

In introducing registration of title to Scotland, the Land Registration (Scotland) Act 1979 inaugurated a revolution in land law and conveyancing the effects of which are still with us today. The relevant Government files, now open to the public under the 30-year rule, are therefore of exceptional interest.[1] Among the many things in the files to arrest the attention of the interested reader is the following letter, handwritten in a bold red ink:[2]

9 Gladstone Terrace
Edinburgh 9
13 February 1979

Dear Lord McCluskey

LAND REGISTRATION (S) BILL

I enclose herewith some criticisms of the above Bill.

Yours faithfully

George Gretton
G. L. GRETTON

Lord McCluskey QC was the then Solicitor General for Scotland. A second letter was sent to the Lord Advocate, Ronald King Murray QC, MP.[3] Although the letters did not say so, their author was a first-year law apprentice with Messrs Ketchen and

1 The relevant Government Departments were the Scottish Home and Health Department (based in Edinburgh) and the Lord Advocate's Department (based in London). The former was responsible for policy and for instructing the Bill; the latter was responsible for drafting the Bill. The files are preserved in the National Records of Scotland ("NRS"). The principal files of relevance are, for the Scottish Home and Health Department, HH41/1430, HH41/1576, HH41/1640, HH41/1692, HH41/1693, HH41/1798, HH41/1799, HH41/2024, HH41/2025, HH41/2026, HH41/2570, HH41/2721, and HH41/2722, and, for the Lord Advocate's Department, AD63/1361/1, AD63/1363/2, AD63/1363/3, AD63/1363/4, AD63/1363/5, AD63/1363/6, AD63/1363/13, AD63/1363/14, AD63/1363/15, and AD63/1363/16.

2 NRS AD63/1363/5. A copy can be found on NRS HH41/2025.

3 It is not, however, on file.

Stevens WS. That he knew something of the law was evident from the one-page typewritten note of "criticisms" that accompanied the letters. This did not beat about the bush. "The Land Registration (Scotland) Bill", it began, "is defective in draftsmanship and objectionable in policy".

In respect of the former, the note continued, "the whole Bill obviously needs to be re-drafted". Among the points singled out for attention were the reference in cl 2(1)(a)(i) to contracts of ground annual as a trigger for first registration in the new Register ("Does the draftsman really believe that it is still competent to create ground annuals?"), and the contradiction between cl 2(1)(a), which included the grant or assignation of a long lease as a trigger for first registration, and cl 2(2) which announced that cl 2(1) did not apply to incorporeal heritable rights ("Does the draftsman not know that leases are incorporeal heritable rights?").

But it was the law apprentice's comments on policy that were the more telling. "What", he asked, "does rectification mean? I am unable to extract from the Bill any clear statement on its meaning or – more importantly – its consequences." This was "part and parcel of the general failure of the Bill to face up to the problem of competition of title". Take the case, he posited, of registration of an *a non domino* disposition. "The purpose of the Bill is to make the *a non domino* disponee the proprietor" but provisions such as cls 3(1) (on the effect of registration) and 7 (on ranking) resulted in a failure to achieve that purpose.[4]

(2) And the Lord Advocate's response

By the time Mr Gretton's letter arrived, the Bill had completed all its stages in the House of Lords and would soon begin, and complete, its passage through the House of Commons.[5] Even so late in the day, however, the letter was taken seriously. On the misapprehension that the writer was one of his constituents,[6] the Lord Advocate insisted on replying in his own name, and set his officials to the task of preparing a response. In all, three notes were produced, by J F Rankin of the Home and Health Department (25 February), by Harry Glover, who was the solicitor instructing the Bill (28 February), and by John Robertson, who was one of the representatives of the Registers on the Bill team and was later to be Keeper (1 March).[7] All three found Mr Gretton's criticisms to be without merit.[8] Responding to the suggestion that the meaning of "rectification" might be unclear, Glover wrote that:

4 The clause numbering used in the note was that of the Bill as introduced to the House of Lords on 23 November 1978. Due to amendments the numbering had been slightly altered by the time the note was written. I have used that later numbering, which was also the numbering in the Bill as passed and hence in the Act.

5 The Third Reading in the House of Lords took place on 15 February 1979. The Bill was then considered in the House of Commons on 15 March (Second Reading), 27 March (Committee), and 30 March 1979 (Third Reading).

6 Ronald King Murray was MP for Edinburgh Leith.

7 All three can be found in NRS HH41/2025. Apart from the draftsmen (J Fleming Wallace and John McCluskie), the Bill team comprised Harry Glover, two officials from the Scottish Home and Health Department (A T F Ogilvie and J Rankin) and two officials from the Registers of Scotland (David Williamson, the Keeper, and John Robertson).

8 Except for the criticism as to leases and incorporeal heritable rights where Glover thought "there is a point here".

> It is a rule of statutory interpretation that a good dictionary should be enough to give the meaning of any word not defined. "Rectify" and "inaccuracy" are ordinary English words. Clause 9(1) does not indicate how wide "rectification" could go, and in my view should not do so.

As to the central point on the effect of registration, Robertson explained that "it is not the purpose of the Bill to make the *a non domino* disponee the proprietor", a proposition that was repeated in the Lord Advocate's eventual reply to Mr Gretton, but with the qualifier "generally" inserted before the words "to make".[9]

It is not only hindsight that makes these responses seem inadequate. That registration might confer real rights automatically and indiscriminately, or that "inaccuracy", far from carrying a dictionary meaning, might encompass bijural as well as actual inaccuracies,[10] were matters apparently beyond the contemplation of those responsible for preparing the legislation. David Williamson, the Keeper of the Registers and a key figure in the preparation of the legislation, put it this way: "the Bill was doing no more than changing the *method* of registration with the implication that the *effect* of registration under the new system would be the same as that under the old system as regards constitution of real rights etc".[11] Mr Gretton was right to think otherwise.

Needless to say, no changes were made to the Bill as a result of Mr Gretton's intervention. Instead, the defects to which he drew attention were carried forward to the Act where, a few years later, they were exposed afresh in articles written by me.[12] I now discover, not for the first time, that George had been there first and had come to similar conclusions.

B. SOME MISAPPREHENSIONS CORRECTED

(1) Bill (not) put together in a hurry

George Gretton's letter apart, there is much else of interest in the Government files. They show, for example, that, far from the Bill being put together late in the day and in haste, as is commonly supposed, the timetable was actually quite leisurely. The preparation of instructions for the draftsman was already under way by the start of

9 This qualifier was added as a correction in ink in the last version of the Lord Advocate's letter to appear in the files: see NRS AD63/1363/6. See also para 1.3 of the original instructions for the Bill (NRS AD63/1361/1): "Registration of a *valid* title will be the only method of obtaining a real right" (my emphasis). Ironically, this comes close to s 50(2) of the Land Registration etc (Scotland) Act 2012 ("Registration of a valid disposition transfers ownership"), a provision which, in combination with s 49(4), was intended to *abolish* the Midas touch favoured by the 1979 Act. See K G C Reid and G L Gretton, *Land Registration* (2017) para 9.20.

10 Here I use terminology which only became established many years after the passage of the 1979 Act. For an explanation of these and other aspects of the Act, see Reid and Gretton, *Land Registration* (n 9) paras 2.7–2.13.

11 NRS HH41/1430: minute of a meeting between Williamson and Scottish Office solicitors, 31 March 1977 (my emphases). In similar vein, in a memorandum to the Solicitor's Office from 1976 (preserved in NRS HH41/1640) which became the basis of the initial instructions to the draftsman, Williamson wrote (para 1): "The policy on this is that the introduction of registration of title to land should not . . . result in a major change in the substantive law of land tenure. Scots law has long demanded completion of title by public registration. The proposed bill merely changes the method of registration and provides in addition that registration confers a guarantee of validity of title."

12 K G C Reid, "New titles for old" (1984) 29 JLSS 171; K G C Reid, "Registration of title: the draftsman's part" (1984) 29 JLSS 212, esp at 212 and 214; and K G C Reid, "*A non domino* conveyances and the Land Register" 1991 JR 79. These articles also cover a number of other issues.

1977,[13] and the completed instructions were sent to the Lord Advocate's Department on 17 May.[14] By 11 July 1977 a first print of the Bill was available, comprising some 23 clauses.[15] Drafting work continued into the late autumn until it became apparent that the Bill was not, after all, to be introduced during the 1977/78 Parliamentary session. Work on the Bill was resumed in the spring of 1978 and, by the late summer, was once more in full flood.[16] Reading the files, it is hard not to be impressed by the energy and care with which the Bill was prepared. Moreover, its introduction to Parliament, on 23 November 1978, was followed by months of correspondence between the instructing solicitor in Edinburgh (Harry Glover) and the draftsman in London now principally responsible (John McCluskie) as a result of which innumerable further changes were made.[17] To this process significant inputs were made by the Registers, by the Law Society of Scotland, and by other outside bodies.[18] If the ultimate Act was defective, it was certainly not for want of trying.

(2) Bill (not) restricted as to length

A second misapprehension, as it turns out, concerns the length of the Bill. For what has appeared, to later eyes, as reckless brevity, a plausible explanation seemed to lie in the lack of Parliamentary time of a minority Government, headed by Jim Callaghan, which was on the brink of falling. The Bill was short, so the theory went, because nothing longer would have been allowed by the legislative timetable. The files tell a different story.[19] On 24 May 1977 clearance was obtained from the Home and Social Affairs Committee for a Bill of "about 60 clauses", which is twice the length of the eventual Act. Furthermore, by the time the Bill was introduced to Parliament, on 23 November 1978, the autumn election that many had expected had been ruled out,[20] and Parliament was expected to run its full course, that is to say, until October 1979. This would give ample time for the Bill's passage, especially as the Second Reading in the Commons was to be in the Scottish Grand Committee rather than the full House. It is true that, in March 1979, the Government was suddenly in peril when, following the failed referendum on the Scotland Act 1978 and thus the apparent collapse of plans for devolution, the Scottish National Party withdrew the support of its 11 MPs and lodged a motion of no confidence.[21] The

13 The instructions were prepared first by R J C ("Bob") Angus and, from February 1977, by Harry Glover: see NRS HH41/1430. They were based on detailed guidelines prepared the previous year by David Williamson, the Keeper of the Registers, and preserved in part in NRS HH41/1640.

14 See letter by C J Workman to J M Moran dated 17 May 1977: NRS AD63/1363/2. The instructions themselves can be found in NRS AD63/1361/1.

15 NRS HH41/1798.

16 See NRS AD63/1363/3 and HH41/1799. Successive Bill prints can be found in NRS AD63/1363/16.

17 See NRS HH41/2570, HH41/2721, HH41/2722, AD63/1363/4, AD63/1363/5, and AD63/1363/6.

18 There was, for example, extensive correspondence with the Solicitor (Scotland) to the Crown Estate Commissioners in relation to the foreshore.

19 See NRS HH41/1430.

20 The Prime Minister, Jim Callaghan, ruled out the possibility on 7 September 1978. The surprise which this occasioned is well caught by the contemporary account in B Donoughue, *Downing Street Diary Volume 2: With James Callaghan in No 10* (2008) 357–360.

21 E A Cameron, *Impaled upon a Thistle: Scotland since 1880* (2010) 317–319; C Harvie, *No Gods and Precious Few Heroes: Scotland 1900–2015* (4th edn, 2016) 184–186; Donoughue, *Downing Street Diary* (n 20) 453, 457–458 and 464–473. In the referendum, held on 1 March 1979, those in favour of the Act failed to achieve the required threshold of 40%. Subsequent talks between the Government and the SNP having broken down, the no-confidence motion was lodged on 22 March.

Government's defeat on 28 March led to the dissolution of Parliament on 7 April. But this had no effect on the Bill which, by 28 March, had completed virtually all of its Parliamentary stages.[22] In none of this was there any reason for restricting the Bill's length. If the Bill was short, it was short by design and not by necessity.

(3) Henry Report (not) disregarded

A final misapprehension concerns the Henry Report. In Scotland the modern origins of registration of title lie in the reports of two committees – one, chaired by Lord Reid, which examined and approved the principle of registration of title,[23] and a second chaired by the Professor of Conveyancing at Edinburgh University, G L F Henry, which worked out the technical details and produced draft legislation.[24] So far removed is the wording of the 1979 Act from that proposed by the Henry Committee that it has been natural to assume that the Bill team started from scratch and paid scant attention to the Henry Report. This too turns out to be untrue. The original instructions for the Bill make frequent reference to relevant parts of the Henry draft. A table preserved in the files plots the Bill provisions against the equivalent provisions in the Henry Report.[25] And the long correspondence between the instructing solicitor and the draftsman concluded, on 9 April 1979, with the words: "The Bill team at this end join with me in sending our thanks for your help in getting the Henry Report on the statute book."[26] Far from being ignored, the Henry Report was a constant companion throughout the legislative process. Only the professor himself was absent. While both Professor A J McDonald of Dundee University and Robert Sutherland of Glasgow University put forward their views at length,[27] Professor Henry, by now retired but by no means old, appears to have played no part in the enactment of his proposals.[28]

22 All that remained was the Third Reading in the House of Commons, which took place two days later, on 30 March 1979.

23 Registration of Title to Land in Scotland: Report by a Committee Appointed by the Secretary of State for Scotland (Cmnd 2032: 1963).

24 Scheme for the Introduction and Operation of Registration of Title to Land in Scotland: Report by a Committee appointed by the Secretary of State for Scotland (Cmnd 4137: 1969). For further details of both reports, see Reid and Gretton, *Land Registration* (n 9) paras 1.16 and 1.17. See also NRS DD12/602 which records the acceptance of the Reid Report and the appointment of a committee under Professor Henry.

25 See NRS HH41/1799.

26 NRS HH41/2025: letter from H D Glover to J C McCluskie, 9 April 1979.

27 See NRS HH41/2025 (Professor McDonald, 5 March 1979) and AD63/1364/4 (Robert Sutherland, 20 October 1978). To some extent, Sutherland's comments anticipate Gretton's. In the second of two papers ("The Reform of Land Law in Scotland") he attacks the Reid Report for its Anglicising tendencies, for its absence of comparative law, for its preoccupation with the practicalities of registration, and for its failure to give "a central place to the underlying theory of the law, to the primary purpose of land registration as to the constitution of real rights" (19). These comments, too, were disregarded.

28 Professor Henry was born in 1910 and retired as Professor of Conveyancing at Edinburgh University in 1973; he died in 1994. Those who teach law will enjoy, but perhaps not believe, Nicholas Fairbairn MP's account of how he managed to pass Professor Henry's course: see Hansard: HC Deb, Scottish Grand Committee, 15 March 1979, cols 33–34.

C. BENEFICIAL INTEREST

(1) Introduction

The most surprising discovery from the files is, however, something completely different. In the print of the Bill made on 16 November 1978, a week before its introduction to Parliament,[29] a hitherto unknown provision appears as clause 4.[30] Headed "Disclosure of beneficial interests", this provides that, where an applicant for registration is a company or a trustee in a private trust, the application must specify "any person having a beneficial interest in land, and the nature of that beneficial interest". This anticipates by almost 40 years the provisions on registration of controlling interests in land contained in the Land Reform (Scotland) Act 2016.[31] The rest of this essay is an account of the rise, and the eventual fall, of the 1978 provision.

(2) The background

The "Who owns Scotland?" question is not a new one. From at least the early 1960s there had been regular calls for the production of a register listing Scotland's landowners and the amount of land that they owned.[32] The inspiration for this "land register" was the "Return" published by the Government in 1874 and showing, by county and municipal burgh, the names and addresses of those owning land in Scotland of an acre or more, as well as the annual value of the land and its estimated acreage.[33] The exercise had never been repeated.[34] Nor were successive Governments in the 1960s and 1970s inclined to repeat it, partly on the grounds of cost but partly due to a reluctance to make the information available in the first place.[35] In the face of official intransigence, an octogenarian forestry consultant from Blairgowrie called John McEwen decided to compile a register of his own. An interim account of his researches was published in 1975,[36] and the full register appeared in 1977 in the form of a book entitled *Who Owns Scotland?*[37] With some exceptions, it attempted to list the owners of all estates in Scotland of over 1,000 acres.

Neither the compilers of the 1874 Return nor McEwen, a century later, worked

29 The print is dated 16 November 1978. The Bill was introduced to the House of Lords on 23 November 1978.

30 For successive Bill prints, see NRS AD63/1363/14–16.

31 Land Reform (Scotland) Act 2016 ss 39–42.

32 In 1963, for example, this issue was pursued both by a Labour MP, John Rankin, and by the Treasurer of the Scottish National Party: see NRS HH41/1576.

33 Scotland: Owners of Land and Heritages: 1872–73 Return (C 899: 1874).

34 Unknown to the land reformers of the early 1970s, however, an extensive (but unpublished) survey by the Inland Revenue in the second decade of the 20th century identified and mapped the ownership of virtually the whole of Scotland. This was for the purposes of a proposed land tax which, in the event, did not materialise. See A Wightman, *The Poor Had No Lawyers: Who Owns Scotland (and how they got it)?* (2010) 96–97. The existence of the survey was uncovered by *The Press and Journal* newspaper in February 1978.

35 Cost was the official reason given for refusing successive requests for a register. See the Parliamentary questions and the replies recorded in NRS HH41/1692, and also Land Resource Use in Scotland: The Government's Observations on the Report of the Select Committee on Scottish Affairs (Cmnd 5428: 1973) para 39.

36 J McEwen, "Highland landlordism", in G Brown (ed), *The Red Paper on Scotland* (1975) 262.

37 J McEwen, *Who Owns Scotland? A Study in Landownership* (1977). McEwen was born in 1887 and lived until 1992.

from the Register of Sasines. To do so would hardly have been practicable if the task was to be completed within a reasonable time. In 1874 the chosen method of proceeding was a questionnaire addressed to landowners or their agents and supplemented by "inquiries on the spot" by officials.[38] A century later, McEwen, working entirely on his own, relied on a survey of landed estates that had been carried out in the 1960s by a geographer called Roger Millman at the behest of the Countryside Commission. This comprised a series of one-inch OS sheets on which estate boundaries were plotted, together with a card index of those who were believed to be the owners. McEwen added his own estimate of area.[39]

Both surveys fell some way short of perfection. In giving names and acreage, the 1874 Return did not always identify the land in question. For example, the entry for Lord President Inglis attributes to him the ownership of 781 acres but gives as the address his town house (30 Abercromby Place, Edinburgh) rather than the landed estate (Glencorse) to which the acreage actually refers.[40] In the case of McEwen's survey, there were significant errors, especially in respect of owners and acreage.[41]

Nonetheless, the publication of *Who Owns Scotland?*, on 24 October 1977, was a defining moment for the cause of land reform. It spawned newspaper articles, interviews, and television programmes.[42] While some of the data was to be challenged, the overall picture was not. On McEwen's figures, around half of Scotland was owned by 546 individuals or companies;[43] a mere 140 owned half of the Highlands and Islands. Even in remote Westminster, the ownership of land in Scotland came to be seen as an issue that might require attention.

(3) The politics

In the late 1970s the land question attracted a range of views amongst Scottish politicians. McEwen himself attributed the "present degraded, underdeveloped condition" of Scotland's land to "the fact of ownership, in the main, by powerful, selfish, anti-social landlords"[44] and called for "cap-in-hand servile flunkeyism [to be] replaced by dedicated workers reclaiming our desert lands".[45] For Jim Sillars MP the answer lay in the nationalisation of land against payment of (limited) compensation, for "until the people own the land they can never claim to own their own country".[46] The Labour Party, of which both McEwen and Sillars were members, was more cautious, proposing to limit nationalisation, at least for the time being, to land

38 Return (n 33) iii–iv.
39 McEwen, *Who Owns Scotland?* (n 37) 13–16.
40 Return (n 33) 63. On the acquisition and use of Glencorse, see J Crabb Watt, *John Inglis, Lord Justice-General of Scotland: A Memoir* (1893) 320.
41 Wightman, *The Poor Had No Lawyers* (n 34) 98–100. One example was mentioned in the House of Commons during the committee stage of the Land Registration Bill: by mixing up names, McEwen had misattributed the ownership of land to the MP, Sir John Gilmour: see Hansard: HC Deb, First Scottish Standing Committee, 27 March 1979, cols 64–65.
42 See for example the sympathetic coverage in *The Scotsman* (by Neal Ascherson) and *The Glasgow Herald* (by James McKillop) on 25 October 1977.
43 McEwen, *Who Owns Scotland?* (n 37) 88. On McEwen's figures, 546 people owned 9,358,100 acres out of a total acreage for the country of 19,068,807.
44 McEwen, *Who Owns Scotland?* (n 37) 13.
45 McEwen, "Highland landlordism" (n 36) 262.
46 J Sillars, "Land ownership and land nationalisation", in G Brown (ed), *The Red Paper on Scotland* (1975) 254 at 256.

needed for development.[47] The Scottish National Party, in turn, was mainly preoccupied with foreign ownership, which, in the light of well-publicised acquisitions by Dutch and Arab interests, was said to be in danger of taking over the country. The Party's new land policy, launched on 7 November 1977, proposed to restrict the acquisition of agricultural land and forestry to persons who were resident in Scotland and on the electoral roll, or to companies where 80% of the shareholders and share capital were or were held by such persons.[48] In addition, and whatever their other differences, those seeking change were united in a desire for more, and better, information as to landownership patterns in Scotland. Only the Conservative Party, as might be expected, was content with the *status quo*.

Some response from the government of the day could hardly be avoided.[49] At a meeting with officials held on 26 June 1978, the (Labour) Secretary of State for Scotland, Bruce Millan,[50] considered the options.[51] Millan had been singled out for criticism in McEwen's book for maintaining "that a land register of all our landlords . . . is of no value".[52] Such a register could not, of course, be conceded. But, Millan observed, there was a Bill in hand for a new Land Register which, in time, would disclose the ownership of the whole country by reference to the OS map. Might not the Register be adjusted to disclose "beneficial" as well as actual title? If so, buyers (including foreign buyers) would be discouraged from hiding their acquisitions by means of companies and trusts – thus meeting a key demand of the land reformers. Officials were invited to consider further the practicability of this suggestion and, if appropriate, to prepare a legislative provision.

(4) The clause

Following the meeting of 26 June 1978 there was prolonged debate by ministers and officials within the Scottish Office, both as to the merits of Bruce Millan's proposal and as to the details. To the former I will return shortly.[53] As to the latter, a number of questions fell to be determined.[54] For example, should the duty to disclose beneficial interest apply only at the point of application for registration or should there be a continuing duty of disclosure? Should the duty be absolute, or restricted to such information as the applicant had power to obtain?[55] Should nominees be covered as well

47 McEwen, *Who Owns Scotland?* (n 37) 123–124. Judging by a draft paper dated August 1975 and preserved at NRS HH41/1692, the Party's Scottish Executive was more radical, being willing to contemplate the nationalisation of large agricultural and sporting estates.

48 See NRS HH41/1692. The SNP also sought the break-up of large estates by permitting only family-sized farms.

49 Immediate reactions at ministerial and official level can be found in NRS HH41/1692. In the light of a BBC television documentary based on McEwen's book, one of the SHDD members of the Bill team (A T F Oglivie) minuted the other (J Rankin) on 19 October 1977 that "this gives a foretaste of the kind of thing we can expect to hear if our Bill goes ahead", adding that "I think it might be as well to order a copy of Mr McEwen's book via Library".

50 On Bruce Millan, see D Torrance, *The Scottish Secretaries* (2006) 282–290.

51 See NRS HH41/2024: minute by A T F Ogilvie to D J Cowperthwaite, 18 July 1978; submission to ministers by G Mowat, 19 July 1978.

52 McEwen, *Who Owns Scotland?* (n 37) 7.

53 See D(1) below.

54 See NRS HH41/2024.

55 The relevant junior minister, Harry Ewing MP, was strongly opposed to a get-out clause: see NRS HH41/2024: minute, 27 September 1978.

as trustees? In the case of companies, should all shareholdings be disclosed or only those above a certain percentage of share capital? And what should be the threshold area of land to which the duty should apply? In seeking answers to these questions it was necessary to strike a balance between what was desirable in the interests of full disclosure of beneficial interest and what was practicably workable in a system of land registration. As late as 2 October 1978, officials were expressing concern at the lack of firm decisions from ministers, despite an apparent intention to introduce the Bill to Parliament the following month,[56] and it was not until 19 October that the policy was sufficiently settled to prepare and send outline instructions for a clause to the draftsman.[57] By 26 October the draftsman had produced "a first, and very tentative, draft clause", and after some further correspondence and adjustment the clause was included in the Bill print of 16 November as clause 4.[58] This clause has never before been published. The first two subsections read:

(1) Where –

(a) an application is made for registration of an interest in land extending to 2 hectares or more, being the interest of the owner of the *dominium utile* in the land or of the holder of a long lease of the *dominium utile* in the land, and
(b) the person who will, on registration, be entitled to that interest –
(i) is a company; or
(ii) is the trustee of a private trust,

the applicant shall, to the extent that it is within his power to do so, specify in the application any person having a beneficial interest in that interest in land, and the nature of that beneficial interest.

(2) In this section –

(a) references to a person having a beneficial interest –
(i) in relation to a company, are references to any person who is interested in shares comprised in relevant share capital of the company of a nominal value equal to one-tenth or more of the nominal value of that share capital; and
(ii) in relation to a private trust, are references to any beneficiary of that trust;
(b) "relevant share capital" means the issued share capital of a company of a class carrying rights to vote in all circumstances at general meetings of the company;
(c) "company" means an incorporated company (whether a company within the meaning of the Companies Act 1948 or not) and includes an oversea company within the meaning of section 406 of that Act.

Subsection (3) amplified the meaning of being "interested" in shares by applying section 28 of the Companies Act 1967.[59] This imported a declaration that remoteness

56 NRS HH41/2024: minute by J F Rankin to A L Rennie, 2 October 1978.
57 NRS HH41/1799: letter from H D Glover to J C McCluskie, 19 October 1978. Glover wrote "with some hesitation, both because the time is so short and because, consequently, the detail has not yet been worked through as I would have wished".
58 NRS HH41/2026.
59 The suggestion to use company law had come from Bruce Millan himself: see NRS HH41/2024: minute, 2 August 1978.

was not a bar to being "interested", as well as a number of specific rules, including rules extending "interest" (1) in cases where trustees held shares, to the trust beneficiaries (other than discretionary beneficiaries), and (2) in cases where a body corporate held (or was "interested" in) shares, to any person whose directions governed the body corporate or who was entitled to exercise one third or more of the voting power at a general meeting. Finally, subsection (4) made it an offence, punishable by a fine or up to two years' imprisonment, not to provide the information required.

This was a provision designed to impress. All land of two hectares or more was covered;[60] both trustees and companies were subject to the duty of disclosure; and, in the case of companies, the threshold for beneficial interest was a mere 10% of share capital, and not the 25% that officials had urged on ministers[61] and that is found today in the provisions of the Companies Act requiring disclosure of "significant control".[62] Yet, as the framers of clause 4 were well aware,[63] there were also significant shortcomings. Companies applying for registration were bound to disclose their own shareholders (where the 10% threshold was reached) but not, usually, the shareholders in any company that held their shares.[64] Foreign companies were included, at least if they had a place of business within Britain,[65] but it would often be difficult or impossible to monitor the information that they provided. Many nominee shareholdings would remain untouched by clause 4 because companies lacked the power to uncover the underlying "owner".[66] And, finally, even if full and accurate disclosure was made at the time of registration, there was no provision for updating the information when shares changed hands in the future. No doubt the clause was a contribution to overall transparency; but for those wishing to acquire land in secret there would be plenty of ways of continuing to do so. Indeed, it could hardly be otherwise, for the task of tracing all beneficial interest was (and is) evidently a hopeless one.

D. CLAUSE 4: IN OR OUT?

(1) Clause 4 included

A decision to draft a clause was not the same as a decision that the clause should be included in the Bill. It is true that, from the start, the clause had the support of ministers – of Bruce Millan, the Secretary of State for Scotland, and of Harry Ewing,

60 This was tied into the requirement, in what became s 6(1)(a) of the Land Registration (Scotland) Act 1979, for the Keeper to note on the title sheet the area of the land in cases where that area extended to two hectares or more. This provision also was intended as a concession to the land reformers.

61 NRS HH41/2024: submission to ministers, 20 September 1978.

62 Companies Act 2006 s 790C(2),(3) and Sch 1A para 2.

63 See eg NRS HH41/2025: submission to ministers, 23 February 1979.

64 Unless, under s 28(3) of the Companies Act 1967, they controlled at least one third of the voting power.

65 These were the "oversea" companies mentioned in cl 4(2)(c). Such companies were required to lodge certain documentation with the registrar of companies: see Companies Act 1948 ss 406 ff.

66 Only listed companies had this power, under s 27 of the Companies Act 1976. Needless to say, these were not the companies that were being targeted by cl 4.

the junior minister with the relevant responsibilities.[67] But officials were decidedly less enthusiastic about what may have seemed as a merely political measure. In the best of civil service traditions, they assembled the arguments against the clause. It was unnecessary ("Since beneficial ownership and title are in the great majority of cases one and the same thing, it can be said that the Register of Sasines is very effective in providing a public record of the beneficial ownership of land").[68] It was premature (better to wait for the Northfield Committee to report).[69] It was the wrong vehicle (this was a matter for legislation on company law and not on land registration).[70] It was ineffectual (foreign buyers and others would have no difficulty in evading it).[71] It imposed an undue burden on applicants for registration.[72] It imposed an undue burden on the Keeper of the Registers.[73] And it would discourage inward investment.[74] When these arguments made only limited headway,[75] officials contacted their counterparts at the Department of Trade with responsibility for company law,[76] who obliged by identifying "very serious technical objections to your proposals" and doubting "if they can be satisfactorily resolved".[77] Foreign companies were a particular difficulty for, even if they "do know the identity of significant shareholders, they may well not wish to disclose them in Scotland if they are not required to do so in their country of origin. Have you asked Hoffman La Roche if they would comply with these proposals?"[78]

67 Harry Ewing MP was Parliamentary Under Secretary of State responsible for Devolution, Home and Health Affairs.

68 NRS HH41/2024: submission to ministers, 20 September 1978. In the files, beneficial "ownership" is used interchangeably with beneficial "interest". For the sake of George Gretton's blood pressure, the latter term has been preferred in this essay. It seems hardly necessary to add that beneficial "owners" do not actually own the land. Rather they hold part or all of the economic (or beneficial) interest in the person who does. So, and simplifying a little, if land is owned by a company, the beneficial "owners" are the shareholders; if it is owned by a trust, the beneficial "owners" are the trust beneficiaries.

69 NRS HH41/2024: submission to ministers, 19 July 1978. The Northfield Committee did not report until July 1979 which, as it turned out, was after the General Election: see Report of the Committee of Inquiry into the Acquisition and Occupancy of Agricultural Land (1979: Cmnd 7599). At para 442, the Report accepted "that there is genuine concern about the influx of overseas buyers" (it estimated that 1% of agricultural land in the UK was foreign-owned: see para 410), but thought that "it is very difficult to condemn the present scale of foreign ownership on agricultural or economic grounds . . . On large Highland estates overseas purchasers have often been the only buyers on the market." Accepting, however, that "the insecurity of not knowing precisely who owns the land must be unsettling for the communities who live in it" (para 443), the Report called for more and better information as to landownership, and for the noting of beneficial interest on the Land Register (para 29).

70 NRS HH41/2024: submission to ministers, 21 July 1978.

71 NRS HH41/2024: submission to ministers, 19 July 1978.

72 NRS HH41/2024: submission to ministers, 20 September 1978.

73 NRS HH41/2024: note by J F Rankin, 7 July 1978.

74 A point first made by the Department of Trade: see NRS HH41/2024: letter by P A R Brown to A L Rennie, 13 October 1978.

75 The impatience of ministers can be seen from NRS HH/41: minute by Secretary of State, 2 August 1978; minute by Harry Ewing, 27 September 1978.

76 NRS HH41/2024: letter by A L Rennie to P A R Brown, 4 October 1978 ("I thought you might like to have advance notice of these proposals before my Secretary of State seeks the approval of the Home Affairs Committee").

77 NRS HH41/2024: letter by P A R Brown to A L Rennie, 13 October 1978. The gist of this was passed on to ministers in a submission of 16 October 1978.

78 NRS HH41/2024: letter by B Murray to J F Rankin, 18 October 1978.

For ministers, however, the political imperative remained stronger than any purely technical objections. Responding on 16 October 1978 to some of the points that had been made, Bruce Millan emphasised that:[79]

> There is a lot of interest in "Who owns Scotland". Leaving aside the question of beneficial ownership, I am not clear how the new system of registration will help those who want to tot up total ownership of land by any person – whether a foreigner or anyone else . . . Totting-up in this way could of course be made nugatory if we don't make some attempt at solving the beneficial ownership problem.

A meeting was required, Millan continued, in order to finalise views and to assess the Bill as it stood (i.e. without clause 4) for "its political attractiveness". In this lay an implicit threat: the choice might lie between a Bill with clause 4 or no Bill at all.[80] The Queen's Speech, at which the Bill was due to be announced, was only a fortnight away.[81]

The meeting took place on 24 October 1978, and was attended by all relevant parties – by the ministers with policy responsibility (Bruce Millan and Harry Ewing), by both law officers (Ronald King Murray QC MP and Lord McCluskey QC), and by the officials in the Bill team. The result was hardly in doubt: the Bill would proceed with the addition of clause 4.[82]

(2) Clause 4 excluded

The matter was not, however, one for the Scottish Office alone. The new policy would need to be approved by the Home and Social Affairs Committee, chaired by the Home Secretary, Merlyn Rees. Sensing trouble, and short of time, Millan sought to have clause 4 agreed by correspondence. "May I take it", he asked Rees by letter on 14 November, "that if no objections are raised to my proposals by close of play on Thursday [16 November] I can regard them as cleared?"[83] Meanwhile, he had managed to neutralise the threat from the Department of Trade by means of a personal letter to the Secretary of State, Edmund Dell, which emphasised that "there is a very strong feeling in the Party in Scotland about land ownership and the provision I am suggesting is a very modest step in recognition of that feeling".[84] In the event, the opposition came from an unexpected source. Just before Millan's deadline, a letter was sent by the Lord Chancellor, Lord Elwyn Jones, to the Home

79 NRS HH41/2024: minute, 16 October 1978.

80 This may not have been an idle threat. From the start, Millan had been judged by officials to be unenthusiastic about the Bill: see NRS HH41/2024: minute by A T F Ogilvie to D J Cowperthwaite, 18 July 1978. The Lord Advocate took the threat sufficiently seriously to ask his officials for arguments in favour of a Bill shorn of cl 4: see AD63/1363/3: minute by J F Wallace to the Lord Advocate, 24 October 1978.

81 The Queen's Speech was scheduled for 1 November 1978.

82 NRS HH41/2024: note of meeting, 25 October 1978.

83 NRS HH41/2024: letter from Millan to Rees, 14 November 1978.

84 NRS HH41/2024: letter from Millan to Dell, 24 October 1978. Dell's reply, on 3 November 1978, pointed out some of the flaws in cl 4 (e.g. "the obligation could in effect be made almost meaningless by the device of a company setting up a wholly-owned subsidiary to hold the land") but made no objection. As it happens, Dell resigned as Secretary of State for Trade before the meeting of the Home and Social Affairs Committee on 22 November, and was replaced by a Scottish MP and future Labour Party leader, John Smith.

Secretary.[85] This began by expressing "considerable reservations about the merits of including in a conveyancing bill provisions which are designed to alleviate political pressures and are (as Bruce Millan points out) irrelevant to the Bill's main purpose." The Lord Chancellor then came to what was evidently the main point:

> I am also concerned about the possible repercussions for England and Wales. The Bill would introduce into Scotland a system of land registration incorporating most of the principles established for England and Wales by the Land Registration Act 1925. I am anxious lest the proposed new provisions should be treated as a precedent for corresponding legislation south of the border . . . Under English law company share holdings and trust interests are not associated with the legal title to the land . . . The trusts are kept "behind the curtain" of the title.

Scotland, it seemed, could not have what England did not want (or was not to be allowed).[86]

In the light of the Lord Chancellor's opposition, the Home Secretary decided to take the matter to the next meeting of the Home and Social Affairs Committee, which was scheduled for 22 November.[87] As the Bill was due to be introduced to the House of Lords on the following day,[88] it was necessary to prepare two prints, one of which included clause 4 and one of which did not.[89] At the meeting, neither side was willing to concede to the other. The minutes recorded the outcome in this way:[90]

> THE HOME SECRETARY, summing up the discussion, said that the Committee felt that there was a strong case in principle for public access to more comprehensive information about land ownership. Having regard, however, to the possible repercussions for England and Wales at the present time and to the scope for evasion of the provisions proposed by the Secretary of State for Scotland, they agreed that those provisions should not be included in the Bill when it was introduced in the House of Lords. In dealing with any resulting criticism, Ministers would be free to express a sympathetic attitude and to say that the Government were giving thought to the matter, including the technical aspects . . . In the light of these [technical] consultations and of the reactions to the Bill, the Secretary of State would consider whether to seek approval for a Government amendment at an appropriate stage of the Bill's passage through Parliament.

Millan could, and did,[91] claim a victory of sorts. But it was the Bill print without clause 4 that was selected for introduction.

85 NRS HH41/2024: letter from Elwyn Jones to Rees, 16 November 1978.
86 Perhaps conscious of the awkwardness of that argument, the Lord Chancellor concluded his letter by suggesting that the matter might be dealt with by the proposed new Scottish Assembly – and hence, he implied, safely out of the sight of an English audience.
87 NRS HH41/2024: minute from Rees to Millan, 20 November 1978.
88 Millan had brought the introduction of the Bill forward as a means of heading off an attempt at Legislation Committee to have the other Scottish Bill, on Criminal Justice, introduced in the Lords rather than the Commons: see NRS HH41/2024: minute by Secretary of State, 14 November 1978.
89 NRS HH41/2024: minute from A T F Ogilvie to J F Rankin, 21 November 1978; NRS HH41/2026: minute from H Glover to J C McCluskie.
90 NRS HH/41/2025: minutes, Cabinet Office, 22 November 1978.
91 In a contemporary note, his private secretary recorded that "the S of S has told me that at HS today he secured general agreement in principle for the objective of including beneficial ownership in the Bill": see NRS HH/41/2025.

(3) Clause 4 suppressed

Millan had secured the right to bring clause 4 back to the Home and Social Affairs Committee. But, due to concerns about defeat in the House of Lords,[92] an amendment reinstating the clause could not be contemplated until the Bill moved to the House of Commons towards the end of February 1979.[93] In reopening the issue in February, a submission to ministers invited their views as to "whether the proposals on 'beneficial ownership' are judged to be sufficiently attractive, practically and politically, as to justify their inclusion by means of Government amendment to the Bill at Commons Committee stage".[94] The responses to this submission ranged from the unenthusiastic to the hostile. The Lord Advocate (Ronald King Murray QC, MP) thought that clause 4 was "so patently defective that it is not practical politics to table it".[95] The assessment of the Solicitor General (Lord McCluskey QC), battle-weary from the many technical amendments to the Bill during the Committee stage in the Lords, was scathing:[96]

> This Bill is concerned with valuable but technical improvements in connection with title to land: there is not, and never has been, any necessary connection between title and beneficial entitlement. To introduce such a connection in this Bill would be unsound legal policy. It would introduce criminal sanctions which the Bill should avoid.[97] It would be a futile gesture because the provision can be side-stepped with ease: Acts of Parliament should not make futile gestures. In addition, this Bill derives from years of the most careful study and thought by conveyancers and others; it is now welcomed by nearly all[98] and it is long overdue. The proposed new provision derives from ill-researched scare stories: it has not been studied in depth by anyone. It will be opposed by many and the passage of the Bill will be threatened.

Harry Ewing accepted the view of the law officers.[99] Only Bruce Millan wished to keep matters open,[100] though before the end of March he too had abandoned the provision.

By March 1979, therefore, the enthusiasm of the previous summer and autumn had largely disappeared. For this startling change of mind, three reasons may be suggested. First, the political circumstances had changed. A general election could

92 Introducing cl 4 by amendment was thought to be more risky than introducing cl 4 as part of the original Bill: NRS AD63/1363/3: mufax by J F Wallace to A L Rennie, undated but probably in October 1978; NRS HH41/2670: minute by A T F Ogilvie to D J Cowperthwaite, 18 December 1978.

93 The Bill completed its passage in the House of Lords on 15 February 1979.

94 NRS HH41/2025: submission to ministers, 23 February 1979.

95 NRS AD/1363/6: minute on behalf of Lord Advocate, 28 February 1979.

96 NRS HH41/2025: minute of behalf of Solicitor General, 1 March 1979.

97 As the Land Registration etc (Scotland) Act 2012 has not: see s 112.

98 Perhaps, in making the qualification "nearly", he had in mind Mr Gretton, whose letter had arrived a fortnight earlier.

99 NRS AD/1363/6: minute on behalf of Harry Ewing, 5 March 1979.

100 NRS AD/3363/6: minute of behalf of Secretary of State, 13 March 1979. It is worth quoting in full: "I do not think we need to take a final decision about this at the moment. It shouldn't be mentioned by ministers during the Second Reading debate, but in case the matter is raised then, a defensive non-committal note should be provided for use in winding up. We can then take it from there – there may be something put down by a Member at the Committee stage." In the event, such a note seems to have been used by Harry Ewing in winding up: see Hansard: HC Deb, Scottish Grand Committee, 15 March 1979, cols 47–48.

not long be postponed; support among the electorate for the SNP – and hence, to some extent, support for land reform too – was in freefall;[101] and MPs, distracted or perhaps just bored, showed little interest in the Land Registration Bill.[102] Secondly, the deficiencies of clause 4 seemed more serious than before, especially now that the law officers had engaged with the provision and given their views. And finally, the government, unable to muster a Commons majority, fought shy of a provision where controversy was to be expected.[103]

The final scene was played out before a small number of MPs in a committee room in the Palace of Westminster. At the Bill's Committee stage on 27 March 1979, Denis Canavan, a Labour backbencher, sought to introduce a clause requiring the disclosure in applications for registration of beneficial "ownership".[104] In opposing the amendment on behalf of the Government, the Lord Advocate used exactly the same arguments as had been used against ministers by their officials in the previous summer.[105] Canavan's clause was, in fact, brief and unworkable;[106] but that ministers had a better version in their pockets was not mentioned either during the debate or subsequently. Canavan's amendment attracted SNP support, as might be expected, but was voted down with the help of the Conservatives. On the very next day, the SNP voted with the Conservatives to bring the Government down.[107] The result was the general election of 3 May 1979 that brought Margaret Thatcher and the Conservatives to power, and reduced the SNP's representation from 11 MPs to two. A generation was to pass before beneficial ownership re-emerged as a serious political topic.[108]

101 The decline began in 1978 when, in a series of by-elections (Glasgow Garscadden in April, Hamilton in May, and Berwick and East Lothian in October), Labour easily fought off the challenge of the SNP. In the general election in May 1979, the SNP share of the vote was 17.3%, as compared with the 30.4% at the previous election in October 1974.

102 Proceedings were interrupted on two occasions during the Second Reading in the Scottish Grand Committee, on 15 March 1979, because attendance had dropped below the quorum of 17 MPs. At the Committee stage, on 27 March 1979, the First Scottish Standing Committee went through the whole Bill in less than three hours.

103 In a well-informed contribution to *The Scotsman* on 31 January 1979, suggestive of off-the-record briefing, Arnold Kemp described a clause on beneficial interest as "a hot potato for which a Government with a tenuous hold on Parliament is unlikely to find time".

104 Hansard: HC Deb, First Scottish Standing Committee, 27 March 1979, cols 55–63.

105 See D(1) above.

106 There were only two subsections. The first read: "When an application to register an interest in land under section 4 of this Act is made in the name of a person who is not the beneficial owner or its only beneficial owner, then the applicant shall name the beneficial owner or owners". The second made non-compliance an offence. There was no attempt to define "beneficial owner".

107 In the contemptuous phrase of the Prime Minister, Jim Callaghan, this was "the first time in recorded history that turkeys have been known to vote for an early Christmas": see Hansard: HC Deb 28 March 1979, col 471.

108 The idea was first revived by the Land Reform Policy Group which was set up, pre-devolution, by the Labour Government in the late 1990s. After considering various options, the Group concluded that "the various approaches examined to date suggest that it will be difficult, if not impossible, to make . . . legislation effective": see Scottish Executive, *Land Reform: Proposals for Legislation* (SE/1999/1: 1999) paras 6.6 and 6.7. For earlier discussion, see two papers by the Land Reform Policy Group: *Identifying the Solutions* (1998) 39, and *Recommendations for Action* (1999) 9. The issue arose once more during the passage of the Land Registration Bill in 2012 although, as in 1979, no provision was included in the Bill itself: see Scottish Parliament, Economy, Energy and Tourism Committee, *Stage 1 Report on the Land Registration etc (Scotland) Bill* (2012) paras 214–219. Finally, the proposal of the Land Reform Review Group that ownership of land by companies be limited to companies registered in an EU Member State (*The Land of Scotland and the Common Good* (2014) 34–35) led,

E. PROFESSOR GRETTON'S BILL

We began with a letter from Mr Gretton identifying conceptual frailties in what became the Land Registration (Scotland) Act 1979. On account of those frailties, and for other reasons as well, the 1979 Act's life proved unexpectedly short. To George Gretton, Lord President Reid Professor of Law at Edinburgh University and Scottish Law Commissioner, fell the task of preparing the replacement legislation.[109] The result was the Land Registration etc (Scotland) Act 2012, which came into force in 2014.[110] And so it was that, 35 years after Mr Gretton's letter, the new law of land registration came to be based on Professor Gretton's Bill. In a long and distinguished career that is not the least of George's achievements.

indirectly, to the requirements to disclose information as to "controlling interests in owners and tenants of land" in ss 39–42 of the Land Reform (Scotland) Act 2016.

109 This was done by the Scottish Law Commission in its Report on *Land Registration* (Scot Law Com No 222, 2010). George Gretton was the lead Commissioner in the preparation of the Report.

110 For background and analysis, see Reid and Gretton, *Land Registration* (n 9).

"ONCE MORE INTO THE BREACH": A STUDY ON BOUNDARIES

Robert Rennie

A. WHY HAVE BOUNDARY MARKERS

During the US Presidential campaign in 2016 Donald J Trump indicated that one of the first things he would do if elected President would be to build a wall along the boundary between the US and Mexico. He also said that the liability for the cost of the erection of the wall would fall on the Government of Mexico. Presumably it would not be a mutual wall. These statements brought forth ecstatic cheers from those who believe in a concept of "Fortress America" but gasps of horror from those who still believe that America should "bring us your huddled masses". Boundary markers are of course not new. People have been building walls for thousands of years. One thinks of the commissioning of walls by the Roman Emperors Hadrian and Antoninus Pius, and also of the Great Wall of China. These were walls to keep invaders or undesirables out. More recently there have been walls to keep people in. One thinks of the Berlin Wall in particular. There are many other examples of walls or fences being put up to prevent asylum seekers, refugees or economic migrants from entering European countries. Following the vote in the UK to leave the European Union questions of borders have arisen again in Ireland and, possibly at the River Tweed.

Walls, fences, hedges and other enclosures can give rise to incredible levels of emotion. This applies in a private as well as a public or global context. In terms of private rights in relation to land, however, the problems do not usually arise as a result of security considerations but more as a result of the need to assert ownership against encroachers. Inextricably linked to the need to assert defined ownership is the emotive need to defend one's own land. The lengths to which people will go, and the expense they are prepared to incur, to assert a particular boundary line has never ceased to amaze, and, in many cases, depress me.

Since my appointment to the Chair of Conveyancing in the University of Glasgow in 1993 I have given over 400 opinions in relation to boundaries, encroachments and the interpretation of descriptions in both Sasine and land registered titles. I have also delivered a number of lectures on boundaries and descriptions to the profession and have penned two articles both in the *Scots Law Times*.[1] In addition, I have acted as an arbiter and have given opinions following joint submissions by both parties in disputes. I have also acted as a person of skill

1 R Rennie, "Boundary disputes" 2001 SLT (News) 115; R Rennie, "Boundary disputes revisited" 2013 SLT (News) 147.

following judicial references from sheriffs. In none of these cases has my decision or opinion been accepted with equanimity by the disappointed party.

I recall in one case standing in the rain in a converted farmhouse steading development comprising only two houses accessed by a dismal common track. The assembled cast were myself, as arbiter, my clerk (a young associate holding an umbrella over my head as befitted my exalted position), the two feuding couples, and solicitors and counsel for both sides. That made ten people in all. The arbitration had been conducted along very formal lines with submissions, counter-submissions, adjustments and a closed record. The two couples who were parties to the dispute stood aloof from each other in serried ranks. They exchanged no words and plainly had not done so for years. Afterwards we all repaired to a local sheriff court where a large room had been hired for the occasion. I was then addressed by counsel and heard evidence from the parties and their surveyors. At the end of the proceedings what struck me forcibly was that the strip of ground in dispute was smaller in extent than my own office in Glasgow and could not have been worth more in agricultural value than a few hundred pounds. I eventually found (as one has to do) for one side and awarded expenses against the other side. Taking into account my own fees, my clerk's fees and the expenses of solicitors and counsel it must have cost the losing party the best part of £75,000.

B. THE LAND REGISTER: CERTAINTY GUARANTEED?

(1) Introduction

It would, I think, be reasonable to assume that once titles are registered in the Land Register then, subject to the formal process of rectification, there should be limited room for dispute as to the extent of ownership. Oddly, however, my own experience is the reverse. I have had to deal with more boundary disputes where either or both titles are registered than I ever had to deal with in the good old Sasine times. I have pondered endlessly over why this should be the case. It may be that people are less reasonable now than they were in bygone days. It may be that solicitors are less reasonable and more aggressive on behalf of clients than they were. It may also be that solicitors no longer have the confidence or authority to tell a client not to waste time and money on such disputes.

(2) The limitation of scale

A typical description in the property section of a registered title sheet will contain a simple statement to the effect that the land has a postal address and is shown outlined in red on the title or cadastral plan. If the property is a flat then the steading or cadastral unit of the tenement or block of flats in which it is located may be shown outlined in red and the subjects described as lying within the steading, possibly with a postal address or some other information indicating the location of the flat within the tenement or block. In some cases where the previous Sasine titles have indicated that a boundary is taken along a particular feature such as a wall or a fence the Keeper may insert a note in the property section to the effect that a particular boundary is taken along the outside or inner face or the mid line of that

feature. Generally speaking, however the actual feature (wall, fence or hedge) is not named as such; all that is noted is that the boundary runs along a particular line or face. The problem is one of scale.

The scale used for title plans in relation to suburban and urban properties is 1:1250 where 1 mm on the title plan is equivalent to 1.25 metres on the ground. Where the property lies outwith a city such as in a village, a small town or a rural area the scale is 1:2500. Where the subjects are mountain or moorland the scale is 1:10000. It is reckoned that one can scale to 0.23 metres on a 1:1250 map, to 0.46 metres on a 1:2500 map and to 1.83 metres on a 1:10000 map.[2] The outer edge of the red line on the title plan is in most cases (but not all) deemed to be the outer extent of ownership. But in some cases where, for example, the boundary is the middle line of a feature the outer edge of the red line will include the whole of that feature yet the actual legal boundary will be a mid-point on that red line.

The limitations of scale were recognised in one of the exclusions of indemnity under the Land Registration (Scotland) Act 1979. It provided that there was no entitlement to indemnity in respect of loss where the loss arose as a result of any inaccuracy in the delineation of boundary shown in a title sheet, being an inaccuracy that could not have been rectified by reference to the Ordnance map, unless the Keeper had expressly assumed responsibility for the accuracy of that delineation.[3] This exclusion of the right to claim indemnity or compensation[4] has been maintained in the Land Registration etc (Scotland) Act 2012 where it is provided that the Keeper has no liability to pay compensation if the inaccuracy in the Register is consequent upon an error in the cadastral map and that error was made in reasonable reliance upon the base map.[5]

(3) The "or thereby" rule in the Land Register

When surface areas or lineal measurements are given in particular descriptions in Sasine titles they are always qualified by the words "or thereby". The precise meaning of these words in a Sasine context has perhaps never been clear. In many respects, however, that lack of clarity has been something that discouraged boundary disputes rather than encouraged them.

The leading case in relation to the flexibility afforded by the "or thereby" rule is *Hetherington v Galt*.[6] In that case there were two adjacent plots of ground which were described in their respective titles by reference to a plan and by measurements. The lineal measurements however were qualified by the words "or thereby". It was accepted that neither the plan nor the lineal measurements given in the deeds were strictly accurate. In the past the mutual boundary between the two properties had been adjusted and agreed in a verbal agreement between previous proprietors. This had been marked by a line of trees that had been planted at joint expense. As is often the case with trees they grew upwards and outwards.

Mr Galt desired to cut down the trees and his neighbour, Mr Hetherington, raised an action of suspension and interdict. It was maintained by Mr Galt that the trees

2 I Davis and A Rennie (eds), *Registration of Title Practice Book* (2000) para 4.26.
3 Land Registration (Scotland) Act 1979 s 12(3)(d).
4 The 1979 Act used the term "indemnity" and the 2012 Act the term "compensation".
5 Land Registration etc (Scotland) Act 2012 s 78(a).
6 (1905) 7 F 706.

were wholly situated within his property. Mr Hetherington argued that the trees were on the previously agreed boundary. The descriptions in the two original feus[7] contained a surface area, a note of adjoining features and lineal measurements. The lineal measurements were qualified by the words "or thereby". The Lord Ordinary[8] held that the trees were on the line of the boundary and therefore were common property and granted the interdict after a proof. Mr Galt reclaimed. The dispute was between singular successors of the original reasonable parties who had come to the arrangement in relation to the trees. The judges in the Inner House agreed with the Lord Ordinary and refused the appeal.[9] They held that the agreement was binding on singular successors. The words "or thereby" were crucial to the decision. The judges took the view that these words imposed a latitude sufficient to cover minute discrepancies or variations in the actual measurements set out in the deeds. Lord Kyllachy also laid stress on the fact that the trees had been planted by the respective authors of the parties at mutual expense at a time when the feus had been divided and more importantly that the purpose of planting the trees was to denote the boundary line from north to south.[10]

Hetherington v Galt was distinguished in the sheriff court case of *Griffin v Watson*.[11] In that case the gardens of two adjoining properties were separated by a dwarf wall that had been built wholly on one of the properties at the then owner's expense. The neighbour on the other side of the wall then proposed to build a garage and the action was raised when this was in mid-construction. The neighbour wanted to erect the garage wall on the whole width of the dwarf wall. The action was raised by the owner of the ground on which the wall was built for declarator that that the garage would be an encroachment. The other neighbour argued that the dwarf wall was, to the extent of one-half thickness, on each neighbour's ground and offered to restrict construction of the garage wall to the mid-point. The descriptions in the two feu charters contained lineal measurements along the boundaries qualified by the words "or thereby" and *Hetherington v Galt* was relied on by the neighbour.

The sheriff held that the earlier decision depended on its own facts and could be distinguished even although in both cases the deviation was only a matter of inches. He held that the fact that a wall of a *new* building (the garage) was to be erected on the dwarf wall or at the mid-point was sufficient to distinguish the cases. He also took account of the fact that in *Hetherington v Galt* the tree boundary had been in place for a period of more than 20 years after the original agreement, whereas the dwarf wall had only been in existence for little more than two years before the action was raised. It was also pointed out by the sheriff that in *Hetherington v Galt* the parties accepted that the measurements in their deeds were wrong. In contrast, there was no such admission or acceptance in the case before him. He granted the declarator holding that the proposed garage was an encroachment.

It is difficult to see how there can be any "or thereby" rule where titles are registered in the Land Register. There is certainly no statutory provision to that effect. The fact however that there is no indemnity or compensation where loss arises in relation to an inaccuracy in the delineation boundaries or upon an error in

7 The original grants of the land from the feudal superior.
8 Lord Stormonth-Darling.
9 Lord Justice-Clerk Macdonald, Lord Kyllachy and Lord Kincairney.
10 (1905) 7 F 706 at 713.
11 1962 SLT (Sh Ct) 74.

a cadastral map has often been said to import the "or thereby" principle.[12] I do not agree; there is a difference between an exclusion of an entitlement to indemnity or compensation and the correct legal delineation of the line of a boundary. Compensation is paid for the *loss* of a right; the fact that none is payable is not a factor in defining a boundary.

(4) The role of the Keeper

It is, I think, fair to say that for some time the overall policy of the Keeper has been not to become involved with the parties in any type of dispute in relation to title. In particular, the Keeper will not become involved in disputes over possession (in relation to positive prescription and more generally), boundaries and the existence or otherwise of servitudes constituted by implication or positive prescription. This policy of non-involvement has extended to the removal of the pre-registration enquiry function. In relation to boundary questions the Keeper's response is often expressed in the words "the Land Register accurately reflects the deeds submitted to the Keeper".

C. SURVEYORS, MEASUREMENTS AND SCALES

(1) Measurements

Sasine descriptions take many forms. The most comprehensive comprises a statement of the parish and county in which the property is situated, a statement of the surface area, a narrative of the physical boundaries (walls, hedges, roads, rivers, etc), a statement of the lineal measurements along these physical boundaries and a reference to a plan of the subjects annexed and executed as relative to the deed in question. Where the title is registered in the Land Register, however, the verbal description, generally speaking, is contained in a brief narrative in the property section of the title sheet but the extent of the subjects is perilled almost entirely on the title plan.

Where there is a dispute involving a Sasine title or titles that contain all the elements listed above a surveyor will be able to plot the boundaries on the ground and apply the lineal measurements stated in the deed. The surveyor will also (hopefully) be able to identify the plot by means of the plan attached. But this is not always as easy as it sounds and not all Sasine descriptions contain all of these elements. Before land registration was introduced it would, I think, be fair to say that the standard of Sasine descriptions had deteriorated to the point where they only contained a reference to an attached plan. Many Sasine plans also fell into the category of "floating shapes", which could not be accurately identified on the Ordnance Survey Map because there were no surrounding features shown. If the plan in a full particular Sasine description has been drawn up properly then all the other elements of the Sasine description should coincide with that plan. Of course, this does not always happen. There are however certain presumptions which are applied where there are inconsistencies among or between the various elements of

12 See e.g. Davis and Rennie, *Registration of Title Practice Book* (n 2) para 4.26.

the description.[13] One of the presumptions is that measurements (lineal or surface) and plans are generally presumed to be demonstrative rather than taxative. The statement of physical boundary markers was the most important element.

(2) The fixed starting point – disputes between surveyors

It is, I think, safe to say that in every boundary dispute in which I have been asked to provide an opinion or to act as an arbiter or expert, there have been surveyors acting for both sides of the dispute. Surprisingly perhaps they have come to different conclusions about where the precise legal boundary lies. Even where both titles are registered in the Land Register without an apparent overlap surveyors are able to disagree on the precise location of the disputed boundary. The fact that courts have gone behind the Land Register "curtain" and looked at the prior Sasine titles in such cases has of course added further uncertainty. One of the reasons for conflict between surveyors is that different results can be obtained depending on the particular physical starting point from which any measurement is taken. I have known some parties (including surveyors) who will argue that their calculation of where the boundary lies is correct and not only that the disputed boundary fence is in the wrong place, but that the reason for this is that all other 19 plots in the street are out by a half metre. A measurement must start at a fixed point. If surveyors start at different fixed points then they can come to different conclusions.

(3) Scaling

Where a title is registered the property section it does not contain any measurements although there may in some cases be notes that indicate what the boundary features are. If one looks at a registered title plan showing a neat rectangle outlined in red beside another neat rectangle in a row of neat rectangles one would think that there could not possibly be a problem. This rather optimistic view however takes no account of human nature. It is possible to ascertain a lineal measurement by applying the scale on the title plan. Accordingly, some surveyors apply the lineal measurement as scaled to the position on the ground starting at one physical boundary and then arrive at a conclusion on where the boundary between the two properties must be. If the front boundary scales at a particular length then one would assume in the case of the ordinary rectangular plot that the width can be established and the boundary fixed. Alas this has not proved to be the case.

(4) The tolerances

As I have already noted there are certain limitations as to how far a surveyor or indeed any other person can scale the boundary length from the plan of a registered title. The most common scale is that used for urban and suburban properties of 1:1250.[14] A tolerance in relation to the scaling of a lineal boundary is the margin on either side within which it is not possible to state with complete accuracy where the boundary lies. In relation to urban and suburban property the tolerance is plus or

13 These presumptions will be considered later.
14 Where 1 mm on the title plan is equivalent to 1.25 metres on the ground.

minus 0.4 metres. In relation to rural property where the scale is 1:2500 the tolerance is plus or minus 0.9 metres and in the case of mountain and moorland where the scale is 1:10000 the tolerance is plus or minus 3.5 metres.[15] These tolerances are not to be found in any statutory or regulatory provision and, depending on the length of the particular boundary, slightly different tolerances may be appropriate. The Ordnance Survey website states that at the 1:2500 scale for the national grid surveying tolerances are as follows:

(1) Distances up to 200 metres – 1 metre in 100 metres.
(2) Distances of 200 up to 1000 metres – 2 metres.
(3) Distances over 1000 metres – 1 metre in 500 metres.

Applying the 1:10000 scale, the tolerance can be 3.5 metres either way. I have, however, seen it suggested that at that scale the tolerance can be as much as eight metres. Accordingly, a surveyor can only give a report and expert evidence applying the tolerances. It is possible therefore for a surveyor to state with complete honesty and integrity that the boundary that is being insisted upon by one of the proprietors is "within the applicable tolerance". It is obvious that theoretically it would be possible in some cases of a very narrow disputed area for both parties' surveyors to use exactly the same scaling yet disagree on where the wall should be positioned.

D. THE SASINE PRESUMPTIONS

A bounding description in a Sasine title should provide certainty but where the various elements of the description (surface area, physical boundaries, lineal measurements and plan) are inconsistent there can be obvious difficulties. The courts apply various rebuttable presumptions to deal with such inconsistencies.[16] These presumptions may be summarised as follows:

(1) A court will endeavour to ascertain the intention of the parties to the deed containing the description and, to a limited extent, extrinsic evidence can be led including evidence of possession.[17]
(2) Where there is a conflict between (a) physical boundaries narrated in the deed such as walls or fences, and (b) a plan annexed to the deed, and there is a statement of the superficial area, the plan will be preferred if it is consistent with the superficial area.[18]
(3) Where there is a conflict between (a) a physical boundary such as a wall that is referred to in the deed and (b) lineal measurements or a plan, then the physical boundaries will be definitive because the measurements or the plan will be deemed to be demonstrative and not taxative unless it is stated otherwise.[19]

15 The tolerance figures correlate broadly with the scaling figures set out at B(2) above.
16 See J M Halliday, *Conveyancing Law and Practice* (2nd edn, 1997, by I J S Talman) para 33-13; W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, vol 1, 2009) para 3-08.
17 Halliday, *Conveyancing Law and Practice* (n 16).
18 *North British Railways v Moon's Trs* (1879) 6 R 640; *Anderson v Harrold* 1991 SCLR 135.
19 *Fleming v Baird* (1841) 3 D 1015; *Blyth's Trs v Shaw Stewart* (1883) 11 R 99; *Currie v Campbell's Trs* (1888) 16 R 237 at 240; *Drumalbyn Development Trust v Page* 1987 SLT 379; *Rutco Inc v Jamieson* 2004 GWD 30-620.

(4) In some cases where measurements are stated to be taxative[20] then they may overrule a plan where no physical boundaries are given in the verbal description.[21]

These, however, are only presumptions; it is quite clear that cases are decided on the basis of their own facts and it cannot be said that all the cases can all be reconciled.

A recent example of this type of dispute is *Campbell-Gray v Keeper of the Registers of Scotland*.[22] This was an appeal to the Lands Tribunal by the proprietor of three areas of land held on a Sasine title. The neighbouring title was registered in the Land Register and the Sasine proprietor applied to the Keeper to rectify the registered title by excluding certain areas. The land argued over by the parties had been part of an estate. The overlaps were, to a great extent, strips of roadside verge along an access road through the original estate. The verges lay between the registered proprietor's title and the tarmacked carriageway of the access road. The Keeper accepted that two of the disputed strips should not form part of the registered proprietor's title but did not accept that the other disputed areas were incorrectly mapped. The Keeper had been unable to determine an issue of competing assertions of possession, not surprising in relation to a verge. The registered proprietor eventually conceded that part of two of the disputed areas should be excluded from his title.

The Tribunal allowed the appeal so far as the conceded rectification was concerned but otherwise refused it. In relation to the verbal description of the title boundary as "the road" the Tribunal took the view that the term "road" was not necessarily restricted to the tarmac surface. Reference was made to the statutory definition of road.[23] However, the Tribunal indicated that a practical approach to the interpretation of the titles favoured the registered proprietor. In relation to the identical plans referred to in two dispositions the Tribunal took the view that where a coloured line followed a physical feature on the ground the boundary also followed that feature. More importantly, the Tribunal held that the plans were consistent with the verge being excluded from the Sasine proprietor's title. The final conclusion was that it would be unreasonable, taking into account the area and boundary distance, to interpret the plans as showing the boundary as the hard edge of the carriageway and taking the wording, plans and measurements, read consistently, the boundary had been sufficiently precisely identified. On that basis the Sasine proprietor's possession was excluded by the description as a whole.

I think it is fair to take out of this decision that in Sasine terms at least the rule that physical boundary features such as walls, fences and roads which are set out in the deed will, to a large extent, prevail provided of course these boundary features are clear and capable of exact interpretation. In *Luss Estates Co v BP Oil Grangemouth Refinery Ltd*[24] a physical boundary which was stated to be the "seashore" did not overrule the extent shown on a plan because the term "seashore" was itself not capable of precise definition.

20 This is unlikely.
21 *Brown v North British Railway* (1906) 8 F 534.
22 2015 SLT (Lands Tr) 147.
23 See the Roads (Scotland) Act 1984 s 151, in which it is stated that "road" includes verges.
24 1987 SLT 201.

E. THE CASE LAW

One of the issues that has arisen in various litigations involving boundaries is whether or not a title that is registered in the Land Register with no exclusion of indemnity[25] is the final measure of the ownership rights. In theory, at least, under the 1979 Act provisions it was. A registered title of course will always in some way have derived from a previous Sasine title. In some cases, the Sasine title may relate exclusively to the plot in question. In other cases the Sasine title will be of a larger area of which the registered plot forms part. In the former case it is a moot point as to how far a court can or should look at the previous Sasine title with a view to interpretation of the boundaries. One can argue that the whole point of the land registration system is that one cannot go behind the title sheet and look at previous Sasine titles. This is often known as the "curtain" principle. It has been suggested that where a title has been registered it is not competent to part the curtain and look at Sasine titles.[26] Indeed, Professors Reid and Gretton state:

> A temptation in cases like this is to take a peek at the Sasine title. Admittedly, the boundaries must be determined from the Land Register only – except where the details in that Register are deliberately vague (as in tenements) or are being challenged by means of an application for rectification to the Register.[27]

Nevertheless, there have been a number of occasions where the court has parted the curtain and looked at Sasine titles. In *Clydesdale Homes Ltd v Quay*[28] Lord Malcolm in the Outer House found that the title plan in the registered title did not provide the same level of detail as the original Sasine feu plan. The issue was decided in favour of the pursuer, Lord Malcolm preferring the evidence of the pursuer's expert. It was accepted that the fence that was *in situ* had been constructed on the same line as a previous fence, indicating the boundary had always been a certain length and in a certain position.

In *Stuart v Stuart*[29] the sheriff also looked at the previous Sasine title. Rather enigmatically he stated: "Such titles would be irrelevant to the issue of who currently owns any property, but relevant to the line of a disputed boundary."[30] In that case the physical boundary was a row of Leylandii trees. The defender took the rather rash view that the trees were on his own side of the boundary and cut them down. The sheriff held that he was wrong, choosing between conflicting technical evidence of surveyors.

In *Welsh v Keeper of the Registers of Scotland*[31] Mr Welsh had applied to the Keeper. He sought rectification of his title in relation to a boundary. The Keeper refused and Mr Welsh appealed to the Lands Tribunal. His neighbour opposed the appeal. The Tribunal held that the boundary line in the title sheet was not inaccurate where it had been based on boundary lines plotted in a prior disposition that had been granted in relation to neighbouring land on the basis of current physical features and

25 Or Keeper's warranty under the Land Registration etc (Scotland) Act 2012.
26 *See Marshall v Duffy* 2002 GWD 10-318.
27 K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 177.
28 [2009] CSOH 126.
29 27 July 2009, Stonehaven Sheriff Court, unreported.
30 Page 20 of transcript.
31 2010 GWD 23-443.

not on the land as laid out in a 1911 Ordnance Map. Not surprisingly the disputed area was a narrow access track between the two properties and the line of the track had changed over the years. Welsh argued that the boundary was to be determined by the position of the track shown on a 1911 Ordnance Survey Map.

As Professors Gretton and Reid note in their commentary in the case[32] both parties argued for a flexible interpretation of the title situation appealing to the so-called "Hoffmann approach" to the matrix of fact.[33] Taking a very practical view the Tribunal acknowledged that the route of the track had altered since 1911 and that the line in 1962 was different. One might have expected the issue to be decided on the basis of the line of the track at the time the original descriptions were laid down. But the Tribunal concluded in favour of the 1962 line on the basis that it was the intention of the parties in 1962 that mattered.

The court also looked at the Sasine plans in *North Atlantic Salmon Conservation Organisation v Au Bar Pub Ltd*.[34] In that case one of the difficulties was that, although the title was registered, the property was tenemental and so the property section of the title sheet merely indicated that the property was "within" the red line on the title plan. The owners of the pub had arranged tables and chairs outside their establishment at 101 Shandwick Place, Edinburgh. An adjoining proprietor at Rutland Square claimed that the ground had been formerly a piece of stable ground conveyed as common property in 1856. Eventually the sheriff decided the issue in favour of the Rutland Square proprietor by reference to a feuing plan drawn up in 1836 which was followed almost a hundred years later by an agreement between Edinburgh Corporation and the proprietors of Rutland Square.[35]

In *Smith v Crombie*[36] two houses were feued out in the mid-1980s. Each Sasine deed had a verbal description and a plan annexed. Each property was also described as being bounded by the other. The plans were based on the Ordnance Survey Map but both parties agreed that the plans were inaccurate. Neither title had been registered in the Land Register. After a proof the Lord Ordinary found that the "true boundary" was a line drawn from the centre of the existing dividing wall between the houses and that the fence separating the gardens was in the wrong place. His Lordship held that even looking at the Sasine plans the pusuer's title was not *habile* to allow him to acquire the disputed strip by prescription. On this basis, his Lordship held that the defenders' extension was built wholly on their own land and there was no encroachment. This case illustrates another way of looking at boundary disputes, but it is odd in as much as the court simply ignored the Sasine titles substituting a boundary line of its own choosing. This was a boundary dispute that involved an extension and had the decision gone in favour of the other party the question of demolition of the extension would have arisen.

In the *Trustees of the Elliot of Harwood Trust v Feakins*[37] the question related to the thickness of the red line on the title plan in a registered title. As I have already indicated it is normally (but not always) accepted that the legal boundary is the

32 K G C Reid and G L Gretton, *Conveyancing 2010* (2011) 158.
33 Under reference to the judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896.
34 2009 GWD 14-222.
35 See the discussion in Reid and Gretton, *Conveyancing 2009* (n 27) 174–176.
36 2012 GWD 16-331.
37 2013 SLT (Sh Ct) 108.

outer edge of the red line. An error had occurred because the lodge had been variously named Clocker Lodge, The Clocker and Harwood Lodge. By whatever name, it was not meant to be conveyed with the whole estate. The sheriff had to decide first of all whether it had been bought and sold in terms of the missives and, secondly, assuming it had not, whether it had been inaccurately included in the title sheet and therefore whether rectification was possible. The plan attached to the qualified acceptance in the missives was no clearer than the plan attached to the disposition or for that matter the registered title plan. Various witnesses gave evidence including the estate agent and the sellers' solicitor. Mr Feakins' claim was that the lodge was within his registered title. So far as rectification was concerned however the question was whether or not he was a "proprietor in possession".[38] The property was occupied by a liferentrix of sorts.[39] No expert witnesses were called in relation to the interpretation of the various plans. The sheriff held that Mr Feakins was indeed the proprietor in possession.[40]

In *Rivendale v Keeper of the Registers of Scotland*[41] there was an overlap in the Sasine Register. A cottage and ground had been conveyed out of an estate in 1950. There was a later conveyance out of the same estate in 1958 and unfortunately this included part of the garden that had already been conveyed in 1950. The second area was registered in the Land Register in 2007 and the Keeper included the disputed area with no exclusion of indemnity. In 2010 the first property changed hands and the purchaser applied for first registration based on the 1950 Sasine title. Because of the operation of the so-called "Midas Touch"[42] the Keeper had effectively given good title to the owner of the second property. The difficulty that then ensured was that in terms of section 9 of the 1979 Act rectification of the registered title to the second property could normally not take place if it prejudiced a proprietor in possession. There was a complicated and bitter dispute between the parties as to who actually possessed. The front garden of the property conveyed in 1950 was adjacent to an access road. The Keeper refused to rectify and the owner of the 1950 cottage appealed to the Lands Tribunal. The Lands Tribunal in a judgment of Solomon held that part of the disputed land had been possessed but not all of it. Partial rectification was awarded and an appeal to the Inner House seeking full rectification was refused.

F. BOUNDARY AGREEMENTS

I recall that worries were expressed at the time the 1979 Act was passed that there could be pockets of "no man's land" that were left effectively unregistered. These doubts were in the main directed at situations where two adjoining titles appeared not to cohere of or, to use old fashioned language, "run or march with each other".

38 In terms of the Land Registration (Scotland) Act 1979 s 9.

39 The occupier was a Miss Lauder, the former housekeeper of a previous owner of the estate by virtue of a deed registered in the Books of Council and Session but not in the Register of Sasines. Accordingly she had no real right of liferent.

40 See the discussion in R Rennie, "The lodge with three names: *Lubbock v Feakins*" (2012) 16 EdinLR 438.

41 30 October 2013, Lands Tr. For the appeal to the Inner House, see *Rivendale v Clark* 2015 SC 558.

42 See K G C Reid and G L Gretton, *Land Registration* (2017) para 2.13.

One of the solutions to this was section 19 of the 1979 Act, which, when it was in force, allowed parties of adjoining properties to enter into an agreement fixing the boundary between their respective lands where there was "a discrepancy as to the common boundary". The agreement could be registered in the Register of Sasines or in the Land Register. Section 19 was repealed in 2014 when the Land Registration etc (Scotland) Act 2012 fully came into force.

There had been several criticisms of the provision. The first criticism was that section 19 was only meant to apply where there was a "discrepancy" and there was some doubt as to what this actually meant. The second criticism was that the agreement could be used effectively to transfer more significant pieces of land from one proprietor to another where such a transfer should really have been put into effect by disposition. The third criticism was that the agreement bound singular successors and heritable creditors and there was no requirement for a successor or, for that matter, an existing heritable creditor to consent.

While one can accept some of these criticisms there is no doubt in my mind that this type of agreement was useful and indeed was used in relation to boundary disputes. For example, a decision of an arbiter or expert or for that matter a sheriff or a judge on where a boundary lies does not automatically alter the state of the title unless it is a court decision coupled with some form of rectification or declaratory order capable of registration. In many ways section 19 mirrors the outcome in *Hetherington v Galt*[43] where two sensible and reasonable proprietors simply agreed where the boundary should be and planted trees to mark it. Essentially the Court of Session upheld that agreement notwithstanding any arguments on title and, moreover, held that it bound singular successors. It does seem to me that where there is no statutory facility to agree a boundary then there is less incentive to come to an agreement on the boundary. Added to this is the fact that even if the parties do agree a boundary line after a lengthy and bitter dispute there is no mechanism for registering that line and the question arises as to whether such an agreement would actually preclude a further dispute between singular successors.

G. CONCLUSION

I have sometimes wondered whether the interpretation of boundaries and the resolution of boundary disputes were easier when titles were in the Sasine Register. Lawyers advising clients and indeed courts faced with the task of interpreting boundaries and descriptions did at least have the benefit of a reasonably coherent body of principles or presumptions relating to boundaries and boundary features. Professor Halliday devoted a whole chapter to the question of descriptions in Sasines titles;[44] Gordon and Wortley also devote a whole chapter to land and boundaries.[45] Unfortunately, in the case of registered titles there is no coherent body of law or practice or presumptions, far less principles, which apply. It is clear from the individual decisions of courts and the Lands Tribunal that each case is taken very much on its own facts and circumstances. Indeed, it does seem to me that the courts

43 See C.(3) above.
44 Halliday, *Conveyancing Law and Practice* (n 16) ch 33.
45 Gordon and Wortley, *Scottish Land Law* (n 16) ch 3.

and the Tribunal are at pains to find a "solution" that is practical and based on some sort of logical analysis. In some cases the Sasine titles are looked at; in others the evidence of surveyors is crucial.

Strictly speaking, with a Land Registered title the Sasine presumptions that apply where there are apparent contradictions or ambiguities should not apply because they can only be applied to Sasine descriptions. While it might be a pity to come to the conclusion that boundary disputes were easier to resolve in Sasine titles than in Land Registered titles I have found myself coming to that conclusion, albeit reluctantly. I consider that the following, however, can be taken from decisions up to now:

(1) Where there is a dispute between neighbours and a particular physical boundary has been *in situ* for a considerable period of time, say in excess of a period of positive prescription, a court is likely to favour the *status quo* if this can be done within the tolerances of scale.
(2) Courts and the Lands Tribunal are not keen to arrive at a conclusion that might involve the demolition, or part demolition, of an existing building or substantial boundary feature, albeit a court could come to an awkward decision on the line of the boundary and at the same time refuse an order for demolition.[46]
(3) The demeanour of witnesses (including expert witnesses such as surveyors) and the degree of reasonableness with which they support their views in giving evidence is often important.
(4) I have known cases where one neighbour has put forward a proposal to adjust a boundary only to be met with an "all or nothing" response from the other party. It is, I think, fair to say that courts and the Lands Tribunal regard disputes over small areas of ground at a boundary as a waste of judicial time and energy and often support the "reasonable party".

46 *See Anderson v Brattisanni's* 1978 SLT (Notes) 42. While this case was about encroachment by a flue being affixed to another person's wall which had been in place for some time and the court refused to order its removal, a similar approach is likely to be taken for example where a small corner of an extension to a house is actually erected on a neighbour's property.

POWERSHIP AND ITS OBJECTS

*Lionel Smith**

A. INTRODUCTION

George Gretton is the author of many great texts. My focus is on a masterpiece of comparative law and legal analysis: "Ownership and its objects".[1] This article is "a triumph of scholarship".[2] My goal is to try to extend some of George's thinking in that article to another dimension of legal analysis, one that is represented by the analytical contribution of Wesley Hohfeld; in particular, Hohfeld's distinction between rights in a strict or narrow sense, and other juristic relations such as powers. My hope is that this will provide another avenue for discussion of some of the questions that attracted George's attention, particularly in relation to his discussion of security interests.

B. RIGHT AND POWER

There is a tendency to use the word "right" in a wide sense that covers all juristic prerogatives. "I have a right to free speech", "I have a right to sell my house to whomever I wish", "I have a right to practise my profession". Hohfeld's contribution was to attempt to generate a more precise vocabulary.[3] He argued that a right is an ability, with the support of the legal system, to require another person to do or not to do something.[4] On this view, not every juristic prerogative is a right. I do not have a right to practise my profession, because no one is legally obliged towards me in this respect. Hence, according to Hohfeld, there are rights in the strict sense, sometimes called "claim-rights", which are legal prerogatives through which I may demand that

* I thank Robert Stevens and my colleague Alexandra Popovici for their helpful comments; Alexandra joins me in this salute to George Gretton.

1 G Gretton, "Ownership and its objects" (2007) 71 Rabels Zeitschrift 802.

2 To borrow George's own expression in referring to work of the Scottish Law Commission: G Gretton, "Equitable ownership in Scots law?" (2001) 5 EdinLR 73 at 74, n 8.

3 W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (3rd printing, 1964, with new foreword by A L Corbin); original publications: W N Hohfeld, "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 Yale LJ 16; W N Hohfeld, "Fundamental legal conceptions as applied in judicial reasoning – II" (1917) 26 Yale LJ 710.

4 Hohfeld's terminology was adopted in American Law Institute, *Restatement of the Law of Property* (1936), 5 vols. According to § 1: "A right, as the word is used in this Restatement, is a legally enforceable claim of one person against another, that the other shall do a given act or not do a given act."

another person do or refrain from doing something. But there are also privileges, sometimes called liberties, which are legal prerogatives that allow me to do some action: I have a privilege, not a right in the strict sense, to walk on the street or indeed on my own land; and I have a privilege to practise my profession.[5] There are also powers: a power allows a person to change existing legal relationships.[6] I have a power, not a right in the strict sense, to accept a contractual offer and, if I do, the existing legal relationships will change. There are also immunities.[7] "Parliamentary immunity" means, in part, that a Member of Parliament is not subject to the liability that normally arises when a person utters defamatory words. Every Hohfeldian relation has two ends: just as a right in one person corresponds to a duty in another, so a power in one corresponds to a liability in another, an immunity in one corresponds to a disability in another, and (somewhat awkwardly) a privilege in one corresponds to "no-right" in another.

This system has been immensely influential in the common law world, especially in relation to analytical jurisprudence. In the civil law it has not attracted so much attention. One reason is the civilian notion of "subjective right". The adjective "subjective" is used partly because many European languages have a single word for what in English are "law" and "right". To take an example, what is called in English "the law" may be called in French *le droit objectif:* the law, or what is lawful, as it applies to everyone. By contrast, a particular right held by a particular person is called in French *un droit subjectif*. But as it has evolved in legal scholarship, the idea of "subjective right" stands for more than just particularity. It stands for liberty, in the political and not the Hohfeldian sense of the term. The civilian idea of subjective right typically means more than simply a juristic prerogative that allows the holder to demand that another person do, or not do, something. It also imports that the right-holder may so demand *entirely in his or her own interest,* and as he or she sees fit.

In the common law, this is not so obvious. This may be because of the long history of the law of trusts. Common lawyers are used to people holding rights, as well as the associated powers and privileges, but holding them for the benefit of someone else, so that the holder is not free to use the prerogatives in his or her own interest. Whatever the reason, in the common law, "right" carries only the freight with which Hohfeld charged it: the power of one person to force another to do or not to do something. The label says nothing about whether the right-holder holds the right for his or her own benefit, or for that of another. One outcome of the civilian

5 *Restatement* (n 4) § 2: "A privilege, as the word is used in this Restatement, is a legal freedom on the part of one person as against another do a given act or a legal freedom not to do a given act."

6 *Restatement* (n 4) § 3: "A power, as the word is used in this Restatement, is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." The best reading of a Hohfeldian power probably makes it narrower than this. If I punch you, I create a new right or power in you (an extra-contractual claim against me) and a new duty or liability in myself towards you; but punching is probably not usefully considered the exercise of a legal power. A narrower understanding might therefore confine the idea of powers to those that are exercised by juridical acts, in the sense of manifestations of intention that are designed to produce juridical effects. My reading of Hohfeld, *Fundamental Legal Conceptions* (n 3) at 50–60 is that he would have approved of this narrower reading.

7 *Restatement* (n 4) § 4: "An immunity, as the word is used in this Restatement, is a freedom on the part of one person against having a given legal relation altered by a given act or omission to act on the part of another person."

approach is a different terminology from that of Hohfeld. If the word "right" imports that the right-holder can use the prerogative in his or her own interest, then a different label is needed where this is not the case, *even if* the structure and content of the juridical relationship is otherwise identical. Take the case of a person who holds some asset for the benefit of another. The Hohfeldian analysis is that the person holds a right, or rights, and possibly powers and other prerogatives, but (through the addition of fiduciary and other obligations) holds those prerogatives for the benefit of the other.

One civilian analysis, on the contrary, is that the word "right" is definitionally unsuitable here, since an essential characteristic of a right is missing. It is rather like the experience of the BBC writer who found that it was not possible to order a *pizza marinara* with mozzarella, because a *pizza marinara* is made with tomato sauce and garlic and by definition does not have mozzarella. It was, however, possible to order a *pizza margherita* (tomato sauce and mozzarella) with garlic, thus getting to the same destination.[8] This analysis thus leads to the conclusion that another label is needed, and that we should say that this person holds not rights, but powers. This terminology gives very different meanings to "right" and "power" than Hohfeld's system does.[9]

This is one civilian analysis. It is not necessarily the only one. In the Scottish trust, the trustee is understood to holds *rights* in trust, not just powers, even though these rights are not held by the trustee for his or her own benefit.[10] It may therefore be that the Hohfeldian system is available to at least some civilian jurists. In this paper, I follow Hohfeld's terminology, without meaning to suggest that it is universally applicable.

C. THE AMBIGUITY OF "REAL", "PROPRIETARY", "*IN REM*" AND "*ERGA OMNES*"

George's text explores the profoundly ambiguous nature of ownership. One sense makes ownership a real or proprietary right, indeed the most important real right; in this sense, being a real right, it stands apart from all personal rights, and becomes a particular legal relationship between a person and a tangible thing (or, to put this differently, a relationship between and among people that is mediated by a tangible thing). It is one kind of right, albeit a very important one. In this sense of the word, the object of ownership is a tangible thing. Another sense makes ownership the relationship between a person and his or her rights. In this sense, I own my rights, or

8 D Mitzman, "The day I ordered a pizza that 'doesn't exist'", online at http://www.bbc.com/news/magazine-33542392. After interviewing a number of subjects, Mitzman eventually concluded that her original request was semantically comparable to asking for a black coffee with milk. Indeed one interviewee opined that the pizza maker "was wrong to say she would make you a *margherita* with garlic because *margherita* with garlic doesn't exist".

9 For a fuller discussion, see L Smith, "Droit et pouvoir" in A-S Hulin and R Leckey (eds), *L'abnégation en droit civil* (2017).

10 G Gretton, "Trust and Patrimony" in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 182; G Gretton, "Trusts without equity" (2000) 49 ICLQ 599. A similar analysis has been proposed for the French *fiducie*: F Barrière, "The French *fiducie*, or the Chaotic Awakening of a Sleeping Beauty" in L Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (2012) 222 at 236–237.

at least those that are capable of alienation and hence considered patrimonial in one civilian way of thought.[11] Here the object of ownership is a right, or at least it can include a right; in fact, those who say that a right can be owned typically say that a tangible thing can also be owned.[12] This approach means that ownership is not particularly about property law, unless perhaps the law of obligations is only a sub-category of the law of property and the law of property is not particularly about real or proprietary rights but is rather the domain of patrimonial rights. Taken to its logical conclusion, it implies that ownership is not a real or proprietary right;[13] indeed, it is not a right at all, but is rather the relationship between a person and his or her assets. It is a relationship of titularity or "mine-ness".

To say that a patrimonial right is a real or proprietary right, as opposed to a personal right, is to say that it is effective *erga omnes:* against everyone, at least in principle and perhaps subject to exceptions. One source of the ambiguity of "ownership" is that there are two senses in which a right is effective *erga omnes*. If I own a car, I have certain rights (of exclusion, for example) against everyone. If George owes me $50, I have a right against George to be paid $50. But this personal right has some effects *erga omnes,* which is one argument used for a wide-ranging notion of ownership. Everyone else must respect the obligational relationship between George and me; they may be liable for wrongdoing if they interfere with it.[14] But this is quite a different juridical effect. In the first case, the rights I have in relation to the car are the same against everyone. In the second case, only George must pay me $50. What everyone else has to do, or not do, is quite different. They have to obey the general law, which forbids certain interferences with the performance by others of their obligations. The claim for $50 is mine, and that is true against George and against everyone else. But I do not have a claim for $50 against everyone. The *erga omnes* effect of the personal right is quite different.

The same ambiguity can arise in relation to powers. They may or may not be in relation to real or proprietary rights, but when they operate, everyone must respect their operation. I have a power to transfer my ownership of my car (a power in relation to a real right), and I have a power to assign the debt that George owes me (a power in relation to a personal right). I may have a power to create a new real right: by carving a usufruct out of my ownership, or, in the common law, by carving a lesser estate, such as a leasehold estate, out of a fee simple. And I may have a power to create a new personal right, for example by accepting your contractual offer. So too a person may have a power to destroy a real right (by surrendering her usufruct or her leasehold to the owner or fee simple holder), and may have a power to destroy a personal right (by forgiving a debt that is owed to her). In every case, the power operates *erga omnes* in one sense: it works to alter existing legal relationships and, speaking generally, no one can question that. But only in some of these cases does

11 For those who may be unfamiliar with the term "patrimonial rights", it captures all rights with an economic destination, and thus excludes such rights as the right to one's reputation or one's bodily integrity. In the common law, Peter Birks called extra-patrimonial rights "superstructural": P Birks (ed), *English Private Law*, vol 1 (2000) at xxxviii, n 3.

12 This is what Gretton calls the Gaian schema, or Gaianism: Gretton, "Ownership and its objects" (n 1) at 804–805 and *passim*.

13 Gretton, "Ownership and its objects" (n 1) at 813–815.

14 A system could take the distinction between real and personal rights so seriously as to deny any form of civil wrong for interference with other people's obligations. But this is true of neither the common law nor the civil law: Gretton, "Ownership and its objects" (n 1) 813.

the power operate in relation to a real right, a right that itself has effect *erga omnes* in the sense that it is exigible against everyone.[15]

Indeed, Hohfeldian powers do not only operate in relation to rights. A licence is a Hohfeldian privilege: an ability to do lawfully something that, absent the licence, would be unlawful. Some are inherently personal (like a licence to drive or to practise dentistry), but some are transferable (like most licences to use a computer program and, in some cases, a governmental licence to practise commercial fishing or to produce and sell milk). If the licence is transferable, the holder has a power over or in relation to the licence. And there are powers to create powers: if I make you a contractual offer, I create in you a power, namely, a power to bring a contract into existence (and in so doing, I create in myself a liability). You also have the power to destroy the power that you thereby acquire, by rejecting the offer.

D. PROPER SECURITY

My goal in this paper is to use Hohfeld's terminology to probe into some aspects of the law of security interests, and how we can understand the place of those interests within the overall scheme of ownership and other patrimonial rights. By "security interest", I mean any interest in some collateral that exists to secure the performance of an obligation.

Scots law has a wonderful pair of terms: proper security and improper security.[16] In proper security, the debtor acquires or retains the collateral, and the secured creditor holds some separate security interest in the collateral, such as a charge or a hypothec. In improper security, the creditor retains or acquires the full title in the collateral, as opposed to holding some limited interest. An example of the creditor who *retains* full title is the seller who retains ownership until the price is paid. An example of the creditor who *acquires* full title is found in the common law mortgage, or in a case of assignment of debts by way of security; in both, all of the security-giver's rights are transferred as security. If this retention or acquisition were not by

15 Some of this ambiguity emerges in discussions in the common law regarding the nature of a claimant's right in or over the traceable proceeds of some other asset to which the claimant had a claim. Birke Häcker, for example, uses the term "power *in rem*" to refer to "lesser proprietary interests capable of modifying or re-allocating vested rights *in rem*": B Häcker, *Consequences of Impaired Consent Transfers* (2009) 129–130; cf P Birks, *Unjust Enrichment* (2nd edn, 2005) 163. And yet, in some such cases, the asset that the claimant recovers is itself a personal right, like a bank account (e.g. *Jones & Sons (Trustee) v Jones* [1997] Ch 159). What the claimant asserts is not necessarily a right *in rem*, but only that the rights in question – whether *in rem* or *in personam* – are in some sense the claimant's rights. My own view is that in such cases, in the common law, the claimant asserts a trust interest, which in that system is a kind of obligation that is capable of binding successive persons to whom the trust property may be transferred, and that can exist in relation to any kind of patrimonial right held by the trustee, whether *in rem* or *in personam*, and indeed in relation to other juridical prerogatives like powers and privileges: L Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 LQR 338. Hence, in such cases, any power of the claimant is *in rem* not in the sense that it must relate to a right *in rem*, but in the wider sense that everyone is bound to respect its exercise (cf Häcker, 129: "A power is '*in rem*' if it relates to a particular object or asset and is (in principle) exigible against third parties.").

16 Discussion Paper on *Moveable Transactions* (SLC DP, No 151, 2011) xxiv, 43–44. George Gretton was the principal author of this Paper.

way of security, then we would not be in the domain of security. If however the creditor holds full title to the collateral by way of security, this is improper security. As is well known, this situation needs various kinds of policing by the legal system. This is because full title otherwise carries the possibility that the creditor may walk away with more than she was owed and, since the title was held by way of security, this would be problematical.[17]

If we focus on proper security, what does the secured creditor have? It has the right to be paid, or otherwise to have the secured obligation performed.[18] But that is not the security; that is the secured obligation. The security is something accessory to that.

And what is security? Security is some additional legal prerogative or prerogatives over the collateral. In his text, after looking at the objects of ownership, George Gretton also looked at the objects of security: that is, the collateral. The collateral may be a real (proprietary) right or a personal right; it may also be an intellectual right for those who do not see such rights as either real or personal. In other words, it can be any patrimonial right. George rejected the view, often expressed, that a security right held over a personal right belonging to the debtor must be a real or proprietary right because it can be effective against transferees of the collateral.[19] George's scheme makes security a "limited" right, carved out of the debtor's right.[20] If the collateral is a real right, like ownership of land, then the security right will also be a real right. If the collateral is a personal right, like a debt owing to the debtor who uses it as collateral, then the security right will also be a personal right:

> A limited right is less than the right from which it derives. It would be strange, therefore, if it could be real while the primary right was personal. I cut a loaf and I find that my slice is a slice of bread. Since the loaf was bread, what else would I expect?[21]

George adds some terminological detail later.[22] He says that the limited or daughter right has two objects: (i) the mother right and (ii) the object of the mother right. Assume that the debtor owns land, and grants a security right. The objects of the security right are (1) ownership of the land and (2) the land. And we can describe this by saying that the secured creditor holds a security over the right of ownership, and a security in the land.

17 In the common law, such policing includes the equity of redemption in the law of mortgages; for other mechanisms, see L Smith, "Relief against forfeiture: a restatement" (2001) 60 CLJ 178. For discussion of the civil law, with particular reference to Quebec, see M G Bridge et al, "Formalism, functionalism, and understanding the law of secured transactions" (1999) 44 McGill LJ 567 at 654–658.

18 On the question whether, in Scots law, the secured obligation can be other than an obligation to pay money, see G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 128–129. For the Quebec hypothec, see Civil Code of Québec, Art 2687: "A hypothec may be granted to secure any obligation whatever."

19 Gretton, "Ownership and its objects" (n 1) at 838–839. We will return to why Gretton is correct on this point.

20 Gretton, "Ownership and its objects" (n 1) at 832–848; he also sometimes calls it a "daughter" right (at 839, 843). In his scheme, both of these labels apply not only to security but also to other limited rights, such as usufruct, that are understood to be carved out of a greater right (in the case of usufruct, out of ownership).

21 Gretton, "Ownership and its objects" (n 1) at 839.

22 Gretton, "Ownership and its objects" (n 1) at 842–844.

With the greatest respect and affection, I would like to add a nuance and then a suggestion, both derived from my reading of Hohfeld. The nuance is that we should first notice that the collateral need not even be a right. It can consist of other juristic prerogatives. For something to be useful and useable as collateral, it has to be realisable into money. But it need not be a right. A fishing licence is only a privilege, not a right; there may be no fish, and no one is obliged by the licence itself to provide them, or to perform any prestation at all.[23] But it can be used as security in as much as it can be sold.[24] Even a Hohfeldian power could be used as collateral, so long as it was capable of being turned into money.[25] Now where does the bread slice metaphor leave us? If the loaf is not even a right, the slice cannot be a right. And if the loaf is a privilege, I am not sure it follows that the security is itself a subsidiary privilege.

I would suggest that this helps us to see that the core of *proper* security is not a right at all, but rather a set of Hohfeldian powers and privileges; and this, regardless of whether the collateral is a real right, a personal right, or a privilege or a power. What the security holder needs to be able to do is to turn the collateral into money: generally, to sell it.[26] And what the security holder has is an ability to have the debt owing to him paid out of those proceeds, before the debtor or any other creditor can access them. If the debtor's collateral is a loaf of bread, the security is not so much a slice of that loaf as it is the bag in which the loaf is carried.

23 A "prestation" in civilian terminology is that which must be done, or not done, by the one who owes an obligation in order to fulfil the obligation. An obligation always has a prestation, so the absence of a prestation in the fishing licence case shows that there is no obligation, and thus no right in Hohfeld's sense of the word. Of course, if I charge you money to grant you a licence to fish in my pond, I may also give you (expressly or impliedly) a right against me to come on my land. But the licence itself is only a permission, creating no obligation. I could give you such a permission while you were already my guest, without creating in you any patrimonial right (in Hohfeld's sense) against me; that is, without creating in myself any obligation owed to you (this says nothing about your extra-patrimonial rights (n 11)). This gratuitous permission to fish, like the permission to be on my land, could be revoked at any time, for any or no reason. The nature of the licence as a Hohfeldian privilege is perhaps clearer in the case of a governmental licence: it allows one to do what would otherwise be unlawful, but obliges no one.

24 *Saulnier v Royal Bank of Canada* 2008 SCC 58, [2008] 3 SCR 166. The case held that the fishing licence could be collateral under the secured lending legislation, and also that it was "property of the bankrupt" divisible among unsecured creditors in bankruptcy.

25 In *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721, the judgment debtor had created a trust. He was only a discretionary object of the trust, which meant that in that capacity he had no right (but only a hope) to receive any trust property. However, he also held a power of revocation, the exercise of which would make him solely entitled to all of the trust property. It was held that his creditor could execute against the power, effectively requiring the exercise of the power to allow, in turn, execution on what would become a right to the trust property. The power of revocation could presumably have been used as collateral. See also *Clayton v Clayton* [2016] NZSC 29, where the powers of the settlor (creator of the trust) over the trust were so extensive that it was held to be appropriate to treat them as "relationship property" divisible on marriage breakdown, even though (again) the settlor did not have any rights, strictly speaking, to any of the trust property during the life of the trust. Here too, such powers, which were treated as assets available to a creditor, could presumably have been used as collateral.

26 Gretton, "The Concept of Security" (n 18) at 128: "A right in security, when realised, will produce money."

To sell another's asset (whether that asset be a right, privilege or power), you need a Hohfeldian power.[27] Indeed in the common law, this is called the "power" of sale, in relation to both proper and improper security.[28] Whether the sale is carried out privately or through a judicial process, it is still the exercise of a power. Corresponding to the power of sale, the debtor has a Hohfeldian liability, not an obligation: she does not have to do anything, but she is liable to have her rights transferred to a buyer. When the proceeds are received, the creditor is able to pay itself out of them, in priority to the debtor or any other creditor, accounting to the debtor for any surplus. This ability of the creditor to pay itself out of the proceeds is a Hohfeldian privilege.[29] It is not a right, since again the debtor is not under any corresponding obligation to render any prestation in this respect.[30] A privilege is an ability to do lawfully something that, without the privilege, would be unlawful. Normally if I am holding the proceeds of the disposition of another person's asset, it would be unlawful as against that person for me to take some or all of those proceeds in discharge of a debt. Even if the debtor had authorised this, it would probably be unlawful as against other creditors, were I only an unsecured creditor, since it would be an unjustifiable preference. But when I am a secured creditor, I am privileged to do this, against the debtor and unsecured creditors, in relation to the proceeds of my collateral. The privilege runs out when the secured debt is paid; in relation to any surplus, the creditor has a duty and the debtor holds a right, as perhaps do unsecured or lower-ranking secured creditors.

One of the reasons that security interests are called real or *in rem* rights, even when the collateral is a personal right held by the debtor, is that the security may be exercisable against third party transferees from the debtor: the famous *droit de suite*. But I agree with George Gretton that this is a mistake.[31] As we have already seen, this is a version of the same ambiguity that affects the concept of ownership.[32] If I hold security over your rights, I might have the power to sell them in order to pay the debt owing to me. I may hope that this power is not destroyed by your transfer of the rights to another. If I am correct in so hoping, this only means that

27 You also need a Hohfeldian power to sell your own asset. In Quebec it is possible to give someone a real right, like ownership of a house, and to make that right inalienable (though this requires publicity and must be limited in time): Civil Code of Québec, arts 1212–1217. An inalienable right would be useless as collateral, unless there was some way (such as a trust structure) to get around the inalienability, which proves the point.

28 Hohfeld, *Fundamental Legal Conceptions* (n 3) at 53 notes that the power of sale of a pledgee is a power in his terminological scheme.

29 Under the Civil Code of Lower Canada, a creditor's preference or priority in relation to assets of the debtor (as distinct from any power of sale) was indeed called a "privilege".

30 Of course, the debtor is obliged to render the prestation of the secured obligation; but I am not discussing the right of the creditor to the performance of the secured obligation, but rather the specific prerogative of the creditor to pay itself out of the proceeds of the collateral. The debtor does not owe an obligation to pay the secured debt *out of those proceeds;* on the contrary, the debtor is at liberty to perform the secured obligation out of any assets. If the sale of the collateral were made through some judicial process, and the proceeds were held by some official, the creditor would have a right against that official, but this is an extra layer of analysis that does not clarify the relationship between the secured creditor and the debtor. If a simple mandatory or agent were used by the creditor, the creditor would also have rights against that person, but this would not complicate the analysis of the security as such.

31 Gretton, "Ownership and its objects" (n 1) at 838–939.

32 See above at C.

my *power* still exists in relation to those rights. It does not mean that I have *rights* against the world.

The realisation of a security might involve other steps. It may be necessary to give notice to the debtor before exercising a power of sale. In that case, the giving of notice is also a power, one that ultimately creates or perfects the power of sale.[33] If the collateral consists of rights in relation to a tangible thing, the creditor may have a right to take possession of the thing, perhaps only upon default, and perhaps only on the giving of notice.[34] This is a Hohfeldian right, with the debtor having a duty to surrender possession. But in a way, this right is only accessory to the power of sale. What buyer will pay full price for the debtor's rights if he, the buyer, has to look forward to the need to take some legal proceeding to get possession of the thing in question? In proper security, the creditor does not have the right to take *and retain* possession. Generally, he takes possession in order to sell.[35]

Other enforcement measures also operate through Hohfeldian powers. In the case of a hypothec, Quebec law allows the possibility of "taking in payment", which means that the creditor acquires the collateral in extinction of the debt.[36] Both the debtor and later-ranking creditors are protected against abuse of this recourse, but subject to that control, it is a power that the creditor holds, to acquire the collateral.[37] The hypothecary creditor might also have the power to administer the collateral, in order to generate revenues to be used in paying the secured debt. An example is a hypothec over an immovable with commercial tenants; the

33 In a rather civilian way, the English law of mortgages distinguishes between when the power of sale "arises", and when it is "properly exercisable": L Smith, "Security" in A Burrows (ed), *English Private Law* (3rd edn, 2013) 307 at 325–326. Notice may be necessary to make the power properly exercisable. If it is exercised when it has arisen, but before it is properly exercisable, the purchaser will generally take a good title, while the mortgagee may be liable to the mortgagor for improper exercise of the power.

34 It is a curious feature of the common law of mortgages that the mortgagee can take possession without the need for default, although this may be modified by statute or contract: Smith, "Security" (n 33) at 322. But a common law mortgage is an improper security. Even in its modern English form of a "charge by way of legal mortgage", when it is created by a freeholder its incidents are those that would be created by the grant of a 3,000-year lease by way of security: Smith, "Security" (n 33) at 310; Law of Property Act 1925 s 87(1).

35 Robert Stevens argues that in the case of the common law's fixed charge, which allows the debtor to be in possession of the collateral, the creditor holds a Hohfeldian right against the debtor, that the debtor retain and not alienate the security: R Stevens, "Contractual Aspects of Debt Financing" in D Prentice and A Reisberg (eds), *Corporate Finance Law in the UK and EU* (2011) 213 at 216. This may be true, but I wonder whether that right is a creature of contract, rather than a necessary feature of security. Stevens acknowledges that it is not a feature of securities which permit the debtor to alienate the collateral in the ordinary course of business, such as the floating charge and the Quebec hypothec of a universality (Civil Code of Québec, art 2674). Indeed, in Quebec hypothecs generally, the debtor's Hohfeldian power to alienate the collateral is specifically preserved (Civil Code of Québec, art 2733, without affecting the "rights" of the creditor). The Quebec hypothecary creditor does have a Hohfeldian right against the debtor that the debtor not cause extraordinary devaluation to the collateral (art 2734); but such conduct would in any event border on bad faith.

36 Civil Code of Québec, arts 2778–2783.

37 Civil Code of Québec, arts 2773–2777. Once this step is taken, the creditor will have a right to possession, but this is not held as a security; it is a consequence of the exercise of the power to take in payment, which brings the security to an end and leaves the creditor holding the collateral absolutely.

creditor administers it to receive the rents. Again, this is only a power: a power to deal with the debtor's property, and a power to give discharges to the tenants even though it is the hypothecary debtor who is the creditor of those tenants. This power is coupled with the same privilege that was described earlier: the hypothecary creditor has the ability to pay itself out of the proceeds of the debtor's asset. In Quebec law, it may also be coupled with a right, namely a right to take possession. But as with the power of sale, this is not juridically necessary to make the security work; it is added to make the creditor's powers more apt to extract the true value of the collateral.

Consider finally the pledge or pawn. It may include a power of sale. It certainly entitles the pledgee to retain possession or detention of the pledgor's thing until the debt is paid.[38] We may speak of a "right" to retain possession against the pledgor, and use the same expression in relation to one who holds a lien.[39] But again, this is a Hohfeldian privilege: the pledgee cannot extract any prestation from the pledgor, but is at liberty to do what would otherwise be unlawful: namely, to retain the pledge regardless of the wishes of the pledgor.[40]

E. CONCLUSION

Proper security is mainly about powers and privileges, not rights. It is these powers and privileges that improve the position of the secured creditor in relation to the secured debt – which itself is, of course, a right of the creditor.

It may be that the object of a real right is a tangible thing, while the object of a personal right is a prestation or performance.[41] I am not sure: tangible things do not line up well with abstract ideas like prestation, and moreover, even real rights have corresponding duties that could be said to have prestations. I think these are two different senses of the idea of "object". To say that a tangible thing is the object of a right of ownership is to say that the ownership is of, or over, that thing. To say that the object of a personal right is a presentation is to describe what must be done to fulfil the obligation. Those are different ideas. The first points to the thing on which the right bears (without addressing the content of the right); the second specifies the content of the right.

When we ask what are the objects of powers, we are confronted with this ambiguity, and also with another. As we have seen, there are at least two senses in which a power can operate *in rem* or *erga omnes*. First, it may operate in relation to real or proprietary rights; secondly, even if it only operates in relation to personal rights, or in relation to powers or privileges, the operation that it has works against everyone. It is the second sense, not the first, that gives a

38 In Quebec, as in many civilian systems, possession is the appropriate label only in relation to a person who holds for himself (Civil Code of Québec, art 921). Detention is the appropriate label where a person controls a thing but acknowledges the superior right of another (ibid).

39 As I have myself, in the context of the lien in the common law: Smith, "Security" (n 33) at 335. I note with sympathy George's observation that the Scots law of lien is "a conceptual guddle" (Gretton, "The Concept of Security" (n 14) at 145) and his suggestion (at 144) that "[i]ts English origin explains its chaotic state."

40 Hohfeld, *Fundamental Legal Conceptions* (n 3) at 89 identifies the lien-holder's ability to retain possession as a privilege within his terminological scheme.

41 Gretton, "Ownership and its objects" (n 1) at 841–842.

kind of "*in rem*" effect to a security over personal claims belonging to the debtor: that security allows the secured creditor to take the value of the collateral ahead of the debtor, and if the security is perfected, also ahead of any person to whom the debtor transferred the collateral, and ahead of the undefined mass of other creditors of the debtor. The exercise of this security may change the legal situation of the debtor, and perhaps of a person to whom the debtor transferred the collateral.[42] It does not directly change the *legal* situation of each member of the mass of creditors, but it changes their *factual* situation for the worse.[43] In this looser sense, a power can be said to operate *in rem*, or perhaps better, *erga omnes*, regardless of whether its object is a right *in personam* or *in rem* or is not a right at all. In the narrower sense, a power may be called real, proprietary, or *in rem* where it operates with respect to rights that are themselves real, proprietary, or *in rem*.[44]

The combination of these ambiguities makes it difficult to say what is the object of a power. If it is a power to transfer or even to eliminate some right *in rem*, then we might say that the object of the power is the object of the right. In other words, if I hold ownership of land, and you, as my hypothecary creditor, have a power to transfer my ownership of the land, we might say that the object of your power is the land.[45]

But it is only a subset of powers that relate to rights *in rem*. Many of them relate to other prerogatives, such as rights *in personam*, or to privileges or other powers. Moreover, as we have seen, these powers can have important *erga omnes* effects, so much so that they are often called "rights *in rem*" even though this is misleading. What are the objects of such powers? Now we can think of the other sense of "object", the sense in which the object of a right *in personam* is the prestation that the debtor must perform. It is, in a sense, the content of the right. A power is "an ability on the part of a person to produce a change in a given legal relation".[46] It is perhaps fitting to say that the object of a power is the juridical relationship that the power is apt to change. That relationship can be a right (*in rem* or *in personam*), but it can also be a privilege or an immunity or even another power. The change

42 This is because it allows the secured creditor to take the proceeds in priority, which would otherwise not be possible. The secured creditor's privilege diminishes what would otherwise be the rights of the debtor or his transferee.

43 What I mean is that it does not affect directly the rights of the other creditors; what it does is diminish the assets of the debtor, which diminishes the prospects of other creditors for the successful recovery of their (legally unchanged) claims.

44 For rights, Hohfeld rejected "*in personam*" and "*in rem*" in favour of "paucital" and "multital" (Hohfeld, *Fundamtal Legal Conceptions* (n 3) at 72ff), and he was willing to apply these labels to all of his jural relations (71). A multital power would thus be one that directly changed the *legal* position of an undefined class of persons. This would be true of any power to create, transfer or destroy a multital right, or indeed any power to create, transfer or destroy a multital power, privilege or immunity: since the multital rights, powers, privileges and immunities operate in relation to an undefined class of persons, so too do changes to them. For an important critique of Hohfeld in this respect, see however F H Lawson, "Rights and Other Relations In Rem" in E von Caemmerer et al (eds), *Festschrift für Martin Wolff* (1952) 103.

45 This might even be true if the power is a power to *create* a right *in rem*, such as the power of an owner of land to create a usufruct. In that case, it is curious to see that the object of the power (the land) is not for the time being itself the object of the posited right (the usufruct), since the right does not yet exist. Conversely, when the usufruct is created, the power will no longer exist.

46 See n 6 above.

itself can be creation, modification, or destruction.[47] In other words, speaking generally, the objects of powers are legal relationships (of all kinds) between persons.

George Gretton's scholarship has taken all of us forward in understanding not only security in its many manifestations, not only ownership and its objects, not only trusts and property law more generally, but also the lexical and conceptual ambiguities that lie behind our most everyday legal terms. Of all the many compliments that I would like to pay him, let me close with this one: every time I reread one of his texts, I find something new to think about. And that is a sign of the very best scholarship.

47 Again, in the case of a power to create a legal relationship (such as an offeree's power to create a contract, by accepting the offer), this suggests that the object of the power is something that does not yet exist.

GEORGE GRETTON AND THE SCOTS LAW OF RIGHTS IN SECURITY

*Andrew J M Steven**

A. INTRODUCTION

It is a measure of George Gretton's contribution to legal scholarship that this essay begins by defining its scope to exclude areas of rights in security law where an assessment of that contribution is equally merited. I have chosen to limit my study principally to the law of proprietary security,[1] in other words, the law of security over assets. This was the subject matter of my doctorate[2] and George was one of my supervisors. It is also the area in which I have principally worked as a Scottish Law Commissioner, with George as my predecessor.

Nevertheless, the term "rights in security" in the wider sense includes personal security (caution),[3] a subject with which George notably engaged following the decision of the House of Lords in *Smith v Bank of Scotland*.[4] And the law of proprietary security itself can be divided into (1) express; (2) tacit; and (3) judicial security.[5] George's contribution to the law in relation to the third of these, otherwise known as "diligence", has been the most significant since that of Graham Stewart.[6] It was also the subject of his first monograph.[7] For the most part, however, diligence is beyond my scope.

I begin by considering the state of the Scots law of proprietary security prior to George starting to write in this area. There then comes a broad overview of his

* I am grateful to Alisdair MacPherson and Professor Hector MacQueen for comments on an earlier draft.

1 I use the term "proprietary security" as "real security" is arguably restricted to rights in security whether the creditor has a subordinate right in the property. The scope of this essay is wider and includes, for example, retention of title. No allusion to English law terminology is intended.

2 A J M Steven, *Pledge and Lien* (2008).

3 See W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable, including Cautionary Obligations* (1897).

4 1997 SC (HL) 111. See G L Gretton, "Sexually transmitted debt" 1997 SLT (News) 195; G L Gretton, "Good news for bankers – bad news for lawyers" 1999 SLT (News) 3; and G L Gretton, "Sexually transmitted debt" 1999 TSAR 419. The subject of "cautionary wives" also featured in George's contribution to the annual Reid and Gretton volumes on Conveyancing over several years.

5 See G L Gretton, "The Concept of Security" in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 126 at 140–142. And see, similarly, Bell, *Comm* II, 10.

6 J Graham Stewart, *A Treatise on the Law of Diligence* (1898).

7 G L Gretton, *The Law of Inhibition and Adjudication* (1987). A second edition appeared in 1996.

scholarly impact and approach. This is followed by a review of two areas with which he is particularly associated: retention of title and floating charges. The penultimate section discusses George's contribution to reform, prior to the conclusion.

B. PRE-GRETTON

Like other areas of private law, the law of rights in security (both in its wider and narrower senses) was treated by the institutional writers.[8] The contribution of the last of these, Bell,[9] was particularly significant because by the time he wrote in the early nineteenth century, commercial law was establishing itself as a subject in its own right. Bell held the Chair of Scots Law at Edinburgh.[10] But in the period between the institutional writers and George Gretton, it was two professors in the University of Glasgow who made the most significant contributions to this area.

The first was William Murray Gloag (1865–1934). Gloag was Regius Professor at Glasgow from 1905 until his death.[11] He was responsible for the proprietary security part of the magisterial *Law of Rights in Security* of 1897, co-written with James Maxwell Irvine (1862–1945).[12] It remains the leading treatise in the area. But Gloag wrote at a time when property law in Scotland was notoriously in a parlous state. This is evidenced by his suggestion that the right held by a pledgee might be described using the English term "special property"[13] rather than "real right".[14] Today, Gloag is primarily remembered for his contribution to contract law[15] and an emphasis on contract law can be seen in his work on security rights.[16]

The second scholar was John Menzies Halliday (1909–88). Jack Halliday was Professor of Conveyancing at Glasgow from 1955 to 1979. As was the pattern with conveyancing chairs, the appointment was held part-time and combined with a career in practice. Halliday sat on the committee that recommended the introduction of the floating charge to Scotland.[17] He served as a Law Commissioner and was the

8 E.g. Stair, *Inst* 1.13.11–16, Bankton, *Inst* 1.27, Erskine, *Inst* 3.1.33.

9 Another George. See Bell, *Comm* II, 19–24 and Bell, *Prin* §§ 203–209 and 1362–1454.

10 From 1822 to 1843. See K G C Reid, "From text-book to book of authority: the *Principles* of George Joseph Bell" (2011) 15 EdinLR 6 at 7–9.

11 See J Chalmers, "Resorting to Crime" in R G Anderson, J Chalmers and J MacLeod (eds), *Glasgow Tercentenary Essays: 300 Years of the School of Law* (2014) 70 at 83–84.

12 Gloag and Irvine, *Law of Rights in Security* (n 3). See A J M Steven, "One hundred years of Gloag and Irvine" 1997 JR 314. See too Gloag's titles on "Blank Transfer" in J L Wark and A C Black (eds) *Encyclopaedia of the Laws of Scotland* vol 2 (1927); "Heritable Securities" vol 7 (1929); "Hypothec" and "Lien" vol 9 (1930); "Pledge" vol 11 (1931); and on "Retention" and "Securities" vol 13 (1932).

13 Gloag and Irvine, *Law of Rights in Security* (n 3) 200.

14 Although note the later W M Gloag, *Law of Contract* (2nd edn, 1929) 14–15 and Gloag, "Pledge" (n 12) para 754: "The term 'special property', used in English law to denote the right invested in a pledgee, is unknown to the law of Scotland." And at para 755: "As long as the security rests on mere contract . . . the creditor . . . has no real right over the subject".

15 See Gloag, *Law of Contract* (n 14).

16 E.g. Gloag and Irvine, *Law of Rights in Security* (n 3) at 2–3 where it is stated that the book is limited to "contractual rights in security". That said it covers tacit security rights such as the landlord's hypothec and lien.

17 Eighth Report of the Law Reform Committee for Scotland (Cmnd 1017: 1960). He was co-opted to the committee when the project was expanded from moveables to include heritable property.

architect of the legislation on standard securities,[18] which was a very significant reform of the law of security over land. He produced the standard text on that legislation, as well as a multi-volume work on conveyancing.[19]

Jack Halliday's twilight and George Gretton's academic blossoming coincided. In an article published shortly before Jack Halliday's death, George described him as "the grand old man of Scots conveyancing".[20] Earlier, there had been skirmishes between them on the nature of *ex facie* absolute dispositions[21] and on the ranking of heritable securities.[22] While both state their views firmly, there is clearly expressed mutual respect.[23] But probably their best-remembered interaction was on floating charges.[24] An article published by George in the *Scots Law Times*[25] criticising the lack of conceptual foundations of the legislation introducing this security to Scotland, its failure to integrate with Scots property law and the problems that this was causing for the courts prompted Jack Halliday to write to the editor. He replied that the approach taken probably better allowed justice to be achieved in individual cases "than would have resulted from an ab ante attempt by parliamentary draftsmen to provide for all possible problems of integration".[26] He concluded: "If I may quote a relevant testimonial from one of my Glasgow clients of many years ago: 'Judges are no' daft'." My view, as we shall see later,[27] is that subsequent events have vindicated George's position. Clear concepts are crucial in property law, something that Jack Halliday is said to have emphasised with students: "In his teaching, he stressed principles, and the importance of real rights for the security of dealings in property."[28] This statement is more true still of George Gretton.

In summary, whereas it might be said that Gloag approached security rights from the perspective of contract law, and Halliday's perspective was that of legal

18 Conveyancing and Feudal Reform (Scotland) Act 1970 Part II.

19 J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (1970). A second edition appeared in 1977. And see J M Halliday, *Conveyancing Law and Practice* (4 vols) (1985–90). A second edition, edited by Iain Talman, appeared in 1995–96.

20 G L Gretton, "Debt factoring and floating charges (Scotland)" 1987 JBL 390, n 4.

21 G L Gretton, "*Ex facie* absolute dispositions and their discharge: exhumation" (1979) 24 JLSS 462; J M Halliday, "*Ex facie* absolute dispositions and their discharge: post-exhumation" (1980) 25 JLSS 24 and the letter by G L Gretton published at (1980) 25 JLSS 139.

22 See G L Gretton, "Ranking of heritable creditors: interpretations" (1980) 25 JLSS 275; J M Halliday, "Ranking of heritable creditors: a matter of interpretation" (1981) 26 JLSS 26 and G L Gretton, "Ranking of heritable creditors: a reply to a reply" (1981) 26 JLSS 280.

23 E.g. Jack Halliday ((1981) 26 JLSS 26 at 31) describes George's article on ranking as "excellent and thought-provoking" stating that he (Halliday) is indebted to him. George replies ((1981) 31 JLSS 280 at 282) that "the compliments should all be the other way". Mutual respect is a theme to which George returned in "A sermon on missives: the Gospel according to St Matthew, chapter 7, verse 12" (1989) 34 JLSS 19.

24 On which see R B Jack, "The Coming of the Floating Charge to Scotland: an Account and an Assessment" in Cusine (ed), *A Scots Conveyancing Miscellany* 33–46. Professor Jack (at 40) uncharitably describes George's criticisms as "Dreyfus-like", a reference to the French political scandal in which Captain Alfred Dreyfus was wrongfully convicted of treason in 1894.

25 G L Gretton, "What went wrong with floating charges" 1984 SLT (News) 172. A revised version of this article was published as G L Gretton, "Floating charges: The Scottish experience" 1984 JBL 255.

26 "Letter to the Editor" 1984 SLT (News) 190.

27 See E below.

28 D M Walker, "Jack Halliday: the Man and his Work" in Cusine (ed), *A Scots Conveyancing Miscellany* (n 5) 1 at 3.

practice and conveyancing, there is, however, a need for security rights to be approached from the perspective of property law. Enter George Lidderdale Gretton.

C. SCHOLARLY IMPACT AND APPROACH

(1) Overview

One of George's earliest law publications was "Security over Moveables without Loss of Possession". Published in the *Scots Law Times* in 1978,[29] it begins in his now familiar style: "There is a widely accepted belief that a security over moveable property can subsist only as long as the property secured is in the possession of the creditor." He goes on to debunk this by demonstrating that a quasi-security over corporeal moveables can be created by sale and leaseback, provided that there is delivery to the creditor, which can be immediately followed by redelivery.[30] Thus the correct position is that while delivery is required, ongoing possession is not. The fact that parties have to go through such steps because Scots law is so restrictive as to security over moveables is a subject to which George was to return later as a Law Commissioner.[31]

Over the decades since that article was published, George's contribution to the literature on the Scots law of proprietary security has been immense. In the late 1970s and the entirety of the 1980s it is noticeable that almost all his articles (on all subjects) were published in only four journals: the *Scots Law Times*, the *Journal of the Law Society of Scotland*, the *Juridical Review* and the *Journal of Business Law*.[32] The majority were published in the first two of these, which are primarily read by the legal profession in Scotland. Today it is unthinkable that an academic in a Scottish Law School would publish mainly in professional journals. It is equally unthinkable that the *Journal of the Law Society of Scotland* would now publish an article like George's 1978 piece on ranking of heritable creditors mentioned above, which led to the debate with Jack Halliday.[33]

During the initial decade or so of activity, particularly strong themes were heritable securities[34] and retention of title clauses,[35] as well as the start of the campaign against floating charges.[36] In 1987 his influential "The Concept of

29 1978 SLT (News) 107.

30 Delivery is needed because of s 62(4) of the Sale of Goods Act 1979 (formerly s 61(4) of the Sale of Goods Act 1893) which disapplies the Act for sales acting as securities. See also Gretton, "The Concept of Security" (n 5) at 135–138. But cf Gloag, "Pledge" (n 12) para 754.

31 See F below.

32 See the Bibliography at the end of this volume. George was Scottish editor of the *Journal of Business Law* from 1983 to 1999.

33 G L Gretton, "Ranking of heritable creditors: interpretations" (n 22). This includes complex ranking arithmetic.

34 As well as the articles on *ex facie* absolute dispositions and ranking mentioned above (nn 20 and 21) see G L Gretton, "Inhibitions, securities, reductions and multiplepoindings" (1982) 27 JLSS 13 and 68; G L Gretton, "Inhibitions and securities for future advances" (1983) 28 JLSS 495; and the magisterial G L Gretton, "Radical rights and radical wrongs: a study in the law of trusts, securities and insolvency" 1986 JR 51 and 192.

35 See D below.

36 See E below.

Security" was published in the *Festschrift* for Jack Halliday.[37] A theme of that essay is one to which he has frequently returned elsewhere: the difference between (1) a security right in the strict sense of that term (a real right in the property of another), which is now often termed a "true" or "proper" security; and (2) functional or "improper" security.

The 1990s saw the connections of Scottish private lawyers with South Africa being re-established following the end of apartheid, as well as increasing collaboration with scholars in continental Europe. The development of the internet and digital communication assisted internationalisation, as well as revolutionising legal research. All of this was to impact on George's scholarship.[38] And then of course there was the *Sharp v Thomson* saga[39] and the start of the annual conveyancing roadshows with Kenneth Reid, in which George gives his yearly assessment of new case law on standard securities and which he dubs "Carry on Conveyancing".[40] Another important development was the founding of the *Edinburgh Law Review* in 1996, a journal to which George has contributed frequently on security rights and other matters.[41]

A new theme in the 2000s was the impact of human rights on private law. Again George was quick to engage.[42] Recent years have seen George writing on the subject of reform of the law of security rights, linking to his role as a Scottish Law Commissioner working on moveable transactions law.[43] One of his latest publications, in the memorial volume to Professor Angelo Forte, considers ship mortgages as well as other property law aspects of ships.[44] Reinhard Zimmermann and Johann Dieckmann have commented that "The largest hole in modern Scottish [legal] literature gapes in the area of security."[45] Without George's contribution over the last 40 years that hole would be immeasurably larger.

(2) Reliance on publications in court

In the field of proprietary security, it is George's work on standard securities that has principally been cited to and by the courts. The treatment of this type of security in

37 Gretton, "The Concept of Security" (n 5). On this see the contribution by John MacLeod to this volume at 177–193.

38 See e.g. P Nienaber and G Gretton, "Assignation/Cession" in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 787–818 and G L Gretton, "Scots law in shock: real rights and equitable interests" (1999) 6 European Review of Private Law 403.

39 See E below.

40 The roadshows began with "What happened in Conveyancing? 1991" (1992). Since 2000, when *Conveyancing 1999* was published, the text has subsequently been issued as a book.

41 See e.g. G L Gretton, "Registration of company charges" (2002) 6 EdinLR 146, a devastating critique of the legislation on this subject.

42 See G L Gretton, "The Protection of Property Rights" in A Boyle, C Himsworth, H MacQueen and A Loux (eds), *Human Rights and Scots Law* (2002) 275–292. The treatment at 284–285 of the retention of title case of *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (1995) 20 EHRR 403 is particularly worth reading.

43 See e.g. G L Gretton, "Security over Moveables in Scots Law" in J de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (2009) 270–284. See F below.

44 G L Gretton, "Ships as a Branch of Property Law" in A R C Simpson, S C Styles, E West and A L M Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (2016) 367.

45 R Zimmermann and J A Dieckmann, "The literature of Scots private law" (1997) 8 StellLR 3 at 10.

Gretton and Reid on *Conveyancing*[46] has been referred to on numerous occasions.[47] And in the landmark Supreme Court case of *Royal Bank of Scotland plc v Wilson*,[48] Lord Rodger of Earlsferry said: "[E]ven Professor Gretton and Professor Reid have felt moved to warn that 'The law about the enforcement of standard securities is a subject of great and unnecessary complexity: it is a veritable maze': *Conveyancing* (third edition, 2004), para 19-32. The Court must try to find a way through the maze."[49] George's work on characterising the *ex facie* absolute disposition[50] was relied on by the court in *Sexton v Coia*.[51] In *Trotter v Trotter*,[52] George's aforementioned essay "The Concept of Security"[53] was relied on by Sheriff Principal Nicholson in refusing to order that a standard security be granted by one of the parties to a divorce case in favour of the other.[54] The reason was indeed a conceptual one. There was no debt owed and, as George had pointed out, a security requires to be accessory to a debt.[55] Most recently, 2017 has seen two significant security cases where the court has relied on George's work. In *OneSavings Bank plc v Burns*,[56] which concerned the form of an assignation of a standard security, significant reference was made by the sheriff to a relevant article by George.[57] And, in *MacMillan v T Leith Developments Ltd (in receivership and liquidation)*,[58] a court of five judges overruled the controversial decision of *Lord Advocate v The Royal Bank of Scotland plc*,[59] on the meaning of the term "effectually executed diligence" in relation to floating charges. George's work[60] criticising that decision was vindicated.

It is perhaps unsurprising that most of the court references to George's work involve land. Case law on moveable property is rarer, as land is typically of higher value. An exception to this is the English case of *R (on the application of Cukurova Financial International Ltd) v HM Treasury*.[61] There the High Court considered, while ultimately rejecting, George's argument[62] that the statutory instrument[63] implementing the EU Directive on Financial Collateral Arrangements[64] was *ultra*

46 The first edition was published in 1993. The fourth and current edition was published in 2011.
47 See e.g. *Clydesdale Bank plc v Hyland* 2004 Hous LR 116, *Northern Rock (Asset Management) plc v Doyle* 2012 Hous LR 94, *Firstplus Financial Group plc v Pervez* 2013 Hous LR 13 and *Outlook Finance Ltd v Lindsay's Exr* 2016 Hous LR 75.
48 [2010] UKSC 50. See G L Gretton, "Upsetting the apple-cart: standard securities before the Supreme Court" (2011) 15 EdinLR 251.
49 [2010] UKSC 50 at para 15.
50 G L Gretton, "*Ex facie* absolute dispositions" (n 21) and Gretton, "Radical rights and radical wrongs: a study in the law of trusts, securities and insolvency" (n 34).
51 At para 10. The case is noted at 2004 GWD 17-376, but the transcript is available via http://www.bailii.org/.
52 2001 SLT (Sh Ct) 42.
53 Gretton, "The Concept of Security" (n 5).
54 2001 SLT (Sh Ct) 42 at 47.
55 Gretton, "The Concept of Security" (n 5) at 127.
56 [2017] SC BAN 20.
57 G L Gretton, "Assignation of all-sums standard securities" 1994 SLT (News) 207.
58 *MacMillan v T Leith Developments Ltd (in receivership and liquidation)* [2017] CSIH 23.
59 1977 SC 155.
60 In particular G L Gretton, "Inhibitions and company insolvencies" 1983 SLT (News) 145.
61 [2008] EWHC 2567.
62 G L Gretton, "Financial collateral and the fundamentals of secured transactions" (2006) 10 EdinLR 209 at 212.
63 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226.
64 Council Directive 2002/47 OJ 2002 L168/43.

vires on the basis that it applied to a greater class of transactions than the Directive authorised.[65]

(3) The Gretton approach

Some observations can be made about George's scholarship and its style. While what follows principally relates to his work on proprietary security, the observations apply generally. First, George believes that it is essential for the law in practice to be based on sound theory:

> It has always seemed to me to be a mistake to draw a sharp distinction between legal theory and legal practice. Legal practice has to be grounded in theory. Legal theory has to be connected with practice . . . Practice without theory is blind. Theory without practice is empty. The law of rights in security is an excellent illustration of this truth.[66]

This is the hallmark of George's work. It is associated inextricably with his indefatigable searches for underlying theory in areas where he considers that it has, thus far, not been identified. As Ken Swinton has acutely observed,[67] George asks the "Emperor has no clothes" questions. And, if no clothes are found, there will be criticism and often frustration, where the cause is new law being applied in Scotland without sufficient regard for existing principles.[68] In relation to proprietary security, George's approach is that the underpinning principles of property law are crucial. He has demonstrated time and time again a lack of underlying theory is a recipe for uncertainty and that certainty is one of the fundamental principles of property law. An example is the willingness of the Scottish courts to admit the trust acting as a security in some circumstances, but not others.[69]

Secondly, George has a rare talent for clarity of exposition. No matter how difficult the subject is, his writing is accessible. Long sentences are eschewed. Articles are written in the first rather than the third person.[70] The style on occasions is very informal.[71] A particular feature is the frequent use of examples, something evident from his earliest articles[72] and which continues until this day. George, ever the admirer of matters German, calls this the "*zum Beispiel* approach". He also deployed

65 [2008] EWHC 2567 at para 92. Moses LJ refers to George as "Professor Graten of Edinburgh University". Mention must also be made of the important English case of *Akers v Samba Financial Group* [2017] UKSC 6, [2017] 2 WLR 273 which, while not a case on proprietary security, concerned the related area of insolvency law. Lord Mance at para 37 referred to George's article "The laws of the game" (2012) 16 EdinLR 414. And at para 35 there is mention of the patrimony theory of trusts in Scots law, which George played a significant role in developing.

66 Gretton, "The Concept of Security" (n 5) at 147. See also K G C Reid and G L Gretton, *Conveyancing 2013* (2014) 128: "Theoretical problems cash out as practical problems".

67 In LLB course materials at Abertay University, when I was external examiner.

68 The obvious example is the floating charge, on which see E below. But there are numerous others, such as the EU Directive on Financial Collateral Arrangements and the UK Regulations which implemented it. See Gretton, "Financial Collateral and the Fundamentals of Secured Transactions" (n 62).

69 G L Gretton, "Using trusts as commercial securities" (1988) 33 JLSS 53.

70 E.g. Gretton, "*Ex facie* absolute dispositions" (n 21): "I begin this article with an apology ".

71 See G L Gretton, "Debt factoring and floating charges (Scotland)" 1987 JBL 390: "This [case] has set the cat among the pigeons."

72 E.g. G L Gretton, "Ranking of inhibitors: a rejoinder" (1979) 24 JLSS 101 and Gretton, "Ranking of heritable creditors: interpretations" (n 21). Another striking example is Gretton, "Assignation of all-sums standard securities" (n 57).

this approach as a Law Commissioner. The Scottish Law Commission's Discussion Paper on Moveable Transactions,[73] principally authored by George, is replete with examples. Many have commented to me as to how helpful a statement of the current law it is. I cannot help digressing from the subject of proprietary security at this point to mention the Commission's draft Land Registration (Scotland) Bill, instructed by George. It has a schedule giving worked examples in relation to the new advance notice, which the draft Bill introduces.[74] Alas the schedule did not make it into the Land Registration etc (Scotland) Act 2012, which was based on the draft Bill.

Thirdly, where George believes that legislators, judges, or other writers have got something wrong, he has never been scared to say so. The areas of retention of title and floating charges, to be discussed shortly, are obvious examples. But, again I cannot resist treading outwith proprietary security to quote George explaining his rationale in an article based on the text of a lecture to solicitors:

> You may be getting rather irritated by now at hearing me saying that court decisions are wrong, but if you conclude that I am no respecter of authority, you are mistaken. To say that a court decision is wrong is simply to say that it is contrary to better authority. It is the person who mindlessly accepts the latest case who fails to respect authority.[75]

George can sometimes be blunt,[76] but his criticism is invariably of substance.[77]

Fourthly, George's belief in the value of comparative law is one that is strongly held.[78] One of his favourite quotations comes from Stair's *Institutions*: "no man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world".[79] Allied to this is a fascination with legal sources with more than one authoritative language, such as the European Convention of Human Rights[80] and EU legislation.[81]

Fifthly, George regularly uses humour, something that one struggles to find in earlier writers on Scots law. I cannot imagine Gloag or Halliday making statements such as "Alex, aged 40, a heavy drinker, smoker and drug abuser, who works as a mercenary . . . will not get such favourable terms [for life assurance in relation to a mortgage] as Tom, a healthy 21-year-old who avoids all drugs and hazardous activities, such as sexual intercourse, except under medical supervision"[82] or "Welcome, O Earthlings, to Planet Zlbiamg"[83] (as regards language used by banks

73 Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011).
74 Draft Land Registration (Scotland) Bill sch 3, contained in Report on *Land Registration* (Scot Law Com No 222, 2010) vol 2.
75 G L Gretton, "Destinations" (1989) 34 JLSS at 303. This article curiously drew a letter of complaint alleging, without further specification, that it contained "some extremely questionable propositions as to the law stated without authority": see (1989) 34 JLSS 325.
76 E.g. Gretton, "Ranking of heritable creditors: a reply to a reply" (n 22): "I am unrepentant".
77 For example, his controversial comment in "Of Law Commissioning" (2013) 17 EdinLR 119 at 151 that "Few people north of the Border emerge from extensive dealings with Whitehall without experiencing an urge to vote SNP" stems from his criticism that civil servants in London pay insufficient attention to the distinctive nature of Scots law.
78 E.g. in "The Concept of Security" (n 5) he refers to England, France, Germany and the USA.
79 Stair, *Inst* 1.pr.
80 See e.g. Gretton, "The Protection of Property Rights" (n 42) at 276–277.
81 See e.g. Gretton, "Financial collateral and the fundamentals of secured transactions" (n 62) at 214–215.
82 G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 21.29.
83 Gretton and Reid, *Conveyancing* (n 82) para 21-10, n 3.

relating to mortgages). George is also not averse to the occasional rhetorical flourish. For example, "The Conveyancing and Feudal Reform (Scotland) Act 1970 made vast improvements to the law of heritable security. But it was not perfect, for nothing in this world is perfect, except the beloved to the lover."[84] In summary, George's approach to scholarship is distinctive and his contributions are distinguished.

D. RETENTION OF TITLE

In 1976 the English Court of Appeal issued its judgment in the landmark case on retention of title: *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*.[85] That same year another very significant event happened. Two students, who had recently begun the graduate LLB at the University of Edinburgh, met for the first time. Their names were George Gretton and Kenneth Reid. The past 40 years have seen a level of collaboration between these two stellar academic figures for which it is difficult to find a comparator. Their names are so closely associated that they have even been confused for each other.[86] The subject of retention of title was one of their earliest and best-known collaborations.

The *Romalpa* case involved an "extended" retention of title clause. Such a clause has two parts. The first retains title not only for the price due to the seller under the contract but for "all sums" owed to the seller by the buyer, including the price due under any other sales contract. The second part provides that if the buyer resells the goods, normally conferring a good title on the sub-purchaser under section 25 of the Sale of Goods Act 1979, then the proceeds are to be held on trust for the seller. The Court of Appeal upheld the validity of both parts. The *Romalpa* clause subsequently came to be tested in the Scottish courts.

In the 1981 case of *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd*,[87] the Inner House of the Court of Session, while curiously not referring to the English case itself, held that a clause akin to the second part of the clause in *Romalpa* was not enforceable. The court proceeded partly on technical and policy grounds. In respect of the latter, concern was expressed as to the effect of such clauses on other creditors in an insolvency.[88]

The validity of the first part of the clause was challenged in the Outer House in another 1981 case, although one that was not reported until 1983. In *Emerald Stainless Steel Ltd v South Side Distribution Ltd*,[89] Lord Ross declared it to be "wholly ineffectual", on the basis that it "was an attempt to create a hypothec".[90] On reading

84 K G C Reid and G L Gretton, *Conveyancing 2015* (2016) 193. See also G L Gretton, "Receivers and arresters" 1984 SLT (News) 177 at 179 in relation to the introduction of floating charges: "The fathers have eaten a sour grape, and the children's teeth are set on edge." (While unattributed by George, this is from Jeremiah 31:29.)

85 [1976] 1 WLR 676.

86 See Gretton, "Destinations" (n 75) at 302: "Many people think that Mr Reid and I are the same person. This is not true."

87 1981 SLT 308.

88 For George's assessment, see Gretton, "Using trusts as commercial securities" (n 68) but compare G L Gretton, "Constructive trusts I" (1997) 1 EdinLR 281 at 304–305. See also W Loof, *Of Trustees and Beneficial Owners* (2016) 125–126.

89 1983 SLT 162.

90 1983 SLT 162 at 163.

the case again in preparation for writing this essay, and as a former student of George and of Kenneth Reid, I find this argument difficult to follow. The reason is a simple conceptual one. A hypothec is a subordinate real right in something owned by another (*jus in re aliena*), so ownership cannot be a hypothec.[91] Unsurprisingly, this was a main criticism by George and Kenneth when, as what would nowadays be described as "early career researchers", they wrote an article on the case in the *Scots Law Times*.[92] They made other criticisms. "Remarkably", they wrote, "there is no mention of the Sale of Goods Act [1979]"[93] in the judgment. They went on to focus on section 17 of that Act, under which ownership passes when the parties intend it to pass, before discussing the relevance of section 62(4). This is the provision that disapplies the Act for sales intended to operate as a security, so that the common law applies. They argued that the provision was not applicable on the basis that the sale is not a "sham" and that even if it did apply the retention of title would be valid at common law.

The article drew a response from Sir Thomas Smith, who argued that while a "price only" retention of title clause was valid, an "all sums" clause "would seem to involve security without transfer of possession by the creditor which is contrary to the principles of Scots law".[94] He referred to the functional approach to security taken by Article 9 of the Uniform Commercial Code of the USA, which treats retention of title clauses as security rights. Unsurprisingly, there was to be a reply from George and Kenneth. It stated that "the traditional line of approach of Scots law to secured transactions has been rigorously formalistic".[95] They noted also that under UCC-9 both "price only" and "all sums" retention of title clauses are regarded as securities.

In 1983 a second case came before Lord Ross on an "all sums" retention of title clause. This was *Deutz Engines Ltd v Terex Ltd*.[96] His Lordship reached the same conclusion as he had in *Emerald Stainless Steel*. There were nonetheless notable differences. There were no references to hypothecs and there was a discussion of the application of sections 17(1) and 62(4) of the Sale of Goods Act, the provisions mentioned in George and Kenneth's article. The *ratio* of the decision is that, while a "price only" retention of title clause is permissible, one for "all sums" is an "attempt to create a security without possession"[97] and that section 62(4) operates to disapply the Sale of Goods Act. The penultimate paragraph of the judgment is now notorious:

> I would only add that in the *Scots Law Times* (1983 SLT (News) 77) two individuals whom I understand to be academic lawyers contributed an article which was critical of my decision in *Emerald Stainless Steel Ltd*. I do not think it necessary or appropriate to

91 For another example of doctrinal confusion between ownership and security as a subordinate real right, see Gretton, "*Ex facie* absolute dispositions" (n 21).
92 K G C Reid and G L Gretton, "Retention of title in Romalpa clauses" 1983 SLT (News) 77.
93 Reid and Gretton, "Retention of title in Romalpa clauses" (n 92) at 80.
94 T B Smith, "Retention of title: Lord Watson's legacy" 1983 SLT (News) 105. For George's assessment of T B Smith, see G L Gretton, "The Rational and the National: Thomas Broun Smith" in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 30.
95 K G C Reid and G L Gretton, "Retention of title for all sums: a reply" 1983 SLT (News) 165.
96 1984 SLT 273.
97 1984 SLT 272 at 275 per Lord Ross.

> pass comment on their article except to observe that in the *Scots Law Times* (1983 SLT (News) 105) Professor Sir Thomas Smith has replied to their article, and that I find the views expressed in the latter article much more convincing than those contained in the former.

This resulted inevitably in George and Kenneth returning to the fray of what was now "something of a running battle".[98] They argued forcefully again in a further article that section 62(4) was not engaged because there was no sham sale.[99] Its correct province was debtor-to-creditor sales whereas in a retention of title situation the sale is from creditor to debtor. And, even it did apply, an "all sums" clause was valid at common law.

The scene was set for the final act. In *Armour v Thyssen Edelstahlwerke AG*[100] the Outer House was once again called to rule on the validity of an "all sums" clause. Lord Mayfield followed the earlier decisions and held it to be invalid. The case was appealed to the Inner House, which reached the same decision.[101] This was unsurprising as the court was presided over by the now Lord Justice-Clerk Ross.[102]

Kenneth and George wrote another article, disagreeing with the decision.[103] They adhered to their earlier arguments, but had a new one, which they believed to be definitive. This was that the consent of both the seller and the buyer is needed for ownership of the goods to transfer: "The principle remains inviolate that no-one can unwillingly become a proprietor."[104] The fact that the parties had agreed on "all sums" retention of title clause meant that there could be no transfer until all sums were paid.

The case was appealed to the House of Lords where the decisions in the lower courts were overruled.[105] Rather than being an attempt to create a security that engaged section 62(4), the clause was, in Lord Keith of Kinkel's view, "simply one of the conditions of what is a genuine contract of sale".[106] And in the words of Lord Jauncey of Tullichettle: "The contract of sale did not attempt to create a right in security . . . rather did it operate to transfer possession and dominium in two stages."[107]

The final decision in *Armour* is the result of the application of correct principles of Scottish property law.[108] It is also a reaffirmation of the fact that our law does not take a functional approach to security rights. But would it have happened without the writings of George and Kenneth? We will never know, but there must be some

98 G L Gretton, "Retention of title in Scotland: the House of Lords decides" 1991 JBL 64.
99 G L Gretton and K G C Reid, "Romalpa clauses: the current position" 1985 SLT (News) 329.
100 1986 SLT 452.
101 1989 SLT 182.
102 In "Retention of title in Scotland: the House of Lords decides" (n 97) George notes that the doctrine that an "all sums" clause is invalid is "especially associated with Lord Ross and Mr Drummond Young QC". James Drummond Young had appeared in all three cases. Later, as Lord Drummond Young, he was Chairman of the Scottish Law Commission during some of the period in which George was a Commissioner. He is also a contributor to the current volume.
103 K G C Reid and G L Gretton, "All sums retention of title" 1989 SLT (News) 185.
104 Reid and Gretton, "All sums retention of title" (n 103) at 187.
105 1990 SLT 891.
106 1990 SLT 891 at 895.
107 1990 SLT 891 at 896.
108 Interestingly, the successful senior counsel was Jonathan Mance QC of the English Bar, who now, as Lord Mance, is the Deputy President of the Supreme Court.

doubt. What is certain is that their influence was palpable and that their scholarship genuinely had impact.

E. FLOATING CHARGES

"The introduction *ex nihilo*[109] of a new type of legal concept is often fraught with unforeseen difficulties"[110] wrote George in 1981. His subject matter was the floating charge, which had been introduced from English law into Scotland 20 years previously by the Companies (Floating Charges) (Scotland) Act 1961. This was George's first salvo in what has been a career-long assault on the floating charge. As we saw earlier, it was something on which he clashed with Jack Halliday.[111] George has firmly become established as the floating charge's chief critic in Scotland.[112] It is therefore easy to guess my reaction some years ago when I came to mark the exam script of a student who had been using voice-recognition software to answer a question on security rights. The software was not entirely reliable. The script contained numerous references to "floating georges".

Scottish common law is restrictive as to the creation of security over moveable property and the 1961 legislation was prompted by a Report of the Law Reform Committee for Scotland. The Report states: "In the field of *commercial law*, unless there be good reason to the contrary, it is desirable that the law of Scotland and English should be the same" (my emphasis).[113] George's principal objection to the floating charge is that it is a proprietary security that fits badly with the rest of Scottish *property law*, leading to uncertainty[114] and incoherence.[115] He has expressed this view forcefully, stating that this type of security right is "incompatible with the very grammar of our law . . . the problem of the floating charge in Scotland is a problem of genetic incompatibility".[116] In English law the floating charge is a creature of equity and there is no system of equity within Scottish property law. When making this objection, George is echoing the famously expressed view of Lord President Cooper that the "floating charge is utterly repugnant to the principles of Scots law".[117]

109 "Out of nothing". George's fondness for Latin is well-known. In Gretton, "Financial collateral and the fundamentals of secured transactions" (n 62) at 221 he proposed tongue-in-cheek that it should become the single legislative language for Europe. And in Gretton, "The laws of the game" (n 65) he bemoans the fact that Latin is now "shunned as elitist".

110 G L Gretton, "Diligence, trusts and floating charges 1 'effectually executed diligence'" (1981) 31 JLSS 57.

111 See B above.

112 See e.g. D Cabrelli, "The case against the floating charge in Scotland" (2005) 9 EdinLR 407. But the floating charge also has trenchant critics in other jurisdictions. See e.g. R M Goode, "The Exodus of the Floating Charge" in D Feldman and F Meisel (eds), *Corporate and Commercial Law: Modern Developments* (1996) 193.

113 Eighth Report of the Law Reform Committee of Scotland (n 17) at para 30.

114 Once described by George in the colourful phrase: "psychedelic obscurities". See G L Gretton, "Ownership and insolvency: *Burnett's Trustee v Grainger*" (2004) 8 EdinLR 389 at 391.

115 See G L Gretton, "Reception without integration? Floating charges and mixed systems" (2003) 78 Tulane Law Rev 307. See also Gretton, "The Rational and the National: Thomas Broun Smith" (n 94) at 39–41.

116 Gretton, "What went wrong with floating charges" (n 25) at 173.

117 *Carse v Coppen* 1951 SC 233 at 239. Even after numerous reads over many years I am still struck by the strength of that statement.

In his earlier writings another of George's main criticisms was the quality of the legislation.[118] The 1970s and 1980s saw a procession of cases in which the courts struggled to interpret it, each typically followed by an article by George.[119] Even in 2017, that struggle continues.[120] But, in an article published in 2003, George argued that the "draftsperson had an impossible task. The English law was nonstatutory, so there was no text to be copied. It was based on equity, and thus would present the gravest difficulties in applying it to Scotland."[121] As someone who has now acquired experience as a Law Commissioner of preparing draft legislation I would readily agree.

The difficulties encountered in the 1970s and 1980s cases eventually prompted George to publish an article in 1986 mooting the abolition of the floating charge and its enforcement mechanism of receivership.[122] This saw him return to his previously expressed themes. He criticised also the economic impact on other creditors of a security that can encumber the entirety of a company's property "down to the last paper clip and the carpet on the floor".[123] Others shared that view.[124] The Enterprise Act 2002, with its introduction of the "prescribed part" and a requirement for floating charges to be enforced normally by administration rather than receivership has addressed this issue to some extent.[125] But George's suggestion that outright abolition be considered was regarded as maverick.[126]

Then came the 1990s. The retention of title saga discussed above having now been settled, it was time for another *cause célèbre* involving the courts and George. Steven and Carol Thomson contracted to purchase a house in Aberdeen from a company. In accordance with usual conveyancing practice they handed over the money and received a deed of transfer (disposition). But prior to that deed being registered a floating charge that the selling company had granted was enforced and attached to the company's "property and undertaking".[127] The question was whether that included the house. The answer seemed clear. Ownership of land transfers on registration in terms of the publicity principle of property law. Thus the house was

118 Gretton, "Diligence, trusts and floating charges" (n 110); Gretton, "What went wrong with floating charges" (n 24) at 173–174.

119 See *Lord Advocate v Royal Bank of Scotland Ltd* 1977 SC 155, on which see Gretton, "Diligence, trusts and floating charges" (n 109); *Armour and Mycroft, Petrs* 1983 SLT 453, on which see Gretton, "Inhibitions and company insolvencies" (n 60); *Cumbernauld Development Corporation Ltd v Mustone Ltd* 1983 SLT (Sh Ct) 55, on which see G L Gretton, "Receivership and sequestration for rent" 1983 SLT (News) 277; *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SLT 94, on which see Gretton, "Receivers and arresters" (n 84) and G L Gretton, "The floating charge in Scotland" 1984 JBL 344 and *Ross v Taylor* 1985 SLT 387, on which see G L Gretton, "Post-crystallisation assets (Scotland)" 1985 JBL 474.

120 See *MacMillan v T Leith Developments Ltd (in receivership and liquidation)* [2017] CSIH 17 discussed above at C(2).

121 Gretton, "Reception without integration? Floating charges and mixed systems" (n 115)

122 G L Gretton, "Should floating charges and receivership be abolished?" 1986 SLT (News) 325. This was described by the unsympathetic Professor Jack as "Mr Gretton's latest blast". See Jack, "The Coming of the Floating Charge to Scotland" (n 24) at 45.

123 Gretton, "Should floating charges and receiverships be abolished?" (n 122) at 327.

124 See e.g. Sir Michael Grylls, "Insolvency reform: does the United Kingdom need to retain the floating charge?" 1994 Journal of International Banking Law 391.

125 On which, see K G C Reid and G L Gretton, *Conveyancing 2002* (2003) 89–91.

126 See Jack, "The Coming of the Floating Charge to Scotland" (n 24) at 45–46.

127 Companies Act 1985 s 462(1).

caught. And so held the Outer House and the Inner House of the Court of Session.[128] Following the Outer House decision, George wrote that "[a]ny other decision would have put an axe to our system of property law."[129]

But when the case was appealed to the House of Lords,[130] Lord Jauncey of Tullichettle swung the axe. The decision reached by the lower courts was considered to be unfair. The purchasers lost both the price and the house (which could be sold from under them as the floating charge attached to it). Lord Jauncey reached a contrary decision on the basis that having delivered the deed of transfer and received payment the selling company had lost "beneficial ownership" of the house. But, as George argued, along with Kenneth Reid, this was tantamount to introducing equitable ownership in Scotland,[131] by removing the paramountcy of registration and the publicity principle. The floating charge itself does not obey the publicity principle because it does not require any registration in the Land Register either at the outset or in order to be enforced. Nonetheless, by apparently judicially reforming the general law of transfer to counteract this, Lord Jauncey, in George's words, effected a "cure . . . worse than the disease".[132] Lord Clyde also reached the conclusion that the floating charge had not attached to the house, but on the narrower ground of statutory interpretation. The other three judges agreed that the appeal should be allowed.

Such was the concern over the effect of the decision that the matter was referred to the Scottish Law Commission. But before the Commission had published its report on the matter,[133] another House of Lords case, *Burnett's Trustee v Grainger*,[134] had restricted the ratio of *Sharp* to floating charges. While George's writings on *Sharp*, as well as on *Burnett's Trustee* at its earlier stages, were not expressly cited by the judges, they were drawn on by the successful senior counsel[135] in arguing that *Sharp* should be confined to floating charges. The threat to fundamental principles had passed and George, through his writings, had been at the forefront of achieving this. But the fact that there had been that threat vindicates George in his thesis that the floating charge was introduced to Scotland with insufficient consideration of its coherence with existing Scots law.

The Scottish Law Commission in the early 2000s also worked on recommendations for reform of floating charges law in Scotland and on producing statutory provisions that were more coherent with underlying property. It published a report in 2004.[136] This recommended the setting up of a new Register of Floating Charges in Edinburgh. Floating charges would be registered there rather than at Companies House as under

128 1994 SC 503 and 1995 SC 455.
129 G L Gretton, "Sharp cases make good law" 1994 SLT (News) 313 at 314.
130 1997 SC (HL) 66.
131 G L Gretton, "Equitable ownership in Scots law" (2001) 5 EdinLR 73 and Gretton, "Scots law in shock: real rights and equitable interests" (n 38). See also K G C Reid, "Equity triumphant" (1997) 1 EdinLR 464.
132 G L Gretton, "The integrity of property law and of the property registers" 2001 SLT (News) 135.
133 Report on Sharp v Thomson (Scot Law Com No 208, 2007).
134 2004 SC (HL) 19. See Gretton, "Ownership and insolvency: *Burnett's Trustee v Grainger*" (2004) 8 EdinLR 389. See also G L Gretton, "Insolvency risk in sale" 2005 JR 335.
135 Patrick Hodge QC, who now, as Lord Hodge, is a Justice of the Supreme Court and contributor to this volume.
136 Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004). George was a member of the advisory group.

the existing law. They would also only become effective on registration and not signature/delivery,[137] the position under the Companies Act and which offends the publicity principle.[138] The recommendations were enacted by Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007. But it has never been brought into force. After the legislation was passed by the Scottish Parliament, the Committee of Scottish Clearing Bankers wrote to the Cabinet Secretary for Justice, objecting to it.[139] The argument was that it would increase costs for business because a floating charge granted by an English company with Scottish assets would have to be registered twice (in the new register and at Companies House). It was better to have a harmonised UK law of floating charges. As had happened in 1961, and much to George's frustration,[140] effectively commercial law had prevailed over property law. But, by this time, he was a Scottish Law Commissioner, with the opportunity to promote reform of the law of proprietary security.

F. REFORM

Prior to his appointment to the Commission, George had written on a number of occasions on the subject of reform. Inevitably, given the experience of the floating charge, a regular theme was harmonisation of Scottish law with the law of England and Wales. This excerpt from a book review published in 1989 rather evocatively sets out his thinking:

> Professor Goode's book, among its many other merits, shows to a Scottish reader, just how fathomless a gulf separates Scots and English security law. Or, to change the image, they are like two railway systems with different gauges, the Anglo-Americans on broad gauge and the Scots and most of Europe on standard gauge. If the two systems are to be united, it must either be on broad gauge, or standard gauge, or a new gauge. The second possibility will not be adopted. And the first and third would involve tearing up the tracks.[141]

Once more his focus is the underlying property law, for the functional approach to security rights taken in the US has yet to find favour in England and Wales.[142] In recent years there have been attempts to produce a functional approach that would work in civil law jurisdictions in Europe.[143]

137 Depending on whether the deed is unilateral or bilateral.

138 A point George has made on numerous occasions. See e.g. G L Gretton, "Floating charges in Scots law: the saga continues" 1995 JBL 212 at 213.

139 See A J M Steven and H Patrick, "Reforming the Law of Secured Transactions in Scotland" in L Gullifer and O Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (2016) 253 at 263.

140 See K G C Reid and G L Gretton, *Conveyancing 2013* (2014) 178.

141 Review of R M Goode, *Legal Problems of Credit and Security* (2nd edn, 1988) published at 1989 Scottish Law Gazette 28. For another use of a railway metaphor in relation to reform of security rights, see H Beale, "The exportability of North American chattel security regimes: the fate of the English Law Commission's proposals" (2006) 43 Canadian Business Law Journal 178 at 198.

142 See L Gullifer and M Raczynska, "The English Law of Personal Property: Under-reformed?" in Gullifer and Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (n 139) at 271.

143 Notably Book IX of the Draft Common Frame of Reference. See U Drobnig and O Böger, *Proprietary Security in Movable Assets* (2015).

In an important piece published in 1999 and drawing on American economics and law literature George expresses scepticism about whether security economically is a good thing.[144] He notes Lynn LoPucki's statement that "Security is an agreement between A and B that C takes nothing."[145] George is the only Scottish scholar to have engaged significantly with the American literature. In his own words, in another book review, "the question [of why the law allows security is] too seldom asked on this side of the Atlantic, and too often on the other. No doubt the right level of debate is to be found in the Azores."[146]

Despite his scepticism, George took on the task as lead Commissioner of producing the Scottish Law Commission's Discussion Paper on Moveable Transactions, which was published in 2011.[147] I noted earlier that the paper was very well-received as a valuable statement of the current law and its deficiencies.[148] As to the economic case for reform, the paper states: "As a working hypothesis we accept that security is generally speaking economically beneficial, albeit that conscious that this view is a 'not proven' one. The view remains the dominant one."[149] The importance of coherence with general property law is unsurprisingly stressed, with a whole chapter devoted to the publicity principle.[150] The paper deals with reform of both the law of assignation of claims and the law of security over moveables. In relation to the latter it proposes a new "true" security right over corporeals and incorporeals created by registration. A functional approach is rejected.[151]

I succeeded George as lead Commissioner and it is my task to complete the project. It is a great tribute to George that consultees generally expressed strong support for the new scheme which he proposed. But there was one notable criticism. The Discussion Paper argued that the new scheme, if implemented, would in time lead to the demise of the floating charge.[152] The premise is that the new security would be used instead. There is then a specific question asking consultees whether they agree that the floating charge for the time being should *not* be abolished.[153] Several consultees interpreted this inaccurately as a commitment to abolishing the floating charge and expressed trenchant opposition. It is reasonable to speculate that George's reputation as the chief Scottish critic of the floating charge may have influenced this.

144 G L Gretton, "The reform of moveable security law" 1999 SLT (News) 301.
145 L LoPucki, "The Unsecured Creditor's Bargain" (1994) 80 Virginia Law Review 1887 at 1899.
146 Review of G McCormack, *Secured Credit under English and American Law* (2004) published at (2006) 10 EdinLR 172.
147 Discussion Paper on *Moveable Transactions* (n 73). See also G L Gretton, "Reform of security over moveable property: the Discussion Paper in outline" (2012) 16 EdinLR 261.
148 At C above.
149 Discussion Paper on *Moveable Transactions* (n 73) para 12.20. This is indeed the dominant view. See e.g. G Affaki, "Increasing Access to Credit through Reforming Secured Transactions Laws" in B Foëx (ed), *The Draft UNCITRAL Model Law on Secured Transactions: Why and how?* (2016) 157.
150 Discussion Paper on *Moveable Transactions* (n 73) ch 11.
151 Both because of the disconnect with underlying property law and because such an approach is not taken in England and Wales.
152 Discussion Paper on *Moveable Transactions* (n 73) para 22.28.
153 Discussion Paper on *Moveable Transactions* (n 73) question 86.

G. CONCLUSION

I have attempted to demonstrate the breadth and depth of George's contribution to the Scots law of proprietary security. As a pupil, colleague, successor as Law Commissioner, co-author and friend I owe George a great debt. The law of proprietary security is one of the many areas of our law that also owes him such a debt. If the Scottish Law Commission's recommendations on moveable transactions are eventually implemented much of the credit will be due to George. But, as a result of his work on proprietary security over the last 40 years, his status as one of the most significant contributors to the subject in Scotland and indeed beyond has already been secured.

DOUBLE SALE IN FRENCH LAW

Lars van Vliet

A. INTRODUCTION

A classic problem in private law arises when a seller (A) sells a thing to a buyer (B), does not deliver the thing, and then sells the same thing to a second buyer (C) who takes delivery. Of course, non-performance by A as against B triggers contractual remedies as between these two parties. As performance is no longer possible the remedy will be damages for non-performance. However, the more interesting question is whether or not B may have a remedy against C. Traditionally, many legal systems have been reluctant to allow such a remedy because it would give third party effect to a personal right (B's right as against A) thus blurring the borderline between the law of contract and the law of property. Another reason for not allowing such a protection of the first buyer is the principle that all personal rights against the same debtor (here the seller) are equally strong, a principle that is most prominent in insolvency law (*concursus creditorum*).

In Scots law the solution to the problem is known as the "offside goals rule". It enables B to avoid the transfer to C if C had knowledge of the previous sale to B or if C gave no value. Modern legal systems are divided over the question of double sale or, more generally, double transactions that create competing rights to the transfer of ownership. The different approaches in continental European legal systems are the result of the different views to be found since the time of the medieval commentators. In this essay we will focus on French law. Over time French law underwent major changes, switching back and forth even in recent years.

B. THE INFLUENCE OF THE TRANSFER SYSTEM

The problem of whether or not B's personal right against A has any protection against C partly depends on the transfer system that applies. In the French consensual system, the sale itself passes ownership.[1] In principle, B is already the owner of the thing sold to him, and C can only acquire ownership under the rules of third party protection, as this is an *acquisitio a non domino*, a transfer by a non-owner.

However, even in French law the problem arises frequently because in the sale of land the parties will often postpone the passing of ownership until the moment the

1 See L P W van Vliet, *Transfer of movables in German, French, English and Dutch law* (2000) ch 3.

notarial deed is made and signed. Before that moment, the parties either sign a bilaterally binding but non-notarial sales contract or the seller gives a unilaterally binding promise to the prospective buyer to enter into a sales contract if the promisee invokes the option to buy.

In a tradition system, which requires a separate legal act of delivery or conveyance for the passing of ownership, the delivery or conveyance is in principle decisive for resolving the conflict between the first and second buyer. In short, if the first buyer has not yet acquired ownership,[2] the second buyer to whom delivery or conveyance is made in principle receives ownership. If ownership has already passed to the first buyer a delivery or conveyance to the second buyer can only pass ownership to the second buyer under special rules protecting a buyer against a seller lacking the right of disposal (acquisition from a non-owner).

C. ROMAN LAW AND THE APPROACH OF BALDUS

The conflict between the first and second buyer becomes acute only in a legal system that recognises the right to specific performance.[3] Roman law did not recognise any right to specific performance,[4] and the medieval glossators stuck to this view. As a consequence, they did not perceive double sale as a special legal problem, because in the case of non-performance the first buyer would have to be content with damages anyway.[5] Gradually in the period of the glossators and commentators the right to specific performance came to be recognised.[6] This is also the time in which double sale is given special attention and attempts are made to protect the first buyer.

According to Roman law, a direct remedy against C was not available to B because the contract of sale only binds the parties to the contract (privity of contract). This principle of privity of contract still applies in many legal systems. As Roman law required an act of conveyance for the passing of ownership (from the classical period: *traditio*) it was this act that decided the conflict between the two buyers. C 3.32.15 pr states: "Whenever a piece of land is validly sold to two persons, it is trite law that the person to whom the thing is first delivered has the strongest position to keep ownership."

The first author to deviate from Roman law and to give the first buyer a remedy against the second buyer was Baldus.[7] To protect the first buyer he used an action that was not originally designed for this purpose, namely the *actio revocatoria* (*actio pauliana*), an action available to a creditor to annul juridical acts performed by the debtor in fraud of his creditors (i.e. frustrating the possibility of seizure and execution by creditors). In the case of double sale, he allowed this action only if the second buyer knew of the earlier sale. Where the second transaction is a donation, the *actio*

2 Not even conditionally on payment (retention of ownership clause).
3 See also J E Scholtens, "*Difficiles nugae* – once again double sales" (1954) 71 SALJ 71 at 85 fn 33 and J A Ankum, *De geschiedenis der "actio pauliana"* (1962) 213–214 and 229.
4 Gai Inst 4.48.
5 S Sella-Geusen, *Doppelverkauf: zur Rechtsstellung des ersten Käufers im gelehrten Recht des Mittelalters* (1999) 117.
6 R Zimmermann, *The Law of Obligations* (1996) 774.
7 Ankum, *Geschiedenis* (n 3) 182.

pauliana would even be available if the donee was in good faith. In his comment on C 7.75 he writes:

> If you sold me a thing, and before delivering it, you sold and delivered it to Titius, thus defrauding me, Titius' position is stronger as regards the revindication and the *actio publiciana*. However, I am able to annul if he participated in the fraud. Moreover, if it was donated to him, it can even be annulled if he did not participate in the fraud.[8]

Baldus' broad application of the *actio pauliana* was not, however, generally adopted by the other commentators.[9] Nor did the humanists and the Dutch elegant school adopt his view.[10] Jurists of the *usus modernus*, on the other hand, did accept it.[11] Although in French law, before the *Code civil*, the broad *pauliana* was not accepted, the first buyer was sometimes given an action against the second buyer on a different legal ground, namely the argument that no one should profit from his own fraud.[12] Under the regime of the land registration Act of *11 brumaire an VII* (1798), which introduced a regime in which all transfers of land were required to be registered, the Supreme Court held that the registration in favour of the second buyer was valid, even if the second buyer was aware of the previous sale.[13]

D. THE FRENCH STATUTE OF 1798

The statute on land registration of *11 brumaire an VII* (1 November 1798) introduced a system of land registration for the whole of France. It required registration of, among other things, deeds of mortgage and deeds of conveyance. The relevant provisions read as follows:

> Article 26. The deeds transferring things and rights which may be mortgaged shall be entered into the registers of the office of the keeper of the mortgages in the district where the thing is situated.
>
> Until that moment, they cannot be set up against third parties who contracted with the seller, and who fulfilled the present requirements.
>
> Article 28. The registration required by Article 26 transfers to the acquirer the rights which the seller has on the ownership of the immoveable, subject to the debts and mortgages which burden the immoveable.[14]

8 Baldus, *In VII, VIII, IX, X & XI Codicis libros Commentaria*, Venice (1577) 127: "Vendidisti mihi rem aliquam, et antequam tradas vendidisti, et tradidisti eam Titio, in fraudem meam, nam in rei vendicatione, et Publiciana potior est Titius: tamen si fraudem participavit, revocabo. Si autem fuit sibi donata, revocatur, etiam si fraudem non participavit."

9 Ankum, *Geschiedenis* (n 3) 186.

10 Ankum, *Geschiedenis* (n 3) 211–214 and 229.

11 Ankum, *Geschiedenis* (n 3) 259–262.

12 Ankum, *Geschiedenis* (n 3) 325.

13 Ankum, *Geschiedenis* (n 3) 329.

14 Original text: "XXVI. Les actes translatifs de biens & droits susceptible d'hypothèque, doivent être transcrits sur les registres du bureau de la conservation des hypothèques dans l'arrondissement duquel les biens sont situés.

Jusque-là ils ne peuvent être opposés aux tiers qui auraient contracté avec le vendeur, & qui se seraient conformés aux dispositions de la présente.

XXVIII. La transcription prescrite par l'article XXVI, transmet à l'acquéreur les droits que le vendeur avait à la propriété de l'immeuble, mais avec les dettes & hypothèques dont cet immeuble est grevé."

Although Article 28 provides that the registration itself passes ownership to the buyer, this provision was soon to be superseded by the 1804 civil code, which in various provisions laid down the so-called consensual transfer system in which the contract of sale itself passes ownership (Articles 1138[15] and 1583 of the *Code civil*). After a fierce battle between proponents of compulsory registration and its adversaries, the latter emerged victorious: the Code did not impose any *general* registration requirement for the transfer of immoveable property. However, registration was still necessary for donations of land and for mortgages.

When the Conseil d'État was asked to advise on the relationship between the new civil code and the system of the statute of *11 brumaire an VII*, it confirmed that the system of transfer of ownership as laid down in the statute of *11 brumaire an VII* was indeed no longer valid under the civil code.[16] In this advice, the Conseil d'État holds that, if the seller burdens the property with a mortgage after entering into a sales contract, this mortgage cannot be registered, even if the sales contract has not yet been registered.[17] Here the Conseil d'État applies the *nemo plus* rule: it holds that ownership has already passed and that therefore the mortgage cannot be registered. The Conseil d'État expressly states that the system of the statute of *11 brumaire an VII* no longer applies since the entry into force of the *Code civil*. Despite what Article 1583 of the *Code civil* seems to suggest, the passing of ownership not only works as between seller and buyer, but also against third parties.

With the introduction of the civil code, the system of mandatory registration of sales contracts relating to immoveables and rights on immoveables had been abolished. As we shall see below, the mandatory registration of these sorts of legal acts was only reintroduced in 1855.

Already in 1805, under the regime of the statute of *11 brumaire an VII*, the French Supreme Court held that if the second buyer knew that the immoveable had already been sold to another person, the second buyer would be protected because the first buyer had not been prudent enough to have his acquisition registered:

> Considering that one cannot accuse a person of fraud who buys an immoveable which he could know had already been sold to another, as long as the first sale has not been registered and consequently ownership has not passed, because taking advantage of the law does not amount to fraud, and considering that the first seller should blame himself for not showing the same diligence of having his deed registered; [. . .][18]

Having seen that Article 28 of the statute of *11 brumaire an VII* requires registration for the transfer of ownership to be valid, this result is a logical consequence of the

15 In 2016, this was replaced with Art 1196(1).

16 In an advice (*avis*) dated *11 fructidor an XIII* (29 August 1805). The text of the advice is to be found in Merlin, *Répertoire universel et raisonné de jurisprudence*, vol 15 (5th edn, 1826) "Inscription Hypothécaire" § VIIIbis, 2 at 118.

17 A Colin and H Capitant, *Cours élémentaire de droit civil français*, vol I, (6th edn, 1930) 949–950.

18 *Cass 3 thermidor an XIII* (22 July 1805), in Ledru-Rollin, *Journal du Palais, Recueil le plus ancien et le plus complet de la jurisprudence française*, vol IV (3rd edn, 1838) 669–670. Although the text of the judgment says "could know" thus giving the impression that it was a case in which the second buyer had no actual knowledge of the previous sale, the judgments at first and second instance determining the facts clearly indicate that the second buyer knew of the earlier sale. Also, the question (*moyen de cassation*) presented to the Supreme Court involved a second buyer who knew of the previous sale. As the Supreme Court only answers the questions presented, "could know" should be read as "knew".

failure to register the first sales contract. According to the court, a different solution could be accepted only in case of fraud.

In a judgment that is only a few weeks older the Supreme Court allowed an exception if the second sale could be regarded as simulated.[19] However, it remained unclear which facts could amount to such a simulation. Obviously, mere knowledge of the previous sale is not seen as simulation.

E. POST-*CODE CIVIL* LEGISATION

(1) The 1855 land registration statute

The requirement of registration of transfers of immoveable property, abolished by the *Code civil* in 1804, was reintroduced by the land registration statute of 1855.[20] However, the text of the statute did not resolve our question: whether the second buyer who registered first acquires ownership even if he knew about the previous sale. Article 1 of this statute requires every deed of conveyance to be entered into the land register and Article 3 adds:

> Until the registration the rights based on the deed and judgments mentioned in the previous articles cannot be set up against third parties who have rights on the immoveable which they have preserved according to the statute. [. . .][21]

Again, it was up to the Supreme Court to decide whether the second buyer who registers first acquires ownership even if he knew of the first sale. Shortly after promulgation of the statute the Supreme Court in 1858 gave an ambiguous judgment.[22] The advocate's criticism of the Court of Appeal's judgment (*moyen de cassation*) was that the 1855 statute gave preference to the first registration and did not take into account whether or not the second buyer knew of the earlier sale, and that, in the eyes of the 1855 statute, the earlier sale had not taken place as against third parties as long as it had not been registered. Rejecting this criticism, the Supreme Court held:

> between two successive acquirers in good faith the first to register his contract is preferred over the other; – but considering that fraud makes an exception to all rules; that if the registration is the result of a conspiracy between the seller and the acquirer, it cannot have any effect[.]

This criticism was dismissed because the Court of Appeal had inferred such a conspiracy from the knowledge of the second buyer that the immoveable had already been sold to another, combined with the fact that the parties had created a usufruct in favour of the seller, so that the purchase price was accordingly lowered.[23] The

19 *Cass 17 prairial an XIII* (6 June 1805), Ledru-Rollin, *Journal du Palais, Recueil le plus ancien et le plus complet de la jurisprudence française*, vol IV (3rd edn, 1838) 583–584.

20 *Loi du 23 Mars 1855 sur la transcription en matière hypothécaire*.

21 Art 3: "Jusqu'à la transcription les droits résultants des actes et jugements énoncés aux articles précédents ne peuvent être opposés aux tiers qui ont des droits sur l'immeuble et qui les ont conservés en se conformant aux lois. [. . .]"

22 *Cass req, 8 décembre 1858*, DP 1859.1.184.

23 It should be noted, however, that no criticism had been directed against this inference by the Court of Appeal, so that it was binding upon the Supreme Court.

judgment is confusing because first the court holds that the rule giving priority to the first registration applies to buyers in good faith, and next the court seems to hold that mere knowledge of the previous sale is not enough to render the registration void, that the registration is only void if there was a conspiracy between the seller and buyer. This last approach dominated in French doctrine during the period 1858 until 1925.

In two judgments from 1925[24] the Supreme Court held that in principle the second buyer who registers his contract first will take preference over an earlier unregistered sale (first registration takes preference) but that this rule does not apply "if the second sale is the result of a conspiracy characterized by fraudulent acts aimed at robbing the first buyer".[25] However, the second of the two judgments adds that mere knowledge of the previous sale does not amount to fraud, repeating the words of the judgment of *3 thermidor an XIII* (22 July 1805):

> the person buying an immoveable which he knows has been sold to a third party previously and who has his contract registered first, does not commit any fraud by taking a profit which the law itself offers to the most diligent acquirer[.]

(2) The 1955 decree on land registration

The 1955 decree[26] on land registration (the successor to the statute of 1855) offers protection against unregistered rights. Article 30(1) reads as follows:

> If juridical acts or judgments which should be published according to the first paragraph of Article 28 are not published, they cannot be invoked against third parties who received on the same immoveable from the same person a conflicting right on the basis of juridical acts or judgments subject to the same duty of publication and which have been published, or who have had privileges or mortgages registered. Nor can they be invoked if they are registered, provided the juridical acts, judgments, privileges or mortgages invoked by these third parties have been registered previously.

According to the text of the decree only the date of registration is decisive. It may surprise the reader that the text does not contain any exception for third parties who knew of the unregistered right.

In principle, under the consensual transfer system, ownership will already have passed to the first buyer so that the second buyer buys from a non-owner. Consequently, without a special rule the second buyer cannot acquire ownership. It is therefore surprising that Article 30 speaks of the third party acquiring a *conflicting* right. That right cannot be ownership but merely a contractual right. Article 30 now has the effect that it gives ownership to the second buyer who registers first.[27]

In practice, however, the sale of immoveable property normally contains a clause postponing the transfer of ownership to the moment of signing the notarial deed. As a result, we find in French case law many examples where despite the presence of a non-notarial sales contract ownership is still with the seller. In the case of double

24 *Cass req 6 avril 1925* and *Cass civ 7 décembre 1925*, both published in DP 1926.1.185.
25 *Cass civ 7 décembre 1925*.
26 *Décret n° 55-22 du 4 janvier 1955 portant réforme de la publicité foncière*.
27 T Revet, "Un revirement fâcheux: l'abandon de la condition d'ignorance, par le second contractant ayant procédé le premier aux formalités de publicité foncière, de l'existence d'un premier contrat translatif" 2011 RTD civ 369.

sale, the seller will then refuse to sign the notarial sales contract with the first buyer. In that case, of course, the *nemo plus* rule does not apply.

F. THE CASE LAW SINCE 1968

(1) Protection of the first buyer

From 1968, the French Supreme Court held that a third party who knew of an unregistered right (in our case: the second buyer) could not rely on the protection offered by Article 30 of the decree.[28] Article 30 uses the expression *inopposable* to say that the unregistered right cannot be invoked against a third party. The words used by the French Supreme Court in preferring the first buyer are quite vague. The court says that the second sales contract is "inopposable" as against the first buyer. In a judgment from 1972, confirming the 1968 judgment, the Supreme Court bases its judgment explicitly on fraud.[29] It does not indicate, however, whether the sanction is voidness or voidability. In the 1968 judgment, the Court says that the acquisition by the first buyer "can be invoked against" the second buyer. Since 1974 the Supreme Court has based the rule on delict, holding that the second buyer's knowledge of the previous transfer to the first buyer constitutes a delict against the first buyer.[30]

(2) Sub-dispositions by the bad faith second buyer

What if the second buyer C who knew of a previous sale to B has already transferred the immoveable to a *bona fide* sub-buyer D or mortgages the property to a *bona fide* lender D? In principle, the *nemo plus* rule applies that also applied to the second buyer. If ownership already passed to the first buyer (which does not often happen in practice) neither the seller nor the *mala fide* second buyer could transfer ownership or create a mortgage in favour of the sub-acquirer. Could the sub-acquirer then invoke third party protection?

In a 1949 case, the owner X had given Y an option to buy her property. Although Y had already invoked the option and thus had already acquired ownership, X transferred the immoveable property to a company, which she had set up together with another person. The transfer to the company was registered several days before the registration of the sales contract with Y. The company then sold the land on to the Paris city council. As it was in good faith, the city council of Paris asserted that it had become the owner. Since the lower courts had held that the setting up of the company and the transfer to that company had been fraudulent, the Supreme Court held that the setting up and the transfer were void. The Supreme Court then drew the conclusion that therefore the city council, although it was in good faith, could not have acquired ownership because it acquired from a non-owner.[31]

This decision has received a lot of criticism because it diminishes the reliability of the land register. A buyer could never be certain that he acquires ownership

28 *Cass civ 3, 22 mars 1968*, Bull civ III, nr 129.
29 *Cass civ 3, 10 mai 1972*, Bull civ III, nr 300.
30 *Cass civ 30 janvier 1974*, Bull civ III, nr 50. In *Cass civ 3, 3 octobre 1974*, Bull civ III, nr 335 the Supreme Court holds that such knowledge may constitute a delict, but from *Cass civ 3, 20 mars 1979* (Bull civ III, nr 71) the formulation of *Cass civ 30 janvier 1974* returns.
31 *Cass civ 10 mai 1949*, Bull civ nr 160, D. 1949, 277.

because he can never be certain that his seller, who was registered as owner, really was the owner. Perhaps this seller had bought the property with knowledge of an earlier non-registered sale in favour of another person.[32]

According to a 1992 judgment of the Supreme Court a distinction should be made between a *bona fide* sub-buyer and a sub-buyer who knew of the previous sale. The Court of Appeal in that case had held that the sub-buyer (D) had not acquired ownership because his seller (C), a second buyer with knowledge of the previous sale, could not invoke the first sale's lack of registration, and D could not acquire more rights than his author had. The Supreme Court quashed the judgment because the Court of Appeal had not considered whether the sub-buyer was in good faith.[33] By doing so the Supreme Court implicitly held that the *bona fide* sub-buyer is able to rely on the fact that registration in favour of the first buyer did not take place and that he acquires ownership, so that the first buyer loses ownership. In that case, the first buyer can demand damages from the second buyer (based on delict), but not from the sub-buyer.[34]

This approach, applying the law of delict, prevents the problem of the second buyer's lack of ownership spilling over into subsequent dispositions. The remedy of the first buyer, in this case the second buyer's inability to invoke the registration in favour of the second buyer, can be used against the *mala fide* second buyer only as long as he has not yet sold the property or granted a subordinate property right. After a sub-sale the first buyer can only invoke the remedy against a *mala fide* sub-buyer. The *bona fide* sub-buyer, on the other hand, will become and remain owner in this approach, and the delictual action against the second buyer (originally aimed at the inability to rely on his own registration) will be transformed into an action for payment of damages.

(3) Criticism of the case law

This case law protecting the first buyer against a second buyer in bad faith is often justified by saying that a registration system is for informing those who do not know, so that a person with knowledge of a previous sale should not be able to rely on the absence of registration of the first sale. However, there has also been fierce criticism of the new approach of the Supreme Court. The core of this criticism is that it diminishes legal certainty whereas legal certainty is the main goal of a system which makes third party effect depend on registration.[35]

At first sight the criticism may not seem very convincing, as it would allow someone to rely on the register when he knew better. But a closer look at concrete examples makes it more convincing. The first problem is how to establish the second buyer's knowledge. Is the second buyer assumed to have been in good faith unless the first seller is able to prove the contrary? If yes, the first buyer will hardly ever be able to prove this knowledge. Indeed, in French law good faith is presumed. Sometimes the evidence is easy to provide, e.g. where the immoveable was first sold

32 J Piedelièvre and S Piedelièvre, *La publicité foncière* (2014) nr 501.
33 *Cass civ 3, 11 juin 1992*, nr 90-10687, D 1993, 528.
34 Piedelièvre and Piedelièvre, *La publicité foncière* (n 32) nr 502.
35 See e.g. M Gobert, "La publicité foncière française, cette mal aimée" in *Etudes offertes à Jacques Flour* (1979) 207 at 224 ff and L Aynès, "Publicité foncière et mauvaise foi de l'acquéreur: un revirement de jurisprudence radical et salutaire" 2011 Recueil Dalloz 851.

to a company and subsequently to the director of the company. The court may come to the rescue of the first buyer by inferring knowledge from certain facts, such as the speed with which the second buyer has his conveyance deed registered.

In a case decided by the Supreme Court on 6 April 1925, the Court of Appeal of Douai had accepted that there was a conspiracy between the seller and the second buyer aimed at frustrating the first buyer's rights. The second buyer had registered his sale on the day after the sale, which was unusually fast. The judgment of the Supreme Court does not disclose whether or not there were any further facts that led the Court of Appeal to this conclusion. The Supreme Court held that this is a factual finding that is left to the lower instance courts since the Supreme Court does not judge the facts. Therefore, we might suspect that the speed of registration was the only objective factor leading to this view.

A second problem is that it may be uncertain whether the first sale is (or remains) binding. If the first buyer has difficulties raising the purchase price, the seller might have a valid reason for terminating the contract. If the first buyer regards the sale to him as binding and wishes to obtain a court order for conveyance to him, he could protect his position by registering the writ of summons or registering a notarial deed stating that the buyer demands the seller to perform the contract under Article 37(2) of the decree of 1955. Should we require the second buyer, who knows about the conflict between the seller and the first buyer, to ask the first buyer whether or not he accepts the termination of the contract? And what if after the sale the parties attempt to renegotiate the contract but never come to agreement, let alone a registration of the sale? This happened in a recent Austrian case.[36]

Another criticism of the case law is that the second buyer is not alone in acting incorrectly: the first buyer also acted incorrectly when he failed to have his contract registered promptly. Yet, this argument is not always compelling. Normally two different contracts of sale are made: the first is not a notarial deed, the second is in notarial form. If the seller, after having sold the immoveable by means of a non-notarial deed, refuses to sign the notarial deed, the first buyer will be unable to register his right, because the non-notarial contract cannot be registered. For registration, a notarial deed is required. The only option left is for the first buyer to start proceedings against the seller and have the writ of summons or the buyer's statement demanding performance (in notarial form) registered under Article 37(2) of the decree of 1955. What if the immoveable has already been sold to the second purchaser in the meantime? The first buyer cannot be blamed for not registering promptly.

(4) 2010: The Supreme Court reverses its previous case law

This criticism may have been the reason why from 2010 onwards the Supreme Court reversed this case law, holding that even if the second buyer knew of an earlier sale, he was protected if his acquisition was registered first.[37] The Supreme Court had already taken this approach in disputes between the unregistered acquirer of a

36 *Oberster Gerichtshof 12 April 2016*, 2 Ob 87/15f.

37 *Cass civ 3, 10 février 2010, pourvoi nr 08–21656*, Bull civ III, nr 41, followed by *Cass civ 3, 15 décembre 2010, pourvoi nr 09-15891*, *Cass civ 3, 12 janvier 2011, pourvoi nr 10-10667*, and *Cass civ 3, 19 juin 2012, pourvoi nr 11-17105*.

mortgage and the acquirer of the mortgaged property[38] and in a dispute between the unregistered acquirer of a long lease (*bail emphytéotique* and *bail à construction*) and a registered mortgage.[39] This new approach coheres well with the Supreme Court's judgment that a notary drawing up the sales deed in favour of the second buyer knowing of a previous unregistered sale to another is not liable in delict against the first buyer. The Supreme Court held that the notary could not refuse to draw up the deed for the second sale.[40]

Aynès[41] and Cohet-Cordey[42] claimed that this solution had the advantage of giving full force to the registration system. According to Aynès, the new case law of the Supreme Court is a return to the position under the pre-1968 case law, which means that the first buyer is not always unprotected against a second buyer with knowledge. It means that, as in the old case law, the first buyer is only protected in the case of fraud. Mere knowledge on the part of the second buyer does not suffice. Fraud means a conspiracy between the seller and the second buyer aimed at depriving the first buyer of his rights.[43]

(5) Consistency of the post-2010 case law?

De Bertier-Lestrade, however, pointed to the fact that because of this case law the rules on protection of the second buyer of immoveables differed from the rules on double sale of moveables.[44] Article 1141 (old) and Article 1198(1) (new) of the civil code provide that in the case of a double sale of a moveable thing, the buyer who gets actual possession (*possession réelle*) first will be preferred, provided he is in good faith. It means that if the first buyer has already acquired ownership, the seller will nonetheless be able to give ownership to the second buyer who is in good faith.

However, case law on double sale of moveables and case law on double sale of immoveables did not run entirely in parallel: each assessed the second buyer's good faith at a different moment. According to the Supreme Court in the post-1968 case law the second buyer of immoveable property needed to be in good faith when he signed the (non-notarial) contract of sale. Even if he was no longer in good faith at the time of registration of the notarial deed, he would still acquire ownership.[45] Yet, in the case of moveables, the second buyer is required to have been in good faith at the moment he acquires actual possession.[46] Here it does not suffice if he was in good faith when he bought the thing. This is an inexplicable difference.[47]

38 *Cass civ 3, 17 juillet 1986*, nr 85.11627, Bull civ III nr 118.
39 *Cass civ 2, 11 juillet 2002*, nr 00-20697, Bull civ II, nr 170.
40 *Cass civ 1, 20 décembre 2012*, nr 11-19682, D. 2013, 97.
41 L Aynès, "Publicité foncière et mauvaise foi de l'acquéreur: un revirement de jurisprudence radical et salutaire" 2011 Recueil Dalloz 851.
42 F Cohet-Cordey, "Publicité foncière et mauvaise foi du second acquéreur : interprétation objective" 2013 AJDI 302.
43 Aynès, "Publicité foncière" (n 41).
44 B de Bertier-Lestrade, "Retour sur la mauvaise foi dans les règles de publicité foncière et les règles de conflits d'actes" 2011 Recueil Dalloz 2954. See also W Dross, "A quoi sert la publicité foncière? L'opposabilité des servitudes non publiées à l'ayant cause de mauvaise foi" 2013 RTD civ 865.
45 *Cass civ 3, 22 mai 1990*, Bull civ III, nr 128. See also Ph Delebecque and Ph Simler, "Publicité foncière. Seconde vente. Mauvaise foi du second acquéreur. Moment de l'appréciation" 1992 RDI 104.
46 *Cass civ 1, 27 novembre 2001, pourvoi nr 99-18.335*.
47 In itself, the requirement of Art 1141/1198(1) *Code civil* is already difficult to justify. See L van Vliet, "*Michael Gerson (Leasing) Ltd v Wilkinson*: A comparative analysis" (2001) 5 EdinLR 361–371.

This new case law of the Supreme Court was also at odds with its own case law on protection against unregistered servitudes, under which a buyer is not protected against an unregistered servitude of which the buyer was aware.[48] It also deviated from its own case law on the so-called *actio pauliana* (transactions voidable at the instance of creditors). The Supreme Court accepts a broad interpretation of the *actio pauliana* by allowing the defrauded first buyer to use this action against the second buyer thus annulling the sale and transfer to the second buyer, thus adopting a view first defended by Baldus.[49] The old case law on double dispositions of immoveable property was in line with the case law on the *actio pauliana*. The new case law could easily be circumvented by the first buyer by making use of the *actio pauliana*.

G. THE 2016 REFORM OF THE LAW OF OBLIGATIONS

(1) The new provisions

The 2016 reform of the French law of obligations put an end to the post-2010 case law on double sales of immoveable property. It brings the double sales of immoveables in line with the double sales of moveables, and covers both problems in the same new Article 1198 of the *Code civil*. The first sentence is the successor to the old Article 1141 on double sales of moveables, but the second sentence gives a somewhat similar provision for the double "transfer" of rights in immoveables. Article 1198 *Code civil* provides:

> When two successive acquirers over the same corporeal moveable hold their right from the same person, he who has first taken possession of that moveable is preferred, even if his right is posterior, provided that he is in good faith.
>
> When two successive acquirers of rights over the same immoveable hold their right from the same person, he who has first registered his title in the form of an authenticated instrument in the land register, made in notarial form, is preferred, even if his right is posterior, provided that he is in good faith.[50]

As in Article 30 of the 1955 decree on land registration the acquisition of a right in the same immoveable refers to property rights such as ownership. Therefore, strictly speaking, Article 1198 is a contradiction in terms because only one of the

48 *Cass civ 3, 2 juillet 2013*, nr 12-20.681.

49 In *Cass civ 3, 6 octobre 2004*, nr 03-15392, D 2004, 3098, this was confirmed in a case in which the sellers of immoveable property, after having sold the property in an unregistered non-notarial deed, donated the same property to their son. The Court of Appeal had held that the *actio pauliana* was not available because (1) the first buyer did not have a personal right (*créance*) and (2) this conflict about a double disposition of the same immoveable property should be solved by applying the rules protecting third parties against unregistered rights (i.e. the decree of 1955 on land registration). The Supreme Court, however, reversed the judgment and allowed the *actio pauliana*, because "the fraudulent transaction had the effect of making it impossible to exercise the special right which the creditor has on the alienated thing".

50 "Lorsque deux acquéreurs successifs d'un même meuble corporel tiennent leur droit d'une même personne, celui qui a pris possession de ce meuble en premier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi.

Lorsque deux acquéreurs successifs de droits portant sur un même immeuble tiennent leur droit d'une même personne, celui qui a, le premier, publié son titre d'acquisition passé en la forme authentique au fichier immobilier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi."

two successive buyers will receive ownership and be "the acquirer". What the article covers is the conflict between two creditors who both have conflicting rights to the acquisition of a property right under a contract which, without this conflict, would have transferred ownership or created the subordinate property right instantly at the time of the contract. According to *Cass civ 3, 22 mai 1990*[51] the second buyer required to have been in good faith when he bought the property.

This provision about the double sale of immoveables was not included in the draft prepared by Professor Catala,[52] nor in the draft ordinance published on 25 February 2015 for consultation.[53] The report presented to the President does not explain at all why this provision was adopted and simply says that article 1198 extends the already existing rule on double sales of moveables to double sales of immoveables.[54] It might be suggested that it was not intended to overrule the Supreme Court's case law. On the other hand, this seems unlikely because the provision was added after February 2015 while the Supreme Court had already changed its stance in the period since 2010. If the provision had already been adopted in the Catala pre-project from 2005, it could have been regarded as a codification of the case law on double sales of immoveables as it stood in 2005. But it seems unlikely that the provision was added without the legislator realising that it would overrule current case law.

Could the new provision in Article 1124 of the *Code civil* about *promesses unilatérales* (unilateral promises) play any role in the case of a sale to a third party?[55] The new provision defines the unilateral promise as a contract in which the promisor gives the beneficiary the right to opt for the conclusion of a contract the main elements of which are determined, so that the conclusion only lacks the consent of the beneficiary. It binds the promisor unilaterally. In the case of an option to buy, if the beneficiary invokes the option, the purchase contract is completed and binding on both parties, i.e. it becomes *synallagmatique* or reciprocally binding. To a certain degree the new provision already protects this option to buy against a double sale by the promisor to a third party. The third sentence of Article 1124 reads: "The contract concluded in violation of the unilateral promise with a third party who knows its existence is void." Most probably the term "void" (*nul*) means voidable at the instance of the beneficiary. Automatic voidness would not make any sense. Although the beneficiary has the power to invoke the option and demand specific performance despite the sale to the third party, if he chooses to demand damages instead, the contract with the third party should remain valid and should be able to transfer ownership to the third party. Article 1124 ensures that the rule on double sales as laid down in Article 1198(2) is extended to protect the beneficiary of a unilateral promise (an option to buy), but the provision is much wider and also applies outside of sale.

51 Bull civ III, nr 128.

52 *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil), Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice*, published 22 September 2005.

53 The draft ordinance of 2015 had an art 1199 which only contained the first sentence of the current art 1198.

54 *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*.

55 This is claimed by V Streiff and C Pommier, "Gestion des conflits entre acquéreurs successifs et publicité, la réforme du droit des contrats" La Semaine Juridique Notariale et Immobilière, n° 21, 27 mai 2016, 1170.

(2) The position of the sub-acquirer after 2016

From the text of the new Articles 1198 and 1124 it is unclear what the position of the sub-buyer will be. It should be remembered that the *nemo plus* approach applied by the Supreme Court in 1949[56] left the sub-buyer unprotected even if he bought in good faith. The delictual approach applied in 1992[57] is more nuanced and enables the sub-buyer to acquire ownership if he was in good faith. In such a case, the first buyer could only sue his seller or the second buyer for damages. If Article 1124 does not mean automatic nullity but mere voidability at the option of the beneficiary, he should no longer be allowed to avoid the sale A–C after a sub-sale C–D. Similarly, it should be possible to interpret Article 1198(2) in such a way that the acquisition by the *mala fide* second buyer is still preferred if the sub-buyer bought in good faith. However, it is to be feared that the text of Article 1198 leads to the application of the *nemo plus* rule and that the second buyer's knowledge automatically leaves the *bona fide* sub-buyer unprotected.

G. CONCLUSION

We have seen that the French rules on double sale of immoveables have radically changed back and forth several times. The overview started by analysing the law of *11 brumaire an VII*, which made registration in the land register a prerequisite for transfer of ownership. In that system, as to be expected, the first registration prevailed, even if that was a registration in favour of a second buyer with knowledge of a prior sale to another. The first buyer could only be protected in the case of fraud. Under the land registration statute of 1855 and the land registration decree of 1955 the second buyer with knowledge was protected against an earlier non-registered sale, except in the case of conspiracy. From 1968, the Supreme Court changed its approach holding that the *mala fide* second buyer could not invoke his registration against the first buyer. The Supreme Court was heavily criticised for this. The reproach was that it undermined the reliability of the registration system. Moreover, knowledge of the previous sale is difficult to prove. Should it be possible to infer that knowledge from the speed of registration? What if the second buyer is uncertain whether the first buyer accepts the termination of the first sales contract by the seller? Since 2010 the Supreme Court has returned to its approach from the period before 1968. However, this reversal has now been overruled by the legislator in 2016 as part of the reform of the French law of obligations. The reason is unclear as explanatory notes do not exist. It is yet to be seen whether a *bona fide* sub-acquirer is left unprotected by the new provisions.

56 *Cass civ 10 mai 1949*, Bull civ nr 160, D 1949, 277.
57 *Cass civ 3, 11 juin 1992*, nr 90-10687, D 1993, 528.

SOME PROPERTY PROBLEMS IN BUILDING CONTRACTS

Sarah P L Wolffe and W James Wolffe

A. INTRODUCTION

Nineteenth-century industrial activity left its mark on Scotland's law as well as on its landscape. This is the story of two engineering projects that did not go according to plan: the erection in the 1850s of a gas-holder tank at Dundee Gas Works; and the construction in the 1860s of the Monkton, Ormiston and Dalkeith Railway.

In each case the contractor became insolvent and the employer made alternative arrangements for completion of the works.[1] The original contractor had brought materials onto the site to be incorporated into the works, and plant and tools to be used in the construction process. The substitute contractor used those materials, plant and tools. Claims advanced by the contractor's trustee in sequestration led the court to analyse the nature of the employer's rights in relation to construction materials, and plant and tools which the contractor had brought onto the site.

These two decisions – *Kerr v Dundee Gas Light Company*[2] and *Moore v Gledden*[3] – contain discussions of the law of retention and pledge, which, though not unproblematic, are of some general interest.[4] They are, in any event, the leading Scots law authorities on a recurrent fact situation that all developed legal systems must resolve[5] and that have, recently, been addressed in a different way by the higher courts of England and Wales.[6]

George Gretton taught us that insolvency tests our doctrine; and these cases illustrate the point. For those of us who were students of law at the University of Edinburgh in the 1980s, George was our Gaius – the teacher who, with the other

1 We use the conventional terms "employer" and "contractor", although a building contract is not a contract of employment but a contract *locatio operis faciendi*.

2 (1861) 23 D 343.

3 (1869) 7 M 1016; (1869) 41 Sc J 567; (1869) 6 SLR 652.

4 Although *Kerr* relies on retention, it is not referred to in that context in W M Gloag and J M Irvine, *Law of Rights in Security* (1897), W M Gloag, *The Law of Contract* (2nd edn, 1929), or in W W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007). *Moore* has been much footnoted, though little discussed, and is described by Gloag and Irvine at 235 as "somewhat anomalous". A J M Steven, *Pledge and Lien* (2008) paras 6-15–6-17 and 11-05 critically considers both cases.

5 See generally N Dennys and R Clay (eds), *Hudson's Building and Engineering Contracts* (13th edn, 2015) 967–1007; S Furst and V Ramsey (eds), *Keating on Construction Contracts* (10th edn, 2016) 327–331.

6 *Re Cosslett (Contractors) Ltd* [1997] Ch 23 affd [1998] Ch 495 and *Smith (Administrator of Cosslett (Contractors) Ltd v Bridgend County Borough Council* [2000] BCC 1155 revd [2002] 1 AC 336.

members of the miraculous generation of scholars who graced Edinburgh Law School at that time, taught us how to think about the law – to understand it as an intellectually coherent system, to apply critical rigour to the decisions of our courts and to value doctrinal study. It is a privilege to have the opportunity to acknowledge that debt.[7]

B. *KERR V DUNDEE GAS LIGHT COMPANY*

The Dundee Gas Light Company resolved to erect a gas-holder tank on a property called "Peep-o'-Day".[8] They engaged a contractor called Chappell. Although the parties did not agree the terms of the construction contract,[9] Chappell started work. He was subsequently sequestrated and Kerr appointed as trustee. The company engaged another contractor to complete the work. Chappell left materials and tools – including a crane – on the site. Kerr demanded delivery of these. The company refused to give them up, and applied to the sheriff for warrant to have them valued. Once valued, they were handed to the substitute contractor to complete the work. The materials were used and the tools never given up to Kerr.

Kerr raised proceedings seeking payment for: (1) the value of the work done by Chappell, less payments to account; and (2) the value of the materials and tools left on site. The company resisted the claim, maintaining *inter alia* that they had lawful possession of the materials and tools and were entitled to retain them in security for performance by Chappell of his contractual obligations and to apply them in compensation[10] of the company's claim against Chappell for damages.

The court's interlocutor[11] stated that the company were entitled: (1) "to retain the materials permanently for the purposes of the contract, and to have them used and wrought up into the contract work"; and (2) "to retain the said plant or tools temporarily for the purpose of being used in the execution of the contract work" but, on completion, Kerr was entitled to vindicate those items. Further, Kerr was entitled to payment for the value of the materials used, and to reasonable consideration for the use of Chappell's plant and tools. The company were entitled to set off their claim for damages against those claims, but not against Kerr's claim to damages for the unlawful detention of the tools after the work was completed.

The court analysed separately the position as regards the construction materials and the contractor's plant and tools. The members of the court agreed that when

7 One of us wrote an essay on this subject in the 1990s, on which George generously commented, as did Kenneth Reid, Hector MacQueen, Andrew Steven, and James Arnott. This more developed work has also benefited from further comments from Andrew Steven.

8 Peep o' Day House was the former residence of the 6th Earl of Airlie. The house was removed when the gasworks were constructed. The name – said to have been descriptive of the position of the house, facing east, towards the dawn – is preserved in Peep o' Day Lane, which runs between Broughty Ferry Road and East Dock Street.

9 A draft contract sent by the company to Chappell (and reproduced in the Session Papers held in the Advocates Library) contained a clause "declaring that all materials, articles and others, which Chappell should bring upon the Company's premises for the purposes of the work, should not be thence removed until after the full completion of the contract, but the same should be held as impignorated to the Company for the due performance of the contract". The terms of this draft were never agreed and this clause did not form part of the contract on which the work was carried out.

10 Properly, it may be thought, balancing of accounts in bankruptcy, although the court did not discuss the issues in these terms. Balancing of accounts in bankruptcy is discussed further below at C.

11 (1861) 23 D 343 at 351.

Chappell brought construction materials onto the company's premises, they were put into the Company's possession, although they disagreed as to whether or not this entitled the employer to exercise possessory remedies against the contractor prior to insolvency.[12] Lords Benholme and Cowan held that the materials remained the contractor's property (and so passed to his trustee).[13] Lord Justice-Clerk Inglis expressed himself equivocally on the question of ownership – in language that, if it were to be used by a student of George Gretton's, would surely earn a rebuke:

> It is in vain to consider to what extent, or in what sense, delivery of [the] materials into the possession of the defenders made them the property of the defenders. In one sense it did, and in another it did not.[14]

The bench nevertheless agreed that, following Chappell's bankruptcy, the company had a right to retain the materials "permanently", and to use them for the purposes of the construction work.

Lords Inglis and Benholme held that the company were also entitled to retain the plant and tools that Chappell had brought onto the site, albeit "only temporarily for the purposes of being used in the execution of the contract work". As Lord Benholme put it, the property in the tools vested in the trustee "subject to a temporary burden" entitling the employer to use them for completion of the building contract.[15] On completion of the work, the company were obliged to redeliver the tools to Chappell or to his trustee. Kerr was accordingly entitled to vindicate the tools, or to be paid an equivalent in money's worth. Lord Cowan dissented on the basis that, unlike the materials, the tools had never passed into the company's possession:

> These were not brought to the defenders' ground under any express stipulation in the contract, or any implied understanding. There was an obligation on the part of the contractor to do the work; but he was not obliged to use any particular tools. He might have borrowed the necessary tools, or changed for others, those with which he commenced operations.[16]

12 Lord Justice-Clerk Inglis stated that the company "were entitled to prevent the materials from being removed or taken out of their possession". Lord Cowan stated that "as to the materials", he concurred "in every word your Lordship has stated": (1861) 2 D 343 at 348. Lord Benholme said: "As to the materials . . . while this contractor was solvent and able to perform his contract, I am not prepared to say that I would have interfered with him in the execution of his contract had he chosen to remove some materials in order to replace them with others. That would have been allowable during his solvency, while he was in the active and bona fide prosecution of the contract": (1861) 2 D 343 at 350.

13 This is orthodox. Although the court held that delivery to the site put the goods into the possession of the employer, possession on its own is not enough to transfer ownership, but also needed is the "intention or consent of the former owner to transfer it upon some just or proper title of alienation": Erskine, *Inst* 2.1.18. A building contract is a contract of location. In such a contract, where the workman supplies materials as well as work, ownership passes, in the absence of a contractual provision to the contrary, when the work is completed (Bell, *Commentaries*, I, 193–194 and 276), subject, in the case of a building contract, to the law of accession: *McIntyre v Clow* (1875) 2 R 278 at 283 per Lord Ardmillan.

14 (1861) 2 D 343 at 348. The suggestion that the materials might "in one sense" be the property of the defenders but in another sense not is, certainly so far as Scots law is concerned, legal nonsense. But Lord Inglis' equivocation is, practically if not legally, intelligible, since the company had the right to retain the goods "permanently" even against the contractor's trustee, to use them, and, by using them in the construction works, appropriate them to their ownership.

15 (1861) 23 D 343 at 350.

16 (1861) 23 D 343 at 350.

C. *KERR* AND THE RIGHT OF RETENTION

The right of retention[17] discussed in *Kerr* looks like a lien – a right to retain corporeal moveable property that had been put into the employer's possession under the contract until performance of the contractor's obligations. That characterisation would be consistent with the court's focus on the employer's possession of the goods,[18] with the priority in insolvency, and with its extinction upon completion of the works.[19]

While the right to *retain* the goods might be explained on this basis, it is more difficult to identify a satisfactory basis for the right of use that the court acknowledged. If a building contract explicitly gives the employer a right to use goods brought onto the site,[20] that may be regarded as a contractual right that the employer may exercise as long as it is can, by virtue of the right of retention, resist the trustee's claim to vindicate the goods.[21] But in *Kerr* there was no relevant contractual provision.

As Dr Steven has pointed out,[22] a lien does not normally confer a right to use the property retained. Far less does it normally entitle the holder of the lien to use the retained goods in such a manner that they would never be returned *in specie* to Chappell or his trustee. Furthermore, the right to retain the tools was not a right to retain until *Chappell* fulfilled his obligations, but until the company itself completed the works through a substitute contractor. Dr Steven suggests that: "the fact that it was the retaining party who could go ahead and complete the work makes the right of retention a sui generis one", which he proposes would be better analysed in terms of an equitable right arising on bankruptcy.

There is textual support for this proposal. Lord Inglis observed that the right to retain the materials arose "on the occurrence of [Chappell's] bankruptcy".[23] Lord Benholme stated:

> matters are very much altered, when in consequence of insolvency, the work comes to a stand, and the company are obliged to provide for the due and speedy execution of the work. Rights then came into existence, especially as regards the stone and materials, which had not emerged before.

But if they are new rights arising upon insolvency, it is not clear why the court addressed whether the goods had been put into the employer's possession upon delivery to the site. Indeed, if the goods were, from that point, in the company's possession, one might have thought that they could retain them in the face of the contractor's refusal or inability to perform regardless of insolvency.

The shifting majorities invite anxiety about the court's approach to the issue of possession. The issue seems particularly acute in relation to the contractor's tools

17 For the multiple meanings of the term, see *Inveresk plc v Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106 at para 29 per Lord Hope of Craighead and para 60 per Lord Rodger of Earlsferry.

18 Although, as Steven has persuasively argued, possession is not the only basis upon which a right of retention may be founded: *Pledge and Lien* (n 4) at paras 13-04–13-26.

19 (1861) 23 D 343 at 349 per Lord Justice-Clerk Inglis and at 350 per Lord Benholme.

20 As in the *Moore v Gledden* (n 3) and *Cosslett (Contractors) Ltd* (n 6) cases discussed below at D and E.

21 Compare *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508–509 per Millett LJ, quoted below in the text at n 51.

22 Steven, *Pledge and Lien* (n 4) at para 11-07.

23 (1861) 23 D 343 at 348.

and plant. In the absence of a relevant contractual provision, Lord Cowan's dissent[24] appears more accurately to describe the commercial position, at least prior to insolvency. And even in relation to materials, one might have taken the view that the contractor is, in the absence of any relevant contractual provision, entitled to bring the required materials onto the site as and when he requires them and, as Lord Benholme observed, *prima facie* free, from time to time, to substitute other goods.[25]

One may question whether the court needed to address these issues. By the time Kerr raised the action, the work had been done, and the practical question was the adjustment of the parties' respective claims. The trustee, it may be thought, would have rights on completion to delivery and payment, consistent with the court's decision, regardless of whether the company had, prior to completion, been exercising a right to retain and use the materials. The question of set off against the company's claim for damages could be dealt with through balancing of accounts in bankruptcy, without necessarily requiring to analyse the nature of the company's rights in the goods when they were brought onto the site.

Nevertheless, at least where the employer's solvency is not in doubt and the employer can accordingly pay,[26] the rights of retention and use identified in *Kerr* generate, it may be thought, a practically satisfactory outcome – one that facilitates the employer's ability to complete the works in the face of a contractor's default, but with appropriate payments for the benefit of the contractor's creditors. *Kerr* should, in that regard, be seen in the context of the view that an employer's primary remedy, faced with a contractor who is unable or unwilling to fulfil its contractual obligations, is to seek implement, which failing judicial warrant to execute the work itself, or through a substitute contractor, at the contractor's expense.[27] If the employer may be authorised to execute the work, effectively in implement of the contractor's obligations, it is, perhaps, a small step to allow the employer to use the contractor's materials and tools to that end.

The right of retention articulated in *Kerr* may be compared with other doctrines, which seek to secure an equitable result in relation to cross-claims. In the context of insolvency, balancing of accounts in bankruptcy relaxes the rules applicable to compensation in order to secure an equitable result according to the circumstances of the case.[28] The "court can regulate its operation to ensure fairness",[29] and there are no

24 See text at n 16 above.

25 (1861) 23 D 343 at 350. The majority view in *Kerr* is, of course, to the contrary.

26 If the employer is insolvent, it may be unlikely to complete the works in any event.

27 This at least was the nineteenth century approach: *Davidson v Macpherson* (1889) 30 SLR 2; *Commissioners of Northern Lighthouses v Edmonston* (1908) 16 SLT 439. Today, in practice, it is more likely that the employer would exercise a contractual power of determination, or rescind the contract in response to the contractor's material breach, with financial claims being advanced under provisions in the contract or by way of a claim for damages for breach.

28 See *Ross v Ross* (1895) 22 R 461 per Lord McLaren at 464–465. For an earlier case demonstrating the remarkable latitude as regards relaxing the requirement of "pure" compensation, see *Mill v Paul* (1825) 2 S 219 at 220, where Lord Glenlee states: "Where counter claims exist at the date of the sequestration, or an accession to a trust deed . . . they may compensate each other, and that *whether the claim on which compensation is pleaded be presently exigible, contingent or future, provided it actually existed at that period*" (our emphasis). For a discussion in modern times, see Lord Hodge in *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* [2010] BLR 622.

29 *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* (n 28) per Lord Hodge at para 25.

formal requirements as to how this may be achieved in any particular case.[30] Likewise, the species of retention–compensation discussed in *Inveresk plc v Tullis Russell Papermakers Ltd*[31] – not itself an insolvency case – involves, as Lord Rodger explained, the exercise of an equitable jurisdiction to secure equitable results,[32] and operates although the defender has "no antecedent right" to retain the debt.[33] One can, perhaps, see in *Kerr,* a like equitable jurisdiction applied to the retention of goods.

D. *MOORE V GLEDDEN*

(1) Circumstances of the case

Rosser and Smith entered into two contracts with the North British Railway Company to construct railway lines. Gledden was their cautioner. Rosser and Smith brought plant and material (including a crane) onto the site, but became unable to continue. The company agreed that Gledden should take over the contracts. Rosser and Smith assigned to Gledden their rights under the contracts and the plant and materials belonging to them on or near the works.

Rosser and Smith were sequestrated. Their trustee, Moore, raised proceedings seeking reduction of the assignations to Gledden, and delivery of the plant and materials. Gledden argued that the company had, under the building contracts, obtained a pledge over the plant and materials, and that he, Gledden, was entitled, as cautioner, to the benefit of that security.

Each contract contained the following clause:

> And it is hereby specially stipulated and agreed that all materials, as well as tools, machinery, rails, scaffolding, wagons, horses, houses, sheds, and implements of every description, brought on or left near to the site of the said works hereby contracted for, shall from the time of their being so brought and left, *be held to be the property of, and belong to, the company, and shall not, without their consent in writing, be removed or taken away therefrom; and it shall be in the power of the company to use or sell all the materials, tools, machinery*, rails, scaffolding, wagons, houses, horses, sheds and implements of every description, either by public roup or private sale, as they shall think most expedient, *and to impute the price or prices thereof pro tanto in extinction of the obligations of the contractors*; *but the said materials, tools, machinery, scaffolding, wagons, houses, sheds and implements shall until default or bankruptcy . . . remain under the care or custody and shall be entirely at the risk of the contractor*.[34]

30 There is no detailed discussion in the relevant textbooks of the procedure to be followed.

31 2010 SC (UKSC) 106. We use "retention–compensation" as a shortened form of Lord Rodger's characterisation of "retention for the purposes of compensation".

32 See, for example, *Highland Council v Construction Centre Group Ltd* 2004 SC 480 (interim suspension of a charge on a decree sought to be enforced by an insolvent party granted to a petitioner wishing to rely on an adjudicator's award in its favour); *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* (n 28) (court refused motion by insolvent pursuer for summary decree to enforce an adjudicator's award on the basis of the defender's illiquid and unresolved claim for breach of contract against the pursuer); *Smith v Harrison & Co's Trs* (1893) 21 R 330 (*de facto* set off effected by arbiter to whom tenant and landlord's claims had been referred for valuation upheld by the court); and *Jaffray's Trustees v Milne* (1897) 2 R 602 (defender landlord entitled to rely on sum due to him in action against him by his tenant's trustee in sequestration, without requiring the landlord to raise a separate action – counterclaims not yet being an available procedure).

33 See, especially, 2010 SC (UKSC) 106 at para 106.

34 Italics added. The full contract is reproduced in the Session Papers in the Advocates Library.

The judges of the Second Division "thought the points raised . . . of such importance and of such comparative novelty and difficulty" that they availed themselves of the (then relatively new) power[35] to direct a hearing before seven judges. The majority (Lord Kinloch dissenting) held that the company had, indeed, acquired a real right in Rosser and Smith's plant.[36] As a practical matter, this decision meant that Gledden could use that plant to complete the works.

Lord Neaves gave the leading opinion.[37] He recognised that the constitution of a real right in corporeal moveables requires: (1) a "contract fixing the nature of the right"; and (2) possession. He held that: (1) the contract granted a right in security; (2) the grant was completed by possession when the goods were delivered on site; and (3) the right subsisted notwithstanding that the goods remained "under the care or custody" of the contractors. Each of these three points merits further comment.

(2) Interpretation of the contract

The contract provided that the materials and tools on site "be held to be the property of, and belong to, the company". Such wording is capable of evincing an intention to transfer ownership.[38] For example, in *Bennett and White (Calgary) Ltd v Municipal District of Sugar City*,[39] the contract provided:

> All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the contractor . . . shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty . . .

In that case Lord Reid, giving the advice of the Privy Council, stated that: "the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown".[40]

The decision by counsel in *Moore*[41] to argue that the clause granted a security right, was, though, surely correct and reflected its underlying commercial purpose[42]

35 Court of Session Act 1868 s 60 (re-enacted, with modification, Court of Session Act 1988 s 36).

36 See the terms of the interlocutor quoted at (1869) 7 M 1016 at 1026. Notwithstanding the terms of the contract, no real right was transferred in goods placed "near the works", if not on ground occupied by the company: see the exchange between Lord Neaves and counsel reported at 1022. See also *Stirling County Council v Official Liquidator of John Frame Ltd* 1951 SLT (Sh Ct) 37.

37 The Lord Justice-Clerk (Patten), Lord Benholme and Lord Ardmillan concurred *simpliciter*. The Lord President (Inglis) and Lord Cowan gave short concurring opinions. Lord Inglis' opinion is reported only in the SLR report at 656. Lord Kinloch dissented, for reasons discussed below at C.(3).

38 That would be the natural meaning of the word "property". English law knows the term "special property", but as Lord President Dunedin observed in *Hayman v McLintock* 1907 SC 936 at 950: "There is no such thing in Scots law as the term special property, and there cannot be according to the law of Scotland a distinction between *the* property and a special property."

39 [1951] AC 786.

40 [1951] AC 786 at 815.

41 George Young QC, later Lord Young. For Young's heterodoxy in relation to the law of security, see A F Rodger, "Pledge of bills of lading in Scots law" 1971 JR 193 at 204.

42 Compare *Hart v Porthgain Harbour* [1903] 1 Ch 690 at 694 per Farwell J and *Reeves v Barlow* (1884) 12 QBD 436 at 438–442 per Bowen LJ; *Re Cosslett Contractors* [1998] Ch 495 at 506–507 per Millett LJ. In *Bennett and White (Calgary)* (n 39) at 813 Lord Reid analysed previous English case law, and concluded that the effect of a clause such as the clause in *Moore* depended on whether it stated that the goods would be "considered" or "deemed" to be the employer's property, or, on the other hand, would "be and become" his property. This distinction has been persuasively criticised: see Dennys and Clay (eds), *Hudson's Building and Engineering Contracts* (n 5) paras 8-076–8-077.

– after all, the draft contract in *Kerr* expressly referred to impignoration.[43] The express right to sell the goods and to apply the proceeds of sale in extinction of the contractors' obligations was eloquent of a security right. And the express provision giving the creditor a right to use the goods was consistent with a pledge[44] and would have been redundant if ownership had been transferred.

(3) Possession

The critical question was, then, whether or not the parties' intention had been effected by delivery of the goods to the site – whether that put the goods into the employer's possession. On this, Lord Neaves followed *Kerr*; and derived additional support from the contractual prohibition on the removal of the goods from the site. Lord Kinloch dissented on the ground that the employer never had possession of the materials and tools:

> Possession of moveables is an individual and personal, not a territorial, thing. The great majority of mankind live, and act, and labour, on ground which is not their own; and their individual possession of their own moveables is none the less considered a proper personal possession . . . There is no such principle as that a man's possession of moveables on the ground of another is the possession of the proprietor of the ground.[45]

He suggested that *Kerr* deserved reconsideration. The majority rejected this invitation, and the approach to the issue in *Kerr* and *Moore* – whatever doubts might be entertained about it[46] – accordingly has the authority of the Full Bench.[47] On Lord Neaves' analysis, transportation of the goods onto the employer's land[48] effected the outward change of position required to create a pledge.[49]

One may contrast Millett LJ's analysis in *Re Cosslett (Contractors) Ltd* where the contract contained a similar clause.[50] He derived the employer's rights exclusively from contract:[51]

> the [employer's] rights in relation to the plant and materials are exclusively contractual, and are not attributable to any delivery of possession by the [contractor]. When the [contractor] brings plant and materials onto the site they remain in the possession of the company to enable it to use them in the completion of the works. There is no question of the [contractor] delivering possession at that stage, either by way of security (i.e. as a pledge) or otherwise (i.e. by way of lien). The [employer] comes into possession of the plant and materials when it expels the [contractor] from the site leaving the plant and materials behind. But this does not amount to a voluntary delivery of

43 See n 9 above.
44 This is the *pactum antichresis*: Bankton, *Inst* 1.17.3.
45 (1869) 7 M 1016 at 1024.
46 See discussion at nn 23–25 above.
47 *Yuill's Trs v Thomson* (1902) 4 F 815.
48 He held that the employer remains in both natural and civil possession of the site: (1869) 7 M 1016 at 1020. Although under most building contracts, the employer gives "possession" of the site to the contractor (J M Arnott and W J Wolffe, "Building Contracts" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 3 (1994), para 53) and modern building contracts will do so expressly, on Lord Neaves' analysis this is, in legal terms, "mere access". See (1869) 7 M 1016 at 1020.
49 (1869) 7 M 1016 at 1020–1021.
50 Quoted below at E.
51 [1998] Ch 495 at 508–509.

> possession by the [contractor] to the [employer]. It is rather the exercise by the [employer] of a contractual right to take possession of the plant and materials against the will of the [contractor]. In my judgment, therefore, the council's rights are derived from contract not possession.

The proposition, which appears in this passage, that the contractor retains possession of goods brought on site is consistent with two twentieth-century Scottish cases, *Thomas Graham v Glenrothes Development Corporation*[52] and *Archivent Sales and Developments Ltd v Strathclyde Regional Council*.[53] In each case, a supplier of construction materials entered into a contract of sale with a contractor. The supplier delivered the goods directly to the site without payment. The contractor became insolvent. The unpaid seller sought delivery of the goods. The employer relied on section 25 of the Sale of Goods Act,[54] which provided:

> Where a person, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods . . . the delivery or transfer of the goods . . . under any contract of sale or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner.

Since the supplier delivered them directly to the site, in light of *Moore*, a question might arise as to whether the contractor ever had "possession of the goods". An argument along those lines was presented in the lower courts in *Thomas Graham*,[55] but was rejected, and not renewed on appeal. Lord President Clyde noted simply that the requirement:

> is admittedly satisfied . . . by the [employer's] averment that the [contractor] obtained possession of the goods with the [suppliers'] consent when their employees unloaded the goods from the lorries which brought them to the housing site.

In *Archivent*, Lord Mayfield addressed the point as follows:

> The [suppliers] maintained that because of the contract between the [contractor] and [the employer] . . . as soon as the goods arrived on site they were held by [the contractors] for [the employer] and were in the control of the [employer] . . . In my view however control does not negative possession. The goods were delivered to [the contractor] by [the suppliers] at the site. At that stage the [employer] did not know that the goods were on the site. It was only later when they instructed procedure pertaining to a Bill of Quantities that they were aware of the presence of the goods. During that period in my view [the contractor was] in fact in possession of the goods and certainly had custody of them. The restriction on [the contractor] was against removal from the site. In my view that is not inconsistent with possession.[56]

52 1967 SC 284, 1968 SLT 2.
53 1985 SLT 154.
54 In *Thomas Graham* the 1893 Act; in *Archivent* the 1979 Act.
55 1968 SLT 2.
56 The apparent focus in *Archivent* on the contractual interim payment mechanism is open to criticism: see *Egan v State Transport Authority* [1982] SASR 481 and *P4 Ltd v United Integrated Solutions plc* [2006] EWHC 2640 (TCC).

These cases might be rationalised with *Moore* either on the basis that multiple parties may independently possess the same property;[57] or on the basis that possession, in this context, has different meanings for different purposes.[58] The former rationalisation would be incompatible with Lord Watson's observation in *Mess v Hay*,[59] that:

> in order to constitute a valid pledge of moveables, there must be delivery of them to the pledgee, to the effect of vesting him with possession independent of the possession or control of the pledgor. Their joint possession will not suffice to create a right of security in the pledgee.

Alternatively, of course, one or other of these lines of authority may fall to be reconsidered.

(4) "Care and custody"

The contracts stated that the goods were to remain under the contractor's "care and custody" and *Moore* can accordingly be presented as raising a general question, namely whether a pledge of goods can survive if the goods are left in, or returned to, the custody of the pledgor. Previous authority would have suggested a negative answer. In *Hamilton v Western Bank of Scotland*,[60] the only authority on pledge cited in *Moore*, the court asserted that "actual delivery or custody" was necessary to constitute a pledge.[61] And Hume observed,[62] under reference to *Alexander v Black*[63] (in which pledged cattle had been redelivered to the pledgor for grazing): "Suppose that the creditor redelivers the moveable to the owner, expressly in loan, hyre, or deposition or the like, still I incline to think his pledge is extinguished".

Lord Neaves justified his conclusion that the provision in the contract about "care and custody" did not prevent a pledge from being created, by observing that:

> It is no unusual thing for the former owner of a thing to retain the custody of it after parting with the property. I may buy an article from a tradesman and, after taking delivery on the spot, I leave it with him to make an alteration or execute additional work on it for me. Or, I may buy a horse from a livery stabler, and then leave it in his hands at livery.

These were orthodox illustrations, in the context of sale, of *constitutum possessorium*.[64] The former had the authority, in that context, of Bell.[65] The latter was Hume's illustration,[66] and Lord Neaves (who had been Hume's student[67]) referred again to both

57 Compare C Anderson, *Possession of Corporeal Moveables* (2015) paras 3-98–3-99.
58 Compare Anderson, *Possession of Corporeal Moveables* (n 57) paras 1-58–1-59.
59 (1898) 1 F (HL) 22 at 26.
60 (1856) 19 D 152.
61 See, in particular, (1856) 19 D 152 at 159–160 per Lord President McNeill.
62 G C H Paton (ed), *Baron David Hume's Lectures 1786–1822*, vol 4 (Stair Society vol 17, 1955) 3.
63 16 January 1816, unreported.
64 D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005) paras 8–23 to 8–25. See also *Orr's Trs v Tullis* (1870) 8 M 936.
65 Bell, *Comm* I, 187–189.
66 G C H Paton, *Baron David Hume's Lectures 1786–1822*, vol 3 (Stair Society vol 15, 1952) 251.
67 As had Lords Cowan and Benholme: G C H Paton (ed), *Baron David Hume's Lectures 1786–1822*, vol 6 (Stair Society vol 19, 1958) 411. Lords Cowan and Benholme had retained their lecture notes on the subject of pledge: *Christie v Ruxton* (1862) 24 D 1182 at 1186.

only a year later.[68] Lord Neaves' reliance on them in *Moore* assumes that *constitutum possessorium* is available in pledge, as in sale. But if, as Hume observed, a pledge cannot survive redelivery to the pledgor, on a contract of loan, hire or custody, a pledge could hardly be constituted in the circumstances which Lord Neaves described.[69]

Today, it is less clear that the law sets its face against such arrangements. The "apparent monopoly of actual delivery"[70] implied by *Hamilton* has been persuasively criticised.[71] And in *North-Western Bank v Poynter, Son & Macdonalds*[72] the House of Lords held that the return of a pledged bill of lading to the pledgor as the pledgee's agent for sale of the goods did not extinguish the pledge. Lord Herschell proceeded[73] on the basis that a pledge is not extinguished:

> where possession is given to the person who happens to be the pledgor, just for the same legitimate purpose and in the same business manner as it might be given to any third person filling the same commercial capacity—that is to say, if it is given to a broker for sale or to a warehouseman to warehouse, or in other cases which might be put.

But the case of *Poynter* has, on this point, been roundly criticised by Alan Rodger.[74] There are aspects of Lord Rodger's critique which may be questioned[75] but his basic point – that the doctrine articulated in *Poynter* is capable of undermining the general principle that security over moveables depends on possession – remains valid.[76] It may be noted that four years after *Poynter*, Lord Watson contemplated that, while pledged goods might be stored on the pledgor's premises, the pledgee would have to establish "exclusive custody and control", for example by placing the goods in a locked room and delivering the key to the creditor.[77]

In truth, on the facts of *Moore*, the general question did not arise, and Lord Neaves' reliance on examples from the law of sale was unnecessary. *Moore* did not

68 *Orr's Trs v Tullis* (1870) 8 M 936 at 951.

69 But see statements in South African cases to the effect that "*constitutum possessorium* can have no place in a case of pledge where the pledged articles are to remain with the pledger *to be used by him for his own benefit*": *Lighter & Co v Edwards* 1907 TS 442; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (emphasis added; the qualification is noteworthy); though for a more absolute statement against the availability of *constitutum possessorium* in the context of pledge, see *Standard Bank of South Africa Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102.

70 Steven, *Pledge and Lien* (n 4) at para 6–21; see, in particular *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70.

71 Rodger, "Pledge of bills of lading in Scots law" (n 41); Steven, *Pledge and Lien* (n 4) paras 6-21–6-25.

72 (1894) 22 R (HL) 1.

73 (1894) 22 R (HL) 1 at 8–9, interpreting an important passage in Bell *Comm* II, 22.

74 Rodger, "Pledge of bills of lading in Scots law" (n 41).

75 George Gretton has observed that Rodger's statement that *Poynter* "has remained a dead-letter so far as Scots law is concerned" (see 1971 JR 193 at 208) overstates the position: G L Gretton, "Pledge, bills of lading, trusts and property law" 1990 JR 23. The South African authority upon which Lord Rodger relied must now be supplemented by the cases mentioned at n 69. Rodger interpreted the phrase "without necessity" in the key passage from Bell (see 1971 JR 193 at 207) to refer to voluntary action as contrasted with a transfer procured by force; but Bell did not, in similar contexts, use the word "necessary" in this way: see Bell, *Comm* I, 187 and II, 22. The better point, in relation to the passage from Bell is that Lord Herschell's interpretation, if correct, would subvert the very point which Bell was seeking to make.

76 The Scottish Law Commission in its Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011), which was principally authored by George Gretton, at paras 15.4–15.6, consulted on whether redelivery to the pledgor should extinguish the pledge.

77 *Mess v Hay* (1898) 1 F (HL) 22 at 26.

involve *constitutum possessorium* at all – indeed, it was the opposite case. The goods were not left with the contractor. They were actually delivered to the employer's site and, while the contractor was admitted to the site to undertake work using them, there was a prohibition on their removal from the site. As long as that contractual prohibition was observed, the provision leaving the goods in "care and custody" of the contractor was unlikely to "sanction a fraud upon the rule which requires possession to complete a real right to moveables".[78]

E. *COSSLETT (CONTRACTORS) LIMITED*

In *Moore*, although the legal question was whether the assignation to Gledden was valid, the practical question was whether or not Gledden, as cautioner, was entitled to use the plant to complete the works. The way the issue arose meant that the court did not have to address the question of whether the employer could retain the plant after completion. That issue arose squarely in *Cosslett Contractors*.[79] In 1989, Mid-Glamorgan County Council contracted with Cosslett (Contractors) Ltd for works directed to rehabilitating land that had been disfigured by derelict coal dumps. Cosslett brought two substantial coal washing plants onto the site. The contract was subject to the ICE Conditions of Contract. Condition 53 provided inter alia as follows:

> (2) All plant, goods and materials shall when on the site be deemed to be the property of the employer.
>
> . . .
>
> (6) No plant (except hired plant) goods or materials or any part thereof shall be removed from the site without the written consent of the engineer which consent shall not be unreasonably withheld where the same are no longer immediately required for the purposes of the completion of the works . . .
>
> (7) Upon the removal of any such plant goods or materials as have been deemed to have become the property of the employer under sub-clause (2) of this clause with the consent as aforesaid the property therein shall be deemed to revest in the contractor . . .

Condition 63 provided that if the contractor should become bankrupt, the employer could, on giving notice, enter the site and complete the works or employ another contractor to do so:

> and the employer and such other contractor may use for such completion so much of the constructional plant temporary works goods and materials which have been deemed to become the property of the employer under clause . . . 53 . . . as he may think proper and the employer may at any time sell any of the said constructional plant temporary works and unused goods and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the contractor under the contract.

The contractor became unable to fulfil its obligations and abandoned the works. The employer found a substitute contractor, which commenced work using Cosslett's

78 Compare Bell, *Comm* II, 22.
79 *Re Cosslett (Contractors) Ltd* (n 6).

plant. Cosslett went into administration and the administrator demanded return of the coal washing plant, and applied to the court. Jonathan Parker J rejected the application[80] and the Court of Appeal[81] dismissed the administrator's appeal.

The Court held that condition 53(2) did not convey title to the plant. Nor did the council have a pledge or a possessory lien because, according to Millett LJ, in the passage quoted above,[82] the plant remained in the possession of the contractor until the council exercised its rights under the contract. The contractor's rights derived from contract alone. The contractual right of retention and use did not constitute a security, for an equally fundamental reason:[83]

> It does not secure the performance of the contract by the company, but merely enables the council to perform the contract in its place. It does not, therefore, secure the discharge of any debt or other legal obligation of the company or of any third party, whether to complete the works or pay damages for its failure to do so. Completion of the works by the council does not discharge either of these obligations.

By contrast, the power to sell the plant and apply the proceeds towards discharge of sums due by the company, was a security – an equitable charge. This was a floating charge, which, since it had not been registered, was void against the administrator.[84] The council's *contractual* right to retain and use the plant and materials was unaffected, but, upon completion, the council could not resist the administrator's claim for delivery.

By the time judgment was handed down, the council had sold the plant. The administrator accordingly issued a fresh writ seeking damages for conversion. The case reached the House of Lords.[85] The House confirmed that the employer's right to sell constituted a security interest of the nature of a floating charge, which was void against the administrator. Lord Hoffmann stated:[86]

> because the property subject to condition 63 (constructional plant, temporary works, goods and materials on the site) was a fluctuating body of assets, which could be consumed or (subject to the approval of the engineer) removed from the site in the ordinary course of the contractor's business, it was a floating charge.

Cosslett Contractors accordingly, like the Scottish cases, but on the basis of an entirely different analysis, ensured that the contractor's plant could be used to complete the works notwithstanding the contractor's insolvency. However, because the charge had not been registered, the council could not resist the administrator's claim for delivery of the plant on completion. The outcome is consistent, in that regard, with the analysis in *Kerr,* where the court held that, following completion, the employer's continued retention of the contractor's plant and tools was unlawful. Because of the way the issue arose in *Moore,* the court did not have to address that question. However, if, as the court held to be the case in *Moore,* a pledge has been

80 [1997] Ch 23.
81 [1998] Ch 495.
82 See text at n 51.
83 [1998] Ch 495 at 508B–D per Millett LJ.
84 See now the Companies Act 2006 Part 25.
85 [2002] 1 AC 336.
86 [2002] 1 AC 336 at para 41. See also para 63 per Lord Scott of Foscote. Lords Bingham, Browne-Wilkinson and Rodger agreed with Lord Hoffmann.

constituted, the particular argument that defeated the council in *Cosslett Contractors* would not arise. This is because section 859A of the Companies Act 2006 excludes a pledge from the definition of a "charge" that requires to be registered.[87] Nevertheless, other issues could come into play, including, where the contractor is in administration, the statutory moratorium on enforcement of security rights over the company's property.[88]

F. CONCLUDING REMARKS

The decision of the House of Lords in *Cosslett Contractors Ltd* was greeted with a measure of relief,[89] although commentators noted the potential consequences for employers and contractors alike.[90] A determination that a clause in a construction contract creates a valid security right may be to the advantage of the employer in the case immediately at hand, but if the clause appears in a standard form widely used in the industry, this may have implications more generally for contractors and lenders. *Kerr* and *Moore* – and the marked difference in the approach taken to the question of possession between those cases and the Court of Appeal in *Cosslett Contractors* – are, accordingly, not merely of academic interest. Of course, the potential to characterise the security right granted by the contractor as a floating charge was not one that was available to the nineteenth century Court of Session. It would not be appropriate for us to do more than observe that the questions which arise have not been tested in modern Scottish litigation.

87 Companies Act 2006 s 859A(7)(b).
88 Insolvency Act 1986, Sch B1 para 43.
89 See e.g. H R Dundas, "Common sense prevails: *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council*" 2002 Arb 168.
90 See e.g. L S Sealy, "Floating charges – *Cosslett* in the House of Lords" 2002 CLJ 281 and E Baker and A Lavers, "Worst case scenario: anticipating contractor insolvency – lessons from recent cases" 2004 Const LJ 58.

Part 5:
The Law of Succession

THE WILL TO MAKE A WILL[1]

Alan Barr

A. INTRODUCTION

The clue, surely, is in the name. To make a will, you must have the will to do so. To adopt the legal terminology which George Gretton so often cuts through to get to the heart of the matter, in Scotland you cannot make a will unless you have the legal capacity to do so. That restriction to those with capacity of course applies to a wide variety of juristic acts, as one might expect – but it seems particularly appropriate in the case of testamentary instructions, when one is dealing with a legal act that will only take effect after all vestiges of capacity have been lost, the testator then being dead. (The possibility of capacity for legal and other acts after death depends of course on views of the afterlife, although in an area closer to George's incredibly wide mainstream of interests, perhaps the dead in Scotland continue to own property, at least up to the point when confirmation is obtained by their executors.)

But until relatively recently, it seemed tolerably clear that adults who had lost capacity could not give effective testamentary instructions. At its most basic level, that remains the case – historically and currently, challenges to wills by disappointed beneficiaries (or more usually non-beneficiaries) often include in their arsenal of attack a claim that the deceased testator lacked testamentary capacity. If a testator lacking capacity makes a will himself, then it remains open to likely and successful challenge.

But what if someone else makes the will for him? Until relatively recently, that was not considered possible under Scottish law. But matters may have changed with the introduction of the Adults with Incapacity (Scotland) Act 2000. However, I will argue that matters have not – or perhaps should not have – changed in this particular.[2]

1 The genesis of this article lies in consideration of the subject discussed over the years in a series of seminars presented by myself and Sandra Eden on the same model as *Conveyancing: What happened in . . .*, delivered by George Gretton and Ken Reid for 25 years. As chairman and less grandly as chauffeur and "roadie" to these seminars since their inception, many miles of the roads of Scotland have provided ample and welcome opportunity to discuss law and much else besides with George and Ken. The present article is one of a number of subjects that George was always encouraging me to write up more fully and on which George shared at least some of my views. The pressures of practising life have for a while detracted from any ability to do such writing; nothing gives me more pleasure than now, for once at least, being able to respond to George's gentle if persistent encouragement for the purposes of this collection.

2 Some of the points considered here have also been briefly considered in a slightly different context in an excellent article by Ken Swinton, "Judicial will making by rectification and intervention" 2014 SLG 2, where doubts are also expressed about the effectiveness of such will-making. See also the article by Alan Eccles and Lisa Miller "*T, Applicant*" 2006 SLT (News) 1.

It should still require the will of the putative testator to make that testator's will, unless and until the law is changed more specifically and definitively to enable someone else to make that will for him.

The 2000 Act of course contained no specific authorisation for anyone to make a will on behalf of an incapable adult. It is generally a splendid piece of legislation, very worthy of being the first really substantive piece of legislation directly affecting the population passed by the revived Scottish Parliament.[3] Its terms derived directly from a Report by the body in which George has carried out such good work over many years, the Scottish Law Commission.[4] There was considerable pressure applied to ensure that this Report had a more effective fate than many of the efforts of the SLC; and the whole subject of adult incapacity was one that cried out for reform.[5] The Act might even be regarded as being particularly true to a fundamental aspect of Scots law so important to George Gretton, commencing as it does with direct recourse to principles.[6] But nowhere in these principles or in the detail of the Act is the making of a will for an incapable adult specifically authorised. This article will argue that the apparent acceptance of such a course of action is at very least undesirable, for a range of reasons relating to law, policy, principle, necessity, consistency and practicality.

B. THE CASES

(1) *T, Applicant*

The case of *T, Applicant*[7] was the judicial starting point for the apparent ability to make a will on behalf of an incapable adult, although in fact it drew on earlier commentary on the new Act. It was a decision of Sheriff John Baird, who before his retirement dealt with the vast majority of cases on adult incapacity in Scotland's largest sheriffdom and made a very considerable contribution to the

3 In 1999, the first year of new Scottish Parliamentary legislation, the only Act passed (the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, now repealed), was coincidentally in the same area of law and policy. The three Acts passed earlier than the Adults with Incapacity (Scotland) Act were on subjects with considerably less direct effect on the citizens of Scotland – the Public Finance and Accountability (Scotland) Act 2000; the Budget (Scotland) Act 2000 (despite its name, a much more limited piece of directly effective legislation than its more recent successors, following further tax devolution); and the Census (Amendment) (Scotland) Act 2000 (which allowed the census to gather information about that still somewhat fraught subject in Scotland, religion). Coincidentally, the immediately succeeding Act passed by the Scottish Parliament was one that was at the heart of George Gretton's interests, the Abolition of Feudal Tenure etc (Scotland) Act 2000.

4 Report on *Incapable Adults* (Scot Law Com No 151, 1995).

5 The history and origins of the legislation are explored by Adrian Ward in *Adult Incapacity* (2003) paras 3.3–3.6. Despite my disagreement with Adrian on the subject considered in this article, it would be wholly inappropriate not to acknowledge from the outset the immense and beneficial input from Adrian Ward on the whole area of adult incapacity law in Scotland and beyond. His efforts have been tireless and the state of our law in this most difficult and personal of fields has been and continues to be immeasurably improved by these efforts.

6 See Adults with Incapacity (Scotland) Act 2000 s 1(1)–(5).

7 2005 SLT (Sh Ct) 97.

development of what is essentially a new (or at least radically reformed) area of jurisprudence.[8]

T, Applicant concerned an application for an intervention order, procedurally a new possibility introduced by the 2000 Act. To leap straight to the result, the application was granted; and it authorised the solicitor of an adult who had lost capacity, to execute a codicil to her will. According to the sheriff, granting the application removed the possibility of her estate devolving in a way completely contrary to her stated intentions; and although she (obviously) had not given instructions, he was satisfied that that if she had had the capacity to give instructions, the result was precisely what the adult *would* have done herself.

The circumstances of *T, Applicant* were as follows, drawing from the sheriff's narrative. The adult was 81 years old and suffered from Alzheimer's Disease. She was widowed, but had two children, both sons. One of them was the applicant in this case, but the other had pre-deceased her, leaving his widow, the adult's daughter-in-law. In August 2001, the adult, who still then had full capacity, executed both a will and a power of attorney. The son, the applicant in the present case, was appointed as attorney (along with his wife). The adult was intending to regulate her affairs after she had died, but also to make provision authorising the attorney to take certain steps on her behalf while she was still alive but in the event that she subsequently lost capacity, which is what happened. She was at the relevant time the owner of heritable property, being the house in which she then lived in Glasgow.

The adult became incapable of independent living and moved into care. Both son and daughter-in-law lived elsewhere and her house (easily her most valuable asset) lay empty. Her surviving son, the applicant, had his own home, and her daughter-in-law similarly lived independently, in England. It became desirable (at least) to sell the house.

In the adult's will, she had directed that she was leaving her house (and no other specified estate) to her surviving son, the applicant. The daughter-in-law was left the residue of her estate, but (at least according to the sheriff) the clear instruction was that the son was to be the principal beneficiary. (In passing, this is illustrative of the dangers inherent in drafting for a situation where large proportions of the estate are to pass by way of specific legacy. There are all kinds of reasons why a testator's estate may change its composition between executing a will and the death bringing it into effect. Also in passing, it is assumed that the power of attorney included the right to obtain access to this will.)

The sheriff stated (presumably drawing on the pleadings) that if the adult had died before the present situation had arisen, her surviving son, the applicant, would have inherited the house, completed title to it, and then subsequently disposed of it as he had no desire to live in it, retaining the net free proceeds. Her daughter-in-law would have inherited a modest sum constituting the residue of her estate.

The power of attorney, dated 10 August 2001, included the power to sell her home, if the attorney thought this appropriate. The sheriff thought (probably incorrectly, for reasons discussed below) that the effect of selling the house would be that, because of the wording of the testamentary provision and the son having sold

8 An appreciation of the input from Sheriff Baird in this rapidly developing field can be found at Journal Online, February 2015; and in Mental Capacity Law Newsletter, March 2015 (Issue 54).

the actual asset which was left to him, the net free proceeds would fall into the residue of the adult's estate. This would have had the "catastrophic" (sic) effect for the son, of preventing him from succeeding to anything from his mother's estate.[9] At the same time it resulted in an unexpected, and unintended, windfall benefit of a substantial nature for the adult's daughter-in-law. The sheriff also stated that it would also deprive the son of the opportunity to use any of the proceeds of the sale for the benefit of the adult in the meantime (although I confess to not seeing why this, rather than the opposite, should be true).

The result was that the intervention order was granted:

> The answer therefore is that, provided the court can be given sufficient material to be satisfied as to the intention of the adult, authority should be given to execute a codicil to the will, making it plain that it is not just the house, but also the net free proceeds of the sale thereof, which are to be left to the applicant.[10]

Notoriously in relation to judicial decisions on wills, each case turns only on its own facts, circumstances and the particular wording of the document under consideration. That is at least as true in relation to decisions on adults with incapacity, where very specific factors will always be in play.

Although this case was of limited application beyond its own facts, and involved a codicil rather than a new will, Sheriff Baird was quite prepared to throw down a broader challenge:

> However, there may well be a point of more general importance which arises, and that is whether the existence of the kind of power which the court has authorised in this case imposes a duty on practitioners to advise on the terms of testamentary provisions made by their clients, in circumstances where they learn that a client has lost capacity to order his or her affairs further, and if necessary, to seek permission of the court to make alterations to those provisions in accordance with known intentions, and in order to ensure that they are carried out as far as possible.[11]

(2) After (and before) *T, Applicant*

T, Applicant concerned a codicil – it involved building on something that was already there. A further application for a codicil to direct the application of the proceeds of a house that required to be sold in favour of the beneficiaries of a legacy of the house failed, as evidence emerged (from notes of instructions for the existing will) that this was exactly contrary to the adult's testamentary intentions.[12] But there was no question posed in that case on the legal effectiveness of making such an application.

If the power to create testamentary instructions was there, did it extend to a whole will and perhaps to making this completely from scratch? As regards a whole will, this had been addressed by Sheriff Baird in *G, Applicant*,[13] where what was directed was the re-writing of an existing will. He considered that there were a large

9 *T, Applicant* (n 7) at 98.
10 *T, Applicant* (n 7) at 99.
11 *T, Applicant* (n 7) at 99.
12 *H, Applicant* 2011 SLT (Sh Ct) 178.
13 2009 SLT (Sh Ct) 122.

number of mistakes in what had been prepared, but there were at least clear expressions of testamentary instruction by the adult available. However, the sheriff went on to say:

> I have not yet been asked to authorise the making of a will on behalf of an adult who does not have capacity to do so, and who has not previously made one, but where the exercise of prudent estate planning might warrant it. It might not be easy to establish what the adult's testamentary intention would have been, but I cannot see any reason in principle why that should not happen, provided, again, that the application satisfies the general principles laid out in s 1 of the Act.[14]

The shrieval gauntlet was thrown down. That even Sheriff Baird himself would not pick it up in all circumstances was made clear in remarks he made in another case, *P's Guardian, Applicant*.[15] In that case, he referred to a further case in which an application had been brought forward to make a will, under which the adult's estate would have been distributed in the same manner as on intestacy, but with an executor nominate appointed. Sheriff Baird did not consider that the mere avoidance of the need for a dative appointment would have been sufficient to justify the creation of a will.

Sheriff Baird had in *T, Applicant* drawn attention to Adrian Ward's comments on the extremely wide and in his view potentially unlimited scope of intervention orders:

> They are a new statutory creation, and are therefore circumscribed only by the statute which created them, and not by any previous law or by any law relating to other techniques or appointments. It would therefore seem that an intervention order may authorise anything, subject only to the following limitations. [Which were explained to be that the adult could lawfully carry it out if unimpaired; that it must be within the scope of the Act; that it must relate to welfare or property or financial affairs; and that it must be possible to frame the order.][16]

Ward goes on to give the specific example of an elderly woman with multiple siblings, but living only with one sister. On learning that intestacy would take her estate (including their common residence) to all the siblings, she instructs a will leaving the house to her cohabitant sister. Having given these instructions, she is dramatically (and it must be said somewhat unrealistically) struck with a serious illness rendering her incapable of executing the will that had been swiftly prepared. In Ward's view, the solicitor should immediately seek an intervention order authorising him to execute the will which had been prepared; it would in his view have been granted; and somewhat disturbingly for professional indemnity insurers, "the solicitor could well have been held in breach of duty to his client if he had not immediately sought the order".[17]

If hard cases make bad law, this is a particular example of a hypothetical hard case

14 *G, Applicant* (n 13) at para 22.
15 2012 GWD 39–771.
16 Ward, *Adult Incapacity* (n 5) para 10.33.
17 Ward, *Adult Incapacity* (n 5) para 10.34. Quite apart from severe doubts about whether this could indeed constitute a breach of professional duty, there are now doubts about whether such a solicitor could claim a legitimate interest in the adult's affairs to make such an application – see *J, Solicitor, Applicant*, [2016] SC EDIN 66.

attempting to make especially bad law. It is most certainly the case that solicitors should act promptly to prepare wills in any event – and even more promptly in any case where urgency is justified. But if they are overtaken by wholly unexpected events, it seems too much to demand what may still be a rather speculative attempt at an intervention order.

(3) *Ward, Applicant*[18]

It is not surprising that the attempt to make a will from scratch for an incapable adult should have been made in the circumstances of this case; and that Adrian Ward should have been the one to make it.

The original application here was for an intervention order to allow the applicant "to execute on behalf of [the WI adult] a will in accordance with a draft will appended as a schedule to this application". After a passage detailing that he would describe the person in question as "the WI adult" and regretting that it was not now apparently suitable to refer to "the *incapax*", the sheriff principal explained the background and the initial decision of the sheriff (which was to refuse the application, against which decision this was an appeal):

> From the sheriff's note, I find it not altogether clear how far the sheriff was in agreement with the propositions advanced to him by the pursuer but I have overall the impression that he was willing to accept that the Act does in principle permit the possibility of an intervention order being granted to an "intervener" to execute a will on behalf of a WI person in appropriate circumstances. Thus he refers without apparent disapproval or disagreement to a view of Sheriff JA Baird in one of his reported cases to the effect that an intervention order may authorise almost anything and he appears to go along with another view expressed by Sheriff Baird to the effect that there is no reason in principle why making a will should not be authorised by an intervention order provided that the general principles of section 1 of the 2000 Act are satisfied. He agrees expressly with that proviso of Sheriff Baird (that any application for such an intervention order must satisfy those general principles of section 1) but takes the view that in the present case that test has not been met.

He continues:

> For my part, having been addressed by the pursuer at much greater length than was the sheriff, *I accept the proposition that the Act in principle enables the granting of power to an "intervener" to make and sign a will on behalf of a WI person if the circumstances be appropriate and provided certain things are proved to the satisfaction of the court* (on which see further below). The Act, and in particular section 1 thereof, is very broadly worded and section 1(4)(a) would appear habile to allow views expressed by the WI person on who should inherit his estate at his death to be taken into account in a decision by the court on whether and if so what intervention order to make. *If those views amount to a statement of testamentary intention made by a person having testamentary capacity at the time then I see no sufficient reason why effect should not be given to them through the medium of an intervention order if for some reason that person lacks the ability to put them into effect himself*.[19]

18 Sheriff Principal B A Kerr at Paisley, 17 December 2013, available at https://www.scotcourts.gov.uk/search-judgments/judgment?id=21f886a6-8980-69d2-b500-ff0000d74aa7.

19 *Ward, Applicant* (n 18) at paras 4 and 5 (emphases added).

The sheriff principal did recognise that this represented a major departure for the law of succession in Scotland. In these circumstances, the court had to be satisfied (1) that the adult had testamentary capacity at the time of expressing his views; and (2) that his expression of such views amounted to a declaration of a testamentary intention.

The applicant had in this case sought however to go much further. His submission was to the effect that it was unnecessary to consider whether the WI adult had capacity to instruct the preparation of a will – section 1(4)(a) of the 2000 Act on a proper interpretation required only that the WI person should have expressed *some* wishes and feelings concerning the disposal of his estate on his death for it to be open to the court to make an intervention order authorising the preparation and execution of a will to that effect on his behalf. This was so even if the adult never had the requisite capacity.

This was not accepted. The sheriff principal concluded that what was required was a proof at which testimony of an appropriately qualified sort could be led on the questions of whether the adult had testamentary capacity at any appropriate time; and whether the views expressed by him were so expressed as to amount to an expression of testamentary intention.

The sheriff principal recognised that his demand for proof might be seen to be a heavy one – but making a will for an incapable adult is a large step, especially where there was some indication of disputed evidence. In a somewhat unfortunate choice of phrase, he rejected the notion that his demand for a proof was akin to a sledgehammer to crack a nut.[20]

So a proof was directed, to be heard by a different sheriff. Furthermore, other parties were to be permitted to lodge answers; and the Sheriff Principal thought it appropriate that an *amicus curiae* be appointed to assist the court in the absence of a contradictor.[21]

This decision leaves much still open to debate. The evidential burden is heavy – there needs to be evidence of actual testamentary intentions, of capacity to hold such intentions and that those intentions have not changed by the time an order is sought. And there appears to be an invitation for someone to make the case that such an intervention order may be inappropriate for any of these or – perhaps – any other reason.

The demands posed by following what is required in *Ward* should give potential applicants pause for thought at the very least. While in some cases, it will be readily possible to prove the previous testamentary capacity of an incapable adult, it will often be extremely difficult to prove what were that adult's previous testamentary intentions – and that they remained consistent. Indeed, it may be that if the sheriff principal's requirements as set out in *Ward* are to be met, the circumstances in which the realistic possibility of a successful application for a new will or codicil are extremely limited and such applications will not be made. But on balance it would be better if it were accepted that in fact there was no basis on which such an application can be entertained, for a wide variety of reasons.

20 *Ward, Applicant* (n 18) at para 16.
21 I understand that the proof did not proceed.

C. REASONS TO REJECT APPLICATIONS TO MAKE WILLS

(1) Law

It may be an attempt to shut the legal door after a number of judicial horses have at least started to bolt, but it may still be worth considering whether in fact there is a *legal* basis on which intervention orders (or aspects of guardianship orders) can properly be sought to carry out testamentary instructions on behalf of incapable adults. Going right back to *T, Applicant*, Sheriff Baird considered that his decision was a step that was "authorised" by section 53(9) of the 2000 Act.[22] Section 53(9) provides: "Anything done under an intervention order shall have the same effect as if done by the adult if he had capacity to do so." But this provision does not give authority or scope to do *anything* by an intervention order. It merely states that that anything that can be, and is done, by an intervention order is to be treated as being just as effective as if it were done by the adult. Crucially, it does *not* say that "anything" can be done by such an order.

So legal authority must be sought elsewhere. There is no doubt that the scope of potential orders is wide and possibly the legal authority can be found in section 53(5), which states that "An intervention order may – (a) direct the taking of any action specified in the order;". But that still rather begs the question, of which "actions" are in fact permitted to be authorised by an intervention order. If nothing is in fact specified as being authorised (and very little is so specified in the Act), is anything and everything therefore permitted?

Surely that cannot be the case? What about voting? Running for Parliament? Marrying? Adopting a child? The adult, if capable, could do all of these things (although some at least would require the co-operation of others), but I do not think that it could be successfully argued that an intervention order could be used to achieve any of them for the adult.[23]

(2) Principle

If there is legal authority for someone other than an incapable adult to implement testamentary intentions, it must lie in the vitally important principles set out in section 1 of the Act. This was recognised by Sheriff Principal Kerr in *Ward, Applicant*. The two principles likely to be most relevant are those set out in subsections (2) and (4)(a) of section 1:

> (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
>
> . . .

22 2005 SLT (Sh Ct) 98 at 99. Ward also appears to regard this as providing authority for what can be done by an intervention order – see *Adult Incapacity* (n 5) para 10.33.

23 The possibility of voting is an interesting one. It would seem at least as possible to gather and demonstrate "the present and past wishes and feelings of the adult" with regard to voting intentions as it would be in relation to testamentary intentions. Perhaps one can anticipate a spate of intervention orders being launched in the care homes of marginal constituencies.

(4) In determining if an intervention is to be made, and if so, what intervention is to be made, account shall be taken of –
(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication . . .

The principles are recognised as being extremely important – but by their very nature they are general. In relation to testamentary instructions, it might be questioned whether the effective creation of such instructions is ever to the benefit of the adult himself, as opposed to the beneficiaries who would take under such instructions.[24] However, it is clear that the notion of "benefit" is much wider than substantive, corporeal benefit to the adult. A perfect example lies in the power, available in a wide range of possible interventions (such as powers of attorney, intervention orders or guardianship) to make gifts on behalf of the adult (whether for tax planning or more personal purposes). Benefit can clearly arise from confidence that matters are in the widest sense well ordered, even if the adult has less resources directly available to him. The same might well be said of confidence that appropriate arrangements are in place to deal with assets after the adult's death.

But that is a fairly tenuous argument – particularly when it is combined with the difficulty of ascertaining with any degree of certainty the past or present wishes of the adult. The principles of the Act often lead to contradictory results; and as with all such principle-based considerations, they may require to be balanced against each other. If one is to engage in such a radical course of action as creating a will for an adult, it is not too much to expect more definite justification.

(3) Policy

One could feel more confident in attempting to allow testamentary instructions to be prepared for incapable adults if this had been part of the policy of the 2000 Act. But insofar as this can be ascertained, the exact opposite would seem to be the case. The specific matter has been examined on a number of occasions by the Scottish Law Commission; and their conclusion (including after consideration of the analogous power to make "statutory wills" under similar English legislation) was that there should be no such authority provided in Scots law.[25] This was specifically addressed in the *Report on Incapable Adults*, which led directly to the 2000 Act:

> Returning to the financial aspects of guardianship, we proposed in our discussion paper that financial managers should *not* have power to make or vary a will on behalf incapable adults . . . Those responding were generally in agreement with our proposals. One organisation involved with the mentally handicapped thought that giving the court power to make a will should not be ruled out as there would be potential benefits. *There are*,

24 This point is noted by Ken Swinton in "Judicial will making by rectification and intervention" (n 2) at 3–4. In *P's Guardian, Applicant* (n 15), the apparent benefit only to the applicant (rather than the adult) – was a factor in Sheriff Baird refusing the application.

25 See Report on *Succession* (Scot Law Com No 124, 1990) paras 4.78–4.80. The Commission had not changed its view by the time of its later Report on *Succession* (Scot Law Com No 215, 2009), although it noted the passage of the 2001 Act and the use of intervention orders in this context. By the time of the later Report, the Commissioners of course included one George Gretton.

however, objections in principle to allowing one person to make a will for another and, in the absence of any widespread support for change, we think the law should remain as it is.[26]

Given the novelty of the potential new power to give testamentary instructions on behalf of an incapable adult and in the face of such clear opposition to the introduction of such a power, one would expect to find very specific statutory authorisation before such a power could be exercised. There is no such specific legislation or even parliamentary statement to such effect. Going further than that, if courts are to adopt a purposive approach to legislation, then it would seem equally valid to find specific reference to the *absence* of a particular purpose in Scottish Law Commission material leading directly to a particular Act as it would be to resolve ambiguities in the enactment of the underlying Commission Report.

(4) Necessity

All of the reasons why a power to create a will for an incapable adult might be considered an unwelcome development might be outweighed by an overwhelming necessity for the power to exist. However, there would appear to be little such necessity. If adults lose capacity, this will either be at a time when they have made a will; or when they have not. If they have not made a will, the law of intestacy (as with anyone else) provides a more or less suitable solution – certainly one that the legislature has determined to be the most reasonable. If they have made a will, that will in almost all circumstances be a document that absolutely fulfils one of the most important principles governing adults with incapacity – it will represent the past (and probably the present) wishes and feelings of the adult so far as these can be ascertained.[27]

That of course is not the end of the matter. If after the death of the adult, everyone concerned agrees that the existence or lack of testamentary instructions is inappropriate (in terms of the wishes of the adult or indeed the wishes of the beneficiaries), there is nothing to prevent them re-arranging the dispositions of the deceased's estate to rectify the position. Such a re-arrangement can be treated for most tax purposes as if carried out by the adult[28].

But even that does not represent all of the reasons why creating fresh testamentary instructions may not be necessary. The prime substantive reason why the decision in *T, Applicant* was considered necessary was that the sale by an attorney of the adult's property was considered to lead to ademption of a legacy of that house in favour of the applicant. It was later decided in the Court of Session that such a legacy would not adeem; and that the proceeds would be available for the legatee.[29] (Although this was only directly decided in a later case, the authority on which the later decision was based to a substantial extent was old; and would if argued have been available to the court.[30])

Legislation has even intervened further to remove another possible reason to alter the will of an incapable adult. Thus, with effect from 1 November 2016, if

26 Report on *Incapable Adults* (n 4) para 6.105, emphasis added.
27 In terms of the Adults with Incapacity (Scotland) Act 2000 s 1(4)(a).
28 Inheritance Tax Act 1984 s 142; Taxation of Chargeable Gains Act 1992 s 62.
29 See *Turner v Turner* [2012] CSOH 41, 2012 SLT 877.
30 *McFarlane's Trs v McFarlane* 1910 SC 325.

testamentary provisions (or indeed a survivorship destination) exist in favour of a spouse or civil partner but that relationship has come to an end by the time of death that brings the provisions into effect, the spouse or civil partner will be treated as having predeceased.[31] (This provision only applies on the final termination of the relevant relationship – one situation where action on behalf of an incapable adult might be considered necessary is where the relationship has broken down without formal termination; but in that situation testamentary arrangements may be a relatively minor part of the interventions desirable on behalf of that adult.)

But the point remains – the number of situations where testamentary intervention on behalf of an incapable adult might actually be considered necessary is likely to remain extremely limited.

(5) Consistency

The random development of our law through what happens to get to court has always been a concern to George Gretton, the serendipity of decided cases not being a good basis for any kind of coherent development. This problem is particularly evident in relation to an area of law where personal factors will create infinite variation in the circumstances that might arise.

The potential problem goes further than that. With one exception, the reported cases on testamentary instructions for an incapable adult have all been decided at the level of a single sheriff (and predominantly by one particular sheriff). Again with one exception, none has been subject to an appeal. As such, the decisions are of limited formal authority, although they are building to a consistent conclusion.

Perhaps even more importantly, in very few cases has there been a formal contradictor – the applications have been unopposed.[32] The sheriff in question has been left to make such opposition as he might think fit. This is far from ideal – but is not surprising, as the substantive opposition that might come from those adversely affected by the success of an application to alter an adult's will is likely to involve considerable risk and expense. Such practical considerations are symptomatic of the difficulties of developing such apparent new law without a firm and authoritative base.

(6) Practicality

The decision in *Ward, Applicant* has perhaps made the current situation rather more manageable than it would otherwise be. If it was always the duty of those concerned with what could or should be done for adults with incapacity to consider in every case what their testamentary intentions might be or might have been, this would involve what could be a demanding and expensive exercise in many cases. That expense and complication might spread to those adversely affected by any attempts to alter the current testamentary position.

But in most cases to speculate on what an adult's testamentary intentions might be beyond any existing will would be a fruitless exercise. Such an exercise should not

31 Succession (Scotland) Act 2016 ss 1, 2.

32 Sheriff Baird himself has remarked that it is unsatisfactory that such cases generally involve argument only on behalf of the applicant, with no representation by those who might oppose or indeed the adult himself. There was a direction in *Ward* that if the matter went to proof before a different sheriff, an *amicus curiae* should be appointed.

be demanded in any but the most extreme of cases – and even in such cases, it would be preferable if it was clear that there was no power for anyone else to implement the testamentary wishes of an incapable adult.

This is so even in what is seen as the "paradigm" case demanding court intervention to "correct" an unjust situation. This is where a capable adult (with clear consideration of his capability) has given instructions for a first or new will and these instructions have been implemented even to the extent of a new draft having been sent to the adult. There then occurs supervening incapacity before the will implementing the instructions has been signed. The gap between the new will being available and the supervening incapacity may be short or long; and reasons for the delayed signing may vary – but it might be said, and argued in an application to have such a will executed on behalf of the now incapable adult, that there is clear evidence of the adult's testamentary intentions from a recent time when he had capacity.

But those who have worked in this area for a long time know that this is not necessarily the case; and indeed, that the exact opposite may be the case. Wills practitioners have a good deal of experience of clients delaying finalising testamentary instructions for many reasons. Sometimes it is just procrastination or an unwillingness to face the reason why a will has to be made. But not uncommonly, wishes and intentions change when the prospective testator sees in hard text what he has instructed. This may involve re-thinking what has become what is now seen as an inequitable division. Those out of favour may have passed back into it; or vice versa. The point is that an instructed but unexecuted will may lack finality for many reasons, at least some of which may specifically involve a change of testamentary intention. For anyone other than the testator to speculate on the actual reason is ambitious, to say the least.

There are many other practical reasons why making wills for incapable adults is not to be encouraged. If someone decides to apply to create such testamentary instructions, it will be necessary to inform those affected. These may be beneficiaries under existing wills executed when the adult was capable, intestate beneficiaries or both. Quite apart from this being a gross invasion of the privacy of the adult (who may very specifically have wished that his testamentary intentions should remain confidential until after his death), the involvement of others is another exercise in unwarranted speculation. Until the adult dies, it cannot be known whom the beneficiaries of his estate will be. Prospective beneficiaries may predecease; and their successors may have very different views on what should be done. Any attempt to resist the application of an officious intervener will be costly and may involve emotional as well as financial investment. The family of an adult in these circumstances should not be put to the dilemma of whether to become involved – the lack of any opposing case in the reported applications may be indicative of the difficult position into which such prospective beneficiaries are put.

More generally, the costs of such an application may well be borne by the adult's estate. Such costs are not inconsiderable but when this is thrown into any "benefit balance", it may be too late to prevent such costs being incurred, unless the application is regarded as being essentially self-serving so that expenses may not be paid by the adult's estate.[33]

33 As was the case in *P's Guardian, Applicant*, where the expenses of the unsuccessful application to make a codicil were to be borne by the applicant in her personal capacity.

Also, more generally, it is an unnecessary additional burden on those carrying out the demanding functions of guardian or attorney to be required to consider whether an adult's testamentary instructions should be varied, or created from scratch. They have enough to do and it would be better if it could be confirmed that there is no duty to consider such matters, because there is no power to do anything about them. Alternatively, and with all the difficulties and expense that it would bring, if is considered that others should have power over the testamentary instructions of an adult, the nature and extent of that power should be clearly set out in legislation. Unless and until this done, those claiming an interest in the affairs of an incapable adult should be loath to extend that interest to making a will for that adult.

EXPLORING THE BOUNDARIES OF SUCCESSION LAW

Alexandra Braun[*]

A. DEFINING THE BACKGROUND

All legal systems feature a set of rules that regulate how wealth is passed on death of a person, for the law needs to have some provisions in place to ensure, among other things, that the deceased's property does not remain ownerless. These rules determine what happens when the deceased has made no express or valid disposition, but also which instruments a person can use to arrange who will receive her property on death (i.e. a will or, in some jurisdictions, also an inheritance contract).[1] They also set out provisions on formalities, capacity, the effect of remarriage or divorce, the consequences of simultaneous or near simultaneous death, unworthiness and forfeiture of the beneficiary, lapse, the construction and rectification of testamentary dispositions etc. In addition, specific laws are usually put in place the purpose of which is to protect the interests of creditors and those of family members and dependants of the deceased. The collection of these rules is commonly referred to as succession law.

It is generally assumed that succession law is a distinct area of private law with its own rationale, and that it is possible to define with certainty what falls within its domain. This chapter seeks to question the latter of these assumptions and argues that the scope of this province of the law is not self-evident. Where exactly does the law of succession begin and where does it end? What does it cover and how far do and should its rules extend? George Gretton has drawn attention not only to the difficulties of defining, for instance, the border between property law and the law of succession, but also that between dispositions that take effect during lifetime and those that take effect on death, both of which are linked. As he rightly noted "legal history, and modern law, is full of arrangements that straddle the boundary of life and death, arrangements that are both *inter vivos* and *mortis causa*".[2] In other words, the will is not the only instrument by which a person can

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1 This is, for instance, the case in Germany (see § 1941 and §§ 2274 ff BGB).

2 G L Gretton, "*Quaedam meditationes caledoniae*: The property/succession borderland" (2014) 3 European Property Law Journal 109 at 126.

determine her successors on death, even though legislatures commonly award it the "pride of place",[3] as *the* instrument by which a person can make dispositions with effect on death.

Although George Gretton was examining primarily the *donatio mortis causa*, to which we will return in due course, there are many other arrangements or techniques that lie at the intersection between life and death, the proliferation of which calls into question the scope and boundaries of current succession laws. Among these mechanisms are, for instance, life insurance, pension and retirement schemes, various forms of bank accounts or joint tenancies, trusts, foundations, clauses in partnership agreements, as well as certain lasting powers of attorney.[4]

Since these mechanisms can produce effects both during lifetime and on death, they frequently defy classification, being neither wholly *inter vivos* nor wholly testamentary.[5] This is problematic not so much on a purely theoretical and conceptual level but, more importantly, on a practical level, for, depending on whether we see these techniques or arrangements as belonging to the realm of lifetime transfers or transfers that take effect on death, different sets of rules apply that are supported by their own and very specific policy considerations.

As a consequence, when confronted with mechanisms that cross the lifetime/testamentary divide, the question that poses itself is whether to treat them as a separate and special category, or rather whether, and to what extent, to subject them to succession rules, even though they are not formally part of what the respective legal systems consider conventionally to be succession law. For instance, in many legal systems marriage or divorce has the effect of automatically revoking a person's will. This rule is normally justified on the basis of the deceased's presumed intention and the fact that marriage triggers new responsibilities. Should the same regime apply to beneficiary nominations or designations in pension schemes, life insurance policies or bank accounts? Also, should creditors and family members and dependants have a claim over wealth that is passed on death through the use of mechanisms other than a will?

These questions are important and warrant discussion not only for reasons of doctrinal coherence, but also because there is a serious risk that succession laws are being circumvented and the purpose of these laws frustrated. The aim of this contribution is to explore the boundary between lifetime transfers and testamentary ones and to consider some of the problems that arise for succession lawyers, courts and lawmakers when grappling with these questions. It will first investigate whether difficulties of classification represent a novel problem, before examining which mechanisms pose such difficulties and why, and how they have been addressed so far.

3 I have borrowed this expression from G Miller, *The Machinery of Succession* (2nd edn, 1996) 1.

4 Similar problems of classification have arisen in relation to secret trusts. See P Critchley, "Instruments of fraud, testamentary dispositions, and the doctrine of secret trusts" (1999) 115 LQR 631.

5 The use of the term "testamentary" is not always consistent nor clear, as the meaning seems to be context-dependent. At times "testamentary" only concerns matters pertaining to a will, while at others it seems to take a wider meaning, referring to aspects or dealings related to death more generally. This essay uses the term in its wider sense.

B. STEPPING BACK IN TIME

Difficulties in classifying arrangements into lifetime and testamentary ones are not entirely new. Roman lawyers too were confronted with similar challenges, in particular in the context of *donationes mortis causa*, that is to say gifts made in contemplation of death. Roman law recognised different types, the main ones being: (1) donations made under the apprehension of an impending death, in which there was an immediate and unconditional transfer of the property which the donor could claim back in case he survived the donee; and, (2) donations made subject to the suspensive condition that the donee survived the donor. Such gifts were hybrid in nature,[6] for, although they were made *inter vivos*, they only took full effect on death of the donor.

Even though Roman lawyers did not formally categorise[7] transactions into *inter vivos* and *mortis causa* ones,[8] they struggled with the question of whether to assign the *donatio mortis causa* to the law applicable to lifetime gifts or to the law regulating legacies. It is impossible to enter here into a detailed examination of the relevant debate. Suffice to say that by classical times the *donatio mortis causa* was being gradually compared to legacies and this was continued also in later years. For instance, the *lex Falcidia* was applied so that an heir could deduct the *quarta Falciada* from a *donatio mortis causa*.[9] Also, the *donatio mortis causa* became freely revocable,[10] and not just when the threat of an impending death subsided, or the donee predeceased the donor. However, while in some respects the *donatio mortis causa* was treated like legacies[11], in others it continued to be seen as a lifetime gift, including in certain matters of capacity,[12] and in matters of form.[13] The assimilation of the *donatio mortis causa* to legacies was continued by Justinian, who admitted, for instance, the same form as for codicils.[14] Nonetheless, the integration was never complete,[15] so that the *donatio mortis causa* continued to remain an instrument to which different sets of rules applied.

Various explanations have been offered as to why Roman lawyers treated the *donatio mortis causa* increasingly like legacies. Some of them resonate with contemporary arguments in support of an extension of succession laws to arrangements that, though taking the form of *inter vivos* transfers, pass wealth on death. In fact, it would seem that, at least at the beginning, the assimilation of the *donatio mortis causa* to legacies was motivated by concerns regarding the risk of a

6 P du Plessis, *Borkowski's Textbook on Roman Law* (5th edn, 2015) 209.
7 M Amelotti, *La "Donatio Mortis Causa" in diritto romano* (1953) 33 ff; P Simonius, *Die Donatio Mortis Causa im klassischen Römischen Recht* (1958) 8–9; M Kaser, *Das römische Privatrecht*, vol I (1971) 228.
8 The meaning of the term *mortis causa capere* will be analysed below at D.
9 F Schulz, *Classical Roman Law* (1954) 332.
10 To what extent this was a post-classical change or not is, however, debated. See M Kaser, *Das römische Privatrecht*, vol II (1975) 565–566; M Harder, *Zuwendungen unter Lebenden auf den Todesfall* (1968) 63.
11 Exactly which provisions or rules were extended to the *donatio mortis causa* has been the subject of numerous, partly conflicting, studies. See B Biondi, *Successione testamentaria e donazioni* (1955) 710 ff; Kaser, *Privatrecht*, vol I (n 6) 564; Simonius, *Donatio* (n 7) 2 ff.
12 For examples, see Biondi, *Successione* (n 9) 711–712 and Simonius, *Donatio* (n 7) 8–9.
13 Du Plessis, *Textbook on Roman law* (n 6).
14 Kaser, *Privatrecht* vol II (n 10) 566.
15 R Knütel, *Kaser/Knütel, Römisches Privatrecht* (20th edn, 2014) 427; Harder, *Zuwendungen* (n 10) 65; Biondi, *Successione* (n 11) 713.

circumvention of existing rules, that is to say concerns that the *donatio mortis causa* would be used to obtain what one could not obtain by way of a legacy.[16] Irrespective of what the other reasons may have been,[17] what is striking for our purposes is that Roman lawyers looked beyond the legal structure employed and placed importance on the functional affinity between the *donatio mortis causa* and legacies.[18]

Also noteworthy is that, throughout history, the *donatio mortis causa* continued to pose difficulties for lawyers,[19] and was seen as some form of hybrid that belonged neither fully here nor there. This is one of the reasons why the German legislature decided to do away with the Roman *donatio mortis causa*,[20] and, as we will see later, has introduced a provision the purpose of which is to determine which donations are regulated entirely by succession law and which are to be treated as lifetime gifts instead.[21] Where it survived, the *donatio mortis causa* continued to prove difficult to fit into existing legal categories.[22]

Thus, the problem of identifying the legal nature of arrangements or techniques that have effects both during lifetime and on death, and the concern about the potential circumventions of succession laws arising from this extension, is an old one. The way the Romans dealt with it was to subject such mechanisms increasingly to the rules applicable to legacies,[23] though this was not necessarily always done in a principled way, but rather achieved on a case-by-case basis.[24]

16 Biondi, *Successione* (n 11) 710; Kaser, *Privatrecht* vol I (n 7) 764. For examples, see Harder, *Zuwendungen* (n 10) 64.

17 S Cugia, *Indagini sulla dottrina della causa del negozio giuridico: L'espressione "mortis causa", diritto romano classico e giustinianeo* (1910) 47 argued that the more the succession became focused on the proprietary aspects of the transmission, the more the *donatio mortis causa* was treated as part of the law of succession. This view is also shared by E F Bruck in his review of Cugia's book: (1912) 33 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 569 at 571. By contrast, Simonius refers to concerns to simplify the law: Simonius, *Donatio* (n 7) 74.

18 Kaser, *Privatrecht* vol II (n 10) 565; Amelotti, *donatio* (n 7) 35; See also R Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (2nd edn, 1866) Part 1, 50 fn 19, who laments the fact that too much emphasis is placed on structure rather than function. As an example of functional similarity he mentioned the *donatio mortis causa* and legacies.

19 Concerning Germanic territories, see G v Schmitt, "Entwurf eines Rechtes der Erbfolge für das Deutsche Reich nebst dem Entwurfe eines Einführungsgesetzes" (1879), in W Schubert (ed), *Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches: Erbrecht*, Part I (1984) 651 ff.

20 K Muscheler, *Erbrecht*, vol II (2010) 1427, para 2828. See also Motive, V, 350, in B Mugdan (ed), *Die Gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol V (1899) 186.

21 See below at E. In France and Italy too it was abolished when the civil codes introduced the prohibition of pacts over future successions. That said, in France a special form survives for spouses. For details about the prohibition in French and Italian law, see A Braun, "Towards a greater autonomy for testators and heirs: some reflections on recent reforms in France, Belgium and Italy" (2012) Zeitschrift für Europäisches Privatrecht 461. In Italy, a debate has arisen regarding which donations with effect on death should be considered a *donatio mortis causa*. For a discussion see, in particular, A Chianale, "Osservazioni sulla donazione *mortis causa*" (1990) Rivista di diritto civile 91.

22 In *Re Beaumont* [1902] 1 Ch 889 at 892, Buckley J spoke of "an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary". Similar the words of J-P Lévy and A Castaldo, *Histoire du droit civil* (2nd edn, 2010) 1431.

23 Kaser, *Privatrecht* vol II (n 10) 567.

24 Cugia, *Indagini* (n 17) 43 ff who denies also that a dispute surrounding the nature of the *donatio mortis causa* had arisen between the two classical schools.

C. ARRANGEMENTS AND TECHNIQUES THAT STRADDLE THE BOUNDARY

So far we have only talked about the *donatio mortis causa*, which has lost much of its relevance in modern times.[25] However, current legal practice is replete with mechanisms that take the form of lifetime transfers, whilst also offering opportunities to pass wealth on death, without however involving a will.[26] Indeed, the number of constructs that has developed in legal and financial practice has risen considerably over the years, especially in certain jurisdictions.

For instance, life insurance and pension or retirement schemes have become very common. They represent investment opportunities and saving mechanisms, the primary function of which is to provide for future events such as retirement, old age and illness. However, at the same time, in many legal systems they also offer members the option to pass benefits on death, often for the maintenance of their dependants. In the case of pensions, these can take the form of a pension or of a lump-sum payment, generally payable to the person nominated by the member. Bank accounts can also operate both as a savings instrument and as a vehicle for passing wealth on death. This is particularly true of American "pay-on-death" bank accounts (PODs), which are created in the name of the depositor who can nominate the beneficiary with effect on death without requiring a will.[27]

Trusts and foundations too can be employed for estate-planning purposes, often for more than one generation. Joint tenancies, or the Scottish special destinations,[28] also allow for wealth to be passed on death without the need for a will. Both techniques provide a way for two or more people to hold property, with the additional benefit that on death of one of the tenants the other becomes automatically and absolutely entitled to the property by way of survivorship. As George Gretton has aptly put it, "[t]he right of the future successor is thus built in to the present property rights." These are therefore convenient proprietary techniques used not only by couples but often also by parents and their children, as a means to pass wealth to the next generation. Where wealth is held in the form of shares in a partnership, clauses in the partnership agreements can be used to determine the beneficiary of the partners' shares with effect upon death.[29]

Thus, succession objectives can regularly be obtained by resorting to various techniques that belong formally to contract law, property law,[30] or even company law, rather than succession law. For that reason, these arrangements take the form of lifetime transfers, rather than of wills,[31] and, in principle, are not therefore subject

25 A Braun and A Röthel, "Exploring Means of Transferring Wealth on Death: A Comparative Perspective" in Braun and Röthel (eds), *Will-Substitutes* (n *) 323 at 335.

26 For an overview of the various devices used in practice across a number of jurisdictions, see Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 327 ff.

27 For details, see T Gallanis, "Will-Substitutes: A US Perspective" in Braun and Röthel (eds), *Will-Substitutes* (n *) 9 at 15–16 and W M McGovern, "The Payable on Death Account and Other Will Substitutes" (1972–73) 67 Northwestern University LR 7.

28 Details can be found in D Carr, "Will-Substitutes in Scotland", in Braun and Röthel (eds), *Will-Substitutes* (n *) 79 at 89 ff.

29 Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) 336–337.

30 Gretton, "The property/succession borderland" (n 2) at 121.

31 See A G Gulliver and C J Tilson, "Classification of gratuitous transfers" (1941) 51 YLJ 1 and Miller, *Machinery* (n 3) 1.

to conventional succession rules. As a consequence, in many countries, a considerable amount of wealth is currently being passed on death outside the traditional sphere of rules which regulate the transfer of wealth on death. As noted earlier, this is problematic not least because of the risk that succession rules are being sidestepped,[32] and that their underlying principles and policies are being undermined, meaning that the interests they are aimed to protect are potentially frustrated. This is not to say that these techniques are necessarily used with the sole aim of circumventing succession laws. I have argued elsewhere that, whilst the fact that the transfer takes place outside the sphere of succession law rules, be they substantive or procedural, can be an important reason why these mechanisms are resorted to, many of them are also the natural consequence of changes in the way wealth is being held or invested.[33] New forms of wealth such as financial assets have emerged alongside real property,[34] and it is inevitable that such wealth is disposed of on death in ways foreseen by the respective financial provider, rather than by will (e.g. by using beneficiary designation forms or nominations).

Even so, the question as to how to tackle these arrangements from a succession point of view remains. What makes this area so intricate is that although these various techniques share with the will the fact that they can function as a means of passing wealth on death, the estate-planning aspect is often not their main purpose, nor the driving force behind their use, but rather an ancillary feature. Many operate either as a savings or as investment devices, thus involving third parties such as financial providers, or represent techniques aimed at holding and managing property. Hence, unlike a will, which will only ever produce effects on death,[35] and which requires death as a pre-condition in order to become effective, to a greater or lesser degree, these arrangements also produce certain lifetime effects. For instance, the member of a pension scheme or the holder of a life insurance policy enters into a legal relationship with another party, the pension or insurance provider, and this relationship has lifetime effects, even if not directly for the beneficiary of the death benefit.[36] In the case of a joint tenancy of a bank account, survivorship operates only on death of one of the tenants, but during lifetime the tenants jointly own the account, which can be administratively convenient. It is often these lifetime effects that make these techniques so attractive.[37]

Thus, many of the mechanisms a person can resort to in order to achieve certain succession purposes are functionally protean,[38] and have therefore a polymorphous

32 As we have seen, this was one reason why rules applicable to legacies were increasingly extended to the Roman *donatio mortis causa*. See above at B.

33 A Braun, "Will-Substitutes in England and Wales", in Braun and Röthel (eds), *Will-Substitutes* (n *) 51 at 70. See also Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 341–354.

34 J H Langbein, "The twentieth-century revolution in family wealth transmission" (1988) 86 Mich LR 722.

35 But see A Röthel, "Will-Substitutes and the Family: A Continental Perspective" in Braun and Röthel (eds), *Will-Substitutes* (n *) 303 at 303 fn 1, according to whom "from a broader perspective, any will has lifetime effects, whether or not they are of immediate legal relevance (expectations, motives etc)."

36 For further details, see Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 344–347.

37 See Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 341–354.

38 George Gretton has pointed this out with regards to trusts. See G Gretton, "Trusts without equity" (2000) 49 ICLQ 599.

nature. Some resemble wills very closely, in that they leave the deceased with full or at least substantial freedom to dispose of her wealth during life and are revocable up until death (such as revocable trusts or the *donatio mortis causa*),[39] whilst others are further removed (e.g. joint tenancies that can be severed but technically speaking not revoked).[40] Hence, some fall more clearly on the testamentary side of the lifetime/testamentary divide than others. The fact that they feature a range of diverse characteristics only adds to the complexity.

D. CHALLENGES OF TERMINOLOGY

The complexity of this area is also reflected in the difficulties encountered whenever legal scholars have tried to identify collective terms or expressions capable of capturing the various mechanisms that produce effects both during lifetime and on death. Before exploring such attempts, it is interesting to note that the Romans had used the phrase *mortis causa capere* as a label for acquisitions on death through arrangements that looked like lifetime gifts, but had functions similar to legacies, such as the *donationes mortis causa*. In particular, the expression indicated transfers occasioned or motivated by the death,[41] but that lacked a specific action, and therefore a specific name.[42] It thus described arrangements that, just like many modern arrangements, straddled the boundary between life and death and not, as one might expect, instruments that we would nowadays define as testamentary, as opposed to lifetime ones.[43] Quite the contrary, the umbrella term was used in opposition to the acquisition of property on death by way of inheritance, legacy or *fideicommissum*.[44] Hence, while it may be tempting to claim a continuity between the Roman and the modern use of the expression *mortis causa*,[45] it would appear that it had a different meaning.

In modern times, American scholars have coined the term "will-substitutes" to describe the various techniques that are used to pass wealth on death without the need for a will and that therefore avoid probate procedures.[46] Whilst this term has generally found little acceptance outside the US, and possibly Canada, it has found

39 This is at least the position in English law. B Sloan, *Borkowski's Textbook on Succession* (3rd edn, 2017) 336.

40 For this reason John Langbein suggested distinguishing between "pure" and "impure" will-substitutes. See J H Langbein, "The non-probate revolution and the future of the law of succession" (1984) 97 Harv LR 1108 at 1109.

41 Cugia, *Indagini* (n 17) 5.

42 Cugia, *Indagini* (n 17) 7; E Schlagintweit, "Die Erwerbung auf den Todesfall (*mortis causa capio*) nach römischen Recht" (1863) 6 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 318; E Böcking, *Römisches Privatrecht: Institutionen des römischen Civilrechts* (2nd edn, 1862) 290 ff.

43 See, in particular, Cugia, *Indagini* (n 17) 1 and 7 ff.

44 Kaser, *Privatrecht* vol I (n 7) 765; Amelotti, *donatio* (n 7) 32; H Lange and K Kuchinke, *Erbrecht* (5th edn, 2001) 740 ff; Simonius, *Donatio* (n 7) 77 ff.

45 Although the term *inter vivos* features in the Roman sources, it is likely that the texts that refer to it were interpolated, and, in any event, they are Justinianic rather than classical in origin. Other terms used in place of *inter vivos* to refer to lifetime donations, were *vera et absoluta* and *directa*. See Amelotti, *donatio* (n 7) 31 fn 94.

46 As to the meaning of "will-substitutes", see A Braun and A Röthel, "Introduction" in Braun and Röthel (eds), *Will-Substitutes* (n *) 1 at 2–3.

its way into the *Restatement (Third) of Property* in the US. The problem with the expression "will-substitutes" is that it suggests that these mechanisms necessarily *substitute* the will, in the sense that they are made in place of a will, when in reality they often *complement* them.[47] Conversely, the Uniform Probate Code (UPC) refers primarily to "non-probate transfers", which however merely reveals that they are not caught by probate procedures,[48] but little else. In other words, these expressions mainly tell us what the mechanisms can do, or what they are not (i.e. a will), rather than explaining or capturing their legal nature.[49]

In some continental European jurisdictions, legal scholars have also searched for appropriate names to denote arrangements that are both lifetime and testamentary. In Italy, where such arrangements have been at the centre of a lively scholarly debate since the 1980s,[50] mostly in the context of discussions involving the prohibition of succession pacts enshrined in Article 458 of the Civil Code, legal scholars have suggested a variety of terms, none of which are used by the legislature. Among these are *istituti alternativi al testamento* (instruments alternative to the will), and more recently also *successioni anomale per contratto* (anomalous succession by means of a contract) and *fenomeni parasuccessori* (phenomena relating to or analogous to succession). However, these expressions seem to also include techniques that operate an immediate and irrevocable transfer made with an eye on death and a future inheritance, and that therefore belong to the realm of anticipated succession (often called *negozi post mortem*).[51] Only the so-called *negozi transmorte* (*trans mortem* acts) are technically speaking similar to wills, for they become final only on death and remain freely revocable until that moment.[52]

As is the case with the Italian Code, the German BGB does not have a specific legal category to describe all of the mechanisms mentioned earlier.[53] Nonetheless, at least since the early 1950s, German legal scholars have developed various terms to capture not just the mechanisms enshrined in the Code, but also others that have arisen in legal practice. Gustav Boehmer had employed the term *Testamentsersatz*,[54] which corresponds to "will-substitutes" and which we said is potentially misleading. Interestingly, this term seems to have disappeared from German legal literature, clearing the way for *lebzeitige Zuwendungen auf den Todesfall*[55] (lifetime attributions/donations with effect on death) or the even more

47 For details see, Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 364–366.

48 The *Restatement (Third) of Property: Wills and other Donative Transfers* § 7.1(a) (2003).

49 In the context of an analysis of conflict of law rules, Talpis suggests speaking of "succession substitutes" which he understands to be wider than "will-substitutes", but whether this is a helpful term is doubtful. J A Talpis, "Succession Substitutes" (2011) 356 *Collected Courses of the Hague Academy of International Law/ Recueil des cours de l'Académie de droit international de La Haye*.

50 A Palazzo, *Autonomia contrattuale e successioni anomale* (1983).

51 In Germany, these techniques belong to the *vorweggenommene Erbfolge* (anticipated succession), but what counts as such is equally object of debate. See P Windel, *Über die Modi der Nachfolge in das Vermögen einer natürlichen Person beim Todesfall* (1998) 359.

52 G Christandl, "Will-Substitutes in Italy", in Braun and Röthel (eds), *Will-Substitutes* (n *) 131 at 132, who discusses the origins of the various terms.

53 Though, as we will see later, it contains a provision aimed at drawing a line between lifetime and testamentary gifts. See below at n 72.

54 G Boehmer, *Grundlagen der Bürgerlichen Rechtsordnung*, vol 2/2 (1952) 82 ff.

55 F Wieacker, "Zur lebzeitigen Zuwendung auf den Todesfall" in H C Nipperdey (ed), *Das deutsche Privatrecht in der Mitte des 20. Jahrhunderts. Festschrift für Heinrich Lehmann zum 80. Geburtstag*, vol 1

common phrases, *Zuwendungen unter Lebenden auf den Todesfall*[56] (attributions/donations between the living with effect on death) and *Rechtsgeschäfte unter Lebenden auf den Todesfall*[57] (juridical acts between the living with effect on death). Such expressions attempt to describe the legal nature of these arrangements where they state that they are made between the living but with effect on death. Whether these labels are any more helpful is, however, debatable because, by definition, all mechanisms, including wills, are created between the living (*unter Lebenden*) and therefore during the deceased's lifetime. As for the phrase *auf den Todesfall*, wills too take effect on death.[58] Thus in some way, wills could be said to fall within the category of at least *Rechtsgeschäfte unter Lebenden auf den Todesfall*, though perhaps not those of *Zuwendungen*, for this term suggests that there are some lifetime benefits.[59]

Be that as it may, what all this illustrates is that it is difficult to identify a term or concept capable of capturing the functions of the various arrangements and techniques common in legal practice, let alone their legal nature. In a way, the diversity and complexity of some of the structures and factual situations involved referred to earlier are bound to thwart attempts to find a suitable name, especially given that the legal nature of at least some of the mechanisms is in and of itself ambiguous.[60] However this is not really an issue, as it is not necessary to define this area of law as a whole or to reduce the various arrangements into a single category. What is more, simply because efforts have been spent to name the ensemble of arrangements or techniques that are neither entirely *inter vivos* nor testamentary, need not suggest that they should be treated as a separate legal category regulated by special rules alongside those governing lifetime and testamentary transfers. On the contrary, the fact that it is difficult to find a suitable term speaks against such a solution. Indeed, it would seem that no legal system, including Roman law, has opted for this approach.[61] Other options are to treat the various devices wholly or partially either as lifetime or as testamentary transfers. This then leads us to the next question: how have lawmakers tackled instruments that have effects both during lifetime and on death?

(1956) 271 ff.

56 See Harder, *Zuwendungen* (n 10) 12 ff who points out that even though this expression is commonly used in German legal literature, it does not follow that legal scholars have dealt with the subject in a systematic manner.

57 Muscheler, *Erbrecht* (n 20) vol I, 423 ff; Leipold, *Erbrecht: ein Lehrbuch mit Fällen und Kontrollfragen* (20th edn, 2014) § 16.

58 See Harder, *Zuwendungen* (n 10) 12 ff and 167 who argues that the term lacks precision and is misleading.

59 T Kipp and H Coing, *Erbrecht: Ein Lehrbuch* (14th edn, 1990) 438 speak of "Zuwendungen von Todes wegen durch Rechtsgeschäft unter Lebenden".

60 Consider the debate surrounding the legal nature of trusts in particular.

61 According to Muscheler, *Erbrecht*, vol II (n 20), 1427, para 2828, the drafters of the BGB had asked themselves whether to create a special regime for promises of a donation or whether to force them into one of the two categories. They decided in favour of the latter option. See also Kipp/Coing, *Erbrecht* (n 59) 445 who refer to the fact that a special regime existed in some of the German territories. To some extent a special regime has been created in France where specific forfeiture rules were developed that apply, for instance, to life insurance that mimic the laws on intestacy. See C Pérès, "Will-Substitutes in France", in Braun and Röthel (eds), *Will-Substitutes* (n *) 159 at 176.

E. DEALING WITH ARRANGEMENTS THAT LIE AT THE INTERSECTION BETWEEN LIFE AND DEATH

In the US, at first, courts treated "will-substitutes" as belonging to the domain of lifetime transfers, primarily to prevent them from being void for not complying with testamentary formalities.[62] The *Restatement (Third) of Property* summarised the situation as thus:

> [T]he traditional explanation for why will substitutes are not wills is the present-transfer theory. A will substitute need not be executed in compliance with the statutory formalities required for a will because a will substitute effects a present transfer of a nonpossessory future interest or contract right, the time of possession or enjoyment being postponed until the donor's death.[63]

The argument used by the courts was that where a donee acquires a "present-interest" during the lifetime of the donor, the transfer is to be treated as lifetime rather than testamentary, even though will-substitues also produce effects on death. The approach was strongly criticised not only for being too flexible and susceptible to manipulation by courts,[64] but also for the legal fictions it requires,[65] especially in cases where all the donee acquires during the lifetime is a contingent right defeasible by the revocability of the instrument. Unsurprisingly, therefore, this approach has lost its force, as steps have been undertaken to harmonise the law of wills and of "will-substitutes". The "present-interest" test has been gradually abandoned in favour of a functional approach and, except for matters of form, for most other purposes "will-substitutes" are now treated as "testamentary" by both the UPC and the *Restatement*.[66] Hence, where states have enacted the UPC, or its provisions have influenced state law, the law of wills and of "will-substitutes" has been largely harmonised. But, similar to what happened with the Roman *donatio mortis causa*,[67] in these states, the process has not been completed, especially given recent interventions at federal level, that have delayed the completion of the unification process.[68]

In other Common Law jurisdictions the approach to these arrangements has been far less systematic and harmonisation has not been sought. For instance, in England and Wales, in the absence of a real academic debate, the approach of the courts and the legislature has so far been piecemeal. With respect to formality requirements, courts have regarded pension nominations and joint bank accounts as "non-testamentary", though for reasons that are not always clear nor comprehensible.[69] For the purposes of the protection of the interests of family members and dependants,

62 Langbein, "The twentieth-century revolution" (n 34) at 1125 ff.
63 *Restatement* (n 48) § 7.1 comment a.
64 For a criticism, see Gulliver and Tilson, "Classification of gratuitous transfers" (n 31) especially at 18 and 37.
65 Langbein, "The twentieth-century revolution" (n 34) at 1128.
66 For an overview, see Gallanis, "Will-Substitutes" (n 27) at 23.
67 See text at n 15 above.
68 For details, see Gallanis, "Will-Substitutes" (n 27) at 26–28.
69 In relation to pensions, the question courts have posed was primarily how much power and thus control the member of the pension scheme has during his lifetime. See A Braun, "Pension Death Benefits: Opportunities and Pitfalls" in B Häcker and C Mitchell (eds), *Current Issues in Succession Law* (2016) 231 at 238–244 and Carr, "Will-Substitutes" (n 28) at 96.

the legislature has treated some arrangements like wills (e.g. the *donatio mortis causa*, statutory nominations as well as joint tenancies), but not others (e.g. life insurance and pension nominations), and again it is not always obvious why. In Scotland too, to date no debate has taken place and no coherent approach has been developed.[70] Here it is worth noting that the recent Succession (Scotland) Act 2016 has abolished the *donatio mortis causa*, but has also established that divorce, dissolution or annulment have the effect of revoking not just any provision in a will but also special destinations.[71] Thus, in this respect, wills and special destinations have been assimilated, but this is not the case with other mechanisms and the reasons for that are not spelt out.

Interestingly, as mentioned above, the German Civil Code did away with the Roman *donatio mortis causa*, and introduced a specific provision (§2301 BGB) aimed at drawing a line between gratuitous dispositions that are testamentary and those that are not.[72] Its primary purpose is to function as an anti-evasion clause, so as to prevent, in particular, the circumvention of formalities required for testamentary dispositions.[73] §2301(1) BGB establishes that where a promise of a donation is to take effect on death and under the condition that the donee survives the donor, the transaction is subject to the provisions governing testamentary dispositions,[74] irrespective of what the parties may have intended. Conversely, §2301(2) BGB states that if the donor *executes* the donation, the provisions regulating *inter vivos* gifts apply. Hence, the provision is seen as drawing a line between what belongs to the law of obligations[75] and the law of property on the one hand, and what falls within succession law on the other hand. In other words, it establishes which transactions are to be seen as testamentary and which are not.

The focus is placed on what the donor loses rather than on what the donee acquires, which we noted is what American courts have concentrated on in the past when they employed the "present-interest test". Both approaches inevitably run into difficulties. While the American "present-interest test" has raised questions about the meaning of "interest",[76] the German solution has elicited a debate surrounding the meaning of "execution" (*Leistungsvollzug*).[77] The drafters of the German BGB have interpreted *Leistungsvollzug* to mean that that the patrimony of the donor has to be "immediately and directly diminished",[78] but this definition has merely shifted the problem onto defining the meaning of an "immediate and direct diminution". Although it is commonly held that the decisive question is whether

70 Carr, "Will-Substitutes" (n 28) at 104–105.
71 Succession (Scotland) Act 2016 s 2.
72 Another rationale behind § 2301 BGB was, as we have seen, to abolish the *donatio mortis causa* as a separate legal instrument. See above at n 20. Windel, *Modi* (n 51) 61.
73 Windel, *Modi* (n 51) 61–62 and 335.
74 This includes but is not limited to formality requirements. See A Röthel, *Schlüter/Röthel, Erbrecht* (17th edn, 2015) 190. As for the type of formalities, the prevailing view is that those required for inheritance contracts (i.e. a notarial act) should apply. See A Dutta, "Will-Substitutes in Germany", in Braun and Röthel (eds), *Will-Substitutes* (n *) 179 at 183.
75 See Dutta, "Will-Substitutes in Germany" (n 74) 187. For Switzerland, see A Rothenfluh, *Zur Abgrenzung der Verfügungen von Todes wegen von den Rechtsgeschäften unter Lebenden: eine Darstellung von Doktrin und Rechtsprechung mit einem Beitrag zur Problemlösung anhand eines neuen Abgrenzungsmerkmals* (1984).
76 See, for instance, Gulliver and Tilson, "Classification of gratuitous transfers" (n 31) 18.
77 Wieacker, "Zur lebzeitingen Zuwendung" (n 55) at 278–279.
78 Motive, V, 352 in Mugdan, *Materialien* (n 20) 186.

the donor himself, and not her heir, has made some economic sacrifice (*Vermögensopfer*),[79] exactly what such a sacrifice consists of is subject to considerable debate among courts and legal scholars.[80] As always with legal terms, they can be interpreted in a narrow or broad manner and it is ultimately often a question of context.

What is remarkable in all this is that the German legislature has not been entirely consistent in drawing the line between gratuitous dispositions that pertain to succession law and those that do not. Indeed, another part of the Code explicitly regulates contracts in favour of third parties that take effect on death (§ 331(1) BGB), and these contracts seem to escape the scope of the anti-evasion rule.[81] In fact, it is important to note that §2301 BGB only deals with donations and does not, in principle, capture other means of passing wealth on death,[82] including those not explicitly regulated by the Code. In light of this incoherence, voices have been raised among German legal scholars to integrate at least some of these arrangements into the law of succession.[83] Thus, even though the drafters of the BGB wanted to avoid the problems raised by the hybrid nature of the Roman *donatio mortis causa*,[84] by excluding it from the code, they did not fully achieve their purpose, as similar problems of classification have arisen with other techniques, now common in German legal practice.[85] Hence, even in Germany, the question about the scope of succession law remains a relevant one.

F. ISSUES AND QUESTIONS

The answer to the question as to the scope of succession laws is, as we have noted, one that bears significant practical consequences for the deceased, her family members and dependants, her creditors and also the administration of estates in general.[86] However, so far, only in few legal systems have the effects of the arrangements discussed here on the operation of succession laws been looked at in a systematic manner. This chapter argues in favour of an extension of at least certain of its rules to mechanisms that, though not being formally considered as part of the

79 Kipp/Coing, *Erbrecht* (n 59) 447; Harder, *Zuwendungen* (n 10) 34–35; Wieacker (n 55) at 279.

80 Röthel, *Schlüter/Röthel* (n 74) 192; Windel, *Modi* (n 51) 333 ff, and, in particular, 354 ff; Harder, *Zuwendungen* (n 10) 33 ff. See further Rötelmann, "Zuwendungen unter Lebenden auf den Todesfall" (1959) Neue Juristische Wochenschrift 661.

81 BGH 26 November 1975, BGHZ 66, 8.

82 This is true, in particular, of non-gratuitous dispositions. BGH 12 November 1952, BGHZ 8, 23.

83 A Röthel, *Ist unser Erbrecht noch zeitgemäß?* (2010) A 3, at 40 ff and 43 ff suggests that for the most common instruments in legal practice, i.e. contracts in favour of third parties taking effect upon death, as well as succession clauses in partnership agreements. This approach seems to be shared by Dutta, "Will-Substitutes in Germany" (n 74) 193. See also Kipp/Coing, *Erbrecht* (n 59) 451–453. Interestingly the authors think that as far as the form is concerned, the law of obligations rather than the law of inheritance should apply (453). This is somewhat surprising given that the formalities for wills are not that complex, for German law admits the holograph will.

84 See above at B.

85 The drafters did not think that there should be another instrument alongside the will, the *Erbvertrag* and lifetime gifts, which it deemed sufficient to give effect to the intentions of a person. See G v Schmitt, "Entwurf" (n 19) 653. Yet, in practice, other instruments have developed.

86 See Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 357–358.

succession laws of the respective legal systems, obtain succession objectives.[87] In order to do so, lawmakers will have to address two key issues: which provisions should apply and to which arrangements.

A first important step is to ascertain which interests the respective succession laws seek to protect and whether these interests are already sufficiently safeguarded by the rules that regulate the specific mechanism, or whether there are particular reasons for not protecting these interests in the same way in a certain context. The conclusion may be that some succession rules are extended while others are not. Decisions are likely to differ depending on the legal system and the legal context concerned, especially as they are not merely based on doctrinal but ultimately also on public policy considerations. For instance, as far as formalities are concerned, the drafters of the American UPC took the view that they were unable to identify policy reasons for applying the formalities applicable to wills to "will-substitutes".[88] Yet, when it came to other rules, in particular default rules applicable to wills, they adopted, as we have seen, a different approach. Turning to Europe, Anne Röthel has shown that Civil Law jurisdictions that recognise compulsory or forced heirship tend to have anti-evasion rules in place that capture all gratuitous transfers made by the deceased, irrespective of whether they take the form of a will, a lifetime gift or another lifetime disposition.[89] In other words, the interests of family members and dependants are generally speaking well protected, although there are exceptions and the protection depends on how the term "gift" is construed. By contrast, creditors seem to face greater challenges.[90] Thus, there are examples of extensions of or integrations into succession law.[91]

The other, and to some extent perhaps more difficult, issue to determine is which arrangements should be subjected to specific succession laws and which should not. In other words, to what extent do they need to encroach into the realm of testamentary transfers to be caught by succession rules? Finding an answer to this question is not an easy endeavour for, as Gulliver and Tilson have put it aptly, "[s]ome human actions fit rather neatly into legal categories; many do not".[92] Clearly not every disposition that is somehow linked to, or motivated by, the death of the transferor should be governed by succession laws. While something more is required, the decision of what exactly that *more* consists of is by no means obvious and requires further consideration. What emerges from what we said above is that irrespective of whether the dividing line is identified by focusing, for example, on whether the donor gives up something during lifetime, the extent of the control she maintains, or on the nature of the right acquired by the beneficiary, drawing a clear line is bound to pose difficulties. What is more, certain techniques or arrangements may

87 Suggestions in this sense have been voiced not only in Germany, but also in other jurisdictions. For Italy, see for instance, A Zoppini, "Contributo allo studio delle disposizioni testamentarie 'in forma indiretta'" (1998) 52 Rivista trimestrale di diritto e procedura civile 1077 and Christandl, "Will-Substitutes" (n 52). For an overview of different jurisdictions, see Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 363, fn 307.

88 In the comment to s 6–101 of the Uniform Probate Code (as amended in 2000) at 726.

89 For an overview, see Röthel, "Will-Substitutes and the Family" (n 35) at 321.

90 Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 350–351. On the centrality of creditor protection to succession law, see Jan Peter Schmidt's contribution to this volume which points out that creditors' interests are sometimes overlooked.

91 Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 359–363.

92 Gulliver and Tilson, "Classification of gratuitous transfers" (n 31) 1.

well warrant a preferential treatment.[93] In fact, the policy considerations underpinning certain succession rules can enter into conflict with those that lie behind incentives to use a particular mechanism. Thus, looking at the purposes of the specific provisions alone will not be enough. It will also be necessary to consider both the functions of the particular techniques and the interests they serve, and to take into account the interests of third parties, including those of financial providers.

G. CONCLUSION

Legal practice features a number of partly heterogeneous arrangements that are testamentary in substance rather than in form. These arrangements tend to blur the boundary between life and death. This is not a new phenomenon, for there have always been mechanisms that have defied legal classification. The Romans faced similar problems and they expressed similar concerns, which is one of the reasons why they assimilated the *donatio mortis causa* with legacies. However, over time the array of arrangements straddling the boundary has grown and their economic impact has increased. As a result, the picture has become more complex and the need to confront the emerging problems is even more pressing than in the past.

As George Gretton has noted "[t]he property/succession borderland is broad and muddy",[94] and this is partly a consequence of attempts to achieve succession purposes through the use of arrangements belonging formally to the laws of contract, property, and company, but also of the fact that, just like property law, succession law is fraught with linguistic difficulties. However, this should not make us suspicious of these arrangements, nor should the difficulties deter legal scholars or future doctoral students from turning their attention to this important field of study. After all, borderlands are often the most interesting and therefore also the most fascinating ones to study.

93 Such a preferential treatment is, for instance, often given to life insurance. See Braun and Röthel, "Exploring Means of Transferring Wealth on Death" (n 25) at 328.

94 Gretton, "The property/succession borderland" (n 2) at 112.

ADEMPTION – VARIOUS MEANINGS OF THE TERM

Roderick R M Paisley

How does one pay a sincere compliment to George Gretton whilst acknowledging both his tendency to self-deprecation and his immense academic standing? It is best to quote a spelling mistake from a student essay almost certainly induced by the mindlessness of an electronic spell checker. Last year, one of my third-year Land Law students cited an article by "George Great One". Truth revealed in Error, no doubt. I have learned a lot from George throughout my career and I am pleased to call him my friend. It is a huge pleasure to dedicate this essay to him as a small token of thanks for all he has contributed to legal scholarship. His generosity of spirit and academic brilliance have inspired many, including me.

A. INTRODUCTION

The law of ademption lies on the interface of the law of property and obligations. Historically, it has caused the greatest confusion in many legal systems. It has been the subject of a major tussle, still unresolved, between Civilian and Common Law notions. This article does not seek to provide a definitive reconciliation of these approaches; it has a more modest aim: to assist in clearing the way for a less muddled analysis, the meaning of "adeem" and "ademption" as found in writings from a number of jurisdictions will be examined. The writer is not aware of any other such source in the literature. This article is deliberately framed as a lexicon of the work of others although the various meanings are classified in a scheme to enable ease of reference and a modicum of analysis. It is hoped that, by identifying the various meanings in the existing published writings, scholars from the different legal traditions will be able to engage in a more fruitful debate.

B. THE MEANING OF ADEMPTION

"The doctrine of ademption in the law of wills", wrote an American commentator 80 years ago, "has become confused by the loose nomenclature of the courts and writers."[1] This mordant criticism remains, for many jurisdictions, apposite today. But it must be admitted that the term "ademption" and its cognates are remarkably

1 B Barstow, "Ademption by satisfaction" (1930–31) 6 Wis LR 217 at 217.

slippery. They have a variety of discrete and overlapping meanings. This leaves the words very difficult to define in a satisfactory manner,[2] and some have despaired of ever finding a suitable result:[3] "Attempts at providing a comprehensive definition of ademption in precise terms seem foredoomed to failure."

For comparative legal research this is a particular difficulty: lawyers from different jurisdictions and different legal traditions may unwittingly talk at cross-purposes. It is thus necessary to identify the various meanings of the term "ademption" and its cognates in order to be able to discard those that are not directly relevant to this study.

C. CORE MEANING

The core meaning of both words "ademption" and "adeem" is "cancellation" and is derived from the Latin words *ademptio* and *adimere*.[4] Despite this lineage, some doubt has been cast on the linguistic elegance and disagreeable sound of the English verb "adeem", although the same commentator concedes that the English noun "ademption" is "not ungraceful".[5] Lewis and Short[6] define *adimire* in several ways including: "to take to one's self from a person or thing, to take away, take away any thing from, to deprive of". Similarly, the *Oxford Latin Dictionary*[7] defines *adimire* in various ways including: "to take (property etc.) away (from a person), steal, confiscate; to take away, deprive of; to refuse or fail to give, deny (to), withhold (from)".

Informative though they are, such definitions still struggle to tie down the meanings of the words even within a relatively wide range. This presages the difficulty that one encounters in the legal sources. When one moves to survey legal literature one is forced to conclude that the terms "ademption" and *ademptio* may be used by lawyers in a remarkably wide sense relating to virtually all the methods, both express and implied, by which rights may be taken away. The taking away of legacies or bequests is obviously only one example within this wide class.

D. WIDE MEANING: ROMAN LAW

This wide meaning is also employed in Roman law as regards *ademptio* and its cognates.[8] This is to be observed in the entries in the standard works, such as Heumann's *Handlexikon*,[9] where the verb *adimere* is defined, by reference to a very

2 T H Leath, "Lapse, abatement and ademption" (1960–1961) 39 North Carolina LR 313 at 320.
3 P E Hassman, "Ademption of legacy of business or interest therein" (1975) 65 ALR 3d 541 § 1[a]. He does, however, go on to state that one may profitably look at ademption from the point of view of the result of the application of the doctrine.
4 "adeem, *v.*" and "ademption, *n.*" *OED Online* (June 2017). The Latin derivation is noticed in *Re Edwards Deceased; MacAdam v Wright* [1958] Ch 168; *Re Church* [1923] 1 DLR 203 at para 60 per Beck JA (Alberta Supreme Court); *Re Puczka* (1970) 10 DLR (3d) 339 at para 9 per Tucker J (Saskatchewan Court of Queen's Bench).
5 P Gane, *The Selective Voet being the Commentary on the Pandects*, vol 5 (1956) Translator's Note, 247.
6 C T Lewis and C Short, *A Latin Dictionary* (1962) s.v.
7 P G W Glare (ed) *Oxford Latin Dictionary* (1982) s.v.
8 W W Buckland, *Textbook of Roman Law* (3rd edn, 1966, by P Stein) 346.
9 H G Heumann, *Handlexikon zu den Quellen des römischen Rechts* (7th edn, 1891, by A Thon) s.v.; (10th edn, 1958, by E Seckel) s.v.

limited number of sources, as *wegnehmen* and *entziehen* both denoting taking away or removal. A more extensive selection of the Roman sources is set out below to illustrate the width of application of these meanings.

Consistent with its scheme of compilation, the *Digest of Justinian* contains no systematic attempt at conceptualisation of the doctrine of ademption. The nearest approach to this is contained in one passage, collected under the heading *De damno infecto et de suggrundis et projectionibus* (anticipated injury and house-eaves and projections) attributed to the jurist Paul in which it is stated that the words *damnum* (injury) and injuring (*damnatio*) are derived from *ademptio* (taking away) and, rather more loosely, from *deminutio* (diminution) of an estate.[10] In broad terms, this can still be accepted as accurate in the context of the law of succession albeit the beneficiary in a bequest that is adeemed loses nothing more than the expectation or hope of a gift – he possesses a mere *spes successionis* whilst the testator retains the right to revoke his will.

In the absence of a conceptual approach in the *Digest*, the meaning of the word *ademptio* and its cognates is illustrated in the legal reasoning applied in the various scenarios collected from the works of the Roman jurists. The *Digest* contains an entire chapter entitled *De Adimendis vel transferendis legatis vel fideicommissis*.[11] This comprises passages relating to various methods of revocation of legacies – including express and implied revocation – and also a single provision on ademption by the testator's alienation of the thing bequeathed.[12] Other passages in the *Digest* continue the pattern of using the words *ademptio*, *adimendi*, *adimere* or *adempta* in a wide sense extending to express[13] or implied[14] revocation of legacies; ademption by the testator's alienation of the thing bequeathed;[15] and ademption by the testator's calling in of a debt bequeathed by him.[16] The words, however, may have meanings wider even than these. In a few passages, either the word *ademptio*, or the cognates, is also used in contexts extending beyond the law of succession such as references to termination of mandates;[17] removal of property from a *peculium*;[18] a forfeiture of property in a criminal context;[19] a deprivation of civil status[20] or rights;[21] and even the severing of grapes from a vine[22] or the felling of a tree.[23] In still other passages in the *Digest* the

10 D 39.2.3 (Paul).
11 D 34.4.1–32.
12 D 34.4.24(1) (Papinian).
13 D 12.6.2(1) (Ulpian); D 28.4.1(1) and (4) (Ulpian); D 28.4.2 (Ulpian); D 28.5.6(4) (Ulpian); D 28.7.27(1) (Modestinus); D 29.1.13pr (Ulpian); D 29.1.15(1) Ulpian; D 29.1.17(2) (Gaius); D 29.7.14pr (Scaevola); D 30.12(3) (Pomponius); D 30.14(1) (Ulpian); D 30.33 (Paul); D 30.96(4) (Julian); D 31.14pr (Paul); D 32.27(1) (Paul); D 33.9.4pr (Paul); D 34.5.10pr (Ulpian); D 36.2.24pr (Paul); D 40.4.40 (Pomponius referring to Ofilius); D 40.6.1 (Terentius Clemens); D 40.7.13(4) (Julian); D 41.8.4 (Paul).
14 D 31.44(1) (Pomponius); D 34.2.3 (Celsus).
15 D 24.1.22 (Ulpian); D 32.11(12) (Ulpian).
16 D 34.4.31(3) (Scaevola).
17 D 1.16.6(1) (Ulpian).
18 D 15.1.4pr (Pomponius).
19 D 4.6.40(1) (Ulpian); D 19.1.31pr (Neratius); D 35.2.11(3) (Papinian); D 48.2.20 (Modestinus); D 48.8.3(5) (Marcian); D 48.21.3(2) (Marcian); D 49.13.1pr (Macer); D 48.19.38(8) (Paul); D 48.44.4 (Marcian). See also D 16.3.31(1) (Tryphoninsus) (deprivation by a thief).
20 D 4.5.7(2) (Paul); D 40.6.1 (Terentius Clemens).
21 D 4.16.1(1) (Paul); D 24.3.2(1) (Ulpian); D 45.1.122(1) (Scaevola).
22 D 7.4.13 (Paul).
23 D 43.27.1pr and 6 (Ulpian).

phenomenon of ademption by alienation is illustrated albeit the word *ademptio* or its derivatives are not used.[24]

The *Institutes of Justinian* contains the title *De Ademptione legatorum*[25] dealing with express revocation and transfer of legacies but also has a provision in the earlier title *De Legatis* specifically dealing with ademption by alienation.[26] The terms *ademptio*, *adimere*, *adimendi* and *adempta* are used elsewhere in the *Institutes* with a wide meaning and incorporate the revocation of a legacy,[27] the removal of aspects of testamentary freedom[28] and deprivation of property.[29]

In the *Codex of Justinian*, the chapter *De Legatis* contains a provision[30] dealing with what would be recognised as ademption by the testator's alienation of the thing bequeathed, but the word *ademptio* or its derivatives is not used in that passage. However, *ademptio* or its cognates are extensively used in the *Codex* in varying contexts relating to succession including the taking away of bequests and legacies;[31] the deprivation of inheritance;[32] and the dispensing with the formalities of execution of *mortis causa* deeds.[33] Such words are also used more widely in connection with matters as diverse as deprivation of property,[34] deprivation of other rights,[35] alteration of religious doctrine,[36] a disappointment of a hope,[37] the destruction of the potential of the tillage of land,[38] deprivation of personal honour,[39] the taking away of money,[40] removing the possibility of fraud[41] and the relief of a person from potential liability.[42] The verb *adimire* and its cognates occasionally occur elsewhere in Roman legal literature. It does not, however, appear in Gaius, *Institutes*, even in the passage dealing with the effects of alienation of a thing that has been specifically bequeathed.[43]

E. WIDE MEANING: LATER CIVILIAN TRADITION

The wide meaning of ademption seen in the Roman sources is also to be found in the writings of the European *ius commune*. A wealth of material comprised in this legal

24 D 30.6 (Julian); D 30.8pr (Pomponius).
25 J Inst 2.21.
26 J Inst 2.20.12.
27 J Inst 2.20.36 and 4.6.33.
28 J Inst 1.7.
29 J Inst 2.12.
30 C 6.3.3.
31 C 6.41.1pr and 6.37.17.
32 C 6.21.9; 6.35.2(1); 6.35.4; 6.36.2pr and 7.12.12pr.
33 C 6.23.15pr.
34 C 1.5.3pr; 6.61.6(3); 7.23.1; 7.663; 8.40.1; 9.1.3pr; 9.47.8; 9.51.3pr and 9.51.5.
35 C 4.20.17pr; 4.24.4; 5.27.6pr; 5.9.5(3); 5.9.7; 7.2.13; 7.16.26; 7.62.15; 8.19.1(1); 8.40.20; 8.42.3; 8.4.6(1); 8.39.2; 8.40.20; 8.51.7, 11.50.2(4) and 11.62.14(2).
36 C 1.5.8pr.
37 C 5.4.23pr.
38 C 11.48.7(1).
39 C 10.32.8.
40 C 5.18.7.
41 C 11.10,1.
42 C 9.6.3 and 11.70.5(2).
43 Gai, *Inst* 2.198.

tradition could be cited to demonstrate the point.[44] But a few representative passages may be quoted as illustrations.

The Roman Dutch jurist, Johannes Voet (1647–1713) uses *ademptio* and its cognates in much the same way as is in the Roman sources. First of all, Voet's *Commentarius ad Pandectas* contains a part, mirroring that in the *Digest*, entitled *De Adimendis vel transferendis legatis vel fideicommissis*.[45] This may be translated as "The ademption or transfer of legacies or fideicommissa."[46] In this part, Voet writes of the express and of the tacit ademption of legacies. In respect of the latter he acknowledges that there are many ways in which a legacy may be tacitly adeemed[47] and lists nine such ways, including the collection of a bequeathed debt owed to the testator by a third party[48] and the alienation of the thing bequeathed.[49] Elsewhere in Voet's work, *ademptio* and its cognates are used in passages dealing with a wide range of matters outwith the law of succession. They include a taking away[50] or forfeiture of property;[51] the deprivation of rights;[52] a loss of possession;[53] a removal of jurisdiction;[54] the revocation of a matrimonial gift;[55] the removal of a responsibility;[56] and the removal of feudal rights and privileges.[57] As regards the law of succession, the words are used in the context of the revocation of legacies;[58] the removal of the power to make a will;[59] the loss of right to deal with property left by succession;[60] and the taking away of an inheritance.[61]

Limiting our enquiry into the use of *ademptio* and its cognates to the law of succession, in the Civilian tradition the term *ademptio* is consistently used to encompass all methods of revocation of legacies, both express and implied. Take the writings of the following three German jurists. The translations are my own and I have supplied the more modern citations of the *Digest*.

44 E.g P Azo, *Summa Azonis Locuples Iuris Civilis Thesaurus*, edn by Henricus Draesius (Venice, 1566) 1088–1092; G D Durante, *De Arte Testandi, et Cautelis Vitimarum Voluntatum Tractatus* (Lyon, 1546) Title X, *De Mutatione Testamenti, & Ademptione Legatorum*, Cautela VII, 250–251; Bartolus de Saxoferrato, *Commentaria In Primam Infortiati* (Turin, 1589) vol 2, *ad* 33.3, *De Adimendis Legatis* 121–125; J J Wissenbach, *Exercitationum ad Quinquaginta Libros Pandectarum Partes Duae* (4th edn) Part 1 (Leipzig, 1573) *Disputatio VI,* 34.15, 684; M Wesenbecius, *Commentarii in Pandectas Juris Civilis et Codicem Justinianem,* (Amsterdam, 1665) 449–450 on 34.4 *De Adimendis vel Transferendis Legatis vel Fideicommis*; J Menochius, *De Praesumptionibus Conjecturis, Signis et Indiciis Tam Civilibus Quam Canonicus Commentaria,* vol 2 (Geneva, 1724) 491–507 and 531; B Carpzov, *Decisiones Illustres Saxonicae* (Leipzig, 1646) *Decisio* 68, 329–332; P Voet, *Institutionum Imperialium Commentarius,* vol 1 (Gorinchem, 1688) 819–824, 2.21; S Stryk, *Specimen Usus Moderni Pandectarum: Continuata Tertia*, vol 4 (7th edn, Halle, 1747) 1008–1012; P Colquhoun, *A Summary of the Roman Civil Law* (1851) vol 2, 193, § 1193.

45 Voet, *Comm ad Pand* 34.4.1-12.

46 See Gane (n 5) vol 5, 247.

47 Voet, *Comm ad Pand* 34.4.5.

48 Voet, *Comm ad Pand* 34.4.5.

49 Voet, *Comm ad Pand* 24.4.6.

50 Voet, *Comm ad Pand* 14.4.4; 39.2.12.

51 Voet, *Comm ad Pand* 10.1.10.

52 Voet, *Comm ad Pand* 1.4.8; 1.4.11; 1.4.21; 1.16.3; 2.1.28; 3.1.2; 3.4.3; 4.8.21; 22.5.6; 24.2.2; 28.8.27 and 42.3.15.

53 Voet, *Comm ad Pand* 2.4.54.

54 Voet, *Comm ad Pand* 2.1.55.

55 Voet, *Comm ad Pand* 23.2.111, 113 and 126.

56 Voet, *Comm ad Pand* 26.4.2; 26.10.7.

57 Voet, *Comm ad Pand* 38 (*Digressio De Feudis*), 7.25.69, 103 and 121.

58 Voet, *Comm ad Pand* 34.4.1–12 and 34.9.6.

59 Voet, *Comm ad Pand* 28.1.40 and 41; 28.6.25.

60 Voet, *Comm ad Pand* 28.1.42.

61 Voet, *Comm ad Pand* 28.3.1 and 39.5.10.

First, Friedrich Albrecht Maul (born 1622):[62]

Ademptio sit dupliciter, expresse et tacite. Expresse adimitur legatum per verba contraria . . . Tacite adimitur legatum primo, quando post legatum inter testatorem & legatarium superveniunt inimicitiae graves & capitalis.[63] *. . . Secundo tacite adimitur, si testator in vita sua alienavit rem legatam.*

Ademption occurs in two ways – express and implied. A legacy is expressly revoked by contrary provision . . . A legacy is impliedly revoked, first, when after the legacy is made grave and deadly hostility arises between the testator and the legatee . . . Secondly, it is impliedly revoked if the testator alienates the thing bequeathed in his own lifetime.

So too George von Widmont (*circa* 1640–1706):[64]

Ademptio legatorum est nihil aliud, quam relictorum per contrariam voluntatem propter testatoris paenitentiam pura vel conditionalis revocatio, & est duplex, una expressa, altera tacita.

Ademption of legacies is nothing other than a revocation of what has been left on account of the testator repenting [of his earlier provision] and it may be either conditional or unconditional and is encountered in two forms, either express or implied.

Similarly, Johan Gottlieb Heineccius (1681–1741), when dealing with revocation of legacies by various means, identified them all as forms of ademption. First, he listed express parole revocation, secondly, informal revocation and then erasure of text, followed by two other forms of ademption, as follows:[65]

Ademtum videri legatum quod testator . . . 4) necessitate haud[66] *urgente alienaverit,*[67] *vel 5) ita destruxerit, ut ad pristinam formam redigi non possit.*[68] *At dissensio quaedam ea in re videatur fuisse inter veteres. De lana enim, in vestem mutata, id apparet ex* [D 32,88pr (Paul); 30.44(2) (Ulpian)] *de domo, legatae areae imposita, ex* [D 46.3.98(8)(Paul); 30.44(4) (Ulpian);[69] 32.79(2) (Celsus)].

A legacy is regarded as adeemed when . . . 4) the testator alienates the subject of the legacy where he is under no pressing necessity to do so; or 5) destroys it so that it is not capable of being put back into its original form. A dispute amongst the ancient Roman writers on the last of these matters may be seen as regards wool that is made into clothes [D 32.88pr (Paul); 30.44(2) (Ulpian)] and as regards a house that has been built on a plot of ground that has been bequeathed [D 46.3.98(8)(Paul); 30.44(4) (Ulpian); and 32.79(2) (Celsus)].

62 F A Maulii, *Thesaurus Theorico-Practicus* (Mainz, 1666) 85–86.
63 Here is cited D 34.4.13 (Marcian)
64 G von Widmont, *Collegia in Pandectas* (Ingolstadt, 1701) 5.34.4, para 2 (p 462).
65 G Heinneccius, *Elementa Juris Civilis Secundum Ordinem Institutionum* (Amsterdam, 1767) *Pandectarum, Pars V*, § 34.4.184, comment 3, 66–67.
66 This word is misspelled as "haut" at 67 (*Pandectarum, Pars V*) in the 1731 Amsterdam edition but the correct spelling is seen in Heinneccius, *Elementa Iuris Civilis Secundum Ordinem Pandectarum* (6th edn, Geneva, 1747) 523.
67 Here is cited J Inst 2.20.12 and D 30.8 (Pomponius).
68 Here is cited D 32.88 (Paul).
69 This is cited incorrectly as D 31.44(1) (Pomponius).

The meaning of the word "ademption" comprising all forms of revocation of legacies continues to be found in legal systems where Civilian ideas have been or remain influential.[70] Such a use may be illustrated by the judicial observation in a nineteenth century Belgian court.[71] In a dispute dealing with the revocation of a will the Court observed: "*l'ademption n'est qu'une negation de la libéralité*" ("ademption is nothing more than a cancellation of the gift"). In the context of a *mortis causa* gift, then, the word "ademption" may mean nothing more complex than revocation. Ademption, in the Civilian tradition, is thus a term that comprises various methods by which a legacy may be revoked.

F. WIDE MEANING: COMMON LAW TRADITION

Within the Common Law world, the widest meaning of ademption appears to be that used in several American cases in which the word "ademption" is defined as:[72] "the extinction, alienation, withdrawal, or satisfaction of the legacy by some act of the testator by which an intention to revoke is indicated; the doing of some act with regard to the subject-matter which interferes with the operation of the will". It may be observed that this definition is not limited to a particular classification of legacy, such as a special or specific legacy. It encompasses also ademption by subsequent portion.[73]

The second part of this wide definition (beginning with the words "the doing of some act") is not limited to the acts of the testator. It has a tendency to comprise factors that may cause a bequest to lapse such as (1) declinature of a bequest by a beneficiary; or (2) where a beneficiary predeceases.[74] Such are not usually regarded as examples of ademption. Even if attention were to be confined to the acts of the testator, there are many such acts which, although they affect the subject matter of the bequest and may interfere with the operation of a will, would not normally be regarded as instances of ademption. For example, during his lifetime a testator may lessen the value of the subject of a bequest simply by continuing to use it – for example by driving a bequeathed car for thousands of miles – but this loss of value of a thing that continues to exist is not normally regarded as ademption. So too the testator may burden the subject of a legacy with debt or by a derivative real right.

70 E.g. Malta: *Desain v Desain Viani* [1948] AC 18 (PC).

71 Cour Imperiale de Bruxelles, II Chambre, 10 June 1812, reported in F N Bux and J S Loiseau, *Jurisprudence du Code Napoléon*, vol 19 (1812) 182 at 184. Art 1038 of the Belgian civil code is in identical terms to Art 1038 of the French *Code civil*.

72 *American Trust & Banking Co v Balfour*, 138 Tenn 385, 198 SW 70 Tenn (1917) (Supreme Court of Tennessee) at 71 per Williams J. This has been quoted in a considerable number of subsequent cases e.g. *Hanafee v Jackson Nat. Bank* reported in SW 2d, 1992 WL 137476 Tenn App, 1992 at 3 per Judge Farmer (Court of Appeals of Tennessee, Western Section); *YIVO Institute for Jewish Research v Zaleski* 386 Md 654, 874 A 2d 411 Md 2005 at 663 and 416 respectively per Greene J (Court of Appeals Maryland).

73 This is not relevant to this present enquiry and the reference to "satisfaction" is elided from the passage where it is quoted in some ademption cases, e.g. *Bollman v Pehlman* 352 Ill App 3d 1203, 817 NE 2d 584 at 1206 and 586 respectively per Justice Cook (Appellate Court of Illinois, Fourth District).

74 The term "ademption" was used to denote this in *Hughes v Hughes*, unreported, Case ref: CIV2787/1991 per Murray J (Supreme Court of Western Australia) available on the website of the Supreme Court of Western Australia.

The testator may physically move the subject of the bequest to another jurisdiction where the applicable legal rules purport to distribute the subject of the bequest on death in a manner contrary to the terms of his existing will. None of these are normally regarded as instances of ademption.

The second part of the definition, quoted above, is therefore an excrescence on the core meaning of ademption: for it is both too narrow and too broad. It is too narrow because the core meaning of ademption relates to something more than "interference" with the operation of the will. And it is too broad because ademption, in its common and narrower meaning, relates not to something that "hinders" the operation of a bequest but to an event that ultimately renders the bequest inoperative. Ademption, in its common and narrower acceptance, relates only to the extinction, in whole or in part, of a bequest or legacy.

In the eighteenth century it was common for English lawyers to use the word "ademption" for a number of forms of revocation of a bequest or legacy including express revocation by subsequent *mortis causa* deed.[75] In similarly wide terms American commentators in Common Law states, in both the eighteenth and early nineteenth century, could write that: "An ademption of a legacy is revocation of it";[76] and: "There may be an ademption of a legacy by an express revocation of it, or by implication, as by transferring it to another, and this ademption must be proved."[77]

Both American formulations are expressly derived from the English writer, Henry Swinburne (1551–1624) who, with reference to sources in Roman law[78] and the Civilian tradition,[79] defined ademption as:[80]

> a taking away of the Legacy before bequeathed . . . Ademption of legacies is two-fold, expressed, and secret. *Expressed*, when the Testator doth by Words take away the Legacy before given. *Secret*, when the Testator doth by Deeds without Words take away the Legacy; as when he doth give away the Thing bequeathed, or doth voluntarily alienate the same before his Death.

G. WIDE MEANING – SCOTS LAW

There are some instances of this wider meaning in Scottish judicial remarks using "adeem" for where a beneficiary is no longer able to comply with a condition attached to the bequest.[81] To assign to "ademption" such a wide meaning, however, deprives it of much content and undermines the attempt to understand its conceptual

75 E.g. the use of word "ademption" to indicate revocation of a bequest by a codicil: *Alexander v Alexander* (1755) 2 Ves Sen 640 at 645, 28 ER 408 at 411 per Sir Thomas Clarke commenting on *Humphrey v Taylour* (1752) Amb 136, 27 ER 89.

76 Z Swift, *A System of the Laws in the State of Connecticut: in Six Books*, (1795) vol 1, 434 referring to H Swinburne, *A Treatise of Testaments and Last Wills*, 522 (edition unknown), but see n 80 below.

77 N Dane, *A General Abridgement and Digest of American Law, with Occasional Notes and Comments*, vol 2 (1823) 261, § 5.

78 D 34.4.1–9.

79 M Wesenbecius, *Commentarii in Pandectas Juris Civilis et Codicem Justinianem ad* 34.4 *De Adimendis vel transferendis legatis vel fideicommis*.

80 H Swinburne, *A Treatise of Testaments and Last Wills* (7th edn, 1793) vol II, 544, Part VII, § XX, 2 and 3.

81 *Henderson's Judicial Factor v Henderson* 1930 SLT 743 at 745 per Lord Mackay.

core. Such a wide meaning is not widely employed either in Scots law or in other modern legal systems.

H. MEANING LINKED TO EXTINCTION OF BEQUEST

In many Common Law jurisdictions the meaning of the term "ademption" is not quite as wide but still denotes a variety of methods by which a legacy or bequest may be extinguished.[82] Two of the more common of these methods of extinguishing a legacy are (1) ademption of a legacy by subsequent portion[83] known as "ademption by satisfaction"[84] and (2) ademption of a legacy due to lifetime alienation or destruction. These shall be examined in order below.

I. ADEMPTION BY SATISFACTION

Ademption by satisfaction applies to specific, demonstrative and general legacies and, in this regard, it may be distinguished from ademption in the narrow sense that applies only to specific or special legacies. This form of implied legal revocation is exemplified in the *Digest*[85] and the *Codex*,[86] recognised in the European *Ius Commune*.[87] It is known to many Common Law legal systems[88] and has been received into Scots law,[89] albeit it is perhaps better classified there as a form of extinction by compensation.[90] Such an analysis is not perfect as the doctrine of compensation or

82 This multiplicity of meanings is recognised in the New South Wales case *Fairweather v Fairweather and others* (1944) 69 CLR 121 at 130 per Latham CJ (High Court of Australia). See also the use of the term "adeemed" in the context of a revocation of a provision in a will by an inconsistent codicil: *Kermode v MacDonald* (1866) 35 Beav 607 at 610, 55 ER 1032 at 1033 per Lord Romilly MR.

83 For English authority: *Powys v Mansfield* (1837) 3 My & C 359, 40 ER 964; *Montefiore v Guedalla* (1859) 1 De GF & J 93, 45 ER 294; *In re Furness; Furness v Stalkartt* [1901] 2 Ch 346; *In Re Eardley's Will; Simeon v Freemantle* [1920] 1 Ch 397; *In re Vaux; Nicholson v Vaux* [1939] Ch 465; *In re Cameron, Decd* [1999] Ch 386. For the application of the doctrine in the Irish Republic: H Delany, *Equity and the Law of Trusts in Ireland* (2003) 703–705. For Australia: G E Dal Pont and R R C Chalmers, *Equity and Trusts in Australia* (3rd edn, 2004) 402–409.

84 Barstow (n 1) 217. Some writers have indicated a desire to abandon the use of the word "ademption" in this regard: P Mechem, "Specific legacies of unspecific things – *Ashburner v MacGuire* reconsidered" (1939) 87 Pa L Rev 546 at 548, n 1.

85 D 31.22 (Celsus); D 34.3.21 (Terentius Clemens).

86 C 6.37.11.

87 E.g. pre-Code French law: J Domat, *Les Lois Civiles dans Leur Ordre Naturel* (2nd edn, 1695) vol 3, II.4.2.11 (721).

88 E.g. Malaya: *Lim Soo Siam v Leow Yong Moey; In the Matter of the Will of Leow Chia Heng, Deceased* [1933] 2 MLJ 214; Guam Code (2007) §§ 407–411 and 2901.

89 J McLaren, *The Law Wills and Succession* (3rd edn, 1894) I, 736–756; D Oswald Dykes, *Supplementary Volume to McLaren on Wills and Succession* (1934) 181, paras 1372 and 1373; *Watson v Blair* (1831) 10 S 12; *Johanson v Johanson's Trs* (1898) 1 F 244. Cf *Smith's Trs v Sellar* (1894) 21 R 633. In Scotland where a testator makes a lifetime provision *in lieu* of a future bequest he should expressly vary his will or seek in exchange for the gift a discharge from the legatee of rights in the future succession to the extent of the gift. A lifetime provision may, however, be regarded in some circumstances as an "advance" in respect of legitim. See *McLachlan v Seton's Trs* 1937 SC 206 at 229 per Lord Mackay.

90 See *Anderson v Anderson* (1679) Mor 11509, Stair's Decisions, II, 705.

set off is normally associated with a situation where the same person is both debtor and creditor to another.[91]

Ademption by satisfaction is properly to be regarded as distinct from revocation in that by revoking a legacy a testator intends to prevent the legatee from having the legacy whereas, by providing the gift during his lifetime, the testator wishes the legatee to benefit and has merely accelerated the gift. There is some merit in the observation that the term ademption is inaccurately applied to satisfaction of a legacy by such prior provision.[92] The matter is not quite so clear cut as that, however, and in one nineteenth century case from the Common Law jurisdiction of New York the matter was analysed thus:[93]

> Some confusion has arisen on this subject, from the failure even of elementary writers, to keep in view the distinction which I suppose exists between what is, strictly, the ademption of a legacy and its satisfaction. *Ademption*, as I understand the term, is only predicable of a specific legacy. It takes place, as the term imports, when the thing which is the subject of the legacy, is *taken away*, so that when the testator dies, though the will purports to bestow the legacy, the thing given is not to be found to answer the bequest. It has been extinguished, if a specific debt, by having been paid to the testator himself; if an article of property, by its sale or conversion. This is ademption – whether or not it has taken place is a conclusion of law, and does not depend upon the intention of the testator . . . When . . . it is determined that it was the intention of the testator to give a specific thing, and not a general legacy, then the intention of the testator has nothing further to do with the question of ademption. This is entirely a rule of law, and the rule is, that the legacy is extinguished, if the thing given is gone.
>
> Satisfaction, on the other hand, is predicable, as well of a general, as a specific legacy. It takes place when the testator, in his lifetime, becomes his own executor, and gives to his legatee what he had intended to give by his will. Thus it may happen, in respect to a *specific* legacy, that it has been both *adeemed* and *satisfied;* adeemed, because the thing is gone when the testator dies; *satisfied*, because the legatee has received it. And this, unlike that of ademption, is purely a question of intention. Upon this question, with a view to ascertain whether, in fact the testator, in making an advance to his legatee, intended it as a satisfaction, either *in toto* or *pro tanto*, extrinsic evidence is admissible."

One could also add that ademption by subsequent portion or compensation seems to operate only if the lifetime gift is accepted by the donee and he is always entitled to refuse: *invito beneficium non datur*.[94] It is probably better classified as a discharge by reason of the acceptance of the gift on the part of the donee. In contrast to this, ademption, in the sense of revocation of a testamentary provision, is the unilateral act of the testator and involves no participation, far less does it require the consent, of the legatee.

91 Erskine, *Inst* 3.4.11–19.

92 See the observations in the American cases *Kramer v Kramer* 201 Fed 248 (Circuit Court of Appeals, Fifth Circuit); 119 CCA 482 (1912) at para 6 per Circuit Judge Shelby; *In Re Brown's Estate* 139 Iowa 219, 117 NW 260 (1908) (Supreme Court of Iowa) at 262 per Deemer J.

93 *Beck v McGillis* (1850) 9 Barb 35, NY Sup 1850 (Supreme Court, New York County, New York) per Justice Harris.

94 D 50.17.69 (Paul); D 50.17.156(4) (Ulpian): *quod cuique pro eo praestatur, invito non tribuitur*; P Halkerston, *Collection of Latin Maxims & Rules in Law and Equity* (1823) 70; A G M Duncan (ed) *Trayner's Latin Maxims* (4th edn, 1894; repr 1993) 288. See the principle applied to a *mortis causa* provision in *Lord Advocate v Gordon* (1895) 22 R 639 at 643 per Lord McLaren.

This distinction having been identified and explored, we must move on as ademption by satisfaction is not relevant to our immediate enquiry.[95] Attention now turns to the common form of ademption known, by reference to the phenomena upon which it arises, as "ademption by destruction" or "ademption by alienation".

J. NARROWER MEANING

A use of the word "ademption" arose in Common Law jurisdictions in which the word denoted something narrower than all forms of revocation. It is difficult to identify with certainty the origin of such use but it was already well established by the turn of the eighteenth and nineteenth centuries. This meaning was asserted by counsel in an English case dating from 1800:[96]

> the devisor must not only have the estate at the conception of the will, but it must continue in him: otherwise there is a revocation. That is the word constantly used: but "ademption" is the more proper expression: the devisor not having the estate in him any longer for the will to operate upon.

Since then, in England and other Common Law jurisdictions, this use has continued and has become the most common meaning of the word "ademption" as the definitions, quoted below illustrate. This narrower meaning is akin to ademption by destruction or alienation. It is known to Common Law jurisdictions such as England, Northern Ireland,[97] the Republic of Ireland,[98] Australia,[99] New Zealand,[100] Canada,[101] as well as the majority of American States.

K. COMMON LAW JURISDICTIONS – GENERAL CONSONANCE OF MEANING

A sample of definitions from various Common Law jurisdictions demonstrates the general consonance of meaning. The sample is also useful in that the various features of ademption are identified in some but not all of the definitions. In England ademption has been defined thus:[102] "A specific legacy or specific devise fails by ademption if its subject matter has ceased to exist as part of the testator's property at his death." A more expansive English definition reads thus:[103]

95 Barstow, "Ademption by satisfaction" (n 1) 217.
96 *Harmood v Oglander* (1810) 31 ER 1010 at 1012 per counsel for the plaintiffs. See also R S Donnison Roper, *A Treatise on the Law of Legacies* (3rd edn, 1828) I, 286–287.
97 *In re Harrison* [1976] NI 120.
98 E.g. *Miley v Carty and Miley* [1927] 1 IR 541; *Kelly v Frawley* (1944) 78 ILTR 46. See also J C Brady, *Succession Law in Ireland* (2nd edn, 1995) 195–197, paras 6.56–6.60. For cases arising prior to the creation of the Irish Free State: *Guiry v Condon* [1918] 1 IR 23; *Gilfoyle and Cullen v Wood-Martin and HM. Attorney General for Ireland* [1921] 1 IR 105.
99 E.g. *Re Hutton, Allen v Hutton* [1916] VLR 546; *Re Morton* [1963] VR 40.
100 E.g. *In re Rudge* [1949] NZLR 752 at 761 per Callan J; *In re Foley (deceased), Public Trustee v Foley and others* [1955] NZLR 702; *Re Dawson* [1987] 1 NZLR 580.
101 E.g. *Re Ashdown* [1943] 4 DLR 517; *Re Swick* [1944] 4 DLR 55; *Re Stevens* [1946] 4 DLR 322; *Re Roger* (1966) 60 DLR (2d) 666 (Ont HC); *Re Britt* [1968] 2 OR 12; *Re Jeffery* (1974) 53 DLR (3d) 650.
102 Parry and Clark, *The Law of Succession* (11th edn, 2002, by R Kerridge) para 14-34.
103 *Williams on Wills* (7th edn, 1995) 441.

> A specific gift may be adeemed by the subject-matter of the gift, between the date of the will and that of the testator's death, ceasing to be part of his estate or ceasing to be subject to his right of disposition or ceasing to conform to the description by which it is given.

In similar vein is the approach of an Irish commentator who acknowledges the existence of the narrower meaning alongside others:[104]

> The term ademption is used to cover several different situations but, in the context of failure of benefit, it is most commonly used where the subject matter of a gift by will has ceased to exist, or conform to the description of it in the will, or has ceased to be the subject to the testator's power of disposition, at the time of his death. In such a case the gift is said to be adeemed.

So too in the Canadian Province of Ontario has it been judicially confirmed that:[105]

> Ademption occurs whenever a testator makes a bequest of a specific piece of property that is not found amongst the testator's assets at the time of his or her death. In such a case, the bequest is said to have adeemed and the bequest simply fails on the basis that "the thing meant to be given is gone".

Similarly:[106]

> Ademption occurs when the property which is the subject matter of a specific gift, although in existence at the date of the will, is no longer in the testator's estate at her death. When a gift adeems, the specific beneficiary receives nothing under the common law. Any property that replaces the specific adeemed gift goes into the residue of the estate.

In the Australian State of New South Wales it has been judicially opined:[107]

> Ademption of a specific gift by will occurs where the property the subject of the gift is at the testator's death no longer his to dispose of . . . An obvious case of ademption is that in which the testator has completely divested himself of the property in his lifetime so that at his death there is in his estate nothing which even substantially answers the words of gift.

As in Singapore:[108]

> Ademption of a specific gift occurs (a) when the subject matter of the gift is disposed of or destroyed before the will takes effect, . . . (b) when it ceases to conform to the description by which it is given, . . .; or (c) when the nature of the gift has changed its character, . . .

The Supreme Court of South Carolina has confirmed:[109]

104 Brady, *Succession Law* (n 98) para 6.56.
105 *In the Estate of Hedley Maude McDougald: The Canada Trust Company v Gooderham* 2003 124 ACWS (3d) 1027 at para 2 per Wilson J (Ontario Superior Court of Justice).
106 *DiMambro Estate v DiMambro* 2002 118 ACWS (3d) 311 (Ontario Superior Court of Justice) para 18 per Day J citing A H Oosterhoff, *Oosterhoff on Wills and Succession* (4th edn, 1995) at 447. See also *Trebett v Arlotti-Wood* 2004 36 BCLR (4th) 166 at para 1 per Newbury JA (British Columbia Court of Appeal).
107 *Brown v Heffer* (1967) 116 CLR 344 at 348 per Barwick CJ; McTiernan, Kitto and Owen JJ (High Court of Australia) ((citations omitted), quoted and applied in *Re Blake* [2009] VSC 184 at para 44 per Forrest J (Supreme Court of Victoria).
108 E.g. *Low Gim Har v Low Gim Siah* [1992] 2 SLR 593 (High Court) at 614 per Chan Sek Keong J.
109 *Rogers v Rogers* 67 SC 168 at 178 per Jones J.

> The doctrine of ademption only applies to specific legacies. Specific legacies are adeemed when the thing bequeathed is, in the lifetime of the testator, lost, disposed of, or so substantially changed or altered as not to exist *in specie* when the will takes effect. In the case of a legacy of a debt or a claim, if the specific thing is disposed of or extinguished, the legacy is adeemed.

To similar effect is the Court of Appeals of Texas:[110]

> Ademption occurs where a specific devise or bequest becomes inoperative because of the disappearance of the subject matter from the testator's estate in his lifetime. Absent a contrary intention expressed in the will, the alienation or disappearance of the subject matter of a specific devise or bequest from the testator's estate adeems the devise or bequest. The doctrine of ademption applies only to specific bequests and devises.

As well as the Supreme Court of Texas:[111]

> The term ademption describes the extinction of a specific bequest or devise because of the disappearance of or disposition of the subject matter given from the estate of the testator in his lifetime.

Indian, Ugandan, Kenyan and Malaysian statutes or ordinances, intended to codify the erstwhile Common Law position, consistently provide as follows:[112]

> If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

In a gloss on this statutory definition Indian commentators have observed:[113]

> Ademption may be defined as a failure of [a] specific bequest or devise owing to the subject or bequest not being in existence as part of the testator's estate at the time of the testator's death.

L. ANGLOPHONE MIXED LEGAL SYSTEMS

In many mixed legal systems, there has been a sustained ingress of Common Law ideas albeit the mix and the extent of the ingress vary from jurisdiction to jurisdiction. The rather more restricted meaning of the term ademption, observed in the quotations from Common Law jurisdictions noticed above, is also prevalent in mixed legal systems where the English language is used in legal disputes. These include jurisdictions such as Jersey,[114] the Virgin Islands,[115] Sri Lanka[116] the

110 *Matter of Estate of Brown*, 922 SW 2d 605 (1996) (Court of Appeals of Texas, Texarkana) at 607 per Justice Bleil.
111 *Shriner's Hospital for Crippled Children of Texas v Stahl* 610 SW 2d 147 at 148 per Justice Spears.
112 Indian Succession Act 1925 s 152; Uganda: The Succession Act 1906 (Ch 162) s 139; Kenya: The Succession Ordinance 1925 s 142; Malaysia (Sabah): The Wills Ordinance, 30 April 1953 s 97.
113 D N Sen and S P Sen Gupta, *Indian Succession Act 1925* (5th edn, 2007) 478.
114 E.g. *In Re Amy* 2000 JLR 80 and 237.
115 *In the Matter of The Estate of Ellen Corneiro Tanggaard* (1946) 2 Virgin Islands Reports 77.
116 H W Jambiah, *Principles of Ceylon Law* (1972) 314.

American state of California,[117] the Philippines.[118] and the Republic of South Africa.[119] For example, a definition of ademption in the South African context is as follows:[120] "The ademption of a legacy may be described as the tacit or implied revocation of a legacy by the conduct or the testator." In Sri Lanka it has been judicially observed:[121]

> A legacy may . . . be expressly or tacitly revoked. If the property bequeathed perishes, or be disposed of by the testator before his death, or be destroyed or altered in such a manner that it can no longer be regarded as the same thing, then the legacy is tacitly revoked.

Scots law is to be found in this family of mixed legal systems and, in Scotland, one can find a similar usage of the terms "tacit revocation"[122] and "ademption". In the vast majority of its uses in Scots law, the term "ademption" has this narrow meaning:[123] "In the law of Scotland the ademption of legacies is a species of revocation by legal implication, and operates in the case of special legacies." More recently, ademption by alienation has been judicially illustrated, without reference to it being a form of revocation, as follows:[124]

> Where the subject matter of a bequest or legacy (whether heritable or moveable) has been disposed of by the testator so that it no longer forms part of his estate at the date of death, the bequest or legacy is said to have been adeemed, and cannot take effect.

Finally, one may note that in some mixed jurisdictions where English is the primary or a primary language, such as Louisiana[125] and Guam,[126] the term "ademption" is not used but there exists a rule similar in effect to the restricted meaning of ademption.

M. NON-ANGLOPHONE CIVILIAN AND MIXED LEGAL SYSTEMS

The fragmentation of the European *Ius Commune* into separate jurisdictions, largely based on nationality, was eventually followed in large measure by the rejection of

117 California Probate Code §§ 21133–21135 and 21139.

118 Philippine Civil Code, Arts 935, 936 and 957. See E L Paras, *Civil Code of the Philippines Annotated* (15th edn, 2002) vol 3, 415–418 and 444–447. In addition, in the Philippines the term "ademption" appears to be applied to the testator's compliance in advance with what he has ordered in the testament e.g. a lifetime gift to the legatee which is ademption by satisfaction: Paras, *Civil Code*, 445.

119 M M Corbett, G Hofmeyr and E Kahn, *The Law of Succession in South Africa* (2nd edn, 2001) 107; M J de Waal and M C Schoeman-Malan, *Introduction to the Law of Succession*, (3rd edn, 2003) 96–97 and 123 and 208. However, even in that jurisdiction, there are occasional wider usages: see e.g. *Oelrich v Beck NO* 1920 OPD 209 at 211 per McGregor J.

120 Corbett, Hofmeyr and Kahn, *The Law of Succession* (n 119) 106.

121 *Mohammed Cassim v Mohammed Hassen*, 1927, 29 NLR 89 at 93 per Dalton J (available at www.lawnet.lk).

122 See e.g. Erskine, *Inst* 3.9.10; Stair, *Inst* 3.8.41.

123 *Ogilvie-Forbes Trs v Ogilvie-Forbes* 1955 SC 405 at 410 per Lord President Clyde. The same usage is found in *McArthur's Executors v Guild* 1908 SC 743.

124 *Turner v Turner; Gordon's Executor v Gordon* [2012] CSOH 41, 2012 SLT 877 at para 20 per Lord Tyre.

125 Louisiana Civil Code Art 1597 (destruction) and Art 1608(3) (alienation); F W Swaim and K V Lorio, *Louisiana Civil Law Treatise: Successions and Donations*, vol 10 (1995) 415–419, § 15.9.

126 Guam Code (2007), § 645 (a) definition of "specific legacy".

Latin as a common means of legal discussion and its replacement in each legal system by national languages or, in appropriate cases, the language of the relevant colonial power. There was a consequent vanishing from domestic legal vocabulary of the word *ademptio* and its cognates. However, the doctrine did not disappear from the various legal systems. For example, where French is used as the primary or a primary language, such as in the Civilian jurisdictions of France[127] and Belgium[128] and the mixed jurisdictions of Mauritius[129] and Quebec,[130] there is a rule similar in effect to the restricted meaning of ademption albeit the term "ademption" is not employed. German law recognises and applies the general Civilian principle, from which there are specific exceptions,[131] that property given away by a testator during his lifetime does not form part of his estate and any testamentary bequest of such property will have no effect: § 2169(1) BGB. That is ademption in the narrow sense used by the Civilian sources.

N. CONCLUSION

With these differences in meaning having been established, it is possible to move with greater confidence to examine the legal problem that faces all jurisdictions that permit testamentary bequests of a specific asset: what occurs when the bequeathed asset is alienated or destroyed during the lifetime of the testator? The question is all the more important in contemporary society since many estates comprise assets situated in jurisdictions outwith that where the estate of a deceased is being administered. It is hoped this article will provide a resource for a cross-jurisdictional conversation and thus ease the administration and distribution of estates.

127 Art 1038 *Code civil*, M Planiol and G Ripert, *Traité Pratique de Droit Civil Français* (2nd edn, 1957) 887–890, P Malaurie and L Aynès, *Droit Civil: Les Successions, Les Libéralités* (2004) 264.

128 Arts 1038 *Code civil belge* and 1042; R Dekkers, *Précis de Droit Civil Belge*, vol 3 (1955) 709, 750–751, 774, 776–778, 785, 787–789 and 791, §§ 1150, 1232, 1233, 1280, 1283, 1285, 1286, 1299, 1305–1310 and 1315.

129 See, e.g. the Mauritius case *Robin v Robin* (1941) MR 106.

130 E.g. Art 769 *Code civil du Québec*, (alienation of bequeathed property); G Brière, *Les Successions, Traité de Droit Civil* (1994) 646–650.

131 See D Leopold, *Erbrecht* (20th edn, 2014) § 22, Rn 771–773.

TRANSFER OF PROPERTY ON DEATH AND CREDITOR PROTECTION: THE MEANING AND ROLE OF "UNIVERSAL SUCCESSION"

*Jan Peter Schmidt**

A. INTRODUCTION

George Gretton once remarked that "universal succession (*successio universalis*) [is] another topic of private law requiring modern comparative study".[1] This comes close to an understatement. For, although "universal succession" is often regarded as a key concept of succession law,[2] scholars understand it in a number of different ways without being aware of these variations in meaning.[3] As a result, the term proves an obstacle to meaningful comparative dialogue. Even on the basic question of whether "universal succession" characterises only Civilian regimes or is also part of English succession law, one encounters contradictory statements.

In the light of this confusion, the first aim of this essay is to offer conceptual clarification. I will discuss two widespread understandings of "universal succession" and show that the choice of terminology relates to comparative methodology in general (section B). After that, I will attempt to demonstrate that "universal succession" can be understood as a mechanism that is central to creditor protection in relation to the transfer of property on death[4] (section C),

* I am grateful to Arvid Arntz, Alexandra Braun, Juan Pablo Murga Fernández, Reinhard Zimmermann, and the editors of this volume, for their valuable comments on an earlier draft. Due to the limitations of space, the number of references has had to be restricted. I hope that those cited can be regarded as sufficiently representative.

1 G Gretton, "Ownership and its objects" (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 802 at 832 n 166.

2 The concept of "universal succession" is not only relevant in succession law, but also in *inter vivos* transactions. Examples can be found in trust law (namely when there is a change of trustees: see G Gretton, "Trusts without equity" (2000) 49 ICLQ 599 at 617f) or in company law (especially in cases of merger, see J Lieder, *Die rechtsgeschäftliche Sukzession* (2015) §§ 16, 17). The present account is limited to succession law, but much of what is said probably applies to the other areas as well.

3 For references, see B(1) and (2) below.

4 As regards "transfer on death", I am referring only to succession law in the formal sense, not to *inter vivos* transactions that pursue the same or similar aims (often called "will-substitutes": see A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (2016)). The limited scope of this essay does not mean that the two topics are unrelated. On the contrary, will-substitutes frequently threaten to undermine policy choices underlying the formal succession regime, and this is true especially for creditor protection, even if this consequence is not necessarily intended

a point that I will illustrate by comparing English and German law (sections D and E).

B. THE USE OF "UNIVERSAL SUCCESSION" IN COMPARATIVE LEGAL LITERATURE

How is the term "universal succession" understood in comparative legal writing? I will limit myself here to the two most widely used meanings.[5]

(1) "Universal succession" as direct transfer of the estate to the beneficiaries

According to the first meaning, "universal succession" is a hallmark of legal regimes that follow the Roman tradition and characterises the transfer of the deceased's assets and liabilities to the "heir(s)" without any process to wind up the estate. Systems of "universal succession" are thus thought to contrast fundamentally with English law, under which the estate passes to an executor or administrator, who discharges the outstanding obligations of the deceased before distributing any residue among the beneficiaries.[6]

While this difference between Civilian and Common Law regimes is generally regarded as a cornerstone of comparative succession law, not all writers employ the notion of "universal succession" to describe it. Many simply distinguish between systems of "direct" and those of "indirect" transfer of the estate,[7] while sometimes we also find the distinction between systems of "continuation" and those of "liquidation".[8]

(see A Braun and A Röthel, "Exploring Means of Transferring Wealth on Death" (in the aforementioned volume) 323 at 350–351 and 357 with further references. For an earlier account see J H Langbein, "The nonprobate revolution and the future of the law of succession" (1984) 97 Harv LR 1108 at 1124f). Therefore, a legal order that strives for coherence must ask itself to what extent it wants to tolerate possible circumventions of its succession regime.

5 According to a third commonly held understanding, "universal succession" means that the estate is transferred *ipso iure* to the successor, that is, without any further requirement, such as a declaration of acceptance or an order of the court. It is submitted here that "universal succession" should be distinguished from the mode of transfer in the strict sense.

6 See e.g. M de Waal, "Comparative Succession Law" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1072 at 1094f; G Miller, *The Machinery of Succession* (2nd edn, 1996) 97f; J C Sonnekus, "The new Dutch code on succession as evaluated through the eyes of a hybrid legal system" (2005) Zeitschrift für Europäisches Privatrecht 71 at 73; M Ferid, "Le rattachement autonome de la transmission successorale en droit international privé" (1974-II) 142 Recueil des Cours 71 at 106. The same understanding of "universal succession" can be derived from the American Uniform Probate Code (UPC), which uses the concept exclusively in the context of "Succession without Administration" (see Part 3, Subpart 2, as amended in 1982).

7 See e.g. A-L Verbeke and Y-H Leleu, "Harmonization of the Law of Succession in Europe" in A Hartkamp et al (eds), *Towards a European Civil Code* (4th edn, 2011) 459 at 463–465; M Wenckstern, "Inheritance, Acceptance and Disclaimer", in J Basedow, K Hopt and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, vol I (2012) 884–887.

8 See e.g. C Gómez-Salvago Sánchez, *La partición judicial: Problemas* (2008) 165f; P A Windel, *Über die Modi der Nachfolge in das Vermögen einer natürlichen Person beim Todesfall* (1998) 2–3. Like "universal succession" the term "liquidation" is susceptible to different meanings and here it is meant of course in its ordinary sense in contrast to the technical term for a corporate insolvency process in UK law.

(2) "Universal succession" as transfer of a "patrimony"

George Gretton and others use the term "universal succession" in a different way, to refer to the transfer of a "patrimony",[9] i.e. of a totality of assets and liabilities.[10] The classical example of "universal succession" is the collective transfer of all rights and duties of a deceased person (except for those extinguished upon death), in other words, the transfer of that person's "estate", which can be regarded as a special form of a patrimony.[11] "Universal succession" can be juxtaposed with "singular succession", in which a right is transferred individually, i.e. not as part of a whole. *Inter vivos* transfers are typically cases of singular succession.[12]

Although the term "universal succession", like "patrimony", is of Civilian origin, in the present meaning it is presupposed to be system-neutral. Therefore, "universal succession" must neither be automatically equated with the way it is understood in a particular legal order, and need not be known and used in the system that is the object of comparative analysis. Hence it is possible to say that "universal succession" characterises not only the position of the Civilian heir, but equally that of the personal representative under English law, because it is upon that person that the deceased person's estate devolves.[13] In contrast to meaning (1) discussed above, it is not relevant whether the "universal successor" also has a beneficial entitlement in the estate or not.

This terminology is in fact found also in the Common Law world. None other than Oliver W Holmes wrote that "[e]xecutors and administrators afford the chief, if not the only, example of universal succession in English law".[14] At least in contemporary English succession law writing, however, the notion of "universal succession" does not seem to be used.[15] The reason is presumably that English scholars do not feel it necessary, as the idea of a personal *representative* who "stands in the shoes of the deceased" already implies the transfer of the entire estate. Instead of carrying Jill's entire belongings to his own house, Jack simply moves into Jill's apartment. For the purposes of succession law, it does not matter which metaphor we use, as the result is the same: to the extent they are transmissible on death, the legal relationships that formerly vested in Jill, now vest in Jack.

9 Gretton, "Ownership and its objects" (n 1) at 832.

10 On this issue Gretton, "Trusts without equity" (n 2) at 608–615 is very instructive.

11 Gretton, "Ownership and its objects" (n 1) at 832; L Smith "Scottish trusts in the Common Law" (2013) 17 EdinLR 283 at 295f.

12 But as seen above (n 2), there are also cases of *inter vivos* "universal succession".

13 See e.g. G Gretton, "Quaedam meditationes Caledoniae: The property/succession borderland" (2014) 3 European Property Law Journal 109 at 119f; I Kroppenberg, "Devolution of the Inheritance/Universal Succession", in Basedow, Hopt and Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (n 7) 459; L Smith, "Trust and patrimony" (2009) 28 Estates, Trusts and Pensions Journal 332 at 346.

14 O W Holmes, *The Common Law* (1881) at 269. At the time Holmes wrote this, "universal succession" was actually still limited to the deceased's personal property (i.e. moveable property). This changed only with the Land Transfer Act 1897. See D(2) below.

15 As seen, Miller, *The Machinery of Succession* (n 6) uses the concept of "universal succession" only with regard to civil law countries, while in the leading modern work on English succession law, it does not seem to appear at all: see R Kerridge, *Parry and Kerridge: The Law of Succession* (13th edn, 2016).

(3) The way towards fruitful comparative analysis

The choice between the two meanings of "universal succession" I have presented should of course not be phrased in terms of right or wrong. "Like Humpty Dumpty, we can make words mean what we want [. . .]".[16] We should just be aware that our understanding may not be shared by everyone else.

Apart from that, both meanings of "universal succession" can actually claim to have legal history on their side. Roman lawyers used the expression "*successio in universum ius defuncti*"[17] to illustrate the legal position of the *heres*, which obviously lends support to meaning (1). However, those who regard "universal succession" as an abstract mechanism for the transfer of an entirety of assets and liabilities can also refer to Roman sources, namely Gaius' famous distinction between the acquisition of single things and their acquisition "*per universitatem*".[18] Although succession law was the prime example of the latter category, there were others too, such as *adrogatio*.[19] In any event, we are of course free to extract the Roman terminology from its specific legal context. Since neither the concept of an acquisition "*per universitatem*" nor that of a "*successio in universum ius defuncti*" explicitly refers to a beneficial entitlement, they both make perfect sense in a system where the estate passes to someone who is in charge of paying debts and distributing the residue. This is also demonstrated by English lawyers historically having no objection to modelling the position of the executor on that of the Roman heir.[20]

The crucial issue, however, is not terminological, but one of comparative methodology. In whatever sense "universal succession" is used, the comparison between Civilian succession regimes and English law remains rather sterile if we fail to identify the "transfer of the estate as a whole" as an element that can be analysed separately from the question of beneficial entitlement. The models simply seem to be incommensurable.

If, in contrast, we accept that the Civilian heir and the English personal representative are both "universal successors" of the deceased, in the sense that all assets and liabilities devolve upon them, the door is opened for a much more refined comparison. We can ask, for example, how the transfer of the estate takes place (*ipso iure*, upon acceptance, or upon other conditions) and how the law takes account of the universal successor's private autonomy. For example, for how long may that party consider available options, and what is the situation of the estate during that period? More importantly for the purpose of this essay, it is only if we identify the mechanism of the "transfer of the estate as a whole" that we can understand and compare how creditors' interests are protected in succession.[21]

Before we come to that issue, it should be stressed that once we have defined the legal mechanism we want to analyse, the name we give it is unimportant. It can indeed be argued that to avoid misunderstandings, the term "universal succession"

16 Gretton, "Ownership and its objects" (n 1) at 834.
17 See e.g. D 50.16.24.
18 Gai Inst 2, 97 and 191.
19 See F Schulz, *Classical Roman Law* (1951) para 368.
20 See, with further references, R Zimmermann, "Heres fiduciarius? Rise and Fall of the Testamentary Executor", in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998) 267 at 302–303 and Smith, "Scottish trusts" (n 11) at 298.
21 Other purposes of "universal succession" cannot be discussed here. For further analysis, see Windel, *Über die Modi* (n 8) at 10–16.

should be discarded altogether and a replacement found. What matters is that "in the conceptual scheme of things there is a slot here which needs a name".[22]

C. SUCCESSION LAW AND CREDITOR PROTECTION

If lawyers from different jurisdictions were asked to present the typical problems of succession law in the form of a play, the *dramatis personae* would probably include the "deceased" (no succession without a body), those who are entitled to benefit, such as "heirs" or "legatees", and finally the person in charge of winding up the estate, e.g. an "executor" or "administrator". One group would probably not be mentioned, or at best be granted a secondary role: the creditors of the deceased. They differ from the others in a fundamental way: their legal position in relation to the deceased's assets is not the result of the death. However, this does not mean that creditors' interests are only an incidental part of succession law. On the contrary, as should become clear from this essay, they have distinctly shaped the modern regimes.

Why do creditors need to be protected when their debtor dies? Their most fundamental concern is of course that their claim is not extinguished. Nowadays, this seems self-evident, but historically it is an idea that is much younger than succession law as such. Only with the growing importance of credit have societies perceived the need to "insure" creditors against the risk of their debtor's demise.[23] The debtor also benefits from the transmissibility of the obligation, as it makes credit cheaper and more accessible.

Nevertheless, the deceased's creditors (henceforth also referred to as the "estate creditors"[24]) will ask for more. They do not want their claim merely to survive nominally, but they also want its economic value preserved. Consider the following three scenarios.

Scenario 1. The deceased, Ian, owed €1,000 to Jack, and his assets are just sufficient to satisfy the debt. In his will, however, Ian provided that the silver plates, by far his most valuable asset, should go to Aron, while Siegbert should receive the rest and also take care of any outstanding liabilities. In this situation, it might not be enough for Jack for Siegbert to become the new debtor, because even if Siegbert were willing to sacrifice his personal assets[25] or legally forced to do so, these assets might be

22 See G Gretton, "Trust and Patrimony" in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 182 at 189 as to the concept of "estate".

23 See indeed M Rheinstein and M A Glendon, *The Law of Decedents' Estates* (1971) 12: "[c]apitalism, ancient or modern, could never have arisen until it became settled that debts would survive the debtor's death". See also F Pollock and F W Maitland, *The History of English Law*, vol II (2nd edn, 1898, repr 1952) 256–260. On the development of Roman law in this respect, see V Korošec, *Die Erbenhaftung nach römischem Recht* (1927).

24 I borrow this terminology from Smith, "Scottish trusts" (n 11) at 293. The category of estate creditors can also comprise creditors whose claims comes into existence only with or after the death, as, for example, in the cases of funeral expenses or inheritance tax. As a rule, those claims also have to be satisfied with preference over the claims of beneficiaries. On the important role of inheritance tax in English law, see E(4) below. "Estate creditors" should in any case be distinguished from the "personal creditors" of the universal successor.

25 The belief that family members of the deceased have a legal, or at least moral obligation to discharge the outstanding debts where the assets are insufficient, actually seems to be quite widespread. See G Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) para 26.55 and Langbein, "The nonprobate revolution" (n 4) at 1121 ff.

insufficient. Therefore, Jack wants to make sure that he can recover the debt by realising the silver plates.

Scenario 2. Once again, Ian the deceased, owed €1,000 to Jack and had sufficient assets. In his will he provided that his entire estate should go to Jill, so that Jack can now claim €1,000 from her and, if necessary, seize the assets that formerly belonged to Ian. But what happens if Jill is insolvent at the time she succeeds? Her personal creditors will rub their hands in view of the fresh influx of assets, which Jack naturally does not want to share with them.

Scenario 3. Finally, assume Ian, the deceased, who again owed €1,000 to Jack, provided in his will that his assets and liabilities should be shared equally among his four children. Jack does not want to have to go after each of them for the amount of €250, but prefers to have one person from whom he can claim the full amount.

Jack's concerns can be summarised as follows. He wants to be exactly in the same position as he was before the death of his debtor, Ian; not better, but also not worse. But to what extent do legal systems actually meet these needs, and which mechanisms do they use for that end? The comparison between English and German law will show that although their answers to these questions differ, in both the idea of "universal succession" plays a crucial role.

Lack of space prevents consideration of other systems, which would show that both within the Civilian and the Common Law world there is a much greater diversity than the broad categorisations offered by comparative law suggest.[26] English law differs considerably in some respects from, for example, the laws in the US, while German law has often adopted different solutions to French law. What will be said about the German *Erbe*, is therefore not necessarily true of the continental heir in general.

D. CREDITOR PROTECTION UNDER ENGLISH AND GERMAN SUCCESSION LAW

(1) English law

Under English law, concern for creditors' interests is immediately apparent.[27] In each of the three scenarios above, Jack could be sure that there is one person,[28] namely the personal representative, against whom he could bring an action, and who would be able to realise any asset, including the silver plates, in order to satisfy it. Testators are not able to exclude assets from the administration procedure,[29] in other words, they cannot break up their own patrimony.[30] Further, the estate assets are shielded from the personal representative's own creditors,[31] while the distribution

26 Still very valuable in this respect is M Rheinstein, "European methods for the liquidation of the debts of deceased persons" (1935) 20 Iowa LR 431.

27 See also Miller, *The Machinery of Succession* (n 6) at 98.

28 It is possible that there is more than one personal representative, but it seems that each one could be sued for the whole amount. Compare the Administration of Estates Act 1925 s 8.

29 See the Administration of Estates Act 1925 s 32(1).

30 Of course, the testator could try to transfer assets via some "will-substitute", for example, a donation or a trust, but then the question arises why the law should allow these dispositions to create a result which succession law exactly seeks to avoid. See n 4 above.

31 *Farr v Newman* (1792) 4 TR 620, 100 ER 1209.

of assets among the beneficiaries will only take place after the claims of the estate creditors have been settled.

It is tempting to think that English law achieves creditor protection primarily thanks to the existence of an organised process, which ensures that assets are only distributed after they have been cleared from any encumbrances. However, in order to be effective, this mechanism requires something else, namely concentration of the entire estate in the hands of the personal representative. The historical development of English law illustrates this very clearly.

Until the Land Transfer Act 1897, only the deceased's personal (moveable) property vested in the personal representative, while his real (immoveable) property passed directly to the "heir" or "devisee". This fragmentation of the estate obviously created problems for the estate creditors. In the worst case, the real property remained completely out of their reach. But even after the law had ensured, by means of a process that stretched over several centuries,[32] that not only the deceased's personal property, but also his real property was answerable for debts, the problem remained that creditors possibly had to pursue two persons instead of one, and use different types of procedure. In an amendment that had "long been called for",[33] the Land Transfer Act 1897 finally put an end to the creditors' worries, as from now on, real property also vested in the personal representative. That person thus became personal *and* real representative,[34] in other words universal successor to the entire estate.[35]

(2) German law

Under German law, the mechanisms to protect creditors' interests are more complex, and less obvious. In scenario 1,[36] Siegbert would be regarded as heir (*Erbe*) and Aron as legatee (*Vermächtnisnehmer*). In a break with the *ius commune* tradition, German law does not grant the legatee immediate ownership, but merely a personal claim against the heir for the transfer of the bequeathed object.[37] The whole estate thus

32 For an overview see A D Tyssen, *The Real Representative Law, 1897, being part I of the Land Transfer Act, 1897, and a discussion on administration thereunder* (1898) 2–4.

33 Tyssen, *The Real Representative Law* (n 32) 1.

34 It has been described as "one of the many oddities of English law" that the personal representative nevertheless has continued to be identified in the same manner until today: R Kerridge, "Intestate Succession in England and Wales", in K Reid, M de Waal and R Zimmermann (eds), *Comparative Succession Law, vol II: Intestate Succession* (2015) 323 at 327.

35 Universal succession is sometimes said to have been introduced into English law only with the Administration of Estates Act 1925 (see e.g. Kroppenberg, "Devolution of the Inheritance/Universal Succession" (n 13) at 459), but this is imprecise. The 1925 Act abolished the distinction between real property and personal property as regards the order of beneficiaries in cases of intestacy (and was highly significant for that). What was hereby achieved should be distinguished from universal succession and rather called "unity (or generality) of succession". On this distinction, see A Heusler, *Institutionen des Deutschen Privatrechts*, vol 2 (1886) § 175.

36 See C above.

37 § 2174 BGB. Again, this is a result which "will-substitutes" threaten to circumvent. See n 4 above. In contrast to Germany, the *legatum per vindicationem* is still found in modern French and Italian law (see Art 1014 *Code civil*, Art 649(2) *Codice civile*). In order to ensure the estate creditors' priority over the beneficiaries, which in itself is uncontested, these legal orders need to resort to mechanisms which the drafters of the BGB deemed too complex. For French law, see F Terré, Y Lequette and S Gaudemet, *Droit Civil: Les Successions. Les Libéralités* (4th edn, 2014) para 900.

falls into the hands of the heir,[38] which is why Siegbert could sell the plates and use the proceeds to pay Jack. As the estate would be insufficient to satisfy both Jack and Aron, any of the parties involved could file for insolvency proceedings (*Nachlassinsolvenz*),[39] in which case the court will appoint an administrator, who has to pay estate creditors first.[40]

The rule that estate creditors come ahead of beneficiaries can be traced back to the medieval German brocard "*Der Gläubiger ist der erste Erbe*", "the creditor is the first heir".[41] Formally, the expression is incorrect, of course. The creditors never became heirs or legatees of the deceased; they simply retained their claim. And yet the saying does capture an essential point, namely that, from an economic perspective, creditors have a preferential stake in the estate.

In scenario 2, the estate would be merged with Jill's own patrimony. One of the consequences would be that her personal creditors could seize the estate assets. As Jill was insolvent, the succession would mean a windfall for them and an inequitable loss for Jack (if, in contrast, the estate was insolvent and Jill solvent, the injustice would hit her and her personal creditors). But of course German law provides means to avoid such outcomes. Both heirs and estate creditors can go to court and request that the estate is put under the administration of a third person (*Nachlassverwaltung*).[42] As a consequence, the estate will be separated from the heir's patrimony with retroactive effect.[43] Jack would thus be able to shield the estate assets from Jill's personal creditors.

In scenario 3, a community of four co-heirs (*Erbengemeinschaft*[44]) would arise, who hold and administer the estate jointly. As a result of yet another deviation from the Roman tradition,[45] German law provides that each co-heir is jointly and severally liable to estate creditors for the whole amount, and not just in the proportion of that co-heir's share.[46] The co-heirs receive a legal benefit in return, because in what has been described as an "astonishing difference"[47] with the case of the sole heir, the

38 § 1922 BGB, the very first provision in the BGB's book on succession, under which the estate is transferred to the heir "*als Ganzes*" i.e. as a whole. In some cases, German law allows for exceptions from universal succession. For a detailed account on the specific succession regimes for agricultural businesses and certain company shares, see A Sanders, "Company Law and the Law of Succession in Germany" in S Kalss (ed), *Company Law and the Law of Succession* (2015) 213–259.

39 §§ 315–331 *Insolvenzordnung*.

40 § 327(1), (2) *Insolvenzordnung*.

41 French writers usually refer to another brocard to express the same idea: *nemo liberalis nisi liberatus*, see e.g. Y-H Leleu, *La Transmission de la Succession en Droit Comparé* (1996) para 539.

42 See §§ 1975–1992 BGB. The disclaimer of the inheritance is thus never the heir's only way of obtaining protection from personal liability. Other Civilian legal regimes continue to rely on the *beneficium inventarii* for this effect, a point that seems to be overlooked by P Matthews "Square Peg, Round Hole? Patrimony and the Common Law Trust" in R Valsan (ed), *Trusts and Patrimonies* (2015) 62 at 67.

43 §§ 1975, 1984(2) BGB, § 784 *Zivilprozessordnung*.

44 § 2032 BGB.

45 Under Roman law, claims and debts were automatically divided among co-heirs (*nomina ipso iure divisa sunt*). The French *Code civil* initially continued the Roman tradition, but the courts and the legislature largely abandoned it during the 20th century, in view of the inequitable results it can produce for estate creditors. See Terré, Lequette and Gaudemet, *Droit Civil* (n 37) para 947f.

46 § 2058 BGB.

47 Rheinstein, "European methods for the liquidation of the debts of deceased persons" (n 26) at 454. There is not space here to look at the reasons for the (by no means self-evident) decision of the fathers of the BGB to treat the *Alleinerbe* differently from the *Erbengemeinschaft*. But see W Schlüter and A Röthel, *Erbrecht* (17th edn, 2015) § 32 para 115.

estate remains separated from the co-heirs' patrimonies, as long as they do not distribute the assets among themselves. This means that their personal assets are automatically protected.[48]

E. ENGLISH AND GERMAN LAW COMPARED

(1) Commonalities and differences

Regardless of differences in terminology and doctrinal construction, we can identify a fundamental structural commonality between English and German succession law: both use the mechanism of universal succession to make sure that the position of creditors is not impaired by the death of their debtor. In particular, universal succession achieves three things, namely that: (1) assets and liabilities are not split up from each other on death, but share the same destination, so that the assets continue to answer to the liabilities;[49] (2) the estate remains separate, or is at least separable, from the successor's patrimony, so that it is, or can be, shielded from the successor's personal creditors; (3) liabilities are not divided among several successors.[50] In short, universal succession has the effect that, although the deceased is dead, the deceased's patrimony lives on, at least temporarily. Universal succession implies a constraint on freedom of testation, because a testator is prevented from bypassing the heir or personal representative.

Universal succession should, however, not be regarded as a strictly defined doctrine. It is rather an organising concept,[51] which helps us to describe and understand a complex legal phenomenon, which is composed of a number of specific rules. These may vary to a certain extent, as the present comparison shows: whereas under English law, the separation of patrimonies is always strict,[52] under German law, it is merely optional in the case of a sole heir.[53] English law can thus be said to have implemented universal succession in a purer, or more consistent, fashion, which in light of the widespread view that universal succession is entirely unknown to English law,[54] may be regarded as somewhat ironic.

Another difference is that while English law always requires an orderly liquidation of the estate, German law only does so in specific circumstances, namely when insolvency or administration proceedings have been requested.[55] But does this mean that creditors are better protected under English law? German

48 § 2059(1) BGB. After the distribution of the assets, the co-heirs' liability becomes unrestricted, with the exception of particular circumstances (see § 2060 BGB).

49 This aspect of a "patrimony" is stressed by L Smith, "Scottish trusts" (n 11) at 286.

50 A further important issue can only be mentioned briefly here: if an estate asset is sold, the purchase price falls into the estate by way of "real subrogation", which, as Gretton, in "Trusts without equity" (n 2) at 610 rightly points out, "is the key to the doctrine of patrimony".

51 Just like the concept of "patrimony", on which see Gretton, "Trust and Patrimony" (n 22) at 189.

52 Matthews, "Square Peg, Round Hole" (n 42) at 70f curiously uses this as an argument to say that the estate cannot be regarded as a patrimony under English law.

53 Besides, modern English law no longer recognises any specific succession regimes, unlike German law. See n 38 above.

54 See B(1) above.

55 The reason that the German executor, the *Testamentsvollstrecker*, is not mentioned here is that the purpose of this institution is to enhance the testator's options, not to protect creditors.

writers often think so.[56] However, as the following analysis will show, their assessment is too superficial.

(2) Heirs and personal representatives as functional equivalents

The idea that English law is more creditor-friendly rests on the assumption – which is also the basis of the distinction between system of "direct" and those of "indirect" transfer of the estate[57] – that other than in cases where an administrator is appointed, German law does not have an equivalent of the English personal representative, who is deemed to serve as an "extra layer of protection for creditors".[58] However, this view reveals a misunderstanding of the role of the German *Erbe*, and of the Civilian heir in general. "Essential to heirship are duties and title, not advantages and emoluments."[59] By making the heir universal successor, and thus debtor of all claims and owner of all assets, the law confers upon the heir the task to wind up the estate, even without saying so explicitly.[60] The *Erbe*'s role as liquidator of the estate comes out most clearly in the case of a legacy, where the *Erbe* acts as an intermediary just like a personal representative, while the position of the legatee is comparable with that of an English beneficiary.[61] It is even conceivable that the heir is ordered by the testator to distribute the entire residue among legatees. The *Erbe*'s vital role in the orderly dissolution of the estate is finally also highlighted by the rule that no estate may be without a universal successor. In the absence of other testate or intestate heirs, the estate will fall to the state,[62] which cannot disclaim it and will thus be responsible for winding it up.

In most cases, the *Erbe* is of course more than a liquidator of the estate, because to the extent that the assets are not required for the payment of creditors or legatees[63], the *Erbe* is entitled to keep them. In English terminology, the German *Erbe* thus combines the roles of personal representative and residuary beneficiary (which shows why the term "heir", which is used so naturally as a stable point of reference by many comparatists, is not system-neutral). Does the *Erbe*'s beneficial interest in the estate make the *Erbe* less reliable as a liquidator than a personal representative under English law? This might be so if personal representative and beneficiary were necessarily different persons. But contrary to what German writers often believe,[64]

56 See e.g. R Bork, "Will-Substitutes: The Perspective of Creditors in Germany, and England and Wales" in Braun and Röthel (eds), *Will-Substitutes* (n 4) 267 at 269 and Windel, *Über die Modi* (n 8) 3.

57 See B(1) above.

58 Bork, "Will-Substitutes" (n 56) at 269.

59 Rheinstein, "European Methods for the Liquidation of the Debts of Deceased Persons" (n 26) at 434.

60 See also Rheinstein, "European methods for the liquidation of the debts of deceased persons" (n 26) at 433.

61 This shows that the widely accepted distinction between systems of a "direct" and an "indirect" transfer of the estate (see B(1) above) fails adequately to describe the differences between German and English law. The same goes for the distinction between systems of "continuation" and "liquidation".

62 § 1936 BGB.

63 A further example is persons with a right to a compulsory portion (*Pflichtteilsberechtige*), who (only) acquire a personal claim against the heir(s) for the payment of the respective sum of money (§ 2303 BGB).

64 See e.g. K Muscheler, *Erbrecht*, vol I (2010) para 1217; Schlüter and Röthel, *Erbrecht* (n 47) § 31 para 115.

the person acting as personal representative is not prevented from being beneficiary. He or she only needs to be designated as such by the will or by law[65] and this is common in practice.

The difference between English and German law thus appears to be more conceptual than substantial. English law makes the two-step procedure of winding up the estate – first continuation, then liquidation – very explicit, while in German law, the second step lies somewhat hidden under the surface (although in the case of a community of heirs, the BGB does in fact state expressly that debts shall be paid before the assets are divided[66]). Besides, English law strives to concentrate the liquidation of the estate in fewer hands, which is seen most clearly in cases of intestacy. While under German law all persons who are beneficially entitled acquire the status of universal successor, under English law the beneficiaries are only the candidates from which the universal successor, in this case called administrator, is to be chosen.[67] However, as the case of legatees shows,[68] under German law a beneficial interest is not necessarily coupled with vesting of the estate.[69] For creditors, in any event, the number of universal successors does not matter, as they can claim the full amount from any of them.

(3) Supervision and personal liability

The far-reaching functional equivalence of the German heir and the English personal representative might be taken to suggest that the level of creditor protection is identical in both cases. To reach this conclusion would be premature, however, because there is a further element that needs to be taken into account: the mechanisms to ensure that the heir and the personal representative actually comply with their task to wind up the estate. One might think that a personal representative, even though that person is not a common law trustee,[70] is burdened with stronger fiduciary duties than an *Erbe*, because the winding up of the estate is after all that person's *raison d'être*. The same impression is conveyed where the personal representative is, in Civilian terms, described as a "fiduciary heir".[71]

However, a comparison between German and English law reveals yet another important commonality: both have largely refrained from subjecting the administration in the hands of the universal successor to *ex ante* control by public authorities. Courts intervene only upon request, either to resolve controversies, or to lend support, especially by certifying the universal successor's title. A German court can issue a "certificate of heirship" (*Erbschein*) for that purpose (§ 2353 BGB), or,

65 Until the Executors Act 1830, the executor was in fact entitled to keep the residue in the absence of contrary testamentary dispositions.

66 §§ 2046, 2047 BGB.

67 Non Contentious Probate Rules 1987, SI 1987/2024, r 22(1).

68 And the same goes for *Pflichtteilsberechtige*. See n 63 above.

69 French law differs from German law in an important respect here, as in principle all kinds of beneficiaries acquire ownership on death. Writers like Verbeke and Leleu, "Harmonization of the Law of Succession in Europe" (n 7) do not pay sufficient attention to this difference.

70 See the instructive analysis by Smith, "Scottish trusts" (n 11) at 288–296.

71 See e.g. Smith, "Scottish trusts" (n 11) at 298. See similarly Zimmermann, "Heres fiduciarius" (n 20) (*heres fiduciarius*) and Gretton and Steven, *Property, Trusts and Succession* (n 25) para 26.50 (fideicommissary heir).

under the European Succession Regulation,[72] a "European Certificate of Succession" (Art 63). Under English law, an executor, whose title derives from the will, is granted "probate" by the court.[73] German lawyers often think that the English system of estate administration is rather interventionist,[74] but this view seems unjustified. For as long as a personal representative does not give a cause to be distrusted, he or she is able to act just as freely as an *Erbe*.[75] In particular, personal representatives do not have to render an account of their administration or even draw up an inventory of the estate,[76] unless they are required to do by the court, upon application of an interested person.[77] And as long as no-one seeks a general order of administration,[78] personal representatives can use their powers to sell assets, pay creditors or distribute assets among beneficiaries without having to ask the court for approval.

So how then do German and English law prevent the *Erbe* and the personal representative from transferring the silver plates to Aron before Jack is paid, or from using the proceeds of their sale to go on a ship cruise? Well, they cannot, at least not physically. But apart from enabling Jack to recover the plates from Aron,[79] they provide sanction mechanisms, which hopefully give the *Erbe* and the personal representative sufficient incentive to respect the creditors' priority. Leaving aside the question of criminal sanctions, both run the risk of incurring personal liability for maladministration, and both can be removed from their positions. While in the context of English law, these remedies seem rather obvious,[80] it is not immediately clear how German law arrives at such results, given that the *Erbe's* responsibility to wind up the estate is not spelt out explicitly. It needs to be remembered, however, that the creditors can request the administration of the estate to be taken away from the heir and conferred upon a third person.[81] This measure has the additional consequence that the heir is regarded, *retrospectively*, as an "agent" ("*Beauftragter*") of the creditors, which makes the heir liable for breach of duty.[82] (Before the separation of patrimonies, a sole heir is personally liable

72 Commission Regulation 650/2012 OJ 2012 L201/107.

73 The situation of the English administrator is different, as the letters of administration are constitutive of that party's title and not just declaratory. See Kerridge, *The Law of Succession* (n 15) at para 18-15.

74 See e.g. Muscheler, *Erbrecht* (n 64) at para 1217 or Schlüter and Röthel, *Erbrecht* (n 47) at § 27 para 5, whose assessment is probably also influenced by the mistaken idea that the personal representative is necessarily a third person, and never the beneficiary.

75 Miller, *The Machinery of Succession* (n 6) at 111 speaks of a "minimum of court interference". This constitutes an important difference to the situation under most US state laws, see Rheinstein and Glendon, *The Law of Decedents' Estates* (n 23) at 478f and 484 and A Braun, "Will-Substitutes in England and Wales" in Braun and Röthel (eds), *Will-Substitutes* (n 4) 51 at 70f.

76 This is different under Scots law, where the inventory is a necessary requirement for the transfer of the assets to the executor. See Gretton and Steven, *Property, Trusts and Succession* (n 25) at paras 26.46–26.49.

77 Administration of Estates Act 1925 s 25(b). See also Kerridge, *The Law of Succession* (n 15) at para 20.16.

78 On which see Kerridge, *The Law of Succession* (n 15) at para 24.25.

79 German law grants estate creditors the possibility to challenge the transfer from the heir to a legatee in case the estate was insolvent (§ 322 *Insolvenzordnung*). On the creditors' rights to refund and to trace under English law, see Kerridge (n 15) paras 24.36–24.47.

80 On the personal representative's liability for "devastavit" and the possibilities to remove him, see Kerridge, *The Law of Succession* (n 15) at paras 24-01–24-06 and 24-27.

81 See text at n 42 above.

82 § 1978(1) BGB.

anyway[83]). These rules further corroborate the close functional equivalence of *Erbe* and personal representative. Finally, we have seen that the German legislature gave co-heirs a strong incentive to satisfy creditors before dividing the assets among themselves, by making them personally liable after the division.[84]

(4) The role of inheritance tax

Although in principle personal representatives are therefore largely under the same duties as an *Erbe*, there is one additional issue that makes it very likely that in practice, the task of the former will be more onerous. This issue is inheritance tax, where there is an important difference between German and English law. While under the former, inheritance tax is charged on each beneficiary in respect of that which the beneficiary effectively inherited, under the latter, it is imposed on the estate and therefore has to be paid, in principle, by the personal representative.[85] Provided that the estate is sufficiently large,[86] a personal representative is therefore faced with a rather powerful additional estate creditor: the Crown. It not only demands a speedy account as to the value of the estate,[87] but it has also adopted a very efficient mechanism to ensure payment of any tax that is due. In order to obtain a grant of probate or letters of administration, which are in practice necessary in order fulfil their duties, personal representatives have to show that either the required inheritance tax has been paid, or that no such tax is payable.[88]

Indirectly, the English regime of inheritance tax thus brings about a considerable formalisation of the estate administration, because in view of the potential civil and even criminal sanctions, the personal representative is well advised to take great care in the ascertainment of all assets and liabilities. It can be assumed that this makes it easier for other estate creditors to assert their claims.

Under German law, estate creditors cannot rely on such a powerful ally, because the German Treasury is only a creditor of the beneficiaries and therefore does not interfere in the winding up of the estate. However, there is no empirical evidence that the protection of estate creditors is diminished because of that.

(5) Overall assessment

The view that English law offers better creditor protection because of its strict requirement to liquidate the estate in an orderly fashion appears to be unfounded. The only tangible disadvantage creditors have under German law is that in some cases they need to be more vigilant in order to have their interests protected: where the heir is insolvent, for example, they cannot sit back, but are required to go to court and request that the estate is put under administration.

83 Contrary to Bork, "Will-Substitutes" (n 56) at 269, however, the personal liability of the sole heir is not the only way in which creditors are protected, for the reasons mentioned.
84 See text at n 47 above.
85 Inheritance Tax Act 1984 s 200(1).
86 The value of the estate must exceed the nil-rate band. For details see Kerridge, *The Law of Succession* (n 15) at para 19-10.
87 See Kerridge, *The Law of Succession* (n 15) at para 19-10.
88 Senior Courts Act 1981 s 109.

Having said that, in the face of a far-reaching equivalence it is of course tempting to argue that English law is then at least superior for another reason, namely that it achieves the desired results in a relatively simple way, while the German regime has been shown to be rather complex. This issue cannot be further explored here, because a comprehensive analysis would also need to take into account the interests of heirs and other beneficiaries. Suffice to say that its complexity is the price for the central virtue of the German regime: in a normal case, where both the estate and the heir's patrimony are solvent and therefore none of the parties involved needs to fear that their interests are at risk, German law dispenses with unnecessary formalities and delays in the distribution of assets,[89] thereby usually freeing the heir from the necessity to seek professional advice. English law can in fact be regarded as paternalistic for insisting on a formal liquidation of the estate even in cases where it is unnecessary.

F. CONCLUSION

Succession law is usually considered only from the perspective of beneficiaries. But to understand its mechanisms, the need for creditor protection must also be taken into account. The most straightforward way to ensure that their prior claim on the estate assets is satisfied is to have an organised liquidation process in the hands of an executor or administrator. It follows that comparative succession law writing distinguishes between systems that require such a procedure and those that do not.

This approach, however, is too formalistic as it creates the impression that the absence of a formal liquidation of the estate is tantamount to its unorganised distribution. This overlooks a mechanism that is not only a necessary pre-requisite for any formal liquidation of the estate, but that already fulfils most of its aims. That mechanism consists of treating the deceased's assets and liabilities as a unity, which is not broken up, but continues on death, so that in the interests of creditors the asset pool is preserved. The entirety of the assets and liabilities can be called the deceased's "patrimony" or "estate", and its transfer to another person "universal succession".

A comparison between English and German law shows that both have implemented universal succession. This is the reason why even in the absence of a formal procedure, the German heir fulfils a role that is very similar to that of the English personal representative. The concentration of all assets and liabilities in the heir's hands ensures that the deceased's patrimony is not dispersed on death, but wound up in an orderly fashion. Thanks to universal succession, German law can afford to keep a formal liquidation process in reserve for specific cases. Moreover, both English and German law can afford to leave the winding up of estates in private hands.

The comparison between German and English law also reveals that for a comprehensive assessment of the level of creditor protection a legal order provides, universal succession and the existence of formal procedures to liquidate the estate are not the only elements that need to be considered. One must also look at the extent of court involvement and the available remedies where universal successors

89 The principal drawback of a formal liquidation process is that the distribution can only take place after all creditors have come forward. The law can tackle this problem by establishing a time-limit, which must not, however, be unreasonably short. On the six-month rule in Scots law, see Gretton and Steven, *Property, Trusts and Succession* (n 25) at para 25.53f.

do not comply with their duties. Finally, the regime of inheritance tax can also be relevant to estate creditors.

General classifications of national succession regimes on the basis of just one criterion, such as the requirement to discharge all obligations before any benefits can be enjoyed, can thus never provide an accurate picture of how the regimes organise the transfer of property on death. Instead, all factors that potentially determine it are required to be addressed independently.

G. EPILOGUE: GEORGE'S FORGOTTEN MASTERPIECE

Initially, I had intended to choose an entirely different topic for this contribution. I wanted very much to present a chess game in which George had once beaten me in great style. I would have analysed the moves in detail and captured the crucial moments of the game in diagrams. Alas, it was not to be. At the time, we did not write down the moves (our encounter was an informal one, just like the "Immortal Game" between Anderssen and Kieseritzky played in 1851), and when after some time I tried to reconstruct the game from my memory, I failed to put the puzzle back together. Unlike the "Immortal Game", which was immediately recorded and published after it had finished, George's win could therefore, very unfortunately, not be saved for future generations of chess players.

I remember vividly the general course of the game, though. Having the black pieces, I played my favourite Pirc-Defence against George's first move e2–e4 and soon achieved a comfortable position (George was a little rusty and understandably not too familiar with opening theory). At some point, I could have exchanged my knight for George's white-squared bishop. I knew it was objectively the best move, but I wanted to keep the position more complex (vainly believing I could outplay George more easily then). Soon I came to regret my decision. While my knight got stuck on the queenside, George's bishop became very powerful on the a2–g8 diagonal, targeting my king's position (a "raking bishop", as chess players like to say).

Patiently, George increased the pressure. The star move of the game was one that looked rather unspectacular: a little pawn push on the kingside, which nipped in the bud all my hopes for counterplay. The legendary Aron Nimzowitsch, the founder of the concept of prophylaxis in chess,[90] would certainly have approved. Being condemned to complete passivity now, I could only wait for George to steamroll my position. Eventually, he broke through in the centre, tore open my kingside, and infiltrated with his rooks. I still hoped that George would overlook some little tactic, or would become nervous in the face of victory, but he showed no mercy, wrapping up the game cleanly. When heavy material losses became inevitable, I stretched out my hand for resignation. Ever the gentleman, George was not triumphant. But I am sure that he was quite pleased with how the game had gone, and rightly so. Despite being the loser, to me it had been another wonderful exchange of ideas with George. I look forward to many more, both on and off the chessboard.

90 See A Nimzowitsch, *Mein System: Ein Lehrbuch des Schachspiels auf ganz neuartiger Grundlage* (first published in different supplements between 1925 and 1927 and later reprinted several times). It is one of the great classics of chess literature. The concept of "*Prophylaxe*" is developed in the second part (titled "*Das Positionsspiel*").

PRESUMPTIONS OF SURVIVORSHIP OR SIMULTANEOUS DEATH IN CASES OF "COMMON CALAMITY":

SCOTS LAW AGAINST THE BACKGROUND OF EUROPEAN LEGAL DEVELOPMENTS

Reinhard Zimmermann and Jakob Gleim

A. SCOTS LAW AND ENGLISH LAW

(1) Three cases

(a) Drummond

During the night of 13 May 1941, an air raid destroyed the house at 12 Pattison St, Dalmuir, Dunbartonshire, killing its inhabitants. These inhabitants were Ralph Andrew Drummond, his wife, and their two sons and the question thus arose who was entitled to the proceeds of Mrs Drummond's war savings certificates. The potential beneficiaries were Ralph Drummond's siblings and the Crown as *ultimus haeres* since Mrs Drummond had no other family, and neither she, nor her husband, had left a will.

According to generally accepted principles, apart from blood relatives, only the spouse can be the beneficiary of an intestate estate.[1] Thus Ralph Drummond's siblings could only have a claim to the proceeds of the war savings certificates if upon Mrs Drummond's death these certificates had passed to her husband's estate or that of the couple's children. In both situations, Ralph's siblings would have stood to inherit as closest blood relatives. Further, since one can only inherit from someone who has died,[2] this required Mrs Drummond to have predeceased her husband and/or their children even if only by a split second. Given the circumstances, this was

1 See the overview in K G C Reid, M J de Waal and R Zimmerman, "Intestate Succession in Historical and Comparative Perspective", in K G C Reid, M J de Waal and R Zimmermann (eds), *Intestate Succession* (2015) 442 at 462–481 and 489–503. Same-sex couples are increasingly treated like married partners in terms of intestate succession, see "Intestate Succession" 503 f; on (heterosexual) cohabitants, see 504–508.

2 On the principle *nemo est heres viventis* see, e.g., F Pollock and F W Maitland, *The History of English Law before the Time of Edward I*, vol 2 (2nd edn, 1898) 308; W Blackstone, *Commentaries on the Laws of England*, vol 2 (1765–69) ch 14. On the Germanic legal maxim *Der Tote erbt den Lebendigen*, see O Stobbe, *Handbuch des Deutschen Privatrechts*, vol 5 (2nd edn, 1885) 21; R Hübner, *Grundzüge des Deutschen Privatrechts* (5th edn, 1930) 741–743; see also, e.g., Grotius, *Inleiding tot de Hollandsche Rechtsgeleertheyd* (2nd edn, 1953, R W Lee (ed)) II, XIV, 8.

impossible to determine, and the siblings' claim seemed doomed. It appears that this was the position then prevailing in Scots common law, even though it had never been explicitly stated by either the courts, or the works of any of the Institutional Writers.[3] The matter came before the Court of Session for the first time in *Drummond's Judicial Factor v HM Advocate*.[4] Counsel for the siblings submitted that Mrs Drummond should be presumed to have been survived by either her husband (who was two years older), or her children. This argument was based on presumptions recognised in Roman law and in the *Code Napoléon*[5] based on the gender and the age of the deceased. Reference was also made to section 184 of the English Law of Property Act 1925[6] which would also have favoured the siblings.

The decision of the Court of Session is remarkable, above all, for its view of the sources of Scots law. For, without dwelling long on the content of the presumptions in question (which he regarded as "essentially arbitrary and artificial rules of expediency" which were, moreover, by no means identical),[7] Lord Cooper (then Lord Justice-Clerk) stated that while Roman law was of considerable significance for the courts of Scotland, it was not binding on them. At the end of the seventeenth century it would have been quite possible to absorb the Roman law presumptions into the emerging Roman-Scots *usus modernus* but that had not in fact happened; and for the courts to intervene at this stage, in the middle of the twentieth century, would have amounted to an arrogation of the legislative power.[8] Lords Mackay and Jamieson concurred, pointing out further that Roman law in Scotland had not been received *in complexu*, but only as far as it had been expedient for the development of Scots law. However, there was no hint of such a reception in the cases or literature.[9] Thus, none of the three judges felt that there was a gap in the law that needed to be filled by judicial development. If the right of Ralph Drummond's siblings to succeed required that either he, or his children, had survived his wife, then, according to general principle, this had to be proven. If such proof was impossible, there could be no claim.

(b) Mitchell

The *Drummond* decision determined the result of another case that came before the Court of Session nine years later.[10] Laban Mitchell, his wife Margaret, and one of their three daughters, Janet, had all died in a plane crash on 17 October 1950. Again, the sequence of death could not be determined. The court had to decide whether Janet's son was entitled to a part of the estate of his grandfather Laban (who

3 For the period before 1944, see G J Bell, *Principles of the Law of Scotland* (4th edn, 1839) § 1640; W G Dickson, *A Treatise on the Law of Evidence in Scotland*, vol 1 (1887, by P J Hamilton Grierson) § 130; G Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890) 846f ; Anonymous, "The Presumption of Life" (1891) 35 *Journal of Jurisprudence* 634 at 636; J M'Laren, *The Law of Wills and Succession as Administered in Scotland*, vol 1 (3rd edn, 1894) paras 117–120.

4 1944 SC 298.

5 References to the relevant sources of Roman law and French law can be found, throughout, in the Scottish legal literature from Bell onwards (n 3).

6 See below A(2).

7 *Drummond's Judicial Factors* (n 4) at 301 (per Lord Cooper).

8 ". . . for such a step would in the circumstances partake of judicial legislation": *Drummond's Judicial Factors* (n 4) at 301; see also Lord Mackay at 305, using the nice phrase "it would be rather strong".

9 *Drummond's Judicial Factors* (n 4) at 302–306.

10 *Mitchell's Executrix v Gordon's Factor* 1953 SC 176.

had not left a will). This depended on whether with the demise of Janet, her son had stepped into her place, "representing" her in the succession.[11] That had to be determined according to section 1 of the Intestate Moveable Succession (Scotland) Act 1855 according to which representation required that the person to be represented had to have predeceased. As it was not possible to determine whether Janet had predeceased her father (Laban), Lord Cooper (by now Lord President) wasted few words in dismissing the grandson's claim.[12]

(c) Ross

Soon thereafter a case had to be decided in which two sisters, Margery and Hannah Ross, died in the same room of gas poisoning; again, it was impossible to determine which sister had died first. Both of them had left, *mutatis mutandis*, identical wills, each leaving her estate to the other. In the event of that other sister having predeceased, they had named certain other beneficiaries. Lord Cooper, once again, had to deal with the matter. But his decision in favour of these other beneficiaries was reversed by the Second Division of the Court of Session.[13] The House of Lords unanimously confirmed the latter decision,[14] finding that the other beneficiaries could not rely on Margery's will, as their rights only arose in the event of Hannah predeceasing Margery; similarly, the claim under Hannah's will failed since it depended on Margery predeceasing Hannah. Thus, the rules of intestacy had to be applied to the two estates – a result that neither sister would have wanted. Central for the determination of the case was how the wills of the two sisters had to be interpreted. Could the phrase "in the event of Hannah (or Margery Newton) Ross predeceasing me" be understood to mean "in the event of Hannah (or Margery Newton) Ross failing to take under the will" or was it limited, in the light of its unambiguous wording, and in accordance with general usage, to the situation that one sister had died before the other? All five law Lords sitting in this case found in favour of the latter interpretation, without being swayed by the "presumption against intestacy".[15]

(2) Preference for the younger person

The *Mitchell* and *Ross* decisions, in particular, were seen as unreasonable, or even absurd.[16] One of the two Scottish judges involved in the *Ross* decision of the House of Lords, Lord Keith of Avonholm, referred to section 184 of the English Law of Property Act 1925, and specifically recommended the introduction of a similar rule

11 On the "doctrine of representation", as perpetuated in many codifications, see Reid, de Waal and Zimmermann, "Intestate Succession" (n 1) at 463–465. For Scotland, see K G C Reid, "Intestate Succession in Scotland", in Reid, de Waal and Zimmermann, *Intestate Succession* (n 1) 370 at 389 f.

12 *Mitchell's Executrix* (n 10) at 181 f: "virtually unarguable".

13 *Ross's Judicial Factor v Martin* 1954 SC 18.

14 *Ross's Judicial Factor v Martin* 1955 SC (HL) 56.

15 On which, see *Ross's Judicial Factor* (n 14) at 70, per Lord Reid: "the presumption against intestacy can never justify going beyond the proper limits of construction".

16 M C Meston, "Wills and Succession", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 25 (1989) para 656 ("some very hard – even silly – decisions"); see also Earl Jowitt und Lord Morton of Henryton, in *Ross's Judicial Factor v Martin* 1955 SC (HL) 56, 64 and 67: "With some regret I have come to the conclusion "; "The case is a most unfortunate one "; M C Meston, "The Succession (Scotland) Bill" 1964 SLT (News) 1 at 3: "difficulties and injustice arising under the present law".

into Scots law.[17] That step was indeed taken by means of section 31 of the Succession (Scotland) Act 1964.[18] It provided that in a situation where two persons have died under circumstances indicating that they may have died simultaneously, or where it is unclear whether one of them had survived the other (such situation is often referred to as "common calamity" in Scotland),[19] it must be presumed that the younger person has survived the older. This statutory "survivorship" presumption is clearly inspired by English law, and modelled on section 184 of the Law of Property Act 1925, which addressed the same problem.

Before section 184 of the Law of Property Act 1925 came into force, the person whose claim depended on the survival of another had to prove that survival. That was in line with general principles of the law of evidence. The leading English decision prior to 1926, *Wing v Angrave*,[20] had stated that "[t]he question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined". As in *Ross*, a husband and his wife had made essentially identical wills, leaving their estates to each other, or to a third party should the other have predeceased. They were washed overboard by the same wave and drowned as their ship sank. English law did not recognise survivorship presumptions related to age or sex along the lines of the *Code Napoléon* (which was referred to).[21] As it could not be proven that either husband or wife had died during the lifetime of the other, the court was faced with the same problem of interpretation as in *Ross*. Neither will had foreseen this situation, leading the House of Lords to the conclusion that the couple's estate planning had failed and that the third party named as beneficiary could not succeed under either will: the court could not base its findings on the mere assumed or probable intention of the testator but only on his or her actual intention, as laid down in the will – *quod voluit non dixit*.[22]

17 *Ross's Judicial Factor* (n 14) at 73; see also Earl Jowitt at 64: "This case certainly seems to me to show the value of such an enactment."

18 On the background of the reform of the Scots law of succession (which was considered to be "utterly out of touch with reality" and as "the most backward in the civilized world") see Reid, "Intestate Succession in Scotland" (n 11) at 380–388.

19 See, e.g., D Bartos, *Bartos and Meston on the Succession (Scotland) Act 1964* (6th edn, 2015) para 31-04; G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd edn, 2013) para 25.19. It is not clear whether the term "common calamity" presupposes death in a common peril, i.e. in one and the same event, as is assumed by Gretton and Steven; *contra* Bartos and Meston. Cf also *Encyclopaedia of the Laws of Scotland*, vol 12 (1931) para 216; Lord Cooper, in *Mitchell's Executrix* (n 10) at 181.

20 *Wing v Angrave* (1860) 8 HLC 183, 11 ER 397. Along the same lines, see also the *Court of Chancery* decision of 1854/1855, dealing with the same set of facts: *Underwood v Wing*, 4 De G M & G 633, 43 ER 655.

21 *Wing v Angrave* (n 20) at 197 f per the Lord Chancellor, Lord Campbell.

22 See the clear statement by Lord Campbell in *Wing v Angrave*, 8 HLC 183 at 202 (who himself, however, dissented, arguing that the will had clearly expressed the intention to leave the estate to a third party whenever the institution of the spouse failed). See also *Underwood v Wing* 4 De G M & G 633 (664 f per the Lord Chancellor, Lord Cranworth: "It is not sufficient to say that, if for any reason the gift to the [spouse] fails to have practical operation, the testator must have intended to benefit Mr. Wing: the answer is, he has not said so, neither expressly nor impliedly; and, if I were to attempt to supply the omission, I feel that I should be making, not construing the testator's will"). Lord Cranworth also took part in *Wing v Angrave*.

(3) Exceptions to the preference for the younger person: spouses

Section 184 of the Law of Property Act 1925 was designed to save the English courts from these problems of interpretation and the unsatisfactory results associated with such strict literalism.[23] However, during the Second World War there was an increase in cases of "common calamity" involving married couples.[24] If there were no common children, section 184 generally favoured the family of the wife, the wife usually being the younger of the spouses. Since there was no good reason for such systematic preference, the application of section 184 was restricted by section 46(3) of the Administration of Estates Act 1925.[25] The presumption that the younger person had survived the elder was no longer to be applied to married couples where the elder partner had died intestate. In such circumstances, it could not be assumed that the younger spouse had survived the elder. But neither could it be assumed that the elder spouse had survived the younger: effectively the position prevailing prior to the introduction of section 184 of the Law of Property Act 1925 had been restored.[26] Scots law also introduced this exception, though in an expanded form: it applies also to cases where the elder of the two spouses has not died intestate; at the same time, it establishes a presumption that both spouses have died simultaneously.[27]

Thus, *Re Rowland*[28] would not have been decided in the same way in Scotland as it was in England. During a journey from the Solomon Islands, Dr Rowland and his wife died when their ship sank in undeterminable circumstances. Their bodies were never found; cause and time of death could not, therefore, be established. "Death in these waters does not normally occur from cold or exposure, but from being eaten by fish", as Lord Denning blithely contemplated.[29] Before departure, Dr Rowland had made a will in which he left his estate to his wife. "[I]n the event of the decease of the said Shirley Brownlie Rowland preceding or coinciding with my own decease", his brother and his sister's child were to inherit. As it could neither be proven that Dr Rowland and his wife had died at the same time, nor that Mrs Rowland had predeceased her husband, the will had failed and the principles of intestate succession applied. The estate thus was to go to Mrs Rowland's niece rather than the two relatives named in the will.[30] In one of his characteristic dissenting opinions Lord

23 See also *Re Rowland* [1963] Ch 1 at 13 per Harman LJ: "One has only to begin with Wing v Angrave to see how easily absurdity may be reached. By section 184 of the Law of Property Act 1925, an attempt was made to mend the situation".

24 R Kerridge, "Intestate Succession in England and Wales", in Reid, de Waal and Zimmermann, *Intestate Succession* (n 1) 323 at 328 f.

25 Inserted by s 1(4) of the Intestate Estates Act 1952.

26 Kerridge, "Intestate Succession in England and Wales" (n 24) 329, referring to a reintroduction of the rule prior to 1926. However, this only applied to intestacy. See also E Jayme and H Haack, "Die Kommorientenvermutung im internationalen Erbrecht bei verschiedener Staatsangehörigkeit der Verstorbenen" (1985) 84 Zeitschrift für vergleichende Rechtswissenschaft 80 at 86 f.

27 Gretton and Steven, *Property, Trusts and Succession* (n 19) para 25.22 rightly point out that this presumption of simultaneous death and the presumption of survivorship in section 31 of the Succession (Scotland) Act may well come into conflict with each other.

28 [1963] Ch 1.

29 [1963] Ch 1 at 4.

30 See the majority opinion of Harman LJ and Russell LJ in *Re Rowland* [1963] Ch 1 at 11–19. The decision was based on Law of Property Act 1925, s 184 which, since Dr Rowland had not died intestate, still applied, even after the reform of 1952.

Denning criticised the literal and narrow interpretation of the term "coincide" as absurd; instead, it had to be assumed that Dr Rowland had intended to cover exactly a situation such as the one that had occurred, i.e. in which he and his wife died in the same calamity.[31] A Scottish court faced with this problem of interpretation could have had recourse to the statutory presumption in section 31(1)(b) of the Succession (Scotland) Act 1964. In cases of "common calamity" it must be presumed that the spouses have not survived each other – which must mean they have to be taken to have died simultaneously. Thus, a disposition conditional on the spouses having died simultaneously has to be taken to cover all cases in which the law presupposes the death to have occurred simultaneously.

(4) An additional exception in Scots law

Another presumption has been recognised in Scotland since 1964, without having any parallel in English law. It is found in section 31(2) of the 1964 Act, and provides a second exception to the presumption of the younger person surviving the elder in a "common calamity". It deals with unmarried persons, in so far as the elder has made a will in favour of the younger and, failing that younger person, in favour of a third person. Where the younger person has died intestate, the elder person is presumed to have survived the younger. This complicated and unhappily phrased provision is designed to take account of the intention of the elder person, as expressed in his or her will, and to prevent the estate from passing to the intestate heirs of the younger person.[32]

B. ROMAN LAW AND *IUS COMMUNE*

(1) Roman law

(a) Parents and children

Scots private law is one of the two main uncodified, mixed legal systems in the modern world. It has been moulded equally by the tradition of Roman law and by English law. In this area, the influence of English law is evident, particularly with regard to the presumption in section 31 of the Succession (Scotland) Act 1964.[33] But the legal position prior to 1964 under Scots common law also corresponded to that in England as is apparent by repeated reference to the leading English case.[34] Although French and Roman sources were also cited in the time before 1964,[35] this was done only in order to state that they could not be applied to "common calamities" in Scotland. But what did these sources say?

31 *Re Rowland* (n 28) at 7–11.
32 See Viscount Colville of Culross, to whom the provision in s 31(2) of the Succession (Scotland) Act is attributable, HL Deb 23 March 1964, vol 256, 1113 f giving an example.
33 See above A(2).
34 *Drummond's Judicial Factor* (n 4) at 302 and 304; *Mitchell's Executrix* (n 10) at 181; *Ross's Judicial Factor* (n 13) at 25 and 30; *Ross's Judicial Factor* (n 14) at 61 f, 64, 65 ff and 72; see also, as far as legal literature is concerned, Dickson, *Evidence* (n 3) § 130; Bell, *Dictionary* (n 3) 847; M'Laren, *Succession* (n 3) paras 119–120.
35 *Drummond's Judicial Factor* (n 4) at 301, 303 and 305; and above n 3.

Book 34, 5 of the Digest (*De Rebus dubiis* – Dubious Cases) contains statements on a range of cases. If a father died together with ("cum") his son who was *pubes* and whom he had named as sole heir in his will, the son was presumed to have survived the father, with the estate of the latter thus going to the son's successors.[36] In contrast, if the son was still *impubes*, the presumption was that the father had outlived the son.[37] Both presumptions also applied to mothers and sons who died in the same shipwreck.[38] In the case of a son who had attained the age of puberty, the presumption that the son had lived longer was based on what is equitable, by common sense or in line with human nature ("humanius est").[39] The rule according to which it must be presumed that a son who is *pubes* would have survived the parent with whom he died, is confirmed by a decision of the Emperor Hadrian.[40] That decision related to the death of father and son as soldiers; although it does not refer to the son having reached the age of puberty, this can be assumed. Hadrian here had to decide whether the son's estate should go to the mother (because the father had died first) or to the father's relatives (because the son had died first). Hadrian found in favour of the mother.

There is an exception to the rule just mentioned where a freedman died together with his son, without leaving a will. Given the reverence that the freedman owed to his patron, the estate passed to the latter unless it could be proved that the son had survived the father.[41] A further exception was recognised where the testator had ordered his estate to pass to a third party should his heir die childless. The heir had died at the same time as his only son (who was above the age of puberty) in a common peril and it could not be determined whether one had survived the other. Contrary to the presumption that a son above the age of puberty survives his father, the heir was held to have died without issue.[42]

(b) Other case scenarios

It is better not to speak of a presumption of "co-morientes", or simultaneous death,[43] in any of these cases, as in all of them death was presumed to have occurred consecutively.[44] We are dealing, therefore, in the terminology of Scots law, with survivorship presumptions. In contrast, there was no presumption of survivorship in the case of two sons who were *impuberes* and drowned together in a shipwreck; rather

36 Tryphoninus D 34.5.9.4.

37 In both cases it is explicitly added: unless the contrary is proved. M Kaser, *Das römische Privatrecht*, vol II (2nd edn, 1975) 114 views these additions as coming from the post-classical period.

38 Iavolenus D 34.5.22 (mother together with her son who had attained puberty); Gaius D 34.5.23 (mother with underage son). See also Papinian D 23.4.29 pr (mother with her son who is *impubes*).

39 According to R Luzzatto, "Commorienza", in A Azara and E Eula (eds), *Novissimo digesto italiano*, vol 3 (1959) no 2, the Roman jurists based the presumptions regarding the relationships between parents and children on "probability calculi".

40 Tryphoninus D 34.5.9.1.

41 Tryphoninus D 34.5.9.2. See also Luzzatto, "Commorienza" (n 39) no 2.

42 Ulpian D 36.1.18.7. See further below, n 52.

43 S Rugullis, "Commorientes internationales" (2014) 113 Zeitschrift für vergleichende Rechtswissenschaft 186 at 189. But see, e.g., E H W Mutzenbecher, *Die Lehre von den Kommorienten* (1901) 11, 17. The term "commorientes" can be found in Ulpian D 24.1.32.14; it describes the situation in which two persons die simultaneously.

44 According to M Kaser, *Das römische Privatrecht* vol I (2nd edn, 1971) 273 it was only the post-classical doctrine that derived general legal presumptions from individual decisions; see also Kaser, *Das römische Privatrecht* (n 37) 114.

it is explicitly stated that neither brother outlived the other.[45] Another fragment, similarly, reveals that if a minor and his brother have died together and it is not clear who first drew his last breath, one cannot be presumed to have survived the other.[46] The result is that neither is the heir of the other. Whether these texts can be understood as expressions of a presumption of simultaneous death[47] is unclear but probably has to be answered in the negative.[48] It rather seems to be the result of the normal rule that whoever bases his claim on one person having survived another (or not having survived another) must be able to prove the fact of survival (or of predecease).[49]

The same applied when a married couple died together.[50] This is evident from a fragment discussing whether in such a situation a stipulation will take effect, according to which the dowry must be returned if the wife dies during the marriage. Tryphoninus found in the affirmative, as long as it could not be proved that the wife survived her husband. He remained silent on whether the spouses were presumed to have died simultaneously, or the wife was presumed to have predeceased her husband. This probably did not matter as far as the stipulation in the present case was concerned.[51]

The only presumption, deviating from the general rules, that can unquestionably be found in our sources of Roman law is a survivorship presumption, and it related to situations where a father or a mother died together with his or her child. Apart from a sense of what is "humanius", the *favor testamenti* may have played a role in this respect.[52]

(2) *Ius commune*

(a) Disputes

Given the unclear state of the Roman sources, it is hardly surprising that a broad range of different interpretations and legal disputes can be found in the *ius commune* sources – with the result that the author of what is probably the most comprehensive treatise on the subject, Theophilus Gaedke, counted the *doctrina de*

45 Tryphoninus D 34.5.9 pr.

46 Marcianus D 34.5.18 pr. See also Rugullis "Commorientes internationales" (n 43) at 187 f with reference to Ulpian D 24.1.32.14.

47 See, e.g, F C von Savigny, *System des heutigen Römischen Rechts*, vol 2 (1840) 20 f.

48 See, e.g., K A von Vangerow, *Lehrbuch der Pandekten*, vol 1 (7th edn, Marburg and Leipzig, 1863) 70 f; F Regelsberger, *Pandekten*, vol 1 (Leipzig, 1893) § 60; H Dernburg, *Pandekten* (6th edn, 1900) 112; Mutzenbecher, *Lehre* (n 43) 5; Luzzatto, "Commorienza" (n 39) no 2; undecided C Fadda, *Diritto delle persone e della famiglia* (1923) 38.

49 Rugullis, "Commorientes internationales" (n 43) at 188.

50 Tryphoninus D 34.5.9.3.

51 See further Marcianus D 34.5.16 pr, and Paulus D 34.5.17.

52 Thus, the presumption of survivorship in favour of the son above the age of puberty in Tryphoninus D 34.5.9.4 leads to the son, and subsequently the son's heirs and particularly any grandchildren, succeeding, which is in line with the presumed intention of the father. A son who is *impubes*, on the other hand, is unable to make a will and also does not have children of his own. It would, therefore, appear to be reasonable and in line with the presumed intention of the father to let the estate pass to the father's intestate heirs. Also, the exception from the survivorship presumption in favour of the son under the age of puberty in Ulpian D 36.1.18 can be explained in this way. See Savigny, *System* (n 47) 21 f; C G von Wächter, *Pandekten* vol 1 (Leipzig, 1880) § 42, 2) b; Dernburg, *Pandekten* (n 48) § 50 n 17.

jure commorientium among one of the most difficult areas of Roman law.[53] At the same time, he also very clearly highlighted the reason for these difficulties: the relevant sources only dealt with individual cases and often left the reasoning unexplained.[54] Even the very notion of simultaneous death was the subject of dispute. Did the sources relate only to cases in which two (or more) persons met their end in the same event (in a shipwreck, or an earthquake, conflagration, flood, plague, or battle), or did they also cover constellations in which two persons, separated by a great distance, died of different causes, including natural causes, and where it could not be established in which sequence the deaths had occurred?[55] Could the presumptions of survivorship, tailored for parents and their children, be generalised so as to include other ascendants and descendants?[56] Or should it be generally presumed that minors always died before those who had reached the age of majority?[57] Or was there a general presumption that the elder person died before the younger,[58] or that the relatively weaker died before the relatively stronger?[59] This last criterion was used, in particular, when it came to determining the order of death of men and women caught in the same misfortune: women, after all, were weaker than men ("foeminas debiliores esse viris"), also by their very nature soft

53 T H F Gaedcke, *De jure commorientium ex disciplina Romanorum* (Rostochii et Guestrovii, 1830) *praefatio*.

54 See also C F Mühlenbruch, "Ueber die Priorität des Todes" (1821) 4 Archiv für die civilistische Praxis 391 at 395.

55 In the latter sense, see Mühlenbruch, "Ueber die Priorität des Todes" (n 54) at 397 ff; L Arndts Ritter von Arnesberg, *Lehrbuch der Pandekten* (12th edn, Stuttgart, 1883) § 27, n 1; particularly comprehensively, Gaedcke, *De jure commorientium* (n 53) 1–26. Cf also C F Glück, *Hermeneutisch-systematische Erörterung der Lehre von der Intestaterbfolge nach den Grundsätzen des ältern und neuern Römischen Rechts* (Erlangen, 1803); Vangerow, *Lehrbuch* (n 48) § 33 n 2, 1; B Windscheid and T Kipp, *Lehrbuch des Pandektenrechts* (9th edn, 1906) § 53 n 5. The term "common peril" (*gemeinsame Gefahr*) should not, however, be interpreted too narrowly: Mutzenbecher, *Lehre* (n 43) 13 n 4; but see also n 5 pointing out that if a mother dies in the course of childbirth with the child dying at the same time from weakness, the danger for mother and child is a different one. F-E Fodéré (not to be confused with the well-known lawyer Paul Pradier-Fodéré), *Traité de médecine légale et d'hygiène publique*, vol 2 (Paris, 1813) 219 f reported a case in which a father and his son died at the battle of the Dunes (1658), one of them fighting in the Spanish, and the other in the French army. On the same day their daughter, respectively sister, took her vows resulting in civil death (*mors civilis*). This occurred at noon, i.e. at the time when the battle began. The daughter was considered to have died first since she had voluntarily and at one specific moment "died" for the purposes of secular law. Father and son, by contrast, may have lived longer through the death throes resulting from the injuries sustained. The sequence of death concerning father and son was to be determined according to the rules of Roman law (see above B(1)(a)).

56 See, e.g., Vangerow, *Lehrbuch* (n 48) § 33, Anm 2, 1; von Wächter, *Pandekten* (n 52) § 42, 2; differently, e.g., Regelsberger, *Pandekten* (n 48) § 60, 1; Windscheid and Kipp, *Lehrbuch* (n 55) § 53 (p 238).

57 Mühlenbruch, "Ueber die Priorität des Todes" (n 54) at 399; *contra*: Mutzenbecher, *Lehre* (n 43) 14 f.

58 J Menochius, *De Praesumptionibus, Conjecturis, et Indiciis, Commentaria*, vol 1 (Genevae, 1724) Lib VI, Praesump XLVI, no 32 (with a somewhat unfavourable assessment of age; see, e.g., "senectus ipsa morbus est" (no 1)); Glück, *Hermeneutisch-systematische Erörterung* (n 55) 11. For criticism, see Vangerow, *Lehrbuch* (n 48) § 33, note 2, 1).

59 This is the conclusion arrived at by Gaedcke, *De jure commorientium* (n 53) 103–132; *contra*: Mutzenbecher, *Lehre* (n 43) 15 f with references. For an overview of the rules that have been developed by the authors of the *ius commune*, cf also W Burge, *Commentaries on Colonial and Foreign Laws*, vol 4 (London, 1838) 11 f; and see the extensive casuistry 12–29.

and infirm ("foeminarum naturam mollem ac infirmam [esse]") as well as more fearful and inexperienced.[60]

(b) Speculation

Generalisations such as these stemmed predominantly from speculation on the reasoning behind the Roman presumptions of survivorship.[61] If, for example, a father was presumed to survive his underage child, this was because he had held out longer in whatever adversity they had been trapped.[62] Conversely, if the child had been of age, while the father was an old man for whom the funerary feast would soon have to be planned ("ein altes Silicernium") and the mother a crone ("alte Rukunkel")[63] then the presumption had to be the other way around.[64] Was this presumption of sequential death an attempt to describe what must be regarded as the natural sequence of events: "naturae ordo hic est, ut pater moriatur ante filium . . . et postulat ratio humanitatis, ut patris hereditas . . . ad liberos perveniat"?[65] Could the presumption only be set aside by presenting evidence that the father had survived his son, or perhaps also by showing that the son was weak and fearful while the father was strong and robust?[66] Numerous special cases and exceptions were discussed: what was the legal position if a father died with two sons – one below and one above the age of majority;[67] or when two siblings or two unrelated persons died together?[68] The most prominent, but by no means the only, proponent[69] of the theory that Roman law recognised a general presumption of simultaneous death, except for

60 The quotes are from S Stryk, *Tractatus de successione ab intestato* (Francofurti, 1706) *Dissertatio* X. *De ordine mortalitatis sive de successione commorientium*, Cap IV, § II. He was discussing the *ordo mortalitatis* with regard to spouses and thus, *inter alia*, the question whether the wife (in analogy with a person who is *impubes*) should be seen as predeceasing her husband, as was often claimed, for example by D Covarruvias à Leyva, *Quatuor Libri Variarum Resolutionum*, Lib II, Cap VII, 2 and 10, in: *Opera Omnia*, vol 2 (Madriti, 1610) and B Carpzov, *Jurisprudentia Forensis Romano-Saxonica* (Francofurti ad Moenum, 1644) Pars III, Const XVII, Definit XII, as well as by Gaedcke, *De jure commorientium* (n 53) 117 ("vir et robustior est femina, et, quum majore robore vigeat, se a morte diutius defendere potest, quam mulier"). Stryk himself rejects this idea, stating that a woman having predeceased her husband has to be proven and cannot be presumed. See also Burge, *Commentaries* (n 59) 20 f.

61 Generally, see Gaedcke, *De jure commorientium* (n 53) 27–102; Mutzenbecher, *Lehre* (n 43) 30–34.

62 N H Gundling, *Ausführliche und gründliche Discourse über die sämtlichen Pandecten*, vol 2 (Frankfurt and Leipzig, 1739) 1953; see also, e.g., Menochius, *De Praesumptionibus* (n 58) Lib VI, Praesumpt L, n 30; Carpzov, *Jurisprudentia* (n 60) Pars III, Const. XVII, Definit. XI; Gaedcke, *De jure commorientium* (n 53) 116; Stryk, *Dissertatio* (n 60) Cap II, § III. Cf Mühlenbruch, "Ueber die Priorität des Todes" (n 54) at 401.

63 See the drastic statement by Gundling, *Ausführliche und gründliche Discourse* (n 62) 1953; cf also Mühlenbruch, "Ueber die Priorität des Todes" (n 54) at 406.

64 See, e.g., Stryk, *Dissertatio* (n 60) Cap II, § IX; Gaedcke, *De jure commorientium* (n 53) 118; Regelsberger, *Pandekten* (n 48) 247 f. Cf H Donellus, "Commentarii ad Titulum D. De rebus dubiis", Ad § Cum in bello, no 7, in *Opera Omnia* vol 11 (Maceratae, 1833).

65 Carpzov, *Jurisprudentia* (n 60) Pars III, Const XVII, Definit X nos 8 f; cf Menochius, *De Praesumptionibus* (n 58) Lib VI, Praesumpt L, no 22; J Voet, *Commentarius ad Pandectas* (Paris, 1829) Lib XXXIV, Tit V, III.

66 Carpzov, *Jurisprudentia* (n 60) Pars III, Const XVII, Definit X no 11.

67 Stryk, *Dissertatio* (n 60) Cap II, § XI.

68 See, Cap III, headed "De ordine mortalitatis in successione collateralium et extraneorum", in Stryk, *Dissertatio* X (n 60).

69 See, e.g., J F Ludovici, *Doctrina Pandectarum* (Halae Magdeburgicae, 1709) 550; Gundling, *Ausführliche und gründliche Discourse* (n 62) 1953; further references in Mutzenbecher, *Lehre* (n 43) 5. Along the same lines, see Burge, *Commentaries* (n 59) 18.

cases where parents and children had died together, was Friedrich Carl von Savigny.[70] Also the problems as to how it could be proven that one person had survived the other were discussed again and again.[71]

(c) Perplexity

One cannot avoid the impression that by the end of the nineteenth century a feeling of perplexity prevailed. This is demonstrated, for example, by Mutzenbecher's inability to identify any reasoning behind the relevant Roman rules. He blamed the compilers of Justinian's Digest for having misunderstood the classical Roman lawyers: "non ratione", as he wrote, "sed errore primum" the rules to be found in the Digest had been introduced.[72] Even the textbook by Windscheid and Kipp did not provide much guidance. From the first through to the ninth edition the presumption concerning parents and children who died together was mentioned. In the third edition, a statement was added that could be read as endorsing a presumption of simultaneous death for all other situations, particularly since Savigny was referred to in a footnote. In a comment added in the ninth edition, however, Theodor Kipp rejected such presumption. It would, in his view, not have fulfilled a useful function.[73]

C. CODIFICATIONS OF GERMAN-SPEAKING COUNTRIES

(1) Prussia and Austria

It is hardly surprising, therefore, that the German *Bürgerliches Gesetzbuch* (BGB) made no attempt to pick up the thread of Roman law. Instead, § 20 succinctly stated: "If several persons are killed in a common peril, they shall be presumed to have died simultaneously." The BGB thus took up a tradition reaching back to the two significant German language codifications from the age of the Law of Reason. This was the rule contained in § 39 I 1 of the Prussian Code of 1794. The Prussian legislator had thus adopted from among the various contradictory rules of Roman law the one contained in Marcianus D 34.5.18 as the most reasonable.[74] Koch, in his commentary, presented this as a general rule,[75] to which the presumptions of survivorship for parents and children constituted an exception devoid of intrinsic justification.[76] This reflected a broadly shared conviction.[77]

70 Cf above n 47.

71 See, e.g., Carpzov, *Jurisprudentia* (n 60) Pars III, Const XVII, Definit XIV; Stryk, *Dissertatio* X (n 60) Cap VI; Voet, *Commentarius* (n 65), Lib XXXIV, Tit V, III *in fine*.

72 Mutzenbecher, *Lehre* (n 43) 33. Cf also Windscheid and Kipp, *Lehrbuch* (n 55) § 53, n 5: There was no firm indication for an extension by analogy of the Roman presumption of survivorship. This can only mean that they were unable to find a (convincing) rationale.

73 Windscheid and Kipp, *Lehrbuch* (n 55) § 53 (p 238).

74 C G Suarez, "Amtliche Vorträge bei der Schluß-Revision des Allgemeinen Landrechts", in: (1833) XLI (v. Kamptz) Jahrbücher für die Preußische Gesetzgebung, Rechtswissenschaft und Rechtsverwaltung 2: ". . . so soll angenommen werden, daß keiner den Andern überlebt habe" is reminiscent of ". . . non videtur alter alteri supervixisse" in Marcianus D 34.5.18 pr (see n 46 above).

75 C F Koch, *Allgemeines Landrecht für die Preußischen Staaten: Kommentar in Anmerkungen*, vol I/1 (3rd edn, Berlin, 1856) 105 n 41.

76 H Dernburg, *Lehrbuch des Preußischen Privatrechts und der Privatrechtsnormen des Reichs*, vol 1 (2nd edn, Halle, 1879) § 41 (p 80).

77 E.g. W Bornemann, *Systematische Darstellung des Preußischen Civilrechts mit Benutzung der Materialien des Allgemeinen Landrechts*, vol 1 (Berlin, 1834) 236.

§ 25 of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB), in turn, began by stating what was taken for granted in Prussian law,[78] i.e. that a person whose claim depends on one person having predeceased the other must provide evidence to that effect. Where this is not possible, all are presumed to have died at the same time.[79] This essentially corresponded to the Prussian rule, which was indeed regularly referred to in Austria.[80] The rules of the *ius commune* were, also in Austria, regarded as "in no way successful . . . and quite contested on points of detail".[81] Nonetheless, the prevailing opinion rejected a presumption of simultaneous death[82] in view of the fact that it appeared to be as arbitrary as a presumption in favour of the one or other person's prior death.[83]

Thus, despite appearances, § 25 ABGB did not really constitute a presumption after all.[84] Rather, it was thought that everything could be left to the onus of proof.[85] Whoever bases his claim on the prior death of another person will be unsuccessful if he is unable to prove the priority of that death. Gottfried von Schmitt, the author of the BGB's "Preliminary Draft" of a law of succession, took a different view and simply included § 25 ABGB among the precursors to his proposed presumption of simultaneous death.[86] Among these precursors were also the Saxon BGB of 1865

78 Dernburg, *Preußisches Privatrecht* (n 76) § 41 (p 80).

79 The rule carries on to spell out the consequence for the law of succession. Reference is made to § 536 ABGB, which provided that an inheritance can only pass to someone who has survived the deceased; see, e.g., J Winiwarter, *Das Oesterreichische Recht*, Part 1 (Vienna, 1831) § 54 (p 129); J Krainz, *System des österreichischen allgemeinen Privatrechts*, vol 1 (5th edn, 1913) § 68 *in fine* (p 147).

80 J Ofner (ed), *Der Ur-Entwurf und die Berathungs-Protokolle des Oesterreichischen Allgemeinen bürgerlichen Gesetzbuches*, vol 1 (Vienna, 1889) 46; F E von Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*, vol 1 (Vienna and Trieste, 1811) 127; F X Nippel, *Erläuterung des allgemeinen bürgerlichen Gesetzbuches für die gesammten deutschen Länder der österreichischen Monarchie*, vol 1 (Graz, 1830) § 25, 1); J Unger, *System des österreichischen allgemeinen Privatrechts*, vol 1 (Leipzig, 1856) 251.

81 M E Burckhard, *System des Österreichischen Privatrechtes*, Part II: *Die Elemente des Privatrechtes* (Vienna, 1884) 17; see also Zeiller, *Commentar* (n 80) 128; Unger, *System* (n 80) 251.

82 For references, see Unger, *System* (n 80) 251 n 11. In Prussia, too, it was disputed whether § 39 I 1 was to be interpreted as a true presumption; see A Gebhard, "Allgemeiner Teil, Teil 1", in: W Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches* (1981) 405 with references.

83 Krainz, *System* (n 79), § 68 *in fine* (p 147).

84 See Nippel, *Erläuterung* (n 80) § 25, 1) (the law presumes "not really anything"); Unger, *System* (n 80) 251; L Ritter von Kirchstetter, *Commentar zum Oesterreichischen Allgemeinen bürgerlichen Gesetzbuche* (2nd edn, Leipzig and Vienna, 1872) § 25 (p 42) (not a technical presumption, but only a lingering effect of the incorrect assumption that if there is no presumption in favour of a fact, then there must be a presumption to the contrary); Burckhard, *System* (n 81) 17 (Austrian law completely rejects the determination of a presumption); A Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol I/1 (1925) § 152 (p 358) (no presumption). In contrast, see Winiwarter, *Das Oesterreichische Recht* (n 79) § 54 (p 129).

85 As a result, it was held that anyone making a right dependent on the simultaneity of death of two persons has to prove that both persons in fact died at the same time: Kirchstetter, *Commentar* (n 84) § 25 (p 42). Ehrenzweig, *System* (n 84) § 152 (p 358), read together with § 64 (p 145 f), in this context, draws attention to the fact that the "presumption" of § 25 ABGB cannot, of course, be refuted by the proof of "non-simultaneity" (*Ungleichzeitigkeit*); rather the order of deaths has to be proven.

86 G von Schmitt, "Erbrecht, Teil 2" in: W Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches* (1984) 48.

(§ 2007) as well as the draft for Hesse (Art 7) and the draft law of succession presented by Friedrich Mommsen (§7 (2)).[87]

(2) The genesis of § 20 BGB

The First Commission charged with drawing up a BGB for the German Empire was faced, in the present context, with preliminary drafts from the draftsmen responsible for the General Part and for the Law of Succession.[88] Both proposed a presumption of simultaneous death.[89] It is therefore surprising that the First Commission refrained from any regulation, arguing that any "positive intervention" was either based on inadequate assumptions, or was bound to lead to results which would follow naturally from an application of the rules on onus of proof.[90] The Second Commission took a different view and adapted a rule that corresponded almost verbatim to the draft submitted by the draftsman responsible for the BGB's General Part.[91] In so doing, the Commission claimed that a statutory presumption of simultaneous death would be in line with both fairness and the exigencies of practice and would remove doubts in at least some cases.[92] Reference was made, on the one hand, to the evidentiary requirements for obtaining an inheritance certificate.[93] On the other hand, and above all, it was argued that without such presumption the outcome of disputes surrounding the right to the estate would depend on who among several potential heirs had first taken possession of the estate,[94] as the other potential heirs would then need to present evidence for the sequence of death favouring their claim in order to enforce that claim.[95] The presumption of simultaneous death therefore also serves to prevent potential heirs jockeying for the better evidentiary position.

On two other points, the Second Commission also confirmed the proposal of the draftsman of the General Part. One of them concerned the systematic position for the presumption of simultaneous death in the General Part of the code (and thus in the context of the law relating to missing persons,[96] or more generally, to the end of

87 For a detailed list of further legislation, and draft legislation, from the nineteenth century (including the acts by Reuß-Greitz, Altenburg, and Reuß *jüngere Linie*) see von Schmitt, "Erbrecht" (n 86) at 48.

88 Gebhard, "Allgemeiner Teil" (n 82) at 404–408; von Schmitt, "Erbrecht" (n 86) at 48. On the preparation of § 20 BGB, see also Rugullis "Commorientes internationales" (n 43) at 192 f.

89 In the draft by Gebhard § 4 (44), and that by von Schmitt § 297.

90 "Motive" in: B Mugdan (ed), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol 1 (1899) 374. Gebhard, "Allgemeiner Teil" (n 82) at 407, too, had admitted that a presumption of simultaneity of death was not necessary; it could all be left to the rules on the onus of proof.

91 "Protokolle" in: Mugdan, *Materialien* (n 90) 574.

92 Similarly, Gebhard, "Allgemeiner Teil" (n 82) at 407 f (also drawing attention to the fact that the presumption of simultaneous death, as proposed by him, was in conformity with what, according to Savigny and Windscheid, had applied in Roman law – except for the special rules relating to parents and children).

93 Today § 2354 BGB.

94 In contrast to English and Scots law, German law has a principle of automatic accrual; see K Muscheler, *Universalsukzession und Vonselbsterwerb* (2002), as well as the comparative overview by Inge Kroppenberg, "Devolution of the Inheritance / Universal Succession" in: J Basedow, K J Hopt and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 459.

95 Today § 2018 BGB.

96 §§ 13–19 BGB of 1900.

the existence of a natural person)[97] rather than as part of the law of succession. This reflected the Prussian and Austrian regulatory models[98] and was based on the idea that one was dealing here with a general question that was of particular significance for the law of succession but could also be relevant to other juridical acts.[99] The other point related to the requirements for triggering the application of the presumption of simultaneous death. In contrast to the precursors mentioned above,[100] and in contrast also to the view adopted by the draftsman of the law of succession,[101] the Second Commission favoured a restrictive approach by requiring death in a common peril. Only in such situations was there a sufficient factual basis for assuming that the death had occurred simultaneously.[102]

(3) Reform of the German presumption of simultaneous death

The German legislator's decision in favour of a presumption of simultaneous death has hardly ever been questioned after 1900.[103] Considerable uncertainty, however, prevailed with regard to the requirement of the deaths having occurred in a common peril. Many authors emphasised that the term "common peril" should not be interpreted too narrowly.[104] Thus, the presumption of simultaneous death was to encompass cases such as a shipwreck, in the course of which some passengers jump into the sea and drown, while others make it into a lifeboat which subsequently sinks, and yet others go down with the ship.[105] But this was a matter of dispute.[106] Other ambiguous cases had already been discussed by the Pandectists. Regelsberger, for example, regarded the presumption as not applicable to cases where mother and child die during childbirth, or where two people die in the same epidemic.[107]

97 See, e.g., Unger, *System* (n 80) 235.
98 In contrast to the Saxonian BGB and the Draft of Hesse.
99 Gebhard, "Allgemeiner Teil" (n 82) at 404; along the same lines Unger, *System* (n 80) 250.
100 § 39 I 1 PrALR; § 25 ABGB; § 2007 Saxonian BGB; Art 7 Draft of Hesse; § 7 (2) Mommsen's Draft.
101 § 297 Draft von Schmitt (n 86) 48 who, however, in his motivation refers to "dying together".
102 "Protokolle" in: Mugdan, *Materialien* (n 90) 574; similarly, Gebhard, "Allgemeiner Teil" (n 82) at 407.
103 But see H Völker, "Commorienten", 1947/48 Neue Juristische Wochenschrift 375 f with a proposal for reform drawing on Roman law, and K Muscheler, *Erbrecht*, vol 1 (2010) no 126 suggesting that it would generally be better to presume that the younger survived the elder.
104 See, e.g., P Knoke, in E Strohal (ed), *Planck's Kommentar zum Bürgerlichen Gesetzbuch*, vol 1, (4th edn, 1913) § 20, 1. Also, it was emphasised that § 20 BGB only required a "gemeinsame", rather than a "gemeinschaftliche Gefahr", i.e. an event that is objectively "common" to the parties involved, as opposed to being a (subjectively) shared experience: W Kluckhohn, "Ueber den Begriff der gemeinsamen Gefahr in § 20, zugleich der Lebensgefahr in § 17 des Bürgerlichen Gesetzbuches" (1911) 107 Archiv für die civilistische Praxis 354 at 365; P Oertmann, *Bürgerliches Gesetzbuch: Allgemeiner Teil* (3rd edn, 1927) § 20, 2. b) § 20 BGB would therefore also have to be applied, if one and the same avalanche buries two or more mountaineers not belonging to one group.
105 Knoke in *Planck's Kommentar* (n 104) § 20, 1; see also Theodor Kipp, in Windscheid and Kipp, *Lehrbuch* (n 55) § 53 (p 239); T Loewenfeld, in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, vol 1 (9th edn, 1925) § 20, III 2; Oertmann, *Allgemeiner Teil* (n 104) § 20, 2 c).
106 A different point of view from that adopted by the authors just mentioned was taken, e.g., by E Hölder, *Kommentar zum Allgemeinen Theil des Bürgerlichen Gesetzbuchs* (1900) § 20, 1. See also F Böckel, "Kommorienten" (1902) 93 Archiv für die civilistische Praxis 478 and Kluckhohn, "Ueber den Begriff der gemeinsamen Gefahr" (n 104) at 366 f.
107 Regelsberger, *Pandekten* (n 48) § 61 n 5; further, e.g., Dernburg, *Pandekten* (n 48) § 50 (p 113). In the same vein, Loewenfeld in *Staudingers Kommentar* (n 105) § 20, III. 2 (it is not sufficient, for example, that two persons die in the same apartment from the same illness). Further subtle distinctions can be found in Kluckhohn, "Ueber den Begriff der gemeinsamen Gefahr" (n 104) at 365.

However, exclusion of these cases from the scope of § 20 BGB seemed unwarranted in the light of policy and fairness considerations,[108] and thus Josef Kohler argued that the requirement of "common peril" was unnecessary; in his view, § 20 BGB should also be applied where several persons die in very different areas of the world and as a result of different misfortunes.[109]

The legislator finally intervened in 1939,[110] passing the Missing Persons Act (*Verschollenheitsgesetz*) and thereby repealing §§ 13–20 BGB. The removal of these provisions from the BGB was consistent with the contemporary project of breaking up the BGB.[111] At the same time, it facilitated the creation of a uniform law for the *Reich* and its "Ostmark" (i.e. Austria), even if, in principle, the ABGB continued to apply after the "Anschluss" in the spring of 1938.[112] The presumption of simultaneous death was laid down in § 11 Missing Persons Act and has been retained ever since: without the restrictive criterion of a common peril, and applicable also to cases in which it could not be proved that among several persons who had been *declared dead* one had survived the other.[113] The legal position in Austria and Switzerland is identical.[114] As the Swiss Civil Code (*Zivilgesetzbuch* – ZGB) also provides that when it can not be proved who among two persons has survived the other, both are presumed to have died simultaneously, a uniformity of approach prevails among the German-speaking countries.

D. CODIFICATIONS OF THE ROMANISTIC LEGAL FAMILIES

(1) *Code civil*

The third of the great codifications from the age of the Law of Reason, the French *Code civil*, was much more strongly influenced by Roman law when it came to establishing the order of death than its Prussian or Austrian counterparts. The *Code civil* of 1804, generally famous for "établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque

108 See also Hölder, *Kommentar* (n 106) § 20, 2; E Huber, *Schweizerisches Zivilgesetzbuch: Erläuterungen zum Vorentwurf des Eidgenössischen Justiz- und Polizeidepartements* vol 1, ed M Reber and C Hurni (2009) 71.

109 J Kohler, *Lehrbuch des bürgerlichen Rechts*, vol 1 (1906) § 120. Against Kohler's view, for example, Loewenfeld in *Staudingers Kommentar* (n 105) § 20, III 2; Kluckhohn, "Ueber den Begriff der gemeinsamen Gefahr" (n 104) at 371; a middle line is staken by Oertmann, *Allgemeiner Teil* (n 105) § 20, 4.

110 "Gesetz über die Verschollenheit, die Todeserklärung und die Festsetzung der Todeszeit," 101 *Amtliche Erlasse und Verordnungen* (dated 11 August 1939) 279 at 282.

111 The "farewell from the BGB" was advocated, e.g., by Franz Schlegelberger, the highest public official in the Ministry of Justice: *Abschied vom BGB* (1937).

112 See, in connection with the passing of the *Testamentsgesetz* (Wills Act), R Zimmermann, "Intestate Succession in Germany" in: Reid, de Waal and Zimmermann, *Intestate Succession* (n 1) 181 at 195.

113 This question was debated in the literature prior to the entry into force of the Missing Persons Act; see, e.g., Böckel, "Kommorienten" (n 106) at 488 f; Loewenfeld in *Staudingers Kommentar* (n 105) § 20, III. 1.

114 Under the Death Declaration Act (*Todeserklärungsgesetz*) of 1950 for Austria and Art 32(2) ZGB for Switzerland. The equation of deceased persons with those who have been declared dead is missing in the latter provision. Otherwise the formulation is almost identical. Huber, *Schweizerisches Zivilgesetzbuch* (n 108) 71, rejected a limitation of the presumption to cases of common peril, declaring that such a limitation could not be based on any reason.

matière",[115] established no less than three provisions dealing with the problem,[116] containing the following individual rules: (1) where those who have perished together were not yet 15 years of age, it is presumed that the eldest survived the others,[117] (2) where those who have perished together were over 60 years of age, it is presumed that the youngest survived the others,[118] (3) where some of those who have perished together were under 15, while the others were over 60, it is presumed that the former survived the latter,[119] (4) where those who have perished together were between 15 and 60, it is presumed that a man survives a woman provided they are of the same age or as far as the difference in age does not exceed one year,[120] otherwise, i.e. (5) when those who have perished together were of the same gender, the succession is to follow the natural order, which means that the youngest is taken to have survived the others.[121] This appears to be based on the idea that a stronger person usually survives those who are less strong.[122] The most obvious legal gap in this system of presumptions, i.e. that persons between 15 and 60 years may perish with persons either under the age of 15 or above the age of 60, was filled by courts and legal writers in two different ways: if a person over 60 has perished together with one between 15 and 60, the latter is presumed to have survived. If, however, a person under the age of 15 and a person between 15 and 60 have perished together, no presumption is to be applied; a situation of *non liquet* thus prevails.[123] The first of these solutions corresponds to Art 721a of the *Badisches Landrecht*, whose Arts 720–722 are otherwise identical to Arts 720–722 of the *Code civil* of 1804.[124]

The difference between these complex rules and the simple provisions of the German language codifications (including, in this one instance, the Prussian one[125]) could hardly be greater. In a further contrast to the German language codifications, the presumptions in the *Code civil* were to apply only when, in view of the actual circumstances of the death, nothing else was to be presumed,[126] while the German, Austrian and Swiss presumptions of simultaneous death *always* apply when it cannot be proved who of the deceased persons survived the

115 See the well-known statement by Portalis, cited approvingly in K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, 1998) 90.

116 For an overview, see also Jayme and Haack "Die Kommorientenvermutung" (n 26) 86 f and Rugullis "Commorientes internationales" (n 43) at 190 f. An overview of the presumptions in Swiss law prior to the introduction of the ZGB is provided by E Huber, *System und Geschichte des Schweizerischen Privatrechts*, vol 1 (Basel 1886) 103 f.

117 Art 721(1) *Code civil* (1804).

118 Art 721(2) *Code civil* (1804).

119 Art 721(3) *Code civil* (1804).

120 Art 722(1) *Code civil* (1804).

121 Art 722(2) *Code civil* (1804).

122 J M Boileux, M F F Poncelet, and L Bastiné, *Commentaire sur le Code civil*, vol 1 (3rd edn, Brussels, 1838) 396 f; P Malaurie, *Les Sucessions. Les libéralités* (4th edn, 1998) 50; M Grimaldi, *Droit civil – Successions* (3rd edn, 1995) 74.

123 Grimaldi, *Successions* (n 122) 74 n 78; for the first constellation: *Cour de Cassation*, Civ 1re 25 janv 1956, Bull civ I, no 46; for the second: *CA Rouen,* 8 Fev 1949: D 1949, 189 and *TGI Rochefort-sur-Mer,* 7 mars 1990, D 1992 somm comm 225, obs F Lucet.

124 See W Behaghel, *Das badische bürgerliche Recht und der Code Napoléon* (1869, Freiburg im Breisgau) 342 f.

125 Although that Code in other instances, "often amuses us today by the detail into which it descends": Zweigert and Kötz, *Introduction* (n 115) 89.

126 Art 720 *Code civil* (1804) where it is stated that "la présomption de survie est déterminée par les circonstances du fait".

other. Thus, according to the *Code civil* of 1804, when two people have died in a battle or in a house on fire, the soldier whose unit was first to engage the enemy, or who was in the room in which the fire had broken out, was held to be the one who died first. This rule, too, went back to pre-revolutionary French legal practice.[127] Another difference is that these statutory presumptions only applied when the two persons who perished together were to be each others' heirs.[128] This was overwhelmingly understood as requiring a reciprocal relationship as intestate heirs[129] thus making Arts 720–722 an integral part of succession law. Finally, the requirement that all the persons who perished had to have met their end in the same event is reminiscent of the "common peril" of § 20 BGB[130] but it is in conflict with the other German language codifications, and with German law subsequent to the reform of 1939.

(2) Reform of the *Code civil*

It is hardly surprising, in view of their intricacy, that the French rules were widely rejected by their German-speaking neighbours.[131] Even in France itself, criticism began to grow,[132] until finally, "cette théorie moribonde"[133] was set aside in the course of the reform of the law of succession of 2001. Articles 720–722 *Code civil* were repealed and replaced by a rule providing that when two persons have perished in the same event and the order of their deaths cannot be determined, neither of them is to be taken into account when determining the succession to the other.[134] In other words, they are to be treated as though they had died at the same time. The application of this rule still depends on the deaths having occurred

127 Both examples were cited by Pothier: R J Pothier, *Coutumes des Duché, Bailliage et Prévôté d'Orléans* (Paris and Orleans, 1780) Introduction au Titre XVII, Section V, Article I and by N Th Gönner, *Archiv für die Gesetzgebung und Reform des juristischen Studiums*, vol 2 (Landshut, 1809) 253 at 255. Le Brun, *Traité des Successions* (Paris, 1692) Book I, Chapitre I, Section I, 17, reports of a decision in a *cause célèbre* from 1572, when burglars murdered a woman and her two small children, one eight years and one 22 months old. (The woman was a Madame Bobé, the daughter of the great jurist Dumoulin/Molinaeus.) In this case it was presumed that the children had survived their mother: the burglars would most probably have murdered the mother first, as she was likely to have offered more resistance. Pothier referred to the same case. This was also the principle according to which the *Parlement de Paris* judged the murder of parents and children in the St Bartholomew's Day massacre of 1572 ("in crudelissima illa Christianorum caede, quae Christianissimo Gallorum Regno indelebilem conciliavit maculam"): Stryk, *Dissertatio* (n 60) Cap VI, XI. Finally, Le Brun reported on yet another decision which had moved away even further from the principles of Roman law, for reasons "qui sont fondées sur l'équité naturelle".

128 Art 720 *Code civil* (1804): "Si plusieurs personnes respectivement appelées à la succession l'une à l'autre".

129 Grimaldi, *Successions* (n 122) 75; A-M Leroyer, *Droit des successions* (2009) § 2 no 22.

130 According to Böckel, "Kommorienten" (n 106) at 485, the French legislature had, with fortunate sensitivity, formulated the requirement in the same way as its German equivalent was to be interpreted.

131 See Zeiller, *Commentar* (n 80) 128; Gönner, *Archiv für die Gesetzgebung* (n 127) 256; Böckel, "Kommorienten" (n 106) at 480; F Mommsen, *Entwurf eines Deutschen Reichsgesetzes über das Erbrecht nebst Motiven* (Braunschweig 1876) 136; Gebhard, "Allgemeiner Teil" (n 82) 404; "Motive" (n 90) 374.

132 Lucet, Case note to *TGI Rochefort-sur-Mer*, 7 mars 1990, D 1992, somm comm 225; Grimaldi, *Successions* (n 122) 74 f; Leroyer, *Successions* (n 129) § 2 no 22.

133 P Malaurie and L Aynès, *Les successions. Les libéralités* (5th edn, 2012) no 41.

134 Art 725-1(1) and (2) *Code civil*.

"dans un même événement" and, as in the past, it only relates to intestate succession.[135] Otherwise, however, it corresponds to the relevant rules in the three German-speaking countries.

(3) Italy

French law thus also moved in a direction taken much earlier, and much more consistently, by other major codifications of the Romanistic legal family. This is true, for example, for Italy. Already in 1865, the *Codice civile* had included a rule inspired by Austrian law, even if it was limited to the law of succession and required that the deceased persons were to be each others' heirs.[136] The *Codice civile* of 1942 incorporated this rule into Title I (Natural Persons) of its first book (Persons and Family), thus opening it up to more general application;[137] apart from that it was formulated more clearly but remained unchanged in substance.[138] The explanatory materials make clear that Art 4 does not lay down anything other than what would result from the application of the general rules of the law of evidence: such clarification was useful though not, strictly speaking, necessary.[139] Just as in Austria, it was disputed in Italy whether Art 4 (and previously Art 924) *Codice civile* was actually a statutory presumption: the Italian legislature, it was said, had aimed in the first place at abandoning the contrived presumptions of Roman, French and some of the Italian codifications prior to 1865; but it could not be assumed that they were to be replaced by an even more artificial presumption, devoid of any semblance of probability.[140] Today, however, it is recognised that we are dealing with a statutory presumption of simultaneous death.[141] A requirement that the deaths had to have occurred in the same peril was neither contained in the code of 1865, nor does it exist today.

(4) Benelux

The Dutch *Burgerlijk Wetboek* (BW) had also turned away from the French presumptions of survivorship, and it had done so as early as 1838. Article 878 BW contained a presumption of simultaneous death, albeit only with regard to two or

135 Apparently, the old rule has been relaxed in so far as the two persons no longer have to be entitled, in reciprocity, to become each other's heirs: F Terré, Y Lequette and S Gaudemet, *Les successions. Les libéralités* (4th edn, 2014) no 62.

136 Art 924 *Codice civile* (1865).

137 At the same time, the requirement that the deceased persons were to be each others' heirs was bound to be dropped. On the problem of simultaneous death for insurance law, see Luzzatto, "Commorienza" (n 39) no 15.

138 Art 4 *Codice civile* (1942).

139 G Pandolfelli, G Scarpello, M Stella Richter and G Dallari (eds), *Codice civile, Libro I, illustrato con i lavori preparatori* (1939) 58. With regard to a specific natural disaster, the earthquake of Messina in 1908, which killed around 100,000 people, the Italian legislature introduced an "absolute presumption of simultaneous death", which excluded the possibility of presuming that one person had survived the other; see F Santoro-Passarelli, in F Calasso (ed), *Enciclopedia del diritto*, vol 7 (1960) 980 f.

140 See Luzzatto, "Commorienza" (n 39) nos 2 and 3 with further references; cf also Santoro-Passarelli in Calasso, *Enciclopedia* (n 139) 979 f.

141 A Albanese, in G Bonilini (ed), *Trattato di diritto delle donazioni* vol 1: *La successione ereditaria* (2009) 1014–1016; C Massimo Bianca, *Istituzioni di diritto privato* (2014) 124; G A and A Ansaldo, in P Schlesinger (ed), *Il Codive Civile – Commentario*, vol 1 (1996) 241 f; P Stanzione, in P Cendon (ed), *Commentario al Codice Civile*, vol 1 (2009) 523 f.

more persons who stood to inherit from each other and whose order of death from the same misfortune could not be established.[142] The two requirements restricting the scope of application of this rule were dropped in the course of recodifying the law of succession (2003). Still, however, the new rule in Art 4:2(1) BW only applies within the law of succession.[143] It largely reflects a Benelux Treaty of 1972.[144] That Treaty[145] also led Belgium and Luxembourg to abandon the presumptions taken from French law and to introduce a presumption of simultaneous death in their place.[146] The same holds true for the Spanish *Código civil* of 1889[147] and the Portuguese civil codes of 1887 and 1966.[148]

E. DEATH OF TWO PERSONS WITHIN A SHORT PERIOD OF TIME

(1) The Netherlands

Both during the preparation of the Benelux Treaty and the new codification of the Dutch law of succession, consideration was given to extending the presumption of simultaneous death to situations in which two persons perish as a result of the same event, but one of them dies a short period of time after the other.[149] Such provision can obviate expensive and time-consuming investigations where the sequence of deaths is uncertain. Also, it may be taken to prevent the arbitrariness inherent in an estate passing to an heir who dies shortly thereafter as a result of injuries sustained in the same event, and from there passing on to the *second person's* heirs.[150] On the other hand, defining the "short period of time" within which a subsequent death may be deemed to be a simultaneous death also appears arbitrary. Additionally, as

142 See the similar provision for testamentary succession: Art 941 BW (1838).

143 Art 4:2(1) BW. For motivations concerning this provision, see Gr van der Burght, E W J Ebben and M R Kremer (eds), "Vaststellingswet, Boek 4: Erfrecht", in C J van Zeben (ed), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (2002) 86 (with references, *inter alia*, to a range of foreign laws and codifications, to Luzzatto's contribution to *Novissimo digesto italiano*, and to English law); Gr van der Burght, E W J Ebben and M R Kremer (eds), "Invoeringswet, Boek 4: Erfrecht", in C J van Zeben (ed), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (2003) 1163. Art 7:967(7) BW contains a further rule concerning simultaneous death in the law of life insurance. Outside of succession and life insurance law, it would appear that the general evidentiary rules apply.

144 On the difference, see S Perrick, "Erfrecht en schenking", in *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* (15th edn, 2013) no 36.

145 See M Puelinckx-Coene and S Perrick, "De Benelux-Overeenkomst van 29 December 1972 of de nieuwe commorientenregel" 1978 Tijdschrift voor privaatrecht 43 (with comparison to Dutch and Belgian law before and after the reform).

146 Art 721 *Code civil* (Belgium), added in 1977; Art 720 *Code civil* (Luxembourg), also introduced in 1977. Both provisions are limited to the law of succession (even if, as Puelinckx-Coene amd Perrick, "De Benelux-Overeenkomst" (n 145) at 52, point out, Belgian succession law merely follows what had already been recognised outside of succession law). The Luxembourg version is narrower than the Belgian and Dutch ones, and thus does not reflect the Benelux Agreement.

147 Art 33 *Código civil* (Spain). Apart from the systematic position, this corresponds to Art 924 *Codice civile* (1865).

148 Art 1738 *Código civil* (Portugal, 1867); Art 68(2) *Código civil* (Portugal, 1966). The latter provision, that has extended the application of Art 1738 of the old codification in two respects, is very similar to Art 4 of the *Codice civile* (1943).

149 Van der Burght, Ebben and Kremer, "Vaststellingswet" (n 143) 88; and see Perrick, "Erfrecht" (n 144) at no 29 *in fine*.

150 See Van der Burght, Ebben and Kremer, "Vaststellingswet" (n 143) 88.

demonstrated by the German experience with the notion of "common peril", the interpretation of the term "the same event" is bound to raise difficulties.[151] Most importantly, however, it is widely assumed that this kind of rule would be incompatible with the principle of automatic accrual as applied in countries such as the Netherlands[152] and Germany.[153] From the moment of death, the heir immediately acquires the estate; the incidence of an ownerless estate (*hereditas iacens*) is thus prevented.[154] That is why the heir is not required to declare his acceptance; no transfer of the estate by an official authority is necessary; and no intermediary is involved in the administration of the estate.

(2) England

Of all the jurisdictions under examination here, the only one that has a statutory rule treating two persons who died within a short period of time as having died together is England.[155] A provision to that effect was introduced in the Administration of Estates Act 1925 and came into force on 1 January 1996.[156] It (1) refers to the death of spouses, (2) only deals with cases of intestate succession, (3) establishes a survival period of 28 days, calculated from the day when the first spouse passed away and (4) does not require that the deaths have been brought about by the same event or occurred in a common peril. To a certain extent, section 46(2A) fixes a problem created by the removal of married couples from the general presumption of survivorship in favour of the younger person in 1952:[157] for, if the legal situation for married couples reverted to the one applied prior to 1926, this meant that anyone raising a claim based on the survivorship of a spouse had to prove that the spouse in question had in fact survived. This could lead to complicated and costly investigations, as the Law Commission stated in a Report from 1989 citing one specific example.[158] The introduction of section 46(2A) of the Administration of Estates Act is a consequence of that Report. The survival period initially proposed, 14 days,[159] was doubled in the course of the legislative proceedings in the House of Lords at the suggestion of Lord Mishcon to reflect common drafting practice.[160] From a comparative

151 For these two arguments see, as far as the consultations on the Benelux Agreement are concerned, Perrick, "Erfrecht" (n 144) at no 29 *in fine*.

152 Art 4:182 BW; Perrick, "Erfrecht" (n 144) at nos 73 and 437.

153 §§ 1922(1) and 1942(1) BGB; and see the literature referred to above (n 94) as well as "Motive", in Benno Mugdan (ed), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol 5 (1899) 258–260.

154 On the *hereditas iacens* under the *ius commune* see, e.g., Windscheid and Kipp, *Lehrbuch* (n 55) § 531 with further references; on the transition from the *ius commune* to the codifications of the nineteenth century, see H Coing, *Europäisches Privatrecht*, vol 2 (1989) 636–640.

155 Rugullis "Commorientes internationales" (n 43) at 197.

156 Administration of Estates Act 1925 s 46(2A).

157 See A(3) above.

158 Law Commission Report on *Family Law: Distribution on Intestacy* (Law Com No 187, 1989) para 56.

159 Law Commission Report on *Family Law* (n 158) para 57. In its Working Paper on *Distribution on Intestacy* (Law Com WP No 108, 1988) 54, the Law Commission had initially had a period of seven days in mind. See also the anonymous article in 1957 *The Law Times* 236 at 237, suggesting a survival requirement of two months.

160 HL Deb 27 February 1995 vol 561, cols 1309–1310. See also Law Commission Report on *Family Law* (n 158) para 57 ("it is the current practice to incorporate a survivorship clause into wills"); Kerridge, "Intestate Succession in England and Wales" (n 24) at 344 ("28 days is likely to be the typical survivorship period inserted in a will").

perspective, it is important to note that English law does not appear to have a problem with the idea that it may be unclear, for 28 days after the intestate death of a spouse, to whom his or her estate will pass. English law, after all, does not recognise the principle of automatic accrual. Rather, the estate is first transferred to a personal representative who is then charged with administering and winding up the estate.[161] A period of up to 28 days of uncertainty as to who will ultimately receive what remains of the estate after all debts have been paid does not, therefore, appear to be regarded as an "unacceptable delay in the administration of estates".[162]

(3) Germany and Scotland

In the countries of continental Europe, of course, spouses may insert into their wills a provision covering not only their simultaneous death, but also one death occurring shortly after the other, particularly as a result of the same event. In Germany, for instance, spouses merely have to follow the recommendation set out in books on model wills.[163] But the interpretation of such provisions, designed to prevent the undesirable occurrence of two events triggering an obligation to pay inheritance tax within a short period of time, is subject to dispute.[164]

In Scotland, too, provisions in wills according to which spouses are to inherit each other's estates only in the event of having survived the other for a certain

161 For details, see R Kerridge, *Parry and Kerridge: The Law of Succession* (12th edn, 2009) paras 17-01–17-57, 20-01–20-76; F Odersky, "Großbritannien: England und Wales" in R Süß (ed), *Erbrecht in Europa* (2nd edn, 2008) nos 60–80. However, English law can face the same problem as German or Dutch law if the spouse who died first has appointed the other as executor, with a third party appointed in the event of both spouses passing away shortly after each other.

162 The quote comes from Law Commission Report on *Family Law* (n 158) para 57, referring, however, to the originally proposed period of 14 days.

163 C Keim, in G Brambring and C Mutter (eds), *Beck'sches Formularbuch Erbrecht* (3rd edn, 2014) C I 8, no 3 with further references. In his article "Regelungen für den 'gemeinsamen' und 'gleichzeitigen' Tod im Ehegattentestament" 2005 Zeitschrift für Erbrecht und Vermögensnachfolge 10, however, Keim points out that the courts have always interpreted the expression "gleichzeitiges Versterben", contained in the will of spouses, as including both spouses dying consecutively within a short time as a result of the same event.

164 See, e.g., E M Frick, "Klauseln zum 'gemeinsamen Versterben' in Ehegattentestamenten: Ende eines Mythos? Zivilrechtliche und erbschafteuerliche Folgen" 2006 Zeitschrift für Erbrecht und Vermögensnachfolge 16; H Daragan, "Nochmals: Klauseln zum 'gemeinsamen Versterben' in Ehegattentestamenten: Ende eines Mythos?" 2006 Zeitschrift für die Steuer- und Erbrechtspraxis 119; Keim, in Brambring and Mutter, *Beck'sches Formularbuch* (n 163), C I. 8, no 3. On this view, the spouse who survived for a short time becomes first heir (*Vorerbe*) and the descendants who are usually appointed in case of simultaneous, or roughly simultaneous, death become subsequent heirs (*Nacherben*). This has to be appreciated against the background of the mandatory principle that there must not be an ownerless estate and that, thus, the fate of the estate cannot remain pending (even for a short time) until the death of the surviving spouse; see e.g., D Leipold, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 9 (6th edn, 2013) § 2074, no 13. However, this interpretation does not manage to avoid the occurrence of two deaths (each of them triggering inheritance tax). It has, therefore, been suggested that the *descendants* be the first heirs after the death of the first parent, under the resolutive condition that the second parent survives for longer than the short period. This would mean that if the second parent dies within the short period and, if therefore, no situation of subsequent heirship occurs, inheritance tax is only due once. According to Keim, however, this result can normally also be achieved without such provision in the will.

period of time, for example 30 days, appear to be common.[165] Amendment of the Succession (Scotland) Act 1964 by a provision generally requiring survival for a certain period of time has therefore also been considered.[166] In 1990, the Scottish Law Commission proposed a period of five days[167] – apparently inspired by the 120-hour rule widely recognised in the US.[168] Such a provision, it was hoped, would do away with the need for investigations into the order of death and for the application of the general presumptions of simultaneous death or survivorship. This proposal was thought to be in line with the presumed intention of a typical testator; for a typical testator would not normally want the estate to pass to someone who dies very shortly afterwards without having derived any benefit from the inheritance.[169] Nonetheless, the Law Commission decided against introducing a statutory survival period in its 2009 report.[170] At the same time, it confirmed its earlier view that the system of presumptions contained in section 31 of the Succession (Scotland) Act should be replaced by a rule that when two people have died together or where it is unclear which of them died first, the estate of both parties is to be distributed as if neither had survived the other.[171] The rules prevailing in the US and in Canada were cited as the models for this solution (which remains unimplemented) put forward in the Consultative Memorandum of 1986;[172] it also, substantially, corresponds to the presumption of simultaneous death in continental Europe.

F. EVALUATION

(1) The result of the comparative investigation

We have thus arrived back where we started, in Scots law. Three decisions of the Court of Session from 1944, 1953 and 1955, respectively, provided the point of departure for this essay. They were found to be so unsatisfactory that the legislature stepped in to solve the underlying problem.[173] The model for that reform was English

165 See Scottish Law Commission Consultative Memorandum on *Some Miscellaneous Topics in the Law of Succession* (Scot Law Com CM 71, 1986) 19 ("Some Scottish wills at present do contain [such clause] . . . We understand that the period usually selected is 30 days"); Scottish Law Commission Report on *Succession* (Scot Law Com No 215, 2009) 99 ("It is common practice to provide for a survivance period of around a month"). For comment, see A Barr, J Biggar, A Dalgleish and H Stevens, *Drafting Wills in Scotland* (2nd edn, 2009) para 5.15: all styles use a period of 30 days but seven days does not appear uncommon in practice.

166 Consultative Memorandum on *Miscellaneous Topics* (n 165) 18 f.

167 Scottish Law Commission Report on *Succession* (Scot Law Com No 124, 1990) 64 f.

168 Based on sections 2-104 and 2-601 *Uniform Probate Code*; for comment, see R J Scalise, "Intestate Succession in the United States" in Reid, de Waal and Zimmermann, *Intestate Succession* (n 1) 401 at 405. Scottish legal scholars responding to the *Consultative Memorandum* of 1986 had suggested periods of between two and 30 days.

169 Similarly, for the US, as far as the period of 120 hours applying in many states is concerned, Scalise "Intestate Succession in the United States" (n 168) at 405. See also Meston, "Wills and Succession" (n 16) para 659.

170 Report on *Succession* (n 165) 99.

171 Consultative Memorandum on *Miscellaneous Topics* (n 165) 20 f; Report on *Succession* (n 167), 65 f; Report on *Succession* (n 165) 98 f.

172 Consultative Memorandum on *Miscellaneous Topics* (n 165) 21.

173 See above A(2).

law.[174] Alternative solutions inspired by civilian systems were regarded as unattractive. But it must be noted that only Roman and French law were taken into account. While it is easy to understand why Scottish judges were not prepared to embrace the presumptions originating in Roman law and further developed in France, focusing on the age and the gender of the persons who have perished together,[175] it is surprising to see that nobody noticed how marginal this position had become in continental Europe. Not only German, Austrian and Swiss law recognised presumptions of simultaneous death, but also Italy, Spain, Portugal, and the Netherlands.[176] Similarly, criticism had been voiced in France.[177] At that time, Scottish legal scholarship only stood at the beginning of a new golden age,[178] when the defeatism concerning the autonomy of Scots law and its dependence on English law was finally to be overcome. One symbol of the new spirit animating Scots law was the foundation of the Scottish Law Commission in 1965.[179]

(2) The presumptions of survivorship and simultaneous death compared

Thus, we finally come to the question of whether and why the presumption of simultaneous death (ultimately derived from the continental Law of Reason), are superior to the presumptions of the Roman/French legal tradition, English law, and Scots law. Possible criteria for such an assessment are the probability of the course of events, the presumed intention of typical deceased persons, and normative considerations. The first of these criteria does not provide much assistance. According to French law prior to 2001, a child under the age of 15 was deemed to have died before its father, and an old man before a man in the prime of his years.[180] At best, this is plausible for traditional disasters such as shipwreck, fire, an epidemic, or a robbery: events, in other words, where the fight for survival may indeed be dependent on the strength, experience, and stamina of the individual. Even here, the opposite may be true, as in the burglary mentioned above, or in cases of shipwreck where since the sinking of the HMS *Birkenhead* on 26 February 1852[181] the seaman's rule "women and children first" applies. Such presumptions are untenable when it comes to modern disasters such as air raids, aeroplane crashes, or suicide attacks. The presumption that a man survives a woman of (approximately) the same age with whom he is caught in a common peril must be regarded as discriminatory. A general presumption

174 See above A(2).

175 Pietro Rescigno characterises this set of presumptions very well when he states that the tragedy inherent in the situation is turned into a cruel lottery: *Digesto delle Discipline Privatistiche: Sezione Civile* vol 11 (1994) 460.

176 See above B and C(3) and (4). For a broadly-based comparative overview also covering legal systems outside Europe, see Rugullis "Commorientes internationales" (n 43) at 195–199.

177 A Bonde, *Manuel des successions* (1925) 7.

178 See K G C Reid, "The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland" in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 39.

179 On which, see G Gretton, "Of Law Commissioning" (2013) 17 EdinLR 119; S Wilson Stark, "The longer you can look back, the further you can look forward: The origins of the Scottish Law Commission" (2014) 18 EdinLR 59.

180 See above D(1).

181 Immortalised in the poem "Soldier an' Sailor Too" by Rudyard Kipling ("so they stood an' was still to the Birken'ead drill, soldier an' sailor too").

in favour of the younger person, which prevailed in England between 1925 and 1952,[182] is, considering the probability of the course of events, much too sweeping, which is why French, and already Roman, law had introduced certain differentiations.[183] Moreover, differences in strength, experience, or stamina cannot play a role when dealing with two persons from the same generation, such as siblings.

The presumption of survivorship in favour of the younger person appears to be more plausible, at first glance, from the point of view of the presumed intention of the deceased, at least as far as members of different generations are concerned. Across Europe, the intestate succession regimes give preference to descendants.[184] This only makes sense, however, when the descendant actually survives the deceased and is able to enjoy the benefits of the inheritance. But if father and son perish together, the presumption in favour of the younger person leads to the father's property passing to the son's heirs – often to his mother – rather than to the intestate heirs of the father. This result is likely to contravene the presumed intention of the father for it can, generally speaking, be said that a typical deceased would want his estate to go to *his* intestate heirs rather than to the intestate heirs of another (even if that other person is his son).[185] This argument is even more persuasive where spouses or siblings have perished together if and in so far as they have stood to inherit from each other. There may, therefore, be better reasons against a general survivorship presumption in favour of the younger person. In view of the legal consequences associated with it for the families of the older and the younger person, it may even constitute an unjustifiable age discrimination (in terms of Art 21(1) EU Charter of Fundamental Rights). In cases of testamentary succession, every testator has the opportunity to provide for his dying simultaneously with the beneficiary; whether and to what extent he has done so is a question of interpretation of the will.

(3) Presumption of simultaneous death or general rules of evidence?

If, therefore, statutory survivorship presumptions on the basis of age and/or gender must be rejected, it has to be asked whether the matter cannot be left to the normal rules of evidence. Do we actually need a presumption of simultaneous death? As far as German law is concerned, a convincing explanation has been given by those responsible for § 20 BGB of 1900.[186] It also applies to many other continental

182 See above A(2).

183 After all, English law from 1952 onwards and, following it, Scots law have excluded spouses from this general presumption, though not because of the probability of the sequence of deaths but in order to avoid the systematic benefiting of the family of the (usually younger) wife, see above A(2). On the inconsistencies that may arise from this approach, see Gretton and Steven, *Property, Trusts and Succession* (n 19) para 25.22.

184 R Zimmermann, "Das Verwandtenerbrecht in historisch-vergleichender Perspektive" (2015) 79 Rabels Zeitschrift für ausländisches und internationales Privatrecht 768 at 787 f; R Zimmermann, "Intestate Succession in Germany" in: Reid, de Waal, and Zimmermann, *Intestate Succession* (n 1) 181 at 184 f.

185 Thus, also according to the Scottish Law Commission Report on *Succession* (n 167) 65 f the presumption that the younger person has survived the elder "could easily result in the property of the elder person being distributed in ways which he would not have wished and which his surviving relatives would find hard to accept".

186 See above C(2).

European jurisdictions. On a more general level, it must be pointed out that without some kind of presumption, the fate of the estate would ultimately remain unclear. Assuming that A is the intestate heir of B, and B the intestate heir of A, then, if A and B have died together without having left a will, the intestate heirs of A would have to prove that A had survived B. Similarly, B's intestate heirs would have to prove that B had survived A. Should it turn out that both proofs remain unsuccessful, on what ground can it be presumed that the estate should be divided as if A and B had died simultaneously? At the end of the day, A having survived B is just as probable as B having survived A. Both having died at the exactly same moment is the least likely scenario.[187]

The absence of a presumption of simultaneous death gives rise to even greater difficulties where two potential beneficiaries are not only in dispute with each other, but where both demand an object belonging to the estate from a third party. Consider the following case: the deceased (D) has named his wife (W) his sole beneficiary. Should W be unable to inherit, D has left everything to his old school friend X.[188] W, on the other hand, has left everything to her son (S) from a previous marriage. D and W drown when the ship on which they are travelling sinks, and it is impossible to determine the order of their deaths. D's estate predominantly consists of a portfolio of securities kept in a bank. Assuming that the bank will only release this portfolio on presentation of a certificate of inheritance, without a presumption of simultaneous death serious problems can arise: S cannot request a certificate of inheritance as he is unable to prove that his mother, W, survived D even for a moment. This is consistent with D's presumed wishes. However, X as substitute heir is also unable to obtain a certificate of inheritance as he, too, is unable to prove that W has been unable to inherit. Without a presumption of simultaneous death, the fate of the estate cannot, therefore, be settled in cases where neither of the beneficiaries can gain possession of the estate and thus present the other with a *fait accompli*.

Let us turn again, in the light of these considerations, to the three Scottish and two English cases discussed at the beginning of this essay. The result of the *Drummond* decision[189] is in no way objectionable. That the siblings of Ralph Andrew Drummond could not claim the proceeds of Mrs Drummond's certificates results from the fact that they were unable to prove that Mrs Drummond died before her husband and/or her children. The result would have been the same in a jurisdiction with a presumption of simultaneous death: if it has to be presumed that the entire Drummond family perished at the same moment, Mrs Drummond's assets cannot have been transferred to either her husband or her children. The question as to who was to benefit would have taken a more interesting turn had Mrs Drummond had relatives who would have stood to benefit if her husband and her children were unable to benefit. They would have had to prove that Mr Drummond and their children had predeceased Mrs Drummond, which they would have been unable to do. A presumption of simultaneous death (and only this presumption!) would have led to the (reasonable) result that these other relatives should receive the estate, and not the Crown as *ultimus haeres*.

187 See, e.g., Lord Denning and Russell LJ in *Re Rowland* [1963] Ch 1 at 8 and 16.
188 This constitutes the establishment of substitute succession under § 2096 BGB.
189 See above A(1)(a).

Mitchell[190] dealt with the interpretation of a statute from 1855, according to which a person may only "represent" another, as far as his or her right of succession is concerned, if that other person had predeceased. This could not be proved in that case. Thus, it is hardly surprising, even if unsatisfactory, that the Court of Session rejected the claim. It was not, after all, clear whether Janet Mitchell had died before, or after, or at the same time as her father. In a situation of *non liquet* such as this, a provision requiring a party to have "predeceased" can certainly not be applied, not even by analogy. This is different in jurisdictions that have a presumption of simultaneous death:[191] simultaneous death is to be equated to the case of predecease in view of the fact that both situations are comparable in the one point that is relevant here – Janet has not survived her father.

The result in *Ross*[192] is indeed absurd,[193] but could easily have been avoided by interpreting the will in a less literal fashion. Both sisters obviously wanted their estate to pass to a specific third person should the other sister not be able to inherit. However, when drafting their wills, they had only had in mind the (very likely) eventuality that one of them was to pass away before the other but not the much more unlikely scenario that they should both die in a common calamity. In view of this, predecease must be read as "failing to take" under the will.[194] The same applies *mutatis mutandis* for the English leading case, *Wing v Angrave*:[195] the failure of the will could have been avoided by a more liberal interpretation, focusing on what the spouses obviously intended. *Re Rowland*[196] should also be mentioned in this context. In that case Dr Rowland had even made provision for the eventuality that his death would coincide with that of his wife. A presumption of simultaneous death would here have led to a clear and reasonable result even on the basis of a less liberal approach towards the interpretation of wills.

The presumption of simultaneous death thus turns out to be the superior solution in every respect: it does not arbitrarily benefit one of the deceased persons at the expense of the other, it leads to reasonable results, and it can be rationalised much better, under the auspices of the presumed intention of a typical deceased, than a presumption of survivorship, whether based on age or gender.

190 See above A(1)(b).

191 *OLG Naumburg*, 2003 Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht 1014; D Weidlich, in *Palandt, Bürgerliches Gesetzbuch* (76th edn, 2017) § 1924, no 4. If a descendant does not survive the deceased, he is replaced, according to § 1924 (3) BGB, by the descendants related to the deceased through him. This is the principle of succession *per stirpes*. § 1924 (3) BGB has to be applied by analogy to cases where the presumption of simultaneous death according to § 11 Missing Persons Act applies.

192 Above A(1)(c).

193 Above, at n 16.

194 See Weidlich in *Palandt* (n 191) § 2069, no 1, according to whom the establishment of a substitute succession covers all situations in which the person instituted as first heir does not in fact become heir. Such liberal interpretation is not an infringement of the "Andeutungstheorie", prevailing in the German law of successsion, since the person who was to become heir was mentioned in the will and the testator's intention has thus found an (imperfect) expression in the will itself. Cf also Lord Chancellor Campbell (dissenting), *Wing v Angrave* 11 ER 397, para 202: "she [i.e. the deceased] has clearly intimated her intention that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect".

195 See above A(2) at n 20.

196 See above A(3) at n 23.

This has been recognised by an increasing number of jurisdictions over the last quarter of a century.[197] Scots law, too, recognises it, albeit only as far as spouses are concerned. But there is no reason for this limitation of the presumption's range of application. A mixed legal system such as Scotland is predestined to take up ideas such as this from the civilian tradition. That tradition, after all, did not end with the coming into force of the *Code civil*. George Gretton has repeatedly and emphatically pointed this out.

197 See also Art 32 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (easily accessible in O Radley-Gardner, H Beale and R Zimmermann (eds), *Fundamental Texts on European Private Law* (2nd edn, 2016) 108) which states, under the heading "Commorientes", that where two or more persons die in circumstances in which it is uncertain in what order their deaths have occurred, none of them is to have any rights to the succession of the other(s). This rule only applies if the succession of the persons involved is governed by different laws and if these different laws provide different solutions for the "common calamity" problem. Strictly speaking we are not dealing with a presumption here but that does not normally matter. For an assessment of Art 32, see Max Planck Institute for Comparative and International Private Law, "Comments on the European Commission's Proposal for a Regulation etc" (2010) 74 Rabels Zeitschrift für ausländisches und internationales Privatrecht 522 at 649–652.

Part 6:
The Law of Trusts

RESIGNATION AND JUDICIAL REMOVAL OF TRUSTEES: A SOUTH AFRICAN PERSPECTIVE

M J de Waal[*]

A. INTRODUCTION

In its comprehensive 2014 Report on *Trust Law*, the Scottish Law Commission explains the flexibility of the trust institution by giving the following examples of its wide range of contemporary uses:[1]

> [I]t is clear that the trust plays a crucial part in many areas of the law. These include contract and general commercial law, life assurance and pensions, property law, succession and family law. The part played by the trust in commercial structures, in particular, means that trust law is of great economic importance. Furthermore, trusts are widely used vehicles for investment and financial planning.

This statement is also true of the trust in South African law, a fellow mixed jurisdiction with which Scots law has so many points of contact. As far as the trust is concerned, the two jurisdictions share a fair degree of English common law influence but without ever having adopted the English equitable concept of an ownership divided or "split" between the trustee and the trust beneficiary.[2] Instead, the trusts in these two jurisdictions, as is the case with the trust in numerous other mixed and purely civilian jurisdictions, is premised on the concept of dual patrimonies (or estates, the term more commonly used in South Africa). This concept, so masterly explained by George Gretton as providing the foundation for "a trust without equity", entails that the trustee has two separate patrimonies: his or her own (private) patrimony and the trust patrimony.[3] The assets in the trust patrimony have only one owner, i.e. the trustee, with the trust beneficiary holding a personal right against the trustee in terms of which the latter can be held accountable to carry out the terms of the trust. This concept is regarded as being so firmly

* This chapter is based on research supported by the National Research Foundation (NRF) of South Africa. But all views expressed are the author's personal views.

1 Report on *Trust Law* (Scot Law Com No 239, 2014) para 1.2.

2 A Hudson, *Equity and Trusts* (8th edn, 2015) para 2.1. However, this is a somewhat simplistic way to put the matter. It would be more correct to say that the trustee has the "legal title" of and the trust beneficiary a "proprietary equitable interest" in the trust property: see e.g. M Haley and L McMurtry, *Equity and Trusts* (4th edn, 2014) para 1.31; Hudson, *Equity and Trusts* para 2.2.1; J E Martin, *Hanbury and Martin: Modern Equity* (19th edn, 2012) para 2.001.

3 G L Gretton, "Trusts without equity" (2000) 49 ICLQ 599. For numerous further references to discussions of the concept see Report on *Trust Law* (n 1) para 3.4 nn 3 and 14.

established in Scots law that the Commission considered it unnecessary to recommend putting it on a statutory footing.[4]

Despite its recognition of this basic point of departure, the Commission nevertheless produced a Report with reform proposals touching on numerous areas of Scots trust law. Though still falling short of a "comprehensive statutory statement of trust law in Scotland",[5] both the Report and the draft Trusts (Scotland) Bill flowing from it are impressive in its scope and detail. They open up a rich source for comparative research, also with a view to possible law reform of the South African trust which has so much in common with its Scottish counterpart.

Huge as the scope for comparative work may now be, the aim of the present contribution must necessarily be more modest. It addresses two very specific trust law issues on which reform proposals have been made – i.e. the resignation and judicial removal of trustees – and analyses these proposals in the light of the South African position. Although specific and technical, these issues are nevertheless rightly described by the Commission as "fundamental".[6] And even within the context of these two issues, it will be seen how much the two systems can learn from each other.

B. RESIGNATION

(1) The current position: the statutory power of resignation

Resignation as applied to trustees has been defined for Scots law as "the voluntary divestment of office during the subsistence of a trust and before the completion of its administration".[7] This definition is somewhat more elaborate than the one found in a standard South African work on the law of trusts, according to which resignation "is a mode by which a trustee loses office by his or her own expressed volition".[8] However, they amount to the same thing: resignation entails a voluntary decision by a trustee to continue no longer with his or her duties of trusteeship.

As simple as this may sound, the common law position in both jurisdictions was more complicated. The principle was that, in the absence of any enabling provision in the trust deed, a trustee was not entitled to resign except with the consent of the court.[9] As explained in a South African case, the common law principle had the effect that it was "not competent for a trustee to give up his/her fiduciary duties simply by electing no longer to fulfil them".[10]

4 Report on *Trust Law* (n 1) para 3.4. For recent appellate adoption of George's dual-patrimony theory, see *Ted Jacob Engineering Group Inc v Johnston-Marshall and Partners* 2014 SC 579 at para 90 per Lord Drummond Young.

5 Report on *Trust Law* (n 1) para 1.17.

6 Report on *Trust Law* (n 1) para 1.10.

7 W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) para 22.15.

8 E Cameron, M de Waal, B Wunsh, P Solomon and E Kahn, *Honoré's South African Law of Trusts* (5th edn, 2002) 225.

9 Wilson and Duncan, *Trusts, Trustees and Executors* (n 7) para 22.15; Cameron et al, *Law of Trusts* (n 8) 227. Wilson and Duncan para 22.15, however, point out that in Scots law there are authorities that seem to indicate that in certain circumstances (such as conflict of interests or physical disability) resignation without judicial sanction might have been valid at common law.

10 *Van der Merwe NO and Others v Hydraberg Hydraulics and Others* 2010 (5) SA 555 (WCC) para 17.

Though quite defensible from a dogmatic perspective, the common law principle was not satisfactory. The main concern, which is true with regard to both Scots[11] and South African law,[12] is that it is inadvisable to compel a person against his or her will to serve as a trustee. It is therefore not surprising that the common law position was amended by legislation in both jurisdictions, although much earlier in Scotland[13] than in South Africa.

The current Scottish position is set out in the Trusts (Scotland) Act 1921. The Act stipulates that, unless the contrary be expressed, all trusts shall be held to include the power to any trustee to resign the office of trustee.[14] However, this general rule is subject to the following exceptions:

(a) a sole trustee shall not be entitled to resign the office unless new trustees have been assumed or appointed by the court;[15]
(b) a trustee who has "accepted any legacy or bequest or annuity expressly given on condition of the recipient thereof accepting the office of trustee under the trust" shall not be entitled to resign unless otherwise expressly declared in the trust deed;[16]
(c) a trustee "appointed to the office of trustee on the footing of receiving remuneration for his services" shall not be entitled to resign in the absence of an express power to resign;[17] and
(d) a judicial factor shall not have the power to resign unless judicial authority is obtained.[18]

The Trust Property Control Act 57 of 1988 contains the South African arrangement:[19]

> Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master[20] and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.

The notable differences in approach between the Scottish and South African provisions are discussed in the next part in the light of the Scottish Law Commission's reform proposals.

11 Report on *Trust Law* (n 1) para 4.10.
12 Cameron et al, *Law of Trusts* (n 8) 228.
13 According to the Report on *Trust Law* (n 1) para 4.10, starting with the Trusts (Scotland) Act 1861 s 1.
14 Trusts (Scotland) Act 1988 s 3(a).
15 1921 Act s 3 proviso (1).
16 1921 Act s 3 proviso (2).
17 1921 Act s 3 proviso (2).
18 1921 Act s 3 proviso (3).
19 1988 Act s 21.
20 The Master of the High Court is a state official whose office has certain responsibilities with regard to, among other things, the sequestration of insolvent estates in terms of the Insolvency Act 24 of 1936 and the administration of deceased estates in terms of the Administration of Estates Act 66 of 1965. In addition, the Master has a number of supervisory functions with regard to trustees in terms of the 1988 Act.

(2) The Scottish Law Commission's reform proposals

It is clear from the Report that the Commission did not consider the current provision on resignation to be in need of a drastic overhaul. Its main focus was on whether two of the explicit exceptions to the power of resignation should be abolished. These two exceptions are those mentioned in proviso (2) of section 3 of the 1921 Act:[21] first, where a trustee has accepted a legacy, bequest or annuity expressly given on condition of the recipient thereof accepting the office of trustee; and, second, where a trustee has been appointed to the office of trustee on the footing of receiving remuneration for his or her services.

The Commission concluded that these two exceptions should indeed be abolished. Its first consideration was practical: it noted that there were very few cases on this provision and that this might be "a consequence of the common practice of including a clause in trust deeds reserving the right of resignation" under the circumstances mentioned in proviso (2).[22] Its second consideration had more to do with the principle of the matter: an unwilling trustee should not be compelled to serve in that position; and a trust might suffer "if a trustee were unable for personal reasons to give proper attention to its administration".[23] The Commission thus proposed that proviso (2) should be repealed.

In clause 5 of the Draft Bill the Commission proposes the following new provision on the resignation of trustees:

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) a trustee has power to resign office.
(2) But if the trustee is a sole trustee, the trustee may do so only after–
  (a) an additional trustee is assumed or appointed, or
  (b) a judicial factor is appointed to administer the trust.
(3) Any resignation given in breach of subsection (2) is of no effect.
(4) This section applies irrespective of when the trust was created but only as respects a resignation given after the section comes into force.

As indicated earlier, there are notable differences in approach between the Scottish and South African positions regarding the resignation of trustees. These differences in the main concern: (a) the respective points of departure; (b) the way exceptions are dealt with; and (c) the prescribed formalities for resignation.

(a) Point of departure: the respective default positions

Certainly the most significant difference concerns the very point of departure of the respective provisions. The Scottish default position is that a trustee has the power to resign unless the trust deed, expressly or by implication, provides otherwise.[24] In contrast, the South African default position is that a trustee has the power to resign regardless of what the trust deed provides.[25]

21 See (b) and (c) in B(1) above.
22 Report on *Trust Law* (n 1) para 4.10.
23 Report on *Trust Law* (n 1) para 4.10.
24 Draft Bill cl 5(1).
25 Trust Property Control Act 57 of 1988 s 21.

The obvious question is which one of these approaches is preferable. In my view this question should be answered by reverting to the basic consideration that provided the impetus for the legislative amendment of the common law position in both Scots and South African law. It will be recalled that this consideration holds that it is undesirable that a trustee should be compelled to serve in that position against his or her will. It underlies not only the departure from the original common law position in both jurisdictions but also the Commission's own proposed repeal of proviso (2) of section 3 of the 1921 Act. In the light of the importance of this consideration for the well-being of a trust and its beneficiaries, and also in the light of what seems to be its general acceptance, it is suggested that it should trump any provision in a particular trust deed. The Commission might therefore reconsider the wisdom of its default position.

(b) The way exceptions are dealt with

Another difference between the two approaches is that the proposed Scottish provision contains an explicit exception to the power of resignation, whereas the South African provision contains none. As indicated above, the Draft Bill stipulates that, if a trustee is a sole trustee, he or she may only resign after an additional trustee is assumed or appointed, or after a judicial factor is appointed to administer the trust.[26] With the proposed repeal of proviso (2), and because judicial factors are not in general dealt with in the Draft Bill,[27] the number of explicit exceptions has in fact now been reduced from four to only one.

However, despite this formal difference, the substantive legal position in the two jurisdictions remains the same. The South African position, premised on the common law, is explained as follows:[28]

> If resignation would prejudice the trust, the policy of giving effect to validly constituted trusts must at least temporarily prevail, and until a suitable successor is available override considerations of private convenience. Resignation would accordingly be possible only when there remains at least one further trustee capable of administering the trust or when the trustee who resigns arranges for the Master to appoint a substitute capable of administering the trust.

Although the legal positions are therefore substantively similar, it is suggested that the Scottish arrangement is nevertheless preferable. It not only prevents any possible legal uncertainty in this context but it also clearly sets out the conditions that must be fulfilled before a sole trustee can be allowed to resign.

(c) The prescribed formalities for resignation

A third difference between the Scottish and South African positions is that, whereas the proposed Scottish provision prescribes no formalities that must be complied with in order to make resignation effective, the South African provision does. The South African provision stipulates that a trustee may resign "by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors

26 Draft Bill cl 5(2)(a) and (b).
27 Report on *Trust Law* (n 1) para 4.10 n 17.
28 Cameron et al, *Law of Trusts* (n 8) 228.

or curators of the beneficiaries of the trust under tutorship or curatorship".[29] Although this procedure appears straightforward, it has already generated a number of uncertainties.

The first uncertainty concerns the possible interaction between the statutory provision and the terms of a particular trust deed. Must the statutory formalities be complied with in addition to any further formalities that might be prescribed in the trust deed? Case law seems to suggest an affirmative answer. Thus in a case where the trust deed prescribed that notice of resignation must be given to the co-trustees, the court found that, in order for the resignation to be effective, such notice must be given in addition to compliance with the statutory formalities.[30]

The second uncertainty concerns the question as to exactly when the resignation of a trustee takes effect in the light of the statutory formalities. Again the statute is silent and the courts had to come to the rescue. One case has suggested that resignation only takes effect, first, upon it being shown that the written notice was sent to the Master and the ascertained beneficiaries and, second, upon an acknowledgement by the Master of the receipt thereof.[31] This seems like a reasonable solution but the second requirement entails further practical difficulties owing to differing practices and situations in the various Masters' offices across the country.[32]

For an outsider it is not altogether clear what the proposed Scottish position with regard to formalities, if any, upon resignation is. As mentioned, the proposed new section does not refer to formalities and neither does the rest of the Draft Bill. Informal feedback suggests that the Commission made a policy decision that the Draft Bill should be less prescriptive than the 1921 Act regarding formalities and that the matter of styles should rather be left to practice.[33] The 1921 Act does contain a detailed arrangement,[34] elaborated upon in a schedule to the statute.[35] However, despite these detailed arrangements even the current position does not appear to be that clear. One of the standard Scottish texts on trusts states with reference to the current law that it is "uncertain" whether resignation has to be in writing; but that in practice "it is assumed that it is".[36]

The questions as to what is required for an effective resignation and from exactly which moment it would be effective are not merely theoretical. They often determine whether a particular trustee still had the power to act as trustee or whether a trust still had the required minimum number of trustees.[37] In the light of the uncertainties which have emerged in South Africa, as well as the apparent current uncertainty in Scots law, it is suggested that the Commission should consider a clear and

29 1988 Act s 21.

30 *Sidwell NO v Buisson NO and Others* [2015] ZAFSHC 177. See also *Van der Merwe NO and Others v Hydraberg Hydraulics and Others* 2010 (5) SA 555 (WCC) para 18; *Muller NO v Muller NO and Others* [2015] ZAGPPHC 41.

31 *Meijer NO and Another v Firstrand Bank Ltd and Another* [2012] ZAWCHC 23.

32 See further M J de Waal, "Law of succession (including administration of estates) and trusts" 2012 *Annual Survey of South African Law* 831 at 858–859.

33 See also Report on *Trust Law* (n 1) para 2.26.4. I thank Dr Andrew Steven for his kind assistance in explaining the Scottish position regarding this issue.

34 1921 Act s 19, dealing with "form of resignation of trustees".

35 Schedule A, dealing with "form of minute of resignation". See also the detailed exposition regarding "documentation" by Wilson and Duncan, *Trusts, Trustees and Executors* (n 7) paras 22.28–22.31.

36 G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) para 24.2.

37 See e.g. the cases cited in nn 30 and 31 above.

uncomplicated arrangement regarding formalities that is set out in the proposed section itself. Such an arrangement need not go into the matter of styles but it should, in my view, at least set out what is required for an effective resignation and indicate the exact moment from which a resignation would be regarded as effective. This could pre-empt the type of problems experienced in South African law.

C. JUDICIAL REMOVAL

(1) Removal in general

A useful definition for "removal" – formulated in the South African context but also reflecting Scots law – is that it refers to "those modes by which a trustee loses office without consent on good cause shown for removal".[38]

Both Scots and South African law allow quite a wide range of possibilities as far as the removal of trustees is concerned. One possibility that both recognise is that a trustee may be removed by his or her co-trustees or by beneficiaries. Legislation in each jurisdiction is, however, silent on the point. Whether removal by co-trustees or beneficiaries is possible or not in a particular instance thus depends on the provisions of the trust deed in question. But this will change for Scots law if the Commission's proposals are carried out. The Commission has recommended that these forms of removal should indeed be dealt with in statute and the Draft Bill contains the proposed sections.[39]

The second possibility – and the sole focus of this discussion – is removal by the court. Judicial removal in both Scots and South African law is currently possible on either a common law or a statutory basis. The Commission, once again, has proposed quite far-reaching reforms of the Scottish position. Both the current position and the reform proposals are discussed below.

South African law also provides for a third possibility. This is an official, but nevertheless extra-judicial, mode of removal which can be effected by the Master. This mode of removal is briefly referred to in the discussion below and the question is posed whether it fulfils a useful role in the spectrum of removal options.

(2) The current position regarding judicial removal

In both jurisdictions the common law affords the court the power to remove a trustee. In Scotland it is said that this power is available under the *nobile officium* of the Court of Session[40] and in South Africa it is regarded as forming part of the court's inherent jurisdiction.[41] However, basically the same broad test for the exercise of the power of removal is used. According to Wilson and Duncan the test in Scots law is that the court must be "satisfied that the continuance in office of the trustee concerned would be likely to prejudice or obstruct the due execution of the trust

38 Cameron et al, *Law of Trusts* (n 8) 225.

39 See Report on *Trust Law* (n 1) paras 4.25–4.32 and the Draft Bill cls 7 and 8.

40 Wilson and Duncan, *Trusts, Trustees and Executors* (n 7) para 22.37; Report on *Trust Law* (n 1) para 4.12.

41 *Sackville West v Nourse* 1925 AD 516; *Gowar v Gowar* 2016 (5) SA 225 (SCA) para 27; Cameron et al, *Law of Trusts* (n 8) 232.

purposes".[42] In the old South African case of *Sackville West v Nourse* the court stated that the test for removal is whether "the continuance of the trustees would prevent the trust being properly executed or would be detrimental to the welfare of the beneficiaries".[43]

In the light of the broadly similar tests for removal, it is not surprising that the specific grounds for removal that have emerged from case law in the two jurisdictions are also very much the same. By way of summary, it appears that the following will be typical grounds for removal:[44] a serious breach of trust; the persistent refusal of a trustee to carry out his or her duties as trustee; and the emergence of a conflict between the personal interests and the duties of a trustee. The grounds that would not, generally speaking, warrant removal are quite similar as well:[45] minor irregularities or technical illegalities; disagreement or disharmony among trustees not leading to actual deadlock; and mere hostility between a trustee and a beneficiary.

In Scotland legislation has supplemented this broad common law power with a much more specific statutory power of removal. In terms of this provision a court may remove a trustee on the grounds of "being or becoming insane or incapable of acting by reason of physical or mental disability or being absent from the United Kingdom continuously for a period of at least six months, or having disappeared for a like period ".[46] An application for removal can be brought "by any co-trustee or any beneficiary or other person interested in the trust estate".[47]

The South African statutory power of removal differs markedly. In fact, it does nothing more than give statutory force to the broad common law power, with the addition of a provision regarding standing to bring a removal application:[48]

> A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

Aspects of this provision are discussed below in the light of the Commission's reform proposals. But at this stage it is important to note that it is generally accepted that in South Africa the statutory power has not replaced the common law power.[49] The court therefore has parallel jurisdictions for the exercise of its power of removal.

42 *Trusts, Trustees and Executors* (n 7) para 22.37. See also Report on *Trust Law* (n 1) para 4.12.

43 1925 AD 516 at 527. See also *Gowar v Gowar* 2016 (5) SA 225 (SCA) para 28; Cameron et al, *Law of Trusts* (n 8) 233; F du Toit, *South African Trust Law: Principles and Practice* (2nd edn, 2007) 111.

44 For Scots law see Gretton and Steven, *Property, Trusts and Succession* (n 36) para 24.2; Wilson and Duncan, *Trusts, Trustees and Executors* (n 7) paras 22.37–22.38; Report on *Trust Law* (n 1) para 4.12. For South African law see Cameron et al, *Law of Trusts* (n 8) 233–235; Du Toit, *South African Trust Law* (n 43) 111–112.

45 See the texts in the preceding footnote.

46 1921 Act s 23.

47 1921 Act s 23.

48 1988 Act s 20(1). This section certainly reflects the broad common law test, although it is formulated from a different perspective.

49 See e.g. *Kidbrooke Place Management Association and Another v Walton and Others NNO* 2015 (4) SA 112 (WCC) at para 1; *Gowar v Gowar* 2016 (5) SA 225 (SCA) at para 27.

(3) The Scottish Law Commission's reform proposals

In its Report the Commission expressed the view that the current position in Scots law was "not satisfactory".[50] Its main concern was that it is potentially misleading for the statutory provision "to present only part of the picture".[51] The statutory provision relating to judicial removal should therefore deal with all possible grounds of removal and not only the limited ones currently found in section 23 of the 1921 Act. The Commission nevertheless shied away from proposing "detailed lists" of grounds for removal; instead, it recommended that these grounds should be set out "in fairly general terms".[52] It therefore recommended that both section 23 of the 1921 Act and the common law grounds for removal should be "replaced"[53] with the following provision, found in clause 6 of the Draft Bill:

(1) Where a trustee–
  (a) is unfitted to carry out the duties of a trustee,
  (b) purports to carry out those duties but does so in a way which is inconsistent with, or might be inconsistent with, a trustee's fiduciary duty,
  (c) has neglected the trustee's duties as trustee,
  (d) is incapable, or
  (e) is untraceable,

the court may, on the application of one or more of the other trustees, of a beneficiary or of any other person with an interest in the trust property, remove the trustee from office.

(2) The court ceases to have power at common law to remove a trustee.

(3) This section applies irrespective of when the trust was created.

Once again there are apparent differences in approach between the Scottish and South African positions. These differences in the main concern: (a) the status of the court's power at common law to remove a trustee; (b) the standing to apply for removal; and (c) the Master's role in South Africa in the removal of trustees.

(a) The status of the court's power at common law to remove a trustee

The Commission has thus recommended that (together with section 23 of the 1921 Act) the common law grounds for the removal of trustees should be "replaced" with the new statutory provision. At first blush this signals that the specific power available under the *nobile officium* of the Court of Session is to be abolished. This is indeed confirmed by section 6(2) of the Draft Bill which states expressly that the court "ceases to have power at common law to remove a trustee".

From a South African perspective this immediately raises the question as to the future status in Scots law of the broad common law test for removal that has developed over many years in both jurisdictions. This test – in its Scottish permutation that the court must be "satisfied that the continuance in office of the trustee concerned would be likely to prejudice or obstruct the due execution of the trust purposes" – appears to have stood the test of time in both jurisdictions and it

50 Report on *Trust Law* (n 1) para 4.15.
51 Report on *Trust Law* (n 1) para 4.15.
52 Report on *Trust Law* (n 1) para 4.15.
53 Report on *Trust Law* (n 1) para 4.19.

has also formed the basis of the more specific grounds for removal crafted by both the Scottish and South African courts.[54]

It is suggested that this broad test would indeed cover all the specific grounds for removal now listed in the Draft Bill.[55] The formulation of a broad test – rather than listing specific grounds for removal – would also have been more in harmony with the Commission's general philosophy of leaving the question of removal "to the discretion of the court for consideration in any particular circumstances which may arise".[56] The South African adherence to the broad test, derived from both the common law and the statutory provision, has not resulted in any legal uncertainty. But at the same time it has afforded the courts exactly the sort of flexibility alluded to by the Commission.[57]

(b) The standing to apply for removal

Clause 6 of the Draft Bill lists three categories of persons who would have the necessary standing to apply for the removal of a trustee (or, in the words of the Commission, who would be "entitled to petition").[58] They are, first, one or more of the other trustees; second, a beneficiary; or third, "any other person with an interest in the trust property".[59] The first two categories are very specific and it would normally be unproblematic to determine whether a specific applicant would have standing. The third category is more open-ended and a measure of discretion would be involved in determining the standing of an applicant.

The South African provision lists only two categories.[60] The first is very specific, i.e. the Master. The second corresponds with the open-ended Scottish category, i.e. "any person having an interest in the trust property". Not surprisingly there has not yet emerged any problem regarding the first category. Unfortunately, the same is not true of the second. The problem has its origin in an earlier statement of the Supreme Court of Appeal,[61] which was afterwards widely interpreted as meaning that only a trust beneficiary would fall into this second category.[62] However, in a more recent case the High Court rejected this interpretation.[63] The court concluded that the contentious statement by the Supreme Court of Appeal was meant to be applicable only in the context of the specific facts of that case and not "as a matter of generally applicable principle".[64] The court concluded that the second applicant in the case, although not a trust beneficiary, as the holder of a "housing interest" in the particular

54 See above at C.2.
55 Draft Bill cl 6(1)(a)–(e).
56 Report on *Trust Law* (n 1) para 4.17; and see also para 4.20 where reference is made to the preservation of the court's discretion.
57 See e.g. the recent cases of *Kidbrooke Place Management Association and Another v Walton and Others NNO* 2015 (4) SA 112 (WCC) and *Gowar v Gowar* 2016 (5) SA 225 (SCA). In *Tijmstra NO v Blunt-Mackenzie NO and Others* 2001 (1) SA 459 (T) the court even formulated a number of criteria for removal, based on the broad test as found in the 1988 Act s 20(1), which it considered of possible value in the context of the facts of that particular case.
58 Report on *Trust Law* (n 1) para 4.17.
59 Draft Bill cl 6(1). This corresponds with the current position in the 1921 Act s 23.
60 1988 Act s 20(1).
61 *Ras and Others NNO v Van der Meulen and Another* 2011 (4) SA 17 (SCA) para 9.
62 See e.g. *Theron NO and Others v Loubser and Others* [2012] ZAWCHC 143; *Nkotobe and Others v Bengu and Others* [2015] ZAECBHC 12; *Enslin and Another v Enslin* [2015] ZANWHC 26.
63 See *Kidbrooke Place Management Association and Another v Walton and Others* 2015 (4) SA 112 (WCC).
64 2015 (4) SA 112 (WCC) at para 18.

scheme for retired persons, did have a sufficient "interest in the trust property", and thus the necessary standing.[65] Moreover, the court said, a "co-trustee is an obvious example of someone who might not be a beneficiary, but who would undoubtedly have an interest in the trust property".[66]

This saga illustrates the wisdom of the Scottish formulation in the sense that the two "obvious" examples of persons who should have standing, i.e. co-trustees and beneficiaries, are explicitly mentioned. The third open-ended category gives a court sufficient discretion to determine the standing or not of other persons – as was well illustrated in the South African *Kidbrooke* case.

(c) The Master's role in South Africa in the removal of trustees

Under current Scots law the insolvency of a trustee and his or her conviction of an offence involving dishonesty are not, as such, grounds for removal in private trusts.[67] But a particular trust deed can of course provide that trusteeship terminates under such circumstances.[68] It is probably the case that, if necessary in a particular case, such a trustee can also be removed by a court under its common law power. However, "insanity" or "mental disability" is indeed grounds for judicial removal under the 1921 Act.[69]

In South Africa such eventualities can also be provided for in a particular trust deed. But there exists another possibility. The 1988 Act grants the Master an independent power to remove a trustee from office on certain clearly defined grounds.[70] These grounds include insolvency[71] and conviction of an offence of which dishonesty is an element or of any other offence for which the trustee has been sentenced to imprisonment without the option of a fine.[72] The other grounds are failure by the trustee to provide security as requested by the Master;[73] if the trustee has been declared mentally ill or incapable of managing his or her own affairs;[74] and if the trustee fails to perform satisfactorily any duty imposed by or under the statute or to comply with any lawful request by the Master.[75]

This mechanism thus affords an official, but still extra-judicial, method of removal that is particularly useful in instances where the trust deed is silent on the effect of these specified situations on trusteeship. It is not clear how frequently the various Masters do exercise this power but the relatively few court cases on the issue might be an indication that it does not cause any great practical difficulties.[76] Nevertheless,

65 2015 (4) SA 112 (WCC) at para 18.
66 2015 (4) SA 112 (WCC) at para 18.
67 Gretton and Steven, *Property, Trusts and Succession* (n 36) para 24.2. However, such events disqualify a person from being a trustee of a charity: Charities and Trustee Investment (Scotland) Act 2005 s 69(2).
68 Gretton and Steven, *Property, Trusts and Succession* (n 36) para 24.2.
69 Trusts (Scotland) Act 1921 s 23.
70 1988 Act s 20(2).
71 1988 Act s 20(2)(c).
72 1988 Act s 20(2)(a).
73 1988 Act s 20(2)(b).
74 1988 Act s 20(2)(d) (further including the situation where the trustee is by virtue of the Mental Health Act 18 of 1973 detained as a patient in an institution or as a state patient).
75 1988 Act s 20(2)(e).
76 But see e.g. *Ganie v Ganie* [2011] ZAKZDHC 66 where the court did set aside a trustee's removal by the Master because the latter failed both to give the trustee proper prior notice and to provide sufficient reasons for the removal.

it is clear that removal by the Master is more expeditious and less costly than a judicial process and that it also relieves the burden on the courts.

The Scottish Law Commission's reform proposals do not contain any recommendations regarding the effect on trusteeship of specific situations such as insolvency, conviction of a crime or mental illness. But where a need would arise to remove a trustee on one of these grounds (and the particular trust deed is silent on the matter), judicial removal would seem to be the only option available. In terms of the possible grounds for removal stipulated in the Draft Bill, a court would then have to be convinced that the deficiency in question renders the trustee either "unfitted to carry out the duties of a trustee"[77] or "incapable"[78] to continue in office.

D. CONCLUDING OBSERVATIONS

Even in the quite focused area of resignation and judicial removal of trustees, the Commission's reform proposals have generated much food for thought for both Scottish and South African trust lawyers. On resignation, I have suggested that the wisdom of the Scottish default position should perhaps be reconsidered and that the Commission should also consider setting out a clear and simple arrangement pertaining to formalities upon resignation. South African law, on the other hand, should consider following the Scottish position of making it clear in its statute that a sole trustee should not be allowed to resign unless there are other specified arrangements in place.

On judicial removal, I have questioned the wisdom of the Commission's proposal to abolish the court's power at common law to remove a trustee. It appears that the broad common law test for removal has not only stood the test of time in both Scots and South African law but that it has also formed the basis of the more specific but still remarkably flexible grounds for removal crafted by the courts in both jurisdictions. On the other hand, the Commission's proposal regarding who would have standing to apply for removal, reflecting as it does the current Scottish position, is certainly preferable to the South African formulation which has caused uncertainties in practice. Finally, I have suggested that the South African mechanism of official, but still extra-judicial, removal by the Master in certain clearly specified circumstances might be of interest to Scottish law reformers.

George Gretton has made a remarkable and lasting contribution to the understanding of the trust in civil law and mixed jurisdictions. He has done this, primarily, by his masterful explanation of the concept of patrimony as the key to unlocking the trust outside of the English common law.[79] But he has also shown a keen appreciation of the importance of another concept fundamental to an understanding of trust law, i.e. the concept of trusteeship as an office.[80] This entails

77 Draft Bill cl 6(1)(a).

78 Draft Bill cl 6(1)(d).

79 See above at A and Gretton, "Trusts without equity" (n 3). See also for a more recent contribution G Gretton, "Up there in the *Begriffshimmel*?" in L Smith (ed), *The Worlds of the Trust* (2013) 524.

80 For an exposition of this concept and recognition of the contribution of Tony Honoré in the development of the concept, see e.g. Gretton, "Trusts without equity" (n 3) at 617–618; M J de Waal, "The core elements of the trust: aspects of the English, Scottish and South African trusts compared" (2000) 117 South African Law Journal 548 at 565–567.

that there is an element of official control over trusts that is lacking in, for example, purely contractual arrangements. It is this concept that explains why a trustee may resign his or her trusteeship and why a court may remove a trustee – exactly the topics analysed in this contribution. In characteristic style, Gretton has recognised the doctrinal importance of judicial removal to the law of trusts in this way:[81]

> The fact that a beneficiary who is dissatisfied with his trustee may ask the court to appoint a new trustee is so familiar that we forgot how remarkable it is. Imagine a debtor who, if he is dissatisfied with his creditor, may ask the court for a better one. That is the trust . . . Trust is patrimony, plus office.

It has been my aim to illustrate not only the practical importance of this official dimension of trusteeship in both Scots and South African trust law but also that both jurisdictions have developed the mechanisms to deal with it as far as resignation and judicial removal of trustees are concerned. However, the Commission's reform proposals have now afforded trust lawyers the opportunity to reflect on the state of the current law and to consider the best way forward for appropriate law reform. In this effort we are fortunate enough to have at our disposal George Gretton's significant contribution to our proper understanding of the fundamentals of the trust in civil law and mixed jurisdictions.

81 Gretton, "Trusts without equity" (n 3) at 618.

TRUST, AGENCY AND *LEHMAN BROTHERS*

James Drummond Young

A. THE SCOTTISH TRUST AND OTHER FIDUCIARY RELATIONSHIPS

Trusts, or legal devices similar to trusts, have been in use in Scotland for many hundreds of years, and trusts in the modern sense have been in use since at least the early seventeenth century.[1] They are used to hold large amounts of property[2] and have been the subject of extensive legislation. Nevertheless, despite its fundamental importance to the structure of the legal system, the juridical nature of the Scottish trust was not the subject of detailed analysis until the 1990s. It was reasonably clear how trusts worked in practice, at least in typical cases. It was also clear that the conceptual basis for the Scottish trust was not the same as the basis for the English trust; the latter involves a division of property rights into the legal estate, held by the trustees, and the beneficial interest, which is held by the beneficiaries. The beneficial interest is equitable in nature, governed by a separate system of rules, equity, administered originally by the Court of Chancery and now largely by the Chancery Division of the High Court. The notion of an equitable interest has never been recognised in Scots law. Perhaps because the typical trust worked well in practice, it was not considered necessary to examine the underlying juridical nature of the Scottish trust.

That changed, however, with a series of articles in which George Gretton played a central part.[3] He proposed what came to be known as the "dual patrimony" theory, which was subsequently developed in articles by himself and Kenneth Reid. In essence, the dual patrimony theory is that, when a trust exists, the trustee has two patrimonies: an ordinary or general patrimony, and the special patrimony of the trust. Each patrimony has its own assets and liabilities, and the two patrimonies are distinct from each other. The beneficiary's rights[4] are personal rights against the

1 See Report on *Trust Law* (Scot Law Com No 239, 2014) paras 2.9ff.

2 The Scottish Law Commission estimated that funds held in Scottish trusts amounted to more than £500 billion: see Report *on Trust Law* (n 1) para 2.2.

3 The dual patrimony theory was first put forward by George Gretton. See G L Gretton, "Trust and Patrimony" in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996) 182–192. This was followed by another landmark article: G L Gretton, "Trusts without equity" (2000) 49 ICLQ 599. See also G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017) ch 23; K G C Reid, "Patrimony not equity: the trust in Scotland" (2000) 8 European Review of Private Law 427; and Discussion Paper on the *Nature and the Constitution of Trusts* (Scot Law Com DP No 133, 2006) Part 2.

4 It is competent to set up purpose trusts under Scots law; public purpose trusts (including charitable trusts) have existed for centuries, and private purpose trusts are also probably competent: see Report

trustee, to have the trust patrimony applied in accordance with the purposes of the trust. The dual patrimony theory has been accepted as the fundamental explanation of the Scottish trust in recent case law,[5] and in its recent Report on Trust Law the Scottish Law Commission expressed the view[6] that the law was clearly established in favour of the dual patrimony theory. They also noted that no other plausible theory had been advanced to explain the nature of a Scottish trust.

The duties and responsibilities of a trustee are fiduciary in nature; that is to say, the trustee must at all times act in the interests of the beneficiaries or the purposes of the trust, and unless expressly authorised to do so may not permit any conflict to arise between his or her own interests and the interests of the beneficiaries. A trust is not the only form of legal relationship that is subject to fiduciary duties. Similar duties apply to a range of legal relationships, including partners, company directors and, in some cases, agents.[7] Perhaps the most typical example of agents subject to fiduciary duties are solicitors, where it is well established that they must not permit any conflict between their own interests and those of their clients.

Although trustees and many agents are subject to fiduciary duties, an important difference exists between a trust and an agency relationship. Agency, although very wide and flexible in its potential ambit, is a personal contract, and does not confer any rights over property beyond a personal right. The trust, on the other hand, does affect property rights, and can be said to have quasi-proprietary effects, in that it prevails in the insolvency of the trustee, and also confers a substantial degree of protection against the alienation of trust property by the trustees. Furthermore, unlike agency, the trust is an institution directed specifically to the holding and administration of property. For this reason the two institutions must be kept distinct, and it should not be assumed that, just because both are subject to fiduciary duties, they can be equiparated.

B. THE BENEFITS OF A TRUST IN A COMMERCIAL CONTEXT

The distinction between a trust and other forms of fiduciary relationship, such as agency or partnership, is clearest in a commercial context. The primary advantage of a trust is that it protects against the insolvency of the trustee; if the trustee is sequestrated or placed in liquidation, administration or (formerly) receivership, the trust property remains held for the trust purposes. That proposition was definitively established in the leading case of *Heritable Reversionary Co Ltd v Millar*,[8] and it represents a fundamental principle of the law of trusts. The existence of a trust also

on *Trust Law* (n 1) ch 14. In a purpose trust the trust patrimony is devoted to the advancement of the trust purposes. The Scottish Law Commission thought that any person with a sufficient interest to sue, in the ordinary sense of that word, could take action to enforce such a trust: see Report on *Trust Law* para 14.9.

5 *Ted Jacob Engineering Group Inc v Johnston-Marshall and Partners* [2014] CSIH 18 at para 90, and *Glasgow City Council v Board of Managers of Springboig St John's School* [2014] CSOH 76.

6 Report *on Trust Law* (n 1) para 3.4.

7 The authorities are numerous, but among the more important are *McNiven v Peffers* (1868) 7 M 181, and the Partnership Act 1890 ss 29 and 30 (partners); *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 (company directors); and *Brown v Inland Revenue Comrs* 1964 SC (HL) 180 and *Park's of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36 (agents, and especially solicitors).

8 (1891) 18 R 1166 revd (1892) 19 R (HL) 43. See also *Turnbull v Liquidator of Scottish County Investment Co Ltd* 1939 SC 5, 1938 SLT 584.

confers protection against the disposal of the trust property by the trustee without consideration;[9] in such a case the transferee of the property can be compelled to restore it to the trust.[10] This may be important in the event of fraud or dishonesty on the part of the trustee. The existence of a trust does not, however, provide the beneficiary with protection against a disposal that is merely in breach of the trust purposes, because in such a case the title of the person who acquires the trust property is protected from challenge by section 2 of the Trusts (Scotland) Act 1961. Nevertheless, the practical advantages of a trust relationship are substantial.

In a commercial relationship the main benefit from using a trust is protection against insolvency. A further practical advantage is that an express trust can be set up relatively easily, with minimal formalities; provided that specific property is identified, all that is normally required is a straightforward written declaration that it is held in trust for particular purposes.[11] For these reasons the use of trusts for commercial purposes has greatly increased in recent years, although some examples, such as partnership, are of considerable antiquity.[12] In its Report on Trust Law[13] the Scottish Law Commission drew attention to a number of instances where commercial trusts are now in regular use. For example, parties to a commercial transaction may wish to isolate a fund for a specific purpose. This corresponds to the concept of escrow found in the law of England and Wales and other common law jurisdictions. An escrow is a legal arrangement under which money or other property is held by a designated party to await the occurrence of a future event. In Scotland trust arrangements of this nature are regularly set up by parties to a commercial development to deal with possible snagging problems, to ensure that funds are available in the event of the insolvency of one or more of the parties to the development. Trusts are used in a similar way to set up a fund to meet possible future environmental liabilities. Moreover, a trust can be used as a general form of security for the performance of a commercial contract; thus funds representing the price of goods or services may be paid to a trustee to be held until the goods or services have been satisfactorily provided and then paid to the supplier. In this way both parties are protected against the risk of insolvency or other non-performance.

Apart from protection against insolvency, setting up a trust to hold a fund destined for specific purposes can have a further important practical advantage: the fund can readily be segregated from the other assets of the trustee. Once a trust has been created, the trustee can set up a separate bank account to keep his own funds separate from trust monies, with advantages that are discussed below. Other separate accounts can be

9 Or possibly for inadequate consideration, at least in "strong" cases where it is clear objectively that the consideration is seriously inadequate. This would not, however, enable the beneficiary to claim that the trustee might have obtained a better price for the sale of the property; in such a case the beneficiary's remedy is not against the purchaser of the property but against the trustee, for negligence.

10 *Redfearn v Somervail* (1813) 1 Dow 50, 1 Pat App 707; *Taylor v Forbes* (1830) 4 W & S 444; *Macgowan v Robb* (1864) 2 M 943.

11 Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(iii) and see Report on *Trust Law* (n 1) para 3.15. In some cases intimation to the beneficiaries is required.

12 See the Partnership Act 1890 s 20. Another example is found in *Heritable Reversionary Co Ltd v Millar* (n 8) where a commercial company arranged for title to certain heritable property to be taken in the name of their manager. After he had retired from their service the manager was sequestrated. It was held by the House of Lords that the properties were held on trust for the company. Consequently, they did not pass to the trustee in sequestration.

13 Report on *Trust Law* (n 1) paras 3.14–3.17. See also Gretton and Steven, *Property, Trusts and Succession* (n 3) paras 24.17–22.28.

set up, for example with a stockbroker or investment manager, so that trust assets are segregated from other property. This assists with the practical administration of the trust funds, in that all those involved (who may be relatively junior employees) are reminded that the trust assets form a different patrimony from the trustee's own assets, and must be administered accordingly. The use of segregated accounts is important, because in the modern world most property is incorporeal, in the form of debts, bonds, shares and the like. The intangible – almost evanescent – nature of such property makes proper segregation essential. This is relevant to agency relationships.

C. TRUST AND AGENCY

When an agent, for example a solicitor or stockbroker, acts for a client, it is likely that the agent will require to administer what may loosely be described as client funds. This does not mean that the funds are the property of the client. Where, for example, an agent sells property for a client and receives the price from the purchaser's agent, or receives payment of damages or a debt on a client's behalf, the sum so received will normally take the form of a bank credit, which will be transferred into an account in the agent's name. Unless the account is designated as a trust or client account, that bank credit will strictly speaking be the agent's property, although it is obviously subject to the agent's fiduciary duties.[14]

It is obviously desirable that the holding of client funds should be properly regularised. In two relatively old cases involving the relationship of solicitor and client, *Macadam v Martin's Trustees*[15] and *Jopp v Johnston's Trustees*[16] the Court of Session appears to have achieved this objective by implying a trust. In the first of these cases, clients sent funds to their solicitor for the purpose of making a particular investment. The solicitor paid the funds into his own bank account, which was in credit at the time, but he died a few days later and his estates were subsequently sequestrated. It was held that, because the account was in credit throughout, the funds received from the client were distinguishable from the solicitor's own funds and that accordingly they did not fall into his sequestration. The court's reasoning was shortly stated, but it appears to have been accepted that the funds were held on an implied trust.

In *Jopp* a solicitor sold shares belonging to a client and lodged the proceeds in his own bank account, which was in credit. Two days later he used funds in the account to acquire deposit receipts in his own name. More than a year later he died insolvent, at which point he still had five of the deposit receipts. It was held, following *Macadam*, that the client and not the trustee in sequestration was entitled to payment of the funds on deposit. Once again, the basis appears to have been an implied trust of client's money, although the court's focus was primarily on the mixing of trust funds with the trustee's own funds and the manner in which those

14 The scope and extent of the agent's fiduciary duties will vary according to the nature of the agency. Agency relationships cover a wide range of scenarios, from long-term arrangements conferring wide discretionary powers in the agent to short-term arrangements where the agent transacts with significant amounts of the principal's property, or funds representing that property, as in the sale of heritable property, to very short-term arrangements on an ad hoc basis, for example to pay a debt or perform some other simple ministerial act. On fiduciary duties of agents, see L J Macgregor, *The Law of Agency in Scotland* (2013) ch 6.

15 (1872) 11 M 33.

16 (1904) 6 F 1028. See G L Gretton, "Constructive trusts: I" (1997) 1 EdinLR 281 at 302–303.

might be disentangled. The critical principle was that: "if a man mixes trust funds with his own, the whole will be treated as trust property, except in so far as he may be able to distinguish what is his own"[17]. Lord Justice-Clerk Macdonald appears to have thought that the solicitor was not "in the strict sense of the word"[18] the client's trustee, but that he was "under the obligations of trust", in particular to deal with the funds solely for the client's interest. This perhaps represents a failure to envisage a trust as an abstract legal institution, as against a particular form of deed such as a trust disposition and settlement setting up that institution, but the court's reasoning if properly analysed still appears to be that the client monies were held subject to an implied trust.

D. LIMITATIONS ON THE EFFECTIVENESS OF A TRUST: OVERDRAWN BANK ACCOUNTS AND SET-OFF

In *Macadam* the client monies were held in a bank account that remained at all times in credit; in *Jopp* they were ultimately held in the form of deposit receipts, which represented a credit with the bank. This made disentangling the client monies relatively easy. It is different, however, when the account is overdrawn. When funds are paid into an overdrawn account, they will normally be offset by the bank against the debit balance in the account.[19] Provided that the bank has no notice that trust monies are involved, the result will be that the trust asset, usually a debt due to the trustee, becomes the property of the bank and the rights of the beneficiary are defeated. This was established in *Thomson v Clydesdale Bank Ltd*,[20] a case where a stockbroker sold shares on behalf of trustees and received the proceeds in the form of a cheque drawn by the purchasers' stockbroker. That cheque was paid into the selling stockbroker's overdrawn bank account. This was in accordance with the normal practice of the Edinburgh Stock Exchange; the seller would normally receive the price of the shares in the form of a cheque drawn on the stockbroker's own account. In this case, however, the selling trustees' stockbroker absconded a few days after paying the funds into his overdrawn account. The result was described by Lord Watson as follows:

> When a broker, or other agent entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business, for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can show that the recipient of the money did not transact in good faith with his agent.
>
> In this case . . . [t]he payment to the bank was onerous in so far as concerned the [bank], because, whenever made, it operated in law as a discharge by them *pro tanto* of the broker's liability for the debit balance on his account . . .[21]

While the broker had been guilty of fraud on his customers, the trustees, that was

17 *Re Hallett's Estate* (1879–80) LR 13 Ch D 696, cited in *Jopp* (n 16) at 1035.
18 (1904) 6 F 1028 at 1035.
19 As liquid debts are normally involved, compensation will usually be possible under the Compensation Act 1592. In addition, it is standard practice for banks to insert contractual rights of set-off into the contractual conditions that govern bank accounts.
20 (1893) 20 R (HL) 59.
21 (1893) 20 R (HL) 59 at 61.

not relevant to the question with the bank unless it were coupled with bad faith on their part. The onus of proving bad faith rested with the trustees, and for this purpose negligence was not enough. In *Thomson* the bank had acted in good faith throughout, and was thus entitled to retain the benefit of offsetting the sum paid into their customer's account against the debit balance on that account.

Thomson was followed more recently in *Bank of Scotland v MacLeod Paxton Woolard & Co*,[22] a case where sums that had been obtained by fraud were paid into two accounts in the name of a firm of accountants. The sums were larger than any payments that had previously been made into those accounts, and the bank made inquiries to comply with money laundering legislation but had been unable to discover the true nature of any fraud. On that basis they complied with instructions to pay third parties by banker's drafts, and reimbursed themselves from the funds in the two accounts. Eventually, the nature of the fraud became apparent and the banks stopped all transactions on the two accounts.[23] The parties who had been defrauded claimed that they were entitled to the whole sums standing at credit of the accounts and that the bank was not entitled to take any credit for sums paid by means of banker's drafts. Lord Coulsfield held that the bank had acted in good faith and had given onerous consideration, in the form of issuing banker's drafts on the faith of the funds paid into the two accounts. Consequently, they had brought themselves within the principle that a party who receives funds in good faith and gives onerous consideration is not affected by any breach of trust that might have affected the funds in the past. The critical question was what the parties who had been defrauded had to prove in order to show that the bank was not in good faith.[24] After analysing English and Privy Council authority, Lord Coulsfield concluded that the correct standard appeared from the speeches in *Thomson*:

> [E]vidence of acts or omissions which might be described as showing wilful blindness, wilful or reckless failure to ask questions, commercially unacceptable conduct or any other form of doubtful behaviour, is evidence which can properly be considered, along with any other evidence in the case, in deciding whether an inference should be drawn that the person in question [the bank] was acting dishonestly, but . . . the question is not whether there was blindness or recklessness per se but whether there was dishonesty or improbity.[25]

The principle laid down in *Thomson v Clydesdale Bank* as applied and developed in *Bank of Scotland v MacLeod Paxton Woolard & Co* represents a major limitation on the protection accorded by a trust, as a bank receiving funds from a customer will normally act in good faith. Proof of bad faith is difficult; in this connection it should be recalled that banking transactions are normally carried out more or less instantly, and the sheer volume of business is such that detailed investigation is not possible. Obviously, money laundering legislation has to be complied with, but that is not something that will affect routine transactions with an established client, and money laundering legislation is in any event a matter of public law, which does not generally affect civil rights and obligations.

22 1998 SLT 258.

23 This involved the highly exceptional process of stopping payment of banker's drafts. This was justified by the emergence of clear evidence that some sort of fraud had taken place, although it took some time for the nature of the fraud to emerge.

24 1998 SLT 258 at 274C–D.

25 1998 SLT 258 at 276G–H.

Three further points should be noted. First, the risk that trust funds can be offset against the trustee's private borrowings can be mitigated if trust funds are held in a designated trust account, as the designation of the account as a trust account puts the bank on notice that the funds in the account are held for trust purposes, and that accordingly they cannot be offset against the debit balance in the trustee's own personal account.

Secondly, as a general rule, a separate account is only likely to be set up if there is an express trust. For this reason (among others) it is not usually satisfactory to rely on the implication of a trust into another type of fiduciary relationship, as occurred in *Macadam* and *Jopp*.

Thirdly, an even more complicated scenario may emerge when the bank itself acts as an agent for the purpose of receiving and making payments on behalf of a customer. This is exemplified by the decision in *Style Financial Services Ltd v Bank of Scotland*,[26] where an insolvent department store had received payments due by its customers to the pursuers, who provided an in-house credit card for the store. The payments were then paid into the department store's account with the bank. The pursuers had granted a mandate authorising the bank to credit that account with cheques drawn in their favour. It was held that the payments received by the bank were not subject to any trust in favour of the pursuers,[27] and that accordingly the bank was entitled to set the sums received from customers off against the debit balance on the department store's account. This decision is accordingly against the implication of a fiduciary relationship into a banking contract.

E. RECOGNITION THAT AN EXPRESS TRUST IS PREFERABLE

Thus, by comparison with an express trust, an implied trust carries a greater risk of losing funds through payment into an overdrawn bank account. Making use of an express trust and a designated trust bank account, segregated from other funds of the trustee, reduces this risk. Furthermore, an obvious practical reason supports the use of an express trust: the fact that the trust is express serves as a reminder to all those involved with its administration that a special fund is involved, which must be applied for the particular trust purposes. In this connection, it is significant that the administration of a commercial trust will typically involve a wider range of persons than an ordinary private trust, where frequently all important trust transactions will be authorised by a partner in the trust's solicitors. Thus the use of an express trust and the segregation of trust funds in a designated bank account should be of considerable practical assistance.

In the case of solicitors, while *Macadam v Martin's Trs*[28] and *Jopp v Johnston's Trs*[29] both appear to proceed on the principle that client monies are held on an implied trust, the practical limitations on the protection accorded by such a trust have been addressed in the regulations governing solicitors' accounts. The regulations now in force are the Law Society of Scotland Practice Rules 2011. Rule B6 governs *inter alia* funds that are received by solicitors for their clients, whether as a solicitor or as a

26 1998 SLT 851.

27 The relationship between bank and customer is normally one of debtor and creditor: *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

28 *Macadam* (n 15).

29 *Jopp* (n 16).

trustee (referred to as "clients' money"[30]), and the holding of those funds in a client account.

"Client account" is defined as a bank or comparable account "in the name of the practice unit [solicitor] in the title of which the word 'client', 'trustee', 'trust', or other fiduciary term appears".[31] Rule B6.3.1(a) obliges every practice unit (solicitor) to "ensure that at all times the sum at the credit of the client account . . . shall not be less than the total of the clients' money held by the practice unit". This has the effect of obliging all solicitors to maintain a separate client account, segregated from the firm's personal accounts, to which all clients' money must be credited.

Moreover, the account must be appropriately designated, using words such as "client" or "trustee", to ensure that the fiduciary nature of the account is clear. That will have the effect of impressing the sums in the account with an express or implied trust, thus separating those sums from the solicitor's own funds. Provided that this is done, the problems that arose in cases such as *Thomson v Clydesdale Bank Ltd*[32] and *Bank of Scotland v MacLeod Paxton Woolard & Co*[33] should be greatly reduced, if not avoided. Moreover, the Law Society of Scotland Practice Rules represent a clear recognition of the importance of segregating all funds held in a fiduciary capacity and doing so in express terms, in such a way that it is plain that the funds are held in trust.

F. *LEHMAN BROTHERS*

(1) General

In the course of the Scottish Law Commission's recent project on the law of trusts,[34] the Commission had occasion to consider the use of nominees to hold investments.[35] The collapse of Lehman Brothers in 2008 led to prolonged litigation in the English courts, and the Commission considered the decisions of the lower courts and the underlying regulations governing funds held by financial intermediaries. They concluded that there was an anomaly in the regulations that governed the holding of clients' money by investment intermediaries in Scotland.

Section 139(1)(a) of the Financial Services and Markets Act 2000 provides the Financial Services Authority with power to make rules which result in "clients' money being held on trust". So far as England and Wales were concerned, that power to make use of a trust was implemented, and it was the trust arrangements that were considered in the Lehman Brothers litigation. So far as Scotland is concerned, however, section 139(3) of the 2000 Act provided that in the application of subsection (1) to Scotland the reference to holding money on trust should be read

30 Law Society of Scotland Practice Rules 2011, rule B6.1.1.
31 Law Society of Scotland Practice Rules (n 30).
32 *Thomson* (n 20).
33 *Bank of Scotland* (n 22).
34 The Commission's final analysis of the law and its recommendations are found in its Report on *Trust Law* (n 1).
35 This issue is considered in the Discussion Paper on *Supplementary and Miscellaneous Issues relating to Trust Law* (SLC DP No 148, 2011) paras 5.3–5.12, and in the Report *on Trust* Law (n 1) paras 8.24–8.28, notably at paras 8.25–8.27. The then Chairman's letter of 28 September 2007, addressed to the Advocate General, is found at Appendix A to the Discussion Paper and see also para 5.7. The letter was largely written by George Gretton, who was then a Commissioner.

as a reference to "its being held as agent for the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him".

The Commission were unable to understand why there should be a difference between Scots law and English law in this respect, since agency, without a trust, conferred a lesser degree of protection on the client. Consequently, the Chairman of the Commission[36] wrote to the Advocate General on 28 September 2010 to suggest that, in a proposed reform of the legislation in this area, the limitation in Scots law to the use of agency should be removed and that, as in the rest of the UK, it should be permissible to use a trust to protect clients' money. This would reflect the advantage of a trust in clearly segregating clients' money and making it plain that such money was held for trust purposes.

The Commission's suggestion was adopted by the UK Government, and incorporated into the amended section 137B(1) of the 2000 Act.[37] This subsection permits the rules relating to the handling of clients' money in Scotland to make provision for the holding of such money on trust. Nevertheless, the Lehman Brothers litigation subsequently reached the UK Supreme Court in 2011–12 in *Lehman Brothers International (Europe) v CRC Credit Fund Ltd*[38] and in the course of his opinion in the case Lord Hope of Craighead made certain comments about the Commission's letter. The decision is primarily concerned with the construction of Chapter 7 of the Client Assets Sourcebook (CASS 7), which had been issued by the Financial Services Authority under section 138 of the 2000 Act and required clients' money to be held on trust. Such a provision would have been incompetent in Scotland because section 139(3) of the 2000 Act restricted Scottish regulations to a relationship with agency rather than trust. Thus the substantive issues in *Lehman Brothers* were not directly relevant to Scots law.

The court held that the fiduciary duties imposed by CASS 7 required to be construed in accordance with the objectives of the relevant EU Directives,[39] in such a way as to achieve a high level of protection for clients' money by the prompt and scrupulous segregation of such funds. That general policy would obviously apply in Scotland. The majority of the court[40] held that the protection of clients' money operated in favour of all clients whose funds ought to have been segregated as clients' money and not merely in favour of clients whose funds had actually been so segregated.[41] Furthermore, all identifiable client monies should be included in the pooling exercise, not merely the funds contained in segregated accounts. The past funds that had been deposited with Lehman Brothers and paid into the firm's

36 The present writer.

37 Enacted by the Financial Services Act 2012 s 24(1).

38 [2012] UKSC 6, [2012] Bus LR 667.

39 Council Directives 2004/39 OJ 2004 L145/47 and 2006/73 OJ 2006 L241/49.

40 Lords Clarke, Dyson and Collins; the crucial passages are found at paras 109–113, 145, 147, 159–169 and 171. Lords Hope and Walker dissented on all of the substantive issues.

41 In English equity trusts or equivalent relationships, involving equitable (beneficial) interests in property, are frequently inferred from contracts in situations where in Scotland the parties would be restricted to personal rights. Perhaps the clearest example of this is the estate contract: when in England and Wales a contract is concluded for the sale of real property (land), the purchaser acquires an equitable interest in the property, which confers quasi-proprietary rights and prevails in the insolvency of the seller. This has no parallel in Scots law, although it may perhaps be a source of some of the much-criticised reasoning in *Sharp v Thomson* 1997 SC (HL) 66.

ordinary accounts following the last occasion when clients' money had been segregated should be included in the pooling exercise.

(2) Scots law

Lord Hope agreed that the treatment of client funds should be based on the policy in the EU Directive, but disagreed with the majority on how that policy should be followed at a practical level. Although the case was concerned only with the protection of clients' money in England and Wales, Lord Hope devoted a significant part of his opinion to the question of how clients' money might be protected under Scots law. He referred to the decision of the Court of Session that he had delivered in *Council of the Law Society of Scotland v McKinnie*,[42] to the decision in *Jopp v Johnston's Trustee*,[43] and to the above-mentioned letter from the Scottish Law Commission to the Advocate General. He suggested that the reason for the different treatment of Scots law in section 139 of the 2000 Act lay in the reasoning in *Jopp*, and that in accordance with that reasoning adequate protection should be obtained through the fiduciary relationship of agent and client:

> The relationship from start to finish is one of agency. At no stage did the money cease to be the client's money and become the property of the agent.[44]

He concluded:

> But it is respectfully seems to me that the direction in section 139(3) of the 2000 Act that the reference to money being held on trust is to be held as a reference to its being held as agent offers a level of protection that is no less effective. This is because it is to be assumed that the relationship between the agent and the client is a fiduciary relationship of the kind identified in *Jopp v Johnston's Trustee* . . .[45]

With all due respect, the conclusion that holding funds as agent offers a level of protection equal to that of a trust seems mistaken, both at a theoretical and at a practical level.

First, at a theoretical level, agency and trust are distinct. They both involve fiduciary relationships, but the critical point is that trust is a fiduciary relationship aimed at the holding of property for defined purposes. Agency is not so limited. It is a form of contract[46] of very wide application, and does not inevitably involve the agent's managing the client's money or other property. In some cases, agency can involve the agent's using his own funds for the principal's purposes and subsequently obtaining reimbursement from the principal.[47] Furthermore, the nature and extent of the fiduciary duties that apply to an agency relationship can vary greatly, according to such factors as the level of discretion that the agent has in managing the principal's business and the general nature of the tasks that the agent is charged with performing.

42 1991 SC 355.
43 *Jopp* (n 16).
44 *Lehman Brothers International (Europe)* (n 38) at paras 14–15.
45 *Lehman Brothers International (Europe)* (n 38) at para 22.
46 It is traceable back to Roman law, where the consensual contract of *mandatum* covered gratuitous agency and a number of more complex relationships, usually structured around *locatio conductio*, or hire, functioned in a manner equivalent to non-gratuitous agency in the modern law.
47 As where a solicitor pays outlays in litigation without obtaining any payment from the client; many comparable examples can be imagined.

Secondly, also at a theoretical level, the contract of agency is personal in nature. It does not in itself have what may be described as the quasi-proprietary effects of a trust, in the form of the separation of two distinct patrimonies. In particular, there is no general principle in the law of agency that the patrimony of the principal should be separated from the agent's own personal patrimony. Indeed, in agency relationships governed entirely by the common law (which would exclude solicitors and financial intermediaries) it is not unusual to find funds due to the principal mixed with the agent's own funds.

Thirdly, at a practical level, it is simply wrong to say, in relation to cases such as *Jopp*, that the money held by the agent did not cease at any stage to be the client's money and become the property of the agent. In *Jopp*, when the client's shares were sold, the proceeds were paid into the solicitor's bank account, in a manner that clearly accorded with normal practice at the time. The consequence of paying the funds into a bank account is, technically, that the funds become the property of the bank and are replaced as an asset by the debt owed by the bank to its customer. As long as the account remains in credit, it is not difficult to identify the part of that debt that is due to the client, as occurred in *Jopp*. Where, however, the agent's account is overdrawn, the difficulties considered in *Thomson v Clydesdale Bank*[48] arise. Unless it has notice of a breach of fiduciary duty, the bank is entitled to set off the funds received against the agent's overdraft, discharging *pro tanto* the agent's liability to the bank. In that way any "asset" of the client simply ceases to exist, and tracing becomes impossible. No mention of this problem is made in *Lehman Brothers*.

Fourthly, again at a practical level, because a trust is a legal device aimed at the holding of property for defined purposes, with separation of the two patrimonies, it is a natural and obvious step to hold all funds that are trust property in a defined trust account, segregated from the trustee's own account. Segregation of assets confers great practical advantages, which is clearly why it has been adopted for clients' funds held by solicitors and now for clients' funds held by financial intermediaries. The practical importance of segregation does not appear to have been appreciated in the dissenting opinions in *Lehman Brothers*.

If the facts of *Lehman Brothers* had occurred in Scotland, with merely an agency relationship in place rather than a trust of client's funds, there would have been no obligation to segregate client funds, and the individual clients would only have had a personal right to funds in the name of Lehman Brothers. Such a right would probably have been of limited value in Lehman's insolvency. Furthermore, the need for a trust to protect clients of a financial intermediary is recognised in certain of the authorities cited in the UK Supreme Court, in particular by Lord Collins.[49] These indicated that in the Gower Report of 1984,[50] which preceded the Financial Services Act 1986, it was stated that protection for investors could only be achieved by the segregation of client's money and investments from the firm's money and investments in such a way that beneficial ownership (in the English sense) remained with the clients; that would require a trust for the clients. That is surely in accordance with the position in Scots law, where segregation on trust is necessary, and is not achieved

48 *Thomson* (n 20).
49 *Lehman Brothers International (Europe)* (n 38) paras 186–188.
50 Review of Investor Protection (1984) (Cmnd 9125) para 6.31.

by a mere relationship of agency, notwithstanding the fiduciary nature of such a relationship.

For these reasons, it is thought that the suggestion in *Lehman Brothers* that in Scots law an agency relationship would protect client funds as effectively as a trust is simply mistaken. A trust provides greater protection, both because of its conceptual structure and because of the practical consequence that funds are segregated in a separate account to which the trustee and its creditors have no recourse.

This has, ultimately, been recognised in the amendments that have been made to the Financial Services and Markets Act 2000 in relation to Scotland, in particular the enactment of the new section 137B, which sets up a statutory trust. The same is true of rule B6 of the Law Society of Scotland Practice Rules 2011, and in particular rule B6.3.1(a), which compels solicitors to segregate client funds in a clearly designated account. For the reasons that this essay has sought to address, it is thought that such a trust has manifest advantages, at both a conceptual and especially at a practical level.

Agency and trust are distinct relationships, and should not be confused. It is the trust that provides protection against insolvency, through the separate patrimonies of the trustee and the trust. In commercial relationships, that separation can be usefully exploited. To provide full protection, however, it is important that an express trust should be set up and that trust assets should be properly segregated from the trustee's personal assets through the use of separate trust accounts.

Part 7:
Some Reflections

SOME REFLECTIONS

George L Gretton

A. ON MY LIFE AS AN ACADEMIC

Tuesday 1 September 1981. My first day. Old College was deserted. I walked down silent corridors and chapped on locked doors. Eventually I found the Faculty's administrator, Bill Bell. He was surprised to see me: "I thought you weren't coming till next month." Since I had resigned from my previous post – assistant solicitor at Messrs Ketchen & Stevens WS – I had a sudden panic that I had arrived too soon, and would thus miss a month of salary. Given my hand-to-mouth circumstances at the time, this would have been disastrous. (Happily, I was not mistaken.) An office? No, he hadn't an office for me. Since I showed no signs of turning round and disappearing, he put me in Bill Wilson's office. Where Bill was I do not recall, but I spent much of the next couple of weeks happily browsing the shelves of the then Lord President Reid Professor of Law, and learning much about partnership law.

How much has changed since September 1981? One must not exaggerate: the changes have been large but not everything has changed; the story has been one of evolution, not revolution. Some highlights.

First, those were the pre-computer days. In 1981 academics generally composed with pen and paper, or dictated; the support staff (a term then not yet in use) typed. When I arrived I was one of the few who could type. I asked for a typewriter. The request was refused: typing was for the support staff. I brought in an old portable, and all my early publications were hammered out on it: clackety-clackety-clack. Later I bought an early home computer, a Sinclair QL. Those days did at any rate have the great blessing of being free from email. (I received my first email on Monday 4 May 1992. Its time was 10.54 am and it was from Kenneth Reid.)

The "no equipment for academics" rule was bureaucratic, not financial, but in fact 1981 marked the onset of austerity. That year the Government announced major reductions in tertiary education funding. For reasons that I cannot now recall, my contract had been agreed in the summer of 1980, although I was not to take up my duties until about 12 months later. A few weeks after I arrived, the Dean told me with more candour than tact that my arrival was awkward and that the University had been on the verge of asking me not to come. The difference in the financial environment between now and then, both for the School of Law and the University as a whole, is remarkable.

One campaign I embarked upon soon after arriving concerned Old College itself. The quadrangle's use as a parking lot shocked me: the contrast with the enlightenment

ideals of the architecture was painful. This campaign brought me into conflict with the then Principal. Others joined the fight, and eventually the change was made. I would like to see a plaque put up: "Old College. Construction begun August 1789. Completed September 2011."

What else to add to my random list? Student numbers? A huge increase. Staff numbers – both academic and support – have likewise grown. The RAE/REF? My views on that subject are too unacceptable to be allowed into print.

One more thought. Back in 1981, it must be admitted, we were a bit parochial. Visits by others to us, or by us to others, whether academics or students, were uncommon, and visits to or from places outwith the UK were rare. That has changed partly because the world has changed, but even more it has changed because Edinburgh Law School has changed: parochial no more.

I have been lucky. The years since 1981 have been a fascinating, almost intoxicating, time in the history of law in the UK, not least in Scotland, and to have been at Edinburgh, involved as a teacher, scholar, and legal adviser to government, is to have been blessed by fortune.

Had a gypsy fortune-teller in 1981 said that she could see a festschrift in the womb of time, I would have laughed. With all my heart, I thank the editors and the contributors for this honour beyond my deserts.

B. ON LEGAL SCHOLARSHIP

At school I was taught how to analyse texts, to tease out their meaning, to detect incoherence, ambiguity, *non sequitur*, *petitio principii*. Then at university all this was reinforced and developed. In my first degree I studied philosophy at a time when the focus of debate was often less on philosophical problems as such than on working out what meaning philosophical questions, and philosophical discussions, had, if any: "what does this question or text *actually mean*?" And it turned out that many questions were muddled and many philosophical texts incoherent. Perhaps the master of the "what does this actually mean?" approach was someone little known to the wider world, G E Moore.[1] This approach was not logical positivism, which by the time I went to university was in any case long out of fashion, and which always struck me as wrongheaded, but something more practical and (at least in principle) without metaphysical baggage. I learnt not to be awed by texts, but to see that many are less precise and less coherent than they may seem. I learnt textual scepticism: I learnt – something not so easy to learn – namely *how to not to understand something*. "I don't understand" is an important intellectual muscle.

When I came to study law, the "what does this actually mean?" approach gave me something that many of my fellow-students seemed to lack. Of course, sophisticated reading comes with age and intellectual experience, and most of my fellow-students were school-leavers, but nevertheless I owe more than I can say to what might be called the school of Moore. To tackle enactments, cases, juristic texts, treaties, official reports, one needs the power of sceptical reading. I wish that law students would nod less and struggle more.

1 George Edward Moore (1873–1958).

Another thing I brought with me to the study of law was the philosophy of science of Karl Popper,[2] including ideas added by scholars influenced by him, notably Imre Lakatos.[3] The core idea is simple: science does not proceed merely by the accumulation of data, nor can theories be proved; rather one seeks to frame hypotheses to explain the empirical data, such hypotheses always being tentative, and always sufficiently definite as to be capable of falsification. Much is captured by the title of a book of Popper's, my favourite, *Conjectures and Refutations: The Growth of Scientific Knowledge* (1963). One can, however, never satisfactorily account for all the data. In science, there are always anomalous data, many of which eventually turn out to have been caused by instrumentation error, statistical mistakes, human error and so on. Indeed, as Kant had already said, there are no pure, raw, data anyway. So there is a two-way – I hesitate to say dialectical – process whereby unprovable but in principle falsifiable hypotheses may be undermined by, and may themselves also undermine, empirical data. (Of course, this is a mere nutshell.)

How does all this concern law? For law, the data are the primary sources (if one includes case law under that term, though the primary/secondary distinction is itself a problem). The jurist's task is to frame hypotheses to explain the data. The data vary in their rawness, from, say, a one-sentence case in *Morison's Dictionary* from the sixteenth century, to a subtle and highly-theorised discussion in *Bell's Commentaries*. (Unlike science, the data often contain theorisations by judges or jurists. The difficult implications of already theorised data cannot be explored here, except to say that such theorisations must not be accepted as fully determinative.) Any hypothesis that fits *all* the data is almost certainly a bad one, resorting to ad hoc or degenerative (Popperian terms) manipulation. A good hypothesis must respond to the data but cannot be wholly determined by them, while the data are already to some extent theorised. So: the jurist must not merely accumulate data, but must theorise; the theories must be determinate; they must shun the ad hoc as far as possible (though that is often impossible); they must respond to the case law, but the relationship between theories and case law has to be two-way, which means that the jurist must be ready to cast overboard cases that he or she concludes to be wrong, as scientists must sometimes reject data; to put it another way, sometimes theories must be dumped in the light of cases and sometimes cases must be dumped in the light of theories. There is nothing so practical as a good theory.

The analogy of juridical and natural science must be imperfect. But it is something that I brought with me to law. One type of mediocre legal scholarship is the mere accumulation of data; one type of mediocre legal teaching is the mere serving-up of data like limp fried eggs on a hotel breakfast hotplate. And there is another type of mediocre teaching and scholarship: all nebulous theory, of no use to God or man. Kant said it all, in words that I first read when I was 19 or 20: "Thoughts without content are empty: intuitions without concepts are blind."[4]

Law is neither as determinate as bad books and bad teaching imply, nor as indeterminate as the critics assert. Perhaps one day there will be a statue in Edinburgh's High Street, or at Dirleton in East Lothian where he lived, to Lord Dirleton, who wrote *Some Doubts and Questions, in the Law, Especially of Scotland*

2 Sir Karl Popper (1902–94).

3 Imre Lakatos (1922–74)

4 I Kant, *Kritik der reinen Vernunft*, A edn (1781) 51 and B edn (1787) 75: "Gedanken ohne Inhalt sind leer; Anschauungen ohne Begriffe sind blind" .

(1698), a work known as *Dirleton's Doubts*. He understood the determinate and the indeterminate. To the statue let's add the Lord Dirleton Society.

C. COMPARATIVE LAW

At first I did not much concern myself with comparative law, being too busy enjoying the feast of Scots law to attend to other systems. But when I did so I was fascinated. I remember as a student, browsing in the library, happing across *Wille's Principles of South African Law* – it must have been the sixth or seventh edition. That moment I will never forget: here was another system of private law that was akin to Scots law: *we were not alone*. Thus began my interest in Roman-Dutch law.

After I became a lecturer I was involved in teaching the "Eurolawyers" or "Eurodevils", a group of young lawyers from various places in Europe who, funded by the British Council, visited the UK, some based in London and some in Edinburgh. Part of the annual visit was academic. I saw that to teach them I needed some knowledge of their own systems. I could not study everything; I did the obvious thing and began to look at the two nodal continental systems, French and German law. Thus, perforce, I became an amateurish comparatist, though with weak French, and weaker German, and mere smatterings of some other languages, a true comparatist I could never be.

But my comparativism, however amateurish, has been important to me. For instance, without some knowledge of French scholarship I could not have arrived at the patrimonial theory of the trust, and my debts to German legal thought are too extensive to list. (Some of them are in the Land Registration etc (Scotland) Act 2012.) And it seems to me that comparative law (a deathly phrase, alas) should be part of what legal academics do. Comparative law is the *Beruf unserer Zeit*.

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A Timeline

1950	Born 10 November, Birmingham
1972	BA (Dunelm)
1978	LLB (Edin)
1978–80	Apprentice, Messrs Ketchen & Stevens WS
1980	Solicitor, Scotland
1981	Writer to the Signet
1981	Lecturer in Law, University of Edinburgh
1989	Senior Lecturer in Law, University of Edinburgh
1992	Reader in Law, University of Edinburgh
1994	Lord President Reid Professor of Law, University of Edinburgh
2002	Fellow of the Royal Society of Edinburgh
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PUBLICATIONS BY PROFESSOR GEORGE LIDDERDALE GRETTON

Andrew J M Steven with help from George L Gretton

BOOKS

1987	*The Law of Inhibition and Adjudication* (Butterworths, 1987)
1991	*A Guide to Searches* (Aberdeen University Press, 1991)
1993	(with K G C Reid), *Conveyancing* (W Green, 1993)
1996	*The Law of Inhibition and Adjudication* (2nd edn, Butterworths/ Law Society of Scotland, 1996)
1999	(with K G C Reid), *Conveyancing* (2nd edn, W Green, 1999)
2000	(with K G C Reid), *Conveyancing 1999* (T & T Clark, 2000)
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2005	(with K G C Reid), *Conveyancing 2004* (Avizandum Publishing, 2005)
2006	(with K G C Reid), *Conveyancing 2005* (Avizandum Publishing, 2006)
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2008	(with K G C Reid), *Conveyancing 2007* (Avizandum Publishing, 2008)
2009	(with K G C Reid), *Conveyancing 2008* (Avizandum Publishing, 2009)

2009	(with A J M Steven), *Property, Trusts and Succession* (Tottel Publishing, 2009)
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2016	(with K G C Reid), *Conveyancing 2015* (Avizandum Publishing, 2016)
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