Assignation

STUDIES IN SCOTS LAW

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VOLUME 1

Assignation

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EDINBURGH LEGAL EDUCATION TRUST
2008

Published by
Edinburgh Legal Education Trust
School of Law
University of Edinburgh
Old College
South Bridge
Edinburgh
EH8 9YL

First published 2008

ISBN 978-0-9556332-0-1

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

Typeset by Etica Press Ltd, Malvern
Printed and bound by Bell & Bain Ltd, Glasgow

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For Gilbert, Mary, Murray and Keith

Preface

This work represents a revised version of a thesis on the 'Transfer of Money Claims in Scots Law' submitted to the University of Edinburgh for the degree of Doctor of Philosophy in August 2005, defended in January 2006 and awarded in June 2006. The focus is on the general part of the law of assignation. I do not cover special part subjects in any detail. There are two further points about the nature of the work. One is style. The other is content.

First, style: a doctoral thesis is written over a long, often formative, period of time. At the outset, the writer writes though he has no experience of writing. By the time the writer has gained some experience, often from mistakes, it is too late. For the doctorate is then already written. Doctoral theses, in short, rarely contain good writing and are thus rarely good reading. And I fear this work, in places, is no exception.

Second, content: few legal systems can be as exciting to research as Scots law: it is old, sometimes cosmopolitan and often undiscovered. The PhD student has the time and, hopefully, the inclination, to arm himself with a paper knife and hack his way through unopened sources. This means going back and starting where, in other systems, even a couple of monographs a century would have preserved the state of contemporary law for posterity. The reader should not be surprised, therefore, to see numerous references to old authority. If antiquarian sources have any home, it is in the footnotes of a doctoral thesis. A thesis, it must be emphasised, is not a practitioner's handbook. But, be that as it may, in this subject more than most, the Scots law of assignation has been based firmly on principle. Sometimes sources are old because they form solid and durable foundations. A modern case on the point, though useful, would only confirm what we already know.

Too many people to mention individually have generously assisted me, in many ways: to all of you, my thanks. But two people and one patrimony deserve special mention.

The patrimony is the Edinburgh Legal Education Trust. It was the generous scholarship offered by the Trust which first suggested the opportunity of doctoral research on Scots law. It would not have been possible otherwise. Let its patrimony flourish.

The two people are Reinhard Zimmermann and George Gretton. Professor Zimmermann generously provided me with the opportunity to work for a year at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg. The experience was invaluable and memorable; and the opportunity to use the resources in the Institute's unrivalled library was a privilege indeed. Professor Zimmermann was an understanding and inspiring mentor. For the kindness and generosity extended to me by all members of the Institute and, in particular, by Professor Zimmermann, I will be forever grateful.

My greatest debt of gratitude is to Professor George Gretton. He acted as the primary supervisor of the thesis. He read more drafts than I am sure he cares to remember; and the many penetrating criticisms that he offered improved the thesis immeasurably. I learned much from him. Indeed, if there was any note of sadness on completing the thesis, it was that our regular and lively meetings had to come to an end. Again, my thanks.

I am also enormously grateful to Kenneth Reid and Margaret Cherry for their advice, assistance and patience in guiding me through the publication process.

With these acknowledgements I need hardly mention that I alone bear the responsibility for remaining errors and omissions.

Finally, it would be remiss of me not to record my deep gratitude to Gilbert, Mary, Murray and Keith: my family, for all the support that they, and only they, could provide. Also to Keirs: a special *tapadh leat*.

I have endeavoured to take account of legal developments in Scotland up to 1st May 2007.

Ross Gilbert Anderson
Glasgow
5 March 2008

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References are to paragraph numbers

Abbreviations

ABGB	*Allgemeines Bürgerliches Gesetzbuch*
AC	Law Reports, Appeal Cases (House of Lords and Privy Council) 1890–
AcP	*Archiv für die civilistische Praxis*
AD	Appellate Division (South Africa) 1910–46
ADC	*Acta Dominorum Concilii 26th March, 1501–27th January, 1503* (reprinted Stair Society, 1943, vol 8)
ADWO	*Allgemeine Deutsche Wechsel Ordnung*
aff'd	affirmed
All ER	All England Law Reports 1936–
ALR	*Allgemeines Landrecht* (Prussia)
Am J Comp Law	*American Journal of Comparative Law*
APS	T Thomson and C Innes (eds) *Acts of the Parliament of Scotland* 13 vols (1814–75)
App Cas	Law Reports, Appeal Cases (House of Lords) 1875–90
AUL	Aberdeen University Library
Balfour, *Practicks*	Balfour, *Practicks 1469–1579* (first published 1754; reprinted Stair Society, 1962–63)
Bankton	A McDouall, Lord Bankton, *An Institute of the Laws of Scotland* (1751–53) 3 vols (reprinted 1993–95, Stair Society, vols 41–43)
BCLC	Butterworths Company Law Cases 1983–
Bell, *Commentaries*	G J Bell, *Commentaries on the Law of Scotland* (7th edn by J McLaren, 1870)
Bell's Folio Cases	R Bell, *Cases Decided in the Court of Session 1794–1795* (1796)
Bell's Octavo Cases	R Bell, *Cases Decided in the Court of Session 1790–1792* (1794)
Bell, *Prin*	G J Bell, *Principles of the Law of Scotland* (10th edn by W Guthrie, 1899)
BGB	*Bürgerliches Gesetzbuch*
BLR	Building Law Reports
Br Sup	M P Brown, *Supplement to the Dictionary of Decisions 1622–1794* (1826) 5 vols
BW	*Burgerlijk Wetboek* (Netherlands Civil Code)
c	*circa*

C	Codex
CA	Court of Appeal, England
ch	chapter
Ch	Law Reports, Chancery Division
CLJ	*Cambridge Law Journal*
D	Digest; Dunlop's Session Cases, Second Series, 1838–62; Dalloz
DNB	*Oxford Dictionary of National Biography* (2004)
Dow	*Reports of cases upon appeals and writs of error in the House of Lords decided during the sessions 1827–1832*
12*mo* (Duodecimo)	T Murray, Lord Glendook (ed) *The Laws and Acts of Parliament made by King James the First and his royal successors, Kings and Queen of Scotland* (1682–85)
ed	editor
edn	edition
Edin LR	*Edinburgh Law Review*
Elchies	P Grant, Lord Elchies, *Decisions of the Court of Session, from the year 1733 to the year 1754* (1813)
ER	English Reports (1200–1865) 176 vols
Erskine	J Erskine, *An Institute of the Law of Scotland* (1777; 8th edn by J B Nicholson, 1871; reprinted 1989)
EUL	Edinburgh University Library
EUL Sp Col	Edinburgh University Library, Special Collections
F	Fraser's Session Cases, Fifth Series, 1898–1906
FC	Faculty Collection (Court of Session) 1752–1825
Forbes Dec	*A Journal of the Session Containing the decisions of the Lords of Council and Session, in the most important cases, heard and determined from February 1705, till November 1713: and the acts of Sederunt made in that time* (1714)
Fountainhall	J Lauder, Lord Fountainhall, *The decisions of the Lords of Council and Session, from June 6th, 1678, to July 30th, 1712* (1759)
Gaius	Gaius, *Institutes*
Gloag, *Contract*	W M Gloag, *The Law of Contract in Scotland* (2nd edn 1929)
Grosskopf, *Geskiedenis*	F H Grosskopf, *Die Geskiedenis van die Sessie van Vorderingsregte* (Leiden: Luctor et Emergo, 1960)
GUL	Glasgow University Library
GWD	Greens Weekly Digest 1986–
H & N	Hurlstone & Norman's Exchequer Reports 1856–62
Hailes	*Decisions of the Lords of Council and Session, from 1766 to 1791* (1826) 2 vols
HGB	*Handelsgesetzbuch*
HL	House of Lords
HRG	A Erler et al (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (1971–98) 5 vols

Hume's Dec	D Hume, *Decisions of the Court of Session, 1781–1822*
Hume, *Lectures*	G C H Paton (ed) *Baron David Hume's Lectures 1786–1822* (Stair Society, 6 vols, 1939–58)
ICLQ	*International and Comparative Law Quarterly*
InsO	*Insolvenzordnung*
IR	Irish Reports 1893–
JLSS	*Journal of the Law Society of Scotland*
JR	*Juridical Review*
JSPTL	*Journal of the Society of Public Teachers of Law*
Kames, *Dict*	H Home, Lord Kames, *The decisions of the Court of Session from its first institution to the present time, abridged and digested under proper heads, in form of a dictionary* (8th edn 1807) 2 vols
Kames, *Elucidations*	H Home, Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777)
1 Kames Rem Dec	H Home, Lord Kames, *Remarkable decisions of the Court of Session, from 1716 to 1728*
2 Kames Rem Dec	H Home, Lord Kames, *Remarkable decisions of the Court of Session, from the year 1730 to the year 1752*
Kames Sel Dec	H Home, Lord Kames, *Select decisions of the Court of Session, from the year 1752 to the year 1768*
Kaser, *RPR*	M Kaser, *Das römische Privatrecht* (2nd edn 1971) 2 vols
KB	Law Reports, King's Bench Division 1900–52
Kilkerran	*Decisions of the Court of Session, from the year 1738 to the year 1752* (1775)
Lloyd's Rep	Lloyd's List Law Reports
LMCLQ	*Lloyd's Maritime and Commercial Law Quarterly*
LQR	*Law Quarterly Review*
Luig, *Geschichte*	K Luig, *Zur Geschichte der Zessionslehre* (1966)
M	Macpherson's Session Cases, Third Series, 1862–73
McBryde, *Contract*	W W McBryde, *The Law of Contract in Scotland* (3rd edn 2007)
Mackenzie	Sir George Mackenzie, *Institutions of the Law of Scotland* (2nd edn 1688)
Macq	J F MacQueen, *Appeals to the House of Lords 1851–1865*, 4 vols
MLR	*Modern Law Review*
Mor	W M Morison (ed) *Dictionary of Decisions of the Court of Session 1491–1808* (1813)
Mor Supp Vol	Supplementary Volume to the *Dictionary of Decisions*
Mühlenbruch, *Cession*	C F Mühlenbruch, *Die Lehre von der Cession der Forderungsrechte* (3rd edn 1836)
NAS	National Archives of Scotland
(NE)	New Edition (Shaw's Session Cases, First Series)

OED	*Oxford English Dictionary*
OJLS	*Oxford Journal of Legal Studies*
OR	*Schweizerisches Obligationenrecht* (Swiss Federal Code of Obligations)
Pat App	Paton's Appeal Cases 1726–1821, 6 vols
PC	Judicial Committee of the Privy Council
PECL	*Principles of European Contract Law*
R	Rettie's Session Cases, Fourth Series, 1873–98
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
Reid, *Property*	K G C Reid et al, *The Law of Property in Scotland* (1996)
rev'd	reversed
Rob	G Robinson, *Appeals to the House of Lords 1840–1841*, 2 vols
Ross LC	G Ross, *Leading Cases in the Law of Scotland* (1850) 3 vols
Ross Lead Comm Cas	G Ross, *Leading Cases in the Commercial Law of England and Scotland* (1853–1857) 3 vols
Ross, *Lectures*	W Ross, *Lectures on the History and Practice of the Law of Scotland, relative to Conveyancing and Legal Diligence* (2nd edn 1822)
S	Shaw's Session Cases, First Series 1821–38
SA	South African Law Reports 1947–
SALJ	*South African Law Journal*
Sc Jur	Scottish Jurist 1829–73
SC	Session Cases 1907–
SC (HL)	Session Cases, Cases in House of Lords 1907–
SCLR	Scottish Civil Law Reports 1987–
Sh App	P Shaw, *Appeals to the House of Lords, 1821–1826*, 2 vols
Sh Ct Rep	Sheriff Court Reports (1885–1963)
Sh & Macl	P Shaw and C H Maclean, *Appeals to the House of Lords, 1835–1838*, 3 vols
SLT	Scots Law Times
SLT (Land Ct)	Scots Law Times, Land Court Reports
SLT (News)	Scots Law Times, News Section
SLT (Notes)	Scots Law Times, Notes of Recent Decisions
SLT (Sh Ct)	Scots Law Times, Sheriff Court Reports
SLR	Scottish Law Reporter 1865–1925
SME	*The Laws of Scotland: Stair Memorial Encyclopaedia*
SN	Session Notes 1925–48
So	Solicitors' Journal
Stair	J Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (2nd edn 1693); Tercentenary edition by D M Walker (1981)
Stell LR	*Stellenbosch Law Review*

Stuart	R Stuart, *Reports of cases decided in the Court of Session, 11th November 1851–20th July 1853*
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TLR	Times Law Reports (England) 1884–1952
TPD	Reports of the Transvaal Provincial Division
TR	Durnford & East's Term Reports
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
Tulane LR	*Tulane Law Review*
TvR	*Tijdschrift voor Rechtsgeschiedenis*
UNCITRAL	United Nations Convention on International Trade, *Draft Convention on the Assignment of Receivables in International Trade* A/CN.9/489
UNIDROIT *Convention*	*Convention on International Factoring* (1988) (the Ottowa Convention)
UNIDROIT *Principles*	*Principles of International Commercial Contracts 2004*
U Pa L Rev	*University of Pennsylvania Law Review*
Windscheid, *Pandektenrecht*	B Windscheid, *Lehrbuch des Pandektenrechts* (9th edn by T Kipp, 1906)
WLR	Weekly Law Reports 1953–
W & S	Wilson and Shaw's Appeals to the House of Lords 1825–35, 7 vols
ZEuP	*Zeitschrift für europäisches Privatrecht*
Zimmermann, *Obligations*	R Zimmermann, *The Law of Obligations* (Cape Town: Juta, 1990; reprinted, Oxford: OUP, 1996)
ZHR	*Zeitschrift für das gesammte Handelsrecht*
ZPO	*Zivilprozessordnung*
ZSS (RA)	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)*

1 Introduction

> '…it is probable that a branch of the law which comes at the meeting place of the law of property and the law of obligations can never be anything other than difficult to apply.'[1]

A. THE SUBJECT

1-01. Assignation, assignment, cession: three different English words; but, usually at least, only one underlying concept. The difference in the use of language is indicative of deeper conceptual difficulties. Cession (in Scots law, an 'assignation') seeks to achieve a relatively simple result: the transfer of a personal right. Transfer is a concept well known to lawyers. But we tend to think of corporeal assets as objects of transfer. The tripartite situation in an assignation, however, is more complex. Assignation is just one of several methods by which a debtor-creditor relationship can be utilised, altered, discharged or circulated. The method chosen in any particular transaction ought to depend on the particular legal incidents of the various options. While this work is concerned with the detailed incidents of assignation of money claims, it is important to observe that the law provides other methods which are functionally similar. Unfortunately, in the modern Scottish authorities at least, the relatively clear principles set out in the earlier sources have become confused and the distinctions between different principles blurred. 'The frequent mistakes, defects and weaknesses in our authorities,' wrote Walter Ross, 'sufficiently prepare the mind for an amusement so conducive to the enlargement of its faculties'.[2]

[1] W S Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law' (1919–20) 33 *Harvard L Rev* 997 at 1030.

[2] Ross, *Lectures* vol I, xxi.

B. NATURE OF ASSIGNATION

1-02. 'It is said that this point has never been decided. Points never decided are the strongest and most certain in our law': so observed Lord Monboddo in *M'Donells v Carmichael*.[3] This comment could well have been directed at the juridical nature of an assignation. No decision can be cited where a satisfactory description of 'assignation' will be found, though assignations in Scottish case reports are ubiquitous. The juridical incidents of cession,[4] however, are deeply engrained in the jurisprudence and legislation of the European jurisdictions with which Scots law has much in common; characteristics for which there is evidence in indigenous Scottish sources. Assignation is the *inter vivos* consensual transfer of (*inter alia*) a money claim by the cedent (the creditor in the claim) to a transferee (the assignee). The cedent must intend to convey the claim, which must be identifiable. The assignee must accept the delivery of the assignation. In Scots law, only on intimation to the debtor of the delivery of the assignation is the claim transferred to the assignee. Debtor notification plays a constitutive role in Scots law. It is therefore an essential requirement for a transfer. Intimation raises points of difficulty as much practical as theoretical. These are discussed in detail in chapters 6 and 7 below.

1-03. One aspect of assignation must be highlighted: the debtor's consent to the transfer is not required.[5] While it is occasionally suggested that an assignation occurs with the consent of the debtor,[6] this is incorrect.[7] Indeed, some

[3] (1772) Mor 4974; (1772) Hailes 513 at 514. Cf *Johnston v O'Neill* [1911] AC 552 at 592–593 *per* Lord Dunedin; D Daube, 'The Self-understood in Legal History' 1973 *JR* 126 and (1973) 90 *ZSS (RA)* 1; *Ontario (Securities Commission) v Greymac Credit Corp* (1986) 30 DLR (4th) 1 at 24 *per* Morden JA: 'In the absence of binding authority clearly on point it may reasonably be said that the law is what it ought to be', aff'd [1988] 2 SCR 172.

[4] The historical development of the law, which sheds some light on the terminological differences, is discussed in chapter 4.

[5] Stair III.i.3. Cf Hume, *Lectures* III, 1; C Maynz, *Cours de droit romain* (4th edn 1877) vol 2, 87. See also eg Prussian *ALR* I, 11, § 409 and P M Nienaber, 'Cession' in W A Joubert (ed) *The Law of South Africa* 2nd edn, vol 2, Part 2 (2003) para 6; McBryde, *Contract* para 12-02. S Woolman and J Lake, *Contract* (3rd edn 2001) para 11.4 are equivocal on this point.

[6] See eg Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777) Art 2, at 9–10; Art 39, at 319. See too, H L MacQueen, *SME*, vol 15, para 861. Taking the lease as the paradigm, he observes that a landlord can prevent assignation by refusing to consent to it (*Duke of Portland v Baird & Co* (1865) 4 M 10). He continues: 'It is undecided whether this is a rule peculiar to leases or one which may be extended to all contracts … it may be in other forms of contract there is an implied term that the consent will not be unreasonably or capriciously withheld'. With respect, this confuses the assignation of a claim with the transfer of a contract *in toto* (confusingly, this too is often called an 'assignation'). A lease imposes obligations on the tenant as well as rights. In assigning the lease the tenant is attempting to get shot of his obligation to pay rent. For this reason the consent of the landlord, whether implicit or otherwise, is necessary. The consent of the tenant, however, seems to be irrelevant to the right of the landlord to assign his income stream from rents. Compare English law, where the House of Lords has recently emphasised that assignment occurs without the consent of the debtor: *Mulkerrins v PricewaterhouseCoopers (a firm)* [2003] 1 WLR 1937 at para [13] *per* Lord Millet.

[7] See William Guthrie's criticisms, in his edition of Bell, *Principles* (10th edn 1899) § 1461, n *(f)*, of *Ritchie v M'Lachlan* (1870) 8 M 815. In any event, *Ritchie* involved an order to pay, not a transfer of a claim. This distinction is discussed below.

claims that can be assigned are not based on a consensual relationship between the cedent and the debtor. Claims for reparation in respect of wrongful acts, for example, are assignable[8] although they arise *ex lege* and not *ex voluntate*. Moreover, the relative importance accorded to the doctrine of *delectus personae*[9] in the Scottish sources is not entirely consistent with the debtor's consent being required. *Delectus personae*, like any implied term, can be overcome by agreement.[10] A concept of *delectus personae* would therefore be unnecessary if all transfers required the (even implicit) consent of the debtor. Again, if assignation could not occur without the consent of the debtor, express prohibitions on assignation would be unnecessary.[11] And it is accepted that if the cedent assigns a claim to an assignee whom the debtor does not like, the debtor cannot refuse to pay that assignee.[12] This is the position in the major European systems.[13] Matters are further complicated where the claim transferred is not a claim to payment, but a right to demand non-monetary performance. This work, however, is primarily concerned with the transfer of money claims.

1-04. Only the cedent's right to payment is transferred. If any obligations (assuming there are any) are to be transferred or discharged, the consent of the debtor in the assignation (i.e. the creditor in the cedent's obligation) is required. The point may seem self-evident, but clear statements to this effect are scarce.[14] Historically, where failure to pay a debt could have deleterious personal consequences, there was apparently no free movement of debts, on the ground that there was always *delectus personae* in the person of the creditor.[15] Thereafter, it may have been the case that claims were, at first, only assignable with consent; but we cannot be sure.[16] In any event, the law has evolved. It is now held to be a matter of indifference to the debtor to whom he may be required to tender payment.[17] Crucially, where a transfer does take place, the assignee can have no greater right vis-à-vis the debtor than was held by the cedent. In Scots law, this

[8] *Munro v Wishart* (1582) Mor 10337; *Milne v Gauld's Trs* (1841) 3 D 345; *Traill & Sons v Actieselskabat Dalbeattie Ltd* (1904) 6 F 798, noted at (1905) 17 *JR* 240; *Cole-Hamilton v Boyd* 1963 SC (HL) 1. A right of action for damages for breach of trust is assignable: *Liquidator of Larkhall Collieries Ltd v Hamilton* (1906) 14 SLT 68 OH.

[9] For which see para 2-34.

[10] Some claims are unassignable by statute. Consent cannot render them assignable.

[11] See chapter 10 below.

[12] Assuming there is no *delectus personae creditoris*.

[13] See eg in Germany, A Perneder, *Institutiones* (Ingolstadt, 1565) who noted that cession occurred 'ohne Wissen und Willen des Schuldners', cited by Luig, *Geschichte*, 23. This reflects modern German law where no debtor notification is required to effect a transfer. Pernder's approach is mirrored in the *Liv-, Est- und Curländisches Privatrecht* (1902) Art 3471. Cf P Gide, *Etudes sur la novation* (1879), quoted in para 6-02 below. Guthrie, in his final edition of Bell's *Principles* (10th edn 1899), refers Scots lawyers to the civil law in this regard: § 1460, n *(f)*. Ironically, however, older Scots law – and indeed French customary law – shared little in common with the civil law. See discussion in chapter 5 below.

[14] Cf G L Gretton and K G C Reid, *Conveyancing* (3rd edn 2004) para 22.02: 'Only rights are assignable, not obligations. This is common sense'.

[15] F Schulz, *Classical Roman Law* (1951) 628, cited by Zimmermann, *Obligations* 59. The history of the law of cession will be discussed in chapter 3 below. The Scottish history does not follow the European or English pattern.

[16] See the discussion of the historical evolution of the law in chapters 4 and 5 below. Cf Art 1122 *Code civil*.

[17] *Laidlaw v Smith* (1838) 16 S 367 aff'd (1841) 2 Rob 490 at 501 *per* Lord Cottenham. Compare the older Scottish authority for this proposition cited in para 5-07.

is the principle labelled *assignatus utitur jure auctoris*. The principle is sometimes thought to be peculiar to the law of assignation. It is therefore discussed in detail in chapters 8 and 9.

1-05. As has been suggested, the debtor's consent is not required. What, then, is the position if the debtor actually explicitly consents to the transfer? A common express term in a loan agreement is that the creditor is entitled to assign his rights against the debtor. The parties are here expressing what the law already provides. If the debtor's consent is not required in an assignation, that the debtor does consent can make no difference. The claim is still transferred. And the transfer is an assignation.[18]

1-06. What then of the 'claim' that is to be transferred? 'Claim' is not a popular term in Scots law. Legal writers and judges have often referred to 'debts',[19] 'obligations'[20] and even 'contracts'[21] as the objects of assignation. These are all problematic. They have connotations which tend to focus on the negative side of the relationship. The point is a basic one. Yet it has caused innumerable problems in the Scottish sources. It is worth quoting in full the passage with which Professor Zimmermann opens his magisterial *Law of Obligations*:

> '"Nam fundi et aedes obligatae sunt ob Amoris praedium" said Astaphium ancilla in Plautus' play *Truculentus* (at 214), thus providing us with the oldest source in which the word "obligare" is used. The substantive "obligatio"can be traced back to Cicero. As to the literal meaning of the term, its root "lig-" indicates that somebody or something is bound; just as we are all "bound-back" (to God) by virtue of our "re-ligio". This idea is still clearly reflected in the famous definition which Justinian advanced in his *Institutes*, where he introduced the subject of the law of obligations: "obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura". Today the technical term "obligation" is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance. The party "bound" to make performance is called the debtor (debitor, from debere), whilst at the other end of the obligation we find the "creditor" who has put his confidence in this specific debtor and relies (credere) on the debtor's will and capacity to perform. As far as the Roman terminology is concerned, "obligatio" could denote the vinculum iuris looked at from either end; it could refer to the creditor's right as well as to the debtor's duty. This obviously makes it somewhat difficult to render the Roman idea in English, for the English term "obligation" is merely oriented toward the person bound, not towards the person entitled. With the words "my obligations" I can refer only to my duties, not to my rights.' [22]

In many of the legal systems of Europe, the language employed by the law makes clear that it is the claim, the right, the positive or active element in the obligationary relationship that is being transferred. In French law, and systems based on it, it is quite clear that *cession de créance* refers to the transfer of personal rights. The same is clear from the language of *Forderungsabtretung* employed by German-speaking lawyers; *cesión de creditos* in Spanish; and *cessie van vorderingsrechte (sessie van vorderingsregte)* in Dutch (Afrikaans). As will be discussed below, Scots substantive law has been bedevilled as much by

[18] Cf R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 151, Nr 138 who takes the view that where the debtor consents, the transfer is not a cession.

[19] Eg Stair III.i.3.

[20] Eg Stair I.iii.1.

[21] Gloag, *Contract* 416.

[22] Zimmermann, *Obligations* 1.

imprecise language as a lack of conceptual rigour. As Zimmermann observes, finding English words that adequately describe either the concept of the transfer, or the object of it, is not easy. In a later development in her history, Scots law spoke of the assignation of contracts. No distinction was made between the rights and obligations that form the legal bond that is a contract. This unhappy episode in the Scots law of assignation is discussed in detail in chapter 2 below. Care will therefore be taken here to refer only to claims or rights. 'Claims' is the better term. It implies relativity: a claim must usually be exigible against another patrimony. 'Right' is much broader. It could conceivably encompass real rights, intellectual property rights or even human rights. 'Assignation of claims' also has some historical pedigree in Scots law. Hume entitled his chapter on this area of the law, 'Assignation of Personal Claims'.[23]

C. SCOTTISH TERMINOLOGY

1-07. The transfer of a money claim in Scots law is effected by an 'assignation'. But the term 'assignation' has more than one meaning. Assignation is the term given to the contract to assign.[24] Assignation is also the term used to describe the transfer agreement,[25] the conveyance. Most commonly, it also refers to the physical deed which is delivered. Assignation, again, is used in two more general senses. One is the description of the completed transfer of a claim. This incorporates – normally[26] – the contract (the obligationary agreement), the conveyance (the transfer agreement) and the intimation to the debtor. Only on intimation does the transfer take effect. Assignation is also a general term for transfer in the Scottish sources: it has been applied to transfers of all types of property, not just claims; nor is it limited to incorporeals.[27] 'Assignation', 'assignment', or 'cession' can be used in either a wide or a narrow sense. This work is concerned with the narrow sense, that is to say, the voluntary *inter vivos* transfer of particular claims; one particular type of singular succession. But 'assignation' can also be used in a wider sense to denote a universal succession.[28] And sometimes an 'assignation' can even transfer real rights:

> 'A disposition may, and sometimes doth, signify the alienation of any right, whether real or personal; so the style and translation ordinarily bears, the assignee to transfer and dispone: as assignation is sometimes extended to the disposal of real rights, which are frequently provided, not only to heirs, but to assignees; yet these terms are so appropriated and distinguished, that disposition is applied to the alienation of real rights, and assignation of personal rights.'[29]

[23] Hume, *Lectures* III, 1 Arguably the adjective 'personal' is unnecessary: a claim, by definition, can refer only to another patrimony; rights, on the other hand, may be personal or real.

[24] *Brownlee v Robb* 1907 SC 1302 at 1312 *per* Lord McLaren; *Westville Shipping Co v Abram Steamship Co* 1922 SC 571 at 582 *per* Lord President Clyde; 1923 SC (HL) 68 at 71 *per* Lord Dunedin.

[25] This terminology will be discussed in chapter 10.

[26] A claim may be donated. In such a case there will be no contract.

[27] In particular, see Erskine III.v.1 and the criticism thereof by Hume, *Lectures* III, 8; W Ross, *Lectures* 189(n). Cf the following examples of this usage: *Henry v Robertson & Sime* (1822) 1 S 399 (NE 375); *Borthwick v Urquhart* (1829) 7 S 420; *Johnston v Sprott* (1814) Hume's Dec 448 and J Craigie, *Scottish Law of Conveyancing: Moveable Rights* (1894) 250 ff.

[28] See para 3-01.

[29] Stair III.ii.pr. Erskine III.v.1 extends 'assignation' to the transfer of real rights in corporeal moveables. Cf Mackenzie, *Inst* III.v.1.

'Assignation', therefore, is often used as a synonym for 'transfer'; 'to assign' is a verb interchangeable with 'to transfer'. This linguistic flexibility is perhaps indicative of a unitary approach to the transfer of patrimonial rights. Particular rules apply, naturally, to the transfer of different assets. But it is of interest that, in Scotland, cases involving the transfer of one particular asset are referred to when dealing with other transfers. It is assumed that there are general underlying principles which are universally applicable to all transfers.[30] In other words, at a conceptual and practical level one can identify, at root, a general theory of transfer in Scots law. The idea of a 'general assignation' is perhaps just one manifestation of this. The following seeks to build upon that heritage.

1-08. This work is concerned primarily with assignation as it is used in the specific sense, namely the *inter vivos* transfer of claims. The term 'cession' is the Latin '*cessio*' and '*cedere*'; while 'assignment' is the standard English translation of the foreign equivalents. But the Scottish usage of 'assignation' is old, recognised, and standard. 'Assignation' is therefore preferred except where it is necessary to differentiate the modern transfer from one of its functional equivalents (also sometimes called an '*Assignation*' in foreign legal systems). As previous writers on Scots law have found, it will not be possible to look at the rules regulating the transfer of claims in isolation. Reference will be regularly made, therefore, to the rules relating to the transfer of heritable property and corporeal moveables.

D. TRANSFER OF WHAT?

1-09. The traditional classification of the civil law is between persons, things and actions.[31] Although Stair departed from this classification, it has had an abiding influence on the law of Scotland.[32] In terms of this classification, property (*res*) is divided into corporeal and incorporeal property. This classification can only be understood in terms of the primary real right, ownership. A thing only qualifies for classification if it is 'property', i.e. capable of being owned. Incorporeal property concerns rights, both real and personal.[33] Where, then, to locate the real right of ownership in this classification? It seems to be on both sides: corporeal things are 'property' because they can be owned; they are objects of the primary real right, ownership. Incorporeal property is untouchable, non-physical; or, put another way, rights. Ownership is a right and falls to be considered as incorporeal property. So too do subordinate real rights and

[30] See the third paragraph of the Advertisement to the second edition of Stair's *Institutions*, reproduced in D M Walker's Tercentenary Edition (1981) 64, and the *Institutions* I.i.23. Professor Gretton has written of the 'abiding influence' of Stair's unitary theory of transfer which allows assignation to be treated as 'one particular species of the genus "transfer"': P M Nienaber and G L Gretton, 'Assignation/Cession' in R Zimmermann, D Visser and K G C Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 787 at 789.

[31] This can be traced to Gaius, *Inst* I, 8.

[32] See, eg, Scotland Act 1998, s 129.

[33] Particularly interesting discussion of the development of the idea of claims as property is found in B Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernünftrecht* (Zürich, 1975) 1–35.

personal rights. The incorporeal side of the division therefore encompasses both real and personal rights. But why, then, is the category of *res corporales* necessary? Everything with which the law is concerned is found under the classification *res incorporales*. The real right of ownership is just one of many types of right.[34] And as the real right of ownership may be 'dismembered' to create subordinate real rights, so too can personal rights be dismembered to create subordinate personal rights. As Professor George Gretton has powerfully argued,[35] it is time to move on from Gaius. The traditional Gaian division of things into *res corporales* and *res incorporales* is flawed. The law of things may be better analysed as the law of real rights; and the law of real rights is but one part, albeit a major part, of a wider law of patrimonial rights. And whereas there is a *numerus clausus* of real rights, there is no limit to personal rights. In this light, the importance of the law of assignation becomes clear. For many patrimonial rights can be assigned. And while the content of any patrimony may be as various as each individual holder, commercial undertakings often hold more personal rights than real rights. Commercial undertakings rarely own things. Instead they have contractual claims – personal rights – against customers, workers or suppliers. The success or failure of a business may often depend on how efficiently these claims can be utilised. Banks, meanwhile, deal claims. A credit balance with a bank is a claim against the bank. A loan from the bank is a claim held by the bank. Sometimes, of course, these claims will be secured with a subordinate real right. But the personal right is the principal.

1-10. Money, they say, makes the world go round. But most 'moneys' are actually claims. And claims circulate with the world, often by assignation. If claims are the lifeblood of finance, assignation is the aorta. But it must be emphasised that assignation transfers claims, not ownership of claims.[36] Ownership of claims is meaningless and, as has been seen, an unnecessary duplication. To say a creditor owns a claim adds nothing to his legal position.[37]

[34] Other absolute rights are not real rights, eg, intellectual property rights.

[35] See G L Gretton, 'Ownership and its Objects' (2007) 71 *RabelsZ* 802 and G L Gretton, 'The Financial Collateral Directive' (2006) 10 *Edin LR* 209 at 214.

[36] Cf *Hill v College of Glasgow* (1849) 12 D 46, a decision of the Whole Court. The impressive opinion of the consulted judges distinguishes, particularly clearly, the transfer of personal rights from the transfer of real rights.

[37] J Thomson, *Scots Private Law* (2006) paras 3-12 and 3-13 and K G C Reid, 'Property and Obligations: Exploring the Border' 1997 *Acta Juridica* 225 unnecessarily complicate matters by introducing some real right into the transfer of personal rights. The advantages of that approach are not, at least to this writer, evident. Cf J Ghestin, *Traité de droit civil: Le régime des créances et des dettes* (2005) 11.

[38] Depending on the doctrinal basis of the third party right (*jus quaesitum tertio*), contractual rights may be trilateral.

[39] This is to oversimplify. One can conceive of debts which have, for the time being, no creditor. Take, for example, the bearer bill which has been lost in the post. Whether it is possible to conceive of claims or rights which have, for the time being, no ascertainable debtor is more difficult; yet, in principle, there is no reason why this should not be possible. It should be added that it has never been suggested that it is possible to abandon a right (i.e. for the right to remain in existence but the holder renounces his creditorship). When corporeal property is abandoned (see Reid, *Property* paras 547 and 568), one view is that the former owner's rights are extinguished; the other, that they are transferred to the Crown (*quod nullius est fit domini Regis*). If the right is not embodied in a deed, can there be abandonment when there is

Claims are personal rights. Personal rights are bilateral.[38] They are relative: for every holder of a claim, there should be a concomitant debtor, and *vice versa*.[39] A law of relativity links the relationship between patrimonies. And the law is found in the obligationary relationship, not ownership. Personal rights are like electrodes: for every[40] positive end (the creditor's patrimony), there is a negative end (the debtor's patrimony).[41] It usually makes no difference who holds the claim as creditor. The personality of the debtor, however, is crucial: it is only from the assets in the debtor's patrimony that the creditor can satisfy his claim. When the value of the debtor's liabilities exceeds the value of assets, the debtor becomes insolvent. And on insolvency the creditor may get nothing.[42] Assignation is the transfer of the positive end of this obligationary relationship.

E. CONSTITUENT ELEMENTS IN TRANSFER

1-11. It was observed above that there are, usually,[43] three stages in an assignation. The examination in the pages that follow will concentrate on the second and third stages, the transfer. Stage one, being a contract, is no different from any other.

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nothing to abandon? Whether an abandoned right would vest in the Crown would depend on whether claims can be owned. Cf generally, H Dölle, 'Bermerkungen zur Blankozession' in *Festschrift für Martin Wolff* (1953) 23 at 28. But the point is unlikely to be of much importance. Claims are incorporeal. Where there is no document evidencing the right, there can be no question – as with the finder of a corporeal moveable – of another appearing and seeking to assert the abandoned right. In practice, a creditor can easily get rid of his rights either by discharging the debtor (which, like a waiver, must be communicated: see *Moodiesburn House Hotel Ltd v Norwich Union Insurance Ltd* 2002 SCLR 122 at para [45] *per* Lord Macfadyen) or simply by doing nothing and allowing the prescriptive period to expire. Cf generally, J Kleinschmidt, *Der Verzicht im Schuldrecht* (2003). For waiver of 'entitlements' that are not vested 'rights', see *City Inn Ltd v Shepherd Construction Ltd* [2006] CSOH 94 at paras [19] ff *per* Lord Drummond Young (Ordinary).

[40] Although one could conceive of a personal right which has a patrimony at one end but not the other: see n 37 above. Real rights have a person at one end but not the other.

[41] Cf H D MacLeod, *Principles of Economical Philosophy* (2nd edn 1872) vol 1, 470 who says the positive and negative ends of a contractual relationship 'exactly correspond to polar forces in nature'.

[42] Another reason why claims cannot be owned. It may be conceded that an ownership analysis has some utility in an analysis of transfer; the ownership analysis does not appear helpful where there is no transfer. The objects of ownership are not subject to insolvency. For only patrimonies and not things may become insolvent. But ownership prevails on insolvency. Yet if claims can be owned there is an object of ownership, a *res*, that is subject to insolvency. Ownership prevails on insolvency because ownership is a right in a thing, not a right against a person.

[43] See para 1-07 above.

2 Fundamentals

A. ASSIGNATION AND ACCESSORY RIGHTS

(1) General

2-01. An assignation carries all rights accessory to the assigned claim.[1] Suppose D owes C1 £100 for which P is cautioner. C1 assigns his claim against D to C2. C2 thereby obtains a right to payment against both D and P. For caution is an accessory obligation. The principle is a general one: accessory rights cannot exist in the abstract.[2] Subject to one important exception, they are parasitic to debt. An accessory right presupposes a principal debt. And where the principal goes the accessory follows: *accessorium sequitur principale*. The received position is that the creditor in the principal debt and the secured creditor cannot be different parties. So on assignation of a claim, all accessory rights are also transferred

[1] Stair III.i.17; Erskine III.v.8; Bankton II, 191, 7; *Anderson v Scottish North Eastern Railway Co* (1866) 1 SLR 116; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 368 *per* Lord Blackburn (Ordinary) and 386 *per* Lord Anderson; *Trotter v Trotter* 2001 SLT (Sh Ct) 42.

[2] *Jackson v Nicoll* (1870) 8 M 408; *Cameron v Williamson* (1895) 22 R 293; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 368 *per* Lord Blackburn (Ordinary). Cf § 1250 I (2) *BGB*; Art 3:7 *BW*.

even if there is no express mention of accessory rights in the transfer of the principal claim.[3] The same principle applies to a retrocession.[4]

2-02. The exception relates to a right in security granted for 'all sums due and to become due'. At a particular point in time the debtor may not owe the creditor any money. The security is not, however, discharged. It continues to exist in respect of contingent indebtedness.[5]

2-03. The principle that accessory rights follow the assigned claim is of the greatest importance. It is this incident of assignation that may be decisive in structuring a transaction as an assignation. It is therefore of some interest to observe that other legal systems observe the same principle: France,[6] Germany,[7] the Netherlands,[8] Austria,[9] Switzerland,[10] Louisiana,[11] Quebec,[12] and South Africa.[13] The principle is adopted in the modern European[14] and international contract codes.[15] Indeed, it has been described as a principle of the modern European *jus commune*.[16] If the principle is clear, however, the practice is not. The different accessory rights will therefore be examined separately.

[3] *Johnston v Jack* 12 December 1622, noted by Stair, III.i.4 and J S Sturrock (ed) *Conveyancing according to the Law of Scotland, being the Lectures of the Late Allan Menzies* (1900) 274; *Begg v Begg* (1665) Mor 6304; *Cultie and Hunter v Earl of Airly* (1676) 2 Br Sup 197; 2 Stair 409; *Wilson v Burrel* (1751) Kilkerran 1; *Stewart v Kidd* (1852) 14 D 527; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 386 *per* Lord Anderson. In *Anderson v Provan* (1665) Mor 6235 and 10377 and *Wedderburn v James* (1707) Mor 10399 it was held that the assignee of a landlord's right to rent can exercise the landlord's hypothec. A clause of registration entitling the creditor to summary diligence also passes to an assignee: *Lord Yester v Lord Innerwick* (1635) Mor 10321.

[4] *Ruthven v Gray* (1672) Mor 31; *Duncan v Miller* (1713) Mor 39.

[5] Cf *MacLeod v Bank of Scotland* 1986 SC 165.

[6] *Code civil* Art 1250 (subrogation), Art 1692 (cession); G Ripert and M Planiol, *Traité pratique de droit civil français* (1954) vol VII, para 1219.

[7] § 401 *BGB*.

[8] Art 6:142 *BW*.

[9] § 1394 *ABGB*.

[10] Art 170 *OR* (Swiss Federal Code of Obligations). It may be noted in passing that, in the codification movement at the end of the nineteenth century, the leading Scottish protagonist, Sheriff (later Professor) John Dove Wilson, suggested that the Swiss, *Obligationenrecht* (being 'substantially … a commercial code') would provide the best model for any codification of commercial law in the British Empire: Dove Wilson, 'Concerning a Code of Commercial Law' (1884) 28 *Journal of Jurisprudence* 337 at 341.

[11] Louisiana Civil Code Art 1826 (subrogation) and Art 2645 (cession); S Litvinoff, *The Law of Obligations* (2001) § 11.1.

[12] *Code civil du Québec* Art 1638 (cession). The right to accessories by virtue of *subrogation personelle* is not expressed in the code but is axiomatic: J-L Baudouin and P G Jobin, *Les obligations* (5th edn 1998) para 910.

[13] J G Lotz (rev'd J J Henning) in W A Joubert (ed) *The Law of South Africa* vol 26 'Suretyship' (reissue 1997) para 205; P M Nienaber, 'Cession' in W A Joubert (ed) *The Law of South Africa*, 2nd edn, vol 2, Part 2 (2003) para 49. Cf *Lief v Dettman* 1964 (2) SA 252 (A).

[14] M L R Gandolfi (ed) *Académie des Privatistes Européens, Code Européen des Contrats*, livre premier (preliminary draft, 2001) Art 122(7); *Principles of European Contract Law* (Part III, 2003) Art 11:201(1)(b). Cf H McGregor, *Contract Code* (Milan, 1993) Art 661(2), which makes no express provision for accessory rights.

[15] UNCITRAL Art 12.

[16] M Habersack, 'Die Akzessorität' (1997) 52 *Juristenzeitung* 857 at 861: 'Sie ist, ungeachtet einiger Unterschiedliche im Detail, ein gemeineuropäisches Prinzip des Sachen- und Bürgschaftsrechts'.

(2) Cautionary obligations

2-04. Caution (*anglicé*: guarantee) is a personal obligation granted by a third party to the creditor in respect of a principal debt. If the principal debt is assigned, the general principle is that the assignee may also call upon the cautioner to make payment.[17] No mention need be made of the cautionary obligation in the assignation. If it exists, it goes. Cautionary obligations do not generally raise the same difficulties as accessory real rights in security. It may be mentioned in passing, however, that it is a commonly propounded term, in both Scotland and England, that bank guarantees are not assignable. Guarantees are not, of course, assignable in the abstract anyway. But such a clause is problematic on assignation of the principal. For such a clause leaves a person holding a guarantee when he has ceased to be a creditor; and the new creditor (the assignee) without the benefit of the guarantee. Assignation of the principal thus saps the life from the non-assignable guarantee, but does not kill it.[18] In Scots law an assignation becomes effective only on intimation being made to the principal debtor. Intimation to cautioners is a practical rather than a constitutive requirement. It is discussed in chapter 7 below.[19]

(3) Claims secured by pledge

2-05. Pledge is the simplest security right that can be granted over a corporeal moveable thing.[20] The thing pledged must be given to the pledgee. It is a possessory security. If the pledgee assigns his claim against the pledgor, is the assignee similarly secured? What formalities must occur? Andrew Steven argues that assignation of claims secured by pledge is problematic. The reasoning is good: if I pledge my Rolex watch to you I intend only that you have custody of it; not that it should pass through the grubby hands of any Tom, Dick or Harry. In other words, the pledgee has obligations. And, as Dr Steven rightly points out, obligations cannot be assigned.[21]

2-06. Cogent as this argument is, it is inconclusive. Four reasons may be suggested which cast doubt on it. First, if there is assignation of a claim secured

[17] But compare *Waydale Ltd v DHL (UK) Holdings Ltd* 1996 SCLR 391 OH (Lord Penrose) with the decision of the Cour de Cassation, *com D 2000, 224* (note by L Aynès) (also noted at 2002 *European Review of Private Law* 333) which suggest that cautionary obligations are not inherently assignable. After a reclaiming motion on the issue of *res judicata* (2000 SC 172), the *Waydale* case was remitted again to the Outer House. This time Lord Hamilton came to the opposite conclusion, viz that the guarantee was assignable, though only in the 'transactional context' before him: 2001 SLT 224. This is, with respect, incorrect. The creditor's right to payment from a cautioner is inherently assignable. Moreover, there is not even any need to make express mention of the guarantee in the transfer of the principal obligation. For where the principal goes the accessory must surely follow. A cautionary obligation, like any other obligation, could contain an effective express prohibition on transfer. And such a prohibition could also be implied.

[18] It goes too far to say that such a guarantee is discharged by assignation. For such guarantees are commonly open for a specified period of time. And the claim, in that time, may be retrocessed to the holder of the guarantee; whereupon, with principal and accessory being reunited, the guarantee comes back to life.

[19] See para 7-07 below.

[20] See generally A J M Steven, *Pledge and Lien* (2008).

[21] Steven, *Pledge and Lien* para 4-23 ff.

by a pledge, the accessory principle says that the assignee is entitled to the security. But the assignee does not need immediate possession of the thing. He will need possession only if the article is to be sold. And if the article is to be sold, it matters not whether the article is possessed by the original pledgee or an assignee. In short, while possession may be required for creation of a pledge, there is no reason why transfer of the right of pledge must occur by transfer of possession.[22] Second, if the law were to require the transfer of possession, there is no reason why that need be problematic.[23] There are indeed obligations incumbent upon a pledgee to take reasonable care of the article. But these obligations arise *ex lege* from the fact of possession. If the article is transferred to another pledgee, that pledgee too will be bound. And even if the view were taken that these obligations arise by virtue of the relationship, assignation would not discharge the cedent's obligations *qua* pledgee: the cedent remains primarily liable for any non-performance of these obligations by the assignee. Third, primary legislation envisages the assignation of claims secured by pledge.[24] Finally, as a matter of policy, pledged claims should not, by their nature, be rendered unassignable. The parties can always agree, expressly or impliedly, that a claim may not be assigned.[25]

(4) Standard securities

(a) General

2-07. A standard security may be granted 'over land or any real right in land'[26]. It is usually granted in respect of ownership; but it may also be granted over other subordinate real rights, such as a long lease. Recording or registration is a constitutive requirement for creation. The publicity principle demands that rights voluntarily created in heritage must be publicised. It is not disputed that the transfer of ownership in land must also be publicised. But the requirements for the transfer of subordinate real rights in security are not so clear.

[22] Cf Art 1263(2) *Codice civile* (Italian civil code): 'Il cedente non può trasferire al cessionario, senza il consenso del costituente, il possesso della cosa ricevuta in pegno; in caso di dissenso, il cedente rimane custode del pegno'. An example of disunity between security holder and claim holder.

[23] The Dutch *Burgerlijk Wetboek* provides generally that accessory rights follow the claim: Art 3:82 *BW*; where the claim is secured by a pledge, the cedent is bound to hand over the pledged article to the assignee, but only where the cedent is assigning the whole claim secured by the pledge: Art 6:143(3) *BW*. Cf §§ 1250–1252 *BGB*, and F Terré and P Simler, *Droit civil: Les biens* (5th edn 1998) para 201.

[24] Consumer Credit Act 1974, s 189 defines 'pawnee' and 'pawnor' to include 'any person to whom rights and duties have passed by assignment or operation of law'.

[25] See discussion of the so-called *pactum de non cedendo* at para 11-32 below.

[26] Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(2). Subsection (3) says: 'A grant of any right over land or real right in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security'.

(b) Practical formalities

2-08. The standard security comes in two forms: Form A and Form B.[27] With Form A, the personal obligation is contained in the deed. In other words, accessory and principal are telescoped into one document. With a Form B security, the debt and the security are in separate documents; so the accessory principle and the principle of unity must be carefully considered. Although the legislation expressly recognises assignation of the security,[28] it ignores the principal claim in respect of which the security was granted.

2-09. Schedule 4 provides two forms of assignation, also called Form A and Form B. The nomenclature of the Conveyancing and Feudal Reform (Scotland) Act 1970 is confusing as well as unimaginative.[29] Form A is a style for a freestanding deed of assignation; Form B is a style for endorsement on the standard security itself. But standard security Forms A and B do not conform to a Form A and Form B assignation respectively. One would have thought the endorsement (Form B assignation) would be primarily suited to transfer the deed embodying both security and obligation (Form A security). It seems, however, that there is no provision in the Act that a Form A security must be assigned by way of a Form B assignation or a Form B security by way of a Form A assignation; rather each security may have two forms of assignation. If a Form A security is endorsed (i.e. by Form B assignation), there will be two documents, one to be registered, one to be intimated[30]: the original security duly endorsed and an instrument of intimation that will have to be separately drawn up. If a Form A security is assigned in terms of a Form A assignation, there will be one document, in duplicate, the assignation. One copy is for registration, the other for intimation. With a Form B security matters are more complicated. The Form A assignation purports only to assign the security. As has been seen, however, there must also be transfer of the claim. For where latitude may be accorded to allow the accessory to catch up with the principal, transfer of the accessory without the principal is meaningless. So, strictly speaking, in cases where a Form B standard security is to be assigned, two assignations will be required: one of the claim and one of the security. The first will need to be intimated, the second registered.

(c) Difficulties

2-10. Unlike land, claims are ephemeral. They have no register.[31] Transfer is achieved by intimation to the debtor. Intimation has been likened to *traditio* or

[27] Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 2.

[28] Conveyancing and Feudal Reform (Scotland) Act 1970, s 14(1) and Schedule 4.

[29] The present discussion is limited to voluntary assignations. Similar problems can arise where an assignation of a security is implied rather than express, as with the doctrine of catholic and secondary creditors (for which see *Littlejohn v Black* (1855) 18 D 207 and W M Gloag and J W Irvine, *The Law of Rights in Security* (1897) 61). The doctrine is inconsistent with the accessory principle.

[30] Intimation here is for practical reasons rather than legal reasons, viz, to interpel the debtor from paying the cedent.

[31] Many debts are registered – in the Books of Council and Session – for preservation and execution. But of the various motivations for registering a deed in the court books (summary diligence, preservation, *data certa*) publicity is rarely one. In any event, the Books cannot be easily searched. Whereas the Scots lawyer registers a deed in the Books of Council and Session, his European colleague would have the deed executed notarially or registered in a public register or both.

registration. That analogy may or may not be a good one. But it is apparent that there is a potential conflict between the principles governing assignations and the principles governing real rights in land. Suppose a claim is secured by a standard security. The creditor assigns. The accessory principle holds that the security is transferred with the claim. The principal (the claim) is transferred on the assignee intimating to the debtor. At the moment of intimation, therefore, the assignee obtains a personal right (the principal claim) against the *debitor cessus.* The accessory principle says the assignee is also entitled to the standard security held by the cedent in respect of the principal debt. At the moment of intimation (when the assignee becomes the creditor) the cedent is registered as the holder of a real right. In other words, the transfer of the security is lagging behind the transfer of the claim. In purely theoretical terms, the transfer of the claim and the security can only properly occur if the transfers were simultaneous; a point recognised in the BGB's beguiling provision that 'Neither can the claim be transferred without the hypothec, nor the hypothec without the claim'.[32] The provision is theoretically beautiful; but almost impossible in Scottish practice.[33] What, then, are the practical implications? Providing the assignee is subsequently registered as the holder of the standard security, it might be argued, what is the problem? There are two major issues.

2-11. The first is what might be called the 'unity principle'. This provides that the holder of the personal right against the debtor and the holder of the security, granted in respect of that indebtedness, cannot be different parties. That this is a general principle of most legal systems has never been doubted,[34] though the point is rarely recognised far less discussed. It cannot be said that this necessarily follows from the accessory principle. For, conversely, the accessory principle does not require that the granter of the principal and the granter of the accessory be identical. Gordon can grant to Fidel a standard security in respect of Tony's indebtedness. But, for reasons unexplained, only Fidel can hold the personal claim against Tony and the real right in security. Fidel cannot, for example, have an agent hold the real securities without also transferring the claims. Unexplained as this principle may be, like God, we must believe and answer to it. So, returning to a case of assignation, on intimation of the assignation there

[32] § 1153 II *BGB*: 'Die Forderung kann nicht ohne die Hypothek, die Hypothek kann nicht ohne die Forderung übertragen werden'.

[33] In German law, debtor notification is not a constitutive requirement for cession. Normally, therefore, cession can occur by agreement. Where the claim is secured by a hypothec, the general principle is that neither the claim nor the hypothec is transferred until the transfer is registered: S Kircher, *Grundpfandrechte in Europa* (2004) 222. On registration, both claim and security transfer instantaneously. But where there is a *Hypothekenbrief*, transfer of the claim and the hypothec can occur without registration; see generally: S Kircher, *Grundpfandrechte in Europa* (2004) 52 ff and 100. Similarly, in France, claims are rarely transferred by the standard *cession de créance* which, like Scots law, requires debtor notification. Commercial claims are instead assigned under the '*Loi Dailly*' or the provisions on securitisation. Both of these transfers occur by execution of a single deed (*un bordereau*). No debtor notification is necessary. Accessories are carried without further formality: see Art L 313-27 and Art L 515-21 *Code monétaire et financier* respectively.

[34] It must be observed that this proposition does not hold for Germany or, for that matter, Switzerland. German law recognises the non-accessory *Grundschuld* (for which see S Kircher, *Grundpfandrechte in Europa* (2004) 223; registration is necessary for its transfer). And despite the fact that the majority of European legal systems recognise accessory securities, the demand for reform in some quarters is to make the non-accessory security more widely available: M Habersack, 'Die Akzessorität' (1997) 52 *Juristenzeitung* 857 at 861.

is disunity: the holder of the principal claim and the holder of the accessory are different. An extreme analysis of this disunity concludes that the security must therefore be discharged: the holder has a security in respect of someone who is no longer his debtor. And, it may be recalled, a security cannot exist in the abstract. The debt must be owed to the security holder.[35] For the extreme view, then, disunity equals discharge. A more practical approach to the disunity, however, recognises a problem and tries to rectify it. The solution will be discussed below.

2-12. The second theoretical problem comes with the accessory principle: *accessorium sequitur principale*, the accessory follows the principal. But the principal may only have commercial value with the accessory. What, then, if the assignee, eager to secure his preference, completes the transfer of the security before transfer of the claim?[36] Providing the assignation is quickly intimated, few problems will arise. If there is delay, however, the potential for problems multiplies. Suppose, for example, the transfer of the security is completed, but intimation of assignation of the claim is ignored. There is a breach of the unity principle. All other things being equal, that may not have serious practical consequences. But suppose in the interval between completion of the transfer of the security and intimation of the assignation, the *debitor cessus* becomes insolvent. The cedent continues to hold a personal claim against an insolvent debtor. The assignee, according to the register, has a security, but one that is worthless: it does not secure anything. Similarly problematic situations are easily envisaged. The security is transferred, but before intimation one of the cedent's creditors arrests in the hands of the debtor. The failure to intimate has rendered the security worthless: the debtor must now pay the arrester, irrespective of the song and dance the assignee makes about holding a standard security. Matters can become more complicated still. What if the cedent assigns the same secured claim twice? If the *accessorium sequitur principale* principle takes precedence, the assignee who intimates first to the debtor is preferred; if the publicity principle rules, the party who registers first is preferred. One jurist of repute has said of the second approach that 'nothing is more just and nothing is simpler'.[37] But apparent simplicity and apparent justice deceive. Allowing the rules governing the accessory to govern the transfer of the principal renders the competition between assignees of the same claim horrendously complex. On competition, it is the date of the transfer of the principal that rules.[38]

(d) Solutions: Theory and practice

2-13. With a Form A security one might think that there can be no problem of disunity. That temptation must be resisted. For how is the transfer to be completed? Land law says registration; assignation says intimation. It remains

[35] In modern banking practice, it is common for a syndicate of lenders to appoint a 'Security Trustee' to hold the claims and the securities. Where debt is sold down, therefore, it is the rights against the Security Trustee that are assigned. Neither the original claim nor the securities are assigned: see *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 149. Cf n 47 below.

[36] Cf *Watson v Bogue (No 1)* 1998 SCLR 512; 2000 SLT (Sh Ct) 125 and *Paul v Boyd's Trs* (1835) 13 S 818. This is a complex issue in other jurisdictions: see P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *Transmission des obligations* (1980) 95.

[37] R Saleilles, *La théorie générale de l'obligation* (3rd edn 1925) para 102.

[38] This is the modern trend in other jurisdictions. See, eg, the French position for factoring transactions: Art L 313-27(3) *code monétaire et financier*.

undecided whether registration will carry the personal right to the assignee. In order to prevent disunity, the sensible answer would say that it does, and that for Form A standard securities, registration is the constitutive requirement for assignation. This also has the advantage of providing a certain date of transfer. But that will not obviate intimation. Intimation will still be required for practical purposes: to inform the debtor that he has a new creditor to whom payment should be made. Where the standard security is a Form B security, the potential for disunity is greater. In this situation, what is crucial to be transferred is the claim: it is the principal. That transfer of the security lags behind the transfer of the claim cannot be helped for the lag is inevitable. And the cedent is obliged to do what is necessary to ensure that the position on the register is regularised. Useful reference may be made, for example, to the position in Switzerland[39] and the Netherlands.[40]

2-14. This approach may be criticised on the basis that it erodes the faith that third parties can place in the register: no one can be sure whether, at any particular time, the registered holder of a security is actually the holder of the claim. But this argument may be easily refuted. The presence of a standard security on the register never guarantees the extent to which the holder is a creditor or even, for that matter, whether he is a creditor at all. Claims, it must be remembered, are ephemeral. A heritable creditor's claim to £1m may be discharged in a day. And while the debtor is entitled to a discharge, and to register it, that the security remains on the register is nothing to the point if the 'debtor' is no longer indebted.[41] Publicity is rightly a constitutive requirement for creation of any real right in land. It is also a constitutive requirement for the transfer of the real right of ownership. And the rules prescribing the necessary publicity for the transfer of real rights are usually similar to the rules for creation of real rights. But where the real right is a subordinate real right *in security*, the publicity principle requires only that the creation of the right is publicised. To third party creditors, the personality of the security holder is immaterial. The material factor is that there is a security. And, as has been seen, the transfer of a security can only be meaningful with the transfer of the principal claim it secures.

[39] Importantly, § 835 *Schweizerisches Zivilgesetzbuch* (Swiss Civil Code) provides that registration of the security in the name of the assignee is not essential to the validity of the transfer of the security to him: 'Die Übertragung der Forderung, für die eine Grundpfandverschreibung errichtet ist, bedarf zu ihrer Gültigkeit keiner Eintragung in das Grundbuch'. In French, the article reads, 'L'inscription au registre foncier n'est pas nécessaire pour valider la cession des créances garanties par une hypothèque'. But compare the position in Belgian law, where registration of the security in the name of the assignee seems to be required in terms of the law of rights in security: see P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *Transmission des obligations* (1980) 95, para 17; van Ommeslaghe, 'Le Nouveau regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 530; P A Foriers and M Grégoire, 'Die Forderungsabtretung im belgischen Recht' in W Hadding and U W Schneider, *Die Forderungsabtretung, insbesondere zur Kreditsicherung, in ausländischen Rechtsordnungen* (1999) 136. See generally, discussion by K H Neumayer, 'La transmission des obligations en droit comparé' in *Transmission des obligations* (1980) at 199–200, n 16*bis*.

[40] Art 6:143(4) *BW*: 'In geval van overgang van een vordering waaraan een hypotheek is verbonden, is de vorige schuldeiser verplicht desverlangd ertoe mede te werke dat uit de openbare registers van deze overgang blijkt'.

[41] R Saleilles, *La théorie générale de l'obligation* (3rd edn 1925) para 102 overlooks this point.

(e) Assignation of all-sums securities

2-15. Finally care must be taken with the assignation of standard securities granted for 'all sums due and to become due'.[42] The legislation requires that the amount outstanding at the moment of assignation be expressed.[43] But this may be to state the obvious. It is another way of saying that the cedent must specify what he is assigning. For even if the security was in 'all sums' terms the assignee can only exercise the rights under the security in respect of the claim that has been assigned to him. Although the precise ambit of the specificity principle in Scots law has not been explored, there appears to be no reason why a creditor cannot assign all sums due and to become due from a particular debtor. Difficulties may arise where a cedent purports to assign £100,000 of a £500,000 claim with an 'all sums' security: (i) as to whether only part of the security has been transferred; (ii) if so, to what extent; and (iii) in any event, whether any further advances by the cedent to the debtor are covered by the security. Taking these points in turn: (i) Partial assignation of secured claims is complicated but competent.[44] Where, for example, someone other than the debtor pays the debt, the payer is entitled to an assignation of the creditor's rights against the debtor.[45] It is a general principle that a creditor cannot be forced to assign a security where this would be prejudicial.[46] But there is no reason why the cedent cannot be called upon to execute a partial assignation of the security so that the assignee can rank proportionally with any 'all-sums' creditor for the sum assigned.[47] The general principle is that, in the absence of specific provision, the assignee is entitled to rank *pari passu* as a secured creditor.

2-16. Points (ii) and (iii) may be dealt with together. There will be a presumption that where part of a larger claim secured by an all-sums security is transferred, the assignee is entitled to rank as a secured creditor for the sum assigned, but no more (whether that additional indebtedness was incurred pre- or post-assignation[48]); the cedent is secured for any other indebtedness, including post-assignation advances, by virtue of the all-sums nature of the security. The effect of further advances, of course, will be

[42] See G L Gretton, 'Assignation of All-Sums Standard Securities' 1994 SLT (News) 207, discussing *Sanderson's Trs v Ambion Scotland Ltd*, decided in 1977, reported at 1994 SLT 645.

[43] Conveyancing and Feudal Reform (Scotland) Act 1970, s 14 and Sch 4. Forms A and B for an assignation indicate that a sterling value of the amount assigned must be included, thus excluding (see Sch 4 note 2) the possibility of assigning a security for all sums. If carried to its conclusion this logic would also mean that it would not be possible to assign a standard security in respect of a debt denominated in euros or any other currency.

[44] For partial assignation, see para 2-22 below. For partial assignation of secured claims, see R G Anderson and S Eden, 'Transfer of Preferences on Payment' (2003) 7 *Edin LR* 398. Partial assignation of a standard security is envisaged by Conveyancing and Feudal Reform (Scotland) Act 1970, s 14(1).

[45] By virtue of the so-called *beneficium cedendarum actionum*. But any investigation must start with Lord President Rodger's opinion in *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123, especially at 1143. The opinion is not without its problems.

[46] *Sligo v Menzies* (1840) 2 D 1478; *Ewart v Latta* (1865) 3 M (HL) 36.

[47] Cf Anderson and Eden (2003) 7 *Edin LR* 398. Not all the authorities are intelligible; still less, helpful. Cf *Nicholson's Trs v McLaughlin* (1891) 19 R 49 and Gloag and Irvine, *Rights in Security* (1897) 126, n 5 who suggest that where multiple partial cession of a secured claim is intended a practical solution may be to transfer the entire claim and security to trustees. Each 'assignee' would then have a proportionate claim to the proceeds of the sale of the land.

[48] See, again, G L Gretton 1994 SLT (News) 207 at 209.

prejudicial to the assignee. Naturally, therefore, the assignee's advisors should ensure that specific provision is made to ensure that there is either a ranking agreement or that even if the assignation of the claim is only partial the assignation of the security is entire.

(5) Floating charges

2-17. Similar issues arise with assignations of floating charges.[49] And these issues are likely to become more rather than less relevant. Although floating charges cannot be created without registration, they are effective before registration. The charge need only be registered within 21 days of execution. But the charge is created when it is executed. The charge can therefore be effective but latent for 21 days. For assignation purposes, however, this aspect of the regime was actually beneficial. Since it was recognised that the charge could be created without publicity, any requirements to publicise the transfer were informative only. The accessory principle therefore ruled the transfer: the charge was transferred on the date of the transfer of the claim.

2-18. That the charge could be created without publicity, however, did not sit well with more fundamental principles of Scots law and the regime is to be overhauled. It will be replaced with a new register of floating charges maintained by the Keeper of the Registers of Scotland. One of the provisions of the new legislation is that assignations of floating charges may be registered in the register of floating charges[50]; but that the new provisions are without prejudice to any existing rule of law by which floating charges could be assigned.[51] In other words, that part of the Outer House decision in *Libertas-Kommerz GmbH v Johnson* dealing with floating charges stands.[52] In that case it was held that registration was not a constitutive requirement for a valid assignation. And, indeed, it was not even clear whether assignations could be registered by anyone other than the debtor company.[53] This point is not expressly resolved in section 42, but it seems implicit that assignees will be able to register. But the registration, to reiterate, is not constitutive. It may be added that, in any event, a reading of the new registration provisions show themselves to be permissive rather than mandatory. This allows a single rule to govern the assignation of floating charges: that applicable to the assignation of the

[49] See W Lucas, 'Assignation of Floating Charges' 1996 SLT (News) 203. The doctrine of catholic and secondary creditors does not apply to floating charges: *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co* 1984 SC 1.

[50] Bankruptcy and Diligence etc (Scotland) Act 2007, s 42(1).

[51] Section 42(3). Lucas doubts (1996 SLT (News) 203) that floating charges are assignable because they impose other, inherently personal, obligations on the debtor; as, eg, to produce confidential management accounts. But that argument does not hold good. The floating charge is granted in respect of indebtedness, not incidental obligations such as production of management accounts. If there are non-assignable personal claims, these are not transferred. But that does not mean that the principal claim and the accessory charge are not assignable.

[52] 1977 SC 191. There is a more serious objection to this decision: the treatment of the transfer of the principal claim. The case is sometimes cited for the proposition that intimation of a claim may be informal. The intimation in the case was indeed informal. But the Lord Ordinary accepted the sufficiency of it on the basis of a concession from counsel.

[53] Companies Act 1985 s 466, a strange provision. Why the debtor should register securities for his creditor is unexplained; but so too is much of the legislation on floating charges. See generally G L Gretton, 'Registration of Company Charges' (2002) 6 *Edin LR* 146.

principal claim. From the date of that transfer, i.e. the date of intimation of the assignation to the debtor, the transferee becomes entitled to the benefits conferred by the floating charge. Registration is informative rather than constitutive.

(6) Non-accessory rights

2-19. Non-accessory rights do not transfer automatically. For example, any rights that the original creditor may have, say, to rescind the contract out of which the assigned claim arose, are not accessory. They remain with the cedent despite the assignation.[54] Where there are functional security rights, the cedent will be bound to transfer these to the assignee. In other words, there may be a personal obligation to transfer the functional security or preference.[55] Other rights, although not classically accessory,[56] may be described as such to invoke the accessory principle; statutory preferences are an important practical example.[57]

(7) Retention of title

2-20. The benefit of a retention of title ('ROT') clause in a contract for the sale of goods is not accessory to the seller's claim for the price.[58] Although it is very often used as such, ownership is not a true right in security; it is not a *jus in re aliena*. That said, in such a situation, ownership seems to be parasitic to the debt: on payment of the price of the goods, ownership will pass to the buyer. This is very much like a security. On this basis it could be argued that ownership, though not a *jus in re aliena*, is nevertheless accessory to the claim. But there are difficulties. Suppose Seller Co enters into a contract of sale with Buyer Co. The contract contains a retention of title clause. Seller Co then factors all of its debts to Factor Co. If ownership is treated as an accessory security right, Factor Co becomes the owner of the goods; yet, in terms of the contract, Seller Co is bound to transfer property in the goods to Buyer Co. How can this be achieved if Seller Co is no longer the owner of the goods when Buyer Co tenders payment?

[54] Cf E M Meijers, *Ontwerp voor een Nieuwe Burgerlijk Wetboek, Toelichting, erste Gedeelte* (1954) 603; A S Hartkamp, *Asser's Handeling tot de beofening van het Nederlands Burgerlijk Recht, Deel 1, de Verbintenis in het Algemeen* (11th edn 2000) para 566.

[55] Cf Art 11:204(c) PECL.

[56] Cf A von Tuhr, *Allgemeiner Teil des bürgerlichen Rechts* vol 1 (1910) § 13 (following a passing remark by F Regelsberger, *Pandekten* (1893) § 51 II). Surprisingly, von Tuhr suggests that the accessory principle is of 'little practical value'; and that though a right may be characterised as accessory for one purpose, it does not follow that it need be characterised as accessory for another.

[57] In *Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd* 1999 SCLR 199, the Lord Ordinary described a statutory preference as 'incidental' in contradistinction to 'ancillary'. But this is a novel and unhelpful distinction: see discussion in Anderson and Eden (2003) 7 *Edin LR* 297. Further, there may be public policy considerations which would suggest that Crown preferences should not be exercisable by any party other than the Crown. But there are older cases allowing Crown preferences to be exercised by assignees: *Cleland's Creditors Competing* (1705) Mor 10397.

[58] See, eg, Hartkamp, *Asser's Handeling* para 564. In French and Belgian law the prevailing view is that retained ownership under such a contract is an accessory right: R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 165, Nr 150 ff.

2-21. In some legal systems, assignation is used in sale contracts to fortify ROT clauses. ROT provisions can be defeated by good faith sales.[59] But where ownership has been lost by sub-sale, there is *surrogatum*: the proceeds. So, in German law for example, the original sale contract between Seller Co and Buyer Co will have an extended ROT clause; a similar exercise is attempted in English law with the 'Romalpa' retention of title clause.[60] This provides that Buyer Co assigns to Seller Co its future claims to payment on any sub-sale of the goods to a bona fide third party, X, in security of any liability due under the original Seller Co and Buyer Co sale contract.[61] Debtor notification is not a constitutive requirement for cession and the assignation of future rights is fully recognised. This solution is therefore not presently available in Scots law.

B. PARTIAL ASSIGNATION

2-22. 'The simpler the proposition is', one lawyer has wryly observed, 'the harder … it is to find a precise authority upon it'.[62] Whether there can be a partial transfer of a claim is a simple question. In principle, so too is the answer: there can be. However, the dearth of solid authority for this proposition in Scotland, coupled with the proscription on partial cession in some other legal systems, raises the issue to one of some importance. In Scots law, it has never been suggested that a partial assignation is invalid on the basis that it is prejudicial to the debtor, and thus offends the *assignatus utitur jure auctoris* principle, as in some legal systems.[63] Indeed, there never seems to have been any argument in Scots law that partial assignation is not competent.[64]

[59] In Scotland by Sale of Goods Act 1979, s 25(1) and Factors Act 1889, s 9.

[60] This is discussed at para 10-52 below.

[61] See J Eckert, *Schuldrecht, Besonderer Teil* (2nd edn 2004) Rn 344 ff; D Medicus, *Bürgerliches Recht* (20th edn 2004) Rn 525; D Medicus, *Schuldrecht II, Besonderer Teil* (12th edn 2004) Rn 607.

[62] W A Ashburner, *Principles of Equity* (2nd edn 1933) vii. Cf *Panama & South Pacific Telegraph Co v India Rubber, Gutta, Percha & Telegraph Works Co* (1875) 10 Ch App 515 at 526 *per* James LJ.

[63] Such as South Africa, for which see S Scott, *The Law of Cession* (2nd edn 1991) 192 ff; R H Christie, *The Law of Contract in South Africa* (4th edn 2001) 539; 'N O T', 'Cession of a Portion of a debt' (1929) 46 *SALJ* 270; 'J H L', 'Cession of a Portion of a debt' (1937) 54 *SALJ* 40; E M Burchell, 'Partial Cession' (1952) 69 *SALJ* 131; W Rosenthal, 'Ceding a Portion of a Debt' (1971) 88 *SALJ* 236. It is not possible to execute a legal assignment of part of a debt under English law: *Foster v Baker* [1910] 2 KB 636; *Conlan v Carlow County Council* [1912] 2 IR 535; *Re Steel Wing Co* [1921] 1 Ch 349. See also Sir Roy Goode, 'Are Intangible Assets Fungible?' in P Birks and A Pretto (eds) *Themes in Comparative Law: Essays in Honour of Bernard Rudden* (2002) 97 at 103. A revised version is at [2003] LMCLQ 74. In Louisiana, although partial cession is envisaged by Art 2643 of the Civil Code, the debtor's consent is required: *Salter v Walsworth* (1936) 167 So 494.

[64] On the contrary, all discussion assumes that partial cession is competent: George Dallas of Saint-Martins, *A System of Stiles as now Practised within the Kingdom of Scotland* (1688, published 1774) vol I, at 7, comments that, where there is partial assignation, the warrandice should be carefully restricted. A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 1181 assumes that partial assignation of a claim is competent. J Burns, 'Bond' in Viscount Dunedin et al (eds) *Encyclopaedia of the Laws of Scotland* vol 2 (1927) para 749 states, 'If the assignation is partial only, the extent must be stated'. One important case on assignation in Scots law, *Fraser v Duguid* (1838) 16 S 1130 (for which, more below), involved a partial cession. It has been cited with approval at the highest level: *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123 at 1140A *per* Lord President Rodger. For the right of an assignee to pursue in the cedent's name (with which *Fraser v Duguid* is concerned), see para 2-25 below.

2-23. In *Salamon v Morrison's Trs*,[65] a beneficiary assigned part of her rights under a trust in security for advances, a one-twentieth share in the residue of the trust estate. Intimation of the assignation was made to the trustees. The assignees sought to compel the trustees to exhibit the trust accounts to them. The trustees refused. They argued that 'a person who holds an assignment of a beneficial interest in a trust estate is in an entirely different position from that occupied by his cedent, so far as regards the right to see the trust accounts. The maxim *assignatus utitur jure auctoris* had no application, unless the cedent transferred his whole right out and out to the assignee … an assignee of a part only of his share could not each simultaneously possess and exercise the same right of inspection. A right cannot be assigned and at the same time retained'.[66] The trustee defenders sought to emphasise that, since the assignation was in security, if the assignees were allowed to demand to see the trust accounts, the number of people so entitled would be doubled at a stroke. The beneficiary could execute a score or more of partial assignations and thus 'multiply indefinitely the expense of managing the trust and the duties of the trustees'. Lord Skerrington peremptorily rejected such an argument, continuing:

> 'These arguments [of the defenders] overlook the fact that a share, whether vested or unvested, in the capital of a trust estate is in law assignable in whole or in part… The defenders' counsel expressly conceded that if the action had been at the instance of the pursuer's cedent there would have been no good defence to it. But the right to examine the accounts is just as valuable, and indeed necessary, to a partial assignee as it is to an original beneficiary; and if one denies it to the former, one gratuitously deprives this species of property one of its natural incidents, with the result that it becomes less marketable and consequently of less value to the beneficiary. Does any valid reason exist why a partial assignee should not be entitled to take the best means of satisfying himself that the trust is being properly managed, and of ascertaining the true value of the trust estate? I am aware of none.'[67]

2-24. It was held, however, that, since a beneficiary could not involve the trust in unnecessary expense, neither could an assignee. The latter could therefore be compelled to cover the costs of procuring accounts. As for multiple partial assignations, '[the assignees] must either appoint a single representative to inspect the accounts on their behalf, or they must indemnify the trust by paying for the extra expense occasioned by repeated inspections of the accounts'.[68] Although *Salamon* deals with the situation of an obligation *ad factum praestandum* (that is, to exhibit accounts) it is thought that the same reasoning applies *a fortiori* to the money claim, payment of which should not involve additional expense over and above the principal sum.[69] It is instructive that in France, from where the law of Scotland relating to assignations may have been derived, partial cession is accepted.[70] On the

[65] 1912 2 SLT 499; (1912) 50 SLR 584 OH. See also *A v B* (1534) Balfour, *Practicks*, 517; *Cairnis v Leyis* (1533) Mor 827; Balfour, *Practicks*, 169.

[66] As reported by the Lord Ordinary (Skerrington) 1912 2 SLT 499 at 500.

[67] Lord Skerrington at 500.

[68] Lord Skerrington at 500. The solution adopted by Lord Skerrington is that favoured in the *Principles of European Contract Law* (Part III, 2003) Art 11:103 and the UNIDROIT *Principles of International Commercial Contracts* (2004) Art 9.1.8.

[69] See too *R Gaffney & Son Ltd v Davidson* 1996 SLT (Sh Ct) 36 at 39 *per* Sheriff Principal Hay.

[70] See eg A Rey 'Cession de Créance' in P Raynaud and J L Aubert (eds) *Dalloz Encyclopédie Juridique* (2nd edn 1986), vol III, para 539. See also UNCITRAL Art 9.

insolvency of the debtor in a partial assignation, the assignee and cedent will rank proportionally for their shares.[71] Where an assignation purports to convey more than is actually owed to the cedent, the assignation will be effectual to the extent of the amount owed;[72] the assignee will then have a claim in warrandice against the cedent for the balance.

C. THE ASSIGNEE'S RIGHT TO PURSUE IN THE CEDENT'S NAME

2-25. 'Nothing is more common in law', Lord Kames observes, 'than effects kept up after their causes cease'.[73] The apparent right of the assignee to sue in the cedent's name can only be explained on a historical basis; and, as will be discussed in the following chapter, that historical basis, never entirely firm in Scotland, has certainly ceased. Despite admitting the transfer of claims from an early stage in the development of the law, Scots law has retained the style of *procuratio in rem suam* as a functional equivalent of an assignation.[74] The historical development of the law will be discussed in detail in chapter 4. In summary, however, the procurator was appointed as the creditor's representative. Originally, the procurator's position was precarious. As Roman law developed, his position was improved. Nevertheless, the fact remained: strictly speaking there was no transfer. As a representative, therefore, the assignee had to bring any action in the name of the cedent.[75] This is analogous to English law. There, it was not possible to transfer a debt from one person to another until the Supreme Court of Judicature Act in 1873.[76] The courts of equity circumvented this rule by giving effect to agreements to assign. Under an equitable assignment, the assignee always sued in the name of the assignor. Equity would protect his right to the proceeds. Moreover, the Chancellor could compel the assignor to allow the assignee to use the assignor's name.[77] Scots law has never had a separation between law and

[71] R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 134–135, Nr 125. Cf *Code civil du Québec* Art 1646.

[72] *British Linen Co v Carruthers and Fergusson* (1883) 10 R 923 at 926–927 *per* Lord President Inglis; at 928 *per* Lord Shand.

[73] Kames, *Elucidations* Art 22, 'litiscontestation', at 144.

[74] See, in particular, the opinion of Lord President Rodger in *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123.

[75] See discussion at para 4-04 below.

[76] Which came into force on 1 November 1875: Supreme Court of Judicature (Commencement) Act 1874.

[77] The history of the assignment of choses in action in England is perhaps even more complex than in the civil law. It is treated briefly in para 4-34. It may be observed, however, that there is a further distinction to be made in English law. Choses in action may be legal or equitable. The courts of equity always exercised exclusive jurisdiction over equitable choses. These include some paradigm money claims, eg a pecuniary legacy from a deceased's estate. Where such choses in action were assigned, the assignee was always entitled to sue in his own name. This is somewhat at odds with the accepted rationale of the assignee having the right to sue in the name of the assignor or, in the case of subrogation, the apparent rule that the subrogee *must* sue in the name of the payee. This would depend on whether there was subrogation to an equitable or legal right. Similarly if A concludes an equitable assignment of a legal right (say, a claim to payment) in favour of B and B then assigns his right in turn to C, C is an equitable assignee of an equitable right, and can sue in his own name: G Tolhurst,

equity. As with ownership of a thing, a person is either the creditor of a debtor or he is not. On transfer, the claim is henceforth held by the assignee. Transfer is instantaneous. There is no halfway house.[78]

2-26. Generally speaking, if A tries to bring an action on the basis of a right which he holds in the name of B it can be met with a plea of no title to sue.[79] The apparent rule in the law of assignation is, therefore, peculiar. It is an historical hangover from the days when cession was thought (perhaps erroneously) to be prohibited and the mandate *in rem suam* had to be invoked. Yet the title of the assignee to sue in his own name has, in Scotland, always been accepted.[80] The right to sue in the cedent's name is an anachronism. And, in any event, the mandate *in rem suam* is not a transfer. There are thus two avenues that can be followed where parties to a transaction wish to allow one of them to exercise rights held by the other. The first is to transfer the claim outright, by assignation. It is a transfer like any other. And because it is a transfer, there no basis on which the assignee can sue in the name of the cedent: the assignee is now the creditor and the cedent no longer has any rights against the debtor.[81] The second is to constitute the putative 'assignee' as a procurator *in rem suam*. This gives the assignee a mandate to uplift the creditor's claim on his behalf. This is a clear basis on which to raise an action in the name of the creditor; the same basic principle that allows a solicitor to raise an action in a client's name.[82] The consequences of these actions, however, are different – especially where the cedent becomes insolvent.

2-27. The position has recently been thrown into sharp focus in the context of insurance, and the right of the insurer to be 'subrogated' to the rights of the insured.[83] The specialities of the law of insurance and subrogation cannot

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Assignment of Contractual Rights (2006) para 4-02. Cf A M Tettenborn, *An Introduction to the Law of Obligations* (1984) 202: 'The assignment of things in action is an unplanned area in English law, straddling Common Law and Equity, property and obligation'.

[78] Cf the surprising argument for the pursuers before the House of Lords in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 874 at 882A: 'There is only an *equitable assignation* by the indemnified person to the indemnifier, the latter can deal with this problem in England since the Judicature Act 1873 by joining those with the legal right to sue as co-defendants in the action and in Scotland by convening them as parties if the defender tables a plea of "all parties not called".' There is no such thing as an 'equitable assignation' in Scots law.

[79] *Wyper v Harveys* (1861) 23 D 607 at 613 *per* Lord Justice-Clerk Inglis. Indeed, in two other mixed legal systems, it is clear that the assignee must sue in his own name: Louisiana Code of Civil Procedure Arts 697(2) and 698(2) (West Group, 2001); *Code de procédure civile* Art 59 (Quebec). For the history, see Brunner, 'Inhaberpapier', 535 ff.

[80] *Munro v Wishart* (1582) Mor 10337. Cf *Jacksons (Edinburgh) v Constructors John Brown* 1965 SLT 37 where Lord Fraser followed *Duncan v Town of Arbroath* (1668) Mor 10075. As W A Wilson, *Introductory Essays on Scots Law* (2nd edn 1978) 77 commented, 'This case is found in the collected works of Sir George Mackenzie in his *Pleadings in some remarkable Cases before the Supreme Courts of Scotland* (1673), the fourth of which is *Carmichael against the Town of Aberbrothock* and is in fact the same case, Duncan being Carmichael's assignee'.

[81] Cf *Scottish Iron and Steel Co Ltd v Gillieaux & Collinet* (1913) 30 Sh Ct Rep 42 at 44 *per* Sheriff Lees: 'In their condescendence, the pursuers found upon an assignation … but from the instance it does not appear that the pursuers are assignees. On the contrary, they sue with the consent and concurrence of the original [creditor] which, if it is not to be wholly meaningless, appears to be inconsistent with the title to sue having been passed by assignation'.

[82] Although, in this case, since the mandate is not *in rem suam*, the solicitor cannot retain the proceeds for himself.

be discussed here. For present purposes it is sufficient to note Lord President Rodger's observation that the assignee's right to sue in the name of his cedent is deeply rooted in the law of assignation. The basis of this proposition is to be found in a passage from Lord Corehouse in *Fraser v Duguid*:[84]

> '…it is an established principle in our law, that Ker the assignee may sue in the name of the cedent. What objection can there be to such a proceeding? Even as to expenses, Ker removes every possible objection by coming forward and offering to sist himself. That was more than was necessary, as a mere mandate from him would have been enough.'[85]

This passage is hardly illuminating. On a pragmatic level, there seems to be little point in objecting to an action proceeding where both the assignee and the cedent are parties to the process. The debtor can thereby be sure he is indeed granted a discharge. As to expenses, where the assignee is sisted the debtor will not be prejudiced by the need to raise another action for payment should the action be unmeritorious: the court will be able to decern against either cedent or assignee as *dominus litis*.[86]

2-28. But there are problems. First, who is to grant the mandate? Lord Corehouse seems to suggest the assignee. But that makes no sense. I cannot randomly raise proceedings in the name of another by granting myself a mandate to that effect. Second, what is the effect of raising proceedings in the cedent's name, perhaps some considerable time after the assignation, if an award of expenses is made in favour of the defender? The decree is granted against the nominal pursuer, the cedent.[87] It cannot be the law that the cedent is liable for the expenses of the assignee's action.[88] Third, even if it were the position that an assignee suing in the name of the cedent may do so on production of a mandate from the cedent, that is different from saying, as Lord Corehouse initially suggests, that, as a matter of general principle, an assignee can sue in the name of the cedent without one.[89]

[83] *Esso Petroleum v Hall Russell* 1988 SLT 33 (1st Div) aff'd 1988 SLT 854 HL; *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123 (1st Div) aff'd 2002 SC (HL) 117.

[84] (1838) 16 S 1130, cited by Lord Rodger 2000 SLT 1123 at 1140A.

[85] Lord Corehouse at 1131.

[86] The *locus classicus* of the *dominus litis* doctrine is in Lord Rutherford's opinion in *Mathieson v Thomson* (1853) 16 D 19 at 23–24. He gives the case of an assignee suing in the name of his cedent as the paradigm situation where the defender can demand the *dominus* be sisted. Cf *Waddel v Hope* (1843) 6 D 160 and *Stevenson v Sneddon* (1900) 38 SLR 138. The authorities are fully canvassed in *Cairns v M'Gregor* 1930 SC 84 and *Cole-Hamilton v Boyd* 1963 SC (HL) 1; and, most recently, in *Aitken v Financial Services Compensation Scheme Ltd* 2003 SLT 878 and *O'Connor v Bullimore Underwriting Agency Ltd* [2005] CSOH 90.

[87] It is for this reason that J P Wood, *Lectures on Conveyancing* (1903) 582 cautions all cedents to insert a clause prohibiting the assignee from suing in the cedent's name. That may be well advised but, strictly speaking, it is unnecessary in a true assignation: suing in the cedent's name is inconsistent with transfer.

[88] Unless, perhaps, the assignee failed to recover because the claim was not due. That would be a breach of warrandice for which the cedent would be liable.

[89] It is interesting to note that in Gloag and Henderson, *The Law of Scotland* (10th edn 1995) (of which Lord Rodger was one of the editors) it is stated at para 11.16 only that 'An assignee may sue in his own name, *or may sist himself as pursuer in an action commenced by his cedent*' (emphasis added). Citation of *Fraser v Duguid* then follows. Nevertheless, *Grier v Maxwell* (1621) Mor 828; Hope *Major Practicks* II, 12 § 22 (though the reports are too brief to be useful), *Paxton v Hunter* (1749) Kilkerran 581; *Marshall v Grant and Sillers*, 31 May 1864, noted at (1864) 8 *Journal of Jurisprudence* 360; *Traill & Sons v Actieselskabat Dalbeattie Ltd* (1904) 6 F 798,

But, finally, and in any event, can such a mandate be sufficient? If the form of the transaction is a mandate *in rem suam*, the 'assignee' is a mere mandatory not a transferee. Consequently, he *must* bring the action in the name of the cedent. But if there is an outright assignation the position is different. The assignee, properly so-called, is now the creditor. A post-assignation mandate from the cedent cannot change that. Raising the action in the cedent's name is thus irrelevant: the named pursuer (the cedent) has no title to sue, and he has no right which he can authorise the transferee to exercise.[90]

2-29. The most conservative of the institutional writers,[91] Erskine, well distinguishes a conveyance by assignation from a mandate:

> 'It would seem, that by our ancient law all obligations were intransmissible, from a notion that no creditor could compel his debtor, contrary to the precise terms of his obligation, to become debtor to another, where the obligation did not expressly bear *to assignees*. And it was perhaps upon this ground, that by the old style of assignations, which is sometimes continued to this day, the assignee was made a mandatary and procurator *in rem suam*; which mandate empowered him to sue for, recover, and discharge the obligation, as the creditor himself could have done; *but our later customs have considered assignations, not barely as mandates, but as conveyances, by which the property of the subject assigned* is, without any such clause, fully vested in the assignee; and the general rule is, that whoever is in the right of any subject, though it should not bear *to assignees*, may at pleasure convey it to another, except where he is barred, either by the nature of the subject or by immemorial custom.'[92]

And if the consequences of this distinction are followed to their logical conclusion, a more serious objection is encountered.

2-30. Suppose an assignee sues in the cedent's name. The defender takes no plea to the relevancy. The pursuer is successful. Decree is granted in the pursuer's name, i.e. the cedent's name. The cedent then becomes insolvent. Who is entitled to enforce the decree against the debtor: the cedent's trustee in sequestration or the assignee? A mandate *in rem suam* will not confer a preference on the mandatary over the other creditors of the insolvent cedent.[93] There is little discussion of the effect of insolvency on a mandate. But first principles must rule. It is a contract. The rights arising out of this relationship are personal. There may have been protection in classical

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Goodall v M'Innes Shaw 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary), and *Ryan v M'Burnie* 1940 SC 173, maintain the right of the assignee to sue in the name of the cedent. Cf the doubts expressed about this by A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 304.

[90] *Stewart v Kidd* (1852) 14 D 527, in so far as it suggests that an assignee can sue in the name of the cedent if he produces a special mandate to that effect, must be wrong.

[91] The description is Lord Reid's: 'The Judge as a Law-Maker' (1972–73) 12 *JSPTL* 22 at 24.

[92] Erskine III.v.2, emphasis added. For Erskine's statements about the history of the law, see chapter 5.

[93] U Georgen, *Das Pactum de non cedendo* (2000) 50, n 176. It also raises the question of what happens if the assignee sues in the name of the cedent and loses and it is the assignee that becomes insolvent. Does this mean that the cedent, who may have had nothing to do with the proceedings, is fixed with liability not just for expenses (the doctrine of *dominus litis* is limited to expenses) but to the principal sum on any counterclaim? It may be observed by way of analogy that a beneficiary may only bring actions against third parties in the name of the trustees where sufficient caution is found for any expenses that may be awarded against the trustees: *Morrison v Morison's Exrx* 1912 SC 892; *Brown's Tr v Brown* (1888) 15 R 581.

Roman law, on the basis that the procurator became the true creditor by novation of the debtor/creditor relationship on *litis contestatio*, or on the procedural development which awarded the procurator an *actio utilis*. Yet even by the time of Justinian, the extinctive effect of *litis contestatio* had disappeared.[94] More importantly, it has been denied that *litis contestatio* continues to have this effect in Scotland by the House of Lords, as well as the First Division while Lord Rodger was Lord President.[95] Indeed, it has been held that the effect of decree being pronounced in another's name is to assign judicially the original pursuer's claim to the person named in the decree.[96] This is the opposite of what the creditor who constitutes another as his procurator *in rem suam* wants to achieve. In the other situations where a person is allowed to bring an action in the name of another, anything recovered will benefit the party in whose name the action was brought and decree recovered.[97]

2-31. The law is therefore clear in principle if not in authority. Only a pursuer who is expressly constituted as a procurator *in rem suam* can sue in the name of the cedent. If the cedent becomes insolvent the right to recover will fall into the cedent's sequestration. Indeed, on analogy with the well-known case of *Redfearn v Sommervails*,[98] by allowing the decree to pass in the cedent's name, the assignee may be personally barred from recovering. As to whether the pursuer, who holds a procuratory *in rem suam*, can sue in his own name, the position is unclear. While the right of an *assignee* to sue in his own name has never been doubted, there are no cases where a transaction

[94] H F Jolowicz, *Roman Foundations of Modern Law* (1957) 88. For discussion of the *litis contestatio* in Roman law, see para 4-04.

[95] *Stewart v London, Midland & Scottish Railway Co* 1943 SC (HL) 19 at 25 *per* Viscount Simon LC; *Dick v Burgh of Falkirk* 1976 SC (HL) 1, cited with approval by Lord Rodger in *Coutts' Tr v Coutts* 1998 SC 798 at 804D–I. Lord Rodger is well acquainted with the *litis contestatio* doctrine: see A Rodger, 'Procurator Restitutus' in C Krampe (ed) *Quaestiones Iuris, Festschrift für Joseph Georg Wolf zum 70 Gesburtstag* (2000) 207–220. For *litis contestatio* in older Scots law, see G Ross (ed) *Bell's Dictionary and Digest of the Law of Scotland* (1882) 601, 'litiscontestatio' and the arguments in *Sir John Meres v York Buildings Co* (1728) 1 Kames Rem Dec 193. Cf L R Caney, *A Treatise on the Law of Novation* (2nd edn 1973) 66 ff. Even if there were some sort of novation, the decree would still be in favour of the now bankrupt insured. His trustee would take the proceeds. Also, novation extinguishes the original obligation. Consequently, any accessory security rights will also be extinguished. In classical Roman law accessory cautionary obligations were thus discharged: see P F Girard, *Manuel élémentaire de droit romain* (6th edn 1918) 745, n 5; (8th edn 1929) 774, n 5. So an assignee suing in the name of the cedent would lose accessory security rights to which he would otherwise be entitled. This would be a major factor in deciding whether to exercise the apparent right to sue in the name of the cedent. Admittedly, by the time of Justinian, *litis contestatio* had ceased to have any novatory effect: see the preceding note and, more generally, see Mühlenbruch, *Cession*, § 4, 35–37, n 64 for the distinction between delegation and *litis contestatio*. For the remarkable survival of the *litis contestatio* in modern American law: R Helmholz, 'The *litis contestatio*: Its survival in the Medieval *ius commune* and Beyond' in M Hoeflich (ed) *Lex et Romanitas: Essays for Alan Watson* (2000) 73 at 80.

[96] *Brand & Co and W T Craig v Cummings* (1913) 30 Sh Ct Rep 26 at 28 (a case involving the right of an agent disburser to take a decree for expenses in his own name). Indeed, it is on this basis that the right of the so-called 'agent disburser' developed: the agent takes decree in his own name. The effect is to assign judicially the award of expenses to the agent: *Gordon v Davidson* (1865) 3 M 938; *Fleming v Love* (1839) 1 D 1097.

[97] Eg, the right of a beneficiary to bring an action in the names of the trustees to vindicate trust property. It is accepted that any benefit enures to the trust, not directly to the beneficiaries.

[98] (1813) 1 Dow 50 HL, discussed in para 9-25.

in the form of a mandate *in rem suam* has allowed the mandatory to sue in his own name. If the cedent becomes insolvent the right to recover will fall into the cedent's sequestration.

2-32. The issue has also arisen on the appointment of a receiver. The receiver has the power to ingather debts owed to the company in receivership.[99] In whose name should the receiver raise actions for payment? His own?[100] The name of the company in receivership?[101] Or the name of the creditor holding the floating charge? The courts have swayed between the first two alternatives, finally falling on the side of the second.[102] The basis for this view, however, is not clear. A floating charge attaches to incorporeal moveables 'as if' it were a fixed security, i.e. an assignation in security.[103] Lord Prosser has suggested that the attachment cannot be exactly the same as an assignation in security; otherwise the receiver would be able to sue in his own name, which he cannot.[104] But this is to confuse the receiver with the creditor: if the attachment of a floating charge is equivalent to an assignation in security, the assignee must be the creditor who holds the floating charge. The creditor is quite separate from the receiver, although the receiver acts for the creditor's benefit. So the only person with a good title to sue is the creditor.

2-33. It is noteworthy that, when a right is assigned on which diligence has followed, the assignee cannot execute the diligence in the name of the cedent.[105] If the cedent has applied for a warrant to use diligence, and providing execution has not begun, the diligence can be issued in the name of the assignee.[106]

D. THE (IR)RELEVANCE OF DELECTUS PERSONAE

(1) Rights and liabilities

2-34. On intimation, an assignation transfers claims without the consent of the debtor. Claims are to be distinguished from obligations or liabilities. A person cannot escape his liabilities without the consent of his creditor.[107] This

[99] Insolvency Act 1986, s 55 and Schedule 2; Companies Act 1985, s 471(1)(f).

[100] *McPhail v Lothian Regional Council* 1981 SC 119 OH.

[101] In *Blyth Dry Docks & Shipbuilding Co Ltd v Commissioners for the Port of Calcutta* 1972 SLT (Notes) 7, the receiver raised the action in the name of the company in receivership but concluded for payment in his own name. The Second Division repelled an objection to the competency. The receiver's right to sue in the company's name is now statutory: Insolvency Act 1986, s 57(1).

[102] As was held in *Taylor v Scottish and Universal Newspapers Ltd* 1981 SC 408 OH, *McPhail v Cunninghame District Council* 1983 SC 246, and *Myles J Callaghan Ltd (in receivership) v Glasgow District Council* 1987 SC 171 OH, all declining to follow *Lothian RC* above.

[103] *Forth & Clyde Construction Ltd v Trinity Timber & Plywood Co* 1984 SC 1.

[104] *Myles J Callaghan Ltd* at 181. Cf *Fraser v Dunbar* (1839) 1 D 882; 6 June 1839 FC.

[105] *Hay v Stewart* (1745) Mor 834 and 8123; Elchies, *Assignation* No 6; *Horning* No 3; Kilkerran 331; *Foggo and Galloway v Scot and Oliver* (1769) Mor 3693; Hailes 319 at 320 *per* Lord Pitfour.

[106] *Young v Buchanan* (1799) Mor 8137.

[107] A point recognised by McBryde, *Contract* para 12-57, n 189: 'Obviously if any debtor could assign a debt, without the consent of the creditor, to any person the debtor chose, there would be the end of commercial life as we know it'. This is preferable to his statement that (*Contract* para 12-73): 'The assignation may transfer rights and, in some circumstances, obligations…'. Cf K G C Reid and G L Gretton, *Conveyancing* (3rd edn 2004) para 22.02 quoted in para 1-04 above. Surprisingly, it was suggested in the 'Halliday Report', *Report by*

much seems clear. Yet the classic cases on the subject in Scotland constantly refer to the assignation of *contracts*, and the doctrine of *delectus personae*; the presence or absence of the latter being the decisive factor in the determination of whether a *contract* can be the object of assignation.[108]

2-35. There are two points to be made. First, to speak of the assignation of *contracts* is inaccurate.[109] Contracts are, by definition, at least bilateral. They contain rights. But mutual contracts contain correlative obligations. To say that a *contract* is assignable necessarily admits that it is possible to alienate one's liabilities without the consent of the creditor.[110] *Rights* are the proper subjects of assignation. Secondly, reference to *delectus personae* contributes only confusion to the question of what can be assigned. It will be seen that almost all the references to *delectus personae* are actually instances of liabilities. These, *ex hypothesi,* are not transferable or at least not without the consent of the creditor.

(2) Delectus personae and assignation of 'contracts'

2-36. The transfer of a mutual contract[111] necessarily supposes the transfer of liabilities as well as rights.[112] A paradigm assignation does not require the consent of the debtor; liabilities, in contrast, cannot be transferred without the consent of the creditor. Yet, on one reading of the authorities, Scots law appears to disregard this important rule. The textbook statements are based, essentially, on two cases: *Cole v Handasyde*[113] and *Anderson v Hamilton & Co*.[114] The rubric in a third and oft-cited case, *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation*[115] contributes further to the confusion. The factual situations in the cases are almost identical. A enters into a mutual contract with C for the delivery

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the Working Party on Security over Moveable Property (1986), at 9 that one of the problems with an assignation in security was that the assignee could become liable for the obligations of the cedent. That is not correct. For a better view, see H L MacQueen, 'Assignation' in *SME*, vol 15 (1995) para 858. Further discussion is found in 'Transfer of Contracts', para 3-28 ff below.

[108] *Cole v Handasyde & Co* 1910 SC 68 at 73 *per* Lord Dunedin and the opinion of the Lord Ordinary. *Cole* was approved most recently in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH and *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270 OH.

[109] F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (9th edn 2005) para 1304.

[110] It is probably possible in Scots law to transfer a contract *in toto*. However, since this requires the consent of all the parties, this is not an 'assignation' in the strict sense of the term: see '*cession de contrat*' below.

[111] Gloag, *Contract* (2nd edn 1929) 416–422; McBryde, *Contract* para 12-42; Reid, *Property* para 600. See also D M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn 1995) para 29.23.

[112] J Ghestin, 'La transmission des obligations en droit positif français' in *La transmission des obligations* (1980) 7-8: 'La cession de contrat synallagmatique contient nécessairement une cession de dettes'.

[113] 1910 SC 68.

[114] (1875) 2 R 355. See, eg, W M Gloag, *The Law of Contract in Scotland* (1914) 458 ff; (2nd edn 1929) at 416–422. Gloag's tripartite distinction at 416 is, with respect, confused. Though not infrequently cited (eg it is adopted by T B Smith, *Short Commentary on the Law of Scotland* (1962) 785 ff), none of those examples in his division can be the object of assignation. Indeed Gloag's suggested trichotomy directly contradicts his treatment of delegation at 258 (2nd edn, 1929). In a similar vein, see also D M Walker, *The Law of Contracts and Related Obligations* para 29.28.

[115] 1907 SC 463.

of certain goods or provision of services. In *Cole* there was no performance by A; in *Anderson* and *Asphaltic Limestone*, A had partially performed. In all the cases, A then became insolvent. The question for decision in each case was whether B, the trustee or insolvency administrator of the insolvent estate, could 'adopt' A's contract with C, tender performance and thereby become entitled to payment. In *Cole*, C was held bound to pay B. In *Anderson* the adoption came too late. In *Asphaltic Limestone*, the question was whether the insolvency administrator could adopt one contract but repudiate another. 'Adoption' is a difficult concept, but it is distinct from an assignation. Confusion arises because often the trustee will be an assignee of the *rights* (although a liquidator is not, since there is no vesting as a result of liquidation).[116] It is by 'adoption' that the trustee performs the debtor's existing obligations and undertakes new liabilities. The right to 'adopt' is peculiar to trustees in sequestration[117] and to executors on death. There is no *assignation* of the obligations to deliver the goods, so reference to the assignation of *contracts* is inaccurate.[118] The concept of adoption will be discussed in more detail below.

2-37. *Asphaltic* complicates matters by characterising the liability of the insolvent company to perform its obligations as a right to perform and thus claim the money. That is a mistake. Formulating an obligation or liability positively, in terms of an entitlement to the pecuniary award payable on performance of the obligation, unhelpfully clouds the legal situation.

2-38. Whether the creditor is bound to accept performance from someone other than the debtor is a proper question of *delectus personae*. And it may be that an assignee of rights wants to perform the cedent's outstanding obligations, as in *Asphaltic*. The presence or absence of *delectus personae* will determine whether the creditor is bound to accept the performance. If there is *delectus personae*, the assignee cannot perform the cedent's obligations, even if he wants to; if there is no *delectus personae*, the assignee may perform if he wants to, but he is never bound to do so by virtue of the assignation.[119] What is not clear, however, is what most of this discussion has to do with the law of assignation. Indeed, Nienaber and Gretton have gone so far as to suggest that:

> 'One pessimistic view would be that *Cole* has reduced the Scots law of cession to a hopeless morass of confusion between assignation, delegation and sub-contracting, and the role of *delectus personae* in all three. But the essential principles should, notwithstanding *Cole*, be clear enough.'[120]

[116] At least, not automatically. But though uncommon, vesting in a liquidator is possible: Insolvency Act 1986, s 145; Titles to Land (Consolidation) (Scotland) Act 1868, s 25, read with Conveyancing (Scotland) Act 1924, s 4.

[117] Or his corporate equivalent, i.e. a liquidator, receiver or administrator.

[118] Although the terminology is widespread: see eg *Scottish Iron & Steel Co Ltd v Gillieaux & Collinet* (1913) 42 Sh Ct Rep 42; *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH; *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270 OH.

[119] Some historical antecedents of *Asphaltic Limestone* are: *Logan v Hamilton* (1627) Mor 9207; *Murdoch v Dick* (1673) Mor 9209; *Shearer v Cargill* (1686) Mor 9210; *Lord Lyon v Feuars of Balveny* (1672) Mor 5076; *Shaw v Forbes* (1687) Mor 4381. None of these cases renders the assignee liable for the cedent's obligations; but the assignee may be entitled to perform the cedent's obligations if the debtor will not otherwise pay.

[120] P Nienaber and G L Gretton, 'Cession/Assignation' in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 807.

It is interesting to note that in English law, where references to the assignment of contracts were common, the House of Lords has now accepted that only *rights* arising out of a contract can be assigned.[121]

(3) What is delectus personae?

2-39. It is often said that the presence of *delectus personae* will bar assignation.[122] *Delectus personae* is of two sorts: *delectus personae creditoris* and *delectus personae debitoris*. The former bars assignation of the right; the latter prevents the debtor sub-contracting. What, then, is *delectus personae*?[123] It has been said that there is *delectus personae* where the parties to the contract selected each other on the basis of personal qualifications or suitability,[124] or where there is 'deliberate choice as opposed to mere caprice'.[125] In the first edition of his work on *Contract*, Gloag suggests the following:

> 'It is submitted that in contracts where the element of *delectus personae* consists in the fact that reciprocal obligations are undertaken on each side, though not assignable by voluntary assignation, admit of being adopted and carried out by the trustee in bankruptcy.' [126]

2-40. Here, Gloag confounds the three concepts of assignation, sub-contracting and adoption and the respective role of *delectus personae* in each. Indeed, if *delectus personae* bars assignation, but *delectus personae* can consist in 'reciprocal obligations undertaken on each side', then, since this is the essence of a *contract*, on Gloag's own argument, contracts cannot be

[121] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161. Strangely, the Lord Ordinary in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH suggested that the underlying reasoning of the House of Lords was inconsistent with the principles of Scots law.

[122] McBryde, *Contract* paras 12-33 ff. See also Reid, *Property* para 600; J C Carmont KC, 'Delectus Personae' in Lord Dunedin et al (eds) *Green's Encyclopaedia of the Laws of Scotland* (2nd edn 1928) vol 5 para 1172 ff. This analysis has been employed by the House of Lords: *International Fibre Syndicate Ltd v Dawson* (1901) 3 F (HL) 32. Cf P Nienaber, 'Cession' in W A Joubert et al (eds) *The Law of South Africa*, 2nd edn, vol 2, Part II (2003) para 38.

[123] In the context of assignation, the formulation can be traced to Erskine III.v.2. Erskine's *Institute* first appeared (posthumously) in 1773. Until the nineteenth century, however, the terminology is found only in leases cases: see eg Lord Monboddo in *Locheil's Trs v Alexander, Duke of Gordon* (1772) Mor 15050; Hailes 472 at 472 and 475. *Atchison v Benny* (1748) Mor 10405 refers to '*electio personae*' in the context of the tenant of an urban dwelling. The earliest use of '*delectus personae*' traced, is in *Nairne v Freeburn* (1737) Mor 10403. Cf W C Smith, 'The Sources of the Law of Scotland' (1904) 16 *JR* 375 at 387 who suggests that the term *delectus personae* was first invoked in an arbitration case, *Buchanan v Muirhead* (1799) Mor 14593 (which refers to '*dilectus personae*'), and that, 'ever since nobody has been quite able to understand it'.

[124] W Trotter, *The Law of Contract in Scotland* (1913) 269. There seems no reason why there cannot be *delectus personae* on only one side of a contract, thereby allowing sub-contracting by one party but not by the other. See *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 618E *per* Selikowitz J quoted below. This is preferable to the dicta of Lord McLaren in *Berlitz School of Languages v Duchêne* (1903) 6 F 181 at 185 – he states that *delectus personae* bars the assignation of a contract; *a fortiori*, there can be no assignation of any particular rights under that contract. This is incorrect.

[125] Gloag, *Contract* (2nd edn 1929) 416. Cf F Valleur, *L'Intuitus personae dans les contrats* (Paris, 1938) 7.

[126] *Contract* (1914) 466.

assignable.[127] In the second edition of his work, Gloag adopts an oft-cited dictum of Bramwell B:[128]

> 'Where a contract is made in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, *or where there might be a set-off*, no other person can interpose and *adopt* the contract.'[129]

2-41. There are a number of problems with this explanation. Only the most difficult will be discussed here.[130] If the possibility of set-off is fundamental to *delectus personae*, then there must be *delectus personae* in every contractual relationship where the possibility of set-off has not been excluded. But the most commonly assigned right is the right to payment arising out of a contract. It is incontrovertible that such *rights* are transferable. Since the debtor may plead compensation against the assignee (*assignatus utitur jure auctoris*), a potential plea of compensation is entirely irrelevant to both assignation and *delectus personae*.[131]

2-42. Where there is *delectus personae* in a contract, the chosen person is not usually debarred (subject to some special cases addressed below) from assigning his *right* to payment. A person cannot transfer his obligation to perform without the consent of the other party because it is a liability. This prohibition has nothing to do with the fact that he is especially skilled.[132]

> 'The restriction on the cession of rights in a contract because it involves *delectus personae* is tested with reference to the nature of the debtor's obligation vis-à-vis the cedent, and not the nature of the cedent's obligation vis-à-vis the debtor[133]… . In this case the nature of the obligation which allegedly rests on the applicant is the obligation to make payment. It is not affected by the change in the identity of the creditor.'[134]

[127] See too the title on '*Delectus personae*' by Carmont KC in Dunedin (ed), *The Laws of Scotland* vol 5, especially at para 1189.

[128] At 416 and again at 418.

[129] *Boulton v Jones* (1857) 2 H & N 564; 157 ER 232 (emphasis added). Admittedly, Gloag later rightly criticises (at 422) the Second Division for their approval of *Boulton* in *Grierson, Oldham & Co v Forbes, Maxwell & Co* (1895) 22 R 812. *Boulton* was cited by Sheriff Lees in *Scottish Iron & Steel Co Ltd v Gillieaux & Collinet* (1913) 30 Sh Ct Rep 42 at 45, a judgment that preceded the publication of the first edition of Gloag on *Contract*. See too the criticism in Bell, *Principles* (10th edn by W Guthrie, 1899) § 1459, n *(h)*.

[130] The other issues being the relative state of English law when the statement was made, the reference to 'adoption', and that *delectus personae* is not a term of English law; it is not mentioned in *Boulton* or, it seems, any other English case. *Boulton* is really an authority for the proposition that an offer to contract addressed to X cannot be accepted by Y: see McBryde, *Contract* para 6-107; cf *Hersch v Nel* 1948 (3) SA 686 (A) at 691 *per* Schreiner JA. For English law see generally: Sir Guenter Treitel, 'Assignment' in P Birks (ed) *English Private Law* (2000) vol II, para 8.343.

[131] Gloag's passage at 418 contradicts his treatment of the *assignatus* rule at 429.

[132] Cf S Woolman and J Lake, *Contract* (3rd edn 2001) para 11.4 and H Weber, *Einführung in das schottische Recht* (1978) 81. Both works conflate the concept of transfer of rights (which does not require the debtor's consent) and the transfer of contracts (which requires the consent of the *creditor* in the *liability* to be assigned).

[133] See *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) at 112.

[134] *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 618E *per* Selikowitz J. See also T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) para 186, at 268: 'Il est donc démontré par tout ce qui précède, que les droits de créance, même lorsque leur création légale ou conventionnelle a été certainement déterminée par la considération

2-43. An employee in a contract of employment is a useful example. Such a person may or may not be considered as skilled. The point is not relevant to the assignability of the employee's wages. They are assignable: they are simple money claims and, consequently, arrestable (to the extent that they are not alimentary).[135] In the case of a contract for professional services where there will usually be *delectus personae* vis-à-vis the contractor, the contractor's fees are assignable as well as arrestable.[136] As the example of the contract of employment shows, however, there may be exceptions to this principle: e.g. the right of an employer to the service of an employee is said to be a right coloured by *delectus personae* and as such unassignable (remembering always that 'assignable' means transfer without the consent of the debtor).[137] Certain rights under a lease are also problematic.[138] Yet, neither of these examples are paradigm situations of the assignation of a money claim. Nevertheless, this is not to say *delectus personae* is meaningless. In particular, when used in its proper sense, it will be relevant in two cases: (i) sometimes *delectus personae* will prevent *claims* from being assigned (*delectus personae creditoris*); (ii) it will determine whether a debtor can sub-contract an obligation (*delectus personae debitoris*).

(4) When is delectus personae relevant?

2-44. There are certain claims which are inherently non-transferable. Numerous statutory provisions state that a purported assignation of particular claims will be void.[139] Prohibitions may also be expressed in contract by a so-called *pactum de non cedendo*. These prohibitions will be discussed in detail below.[140] But it is also possible to view these prohibitions from the point of view of the right assigned: there is *delectus personae creditoris* and, as result, the right is non-transferable. Conversely, however, one can expressly override what the law would imply; that is to say, one can contract out of *delectus*

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de la personne, sont pleinement cessibles comme les autres. Comment donc se fait-il qu'on lise souvent dans les auteurs et dans les arrêts qu'un droit constitué *intuitu personae* ne peut être cédé? C'est uniquement par l'effet d'une équivoque qui s'est produite quant à la manière d'envisager le droit. On a confondu l'élément passif avec l'élément actif, c'est-à-dire la dette avec la créance.'

[135] Debtors (Scotland) Act 1987, Part III, ss 47–50 and sch 2. But, unusually, if the employee becomes bankrupt, his wages do not vest in the trustee: Bankruptcy (Scotland) Act 1985, s 32(1); although the trustee can apply to the sheriff for an order that the bankrupt pay over income that exceeds the alimentary level (s 32(2)); see too *Brown's Tr v Brown* 1995 SLT (Sh Ct) 2. Compare the French position: F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (9th edn 2005) para 1278.

[136] J Graham Stewart, *Diligence* (1898) 100.

[137] The subject is large and cannot be discussed here. It is usually examined only in the context of employment law with little consideration of the basic juridical nature of the transfer. Often, where a business is transferred, the transferee may wish to enforce restrictive covenants against former employees: *Berlitz School of Languages v Duchene* (1903) 6 F 181; *Fraser & Son v Renwick* (1906) 14 SLT 443. Cf V Bertrand, *Transfert des contrats de travail et cession d'entreprise* (1988).

[138] These cannot be considered here. Some long leases are deemed to be assignable, while shorter leases are held to be unassignable. The usual provision is that the lease is assignable with the consent of the landlord, which shall not be unreasonably withheld. See generally A McAllister, *Scottish Law of Leases* (3rd edn 2002) ch 6.

[139] See McBryde, *Contract* para 12-46.

[140] See chapter 10.

personae.[141] At common law, certain rights are deemed to be unassignable because the debtor has a recognised interest in retaining a particular creditor; other rights are unassignable by statute. The express agreement of the parties cannot override legislative provisions rendering a claim unassignable.

2-45. There are important implications for the *delectus personae* rule if the holder of the right becomes bankrupt. A trustee in sequestration is a judicial assignee. Arguably, therefore, such a non-assignable right cannot fall into the right holder's sequestration.[142] *A fortiori*, it will not be arrestable. What claims, then, cannot be assigned on the basis that they are personal to the holder? It has been held in South Africa that the entitlement of the State to payments of tax is personal to the Revenue and cannot be ceded.[143] In Scotland, however, it appears that the Revenue can transfer claims owed to it. Moreover, the statutory preference enjoyed by the Revenue is accessory; and, consequently, can be exercised by the assignee.[144] Social security claims cannot be assigned. It has not been decided whether a right held under a contract by virtue of a *jus quaesitum tertio* can be assigned. But where the *tertius* has right to payment of a sum of money, it can be assigned. Intimation to the primary debtor is sufficient. It has been held that a right accorded by statute is not assignable if the statute does not expressly authorise assignation;[145] but these authorities cannot be taken to have established a general principle. Whether a statutory right is assignable will always depend on the particular legislative provisions.[146] There is a presumption that money claims to payment are assignable without the debtor's consent. The presumption, however, is weaker vis-à-vis obligations *ad facta praestanda*. These are owed to a particular creditor. And, in some cases, the debtor is not required to perform to an assignee of the creditor:

[141] Cf S Woolman and J Lake, *Contract* (3rd edn 2001) para 11.4: 'Most contractual rights are assignable when consent is given'. Almost all contractual rights are assignable where consent is given. Rights arising out of an illegal contract and rights deemed unassignable by statute are perhaps the only exceptions.

[142] *Mulvey v Secretary of State for Social Security* 1996 SC 8 aff'd 1997 SC (HL) 105. But see discussion in chapter 10.

[143] *Namex (Pty) Ltd v Commissioner for Inland Revenue* 1922 (2) SA 761 (C). It could be argued that the change of creditor places a greater obligation on the debtor, and any right on the part of the Revenue is to be construed restrictively: Cf Lord President Clyde in *Ayrshire Pullman Motor Services v Commissioners of Inland Revenue* (1929) 14 TC 754: 'No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest shovel in his stores'. *A fortiori*, why should an assignee be able to enforce a preference which could be seen as personal to the Crown?

[144] *Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd* 1999 SCLR 199 OH discussed by R G Anderson and S Eden, 'Transfer of Preferences on Payment' (2003) 7 *Edin LR* 398. The Crown preference for Revenue arrears has been abolished: Enterprise Act 2002, s 251. The point may still be relevant: see eg *Jackson and Long, Noters* 2004 SC 474 OH. Other rights have been held to be personal to the Crown and thus non-transferable: *Orr-Ewing v Earl of Cawdor* (1884) 11 R 471; (1885) 12 R (HL) 12. Some Roman-Dutch writers treat other ancillary benefits as accessory, eg Voet, *Commentarius* 11.4.12 (insolvency preference of funeral expenses). Cf *Hood v Pedden* (1829) 8 S 208.

[145] *MacKnight, Petr* (1875) 2 R 667 at 668 *per* Lord President Inglis; *Goodall v M'Innes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary).

[146] See R R M Paisley, 'Personal Real Burdens' 2005 *JR* 377 at 396.

> 'It is the same to me, whether I pay money to my creditor or to his mandatary; but is not the same to me, whether I perform personal service to my superior or to his mandatary. If I have obliged myself to lend my horse to John, there is a *delectus personae*, and I am not obliged to lend it to any other.'[147]

2-46. The employer's right to service from an employee is perhaps the paradigm example of this doctrine.[148] However, like statutory rights, whether a particular obligation *ad factum praestandum* is assignable by the creditor will depend on the obligation. Some are assignable, others are not.

[147] Kames, *Elucidations*, Art 2, at 8

[148] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1026 *per* Lord Atkin; *Ross v McFarlane* (1894) 21 R 396.

3 Functional Equivalents

A. UNIVERSAL SUCCESSION/TRANSMISSION

3-01. The *inter vivos* transfer of claims by assignation is a species of singular succession. This can be contrasted with the concept of universal succession. This was held to occur on death, with the heir succeeding to the universality of the deceased's assets and liabilities. Stair describes the difference between singular and universal succession thus:

> 'Heirs in law are called universal successors, *quia succedunt in universum jus quod defunctus habuit*, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him *activè*, in all the rights belonging to him, and *passivè*, in all the obligations and debts due by him; and when they do not orderly enter, they become successors *passivè*, liable to the defunct's debt, but not heirs *activè*, having power to claim his right, till they be entered according to law: other successors are called singular successors, as assignees and purchasers, but heirs only are universal successors.'[1]

[1] Stair III.iv.23. See too Erskine II.vii.1.

That universal succession can render the successor actively liable for debts is a major difference from singular succession. Universal succession is complicated.[2] It has not been properly studied in Scotland. Indeed, the succession of liabilities is not as complete as it might sound. Since Justinian's time, an heir has been able to limit his liability to the extent of the deceased's assets. There is much to be said for the view that on death there is neither a 'succession' of assets nor a cessation of legal personality. But the point cannot be discussed here. In modern law, the concept has been developed beyond the limits envisaged by Stair, being regularly invoked in business transfers. There is considerable authority for the proposition that on transfer of all the assets of a business which continues trading under the same name, the transferee becomes jointly and severally liable for the debts of the transferor.[3] This principle is particularly important on nationalisation or privatisation of industry. It has been observed in the House of Lords that universal succession, unknown to English law, is a concept Scots law shares with other civil law countries.[4] In the last hundred years or so, however, the Court of Session has been more reluctant to admit the principle.[5] For present purposes it is sufficient to note that the *inter vivos* voluntary assignation of claims is a form of singular succession. Such an assignation is to be distinguished from a 'general' assignation which may, in fact, be a form of universal succession. In the Scottish sources, this conceptual distinction is sometimes expressed in a nomenclature which distinguishes transfer (singular succession) from transmission (universal succession).[6]

B. NOVATION [7]

(1) General

3-02. Suppose B owes obligation *xy* to his creditor A. It is agreed, however, that it would be mutually preferable for B to owe A obligation *yz*. A discharges B

[2] Cf Reid, *Property* para 598 and T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1, para 42 ff, 'De la Transmissibilité'.

[3] *M'Keand v Laird's Tr* (1861) 23 D 846 at 855 *per* Lord Justice-Clerk Inglis; *Miller v Thorburn* (1861) 23 D 359; *Thomson & Balfour v Boag & Son* 1936 SC 2 at 10 *per* Lord President Normand; *Miller v McLeod and Parker* 1973 SC 172; *Ross Harper & Murphy v Banks* 2000 SC 500 OH.

[4] *Metliss v National Bank of Greece and Athens* [1958] AC 509 at 530 *per* Lord Keith of Avonholm, quoting Stair III.iv.23. For the comparative history, see generally, L Sedatis, 'Universalsukzession' in *HRG* vol 5 (1998) 490. Cf the old German law under § 419 *BGB* which was repealed by the *InsO* in 1999. The corresponding Austrian provision, § 1409 *ABGB*, remains in force.

[5] *Smith's Trs v A D Smith* (1899) 6 SLT 263 OH at 267; *Ocra (Isle of Man) Ltd v Anite Scotland Ltd* 2003 SLT 1232 OH.

[6] Cf *Riley v Ellis* 1910 SC 934. As for Lord Dunedin's dissent in *Riley v Ellis*, see G L Gretton, *SME*, vol 8, 'Diligence' para 261. In German law, an *inter vivos* transfer, i.e. singular succession, is seen as just one part of the general concept of succession which may be universal as well as singular: see K W Nörr, R Scheyhing and W Pöggeler, *Sukzessionen* (2nd edn 1999). Cf T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) 70 ff.

[7] Or 'innovation': see the title in Morison's Dictionary. Cf J Chisolm (ed) *Green's Encyclopaedia of Scots Law* (2nd edn 1909) vol 8, 560, *s.v.* 'Novation'. Only 'voluntary' novation will be considered here. The Romans contrasted this with *novatio necessaria*, which occurred on *litis contestatio*. This will be ignored on the grounds that it is not a true form of novation: see *Coutts' Tr v Coutts* 1998 SC 798; I G Farlam and H W Hathaway, *Contract: Cases, Materials and Commentary* (2nd edn 1988) 733; L R Caney, *A Treatise on the Law of Novation* (2nd edn 1973) 66–67.

from his obligation *x*, while B agrees to undertake to A obligation *z*. There has been the extinction of one obligation on the creation of another. There are still only two parties. The only difference in the relationship between the parties is the content of the obligation owed by the debtor to the creditor.[8] A new obligation has been created with the consent of both parties. Of first importance, however, is the fact that there has been a discharge of the antecedent obligation.[9]

> 'Obligations are also dissolved by novation or innovation, which, in the strict acceptation of the word, denote the change of one obligation to another, in such manner that both debtor and creditor continue the same.'[10]

If there is no intention to discharge the old obligation then there is no novation but only corroboration, i.e. the creation of an additional obligation.[11] Importantly, where there is a discharge of the principal obligation, any accessory rights will also be discharged.[12] This incident of novation may considerably limit the practical application of the doctrine.[13] In this respect, novation may be contrasted with an assignation. An assignation requires the continued existence of the claim.[14]

3-03. A change of debtor with the creditor's consent is a delegation:

> 'Innovation is the turning of one obligation into another; and if it be a third person becoming debtor for relief of the former debtor; it is called Delegation.'[15]

There is seldom any distinction made between novation and delegation. It is common for the terms to be used interchangeably. But since there is the tendency to confuse, in particular, sub-contracting and delegation, it is important to be clear that delegation is a method of extinction of obligations where three parties are involved. Delegation is a species of novation. And, for present purposes, it is delegation that is the more relevant of the two.

[8] Cf *De Montfort Insurance Co v Lafferty* 1997 SC 335 OH; *Baxter, Clark & Paul v Tulloch Construction Group Ltd* 1999 GWD 37-1789.

[9] Erskine, III.iv.22; Bankton I, 495, 37; *Blyth & Blyth v Carillion Construction Ltd* 2002 SLT 961 OH; Cf F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (9th edn 2005) para 1417: 'La spécificaté de la novation réside dans son effet extinctif, plus précisément dans le lien indissociable établi entre l'extinction de l'obligation primative et la création de la nouvelle obligation'. For the history, see R Feenstra, 'L'Effet Extinctif de la Novation' (1961) 29 *TvR* 397 at 414.

[10] Erskine III.iv.22.

[11] Ulpian, D 46.2.1.1-2; Stair I.xviii.8; W M Gloag and J W Irvine, *The Law of Rights in Security* (1897) 653; *MRS Distribution Ltd v D S Smith (UK) Ltd* 2004 SLT 631 at 635.

[12] Erskine, III.iv.22; Bankton, I, 495, 37. Cf J-L Boudouin, *Les obligations* (5th edn 1999) para 881; Louisiana Civil Code Art 1884.

[13] P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La Transmission des obligations* (1980) 84.

[14] Compare the following passage in I M Fletcher and R Roxburgh, *Greene and Fletcher*: *the Law and Practice of Receivership in Scotland* (3rd edn 2005) para 4.07: 'A deed of novation is the deed under which a contracting company in receivership, subject always to the consent of the employer as *delectus personae* is involved in such contracts, assigns its rights and obligations under a building contract to another contractor who takes over the role of contractor and completes the work'. Novation can only occur by consent, so references to *delectus personae* are meaningless. But if novation is envisaged, why the reference to 'assign'?

[15] Stair I.xviii.8; see also Mackenzie *Inst* III.iv.8; Erskine III.iv.22; Bankton I, 486, 5; Bell, *Principles* § 576; Pothier, *Traité des obligations* (1761) §§ 584 and 600 in M Bugnet (ed) *Oeuvres de Pothier* (Paris, 1861) vol 2, at 319; Voet, *Commentarius ad Pandectas* 46.2.2 (trans Gane, *The Selective Voet, Being the Commentary on the Pandects* vol 7 (1957) 73); Ulpian, D 46.2.11 and 13.

(2) Substitution of liabilities: delegation

3-04. 'Delegation' has more than one meaning. In everyday usage 'to delegate' is to entrust the performance of a responsibility to another; so an ability to delegate is an attribute of a competent manager.[16] In Scots law, however, delegation is a term of art. Delegation is the method whereby a *liability* owed by B to A, can be substituted by a liability undertaken by C. It is a fundamental principle that a debtor cannot liberate himself from his obligations without his creditor's consent. Crucially, therefore, B's liability to A can only be substituted by C's, *if A consents to B's discharge*.[17] Delegation therefore effects a change of debtor. If the creditor does not obtain a right against the new debtor, there cannot be delegation.[18] While it is convenient to speak of the 'transfer' of liabilities as the converse of the assignation of rights,[19] delegation is Scots law *transfers* nothing. Although the introduction of the new debtor may be at the instance of the original debtor,[20] juristically speaking there is no 'transfer' of the obligation. Rather B is discharged on the constitution of an obligation between A and C (perfect delegation); alternatively, A acquires C as a new debtor without relinquishing his rights against B (imperfect delegation).[21] Outside of leases, where the law has yet to be analysed, there are no Scottish cases where A discharges B but the obligation remains in force, to be performed by C. As will be discussed below, however, there seems no reason in principle why this should not be allowed. Further, there seems no reason in principle why the creditor cannot discharge the original debtor conditionally, e.g. subject to a resolutive condition should the new debtor fail to pay.[22]

[16] It is in this sense that the prohibition *delegata potestas non potest delegari* applies in public law. In private law it is also relevant to eg a mandatory. He cannot give to another the authority conferred upon him by the mandant. Compare the issue of non-delegable duties in delict: see eg W Stewart, *Reparation* (2000) para 3-3 ff.

[17] Cf § 415 *BGB*: '…so hängt ihre Wirksamkeit von der Genehmigung des Gläubigers ab…'. In German law, although B is discharged from his liability, the debt itself is not discharged; rather, there is a genuine transfer of the debt (*Schuldübernahme*). The *Anweisung* developed from the principle of delegation: see para 3-14 below. But note that some accessory rights are still extinguished: § 418 *BGB*. Cf § 364 *BGB*.

[18] *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord President McNeill. Cf *Calders Ltd v Inland Revenue* 1944 SC 433 where the First Division held that although there was an intention to delegate and a new debtor, there was no discharge of the debt as this was contrary to the intention of the parties. Lord Mackenzie was alone in understanding the nature and effect of delegation: see 444. See too *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 at 635K–L.

[19] As Bankton I, 495, 37, does.

[20] See Pothier, *Traité des obligations* (1761) § 583, and § 414 *BGB*. Cf N Whitty, 'Indirect Enrichment in Scots Law' 1994 *JR* 200 and 239 at 261, n 45.

[21] For this reason there is no equivalent of the rule *assignatus utitur jure auctoris* in a case of delegation. See eg the arguments for the pursuer in *Hamilton v Earl of Kinghorn* (1674) Mor 2602. This causes some problems in French law which requires a *justa causa* for a binding obligation. Where the new debtor is delegated by the original debtor, the delegated party can raise those exceptions (although not compensation) which the original party could have raised against the creditor: see § 417 I *BGB*. It should be remembered that German law recognises the transfer of an obligation. Scots law is somewhere between the French and the German: the law of proper delegation is like the French; but Scots law also recognises the *Anweisung* and, in principle, the transfer of an obligation. Cf PECL Art 12:102(4). For the Roman law, see W Buckland, *A Textbook of Roman law from Augustus to Justinian* (1921) 566.

[22] This is essentially the position in Scots law on payment by cheque, for which see para 3-14 below.

3-05. To reiterate, then, delegation can only occur with the creditor's consent. At root is the solvency of the debtor. If the debtor were allowed to transfer his liabilities to another, without the consent of the creditor, the creditor would be forced to bear the risk of the transferee's insolvency.[23] This rationale is appealing. But the rule cannot be based purely on considerations of solvency; after all, a delict creditor has no choice but to accept his debtor, solvent or not. Be that as it may, it is undoubtedly the law that a debtor cannot alienate his obligations without the consent of his creditor:

> 'Generally, all obligations are intransmissible,[24] upon either part directly without the consent of the other part, which is clear upon the part of the debtor, who cannot, without the consent of the creditor, liberate himself, and transmit his obligation upon another, though with the creditor's consent he may, by delegation.'[25]

The Scottish sources are not without their problems. Gloag apparently recognised the proper usage of delegation, quoting verbatim the above passage from Stair.[26] But he conflates the concept with sub-contracting. And he admits of the assignation of *contracts*: that is to say, the transfer not only of rights without the consent of the debtor, but also *liabilities* without the consent of the creditor.[27] McBryde accepts that delegation can mean sub-contracting as well as the 'transfer' of an obligation as where a new debtor is substituted for the old with the consent of the creditor.[28] With respect, this is as unhelpful as it is infelicitous. One of the great problems in this area of the law is a lack of conceptual clarity. That a layman may mean sub-contracting though he labels it 'delegation' should not be allowed to confuse matters of principle.[29] A distinguished former Chief Justice of South Africa lucidly articulates the distinction:

[23] Cf Gloag, *Contract* 416: '*Prima facie*, there is always *delectus personae* in the choice of a debtor'. It must be remembered that Gloag's treatment of this area of the law is not coherent and must be treated with caution.

[24] I.e. *inter vivos*.

[25] Stair III.i.2; See also Erskine III.iv.22; Bell *Principles* § 576; Voet, *Commentarius ad Pandectas* (trans Gane *The Selective Voet*, vol 7 at 83) 46.2.11; Ulpian, D 46.2.11. Cf P Gide, *Etudes sur la novation et le transport des créances en droit romain* (1879) at 436: 'Il existe, en effet, une différence profonde entre le transfert de la créance et le transfert de la dette: si le changement de créancier est à peu indifférent au débiteur, on ne peut pas dire que, à l'inverse, le changement de débiteur soit indifférent au créancier, car il se peut que le nouveau débiteur soit moins solvable que l'ancien. Ce changement ne peut s'opérer par une simple convention entre l'ancien débiteur et le nouveau; il y faut encore le consentement d'une troisième personne, le créancier, en sorte que tout transfert de dette est, de sa nature, une opération de trios acteurs, c'est-à-dire une délégation'.

[26] Gloag, *Contract* 258.

[27] Gloag's paragraph, at 418, headed 'Assignation and delegation of work' is confused as to the distinctions between assignation of rights, delegation of liabilities, and sub-contracting.

[28] McBryde, *Contract* para 12-142. In any event, delegation is a method of extinguishing obligations, not transferring them. Admittedly, there seems no reason why transfer of obligations should not be allowed, providing always that the creditor consents.

[29] Indeed McBryde, para 12-142, concedes, in footnote 248, that his usage has led to confusion, noting the disapproval of the treatment of delegation in the first edition of his work by Lord Justice-Clerk Ross in *W J Harte Construction Ltd v Scottish Homes* 1992 SC 99 at 111. Only Lord Murray in *Harte Construction* seems to have had a clear view of the distinction between sub-contracting and novation/delegation. See also the references to 'delegation' in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH; sub-contracting is what is meant. Cf E Allan Farnsworth, *Farnsworth on Contracts* (2nd edn 1998; with Supplement 2000) § 11.1: 'an obligor's empowering of another to perform the obligor's duty is known as

> 'There is no doubt that, generally speaking, a contractual obligation cannot effectively be transferred from the debtor to a third person by agreement unless the creditor consents thereto and agrees to accept the third person as his debtor in substitution for the original debtor. Such a transfer, therefore, involves the concurrence of the three parties concerned and is properly termed a "delegation", which is a species of novation. Although the term "cession" is sometimes used with reference to a transfer of obligations, particularly in cases where it is sought to substitute some third person for a party under a contract containing reciprocal rights and obligations, this is strictly a misnomer in that "ordinarily rights can be ceded but obligations cannot".'[30]

(3) Burdens of proof and business transfers

3-06. In practice, there are likely to be two situations where a party will seek to show that delegation has occurred. The first is the classic case of a *debtor* seeking to argue that he has been discharged. In this case it will be difficult to argue that the discharge was implicit. Normally, the intervention of the new debtor will have been at the behest of the original. The delegation will only occur because the original debtor wants to be discharged by the creditor (perfect delegation). The second case is where the *creditor* is seeking to argue that there has been a 'delegation' (imperfect delegation). This most commonly occurs on business transfers,[31] or between the creditors of a partnership and a retiring partner for pre-retirement debts.[32] Suppose, for example, A Ltd has a contract to provide services to Origins Co. The entire property and undertaking of Origins Co is sold as a going concern to New Co. For the services rendered by A Ltd to Origins Co, the latter had an obligation to pay. After the transfer, the services are rendered to New Co. New Co accepts performance. Is New Co liable in contract to A Ltd? Are the terms of the contract the same? Here the pursuer will be A Ltd. A Ltd will seek to argue that New Co has been 'delegated' and is now liable for the contractual obligations of Origin Co. There has usually been no intention on the part of A Ltd to discharge Origin Co. Indeed, Origins Co's liabilities are rarely a live issue: by the time the dispute occurs, Origins Co may no longer exist. The question is whether A Ltd now has an *additional*, rather than a *substitute*, debtor.

3-07. When can consent to a delegation be implied? Some sources suggest that the consent of the creditor to discharge the debtor in a case of perfect delegation may be readily implied.[33] So Stair tells us that novation is 'ordinarily inferred' where a posterior security bears 'in satisfaction of the

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a *delegation* of the performance of the duty. By a delegation, the obligor as *delegating party* (B) empowers a *delegate* (C) to perform a duty that the delegating party owes to the obligee (A)'. This is a reference to sub-contracting not *delegatio*. Cf the opinion of Pound J in *Langel v Betz* 250 NY 159 (1929).

[30] *Froman v Robertson* 1971 (1) SA 115 (A) at 122 *per* Corbett AJA (references omitted). See also *Dage Properties (Pty) Ltd v General Chemical Corporation Ltd* 1973 (1) SA 163 (A); *Milner v Union Dominions Corporation (SA) Ltd* 1959 (3) SA 674 (C) at 676F *per* Watermeyer J.

[31] *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 at 636D–E *per* Lord Drummond Young (Ordinary).

[32] See generally Anon, 'Partnership Liability Questions' (1925) 41 *Scottish Law Review* 65, 149 and 184.

[33] *Dunlop's Tr v McKechnie* (1845) 7 D 494 approved in *Campbell v Cruikshank* (1845) 7 D 548; *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631. Cf *Code civil*, Arts 1273 and 1275; *Code Civil du Québec*, Art 1661; Louisiana Civil Code, Arts 1880–1882; Swiss *OR*, Art 116(1).

former obligation' or where a posterior bond bears to be 'in full satisfaction of the sum for which the former was granted', though there be no express reference to discharge, novation or the former security.[34] Hume states that 'We admit of evidence, if in itself clear and satisfactory,[35] that such was truly the purpose of the parties – to innovate the claim of debt, though there be no explicit clause of discharge on the face of the new voucher; but the purpose appears only in the whole circumstances of the transaction and of the situation of the conduct of the parties'.[36] And, further, that 'In general and ordinarily it may, perhaps, be said that novation is to be inferred from redelivery of the original document of debt to the original party debtor'.[37]

3-08. The most recent case in Scotland distinguished between *expromissio* and *adpromissio*.[38] These terms are equivalent to perfect delegation and imperfect delegation respectively. In *MRS Distribution*[39] New Co's obligations were inferred by mere fact of accepting goods and paying for them. The court readily inferred the consent of the new debtor (New Co) to be liable to the creditors of the old debtor (Origin Co). The Lord Ordinary held that New Co become bound to perform Origin Co's contractual obligations on the same terms that Origin Co was bound to perform.

3-09. Where the new debtor comes in as an additional debtor (*adprommisor*), the analogy is closer to caution than novation. Here, it is the creditor who is seeking to argue that he has a new debtor by virtue of an agreement between Origin Co and New Co, to which the creditors of Origin Co were not a party.[40] In this type of case, the creditors often seek to argue that there has been a universal succession of rights and obligations.[41] As far as delegation is concerned, however, there is no obvious need for a presumption in this case.[42] Difficulty arises on the insolvency of the new firm or business, when the creditors seek to hold the original debtor liable. It is in this case that the

[34] Stair I.xviii.8, citing *Chisolm v Gordon* (1632) Mor 16472 and *Lawson v Scot of Whiteslade* (1633) Mor 11519. In an attempt to clarify the opinions of the classical jurists, Justinian determined by statute that the intention to novate had to be explicit: *Inst* 3.29.3a, for which see D Daube, 'Novation of Obligations giving a bonae fidei Iudicium' (1948) 66 *ZSS (RA)* 91; R Feenstra, 'L'Effet Extinctif de la Novation' (1961) 21 *TvR* 397 and A Watson, 'D.12.1.32 and Delegatio' (1966) *TvR* 175, partly reproduced in A Watson, *Studies in Roman Private Law* (1991) 219. Like Stair, Voet also departed from this rule: *Commentarius* 46.2.3. Cf *Heritable Securities Investment Association Ltd v Wingate* (1891) 29 SLR 904 at 907 *per* Lord Wellwood, and Anon, 'Partnership Liability Questions' (1925) 41 *Scottish Law Review* 65 at 71.

[35] Cf *Fox v Anderson* (1849) 11 D 1194 at 1197 *per* Lord Fullerton: 'clear evidence' is required; *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord President M'Neill: 'I think, in a case where delegation is pleaded, that it is necessary to make a very clear case'.

[36] *Lectures* vol III, 61.

[37] *Lectures* vol III, 61.

[38] *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 OH.

[39] *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 OH.

[40] It is an interesting point whether the creditors of the retiring partner could enforce an indemnity granted to the retiring partner by the continuing partners by way of a *jus quaesitum tertio*. Cf *Hill's Tr v Gowans* (1872) 9 SLR 397.

[41] See, *inter alia*, *M'Keand v Laird's Tr* (1861) 23 D 846; *Miller v Thorburn* (1861) 23 D 359; *Nelmes & Co v Montgomery* (1883) 10 R 974; *Heddle's Exrs v Marwick* (1888) 15 R 698; *Stephen's Trs v MacDougal & Co's Trs* (1889) 16 R 779; *Henderson v Stubbs* (1894) 22 R 51; *Smith's Trs v A D Smith* (1899) 6 SLT 263 OH; *Ocra (Isle of Man) Ltd v Anite Scotland Ltd* 2003 SLT 1232 OH. Cf *Gailey v Environmental Waste Controls*, 5 December 2003, Lord Drummond Young, unreported.

[42] *MRS Distribution Ltd v Smith (UK) Ltd* at 636A *per* Lord Drummond Young (Ordinary).

categorisation of the new debtor as an *expromissor* or *adpromissor* will become important. If he is an *expromissor*, the original debtor will have been discharged; if an *adpromissor*, the original debtor will remain liable. In a partnership case, the retiring partner will remain liable (on a joint and several basis) for all the debts of the partnership prior to his retirement. In a business transfer case delegation (*expromissio*) is not presumed:[43] 'The mere fact that a new agreement was made' (between the Origin Co and New Co) is not enough to infer that the creditors discharged Old Co.[44] But to say that 'delegation is not to be presumed' takes us little further. In most of these cases, delegation, in the orthodox sense of the term, is not at issue. There is no issue of discharge. In the case of an additional or corroborative obligation (*adpromissio*), references to 'delegation' are confusing. Every delegation must give rise to a new obligation. For a proper delegation, however, a concomitant discharge of prior obligation is necessary. The introduction of an additional obligant, therefore, does not raise any issue of discharge and cases on the implication of consent to discharge are not relevant.

(4) Insolvency

3-10. The creditor bears the risk of the new debtor's insolvency. The original debtor's liability does not revive if the delegated debtor becomes bankrupt.[45] The original debtor may incur liability only on the grounds of fraud.

(5) Validity of the original obligation

3-11. There can be no delegation of a void obligation. If, however, the original obligation is voidable only and it is delegated before rescission then consent of the creditor to the delegation may amount to a waiver of his right to rescind the original obligation.[46]

C. DELEGATION OF PERFORMANCE

3-12. One can delegate *rights* as well as liabilities.[47] This is just another method of achieving what is usually done by assignation. One of the differences is the

[43] Mackenzie *Inst* III.iv.9; Erskine III.iv.22; *Dudgeon v Reid* (1829) 7 S 729; *Campbell v Cruikshank* (1845) 7 D 548; *Buchan, Watson & Co v Adam* (1833) 11 S 762 at 770 *per* Lord Gillies; *Mowbray v White* (1824) 3 S 146; *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord Curriehill; *M'Intosh & Son v Ainslie* (1872) 10 M 304 *per* Lord President Inglis.

[44] *Holmes v Gardiner* (1904) 12 SLT 668 at 669 *per* Lord Stormonth Darling (Ordinary).

[45] Bankton I, 486, 5. Cf Art 1206 of the Spanish *Código Civil*: 'La insolvencia del nuevo deudor, que hubiese sido aceptado por el acreedor, no hará revivir la acción de éste contra el deudor primitivo, salvo que dicha insolvencia hubiese sido anterior y pública o conocida del duedor al delegar su deuda'. Art 1276 *Code civil* is in similar terms.

[46] L R Caney, *A Treatise on the Law of Novation* (2nd edn 1973) 13.

[47] See the excellent discussion in Scottish Law Commission Discussion Paper No 95, *Recovery of Benefits Conferred under Error of Law* (1993) vol II, 162. Much of this reflects the expertise of Niall Whitty, then one of the Commissioners. There is, however, a typographical error in para 2.170. A corrected version is quoted by R Evans-Jones, *Unjustified Enrichment* vol

effect on existing obligations. Delegation is an instance of extinction of obligations through substitution. Assignation is a method of transfer of rights; assignation *per se* does not discharge anything.[48] References to delegation of performance are common. But care is needed. As has been seen, 'delegation' is rarely used precisely. 'Delegation of performance' can refer to at least two types of case. First, proper delegation. This imports an immediate discharge of the original obligant, (*delegatio obligandi*). In proper delegation, the new debtor undertakes a new obligation to the creditor which the creditor accepts in lieu of the original creditor's obligation. As a result, the original debtor is discharged. The introduction of the new debtor can occur without the consent of the original debtor.[49] Alternatively, the introduction of the new debtor may be instigated by the original debtor. He can order one of his own debtors to pay the creditor. There is, then, no immediate discharge of the original obligant (*delegatio solvendi*). So, if X is indebted to R, and P to X, X may order P to pay R. If R accepts this obligation in lieu of X's obligation, X will be discharged. In other words, there must still be an intention to discharge X. This notion can be traced to the Roman notion of delegation. Alternatively, there may be no immediate discharge of X. His discharge is conditional on P paying R.[50] In this case, no new obligations are created, but the two existing obligations are discharged by a single payment. This proceeding is the basis for the order to pay. It is important to make these distinctions at the outset, as there has been little consideration in the Scottish sources.[51]

D. MANDATES TO UPLIFT

3-13. Roman law did not recognise a general concept of cession. Instead a type of mandate was resorted to. By this proceeding, the creditor would authorise the 'assignee' to uplift the claim and grant the debtor a discharge. Importantly, the mandate was in *in rem suam*. The assignee could retain the proceeds for his own benefit. Also, because the 'assignee' was a procurator and representative of the cedent, his position was precarious. The Scottish history of the law of assignation is confused. Regular parallels have been drawn between assignation and the mandate *in rem suam*; indeed, an assignation has been described as nothing more than a mandate *in rem suam*.[52] These issues will be discussed in detail in chapters 4 and 5.

1, *Enrichment by Deliberate Conferral* (2003) para 8.37. Cf L R Caney, *A Treatise on the Law relating to Novation* (2nd edn 1973) 2 and 37.

[48] Erskine III.iv.22. This is a matter for agreement between cedent and assignee. Where the cedent is obliged to assign, the assignation will discharge that obligation. Cf *Purnell v Shannon* (1894) 22 R 74.

[49] Eg Art 1274 *Code civil*.

[50] Cf Art 1277 *Code civil.* As will become clear below there is little difference between this conception of delegation and the *Anweisung*.

[51] See, in particular, the caution urged by J Domat, *Les loix civiles dans leur ordre naturel* (2nd edn 1695) III.iv.pr, vol III, 582. See too, R J Pothier, *Traité du contrat de vente* (1762) §§ 551–552, who discusses the issues with particular clarity.

[52] *Carter v McIntosh* (1862) 24 D 925 *per* Lord Justice-Clerk Inglis.

E. MANDATES TO PAY (ANWEISUNGEN)

3-14. If X is indebted to R, and P to X, X has a number of options to discharge his debt to R. He could assign his claim against P to R. R will intimate this to the debtor, P. P's consent is not required. But although creditors often accept an assignation of a right against another instead of payment, the assignation will not necessarily[53] extinguish the cedent's obligation to the assignee. This will always depend on the underlying contractual relationship of the parties. In any event, an assignation may occur even although there is no pre-existing obligation to grant one. The order to pay (known as an *Anweisung* in German law; but, confusingly, '*Assignation*' in Austrian law) is different. It is based on the basic principle of delegation of performance. The intermediate creditor (X) directs his debtor (P) to pay his (that is, X's) own creditor, R. On payment by P to R there is a double discharge: P–X and X–R (see Figure1 below). Before payment, however, the obligations of the respective parties remain unchanged. The order to pay is normally reduced to a writing delivered by X to R which is presented to P. A common-place example would involve X drawing a cheque on his bank P in favour of his creditor R. The effect of the drawing of the cheque on the underlying obligation at common law is controversial.[54] Particular provisions of the Bills of Exchange Act 1882, which apply only to Scotland, complicate matters further.[55]

3-15. The order to pay is well known to the law. For some legal systems it is but one type of delegation: the *Code civil*, for example, has no special provisions on the order to pay; conversely, in the *BGB* one must move between the provisions on *Schuldübernahme* and *Anweisung* to get a full picture: no paragraph of the *BGB* is dedicated to novation or delegation.[56] Once an order to pay is reduced to writing, however, it has the potential to circulate as an item of credit. Indeed, in modern German law, the *Anweisung* must be embodied in a deed.[57] This

[53] It will always depend on the contract between the parties. The following assumes that there is no agreement.

[54] Gloag, *Contract* 273 suggests that payment by cheque discharges the debt subject to a resolutive condition that the cheque is honoured, citing *Leggat Bros v Gray* 1908 SC 67. See too, *Glasgow Pavilion Ltd* v *Motherwell* (1903) 6 F 106 at 119 *per* Lord Young to the same effect. Cf *Lindsay v Gray* (1629) Mor 1543; W Forbes, *Bills of Exchange* (2nd edn 1718) 107; *Richardson v Fenwick* (1772) Mor 678; Hailes 471 *per* the Lord President (Dundas of Arniston): 'After a bill is accepted, the drawer is only subsidiarily liable'; *Herries & Co v Crosbie* (1775) Mor 2577, 22 February 1775 FC, Hailes 616 at 617 *per* Lord Elliock: 'all bills are in effect in security, never *in solutum*; for the indorsee has recourse against an indorser. This would not be the case if they were *in solutum*'; *Walker & Watson v Sturrock* (1897) 35 SLR 26, and *McLauchlin v Allied Irish Bank* 2001 SC 485. See too *Whitbread Group plc v Goldapple Ltd (No 2)* 2005 SLT 281 at para [28], *per* Lord Drummond Young (Ordinary): once a creditor has received a cheque, the underlying debt cannot be enforced unless the creditor receives notice that the cheque has been dishonoured. Cf *Décret-loi du 30 octobre 1936,* Art 62 (France) to the same effect, now found in Art L 131-67 *Code monétaire et financier*: 'Le remise d'un cheque en paiement, acceptée par un créancier, n'entraîne pas novation. En conséquence, la créance originaire, avec toutes les garanties qui sont attachées, subsiste jusqu'au paiement du chèque'. In *Re Charge Card Services Ltd* [1987] Ch 150, [1989] Ch 497 it was held that payment by credit card amounted to an absolute discharge of the obligation to make payment. The seller had no claim against the buyer when payment was not forthcoming from the credit company.

[55] In particular, s 53(2) and s 75A.

[56] H Hahn, *Die Institute der Bürgerlichrechtlichen Anweisung der §§ 783 BGB und der 'Délégation' der Art 1275 f. C. Civ in Rechtsvergleichender Darstellung* (Thesis, Munich, 1965) 11. See too § 364 *BGB*.

[57] § 783 *BGB*. Cf Windscheid, *Pandektenrecht*, vol 2, § 412 at 812, n 13.

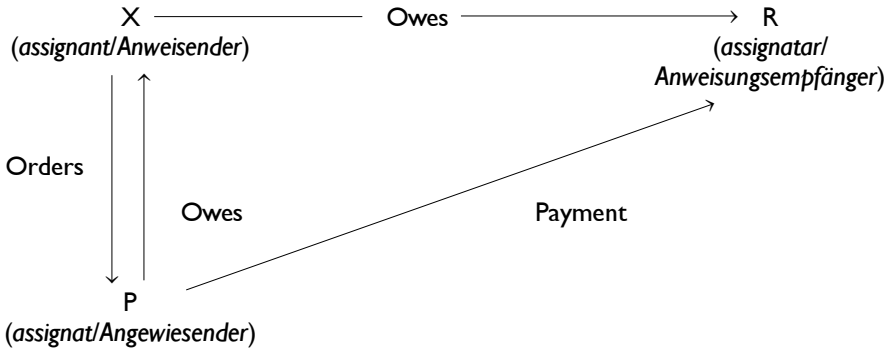

Figure 1: Debt relationship in *Anweisung*

reification occurs on a daily basis. X will normally draw an order on P in favour of R. X will deliver this to R. R will then present this to P either for acceptance or for payment. Not only is a cheque an order to pay, many other banking transactions can be analysed in similar terms.[58] There are some differences between an order to pay and a cession. These must be highlighted, since the concepts have become confused in the Scottish sources. For example, statute now designates the effect of a presentment (which, of course, may not be accepted) by P as a cession rather than in terms of an order or mandate to pay.[59] The majority of the well-known nineteenth century Scottish cases ostensibly dealing with 'assignation' actually involve mandates to pay.[60] Importantly, where an order is accepted by P, the document can be transferred.[61] With reification of debt in deed the debt can circulate.

3-16. The German jurist, Carl Friedrich Mühlenbruch,[62] highlights at least six differences between an order to pay and a cession:

(i) In a cession the debtor must be indebted to the cedent. It is his right against the debtor that the cedent transfers. This is not the case in an order to pay. P need not be X's debtor.[63]
(ii) With an order to pay, R obtains a right against P only on P accepting.[64] R does not get a right against P by intimation (as in a Scottish assignation) or on presentation (as with a bill of exchange).[65]

[58] Detailed discussion is outwith the scope of this work, but compare *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905 and P Marburger, 'Anweisung' in *Staudingers Kommentar zum BGB* (Neuarbeitung, 2002) § 783, nn 33–58.

[59] Bills of Exchange Act 1882, s 53(2).

[60] See the discussion in para 5-38 below.

[61] § 792 *BGB*.

[62] Mühlenbruch, *Cession* § 18, 226–229. See also Mühlenbruch, *Lehrbuch des Pandektenrechts* (1840) vol 2, § 496. Mühlenbruch had an abiding influence on the German private law generally and the law of cession in particular. Klaus Luig has described him as the 'father' of the German law of cession: Luig, *Geschichte* 47.

[63] As with the 'cash-credit' developed by the Scottish banks in the eighteenth century. See too eg R J Pothier, *Traité du contract de change* (1763) § 226.

[64] Cf D Medicus, *Schuldrecht II, Besonderer Teil* (11th edn 2003) § 119, n 583 (1).

[65] See Bills of Exchange Act 1882, s 53(1). This provision was based on the common law. The common law, however, had confused the mandate to pay with the mandate *in rem suam* which is a mandate to uplift: see generally G L Gretton, 'Mandates and Assignations' (1994) 39 *JLSS* 175.

(iii) Fundamentally, an *Anweisung* does not involve the entry, or substitution, of R into the relationship of P and X, or a change in the existing debt relations of the parties.[66]
(iv) The *Anweisung*, of itself, does not give to R those rights that X held against P. It transfers nothing.[67] As a result, P cannot raise any defences against R that he could have raised against X. R's right comes into existence only on acceptance by P. Because P is essentially paying on X's behalf, however, P can raise those defences that X could have raised against R.[68]
(v) Acceptance by P has no effect of the relationship between the parties.[69] The existing obligations (i.e. usually the X-R and the P-X obligations) remain in force until P makes payment.
(vi) An *Anweisung* to the order of R can be further transferred.

3-17. Admittedly, it is not clear how Mühlenbruch's sixth point differentiates the *Anweisung* from cession. Point (v) is controversial. Some authorities suggest that acceptance effects a cession of sorts; others, that the double-discharge P–X and X–R occurs, subject to a resolutive condition if P fails to pay R. Additionally, a mandate to pay is revocable prior to acceptance;[70] a mandate to uplift is irrevocable. There are also some difficult cases:

(a) Is P bound to pay R if ordered to do so by X? This will depend on the contractual relationship between X and P.[71] In the standard example of a

[66] See, in particular, Mühlenbruch, *Cession* § 18, n 433.

[67] See eg *Rechten en Coutumen van Antwerpen* (1582) Tit 64, 'Van Bethalinge, bewijsinghe etc' (2): '…midts dat bewijsinghe gheen betalinghe en is'; *ALR* I, 11 § 380: 'Die bloße Anweisung einer Schuldforderung ist noch für keine Abtretung derselben zu achten'; C J A Mittermaier, *Grundsätze des gemeinen deutschen Privatrechts* (7th edn 1847) vol 2, § 561, at 816; A von Tuhr, *Allgemeiner Teil des bürgerlichen Rechts* vol 2 (1914) § 44.

[68] This point, though difficult, is important. Even Max Kaser did not master the subtleties at the first attempt. In the first part of the first edition of *Das römische Privatrecht* (1955) Part I, § 152 II, at 544, he wrote: 'Der Schuldner hat dem Neugläubiger gegenüber zwar die Exceptionen, die er dem Altgläubiger nicht aber die, die der Altgläubiger gegenüber dem neuen entgegensetzen könnte'. In other words, the debtor (P) can plead those defences he had against the old creditor (X) against the new creditor (R). That is not correct. Compare the revised, and correct, approach in the second edition: Kaser, *RPR* I, § 152 II 3, at 652. In Scots law, the principle is properly articulated in Dirleton's report of the Court of Session's decision in *Grant v Lord Banff* (1676-1677) Mor 1654 at 1657: 'if the suspender had been content to give bond to him, it would have been *delegatio*, in which case the exceptions competent against the *delegantem* would not have been competent against the person in whose favours the delegation was made'. The reference here to *delegatio* is to imperfect delegation. Cf modern German law under § 417 I *BGB*: 'Der Übernehmer kann dem Gläubiger die Einwendungen entgegensetzen, welche sich aus dem Rechtsverhältnis zwischen dem Gläubiger und dem bisherigen Schuldner ergeben'. In French law, the new debtor cannot plead the defences that were available to the original debtor against the creditor: Neumayer, 'La transmission des obligations en droit comparé' in *La transmission des obligations* (1980) at 231–232.

[69] But see the view to the contrary of R T Troplong, *Des privilèges et hpothèques ou, Commentaire du titre XVIII du livre III du code civil* (4th edn 1845) at 527–528.

[70] C J A Mittermaier, *Grundsätze des gemeinen deutschen Privatrechts* (7th edn 1847) vol 2, § 561, 815. See too *Morrice v Sprot* (1846) 8 D 918 at 924 *per* Lord President Boyle, and *Strang v Ross Harper & Murphy* (Sh Ct) 1987 SCLR 10 to the same effect. *Strang* incorrectly characterised the mandate to pay as an assignation. However, the result was correct: the mandate was revoked by the death of the granter. An unintimated assignation is not revoked by the death of the cedent: Confirmation Act 1690 (*12mo* c 26; APS, c 56). See further para 5-18 below.

[71] Unlike in English law, the creditor in Scots law has an action for non-acceptance.

bank customer relationship, P will be bound to pay R providing X is in funds or has a suitable overdraft facility.

(b) Is R bound to accept performance from his debtor's debtor? R is probably bound to accept payment of X's debt from P. However, if the payment is in anything other than legal tender, some sort of consent, probably implicit, is required. The position would be the same if X offered R payment in anything other than legal tender; the general principle being that creditors need only accept payments in legal tender.[72]

(c) What is the patrimonial effect of an order to pay compared to an assignation? This issue is best focused with the question: what is the effect of the order on the insolvency of X?[73] Until payment there is no discharge either of the P-X debt or the X-R debt. If there is only an order to pay, which is retained by R, then there is also no *transfer* of any claims. If presented with the order after the insolvency of X, P can and should refuse to accept. If X breaks after acceptance by P, P is nevertheless liable to pay R. Similarly, if P becomes insolvent, or fails to satisfy X's debt to R, X remains liable. After acceptance by P, however, it is probably the case that creditors of X can no longer arrest in the hands of P. This would suggest that the effect of acceptance is to discharge P's obligation to X subject to a resolutive condition which is triggered on P failing to perform to R.

(d) What of P's defences? It seems that in cases of orders to pay, P is paying to discharge X's debt. This is different from the case of a cession. In a cession, the debtor, P, is paying R to discharge his own debt: R is P's creditor. In the cession case, P can raise against R all defences he would have had against X. In the order of payment situation, however, P is paying to discharge X's debt. The instruction is from X to P. There is no question of transfer. The difference to P is that he (P) cannot raise against R any defences that he (P) has in his relationship with X.[74] Similarly, if P overpays to R, or if it transpires that the relationship between X and P was void, P cannot recover from R. This is because R has received only that which is owing to him. The debt between X and R has been discharged. It is X who has then been enriched.[75]

(e) *Competition*. X orders P to pay his (X's) creditor R. Thereafter, X assigns his claims against P to a third party, Y. If Y intimates this assignation to P before P pays R, or P accepts the order to pay R, Y becomes P's creditor. Does this necessarily mean, however, that P cannot still pay R or X? It

[72] Cf *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 474 *per* the Sheriff-Substitute (Gillespie Dickson). See too *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728; *Homes v Smith* [2000] Lloyds Law Rep (Banking) 139.

[73] It has been suggested that since a delegation of rights is a dispositive act, it can be challenged by creditors if the delegating party subsequently becomes insolvent in the prescribed period: L Aynès, *La cession de contrat* (1984) at 50–51, notes 119 and 124. If P subsequently becomes insolvent, it is thought his payment could also be challenged as an unfair preference since the effect of the payment was also to discharge his liability to X. Note, however, that it is only on acceptance or, failing which, payment, that X's liability to R is discharged. Until then, creditors of X can arrest in P's hands: compare F Roger, *Traité de la saisie-arrêt* (2nd edn 1860) 193, para 209.

[74] Although it is not clear whether P can raise defences based on the relationship between X and R. As will be seen, this is probably not permitted.

[75] Detailed discussion of three party enrichment situations is outwith the scope of this work, but see H L MacQueen, 'Payment of Another's Debt' in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 458, and S Meier, 'Mistaken Payments in Three-Party Situations: A German view of English Law' (1999) 58 *CLJ* 567.

could be argued that, since X ordered P to pay R, X's instruction can be raised against Y on the basis of the *assignatus* rule. But the better view is that by virtue of the assignation (completed by intimation), X has thereby revoked his order. Unlike an assignation or mandate to uplift (which are irrevocable), the order to pay is inherently revocable before acceptance.[76] P must therefore now pay Y. Since P has never paid R, X will remain liable to R. A similar issue will arise if another creditor of X lays an arrestment in the hands of P after X has ordered P to pay R but before acceptance.

(f) Can an unaccepted order to pay be transferred? The matter was somewhat controversial in the drafting of the German provisions. As has been stressed above, until there is acceptance by P, R has no rights against P to transfer.[77] After acceptance, R has an independent right against P. Indeed it is questionable why a specific provision in the codes dealing with *Anweisung* is required to state that such rights can be assigned.

3-18. Although there are few modern cases dealing with the order to pay, they are – or, at any rate, were – commonly used in Scottish practice. Private lawyers seldom reflect on the effect of taxation regimes on the development of private law. But the influence can be considerable. Take a contractor, A Ltd, employed by a local authority. There are a number of ways A Ltd may utilise its rights to payment. Prior to 2003,[78] a common method in practice was to instruct the local authority to pay all the sums that were owed (rather than a particular sum) to a named creditor or order. The reason was simple: such an instruction was not liable to stamp duty;[79] an assignation would have been.[80]

F. SUB-CONTRACTING

3-19. It is not possible for A to transfer his liabilities to B without the consent of his creditor (C); but it is possible for A to enter into an agreement with B whereby B undertakes to A to perform A's obligations to C. *Sub-contracting* obligations is generally unobjectionable because the rights and obligations of the original parties (A and C) remain unchanged.[81] A, therefore, bears the risk of the insolvency of B.[82] If there is no personal choice in the agreement

[76] *Morrice v Sprot* (1846) 8 D 918 at 924 *per* Lord President Boyle. Cf *Crockat v Brown* (1743) Elchies, *Assignation* No 5, and *ALR* I, 16 § 275.

[77] See U Hüffer, 'Anweisung' in *Münchener Kommentar zum BGB* (4th edn 2004) § 792, Rn 2.

[78] When stamp duty was abolished.

[79] 'Stamp Duty on Mandates' (1926) 42 *Scottish Law Review* 190; 'Mandates' (1938) 54 *Scottish Law Review* 37. Cf *Smith v Paterson* (1894) 10 Sh Ct Rep 171. It should be remembered that stamp duty was not a mandatory tax. However, non-stamped instruments could not be relied upon in court proceedings: see *Henty & Constable (Brewers) Ltd v Inland Revenue Commissioners* [1961] 1 WLR 1504 at 1511 *per* Donovon LJ. For a case involving an assignment, see *Coflexip Stena Offshore Limited's Patent* [1997] RPC 179.

[80] Stamp Act 1891, schedule 1 (as amended); M J M Quinlan, *Sergeant and Sim on Stamp Duties* (12th edn 1998) 225 and 268.

[81] See eg *Hodge v Brown* (1664) Mor 2651. Cf D M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn 1995) para 29.34. Walker's passage would admit the assignation of obligations without the consent of the creditor. Cf § 267 I *BGB*.

[82] *Borders Regional Council v J Smart & Co (Contractors) Ltd* 1983 SLT 164 at 168 *per* Lord Justice-Clerk Wheatley: 'The fact that someone else was actually doing the work did not alter that legal responsibility. Although the hand which was doing the work for them was chopped

between A and C, C will be contractually bound to A to accept any satisfactory performance tendered on A's behalf.[83] C probably also has no title to sue B, or vice versa. If there is personal choice (that is, there is *delectus personae*), A cannot enter into such a sub-contract; to do so would probably breach his contract with C. In any event C would not be bound to accept the performance of anyone other than A. There will always be a practical question of what loss has actually been occasioned to C by a vicarious performance of A's obligations. A clause in a lease barring assignation does not bar sub-contracting.[84] Some of the sources refer to the right of a contractor to 'delegate' performance of his obligations to another. This is a common and every-day usage of the term 'delegation'.[85] But the term is apt to mislead. In Scots law, 'delegation', properly so-called, extinguishes obligations.

G. ADOPTION OF CONTRACTS ON INSOLVENCY

3-20. One of the problems with the law of assignation in Scots law has been the continued reliance on cases that have nothing to do with the transfer of claims. Three classic cases which accorded importance to the principle of *delectus personae* in assignation, *Anderson v Hamilton & Co*,[86] *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation*[87] and *Cole v Handasyde*,[88] were not assignation cases. All involved insolvency administrators. The question was whether the liquidator or trustee was entitled to 'adopt' contracts of the insolvent. This question is of crucial practical importance, particularly in corporate insolvency.

3-21. Generally speaking, where a debtor has become insolvent, the insolvency administrator (including for present purposes liquidators, receivers and administrators) appointed on his estate has a choice as to whether to continue to perform the insolvent's obligations under a contract.[89] He may wish to do so in order to claim the counter-performance. But there may be no incentive for the administrator to perform. The insolvent may have an obligation to deliver goods which were paid for in advance. Similarly, there is no adoption merely by claiming an accrued debt.[90] But if the insolvency administrator decides to undertake performance of the insolvent

off when the sub-contractors went into liquidation and went out of business, the legal liability to see that the works were completed to the satisfaction of the architects remained with [the original contractor]'.

[83] *West Stockton Iron Co Ltd v Neilson & Maxwell* (1880) 7 R 1055 at 1060 *per* Lord Gifford, followed in *Johnson & Reay v Nicoll & Son* (1881) 8 R 437; *Stevenson & Sons v Robert Maule & Sons* 1920 SC 335. To plead a relevant case of *delectus personae*, see *Ian McLaren Building Maintenance Ltd v Gordon* 1995 GWD 31-1629.

[84] *Rochead v Moodie* (1687) Mor 10392. See also *Lady Binnie v Sinclair* (1672) Mor 10382 (where sub-letting was prohibited).

[85] *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796; *W J Harte Construction Ltd v Scottish Homes* 1992 SC 99.

[86] (1875) 2 R 355.

[87] 1907 SC 463.

[88] 1910 SC 68.

[89] For the general effect of insolvency on obligations, see D Hutchison and F Reid, 'The Exercise of Contractual Rights or Powers Against an Insolvent Estate' (2003) 120 *SALJ* 776, although not all of the authors' conclusions can be accepted.

[90] *Sturrock v Robertson's Tr* 1913 SC 582; *Craig's Tr v Lord Malcolm* (1900) 2 F 541.

debtor's obligations, this is known as 'adoption'. It has nothing to do with assignation. Nor is it likely to be a novation or delegation:[91] the other party is not discharging the debtor. Adoption is an independent concept. It allows the administrator to perform the debtor's obligations. An insolvency administrator can decide to adopt one contract with a particular creditor though not others.[92] But he cannot 'cherry-pick' particular rights in an individual contract.[93]

3-22. In English law, receivers were not, at common law, agents of the company. They were therefore personally liable on contracts. Court-appointed receivers were usually expressly appointed as agents of the company. Consequently, they had no liability on contracts which they either adopted on entered into on behalf of the company.[94] The present law, in both Scotland and England, is that the liquidator, receiver or administrator is personally liable on adopted contracts of employment. Employees under such contracts therefore do not have to rank as creditors in the insolvency: they can sue the receiver himself for payment of wages, pension contributions and the like.[95] As for other contracts, appointment of a receiver, does not, of itself, affect the existence of the contract; but the receiver does not adopt by mere reason of his appointment.[96] Curiously, however, the legislation does not provide for the effect of adoption of a contract that is not an employment contract.[97] A receiver has fourteen days to decide whether to adopt a contract of employment.[98] By statute, the effect of adoption of a contract of employment by an administrator or receiver is prospective in effect only.[99]

[91] Cf R Goode, *Principles of Corporate Insolvency Law* (3rd edn 2005) para 9-57. J St Clair and Lord Drummond Young, *The Law of Corporate Insolvency in Scotland* (3rd edn 2004) para 6-22 provide no guidance as to the juridical nature of adoption.

[92] *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation* 1907 SC 463.

[93] *Powdrill v Watson* [1995] 2 AC 394 at 449 *per* Lord Browne-Wilkinson.

[94] The history is recounted by Nicholls LJ in *Re Atlantic Computer Systems* [1992] Ch 505.

[95] Insolvency Act ('IA') 1986, s 57(1A)–(2D). The receiver is entitled to be indemnified out of the property in respect of which he was appointed. It is not immediately clear whether an adopted contract falls under the 'property in respect of which he was appointed'. This raises the issue of whether future property is attached by a floating charge. In *Ross v Taylor* 1985 SC 156, the Inner House held that future property is covered by a floating charge. However, since a floating charge attaches as if it were a fixed security (in the case of claims, an assignation in security) such future property must be assignable. Contracts can only be transferred in their entirety with the consent of the original parties. There are difficulties with the idea that a contract *in toto* can be assigned in security: the creditor would be taking on a *liability*. Admittedly, in English law at any event, the House of Lords has ignored such conceptual niceties: *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214. Crystallisation of a floating charge does not affect the *assignatus* principle; where the company is insolvent, balancing of accounts in bankruptcy will additionally be available to the debtor. See discussion in para 8-61.

[96] IA 1986, s 57(4).

[97] Cf *Re Newdigate Colliery Ltd* [1912] 1 Ch 468. Where a receiver retains property of another without paying hire charges and the like, the receiver is not liable for adopting the contract. For there is nothing to stop the true owner retaking possession of the goods: *Re Atlantic Computer Systems* [1992] Ch 505 at 524C-G. But compare the older Scottish authorities cited in para 3-24 below. Where a company is in administration, the position may be different: IA 1986, s 19.

[98] IA 1986, s 57(5). This overrules the decision in *Nicoll v Cutts* [1985] BCLC 322. Cf *Jamieson, Petitioner* 1997 SC 195, and *Re Antal International Ltd* [2003] 2 BCLC 406.

[99] For administration, see IA 1986, s 19(6). For receivership, see s 57(2)–(2D).

[100] Companies (Floating Charges and Receivers) (Scotland) Act 1972, s 13(7).

3-23. The Scots law of adoption of contracts was further confused as a result of the introduction of receivership in 1972.[100] A floating charge attaches 'as if' it were a fixed security. For debts due to the company in receivership the relevant 'fixed security' is an intimated assignation in security.[101] It has been suggested that this view is problematic in the case of mutual contracts: a floating charge holder could thus become liable for the company (in receivership)'s *obligations*:

> 'Many contracts would contain an element of *delectus personae* and would not be assignable. For example, if the effect of the appointment of a receiver to a construction company is to assign its contracts to the security holder, then a bank, while it would be able to recover certified payments, could be liable to complete the construction of a motorway or housing scheme. If, on the other hand, the suggestion is that only the company's rights are assigned, while its obligations remain incumbent upon it (cf Gloag, *Contract* (2nd edn) 416), so as to enable the bank to recover the payments even though the company may be unable to fulfil its outstanding obligations, the result is plainly inequitable.'[102]

This passage exemplifies the confusion in the authorities between the transfer of contracts and the assignation of claims. It is indeed absurd that an assignee of receivables could be liable to construct a housing scheme. But the idea that an assignee of a claim can become liable for *any* of the cedent's liabilities is absurd. Assignation transfers only rights. The result is not 'inequitable' because the debtor is not bound to make additional payments for what has not been performed. This is a basic application of the *assignatus* rule. In any event, where there is insolvency, unfairness is no argument. Insolvency, by definition, ensures only unfairness.[103] With an existing contract, an insolvency administrator may voluntarily wish to perform the obligations incumbent on the debtor company so as to acquire additional rights to payment. The insolvency administrator can do this by adoption. If, however, there is *delectus personae* in the company in receivership, the insolvency administrator himself – or, for that matter, the charge holder – *cannot* perform (without the counterparty's consent). In this respect, adoption is like sub-contracting. Of course, to say that there is *delectus personae* in a juristic (as opposed to a natural) person is to empty *delectus personae* of much content.[104] Juristic persons have a personality only in the legal sense. Directors, shareholders and employees come and go. Therefore, if, in our example, the administrator is of the view that the contract may be of value, he can have the contract performed by employees or officers of the company.

3-24. The general principles of adoption of contracts at common law are even less clear than under statute.[105] The issue is not limited to administrators and receivers. It applies to the trustee in sequestration over the estate of an

[101] W A Wilson, 'The Receiver and Book Debts' 1982 SLT (News) 129; *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1.

[102] R J Reed (now Lord Reed), 'Aspects of the Law of Receivers in Scotland' 1983 SLT (News) 237 at 239.

[103] See, in particular, G L Gretton, 'Ownership and Insolvency' (2004) 8 *Edin LR* 389.

[104] Some commercial contracts will therefore include 'change of control' clauses. This gives A the right to terminate the contract on the removal of certain directors of B Ltd or on the transfer of a portion of B Ltd's share capital. But such a stipulation will not easily be implied.

[105] *Edinburgh Heritable Security Co Ltd v Stevenson's Tr* (1886) 13 R 427 at 428 *per* Lord McLaren (Ordinary): 'The ground of action is that the trustee has 'adopted' the subjects as his property. I am not sure that I understand exactly what is meant by this expression. It is a metaphysical expression borrowed from a different branch of the law; and after hearing

individual; to the judicial factor acting on the estate of, for example, a partnership; or a trustee acting under a trust deed for creditors.[106] Moreover, adoption is not, for that matter, limited to contracts of employment. Many of the older Scottish authorities deal with the adoption of leases by trustees for creditors.[107] Adoption is not to be implied where the trustee has entered only into tentative possession,[108] nor indeed if the trustee sells the lease subject to conditions, without having entered into possession himself.[109] It has been the law since *Ross v Monteith*[110] that a trustee who adopts a lease is personally liable for arrears of rent. And, further, because the trustee cannot possess without paying, the landlord need not rank on the tenant's bankrupt estate for arrears. For the arrears are expenses incurred by the trustee and, as such, expenses of the insolvency.[111] But where, for example, the landlord has acceded to the trust deed or conducted himself in such a way that he intended to claim as an ordinary creditor upon the bankrupt's estate, the preference may be lost.[112]

3-25. Adoption is a fascinating, if neglected, subject. It cannot be further discussed here. There is a long tract of authority dealing with this concept. Adoption and assignation are often confused. Many of the cases deal with leases where the law is anyone's guess. In any event, assignation of claims is distinct from the concept of the assignation of a lease. Finally, some of the cases are not consistent with the modern view of adoption handed down by the House of Lords in the context of the statutory framework applicable to administration and receivership and adoption of contracts of employment.[113]

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argument I am still unable clearly to represent to myself what is the legal obligation whereby the defender is supposed to have rendered himself responsible for the payment of the heritable debt.'

[106] *Ford & Sons v Stevenson* (1888) 16 R 24.

[107] See eg *Kirkland v Gibson* (1831) 9 S 596 aff'd (1833) 6 W & S 340 HL; *Kirkland v Cadell* (1838) 16 S 860 (Whole Court); Cf the brief discussion by Professor J M Halliday in the Scottish Law Commission Memorandum *Examination of the Law Relating to Insolvency, Bankruptcy and Liquidation in Scotland* (SLC Memo No 16, 1971). There is neither reference to authority nor identification of the principles involved. Compare the position in English law: R Goode, *Principles of Corporate Insolvency Law* (3rd edn 2005) para 9-60.

[108] *Dundas (Lord Strathmore's Tr) v Hood (Kirkaldy's Tr)* (1853) 15 D 752.

[109] *Imrie's Tr v Calder* (1897) 25 R 15.

[110] (1786) Mor 15290. This can be contrasted with adoption of contracts of employment under modern insolvency legislation, which is prospective only.

[111] *Nisbet and Company's Tr, Petr* (1802) Mor 15268 at 15270. See also *Dundas (Lord Strathmore's Tr) v Hood (Kirkaldy's Tr)* (1857) 20 D 225. Cf *Lachlan Maclean's Tr v Maclean of Coll's Tr* (1850) 13 D 90 at 96 *per* Lord Mackenzie.

[112] *Lachlan Maclean's Tr v Maclean of Coll's Tr* (1850) 13 D 90. Interestingly, in *Maclean* there was a suggestion that a trustee for creditors who adopts the lease may be liable only up to the value of the estate. Cf *Wilson v Magistrates of Dunfermline* (1822) 1 S 417 (389 NE), and *Moncreiffe v Ferguson* (1896) 24 R 47.

[113] *Powdrill v Watson* [1995] 2 AC 394, discussed in Goode, *Principles of Corporate Insolvency Law* (3rd edn 2005) para 9-57 ff. *Powdrill* was followed by the Inner House in *Lindop v Stewart Noble & Sons* 1999 SCLR 889.

H. SUB-PARTICIPATION AND OTHER CONTRACTUAL ARRANGEMENTS

3-26. Only rights, and not obligations, are assignable. In the agreement between the cedent and assignee, however, there may be a term that the assignee is to be responsible for the fulfilment of the cedent's obligations towards the debtor. In so far as this imposes a contractual obligation upon the assignee towards the cedent the term is unobjectionable. One could imply a *jus quaesitum tertio* in favour of the debtor so as to allow the debtor to sue the assignee for performance of the cedent's obligations. But, in any event, the cedent remains primarily liable for any obligations in the underlying contract owed to the *debitor cessus*.[114]

3-27. As has been observed, in Scotland, the transfer of a claim is, usually, a three-step process.[115] The contract to assign, like any other contract in Scotland, does not require consideration; strictly speaking, neither does the conveyance.[116] In some other systems the contract and transfer are inseparable. In French-based systems, cession is seen as a sale. The sale becomes effective between the parties thereto on agreement being concluded. This will have effect with third parties on notification to the debtor. In Scotland, the contract and conveyance are separate. But, whatever the consideration, transfer occurs only on intimation of the delivery of the transfer agreement. What, then, if there is a mere 'sale' of claims without intimated assignation? What is the effect of an agreement to assign, which is neither implemented by the cedent (by delivery of the transfer agreement) nor completed by the assignee (by intimation)? In modern financial practice, non-notification debt factoring is termed 'sub-participation'.[117] The claims are sold to the debt factor. There is either an unintimated assignation in favour of the financier or the seller purports to hold the receivables in trust for the factor. As for the first case, an unintimated assignation in Scots law has few transfer consequences. In other legal systems, special provisions are applicable to the sale of receivables. Notification to the debtors is not required for an effective transfer.[118] In our second case, it has been held that the trust will effectively protect the beneficiary (the buyer or factor) against the insolvency of the seller.[119] But there are serious problems with the view that a trust can be validly utilised

[114] Cf A Rey, 'Cession de Créance' in P Raynaud and J L Aubert (eds) *Dalloz Encyclopédie Juridique* (2nd edn 1986) vol III para 536, and J Ghestin, 'La transmission des obligations en droit positif français' in *La transmission des obligations* (1980) 59, No 78 : 'Il peut y avoir tout d'abord, « cessionnaire » s'engage à l'égard du son « cédant » à payer la dette de ce dernier. Ce contrat reste tout à fait étranger au créancier, qui ne peut s'en prévaloir et qui garde la possibilité d'exiger le paiement du débiteur initial, s'il n'est pas payé par le « cessionnaire »'.

[115] There may not be an initial contract as, for example, in a gratuitous assignation: consequently, the assignation would be a two-stage process consisting of delivery of the transfer agreement and intimation thereof.

[116] But, it should be noted, a gratuitous conveyance may have serious transfer consequences. See the discussion in para 11-01.

[117] Cf D Desjardins, 'Assignment and Sub-Participation Agreements – A Basic Overview' (1986) 65 *Canadian Bar Review* 224. See R Goode, *Commercial Law* (3rd edn 2004) 146, Fig 4.5 for a diagrammatic distinction between sub-participation and assignment.

[118] Cf the French 'Loi Dailly': *Loi facilitatant le credit aux enterprises* of 2.1.1981 (this measure takes its name from Senator Etienne Dailly who introduced the legislation), now found in the *Code monétaire et financier* Art L 313-23 ff.

[119] *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207.

in order to defeat the rights of lawful creditors.[120] In other situations, such behaviour would be categorised as fraudulent.

I. TRANSFER OF DEBTS AND CONTRACTS

(1) Introduction

3-28. Assignation is the transfer of rights against the debtor without the consent of the latter. Delegation is the discharge of an existing obligation on the undertaking of a new obligation by a debtor of the original debtor. All parties must consent and there must be an intention on the part of the creditor to discharge. A double discharge of two debts by one payment can be achieved by an order to pay. This is all well and good in principle. But what if the parties wish to transfer only the liabilities or both claims and liabilities? An assignation of the rights and a delegation of the liabilities would necessitate a discharge of the original liabilities followed by the constitution of new debts. This will have implications, for example, in matters of prescription and for any accessory securities. Logically, however, a further alternative should be available: transfer of a liability or a contract *in toto*. But though a logical possibility, such a concept raises difficult questions of legal principle.[121]

3-29. This paragraph concentrates on the transfer of entire contracts rather than of debts alone, since the former is of greater practical importance, and the same principles apply *mutatis mutandis*. Although the Scottish sources are confused, it seems (albeit by default rather than a product of critical analysis) that Scots law recognises the possibility of the transfer of an entire contract.[122] There are,

[120] G L Gretton, 'Ownership and Insolvency: *Burnett's Tr v Grainger*' (2004) 8 *Edin LR* 389 at 394; K G C Reid and G L Gretton, *Conveyancing 2004* (2005) 80 ff. There are also more technical reasons why a trust in favour of the 'assignee' should not defeat the rights of a creditor of the trustee holding a floating charge, for which see K G C Reid, 'Trusts and Floating Charges' 1987 SLT (News) 113. Also, as is pointed out by A J M Steven and S Wortley, 'The Perils of a Trusting Disposition' 1996 SLT (News) 365 at 367, declaring a trust in favour of the putative transferee is the converse of transferring to the buyer; see too a case they cite: *Ewart v Hogg* (1893) 1 SLT 63 OH. Interestingly, J G Birrell gave no reasoned response to this argument in his reply at 1996 SLT (News) 395. Cf J Chalmers, 'In Defence of the Trusting Conveyancer' 2002 SLT (News) 231, and Fletcher and Roxburgh, *Greene and Fletcher*: *the Law and Practice of Receivership in Scotland* (3rd edn 2005) para 5.22: 'While there has always been resistance to the introduction of equitable principles into the law of Scotland, it seems clear that the courts in Scotland will be prepared to examine the reality of the transaction. If the right to payment of debts is truly vested in another person, even although a formal assignation of that interest has not been intimated to the third party, the court will apparently be prepared to give effect to the arrangement'. But that is no argument. There is no obligation to intimate an assignation, although the 'assignee' who does not do so takes a risk. Fletcher and Roxburgh argue that assignees who do not intimate should be absolved of that risk. That is a policy issue to be addressed by the law reformer, not the judge. In any event, at para 8.18, the authors expressly state that intimation is a prerequisite for a valid assignation.

[121] Cf A F Schnitzer, *Vergleichende Rechtslehre* (2nd edn 1961) vol II, 626.

[122] Some of the cases are discussed above at para 2-36 ff and para 3-20. See also McBryde, *Contract* paras 12-33 to 12-43. E M Wedderburn, 'Assignation' in Lord Dunedin et al (eds) *Encyclopaedia of the Laws of Scotland* (1928) vol 2, 12 correctly draws the distinction between assignable rights and assignable contracts, the consent of the creditor in the assigned obligations being required in an assignation of contract.

however, very few examples of a genuine assignment of contract in Scots law.[123] Most of the cases which mention the idea confuse assignment of contracts with assignment of claims. There are also many dozens of cases on the assignation of leases.[124] This, it seems, is the transfer of an entire contract. But leases of heritage in Scots law also bear some of the hallmarks of a real right and the assignation of a lease has peculiarities. In any event, the discussion of leases is outwith the scope of this work.[125]

3-30. This work is concerned with the assignation of personal rights; and, in particular, money claims. It is a classic, bipartite transfer. It will affect a third party (the debtor); but there is still only one transferor and one transferee. The transfer of contracts – *cession de contrat* in French – is different.[126] It is difficult to formulate the juridical structure of this proceeding in terms of the law of transfer. Indeed, there are some fundamental theoretical difficulties with the concept of a 'transfer' of an obligation or liability. It seems to be the only type of transfer which, of its very nature, affects the patrimonies of more than two parties (ordinarily the transferor and transferee).[127] In the case of *cession de contrat* there is no change in the

[123] But see *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH. *Karl Construction Ltd v Palisade Properties Plc* 2002 SC 270 concerned a purported assignment of a contract under Art 19.1.1 of the JCT Standard Form Building contract. These contracts are standard in the construction industry. Cf *Brown v Doctor* (1852) 1 Stuart 269.

[124] The cases are collected in A McAllister, *Scottish Law of Leases* (3rd edn 2002) ch 6.

[125] Cf *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 108H–109B *per* Lord Browne-Wilkinson: 'As to the analogy with leases … [counsel] … satisfied me that the analogy is a false one. A lease is a hybrid, part contract, part property.'

[126] See L Aynès, *La cession de contrat* (Economica, 1984) 59. As ever, not all of the author's analysis is acceptable. See also Art 12:201, *Principles of European Contract Law* (2003), 'Transfer of Contract' and UNIDROIT *Principles of International Commercial Contracts* (2004) Art 9.3.1. There is little discussion of the concept in English; most references to 'assignment of contracts' are actually references to the assignment of claims. The position is better on the continent: see, for example, Lehmann, 'Die Abtretung von Verträgen' in E Wolff (ed) *Deutsche Landesreferate zum III Internationalen Kongress für Rechtsvergleichung in London 1950* (1950) (Professor T B Smith, then of the University of Aberdeen, was present at this conference: 1951 SLT (News) 37). G Teles, 'La Cession de Contrat' (1951) *Revue internationale de droit comparé* 217; J Becqué, 'Vertragsabtretung im französischen Recht' (1953) 18 *RabelsZ* 631; *idem,* 'La Cession de Contrat' in *Etudes de droit contemporain, Contributions françaises aux IIIe et IVe Congrès internationaux de droit comparé*, (Paris, 1959) vol II, 89. The most detailed discussion is found in the various papers in *La Transmission des obligations, Travaux des 9 Journées d'études juridiques Jean Dabin* (Centre de Droit des Obligations de l'Université Catholique de Louvain, Brussels & Paris, 1980). Of existing European Codes, only the Italian and Dutch codes fully recognise the concept of assignment of an entire contract: see H P Böttger, 'Die Vertragsabtretung nach italianischem Recht' (1971) 72 *Zeitschrift für vergleichende Rechtswissenschaft* 1 and (1972) 73 *ZvergRW* 1 (2 parts); and Art 6:155 *BW* ff. While the recognition of the transfer of debts and contracts is a relatively modern development in Europe, the civil code of the law of the Ottoman Empire contained detailed provisions on 'havale' or '*transport de dette*': Art 673 ff *Code Civil Ottoman* in G Young (ed) *Corps de droit Ottoman* (1906) vol VI, for which see A Cheron, 'Le transport de dette ('Lewala') en droit musulman (1919–20) 59 *Bulletin de la société de législation comparé* 571.

[127] L Aynès, *La cession de contrat* (1984) 96. Indorsation of an accepted bill of exchange does not affect the patrimony of the drawee. He is still indebted. The only uncertainty is the identity of his creditor. This is like cession. Presentment for acceptance, by virtue of s 53(2) of the Bills of Exchange Act 1882, seems to effect an assignation of funds. Acceptance, therefore, seems to be deprived of much patrimonial effect (although it remains important for the holder's remedies).

existing contract which is the object of the transfer (like assignation but unlike a delegation); what changes are the parties to the relationship and the patrimonies in which the rights and obligations are held. If there is to be the transfer of a liability, the consent of the creditor in that liability, as in delegation, is crucial. Absent such consent the creditor will not be bound to accept any performance rendered by a third party[128] and the original debtor remains bound. If there is consent, there remains the further question as to what is the effect of this consent on the liability of the original debtor.[129] Crucially, for the purposes of juridical classification, a *cession de contrat* seems to be achieved entirely by agreement. In this respect it is similar to delegation or novation, but differs from assignation which requires a transfer agreement and perfection (by intimation of delivery of the transfer agreement). Only on the completion of all the formalities is there a transfer of the thing or claim. In a case of *cession de contrat*, however, rights and liabilities move from patrimony to patrimony as a result of a tripartite transfer agreement. But while participation of the debtor is an equipollent to formal intimation of an assignation,[130] it can give rise to problems of transfer. It may be difficult to establish the precise date at which the transfer occurred.[131] This can only be achieved by some public or extraneous act. In Scotland, an obvious of way of ensuring that the transaction is of a certain date would be to register the agreement in the Books of Council and Session or in the relevant Sheriff Court Books.

(2) International recognition of transfer of contracts

3-31. On assignation of a claim to payment, the debtor's consent is not required. On transfer of an entire contract, however, the third party's consent (i.e. the debtor in the claims; creditor of the liabilities) *must* be obtained. Were it otherwise, all debtors could alienate their overdrafts to men of straw.[132] It is therefore universally accepted that if a legal system admits the concept of transfer of entire contracts, the consent of both parties to the original contract, as well as between the transferor and transferee, is required. Unlike in the cession of claims, therefore (where a debtor may have a new creditor imposed

[128] Where there is no *delectus personae*, a creditor may be bound to accept performance which is tendered on his debtor's behalf. See discussion at para 2-40 above.

[129] See below.

[130] See criticism of this rule in para 7-11 below.

[131] The transfer of employment contracts under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (implementing the Acquired Rights Directive 77/187/EC: see H Kötz, *Europäisches Vertragsrecht* (1996) § 14, at 410, n 29; in English as *European Contract Law* (1997, trans T Weir). In the UK, the 1981 Regulations have been replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/46, as from 19 April 2006. The necessity of establishing a certain date of transfer in such cases has recently been highlighted by the European Court of Justice in C-478/03 *Celtec Ltd v Astley* [2005] ECR I-4389 and applied by the House of Lords in *North Wales Training Enterprise Council Ltd v Astley* [2006] 1 WLR 2420.

[132] Cf Gloag, *Contract* 416, whose comment that, 'There is no general principle of law by which a party who has entered into a contract can get rid of the liabilities it may involve by assigning it to a third party' raises rather than answers the question of whether consent is required. Normally, the transfer of an *asset* for no consideration may be subsequently attacked under the *actio pauliana*. With the transfer of a liability, however, any payment would be made by the *transferor*; while, if there is no consideration, the transferor's general creditors would not be prejudiced: the transaction leaves one less creditor to pay.

upon him), in the assignment of a contract, a creditor cannot have a new debtor imposed upon him.[133] In practice, standard contractual terms will seek to elicit the consent of the other party to the contract to a transfer of a contract or obligation in advance. Both the *Principles of European Contract Law*[134] and the UNIDROIT *Principles of International Commercial Contracts*[135] expressly sanction this. However, bringing the agreement to the attention of the third party will be necessary in practice. A certain date of transfer will be required. *Data certa* could be established, in Scotland, by registration of the transfer agreement in the Books of Council and Session. A debtor may consent in advance (say, in a set of standard terms) to an assignment of the contract. But if he is not informed of the transfer when it occurs, he may in all good faith perform to the original creditor.[136] This point highlights the problems of attempting to achieve by private agreement the transfer of rights and obligations without at least the passive participation of the parties to the rights or obligations to be transferred. Whatever legal regime governs the formalities, practical necessity will demand that the original parties are at least notified.[137]

(3) Scots law

(a) Authority

3-32. There is no meaningful discussion in the Scottish sources of the idea of transfer of an entire contractual relationship.[138] Much of the modern Scottish case law on 'assignation' is couched in terms of assignation of contracts.[139] The litmus test of assignability, according to these cases, is *delectus personae*. Yet these two ideas are incompatible. *Delectus personae* is an implication of what the parties are free to express in any situation. On

[133] Cf Y M J V Boon, *Assignment of Contract: a Study in Comparative Law* (unpublished M Litt Thesis, University of Aberdeen, 1972) 12. There are problems with Boon's analysis. For example, he describes (at 7 and 14) the concept of 'assignment' generally as 'the act of one party without the concurrence of the other party to the contract'; yet he accepts that in the 'assignment' of a contract, all the parties must consent. Also, his analysis assumes that an 'assignment' of claims occurs *solo consensu*.

[134] Art 12:101(2).

[135] Art 9.3.4.

[136] See discussion of this principle in chapter 6, 'Intimation', below.

[137] Cf the code edited by Professor M L R Gandolfi, *Académie des privatistes européens, Code européen des contrats,* Livre Premier (Preliminary Draft, 2001) Arts 118–120. This is based, to a large extent, on Italian law. An English version has been published, including revisions by Professor Harvey McGregor QC, in a special issue of the *Edinburgh Law Review*: (2004) 8 *Edin LR* 4-89. This translation poses some difficulties for the Scots lawyer. For example 'set-off' replaces 'compensation', although the former term is wider than the latter in Scots law. 'Non-opposability' is also dropped, although this is a helpful translation of the well-known term of art in Scots law, '*ad hunc effectum*'.

[138] For comparative discussion, see Boon, *Assignment of Contract: a Study in Comparative Law*. Boon's thesis is of considerable value, providing an English language introduction to the sources of French, Belgian, Dutch and German law. That said, however, much of Boon's analysis of the Scottish sources cannot be accepted.

[139] Eg, the leading comparative study suggests that Scots law recognises the assignment of contracts, citing *Cole v Handasyde & Co* 1910 SC 68: K H Neumayer, 'La transmission des obligations en droit comparé' in *La transmission des obligations* (1980) 260, n 350. *Cole* involved adoption not assignment, whether of claims or an entire contract.

occasion it can be relevant to the assignation of claims. Although there may be no express provision in the relationship between debtor and creditor that a claim is not assignable, the law sometimes holds by implication that it may not be assigned. Social security and other alimentary payments are perhaps the most obvious examples. Since, however, *delectus personae* is merely the implication of what the parties can express, *delectus personae* cannot override the parties' manifest intention to transfer. And because the transfer of an entire contract, by its very nature, requires the consent of all the parties, this consent must trump the implied term. The authorities in Scots law which refer to assignation of contracts and *delectus personae* are, therefore, of limited utility. Either they sanction the assignment of *contracts*, in which case *delectus personae* is rarely relevant; or they refer to *delectus personae* though they are cases dealing with assignation of claims or sub-contracting. A passage from Gloag and Henderson may exemplify the confusion: 'where a *contract* is assigned the assignee acquires the right to sue and in some cases may be saddled with the liabilities arising under it'.[140] But if 'assignation' is the transfer without the consent of the debtor this is problematic, as the authors recognise:

> 'In cases where both the contracting parties consent to the assignation there is no difficulty, but it is a question of some complexity how far one party to a contract can assign without the consent of the other.'[141]

This conflates the transfer of contracts with the transfer of claims. If the principles applicable to each are kept in view, the complexity to which the authors refer cannot arise: for a valid transfer of a contract, both parties to the original contract, as well as the assignee, must consent.

(b) Effect of transfer

3-33. In principle, if all the parties have consented to the transfer, the new debtor becomes liable for the obligation. There need only be an intention to transfer; an intention to discharge the original debtor is not required. This point is self-explanatory: the debt is not being discharged but transferred. Therefore, on the transaction taking effect, the original debtor is no longer liable under the contract. The corollary is that the transferee is liable. The transferee also becomes the creditor of the other party to the contract. In practice, the effective date of transfer is crucial. Sometimes the transferor intends to transfer prospective liabilities, that is to say, liabilities arising after the date of the transfer. Sometimes the intention is to transfer retrospective liabilities, that is to say liabilities that arose before the date of the transfer. Sometimes the intention to transfer all liabilities, retrospective and prospective. The parties are free to choose whether the liabilities transferred are all the liabilities that may have arisen under the contract or only liabilities that might arise in the future. Parties should be careful to spell out what liabilities it is they wish to transfer. Should a question arise at later date as to the party responsible for performance of the obligation, resolution will be a matter of construction of the transaction documents. And where only present words of conveyance are used it is arguable, from the assignee's point of view, that the intention was that only liabilities arising after the effective date of the transfer are transferred. For it is only against these risks that the transferee

[140] W M Gloag and R C Henderson, *The Law of Scotland* (12th edn 2007 by H L MacQueen et al, 2001) para 8.15 (emphasis added).

[141] Gloag and Henderson, *The Law of Scotland* (12th edn), para 8.15.

can properly protect himself. Construction of the original counterparty's consent, in contrast, would focus on liabilities existing prior to the effective date. For the contractual counterparty can know only of these. If the counterparty is to consent to the transfer of all liabilities, existing or potential, clear words will be needed.

Other points remain unclear. What is the warrandice in such a transfer? Is there a guarantee that the transferee is solvent? Or does the consenting party take that risk by actively consenting? The UNIDROIT *Principles* thus articulate a number of possibilities regarding the effect of the transfer on the transferor's liability:

> '(1) The other party [i.e. the creditor in the contractual obligations being transferred] may discharge the assignor; (2) The other party may also retain the assignor as an obligor in the case the assignee does not perform properly; (3) Otherwise the assignor remains as the other party's obligor, jointly and severally with the assignee.'[142]

The position in the *Principles of European Contract Law* is that consent to substitution of a new debtor is the same as consent to discharge of the original debtor.[143] No account is taken of the third possibility, which appears in the UNIDROIT *Principles*, that the creditor may consent to a new debtor performing the original debtor's obligations without intending to discharge the original debtor. This third possibility supposes that the creditor may hold the old debtor jointly and severally liable with the new. Any of the possibilities articulated in the UNIDROIT principles would be open to Scots law. The differences are important. If the original debtor remains jointly and severally liable, the creditor may accept performance from the new debtor but hold the original debtor responsible for any non-performance.

(c) Defences

3-34. An assignation cannot prejudice the position of the debtor: *assignatus utitur jure auctoris*.[144] On a transfer of an entire contract the new debtor can raise those defences against the creditor which the original debtor could have raised; conversely, the creditor will also be able to raise any defences arising out of the original relationship against the new debtor.

(d) Accessories

3-35. If the assignment of an entire contract is properly recognised as a transfer, the accessory principle can apply. But the accessory principle can only be applied to the transfer of an entire contract with difficulty. If George grants to Elaine a standard security in respect of Alan's indebtedness, it makes no difference to George whether Elaine assigns her right to another. But whereas George is willing to grant security for Alan's indebtedness, George may not be willing to provide that security for X, the 'assignee' of Alan's liabilities. So it will be a question of construction whether the party granting the security in respect of a debt had the personality of the debtor in view. And while such a case will not be common, it can certainly be envisaged: take, for example, guarantees granted by a third party at the behest of the creditor.[145]

[142] Art 9.3.5.

[143] Art 12:101(1).

[144] See chapter 8 below.

[145] Cf R Saleilles, *La théorie générale de l'obligation* (3rd edn 1925) at 101, para 108.

(e) Executed and executory contracts

3-36. There is perhaps another way of analysing an assignment of contract. One can distinguish between executed, or partially executed, contracts on the one hand; and, on the other, those on which performance is yet to occur, executory contracts. Arguably, in the case of the executory contract, the purported assignment of the whole contractual relationship by the debtor to another cannot prejudice the creditor. If the creditor is not satisfied with the performance of the new debtor he can simply refuse to perform his own obligations on the basis of the principle of mutuality.[146] The problem is whether the creditor would be *bound* to accept the new debtor, though the creditor has not previously consented, leaving the entire regulation of the relationship between the creditor and the new debtor to the law of mutuality. This is where the problems start. Suppose, for example, that it is Jack who is bound to perform first; say, for example, to tender goods or services to Jill. Jill purports to assign the entire contract to Dave. Jack knows nothing of Dave's solvency. Can it really be the case that Jack is bound to perform to Dave and hope that he gets paid? Would Jack even have a title to sue Dave for payment? Such a case highlights the difficulties of trying to find the basis of conveyances in the distinction between executed and executory contracts.

(f) Conclusion

3-37. Assignation of contracts is important. The different concepts of assignation of claims, delegation of liabilities, orders to pay, sub-contracting etc, are confused in the modern Scottish sources. There are numerous possible applications of the doctrine of assignment of contracts. Many statutory transfers can be analysed in terms of an assignment of a contract.[147] The importance of this institution to commerce is great. Curiously, it has been entirely ignored by English lawyers. In English law, there are only two possibilities: assignment of claims (or choses in action) or novation of liabilities.[148] The development of this institution is therefore of great interest. But Scots law, in its underdeveloped state, has not yet grappled with the paradigm assignation of claims. And it is only to this difficult subject that attention now turns.

[146] This is the approach suggested by S Woolman and J Lake, *Contract* (3rd edn 2001) para 11.4 for the assignation of *rights*. See too H Weber, *Einführung in das schottische Recht* (1978) 81. But, like Gloag, Woolman's and Weber's approach is contradictory. They admit of the transfer of claims, not liabilities, without the consent of the other party; yet, in the same breath, suggest that *contracts* may be assigned *in toto*, the determinative factor being the presence or absence of *delectus personae*. In other words, they confuse the concepts of cession and sub-contracting. No mention is made of whether all parties must consent. Since they view assignment as occurring without the consent of the debtor, in admitting assignment of contracts they are admitting the assignment of liabilities without the consent of the creditor which, on their own analysis, is not permissible.

[147] Eg, the Transfer of Undertakings (Protection of Employment) Regulations 2006, reg 4. Nevertheless, previous consideration in the UK of these provisions has tended to adopt, following English law, a novation analysis. But compare, in a Scottish context, Bankruptcy (Scotland) Act 1985, s 31.

[148] *Don King Productions Inc v Warran* [2000] Ch 291 at 318 *per* Morritt LJ: 'It is not possible (save pursuant to statutory authority) without a novation to transfer the burden of a contract to a third party'. See too Sir Guenter Treitel, 'Assignment' in P Birks (ed) *English Private Law* (2000) vol II, para 8.346.

4 The European History

'If we were asked – Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer – the man who first discovered that a Debt is a Saleable Commodity.'[1]

A. INTRODUCTION

4-01. The transfer of claims has considerable economic importance. Yet, in law as in life, before a revolutionary step is actually taken, that which seemed radical and impossible one day may appear obvious and irreplaceable the next. With the circulation of debt, the law was slow to develop.[2] Indeed, despite the commercial desirability of transfer, the law provided more hindrance than assistance. The laws of assignation, cession or assignment, from Rome to Scotland, are perhaps particularly striking examples of Alan Watson's thesis on the dysfunctional nature of legal rules.[3] It is only with some idea of the historical development of the law, in Scotland and abroad, that the reasons for this arrested development can be properly appreciated – if not always entirely understood.

B. ROMAN LAW [4]

(1) Background

4-02. The lasting influence of Roman law on the concept of cession of claims in the civilian tradition proved almost unshakable, with thoroughly unhelpful consequences. Classical Roman law did not admit the transfer of claims. The relationship between debtor and creditor was deemed inherently personal. 'The creditor could not be forced to accept another debtor nor the debtor to submit to another creditor'.[5] This is unsurprising. In Roman law,[6] and for centuries thereafter, failure to perform one's obligations had personal consequences:

[1] H D MacLeod, *Principles of Economical Philosophy* (2nd edn 1872) vol I, 481. Cf Stryk, *De litterarum cambialium acceptione* (1698) who confidently stated that the development of the bill of exchange was the *fifth* element without which the modern world could not exist! Quoted by G Schaps, *Zur Geschichte des Wechselindossaments* (1892) 4. Cf Bell, *Commentaries* I, 411.

[2] Cf R von Jhering's tongue-in-cheek observation (*Scherz und Ernst in der Jurisprudenz* (10th edn 1909) 308): 'eine Succession in eine Forderung – kann man sich etwas Widersinniger denken?'.

[3] See, in particular, A Watson, *Society and Legal Change* (2nd edn 1994) 5 and 130; also Watson, *Legal History and a Common Law for Europe* (2001) 101.

[4] What follows is necessarily a selective summary of the Roman position. Of primary concern here is the influence of the probable Roman position on later legal development. For detailed discussion of the Roman position from pre- to post-classical times, and for references, see Kaser, *RPR* I §§ 152 and 153; II, §§ 275–276. See also Luig, *Geschichte* 2–9 and Grosskopf, *Geskiedenis* 1–23.

[5] C Maynz, *Cours de droit romain* (4th edn 1877) vol 2, 78: 'le créancier ne peut être forcé d'accepter un autre débiteur, ni le débiteur de subir un autre créancier'. See too Windscheid, *Pandektenrecht* § 329.

[6] For the Roman concept of obligation, see G Long, '*Obligationes*' in W Smith (ed) *A Dictionary of Greek and Roman Antiquities* (London, 1875) 817–821. Compare the position in Jewish law: I Herzog, 'Assignment of Rights in Jewish Law' (1931) 43 *JR* 127.

enforced servitude and perhaps even death;[7] although the deleterious consequences of non-payment have perhaps been overemphasised:

> 'The details of personal execution are uncertain. It seems unlikely that a deeply obscure provision of the Twelve Tables (3.6) – "let them cut up their shares" (*partes secanto*) actually referred, as used to be believed (perhaps by those who had recently read *A Merchant of Venice*), to the creditors actually carving up the debtor's body rather than his assets. But what personal execution did mean, was that the debtor, although not enslaved, was in the power of the creditor and could be imprisoned. It may be that this continued until he worked off his debt, although this is not certain.'[8]

4-03. From the debtor's point of view, then, the person of the creditor could be particularly relevant. If the creditor were allowed to transfer his rights without his debtor's consent, the debtor could have found himself subjected to a harsher creditor. And a harsher creditor could spell ready imprisonment, enslavement or worse.

(2) Procedural representation (procuratio)

4-04. In modern law, cession is the transfer of a claim without the consent of the debtor. In the civil law, however, even if the debtor did consent, there was no mechanism to achieve *transfer*. There were two functional equivalents. The first was delegation. This had the opposite effect from transfer. By delegation, the original debt was discharged and the debtor undertook his obligation to a new creditor.[9] The consent of the parties removed the objection based on the personal nature of the obligation.[10] Secondly, a form of procedural representation was invoked. The 'assignee' was constituted as the procurator of the cedent. The procurator was empowered to uplift the claim from, and discharge, the debtor on the creditor's behalf, i.e. in the original creditor's name. But the procurator was also entitled to retain the proceeds: the mandate was *in rem suam*.[11] The constitution of the putative assignee as a procurator was, of itself, insufficient to protect the assignee's position, which remained precarious. The cedent was still the creditor and could revoke the mandate at any time.[12] Further, the mandate would be revoked by the death of the cedent. Only on *litis contestatio*[13] would the procurator become creditor of the debtor. This effect was an incident of the formulae system. The debtor was condemned to pay the procurator rather than the cedent: 'whatsoever the debtor ought to have paid to [the original creditor], he is condemned to pay it to [the new creditor].'[14] There was some juridical

[7] Zimmermann, *Obligations* 2. Cf J A Crook, *Law and Life in Rome, 90 BC–212 AD* (1967, Cornell University Press Paperback, 1985) 172–178.

[8] D Johnston, *Roman Law in Context* (1999) 108–109.

[9] See generally, W Endeman, *Der Begriff der Delegatio im klassischen römischen Recht* (Marburg, 1959); Kaser, *RPR* I, § 152.

[10] C Maynz, *Cours de droit romain* (4th edn 1877) vol 2, 78.

[11] Gaius II, 38 and 39.

[12] Luig, *Geschichte* 4. This factor seemed to support the proposition that claims were not transferable, see Luig, 14.

[13] For the *litis contestatio*, see generally J M Kelly, *Roman Litigation* (1966) 5, and M Kaser and K Hackl, *Das römische Zivilprozessrecht* (2nd edn 1996) §§ 41 and 42. For *litis contestatio* in the context of *procuratio*, see Mühlenbruch, *Cession* § 6, 48.

[14] J-P Lévy and A Castaldo, *Histoire de droit civil* (2002) 1009.

difficulty in this proceeding. The ordinary contract of mandate in Roman law was supposed to be both gratuitous and, importantly, for the benefit of the mandatory.[15] So the use of procedural representation to effect a transfer of a claim owed little, initially at least, to the mandate *in rem suam* and everything to the novatory effect of *litis contestatio*.[16] The procuratory *in rem suam*, at this stage, provided only minimal assistance. It allowed someone other than the original creditor to claim from the debtor and to retain the proceeds; but that was all. There was no protection from the insolvency, or even from the voluntary acts, of the original creditor. Only by instituting proceedings against the debtor could the assignee ensure he would not be disappointed. Such conditions were not conducive to the free circulation of claims.

4-05. From the time of Antoninus Pius (the middle of the second century) the cessionary was, in certain respects, protected. He was accorded an *actio utilis*, which allowed him to sue the debtor in his own name; further, and importantly, the cedent's demise would no longer have any adverse effect on the cessionary's position.[17] Moreover, because the cessionary's *actio utilis* was not transferred from the cedent, but was accorded to the cessionary in his own right, the cedent could not revoke it. Initially, the action was awarded only on the sale of an inheritance.[18] Subsequently, it was extended to the sale of other claims and the giving of a claim in discharge of a debt.[19] While the cedent lived, however, the cessionary's position remained invidious. The cedent, after all, continued to hold the *actio directa*; as a result, the cedent could still discharge the debtor. However, by intimating (by a so-called *denuntiatio*) to the debtor that he (the procurator), not the original creditor, was to be paid, the debtor could no longer validly pay the cedent.[20] It has been suggested, therefore, that on notification the cessionary was in the same position as a transferee;[21] and that the *denuntiatio* took the place of the *litis contestatio*.[22] Both destroyed the cedent's *actio directa*; or, at least, emptied it of content:[23] the debtor who paid a cessionary after intimation of the *procuratio*

[15] Zimmermann, *Obligations* 61.

[16] Luig, *Geschichte* 4; Cf L R Caney, *A Treatise on the Law of Novation* (2nd edn 1973) 66 ff.

[17] Kaser, *RPR* I, § 153. But see C 4.10.1, cited by G H Maier, 'Zur Geschichte der Zession' in H Dölle et al (eds) *Festschrift für Ernst Rabel*, vol II (1984) at 207 which suggests that the cessionary was only protected from the cedent's death on *litis contestatio*.

[18] D 2.14.16 pr

[19] C 4.39.8; C 4.10.2; C 4.15.5. Constitution of the 'assignee' as a procurator *in rem suam* did not continue to be necessary to entitle the assignee to an *actio utilis*: Windscheid, *Pandektenrecht* § 329, n 6. Mandate was seen, in Roman law, as just one method of achieving a cession: Windscheid § 329, n 11.

[20] Quite when this practice began is not clear. C 8.41.3 (Gordonian, AD 239) and C 8.16.4 (Alex, AD 225) are often cited as examples of the practice in late classical law; but it is difficult to see their relevance.

[21] See Luig, *Geschichte* 7: he disagrees with the argument that intimation was required only to place the debtor in bad faith (see D 2.14.16 pr); rather it was required to nullify the cedent's 'lingering' right and constitute the assignee as the sole creditor in the claim. Cf C 8.41.3 pr. and Luig, *Geschichte* 14. There are perhaps some parallels between this so-called 'lingering' right and the problematic so-called 'radical right' doctrine which bedevilled the Scottish law of property in the nineteenth century: see G L Gretton, 'Radical Rights and Radical Wrongs' 1986 *JR* 51 and 192. Both doctrines arise from a difficulty in conceptualising a unitary transfer and its consequences.

[22] M Maynz, *Cours de droit romain* (4th edn 1877) vol 2, 90.

[23] Luig, *Geschichte* 15.

had the *exceptio doli* against the cedent.[24] Since the existence of a defence of good faith payment in Roman law is disputed,[25] the *exceptio* provided some measure of debtor protection. Had there been no intimation, the debtor would have been entitled – indeed obliged – to pay the cedent. It is not entirely clear whether intimation to the debtor was a constitutive requirement of transfer or whether it was merely required to place the debtor in bad faith. There is no indication in the sources that there were any prescribed formalities for intimation.[26] In this respect, Roman law was more liberal than modern Scots or French law.[27]

4-06. Instead of intimation, the cessionary could also obtain a part payment from the debtor. This was often achieved by an acknowledgement from the debtor that the procurator was the new creditor.[28] Again, this removed any rights the cedent would have had to claim payment from the debtor. By a constitution of Gordonian, the cessionary was given direct protection against the cedent who fraudulently sold the same claim twice.[29] The cessionary was given an independent right, an *actio utilis*, by reason alone of the fact that he had been granted a mandate *in rem suam*.

C. POST-CLASSICAL ROMAN LAW

(1) General

4-07. In post-classical times the cessionary was given greater substantive protection. Justinian awarded the cessionary an *actio utilis* where a claim was donated.[30] With the lapse of the formulae system, it was no longer satisfactory to explain the cessionary's position on the basis of the *litis contestatio*. Moreover, enigmatic references to *actiones* after the formulae system's demise clouded the substantive position. For most writers, the combined effect of these references to actional law was that, by the fifth century, Roman law in the west had reached the position that claims were transferable.

(2) Problems with the Roman position

(a) *General*

4-08. For the modern lawyer, two issues give cause for concern. First, the procedural nature of Roman law: the Roman jurists spoke in terms of actions. Abstract rights or claims were not concepts with which they concerned themselves. The second problem is the Roman sources. The *Corpus Juris Civilis* was compiled in the sixth century. The *Digest* is made up of writings of the classical jurists. The last jurists belonging to the classical period of Roman law,

[24] Luig, *Geschichte* 19.

[25] Cf Kaser, *RPR* II, § 277, at 452, n 9. For good faith payment in Scots law, see para 7-01.

[26] C Maynz, *Cours de droit romain* (4th edn 1877) vol 2, 90.

[27] See paras 6-01 ff below.

[28] This continues to be a recognised equipollent to intimation in modern Scots and French law: see para 7-12.

[29] The double sale is an age-old problem for the law. For a discussion of the position in modern Scots law, see 11-04 below.

[30] C 8.53.33 (AD 528) is usually cited although C 8.54.33 seems to be the relevant text. It is strange that gratuitous transfers were singled out for protection; the law is usually suspicious of transactions for no consideration.

however, had stopped writing in the middle of the third century. The law that is presented in the *Digest*, therefore, was some three hundred years out of date. The sources speak exclusively in terms of actions and of the procurator *in rem suam*. There is nowhere any discussion, never mind recognition, of the paradigm transfer of a money claim. There are, however, several examples in the Roman sources which indicate that there was, at least, no abstract prohibition on cession in Roman law.

(b) *The Lex Anastasiana*[31]

4-09. The *Lex Anastasiana* provided that the buyer of a litigious claim could claim from the debtor only the sum that the buyer had paid the cedent, plus interest.[32] But why was there specific provision regulating the sale of litigious claims if it were the case that claims were not assignable at all?[33] What does 'sale' in this context mean? Did the sale of an incorporeal comprehend transfer or merely a contractual right to transfer? The answer to these questions is unknown. What can perhaps be asserted with greater certainty is that the very existence of the *Lex* might indicate that the fundamental objection that another, perhaps harsher, person could not exercise the rights of the original creditor no longer held sway.

(c) *Universal succession* [34]

4-10. This could occur on death or in the *cessio bonorum*.[35] In a universal succession, the transmission is of everything in the transferor's patrimony; so, if there were claims, these would also transmit:

> 'Si la créance se transmettre avec l'ensemble du patrimoine, pourquoi ne pourrait-elle pas tout aussi bien faire l'objet d'un transfert spécial? En général, tous les droits qui se transmettent à titre universel peuvent se transmettre également à titre particulier.'[36]

[31] C 4.35.22 (Anastasianus, 506). See too subsequent development by Justinian: C 4.35.23.

[32] C 4.35.22.1. See Mühlenbruch, *Cession* § 53; Kaser, *RPR*, II, § 277 at 453. Cf Anon, 'Lex Anastasiana' (1913) 30 *SALJ* 290 at 291: 'It would appear from the preamble of the *Lex* that […] there came into existence a class of persons (perhaps legal practitioners of the baser sort) who made a practice of pestering creditors who were taking legal proceedings against their debtors, until the creditors reluctantly ceded their rights of action to such persons for a sum less than the original amount that was owing, and the cessionaries would then worry the debtors in various ways till they got paid the full amount. To this practice the *Lex* was calculated to put a stop'.

[33] The civilian prohibitions on cession on the grounds of public policy have some parallel with the English rules on champerty and maintenance. See also the discussion in Johannes Sande, *Commentary on the Cession of Actions* (trans P C Anders, 1906) 201 ff; Mühlenbruch, *Cession* § 31, 383.

[34] See too eg G Köbler, *Lexikon der europäischen Rechtsgeschichte* (1997) 'Universalsukzession'; and L Sedatis, 'Universalsukzession' in HRG vol 5 (1998) col 489 and references there cited.

[35] See P F Girard, *Manuel élémentaire de droit romain* (8th edn 1929) 776.

[36] 'If the claim is transferred with the entirety of a patrimony, why can it not also be transferred individually? In general, all the rights that can be transmitted by universal succession can equally be transferred by singular succession': P Gide, *Etudes sur la novation et les transport des créances en droit romain* (1879) 238. Cf A F J Thibaut, *System des Pandekten-Rechts* (6th edn 1823) § 77 who says of the alleged general principle that 'cessibel ist, was vererbt, nicht cessibel, was nicht vererbt werden kann, ist falsch'. The example he gives is of litigious claims. These passed by

(d) *Beneficium cedendarum actionum*

4-11. Roman law recognised the right of the payer of another's debt (most often a cautioner) to step into the shoes of the principal creditor. The idea gave rise, in modern civil law, to the general principle of *cessio legis* (subrogation). But the Roman sources are not clear as to whether the *beneficium* operated a transfer. The texts, yet again, analyse the third party's payment as a sale of the creditor's rights.[37] In Roman law, sale was a consensual contract, concluded by mutual stipulation. For corporeal moveable property, a physical conveyance of the property to the transferee (*traditio*) was required to transfer ownership. Such a proceeding is evidently ill suited to claims.

(e) *Sale of spes successionis*

4-12. In Roman law rights to inherit could be sold. An entire *Digest* title is dedicated to the subject.[38] And since these rights could be sold, they must, it has been suggested, have been transferable.[39] There are three problems with this position. First, the language of sale is notoriously imprecise. Even in modern Scots law, 'sale' can mean many things.[40] But a contractual right to a transfer is not the same as a transfer. Second, a buyer may be perfectly content to 'buy' and pay for an asset without the asset thereupon being transferred to him. Indeed, in modern practice, it is common: non-notification debt factoring is an obvious example. Such a proceeding often takes place where the buyer is content to bear the risk of the cedent's insolvency. Third, modern research is hampered by the fact that there was curiously little discussion in Roman law of the effect of insolvency. It is on insolvency that the difference between the contract to transfer and the transfer itself becomes crucial. This is not the appropriate place to discuss this curious lacuna in Roman legal literature. For present purposes it is sufficient to stare into the abyss. The juristic sources that have survived simply do not consider the abstract question of transfer. Their concern was exclusively with *actiones*. It was this focus that would bedevil much subsequent development.

(f) *Economic arguments*

4-13. Perhaps the most important argument about the position in Roman law is at one and the same time the strongest and the weakest: from a modern view, it is almost inconceivable that Roman society could have functioned without claims being transferable. Claims are important assets. Roman society was, on

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universal succession on death, but they were not freely assignable because of the *Lex Anastasiana*. However, as J Barr Ames observes ('The Inalienability of Choses in Action' in *Select Essays in Anglo-American Legal History* (1909) vol III, 580 at 581), universal succession 'was hardly a departure from the rule, since the representative was looked upon as a continuation of the persona of the deceased'.

[37] Paulus, D 46.1.36, discussed by Lord President Rodger in *Caledonia North Sea v London Bridge Engineering* 2000 SLT 1123.

[38] D 18.4 *De heredatae vel actione vendita.* Cf the authorities cited in para 4-14 below, which suggest that rights to inheritance could be transferred by *in jure cessio*.

[39] T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1890) vol 1, 193.

[40] Cf Sale of Goods Act 1979, ss 17 and 18, rule 1; *Lord Advocate v Caledonian Railway Co* 1908 SC 566 at 575 *per* Lord President Dunedin; *Gibson v Hunter Home Designs Ltd* 1976 SC 23, and *Sharp v Thomson* 1995 SC 455 rev'd 1997 SC (HL) 66.

one view, a commercial one.[41] Practical necessity, it is argued, would have demanded that claims be exercisable other than by the original creditor. While the Roman sources seem to indicate that cession in the modern sense of the term was not admitted, 'it is, however, obvious that no society in which commerce plays even a minor role can do without it'.[42] Tempting as this conclusion may be, however, it must be remembered that in other areas Roman law was dysfunctional.[43] It is perhaps not sufficient to throw up one's hands in exasperation at the suggestion that a sophisticated and commercial society like Rome could have functioned without the concept of cession. In other words – be wary of imposing the concepts of modern corporate finance on the lawyers of third century Rome or sixth century Constantinople.[44] And it must also be remembered that the commercial development of Rome at the time of classical jurists can be overemphasised.[45] In any event, by way of *delegatio* and *procuratio* almost identical results could be achieved without a concept of cession. To borrow a more recent analogy, it may be recalled that the industrial revolution did not seem to be unduly hampered by the failure of English law to admit the assignment of choses in action at law until the Judicature Act in 1873.[46]

4-14. Others have not been so cautious. It has been argued that the omission of cession from the Roman texts does not necessarily mean that claims were not transferable in Roman law. There are said to be two main reasons for this position. First, the compilers of the *Digest* misunderstood Gaius (*obligationes nihil eorum recipient*).[47] This does not mean, according to Gide, that claims were not

[41] D Johnston, *Roman Law in Context* (1999) 77 ff; Johnston, 'Law and Commercial Life in Rome' (1997) 43 *Proceedings of the Cambridge Philological Society* 53; F P Walton, 'The Growth of Commercial Law at Rome' (1893) 5 *JR* 332. Compare Bell, *Commentaries* (7th edn 1870) I, 506, who says in the context of the law of agency: 'In Rome, commerce and its relations and facilities were discouraged or not regarded with favour'.

[42] P van Warmwlo, 'Male Fide Cession, Stare Decisis and Abrogation by Disuse' (1974) 91 *SALJ* 298 at 301.

[43] See, above all, A Watson, *Society and Legal Change* (1977) chapters 2–4.

[44] Cf Lord Kames, *Historical Law Tracts* (2nd edn 1761) Tract III 'History of Property' at 82: '…in the investigation of original laws, nothing is more apt to lead into error, than prepossession derived from modern improvements'.

[45] Crook, *Law and Life in Rome, 90 BC–212 AD* (1967) 206: "Roman economic life remained overwhelmingly based on agriculture as its primary product; no industrial revolution, no 'take-off', ever occurred and no significantly big-business ever appeared. And the law both reflected this situation and reciprocally helped to condition and maintain it." See also Crook's comments at 207 regarding the primitive nature of Roman accounting practices.

[46] See discussion at para 4-34 below. It is, of course, impossible to know how a different legal regime would have affected economic development. Until recently, the development of legal norms occurred with remarkably little reference to economics. Nevertheless, the history of the law of cession demonstrates that an economy can find quite workable functional equivalents. The point is important. Some property law theorists assume that a concept of cession is indispensable: see eg W Mincke, 'Property: Assets or Power? Objects or Relations as Substrata of Property Rights' in J W Harris (ed) *Property Problems: From Genes to Pension Funds* (1997) 83: 'We need to be able to transfer obligations. Our economy would come to a halt without that possibility. So we have to model our legal tools according to that need. The outcome seems clear. It must be something like the general concept of property or *propriété* as it is found in English or French law'. The reference to 'obligations' is ambiguous: modern English law, for example, still does not recognise the transfer of *obligations*, as opposed to claims: *Pan Ocean Shipping Ltd v Creditcorp Ltd, the Trident Beauty* [1994] 1 WLR 161 HL; Sir Guenter Treitel, 'Assignment' in P Birks (ed) *English Private Law* (2000) vol II, para 8.346.

[47] Gaius, II, 38.

transferable at all. Rather, it must be taken in context: claims were simply not transferable either by the usual conveyances (i.e. *mancipatio*, *in jure cessio*, or *traditio*) or even by mere *stipulatio*.[48] When the compilers of the *Digest* encountered this fragment of Gaius, they forgot that the rule that claims were not assignable had since been superseded by piecemeal and incremental intervention by the praetor. In taking Gaius at face value they then sought to excise all the material on cession from the *Digest*.[49]

4-15. The next point follows from the last: it was because the recognised conveyances were unsuitable for transferring claims that an artificial analysis had to be employed; this turns the received interpretation on its head, i.e. the reason that 'cession' could be effected only by artificial means indicated that economic development had outpaced legal development. The special proceeding of constituting the assignee as a procurator *in rem suam*, Gide argues, occurred because claims had to be, and were, transferred in practice. There was no abstract prohibition on transfer, simply no other recognised conveyance. The existing institutions of *mancipatio*, *in jure cessio* and *traditio* were simply of no use in the case of the transfer of a claim.[50]

(g) *Conclusions*

4-16. What conclusions can be drawn from these arguments? Without a legal mechanism for transfer, it cannot be said that Roman law recognised cession. That there were workable functional alternatives is nothing to the point. Functional alternatives evolved because cession was not recognised. Moreover, much discussion of the Roman sources is predicated on the modern view of cession, viz that it occurs without the consent of the debtor. But there was still no way to bring about a *transfer* of the claim, even if the debtor did consent. Only *delegatio* was available. This would have destroyed the claim, not transferred it.[51] The temptingly forceful argument that the debtor could not have another creditor imposed upon him without his consent is, therefore, emptied of much content. Even where there was to be no *imposition* of a new creditor (because the debtor consented), there was still no mechanism to achieve a transfer.

D. TO THE GLOSSATORS AND COMMENTATORS

4-17. As the law developed, it seems that some claims were accepted as transferable, for example, claims which were held in respect of a thing that was transferred. Grosskopf draws attention to an example in a Lombard deed of AD

[48] T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1890) vol 1, 210.

[49] P Gide, *Etude sur la novation et le transport de créances en droit romain* (1879) 240–242.

[50] It should be noted that there are also two difficult passages in the Roman sources which suggest that inheritance rights could actually be transferred outright *in jure cessio*: Gaius II, 35; Ulpian D 19.13 and 14. Cf H Home, Lord Kames, *Principles of Equity* (2nd edn 1767) 206: 'In our later practice an assignment has changed its nature, and is converted into a proper *cessio in jure*, divesting the cedent *funditus* and vesting the assignee'. Kames is referring to *cessio in jure* literally; he is not to be taken as suggesting that Scots law received the Roman process of *in jure cessio*.

[51] Windscheid, *Pandektenrecht*, § 329, 361.

789 where rights of action for compensation for death were transferred to the buyer of slaves.[52]

4-18. A revival of the study of the Roman law found in the *Digest* occurred in the west at the turn of the twelfth century. Beginning with Irnerius (c 1055–1130) the so-called Glossators[53] sought to elaborate and expound on the law in the *Digest*. Their glosses on the original text contained much learning and, importantly, cross-references without which the *Digest* would have remained largely impenetrable. Their work was consolidated by Accursius (who died in 1260) in the gloss *ordinaria*.[54] The approach was rigorous but academic. They were unconcerned with the practice of law. Consequently, their views on cession were conservative and true to the Roman sources. The later Glossators were unequivocal that the *actio personalis* held by the creditor could not be transferred to another.[55] Their approach was preserved for posterity with Accursius' striking comparison of the action-obligation relationship to the bond between spiritual soul and mortal body: 'the action arising from the obligation hinges on the bones and entrails of the creditor and can no more be separated from his person than the soul from his body.'[56] It is to this literary quality (or 'dans leur langage enérgetique et bizarre')[57] that Luig and Grosskopf attribute the later acceptance in the *jus commune* of the principle that claims were not transferable.[58] Indeed, of the otherwise practically orientated Commentators,[59] even such figures as Baldus (1327–1400) and Bartolus (1313–1357) were seduced by the poetic appeal of Accursius' exposition; as were many other scholars of renown in the centuries that followed. In the Glossators' opinions, the *actio directa* remained with the original creditor. A third party could only exercise these rights indirectly by way of a *procuratio in rem suam*. It was this view which coloured much subsequent legal development; in Scotland, it clouded investigations of the history and confused much of what came after.

E. NATIONAL DEVELOPMENTS

(1) General

4-19. There are some difficulties in tracing the development of the concept of cession. The concept (or functional equivalents), it will be seen, is universal and ubiquitous. The sources are numerous. How should differences between case

[52] Grosskopf, *Geskiedenis* 31–32.

[53] For the Glossators and Commentators generally, see P Stein, *Roman Law in European History* (1999). For their views on cession, see R Fränkel, 'Zur Zessionslehre der Glossatoren und Postglossatoren' (1910) 66 *ZHR* 305–348; (1911) 67 *ZHR* 79–126.

[54] For a concise introduction see B Nicholas, *An Introduction to Roman Law* (1962) 46–47.

[55] Grosskopf, *Geskiedenis* 50 ff.

[56] Zimmermann, *Obligations* 58. The paraphrase was first invoked by the Glossators: Azo, Sum Cod 4.10 Nr 19: *Si aliquis eam vult omnino a se separare per cessionem, non potest, adeo inhaeret ossibus eius*; Accursius, Gloss *in nominibus* on D 15.1.16: *Quae nomina sive actiones non possunt separari a domino, sicut nec anima a corpore*; Accursius, Gloss on D 17.2.3 pr: *ossibus…inhaerent*, cited by Luig, *Geschichte* 12 and Grosskopf, *Geskiedenis* 50. See too, E Genzmer, 'Nomina ossibus inhaerent' in Université de Lausanne, *Mélanges Philippe Meylan* vol 1 (1963) 159–165, and W Ogris, 'Abtretung' in *HRG*, vol 1 (1971).

[57] P Gide, *Etudes sur la novation et les transports de créances en droit romain* (1879) 233.

[58] Luig, *Geschichte* 18–21; Grosskopf, *Geskiedenis* 51.

[59] See Grosskopf, *Geskiedenis* 44 ff and references there cited.

law and juristic writings be evaluated? The former is necessarily pathological, perhaps unrepresentative of non-contentious general principles; the latter, on the other hand, may be, and often are, detached from practical reality.[60]

(2) French customary law

4-20. The evolution of the law of cession in France is of particular interest to Scots lawyers. The French sources evidence the first, and most important, departures from the strictures of Roman law. Heinrich Brunner has trawled the older French sources, tracing the development of reified obligations.[61] While many of the sources touch on the law of cession, the basic concept of cession was not regularly invoked. Rather, obligations to pay were more often reified in a moveable bond.[62] These were initially in the form of undertakings on the part of the debtor to pay the creditor. Sometimes the promise would include a clause that it was payable to order; sometimes that it was payable to bearer; in other cases, transfer seems to have been possible even without such a reference.[63]

4-21. Brunner also identified cases on cession from the early thirteenth century.[64] Take, for example, a decision of the Normandy Exchequer in 1219. The creditor transferred his claim against the debtor. The assignee then sought payment. The debtor countered the demand by producing a discharge from the cedent. The discharge post-dated the deed of cession and was thus held ineffectual. The debtor was ordered to pay the assignee. It is not clear whether this was a double payment. There is also an example of a debtor arguing that his agreement was with the original creditor only and he could not be compelled to enter into proceedings with an assignee.[65] In another case of 1298, the assignee was constituted as a procurator *in rem suam*;[66] and there is another referring to a mandate to uplift.[67] It seems, however, that where cession was admitted, the sole common requirement was intention. The style was

[60] This fundamental problem for legal history is identified by Alan Watson, *Ancient Law and Modern Understanding* (1998) 89: 'Evidence for legal history is the written record, occasionally archaeology, but never the spoken word not recorded in writing. So often the evidence for legal history misrepresents what actually happened'.

[61] H Brunner, 'Das französische Inhaberpapier des Mittelalters und sein Verhältnis zur Anwaltschaft, zur Zession und zum Orderpapier' originally published in H Brunner (ed) *Festschrift im Namen und Auftrage der Berliner Juristen-Fakultät zum 50jährigen juristischen Doktorjubiläum von Heinrich Thöl* (Berlin, 1879) but reproduced in K Rauch (ed) *Abhandlungen zur Rechtsgeschichte, gesammelte Aufsätze von Heinrich Brunner* (1931) vol I, 487. All further references to Brunner are to the pagination in the latter collection. There is much background to be gained from J P Dawson, *The Oracles of the Law* (1968). Grosskopf, *Geskiedenis* chapter 5 is, to a large extent, based on Brunner's work: see 78, n 1.

[62] Brunner, 'Inhaberpapier', 494.

[63] Brunner, 'Inhaberpapier', 497 observes that the *Coutumes du Beauvoisis* (1283) 35, 19 recognise the transfer and transmission of moveable bonds.

[64] Brunner, 'Inhaberpapier', 495 ff.

[65] Brunner, 'Inhaberpapier', 496. At this time, it seems that the parties would have to consent to entering into proceedings with each other. Cf the further examples adduced by Brunner, especially at 498, n 2, a case involving a mandate to uplift which he distinguishes from cession.

[66] Brunner, 'Inhaberpapier', 496.

[67] Brunner, 'Inhaberpapier', 498, n 2 ('*Einkassierungsmandat*'). Both the *procuratio in rem suam* and the *Einkassierungsmandat* are mandates to uplift. A *procuratio in rem suam* is, as the name suggests, *in rem suam*; and *Einkassierungsmandat* may be *in rem suam*; but it need not be.

irrelevant.[68] There is no evidence, in the sources available, either of different types of mandate being distinguished or of any distinctions being made between transfer and mandate. Italian notaries,[69] apparently due to their focus on the Roman *actiones*, originally invoked the language of *procuratio*. This practice had spread beyond Italy, others copying their styles as a precautionary measure. Drafters adopted, in the language of modern commercial practice, the 'belt-and-braces' approach.[70] Many deeds even purported to constitute transferees of immoveable property as procurators, though the transfer of immoveable property was not based on any theory of *procuratio in rem suam*.[71] For Brunner, since such a disponee of immoveables was always considered as a transferee or singular successor and not merely as a procedural representative, so too should an assignee.[72]

(3) The sixteenth and seventeenth centuries: France and the Netherlands

4-22. The so-called 'practical' French Romanists, Petrus Rebuffus[73] and Andreas Tiraquellus[74] held that, after a cession, the cedent no longer had any claim against the debtor, though both jurists held that the *actio directa* remained with the cedent.[75] As a result, a claim could only be transferred once.

4-23. French Humanists, on the other hand, attempted to reconstruct the law of Justinian by close textual analysis. Unsurprisingly, therefore, they took a more orthodox view of cession. By a mandate *in rem suam* a third party could exercise the cedent's *actio directa* in the cedent's name; by cession, the cessionary could pursue in his own name by virtue of the *actio utilis*. But their views were not always intelligible. When the leading French Humanist, Cujacius, conceded that issues involving cession were a '*quaestio subtilis, et satis difficilis*',[76] he was at least honest. For his treatment of cession was contradictory. On the one hand, he said that there was no difference between

[68] Brunner 'Inhaberpapier', 501, n 345.

[69] For whom, see Grosskopf, *Geskiedenis* 34–42.

[70] Brunner, 'Inhaberpapier', 502: 'Die Sitte der Notare, die Klausel des procurator in rem suam den verschiedenartigsten Urkunden einzufügen, hat ihren Ausgangspunkt in Italien. Schon die italienischen Notare liebten es, der Übertragung des Rechts vorsichtshalber die 'cessio actionum' anzuhängen, eine Klausel, die dann ihrerzeits wieder den procurator *in rem suam* hinter sich nachzog'.

[71] Brunner, 'Inhaberpapier'. But it must be conceded that some feudal grants can be construed in terms of *procuratio*.

[72] Note Brunner's reference (at 499) to a small compilation of the law of the office of justice in Poitou dating from the second half of the fourteenth century. This suggests that at that time there were thought to be two ways to effect a cession: one was by a mandate to pay, the other by cession. The latter effected a transfer of the claim on the debtor becoming aware of it; the former was a functional equivalent. Interestingly, it is stated that a cession must be in writing.

[73] P Rebuffus (Pierre Rebuffi), *Tractus de cessionibus* in *idem*, *Commentarii in constitutionis seu ordinationis regias* (1554) Art II. Rebuffus was born in 1487 and was Professor in Paris in 1557.

[74] A Tiraquellus, *de retrait lignagier* § 26 in *idem*, *Opera Omnia* (1588). Tiraquellus was born c 1488 and died in 1558. But note Coing's reservations about these texts: H Coing, *Europäisches Privatrecht*, vol 1 (1985) § 86, n 5.

[75] Grosskopf, *Geskiedenis* 88–89.

[76] J Cujacius (Jacques Cujas), *Opera, ad* C 4.10.1.2, quoted by Grosskopf, *Geskiedenis* 91, n 288.

cession and a mandate *in rem suam*; on the other, he elaborated the different results that followed from each. Furthermore, he asserted in one place that after cession the *actio directa* remained with the cedent; elsewhere that after cession the cedent could no longer claim from the debtor.

4-24. In the southern Netherlands of the sixteenth century, there was a greater inclination to accept cession. It was admitted that the cessionary had the right to claim in his own name from the debtor. The cessionary was also entitled to use diligence, although it was uncertain whether the cessionary could do this in his own name.[77] The Grote Raad van Mechelen also accepted that cession was a transfer.[78] The form, it seems, was derived from the Roman, the cessionary being surrogated and substituted into the position of the cedent.[79] This is more consistent with a theory of representation than with the idea of outright transfer. Writing was always required. It was also suggested that a claim could be ceded only once.[80] Why this should be so, however, is not explained. Perhaps it was assumed that claims could not be transferred: the 'cessionary' was a mere representative and a representative could not 'delegate' to another what had been 'delegated' to him.[81]

4-25. At the Leuven law school, the jurists of the day, such as Gudelinus,[82] Zoesius[83] and Perezius,[84] continued to hold under Humanist influence that the cedent's *actio directa* was not transferable. The cessionary could only make use of the cedent's right as a procurator *in rem suam*; as a result, the action had to be brought in the name of the cedent. The cessionary could sue in his own name only by virtue of the *actio utilis*.

4-26. In the northern Netherlands there were two approaches. In Friesland, Roman law was more strictly adhered to than elsewhere in the Netherlands. The two best-known Frisian jurists, Ulrik Huber[85] and Johannes van den Sande,[86] adopted the conservative view that claims were not transferable. Only the mandate *in rem suam* was available. This can be contrasted with the opinions of the Roman-Dutch jurists, such as Groenewegen, van Leeuwen,

[77] P Peck (Petrus Peckius), *Opera Omnia* (Antwerp, 1679) 3.6, cited by Grosskopf, *Geskiedenis* 100 and Y M J V Boon, *Assignment of Contract: a Study in Comparative Law* (unpublished M Litt Thesis, University of Aberdeen, 1972) 183–184.

[78] Grosskopf, *Geskiedenis* 101, n 288.

[79] H Coing, *Europäisches Privatrecht*, vol 1 (1985) 446–447.

[80] See the opinion of Christinaeus (Paul van Christynen) cited by Grosskopf, 100.

[81] 'Delegation' is used in a loose sense. It should not be confused with *delegatio*.

[82] P Goudelin (Petrus Gudelinus), *Commentarium de jure novissimo* (Arnhem, 1643) IV.4.

[83] H Zoes (Henricus Zoesius), *Commentarius ad D 44, 7, 67* (Brussels, 1718).

[84] A Perez (Antonius Perezius), *Praelectiones in C 4, 10, 13* (1639). Perezius was born in Spain. See discussion of these writers in Grosskopf, *Geskiedenis* 103, n 288.

[85] *Heedendaegse Rechtsgeleertheyt* (originally published 1686; 4th edn enlarged and revised by Z Huber, Amsterdam, 1742), in English as *The Jurisprudence of my Time* (P Gane trans, Durban, 1939). See discussion in Grosskopf, *Geskiedenis* 111 ff.

[86] *Commentarius de actionum cessione* (1623), in English as *Commentary on the Cession of Actions* (P C Anders trans, 1906). See discussion in Grosskopf, *Geskiedenis* 105–110. Van den Sande's *de actionum cessione* has been cited in Scotland: see *Ewart v Latta* (1863) 1 M 905; while his *Theatrum practicantium, hoc est decisiones aurae sive rerum in suprema Frisiorum curia judicatarum* (originally published in 1615) is referred to by Kames, *Principles of Equity* (3rd edn 1778) II, 183 in the context of arrestment; Friesland being 'the country from whence we borrowed an arrestment'.

and Voet,[87] who were more receptive to the idea that cession effected a transfer. By virtue of the cession, the right of the cedent was transferred to the cessionary. No notice was required. The debtor would be protected if he paid the cedent in good faith. The basic principles enunciated by these writers are still reflected in the law of modern South Africa.

4-27. There is no evidence that these writers influenced the substantive law of assignation in Scotland to any great extent; all of the works referred to in this section, however, are found in the Advocates' Library.

(4) French law after the Coutumes

4-28. It was the *Coutume de Paris* of 1510 that contained the well-known provision: 'le simple transport ne saisit point'.[88] The provision is found in the title on execution, not cession or sale. In 1580, the provision was supplemented with important practical details: 'et faut signifier le transport à la partie et en bailer copie auparavant que d'exécuter'.[89] It is with these provisions that one could now speak of transfer only on intimation.

4-29. Moving from the late fourteenth century into the fifteenth, there are cases dealing with good faith payment where the debtor pays in ignorance of the cession; but there seems to have been no good faith defence where the debtor had private knowledge of it.[90] Under the *Coutumes* of Anjou and Maine of 1437, the debtor was accorded the right to demand evidence of the transfer from the putative cessionary.[91]

4-30. It is under the heading of 'Subrogation' that Domat first touches on the issue of transfer of claims.[92] For Domat, 'transport' was a type of succession of which there were two: universal or singular. Singular succession divided, again, into two: gratuitous or onerous. Like earlier sources, however, Domat is not specific about the nature of the 'transport'.[93] Pothier, on the other hand, identifies that there is a difference between a *transport-cession*, as he calls it, and *transport de simple délégation ou indication*.[94] In a passage that is of particular interest to Scots lawyers, he uses the term '*assignation*':

> « Le transport de simple délégation ne contient point de vente ; c'est une simple indication que je fais à mon créancier, *unde ipsi solvam*, en lui assignant un de mes

[87] See discussion in Grosskopf, *Geskiedenis* 103, n 288, (Sande); 118–122 (van Leeuwen and Voet). For information on the life and works of these well-known jurists, see D H van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1979) 356–357 (Groenewegen); 357–359 (van Leeuwen); 362–365 (Voet).

[88] Art 170. Cf the Coutume de Xaintonge of 1520, IV, 873, ch 42: 'transport simple sans apprehension de fait ne saisit', cited by Brunner, 'Inhaberpapier', 503, n 2.

[89] Art 108.

[90] Brunner, 'Inhaberpapier', 498.

[91] Brunner, 'Inhaberpapier', 498. This is similar to the position that had been reached by Roman 'vulgar' law in the East: Kaser, *RPR* II, § 276, at 452.

[92] J Domat, *Les loix civiles dans leur ordre naturel* (2nd edn 1695) III.1.vi (vol II, 261).

[93] *Les Loix civiles* 552–556 and 584.

[94] R J Pothier, *Traité du contrat de vente* § 551–552 in M Bugnet (ed) *Oeuvres de Pothier* (1861) vol 3, 218.

débiteurs, et lui donnant pouvoir d'exiger de lui, **en mon nom**, ce qu'il me doit, pour être par lui reçu en déduction de ce que je lui dois. »[95]

4-31. If P is indebted to X, and X is indebted to R, Pothier oberves that in *delegatio solvendi*, the intermediate creditor X bears the risk of the insolvency of P: until P pays R, neither P nor X are discharged.[96] This is carried forward into the *Code Civil*.[97] Yet in suggesting that R pursues P in X's name, Pothier seems to confound the *procuratio in rem suam* and the mandate to pay: in *procuratio*, the 'assignee' *uplifts* in the original creditor's name; in a mandate to pay, the original debtor, P, *pays* X's creditor, R, in the name of X.

(5) Early codifications

4-32. It was natural law that strongly influenced[98] the *Codex Maximilianeus Bavaricus* (1753),[99] the Prussian *Allgemeines Landrecht* (ALR) (1794),[100] and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811).[101] They all admitted the free transfer of claims. In so doing, the provisions on cession evidenced a fundamental shift from the conservative view that claims could not be transferred without the consent of the debtor. Moreover, these provisions also allowed transfer to occur without debtor notification. This was a radical change.

(6) The German Pandectists

4-33. The German Historical School in the nineteenth century advanced the scientific study of Roman private law. Its approach has endured. But for many (most famously Otto von Gierke) this *Begriffsjurisprudenz* was irrelevant. In the relentless quest for dogmatic and scientific elegance, the demands of daily

[95] *Traité du contrat de vente* § 551 (emphasis added). Cf *idem*, *Traité du contrat de change* (1763) § 226.

[96] *Traité du contrat de vente* § 551.

[97] *Code civil* Art 1277: 'La simple indication faite, par le débiteur, d'une personne qui doit payer à sa place, n'opère point novation. Il en est de même de la simple indication faite, d'une personne qui doit recevoir pour lui'. The Belgian provision is identical.

[98] For some general remarks on the history of these codifications, see O F Robinson, T Fergus and W Gordon, *European Legal History* (3rd edn 2000) 256 ff; H Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen I, europäischen Kontext* (9th edn 2001) § 5.

[99] Part 4, Cap 15, § 7. For the Bavarian code generally, see K Luig, 'Die Grundsätze des Vertragsrechts in Kreittmayrs Codex Maximilianeus Bavaricus Civilis von 1756' in *Römisches Recht, Naturrecht, Nationales Recht* (1998) 437 ff.

[100] *ALR* I, 11, § 382: ‚Alle Rechte, welche nicht an die Person des Inhabers gebunden sind, können anderen abgetreten werden'; §§ 376/77: 'Die Abtretung der Rechte setzt einen Vertrag voraus, wodurch jemand sich verpflichtet, einem Andern das Eigenthum seines Rechts, gegen eine Bestimmte Vergeltung, zu überlassen. Die Handlung selbst, wodurch das abzutretende Rechte dem Andern wirklich übertragen wird, wird Cession genannt.' § 393: 'Durch die Erklärung des Cedenten, dass der Andere das Abgetretene Recht von nun an als das seinige auszuüben befugt sein soll, und durch die Annahme dieser Erklärung, geht das Eigenthum des Rechts selbst auf den neuen Inhaber über.'

[101] *ABGB* § 1392: 'Wenn eine Forderung von einer Person an die andere übertragen, und von dieser angenommen wird; so entsteht die Umänderung des Rechts mit Hinzukunft eines neuen Gläubigers"; § 1394: "Die Rechte des Übernehmers sind mit den Rechten des Überträgers in Rücksicht auf die überlassene Forderung eben dieselben.'

practice were ignored. The criticism is particularly apposite to the treatment of cession. Whatever the level of commercial development at Rome, it was hardly similar to the conditions of nineteenth-century Prussia or Austria. The Pandectists, in other words, were presenting law 'out of context'.[102] It has been observed that, for any commercial society, the basic concept of cession is desirable. Indigenous Germanic law,[103] as well as the Prussian and Austrian codes provided for the transfer of claims. The *Allgemeine Deutsche Wechsel Ordnung* – which had been adopted by all the states in the German Bund in 1848[104] – also admitted transfer. The German Pandectists did not. Their adherence to the Roman texts was unfailing:[105] the Roman texts simply did not acknowledge the concept of a *transfer* of a claim.[106] This led to a conflict of theory and practice and, frankly, an approach to cession that was incoherent.[107] A major shortcoming with the Pandectist approach was that it did not consider whether transfer would be possible even if the debtor did consent.

4-34. Ultimately, it took the most famous of the Pandectist scholars, Bernhard Windscheid, to drag academic lawyers from the toil of trying to apply old sources couched in terms of actions to a modern approach for modern problems. His essay on *Die Actio des römischen Civilrechts vom Standpunkt des heutigen Rechts* in 1856 was a crucial development in nineteenth-century German scholarship. The Roman sources were concerned primarily with *actiones*. This was a natural result of the formulae system in which the jurists worked. But *actiones* were of little relevance to modern civil procedure. Windscheid sought to show that it was evident from the Roman sources themselves that, by the time of Justinian, claims were, to all intents and purposes, fully transferable.[108] Crucially, he asserted that the change of creditor did not destroy the nature and content of the obligation.[109] Actions were the be-all and end-all for Roman lawyers. They were not concerned with the transfer of rights.[110] For this reason no distinction could be made between action and right. He who held the action held the right.[111] And a change in the

[102] See A Watson, *Law Out of Context* (2000).

[103] Cf O Stobbe, 'Zur Geschichte der Uebertagung von Forderungsrechten und der Inhaberpapiere' (1868) 11 *ZHR* 397 at 399. G Dahm, *Deutsches Recht* (1951) suggests that the highly developed law of the central and northern cities was often considerably more advanced than the equivalent Roman law. For general discussion of the influence of Roman law in Germany, see J P Dawson, *The Oracles of the Law* (1968) 148–262.

[104] *ADWO* §§ 9–10. It came into force in all the states of the Bund – with the exception of Austria, where it was adopted in 1850 and remained in force until 1938 – on 1 May 1849. It was expressly provided that the right to draw a bill was not limited to merchants. Indeed, anyone with contractual capacity could draw a bill: *ADWO* § 1.

[105] See, eg C F Puchta, 'Cession' in J Weiske (ed) *Rechtslexikon für Juristen aller deutschen Staaten enthaltend die gesammte Rechtswissenschaft* (Leipzig, 1840) vol 2, 636 ff.

[106] Mühlenbruch, *Cession*, § 4.

[107] See eg A J F Thibaut, *System des Pandekten-Rechts* (6th edn 1823). At § 79 he states that cession transfers the entire right to the cessionary; yet, at § 78, he points out that while cession can occur against the will of the debtor, the debtor remains bound to the cedent after cession; and the cedent can still validly demand payment.

[108] Literally, that claims were 'nicht unübertragbar': B Windscheid, *Der Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (1856) 168.

[109] B Windscheid, *Actio* 182. For which see generally Luig, *Geschichte* 90 ff; C Hattenhauer, '§§ 398–413 Übertragung einer Forderung' in *Historisch-Kritischer Kommentar zum BGB* vol 2 (2007).

[110] See generally Luig, *Geschichte* 92–95.

[111] Cf Windscheid, *Pandektenrecht* § 329, n 7.

person of the creditor need not destroy the content of the underlying obligation.[112] Whether Windscheid's theory was entirely coherent need not be discussed here.[113] For present purposes it is sufficient to note that it was his contribution that galvanised other jurists into reconsidering the traditional approach that claims were intrinsically non-transferable. It was only with the promulgation of the BGB – which came into force in 1900 – that free transfer of claims became accepted throughout Germany.

(7) The German Code

4-35. For the law of cession, the BGB represented a major departure from the 'heutiges römisches Recht'. The first draft of the BGB explicitly stated that *Forderungsabtretung* was the transfer of a claim without the consent of the debtor.[114] By the final draft, however, *Forderungsabtretung* was described only in terms of transfer. There was also a change in direction with regard to intimation. Intimation was not a constitutive requirement for a valid cession. But it was practically important. The position in the first draft – that only certain knowledge would interpel the debtor from paying the cedent – was replaced with a general principle of good faith. The debtor's private knowledge of the cession thus became relevant.[115]

(8) English law

4-36. English law has not, and never had, a unitary law of assignment. The rules depend on the object of the assignment. Choses in action may be legal or equitable. A claim to payment is a legal chose. Assignment of claims to payment only became possible at law with the coming into force of the Judicature Act in 1875.[116] There were essentially two ways in which this prohibition was circumvented. The first was similar to the civil law concept of appointing a procurator *in rem suam*: the assignor could appoint an 'attorney' to collect from the debtor, in the assignor's name.[117] The second circumvention was in equity.

[112] Windscheid, *Actio* 169. As Hattenhauer, § 24, n 142, points out, however, Windscheid later retreated from this view: *Pandektenrecht* § 329, n 2. A claim would only be unassignable if the content of the obligation went to the root of the obligation; in other words, if the debtor would be prejudiced. Mere change in the person of the creditor, although it changed the nature of the obligation, did not prohibit cession: Windscheid, *Pandektenrecht* § 329, n 10.

[113] Cf J Schmidt, '"Actio". "Anspruch". "Forderung".' in M Martenik (ed) *Vestigia Iuris: Festschrift für Günther Jahr zum 70 Geburtstag* (1993) 401 ff.

[114] *Erster Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich* (1887) § 293.

[115] See generally Luig, *Geschichte* 118–141 and, in particular, F von Kübel, *Kommission zur Ausarbeitung eines bürgerlichen Gesetzbuches, Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich* (1882) Book 2, Part 1, tit 4, 'Abtretung der Forderungen' on § 15, especially at 34 ff. The textual amendments can be traced in H H Jakobs and W Schubert (eds) *Die Beratung des Bürgerlichen Gesetzbuchs, Recht der Schuldverhältnisse I, §§ 241–432* (1978) especially at 757–769.

[116] Supreme Court of Judicature Act 1873, s 25(6). Some equitable choses were always transferable in equity: G Tolhurst, *The Assignment of Contractual Rights* (2006) para 4.02. The Crown could always assign. And claims against the Crown were also assignable: S J Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516, 529; (1932) 48 *LQR* 248 at 254. But a Crown assignee could not assign.

[117] See generally S J Bailey (1931) 47 *LQR* 516; (1932) 48 *LQR* 248 and 547 (3 parts).

The courts of Chancery treated, and all English courts now treat, agreements to assign as assignments: equity holds as done that which ought to have been done.[118] In so doing, the distinction between contract and conveyance collapses. Private agreements have third party effect. But how was the Chancellor able to 'hold as done that which ought to have been done' if assignment was not recognised at common law?[119] It is probably the case, therefore, that the development of the equitable assignment of choses in action owes its development to the trust: on assignment, equity recognises the assignor as holding for the assignee. The assignee becomes beneficially entitled to the claim. On a double sale of the same claim, the first assignee to notify the debtor is preferred.[120]

F. TERMINOLOGY

4-37. In Scots law, the transfer by a creditor of his claim against his debtor, without the consent of the latter, is usually called 'assignation'. The terminology calls for some explanation; not least because the term is used in a confusing multitude of senses. In Austria, '*Assignation*' refers to the similar, but conceptually distinct, institution of *Anweisung*.[121] 'Assignment' is also not

[118] J McGhee, *Snell's Equity* (30th edn 2000) para 3-25. Cf H W Elphinstone, 'Chose in Action: What is it?' (1893) 9 *LQR* 311.

[119] G Gilmore, *Security Interests in Personal Property* (1965) I, 202: 'Thus by the typically muddle-headed process of thinking known as the genius of the common law, assignments of intangibles were made effective in fact while basic theory still proclaimed them to be a legal impossibility'. Cf F C T Tudsbery, *The Nature, Requisites and Operation of Equitable Assignments* (1912) 6–7; Sir Guenter Treitel, *The Law of Contract* (11th edn 2003) 672 ff. It is probably going too far to say that there was a prohibition on assignment in English law. But the legal history of the assignment of choses in action is perhaps even more complex than in the *jus commune*. The subject cannot be discussed here. Fortunately, some of the best legal minds in the Anglo-American tradition have addressed the subject. See, in particular, J Barr Ames, 'The Inalienability of Choses in Action' in *Select Essays in Anglo-American Legal History* (1909) vol III, 580 ff; W W Cook, 'The Alienability of Choses in Action' (1915) 29 *Harvard LR* 816; S Williston, 'Is the right of an Assignee of a Chose an Action Legal or Equitable?' (1916) 30 *Harvard LR* 97; W W Cook, 'The Alienability of Choses in Action; A Reply to Professor Williston' (1917) 30 *Harvard LR* 449; S Williston, 'The word 'equitable' and its applicability to assignment of Choses in Action' (1918) 31 *Harvard LR* 822; W S Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harvard LR* 997; Holdsworth, *History of English Law* vol 8 (1926) 113 ff; A L Corbin, 'Assignment of Contractual Rights' (1926) 74 *U Pa L Rev* 207.

[120] *Dearle v Hall* (1828) 3 Russ 1. An equitable assignee of a legal interest who further assigns is assigning an equitable interest: G Tolhurst, *Assignment of Contractual Rights* (2006) para 4-02.

[121] Cf W Schubert (ed) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuches* (15 unnumbered vols, 1980–86) II, 4, 2, 'Anweisung'; 9, 'Terminologie'; A Tobler (ed), *Tobler-Lommantisch Altfranzösiches Wörterbuch* (1925) vol 1, 598, lines 18–28; *Brockhaus Enzyklopädie* (17th edn 1966) vol 1, 597. Cf the Dutch 'assignatie' or 'aanweijzen': see *Winkler Prins Encyclopaedie*, (6th edn 1948) vol 1, 542. This title is somewhat abbreviated in the 7th edn of 1966; and V G Hiemstra and H L Gonin, *Engels-Afrikaanse Regswoordebook* (1963) 14: (1) *aanwysing*, toewysing, vasstelling, bepaling... assignasie van skuld (skuldenaar A versoek sy skuldenaar, B, om regstreeks aan A se skuldeiser te betaal; deur De Groot en Van Leeuwen *aanwysing* genoem; ook: die dokument waarin die reëling verval is (veroudered)'.

uncommon in the Scottish sources.[122] This is the terminology used in England. The English term dates from the fourteenth century and could also mean 'an order, request or directive'.[123] The usage of 'assignment' to connote a transfer dates from the fifteenth century.[124] The term 'cession' is also regularly used in Scots law. In particular, the assignee is frequently designated as the 'cessionary' in the Scottish sources.[125]

4-38. The etymological roots of the term 'assignation' are not clear. The word 'cession' is derived from the Latin '*cedere*' ('*cessio*'). This was used in the Roman legal sources.[126] Importantly, however, this never seems to have meant more than mere agreement, not transfer.[127] 'Assignment' and 'Assignation' come, through old French, from the Latin '*assignare*' (*assignatio*);[128] in the Roman sources the term expressing the same idea is '*adsignatio*'.[129] *Assignatio* or *adsignatio* means to allot, appoint or to make over to. This is the meaning of the verb 'assign' in English.[130] In old French, 'assignation' could mean an order to pay money.[131] The French traditionally always used the term '*transport*' to refer to what is designated in modern French law as *cession de créance*.[132]

4-39. The first reference to 'transport' in French law that Brunner traced is to an Ordinance of the fair of Champagne in 1334.[133] In France, 'cession' originally referred only to the *cessio bonorum*. It is only with the writings of

[122] See McBryde, *Contract* para 12-05 for references. See too the 'Deeds of Assignment' of 22 July 1786 and 17 April 1789, granted by the poet, Robert Burns, of his share in his farm at Mossgiel, Ayrshire and the copyright in his works, in G Ross Roy (ed) *Letters of Burns* (1985) vol I, 33–34; and Kames, *Principles of Equity* (3rd edn 1778) II, 190.

[123] H Kurath and S M Kuhn (eds) *Middle English Dictionary* (1956) 453.

[124] *Middle English Dictionary*, 454.

[125] Eg Erskine III.v.1.

[126] Cf Windscheid, *Pandektenrecht* § 329, n 11; See C 4.35.22 cited by Zimmermann, *Obligations*, 58, n 108. For further references, see H G Heumann, *Handlexicon zu den Quellen des römischen Rechts* (5th edn 1879) 66, 'cedere'.

[127] Kaser, *RPR* II, 454, n 4.

[128] C T Onions (ed) *The Oxford Dictionary of English Etymology* (1966) 56. Cf D du Cange, *Glossarium mediae et infamae latinitatis* (1698) vol 1, 437, 'assignatus'; Heumann, *Handlexicon* 42, 'assignatio'.

[129] Heumann, *Handlexikon* (5th edn 1879) 42, s.v. 'assignare'; (9th edn 1907) 18, 'adsignare'. Cf I J G Scheller, *Ausführliches und möglichst vollständiges lateinisch-deutsches Lexicon oder Wörterbuch* (3rd edn 1804) vol 1, 351 'Adsignatio' cited by Mühlenbruch, *Cession* 228, n 437. Scheller's dictionary has been translated into English as *Lexicon totius Latinitatis = A dictionary of the Latin language: originally compiled and illustrated with explanations in German* (OUP, 1835).

[130] J A H Murray, H Bradley and W A Craigie, *The Oxford English Dictionary* (1933) vol 1, 508.

[131] See R J Pothier, *Traité du contrat de change* (1763) § 226; D Lalande, *Lexique de chroniqueurs français (XIVe depuis du XVe siècle)* (1995) 30, 'Assignation': 'Mandate, ordre pour recevoir une somme assignée sur un certain fonds' (although, admittedly, this sounds like a mandate to uplift). Examples of the use of 'assignation' in this sense of an order to pay are cited from the early fifteenth century: E Baumgartner and P Ménard, *Dictionnaire étymologique et historique de la langue française* (1996) 52.

[132] A Rey et al, *Le Grand Robert de la langue française* (2nd edn 2001) vol 6, 1421 suggests that 'transport' was used for 'cession de droits' as early as 1312. Cf Lalande, *Lexique de chroniqueurs français* 66, v. 'cession'; at 523 *s.v.* 'transport', who provides examples of the use of 'transport' in the fourteenth and fifteenth centuries. Cf M Merlin, *Réparatoire universel et raisoné de Jurisprudence* (5th edn 1827) vol XVIII, 'Transport': 'Transport et cession … sont synonymes'.

[133] Brunner, 'Inhaberpapier' at 498.

Pothier, that the term *cession* began to be used for the transfer of claims,[134] although the language of cession had been used for some time to designate the debtor (the *debiteur cédé*) and the assignee (the *cessionnaire*) respectively.[135] In modern French law, '*assignation*' refers to the proceeding whereby notice is given of legal proceedings. The word '*assignat*' is one of the best known in European economic history. These instruments were issued by the French revolutionary government in the 1790s, the obligations backed by confiscated church lands. The *assignats* were issued in excess of the assets backing them and the last presses were discharged in 1796. (Unfortunately, there does not seem to be any connection between this usage and the important role played by the Scot, John Law, in the development of the French banking system). In the older sources, the 'assignat' is the person who is ordered to pay, the drawee. There is a recent example of the Scots law of cession employing French-like terminology. Regulations dealing with the controversial right to collect toll moneys payable for crossing the Skye Bridge refer to the assignee as the 'concessionaire'.[136]

4-40. There are perhaps two points that can be taken from the terminological confusion. First, it may be that in Roman law, and for a long time thereafter, the different modes of effecting a transfer were not clearly demarcated. Roman law did differentiate between a *delegatio* (a form of *novatio*) and a mandate. But the subtle distinctions between an outright transfer, the *procuratio in rem suam* (a mandate to uplift), and the mandate to pay, were never properly distinguished. The prevalence in the sources of the term *adsignatio* would support this. The notion of 'making over' is consistent with all three concepts. Further refinement came only later. And, when it did come, the genus, *adsignatio*, gave its name to different species in different jurisdictions. In the Germanic areas of Austria and Hungary, the general concept of '*adsignare*' can be traced directly to the order to pay, the *Anweisung* or, in the language of the ABGB, '*Assignation*'. In Scotland, as will become clear below, 'assignation' was always used to refer to transfer. In France, too, *adsignatio* developed eventually into a transfer (*transport*, *subrogation*).[137] In France, Germany and Austria the different concepts seem to have been relatively clearly distinguished. In any event the terminology in each jurisdiction has been consistent. This leads us to the second point. In Scots law, the terminology has varied. Varied Scottish usages may reflect the diverse influences on Scots law, and a practical rather than theoretical approach. Some of the deeper misunderstandings, in particular with regard to the difference between a mandate to pay and a mandate to uplift, are manifest in our imprecise and liberal use of language.

[134] Compare J Domat, *Les loix civiles dans leur ordre naturel* (2nd edn 1695) writing at the end of the seventeenth century and Pothier writing in the middle of the eighteenth. Domat, vol II, 587 refers to 'cession' only in the context of the *cessio bonorum*.

[135] See eg Domat, *Les loix civiles* vol III, 261. Interestingly, R T Troplong, *De la vente ou, Commentaire du titre VI du livre III du code civil* (4th edn 1845) vol 1, para 878, observes that '*cession*' is the generic term, *transport*, *délégation*, *subrogation* and *l'indication de paiement* being species.

[136] Assignation Statement (Prescribed Information) (Scotland) Regulations 1991, SI 1991/2152. For the most recent attempt to argue that there is no valid right to collect the tolls, based on two charters granted by William the Lion in 1180 and James VI in 1587: see Sheriff Principal Sir Stephen Young QC's note in *Procurator Fiscal v Robbie the Pict* 2004 GWD 31-643. The tolls were finally abolished on 21 December 2004.

[137] Domat, *Les loix civiles* III.i.vi. But see discussion of Pothier, *Traité du contrat de change* (1763) § 226, in para 4-49 below.

G. MANDATES TO PAY: ANWEISUNGEN

4-41. The German, Austrian and Swiss Civil Codes contain provisions on *Anweisung*.[138] An *Anweisung* is an order to pay. Suppose X is indebted to R. P is indebted to X. X (the *assignant* or *Anweisender*) can order P (the *assignat* or *Angewiesender*) to pay R (the *assignatar* or *Anweisungsempfänger*). Such an order has no effect on the respective rights of the parties until P either accepts the order or pays R. Crucially, the effect of this payment is two-fold: it extinguishes the debt P-X as well as the debt X-R. The concept is old.[139] It is recognised in both Scots[140] and South African law.[141]

4-42. In the *jus commune*, 'assignation' was the original term for *Anweisung*.[142] Importantly, for present purposes, it has been accepted for many centuries that on acceptance by P, R obtains an independent right against P. R can transfer this right. If so, then this is a clear example of a transfer of a claim. The doctrine of *Anweisung* is crucial to the development of this area of the law since it is a functional equivalent of cession. Indeed, it seems that in Assyrian, Babylonian, and Egyptian law, the concept of the order to pay was used to facilitate a circulation of claims.[143] Fundamentally, an *Anweisung* is a

[138] See generally, para 3-14 above; *BGB* §§ 783 ff; *ABGB* §§ 1404 ff; *OR* Art 466. It should be noted that this doctrine draws on the Roman principle of delegation. It is under this heading that the doctrine is found in French law. In the Austrian *ABGB*, *Anweisung* is alternatively styled '*Assignation*'. This should not be confused with the Scottish notion of 'assignation' which corresponds to *Forderungsabtretung* in German. For a helpful introduction see, D Medicus, *Schuldrecht II, besonderer Teil* (11th edn Munich, 2003) § 119; H Koziol and R Welser, *Grundriss des bürgerlichen Rechts* vol II (12th edn Vienna, 2001) 148 ff; see too G Ertl, 'Anweisung' in P Rummul (ed) *Kommentar zum allgemeinen bürgerlichen Gesetzbuch* (2002) vol 2, § 1399 ff. In South African law too, 'assignation' is the term given to orders to pay, not transfer; 'cession' being the institution corresponding to the Scottish assignation: see S Scott, *The Law of Cession* (2nd edn 1991) 193. The older, pre-*OR*, codes, in force in the individual cantons of Switzerland, are of interest. For example, the *Code du canton de Berne* (1831) contained some twelve provisions on the *Anweisung*, yet only three on cession: see Arts 980–982 (cession) and Arts 983–995 (*Anweisung*). The Code is found (in French translation) in the helpful compilation by M A de Saint-Joseph, *Concordances entre les codes civiles étrangers et le code Nepoléon* (Paris and Leipzig, 1840) sheet 89 ff. As usual, however, the Prussian *ALR* contains the largest number of provisions on *Anweisung*, no fewer than forty-eight: *ALR* I, 16, §§ 251–299.

[139] Cf W Schubert (ed) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuches* (15 unnumbered vols 1980–86, originally 1874), II, 4, 2, 'Anweisung', 14.

[140] See *Earl of Mar v Earl of Callander* (1681) Mor 2927. See also *Annotations on Stair's Institutions* (1824) 40–41, generally attributed to Patrick Grant, Lord Elchies. Although Elchies does not mention the *Earl of Mar* case, the example he gives uses the exact facts of the case, with the Lord of Gloret, the Earl of Callander and the Earl of Mar substituted for Caius, Seius and Titius respectively. I am grateful to Niall Whitty for this reference. See also *Wallet v Ramsay* (1904) 12 SLT 111 OH. These two cases are discussed in R Evans-Jones, 'Identifying the Enriched' 1992 SLT (News) 25.

[141] See P M Nienaber, 'Cession' in W A Joubert et al (eds) *The Laws of South Africa*, 2nd edn, vol 2, Part II (2003) para 17.

[142] Cf § 1404 *ABGB*; Ross, *Lectures* 188–189(n) is the only Scottish writer to have appreciated this point: 'the very word assignation in its original import, does not mean a conveyance, as Lord Kames supposes, but an appointment or constitution for a particular purpose'.

[143] U Wesel, *Geschichte des Rechts: von den Frühformen bis zum Vertrag von Maastricht* (3rd edn 2006) 91, Rn 78; A H Preussner, 'The Earliest Traces of Negotiable Instruments' (1928) 44

mandate addressed to the debtor (P) to pay R. This can be distinguished from the historical development of cession in most countries, which evolved from the mandate *in rem suam*. This was a mandate addressed to the 'assignee' (R) to uplift the claim from the debtor (P). While it is disputed whether the mandate *in rem suam* can be viewed as a transfer,[144] it is undisputed that an order to pay, of itself, transfers nothing; rather it effects a double discharge of the debt relationships P–X and X-P by a single payment P–R.

4-43. Admittedly, however, there is a subtle difference for the plea of *delectus personae creditoris* in the case of (i) cession and (ii) *Anweisung*. In the first case, the cessionary obtains a right against the debtor irrespective of the debtor's consent. The debtor may, therefore, be sued by the assignee. In the case of the *Anweisung*, P has the option of whether to accept the mandate. If he refuses, R will have no independent right against P. P can always refuse the order to pay. If R has no independent right, then he cannot obtain any judgment that can be forcibly executed on the debtor. Any right obtained by R, therefore, can be said to be based on P's consent.

4-44. What then of Roman law? It was the idea that there was always *delectus personae creditoris* in any debt in Roman law that necessitated the development of the *procuratio in rem suam*. It has been suggested – surprisingly, perhaps – that Roman law knew nothing of the *Anweisung*; rather, the order to pay was only subsequently re-constructed in terms of the Roman contract of mandate.[145] While this may explain subsequent Romanisation of the order to pay, it is most unlikely that the idea was not recognised in Roman law, even if clear examples are not found in the sources. It was known to less developed legal systems than Rome, and has been found in almost every system since. In any event, active delegation (*delegatio solvendi*), as recognised in classical Roman law, provides much of the conceptual basis of the *Anweisung*.[146] Although there is little trace of the Roman

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American Journal of Semantic Languages and Literatures 92 (cited by O R Keister, 'Commercial Record Keeping in Ancient Mesopotamia' (1963) 38 *Accounting Review* 371); A T Olmstead, 'Materials for Economic History of Ancient Near East' (1930) *Journal of Economic and Business History* 224; W L Westermann, 'Warehousing and Trapezite Banking in Antiquity' (1931) *Journal of Economic and Business History* 49. Orders to pay were current in Ancient Greece: see L Beauchet, *Histoire du droit privé de la Republique Athénienne* (1897) vol 4, 507–508; moreover, there was also no prohibition on cession there: see 537–541 and H J Wolff, 'Zur bedeutung der altgreichischen Rechtsgeschichte für die Rechtswissenschaft' in E von Caemmerer (ed) *Xenion: Festschrift für Pan J Zepos* (1973) vol I, 757 at 763. The reader with Ancient Greek can peruse examples of such orders reproduced and discussed by L Goldschmidt, 'Inhaber-, Order- und executorische Urkunden im classischen Alterthum' (1889) 10 *ZSS (RA)* 352. See also G R Driver and J C Miles, *The Assyrian Laws* (1935); C H W Johns, *Babylonian and Assyrian Laws, Contracts and Letters* (Edinburgh 1904; reprinted 1987) 334–335. F W Maitland, 'The Mystery of Seisin' (1886) 2 *LQR* 481 at 489–490 argued that even at a comparatively late stage in English law, lawyers were incapable of conceptualising incorporeals, as opposed to corporeal things, being the object of transfer. That is overstated. From its inception, Scots law has allowed claims to be transferred. Cf R H Lowie, 'Incorporeal Property in Primitive Societies' (1928) 37 *Yale LJ* 551.

[144] Cf Luig, *Geschichte*, quoted in para 4-07(n) above; A M Bell, quoted in para 5-32(n) below; and Huc quoted para 5-19(n) below.

[145] See W Schubert (ed) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuches* (1980–86) II, 4, 2, 'Anweisung' at 1. Cf Gaius III, 134 and further Roman references in R J Pothier, *Traité des obligations* (1761) § 446.

[146] Kaser, *RPR* I, § 152 III.

doctrine of *delegatio solvendi* in western vulgar law, in practice the order to pay was utilised: the reification of an obligation in a bond (*cautio*) was a known method of circulating debt.[147]

4-45. In any event, the Romans did recognise an order to pay of sorts. Moreover, an order drawn on one not necessarily indebted to the drawer. The letter of credit drawn by Cicero on a friend in Athens in favour of his son, who was studying there, is frequently cited.[148] And there are many other examples of orders to pay being used in commercial situations in Roman times.[149] Further, early forms of orders to pay have been found similar to modern cheques.[150] Of course, the admission of the order to pay does not, *per se*, mean that claims were transferable. That the Romans recognised the concept of the order to pay is a quite neutral piece of evidence for determining whether they recognised the transferability of claims.

4-46. The crucial confluence between the distinct concepts of *Anweisung* and cession is found at the point of legal evolution when the *Anweisung* was admitted as transferable. If the *Anweisung* has been accepted, and an accepted *Anweisung* can be transferred, then every transfer of the *Anweisung* is a transfer of the rights of the holder against the drawee.[151] Some have adduced evidence that the transfer of claims, by way of a transferable order to pay, did occur in Roman times.[152]

4-47. There remains, then, only one possible difference between the transfer of an accepted order to pay, and cession in the modern sense of the term. It has been suggested that cession is the transfer of a claim *without the consent of the debtor*. By definition, however, an *Anweisung* requires the consent of the drawee (*assignat*). In Scotland, 'Assignation' is the term used for cession. 'Assignation' is also used in the European sources. The Bavarian code of 1756

[147] E Levy, *Weströmisches Vulgarrecht, Das Obligationenrecht* (1956) § 58; Kaser, *RPR* II, § 276, 452; Grosskopf, *Geskiedenis* 22 citing, *inter alia*, the Theodosian Code 2.13.1 (although this text seems to suggest that an attempt to transfer the *cautio* to another would result in the debt being discharged) and *Geskiedenis* at 30 ff with examples from the seventh and eighth centuries.

[148] XII.24.1; XII.27.2; XV.20.4; XV.1.5 in D R Shackelton Bailey (ed and trans), *Cicero's Letters to Atticus* (1999) vol 3, 308–309; 314–315; vol IV, 261–262; 308–309 respectively. See A Früchtl, *Die Geldgeschäfte bei Cicero* (1912) 25 and J Andreau, *Banking and Business in the Roman World* (trans J Lloyd, 1999) 20–21; Ulpian, D 38.4.1.5. See also D 38.4.3 and D 36.2.7. Früchtl, 26 refers to a passage where Atticus 'überließ dem Cicero seine Forderung an Xenon'.

[149] Früchtl, *Die Geldgeschäfte* 20 ff.

[150] See J Andreau, *Banking and Business in the Roman World* (trans J Lloyd, 1999) 42–43. Cf Andreau, *La vie financière dans la monde romain* (1987) 561–563 and 702–703. The English version is not a complete translation of the much larger French original.

[151] Früchtl, *Die Geldgeschäfte* at 27 concedes that the written orders to pay used by Cicero were not bills of exchange; however, they do seem to have allowed a circulation of credit. Compare examples of transferable orders taken from sixteenth-century Italy by G Schaps, *Zur Geschichte des Wechselindossaments* (1892) 78 ff.

[152] R Beigel, *Rechnungswesen und Buchführung der Römer* (1904) 214 cited by Früchtl, *Die Geldgeschäfte* 27. Cf H Blümner, *Römischen Privataltertümer* (1911) 654. These works, admittedly, are not written by lawyers. Shorn of burdensome knowledge of the Roman formulae system, however, these writers may actually provide a more realistic picture of reality than that found in juristic works. Cf the Roman references in S P Lipman, *Wetboek van Koophandel, Vergeleken met het Romeinsche en Fransche Regt* (Amsterdam, 1839) 46.

contains provisions on 'assignation'.[153] It also contains provisions on 'delegation' and 'expromission'.[154] The Bavarian provisions on assignation are a curious amalgam of the concepts of cession and *Anweisung*. For instance, the code provides that the debtor's consent is not required – it is immaterial whether he pays his creditor or his creditor's order.[155] And there is no possibility of payment in good faith to the original creditor where there has been notification to the debtor.[156] But such incidents are in the nature of cession, not *Anweisung*. It should be remembered that any right that the payee may ever have against the debtor based on *Anweisung* is based on the consent of the debtor. Even if he has obliged himself to accept, he need not do so. In all other respects, however, the provisions in the Bavarian code are couched in terms of *Anweisung*. In mid-eighteenth century Bavaria, then, lawyers had not yet completely differentiated the order to pay (*Anweisung*) from cession. It is only with the Prussian and Austrian provisions at the turn of the nineteenth century that 'assignation' is clearly invoked to mean the order to pay, not cession.[157]

H. COMMERCIAL LAW

(1) Bills of exchange in international commerce

(a) *General*

4-48. Bills have been used for centuries. Early traces of the bill can be found in the period that the glossators, commentators and later writers of the *jus commune* were asserting that claims were intrinsically non-transferable. Yet every endorsement transfers the holder's rights against the drawee. And the transfer occurs without intimation to the debtor. This suggests that the received position, that claims were originally not transferable, is wrong. Indeed, there may be an interesting parallel between the history of cession in the *jus commune* and the history of the assignment of claims in the English common law. James Steven Rogers has shown that the bill of exchange developed in England in order to circumvent the common law prohibition on assignment.[158] This analysis contradicts the orthodox position that the attraction of the bill of exchange was the privileges accorded to an onerous *bona fide* transferee (the so-called holder in due course), who can obtain greater rights than those held by his author. In particular, the drawee cannot plead defences that he could have pled against the drawer, especially *compensatio*.[159] Yet, in English law, the defence of set-off was not admissible

[153] See *Codex Maximilianeus Bavaricus Civilis* (1756) Part IV, cap 15, § 7.

[154] *Codex Maximilianeus* Part IV, §§ 5 and 6.

[155] *Codex Maximilianeus* Part IV, cap 15 § 7, sexto: 'Ist die Einwilligung des Debitoris assignati hierzu nicht erforderlich, weil ihm allzeit gleichgultig seyn ran, ob er Assignantem oder Assignatarium bezahlt'. ('The debtor's consent is not necessary because it is of no consequence to him whether he pays the original creditor or the assignee').

[156] *Codex Maximilianeus* § 7, 17*mo* and 18*vo*.

[157] *ALR* I, 11 § 380; *ABGB* § 1400 ff.

[158] J S Rogers, 'The Myth of Negotiability' (1990) 31 *Boston College Law Review* 265 especially at 277 and 285 ff. This article is reproduced in R Cranston (ed) *Commercial Law* (1992) 287. See also J S Rogers, *The Early History of the Law of Bills and Notes* (1995) ch 8. Cf F Pollock and F W Maitland, *The History of English Law before the time of Edward I* (2nd edn 1898, reprint 1968) vol II, 227.

[159] See para 4-47 below.

in the common law courts until 1729.[160] So the most common defence which the holder in due course principle elides, did not appear in English commercial law for some time after bills had been in widespread use. Whether one accepts Rogers' analysis or not, his work highlights that traditional explanations of the genesis of the rights of the holder in due course are not satisfactory answers to what has been termed the most important question in the entire law of negotiable instruments.[161]

(b) *The peculiar privileges accorded to a bill*

4-49. Others have recognised that the incidents peculiar to the bill of exchange were twofold: (1) summary diligence and (2) transfer without intimation. The first allowed holders to avoid prolonged court proceedings. Summary diligence (*anglicé*: 'execution') has been available on a bill of exchange from early times.[162] If so, the holder's freedom from the debtor's defences (the so-called *assignatus utitur jure auctoris* rule) is obvious. Summary diligence is the equivalent to the warrant found in a court decree ordaining the debtor to pay. By this point, the debtor cannot raise a defence that he has a liquid claim against the creditor (or his assignee). It is too late. The point is simple and, perhaps, startling. For it contradicts much of the received history of the development of the bill of exchange. Those who emphasise that the holder in due course can take a better title than the transferor make little reference to the privilege of summary diligence.[163] The holder in due course's freedom from the debtor's defences can

[160] See para 8-48 below.

[161] G Schaps, *Zur Geschichte des Wechselindossaments* (1892) § 20, 117.

[162] G F von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966) § 3 at 15 emphasises that this privilege was accorded to bills at the fairs and markets of continental Europe in the fourteenth century. D Maxwell, 'Diligence' in Stair Soc, *Introduction to Scottish Legal History* (1958) 237 suggests that, in Scots law, registration for preservation and execution grew out of the practice of the church. It appears more likely that summary diligence grew from the practice of preserving documents in court books, which gave them the same effect as a decree of the court. As a result, diligence could follow. Over time, these books became known as the Books of Council and Session: see generally J Imrie, 'Public Records and Registers' in *SME*, vol 19 (1989) especially at para 837 ff and references there cited. Summary diligence was made available to the holder of a bill of exchange against the drawee by the Acts of 1681, c 20 (foreign bills) and 1696, c 36 (inland bills). This privilege is retained by the Bills of Exchange Act 1882, s 98, although Bell, *Commentaries* I, 411 (7th edn 1870) and G W W, 'The Bills of Exchange Act 1882 and Summary Diligence' (1891) 7 *Scottish Law Review* 182 at 184, thought summary diligence 'peculiar to our law' and that there were no similar provisions on summary diligence in English law. In fact, there was an ingenious common law method whereby an identical result was achieved: by way of the 'warrant to confess judgment': the debtor in a bill would appoint the creditor or bearer to act as the debtor's agent in any action for payment. The Scottish experience is reasonably consistent with R de Roover and L Laubenberger, 'Wechsel, Wechselrecht' in *HRG*, vol 5 (1998) at 1182, who suggest that it was only in the seventeenth century that the bill of exchange evolved to facilitate the free circulation of claims by excluding the debtor's defences.

[163] Cf *Byles on Bills of Exchange* (27th edn 2002) para 1-06; D V Cowen and L Gering, *Cowen's Law of Negotiable Instruments in South Africa* (5th edn 1985) 32; J Milnes Holden, *History of Bills of Exchange in English Law* (1955) has no entry for 'execution' in the index; nor does he look at the historical basis of the rule, cf 182–183. In Scots law, the first case that authoritatively decided that the onerous *bona fide* indorsee was not subject to defences was *Stuart and Gordon v Campbell* (1699) Mor 1497.

also be explained in terms of an equally basic principle: the *Anweisung*. From the perspective of this basic principle, freedom from the debtor's defences is not exceptional; it is but a natural incident of the *Anweisung*. X orders P to pay R, P's creditor. P pays in X's name. As a result P cannot raise defences against the payee (R) which he might have had against X. Moreover, on acceptance by P to pay R, the discharge of the original debtor X is conditional on R being discharged. Therefore, R's so-called of right of recourse against X is unexceptional. The right to payment against X is the principal obligation which, if not discharged by P, continues to subsist.[164]

4-50. That these arguments do not seem to have been advanced before, perhaps underlines the lawyer's tendency to compartmentalise. Academic lawyers have ignored the substantive importance of an aspect of procedure: summary diligence. Commercial lawyers have ignored the basic principles of a foundation subject: those concerning the mandate to pay (*Anweisung*). Other sources, particularly in Scots law, when highlighting the privileges of the bill of exchange, focus on the transfer of claims without the need for intimation.[165] For our purposes, however, to what extent does the admission of transfer of claims by way of bills of exchange affect the history of the law of cession?

(c) *Historical development of the bill*

4-51. The genesis of the bills of exchange in Europe has been the subject of detailed debate.[166] The received history of the bill of exchange is that it originated in Italy. It was a response to the needs of merchants. They were naturally wary of sending money long distances. The bill of exchange, therefore, evolved in the thirteenth century as a means of settling large-scale international accounts.[167] In the fourteenth century they became widespread, particularly at the fairs of Champagne and Lyon, where there were a useful mechanism for merchants from foreign lands with different currencies to effect payment.[168]

4-52. Some continental writers have also noticed the similarities between the bill of exchange and the doctrine of *Anweisung*.[169] For example, Pothier refers to older methods of payment on behalf of another (*rescriptions*).

[164] Cf L Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 401 ff.

[165] W Forbes, *A Methodical Treatise concerning Bills of Exchange* (2nd edn 1718) 80 ff and 212–227; W Glen, *Treatise on the Law of Bills of Exchange, Promissory Notes and Letters of Credit* (2nd edn 1824) 137 ff; Bell, *Commentaries* (7th edn 1870) I, 413: 'The two great privileges of bills and notes are summary execution and transmission by endorsation'; R de Roover, *L'Evolution de la lettre de change XIVe–XVIIIe siècles* (Paris, 1953) 83 ff.

[166] The leading treatment is in Goldschmidt, *Universalgeschichte des Handelsrechts* 383 ff. Goldschmidt was a remarkable figure. A brief synopsis of his life in English can be found in R Zimmermann, 'Was heimat hieß, nun heißt es Hölle' in J Beatson and R Zimmermann (eds) *Jurists Uprooted, German-Speaking Émigré Lawyers in Twentieth Century Britain* (2004) 1 at 23. See too L Weyhe, *Levin Goldschmidt: ein Gelehrtenleben in Deutschland* (1996); K Otto Scherrer, 'Goldschmidts Universum' in M Ascheri et al (eds) *'Ins Wasser geworfen und Ozeane durchquert': Festschrift für Wolfgang Nörr* (2003) 859–892.

[167] E Jenks, 'Early History of Negotiable Instruments' (1893) 9 *LQR* 70; W Holdsworth, 'Origins and History of Negotiable Instruments' (1915) 31 *LQR* 12, 173 and 376 (3 parts); J M Holden, *History of Negotiable Instruments in English Law* (1955).

[168] P Huvelin, *Essai historique sur le droit des marches et des foires* (1897) 534 f.

[169] G F von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966) § 9, at 30 and § 12, at 36.

Strangely, however, he suggested that they were no longer in use. Yet, as can be seen from his own observations, the basic *Anweisung/recription* seems quite indistinguishable from the bill of exchange:[170]

> «Le principal espèce de rescription est celle par laquelle un débiteur mande à quelqu'un de payer une certaine somme pour lui à son créancier entre les mains duquel il remet à cet effet la rescription.
>
> C'est ce qu'on appelle *adsignatio*.
>
> Cette espèce d'affaire se passe entre trois personnes:
>
> 1. Le débiteur, *adsignans*, qui indique à son créancier une personne de qui il recevra une certaine somme qu'il doit ;
> 2. La personne qu'on indique au créancier pour recevoir d'elle la somme, *adsignatus* ;
> 3. Le créancier à qui on a fait assignation, *adsignatarius*.
>
> Le personne indiquée, *adsignatus*, est ordinairement quelqu'un des débiteurs de l'indiquant ; mais ce peut être aussi quelqu'un de ses amis, qui, sans être son débiteur, veut bien avancer cette somme pour lui. »[171]

Modern writers have also emphasised the link between ancient law and modern payment instruments.[172]

4-53. The most common, everyday instance of the order to pay in modern law is the cheque. The definition of *Anweisung* in the modern codes is almost identical to the definitions of a bill of exchange.[173] If so, the attribution of the development of the bill to Italian merchants is only part of the story. As was noted above, the concept of the order to pay is old. It seems that in Arabia[174] and in India[175] this concept was developed for commercial purposes. And further early examples of the order to pay have been identified.[176] Therefore, although Italian merchants may be rightfully credited with the development of the modern bill of exchange in the thirteenth century,[177] the trail of development is much older. Many legal traditions have, from early times, admitted that an obligation to pay, reified in a document, may be transferred.

[170] *Traité du contrat de change* (1763) § 225.

[171] *Traité du contrat de change* § 226.

[172] P Ourliac and J de Malofosse, *Droit romain et ancien droit* (1957) 217–218.

[173] Cf the modern Wechselgesetz, § 1 and Scheckgesetz, § 1 (both introduced by the Nazis in 1933, implementing the Geneva Convention, itself largely based on the *ADWO*) and the provisions on *Anweisung* under § 783 ff *BGB*. A cheque can only be drawn on a bank: ScheckG § 3. The main difference between a bill or cheque and the general concept of an order to pay is that the former can be granted only for money; an ordinary order to pay may encompass money, 'Wertpapiere' or other fungible goods.

[174] R Grasshoff, *Die* sufta 'ga *und* hawâla *der Araber: ein Beitrag zur Geschichte des Wechsels*, Dr Iuris, Albertus-Uiversität zu Königsberg (1899) [EUL Sp Col Serj Coll P 2977 Gra]. But compare the doubts expressed by L Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 410, n 76 about an Arabian genesis.

[175] L Levi, *International Commercial Law* (1863) vol 1, 351 hints at this, but does not elaborate.

[176] Eg A Heeren, *Ideen ueber die Politik, den Verkehr und den Handel der vornehmsten Voelker der alten Welt* (1815) vol 1, 41–43.

[177] Pothier, *Traité du contrat de change* (1763) §§ 6–7 suggests that bills of exchange were not known to Roman law. He gives the example of 4, § 1 *de Naut foen* [D 22.2.4.1], saying that this would not have been necessary had the Romans known bills. All Pothier says with certainty is that bills have been in common usage since the fourteenth century.

4-54. There are a number of examples of a transferable order or bill that are usually cited as the precursors to the modern development of bills: Pothier gives an example of a bill drawn during Louis' Crusade in 1256.[178] Von Martens refers to one drawn by Pope Gregory IX in 1233;[179] while, in 1307, Edward I ordered certain money collected for the Pope to be remitted by bill rather than coin or bullion.[180] James Buchan points to the assets left in 1268 by Ranieri Zeno, Doge of Venice, a large proportion of which was in 'negotiable city bonds'.[181] Admittedly, the most distinguished writer on the subject, Levin Goldschmidt, dismisses attribution of the discovery of the bill of exchange to any individual group, whether the Jews, Genoese, or Florentines, as fantasy.[182] The genesis and evolution of bills of exchange is a fascinating area of comparative legal history; but one, sadly, lying outwith the scope of this work.

4-55. For the moment it is difficult to draw similar attention to the development of the civil law as Rogers has done for Anglo-American law,[183] that there are important links between the history of cession, the concept of the order to pay and the law of bills of exchange. There were several methods known to various peoples, from diverse legal traditions, which enabled either the transfer of claims or a functional equivalent to be effected. If this is so, the standard history of the civil law of the *jus commune*, which was all too often divorced from practical reality – including the everyday practice of commercial law – is flawed and misleading. There is perhaps a parallel here with the accepted history of the law of usury, where the church failed to practise what it preached and actively profited from the usury canon law prohibited.[184] So too with cession: what was rigidly prohibited by the jurists of the civil law, from post-classical Rome to nineteenth-century Prussia, was not only easily circumvented, but deliberately and profitably practised by commercial lawyers. One possible difference lay in the role of the consent of the debtor. But, as has been seen, the civil law knew no mechanism of *transfer*, even with the debtor's consent.[185]

(2) Bills in England

4-56. In England, meanwhile, all bills were originally taken to a named creditor 'or his assigns'. There is little discussion in the English sources of functional equivalents to assignment, such as the order to pay. All bills were originally non-transferable. Subsequently, they became transferable with the direction that the obligation was payable 'to the order of the payee' or 'to bearer'. The absence of this clause would render the bill non-transferable, though the obligation remained valid.[186] Such a clause was never necessary in Scotland.[187] But in

[178] Pothier, *Traité du contrat de change* (1763) § 7, n 1.

[179] G F von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966) 24.

[180] L Levi, *International Commercial Law* (1863) 350.

[181] J Buchan, *Frozen Desire: An Inquiry into the Meaning of Money* (1997) 60.

[182] L Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 409.

[183] J S Rogers, *An Early History of the Law of Bills and Notes* (1995).

[184] R Zimmermann, *The Law of Obligations* (1996) 172 f.

[185] Mühlenbruch, *Cession* § 4, 28 ff.

[186] *Smith v Kendall* (1794) 6 TR 123; 101 ER 469 cited by L Levi, *Manual of the Mercantile Law of Great Britain and Ireland* (1854) 243, § 297. The modern position is found in the Bills of Exchange Act 1882, s 8(4) and (5).

[187] *Crichton v Gibson* (1726) Mor 1446; 1 Kames Rem Dec 154; 1 Ross LC 51(n) and authorities discussed in para 5-07 below. In *MacWilliam v Mediterranean Shipping Co* [2005] 2

England bills to order or bearer were transferable. And these transfers imported a transfer of claims. If this can be asserted with confidence, however, the implications for the accepted history of the law of cession, assignation and assignment cannot. Although merchants were drawing bills to settle complex international transactions, ordinary Englishmen could not, it seems, transfer claims among one another. To say, as the accepted history of the English law of assignment does,[188] that the law evolved from the elaborate to the easy, does not appear likely.[189] In a modern context one could scarcely imagine a securitization industry emerging without the basic concept of assignment.[190] As is so often the case, it could be that English law was exceptional. European merchants developed the bill of exchange. English merchants traded with Europe. Perhaps the concept was thus introduced to English law by way of mercantile interaction. Rogers argues that the bill of exchange evolved in England simply to facilitate the transfer of claims.[191] But that is not a satisfactory explanation for the historical development of the bill in international terms.

(3) Evolution of the concept of indorsation

4-57. The history of indorsation reflects the complexity in the history of cession. There has been considerable debate about the nature of indorsement, especially of bearer bills, and how it interacted with the relevant procedural law.[192] Importantly, most authors who have considered indorsation since conclude that an indorsement encompasses a cession.[193] But others dissent: cession is transfer without the debtor's consent; a debtor who accepts a bill,

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AC 423, Lord Rodger, observes (at para [67]) that the Bills of Lading Act 1855 was introduced to address problems of transfer of straight bills of lading in English law. It is interesting that when Lord Rodger examines Bell, *Commentaries* (3rd edn 1821) I, 453, n 3; (7th edn 1870) I, 590, n 5, Bell makes no mention of the need to address a bill of lading expressly to 'assigns' to render it transferable. This is unsurprising: in Scotland rights were long freely transferable. See too H D MacLeod, *Principles of Economical Philosophy* (2nd edn 1872) vol 1 488–489 to the same effect. Parliament also passed the Friendly Societies Act 1855 (18 & 19 Vict c 63) in the same year. This allowed a society, under s 14, 'to transfer its engagements'. See discussion in *Stansell Ltd v Co-operative Group (CWS) Ltd* [2006] 1 WLR 1704 at para [73] *per* Longmore LJ.

[188] See W S Holdsworth, 'The Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12, 173 and 376 (3 parts).

[189] W T Baxter, 'Credit Bills and Bookkeeping in a Simple Economy' (1946) 21 *The Accounting Review* 154 at 160, cited by J M Holden, *The History of Negotiable Instruments* (1955) 2.

[190] Ironically, however, the subtleties of the English law of equitable assignments means that it is difficult to conceptualise any *transfer* of assets in a securitization: there is never debtor notification. If there is no notification, there is no transfer at law; but there is an equitable assignment. This is perfectly acceptable for the purposes of a securitization transaction. In Scottish terms, in so far as there is no debtor notification, there is simply no *transfer* of the assets to the single purpose vehicle (SPV).

[191] J S Rogers, *The Early History of Bills and Notes* (1995).

[192] See Brunner, 'Inhaberpapier', 533–546. The holders of bearer bills often had considerable difficulty before the French courts to establish that they were suitably authorised by the original creditor.

[193] R J Pothier, *Traité du contrat de change* (1763) § 23; G Schapps, *Zur Geschichte des Indossaments* (1892) 131–133 (France) § 40, at 179 (England); cf § 32, at 158 (Germany). In Scots law, see in particular the anonymous case decided sometime in the 1720s reported at 1 Kames Rem Dec 190.

ex hypothesi, has consented to transfer.[194] The important point for present purposes is that bills of exchange, being indorsable, allowed claims to be transferred, albeit with the consent of the debtor.

[194] See eg L Kuhlenbeck, *Von den Pandekten zum bürgerlichen Gesetzbuch* (1899) vol 2, 162: 'Hier ist nur zu bemerken: Das Indossament ist keine Cession'.

5 The Scottish History [1]

'Assignations are more frequent with us than anywhere; there is scarce mention thereof in the civil law.'[2]

A. INTRODUCTION

5-01. In one of the most extensive Scottish litigations in modern times, *Caledonia North Sea Ltd v London Bridge Engineering Ltd*,[3] Lord President Rodger provided a historical *tour de force* of the history of the law of assignation:

'Nowadays we think of the cedent transferring rights to the assignee. That causes us no difficulty since modern legal systems tend to recognise that rights are transferable. At an early stage in its history, however, Scots law regarded contractual

[1] For a recent overview, see generally, K Luig, 'Assignation' in K G C Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 2, 399 ff.

[2] Stair III.i.3.

[3] 2000 SLT 1123 aff'd 2002 SC (HL) 117.

> rights as being, of their very nature, personal to the creditor and as therefore not capable of being transferred to other people. One device, which was adopted to avoid the resulting practical problems and to give the effects of a transfer, was for the creditor to agree that the other party could take proceedings to enforce the right, using the creditor's name but keeping any sum which was recovered. In other words the creditor made the other party a procurator *in rem suam*. See, for example, Stair, *Institutions*, III.i.3; Bell's *Principles* (10th edn 1899), para 1459. As Lord President Inglis remarked, a procuratory *in rem suam* "is just one of the definitions of an assignation": *British Linen Company v Carruthers and Fergusson* at (1883) 10 R 926. Signs of this approach survive today in the rule that an assignee may sue either in his own name or in the name of the cedent.'[4]

5-02. There is much to be learned from this analysis. It accurately reflects the historical development in Europe, on which his Lordship drew heavily.[5] The considerable influence exercised by the civil law and the *jus commune* on the Scots law of property and obligations was such that it is tempting to draw the conclusion that Scots law developed in parallel with continental law. As will become clear, however, such a conclusion would be misleading. There is no evidence in the early Scottish sources, for example, of an argument that claims are personal to the creditor ever being sustained. Indeed, nowhere has this point even been argued. And although the institutional writers referred to Roman law in passing, there are relatively few references to the procurator *in rem suam* in the Scottish sources. References to assignation, in contrast, are everywhere. Where *procuratio* does appear, the references are relatively late: there are few prior to the nineteenth century. By this time the law of assignation in Scotland was settled. Scots law had, by then, already developed a general theory of the transfer of claims, quite independently of ideas of *procuratio in rem suam*.[6] Scots law also recognised the ancient order to pay, perhaps even before the reception of Roman law. As Scots lawyers began to take heed of the civil law, however, they sought to engraft the principle of *procuratio* onto their existing notion of transfer. Various reasons may be ascribed: ignorance, a need for authority, or open legal borrowing. But, whatever the reasons, the *procuratio* approach confuses rather than clarifies the Scots law of assignation.[7] And it is an approach that has come close to rewriting – erroneously – this chapter of Scottish legal history. In any event, even when *procuratio* was employed as a matter of style, the style had few consequences of substance. The general principles of the law of assignation took little heed of the forms.

[4] 2000 SLT 1123 at 1139L–1140A.

[5] 2000 SLT 1123 at 1140F–J; 1143K–1144B referring to R J Pothier, *Coutumes des Duché, Bailliage et Prévôté d'Orléans* (1740) 20.5.1–2; *Traité des obligations* (1761) 2.6.4 and 3.1.6.2. Pothier's Commentary on the *Coutumes des Duché, Bailliage et Prévôté d'Orléans* is in M Bugnet (ed) *Œuvres de Pothier* (1861) vol 1, § 103 at 672 ; chapter 20 is entitled 'du droit d'exécution', title 5, 'des opposition des créanciers'. There is comparison of subrogation and *procuratio in rem suam* in Bugnet's edition at § 84, 667. Bugnet, *Oeuvres*, vol 2 contains the *Traité des obligations* and section 2.6.4 is entitled 'De quelle manière s'éteignent les cautionnements'; but there is discussion of the *beneficium cedendarum actionum* at § 440, 237. The passage cited 3.1.6.2 is found in Bugnet's edition beginning at § 551, at 290. See, in particular, §§ 556–557, 291–296. Lord Rodger also cites Art 1251 *Code civil* (subrogation légale); and § 774 (*cessio legis*) and § 426 II *BGB* (the creditor's obligation to assign his rights against a joint-obligant on payment by another).

[6] Klaus Luig has taken a similar view in Reid and Zimmermann, *A History of Private Law in Scotland* vol 2, 419.

[7] See, again, Luig, 'Assignation' at 419.

B. EARLY REFERENCES IN THE SCOTTISH SOURCES

5-03. The assignation sources are of considerable antiquity. Some are contemporaneous with the main reception of Roman law in Scotland.[8] It was in the law of moveable property where the Roman influence was most keenly felt. Yet, even after the reception, there is remarkably little reference to the notion of *procuratio in rem suam*. Where reference is made, it is to explain the susceptibility of the assignee to the debtor's defences: compensation or other claims that would have been prestable against the cedent.[9] There is no evidence that claims were regarded as non-transferable.

5-04. The earliest reference to assignation seems to have been found by Professor MacQueen in an undated grant by Fergus, Earl of Buchanan (who died before 1212), addressed to the grantee, 'his heirs and assignees'.[10] This may not be of decisive importance where 'assignee' refers to a transferee of corporeal property. The first reference to an assignation of a personal right is to be found in an instrument in the Abbey of Couper Angus which has been dated to 1297.[11] *Regiam Majestatem* says that homage has to be done for services and returns assigned in money and other things.[12] Kames refers to a bond by Simon Lockhart of Ley in favour of William of Lindsay and his assignees dated 1323;[13] Sir William Craigie refers to a deed dating from 1400 which refers to 'assigneiis';[14] Kames, again, to a bond by James of Douglas, Lord of Balvany in favour of 'Shir Robert or tyll his ayre executuris or assignes' dated 8 May 1418[15]; and Walter Ross to a bond granted by James, King of Scots to Henry VI of England 'his heirs, successors or to their certain attorney or depute', dated 8 March 1424.[16] Indeed, the references to 'assign' or 'assignees' in Scottish deeds in the fourteenth century are numerous.[17] The second oldest case in *Morison's Dictionary*, in 1492, is an assignation case;[18] and there is another, reported elsewhere, in 1493.[19] Sir John Skene has no entry for assignation in his dictionary, but he does mention both 'assignation'

[8] Of course, dating the reception of Roman law in Scotland is controversial.

[9] As in *Henderson v Birnie* (1668) Mor 1653 and *M'Donells v Carmichael* (1772) Mor 4974; (1772) Hailes 513.

[10] H L MacQueen, *SME*, vol 15, 'Obligations' (1995) para 854, n 1 referring to the deed in J Robertson (ed) *Collections for a History of the Shires of Aberdeen and Banff* (Spalding Club, 1843) 407.

[11] See D M Walker, *A Legal History of Scotland*, vol 1 (1988) 381 and Luig, 'Assignation', who points out that the assignation was in security.

[12] III, 60 cited by Walker, *A Legal History of Scotland* vol 1, 381.

[13] H Home, Lord Kames, *Historical Law Tracts* (2nd edn 1761) 431 ('Willielmo haeredibus suis et suis assignatis').

[14] Sir William Craigie, *A Dictionary of the Older Scottish Tongue, from the twentieth century to the end of the seventeenth* (1937) vol 1, 122, 'assigné'. The deed in question is found in W Fraser (ed) *Memoirs of the Maxwells of Pollok* (1863) 141.

[15] Kames, *Historical Law Tracts* (2nd edn 1761) 433.

[16] Ross, *Lectures* I, 27.

[17] Craigie, *A Dictionary of the Older Scottish Tongue,* vol 1, 122, 'assign', n 2; at 122, 'assigna', 'assignatioun'. Cf at 474, 'cessionar, cessioner'.

[18] *Drummond v Muschet* (1492) Mor 843; Balfour, *Practicks*, 169.

[19] *Countess Crawfurd v Athilmer* (1493) ADC I, 313, cited in Walker, *A Legal History of Scotland* vol 2 (1990) 710.

and 'cession' in his definition of 'Dyvour'. Skene clearly considers 'cession' and 'assignation' to be synonyms.[20] Similarly, even the most superficial browse through *Morison's Dictionary* will produce innumerable incidental references to assignations and assignees in cases on quite unrelated topics.[21]

C. BONDS, MANDATES AND ASSIGNATIONS

(1) Claims intrinsically assignable

5-05. In Stair's opinion, obligations were of their nature originally intransmissible and non-assignable without the consent of the parties. As a result, only obligations taken expressly to assignees were assignable.[22] Hume makes a similar point:

> 'The notion that the obligation was to be ruled, in that respect, strictly and literally, by its own terms; so that the creditor in a bond (for instance) could as little devolve his claim and right of action upon another, as the debtor in the bond can free himself, and substitute another person as debtor in his room. It was thought that the conveyance of claims of debt, and rights of action, was rather unfit to be countenanced, as giving encouragement to litigation, and being often, in effect, the buying of a lawsuit.'[23]

5-06. For Kames claims were only transferable where the obligation was taken expressly 'to assignees'.[24] Erskine was similarly of the view that claims could be transferred if the obligation was in terms transferable.[25] This is not dissimilar to an *Anweisung*. The debtor agrees to pay his creditor or his creditor's order. An examination of the styles shows that the debtor almost always undertook to pay the creditor 'or assignees'. It may be, therefore, that it was unnecessary to consider whether an obligation was a personal tie between two parties: as a matter of course, a debtor would consent to transfer. The evidence points to this being the established practice.[26] Despite this practice, however, it must be emphasised that all the writers recognise, irrespective of the debtor's consent, a concept of transfer in Scots law. We may contrast the position in the civil law which, even by the nineteenth century, lacked a general concept of transfer, even with the consent of the debtor.

[20] *De Verborum Significatione* (Edinburgh 1597; 3rd edn 1826): 'Dyour': 'Dyvour, otherwais Bairman, quha being involved and drowned in debts, and not being able to pay or satisfie the same, for eschewing of prison and uther paines, makis cession and assignation of his gudes and geare in favours of his creditoures and dois his devour and dewtie to them, proclaimed himself Bair-main, and indigenct, and becummed debt-bound to them of all the hes. Leg.burg.ca.Bair-man, 144. In Latin *cedere bonis*'.

[21] Cf Walker, *A Legal History of Scotland* vol 2, 710: 'It seems that by the later fifteenth century, rights created by contract were recognised as having a proprietary character so as to be assignable'. The reference to 'proprietary' is perplexing. Contractual rights are personal rights, not real rights.

[22] Stair III.i.2.

[23] *Lectures* vol III, 1.

[24] H Home, Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777) Art 39, at 319. But see discussion of these opinions at para 5-07 below.

[25] Compare his approach at II.viii.7 and III.v.2.

[26] The styles will be examined below. Cf *Code civil* Art 1122: 'On est censé avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention'.

(2) Reification

5-07. Where transfer was desired it was in Scotland, as in France, common to reify debts into moveable bonds.[27] The original Scottish term was 'ticket'.[28] Normally the bond would bear to be granted in favour of the creditor, 'his heirs, executors or assignees'[29] or 'his heirs, executors, assignees, or any having his order'.[30] Such a clause would leave it open to the creditor to 'make over' his claim against the debtor to another either by outright transfer or by ordering the debtor to pay. Indeed, such a clause expressly recognises universal succession on death ('heirs and executors'), singular succession by *inter vivos* voluntary transfer ('assignees') and the order to pay ('any having his order'), as distinct concepts. As for whether this recital was actually necessary, however, Stair was explicit. That an obligation did not mention assignees was immaterial. The creditor could still transfer by assignation.[31] Other bonds, such as bonds

[27] Macvey Napier, *Lectures on Conveyancing 1843–44* (Typescript in EUL taken from MS in Royal Faculty of Procurators in Glasgow), Lecture 10, 135 points out the difference between the moveable bond and the bill: bonds could be granted for obligations *ad factum praestandum*; bills were used only for money obligations. See also *Sharp v Harvey* (1808) Mor 'Bill of Exchange', App 1, No 22 and A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 486.

[28] *Bundie v Kennedy of Culzean* 11 June 1708, Forbes Dec; Mor 4907; Ross, *Lectures* I, 25 and 45. He also suggests that the term 'bond' is of Swedish or Gothic origin. This seems far-fetched. See also A J Mackenzie Stuart, 'Moveable Rights' in Stair Society, *Introduction to Scottish Legal History* (1958) 203, para 13; Macvey Napier, *Lectures* at 136.

[29] Sir George Dallas of St Martin, *System of Stiles* (1688, published 1774) vol I, 5, Dallas is described by W Ross *Lectures*, 2 as the 'Father of Scottish Forms'. See also Juridical Society of Edinburgh, *Juridical Styles* (3rd edn 1794) vol III, 18. Ross, *Lectures*, 45, cites a deed from '*Carruthers Styles*' which is in similar terms. The authorship of this work is mysterious. The Sweet and Maxwell, *Bibliography of the Commonwealth of Nations*, vol 5, *Scottish Law to 1956* (2nd edn by L F Maxwell, 1957) attributes the *Compend or Abreviat of the most important ordinary securities of and concerning Rights Personal and Real, redeemable and irredeemable of common use in Scotland* (1702) to one Carruthers. The anonymous copy of the work in the Edinburgh University Library (EUL Sp Col E.B. .34 (4107)), is attributed to Sir Andrew Birnie of Saline, Lord of Session. Professor D M Walker, 'Judicial Decisions and Doctrine in Scots Law' in J Dainow (ed) *Judicial Doctrine and Precedent in Civil Law and Mixed Legal Systems* (1974) 207–208 attributes the title published in 1702 to Carruthers; the title of 1709 to Andrew Birnie. Cf the respected bibliophile, historian and lawyer, David Murray, who, in his *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910) 34, n 4, records both claims to authorship, but prefers neither.

[30] Ross, *Lectures* I, 64. Compare the deed cited by Sir William Holdsworth, where the *granter* binds himself thus: 'I the said Thomas Thorne bynd me myne ayres executors and assignes and all my goods' (Holdsworth, 'Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* at 378). This is an example of nonsensical material appearing in styles. That the granter purports to bind his assignees to pay his obligations cannot have meant that he could transfer his liability to someone else without the creditor's consent.

[31] Stair, III.i.16; see also W Forbes, *Bills of Exchange* (2nd edn 1718) 80 citing *Stewart v Stewart* (1669) Mor 30, 4337 and 5587; Erskine III.v.2; III.ii.27: 'Some foreign writers have maintained, that a bill which is taken payable only to the creditor, and not also to his order, is not indorsable; but if all rights, though they should not specially bear to assignees, pass by assignation, which is at least a general rule in commercial states, bills by the same rule, though they do not bear *to order*, must be transmissible by indorsation'; Bankton II, 193, 19: 'All personal rights may be assigned, tho' they mention not assignees'. In the same paragraph, Bankton observes – as do the other institutional writers – the anomalous position with reversions. These, apparently, had to bear expressly to assignees to be assignable; reversions, 'being against the nature of property… are to be most strictly observed; and are *strictissimi juris*': Mackenzie, *Inst* (2nd

of annuity, were not taken expressly to assignees,[32] yet annuities were assignable.[33] More fundamentally, one study of notarial protocols indicates that, in the fifteenth and sixteenth centuries, bonds were not granted to creditors at all; instead the debtor would appear before a notary and bind himself to make payment.[34] Walter Ross enters into detailed discussion of the reasons that obligations were granted to 'heirs, executors and assignees'. But not once does he mention the personal nature of obligations. The importance lay rather in the law of succession: executors were liable for the moveable debts of the estate.[35] A bond payable to X, 'his heirs, executors and assignees' could be distinguished from one payable to X, 'secluding executors'.[36] The latter bond was treated as a heritable debt and thus did not form part of the *legitim* fund.

5-08. Although recognised by them, the distinct concept of *Anweisung*, is not, however, fully discussed by the institutional writers. Stair, for example, focuses instead on the blank bond. This instrument seems to have been particularly fashionable in France and Scotland.[37] The debtor would give a receipt of his indebtedness to the creditor. The name of the creditor, however, would be

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edn 1688) II.viii, at 165-166. As Mackenzie himself observes, however, reversions could be arrested though not expressed to assignees. Importantly, Erskine II.viii.7 doubts the view that reversions had to expressly mention assignees to be assignable; the distinction, in his view, appeared 'to be without a real difference': there are many types of right that are assignable though they do bear to be granted to assignees. Erskine observes that reversions are adjudgable (rather than arrestable); and adjudication is merely a 'legal assignment'. Cf Kames, *Principles of Equity* (2nd edn 1767) 78. For judicial authority, see *Steuart v Steuart* (1669) Mor 30, *sub nom Stewart v Stewart* Mor 4337; *Barber v Barber* (1705) Mor 10327; Fountainhall II, 259, (both cases dealing with transmission); *Crichton v Gibson* (1726) Mor 1446; 1 Kames Rem Dec 154; 1 Ross LC 51(n); *Boswall v Arnot* 7 February 1759 FC; Mor 12578. Some two hundred years after Stair, in *Johnstone-Beattie v Dalzell* (1868) 6 M 333 at 344, Lord President Inglis made the same point: "It rather appears to me that when a right is conceived in favour of a party and his assignees, or a party or his assignees, which, without mention of assignees, would still have been assignable, the expression of assignees does not alter the nature of the right. … It is an unnaturally forced construction to say that the words 'or to his assignees' make the right anything better or worse than it would otherwise have been without them'.

[32] Juridical Society of Edinburgh, *Juridical Styles* (3rd edn 1794) vol III, 24.

[33] A style assignation of the annuity follows the style for a bond of annuity in the *Juridical Styles* cited in the previous note.

[34] D Murray, *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910) 24.

[35] See Macvey Napier, *Lectures on Conveyancing 1843–44* at 137 ff. Cf Erskine II.viii.5–8.

[36] See Macvey Napier, *Lectures* 199.

[37] For the developments in France, see H Brunner, 'Das französische Inhaberpapier', 544–545; L Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 397, n 2; J Brissaud, *History of French Private Law* (trans R Howell, 1912) § 394; W Holdsworth, 'Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12 at 24. Although there are examples in English law of the problems that arise where bills are drawn in favour of fictitious payees, they come much later: see eg *Tatlock v Harris* (1789) 3 TR 174; *Vere v Lewis* (1789) 3 TR 182; *Minet v Gibson* (1789) 3 TR 482; 100 ER 689 aff'd (1791) 1 Ross Lead Comm Cases 76; Lord Mansfield's speech in *Stone v Freeland* is reported in a footnote to *Collis v Emett* (1790) 1 H Bl 313 at 317; 126 ER 185 at 187 and is quoted by Lord Herschell in *Bank of England v Vagliano Bros* [1891] AC 107 at 152. Cf *Gibson v Hunter* (1794) 2 H Bl 187 and 288; 126 ER 499 and 557. See now Bills of Exchange Act 1882, s 7(3). For the incidence of this form in German law, see H Dölle, 'Bemerkungen zur Blankozession – Beitrag zur Lehre von der subjectlosen Rechten' in E von Caemmerer et al (eds) *Festschrift für Martin Wolff* (1953) 23 ff.

left blank. The creditor could then transfer this bond by delivery. The debtor has granted what is in essence a bearer bill. Importantly, no mention is made in the bond that the debtor is granting the bond in respect of a debt to a particular creditor. As a result, the debtor was prevented from compensating the holder's claim to payment with a claim owed to the debtor by the original creditor.[38] Moreover, the bond could be transferred by mere delivery. No intimation was necessary,[39] only presentment for payment. Yet the basic concept of *Anweisung*, where there is an order to pay a particular creditor, seems a basic prerequisite for recognition of a blank bond. Drawing on the debtor to pay, but leaving the name of the ultimate payee blank, is just another way of reifying the debtor's obligation in such terms that he is to pay the creditor 'or his assignees'. Indeed, it is hard to believe that Scots law did not recognise the concept of the ordinary order to pay, whereby X asked his debtor, P to pay X's creditor R, 'or his order' or 'R, his heirs, executors or assignees' before it developed the concept of the blank bond.

(3) Reasons for bonds

5-09. Recourse to the blank bond had more to do with the political climate of the time (and, in particular, the penalty of forfeiture) than with circumventing any rule preventing the transfer of claims:

> 'The escheats or forfeitures of the moveable goods of individuals, so frequent and so distressing among our forefathers, together with the embarrassments occasioned by the private prohibatory diligences of inhibitions and arrestments, etc put the ingenuity of people to work to discover means of defeating the effects of these legal evils. The most effectual method devised for the purpose proved to be the execution and delivery of bonds blank in the creditor's name, which like the old tickets to bearer, went from hand to hand, without bearing a trace of their transmission; and consequently, eluded the effects of diligence of all kinds. The practice, it seems, increased with the internal commerce of the country, and grew up to a dangerous length towards the end of the seventeenth century.'[40]

5-10. The blank bond had several disadvantages for the debtor. First, it seemed that in so doing he would lose any right to plead compensation.[41] Secondly, it is not clear whether the defence of good faith payment applied to blank bonds.[42] The problem of blank bonds was serious enough to provoke the Scottish Parliament into passing the Blank Bonds and Trusts Act 1696.[43] In France, the *Parlement* of Paris prohibited blank bonds and, in 1716,

[38] See, in particular, the arguments for the respondent in *Grant v Lord Banff* (1676–1677) Mor 1654 at 1655. See also *Grant v McIntosh* (1681) Mor 1653.

[39] See eg *Grant v Lord Banff* (1676–1677) Mor 1654 and Stair III.i.5. *Telfer v Geddes* (1665) Mor 16642 and *Brown v Henderson and George* (1668) Mor 1665 are cases of good faith payment. But there are other cases which indicate that intimation was required to transfer the claim in the bond: *Crauford v Crauford & Kniblo* (1627) Mor 1661; *M'Culloch v Cleland* (1684) Mor 1666; *Campbell v Murray* (1697) Mor 970.

[40] Ross, *Lectures* I, 65.

[41] *Henderson v Birnie* (1668) Mor 1653. In *Monteith v Earl of Gloret* (1666) Mor 832, the fact that the assignee had taken gratuitously seems to have influenced the court.

[42] Stair, *Institutions* (1st edn 1681) Part II, title xxiii, at 6. Cf S F C Milsom, *Historical Foundations of the Common Law* (2nd edn 1981) 250.

[43] Cap 25 (both 12*mo* and APS).

instruments payable only to bearer (except those issued by the state or by the bank founded by the Scot, John Law) were declared illegal.[44] With the increase in use of the bill of exchange at the beginning of the eighteenth century, the French realised that bearer bills were economically necessary. As a result, the edict of 1716 was repealed in 1721.[45]

(4) Sources

5-11. The Scottish cases on bills of exchange reported in *Morison's Dictionary* do not generally appear until after 1696.[46] Prior to then, decisions on moveable bonds are collected under 'Blank Writ' or 'Assignation'. The 1696 Act proscribed bonds 'blank in the person or persons name in whose favors they are conceived'. It was not clear whether bearer bills fell within this definition; nor, indeed, is it clear whether blank bonds fell within the exception at the end of the Act that 'this Act shall not extend to the indorsation of bills of exchange or the notes of any trading company'. Arguably bearer bills did not fall within this exception (they are not indorsed) and there is at least one case where a bearer bill was held void by the 1696 Act.[47] A bearer bill is functionally identical to a blank bond. Remarkably, the 1696 Act was finally repealed only in 1995.[48] The danger of falling foul of the statute was a real one. One of the paradigm examples of the bearer bill, the low-value bank note (pioneered by the Scottish banks[49]), was

[44] See Brissaud, *History of French Private Law* § 396; W Holdsworth, 'The Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12 at 24.

[45] Brissaud § 396; Holdsworth, 'The Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12 at 24. A bank note issued by John Law's bank in 1720, on display in the British Museum in London, runs: 'La Banque promet payer au porteur à vüe CINQUANTE livres Tournois en Especes d'Argent valeur recüe, à Paris le deuxième Septembre mil sept cens vingt'. There was a considerable civil law influence on the laws of where today is Latvia, Estonia and Lithuania, prior to the invasion and occupation of these countries in the twentieth century. And Art 3473 of the *Liv-, Est- und Curländisches Privatrecht* (1902) expressly recognised transfers in blank.

[46] But compare *Lindsay v Gray* (1629) Mor 1543 where the brief report refers to a 'letter of exchange'. One clear exception is *Kennedy v Hutchison* (1664) Mor 1496. It involved an English debtor. Compare S G E Lyle, *The Economy of Scotland in the European Setting 1550–1625* (1960) 140 and T C Smout, *Scottish Trade on the Eve of Union 1660–1707* (1963) 117 who observes that from 1660 bills 'became a regular feature of Scottish commercial life. … Between 1660 and 1707, bills were common on the trades to England, Holland, France, Germany, Danzig and much of Scandinavia'. This may have had much to do with the Money Act 1663 (APS, c 29; 12*mo* c 11) which prohibited the export of money from Scotland except for payment for Norwegian timber or for corn in times of famine. There are further references to bills of exchange in A Barr, 'Commercial Paper' in *SME*, vol 4 (1992) para 104. Scottish merchants were initially suspicious of bills of exchange. As late as 1705, one Glasgow merchant could still write: 'I abhorred to send a ship in her ballast to purchase the goods on credit, which hath destroyed many unthinking men, when Bills of Exchange came upon them like an Thunder-Clap; although I confess at times it cannot be evited': J Spreull, 'An Accompt current betwixt Scotland and England' in *Miscellaneous writings of John Spreull (commonly called Bass John): with some papers relating to his history, 1646–1722* (1882) 49. See too J Agnew, *Belfast Merchant Families in the Seventeenth Century* (1996) 158–159.

[47] *Walkingshaw's Exrs v Campbell* (1730) Mor 1684.

[48] Requirements of Writing (Scotland) Act 1995.

[49] Settling debts with other debts was more common in Scotland than elsewhere: W Sombart, *Der moderne Kapitalismus* (1928) vol III (1), 193. As Walter Bagehot succinctly put it, 'The

originally always granted to a named creditor or the bearer, presumably with the 1696 Act in mind.[50] The instrument could then be indorsed in blank.[51] The bill became transferable by mere delivery. Thus was the Act easily circumvented. Blank bonds did appear after the 1696 Act. But, by then, their original attributes (compensation not pleadable and no intimation required) seem to have been forgotten.[52] Confusingly, however, there is also considerable authority for the view that where a debt is reified in a bond, the debt must nevertheless be transferred by intimated assignation. Delivery of the bond did not, of itself, transfer the claim, the bond was seen merely as an accessory of the claim.[53] This line of authority, however, is problematic: it ignores the position of the debtor. If a debtor has executed a bond (and he may well have consented to its registration for preservation and execution) he can insist that payment will be made only on delivery of the bond.

5-12. Nevertheless, from an early date the Scottish sources distinguish the concept of *Anweisung* from transfer (by assignation). The second oldest case in *Morison's Dictionary*, reported in 1492, is an assignation case. It involved a question of intimation. The report reads:

> 'Gif ony creditour makes and constitutis ony persoun his cessioner and assignay to ony debt auchtand to him, the said assignay aucht and sould make lauchful intimatioun of the said assignatioun to the debtour, utherwayis gif the said debtour happinis to pay the creditour, *or ony utheris in his name, havand his richt and power before ony intimatioun maid to him* he onnawayis sould be compellit to mak ony payment to the said assignay be ressoun of his assignatioun.'[54]

The case has always been referred to as an assignation case, i.e. a transfer of a claim by a creditor against his debtor to a singular successor. But a closer reading suggests that the case might actually have involved a mandate to pay, i.e. a delegation of performance or *Anweisung*. The italicised passage is not easy to follow as a result of the ambiguous use of the pronouns 'his' and 'him'. A radical interpretation, however, suggests a debtor in double distress. The creditor assigns his claim against the debtor, i.e. transfers it. The question

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Scots hate gold' (*Lombard Street: a Description of the Money Market* (2nd edn 1873)). Sombart, reflecting on the Scottish roots of the founders of both the central banks of France and England (John Law and William Paterson, respectively) describes Scotland as the 'Heimatland des modernen Kreditwesens': the home of the modern banking system.

[50] W Graham, *The One Pound Note in the History of Banking in Great Britain* (2nd edn 1911) reproduces copies of such notes. There is also the interesting question of whether the banks would have fallen under the exemption in the 1696 Act for 'notes of a trading company'. It is thought that the banks were financial companies, not trading companies, so they would not have fallen within the exemption. See too *Pentland v Hare* (1829) 7 S 640 and *Duncan's Trs v Shand* (1872) 10 M 984 where promissory notes were held void for failing to name a creditor.

[51] In Scots law, there seems never to have been a prohibition on indorsement in blank. Compare the position in France under the laws of 7 September 1660 and 9 January 1664: see G Schaps, *Zur Geschichte des Indossaments* (1892) § 22 at 124. No such prohibition was included in the *Ordonnance du Commerce* of 1673. The position under the various laws in force in Germany was similarly hostile to blank endorsement: Schaps § 39 at 175, n 1, though these provisions seem to have been much ignored in practice: Schaps, § 39 at 175, n 1.

[52] See eg *Baillie v Dawson* (1733) Mor 1667; Elchies, *Bill of Exchange* No 1; *Compensation*, No 1.

[53] Bell, *Commentaries* II, 24; *Christie v Ruxton* (1862) 24 D 1182 at 1186 *per* Lord Benholme, basing his opinion on his notes of Hume's *Lectures*.

[54] *Drummond v Muschet* (1492) Mor 843 (emphasis added).

is: what then happens if the debtor is, before intimation of the cession, instructed to pay the original creditor, or 'ony utheris in his name', i.e. there is a competing order to pay? It is only with an *Anweisung* that payment is made in the original creditor's name rather than in the debtor's own name.[55] Now, until intimation there is no transfer by assignation. So, until intimation, the debtor remains obliged, and in good faith, to pay the cedent or the cedent's order. There are, then, two points of interest to emphasise. First, one of the earliest 'assignation' sources in Scots law recognises, on this interpretation, both concepts. Second, even at this early stage, 'assignation' is used to refer to the cession, and not the order to pay (*Anweisung*).

D. DEVELOPMENT OF SCOTS LAW

(1) Assignation and mandates to uplift: Scots law and the Civil law

5-13. Stair recounted the history of the transfer of claims in Scots law thus:

> 'Yet, that obligations may become the more useful and effectual, custom hath introduced an indirect manner of transmission thereof, without the consent of the debtor, whereby the assignee is constituted procurator; and so as mandatar for the creditor, he hath power to exact and discharge, but it is to his own behoof, and so he is also denominated donatar; and this is the ordinary conception of assignations. The like is done amongst merchants, by orders, whereby their debtors are ordered to pay such a person their debt, which indeed is a mandate; but if it be to his own behoof it is properly an assignation… Assignations are more frequent with us than anywhere; there is scarce mention thereof in the civil law.'[56]

For Stair, assignation was the transfer of the right (and, importantly, a transfer *without the consent of the debtor*), while the mandate to pay was an order among merchants. Stair suggests that it was because of the inconveniences of the old rule that claims were not transferable or transmissible that the law developed so as to admit of the assignation of claims in the modern sense.[57] Stair suggests that the *procuratio in rem suam* was invoked to circumvent the old prohibition. There are five points, however, which undermine Stair's version of the historical development of Scots law. It will be shown that Stair's view of the historical development of the Scots law of assignation was thinly veiled Romanisation.[58]

5-14. First, Stair suggests that the old prohibition on transfer was circumvented by the device of the mandate *in rem suam*. That statement certainly seems to be correct with regard to the development of the civil law. Crucially, however, Stair then cannot help but comment on the peculiarity of his own argument: 'Assignations are more frequent with us than anywhere; there is scarce mention thereof in the civil law'. Stair could not understand why, if Scots law and the civil law shared the same history, assignations were so common here yet so seldom encountered there.

[55] See para 3-13 above.

[56] III.i.3.

[57] Stair III.i.2-3. In *Muir v Ross' Exrs* (1866) 4 M 821 at 826, Lord Curriehill accepted this account of the law without question.

[58] Professor Luig has written that 'the idea of a procurator *in rem suam*, which was borrowed from Roman law, had no apparent consequences for the rest of Stair's exposition': 'Assignation' in Reid and Zimmermann, *A History of Private Law in Scotland* vol 2, 412. The French apparently had a similar experience with jurists attempting to show that the provisions of the *Coutume de Paris* were consistent with the Roman texts: see Grosskopf, *Geskiedenis* 83–84.

5-15. Secondly, it is not immediately apparent why the old rule – assuming, for the moment, it was a rule – proscribing transfer was so inconvenient. The use of the bond and, in particular, the blank bond, seems to have successfully circumvented it. Indeed, many of the cases involving blank bonds refer to their transfer by *assignation*. The introduction of the concept of *procuratio* seems, therefore, to have confused rather than assisted matters. Bonds were still granted debtors to the creditor, 'his heirs and assignees'. Moreover, until 1696, if a blank bond was used, intimation was not required. According to Stair, this was one of the major motivations for using blank bonds.[59]

5-16. Thirdly, despite Stair's assertion that the concept of *procuratio in rem suam* was invoked, the relative lack of discussion of 'assignations' in terms of *procuratio* in the Scottish sources is particularly striking. Indeed, the only substantive relevance that the characterisation of assignation in terms of *procuratio* had for Scots law was to explain why the debtor was able to plead defences he held against the cedent against the assignee[60] (an incident that is not, as it happens, dependent on the *procuratio* analysis);[61] and, perhaps, the right of the assignee to sue in the name of the cedent.[62] That is not to say that the concept of *procuratio* was foreign to Scots lawyers before then.[63] References to assignation as a mandate are sometimes made. But these references were usually made when attempting to explain incidental effects of assignation rather than transfer itself. This is similar to the French experience where although the transfer of claims was admitted, the language of *procuratio* was often invoked.[64]

5-17. Fourthly, in Scots law an assignee was always viewed as a transferee.[65] There are only two possible elements of the substantive law that have been explained in the basis of the *procuratio* theory. One is the right of the debtor to plead defences he held against the cedent against the assignee. The other is the effect of the cedent's death on an assignation. In 1690,[66] the Parliament of Scotland legislated so as to provide that, although intimation had not been made in the cedent's lifetime, the assignation could still be intimated. The reason for the legislation may have followed from a misunderstanding of the law: it was thought that an unintimated assignation fell on the death of the cedent.[67] The reason for this, it was said, was that the assignation was a mere

[59] Stair III.i.5.

[60] See arguments in *Ruthven v Gray* (1672) Mor 31; *Henderson v Birnie* (1668) Mor 1653 and the opinions in *M'Donells v Carmichael* (1772) Mor 4974; (1772) Hailes 513.

[61] See para 8-05 below.

[62] *Grier v Maxwell* (1621) Mor 828 and *Westraw v Williamson* (1626) Mor 859. See also *Shaw v Dunipace* (1629) Mor 3166 where the language of *procuratio* is invoked.

[63] See, eg, the assignation reproduced by P Gouldesbrough, *Formulary of Old Scots Legal Documents* (1985, Stair Society vol 36) 2. In this deed, dated 29 February 1659, the cedent 'makis, constitutes and ordaines the said JE, his aires, executouris and assignais, my verie laufull wndowbtit and irrevocable cessioneris, assignais, donatouris and procuratouris *in rem suam*'.

[64] Pothier, *Traité du contrat de vente* § 550.

[65] See, for instance, an early case, *Munro v Wishart* (1582) Mor 10337 where the assignee of a delictual claim sued in his own name.

[66] Confirmation Act 1690 (APS, c 56; 12*mo*, c 26).

[67] See eg Erskine III.v.3; Hume, *Lectures* III, 4; Bell, *Principles* (10th edn 1899) § 1467. It should be emphasised, however, that there is no strong judicial authority for the proposition; quite the contrary. In *Shaw v Dunipace* (1629) Mor 3166 it was held that payment by the assignee to the cedent had rendered the assignation irrevocable. In *M'Ilwraith v Rigg and Lessils* (1687) Mor 839 the assignee was entitled to raise an action after the death of the cedent. In

procuratio, and such a mandate was revoked by the death of the cedent. In an *Appendix* to the *Institutions*, Stair refers to some Acts of Parliament passed in the session while the second edition of the *Institutions* was with the printer. Of the Act of 1693, 'anent Procuratories of Resignation and Precepts of Sasine',[68] he says:

> '…but procuratories of resignation and precepts of seasin are irrevocable mandates in the behove of the mandatar; and they are no more revocable than assignations, which by their nature and style are procuratories by the cedent to the assignee *in rem suam*: for debtors are not obliged to pay any other but the persons mentioned in the obligation, or their heirs, (which *fictione juris* are esteemed the same persons with the creditors,) and therefore unless the obligement bear especially to assignees, the debtor is not the assignee's debtor; and so the assignee obtains payment as being the procurator or mandatar of the creditor; yet the mandate is not revocable by the death of either cedent or assignee, even by our own former custom.'[69]

5-18. Such a theory is consistent with the principles of *procuratio in rem suam*. But it is insufficient to explain assignation. It fails to explain, for example, why other transfers, such as dispositions of heritage, also fell on the death of the disponer: the 1690 Act is not limited to assignations, while the Precepts of Sasine Act 1693 does not purport to apply to assignations at all. Stair is reasoning by analogy. But, having done so, his conclusion – that obligations must bear to assignees to be assignable – has no relevance to the Act. As he himself recognises, before the 1693 Act assignations were irrevocable. The Act must, therefore, have been declaratory.

5-19. Similar difficulties are found in Kames' discussion of the same Act. Kames indicates that 'An obligation for a sum of money, without mentioning assignees, is not assignable'.[70] Where this was missing, the procuratory *in rem suam* could be invoked. However, one of the problems with the procuratory, Kames argued, was that it would fall on the death of the granter, hence the need for the 1693 Act. Kames' opinion of this statute was not a good one; he saw it as contrary to principle.[71] Kames further suggests that the Act would have been unnecessary

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Ridpeth's Exrs v Hume (1669) Mor 2792 (see Gosford's report) part payment from the debtor before death meant that the assignee was preferred to an executor-creditor. Analogously, *Hamilton v Ross* (1622) Mor 1667 sanctioned the filling up of the name of the assignee in a blank bond after the death of the cedent. Cf the authorities which hold that an arrester who laid on the arrestment in the lifetime of the common debtor, who dies prior to furthcoming, is preferred to an executor-creditor confirming prior to furthcoming: *Riddel v Maxwell* (1681) Mor 783 and 2790; *Hume v Hay* (1688) Mor 2790 and *Russell v Balincrieff* (1688) Mor 2791.

[68] APS IX, 331, c 73; *12mo* c 35. Although the Act mentions mandates *in rem suam*, it applies only, as the title would suggest, to transfers of heritable property. See too the Confirmation Act 1690 (APS, c 56; 12*mo*, c 26), the Summary Registration Act 1693 (c 15; APS c 24) and the Registration Act 1696 (c 39; APS c 41) which were also passed – in quick succession it must be observed – to declare the effect of death on various legal transactions. The flurry of legislative activity over this issue remains a mystery; all the more so considering that there has been no regulation of the matter in Scots law since.

[69] Stair, *Inst*, 'Appendix' (Tercentenary edn, by D M Walker, 1981) 1087.

[70] Kames, *Elucidations*, Art 39, at 319.

[71] Kames, *Elucidations* 320: 'To make this statute accord with principles, has not been attempted by any writer: nor does it seem to be an easy task; for surely the legislature could not mean to empower one to act *procuratio nomine*, without a constituent. I understand the statute as empowering these several acts to be done, not *procuratio nomine* but by express authority of the statute'.

had lawyers resorted to the simple expedient of taking obligations expressly to assignees.[72] So Kames' opinion follows Stair's. And it has the same weaknesses. In particular, if obligations were of their nature intransmissibile (as Stair, in one place, says[73]), why did the mere mention of assignees change that? It should be remembered that in Roman law, there was no method of *transfer* even with the debtor's consent. It was for that reason that the *procuratio in rem suam* was invoked. According to Stair, however, *procuratio* must be used, even where an obligation bears to assignees. Further, as Walter Ross[74] has pointed out for Scots law, and as Heinrich Brunner[75] has done for French law, style transfers of many different types of asset bore to be to assignees or invoked the language of *procuratio*, such as heritable grants. Yet it was not suggested that other types of property would have to be transferred by the *procuratio in rem suam* merely because there was an omission of the word 'assigns' in the grant. The inclusion of the words 'assignees' for one purpose[76] was copied by conveyancers as a standard clause; and, as Walter Ross has wryly remarked, this 'proves that conveyancers were more attentive to the practice of each other, than to the sense of what they themselves were doing'.[77]

5-20. Finally, in the above-quoted passage,[78] Stair's treatment is inconsistent with his views on assignation expressed in the body of the *Institutions* where he had emphatically stated that claims were assignable, *even though the obligation was not expressly in favour of the creditor's assignees*.[79] In any event, mere mention of an obligation being payable to 'X, his heirs or assignees' would not make the debtor the assignee's debtor; intimation of an assignation or acceptance by the

[72] Kames, *Elucidations* 320–321. Kames was at least unequivocal that assignation effected a transfer: 'By our old law, derived from that of the Romans and from England, a creditor could not assign his claim: all he could do was grant a procuratory *in rem suam*, which did not transfer the *jus crediti* to the assignee. … In our later practice an assignment has changed its nature and is converted into a *cessio in jure*, divesting the cedent *funditus* and vesting the assignee': *Principles of Equity* (2nd edn 1767) 206. The second part of this passage is borrowed from counsel's argument in *Sir James Carmichael v Carmichael of Mauldsly* (1719) 1 Kames Rem Dec 35 at 38. It is inconsistent with what Kames says about *procuratio* in his *Elucidations*. His passage in *Principles of Equity*, however, is correct in so far as it highlights that *procuratio* and assignation are not identical. See too T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol I, § 151, 216 : 'Il faut cependant reconnaître que le *procuratio in rem suam* ne réalise pas véritablement le transfert de la créance dans le patrimoine de l'acquéreur ou cessionnaire, puisque ce dernier agit seulement au nom d'autrui'. Compare the modern South African authorities: *Ex parte Kelly* 1943 OPD 76 at 83; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C); *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A) discussed by S Scott, *The Law of Cession* (2nd edn 1991) 154, n 8.

[73] Stair, III.i.2.

[74] Ross, *Lectures* I, 187–188n.

[75] Brunner, 'Inhaberpapier', 502, 531 ff.

[76] See para 5-07 above.

[77] Ross, *Lectures* II, 169: 'The moment a new term was invented by any body, and known, the ordinary list became enriched by it; in so much, indeed, that in many charters we find repetitions of the same thing, under different words; which proves that conveyancers were more attentive to the practice of each other, than to the sense of what they themselves were doing', cited by Reid, *Property* para 641, n 4.

[78] Stair, *Inst, Appendix* (Tercentenary edn by D M Walker, 1981) 1087.

[79] Stair, III.i.16. And see Erskine III.v.2 to the same effect, discussed below.

[80] Stair, III.i.6.

debtor is required for this.[80] Moreover, Stair's assertion that, by Scottish custom, mandates were not revocable by the death of the cedent is puzzling: it would suggest, first, that the Act was unnecessary; and, secondly, that the decisions of the court[81] – which he had himself cited, as well as decided – were wrong. Moreover, all the 1690 Act says is that a deed delivered by the grantor who has since died can be intimated, in as much as a delivered disposition can be recorded after the death of the granter. If, however, the granter died bankrupt and his estate is sequestrated before intimation, the assignee will not be protected.[82] A similar point was made by Kames. In Scots law, unlike Roman law, assignation operates as a *cessio in jure*.[83]

5-21. Stair was a jurist of the first rank. Yet his treatment of assignation is inconsistent. His various statements on the matter are contradictory: obligations are inherently intransmissible necessitating, therefore, a mandate *in rem suam*. While obligations are, of their nature, inherently intransmissble, they can be assigned where they bear to assignees. But though obligations to assignees are freely assignable, any 'assignation' must take the form of *procuratio in rem suam*: something that is supposedly required only for non-assignable obligations. With the assertion that claims are freely assignable, even where they bear not to assignees, Stair comes full circle. Stair's picture of the historical development of the law (unlike his discussion of the substantive law, which is perceptive), is, frankly, incoherent.[84]

5-22. That Stair's treatment of the history of the law of assignation is simply wrong is evident from Erskine's strategy, at least partly, to depart from it. Erskine accepts the early history that obligations were originally intransmissible. But in modern law, he notices, 'the general rule is, that whoever is in the right of any subject, though it should not bear *to assignees*, may at pleasure convey it to another.'[85]

5-23. As he was wont to do, Walter Ross was careful to emphasise the indigenous elements of Scots law; yet he too was forced to shake his head in bewilderment at the effect of various influences – native, English, Roman and French – on the evolution of the concept of assignation in Scots law: 'It is these changes in our law, these mixtures of principles, which render the practice and decisions of our court … so contradictory, and to us almost inexplicable'.[86]

(2) Assignability of non-contractual claims

5-24. The civil law did not know any way by which claims could be transferred (except, perhaps, with the debtor's consent by way of a reified obligation). In later European development, it was clear that claims were regularly transferred, contrary to the position of many civilian jurists. A combination of two factors underlies this development: (1) the tendency to reify obligations into bonds; (2) the tendency for all obligations to be granted to a creditor, 'his heirs and

[81] Eg *Stewart v Stewart* (1669) Mor 4337 and 5587.

[82] Cf the confused opinion of Sheriff Erskine Murray in *Bank of Scotland v Reid* (1886) 2 Sh Ct Rep 376.

[83] H Home, Lord Kames, *Principles of Equity* (2nd edn 1767) 206.

[84] Cf Bell's comment (quoted in para 11-09 below) that he was often lost in some passages in Stair which he found to be 'deformed with a sort of confusion and rambling'.

[85] III.v.2.

[86] Ross, *Lectures* I,183.

assignees'. It would seem, therefore, that whether the debtor consented to assignation was often not relevant. The question rarely arose. In modern legal systems, assignation occurs without the consent of the debtor.[87] It is arguable that, with contractual claims at least, consent to any transfer is implied.[88] But many assignable claims, such as claims for reparation, are not consensual. So the history of the assignation of such claims is important, since any such assignation cannot be based on the consent of the debtor. Unlike the position in some continental systems, there has been no reception of the *lex Anastasiana*[89] in Scots law. As a result, the assignation of delictual or enrichment claims have long been assignable in Scots law.[90] And the assignee is not limited in the amount that he can recover from the debtor. In some civilian systems, where the *Lex* has been received, the transferee of a litigious claim can only recover from the debtor what he paid the cedent for the transfer.

(3) Cession styles

5-25. As was mentioned above, the Scottish sources on occasion refer indiscriminately to assignation, assignment and cession. This trend perhaps emphasises the hybrid nature of the Scottish position. No doubt Scottish lawyers were aware of the prohibitions on cession in some parts of Europe.[91] Moreover, they seem to have been aware of the equally underdeveloped English position. It is not surprising, therefore, that there are styles where the assignee is constituted as the cedent's procurator, or 'surrogated' and 'substituted' into the cedent's place. Perhaps Scots lawyers wanted to ensure that the Scottish assignation would not fall foul of foreign prohibitions should the deed have to be founded upon abroad. This is not beyond the realms of possibility. The Scottish export trade to Europe was a vibrant one.[92] Such traders would frequently have had the need to assign claims. Consequently, although all discussions

[87] See eg H Kötz, *Europäisches Vertragsrecht* (1996) § 14 (trans T Weir, *European Contract Law* (1997)).

[88] See eg *Code civil* Art 1122: 'On est censé avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention'.

[89] See para 4-09 above.

[90] *Wishart v Munro* (1582) Mor 10337. Munro was the assignee of a spuilzie claim. The wrongdoer was dead. The question was whether the assignee could sue the wrongdoer's heir (who was eight years old!). It was held that the heir remained liable to make restitution of the goods, but had no delictual liability. Claims for solatium have been treated differently and were generally held to be unassignable: See generally, *Cole-Hamilton v Boyd* 1963 SC (HL) 1; R Black in *SME*, vol 15 (1995) para 605; D M Walker, *The Law of Delict in Scotland* (2nd edn 1981) 405 ff. Solatium claims do, however, now transmit on death: Damages (Scotland) Act 1993, s 3; for which, see generally, S Forsyth, 'Transmissible Solatium after Death: a Reappraisal' 1999 SLT (News) 45.

[91] Many Scots studied in France and, following the Reformation, in the Netherlands. Cession ('*transport*') was permitted by French writers; but not by all the Roman-Dutch jurists.

[92] See generally T C Smout, *Scottish Trade on the Eve of Union 1660–1707* (1963). This is the published version of his doctoral thesis, *The Overseas Trade of Scotland with particular reference to the Baltic and Scandinavian Trades* 1660–1707 (University of Cambridge PhD, 1960). See too A M J Rorke, *Scottish Overseas Trade*, 1297–1597 (University of Edinburgh PhD, 2001) and J Watson, *Scottish Overseas Trade 1597–1640* (University of Edinburgh PhD, 2004). There remains much work to be done. There are, for instance, many examples of Scots litigating in the courts of the Hanseatic City of Lübeck in the fifteenth and sixteenth centuries: see eg W Ebel (ed) *Lübecker Ratsurteile 1421–1500* vol 1 (1950), cases 301 (1483) and 407 (1488), both cases

of the substantive law strongly indicate that an assignation in Scots law was an outright transfer, the language of *procuratio* was often retained:

> 'Therefore wit ye me to have made, constitute and ordained, and by thir presents make, constitute, and ordain the said W. G., his heirs and assigneys my very lawful, undoubted and irrevocable cessioners and assigneys, in and to the said sum of [X] … in and to the foresaid bond, decreet interponed thereto, and letters of horning, poinding, caption, inhibitions, arrestment, and others following thereupon … ; and I have surrogate, and by thir presents, surrogate and substitute the said W. G. and his foresaids, in my full right…; with full power to the said W. G. and his foresaids to intromit with, uplift, ask, crave and receive the foresaid sums of money.'[93]

5-26. The high point of the view that the *procuratio* style was absolutely necessary can be found in an opinion of Lord Curriehill in the nineteenth century. He ventured that 'an assignation in its proper form does not contain a direct conveyance, but creates the grantee the cessioner, assignee and donatary of the granter'.[94] But, as his Lordship then conceded,[95] outright transfers were also allowed. There are many styles of this:

> 'Therefore wit ye me as assigney, and having right in manner foresaid, to have assigned and transferred, and by their presents assigns and transfers to, and in favour of the said P. G. his heirs, executors and assignees, the foresaid sum of [X] … and I have surrogate, and by thir presents surrogate and substitute the said P. G. and his aforesaids, in my full vice, right and place of the premises for now and ever: with full power to them, to intromit with, uplift, ask, crave and receive the foresaid sums of money above assigned and transferred, and to use and dispone thereupon at their pleasure….'[96]

The following is the style of a retrocession:

> 'I by my back bond subscribed with my hand, of [the date] for the causes herein specified, band [sic] and obliged me my Heirs, etc, *Not only* to make due Compt etc, *But also* to Transfer etc to and in favour of the said A … Therefore I for me my Heirs etc hereby repone, restore and retrocess the said A and his foresaids in his full right, title, and places of the premises…'[97]

5-27. Matters would be complicated in the case of a retrocession if it was inconsistent with the initial 'assignation'. If an initial assignation is a mere procuratory *in rem suam*, any retrocession ought to be a renunciation. A

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involving a Scot, Albert Nickelsen or Nickessen; Ebel (ed) vol 2, *1501–1525* (1955), case no 302 of 16 October 1510 involving one Wylhelm Conner; Case no 587 of 18 September 1517 involving several Dundonians and a ship, the 'Caledonia'.

[93] George Dallas of Saint-Martins, *A System of Stiles as now Practised within the Kingdom of Scotland* (1688, published 1774) vol I, 6–7. See also the deed in Gouldesbrough, *Formulary of Old Scottish Legal Documents* 2 quoted in para 5-16 above. It is of interest that in France distinguishing between a cession and a mandate to pay required some subtlety: K-H Capelle, 'Anweisung' in F Schlegelberger (ed) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* (1929) vol 2, 242 at 245, the style being: 'Le cédant cède et délègue au cessionnaire ses droits contre le cédé'.

[94] *Muir v Ross's Exrs* (1866) 4 M 821 at 826.

[95] At 827: 'In our law that rigid rule of the common law [that claims are not transferable] is not now enforced but this doctrine shews that a mandate *in rem suam* is *not an incompetent* form by which a creditor may transfer his right' (emphasis added).

[96] Dallas, *Stiles* 8, 'Translation'. See also the Deed of Translation in Gouldesbrough, *Formulary* 4 which contains only words of transfer.

[97] Birnie *Stiles*, para 5-07 above.

proper assignation would be ineffectual. The procurator would have no claim to assign. While a procurator has a mandate to uplift the money from the debtor and to retain it for his own benefit, it is not clear that the procurator has the right to subsequently assign ('translate') the claim to a further assignee.[98] Even if a procurator does have such a right, the subsequent procurator or 'assignee' remains at the risk of the original cedent's insolvency.

5-28. The deeds show that legal advisers did recognise there were differences between a transfer and a *procuratio in rem suam*, even if they did not perhaps fully understand what those differences were. For example, although the style assignations move readily between the language of *procuratio* and that of transfer, there are few examples in the style books[99] where it is purported to transfer the claim as well as constitute the putative assignee as a procurator *in rem suam*.[100] This may be a matter of chance. But there is good reason why such a form would not have been invoked: it would seek to achieve mutually contradictory things. The Scottish styles have changed little over the years despite the increase in the relative importance of incorporeals in commerce.[101]

5-29. Substantive Scots law has always admitted the out-and-out transfer of claims. So despite the assertions by many lawyers from Stair to Lord President Inglis,[102] there was no substantive basis in Scots law for invoking this style. The Scottish experience mirrors the French.[103] Conversely, in those German-speaking areas where the civil law had been superseded by codification, deeds of cession used words of transfer and the language of *procuratio* was abandoned.[104]

(4) Intimation

5-30. In the *jus commune*, a procurator was constituted by mere consent between the mandatory and the mandant. The mandatory's entitlement to sue the debtor and retain the proceeds did not hinge on prior intimation. Intimation, it seems, became relevant only after the formulae system became obsolete and talk in terms of *actiones* became redundant; there was no praetor before whom these *actiones* could be exercised. The rationale for the *denuntatio*

[98] Mühlenbruch, *Cession* 491, for example, thought that the procurator did have such a right. However, he was not clear whether intimation to the debtor was required for this. Others thought that the right to further transfer was the consequence of the cessioner's *actio utilis*: see Luig, *Geschichte* 61 ff.

[99] There are literally thousands of extant assignations in the National Archives of Scotland. The few consulted by the author are similar to the styles quoted above.

[100] But see the deed in Gouldesbrough, *Formulary*, quoted in para 5-16 above, where there appears to be an attempt to assign as well as constitute the 'assignee' as a procurator.

[101] Juridical Society of Edinburgh, *Juridical Styles* (6th edn 1908) vol II, 934 ff; D P Sellar, 'Legal Drafting' (1994) 39 *JLSS* 203.

[102] See eg *Carter v McIntosh* (1862) 24 D 925.

[103] Pothier, *Traité du contrat de vente* (1762) § 551.

[104] Luig, *Geschichte* 31, citing J Schilter, *Praxis juris Romani in foro Germanico* (3rd edn 1713) §§ 63–64. Schilter noted that German practice did not use the language of *procuratio* but 'erb- und eigenthümlich cediren'. Cf the style cession in W X A F von Kreittmayr, *Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem*, Part II (Munich, 1761) Cap 3, § VIII, Nr 5 cited by C Hattenhauer, in *Historisch-Kritischer Kommentar zum BGB* vol 2 (2007) Rn 16, n 84 where the granter describes the assigned claim as one that he 'gänzlich cedirt und überlassen habe'.

was to place the debtor in bad faith to pay the cedent, or perhaps to play the role of *litis contestatio* under the formulae system.[105] The meagre discussion of whether the protection accorded to the cessionary in the civil law, coupled with the continued unnecessary discussion in terms of *actiones*, means that it is difficult to determine whether the *denuntiatio* ever had the role accorded to it in modern Scots law. What is apparent, however, is that there were no particular requirements of form that the notification had to take, in contrast to the relatively onerous formal requirements of intimation in Scots law. In the courts of Flanders in the eighteenth century, for example, it was observed that the requirement of *signification* in French law had no place there; rather, the Roman law ruled and a 'simple cession d'une chose incorporelle rend le Cessionnaire possesseur de la chose cédé'.[106] Stair assumed that intimation was a peculiar aspect of Scots law ('our proper custom')[107] and not borrowed from elsewhere.

5-31. Walter Ross suggested that it was a result of French influence that the intimation requirement was introduced into Scots law.[108] Other writers have picked up on this point.[109] But they are probably merely following Ross. The apparent similarity between Scots and French law, in that both systems require notification to the debtor, coupled with the historical links between the two countries, certainly makes Ross's conclusion a tempting one. There is, admittedly, little historical evidence adduced by any of the other writers or by Ross himself. Like other continental European countries, France also invoked the concept of *procuratio* in the early history of their law of cession.[110] It might be mentioned, however, that *Drummond v Muschet*,[111] which concerned the

[105] C Maynz, *Cours de droit romain* (4th edn 1877) vol II, 90. He also observes that the idea of intimation had existed even during the currency of the formulae system, noting that the first reference to *denuntiatio* is found in a constitution of Severus in AD 226. The better view, however, is probably that of Brunner who was of opinion that there is no trace of any notification requirement in the Roman sources; rather, the source must be looked for in the mediaeval sources and, in particular, the theory of sasine: see Brunner, 'Inhaberpapier', 503–504: 'Es ist in hohem Grade zweifelhaft, was der Satz: *simple transport ne saisit point* ursprünglich bedeutet'.

[106] J Pollet, *Arrêts de Parlement de Flandre, sur diverse questions de droit, de coutume et de practique* (1772) vol II, case no 18, cited by Grosskopf, *Geskiedenis* 84, n 31.

[107] III.i.12. Professor Luig, 'Assignation' in Reid and Zimmermann, *A History of Private Law in Scotland* vol 2, 413, has remarked: 'As earlier with the procurator *in rem suam*, it is surprising to a find a typical Roman institution like intimation being regarded as an invention of the customary law of Scotland'.

[108] For the French influence on Scots law, see F P Walton, 'The Influence of France on Scots law' 1895 3 SLT (News) 189; Walton, 'The Relationship of the Law of France to the Law of Scotland' 1902 *JR* 19; T B Smith, 'The Influence of the "Auld Alliance" with France on the Law of Scotland' in *Studies Critical and Comparative* (1962) 28; Smith, 'Influences françaises dans le droit écossais' (1965) 15 *La Review Juridique Thémis* 43; W M Gordon, 'Scotland and France: the Legal Connection' (1994) 22 *Index* 557.

[109] Eg A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 297. For the clear French influence on the related subject of the *beneficium cedendarum actionum*, see the majority opinion of the whole court in *Sligo v Menzies* (1840) 2 D 1478 at 1490 which stated that Art 2037 *Code civil* represented the law of Scotland. Cf J J Darling, *Practice of the Court of Session* (1833) 29–30 who sees in the Court of Session a French model.

[110] See eg R J Pothier, *Coutumes des Duché, Baillage et Prévôté d'Orléans* (1740) in M Bugnet (ed) *Oeuvres de Pothier* (1861) vol 1, § 84 at 667.

[111] (1492) Mor 843; Balfour, *Practicks* 169.

intimation of an assignation, pre-dates the oft-quoted provision of the Coutume de Paris that 'le simple transport ne saisit point'.[112]

5-32. From this early stage, Scots law has been clear: formal intimation is required. It has never been seriously doubted that intimation is anything other than a 'solemnity requisite to', and 'a full accomplishment of', an assignation.[113] Moreover, because Scots law recognised the concept of transfer of a right from an early stage, difficulties arise as to the concept of *procuratio in rem suam*. What is necessary for a valid procuratory *in rem suam* in Scots law? Assuming a mandate *in rem suam* is not a transfer, intimation becomes merely a practical rather than a constitutive requirement.[114]

5-33. Intimation issues have also arisen with transfers of orders to pay and bills. Bills of exchange, for example, were transferred by indorsement. Each indorsement, transferred the holder's rights against the drawee but no intimation (to the drawee) was necessary. This had important consequences for competition:

> 'Intimation being by our proper custom so necessary a solemnity, it holds not in the orders which stand for assignations among merchants, who act as oft with strangers especially, *qui utuntur communi jure gentium*; and therefore the first order by merchants, direct to their debtor here, to pay the debt to the obtainer of the order, was preferred to arresters and assignees, using diligence before them, though there was neither intimation of the order nor acceptance by the debtor.'[115]

5-34. There are two cases to be distinguished. The first is where the drawer of a bill or order to pay draws on his debtor. The second is where the bill is drawn on credit. In the first case, as has been noted, until payment by the debtor to the holder of the bill, the debt he owed to the drawer was not discharged. Creditors of the drawer should, therefore, have been able to competently arrest in the drawee's hands before payment. Indeed, it is because the debt owed by the drawee to the drawer subsists that the drawee had a defence of good faith payment if he paid on presentment of a posterior order:

> 'Bills of Exchange are also transmitted, without any formal assignation or intimation, by a note on the bill itself, ordering it to be paid to such another… the first order carries the right of the sum in the bill, without necessity if intimation, yet payment made bona fide by a posterior order, secures the payer.'[116]

5-35. If this obligation to the drawer were arrestable, however, there would be serious and deleterious consequences for the drawee who had already accepted. For an acceptor becomes liable on the bill, irrespective of the acceptor's relationship with the drawer. Acceptance, therefore, is the relevant moment for determining arrestability. Before acceptance, creditors of the

[112] When it came to drafting the provisions of the *Code civil*, the original draft allowed claims to be transferred by mere agreement. The requirement of debtor notification was inserted by an amendment proposed by the Tribunal de Paris. The rationale was the protection of third parties by requiring a certain external and public act. This is reflected in Art 1690, which has remained unchanged since it was promulgated in 1804.

[113] Stair III.i.6.

[114] Cf Bell, *Lectures on Conveyancing* (3rd edn 1882) 297: 'It is obviously unnecessary in principle to make intimation of the mere appointment of an attorney, which, in strict law, infers no divesting of the party but leaves him in full legal right'.

[115] Stair III.i.12. See too *Lord Ross v Gray of Newton* (1706) Mor 7724 cited by W Forbes, *Bills of Exchange* (2nd edn 1718) 83.

[116] Stair I.xi.7.

drawer can arrest in the drawee's hands. After acceptance, creditors of the drawer cannot arrest.[117] It was perhaps for this reason that Gloag suggested that the effect of drawing a cheque in settlement of an obligation was to result only in a conditional discharge of the drawer in his obligation to the payee. The discharge was conditional on the cheque being honoured; if the cheque was not honoured the obligation would revive.[118] In the second case, the drawee is not indebted to the drawer. As a result, there is no obligation to the drawer which is arrestable by the latter's creditors.

(5) Modern Scots law

(a) Procuratio in the nineteenth century

5-36. Where the institutional writers had led, the Court of Session of the nineteenth century generally followed. That, in any event, is the position with assignation. The court received unquestioningly the accepted view that claims were originally not transferable. Unlike their predecessors in the eighteenth century, the nineteenth-century judges did not question whether Stair's view, that the mandate *in rem suam* had been introduced to circumvent the prohibition, was defensible. There are therefore numerous judicial dicta in the modern sources which state that an assignation is nothing more than a mandate *in rem suam*.[119] Indeed, it is the nineteenth-century cases which provide the most numerous references to *procuratio* in the Scottish sources. It was a view of which Lord President Inglis, in particular, was convinced.[120]

5-37. Lord Gardenston once stated that while he had 'great respect for the opinions of ancient lawyers such as Craig and Stair: I do not hold them to be infallible'. And, he concluded, the problem with previous decided cases was that the judges had slavishly followed the institutional writers: 'The later lawyers have just followed the blunders of the old ones, and perpetuated those blunders'.[121] Lord Coalston, while gently chiding Gardenston for his intemperate language,[122] agreed with his approach: 'We are not bound to follow the errors of even the greatest men'.[123] In the nineteenth-century assignation cases, the judges did not approach the sources critically. It might be fair to say that, like most lawyers, most of the time, nineteenth-century Lords of Session were copying what was assumed orthodoxy. Yet, as with Stair's analysis, references to *procuratio* contributed nothing of value to the development of the law. And it is

[117] *Ewing v Geills & Johnston* (1698) Mor 1460; *Smith v Home* (1712) Mor 1502; Dalrymple's Dec 130; *Richardson v Fenwick* (1772) Mor 678; Hailes 471 *per* Lord President (Dundas of Arniston): 'Practice is of much consequence. There is no practice authorising arrestment against the drawer when bills are accepted but not paid. After a bill is accepted, the drawer is only subsidiarily liable'. Cf authorities cited in J Graham Stewart, *The Law of Diligence* (1898) 79, n 4.

[118] Gloag, *Contract* (2nd edn 1929) 273 cited in para 3-14 above.

[119] The most famous is probably *Carter v McIntosh* (1862) 24 D 925 *per* Lord Justice-Clerk Inglis. See too *Wyper v Harveys* (1861) 23 D 607 at 613 *per* Lord Justice-Clerk Inglis and Lords Wood, Cowan, Ardmillan, Mackenzie and Jerviswood.

[120] *Carter v McIntosh* (1862) 24 D 925; *British Linen Co v Carruthers* (1883) 10 R 923 at 926. Cf *Lyon v Irvine* (1874) 1 R 512 at 518; (1874) 11 SLR 249 at 253.

[121] *Gillon v Muirhead* (1775) Mor 15286; Hailes 631 at 632.

[122] Hailes at 633: 'I presume my brother [Lord Gardenston] meant to say *errors*; for he must have a great respect for the writers from whom he has learned so much'.

[123] Hailes at 633.

clear that the judges themselves did not fully understand or appreciate how a *procuratio in rem suam* might work. But such was the common currency of the *procuratio* analysis it was even suggested that a mandate *in rem suam* was the only proper style for an assignation.[124]

(b) Confusion with mandates to pay

5-38. What then do the nineteenth-century cases actually say about this mandate *in rem suam*? Matters are especially complex because almost all the cases dealing with the 'mandate *in rem suam*' confounded the mandate to pay (*Anweisung*) with the mandate to uplift (*procuratio in rem suam*').[125] Indeed, most of the well-known and oft-cited nineteenth-century Scottish cases on assignation have nothing to do with assignation in the modern sense. The judges were drawing with various conceptual inks and the resulting picture is not pretty. Originally, it appears no consideration was required.[126] This is consistent with Roman law where mandate was generally viewed as a gratuitous contract. But other authorities require the mandate to be irrevocable to effect an assignation; and the mandate becomes irrevocable only on it being proved that it was given for value.[127] Yet it was also held that a mandate *in rem suam* is irrevocable without any additional proof of onerosity.[128] There is no consensus whatsoever as to when transfer by mandate *in rem suam* is to occur. Protest,[129] informal intimation,[130] formal intimation where there are competing diligence creditors,[131] presentation,[132] and judicial intimation in a multiplepoinding[133] have all been stated as the

[124] *Muir v Ross's Exrs* (1866) 4 M 821 at 826 *per* Lord Curriehill: 'an assignation in its proper form does not contain a direct conveyance, but creates the grantee the cessioner, assignee and donatory of the granter'. However, this assertion is not consistent with his rather less assertive conclusion that a mandate *in rem suam* was a 'not incompetent' method of transferring a claim. For, on his own analysis, a *procuratio* is required because claims are not in any event transferable. Lord Curriehill was recognised by a contemporary Lord Advocate (George Young) as 'the most skilled adepts of our day in the mystery of Scotch conveyancing': (1870) 14 *Journal of Jurisprudence* 1 at 4. In *Wyper v Harveys* (1861) 23 D 607 at 619, Lord Curriehill did not follow his colleagues in characterising an assignation as a mandate *in rem suam*; rather, he recognised only two types of transfer: one, *inter vivos*, by assignation; the other, a judicial transfer, by arrestment.

[125] Cf *Ritchie v M'Lachlan* (1870) 8 M 815. See *Lyon v Irvine* (1874) 1 R 512 at 518 *per* Lord President Inglis. Cf the similar confusion which seems to have arisen in France: see K-H Capelle, 'Anweisung' in F Schlegelberger (ed) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* (1929) vol 2, 242 at 245.

[126] *Reid v Milne* 29 November 1808, Hume's Dec.

[127] *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479 *per* Lord Justice-Clerk Moncreiff; *British Linen Co v Carruthers* (1883) 10 R 923 at 926 *per* Lord President Inglis. Cf *Schlesinger, Davis & Co v Blaik & Co* (1886) 2 Sh Ct Rep 295.

[128] *Muir v Ross's Exrs* (1866) 4 M 821 at 828 *per* Lord Deas.

[129] *Stirling Banking Co v Representatives of Duncanson* (1790-92) Bell's Octavo Cases 111.

[130] *Watt's Trs v Pinkney* (1853) 16 D 279 at 287 *per* Lord Ivory that 'Protest may be necessary, as a ground of summary diligence, but it is not necessary where the mere fact in question is the fact of presentment to the effect of certiorating the debtor that he has got a new creditor, and interpelling him from paying to any other; and the whole matter here is, whether there is any evidence of that presentment'. *Watt's Trs* involved a bill not a cheque.

[131] *Watt's Trs v Pinkney* at 287.

[132] *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479.

[133] *Carter v McIntosh* (1862) 24 D 925 at 935.

moment at which this 'virtual'[134] or 'implied'[135] assignation occurs. It is therefore extremely doubtful whether anything useful can be taken from these authorities.

(c) The Bills of Exchange Act 1882

5-39. The Bills of Exchange Act 1882 has been hailed as 'the best drafted Act of Parliament which was ever passed'[136] and 'a work of art'.[137] Scots law has been forced to endure a unique legal regime – s 53(2) marks the only significant departure from the law otherwise applicable throughout the UK, and, to a large extent, the law exported throughout the Empire – that was based on an unsound, nonsensical and commercially inexpedient proposition: namely, on presentment to the drawee, a mandate to pay simultaneously becomes a mandate *in rem suam* and as such operates as an assignation of any funds in the drawee's hands.[138] As a result the law provided a result that was completely contrary to what was desired. Bills and cheques could not be countermanded (to the extent that the drawee was in funds);[139] and, on presentation of cheques drawn on accounts with insufficient funds, there was an assignation to the extent of the funds. This required banks to move these sums into suspense accounts. Unsurprisingly, the Scottish clearing banks did not appreciate this additional administrative burden. Alas, the misunderstanding has continued; but this has been recounted elsewhere. [140]

(d) Conclusion on the nineteenth century

5-40. Even on a more general level, it is difficult to accept the opinions of the nineteenth-century judges that, in Scots law, an assignation is nothing more than a mandate *in rem suam*. These cases are often, but uncritically, cited. Yet, contemporaneously, and for some time afterwards, the Court of Session placed a considerable emphasis on the role of *delectus personae* in assignability.[141] But any theory of an assignation as mandate *in rem suam* is inconsistent with one which raises the idea of *delectus personae* to a decisive

[134] *Pewtress and Roberts v Thorold* 14 July 1768 FC; *M'Leod v Crichton* 14 January 1779 FC; Mor 16469. The *M'Leod* case is reported under the title, 'Virtual'.

[135] For example, *Campbell, Thomson & Co v Glass* 28 May 1803 FC is even reported in Morison's Dictionary under the heading 'Implied Assignation', No 2.

[136] *Bank Polski v Mulder & Co* [1942] 1 All ER 396 at 398 *per* MacKinnon LJ. The same judge had contributed the entry in the *DNB 1922–1930* for Sir MacKenzie Chalmers, the draftsman of the 1882 Act.

[137] His Honour Judge Raleigh Batt in 'Preface' to Chalmers' *Digest of the Laws of Bills of Exchange* (11th edn 1947) vi, with whom J Milnes Holden, *A History of Negotiable Instruments in English Law* (1955) 202, n 5 concurs in preference to the harsh judgement of Sir John Paget: 'The whole thing is, of course, a shocking piece of legislation' (*Law of Banking* (4th edn 1930) 109; cited by Holden, 322, n 1).

[138] Bills of Exchange Act 1882, s 53(2).

[139] Only partially repealed with the insertion, in 1985, of s 75A into the 1882 Act. See generally, G L Gretton, 'The Stopped Cheque' (1983) 28 *JLSS* 333 and 389; 'Stopped Cheques: the new law' 1986 SLT (News) 25; 'Stopped Cheques' 1986 *JBL* 229.

[140] See G L Gretton, 'Mandates and Assignations' (1994) 39 *JLSS* 175. See the case law there cited, to which may be added *Bank of Scotland v Richmond & Co* 1997 SCLR 303 and *Mercedes-Benz Finance Co v Clydesdale Bank* 1997 SLT 905 OH.

[141] This has been discussed in para 2-34 above.

level. For *delectus personae* is predicated on the view that rights cannot be transferred without the consent of the other party. And it was on the basis of this view that the mandate *in rem suam* evolved in the civil law. So, if the mandate *in rem suam* analysis were indeed an accurate portrayal of Scots law, reference to *delectus personae* would be superfluous. A mandate *in rem suam* is not an out-and-out transfer. It was, after all, because of perceived *delectus personae creditoris* that the idea of the mandate *in rem suam* evolved. Indeed, in a transaction structured as a mandate *in rem suam*, *delectus personae* cannot be relevant: for the creditor does not change.[142]

(e) Twentieth century

5-41. A more modern development can also be noted. The resurgence of the *procuratio in rem suam* is not limited to the dicta of Lord President Rodger in the Piper Alpha appeals.[143] From 1985, mandates became exempt from stamp duty.[144] The formulation of an assignation in terms of a mandate should, therefore, have become the norm; especially since the authorities made no distinction between mandates *in rem suam* and assignations. From 1985, the difference was fiscal: a transaction with an identical purpose, appointing the 'assignee' as the mandatary of the cedent did not attract stamp duty. An outright assignation did. While there was no obligation to stamp an assignation, failure prevented the assignation being relied upon in court.[145] As a result, any well-advised party between 1985 and 2003 would have couched an assignation transaction in terms of a mandate *in rem suam*. But it is difficult to see why mere terminology should mean that a transaction in the form of the mandate could have effect as a transfer (and no longer subject to the cedent's creditors), while at the same time claim an exception from stamp duty.

(6) Appraisal of the Scottish position

(a) General

5-42. Unlike in much of Europe the basic concept of transfer has been recognised in Scots law from earliest times. There are similarities between the Scottish and French development. Originally, it seems, obligations were always reified in a bond. For various reasons these would always be in favour of, *inter alios*, 'assignees'. As a result there was never any consideration – in the Scottish sources at least – of whether assignation required the debtor's consent. As a matter of course the debtor's consent was apparent from the terms of the obligation. At least by the time of Stair, however, it became established that the debtor's consent was not required.

[142] But compare *Goodall v M'Innes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary) where an attempt to conceal the transfer of a non-assignable statutory right by way of a mandate was held to be ineffectual.

[143] See para 5-01 above.

[144] Finance Act 1985, Schedules 24, 27 Part IX and para 3-18 above. See generally, M J M Quinlan, *Sergeant and Sim on Stamp Duties* (12th edn 1998) 225 and 268.

[145] One interesting point to note is that it was always the assignation that was stamped. There is an argument, however, although not a strong one, that it is the intimation that ought to be stamped.

(b) Styles

5-43. The principal reasons for the evolution of the bill, and indeed the blank bond, in Scotland were twofold: to avoid two major incidents of the law of assignation, viz the formalities of intimation and the *assignatus* rule. The bill was not utilised to circumvent any prohibition on transfer. The blank bond seems to have been concerned primarily with frustrating the debtor's defences, especially compensation, and arresting creditors. With the exception of statements in the institutional writings based on Roman law, Scots law does not ever seem to have had any difficulty with the transfer of rights. Writing at the end of the eighteenth century, Hume observed of the development of the law of assignation in Scots law that:

> 'Now, this article of history explains to us the reason for the old form and style of Assignation. This was not, formerly, as it is now, a direct conveyance and transmission of the *jus crediti*, in favour of the assignee: it was in the form of a procuratory merely, or commission, or power of attorney granted by the creditor, and authorising the assignee to exact payment of the debt, as if for him, - in his name, and for his behoof. Men of business (so it appears) were naturally afraid of openly violating the old rule; and it had occurred to them, that, in this way, the real transaction would be sufficiently hidden, and the prohibition eluded, after this fashion, under cover of a form, which was calculated apparently for compliance with the law. Ross[146] says it was borrowed from French practice. Being once fixed on this plan, it happened here, as in many other instances, that the style was continued after the original reasons for it had ceased to apply.'[147]

Moreover, although Scottish assignations often invoked the form of *procuratio*, they did not suffer from the consequences that were characteristic of a mere mandate *in rem suam*. The effect of the cedent constituting the assignee as his 'cessioner' was to effect a transfer. The cedent was denuded of the assigned claim on the assignation being intimated by the assignee to the debtor. The cedent could not revoke. After intimation, the insolvency of the cedent was irrelevant: the assignee was now the creditor. The Scottish assignation also carried accessory rights. These points add considerable flesh to Lord Rodger's view of the history of assignation presented in the Piper Alpha appeals.[148] Contrary to his Lordship's analysis, the mandate *in rem suam* is distinct from the mandate to pay; and both these mandates may, in turn, be distinguished from outright transfer by assignation.[149]

(c) Comparative comments

5-44. This summary of the Scottish position makes for a favourable comparison with the European Codes drafted at the turn of the nineteenth

[146] Ross, *Lectures* I, 180

[147] Hume, *Lectures* III, 2.

[148] See para 5-01 above.

[149] Cf R Zimmermann, *Das römisch-holländische Recht in Südafrika* (1983) 66–69 discussing the decision of the Appellate Division in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A). At 66, Zimmermann rightly remarks that the *Digest* texts (cited by the Court in *LTA*) could not have had any relevance to the modern law of cession since cession was not admitted in classical Roman law.

[150] For some general remarks on the history of these codifications, see O F Robinson, T Fergus and W M Gordon, *European Legal History* (3rd edn 2000) 256 ff; H Schlosser, *Grundzüge der neueren Privatrechtsgeschichte, Rechtsentwicklungen I, europäischen Kontext* (9th edn 2001) § 5.

century.[150] Generally speaking, these codes contained little of substance that had not been settled law in Scotland for two centuries. But what these codes achieved that Scots law did not was clarity. At least for assignation, then, we may, with David Walker, lament 'how much better off we should be if we had codified in the nineteenth century'.[151]

5-45. A curious parallel exists between the position adopted up by the great German jurists[152] and the state of mid-nineteenth-century English law. The common reluctance to admit the free transfer of claims is remarkable. For German lawyers the idea of transfer of claims could not be reconciled with the Roman sources presented in the *Corpus Juris*. In England, assignment was generally not recognised at law, while the rules against champerty and maintenance[153] jealously protected against what was perceived to be the potentially damaging trade in litigious claims. Scots law, in contrast, seems to have been quite unconcerned with (or perhaps just oblivious to) these tensions. There is almost no discussion of the personal nature of a claim. As far as litigious claims were concerned, although concerns were occasionally expressed, and particular measures taken,[154] their transfer in Scots law has proven relatively unproblematic. Whether the Scottish approach can be attributed to the lack of systematic study, corresponding to the *Pandektenrecht* movement, or to a considered reluctance to support a legal rule which would proscribe an institution of such economic expediency as cession, remains unexplained.

5-46. That Scots law took such a unitary approach to claims is again unusual. Where Roman law flourished, the prohibition on cession bore no relation to commercial reality. The same picture can be seen in England. The civil law as well as the common law evolved without regard to the developments in commercial law. Indeed, the practice of commercial lawyers flatly contradicted the heavy dogmatic debates on the civil law prohibition. There is a lesson here. Even now we see the UNIDROIT *Principles of Commercial Contracts* compared to the generally applicable PECL. In France and Germany, a peculiar duality of regimes persists for contractual prohibitions on cession: valid under ordinary civil law, but invalid in commercial law.[155]

[151] D M Walker, 'Review of I S Forrester, S L Goren and H-M Ilgen, *The German Civil Code* (1975)' (1976) 21 *JR* 95 at 96.

[152] It is, admittedly, almost impossible to determine to what extent the writings of the Pandectists actually represented law in force *anywhere*, in much the same way as great American works (like *Farnsworth on Contracts* or *Scott on Trusts*) represent a corpus of American law that is made up only of their (numerous) constituent volumes. The law expressed in these books is not actually in force anywhere; particular aspects of the law of trusts, for example, vary from state to state.

[153] For which, see P H Winfield, 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 *LQR* 143. Maintenance is the funding of either party to an action without lawful excuse; champerty is maintenance coupled with an agreement to share the spoils. Indeed, until the Criminal Law Act 1967, s 13(1), such an assignment was illegal. Yet the law of maintenance and champerty endures in English law: *Trendtex Trading Corp v Credit Suisse* [1982] AC 679; *Giles v Thomson* [1994] 1 AC 142 at 163 *per* Lord Mustill; *Re Oasis Merchandising Services Ltd* [1998] Ch 170 and J McGhee (ed) *Snell's Equity* (31st edn 2005) para 3-36 ff.

[154] In particular, the selling of litigious claims to advocates: Ramsay of Ochtertyre, *Scotland and Scotsmen in the 18th Century* (1888) vol 1, 431 cited by McBryde, *Contract* para 19-46.

[155] Cf in Germany, §§ 399 *BGB* ff and § 354a *HGB*; in France, Arts 1689 ff *Code civil* and Art L 442-6-6-II (c) *Code monétaire et financier*; and the *Loi Dailly* (see *Code monétaire et financier* Arts L 313-23 ff).

5-47. In the wider European context the substantive Scots law of assignation can be seen to be a remarkably mature, if not unique, system. English law was underdeveloped as a result of the peculiar result of the division between law and equity. The common law did not admit the transfer of choses in action at law. Despite the best efforts of the courts of equity, the outright transfer of a claim (if indeed it is possible for English law to think in such terms) was not possible until the unification of the courts of law and equity in 1875. Although the original European codes did finally admit the free transfer of claims (such as the Bavarian Code, the *ALR*, *ABGB* and *Code civil*),[156] the evolution seems to have been more gradual. The order to pay ('assignation' in the European sense) seems to have been the more common interpretation of '*adsignatio*' than transfer. The detailed academic commentaries flatly refused to sanction transfers. The greatest Pandectist of them all, Bernhard Windscheid, could write in 1875 (the year the Judicature Act came into force in England, Wales and Ireland) that the prevailing opinion was still that enunciated by Mühlenbruch in the 1820s: claims were not transferable.[157] Scots law, in contrast, even in 1875, had been sanctioning the free transfer of claims for at least four hundred years.

(d) Conclusion

5-48. One of the most influential Scots lawyers of the twentieth century, Professor Sir Thomas Smith, wrote in the early 1980s that, 'The Scottish Legal Genius at its best has been the selective and synthetic, adopting and adapting by comparative techniques solutions first developed in other systems'.[158] This comment is only partly true for the law of assignation. Scots law in this area was perhaps influenced by the French position, but it is an influence that can be overstated. It is of particular interest that it is the terminology of the Germanic law that Scots law shares, not the French (although admittedly 'assignation', like so many English words, is of old French origin). While Scots law may have borrowed the formality of intimation from French law, much of the anterior and posterior development was indigenous. The sources evidence perhaps two particularly Scottish features. The first is the constant focus on the effect of insolvency on transfers.[159] Assignation is considered as a transfer. This focus does not seem to be so evident in other systems. The benefit of this focus is that it highlights the distinction between contractual undertakings to act, and executed legal acts effecting a transfer. The second point of interest has been the unparalleled willingness of Scots lawyers to assign anything and everything. Stair's justified observation that 'assignations are more common with us than anywhere'[160] should alert comparative lawyers to the rewards that may be mined from this body of Scots law. The liberal attitude of Scots legal writers

[156] For the earlier local codes such as the *Codex Maximilianeus Bavaricus Civilis* (1756) (Bavaria), see B Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernunftrecht* (1975).

[157] B Windscheid, *Lehrbuch des Pandektenrechts* (4th edn 1875) II, § 329 at 257, n 10, cited by Luig, *Geschichte* 118.

[158] T B Smith, 'Law, History of' in D Daiches (ed) *Companion to Scottish Culture* (1981) 205.

[159] See, in particular, Bell's appreciation of Stair's approach in the *Institutions*: 'He seeks with a liberal and learned spirit for the principle of all his doctrines; but he is in general careful to submit them to the test of practice; and to examine rights and obligations with reference to their effects on purchasers or creditors' (Bell, *Commentaries* (7th edn 1870) I, 260, n 2).

[160] III.i.5.

and the courts to assignations was considerably before its time.[161] As will become clear in the following chapters, much of the Scots law of assignation was settled by the mid to late seventeenth century. And the integral parts have been fixed since the fifteenth. If the law of assignation should develop concomitantly with the increase in the importance of incorporeals to modern economies, Scots law, alas, has again bucked the trend. The major *corpus* of the Scots law of assignation was developed and entrenched at a time when Scotland was economically fragile. In these turbulent times assignations were ubiquitous. Following the union with England and the subsequent economic boom that industrialisation and empire brought, the assignation, though a ubiquitous commercial instrument, produced little litigation. This could be a measure of its success and practical utility. The sources were already rich. The principles were settled. Litigation was therefore unnecessary. If this is so, then Scots law has been both a winner and a loser: a winner because it provided its users with a functional body of law at a time when assignation was – in other jurisdictions at least – a controversial operation. But, on another view, Scots law has also lost out. It has been deprived of the litigation that some argue is the lifeblood of a modern legal system.[162] What is important to realise, however, is something that has become, unfortunately, unfashionable: Scots law was workable and useful. At the turn of the nineteenth century it could be favourably compared to the emerging European codes. Paradoxically, however, this rich body of law, comprising settled principles, has generated little discussion. But the issues that were relevant to legal development then are not dramatically different today.

[161] Cf W Sombart, *Der moderne Kapitalismus* (1928) vol III, 189 (14-III-1(1)) who, in his six-volume history, considers Scots, along with the Jews, to be the 'founders of modern capitalism' particularly because of the willingness to employ capital from different sources: '[Die Schotten] fangen schon um die Mitte des 18 Jahrhunderts an, ihre umwälzenden Geschäftsgrunsätze, die alle auf eine Förderung der Kreditwirtschaftlichen Beziehungen hinauslaufen zur Anwendung zu bringen. Aber es dauerte lange, ehe sich das Unternehmertum dazu bequemt, mit fremden Gelde zu arbeiten'.

[162] Lord Rodger of Earlsferry, '"Say Not the Struggle Naught Availeth": The Costs and Benefits of a Mixed Legal System' (2003) 78 *Tulane LR* 419 at 424: 'In any event, a Scots lawyer who hopes to see the law develop must hesitate before complaining of an abundance of cases. Any modern system lives on cases and dies without them: the real threat to the commercial law of Scotland is not too many cases but too few cases'. But the point can be overstated. It is understandable for a litigator to advance such a view. From the perspective of the users of a legal system, however, an effective and efficient system will *avoid* litigation. And, even where there is litigation, it may not produce helpful case law. In English law, it should be remembered, (where London, along with New York, can claim to be the litigation capital of the world) the law of assignment is no more developed than Scots law; in some respects it is less so. Yet assignment is crucial to commercial law. It is not apparent, at least to this writer, why it is desirable to look for the law in a source which is essentially pathological. In any event, law can endure without case law. Most legislation, mercifully, produces little or no litigation. But that does not mean it is 'dead' law.

6 Intimation[1]: Rationale and Rules

A. INTRODUCTION

6-01. Voluntary transfer of a claim requires a conveyance. Conveyance demands a transfer agreement; its delivery from cedent to assignee; and intimation of this delivery, in due legal form, by assignee to *debitor cessus*. Both an agreement to assign and the transfer agreement are often confusingly called an 'assignation'. But it is only with intimation that there is properly an assignation. Scots law is one of a number of legal systems in which debtor notification is a constitutive requirement.[1] Delivery of the transfer agreement has, of itself, few transfer consequences:

[1] The major system requiring debtor notification is French law and those systems that have drawn on it. The traditional principle was famously articulated in the *Coutume de Paris*: 'le simple transport ne saisit point le cessionnaire' (Art 170 in the 1510 edition; Art 108 in the 1580 text). See O Martins, *Histoire de la Prévôté et vicomté de Paris* (1925) vol 2, 574. The modern law is in Art 1690 *Code civil* and in the Dalloz commentary to the Article. Other systems originally based on the French, however, have moved away from formal notification being a

> 'There is such a thing as an imperfect right to a personal debt, as well as to land. A disposition to land without infeftment, is only one step to a transmission of property. An assignation of a bond without intimation, is in like manner but one step to the transmission of a *jus crediti*: The cedent is not divested before intimation. The debt may be arrested by his creditor, and therefore not by the creditor of the assignee. After intimation, the debt is only arrestable by the creditor of the assignee.'[2]

6-02. This has been the law since at least 1492 when *Drummond v Muschet* was decided.[3] It should be remembered that assignation is the transfer of a claim without the consent of the debtor. Therefore, while the debtor's consent is not required to transfer a claim, his passive participation is: 'en un mot, le créance ne peut se transférer sans lui, mais elle peut se transférer malgré lui'.[4] Some modern lawyers, however, are perplexed at what they consider an unnecessary and obsolete formality.[5] Contract and conveyance are clearly demarcated in other jurisdictions without the need for some additional step. And debtor notification

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constitutive requirement. In Luxembourg, the law was changed in 1994, substituting the requirement of 'signification' derived from the French *Code civil*, for one of 'notification'. This can be made informally: see Art 1690 ff *Code civil luxembourgeois* and discussion in G Röhl, 'Die Forderungsabtretung im Recht von Luxembourg' in W Hadding and U H Schneider (eds) *Die Forderungsabtretung, insbesondere zur Kreditsicherung, in ausländischen Rechtsordnungen* (2nd edn 1999) 441 ff. A similar reform was undertaken in Belgium, also in 1994; notification is only required to place the debtor in bad faith: *Code civil belge* Art 1690 ff; for which see, in particular, P van Ommeslaghe, 'Le nouveau régime de la cession et de la dation en gage des créances' [1995] 114 *Journal des Tribunaux* 529 ff; P A Foriers and M Grégoire, 'Die Forderungsabtretung, insbesondere zu Sicherungszwecken, im belgischen Recht' in Hadding and Schneider, 135 ff and R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 126 and 344 ff. Most recently, the Dutch *Burgerlijk Wetboek*, Art 3:94(3) was amended in October 2004, to allow 'stille cessie', or assignment without notification: see J W A Biemans, 'Kritische kanttekeningen bij wetvoorstel 28 878 (cessie zonder mededelingsvereiste)' (2004) 6584 *Weekblad voor Privaatrecht, Notariaat en Registratie* 532. The notification requirement in France has been lifted both for factoring transactions (*Loi facilitatant le credit aux enterprises* of 2.1.1981, the so-called *Loi Dailly* (taking its name from Senator Etienne Dailly, who introduced the legislation), now found in the *Code monétaire et financier* Art L 313-23 ff), and for securitisation transactions (Art L 515-21, discussed in J Ghestin et al, *Le régime des créances et des dettes* (2005) 371 ff). For other jurisdictions which have drawn on French law: cf *Code civil du Québec* Art 1641 and Louisiana Civil Code, Art 2643.

[2] *Creditors of Benjedward, Competing* (1753) Mor 743 at 744; 2 Kames Sel Dec 75 *per* Lord Kames. This view is preferable to Dewar Gibb's statement that 'to speak of a right to a right is redundancy': A Dewar Gibb, *A Preface to Scots Law* (4th edn 1964) 16. He admits, however, that contractual rights to payment can be classed in a general, if not technical, sense as 'property'.

[3] (1492) Mor 843. See also *Competition betwixt Sinclair of Southdun and Sinclair of Brabsterdoran* (1726) Mor 2793; 1 Kames Rem Dec 175.

[4] P Gide, *Etudes sur la novation et le transport des créances en droit romain* (1879) 244. Cf D Benito Gutiérrez Fernández, *Códigos ó estudios fundamentales sobre el derecho civil español* vol 4 (1869) 117–118. Fernández, and to a lesser extent Gide, suggest that the point follows from the assignee being the cedent's mandatary. But the point holds good for outright transfer. Compare I M Fletcher and R Roxburgh, *Greene and Fletcher*: *The Law and Practice of Receivership in Scotland* (3rd edn 2005) para 4.80. They state that intimation of an assignation in Scotland must be accepted by the debtor. That is incorrect. The debtor is a passive party.

[5] Including civilian systems with which Scots law has close affiliations: eg South Africa. S Scott, *The Law of Cession* (2nd edn 1991) ch 7 maintains that there is no transfer until there is notification

is considered an impediment to the utilisation of incorporeal assets as collateral for finance, the formality obstructs the free movement of claims. A passage in the *International Encyclopaedia of Comparative Law* is indicative of foreign perceptions of notice systems:

> 'In France and other countries whose civil law is based on the French model, the formalities needed to make assignments effective as against third parties are so cumbersome that assignment is ruled out as a generally available legal technique of organizing modern accounts receivables financing.'[6]

6-03. Modern international codes therefore provide that transfer occurs by agreement between cedent and assignee.[7] Any analysis of the substantive rules can only occur against the backdrop of the underlying policies which any system must address in formulating the formal/essential[8] requirements for the transfer of a claim. It is difficult (if not impossible) to consider fully policy arguments in the abstract. Different interest groups will highlight different policies with equal force. The following will therefore focus on what can be gauged, namely, judicial or juristic expressions of what is perceived to be the underlying rationale of the rules on intimation in Scots law.

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to the debtor. This is probably not representative of the position in either Roman-Dutch or modern South African law; see P Nienaber, 'Cession' in W A Joubert et al (eds) *The Law of South Africa*, 2nd edn, vol 2, part II (2003) para 6. Belgium and the Netherlands – as well as Germany, Austria, and Switzerland – now also allow a claim to be transferred without debtor notification.

[6] H Kötz (ed) *International Encyclopaedia of Comparative Law* vol 7, ch 13, 75, para 85. Cf H Kötz, *Europäisches Vertragsrecht* (1996) § 14 (trans T Weir, *European Contract Law* (1997) § 14); Professor Sir Roy Goode, 'Europe and English Commercial Law' in B Markesinis (ed) *The British Contribution to the Europe of the Twenty-First Century* (2002) at 19.

[7] *Principles of European Contract Law* (Part III, 2003) Art 11:202; UNIDROIT *Principles of International Commercial Contracts* (2nd edn 2004) Art 9.1.7; UNIDROIT *Convention on International Factoring* 1988, Art 10. H McGregor, *Contract Code* (Milan, 1993) Art 666; M L R Gandolphi (ed) *Code Européen des Contrats* Art 122(6). International private law in this area is complex. Is an assignation a contract or a conveyance for the purposes of Art 12 of the Rome Convention? *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 involved the effect of an English assignment of a French insurance policy. The English Court of Appeal took the view that an assignment is contractual in nature. Article 12 and, therefore, English law applied to the assignment. Accordingly there was no need to comply with the formal requirements of intimation of French law. Characterisation, however, can be more complex. Is intimation a question of formal or essential validity? A different connecting factor may apply to each question. Why must the proper law of the contract apply also to the legal act of transfer? Cf *Bankhaus H Aufhauser v Scotboard Ltd* 1973 SLT (Notes) 87. Unfortunately the complexities of international private law in this area cannot be further discussed here.

[8] This distinction, seldom made, is important. Characterisation for the purposes of international private law can be illuminating: D Pardoel, *Les conflits de lois en matière de cession de créance* (1997); E-M Kieninger, 'Das Statut der Forderungsabtretung im Verhältnis zu Dritten' (1998) 62 *RabelsZ* 678; W Mangold, *Die Abtretung im europäischen Kollisionsrecht: unter besonderer Berücksichtigung des spanischen Rechts* (2001). European authors are more rigorous in their treatment of the subject than English language sources, of which the standard reference is M Moshinsky, 'The Assignment of Debts in the Conflict of Laws' (1992) 108 *LQR* 591. The most recent Scottish contribution approaches the subject from an English perspective: J M Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules concerning inter vivos Transfers of Property* (2005).

B. JUDICIAL EXPRESSIONS OF POLICY

(1) Publicity

6-04. Publicity protects creditors. There are many manifestations of this policy in property law. The law prescribes clearly defined ways of ascertaining whether there has been a change in ownership or constitution of a right in security. Scotland has a particularly strong affection for the principle that people should be entitled to act on the faith of the public records, and rightly so. Yet the requirement for a physical – and therefore public – act has been dispensed with by most legal systems for the transfer of corporeal moveables.[9] The law now recognises that there are innumerable bases on which goods may be possessed. The common law requirement of *traditio*, it could be said, is based on the presumption that the possessor of an article was the owner. Creditors could look at the assets their debtor possessed for a quick and efficient credit rating. But the importance of the presumption has waned,[10] and it is clear that publicity has a relatively small role to play in the transfer of corporeal moveables.

6-05. What then of claims? It has been said that the requirement for intimation in Scots law is based on an analogy with *traditio*[11] for corporeal moveables or registration for immoveables:

> '… the law of Scotland requires that the conveyance of even such a *jus crediti* shall, for its completion, be accompanied by an extraneous and ostensible act, in order to render it effectual in questions with third parties, in the same manner as the transmission of a feudal right requires to be completed by saisine. The usual mode of completing a conveyance of a *jus crediti*, when the subject of it is a money claim is by *intimating* it to the obligant.'[12]

With one exception,[13] however, an assignation of a money claim in modern Scots law may not be completed by registration.[14]

6-06. One advantage of intimation is that it informs the debtor. But intimation can be validly made even although the debtor may have no actual knowledge of the new creditor.[15] And even where the debtor is actually

[9] See L van Vliet, *Transfer of Moveables in German, French, English and Dutch Law* (2000). In Scotland, see Sale of Goods Act 1979, s 17. At common law property cannot pass without delivery. There can always be physical delivery without an *animus transferendi*.

[10] *George Hopkinson Ltd v N G Napier & Son* 1953 SC 139; *Prangnell-O'Neill v Lady Skiffington* 1984 SLT 282. But the rule remains useful: D L Carey Miller, 'Title to Moveables: Mr Sharp's Porsche' (2003) 7 *Edin LR* 221 discussing *Chief Constable of Strathclyde Police v Sharp* 2002 SLT (Sh Ct) 95.

[11] W M Gloag and J M Irvine, *The Law of Rights in Security* (1897) 476–477 approved in *Gallemos Ltd (in receivership) v Barratt Falkirk Ltd* 1989 SC 239 at 243 *per* Lord Dunpark. Cf G Marty, P Raynaud and P Jestaz, *Droit civil, Les obligations* (2nd edn 1989) para 357; Pothier, *Traité du contrat de vente* (1762) § 554 in M Bugnet, *Oeuvres de Pothier* (1861) vol 3, 218–219 and comments at n 3 and R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) at 129, Nr 120.

[12] *Edmond v Magistrates of Aberdeen* (1855) 18 D 47 at 55 *per* Lord Curriehill, aff'd (1858) 3 Macq 116.

[13] Edictal intimation; compare the assignation of incorporeal heritable rights: *Miller v Brown* (1820) Hume's Dec 540; *Edmond v Magistrates of Aberdeen* (1855) 18 D 47.

[14] *Tod's Trs v Wilson* (1869) 7 M 1100.

[15] For example if intimation to one of a body of trustees is sufficient to interpel them all, as in *Jameson v Sharp* (1887) 14 R 643 (where the trustee to whom intimation was made was in sole control of the funds). Edictal intimation is another obvious example.

notified, any publicity is relatively private:[16] only the maker and recipient of the intimation may know of it. It has never been decided whether there is an obligation on the debtor to cooperate with inquisitive creditors. Arguments in favour of notification based on publicity are thus usually given short shrift:

> 'Nor can notification be justified as a means to protect third parties, such as the assignor's present and future creditors. It has been argued that these third parties can turn to the debtor and ask him whether he has been notified of any assignment. But this is impractical in cases where future accounts or a great number of accounts have been assigned or where the assignee does not for the present want to disclose the assignment to the debtor. Nor is the debtor obliged to give a correct answer or to answer at all. If there is a need to protect third parties against all or certain assignments, the validity of the assignment should be made to depend on registration of the assignment in a publicly accessible register.'[17]

(2) Debtor protection[18]

6-07. Intimation is informative: it tells the debtor in the obligation who is to be paid. This is in the debtor's interest: only the creditor in the obligation can discharge him. The onus is on the assignee to intimate. There will always be cases where the debtor who has been notified in *law*, does not, in *fact*, know of the assignation.[19] But it is in the assignee's interest to make the debtor aware of the assignation. For so long as the debtor is ignorant of the assignation there is always the danger that he will pay the cedent. So if practical considerations demand that the debtor be informed, arguably intimation is the proper moment to determine when transfer has occurred.

6-08. What of the debtor's private knowledge? Assume there is no formal notification but that the debtor has learned, by other means, that his original creditor has assigned. Is the debtor in bad faith to pay the cedent? Maybe, maybe not. What should the debtor do? His creditor is the cedent. The parties to the assignation may have no desire for payment to be tendered to the assignee. The debtor is exposed to the possibility that a court may later find that a particular payment to the cedent was in bad faith, and hold the debtor liable to pay again to the assignee.[20] But if the debtor pays the putative assignee without formal intimation, he may not be discharged: the conveyance from cedent to assignee may be defective. Or the cedent may have become insolvent after assignation but before intimation.

[16] Cf B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *OJLS* 81 at 92 'Private Publicity'.

[17] Kötz, *International Encyclopaedia of Comparative Law*, ch 13, vol 7 (1992) 82, para 90. The issue of a dishonest or non-cooperative debtor was recognised but not decided in *Black v Scott* (1830) 8 S 367. Compare the commentary to *Principles of European Contract Law* (Part III, 2003) Art 11:401: 'the intending assignee, before giving value, can ask the debtor whether the debtor has received any prior notice of the assignment'. Such an approach is not realistic.

[18] Cf generally L Miller and L Sarna, 'Assignment of Book Debts: Protection of Third Parties in Quebec' (1981) 59 *Canadian Bar Review* 638.

[19] See *Hume v Hume* (1632) Mor 848.

[20] Cf para 6-25 below.

6-09. Some rationalise the intimation requirement on the basis of – inexplicably unfashionable – labels such as 'debtor protection' and 'publicity'. But these are facets of a more general policy underlying our conveyancing rules: certainty.

(3) Certainty on insolvency and competition

6-10. Formal intimation rules assist a court which may have to determine who the creditor in the claim actually is, when that creditor became entitled, and how much that creditor is entitled to. The theme is manifest in the sources:

> 'It has been the policy of our laws so to regulate this matter [i.e. diligence] as to afford to the debtor the means of having the true amount of the debt due at the date of the proceeding ascertained and the diligence restricted to that amount; while other creditors have an opportunity of producing their claims to the effect of obtaining a share in the attached property in the case of the debtor's insolvency: and we have to submit that this principle ought to be declared and followed out completely in all the several diligences.'[21]

6-11. Scottish case reports are full of multiplepoindings. Assignations being more frequent in Scotland than elsewhere, a large proportion of these competitions involve competing claims to claims. Competitions give rise to notoriously complex questions of law at the best of times. The potential for fraud is always great where there are antagonistic claims and insufficient assets to go round. 'Wherever there is commerce, there must be bankrupts. Wherever there are bankrupts, there will be attempts to disappoint the law'.[22] The law is thus slow to accord one party preference over his fellow unfortunates.[23] Only those who have complied with the requisite formalities will have rights.

> 'Intimations ought to be legally made by a notary, before witnesses, which, as it was most solemn and requisite so to be done, so these were the most probable means to eschew falset; for being otherways done, by such privy ratifications, being deeds only done amongst the parties selves, might have the greater suspicion of falset or simulation, and had the more difficult means of trial and discovery of the same'.[24]

[21] (1835) *Parliamentary Papers*, XXXV [63] *Second Report of the Commission for Inquiry into the Courts of Law in Scotland 1835*, 18. The report was prepared, chiefly, by George Joseph Bell: see W M Gordon in A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990) 79. Cf Lord Johnston in *Macpherson's Judicial Factor v Mackay* 1915 SC 1011, quoted at para 7-31 below.

[22] *Mansfield, Hunter & Co v M'ilmun* (1770) Mor 'Bill of Exchange' App 1, No 1; Hailes 350 at 351 *per* Lord Coalston. This was the rationale behind the notification requirement in the *Coutume de Paris*: see O Martins, *Histoire de la Coutume de la Prévôté et vicomté de Paris* (1925) vol 2, 574–575 ; and why it was carried on into the Code: see R T Troplong, *De la vente, ou Commentaire du titre VI du Livre III du code civil* (4th edn 1845) vol 1, para 882, at 383. These passages highlight the problems experienced in France of fraud in competitions. In modern French law, however, intimation is seen by legal writers, if not yet the courts, as informative rather than constitutive. See in particular J Ghestin, 'La Transmission des obligations en droit positif français' in *La transmission des obligations* (1980) 3 at 29 ff.

[23] *Burnett's Tr v Grainger* 2002 SC 580 at para [28] *per* Lord Coulsfield.

[24] *Stevenson v Craigmiller* (1624) Mor 858. The proceedings in this case are also reported at Mor 836 and 837. Compare the Preamble to the Act of 1617 (c 16 in both APS and 12*mo*), establishing the General Register of Sasines: 'Oure Souerane Lord Considdering the gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties … which can not be avoided vnles the saidis privat rightis be maid publict and patent to his hienes lieges…'. The

This same policy lay behind the Citation Act 1540,[25] which opens thus:

> 'For eschewing of great inconvenientes and fraude, done to our Soveraine Lordis Lieges, by summoning of them at their dwelling places, and oft times falslie, and gettis never knowledge thereof…'

The law on citation and service of charges for payment and arrestment continues to influence the law of intimation of assignations.

6-12. A rule that the transfer takes place when the parties intend to transfer their rights introduces the potential for delicate and prolonged litigation.[26] The idea that a debtor can pay someone who is not his creditor and still be discharged is exceptional.[27] Our law of conveyancing tends to favour bright-line rules and certainty over (individual) equity.[28] The desire to guard against fraud was the rationale behind the French principle, 'Simple transport ne saisit point'.[29] That general suspicion of fraud on insolvency is found in Scots law too. Conveyances are instantaneous and unambiguous. An assignation is a conveyance. Only on intimation[30] does the conveyance take effect. Even in English law, debtor notification is a constitutive requirement for legal assignments, and notice must be in writing.[31] The notice must inform the debtor of the date of the assignment as well as the amount assigned.[32]

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detailed opinion of Lord Justice-Clerk Hope in *Donaldson v Ord* (1855) 17 D 1053 at 1069; (1855) 27 Sc Jur 625 at 631 is the closest there is to a judicial examination of the policy underlying the requirement of formal intimation in the Scottish sources. The reports, however, are unsatisfactory.

[25] APS II, 359, c 10; 12*mo* c 75.

[26] Cf *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at 173 *per* Lord Cameron.

[27] Cf Voet, *Commentarius ad Pandectas* (2nd edn 1707) 18.4.15. But see the residual rule of good faith payment accorded to the debtor. There are many situations where a discharge can be received from someone other than the creditor himself, e.g. the creditor's agent, judicial factor, trustee in sequestration, or *curator bonis*. Indeed, in the case where the creditor is incapax, *only* his *curator bonis* will be able to discharge the debtor. See, generally, the principles applicable to good faith payment, discussed at para 7-01.

[28] See *Sharp v Thomson* 1995 SC 455 (1st Div) rev'd 1997 SC (HL) 66; K G C Reid, 'Jam Today: *Sharp* in the House of Lords' 1997 SLT (News) 79 at 83; Cf M Planiol and G Ripert, *Traité pratique de droit civil français* (2nd edn 1954) vol VII para 1117.

[29] P Ourliac and J de la Malafosse, *Droit romain et ancien droit* (1957) § 219, at 224. The formal requirements found in French and Scots law can be distinguished from the civil law, where no unitary concept of transfer was developed. Claims could be functionally 'transferred' (by a mandate *in rem suam*) without formal notification requirements: C Maynz, *Cours de droit romain* (4th edn 1887) 90. For later European development, which followed this trend, see H Coing, *Europäisches Privatrecht*, vol 1, *1500–1800* (1985) 447 and discussion in chapters 4 and 5.

[30] Or one of the equipollents admitted by the law. These are few in number. See also, in the context of presentment of a bill of exchange, the opinions of Lord Eskgrove and Lord President Campbell in *Stirling Banking Co v Representatives of Duncanson* (1790–92) Bell's Octavo Cases 111 and Bell, *Commentaries* (7th edn 1870) I, 413-421 citing, *inter alia*, Pothier, *Traité du contrat de change* (1763) §§ 146–148 for the requisites of protest.

[31] Even if the debtor is illiterate: *Hockley and Papworth v Goldstein* (1920) 90 LJKB 111. Here assignor and assignee knew of the debtor's illiteracy so intimated orally. This was held insufficient.

[32] *W F Harrison & Co Ltd v Burke* [1956] 1 WLR 419.

6-13. As a final point, it may be apposite to mention that Scotland is a small jurisdiction. The rules need to be simple, clear and, above all, certain. The legal system must seek refuge in principle. Whatever those principles are, they must be clear. Formal rules on intimation are unambiguous, practical and provide a certain date of transfer. This is not to say intimation is the only way. There are others, as the position in other European systems demonstrates.[33] The general principle of good faith payment could be given a more leading role at the expense of intimation. But the certainty that intimation gives to the date of transfer would need a replacement. Other systems accord a special role to notaries. The Scottish equivalent is registration in the Books of Council and Session. That is a possibility. But even if Scots law were to replace intimation with registration as the constitutive requirement for assignation, intimation would remain practically necessary.[34] Assignation involves a tripartite relationship. A debtor can be discharged by a good faith payment. An assignee therefore needs a method to place the debtor in bad faith so as to interpel payment to the cedent. And the only practical solution is to intimate:

> 'But it is adviseable to intimate them, to prevent *bona fide* payment, the intent of intimation being not only to complete the right, as is most cases, but likewise to put the party *in male fide* to pay; this last is expedient, where the former is not necessary.'[35]

The issues have not changed since Bankton's time. It is too often forgotten in academic legal discussions that, in practice, almost all assignations are intimated. Even in England, where the flexibility of the equitable assignment is held up as a desired model for law reformers in all jurisdictions, assignments are intimated. Intimation is a practical requirement. And since notices are served daily it is sensible to have rules regulating them.

6-14. An absence of prescribed formalities introduces uncertainty. Even if intimation were abolished as a constitutive requirement in favour of registration, non-constitutive intimation will remain practically necessary. Three possibilities for reform of Scots law might be suggested:

1. If intimation is retained in a registration system, the assignee who chooses to intimate should do so formally, by an extract of the registered deed or other prescribed form.
2. Notice may be made informally. Often these are deliberately ambiguous: technical wording (perhaps unintelligible to the debtor) in illegibly small font. The ambiguity is deliberate because the assignee wants intimation to have legal effect (by interpelling the debtor and cutting off defences), but the cedent is reluctant, for example, for customers to know that their debts are being factored.[36]
3. Intimation is abolished in every sense. It has no effect. This may not be a workable solution; at least not a workable solution in a system containing a general principle of good faith payment. For how can good faith be determined? Complete abolition would require a principle that the debtor is discharged *whosoever* is paid: cedent, assignee, or fraudster.[37]

[33] Notably Germany: see §§ 398 *BGB* ff.

[34] Cf *Principles of European Contract Law*, Art 11:303; UNIDROIT *Principles of International Commercial Contracts* (2004) Art 9.1.10.

[35] Bankton II, 193, 16.

[36] Cf *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592.

[37] As under § 354a *HGB*.

6-15. Perhaps there is a compromise position: assignees who are reluctant to intimate formally still receive protection from the cedent's insolvency (assuming they have registered their assignations), but the price is that they will be subject to debtor's defences that could have been cut off by a formal intimation. In any event, the first of the three possibilities seems the most advantageous. But these are issues of reform which are for the future. For the present, however, attention must turn to the law as it is, warts and all.

C. DE LEGE LATA: GENERAL PART

(1) Jurists

6-16. Intimation of the delivery of the transfer agreement is essential for an effectual assignation. The point is especially well made by Stair:

> 'The assignation itself is not a complete valid right, till it be orderly intimated to the debtor, which, though at first (it is like), hath been only used to put the debtor *in mala fide* to pay the cedent, or any other assignee; yet now it is a solemnity requisite to assignations, so that though the debt remain due, if there be diverse assignations, the first intimation is preferable, though of the last assignation, and that not as a legal diligence, which can be prevented and excluded by another diligence, but as a full accomplishment of the assignation.'[38]

6-17. For Stair intimation was a 'solemnity requisite to assignations', not just the method of putting 'the debtor in male fide'; only on intimation was there a 'full accomplishment of the assignation'. Bankton is similarly unequivocal[39]:

> 'The assignation is not completed by executing and delivering it to the assignee, but it must likewise be intimated to the debtor, till which is done, the cedent is not understood in our law to be denuded. Intimation of an assignation, is "the assignee's giving notice of his right to the debtor", which regularly ought to be done, by causing it read to him, and thereon protesting, that the debtor may not pay the debt to any other … . Any onerous deed, executed by the cedent before intimation, will prejudice the assignee, and a second assignation for valuable consideration, first intimated, will be preferable.'

(2) Assignation and arrestment

6-18. It has been said that an arrestment, *per se*, is a judicial assignation.[40] Although the subject is controversial, this proposition cannot be correct. An intimated assignation operates as a transfer. An arrestment interpels the arrestee from paying his original creditor and it lays a 'nexus' on the arrested claim.[41] Only on furthcoming is the arrestee's obligation (correlatively the common debtor's claim) transferred to the arrester.[42] This judicial assignation is limited to the common debtor's indebtedness to the arrester. Competition between an

[38] III.i.6.

[39] II, 191, 6.

[40] Cf Stair III.i.24.

[41] Cf Stair III.i.39, this proposition is somewhat controversial and reflects the so-called 'attachment' theory. See generally, A J Sim, 'The Receiver and Effectually Executed Diligence' 1984 SLT (News) 25 and G L Gretton, 'Diligence' in *SME* vol 8 (1992) para 285.

[42] Erskine III.vi.17: 'the decree of furthcoming, therefore, whatever the nature of the subject arrested be, is truly a judicial assignation to the arrester of that subject, even before the sentence is carried into execution'. See too Bankton, II, 190, 2 to the same effect.

arrestment and an assignation is settled in this way. A voluntary transfer (by assignation) occurs only on intimation. An arrestment served on the arrestee prior to intimation is preferred.[43] There are illuminating parallels to be drawn between the law of intimation and the law on service of an arrestment although, admittedly, the service of an arrestment is not a precise equivalent of intimation of assignation. French lawyers readily refer to the analogous rules of arrestment (*saisie-arrêt*; now, *saisie-attribution*[44]) for the purposes of intimation (*signification*).[45] In an attempt to distil some common principles, reference will be made to analogous cases dealing with the service of arrestments, charges for payment and summonses.[46]

6-19. Arrestment also provides a useful control for the debate on whether the intimation should be retained as a constitutive requirement. An arrestment must always be served on the arrestee before it takes effect; an assignation must be intimated. If an arrestee is served with an arrestment on day 1 and an intimation of an assignation on day 2, common sense dictates that the arrestment should prevail. What would be the effect of abolition of intimation as a constitutive requirement for assignation on this competition? Put another way, those who would abolish intimation for assignations, by parity of reasoning, should argue for the abolition of service of an arrestment as a constitutive requirement for a valid arrestment.[47] Otherwise, an assignee's creditors will be able to arrest in the hands of the debtor in the assignation though the arrestee (and *debitor cessus*) will not see any connection between the arrester and the common debtor (here, the assignee).[48] The *debitor cessus* in such a case will be understandably reluctant to comply with the arrestment.

(3) Service of an arrestment [49]

6-20. An arrestee may have no actual knowledge of an arrestment. Personal service of an arrestment on a natural person should take place, at common law,

[43] *Strachan v M'Dougle* (1835) 13 S 954 at 959 *per* Lord Gillies and Lord Mackenzie; J Graham Stewart, *The Law of Diligence* (1898) 141. These issues were drawn into sharp focus in *Lord Advocate v Royal Bank of Scotland* 1977 SC 155. But compare *Iona Hotels Ltd (in receivership) v Craig* 1990 SC 330. A summary of the literature is in S Wortley, 'Squaring the Circle' 2000 *JR* 325.

[44] See *Loi no 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution*, Art 42 ff. On *signification* of the *saisie* in terms of Art 43(1), the *saisie* (arrestment) is viewed as a judicial *cession*: J Ghestin, *Le régime des créances et des dettes* (2005) para 324.

[45] Planiol and Ripert, *Traité théorique et pratique de droit civil français* (2nd edn 1954) Tome VII, 499, n 1. It is likely that the Scots law of arrestment also developed under French influence. Indeed, in some parts of France, the term *arrestation* was even used for their *saisie-arrêt*: see F Roger, *Traité de la saisie-arrêt* (2nd edn 1860) 4, n 1; although Kames, *Principles of Equity* (3rd edn 1778) II, 183 suggests Scotland borrowed its law of arrestment from Friesland.

[46] Graham Stewart, *Diligence* 320; Citation Act 1540 (APS, c 10; *12mo*, c 75); The relevant rules for citation are now contained in the appropriate Ordinary Cause Rules and the Rules of the Court of Session.

[47] Admittedly, in Germany for example, debtor notification is required for arrestment (*Forderungspfändung*: § 1280 *BGB*) but not for cession.

[48] Cf R T Troplong, *De la vente ou, Commentaire du titre VI du Livre III du code civil* (4th edn 1845) vol 1 para 882, 383; F Roger, *Traité de la saisie-arrêt* (2nd edn 1860) 194 f.

[49] Cf the formalities in France for *signification*: *Nouveau code de procédure civile* Art 655 ff.

at their dwellinghouse. Service is by a messenger-at-arms or a sheriff officer in the presence of a witness.[50] The officer knocks at the door and requests to see the arrestee. The officer exhibits his warrant, found in the extract decree.[51] If the debtor is not at home the officer should leave the schedule with a servant or relative in the house. The execution should state that the arrestee or debtor could not be personally apprehended. If the officer cannot find anyone at home,[52] he may post the schedule through the door. This must be followed by postal intimation.[53] If the arrestee pays the common debtor in ignorance of the arrestment, he will be protected.[54] There is no requirement for an acknowledgement on service of an arrestment. Proof is afforded by the fact that service is made by an officer of the court.[55]

(4) Intimation and private knowledge

6-21. If the debtor has learned of the assignation before formal intimation has been made to him, can he still pay the cedent? The answer to this question is disputed; the controversy reaches back more than half a millennium.[56] 'Private knowledge' can bear at least two interpretations. First, a wide interpretation: it refers to all the debtor's knowledge of the transfer, howsoever acquired. This encompasses an informal communication from cedent or assignee. A second interpretation narrows the possibilities: it is limited to knowledge that the assignee acquires from extrinsic sources and not from the parties to the assignation.[57] In the Scottish sources, little attempt is made to distinguish between the different types of private knowledge that could be relevant. The question always asked is whether private knowledge of the assignation – howsoever obtained – obviates formal intimation. Some, especially commercial lawyers,[58] favour a wide role for private knowledge. That, however, is not the law.

[50] Debtors (Scotland) Act 1838, s 32.

[51] *M'Killop v Mactaggart* 1939 SLT 65 OH.

[52] At common law six knocks are essential: *Menzies* (1589) Mor 3773; *Stevenson v Innes* (1676) Mor 3788; *Hay v Laird of Pourie* (1680) Mor 3773 and 3790; *Duff v Gordon* (1707) Mor 3775; *Gillies v Murray* (1771) Mor 3795; G Maher and D Cusine, *Diligence* (1991) para 7.09.

[53] Ordinary Cause Rules r 5.4(4); RCS, r 16.12. Cf *Nouveau code de procédure civile* Art 658.

[54] Debts Securities (Scotland) Act 1856, s 1, cited by W A Wilson, *The Scottish Law of Debt* (2nd edn 1991) para 17.5; Stair III.i.40; *Laidlaw v Smith* (1838) 16 S 367 aff'd (1841) 2 Rob 490.

[55] Debtors (Scotland) Act 1838, s 32. But see *Leslie v Lady Ashburton* (1827) 6 S 165. For modern law see RCS, r 16.12 and annotations.

[56] See eg J van de Sande, *Commentarius de actionum cessione* (1674) in English as *Commentary on the Cession of Actions* (trans P Anders, 1906) 12.18 who summarises some of the contradictory sources in the *jus commune*.

[57] Cf *Codice Civile* Art 1264 (Italy).

[58] Cf L Crerar, *The Law of Banking in Scotland* (2nd edn 2007) 552; E-M Kieniger (ed) *Security Rights in Moveable Property in European Private Law* (2004) 571 states that 'in Scotland, the strict requirement for notification has been lessened; today mere knowledge on the part of the *debitor cessus* is probably sufficient'. With respect, that is incorrect. Indeed, a Scottish solicitor who fails timeously to intimate an assignation may have to answer to a charge of professional misconduct or inadequate professional service, or both: (2002) 47/12 *JLSS* 30.

6-22. The common law is unambiguous. Intimation must be notarial:[59]

> 'The knowledge of an assignation made supplies not the necessary solemnitie of intimation thereof…'[60]

> 'Intimation is either made under form of instrument, or by a charge and that which is intimate must be shown. In assignations (albeit known to the cedent's debitor) nothing can put one in male fide to deal with the cedent but a legal intimation.'[61]

6-23. Notarial intimation requires the participation of five people: a procurator[62] of the assignee, a notary public,[63] two witnesses and the debtor. The procurator reads the assignation, or the relevant parts of it, to the debtor, and protests that the debtor 'should hold the same duly and legally intimated, should not pretend ignorance thereof, or of the intimation, and should not make any payment to any other than the assignee, or those in his right'.[64] The procurator then takes instruments in the hands of the notary. This was achieved by presenting the notary with a piece of money, and asking the notary to make out a formal notarial instrument recording what had been done. The debtor is furnished with a 'schedule' of intimation, which includes a copy of the assignation and the date and time of the intimation.[65] This is signed by the procurator and the notary. There is also executed an 'instrument' of intimation which will be retained by the assignee as evidence of the intimation.[66] The notary, procurator and witnesses signed on every page. The witnesses attest not merely to the subscription but also to the facts narrated in the instrument. Provision is made in the Transmission of Moveable Property (Scotland) Act 1862 for notarial intimation, which remains competent.[67] In such circumstances, a properly intimated assignation at common law will almost always have the effect of furnishing

[59] An acknowledgement is not an essential requirement; indeed an acknowledgement is an equipollent to intimation: see para 7-12 below. But compare the opinions of Lord Justice-Clerk Hope in *Wallace v Davies* (1853) 15 D 688 at 696 and *Donaldson v Ord* (1855) 17 D 1053. Both opinions are ambiguous and the reports are unsatisfactory. A formal (i.e. notarised) acknowledgement by the debtor is an alternative to intimation in French law: *Code civil* Art 1690.

[60] Hope, *Major Practicks* II, 12, § 9.

[61] Robert Spotiswoode, *Practicks of the Law of Scotland* (2nd edn 1706) 18. See also Bankton II, 191, 6.

[62] Surprisingly, it never seems to be suggested that the assignee can act for himself. Whether the procurator was properly authorised has given rise to litigation: *Bruce v Smith* (1577) Mor 845; *The Queen and Abbot of Couper v the Laird of Duffus* (1558) Mor 846; *Scot v Drumlanrig* (1628) Mor 846.

[63] The procurator and notary cannot be the same person: *Scot v Drumlanrig*. For the historical distinction between a procurator and a notary public, see Anon, 'The Notary Public' 1970 SLT (News) 77.

[64] A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 311; A Menzies, *Lectures on Conveyancing* (1856) 244; J Sturrock (ed) *Conveyancing according to the Law of Scotland, being the Lectures of the late Allan Menzies* (1900) 284.

[65] Bell, *Lectures* 311; Menzies, *Lectures* 244. See the forms of the schedule and instrument of intimation in J C Murray, *The Law of Scotland relating to Notary Publics* (1890) 77 ff; *Juridical Styles* (3rd edn 1794) vol II, 351; Cf P Gouldsbrough (ed) *Formulary of Old Scots Legal Documents*, Stair Society vol 36 (1985) 3.

[66] Surprisingly, it was held that it was not customary for notaries to insert these instruments into their protocol book: *Chiesly v Chiesly* (1681) Mor 848. For a style schedule of intimation, see Anon, *Ars Notariatus* (2nd edn 1762) 256 ff.

[67] Section 2, discussed in para 6-35 below.

the debtor with *actual* knowledge of the assignation.[68] Common law intimation is clearly cumbersome. It is never used in practice.[69]

6-24. The principle of transfer only on formal intimation is enunciated with admirable clarity in Gloag and Henderson in a passage that has remained unchanged since the first edition of the work:

> 'In a competition between an unintimated assignation and other claims, the defect in the assignee's title due to the absence of intimation will not be cured by the fact that the debtor was aware of the assignation.'[70]

6-25. This is reflected in the opinion of the Lord Justice-Clerk (Miller of Glenlee) in a case cited by Gloag and Henderson:

> 'Private knowledge has never been held sufficient when supported by no writing whatever. It would be dangerous to prove, by witnesses only, that a man had private knowledge of a deed; for knowledge is an act of the mind, and witnesses may differ in their opinion as to what will infer such knowledge. It would be going very far to refer private knowledge even to the oath of the party; for he might say, "I did know so and so; but I relied on the law, which, by assignation intimated, puts me in *male fide*, but not otherwise".'[71]

[68] See *Tod's Trs v Wilson* (1869) 7 M 1100 at 1103 *per* Lord Kinloch: 'Nothing else other than personal intimation will be sufficient. To hold anything else would lead to confusion inextricable'. In the context of bills of exchange compare *Stirling Banking Co v Representatives of Duncanson* (1790–92) Bell's Octavo Cases 111 and *Poor Irvine* (1790–92) Bell's Octavo Cases 120.

[69] Notarial intimation was still used even after the passing of the 1862 Act: in *Watt v Scottish North Eastern Railway Co* (1866) 4 M 318 at 320, Lord President M'Neill narrates that the assignation in question was intimated notarially. Cf *Mackintosh's Trs v Davidson and Garden* (1898) 25 R 554 regarding the Act of Sederunt of 19 February 1680 which requires notarial intimation on inhibition of an heritable creditor. G L Gretton, *The Law of Inhibition and Adjudication* (2nd edn 1996) 154–155 expresses no view as to whether the Act of Sederunt is still in force; McBryde, *Contract* (2nd edn 2001) para 12-132 refers to it without comment but now doubts whether it is still in force: 3rd edn 2007, para 12-103.

[70] *The Law of Scotland* (12th edn 2007) para 33-06; to which is footnoted: '*Lord Rollo v Laird of Niddrie* (1665) 1 Br Supp 510. It would seem (although the point is not altogether clear) that, according to the decisions even where there is no such competition, the debtor's knowledge of the assignation will not render him liable to the assignee if he pay the debt to the cedent while no intimation has been given. Stair II.i.24; More's Note CCLXXXI; Bell, *Commentaries* II, 18; *Dickson v Trotter* (1776) Mor 873; *Faculty of Advocates v Dickson* (1718) Mor 866; *Lord Westraw v Williamson & Carmichael* (1626) Mor 859; *Adamson v McMitchell* (1624) Mor 859; compare *Leith v Garden* (1703) Mor 865 and Erskine III.v.5'.

Cf Mackenzie, *Inst* III.v.6: 'The debtor's private knowledge is not equivalent to an intimation'; W Forbes, *The Institutes of the Law of Scotland* (1722) vol 1, Pt III, Bk 1, Tit 2 § 1(3): 'But his private knowledge of the assignation is not sufficient'; Bell, *Commentaries* II, 18: 'mere private knowledge is not enough'. In a recent case, however, a proof before answer was allowed on the averment that the debtor had private knowledge of the assignation as a result of informal letters sent to him by the assignee: *Safdar v Shahid* 2004 GWD 28-586. Gloag and Henderson's position is also the position in contemporary French law: F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (9th edn 2005) para 1282: '[la jurisprudence] refuse… de prêter effet à la preuve de la simple connaissance par le débiteur cédé de l'existence de la cession'. But French law has oscillated more than Scots law on the role of intimation: see M Merlin, *Réparatoire universel et raisoné de Jurisprudence* (5th edn 1827) vol XVIII, 'Transport'.

[71] *Dickson v Trotter* (1776) Mor 873; 18 January 1776 FC; Hailes 675 at 675–676. This dictum reflects the position set out in the anonymous work, *Ars Notariatus, or The Art and*

6-26. It is sometimes asserted[72] that intimation is required only in a competition between antagonistic assignees, but that as between the cedent and the assignee, intimation is not required:

> 'But the debtor's private knowledge of the assignation is not sustained as intimation; since that imports neither publication nor possession on the part of the assignee. This doctrine is however confined to the case where there is a competition of creditors; for where there is no creditor in the field, and the sole question is between the assignee and the debtor, the debtor's private knowledge of the conveyance is a sufficient interpellation to him, and puts him *in mala fide* to make payment to the cedent.'[73]

6-27. Such an approach cannot be accepted. As Erskine recognises, an unintimated assignation is liable to be defeated by the cedent's bankruptcy.[74] Suppose, then, that the debtor has private knowledge of the assignation but, before intimation, one of the cedent's creditor's arrests? If the *debitor cessus* is *in mala fide* to pay the cedent, must the arrestee not also be *in mala fide* to

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Office of a Notary Public, as the same is practised in Scotland (1740) 227; (2nd edn 1762) 252. See too the argument in *Charteris and Middleton v Sinclair* (1707) Mor 2876. Compare Stair II.i.24: 'But private knowledge upon information, without legal diligence, or other solemnity allowed in law, *at least unless private knowledge be certain*, it is not regarded and nor doth constitute the knower in *mala fide*' (emphasis added). It is not clear what Stair means by the italicised passage. Cf J Rankine (ed) *Erskine's Principles of the Law of Scotland* (21st edn 1911) 525, which suggests that private knowledge is not enough to effect a transfer, but that it may be enough to bar the debtor paying the cedent and E M Wedderburn, 'Assignation' in Lord Dunedin et al (eds) *Encyclopaedia of the Laws of Scotland* vol II (1926) 8.

[72] This argument is originally based on *Leith v Garden* (1703) Mor 865 and approved by Erskine III.v.5. The earlier case of *Stirling v White and Drummond* (1582) Mor 1689 and 7127 involved payment by the debtor in breach of an interdict, the knowledge was therefore judicial and thus certain rather than private. Cf McBryde, *Contract* para 12-85, n 293 citing *Cochrane v Cochrane* (1836) 14 S 1040 at 1046–1047 *per* Lord Gillies; McBryde *Contract* (2nd edn 2001) para 12-114, n 99 and (3rd edn 2007) para 12-95, n 325; *Donaldson v Ord* (1855) 17 D at 1062 *per* Lord Deas (Ordinary). Cf Hope, *Major Practicks* II, 12, § 7.

[73] Erskine III.v.5. See also Erskine *Principles*, cited in para 6-25 above; and Stair, *Inst* (1681) Part II, title xxiii at 15 to the same effect. Such an approach has also been suggested in France where *cession de créance* is seen as a sale. Sale is effected *solo consensu*. The cessionary becomes the creditor on the conclusion of the agreement. Signification is required only to render the cession opposable against third parties, including the debtor: see eg Terré et al, *Les obligations* para 1289; H de Page, *Traité élémentaire de droit civil belge* (3rd edn 1967) vol III, 360 (Belgian law now requires only simplified notification to interpel the debtor; the cession is otherwise opposable against fourth parties on conclusion of the transfer agreement): *Code civil belge* Art 1690. Cf para 7-25 below.

[74] Bankruptcy (Scotland) Act 1985, s 31(4); *Wood v Weir* (1900) 16 Sh Ct Rep 356; Bell, *Lectures* 310; *Tod's Trs v Wilson* (1869) 7 M 1100; *Struthers v Commercial Bank* (1842) 4 D 460 at 467 *per* Lord Fullerton; *UK Life Assurance Co v Dixon* (1838) 16 S 1277 following *Strachan v M'Dougle* (1835) 13 S 954; *Freugh* (1714) Kames *Dictionary* vol 1, 92; *Burnet v M'Lellan* (1685) Mor Sup Vol 'Harcase' 53. The holder of an unintimated assignation cannot rank on the debtor's bankrupt estate: *Glen v Borthwick* (1849) 11 D 387 at 389 *per* Lord Robertson (Ordinary); *Taylor v Drummond* (1848) 10 D 335. Cf Pothier, *Traité du contrat de vente* (1762) § 556 in M Bugnet, *Œuvres de Pothier* (1861) vol 3, 220. Bugnet points out in n 2 that the introduction of the principle in French law that property passes *solo consensu* probably renders Pothier's view outdated. Cf J L Baudouin and P G Jobin, *Les obligations* (5th edn 1998) para 907. For many, the advantage of the equitable assignment in English law is that the assignment will prevail over the creditors of the cedent. Until 1986, however, where the assignor was a natural person, the assignee may not have prevailed on the assignor's bankruptcy without notice to the debtor: Bankruptcy Act 1914, s 38.

pay the arrester?[75] The arrester's position is no better than the common debtor's.[76] Further, if the debt cannot be effectually arrested by the cedent's creditors, Erskine's view is contradictory. On one view, only an intimated assignation will protect against the cedent's creditors; on the other, an unintimated assignation will defeat an arrestment where the debtor has private knowledge of the assignation. Unsurprisingly, therefore, the law has not followed Erskine's approach: prior to intimation, the cedent's creditors can still arrest in the hands of the *debitor cessus*.[77] The debtor's private knowledge is irrelevant.[78] The position is the same where the cedent grants a second assignation of the same claim before the assignee of the first assignation has intimated: 'Any onerous deed', says Bankton, 'executed by the cedent before intimation, will prejudice the assignee'.[79] It is incontrovertible that the date at which the assignee becomes the creditor in the debtor's obligation is the date on which the requisite intimation is made to the debtor.[80] Notarial intimation at common law, an equipollent, or intimation in terms of the 1862 Act, is required in Scotland to *transfer* the claim being assigned, not merely to place the debtor *in mala fide* to pay the cedent.[81] Looking abroad, some legal systems have dispensed with formal notification requirements to effect a transfer.[82] Transfer is effected by mere agreement. This binds all except the *debitor cessus*; if the latter pays the cedent in good faith prior to notification he will be discharged.

6-28. The date of the transfer is also of importance where the cedent becomes insolvent and the *actio Pauliana* applies.[83] Scots law has oscillated in its approach to the relevant date for the purposes of the *actio Pauliana*. At the beginning of the nineteenth century, Bell advanced the view that the date of intimation was the relevant date:

> 'But questions have arisen, respecting the dates of conveyances of moveables; and these, I now proceed to explain: Debts are conveyed by assignation; and the assignation is held to be complete, only when it has been intimated to the debtor. Now, although the statute [1696 Act] made no exception to the rule, that the date of the conveyance itself should regulate computation of the sixty days,[84] excepting

[75] *Burnett's Tr v Grainger* 2004 SC (HL) 19 holds that creditors who have knowledge of competing creditors' rights cannot be penalised. The debtor in an assignation, however, is not a competing creditor, but a passive party.

[76] Graham Stewart, *Diligence* 233.

[77] *Strachan v M'Dougle* (1835) 13 S 954; *Creditors of Benjedward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 *per* Lord Kames; *Graham v Campbell* (1724) Mor 2776.

[78] For which, see below.

[79] III.i.7. See also Erskine, III.ii.43 and 44: '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'. Cf *M'Gill v Laurestoun* (1558) Mor 843.

[80] *Scot v Lord Drumlanrig* (1628) Mor 846; *Creditors of Benjedward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 *per* Lord Kames; authority cited at notes to para 6-27; *Campbell's Trs v Whyte* (1884) 11 R 1078.

[81] *Liquidators of Union Club Ltd v Edinburgh Life Assurance Co* (1906) 8 F 1143 at 1146 *per* Lord McLaren.

[82] Eg *Code civil belge*, Arts 1689 and 1690; *Code civil luxembourgeois*, Art 1691. Cf Louisiana Civil Code, Art 2643, introduced in 1995. See also *Code civil du Québec* Art 1641 and *Principles of European Contract Law*, Art 11:303(4).

[83] Bankruptcy (Scotland) Act 1985, ss 34, 36 and Insolvency Act 1986, ss 242, 243.

[84] The period is now six months in the case of unfair preferences: 1985 Act, s 36 and 1986 Act, s 243; and two years or five years in the case of gratuitous alienations: 1985 Act, s 34 and 1986 Act, s 242.

> only in the case of seisine, the idea was not perhaps unnatural, of extending the spirit of this exception, to the case of assignations; for, when the act speaks of 'dispositions, assignations etc made and granted', it may be understood well to mean, complete and effectual deeds, having the force of conveyance; which an assignation has not, till intimated. The debtor himself, and his heirs, are indeed, barred by personal exception from objecting to the conveyance; but it has no effect in competition with any other diligence or voluntary right, completed before it. Till intimation, the assignation is an unfinished, ineffectual conveyance and therefore, independently of any idea of publication to the creditors at large, an assignation seems hardly, even under the words of the act, to entitle the creditor to found on it as a conveyance, till it be intimated. In the case of *Hay against Sinclair & Co*[85] already quoted upon another point, the Court found the date of the assignation, not that of the intimation to be the rule.'[86]

6-29. Over the course of the nineteenth century, however, the courts wrestled with various alternatives. One difficult situation arose where there was a contract to give security for a debt if asked, but this was asked for within the sixty days. Was the delivery of an assignation pursuant to this obligation a voluntary act?[87] The authorities cannot be reconciled.[88] There are a number of possibilities.[89] The contract to transfer could fall outwith, but delivery of the assignation and intimation within, the sixty days; or the contract and delivery of the assignation could be outside the sixty-day period, but the intimation within. Wherever the contract is outside the sixty days, it has been argued, the transaction cannot be reduced because the bankrupt does no voluntary act within the sixty days;[90] or delivery is voluntary, but intimation is not an act of the bankrupt;[91] alternatively, delivery and intimation are voluntary acts of the bankrupt.[92]

[85] *Hay v Sinclair & Co*, 8 July 1788 FC; Mor 1194; Hailes 1046. See also *Scottish Provident Institution v Cohen* (1888) 16 R 112 at 117 *per* Lord President Inglis, followed in *Caledonian Insurance Co v Beattie* (1898) 5 SLT 349 OH.

[86] G J Bell, *A Treatise on the Law of Bankruptcy* vol I (1800) 188.

[87] *Gibson v Forbes* (1833) 11 S 916 at 929 *per* Lord Fullerton followed by the consulted judges in *Taylor v Farrie* (1855) 17 D 639 at 650–651. Curiously, the wrong statute is reported to have been cited in argument in *Taylor*, the Session Cases report indicating that reference was made to 54 Geo III, c 87: the Duties on Glass (Ireland) Act 1814!

[88] *Moncreiff v Hay* (1851) 14 D 200 at 203–204 *per* Lord Fullerton: 'It would be a fruitless task to attempt to reconcile the various decisions pronounced at different times on this much vexed question'. Cf Bell, *Commentaries* (7th edn 1870) II, 207 and Bankruptcy (Scotland) Act 1913, s 4; Bankruptcy (Scotland) Act 1856, s 6. For the position of *nova debita*, see *Houston & Co v Claud and Charles Stewarts* (1772) Hailes 468, especially *per* Lord Gardenston and Lord Pitfour at 469; D Antonio, 'Nova Debita' 1956 SLT (News) 13 and *MacArthur v Campbell's Tr* 1953 SLT (Notes) 81. But compare *Creditors of Menzies* (1715) Mor 981. In France, it seems that the date of the deed, not the date of the intimation, is the relevant date for insolvency purposes. But this may stem from the fact that cession is seen as a sale in French law. See generally, J B Blaise and R Desgorces, 'Die Forderungsabtretung im französischen Recht' in Hadding and Schneider at 258. But compare, by analogy, Art L 621-50 *Code du commerce*.

[89] Cf W M Gloag, 'Securities' in Lord Dunedin et al (eds) *The Laws of Scotland* vol 13 (2nd edn 1932) para 784.

[90] *Taylor v Farrie* (1855) 17 D 639 at 648–649 *per* Lord President M'Neill and Lords Ivory, Curriehill, Deas, Handyside, Neaves, Benholme and Ardmillan; Gloag, 'Securities' in Dunedin et al, *The Laws of Scotland* vol 13, para 836.

[91] See, in particular, the argument by John Inglis, then Dean of Faculty, in *Taylor v Farrie* (1855) 17 D 639 at 643.

[92] Erskine III.vi.19 quoted but queried in *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at 170 *per* Lord President Emslie.

Whatever the older authorities may say, the wording of the Bankruptcy (Scotland) Act 1985 is explicit.[93] The relevant date is the day on which the alienation becomes 'completely effectual'.[94] And the rationale for this provision is no different from that which underlay the corresponding section in the 1839 Act:

> 'These enactments passed in 1839, have applied the axe to the root of the evil. They will check and put an end to the many unseemly attempts previously made to defeat the important Act of 1696, by deeds executed on the eve of bankruptcy, under the professed authority of personal and latent obligations at a prior period. For every conveyance and assignation is now to be held of the date of the sasines and intimation of the assignation respectively.'[95]

(5) Intimation by whom?

6-30.

> 'The deed to be intimated is the assignee's. He is the party interested in completing his own title; and though, no doubt, intimation given in due form by the cedent, and proved in writing, would be good and effectual, the proceedings heretofore in use to be adopted in intimations have been always, and in strictly correct principle, in name or on behalf of the assignee.'[96]

There are only two cases where intimation by the cedent has been held good.[97] There are another two cases which seem to hold that there need not be delivery of the assignation, providing there is intimation.[98] Such a proposition,

[93] See W W McBryde, *Bankruptcy* (2nd edn 1995) paras 12-114 to 12-116 and references there cited.

[94] Bankruptcy (Scotland) Act 1985, s 34(3): 'The day on which the alienation took place shall be the day on which the alienation becomes completely effectual' applied in *Accountant in Bankruptcy v Orr* 2005 SLT 1019 OH. See also 1985 Act, s 36(3) and Insolvency Act 1986, ss 242(3) and 243(3). See too *Grant's Tr v Grant* 1986 SLT 220, decided under the Bankruptcy (Scotland) Act 1913. An arrestment served sixty days before liquidation is good: *Commissioners of Customs and Excise v John D Reid Joinery Ltd* 2001 SLT 588; but an arrestment served sixty days before receivership is not 'effectually executed diligence': *Lord Advocate v Royal Bank of Scotland* 1977 SC 155. Cf *Houston & Co v Claud and Charles Stewarts* (1772) Hailes 468 especially *per* Lord Pitfour: 'An antecedent obligation is good against inhibition, but not against bankruptcy. An actual formal security granted before bankruptcy is good for nothing, if security is not given till after bankruptcy. Shall we say that an obligation to dispone is of more weight than an actual disposition?' A point often overlooked is that the common law (where there are no time limits) has not been superseded: *Johnstone v Peter H Irvine Ltd* 1984 SLT 209 and *Bank of Scotland, Petrs* 1988 SLT 690.

[95] *Moncreiff v Hay* (1851) 14 D 200 at 205 *per* Lord Cunninghame on Bankruptcy (Scotland) Act 1839 (2 & 3 Vict c 41), s 35.

[96] Bell, *Lectures on Conveyancing* 310.

[97] *A v B* (1540) Mor 843 and *Libertas Kommerz GmbH v Johnson* 1977 SC 191 OH. It is likely that *A v B* is the same case found in Sinclair's *Practicks* No 107. Cf *Wylie's Trs v Boyd* (1891) 18 R 1121 at 1126 *per* Lord Kincairney (Ordinary) and *Paul's Tr v Paul* 1912 2 SLT 61 OH where proof was allowed on the allegation that the cedent had been fraudulent in failing to intimate the assignation.

[98] *M'Lurg v Blackwood* (1680) Mor 845 approved in *Jarvie's Tr v Jarvie's Trs* (1887) 14 R 411 at 416 *per* Lord President Inglis. Inglis' *dictum* is *obiter*. *Bain v McMillan* (1678) Mor 9128 may be a third case. *Smith v Place D'Or 101 Ltd* 1988 SLT (Sh Ct) 5, cited by Reid, *Property* (1996) para 655, n 14 and McBryde, *Contract* para 4-30, n 70 and para 12-83, n 273, involved a lease which may have specialities.

however, cannot be correct.[99] First, it conflicts with the law on delivery of deeds. Secondly, without delivery of the assignation the assignee cannot effect intimation because he cannot exhibit a copy of the assignation to the debtor.[100] From the converse perspective, the debtor will be wary of paying a creditor who claims to be an assignee without that person producing some sort of deed: 'knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in mala fide*'.[101] Thirdly, the proposition conflicts with the opinion of Bankton who rightly holds that if the cedent 'retain the writings in his own hand, he is not understood divested, since the assignation is still in his power, and which he may destroy'.[102] Indeed, in one old case, the date of intimation, made initially by the cedent, was postponed until the deed of assignation was delivered to the assignee.[103] Certainly, in the case of the double assignation of the same right, priority is always regulated by the first intimation *by the assignee*.[104]

6-31. This view is consistent with an important legal principle: the assignee cannot have the claim transferred into his patrimony without his consent, or at the time he chooses to effect a transfer. But this view also poses one important problem. To the debtor, the assignee is an unknown quantity, a stranger. The Scottish authorities hold that if the debtor pays the cedent after intimation (assuming that he has actually received it), the debtor will not be discharged. Do these rules not perhaps expect too much of the debtor? It took some of the

[99] E M Clive, *The Law of Husband and Wife in Scotland* (4th edn 1997) para 14.064 comments that, 'The law in this whole area seems incoherent'.

[100] The failure to exhibit a copy of the assignation was fatal in *Forbes v Watson* (1714) Mor 3687, 3753 and 7173 where the intimation was edictal. Cf Stair III.i.45.

[101] Lord Kames, *Principles of Equity* (2nd edn 1767) 61; (3rd edn 1778) 59; *Lawrie v Hay* (1696) Mor 849; *Gallemos Ltd (in receivership) v Barratt Falkirk Ltd* 1989 SC 239 at 242 *per* Lord Dunpark. Kames' view is particularly important since he was of opinion that equity should ameliorate the common law necessity of *notarial* intimation. In *Rodgerson Roofing Ltd v Hall & Tawse Scotland Ltd* 2000 SC 249, the First Division held that there could still be a preliminary proof even where the putative assignee had not produced his assignation in an arbitration; the respondents were not prejudiced because they could obtain an order for recovery of any documents in the assignee's hands or the proceedings could be sisted until it was produced. In modern German law, cession occurs by mere agreement. But the debtor is not obliged to pay until the assignee provides a copy of the cession: § 410 *BGB*. Failing which, the debtor will be free to pay the cedent (assuming the cedent has not intimated): see, generally, K Luig, 'Zession und Abstraktionsprinzip' in H Coing and W Wilhelm, *Wissenschaft und Kodifikation des Privatrechts im 19 Jahrhundert* (1977) 112 at 137. Cf M Planiol and G Ripert, *Traité théorique et pratique de droit civil français* (2nd edn 1954) vol 7, 497, n 2.

[102] III, 191, 7; and see III, 202, 46. See too Erskine III.ii.43. Admittedly, if there has been a transfer (i.e. an intimated assignation), it is not clear why subsequent destruction of the assignation is of much relevance. See also, Macvey Napier, *Lectures on Conveyancing*, 202: 'Intimation requires to be done in the name of the assignee, a statement so long and so well established as to make it difficult to conceive how a lawyer like Lord Kames could fall into the error of saying (*Elucid*. No 39) that the intimation should be made in the name of the creditor'. The citation from Kames does not seem to deal with the point. In any event, the use of the term 'creditor' is ambiguous. Before intimation, the cedent is creditor; on intimation, the assignee becomes the debtor's creditor.

[103] *Hisselside v Littlegill* (1685) Mor 11496; Sup Vol 'Harcase' 25. It is on citation of this case that Erskine, *Principles* III.v.2 states that 'Assignations must not only be delivered to the assignee, but intimated *by him* to the debtor' (my emphasis).

[104] Cf P van Ommeslaghe, 'Le Nouveau Regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 533, No 12.

most learned jurists in Europe and England some fifteen hundred years to admit the transfer of claims. Their view was that contracting parties expect to pay only their co-contractor. Might this not be the view of ordinary contract debtors? It is notification from a stranger with which the debtor must comply. If the debtor ignores the assignee's intimation, the debtor is not discharged. Only if considerable formal requirements for intimation are retained is it realistic to expect debtors to understand fully the important legal consequences intimation has for them. And any formal notice must contain writing signed by the cedent, usually a copy of the executed assignation, the cedent being the one party known to the debtor.[105]

6-32. There are also older cases which suggest that inter-spousal assignations require no delivery since a husband is custodian of his wife's deeds.[106] This rule has probably been superseded. But since delivery is a question of fact, it may well be that delivery between cohabiting spouses could be entirely notional.[107] Generally speaking, an assignee must, at the very least, have passive legal capacity[108] to take the rights granted to him by the cedent. If ordinary legal capacity were required to make intimation, however, mere passive capacity would not be enough.

6-33. Can an assignee have a representative intimate on his behalf? An assignee with capacity may voluntarily appoint a representative, such as an agent, a notary or a sheriff's officer. Where the assignee lacks capacity but there is no appointed guardian and time is of the essence, intimation can be made on the assignee's behalf on the basis of the general principle of *negotiorum gestio*.[109]

(6) The Transmission of Moveable Property (Scotland) Act 1862

6-34. The genesis for a statute regulating the intimation of assignations is mysterious. There is no trace of any recommendation in the four *Reports of the Law Commissioners of Scotland* chaired by George Joseph Bell in the 1830s. The Bill was introduced to Parliament by James Moncreiff,[110] the Lord Advocate, who, unusually, was concurrently the Dean of Faculty.[111] He was assisted in its preparation by David Mure, later Lord Mure,[112] and another legally-qualified

[105] Cf D Medicus, *Schuldrecht I, Algemeiner Teil* (16th edn 2005) Rn 741. In practice a copy of the assignation is rarely intimated to the debtor. Instead a notice signed by the cedent is served on the debtor by the assignee.

[106] Eg *Munro v Munro* (1712) Mor 5052.

[107] See generally, Clive, *Husband and Wife* para 14.035.

[108] See D N MacCormick, 'General Legal Concepts' in *SME*, vol 11 (1989) para 1035.

[109] In *Cockburn v Craigivar* (1672) Mor 11493; 2 Stair 56, intimation was made in the name of a third party acting as *negotiorum gestor* for the assignee.

[110] Moncreiff was then MP for Edinburgh.

[111] Moncreiff was appointed Lord Justice-Clerk in 1869. As Lord Advocate, he was responsible for the passage of many important pieces of Scottish legislation. See generally G F Millar, 'Moncreiff, James Wellwood, first Baron Moncreiff of Tulliebole (1811–1895)', *DNB* (2004); and (1895) 11 *Scottish Law Review* 153. The link between the Moncreiff family and the Scots law of assignation extends further. After the death of Moncreiff's brother in 1895, the purported assignation of rights conferred by his brother's will even reached the First Division. Somewhat ungratefully, the Division declined to decide the intimation point: see *Moncreiff's Tr v Balfour* 1928 SN 139 aff'g 1928 SN 64 OH.

[112] MP for Bute. He had also been Solicitor-General from 1858–59 and, briefly, Lord Advocate for almost three months in 1859. See F J Grant (ed) *The Faculty of Advocates in Scotland 1532–1943 with Genealogical Notes*, (Scottish Record Society CXLV, Edinburgh, 1944).

MP, Alexander Dunlop, the Dunlop of *Session Cases* fame.[113] The Bill had its first reading on 10 March 1862,[114] and a second reading on Thursday 3 April, where it was remitted to a committee of the Whole House. It was finally considered on Monday 12 May. It was read for a third time on Wednesday 14 May whereupon it was sent to the Lords and passed without amendment on 31 July. The unamended Bill received Royal Assent on 7 August 1862. It is perhaps justifiable to infer that the legislation was not subjected to great scrutiny.[115]

6-35. The Act allows assignations to be validly intimated in two ways.[116] First, by a notary public delivering a copy of the assignation, certified as correct,[117] to the debtor.[118] This essentially supersedes the common law on notarial intimation. A written certificate in the form annexed to the Act[119] is sufficient evidence of intimation having been made. Secondly, it allowed the holder[120] of an assignation, or any person authorised by him, to transmit to the debtor by post a copy of the assignation.[121] Intimation may be made to a debtor with more than one address at either.[122] In order to prevent good faith payment to the cedent, however, good practice demands intimation is made to both. A written acknowledgement by the debtor is sufficient evidence of intimation having been duly made.[123]

[113] He was then MP for Greenock. Along with Patrick Shaw, Dunlop was one of the first editors of the *Session Cases*: see G F Miller, 'Dunlop, Alexander Colquhoun-Stirling-Murray (1798–1870)', *DNB* (2004). The twenty-four volumes of the *Session Cases,* from 1838 to 1862, are to this day cited by a volume number and the letter 'D' for Dunlop. The last MP with responsibility for the preparation of the Bill was the Member for Perth, Arthur F Kinnaird: see F Prochaska, 'Kinnaird, Arthur Fitzgerald, tenth Lord Kinnaird of Inchture and second Baron Kinnaird of Rossie (1814–1887)', *DNB* (2004).

[114] See 10 March 1862, *Commons Journal* 88.

[115] Eg, the Bill is reproduced without comment in the first issue of the *Scottish Law Magazine*: (1861) 1 *Scottish Law Magazine* 31. The Act as passed is reproduced, again without comment, at 55.

[116] Section 2.

[117] The Act does not enlighten us as to *who* is competent to certify the copy of the assignation as correct. It is perhaps implicit that a notary is to certify the copy as correct.

[118] The precise wording of the Act is 'the person or persons to whom intimation may in any case be requisite'.

[119] See Schedule C. Compare the modern intimation *pro forma* provided in the annexes to French *Décret no 81-862 du 9 septembre 1981*, reproduced in Art L 313-25 *code monétaire et financier*.

[120] This term is undefined in the Act. Such a term could include the cedent.

[121] There is a tension here between the formalities required for a valid intimation and those for execution. The Requirements of Writing (Scotland) Act 1995, s 11(3)(a) states that no writing is required for an assignation. While that may be so, it is (almost) impossible to intimate an assignation without writing. So while the obligationary agreement does not require writing, the transfer agreement does. See *Roadvert Ltd v Pitt* 2002 SCLR 323 OH.

[122] Cf *Irvine of Kincoussie v Deuchar of Comrie* (1707) Mor 3703; *Baillie of Lamingtoun v Menzies (of Culterallers)* (1710) Mor 3704; *Home v Creditors of Lady Eccles* (1725) Mor 3704; *Douglas and Heron v Armstrong* (1779) Mor 3700; *Macdonald v Sinclair* (1843) 5 D 1253 and a contributed note at 1981 SLT (News) 293 and reply at 1982 SLT (News) 65. There may be international private law issues if the debtor, though he has a residence in Scotland, is not domiciled in Scotland for the purposes of citation: *Trowsdale's Tr v Forcett Railway Co* (1870) 9 M 88 at 93 *per* Lord Cowan.

[123] Since such an acknowledgement is only 'sufficient' evidence, other adminicles may be relevant, eg a recorded delivery receipt. That, however, proves only that the intimation was

(7) Competition

6-36. Fundamentally, the last point highlights that the 1862 Act is not clear as to the exact moment of intimation. In particular, the Act does not spell out whether there is valid and effectual intimation on posting of the intimation to the debtor or whether actual receipt by the debtor must be established. If the Act is to be assumed to have introduced a change in the law, then the former position must have been intended. If so, then the potential of payment being made by a debtor to the cedent in good faith, though there has been a proper intimation to the debtor, is greatly increased. The Act did not supersede the common law forms of intimation (where an acknowledgement from the debtor is usually obtained).[124]

6-37. Intimation may be constitutive without being informative. Formal intimation may be good for purposes of competition though the debtor may be ignorant of it. An ignorant debtor is not interpelled and may validly pay the cedent in good faith. On competition, in contrast, the moment of formal intimation rules, not the debtor's knowledge. The date of intimation is the date of receipt, not the date of posting. There is a presumption that the debtor received the intimation on the day following posting.[125] For assignations in security made by companies, which require to be registered in the Register of Companies, the Registrar will accept a recorded delivery receipt as evidence of the intimation being duly made.[126] A disadvantage of standard postal intimation is that there may be no record of the precise time of intimation. Intimation by registered post is preferable. Delivery is made against signature. And the postman notes the time. A competing arrestment, served personally on the arrestee by a court officer, contains the precise time of arrestment. On competition, the earlier is preferred.[127] For Stair, preference required a discernible gap of three hours between the intimation and arrestment, otherwise ranking was *pari passu*.[128] But the better view is that 'when we go to examine minutes and hours, there must be a demonstrative priority: without that arrestments must come in *pari passu*'.[129]

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delivered, not that it has been read by the debtor. Note that Interpretation Act 1978, s 7 has no application to the 1862 Act, it being prior to 1889: Interpretation Act 1978, s 22(1) and Sch 2, para 3. Interpretation Act 1889 does not apply to pre-1889 Acts: s 26.

[124] Section 3.

[125] This follows the law of citation in the Court of Session: RCS, r 16.4(6); and the Sheriff Court, OCR, r 5.3(2). Cf *Alston v MacDougall* (1887) 18 R 78; *Smith v Conner & Co Ltd* 1979 SLT (Sh Ct) 25.

[126] 'Registrar of Companies: Assignations in Security' 1983 SLT (News) 173. However, strictly speaking, if the date following the date of posting is supposed to be the effectual date of notice, the twenty-one days run from the day after the date stamped on the recorded delivery receipt.

[127] *Rollo v Brownlie* (1676) Mor 2653; 2 Stair 436; *Davidson v Balcanqual* (1629) Mor 2773. However, in *Inglis v Edwards* (1630) Mor 2773 the arrestment and intimation bearing to be made on the same day they ranked *pari passu*. In *Adie v Scrimzeor* (1687) Mor 2775 only the intimation bore to have been made at a particular hour. The arrestee deponed that the arrestment had been first. The court ordered that assignee and arrester rank *pari passu*.

[128] Stair IV.xxxv.7 and followed in *Douglas v Mason* (1796) Mor 16213. Cf R Spotiswoode, *Practicks of the Law of Scotland* (1706) 19 discussing a case involving *Robert Balcanqual*, 30 January 1629, *sub nom Balcanqual v Davidson* (1629) 1 Br Sup 165.

[129] *Wright v Anderson and Laurie* (1774) Mor 823; Hailes 558 at 558 *per* Lord Pitfour; *Cameron v Boswall* (1772) Mor 821; Hailes 470 *per* Lord Kennet, disapproving Stair. *Cameron* was approved in *Gibson & Balfour v Goldie* (1779) Mor 824; Hailes 828 by Lord Hailes.

In *Cust v The Carron Company*[130] it was held that the same principles apply to the competition between intimation of an assignation after the death of the cedent and the confirmation of an executor-creditor:

> 'A *pari passu* preference is given when the court cannot know which competitor is preferable. When there is a probability, or even a possibility, that the diligence in appearance posterior may be the first, the Court will give a *pari passu* preference, because it must determine, and in such cases knows not how to determine, otherwise than by dividing the subject in controversy. In this case I have no doubt that the assignation was completed before the confirmation was expede … Lord Stair wished that no time less than three hours might be regarded: he meant that there should be such interval as to prevent all ambiguity. What he wished for is *here* – if the assignation must have been at nine at the latest, and the confirmation at ten at the earliest, the priority is as exactly ascertained as if the assignation had been twenty-four hours before the confirmation.'[131]

6-38. Valuable consideration for the assignation will not supply the want of intimation. Unlike the position in English law, payment of the price for the assignation does not create a trust, constructive or otherwise. In *Robertson v Wright*,[132] Lord President Inglis suggested that a trust may be involved in an assignation. This would have important consequences for competition. But while Inglis' dictum is sometimes referred to, it is, with respect, incorrect.[133] Lord Inglis is reported to have opined:

> 'It is no doubt the effect of an intimated assignation of a *nomen debiti*, that the debtor becomes the debtor of the assignee, and *the creditor* becomes entitled to recover his debt *from him* just as *he* could have recovered it from the cedent. And so in the case of an assignation of a fund the assignee becomes on intimation *the owner of the fund, and the holder of it a trustee for the assignee*, and liable to account to him alone. But the reason why in these cases the intimation has such an effect is, that the person to whom it is made is under a legal obligation to the cedent.'[134]

6-39. The passage is unintelligible. First, the reference to creditor must be to the assignee. But an assignee will not always be the creditor of the cedent: an assignation can be gratuitous. Secondly, the reference to 'from him' must be a reference to the debtor. Thirdly, assignation does not transfer ownership of anything. It transfers claims.[135] Fourthly, the reference to a trust is incomprehensible. Lord Inglis is suggesting that on intimation of the assignation the debtor becomes trustee for the assignee. But a trustee of what? The transferred right is a liability as far as the debtor is concerned. A trust must have assets. I

[130] *Cust v The Carron Company* (1774–75) Mor 2795; Hailes 627. See also *Smith's Trs v Grant* (1862) 24 D 1142.

[131] *Cust* Hailes 627 at 629 *per* Lord Hailes. See too F Roger, *Traité de la saisie-arrêt* (2nd edn 1860) 197, para 212 to the same effect. Cf *Sutie v Ross* (1705) Mor 816; 28 June 1705, Forbes Dec. In *Sutie*, two arrestments made on the same day were ranked *pari passu* although one of the arresters offered to prove the hour of service. The court commented that witnesses are apt to mistake or forget times. This view of witnesses is outdated and proof would now be admitted.

[132] (1873) 1 R 237.

[133] McBryde, *Contract* para 12-27 quotes selectively from Inglis' opinion.

[134] At 245, emphasis added. This idea was not conjured up by Lord Inglis. Earlier authorities are similar: see, eg, *Brierly v McIntosh* (1843) 5 D 1100.

[135] As to whether rights can be owned, see para 1-09. Cf F A Mann, *The Legal Aspect of Money* (5th edn 1992) at 5: 'Bank accounts, for instance, are debts, not money and deposit accounts are not even debts payable on demand'.

cannot create a trust in favour of another over my liabilities.[136] Furthermore, an assignation is the transfer of a claim against a debtor without the consent of the latter. Any trust impressed on the debtor by virtue only of the assignation would, therefore, have to arise by operation of law. But there is no justifiable basis for such a trust. So while the Inner House has recently reminded the profession that the *Session Cases* are the authoritative reports,[137] it must be concluded that, in this case, the *Session Cases* report is inaccurate. For it makes no sense. Compare a very different, but at least intelligible, opinion attributed to Lord Inglis in the *Scottish Law Reporter*:

> 'Now, no assignation of a *nomen debiti* is such that the holder becomes debtor to the assignee if he were not so to the cedent; and so in the case of an assignation of a fund, the assignee becomes owner of the fund, and the holder becomes liable to account to him; but the reason why intimation of assignation has such an effect is because the legal obligation is transferred.'[138]

6-40. This passage is, then, strong authority for the view that transfer occurs only on intimation. If the debtor pays the cedent after intimation, the debtor is not discharged: he has not paid his creditor. Consequently, the debtor remains liable to the assignee. As far as the payment to the cedent is concerned, this is a payment of a debt that is not due. The debtor may have a *condictio indebiti*. But there is no room for any trust.

D. SPECIAL PART

(1) General

6-41. In an arrestment, the court officer can serve the schedule of arrestment in various ways: at the arrestee's address, on an employee of the arrestee, by affixing a copy to the front door of the arrestee's address, or posting it through the door.[139] An old case holds service of an arrestment at a merchant's counting house insufficient.[140] But it would be sufficient today, both for arrestment and intimation. There is no reason in principle why intimation cannot be made to one with the debtor's authority to receive such documents.[141] The general

[136] In *Watt's Trs v Pinkney* (1853) 16 D 279 at 288, Lord Rutherford makes the same mistake, suggesting the debtor can become a trustee of his own *liability* without some declaration of trust by the creditor of that that obligation. See also *Style Financial Services Ltd v Bank of Scotland* 1996 SLT 421 and crucial discussion by G L Gretton, 'Constructive Trusts' (1997) 1 *Edin LR* 281 (Part 1) at 308.

[137] *McGowan v Summit at Lloyds* 2002 SC 638 at 660–661, paras [57]–[58] *per* Lord Reed.

[138] (1873) 11 SLR 94 at 97.

[139] *Fraser, Reid & Sons v Lancaster and Jamieson* (1795) Bell's Folio Cases 135; Mor 3706; 14 January 1795 FC. Again there is an analogy with the law of citation: see the Citation Act of 1540 (APS, c 10; 12*mo* c 75). 'The purpose of serving personally, or at the dwelling-place, is (as the Act of 1540 inferentially states [sic]) to ensure that the writ or summons shall be brought to the knowledge of the person interested – it has no other purpose': *Campbell v Watson's Trs* (1898) 25 R 690 at 695–696 *per* Lord Trayner. See now, OCR r 5.4(3) and (4); RCS r 16.1(1).

[140] *Fraser, Reid & Sons v Lancaster and Jamieson*. Cf *Countess of Cassills v Earl of Roxburgh* (1679) Mor 3695 and 8341; *Nisbet v M'Lelland* (1686) Mor 3696; *Bruce v Sir James Hall* (1708) Mor 3696.

[141] *Home v Pringle* (1706) Mor 734; *Earl of Aberdeen and Creditors of Merchiston, Competing* (1729) Mor 867 rev'd *sub nom Earl of Aberdeen v Earl of March* (1730) 1 Pat App 44. The point was debated but not decided in *Dougal v Gordon* (1795) Mor 851.

principles of agents' ostensible authority rule.[142] Ostensible authority involves a representation of sorts from the debtor that he has authorised his agent. Good faith protection is subjective. The debtor who pays the cedent in ignorance of the intimation ought still to be protected. Nevertheless, it has been held that where a debtor has left the country with his agent in charge of all his affairs, intimation to the agent interpelled the debtor from paying the cedent.[143] And where an agent has a claim against his principal, and this is assigned, the assignee is not absolved from making intimation because the cedent is the debtor's agent.[144]

6-42. A distinction may also fall to be made between the kinds of money claim being assigned. If a claim has already been assigned in security, the debtor (i.e. the cedent of the security) will have a claim to any reversion against the assignee in security. This is itself a claim. In the transfer of the reversion, the debtor to whom intimation must be made is the transferee 'in security'. It is he who is the debtor in the obligation to account for any reversion.[145] If the assignation is a retrocession, there must still be intimation to the debtor.[146]

(2) Debtor is a party to the assignation

6-43. The received position is that it is unnecessary to intimate an assignation to which the debtor is a party.[147] The active debtor does not require the same protection as the passive debtor.[148] It is not sufficient that the debtor is merely a witness.[149] In *Campbell's Trs v Earl of Breadalbane*,[150] however, the court recognised that such an equipollent provides neither publicity nor certainty:

[142] See generally, *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 481 *per* Diplock LJ. There are, however, some older cases which held that service of an arrestment in the hands of a factor was insufficient: *Muirhead and M'Mitchell v Miller* (1610) Mor 732 and 2599; Hope, *Major Practicks* VI, 44, § 6; *Donaldson v Cockburn* (1709) Mor 735; cf *Lady Hisselside v Littlegill* (1685) Mor 11496; Sup Vol 'Harcase' 25. The modern authorities on arrestment indicate that, where free proceeds are to be arrested after the sale by a heritable creditor, the arrestment should be laid in the hands of the bank not the solicitors acting as the bank's agents in the sale: see eg *Abbey National Building Society v Strang* 1981 SLT (Sh Ct) 4; *Abbey National Building Society v Barclays Bank* 1990 SCLR 639; *Lord Advocate v Bank of India* (Sh Ct) 1991 SCLR 320 at 332 aff'd 1993 SCLR 178.

[143] *Dougall's Creditors Competing* (1794) Bell's Folio Cases 41.

[144] See, analogously, *Campbell v McCreath* 1975 SC 81 OH.

[145] *Ayton v Romanes* (1895) 3 SLT 203 OH; *Whittall v Christie* (1894) 22 R 91. Cf *Union Bank v National Bank* (1885) 13 R 380 rev'd (1886) 14 R (HL) 1. For the transfer and transmission of rights of reversion generally, see Erskine II.viii.9–15. See too Balfour, *Practicks*, 448.

[146] Cf *Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd* 1971 SC 140 OH; *Bentley v Macfarlane* 1964 SC 76. These cases are, however, confused. *Craig v Edgar* (1674) Mor 838 involved a general assignation on marriage. This required no intimation.

[147] See eg *Creditors of Ballenden v Countess of Dalhousie* (1707) Mor 865; *Turnbull v Stewart and Inglis* (1751) 2 Kames Rem Dec 260; Mor 868; *Campbell's Tr v Earl of Breadlabane* (1822) 1 S 62, on appeal (1825) 1 W & S 620, remitted to the Second Division in consultation with the other judges, (1827) 5 S 891; remitted to the Lord Ordinary, the reclaiming motion and appeal to the House of Lords: (1829) 7 S 767 aff'd (1831) 5 W & S 256; *Paul v Boyd's Trs* (1835) 1 Ross LC 511.

[148] See eg *Turnbull v Stewart and Inglis*; Elchies, *Annualrent* No 13; *Finlay's Trs v Alexander* (1866) 1 SLR 111 aff'd *sub nom Miller v Learmonth* (1870) 42 Sc Jur 418 at 421 *per* the Lord Chancellor; *Ayton v Romanes* (1895) 3 SLT 203 OH.

[149] Hope, *Major Practicks* II, 12 § 9; *Mackalzean v Mackalzean* (1586) Mor 854 (inserted in notarial instrument of intimation as witness); *Murray v Durham and Lady Winton* (1622) Mor 855; *Law v Currie* (1687) 2 Br Sup 102, Mor Sup Vol, 'Harcase' 24; *Graham v Livingston* (1611) Mor 13089.

> 'Judgement must of course be pronounced in conformity to the opinion of the consulted judges; but I am not prepared to assent to all the propositions contained in that opinion. I have the greatest repugnance to the transference of the share of a partner kept concealed from the world, the partner being allowed to go on with management.'[151]

6-44. There is much to commend this reservation. It is, of course, offset by the practical difficulties of someone in the dual position of transferee and debtor intimating to himself.[152] But such a situation is not unknown to the law.[153] Where the debtor is himself a party to the assignation the assignation should be registered in the Book of Council and Session. Again, this is based on a desire to protect against fraud.[154] Registration provides a certain date at which the transfer occurred, against which competing claims can be judged.[155]

(3) Special parties

(a) Trusts

6-45. It seems that, where a trust is the debtor, intimation to one of the trustees is insufficient to transfer the claim to the assignee.[156] Even if there is entry in the sederunt book, if the entry is not brought to the attention of the trustees, there cannot be sufficient intimation. But such a rule is overly formal. As was pointed out by counsel in one case, 'the pursuer has no means of knowing the precise number of trustees named under the private trust; and even if he did

[150] (1827) 5 S 891.

[151] At 893 *per* Lord Justice-Clerk Boyle. Compare *Hill v Lindsay* (1846) 8 D 472 at 479 *per* Lord Fullerton and comments by Lord Dreghorn in *Hay v Sinclair* (1788) Mor 1194; 10 Fac Coll 45; Hailes 1046 at 1046.

[152] Bankton II, 192, 10 says that it is 'absurd that one should intimate a right to himself'.

[153] See, eg, in the field of company law: *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274. Cf *Moffat v Longmuir* 2001 SC 137; *James Prain & Sons Ltd* 1947 SC 325 at 329 *per* Lord Moncreiff: 'A meeting at which only one member is present to play multiple parts may be thought to be nothing other than a pantomime'; *East v Bennett Bros Ltd* [1911] 1 Ch 163 and Companies Act 1985, ss 267(2) and 371(2).

[154] A beneficiary under a trust may also be a trustee (that is to say, a trustee-beneficiary). He may want to assign his rights. This involves two complex questions of intimation: first, since the debtor is a party to the cession, is formal intimation to him necessary? Secondly, is this assumed intimation sufficient to bind any other trustees? See in this regard the dubious case of *Browne's Tr v Anderson* (1901) 4 F 305.

[155] Compare the doctrine of *data certa* in some continental European systems: see eg *Código civil* Arts 1218–1220 and Art 1526 (Spain); Art 1328 *Code civil/Code civil belge*. This same principle underpins the requirement in France for a notarised deed to express the exact date on which payment was made, where the payer seeks to be subrogated (*subrogation personelle*) to the payee's rights under Art 1250 *Code civil* (*subrogation conventionelle*). See also the Dalloz commentary thereto. This is because, unlike *cession de créance*, no intimation is required to the debtor to achieve a transfer. It is interesting that, although Scotland does not seem to have a developed doctrine of *data certa*, it has the mechanism to give effect to it in the Books of Council and Session and the Sheriff Court Books.

[156] *Kyle's Tr v White* (1827) 6 S 40; *Browne's Trs v Browne* (1901) 9 SLT 128 (OH) rev'd on a different point *sub nom Browne's Trs v Anderson* (1901) 4 F 305, where it was noted that *Jameson v Sharp* (1887) 14 R 644 was a special case (only one trustee was effectively acting and intimation was made to him); *Watt's Trs v Pinkney* (1853) 16 D 279. Many of the cases involving trustees are complicated by the fact that they involve assignations of a '*spes successionis*' for which see W W McBryde and G L Gretton 'Sequestration and the *Spes Successionis*' (2000) 4 *Edin LR* 129. But compare the *obiter dicta* of Lord Kinnear in *Gracie v Gracie* 1910 SC 899.

discover this, he could not know how many had accepted'.[157] In furtherance of their fiduciary duties to the beneficiary, the trustees have a duty to cooperate with each other. It would seem, then, that if one trustee receives intimation of an assignation, his failure to circulate that information among the other trustees is *res inter alios acta* in relation to the assignee. Such an approach is also consistent with the view that the trust is a *quasi*-juristic person in Scots law.[158] In a similar vein, Erskine[159] suggested that intimation to one of several 'joint-debtors' was intimation to all; a view the First Division has endorsed.[160]

6-46. It is sometimes suggested that, since trusts require a quorum to act, intimation to one trustee is not sufficient.[161] This argument fails to recognise that an assignation of a right in which the trustees are the debtors does not require their consent. On service of an arrestment, it makes no difference if the debtor refuses service.[162] However, since an officer of the court, in the presence of a witness, serves an arrestment, there is not the problem of requiring the debtor to acknowledge receipt. The officer merely notes that the arrestee refused to accept service.[163] In the case of arrestments (and, therefore, assignations), then, intimation to one trustee binds all. It does not require a juridical act on the part of any trustee. Where a trustee pays after intimation made to another trustee, however, then, providing the paying trustee was in good faith, the trust is protected. Any intimation to the trustee should state that the intimation is being made to him in his capacity as trustee, in respect of a trust debt.[164] The same principles would seem to apply to executors and judicial factors.[165]

(b) Incapacitated debtor: trustees in sequestration, judicial factors etc

6-47. On sequestration all the bankrupt's assets are transferred to the trustee in sequestration.[166] The trustee, of course, does not become personally liable for the debts. But the trustee must pay the creditors out of those assets. It therefore makes sense to intimate to the trustee. Since the debtor remains the obligant, any intimation to him will still be good in law if not in practice. There are difficult issues where the debtor has granted a trust deed for creditors; in particular whether non-acceding creditors can still use diligence.[167]

[157] *Black v Scott* (1830) 8 S 367 *per* the Solicitor General (Hope) *arguendo*.

[158] *Alexander's Tr v Dymock's Trs* (1883) 10 R 1189 at 1195 *per* Lord President Inglis. See also an anonymous article at (1878) 22 *Journal of Jurisprudence* 617 especially at 622. It is unclear whether a trust can commit a criminal offence. But there is provision in the Criminal Procedure (Scotland) Act 1995, s 141(2)(c), for service of a summary complaint on a trust (for which see P Ferguson, 'Trusts and Criminal Liability' 2006 SLT (News) 175). Remarkably, service on one trustee suffices. *A fortiori* intimation to a single trustee should be sufficient for the purposes of the civil law.

[159] III.v.5.

[160] *Mantach v Sharp* (1887) 24 SLR 453 at 455 *per* Lord President Inglis. In *Finlay's Trs v Alexander* (1866) 1 SLR 111 aff'd *sub nom Miller v Learmonth* (1870) 42 Sc Jur 418 HL there seems only to have been a single executor debtor who was also a party to the assignation in another capacity.

[161] *Black v Scott* (1830) 8 S 367 at 369 *per* Lord Balgray.

[162] Graham Stewart *Diligence* 320 citing Stair IV.xxxviii.15.

[163] *Busby v Clark* (1904) 7 F 162.

[164] *Henderson's Trs v Drummond's Trs* (1831) 9 S 618; *Burns v Gillies* (1906) 8 F 460.

[165] Cf *Mitchell v Scott* (1881) 8 R 875.

[166] Bankruptcy (Scotland) Act 1985, s 31.

[167] See in particular the conflicting opinions of the members of the Court in *Johnston and Colquhoun v Trustees of Fairholms' Creditors* (1770) Mor 'Bankrupt' App No 5; Hailes 386.

6-48. A individual lacking legal capacity is an unlikely *debitor cessus*. For the incapable cannot contract. Incapacity is relevant to assignation where it supervenes after the obligation is incurred. In that event, intimation is made to the curator or guardian. It is he or she who is responsible for the management of the debtor's affairs. And only the curator or guardian can pay or acknowledge intimation.[168] Again, however, it is the *incapax* who remains the debtor; and intimation to an incapacitated debtor is still competent; the debtor is a passive party. Practical considerations, however, strongly support intimation to the guardian. Only passive legal capacity is necessary to receive. So a ward with passive legal capacity may be an assignee. But intimation requires a juridical act from the assignee and thus active legal capacity; the curator or guardian must therefore intimate on the ward's behalf.[169] In the case of a judicial factor appointed over the estates of a partnership, or indeed a company,[170] intimation ought, for the avoidance of doubt, to be made to the judicial factor.[171] Intimation made in the usual way will be effectual notwithstanding the appointment of the judicial factor, but there is the danger that the judicial factor will be able to intromit with the estate in good faith if intimation is not made to him.

(c) Partnerships

6-49. As in the case of a company, it is sufficient to post the intimation of the assignation to a partnership's place of business. Partnerships have legal personality but, unlike companies, need not have a registered office. One of the characteristics of a partnership is mutual agency.[172] Intimation to a partner is sufficient. And there is no reason why intimation to a partner must be made at the firm's place of business.[173] The legal incidents of a partnership demand that this proposition must be correct. A partner is jointly and severally liable for the debts of the partnership;[174] and a decree against a partnership is sufficient to charge an individual partner for payment of the partnership's debt.[175] In any event, the Partnership Act[176] provides that notice to any partner of the firm who habitually acts in the partnership business on any matter relating to partnership affairs operates as notice to the firm. After intimation to one partner, the firm is deemed to know of the assignation. In a case where one of the parties to the assignation and the debtor are both partnerships, sharing

[168] Bell, *Principles* (10th edn 1899) § 2121; *Yule v Alexander* (1891) 19 R 167 at 168 *per* Lord President Inglis; Part III of the Adults with Incapacity (Scotland) Act 2000.

[169] See Part III of the 2000 Act.

[170] D Bennett et al (eds) *Palmer's Company Law* para 15.601 (release dated September 2001).

[171] Cf *Cross & Bogle v Moir* (1775) Mor 757; Hailes 615 *per* Lord Kames: 'I arrest in the hands of a debtor, to hinder him to pay to the common debtor. To what purpose is it to arrest in the hands of a bankrupt, who cannot pay, rather than in the hands of the factor who can? By the late statute [Sequestration Act 1772], the factor is *vested*, in truth and in words; a factor like the present one in truth, though not in words'.

[172] Partnership Act 1890, s 5.

[173] Cf the law on service of an arrestment and a charge for payment: Graham Stewart, *Diligence* 32 and 325; and citation: *Wordie v McDonald* (1831) 10 S 142.

[174] Partnership Act 1890, s 4(2).

[175] *Selkrig v Dunlop & Co* (1804) Hume's Dec 477; *Thomson v Liddell & Co* 2 July 1812 FC; *Knox v Martin* (1847) 10 D 50 at 55 *per* Lord President M'Neill; *James Ewing & Co v M'Lelland* (1860) 22 D 1347 at 1351–1352 *per* Lord Wood.

[176] Partnership Act 1890, s 16.

a common partner, the knowledge of the debtor should be an insufficient equipollent to intimation. This is no different from any other case where the debtor is a party to the assignation. Some additional act is required to ensure that the transfer has a certain date. Partnerships may be so large that intimation to a partner is impractical. In such a case, intimation may be made, as with a company, to an employee.

(d) Companies [177]

6-50. The Companies Act provides a general rule that service of documents on a company is effected by leaving it at, or sending it by post to, the company's registered office.[178] Best practice is to post any intimation to the registered office. But intimation sent to the 'proper place',[179] though not the registered office, is also sufficient. If intimation is personal instead of postal, it may be delivered to an employee at the proper place;[180] that is, a place where the business is habitually carried on.[181] Intimation to the branch of a bank where an account is held would therefore be appropriate where an account holder assigns a right to payment against his bank on a credit account.[182] This will not, however, transfer the liabilities which are owed by the bank on accounts which are held at other branches.[183] In theory, intimation made at the head office of the bank should cover liabilities owed at all branches in Scotland. It is sufficient to hand the intimation to an employee at the branch.[184] According to one Outer House case, money held on deposit receipt is transferred by indorsation and delivery of the deposit receipt.[185] But the better view is that intimation to the bank is required.[186]

[177] There is a wealth of jurisprudence under the analogous provisions of the *Nouveau code de procédure civile* Art 651 ff. In France signification is even more formal than in Scotland: an officer of the court (*d'huissier en justice*) must perform the intimation. Much of what follows is also applicable *mutatis mutandis* to partnerships.

[178] Companies Act 1985, s 725(1). See also *Hannan v Kendal* 30 March 1897, Outer House, unreported. An extract of the Lord Ordinary (Kincairney)'s opinion is reproduced in an appendix to Graham Stewart, *Diligence* 849. The contractual aspects of the case are reported at (1897) 5 SLT 4.

[179] *Campbell v Watson's Tr* (1898) 25 R 690 at 695; *sub nom Campbell v MacAlister* 1898 SLT No 417; (1898) 35 SLR 508 at 511 *per* Lord Young. It is submitted that this is still good law for the purposes of the law of intimation despite the observations of the First Division in *Rae v Calor Gas Ltd* 1995 SLT 244 on the issue of 'personal' citation; see also *Rachkind v Donald & Sons* 1916 SC 751 cited in a contributed note at 1982 SLT (News) 65; *Hay v London & North Western Railway Co* 1909 SC 707. But compare *Ewing & Co v M'Lelland* (1860) 33 Sc Jur 1 OH and *Graham v Macfarlane & Co* (1869) 7 M 640.

[180] *Campbell v Watson's Tr* (1898) 25 R 690.

[181] *Aberdeen Railway Co v Ferrier* (1854) 16 D 422; *Hopper & Co v Walker & Co* (1903) 20 Sh Ct Rep 137; *Corson v Macmillan* 1927 SLT (Sh Ct) 13.

[182] *Dalrymple of Waterside v Bertram* (1762) Mor 752; Kames Sel Dec 263 cited with approval by Erskine III.vi.16; *Lord Advocate v Bank of India* (Sh Ct) 1991 SCLR 320 at 332 aff'd 1993 SCLR 178.

[183] *Stewart v Royal Bank of Scotland* 1994 SLT (Sh Ct) 27. Cf *McNairn v McNairn* 1959 SLT (Notes) 35; *Stevenson v T Dixon Ltd* 1924 SLT (Sh Ct) 45; *London, Provincial and South-Western Bank v Buszard* (1918) 35 TLR 142.

[184] *Macintyre v Caledonian Railway Co* (1909) 25 Sh Ct Rep 329. Cf *Watt v Bank of Scotland* 1989 SCLR 548.

[185] *Shawbridge's Trs v Bank of Scotland* 1935 SLT 568 OH.

[186] *Muir v Ross's Exrs* (1866) 4 M 820 at 826 *per* Lord Benholme.

6-51. The company becomes bound to the assignee from the moment the employee receives the intimation.[187] Of course, other employees, those responsible for making payments, cannot immediately actually know of the intimation. Generally speaking, however, unless the debtor company can show that this *bona fide* payment was made through no fault of its own, the general principle should be that the company would be bound to pay the assignee from the time that the intimation was received. Companies must therefore have systems in place for dealing with and circulating such documents. The cases are not particularly helpful: one holds intimation to a treasurer of a hospital good intimation to the whole company;[188] another holds service on a clerk to certain waterworks commissioners bad.[189] In a modern case it was suggested that intimation should be made to an individual at a company with 'contract-making authority', but that was in circumstances where it appeared that consent to the assignation was required.[190]

6-52. Acknowledgement of intimation is desirable. *The debitor cessus* is a passive party to the assignation and cannot be compelled to acknowledge. But the debtor will often be happy to do so.[191] The best evidence is a written acknowledgement that binds the company. But there are problems. Two legal principles conflict: on the one hand, the law relating to the subscription of deeds; on the other, company law relating to authorised agents. To determine whether an acknowledgement is good is a two-stage process. First, is the deed validly executed? The relevant law is found in Schedule 2 to the Requirements of Writing (Scotland) Act 1995. A deed is signed by a company if it is signed on its behalf by a director, or the secretary, or a person authorised to sign on the company's behalf.[192] The acknowledgement is presumed to have been so granted if the signature is witnessed.[193] Where the company has validly signed, but this has not been witnessed, the acknowledgement is presumed to have been granted if it was subscribed by two directors, a director plus the secretary, or two persons authorised to act on its behalf.[194] The second stage is a question of authority.[195] Only the board of directors has capacity to bind the company. A probative acknowledgement is worthless if the signatories had no authority, actual or ostensible, to perform such an act on the company's behalf.[196] It may be remembered that a single director generally has little or no authority to bind the company *per*

[187] Interestingly, it has been held in England that it is insufficient to serve a summons at the registered office by merely leaving it with a security guard or receptionist. Rather service must be to a 'managing agent' who has a discretion to accept service: *Amerada Hess v Rome* (2000) 97 (10) LSG 36 (QBD). Quite what is 'discretion to accept' service is unclear. And how is the assignee to determine who such a person in the company is?

[188] *Keir v Menzies' Creditors* (1739) Mor 738; 5 Br Sup 656.

[189] *Gall v Stirling Water Commissioners* (1901) 9 SLT 123 OH.

[190] *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197, paras [17] and [19].

[191] Standard form 'acknowledgements' are often disguised discharges or waivers: the debtor is asked not just to acknowledge the assignation but, further, to renounce defences. No *debitor cessus* is bound, by virtue alone of an assignation, to renounce his defences.

[192] Requirements of Writing (Scotland) Act 1995, Sch 2, para 3(1).

[193] Requirements of Writing (Scotland) Act 1995, s 3(1) as substituted by Sch 2, para 3(5).

[194] Requirements of Writing (Scotland) Act 1995, s 3(1A), as so substituted.

[195] See also the *Law Commissions' Joint Consultation Paper on Partnership* (Law Com CP No 159; SLC Discussion Paper No 111, 2000).

[196] Even a probative deed does not prove that the person signing does in fact hold their designated office: 1995 Act, s 3(1C).

se. But it is suggested that directors are, ordinarily, authorised to 'clothe documents with formal validity which has already been authorised by the board or the managing director'.[197] And since an acknowledgement is merely a receipt, rather than a juridical act, signature by a director is sufficient.[198] Acknowledgement by the company's secretary is also good.[199]

6-53. As far as other officers are concerned there is a difficult distinction to be made between their ostensible authority to bind the company and their ostensible authority to communicate decisions of the company. While a putative agent cannot represent his own authority,[200] the assignee must be able to ask someone, other than the board itself, who has authority to bind them. That person (to whom the inquiry is made) must have ostensible authority to make that representation. The distinction is therefore between authority to bind the company and authority to make representations of fact.[201]

6-54. The rules must be workable. The idea that good evidence of intimation to, say, the Royal Bank of Scotland may be provided only in writing by a member of the board is not only unrealistic, but preposterous. The common-sense approach is that found in *Campbell v Watson's Tr*: intimation to, and acknowledgement from, an employee suffices. To repeat: an acknowledgement (as opposed to a discharge or waiver) is not a juridical act; but rather a representation of fact. As a result, the latter type of ostensible authority is sufficient. A purported renunciation of defences by such an employee, however, is ineffectual: few employees have either ostensible or actual authority so to prejudice the debtor company's position.

6-55. That a company is in liquidation, administration or receivership does not affect the method of intimation. In the case of large companies at least, it is unlikely that intimation would ever be made to a director in any event. The fact that a liquidator, administrator, administrative receiver or receiver has superseded all or some of the directors' powers is immaterial for the purposes of intimation. The company, after all, remains the debtor in the obligation.[202]

(e) Crown as debtor

6-56. Intimation should be made to the 'appropriate law officer'.[203] The appropriate law officer is the Lord Advocate where the debtor is part of the

[197] See R Potts (ed) *Gore-Browne on Companies* para § 5.3.3.

[198] Again, there may be a distinction to be made if the written acknowledgement required at common law is more than purely evidentiary and is an *essential*, rather than a *formal*, requirement.

[199] *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711.

[200] *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717.

[201] *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409 at 1422d (Steyn LJ); 1425h (Evans LJ); 1427c (Nourse LJ). Cf *Nouveau code de procédure civile* Art 654, Dalloz commentary, n 5.

[202] Cf *Nouveau code de procédure civile* Art 654, Dalloz commentary n 3.

[203] Cf Crown Proceedings Act 1947, s 46; Crown Suits (Scotland) Act 1857, s 1 (as amended by Scotland Act 1998, Sch 8, para 2) cited by G L Gretton, 'Diligence' in *SME* vol 8 (1992) para 259. These provisions apply only to the bringing of proceedings against the Crown; they are relevant to intimation only by analogy. See also *Cameron v Lord Advocate* 1952 SC 165 OH.

Scottish administration; otherwise intimation should be made to the Advocate General for Scotland,[204] whose office is in London.[205]

(f) Unincorporated associations

6-57. Unincorporated associations have no legal personality. There is some theoretical difficulty with the idea that an entity can contract a debt while at the same time lack personality. Be that as it may, and for the avoidance of doubt, intimation should be made to an office bearer.[206]

[204] Crown Suits (Scotland) Act 1857, s 4A. See also the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999, SI 1999/679; Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999, SI 1999/901.

[205] The Advocate General asks for service of all documents to be made to the Solicitor to the Advocate General, whose office is in Edinburgh (see *www.oag.gov.uk/Service.htm*). Arguably, however, because intimation is a substantive legal requirement – with its own rules and legislation – advantage cannot be taken of the Advocate General's sensible request and intimation must be made to the proper place which, for the Advocate General, is London. For intimation outwith the jurisdiction: see McBryde, *Contract*, para 12-96, n 359 and R G Anderson, 'A Note on Edictal Intimation' (2004) 8 *Edin LR* 272.

[206] Cf *Renton Football Club v McDowall* (1891) 18 R 670 at 674 *per* Lord McLaren.

7 Equipollents and Good Faith Payments

A. GOOD FAITH PAYMENT

(1) General

7-01. Formal intimation rules provide certainty. A system which attributes transfer to the date of delivery of the deed or the parties' intention suffers from the problem that the debtor is unlikely to know of the transfer until after it has been made. Such a system may, however, satisfy the goal of certainty by demanding an authentic or notarised deed of certain date before holding the claim to be transferred. But, even then, there is a real possibility that the debtor, in ignorance of the transfer, may pay his former creditor on the basis of a genuine understanding that the cedent is still his creditor. In this situation the debtor should be discharged.[1] In Scotland, where it has been suggested the requirements for formal intimation are strict, situations remain where some element of good faith protection is required.[2] That is the position for voluntary assignations. On

[1] *Hume v Hume* (1632) Mor 848. Cf Art 6:34 *BW*; Art 1643 *Code civil du Québec* where the debtor who pays the cedent in good faith is discharged even if the formalities required for the cession (which usually encompass debtor notification) are fulfilled.

[2] Cf P Nienaber, 'The Inactive Cessionary' 1964 *Acta Juridica* 99 at 118 ff who argues that any protection of the debtor should be based on the assignee being personally barred. But there can be situations where the assignee does everything in his power to bring the assignation to the debtor's attention, but is nevertheless unsuccessful. The debtor then pays the cedent in good faith: *Hume v Hume* (1632) Mor 848.

occasion, however, there occurs the equivalent of an intimated assignation by force of law, for example the act and warrant confirming a trustee in sequestration.[3] In this situation there is no actual intimation to the debtor.[4] A debtor of a bankrupt creditor, who pays the bankrupt in good faith, is discharged.[5] Large commercial undertakings, such as banks, have knowledge of sequestrations advertised in the Edinburgh Gazette imputed to them. So, where a bank paid out sums to the bankrupt that the latter held on credit with the bank, after publication of a notice of his sequestration, the bank was liable to make a second payment to the trustee.[6] It was irrelevant that the individual teller making the payment was in good faith. Generally speaking, however, the guiding policy is debtor protection. The principle of good faith payment was recognised by Stair:

> 'The third common exception in personal actions is, payment made *bona fide* to him who had not the true right, but where there was another preferable right, which the defender neither did, nor was obliged to know: and therefore the law secures the payer, without prejudice to the pursuer to insist against the obtainer of the payment.'[7]

7-02. The principle is fundamental. It is the basis of debtor protection in systems where notification is not a constitutive requirement for transfer. Potentially this principle could form the basis for future development of Scots law if it were decided to abolish intimation as a constitutive requirement.

(2) Edictal intimation

7-03. Edictal intimation, according to the books, is the method by which intimation is effected of an assignation of a claim in which the debtor is abroad or cannot be found. Although the point seems to have escaped the attention of academics, practitioners and, most importantly, the legislature, it is no longer competent to effect an edictal intimation.[8] Assuming – perhaps with naïve sanguinity – that the oversight will be corrected, then the law is as follows. Edictal intimation is, at present, the only recognised instance of registration as an equivalent of intimation in Scots law.[9] Registration is allegedly the paradigm method for implementing a policy of publicity. Yet utilisation of edictal intimation presupposes that the debtor has *no actual knowledge* of the assignation or

[3] Bankruptcy (Scotland) Act 1985, s 31(4). It is also the equivalent of an arrestment followed by furthcoming: s 37(1)(b).

[4] There are other situations where there may be a transfer by force of law. Even so, intimation may be of some practical importance. Cf Bankton II, 193, 16.

[5] Section 32(6) (*acquirenda*) and s 32(9) (all other dealings). See also Erskine III.v.7; J J Gow, *Mercantile and Industrial Law of Scotland* (1964) 70; *Adam v McRobbie* (1845) 7 D 276; *MacDonald v McIntosh's Tr* (1852) 14 D 937; *Gray v Gray's Tr* (1895) 22 R 326; *Minhas's Tr v Bank of Scotland* 1990 SLT 23; *Rankin's Tr v H C Somerville & Russell* 1999 SC 166 OH. Cf the position on the appointment of a judicial factor: Judicial Factors Act 1889 (as amended by Act of Sederunt 17 March 1967); *Campbell's Judicial Factor v National Bank of Scotland* 1944 SC 495.

[6] *Watt v Bank of Scotland* 1989 SCLR 548.

[7] Stair IV.xl.33. See also Stair I.viii.3. Cf Erskine III.iv.3.

[8] See R G Anderson, 'A Note on Edictal Intimation' (2004) 8 *Edin LR* 272. For edictal intimation in the Hanseatic City of Hamburg before the BGB, see H Baumeister, *Das Privatrecht der Freien und Hansestadt Hamburg* (1856) I, 89.

[9] However, on occasion, a recognised equipollent will not provide a certain date of intimation (as in the case where the debtor is a party to the assignation) and registration in the Books of Council and Session is advised, despite the decision in *Tod's Tr v Wilson* (1869) 7 M 1100.

diligence used against him. The idea that all Scots maintain an agent (or procurator) with knowledge of the Register is fictional. And edictal citation has been described as 'highly artificial'.[10] Only the most fanatical adherent of a doctrine of constructive notice would maintain that a debtor or arrestee should be imputed with knowledge by virtue of registration at the Office of Edictal Citations.

7-04. So does the law protect the debtor's position? Compare the analogous position of arrestment. Take the example of a fund in the hands of a person (George) subject to the jurisdiction of the Scottish courts who cannot be found. He has an obligation to account to John. Jessica is John's creditor. She has extracted a decree for payment against John. She seeks to serve an arrestment in the hands of George. He cannot be found, so service is edictal. George then reappears. Having no knowledge of the arrestment George pays in good faith to John. John now disappears. Is George liable for breaching the arrestment? Erskine says that where an arrestment is properly served on a debtor, it does not matter that he does not have actual personal knowledge of the proceeding, 'for the admitting pretences of ignorance might evacuate the lawful diligence of creditors'.[11] This approach is consonant with the general principle, that the law is concerned only with certain, and not with subjective, knowledge. However, statutory protection for arrestees abroad upon whom there had been only edictal service, was subsequently introduced.[12] A *bona fide* payment did not amount to breach of arrestment. This was reflected in a later case, where a trustee was ignorant of an arrestment which had been properly served at his dwelling place.[13] Arrestees are now protected generally.[14] Similarly, the *debitor cessus*, who can prove that he made payment to the cedent after intimation in good faith, ought to be protected.[15] The burden, however, should be on the debtor.[16]

(3) Co-debtors

7-05.

> 'Where there are many obligants, whether joint debtors or principals or cautioners, intimation made to any one is sufficient for completing the conveyance; but such

[10] *Corstorphine v Kasten* (1898) 1 F 287 at 292 *per* Lord President Robertson.

[11] III.vi.14, citing *Robert Blackwood v Earl of Sutherland* (1701) Mor 1793, a case involving edictal citation of an army officer serving abroad. In ignorance of the arrestment the officer paid the common debtor. He was nevertheless held liable for breach of the arrestment. Cf *Mackie v Dunbar* (1628) Mor 1788 and *Hume v Hume* (1632) Mor 848.

[12] Payment of Creditors (Scotland) Act 1783 (23 Geo III, c 18) s 3; Payment of Creditors (Scotland) Act 1793 (33 Geo III, c 74), s 4; Payment of Creditors (Scotland) Act 1814 (54 Geo III, c 137) s 3; Bankruptcy (Scotland) Act 1856, s 2 (both provisions have been repealed). Arrestees furth of Scotland were also protected in some older cases: eg *Scott v Fludyer & Co* (1770) Mor 'Arrestment' App No 1; Hailes 348 at 349 *per* Lord Coalston: to require a second payment to the assignee 'would be to introduce a new and unknown hypothec into the law'. *Scott* was approved in *Laidlaw v Smith* (1841) 2 Rob 490 at 503 *per* Lord Cottenham LC.

[13] *Laidlaw v Smith* (1838) 16 S 367 aff'd (1841) 2 Rob 490. Cf *Leslie v Lady Ashburton* (1827) 6 S 165.

[14] Debts Securities (Scotland) Act 1856, s 1 cited by W A Wilson, *The Scottish Law of Debt* (2nd edn 1991) para 17.5.

[15] Cf J Russell, *Theory of Conveyancing* (1788) 173.

[16] See *per* the Lord Justice-Clerk in *Laidlaw* at 373: 'I could conceive a case of *presumptio juris et de jure* of an arrestee's knowledge of an arrestment having been used'; Lord Glenlee: 'if the party appears *desiisse possidere dolo malo*, he must acquit himself of all suspicion'.

intimation is not effectual for interpelling those to whom no intimation was made from making payment to the cedent; and therefore assignees ought in prudence to make intimation to all of them.'[17]

7-06. The situation of co-debtors is difficult. The creditor can seek performance of the entire obligation from any one debtor. If intimation were required to all, the desirability of a joint and several obligation would, from a creditor's point of view, be considerably reduced. Conversely, if co-debtors were ignorant of each other, then it is harsh to have the knowledge of one of their number imputed to the others. Any payment in ignorance should therefore have a good faith defence. The clearest statement of the law is Professor Reid's: 'in the case of joint debtors, intimation to one completes the transfer, but intimation to all is necessary to prevent payment to the cedent'.[18]

(4) Cautioners

7-07. Suppose A is the creditor, D is the debtor and G is the cautioner. A assigns his right against D to B. The assignation is intimated to D. An assignation carries accessories.[19] Caution is an accessory obligation. It is rarely suggested that there must be intimation to the cautioner as well as to the principal debtor.[20] Stair suggests that intimation to one is intimation to all:

'Where there are many, *correi debendi*, principal or cautioners, intimation made to any will be sufficient to all; yet this will not exclude payment made by another of the debtors, *bona fide*, to whom no intimation was made; to secure which it is safest for assignees to intimate to all the *correi debendi*.'[21]

7-08. What, then, if A (the cedent) calls upon G to pay after the intimation of the assignation to D, but before G is aware of the transfer? Does a good faith payment to the cedent discharge the cautioner, G? If so, is G entitled to relief against the debtor? If relief is based on the *beneficium cedendarum actionum* then the cedent has nothing to assign. The cedent no longer has any rights against the debtor. On this analysis, then, payment to the cedent after intimation does not discharge the cautioner. The principal debtor's obligation, after all, is no longer owed to the cedent but to the assignee. The assignee, on this analysis, would still be entitled to call upon the cautioner. An assignee may not even have been aware of the existence of the cautioner. How can an assignee be expected to intimate then? The cautioner's remedy is to bring the *condictio indebiti* against the cedent for recovery of the double payment, and to demand, on payment to the assignee, an assignation of the assignee's rights against the principal debtor.

[17] Erskine III.v.5, approved in *Mantach v Sharp* (1887) 24 SLR 453. Erskine cites Stair III.i.10 which is quoted in the text below. Stair deals expressly with correality.

[18] K G C Reid, 'Unintimated Assignations' 1989 SLT (News) 267 at 269. See also the opinion of Stair quoted at para 7-07 below; and T M Taylor, 'Bona et Male Fides' in Viscount Dunedin (ed) *Encyclopaedia of the Laws of Scotland* vol 2 (1927) para 686.

[19] Stair III.i.17; Erskine III.v.8; Bankton II, 197, 7; *Wilson v Burrel* (1748) Kilkerran 1. See generally authority cited in para 2-01.

[20] Hope, *Major Practicks* II, 12, § 8 takes the view that intimation to the principal puts the cautioners *in male fide* even if they are ignorant of the transfer. *Mosman v Bells* (1670) 2 Br Sup 457 is also authority for this proposition. See also *Lyell v Christie* (1823) 2 S 288 and A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 313. Cf Art 1645 *Code civil du Québec*.

[21] Stair, III.i.10.

7-09. Nevertheless, such a result is harsh on the cautioner. He has paid the cedent in good faith. Should this not provide a defence against a demand from the assignee? If so, the assignee has the *beneficium cedendarum actionum* of the cautioner's *condictio* against the cedent. As a matter of policy, the onus should be on the assignee to make intimation to the cautioner. Were it otherwise, the free transfer of cautionary obligations would be threatened by the potential prejudice to the cautioner.[22]

(5) Miscellaneous

7-10. There must also be a residual category. Formal intimation may be properly made, resulting in the transfer of a claim, but the debtor, as a matter of fact, remains ignorant of it. The most common example will be postal intimation to the debtor. If the debtor pays the cedent in good faith because he never received the intimation before payment, he has a defence of good faith payment. This miscellaneous category should also cover cases which would fall within a claim of *assignatus utitur jure auctoris* or the corresponding (identical) rule for arrestment, viz that the arrestee should not be prejudiced by the arrestment.[23] So, for example, where the debtor sends a cheque to the cedent on day 1, and receives intimation of the assignation on day 2, the debtor is not required to countermand the cheque and bear the risk that any countermand will be too late. If his cheque clears on presentment by the cedent, the debtor is discharged.[24] If the cheque in favour of the cedent does not clear, then the assignee can demand payment; there is only a difficulty because of the time lag involved in a payment by cheque – discharge is conditional on the cheque being honoured.[25] The position with dishonest credit card payments may be different.[26]

B. EQUIPOLLENTS [27]

(1) General

7-11. The policy of the law is certainty. The courts are – or at least traditionally were – reluctant to expand the categories of equipollents. Verbal intimation is insufficient.[28] Where notarial intimation is unsuccessfully

[22] And in modern banking practice, cautionary obligations are regularly expressed to be unassignable. Cf J-L Baudouin and P G Jobin, *Les Obligations* (5th edn 1998) para 918. In the converse situation, it has been held that *bona fide* payment by the principal debtor to the cedent when there had been only intimation to the cautioner, was a good defence when the principal was sued by the assignee: *Lyon v Law* (1610) Mor 1786.

[23] Graham Stewart, *Diligence*, 233: 'Arrestment cannot have the effect of making the arrestee's position worse'.

[24] These were the facts in *Bence v Shearman* [1898] 2 Ch 582.

[25] *Leggat Bros v Gray* 1908 SC 67; *McLauchlin v Allied Irish Bank* 2001 SC 485 and authority cited in para 3-14 above.

[26] *Re Charge Card Services Ltd* [1989] Ch 497 CA.

[27] Francophone lawyers use the same terminology: see P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La transmission des obligations* (1980) 96.

[28] *The Queen and the Abbot of Couper v The Laird of Duffus* (1558) Mor 846 has never been doubted. Written notice is required even if the debtor is illiterate: *Hockley and Papworth v Goldstein* (1920) 90 LJKB 111.

attempted, a written acknowledgement is probably required.[29] There are, admittedly, several cases where the requirement of formal intimation appears to have been relaxed to such an extent that if the reasoning in those cases were to be followed, transfer could hardly be said to be based on intimation.[30] However, some of these cases are of limited utility since they confound mandates to pay with mandates to uplift. In a mandate to pay, since there is nothing to intimate, it is hardly surprising that informal intimation was held to be sufficient.

(2) Acts of the debtor

7-12. Where there has been no proper intimation, the debtor's intervention may supply the lack of formality:

> 'Any writ under the debtor's hand, acknowledging the *production of the assignation*, will be sufficient intimation, as if he gave a bond of corroboration to the assignee, or gave discharges of the annualrent, or any part of the principal sum'.[31]

7-13. In *Newton v Colloghan*[32] it was held that intimation was effected by holograph writing of the debtor on the back of a bond, even though this was neither attested nor dated. The court was apparently influenced by the usage of the banking profession. Nevertheless, several members of the court were of opinion that the intimation was insufficient in law and the practice should not be encouraged. An acknowledgement, if it is just that, must be distinguished from a promise to pay (an independent unilateral obligation). In one case it was successfully argued that 'intimation cannot be supplied without a document in writ [sic], or at least a promise of payment upon communing'.[33] In modern law, something less than a promise suffices as an acknowledgement. However, it is likely that some written deed will be required so that there is an ascertainable date on which the transfer can be said to have occurred. Payment, or part-payment, by the debtor to one holding a delivered but otherwise unintimated

[29] *M'Gill v Hutchison* (1630) Mor 860; *Home and Elphingstone v Murray* (1674) Mor 863; *Newton & Co v Cologan & Co* (1785) Mor 850; *Donaldson v Ord* (1855) 17 D 1053 at 1070 *per* Lord Justice-Clerk Hope. But compare his earlier opinion in *Wallace v Davies* (1853) 15 D 688 at 696.

[30] *Wallace v Davies* (1853) 15 D 688 at 696 *per* Lord Justice-Clerk Hope; *Finlay's Trs v Alexander* (1866) 1 SLR 111 at 112 *per* Lord Justice-Clerk Inglis. Lord Justice-Clerk Hope departed from this view in *Donaldson v Ord*. Inglis' opinion in *Finlay's Tr* is not easy to follow. Cf *Watt's Trs v Pinkney* (1853) 16 D 279 at 287 *per* Lord Ivory: he maintained that assignation occurs only on intimation, but that intimation could be informal. The *dicta* in *Libertas-Kommerz GmbH v Johnston* 1977 SC 191 OH were *obiter*; while in *Lombard North Central Ltd v Lord Advocate* 1983 SLT 361, the court failed even to consider the requirement of intimation: see K G C Reid, 'Unintimated Assignations' 1989 SLT (News) 267.

[31] Stair III.i.9 (emphasis added). In modern law, production of the assignation to the debtor will suffice for intimation alone, no additional acknowledgement being required. In Stair's time, however, the intimation had to be notarial. See also *Lord Dunipace v Sandis* (1624) Mor 859. In France, such an acknowledgement by the debtor will have important consequences: the debtor will be deprived of the right to plead compensation of debts, due by the cedent to the debtor, against the cessionary: see Art 1295 *Code civil*; L Aynès, *La cession de contrat* (1984) 40, n 70. Cf Art 1295 *Code civil belge*.

[32] 23 November 1785 FC; Mor 850; Cf *Earl of Selkirk v Gray* (1708) Mor 4453; (1709) Rob 1; *Watson v Murdoch* (1755) Mor 850; 19th November 1755 FC; *Selkrig v Davies* (1814) 2 Dow 230.

[33] *Faculty of Advocates v Dickson* (1718) Mor 866; Dalrymple's Dec 246.

assignation is an acknowledgement.[34] It is probably the case that an acknowledgement can cure an informal intimation, but not a failure to deliver the assignation to the assignee. In some other legal systems, equipollents are of more limited utility in that they have only limited effect: while a debtor who acknowledges the assignation thereby becomes bound to the assignee, creditors of the cedent are not prejudiced by the acknowledgement.[35] There is no trace of such limited effect being accorded to an equipollent in Scots law.

7-14. The equipollent of acknowledgement does give rise to a theoretical problem. Acknowledgement – whether in writing or by payment – is a unilateral act of the debtor.[36] As a result of (perhaps unwanted) intervention by the debtor, therefore, the holder of the delivered but unintimated assignation becomes the assignee. Indeed, this incident has an unexpected consequence for the principle of good faith payment in assignation: assuming the assignation is valid, good faith payment can apply only to a payment made to the cedent. A payment made to the assignee after delivery of the assignation, but before intimation, renders the holder of the assignation the debtor's creditor. As a result there is no issue of good faith payment: the debtor, by his act of payment, renders the assignee his creditor (unless the cedent was sequestrated after the assignation).

(3) Correspondence between assignee and the debtor

7-15. The courts, it has been recently suggested, 'will not require anything formal by way of intimation'.[37] The view is based, chiefly, on an Outer House decision in 1977.[38] The point, however, was not a live one: counsel conceded the intimation point.[39] There is perhaps authority for the proposition that if there is informal intimation such as correspondence, then provided that there is a written acknowledgement from the debtor 'which does acknowledge the interpellation,'[40] then there is good intimation. But since acknowledgement

[34] *Livingston v Lindsay* (1626) Mor 860; *Ridpeth's Exrs v Hume* (1669) Mor 2792; 1 Stair 647.

[35] P van Ommeslaghe in *La transmission des obligations* at 96–97. Grosskopf, *Geskiedenis* 85 suggests that acknowledgement was introduced as an equipollent into French law by Pothier (*Traité du droit de domaine de propriété* (1771) § 215). But this may be doubted. In any event, unlike modern French law, Pothier gave full effect to an acceptance: it was good *erga omnes* and, further, for Pothier, acceptance had no effect on the debtor's right to plead compensation.

[36] van Ommeslaghe in *La transmission des obligations* at 93.

[37] R Bruce Wood, 'Special Considerations for Scotland' in N Ruddy, S Mills and N Davidson, *Salinger on Factoring: the Law and Practice of Invoice Finance* (4th edn 2006) para 7.36. In a similar vein see *Wallace v Davies* (1855) 17 D 688 at 693 *per* Lord Robertson (Ordinary), a case concerning a mandate to pay.

[38] *Libertas-Kommerz GmbH v Johnson* 1977 SC 191. The decision is inconsistent with the opinions expressed in the Inner House, albeit probably *obiter*, in *Gallemos Ltd (in receivership) v Barratt Falkirk Ltd* 1989 SC 239. It was explicitly held in *Faculty of Advocates v Sir Robert Dickson* (1718) Mor 866; Dalrymple's Dec 246 that correspondence was insufficient intimation. See also *John Laurie v Hambly Ltd*, 15 April 1992, Outer House, unreported, Lord Penrose. Lord Penrose was counsel in *Libertas-Kommerz*.

[39] *Libertas-Kommerz GmbH v Johnson* 1977 SC 191 at 205 *per* Lord Kincraig: 'Parties are agreed that it is no longer necessary that intimation should be made by notarial instrument nor by the means prescribed in the Transmission of Moveable Property (Scotland) Act 1862'. The first part of the concession had a sound legal basis, but the second had none. In any event, the raising of the action was sufficient formal intimation.

[40] *Wallace v Davies* at 696 *per* Lord Justice-Clerk Hope; see also Lord Rutherford at 692–693. Cf *Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd* 1971 SC 140 OH.

requires the debtor's participation, this is not truly a method of informal intimation. Acts of the debtor are well established as equipollents.[41] The correct position is stated in the one-line report of an old case: '*Found* the writing a letter to the debtor not a sufficient intimation of an assignation'.[42] A recent case allowed a proof before answer on averments that intimation had been made by letter.[43] But intimation by letter alone is insufficient. So too is rubber stamping an invoice: even if the wording unambiguously refers to assignation having occurred, the intimation is bad for (i) the invoice, *ex hypothesi*, is rendered by the cedent, not the assignee; and (ii) such a notice does not furnish the debtor with a copy of the assignation.[44] Commercial practice has long ceased to comply with the 1862 Act. It is likely that if the point arose for decision the court would accept a written notice signed by the cedent and served on the debtor or the assignee as sufficient.

(4) Judicial intimation

7-16. Production of an assignation in judicial proceedings is said to be the best of intimations[45] in that 'the publication of the conveyance is still more solemn than in the case of a notarial instrument; for they are judicial acts, exposing the conveyance of the right in favour of the pursuer to the eye of the judge as well as the debtor'.[46] The principle is deeply rooted in Scots law:

> 'Intimation may be by any legal diligence, as by arrestment, by a charge or process upon the assignation: yea, though the process be not sustained, because all parties having interest were not called[47] it will stand as an intimation.'[48]

7-17. Two important issues follow. First, there must, as a general rule, have been a deed of assignation. Otherwise there is nothing to produce.[49] Secondly, what exactly is the date on which intimation is made? Only if there is a certain date of

[41] See para 7-12ff above, and also Hope, *Major Practicks* II, 12 § 33.

[42] *Bayne v Cunningham McMillan* (1679) Mor 863 and 9131. See further the unsuccessful arguments for the Faculty of Advocates, suing as assignees, in *Faculty of Advocates v Sir Robert Dickson* (1718) Dalrymple's Dec 246: 'Sir Robert [the debtor] took the advantage to raise a process before intimation, which can afford him no advantage; because it was a point of civility in the Faculty, not to intimate or charge, but to acquaint him in discretest manner of an onerous right in order to obtain payment'.

[43] *Safdar v Shahid* 2004 GWD 28-586.

[44] Cf *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592.

[45] *Carter v McIntosh* (1862) 24 D 925 at 934 *per* Lord Justice-Clerk Inglis.

[46] Erskine III.v.4.

[47] The debtor, needless to say, cannot fall into the category of all parties not called.

[48] Stair III.i.7; cf Erskine III.v.4; Bell, *Comm* II, 18; Bell, *Prin* § 1465. Cf *Lord Elphingston v Ord* (1624) Mor 858; *Ogilvie v Ogilvie* (1681) Mor 863; Sup Vol 21.

[49] Somewhat subverting the theory that an assignation does not have to be in writing according to the Requirements of Writing (Scotland) Act 1995, s 11(3)(a); but compare *Gams v Russel's Tr* (1899) 7 SLT 289 OH. The advantage that the omission does have is to allow a development of a doctrine of *cessio legis*. In such a situation detailed averments as to the basis of the pursuer's position might suffice. In terms of Art 1644, *Code Civil du Québec*, any other evidence of the assignment can be produced in the process. The interesting point is made in Quebec that if the debtor pays between service and the actual appearance in court, the assignee alone will be liable for any expenses, unless the debtor had not complied with an earlier intimation: J-L Baudouin and P G Jobin, *Les obligations* (5th edn 1998) para 895.

assignation, intimated by the production of the deed in proceedings,[50] can judicial intimation be rightfully said to be the 'best'. The law is not clear. There are a number of possibilities: the service of the initial writ,[51] the lodging of the assignation in process, the closing of the record,[52] the date of the decree, or the date of the extract of the decree. There is some difficulty with the proposition that the date of intimation can be held to be the date of service of the initial writ.[53]

> 'I hesitate, however, to believe (what some of the older judgements point at) that the mere act of citation to such a process, not followed with judicial production of the assignment, shall be equally effectual; because that step does not carry evidence with it to the debtor, of the verity of the alleged assignment, or the ground of his claim.'[54]

7-18. The leading case is *Carter v McIntosh*,[55] probably the most cited case in the Scots law of assignation. Unfortunately, the facts of the case are difficult. They must therefore be recited at some length. The case was a multiplepoinding. The fund *in medio* was the estate of a Mr Fyfe who died in 1838. He had left some heritage to his daughter (Mrs Wright) in liferent. The fee was to go equally to his two nieces M Fyfe (Mrs Vass) and E Fyfe (Mrs Ducat). The two nieces were also appointed residuary legatees. Mrs Vass was married in 1844. Mrs Wright died in 1858. Mrs Vass's marriage contract purported to assign in 1844 her rights under the will to her marriage contract trustees. There was an initial dispute as to whether Mrs Vass herself or her marriage contract trustees were entitled to rank in the multiplepoinding. The Lord Ordinary's (Kinloch) first interlocutor dealt with this matter. He held that the trustees were entitled to rank.[56] The rest of the case, however, is not concerned with the claims on Mrs Vass's share of the estate. The remaining claims were made on Mrs Ducat's share. For our purposes the relevant claims on this share were four:

1. Mrs Ducat herself
2. A claim for some £818 made by the representatives of a firm of solicitors, McIntosh & Ducat WS ('McIntosh'). The firm had advanced certain sums to Mrs Ducat's husband, a Major Ducat in 1841. The Major and his wife had jointly granted these claimants an assignation in security of all of Mrs Ducat's rights under the trust. For reasons that are not explained in the reports, a second assignation, by the same parties, was granted in 1842. On the death of the lifrentrix, Mrs Wright, in 1858, McIntosh's representatives raised an action against Mrs Ducat. Arrestments were served on Mr Fyfe's trustees on the dependence of the action. Before the action was called, a compromise agreement was reached in 1858. As a result, Mrs Ducat

[50] *Thomas Dunn's Tr* (1896) 4 SLT 46 OH.

[51] *Whyte v Neish* (1622) Mor 854; *Murray v Durham* (1622) Mor 855.

[52] This seems to be the only certain date for intimation in *Carter v McIntosh*.

[53] The date preferred in *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816, para [54] *per* Sheriff Principal Dunlop QC. See *Laurence McIntosh Ltd v Balfour Beatty Group Ltd* [2006] CSOH 197 at para [23] per Lord Drummond Young.

[54] Hume, *Lectures* vol III, 9. Cf Stair III.i.45 and *Royal Bank of Scotland v Dixon* (1868) 6 M 995.

[55] (1862) 24 D 925.

[56] (1862) 24 D 925 at 927–928. Unfortunately, the Lord Ordinary confused an obligation to assign with an assignation. This failure has had far-reaching consequences for the development of Scots law. Unfortunately the point cannot be discussed here, but see G L Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

'instructed and authorized'[57] Mr Fyfe's trustees to pay the sum of £818 to McIntosh's representatives (who already held an assignation from her). This was apparently intimated to Mr Fyfe's trustees.

3. Arnott ranked for payment of £150 he had advanced to Mrs Ducat. She had drawn a bill for this sum on the trustees, dated March 1856. This was duly presented and protested for non-acceptance in June 1856.[58]
4. After the record had been closed,[59] Mrs Ducat was sequestrated.[60] Her trustee, Carter, successfully craved to be sisted in the process as a claimant. With an additional claim in his name, with answers from the competing parties, a second record was made up and closed in February 1861. Carter sought to be preferred for the whole fund *in medio* on the basis of his act and warrant.[61]

7-19. The Lord Ordinary (Kinloch) repelled Carter's claim. He held that the second (McIntosh) and the third (Arnott) claimants were entitled to be preferred for their whole claims. These rested, he held, 'on absolute assignations, duly completed by intimation, anterior to the date of the sequestration'.[62] He continued,

> 'In the case of [the McIntosh claim], the right rested on a minute of agreement by which Mrs Ducat not only become bound to pay the sum claimed out of her share of Mr Fyfe's estate, but granted an express direction and authority to Mr Fyfe's trustees forthwith to pay the amount to the holders of the deed; and the date of this minute of agreement, it will be observed is considerably subsequent to the time when, by the death of Mrs Wright, the liferentrix, the right of Mrs Ducat had fully vested. There appears sufficient evidence that this mandate *in rem suam* was immediately intimated to the trustees, but it is unnecessary to go curiously into this point, for the production of the minute of agreement containing this mandate in the multiplepoinding raised by the trustees was, according to the authorities, judicial intimation of the assignation…. In the case of Mr Arnott there is not a deed of assignation, but there is what in law is *equivalent* – a draft on the trustees, payable three months after date, protested for non-acceptance. This, it is well-known, is *equivalent* to an assignation of the funds of the drawer in the hands of the drawee, completed by intimation.'[63]

7-20. When the matter reached the Second Division, however, Lord Justice-Clerk Inglis referred to the issue of judicial intimation, but not with respect to the McIntosh claim. He accepted that McIntosh had already intimated their assignation.[64] Lord Inglis refers to judicial intimation only with respect to Arnott's alleged assignation.[65] But it had already been proved that Arnott had protested his bill for non-acceptance.[66] Surprisingly, Lord Inglis seems to assume

[57] (1862) 24 D 925 at 928; (1862) 32 Sc Jur 418 at 418.

[58] (1862) 32 Sc Jur 418 at 418.

[59] In June 1859.

[60] In July 1860.

[61] Founding on the decision in *Gordon v Millar* (1842) 4 D 352.

[62] (1862) 24 D 925 at 931.

[63] (1862) 24 D 925 at 931.

[64] At 933: 'that assignation was intimated long before the sequestration of Eliza Ducat's estate'.

[65] (1862) 24 D 925 at 934.

[66] That this operated as a 'virtual' assignation does not even seem to have been in dispute at the time, see eg *Stewart v Ewing* (1744) Mor 1493.

that this did not amount to intimation (though he does not even mention the proceeding). Indeed, Lord Inglis seems to suggest that it was only as a result of production of the bill in the multiplepoinding that it operated as an assignation. In *Carter*, then, the *dicta* on judicial intimation were *obiter* with regard to both successful claimants: they had both already intimated their assignations.

7-21. In the absence of authority to the contrary, the only certain date is either the date of production of the deed in process, or the date of closing of the record.[67] The most recent case to deal with the matter, however, has raised a logical difficulty with judicial intimation. The Sheriff Principal held that the date of service of the initial writ was the date of the intimation.[68] He then commented:

> 'I approach the issue on the basis that it was argued, namely that intimation was required at latest by the time of the raising of the action. I make that point specifically because it seems to me that there is at least an argument that the assignation gives the pursuers a substantial interest in the subject matter of the litigation, requiring only formal completion by intimation, such that title to sue can be sustained even though intimation is only made in the course of the process (see *Symington v Campbell*[69] at p 437 and *Bentley v Macfarlane*[70] at p 79). For the sake of completeness I should say that *Alderwick v Craig*[71] and *Bank of Scotland v Liquidator of Hutchison Main & Co Ltd*[72] can be distinguished as the foundation of the claimed title was merely an agreement to assign (or equivalent) and not, as with this case, an assignation.'[73]

7-22. This statement highlights a tension between the cases on title to sue on the one hand; and the principles regulating transfer on the other. Some cases suggest that an unintimated assignation provides a sufficient title to sue. The general principle is that transfer occurs only on intimation. The law of intimation, however, says that intimation can occur judicially. Suppose an action is raised. Any debtor served with a writ from someone other than his creditor will be bound to refuse to pay, lest he be found liable to make a second payment to the true creditor. The pursuer is not his creditor. Even if the pursuer is claiming on the basis of an assignation, there will be no copy of it in the initial writ. The Sheriff in *Nigel Lowe Holdings* was untroubled by this: 'I accept that the defenders were entitled to call upon the pursuers to vouch these matters and to give greater specification, but I do not consider that the vouching and specification were required contemporaneously with the initial writ'.[74] In other words, the date of intimation is deemed to be a date at which the debtor has no proof that the putative assignee has any title whatsoever to sue. That analysis suggests that the validity of the intimation is retrospective. These difficulties, together with Hume's adverse opinion,[75] suggest that the decision may be doubted

[67] *Dougal v Gordon* 17 November 1795 FC; (1795) Mor 851; *Thomas Dunn's Tr* (1896) 4 SLT 46 OH.

[68] *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816, para [54] *per* Sheriff Principal Dunlop QC.

[69] (1894) 21 R 434.

[70] 1964 SC 76.

[71] 1916 2 SLT 161.

[72] 1914 SC (HL) 1.

[73] At para [53].

[74] Para [54].

[75] See para 7-17, n 54 above.

7-23. How, then, does judicial intimation work? Initially, the debtor will be bound to plead that the action is irrelevant: whatever the authorities on title to sue say,[76] the debtor cannot pay the pursuer for the simple reason that, until intimation, the pursuer is not the defender's creditor. At the very least, the pursuer's action is almost certainly not necessary.[77] The pursuer then lodges the assignation in process. The defender may have no substantive defence to the claim. The defender should then adjust his pleadings once the assignation has been lodged. It is the date of lodging in process of the assignation that must be taken as the date of intimation of the assignation. Even if the defender has adjusted so as to state no substantive defence, the pursuer will be liable for the debtor's expenses. In short, judicial intimation is an expensive way of intimating an assignation.

C. WHAT IS ASSIGNABLE – THE RELEVANCE OF INTIMATION

7-24. The question of whether intimation is actually *possible* is helpful in focusing the issue on what can be assigned. If there can be no effective intimation, there can be no conveyance of the claim. This does not mean that there cannot be concluded an effective contract to assign, or even delivery of the assignation. But, until intimation, there is no transfer of the claim. So intimation of an assignation of a legacy to the executor made before the testator's death is ineffectual: there is no vested right to assign until death. An arrestment served on the executor after death was therefore preferred.[78] The topic is a large one and cannot be further considered here.[79]

D. THE DELIVERED BUT UNINTIMATED ASSIGNATION

(1) Discharges

7-25. Until the delivery of the transfer agreement is intimated, the cedent can still grant a valid discharge of the debt.[80] Whether the debtor who pays the cedent in the interim period between delivery of the assignation and intimation is discharged, raises questions more complex than might initially appear.[81] Subsequent to the delivery of the assignation, the cedent may compromise all claims with the debtor. The cedent has no idea whether there has been intimation.

[76] These cases are dubious. And they can give rise to strange results. They were most recently followed in *Tayplan v D & A Contracts* 2005 SLT 195 OH.

[77] If the pursuer has a written deed of assignation, there should have been nothing to prevent him from intimating the assignation conventionally. If there is no deed, it is difficult to see how the pursuer can claim to be an 'assignee'.

[78] *Bedwells and Yates v Tod*, 2 December 1819 FC.

[79] See G L Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

[80] *Drummond v Muschet* (1492) Mor 843; *M'Gill v Laurestoun* (1558) Mor 843; *M'Dowal v Fullerton* (1714) 2 Ross LC 709; Mor 576; *Hope and M'Caa v Wauch* 12 June 1816 FC; *Safder v Shahid* 2004 GWD 28-586.

[81] For the position of an arrested claim prior to furthcoming, see *Pitcairn v Fraser* (1836) 14 S 1101.

He grants a general discharge to the debtor. Does this include the assigned claim? Ultimately, the matter is a question of construction of the discharge agreement. It has been held that a general discharge covers an assigned but unintimated claim,[82] but there are also cases where the contrary has been held.[83] In *Mitchells v Sinclair*[84] the court held that, if there is no mention of the assigned debt in a general discharge, it will be assumed that it was not included and is not discharged. This may be unfair on the debtor. If the discharge is in general terms, why can the debtor not found on it? Indeed, where the compromise is for onerous causes, the effect of the decision in *Mitchell* is to require the debtor to make a double payment. As a result, a gratuitous discharge does not prejudice an onerous assignee (there can be no question of double payment here as, *ex hypothesi*, the debtor gave no consideration for the discharge).[85] An onerous discharge, in contrast, does prejudice the assignee (the debtor has given consideration for the discharge; so he cannot be compelled to pay again to the assignee).[86] A cedent who discharges an assigned debt is in breach of warrandice.[87] Creditors who are entering into a general compromise of claims with a debtor should therefore be careful to exclude any assigned claims from the discharge.

(2) General

7-26. The sequestration of the cedent prior to intimation will spell disaster for the assignee. In all likelihood, both the consideration and the claim will be swallowed up by the cedent's insolvency. Quite what is the juristic effect of the delivery of the deed of assignation – or, for that matter, delivery of a disposition of heritage – is therefore one of the burning questions for modern Scots law. There are precious few answers to this question in the sources.

7-27. It is often said that there are only two types of rights in Scots law: real rights and personal rights. The real right/personal right dichotomy is fundamental, especially on insolvency. But how does it explain the delivery of the assignation? It has been said that on delivery of the deed, the transferee thereof is vested in a personal right to the asset (*jus in personam ad rem acquirendam*) over and above his personal right under the contract.[88] This is insufficient – personal rights are, by definition, rights against persons, not rights in things. But if one thing is clear it is that the person to whom an assignation or disposition is delivered does not get *more* personal rights, but *fewer*. On conclusion of the contract to assign the assignee has a contractual right against the cedent to execute and deliver an assignation. The cedent complies. The assignation is

[82] *Alexander v Agnew* (1713) Mor 5041.

[83] *Munro v Munro* (1712) Mor 5052; *Logan v Affleck* (1736) Mor 5041.

[84] (1716) Mor 5031.

[85] *Blair of Bagillo v Blair of Denhead* (1671) Mor 940.

[86] See *Ritchie v Scottish Automobile and General Insurance Co* 1931 SN 83, also reported as an addendum to *Todd v Anglian Insurance Co Ltd* 1933 SLT 274 OH.

[87] *Alexander v Agnew* (1712) Mor 5041.

[88] See eg *Edmund v Gordon* (1855) 18 D 47 at 57 *per* Lord Deas; *Gibson v Hunter Home Designs Ltd* 1976 SC 23 at 27 *per* Lord President Emslie; *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 40 *per* Lord Hope of Craighead. Cf G Lubbe, 'A Doctrine in Search of a Theory: Some Reflections on the Doctrine of Notice in South African Law' 1997 *Acta Juridica* 246 at 248.

delivered. The cedent thus performs his primary obligations under the contract. Performance discharges obligations. So, on delivery of the assignation, the assignee has fewer rights against the cedent than before. The assignee can no longer sue the cedent for specific implement. But there is still no transfer on delivery. If the debtor pays the cedent prior to intimation, he is discharged.[89]

7-28. It has been suggested that there is a distinction between the contractual right to delivery of the assignation (a *jus crediti*) and the right to a complete the transfer by intimation (a *jus ad rem*[90]):

> 'I must confess that upon this subject I think there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words have been used in many cases interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act, or some act which he may compel another, without a suit, to perform; whereas a *jus crediti* may be defined to be a right which the holder of it cannot make available, if it is resisted, without a suit, to compel the person to do something else in order to make the right perfect.'[91]

7-29. It is not surprising that Lord Cranworth found the distinction difficult. The distinction, if indeed there is one, is subtle. Nevertheless, the crucial incidents of delivery of the assignation seem to be four: *First*, as far as a competition with the trustee in sequestration over the estate of the cedent is concerned, delivery of the deed has no effect.[92] *Secondly*, in terms of personal rights, the assignee does not get 'more' personal rights on delivery of the assignation. On the contrary, he gets fewer. This occurs by virtue of the fact that the cedent has extinguished his contractual obligations by performance.[93] *Thirdly*, although having a delivered but unintimated assignation will not assist on the cedent's insolvency, it is a position preferable to a contractual right to delivery. This is the crux of the matter. Possession of the deed of assignation gives the assignee the power to intimate. The assignee is, to some extent, in control of his own destiny. If he fails to intimate and creditors of the cedent arrest in the hands of the *debitor cessus*, the assignee has only himself to blame. Delivery of the deed, then, gives the transferee thereof the power and privilege to rely on himself rather than someone else to comply with the requirements of the law; in the Hohfeldian terminology employed by Professor Reid, the assignee has a

[89] See para 6-27. Cf UNIDROIT Ottawa Convention, Art 8; UNCITRAL, Art 19.

[90] If claims cannot be the object of ownership, '*jus ad rem*' is inaccurate. For discussion of the amorphous nature of the *jus ad rem*, see generally R Michaels, *Sachzuordnung durch Kaufvertrag* (2002).

[91] *Edmond v Magistrates of Aberdeen* (1855) 18 D 47 aff'd (1858) 3 Macq 116 at 122 *per* Lord Cranworth. Cf *Wilson's Trs v Pagen* (1856) 18 D 1096 at 1104 *per* Lord Benholme.

[92] Cf *Strachan v M'Dougle* (1835) 13 S 954 at 959 *per* Lord Mackenzie: 'it is an important general principle of our law, and there is none more vital, that the delivery of the corpus of a deed or instrument will not carry the real right that is contained within such a deed or instrument'. Although, *quaere* whether the 'real right' is ever contained in the deed or instrument. A real right is the relationship of a person to a thing. Delivery of the deed does, however, have an effect in a competition with a floating charge holder: see para 7-31.

[93] A point made by R Michaels, *Sachzuordnung durch Kaufvertrag* (2002) 42.

[94] Reid, *Property* para 644. Cf A von Tuhr, *Allgemeiner Teil des deutschen bürgerlichen Rechts* (1910) vol 1, § 5, at 125, n 14: 'So begrundet z.B. die Auflasung weder ein Recht an der Sache

'power'.[94] *Fourthly*, it is probably the case that the holder of a delivered but unintimated assignation can translate a good right to a second assignee. It will be necessary, however, for the cedent to deliver a copy of the original assignation in the translation. This will have to be intimated to the debtor as well as the second assignation. It provides a link in title. Otherwise, the second assignee will be founding his right against the debtor on the basis of an assignation from a creditor unknown to the debtor. If the first assignation is not intimated to the debtor, the debtor can withhold payment from the assignee. The well-advised debtor would raise a multiplepoinding.[95] The same principle applies to every successive assignation. The failure of the cedent to deliver the original assignation is a breach of warrandice.

7-30. Where only a contract to assign has been concluded, the putative assignee has a personal right against the cedent. That personal right is itself assignable.[96] Suppose, for example, A contracts with B for the assignation of B's claim against C. Before delivery of the assignation, A could assign to D his right to have delivered an assignation (of B's claim against C). The debtor in this obligation is not C but B. On intimation to B, D will have a right to demand delivery of an assignation of B's claim against C.

(3) Unintimated assignations and floating charges

7-31. It has been argued that the effect of the speeches in *Sharp v Thomson*[97] is to render intimation necessary only for the purpose of interpelling the debtor from paying the cedent.[98] Mere delivery of the assignation, it is argued, gives the holder of the first contractual right an insolvency preference. The argument is not new.[99] On the basis of *Sharp*, however, it has been suggested that the analogy between the failure to register a delivered disposition of heritage for almost a year and invoice discounting 'is seemingly irrefutable'.[100]

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noch ein obligatorisches Recht zwischen den Parteien, sondern nur die Möglichkeit, durch darauffolgende Eintragung, Eigentum zu Erwerben'.

[95] Cf Art 6:37 *BW*.

[96] See 'Case Commentary' 2005 SLT (News) 119.

[97] 1997 SC (HL) 66. The debate sparked by this decision has been great. The academic literature is voluminous; the judicial limitations to any *ratio* numerous. See, *inter alia*, K G C Reid 'Equity Triumphant' (1997) 1 *Edin LR* 464; G L Gretton 'Equitable Ownership in Scots Law?' (2001) 5 *Edin LR* 73; *Fleming's Tr v Fleming* 2000 SC 206; *Lady Fforde v McKinnon* 1998 SC 110. Lord Hope of Craighead, who, as Lord President, was overruled by the House of Lords in *Sharp*, has commented extra-judicially that the appellate committee's decision, 'was not well founded in principle': Lord Hope of Craighead, 'The Place of a Mixed System' (2001) 35 *Israel LR* 1 at 18. *Sharp* was distinguished by the House of Lords in *Burnett's Tr v Grainger* 2004 SC (HL) 19.

[98] See eg J G Birrell, '*Sharp v Thomson*: the Impact on Banking and Insolvency Law' 1997 SLT (News) 151; R Bruce Wood, in F Salinger, *Factoring: the Law and Practice of Invoice Finance* (3rd edn 1999) paras 7.51–7.52; and, most pertinently, D P Sellar, 'Current Law Case Update' Law Society of Scotland PQLE Conference, 22 May 2001, 56. The cases cited by Sellar were, however, disapproved by the First Division in *Sharp v Thomson* 1995 SC 455 at 480 *per* Lord President Hope. See too Kames, *Principles of Equity* (2nd edn 1767) 61.

[99] Traces of this theory can be found in *Grigor Allan v Urquhart* (1888) 15 R 56 at 61 *per* Lord Young; and in *Browne's Tr v Anderson* (1901) 4 F 305 at 311 *per* Lord Trayner. The argument was successful in *Till v Jamieson* (1763) Kames Sel Dec 273; Mor 2858 and 5946. But the facts were special. Cf *Macioca v Alma Holdings Ltd* 1993 SLT 730 OH.

[100] Bruce Wood, 'Special Considerations for Scotland' in Salinger, *Factoring: the Law and Practice of Invoice Finance* (4th edn 2006) at para 7.47.

The argument is no doubt partly motivated by a desire of commercial lawyers to bring Scots law into line with English law.[101] With respect, however, the analogy is a poor one. Even if there is an intelligible *ratio* which can be taken from *Sharp*, it is limited to the floating charge.[102] There are no 'equities' with the finance company.[103] They have not been the victims of careless solicitors. Invoice financiers, by trade, ought to be precisely aware of the legal position:

> 'The financing assignee, who serves a useful function in providing working capital loans, is not an ignorant stranger. He is in a position to find out – and, before putting up his money, does find out – all there is to know about the operations of his borrowers. He has a close and continuing relationship with them. He can, if he chooses, require the strictest accounting from them. He does not need to be insulated, as a matter of law, from the risks of the transactions, in which they engage. Because he can investigate, supervise and control, he should be encouraged to do so and penalized is he has not done so…. [W]hy on earth should the fruits of a known insolvent's labor feed the assignee while all the other creditors starve.'[104]

Individuals are required to intimate; so too should companies. The general principle is clear: in Scots law intimation is essential to the transfer:

> 'I think that the law of Scotland and the law of England, in the matter of assignations, start from diametrically opposite bases. I think that, in this matter, the law of Scotland is preferable to the law of England. The object of the law of Scotland is – as in the case of heritable infeftments and heritable securities – to effect security by creating a definite system of completing title on which people can rely. Accordingly for 300 years at least it has been the law of Scotland that an assignation is of no use to the assignee until it is intimated, but that, once it is intimated, it gives him an absolute and preferable right to what is assigned to him against all concerned.'[105]

7-32. The only protection for the assignee who has failed to intimate is to suggest that the cedent holds the claim in some sort of trust. There are two problems with this analysis. First, this seems to be an example of a trust being used to defeat the claims of lawful creditors.[106] Secondly, since a floating charge attaches as if it is a fixed security, on one hypothesis at least, it should defeat the personal rights of any beneficiaries under a trust.[107] Moreover, if delivery of the assignment is the relevant date of preference, the stated policy of the law is subverted. Any competition becomes a free-for-all. The genuine assignee can be defeated by wet ink bearing a prior date to a formal intimation.

[101] For English law, see M Bridge, *Personal Property Law* (3rd edn 2002) at 148 ff.

[102] In *Burnett's Tr v Grainger* 2002 SC 580, Lord Coulsfield suggested that he found the reasoning in Lord Clyde's speech 'difficult to follow' (at para [23]).

[103] *Burnett's Tr v Grainger* at para [28] *per* Lord Coulsfield.

[104] G Gilmore, 'The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman' (1981) 15 *Ga L Rev* 605 at 627. Grant Gilmore was the architect of the US Uniform Commercial Code.

[105] *Macpherson's Judicial Factor v Mackay* 1915 SC 1011 at 1015 *per* Lord Johnston.

[106] G L Gretton, 'Ownership and Insolvency: *Burnett's Tr v Grainger*' (2004) 8 *Edin LR* 389.

[107] K G C Reid, 'Trusts and Floating Charges' 1987 SLT (News) 113. Admittedly, however, even if one does not accept the dual patrimony theory of trusts (for which see G L Gretton, 'Trusts without Equity' (2000) 49 ICLQ 599) it is arguable that since the company has no 'beneficial interest' in assets it holds on trust for another, the trust will not be subject to the charge: *Sharp v Thomson* 1997 SC (HL) 66; *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd* 1914 SC (HL) 1; *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43 and D Cabrelli 'Can Scots Lawyers Trust Don King? Trusts in the Commercial Context' (2001) 6 SLPQ 103.

7-33. Extracting a ratio from *Heritable Reversionary*[108] or *Sharp* may be impossible. On one view – a view, it must be added, that is quite inconsistent with the history and principles of Scots law – it is the passing of 'beneficial interest' that is crucial.[109] What does this mean where there is a competition between a floating charge holder and the holder of a delivered but unintimated assignation? According to *Sharp*, the floating charge does not attach to assets in which the company has no 'beneficial interest'. But it is unclear what this beneficial interest is, or when, exactly, it passes. Three possible situations may be suggested. The first is on the assignee performing his obligations in the agreement to assign (often also referred to, confusingly, as an assignation) by payment. The second is on the cedent performing his obligations by delivery of the deed of assignation to the assignee. A third view is that it is only where both parties have performed – cedent by delivery and assignee by payment – that the object of the assignation is no longer covered by the floating charge.[110] No writing is required for an assignation[111] (though writing is required for intimation, so the statutory abolition is somewhat strange). So an assignee's claim, founded on a verbal assignation, if proved, may be preferred.[112] If so, an assignation is accorded a preference on a corporate cedent's insolvency,[113] though such an 'assignation' would not prevail if the cedent were a sequestrated individual, partnership or trust.[114] Such an 'assignation' also gives an assignee a right which he would not have had if the cedent was solvent. Assume that the receiver did not demand payment, so the debt is still extant. An assignee with no deed will certainly have great difficulty in getting payment from the debtor.[115] But, more importantly, he cannot succeed on competition, whether those competitors are assignees who have intimated or arresters. Put shortly, a wide application of *Sharp* to an assignation is problematic.

7-34. What, then, is the position if the debtor pays the receiver? Receivers are notorious for asserting their (perhaps dubious) rights to assets in furtherance of their duty to the floating charge holder.[116] If a receiver were to demand payment of a debtor after an assignation by the company but before intimation by the assignee, the debtor would be discharged were he

[108] (1891) 18 R 1166 rev'd (1892) 19 R (HL) 43. Lord Watson's speech is the basis of much of the recent confusion. It is difficult to see how much of Lord Watson's speech can still be considered good law following the decision of the House of Lords in *Burnett's Tr v Grainger* 2004 SC (HL) 19. It is to be regretted that the House in *Burnett's Tr* was not asked to overrule *Heritable Reversionary*.

[109] Cf *Brownlee v Robb* 1907 SC 1302 at 1313 *per* Lord Pearson; *Tayplan Ltd v D & A Contracts Ltd* 2005 SLT 195 at para [23] *per* Lord Kingarth (Ordinary).

[110] But compare O Lando, E Clive, A Prüm and R Zimmermann (eds) *Principles of European Contract Law* (Part III, 2003) Art 11:202(1) which suggests an earlier solution: conclusion of the agreement to assign.

[111] Requirements of Writing (Scotland) Act 1995, s 11(3)(a).

[112] But the Civil Evidence (Scotland) Act 1988 may be a small hurdle to overcome.

[113] Or where the cedent is an LLP; it too can grant floating charges: Limited Liability Partnerships (Scotland) Regulations 2001, SSI 2001/128, reg 3, sch 1.

[114] They cannot grant floating charges. It is clear that the trustee in sequestration will be preferred to an assignee who holds an unintimated assignation, see para 6-35 above.

[115] Lord Kames, *Principles of Equity* (2nd edn 1767) 61; (3rd edn 1778) I, 59: 'knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in mala fide*'. Kames' view is important since he was of opinion that equity should ameliorate the requirement of *notarial* intimation.

[116] See S Wheeler, *Retention of Title* (1990).

to pay. The only right that the assignee then has is a personal right against the company for the money. The receiver cannot take the benefit of the claim since it is not an asset in which the company had a beneficial interest. But a company which is in receivership is likely to be in financial difficulties. It is not clear what effect this passing of beneficial interest has in a competition with other creditors who do not hold a floating charge. The other creditors' claims may be greater than the assets. The assignee will therefore only have his contractual right against the company. The company will probably be in no position to fulfil its obligation owing to its practical insolvency.

7-35. But matters may be more complicated still. Suppose A Ltd assigns a claim for value against Eve to John. The assignation is delivered. Before going into receivership, A Ltd then assigns the same claim to Jack, also for value. Jack receives a delivered assignation. Neither assignation is intimated. A Ltd then goes into receivership. Thereafter, Jack intimates to Eve. On the *Sharp* reasoning, John is preferred to Jack. Following intimation, Jack is preferred to John. A strange result, albeit one that may occur under English law (although Lord Reid was at a loss to see how A Ltd can grant a valid assignment to Jack under English law if it has already assigned all its 'beneficial interest' to John).[117] It is therefore disappointing to see these confused rules reproduced in the *Principles of European Contract Law*.[118] Furthermore, what would be the position, on the foregoing analysis, if John is sequestrated in the interim period between delivery of the assignation from A Ltd and intimation by Jack? That there is no clear way ahead here should set the proverbial alarm bells ringing. Such arbitrary, nay, whimsical, rules of competition hardly inspire confidence in the law.

7-36. There is also some difficulty with the attachment of the floating charge. It attaches 'as if' it is a fixed security.[119] There is, however, a problem: it is not possible to create a fixed *security* over incorporeal moveable property in Scotland, in the true sense of the term. The assignation in security is not, strictly speaking, a security; though it may function as such. It is a case of absolute transfer qualified by a personal obligation to re-convey (*fiducia cum creditore*). It is the converse of the sale of corporeal moveables by retention of title.[120] It is notable that other instances of *fiducia cum creditore* need not be registered as 'charges'.[121] The provisions of the Companies Act are construed strictly, like taxation legislation.[122] Terms employed by the Act are to be given their precise legalistic meaning.[123] If this principle is applied to the provisions regarding the floating charge, then one could perhaps argue that a floating charge does not attach to those incorporeal moveables over which it is not possible to create a right in security, the most important of which is the paradigm money claim.

[117] *BS Lyle v Rosher* [1959] 1 WLR 8 HL.

[118] *Principles of European Contract Law* (Part III, 2003) Art 11:401.

[119] *Forth & Clyde Construction Ltd v Trinity Timber & Plywood Co* 1984 SC 1.

[120] *Allan & Son v Turnbull* (1833) 11 S 487 aff'd (1834) 7 W & S 281 HL; *Braithwaite v Bank of Scotland* 1999 SLT 25 at 29A–B *per* Lord Hamilton (Ordinary).

[121] See generally, G L Gretton, 'Registration of Company Charges' (2002) 6 *Edin LR* 146. So, retention of title clauses in sales of corporeal moveables are not registrable in Scotland, although they are in England: *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.

[122] E Ferran, *Company Law and Corporate Finance* (1999) 380 and authority there cited.

[123] See in particular *Barclays Bank plc v British & Commonwealth Holdings* [1996] 1 BCLC 1 and 29, and *NZI Bank v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at 539, *per* Richardson J approved in *Hoverd Industries Ltd v Supercool Refrigeration and Air Conditioning (1991) Ltd* [1995] 3 NZLR 577 at 583 line 40 per McKay J.

7-37. How, then, to judge competing unintimated assignations? In a competition with a trustee in sequestration or liquidator, the trustee or liquidator will be preferred to the 'assignee' who has not intimated. As for a competition with a floating charge holder, it seems that, providing a claimant can prove that he has paid for an assignation and the deed has been delivered, the beneficial interest has passed and the claim is not subject to the charge. It remains to be seen how individual assignees, who fail to intimate before the attachment of the floating charge, will be treated by the courts in competition with a receiver or floating charge holder. There is, however, little to support their position in principle; after all, 'if hardship justified exemptions from *pari passu* ranking there could be no insolvency proceedings in Scotland'.[124] What of a competition between two holders of unintimated assignations? Either party can intimate. Whoever does so first, wins the competition. Matters are more complicated if neither intimates and the debtor raises a multiplepoinding. If both parties enter the process simultaneously, they rank, it seems, *pari passu*.[125]

(4) Conclusion

7-38. On any analysis, intimation to the debtor is practically necessary in order to interpel his payment to the cedent. In Scots law, intimation is also the relevant date for transfer. The rule is certain. The requirement of a formal act reduces the potential for fraud. With formal intimation requirements, good faith payment by the debtor will be the exception rather than the rule.

7-39. Yet, as has been seen, there are often situations where intimation is either impossible or unnecessary. And, when other parties, such as cautioners, are introduced into the equation, the law does not require intimation to them to transfer the cedent's rights against them to the assignee. The law engenders respect through clear and intelligible rules. Certainty is synonymous with such rules. This policy is inherently equitable. But devotion to certainty should not be unfailing. It does not prevent the law attaining equally legitimate objectives. So where devotion to certainty will lead to unfairness, a reappraisal is necessary. Cautioners are a case in point. Intimation is required to the debtor. This provides a certain date of transfer. All accessories follow from the date of intimation to the principal debtor. The goal of certainty has been attained. This being so, there is no need to maintain that a cautioner who pays the cedent in good faith is still liable to the assignee. The cautioner should not be prejudiced. The same can be said of co-debtors who are ignorant of each other.

7-40. If certainty is the goal, why should a requirement of registration not be adopted? As Scots law has demonstrated in the case of edictal intimation, registration is a workable alternative to intimation.[126] Arguably it is preferable: it provides genuine publicity as well as a certain date of transfer. Certainty having being achieved, all questions involving the debtor can be settled by a general principle of good faith payment. Debtor notification can

[124] N Whitty, '*Sharp v Thomson*: Identifying the Mischief' 1995 SLT (News) 79.

[125] Cf Kames, *Principles of Equity* (3rd edn 1778) II, 194: 'In these cases, I cannot discover a rule for preference; nor can I extricate the matter otherwise than by dividing the subject between the competitors. And, after all, whether this may not be cutting the Gordion knot instead of untying it, I pretend not to be certain'.

[126] For which, see R G Anderson, 'A Note on Edictal Intimation' (2004) 8 *Edin LR* 272.

either be retained as an alternative to registration or eschewed in its entirety. But, if there are no formal intimation requirements, how does the assignee demand payment? More importantly, how is the debtor to respond to perhaps vague demands if there are no rules governing what form the assignee's demand must take? A lack of formal rules places the debtor in an invidious position: when can he rely on the notice? What if he does not understand it? Any regime has to address the practicalities of asking the debtor to pay someone other than his original creditor.

7-41. The present Scottish rules may not be perfect; they do, at least, have the benefit of certainty.

8 The Debtor's Defences

A. THE MAXIM

8-01. On assignation, the *debitor cessus* can raise all the defences held against the cedent against the assignee: *assignatus utitur jure auctoris*. This is variously described as 'a law maxim, importing that the assignee comes into the right and place of his cedent';[1] 'the assignee exercises the right of the cedent';[2] or 'the

[1] G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (1882) 66.

[2] A G M Duncan (ed), *Trayner's Latin Maxims* (4th edn 1894, reprinted 1993) 53. Cf W J Stewart, *Collins Dictionary of Law* (2nd edn 2001) 33–34; W Burton, *Legal Thesaurus* (2nd edn 1979) 36; R H Kersley, *Broom's Legal Maxims* (10th edn 1939) 302.

cedent's right must be the measure of the right of the assignee'.[3] In the American Bar Association work, *Latin for Lawyers*, it is said that the maxim applies 'generally to all property, real and personal'.[4] In Scotland, however, it is said to be 'peculiar' to the law of assignation,[5] and it has been held that the principle does not apply to heritable property,[6] corporeal moveables, or to negotiable instruments.[7] Indeed, it has been observed that it is the exemption from the *assignatus* rule which is the peculiar feature of a negotiable instrument.[8] Whatever the shortcomings of the maxim, it is preferable to the expression used in English law, 'subject to equities', which is inherently inaccurate: 'equities' take effect at law as well as in equity.[9]

8-02. The source of the *assignatus* formula is obscure. Stair did not mention it in either the first (1681) or second (1693) edition of his *Institutions.* It was, however, found in some of Stair's manuscripts in the Advocates' Library and was included by William Johnstone in the third edition of the *Institutions* published in 1759:

> '…the common rule of law is more rational, that the assigny *utitur jure auctoris*, and is in no better case than the cedent, unless it be in the matter of probation, that the cedent's oath will not prove against him *nisi in jure litigiosa*, and therefore *in personalibus* all exceptions against the cedent are competent against the assignee, even compensation itself.' [10]

8-03. Subsequent editors of Stair, however, have returned to the text found in the first and second editions.[11] Andrew McDouall, Lord Bankton, refers to

[3] *Robertson v Wright* (1873) 1 R 237 at 243 *per* Lord Ardmillan.

[4] H Jackson (ed), *Latin for Lawyers* (1915; reprinted, Lawbook Exchange Ltd, 2000) 127, no 77, founding on P Halkerston, *A Collection of Law Maxims and Rules in Law and Equity* (Edinburgh, 1823) 14. There is no reference by Halkerston at 190 as to the origin of the term. The statement in the former work that 'the thing assigned takes with it all the liabilities attached to it in the hands of the assignor at the time of the assignment' is inaccurate.

[5] McBryde, *Contract* para 12-64 citing Kames, *Elucidations*, 13–14; Scottish Law Commission Memorandum No 42, *Defective Consent and Consequential Matters* (1978) para 3.137: 'it is possible to argue that apart from settled practice there are today no convincing reasons for making an exception to the general rule [that personal obligations of the transferor are not prestable against the transferee]'. Cf Reid, *Property* para 660.

[6] *Scottish Widows Fund and Life Assurance Society v Buist* (1876) 3 R 1078 at 1082 *per* Lord President Inglis. In fact, feudalism provided a tripartite situation of superior, vassal and transferee, to which the maxim was applied: eg *Governors of Heriot's Trust v Caledonian Railway Co* 1915 SC (HL) 52 at 62 *per* Lord Dunedin; see also the dictum of Lord Young in *Whyte v Lee* (1879) 6 R 699 at 701 quoted in Reid, *Property* para 705. Cf *Arnott's Trs v Forbes* (1881) 9 R 89.

[7] But compare *London Joint Stock Bank v A Stewart & Co* (1859) 21 D 1327.

[8] *Scottish Widows Fund and Life Assurance Society v Inland Revenue* 1909 SC 1372 at 1375 *per* Lord Dunedin. But compare discussion in para 4-47 above, and James Steven Rogers, *An Early History of the Law of Bills and Notes* (1995) for criticism of this proposition in Anglo-American law.

[9] W W Cook, 'The Alienability of Choses in Action' (1917) 30 *Harvard LR* 449; L C B Gower (1956) *Butterworths SA Law Review* 228, both cited by D V Cowen and L Gering, *Cowen's Law of Negotiable Instruments in South Africa* (5th edn 1985) 21.

[10] Stair, *Institutions* (3rd edn, by J Gordon and W Johnstone, 1759) I.x.16. Bell was strongly critical of this passage: see para 11-09 below. The main reason for this criticism was the fact that Stair's passage failed to take account of the apparent freedom that an assignee has from a latent trust. Bell's view was confirmed by the House of Lords in *Redfearn v Sommervails* (1813) 1 Dow 50.

[11] Brodie's edition (4th edn 1826) 120. See his note thereto. Brodie appears to have been the first to notice the irregularity in the text of the third edition. Cf More's edition (5th edn 1832); and D M Walker's Tercentenary edition (6th edn 1981). The text was the subject of full argument in the leading case of *Scottish Widows Fund v Buist* (1876) 3 R 1078.

'*utitur jure auctoris*' in his *Institute* published between 1751 and 1753.[12] But the first recorded use of the full term '*assignatus utitur jure auctoris*' in Scots law, it appears, is in Morison's report of a case in 1755.[13] As a result, the first writer to refer to the maxim in its full form is Erskine (whose *Institute* was published posthumously in 1773).[14] The maxim, as used by Erskine, has been approved by the House of Lords;[15] and it is also used by Bell.[16] It has been suggested[17] that the term was used by Voet.[18] But there is no trace of the term in the passage cited. In *Mansfield v Walker's Trs*,[19] a decision of the Whole Court, it was asserted that Scots law borrowed the term from the civil law.[20]

8-04. The peculiarities of the term may be found in the history of the law of cession. Where the terms '*assignatio*' or '*adsignatio*' or '*assignatus utitur jure auctoris*' appear in European dictionaries, all references are to the related concept of the order to pay (*Anweisung*).[21] The important differences between the concepts of cession and *Anweisung* were not always appreciated. It is the *Anweisung* that was labelled '*Assignation*' in the Germanic sources. This leads to another historical mystery. The *debitor cessus* can raise his defences against a transferee of the original creditor (*nemo plus, assignatus,* call it what you will); in an *Anweisung*, the creditor orders the debtor to pay the creditor's creditor. The debtor is paying in the creditor's name and, as a result, cannot raise defences based on his relationship with the original creditor.[22]

B. THE DEBTOR'S DEFENCES

(1) General

8-05. The *assignatus* rule operates in the peculiar tripartite factual situation involved in an assignation. It is just one facet of the better-known principle, *nemo plus juris ad alium transferre potest quam ipse habet*.[23] This is in line with the approach

[12] I, 343, 69; III.i.8. He also refers to the formulation in the civil law: *non dabeo melioris conditionis esse quam autor meus*, which K Luig, 'Assignation' in K G C Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 2, 415 helpfully identifies as D 50.17.1.175(4).1: 'I cannot be in a better condition (have a better title) than my author by whom the right to me is transferred', *Trayner's Latin Maxims* (4th edn 1894) 393.

[13] *Irvine v Osterbye* (1755) Mor 1715 at 1716. In *Creditors of Earneslaw v Douglas* (1705) Mor 13564 it was argued that a singular successor was '*utuntur jure auctoris*'.

[14] III.v.10.

[15] *Redfearn v Sommervails* (1813) 1 Dow 50 at 66.

[16] G J Bell, *Commentaries on the Law of Scotland* (3rd edn 1816) I, 184.

[17] A Milne et al, *Bell's South African Legal Dictionary* (3rd edn 1951) 68.

[18] J Voet, *Commentarius ad Pandectas* (2nd edn 1707) 11.4.12.

[19] (1833) 11 S 813 aff'd (1835) 1 S & McL 203; *sub nom Stewart's Trs v Walker's Trs* (1835) 3 Ross LC 139.

[20] (1833) 11 S 813 at 822.

[21] D Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (6th edn 1998) 37, No 104: 'Assignatus utitur jure auctoris': 'Der Angewiesene übt ein Recht des Anweisenden aus. Er leistet für Rechnung des Anweisenden'. Cf § 783(2) BGB; R Lieberwirth, *Latein im Recht* (4th edn 1996) 36: 'assignatio' = Anweisung. Cf *Bell's South African Legal Dictionary*, para 8-03 above.

[22] Compare paras 3-14 and 4-47 above.

[23] *Mackenzie v Watson & Stuart* (1678) Mor 10188; *Creditors of Earneslaw v Douglas* (1705) Mor 13564; J S Muirhead, *An Outline of Roman Law* (1937) 150.

taken in other legal systems.[24] The rule embodies the need to protect the debtor, a passive party to the arrangement, who should not be prejudiced. In the law of arrestment, the principle is simply articulated by Graham Stewart: 'Arrestment cannot have the effect of making the arrestee's position worse'.[25] In Quebec, the import of the principle is easily understood in the formulation adopted by the Civil Code: the cedent 'may not, however, make an assignment that is injurious to the rights of the debtor or that renders his obligation more onerous'.[26] In Scotland, by contrast, the principles are not immediately apparent from the so-called *assignatus* rule. It has been subjected to almost no critical analysis. There is, to some extent, a tension between the defences that a debtor can raise under the *assignatus* rule, and those defences that could be raised on the basis of a simple, but general, rule that the debtor should not be prejudiced.

8-06. It is the debtor's right to raise defences against an assignee that was one of the important factors[27] in the utilisation in earlier Scots law of, first, blank bonds and, subsequently, negotiable instruments.[28] The holder of a negotiable instrument taken in good faith and for value is not subject to the debtor's defences.[29] It is the applicability or otherwise of the *assignatus* rule, which demarcates the distinction between 'negotiation' (in the strict sense of the term)[30] and 'transfer' of a bill of exchange.[31]

(2) Juristic Writers

8-07. Although Stair did not actually use the *assignatus utitur jure auctoris* brocard himself, he acknowledged the principle. 'Except in the matter of probation,'[32] he

[24] Cf M Planiol and G Ripert, *Traité théorique et pratique de droit civil* (2nd edn 1954) para 1126; J Ghestin, 'La transmission des obligations en droit positif français' in *La transmission des obligations* (1980) 19 ; P Engel, *Traité des obligations en droit Suisse* (1973) § 276; G Marty, P Raynaud and P Jestaz, *Droit civil: Les obligations* (2nd edn 1989) para 359; S Scott, *The Law of Cession* (2nd edn 1991) 70, 115, 221; R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 152, Nr 140.

[25] J Graham Stewart, *The Law of Diligence* (1898) 233.

[26] *Code civil du Québec* Art 1637; J Baudouin and P Jobin, *Les obligations* (5th edn 1998) para 901 and authority there cited. This is the position in Belgian juristic writing: see P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La transmission des obligations* at 100. The Dutch civil code provides that cession leaves the debtor's defences undisturbed: Art 6:145 *BW*.

[27] See D Cowen and L Gering, *The Law of Negotiable Instruments in South Africa* (5th edn 1985) 21. Cf J S Rogers, *An Early History of the Law of Bills and Notes* (1995) who shows that in Anglo-American law, where the transfer of claims was not admitted at law, the negotiable instrument initially evolved simply to facilitate the transfer of claims.

[28] See general discussion in para 4-47 above.

[29] *Herries & Co v Crosbie* (1775) Mor 2577; Hailes 616.

[30] R Goode, *Commercial Law* (3rd edn 2004) 49, n 164; *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) at 493E–G *per* Holmes JA; *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C) at 179 *per* Corbett J.

[31] D V Cowen and L Gering, *The Law of Negotiable Instruments in South Africa* (5th edn 1985) 22. Cf N Elliot, J Odgers and J M Phillips, *Byles on Bills of Exchange and Promissory Notes* (27th edn 2002) 79: 'The terms "transfer" and "negotiable" are hopelessly mixed up in the Act and in the judgment in *National Bank v Silke* [1891] 1 QB 435.'

[32] This refers to the rule that reference could not be made to the oath of the cedent to establish the assignation.

observes, 'all exceptions competent against the cedent before the assignation or intimation, are relevant against the assignee'.[33] The principle is perhaps most fully articulated by Erskine:

> 'All defences competent to a debtor in a moveable debt against the original creditor, which he can prove otherwise than by his oath, continue relevant against even an onerous assignee, whether those defences arise from a separate backbond granted by the creditor at constituting the debt, or from other grounds; *Scot*, Jan 14th 1663 [*Scot v Montgomery* Mor 10187][34]; because no assignee can be in a better condition than his cedent *utitur jure auctoris*; for the assignment gives him the right merely as it stood in the cedent or original creditor. And this doctrine extends also to mutual contracts, in which the assignees are subjected to all the burdens which affect the right while it was vested in the cedent, not only where the mutual obligations are inserted into the contract itself (for these the assignee cannot be ignorant of), but even where they are partly formed by a separate backbond, if it shall appear by witnesses that the contract and backbond have a relation to and are mutual causes of one another; Stair I.x.16.'[35]

8-08. Erskine suggests that every plea which the debtor could have raised with the cedent can be raised against the assignee. He does not discriminate between defences which can be pled against third parties, i.e. by the debtor against an assignee, and those which can be pled against fourth parties, i.e. creditors of either the cedent or the assignee.[36]

8-09. One of the earliest reported cases on the *assignatus* rule states that 'The Lords found that the assigney could be in no better case than the cedent, albeit it was answered that the cedent could only be excluded by a personal exception'.[37] This comes remarkably close to articulating simply the crux of the modern law. The object of the transfer is a personal right itself. The general principle, therefore, is that only those defences which are connected with the personal right that is assigned may be pled. But what does this mean? What sort of defence is one 'connected with' the claim transferred? George Joseph Bell draws the distinction between those which are *extra corpus juris* and those which are *in corpore juris*:

> 'It is necessary to distinguish between such conditions as are incorporated with the right (*in corpore juris*), and such are extraneous to it. 1. Conditions of the former kind, inherent in the nature of the right, or (in the case of debts) existing as exceptions or counterclaims by the original debtor against his creditor, are effectual both against creditors and purchasers coming in place of the original holder of the right. 2. Conditions of the latter species, collateral obligations, or latent trusts extraneous to

[33] III.i.20. He cites *Swintoun v Brown* (1668) Mor 3412 and 8408; 1 Stair 547 for the proposition that even extrinsic defences are pleadable. Stair's own report of this case is detailed but unintelligible. *Cumming v Cumming* (1628) Mor 9207 and 9147 comes close to suggesting that extrinsic defences are pleadable. Stair's reference to assignation 'or' intimation is poorly expressed.

[34] This case involved a back bond which was of its very nature extrinsic.

[35] III.v.10.

[36] This question is normally viewed in terms of the *nemo plus* rule: see Reid, *Property* para 660. In the author's view, the principles are identical, irrespective of the varying Latin. Compare the cases which hold that the assignee's right is subject to trust rights to which the cedent was subject: *Keith v Irvin* (1635) Mor 10185; *Scott v Dickson* (1663) Mor 5799; *Mackenzie v Watson & Stuart* (1678) Mor 10188 (arrester); *Black v Sutherland* (1705) Mor 10189; *Monteith v Douglas* (1710) Mor 10191.

[37] *Schaw* (1622) Mor 829. See also *Muir v Calder* (1635) Mor 831; Spotiswood, (Assignation) 22.

the deed (*extra corpus juris*), and of which the new holder of the right has no notice, have given occasion to great diversity of opinion among our lawyers.'[38]

8-10. As will be seen, Bell's formulation is the embryonic basis of much that follows. This crucial passage, however, is not without its problems. First, Bell's exposition is vague. What is meant by 'conditions which are incorporated with the right', '*in corpore juris*' and 'inherent'? Do these mean the same thing? What about vices of consent which arise prior to the existence of the right? Are they included? Second, his reference to counterclaims is simply wrong. The debtor cannot bring a counterclaim he would have against the cedent against the assignee. Third, his reference to latent trusts is irrelevant. Latent trusts raise issues with fourth parties, not the debtor and defences which may be available to him. Fourth, the issue of notice, in the sense of good faith, is again of little relevance to the defences available to the debtor. Again, this is a fourth party issue. Fifth, Bell suggests that 'collateral' or 'extraneous' rights (those which are '*extra corpus juris*') cannot be raised by the debtor against the assignee. What, then, of compensation? Compensation may be based on a money claim due and owing to the debtor out of the same contractual relationship which is the basis of the assignee's claim. But it is more common for the debtor to plead compensation of unrelated debts which he alleges are due to him by the cedent.

8-11. Despite these problems, Bell's treatment laid the foundations for the modern law. The distinction between intrinsic and extrinsic claims was not original to Bell. It is, indeed, common sense. Lawyers probably took heed of the principle for centuries prior to Bell. In Balfour's *Practicks*, for example, there is a case of an assignee of a reversionary interest who was held to take the right free of an extrinsic agreement between debtor and creditor.[39]

(3) Intrinsic/extrinsic dichotomy

8-12. The basic principle applicable to the debtor's defences that only defences which are intrinsic to the claim assigned can be pled against the assignee. What, then, is an intrinsic defence? The most obvious is that which arises out of the contract which the debtor has with the cedent. It is these rights which the cedent has transferred to the assignee. The right to plead intrinsic defences is a manifestation of the mutuality principle. So a right of retention or a right to rescind for material breach can be pled against an assignee.

8-13. More difficult is the position of vices of consent, which induced the debtor to contract. These will have arisen prior to the conclusion of the contract.[40]

[38] *Commentaries* (7th edn 1870) I, 302.

[39] *Laird of Drumquhassil v Laird of Minto* (1577) Balfour *Practicks*, C.xvii.449. See also *Gordon v Skein and Crawford* (1676) Mor 7167; and *Auchinleck v Williamson* (1667) Mor 6033 which held that a deed *ex corpus juris* did not bind singular successors. Lords Monboddo and Pitfour make explicit references to the intrinsic/extrinsic dichotomy in *Arbuthnot v Colquhoun* (1772) Mor 10424; Hailes 464. See too *King v Douglas* (1636) Mor 10186 at 10187 referring to a deed '*in corpore primi juris*'; *Cockburn v Trotters* (1639) Mor 4187; *Brown v Sibbald* (1669) Mor 10204 ('*in corpore juris*'); *Crighton v Murray*, 10 March 1686, Fountainhall, I, 407 which refers to 'extrinsick' debts.

[40] Where there is no assignation, and the creditor sues his debtor, such a vice cannot found a counterclaim by the debtor. It does not arise out of the contract but from 'something which preceded' it: *Smart v Wilkinson* 1928 SC 383, followed in *Sutherland v Barry* 2002 SLT 418. See criticism of these

Nevertheless, if there was a vice of consent which induced the debtor to enter into a contract, then it is of fundamental importance to the debtor. The debtor has the right to reduce the contract with the cedent. If the debtor is not to be prejudiced by the assignation, it is necessary that he is able to maintain this right against the assignee. As far as the debtor is concerned a vice of consent in the original contract is manifestly intrinsic to the very basis of the cedent's rights against him. The vice of consent is an inherent qualification to the title of the assignee to sue the debtor. If the cedent assigns, then the debtor can raise vices of consent against the assignee. Similarly, if the putative cedent is not the creditor in the right assigned, then the debtor can plead this against the assignee. This a defect which is intrinsic to the claim assigned.[41] If the putative cedent had attempted to sue the debtor, the debtor could have defended on the basis of this fundamental flaw in his title to sue. Consequently, this can be raised against the assignee. The same applies to factors which would render the contract null, for example, illegality. All factors which are intrinsically concerned with the constitution of the right or the continued prestability of the right assigned, and as such would afford the debtor a defence against the cedent, or putative cedent, can be raised against the assignee.[42]

8-14. What are extrinsic defences? They are rights held by the debtor against the cedent which arise out of transactions distinct, and separate, from the contract out of which the ceded right arose. Such extrinsic claims are described, in other systems, as those based on the cedent and debtor's personal relationship.[43] Rights based on an 'independent personal obligation of the cedent' cannot be pled against an assignee.[44] This formulation obviously raises the question as to which obligations are sufficiently 'independent' or 'unconnected'.

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decisions below. Cf RCS r 25.1; OCR r 19.1, and also *Borthwick v Dean Warwick Ltd* 1985 SLT 269 OH and *Anderson v Spence* (1683) Mor 10286.

[41] Cf Reid, *Property* para 660 for a different view.

[42] Again, compare the similar test for a valid counterclaim: *J W Chafer (Scotland) Ltd v Hope* 1963 SLT (Notes) 11 OH; RCS r 25.1; OCR r 19.1.

[43] Compare the formulation of the first draft of the *BGB*, *Erster Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (1887) § 302: 'Der Schuldner kann dem neuen Gläubiger Einreden nicht entgegensetzen, welche eine ausschließliche Beziehung auf die Person des bisherigen Gläubigers haben'. Cf A J F Thibaut, *System des Pandekten-Rechts* (6th edn 1823) § 79 and S Scott, *The Law of Cession* (2nd edn 1991) 222–225. The modern German provisions are §§ 404 *BGB*.

[44] *Marshall's Trs v Banks* 1934 SC 405 at 411 *per* Lord Murray. Cf Bills of Exchange Act 1882, s 38(2): 'Where he is a holder in due course, he holds the bill free from any defect in title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all the parties on the bill'; *Loi uniforme concernant la lettre de change et le billet à l'ordre* 1932 (the 'Geneva Convention' on Bills of Exchange) Art 17 states that persons liable on a bill cannot plead 'defences founded on their personal relations with the drawer' against a holder. With a holder in due course that must be correct; but it is questionable whether a party liable on a bill cannot plead defences against a mere holder. *Byles on Bills of Exchange* (27th edn 2002) paras 18-32 to 18-34 adopts the analysis of an early edition of Cowen and Gering, *The Law of Negotiable Instruments in South Africa* (4th edn 1966) 271–274 between defences *in rem* and *in personam*. But that distinction is merely the South African formulation of the *assignatus* rule (see S Scott, *The Law of Cession* (2nd edn 1991) 222–225). Put another way, such an interpretation of s 38(2) subjects the holder in due course to the *assignatus* rule.

8-15. On the surface, the intrinsic/extrinsic division provides a neat rationalisation. But neat the law is not. One important defence is usually extrinsic yet may nevertheless be pled against the assignee: compensation. Although compensation may arise out of the same contractual relationship as the right which is assigned, this is unusual. More often than not, compensation is founded on an independent and unrelated obligation. It is an important right for the debtor. Not only does compensation provide a defence; if sustained in court it discharges the debtor's obligation to the extent of his cross-claim.

8-16. The debtor can plead these defences against the assignee: those intrinsic to the claim assigned plus compensation. The 'intrinsic plus compensation'[45] formula is applicable equally to diligence creditors and trustees in sequestration. These creditors are said to take *tantum et tale.* This maxim is notoriously slippery. It has been invoked to mean much more than is understood by the *assignatus* rule or the *nemo plus* rule. In principle, however, these maxims amount to one and the same thing.[46] So the debtor may not plead extrinsic claims against an arrester,[47] adjudger, or against an heritable creditor holding decree of maills and duties.[48]

(4) Intrinsic defences: the paradigm situations

8-17. The classic case is payment of all or part of the debt to the cedent prior to intimation of the assignation.[49] So if the right has been discharged prior to the purported assignation, nothing is transferred.[50] The position may, however, be different where the discharge is granted between assignation and intimation for no consideration.[51] If the debtor reduced the obligation which he owed to the cedent prior to intimation of the assignation, this will be good against

[45] This statement is subject to the major qualification of balancing of accounts in bankruptcy. Further, the development of the *assignatus* rule in Scots law in terms of intrinsic and extrinsic defences is not entirely consistent with an approach which is formulated in simple terms that the assignation cannot prejudice the debtor. Indeed, in other jurisdictions, the intrinsic/extrinsic dichotomy has been abandoned for this reason: see, eg, P van Ommeslaghe, 'La transmission des obligations en droit positif belge', in *La transmission des obligations* (1980) 100.

[46] *Chambers' Judicial Factor v Vertue* (1893) 20 R 257 at 258 *per* Lord Wellwood (Ordinary) approved in *Marshall's Trs v Banks* 1934 SC 405. Cf R G Anderson, 'Fraud on Transfer and on Insolvency: Ta ..., Ta ..., Tantum et Tale?' (2007) 11 *Edin LR* 187.

[47] *Creditors of Glendinning v Montgomery* (1745) Kilkerran 44; Mor 2573; Kames Rem Dec 102; *Gibson v Wills* (1826) 5 S 74; *Brodie v Wilson* (1837) 15 S 1195 at 1196 *per* Lord Gillies; *Houston v Aberdeen Town and Country Banking Co* (1849) 11 D 1490 (no opinions reported); *Chambers Judicial Factor v Vertue* (1893) 20 R 257 at 258 *per* Lord Wellwood (Ordinary). The reasoning of the majority in *Park, Dobson & Co v William Taylor & Son* 1929 SC 571 is wrong.

[48] *Marshall's Trs v Banks* 1934 SC 405 held that such a creditor was merely a judicial assignee of the rights of the proprietor: Lord Justice-Clerk Aitchison at 410–411; Lord Murray at 414; *Stewart v M'Ra* (1834) 13 S 4; *Turner v Nicolson* (1835) 13 S 633; *Elmslie v Grant* (1830) 9 S 200. A summons of poinding of the ground is not a judicial assignation: *Royal Bank of Scotland v Dixon* (1868) 6 M 995.

[49] *Farquharson v Hutchison* (1895) 11 Sh Ct Rep 225; *M'Gill v Laurestoun* (1558) Mor 843; *M'Dowal v Fullerton* (1714) 2 Ross LC 709; Mor 576; *Hope and M'Caa v Wauch* 12 June 1816 FC. See generally, D Girsberger, 'Defences of the Account Debtor in International Factoring' (1992) 40 *Am J Comp L* 467.

[50] *Smiths Gore v Reilly* 2003 SLT (Sh Ct) 15; 2001 SCLR 661 at 668D–E *per* Sheriff Principal Nicolson.

[51] *Blair of Bagillo v Blair of Denhead* (1671) Mor 940. See also para 7-25 above.

the assignee.[52] If the right is inherently unassignable, the debtor need not pay anyone other than the original creditor.[53] If the cedent is only a conjunct creditor, the assignee will also only be a conjunct creditor.[54] Where the benefit of an insurance policy is assigned, the assignee takes the rights of the cedent. So, if the cedent was guilty of a misrepresentation, the insurer can plead this against the assignee.[55] The *assignatus* principle will be particularly relevant in insurance cases. Where an insured wrongdoer is insolvent, injured parties may claim directly against the insurer.[56] The basis of this claim is a statutory assignation of the insolvent insured's rights against the insurer.[57] Any defence, which the insurer would have had against a claim for indemnity by the insured, is good against the statutory assignee.[58] The insurer will often seek to claim that the insured was in material breach of the insurance contract, thus absolving them from liability.[59] If the cedent was personally barred from claiming payment from the debtor, the same defence will be available to the debtor against the assignee,[60] at least in so far as the bar arises out of the same agreement. Nevertheless, where the bar is not intrinsic to the right assigned, but arises from some other relationship between the debtor and the cedent, the bar does not bind the assignee. Where the assignee has obtained an assignation of the debtor's obligation secured by a standard security, the debtor is not bound to pay the assignee the cost of obtaining an assignation.[61] The date of intimation is the crucial date for determining the relevancy of the debtor's exception to the assignee's claim.[62]

8-18. Generally speaking, the principle is the same whether it is expressed in terms of the '*assignatus*' rule or the '*nemo plus*' rule. But there may be cases where the debtor cannot plead defences against the assignee which he could have raised against the cedent.[63] The leading case is *Macpherson's Judicial Factor v Mackay*.[64] A beneficiary under his father's will assigned part (£1000)

[52] Hume, *Lectures* III, 15; *Houston v Nisbet* (1708) Mor 8329; *Thom Scott v Peter Bain*, 25 February 1825 FC; (1825) 3 S 583 (NE 400).

[53] *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228.

[54] *Cairnis v Leyis* (1533) Mor 827; Balfour, *Practicks* 169. There is no mention of the *assignatus* rule in the reports; but this is the basis of the decision.

[55] *Scottish Widows Fund v Buist* (1876) 3 R 1078. Cf where the insurance company has notice of the breach and continues to accept premiums nevertheless: *Armstrong v Turquand* (1858) 9 Irish Common Law Reports 32. Insurance policies have specialities which cannot be discussed here.

[56] Third Parties (Rights Against Insurers) Act 1930, s 1.

[57] *Greenlees v Port of Manchester Insurance Co Ltd* 1933 SC 383 at 400 *per* Lord Justice-Clerk Alness; *Cheltenham & Gloucester plc v Sun Alliance & London Insurance plc* 2001 SC 965 at 970D, para 10 *per* Lord President Rodger; 2001 SLT 347 OH; *Aitken v Independent Insurance Co Ltd* 2001 SLT 376 OH; *Aitken v Financial Services Compensation Scheme Ltd* 2003 SLT 878 at 883H OH.

[58] Cf *Mackay v Duke of Sutherland's Trs* 1971 SLT (Land Ct) 2 for an example of the *assignatus* rule being invoked in a statutory transfer.

[59] For examples, see the cases cited in n 57 above.

[60] The authority is sparse, but see E Reid, 'Personal Bar: Case Law in Search of Principle' (2003) 7 *Edin LR* 340 at 347.

[61] *G Dunlop & Sons' Judicial Factor v Armstrong* 1994 SLT 199.

[62] *Shiells v Ferguson, Davidson & Co* (1876) 4 R 250 at 254 *per* Lord Deas; *O'Hare v Reaich* 1956 SLT (Sh Ct) 78.

[63] Cf G Marty, P Raynaud and P Jestaz, *Droit civil, Les obligations* (2nd edn 1989) para 360: 'Le situation du cessionnaire peut ne pas être toujours absolument identique à celle du cédant'.

[64] 1915 SC 1011.

of his entitlement to a share of the residue to marriage contract trustees. This was intimated to the trustees under his father's trust, of which the beneficiary was one. At the date of intimation to the marriage contract trustees, although certain advances had been made to the beneficiary in virtue of his legacy, there remained in excess of £1000 due to him. It transpired that he had thereafter overdrawn from his father's estate by some £1244. The marriage trustees then sued the testamentary trustees for payment in terms of the assignation. The testamentary trustees sought to compensate their claim against the cedent for repayment. It was held, however, that while the cedent would have had no claim to the £1000 – indeed he would have been liable to repay his excessive drawings – the assignee was entitled to payment. At the date of intimation, there was no claim to compensation.

8-19. Some inherently personal characteristics of the cedent may not be applicable to the assignee. Suppose, for instance, on being sued by the cedent, the debtor could have demanded that the cedent find caution. If the solvency of the assignee is unimpeachable, then the debtor will not be able to demand that the assignee find caution on the basis of the *assignatus utitur* doctrine.[65] It is not just the debtor who can plead *assignatus utitur*. In a multiplepoinding, competing creditors can object to the claim of an assignee on the basis that he can have no better right than the cedent had.[66] A right of reduction held by a creditor which is extinguished by payment cannot be enforced by an assignee of the creditor.[67] The assignation of a share in a partnership will not accord the assignee all the rights of the cedent.[68] Similarly it is conceivable that some inherently personal characteristics of the assignee will accord him additional rights that would not have been available to the cedent.[69] Companies do not qualify for legal aid. Some people do. A liquidator therefore validly assigned a claim from a company that did not qualify to individuals who did.[70]

A few words should be said about the history. Under the old rules of proof, the debtor's defence that the claim had been extinguished, which was to be proved by the cedent's oath, was only available before intimation.[71] There was an exception to this. Where the object of the assignation had been rendered litigious prior to intimation, the cedent's oath could be admitted after intimation to the prejudice of the assignee.[72]

(5) Assignatus utitur: applicable to every assignation?

8-20. It is generally assumed that the maxim is applicable to *all* assignations of money claims with the exception of the assignation effected on the

[65] *Moore v Little* (1899) 7 SLT 43 OH. Cf *Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] 1 WLR 985.

[66] *Briggs's Trs v Briggs* 1923 SLT 755 OH.

[67] *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 365.

[68] Partnership Act 1890, s 31. Cf W M Gloag and J W Irvine, *The Law of Rights in Security* (1897) 457 ff.

[69] See eg *MacKintosh v Brodie* (1826) 4 S 729: the assignee, being a Solicitor to the Supreme Courts, was entitled to pursue in the Court of Session, though the cedent could not have done so.

[70] *Norglen v Reeds Rains Prudential Ltd* [1999] 2 AC 1.

[71] Erskine III.v.10.

[72] Erksine III.v.10.

negotiation of a bill of exchange (whether by indorsement and delivery, or delivery[73]), or on acceptance.[74] In *Scottish Widows Fund v Buist*,[75] Lord President Inglis observed that:

> 'It appears to me to be long ago settled in the law of Scotland – and I have never heard of any attempt to disturb the doctrine – that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor… . But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. […] I think the true view of the law is that these things that are called exceptions are classes of cases to which the doctrine does not apply.'[76]

8-21. The version of the report in the *Scottish Law Reporter*, however, contains additional text, inserted in the bracketed part of the above passage: 'the application of the maxim *assignatus utitur jure auctoris* may be subject to some exception'.[77] Nevertheless, assignation is a transfer. It is thought that where there is an assignation of a money claim, then the ordinary principle of property law applies, and on the facts of an assignation, *assignatus utitur jure auctoris.*

C. DEFENCES AND COUNTERCLAIMS

(1) Introduction

8-22. Assignation is the transfer of a creditor's rights against the debtor, without the consent of the latter. The assignee will be able to enforce the cedent's rights against the debtor. The *assignatus* rule circumscribes the right of the assignee, however, in order to allow the debtor to plead those defences that were relevant against the cedent against the assignee. That is not to say that the assignee becomes liable for the cedent's obligations. As one South African judge concluded, 'should the cessionary be liable for the full counterclaim in excess of the debt ceded, the cessionary's position would be very risky. If this were to be the law, little will hereafter be heard of cession'.[78] And that is undoubtedly also the position in Scots law. Two ancillary points, however, potentially subvert it.

(2) Judicial definitions of assignation

8-23. There are numerous judicial *dicta*, which, if taken literally, would unsettle the idea that the assignee has no active liability for the debts of the

[73] Bearer bills are not indorsed.

[74] Bills of Exchange Act 1882, s 53(2). Only time bills are presented for acceptance. Analysis of presentation as an assignation results from a failure to appreciate the difference between an order to pay and a mandate to uplift. See discussion in para 5-38 ff.

[75] (1876) 3 R 1078.

[76] At 1082.

[77] (1876) 13 SLR 659 at 662.

[78] *Regional Factors (Pty) Ltd v Charisma Promotions* 1980 (4) SA 509 (C) at 512 *per* Burger J. Cf *Anderson v Spence* (1683) Mor 10286 where the debtor sought to render the assignee liable for damages for the cedent's conduct in taking advantage of the debtor's minority in inducing him to contract. This was refused on the basis that the assignee was a singular successor. Interestingly, the court was considerably influenced by the fact that the cedent remained solvent.

cedent. For example, Scotland's only *Contemporary Judicial Dictionary*[79] explains the term assignation in reference to a dictum of Sheriff Principal McLeod in relation to the use of the term 'assignation' in the Conveyancing and Feudal Reform (Scotland) Act 1970, s 20(5):

> 'I am therefore inclined to think that the technical meaning of the word "assigned" is the meaning intended … In law, the ordinary rule is that a personal right vests in an assignee subject to all the contingencies affecting his author's right. If it is correct, as I believe it to be, to give the word "assigned" its technical legal meaning, the subsection operates to assign to a creditor not only the proprietor's rights but his obligations as author of the right assigned.'[80]

8-24. This is incorrect. It may be true to say that an assignee is 'subject to all the contingencies affecting his author's right'; but it does not necessarily follow that an assignation transfers not only the rights of the cedent, but also his obligations.

(3) The assignee and counterclaims

8-25. The fundamental basis of an assignation is the transfer of the cedent's rights against the debtor to the assignee without the debtor's consent. The cedent's obligations do not transfer. But the debtor remains protected. He can still raise all those defences he could have raised against the cedent against the assignee. As for counterclaims, it could be argued that the effect of an assignation is to put the assignee in a better position than the cedent. The debtor cannot bring a positive counterclaim against the assignee. In the often-quoted words of Sheriff Brydon, 'A counter claim is a sword, whereas compensation is only a shield, and the right to defend oneself with the latter does not imply the right to wield the former'.[81] This analysis has been followed,[82] and rightly so.[83]

8-26. Professor McBryde forcefully argues for a re-examination of this rule. He emphasises the legitimate concern that the debtor should not be placed in an inferior position by virtue of the assignation. McBryde postulates the

[79] W J Stewart (ed) *Scottish Contemporary Judicial Dictionary* (1995) 48 'assigned'.

[80] *David Watson Property Management Ltd v Woolwich Equitable Building Society* 1989 SLT (Sh Ct) 74 at 76; rev'd 1990 SLT 764; aff'd 1992 SC (HL) 21, reported at first instance at 1989 SLT (Sh Ct) 4. Cf also D M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn 1995) para 29.29, which contains two errors: first, transfer by assignation is not effected merely by contract; second, the cedent does not by assignation transfer his liabilities.

[81] *Binstock, Miller & Co v E Coia & Co Ltd* 1957 SLT (Sh Ct) 47 at 48 *per* Sheriff Brydon. The sheriff indicated he was merely borrowing the phrase adopted by Sir George Jessel MR in *Birmingham Estates Co v Smith* (1880) 13 Ch D 506 at 509. But the Master of the Rolls did not use the phrase in that case. The phrase was invoked by Cockburn CJ in his detailed opinion in *Stooke v Taylor* (1880) 5 QBD 569 at 575. Counterclaims were first introduced into English law by the Supreme Court of Judicature Act 1873. Lord Neaves invoked the sword and shield metaphor, in the context of a plea of *bona fides*, as early as 1863: *Menzies v Menzies* (1863) 1 M 1025 at 1037.

[82] *Alex Lawrie Factors Ltd v Mitchell Engineering Ltd* 2001 SLT (Sh Ct) 93 *per* Sheriff Taylor, declining to follow McBryde, *The Law of Contract in Scotland* (1987) para 17-87. The substantive issue as to the rights of assignees was not decided by the Inner House in *Tods Murray WS v Arakin Ltd* 2001 SC 840.

[83] See also H L MacQueen 'Assignation and Breach of Contract' (1997) 2 *SLPQ* 114; MacQueen, 'Assignation' in *SME* vol 15 (1995) para 864; H L MacQueen and J M Thomson, *Contract Law in Scotland* (2nd edn 2007) para 2.85 drawing on *Pan Ocean Shipping Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161 HL, for which see G J Tolhurst, 'Assignment, Equities, the *Trident Beauty*, and Restitution' (1999) 58 *CLJ* 546. See also A Deutsch, 'Swords or Shields? Counterclaims and Assigned Debts' 1996 *Greens Civil Law Practice Bulletin* 11-4.

situation of the illiquid claim for damages that the debtor may have against the cedent in the latter's capacity as a seller of goods. The seller assigns his right to payment. The assignee demands payment from the *debitor cessus*. McBryde argues that in such situation it would be unfair on the debtor if he could not bring his counterclaim against the assignee. If the debtor has no defence against the assignee's claim then he is in a worse position than he would have been in but for the assignation.[84] But this overstates the difficulties of the debtor. The argument fails to account for the debtor's right to plead retention. At the heart of the debtor's claim for damages is an allegation that the cedent failed to perform his part of the bargain. Had the cedent sought payment of the price, the debtor could have refused. He is not willing to pay the price until the seller performs his obligations under the contract; this is the defence of the unperformed contract (*exceptio non adimpleti contractus*).[85] Since this is a defence (a shield), there is no problem in allowing it to be pled by the debtor.[86] It is, in Scots law, well established that a debtor may refuse an assignee's demand for payment under a mutual contract on the basis that the cedent has failed to perform his part:

> 'An assignee to a contract, or bond, if he charge the other party to fulfil to him as assignee, his part of the said contract, the defender may allege that the cedent must fulfil his part first, or at least per *simul et semel*; whilk the Lords allow, for that contract whereunto the charger is made assignee; but if the cedent be obliged to the defender by another contract or bond, the assignee is not holden to answer for the same'.[87]

8-27. It is conceded that an assignation of a seller's right to the price of goods will prevent the debtor from exercising his right to retain the goods and claim damages[88] against the assignee. But the effect of allowing a plea of retention is to ensure that the debtor is not prejudiced.[89] If the debtor is sued he does not have to pay until the cedent performs his part of the contract for the sale of goods. Stair suggested that the debtor could compel the assignee to compel the cedent to perform.[90] If the debtor wants to keep the goods he has bought and claim damages then he can still do just that. The assignation makes no difference to the situation. The debtor is still entitled, for instance, to invoke the terms of the Sale of Goods Act 1979 in relation to consignation[91] against

[84] McBryde, *Contract*, para 12-72. Cf S Scott, *The Law of Cession* (2nd edn 1991) 196 who suggests that if the cedent is in a position to pay, then the debtor must bring his counterclaim against the cedent. However, if the cedent is unable to pay, then it is presumed that the cession was effected with the intention of depriving the debtor of his counterclaim and was made *mala fide* and therefore invalid. This, however, is not consistent with the South African cases: *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 617E–H.

[85] *Ross v Ross* (1895) 22 R 461 at 464–465 *per* Lord McLaren; *Lovie v Baird's Trs* (1895) 23 R 1 at 3 *per* Lord McLaren.

[86] This possibility was adverted to by Sheriff Taylor in *Alex Lawrie Factors Ltd v Mitchell Engineering Ltd* 2001 SLT (Sh Ct) 93 at 97B. The Appellate Division in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) also expressly noted that the debtor there was seeking only to counterclaim; he had pled neither retention nor compensation.

[87] *Hamilton v Hamilton* (1629) Mor 830. Cf *Lawrie v Lawson* (1685) Mor 9210; *Shearer v Cargill* (1686) Mor 9210 and Stair I.x.16, followed by Erskine III.v.10 and *Johnston v Robertson* (1861) 23 D 646 and see discussion below.

[88] Sale of Goods Act 1979, s 15B(1)(a).

[89] Cf *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 617E–H *per* Selikowitz J.

[90] Stair I.x.16.

[91] Section 58.

[92] *Lithgow Factoring Ltd v Nordvik Salmon Farms Ltd* 1999 SLT 106.

an assignee.[92] Admittedly, the debtor may have problems satisfying the conditions of mutuality. In particular, the debtor must show that his suspension of performance is on the basis of a failure of the cedent to perform an obligation which is a counterpart of the debtor's obligation to pay. In general, a defender who is sued for a liquid sum cannot withhold payment on the ground that he has an illiquid claim against the pursuer arising out of a different contract.[93] A defence of retention is unproblematic. At heart, retention has nothing to do with liquidity.[94] The introduction of counterclaims into Sheriff Court,[95] and eventually into Court of Session,[96] procedure effected no change in the law of retention on the basis of the *exceptio non adimpleti contractus*.[97] Rather, a counterclaim allows decree for any balance due to the defender to be pronounced in the same action.[98]

(4) Mutuality: exceptio non adimpleti contractus[99]

(a) *General*

8-28. Retention is one facet of 'the principle of mutuality which applies to all contracts'.[100] It is a simple and desirable doctrine: a contractor who seeks to enforce his rights must have performed or be willing to perform the obligations which are incumbent upon him before he can demand counter performance. If the pursuer has not performed, then the defender can 'retain' or 'suspend' his counter-performance. The terminology in Scottish sources is varied. Reference here will be made to 'suspension' rather than 'retention'. Unsurprisingly, the doctrine is old.[101] Suspension merely postpones the performance of obligations, although it is of course possible that performance will never take place. The respective obligations of the parties continue to exist.[102] Suspension can only be invoked where the retained performance is

[93] *Grewar v Cross* (1904) 12 SLT 84 OH.

[94] *Graham v Gordon* (1843) 5 D 1207; *Earl of Galloway v McConnell* 1911 SC 846.

[95] Sheriff Courts (Scotland) Act 1907, Sch 1, r 55.

[96] Administration of Justice (Scotland) Act 1933; Rules of Court 1936, r II,13; Rules of Court of Session 1964, AS 10 November 1964 r 84 (see also SI 1965/321 and SI 1965/1090). See now RCS r 25.1. Counterclaims were first introduced in England, along with a unified concept of set-off, under the Supreme Court of Judicature Act 1873. See generally the opinion of Cockburn CJ in *Stooke v Taylor* (1880) 5 QBD 569 at 573 ff.

[97] *Christie v Birrell* 1910 SC 986 at 991 *per* Lord Mackenzie; at 992 *per* Lord Dundas; at 994 *per* Lord Justice-Clerk MacDonald.

[98] *British Motor Body Co Ltd v Thomas Shaw (Dundee) Ltd* 1914 SC 922 at 930 *per* Lord Skerrington. The leave of the court is required to bring a counterclaim against a company in liquidation: Insolvency Act 1986, s 113.

[99] See generally, P D O'Neill and N Salam, 'Is the *exceptio non adimpleti contractus* part of the new *Lex Mercatoria?'* in E Gaillard (ed) *Transnational Rules in International Commercial Arbitration* (International Chamber of Commerce, 1993) at 147 ff. Cf D Girsberger, 'Defences of the Account Debtor in International Factoring' (1992) 40 *Am J Comp Law* 467.

[100] McBryde, *Contract* para 20-64.

[101] In the first edition of his *Institutions* (1681) Part II, title xxiii, at 16, Stair observes of the authorities – of which he cites: *Keir v Marjoribanks*, 27 July 1546, Mor 5036; *James Crichton v Marion Crichton*, 19 November 1565, Mor 1702; *Lord Herries v Provest of Limluden* July 1581; *Laird of Ker v Panter*, 19 February 1548; *Earl of Glencairn v Commendatar of Kilwinning*, December 1563 – that 'our decisions have been exceeding various in this matter'. The cases are not cited in the second edition: I.x.16.

[102] Erskine III.iv.20; *Ballantyne v East of Scotland Farmers Ltd* 1970 SLT (Notes) 50.

a counterpart of the right claimed by the pursuer.[103] There is a presumption that the obligations contained in a single contract are counterparts of each other.[104] Not every obligation will be a counterpart of the others.[105] Suspension can be raised against a pursuer who is in default in respect of a non-material[106] element of the contract.[107] In a recent Outer House case, the Lord Ordinary explicitly limits suspension to instances of material breach.[108]

8-29. Either way, suspension is an important and forceful remedy. It is particularly important for debtors of a pursuer who is an assignee, since a plea of retention is not subject to the rules of liquidity which govern compensation. The leading case where the distinction between 'retention' and compensation is brought out is *Johnston v Robertson*.[109] Here the pursuer had completed work and claimed for payment of the balance of the contract. He obtained decree in absence. The defenders brought this decree under suspension. They argued, *inter alia*, that the pursuer had been late in completing the contract, that the pursuer was subject to contractual penalties, and that the defenders were entitled to other damages for breach. The defenders attempted to plead compensation. Compensation cannot be pled where the claims are not liquid. The issue was therefore simply whether the defenders were entitled to refuse payment on the basis that the pursuer had not carried out his corresponding obligations under the contract. The defence was successful:

> 'The plea of the defender is based mainly on the rule of the law of Scotland, that one party to a mutual contract, in which there are mutual stipulations, cannot insist on having his claim under the contract satisfied, unless he is prepared to satisfy the corresponding and contemporaneous claims of the other party to the contract. I think that the rule of law, that an illiquid cannot be set-off [i.e. compensated] against a liquid claim, does not apply to such a case; and that, at all events, if the one claim can be liquid, and the other partly illiquid, yet contemporaneous, the rule should suffer some qualification or relaxation if the claims arose under one contract. The counter claims must be contemporaneous, for, if not, the rule would apply.'[110]

[103] Stair, I.x.16; *Bank of East Asia v Scottish Enterprise* 1997 SLT 1213 HL; *Macari v Celtic Football and Athletic Club* 1999 SC 628; compare *Lawson v Drysdale* (1844) 7 D 153 at 155 *per* Lord Cockburn: 'You can't stop the decree by a vague general statement of claim that may be sustained in another process'. A debtor who is also cautioner for the cedent apparently can refuse to pay the assignee on the basis that he is entitled to retain to secure his relief against the debtor: *Sibbald v Turnbull* (1683) Mor 2608. Cf the English position: J Philips, 'When Should a Guarantor be Permitted to rely on the Principal's Set-Off?' [2001] LMCLQ 383.

[104] *Hoult v Turpie* 2004 SLT 308 at 312.

[105] *Bank of East Asia v Scottish Enterprise*; *Macari v Celtic Football and Athletic Club*.

[106] See McBryde, *Contract* paras 20-88 ff for discussion of this term.

[107] Gloag, *Contract*, 628; MacQueen and Thomson, *Contract Law in Scotland* (2nd edn 2007) para 5.10. This is somewhat controversial. In *Marshall's Trs v Banks* 1934 SC 405, Lord Justice-Clerk Aitchison referred to the 'cardinal' conditions in the contract, reflecting the approach of Lord Wellwood (Ordinary) in *Chambers Judicial Factor v Vertue* (1893) 20 R 257 at 258. Lord Anderson in *Marshall's Trs* referred to claims 'connected with' the contract.

[108] *Hoult v Turpie* 2004 SLT 308 at 314L–315D. The Lord Ordinary is, on this detail, wrong.

[109] (1861) 23 D 646. See also *Macbride v Hamilton* (1875) 2 R 775 partly overruled in *British Motor Body Co v Thomas Shaw (Dundee) Ltd* 1914 SC 922; *Turnbull v Hugh McLean & Co* (1873) 1 R 730; *Pegler v Northern Agricultural Implement Co* (1877) 4 R 435; *Christie v Birrels* 1910 SC 986; *Dingwall v Burnett* 1912 SC 1097; *John Haig & Co v Boswell Preston* 1915 SC 339 and *Graham v United Turkey Red Co* 1922 SC 533.

[110] At 652 *per* Lord Benholme; compare Lord Cowan at 654 and Lord Justice-Clerk Inglis at 656. Benholme's dictum was approved in *Redpath Dorman Long Ltd v Cummins Engine Co Ltd* 1981 SC 370 and *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 HL.

8-30. In so far as the claims have to be contemporaneous, the availability of a plea of suspension to an assignee fits in with the distinction previously discussed between intrinsic and extrinsic claims. It has been suggested that, for the plea to be successful, it is necessary that the defender actually counterclaims.[111] Otherwise, it is said, retention 'would obviously give rise to all kinds of abuses' since a defender could retain for a non-material breach while otherwise enjoying the use of delivered goods about which he has no complaint.[112] There may be much to be said for this view. In terms of the authorities, however, a counterclaim is probably not necessary. Providing the defender offers to prove that the pursuer is in breach of contract this should be sufficient for the action for payment to be dismissed.[113] But it is an approach not free from difficulty.

8-31. In *Sutherland v Barry*,[114] landlords sued for outstanding rent. The tenants admitted that the sums sued for were due and owing. But they pled retention on the ground that they had been induced to enter the lease by the pursuer's fraudulent misrepresentations. The tenants counterclaimed[115] for the value of the wet and dry stock which was to be valued and paid for by the landlord at the date of termination of the lease. The pursuer in turn answered the defenders' counterclaim with his own defence of retention, based on the principal claim for rent. This pleading process shows how the concept of retention as a complete defence resulting in dismissal is circuitous; in some situations it could postpone the resolution of a dispute *ad infinitum*. The Lord Ordinary held that since the misrepresentation must logically have occurred prior to the conclusion of the contract, and was essentially based on delict, it could not found a valid plea of retention.[116] On the facts, however, he held that since the rent was due and owing, and since the landlord admitted that he was bound to pay the tenants the value of the wet and dry stock, these amounts should be set off and the balance payable to the pursuer. This was a perfectly sensible way to dispose of the case. Yet, in following *Smart v Wilkinson*,[117] the Lord Ordinary's conclusion in *Barry*, that the defender could not retain against the original contracting party, is inconsistent with the position that would have arisen had the pursuer assigned his right to payment. It is clear beyond doubt that the defender could have pled the fraudulent misrepresentation as a defence to a claim by the assignee on the basis of *assignatus utitur jure auctoris*.[118]

[111] *Ure & Menzies Ltd v Summerville* 1946 SLT (Sh Ct) 23.

[112] At 24 *per* the Sheriff-Substitute (A Hamilton). *Alex Laurie Factors Ltd v Mitchell Engineering Ltd* 2001 SLT (Sh Ct) 93 at 95C–D is predicated upon the assumption that retention is only a valid defence 'to the extent that the pursuers' claims might be extinguished.' But suspension does not extinguish anything. Cf *Principles of European Contract Law* Art 9:201.

[113] *Pegler v Northern Agricultural Implement Co* (1877) 4 R 435 at 441 *per* Lord Shand (dissenting) approved by Lord Jauncey in *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 at 1217E; *M'Donald v Kydd* (1901) 3 F 923; *Macnab v Nelson* 1909 SC 1102 at 1101 *per* Lord President Dunedin. These averments will have to be established if there is a proof: *Kilmarnock Gas Light Co v Smith* (1872) 11 M 58 at 61 *per* Lord Justice-Clerk Moncreiff. It is unclear why the plea of retention was unsuccessful in *Dods v Fortune* (1854) 16 D 478. In *Ure* the conclusion of the defender was for absolvitor which obviously could not have been granted.

[114] 2002 SLT 418 OH.

[115] This was also raised as a separate action *sub nom Barry v Sutherland* 2002 SLT 413 OH. No doubt the defenders raised a separate action for payment based on a provision of the lease since so as not to be approbating and reprobating the lease in the same action.

[116] At 419K–L, para [9] following *Smart v Wilkinson* 1928 SC 383.

[117] 1928 SC 383.

[118] *Scottish Widows Fund v Buist* (1876) 3 R 1078.

8-32. Some landlord and tenant authorities suggest that a liquid claim for rent can be compensated by a 'counterclaim' by the tenant for damages. These are better categorised as retention cases.[119]

(b) Intimation as a cut-off point

8-33. Suppose Keith assigns a claim from a mutual contract with Murray to Mary. Mary intimates to Murray on day 1. On day 2, Keith breaches his contract with Murray. On day three Mary demands payment from Murray. Can Murray plead retention on the basis of a breach which has occurred after intimation? This issue has given rise to considerable debate in Belgium. There any breach by the cedent of his contract with the debtor after the completion of the assignation may still be raised against the assignee. The debtor's right to retain performance on a breach by the creditor is said to arise from the moment that the contract was concluded.[120] This solution has much to commend it.[121]

(c) Contemporaneous but extrinsic claims

8-34. What is the position in a case of complex transactions where the mutual stipulations are actually in a different contract?[122] Gloag observes that 'there is a general presumption that the reason why the parties have not recorded their agreement in separate documents is that they intended them to be dependent on each other'.[123] This would suggest that there can be no retention of performance of an obligation on the basis that the party is in breach of an obligation contained in another document. The introduction of an assignation may complicate matters. What if the assignee is unaware of the counter stipulations which are contained in a different document? The debtor's argument would be based on an extrinsic claim. Yet, why should the debtor be prejudiced by the mere fact of an assignation? In *Caddagh Steamship Co v Steven & Co*[124] it was held that one party was entitled to retain performance under one contract where there was a failure of the other party to perform on another contract. There is partial support for such an approach in Erskine. Of the *assignatus* rule, he observes,

> 'And this doctrine extends also to mutual contracts, in which the assignees are subjected to all the burdens which affected the right while it was vested in the cedent,

[119] Eg *Graham v Gordon* (1843) 5 D 1207 especially at 1211 *per* Lord Cockburn. The opinion of Lord Fullerton in *Graham* was approved in *Lovie v Baird's Trs* (1895) 23 R 1 at 3 *per* Lord Kinnear. See also *Fingland v Mitchell & Howie* 1926 SC 319.

[120] P van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La Transmission des obligations* 102-103; van Ommeslaghe, 'Le Nouveau Regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 531, n 29.

[121] Compare the position in Scots law on a balancing of accounts in bankruptcy for which, see below.

[122] A counterclaim has been allowed on an averment of breach of a separate but ancillary contract to a claim against a claim on the principal contract since they were all related to the same transaction: *Borthwick v Dean Warwick Ltd* 1985 SLT 269 but there was no discussion of the point. Cf *Stewart v Lindsay* 1961 SLT (Sh Ct) 31 and *Hopkirk v Pirie* 1958 SLT (Sh Ct) 9.

[123] Gloag, *Contract* (2nd edn 1929) 595. This passage was approved in *Hoult v Turpie* 2004 SLT 308 at 312 by the Lord Ordinary (Drummond Young).

[124] 1919 SC (HL) 132. See also *Cumming v Cumming* (1628) Mor 9147 and 9207, and *Dick v Skene* 1946 SN 64; Erskine III.v.10 and Bell, *Commentaries* (7th edn 1870) I, 222.

not only where the mutual obligations are inserted into the contract itself (for these the assignee cannot be ignorant of), but even where they are *partly formed* by a separate backbond, if it shall appear by witnesses that the contract and backbond have a relation to and are mutual causes of one another: Stair I.x.16.'[125]

8-35. On Erskine's reasoning, then, a defence 'partly' based on an extrinsic backbond would be admissible where it can be established by evidence that the stipulations are truly contemporaneous of each other. Erskine further suggests that the assignee's knowledge of any backbond may be relevant. Such an approach, however, would lead to considerable uncertainty. [126]

8-36. It is sometimes suggested that suspension can be pleaded at any time, even after decree has been pronounced against the debtor.[127] Subject to the possibility of a reponing note in the Sheriff Court,[128] the suggestion is quite unusual. There would be no end to disputes if, after being given the opportunity to state defences, the defender can wait until he is served with a charge for payment before pleading suspension.[129] The case cited by Erskine[130] was, in any event, pled in terms of compensation (which discharges obligations); while *Glendinning* involved an insolvency and the retention of a corporeal moveable.[131] There was no suggestion that a plea of retention would prevent diligence following on the decree.

8-37. The requirements that the debtor will have to satisfy for retention are, on one view of the requirement of liquidity, less onerous than those for compensation. But the different requirements for a successful plea of retention may be more onerous:[132] in particular, a defence of retention against an assignee will have to be an instrinsic qualification to, and contemporaneous with, the pursuer's claim. Retention cannot be pleaded where the right to do so is excluded

[125] III.i.20 (emphasis added). Cf UNCITRAL Art 20(1): 'In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, *or any other contract that was part of the same transaction*, of which the debtor could avail itself if such claim were made by the assignor' (emphasis added); and PECL, Art 11:307(2): 'The debtor may assert against the assignee all rights of set-off … in respect of claims against the assignor … (b) *closely connected* with the assigned claim' (emphasis added); and UCC § 9-318.

[126] Cf *Park, Dobson & Co v William Taylor & Son* 1929 SC 571 and *Marshall v Nimmo & Co* (1847) 10 D 328.

[127] Erskine III.iv.20 citing *M'Larens v Bisset* (1736) Mor 2646; *Creditors of Glendinning v Montgomery* (1745) Kames Rem Dec 102; Kilkerran 44; Elchies, *Arrestment* 24; Mor 2573 followed in *Paul and Thain v Royal Bank of Scotland* (1869) 7 M 361 at 365 *per* Lord Ormidale. The principle applies only to decrees for payment, not decrees of constitution: *Lockhart v Ferrier* (1842) 4 D 1253 at 1258 *per* Lord Moncreiff.

[128] See OCR r 8.1.

[129] Where a multiplepoinding was raised by a claimant (the real raiser) in the name of the fundholder (as nominal raiser), the fundholder was nevertheless bound by the decree: *Downie v Rae* (1832) 11 S 51. Cf J Millar, 'Multiplepoindings' 1997 *Greens Civil Law Practice Bulletin* 13-8.

[130] *M'Larens v Bisset* (1736) Mor 2646.

[131] Cf the law on retention by an owner, see *Creditors of Glendinning v Montgomery*; *Mein v Bogle*, 17 January 1828 FC; 6 S 360; 2 Ross Lead Com Cas 648 approved by the majority in *Melrose v Hastie* (1851) 13 D 880.

[132] This has not always been kept in view. In *Crawford v Hamilton* (1735) Mor 2548, it was successfully argued that a plea of retention should be refused as it would allow a plea of compensation by the back door.

by agreement.[133] Retention probably cannot be sustained where the counter performance due is conditional and the condition has not yet been purified.[134]

D. SET-OFF

(1) Introduction

8-38. Perhaps the most important defence open to a debtor against a claim by an assignee is to plead some form of set-off.[135] In Scots law, set-off is not a term of art. It is used here in a loose and general sense; a convenient expression which brings together the distinct claims of compensation, contractual set-off and balancing of accounts in bankruptcy. Any attempt at analysis is an uphill struggle – the sources in Scots law on set-off are desperately confused; the law of compensation and retention especially so.[136] Professor McBryde concisely identifies the true distinction between the last two: 'the purpose of retention is to enforce obligations; compensation extinguishes them'.[137]

(2) Compensation

(a) History

8-39. It has been suggested that, prior to the Compensation Act 1592,[138] compensation was not available.[139] And it appears to be reinforced in the decisions collected prior to the Act.[140] But the view is problematic. Compensation is based on common sense and justice. It can be traced at least as far back as Roman law.[141] It would be surprising that Scots law, which borrowed heavily in this area from the civil law, did not recognise *compensatio* as substantive doctrine. Granted, there may have been procedural problems with giving effect to the doctrine. But it does not follow that the substantive principle was not recognised prior to 1592. Lords Eskgrove and Braxfield forcefully make this point in their dissenting opinion in *Harper v Faulds*:[142]

> 'I assume it as a principle, that the law of Scotland is a branch of the civil law, especially with regard to contracts: it is enough, therefore, if the civil law establishes

[133] *Harper v Faulds* (1791) Mor 2666; Bell's Octavo Cases 440 at 464–465 *per* Lord Dreghorn.

[134] At 469 *per* Lord Eskgrove.

[135] See generally *Laing v Lord Advocate* 1973 SLT (Notes) 81.

[136] See generally McBryde, *Contract* paras 20-62 ff.

[137] McBryde, *Contract* para 20-64. Note, however, that the pursuer pleading compensation is seeking to discharge his own obligations; the pursuer pleading retention is seeking to enforce the defender's obligations.

[138] 12*mo* c 143; APS c 61. Of the statute, it has been described as 'a just and positive statute, most creditable to the wisdom and sound views of the ancient Scottish legislature, as it was centuries before such a law was recognised in England' in *Donaldson v Donaldson* (1852) 14 D 849 at 855 *per* Lord Cuninghame.

[139] Stair I.xviii.6; Erskine III.iv.12.

[140] *The Queen v Bishop of Aberdeen* (1543) Mor 2545; Balfour, *Practicks* (Exception) 349, c.xxxii; Hope, *Major Practicks* VI. 44 § 1: Be the old pratique of this kingdome the exception of compensatione wes not admitted, albeit de liquido in liquidum (A 306), befoir the Act of Parliament 1592, c 143. Nota be the Act of parliament compensation is onlie receavable in the first instance and not in suspension or reducitone of decreit: C 786'.

[141] See Zimmermann, *Obligations* 760 ff.

[142] (1791) Bell's Octavo Cases 432 at 440; Mor 2666.

> the principle of retention; and both compensation and retention were received in that law. They are founded on a principle of common justice between man and man; not the creature of statute. They must have been recognised in our law long before the statute 1592, which only allowed the principle to operate by way of exception. Before the act, had two parties come, each with decree in his hand, must both have gone to prison? Surely not; or could this have taken place, though one was a decree for delivery, while the other was a decree for payment? It cannot be. Retention[143] must have existed before the act of Parliament; the case from Balfour proves it.'[144]

8-40. Balfour's case[145] states only that compensation was '*not available by way of exception*'. A similar report is found in Sinclair's *Practicks*.[146] If appropriate stress is placed on the procedural qualification to the statement that compensation was not available until 1592, then the position is more acceptable.[147] In any event, as Bell points out, Balfour's report 'bears no evidence of any such plea or judgement'.[148] Bell was unimpressed by Balfour's suggestion that Scots law did not recognise compensation prior to 1592: 'From the prevalence of the Roman jurisprudence in Scotland, one should not expect to find a period in her law where the doctrine of compensation was unknown'.[149] After all, as he had just argued, compensation is 'not only expedient, it is required by the plainest principles of equity'.[150] In a footnote, Bell refers to an excerpt from the Records of Scotland[151] furnished to him by the Deputy Clerk Register, Thomas Thomson.[152] This shows that, far from refusing the plea of compensation, the Lords of Council responded by allowing the allegation to be proved. They stated,

[143] The use of 'retention' instead of 'compensation' is indicative of the confusion in this area of the law.

[144] At 467–468 *per* Lord Eskgrove. It is interesting that counsel was confident enough to label Stair's suggestion that compensation was not part of Scots law prior to 1592 as a 'ridiculous notion' (see argument at 438). For fascinating, frequently amusing, information about David Rae, Lord Eskgrove, see H Cockburn, *Memorials of His Time* (1856) 118–125.

[145] *The Queen v Bishop of Aberdeen* (1543) Mor 2545; Balfour, *Practicks* 349. For the authority of Balfour's *Practicks* generally, see H McKechnie, 'Balfour's Practicks' (1931) 43 *JR* 179; for Sinclair's Practicks see generally, A Murray, 'Sinclair's Practicks' in A Harding (ed) *Law Making and Law Makers in British History* (1980) 90.

[146] See the annotated provisional version by Professor G Dolezalek available at *www.uni-leipzig.de/~jurarom/scotland*, nos 323, 324 and 539. Bell, *Commentaries* (7th edn 1870) II, 120 cites page 50 of a MS copy. Dolezalek criticises Balfour's wide proposition also: see his n 262.

[147] Cf H Dernburg, *Geschichte und Theorie der Kompensation* (2nd edn 1868; repr 1965) § 30, at 266 who suggests that it was only procedural difficulties that prevented a municipal law reception of the law of compensation expressly admitted by the Canonists. Dernburg was familiar with the Scottish position: he cites the 1592 Act (at 278, n 1) as one of the earliest recognitions of compensation in municipal law.

[148] *Commentaries* II, 120 (7th edn 1870).

[149] *Commentaries* II, 120. Contrast the position in England, which did not admit set-off at law until it was introduced by statute in 1729, see R Derham, *The Law of Set-Off* (3rd edn 2003) para 2.01.

[150] *Commentaries* II, 118.

[151] *Register of Acts and Decreets* vol 26 June 1542–13 February 1543, fol 325 and fol 360. The excerpt is reproduced by Bell in footnote 6.

[152] For Thomas Thomson, see *Guide to the National Archives of Scotland*, Scottish Record Office, (Stair Soc Supplemental vol 3, 1996) xiii and J Imrie, *SME* vol 19 'Public Registers and Records' (1990) para 810. It is fitting that Bell opens his note with a tribute to Thomson, 'to whom Scotland is so much indebted for the restoration of her records'.

'assignis to the procurator foresaid [procurator for the Bishop, the defender] ye xxviij day of Maij instant with continuatioun of dais for proving thereof And ordanis him to haue letters summond sic writtis rychtis resonis & documentis as he has or will vse for preving of ye said allegeance agane ye said day.'

8-41. It seems that the Bishop failed to prove that he had made any payment whatever, and decree was pronounced against him. But there was no dispute that his plea was relevant; the Lords were careful to narrate the fact that they had continued the cause to accord the defender the opportunity to prove his plea of 'contentatioun & payment'. And there is further authority for common law compensation prior to 1592. In *Colyn v Sleich*,[153] a Frenchman, one Colyn, sued Sleich, of Leith, for freight. Both parties compeared and the defender alleged that the pursuer was in turn indebted to him. In response to this the Lords allowed both parties a proof to prove their allegations; it was reported that 'Sleich enacts himself to pay to Colyn what is found just'. Compensation would have been substantive had the plea been sustained.

(b) Liquidity

8-42. The 1592 Act provides that compensation is proponable only by exception where the debts are *de liquido in liquidum* at the time when the plea is entered.[154] Later cases, however, relaxed this requirement. Stair noted that the terms of the statute could be interpreted loosely following the Courts Act 1672[155] which sought to expedite the settlement of disputes before the court and obviate continual hearing and re-hearing.[156] Erskine articulates the principle: *quod statim liquidari potest, pro jam liquido habetur*.[157] But how is '*statim*' to be construed? There are several cases where the cause was sisted to allow liquidation to take place. Cases have been sisted for between two weeks[158] and three or four months;[159] while in another it was mentioned in argument that Menochius[160] observed that Bartolus[161] allowed two months to liquidate the claims – the Lords

[153] 21 January 1499, reported in G Neilson (ed) *Acta Dominorum Concilii: Acts of the Lords of Council in Civil Causes* vol II (1918) 307, cited by D M Walker, *A Legal History of Scotland* vol III (1995) 709.

[154] *Colonel Fullerton v Viscount Kingston* (1663) Mor 2558; 1 Stair 152; *Earl of Linlithgow v Laird of Airth* (1616) Mor 2564; *Tait v Mackintosh* 26 February 1841 FC; 13 Sc Jur 280. Cf G Watson (ed) *Bell's Dictionary and Digest of the Law of Scotland* (1882) 'Liquid': 'A liquid debt is a debt the amount of which is ascertained and constituted against the debtor, either by a written obligation or by the decree of the court. Stair I.xviii.6; Erskine III.iv.16; Bankton I, 492'. In *Pegler v Northern Agricultural Implement Co* (1877) 4 R 435 at 439, Lord President Inglis is reported to have opined 'It is quite settled that it is only against an illiquid claim, that a plea of compensation [founded on an illiquid counterclaim] may be set up'. The bracketed part is excised in the report at (1877) 14 SLR 302 at 305. Irrespective of which report is correct, the opinion makes no sense: both statements are manifestly contrary to the 1592 Act.

[155] APS c 40; 12*mo* c 16.

[156] Stair IV.xl.37.

[157] 'That which may be immediately liquidated, is held as liquid': Erskine III.iv.16 approved by the First Division in *Munro v Macdonald's Exrs* (1866) 4 M 687 at 688 *per* Lord President M'Neill and Lord Curriehill.

[158] *Hisselside v Littlegill* (1685) 2 Br Sup 72; Sup Vol *Harcase* 25.

[159] *Selton* (1683) Mor 2566; Fountainhall I, 244. In an anonymous case reported at (1676) 3 Br Sup 180 compensation was allowed in respect of a debt payable in cheese: the cheese could easily be liquidated.

[160] *Lib 2 centur 1 casu 14.*

[161] *Ad L 46 § 4 de iure fisci.*

allowed a period of five weeks.[162] A claim is liquid if the defender admits that it is due and owing in his pleadings. A pursuer will also be absolved from having to prove that a debt is due if the defender responds 'believed the account to be correct'.[163] However, where this is followed by averments that the pursuer was in breach of his corresponding obligations, the pursuer's claim is not liquid. The admission cannot be divorced from the qualification.[164] And it may be difficult to establish a liquid claim which arises out of a contract containing an arbitration clause.[165] In such a situation the court might sist the proceedings in order to allow liquidation of the alleged debt in arbitration proceedings.

(c) Other substantive rules of compensation

8-43. There must be a *concursus debiti et crediti*.[166] Both claims must form part of the respective creditors' own patrimonies. A claim which is part of another patrimony, like a trust, cannot found a good claim of compensation. Similarly, where the debtor's claim against the cedent has been arrested by one of the debtor's creditors, this will prevent the debtor using it for the purposes of compensation against an assignee. Compensation is not proponable after decree.[167] This includes a decree in absence,[168] but not an order of a baron court[169]

[162] *Brown v Elies* (1686) Mor 2566; Fountainhall I, 391 and 429. See also *Ross v Magistrates of Tayne* (1711) Mor 2568; Fountainhall II, 636.

[163] *Scottish North Eastern Railway Co v Napier* (1859) 21 D 700. Cf *Binnie v Roderij Theodoro* 1993 SC 71.

[164] *Armour and Melvin Ltd v Mitchell* 1934 SC 94 at 96 *per* Lord Justice-Clerk Aitchison; *John Robertson & Co v Bird & Co* (1897) 34 SLR 867 at 869 *per* Lord Kinnear (1st Div). The case is also noted at (1897) 5 SLT 80. See earlier statements to the same effect by Lord Wood (Ordinary) in *Campbell v Macartney* 27 June 1843, to which the First Division adhered. His opinion is reported in an appendix at 14 D 1086 and approved by the First Division in *Donaldson v Donaldson* (1852) 14 D 849 and *Picken v Arundale & Co* (1872) 10 M 987.

[165] See discussion in para 9-01 ff. The issue has arisen in England: *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd's Rep 410.

[166] Erskine III.iv.12.

[167] Sir George Mackenzie of Rosehaugh, *Observations on the Acts of Parliament…*(1687) 269; *Viscount Stormont v Duncan* (1626) Mor 2638; Spotiswood, (*Compensation*) 40; *Walker v Mainquhair* (1632) Mor 2639; *Earl of Marshall v Brag* (1662) Mor 2639; *Naismith v Bowman* (1707) Mor 2645; *Creditors of Paterson v M'Aulay* (1742) Elchies, *Compensation* No 9; Mor 2646; *Wilson & Co*, 15 December 1808, cited by J Graham Stewart, *Diligence* 234, n 2; *Cuninghame, Stevenson & Co v Archibald, Wilson & Co*, 17 January 1809 FC; *Lawson v Drysdale* (1844) 7 D 153 at 155 *per* Lord Cockburn; *Thompson v Whitehead* (1862) 24 D 331 at 346 *per* Lord Cowan. Cf Erskine III.iv.19, approved by J A MacLaren, *Court of Session Practice* (1916) 402, who says that if compensation 'has been pleaded by the debtor in the course of the process and repelled by the judge, it may be received, either by suspension or reduction,' and also the arguments for the suspender in *Beatson and Lumsden v Beatson* (1747) Kilkerran 195; Mor 4345. In *Thoms v Thoms* (1868) 5 SLR 561 there was an attempt to plead compensation after decree. Only Lord Deas based his decision on the fact that the plea was too late. The other judges stuck to the principle that compensation cannot be founded on an illiquid claim. See also *Burrell v Burrell's Trs* 1916 SC 729 to the same effect. Balancing of accounts in bankruptcy, in contrast, may be pled after decree; in other words, where insolvency supervenes after the (now bankrupt) creditor obtained decree, a charge for payment can be suspended. And a defender in the sheriff court may lodge a reponing note.

[168] *Creditors of Robert Paterson v M'Aulay* (1742) Mor 2646; *Wright v Sheill* (1676) Mor 2640; *Logan v Couts* (1678) Mor 2641; *Gordon v Melvil* (1697) Mor 2642.

[169] *Earl of Marshall v Brag* (1662) Mor 2639.

[170] *M'Ewan v Middleton* (1866) 5 M 159. Much will depend on the terms of reference.

or a decree-arbitral.[170] Clearly, if the defender was not called to the action in which decree was pronounced against him, he may still plead compensation.[171] Awards of expenses are different because they come into existence only on decree being pronounced. There is no opportunity to plead compensation against an award of expenses during the process.[172] Where the creditor is bankrupt there is no issue of compensation, rather the question is one of balancing of accounts in bankruptcy. The Act of 1592 introduced compensation by way of exception. It must therefore be pleaded and sustained. Failure to do so will be fatal to the plea. Unlike some other legal systems,[173] in Scotland, compensation is 'the operation of the judge rather than of the law'.[174] Stair asserted that compensation operated *ipso jure* on concourse.[175] But that approach had been departed from even before Bankton[176] and Erskine[177] were writing. Nevertheless, on being sustained, the plea of compensation operates retrospectively to the time of concourse:

> 'Upon a more mature consideration of the nature of compensation, and the reason of the thing, in this case, a very different notion prevailed; namely, that compensation is not the operation of the law, but of the Judge; and that it had no effect till it is applied by the Judge: That it is true, when it is applied, the law, upon principles of equity, gives effect to it *retro* to stop the course of annualrent; and that, in that sense only, is the common maxim to be understood, that compensation operates *retro et ipso iure*; and this being so, that it is optional to the party to plead it or not, or, if he be creditor in more debts, to plead it on which of them he pleases. …Where one is creditor in more debts, why should he not have it in his power to compensate upon the debt which is least secure?'[178]

8-44. The retrospective effect ascribed to compensation has been the subject of fierce criticism by Professor Zimmermann.[179] The requirement in Scots law that compensation must be pled in court and sustained does at least provide some certainty which is absent in systems where compensation is effected by an informal declaration.

[171] *Corbet v Hamilton* (1707) Mor 2642; *A v B* (1747) Mor 2648.

[172] *Fowler v Brown* 1916 SC 597 at 603 *per* Lord Salvensen, following *Fleming v Love* (1839) 1 D 1097.

[173] See R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002).

[174] Erskine III.iv.12. Cf *confusio* which operates *ipso jure*: *Healy & Young's Trs v Mair's Trs* 1914 SC 893. Although it should be noted that confusion operates only to suspend obligations; it does not discharge them: *Competition between Murray, Chapel and Lanark* (1728) 1 Kames Rem Dec 196. It is probably the case that if payment is made in ignorance of the right to plead compensation, there will be no grounds for an unjustified enrichment claim: the debt would only have ceased to be due had compensation been pled and sustained, see generally R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 38 ff.

[175] I.xviii.6. Cf Lord Elchies, *Annotations on Lord Stair's Institutions on the Law of Scotland* (1824) 101.

[176] I.xxiv.23.

[177] See the cases prior to Erskine which departed from Stair: *Cleland v Stevenson* (1669) Mor 2682; 1 Stair 598 approved in *Inch v Lee* (1903) 11 SLT 374 OH; *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No 6; Mor 2550; *Campbell v Carruthers* (1756) Kames Sel Dec 158; Mor 2551.

[178] *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No 6; Mor 2550. See also the opinion of Lord Kyllachy (Ordinary) in *Inch v Lee* (1903) 11 SLT 374.

[179] Zimmermann, *European Law of Set-Off and Prescription* 36, especially at 42–43. See also B van Niekerk, 'Some Thoughts on the Problems of Set-Off' (1968) 85 *SALJ* 31.

8-45. It has been held that, in a competition, other creditors can argue that a competing creditor's claim has been extinguished by compensation.[180] That is doubtful. Compensation is the operation of the judge and not the law. As was explicitly held in *Maxwell*,[181] it is the debtor's prerogative to plead compensation. The prerogative to plead compensation, like universal suffrage, presumes a right not to plead it. If the debtor has not invoked compensation, it is difficult to see how third parties can rely upon it.[182] As a general rule, compensation can be pled against all debts irrespective of the person of the creditor;[183] although certain Crown claims cannot be answered with a plea of compensation.[184] In cases of contractual set-off, extinction will not necessarily operate retrospectively from the date of concourse. And interest may continue to accrue.[185] Since shareholders should be paid last on any winding-up, they cannot compensate debts due to them by the company on any calls made on them.[186] Generally speaking, where a partnership is charged for payment, a debt owed to one of the partners may be compensated; so too a debt due to another partnership where the partners are the same.[187]

8-46. Can compensation be pled on the basis of a conditional or future debt? Suppose Helen can sue for payment, can Sara compensate on the basis of a debt admittedly due to her from Helen payable in fourteen days; three months; or even three years down the line? Bell says no,[188] but this may be doubted. If Bell's position does state the law, the *debitor cessus* is prejudiced by the assignation.[189] In any event, Bell's view is inconsistent with practice which allows up to three months for a claim to be liquidated.[190]

[180] *Middleton v Earl of Strathmore* (1743) Kilkerran 134; Mor 2573. See also *Briggs' Trs v Briggs* 1923 SLT 755 OH.

[181] *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No 6; Mor 2550 and approved in *Turner v Inland Revenue Commissioners* 1994 SLT 811 at 819 *per* Lord Kirkwood (Ordinary).

[182] Cf *Scottish Fishermen's Organisation v McLean* 1980 SLT (Sh Ct) 76, a retention case.

[183] *Taylor v Scottish and Universal Newspapers Ltd* 1981 SC 408 at 415 *per* Lord Ross (Ordinary).

[184] Crown Proceedings Act 1947, s 50. See *Smith v Lord Advocate (No 2)* 1980 SC 227. Cf *Code civil du Québec* Art 1672: compensation is not pleadable against a claim by the state. J-L Baudouin and P-G Jobin, *Les obligations* (5th edn 1998) para 968 also query whether compensation is available against an inherently personal debt such as an alimentary obligation. Cf *Code civil* Art 1293(3).

[185] *Campbell v Carruthers* (1756) Mor 2551; Kames Sel Dec 158.

[186] *Cowan v Gowans* (1878) 5 R 581; *Cowan v Shaw* (1878) 5 R 680; *Miller v National Bank of Scotland Ltd* (1891) 28 SLR 884 OH.

[187] See *Williams' Trustees v Inglis, Borthwick and Co*, 13 June 1809 FC and *Mitchell v Canal Basin Foundry Co* (1869) 7 M 480 especially at 489 for the authority cited by Lord Deas. In *Heggie v Heggie* (1858) 21 D 31 at 32, Lord Cowan observed that 'Very difficult questions have been raised in cases of this kind, and perhaps there is no class of cases in which more ingenious argument has been used in compensatory questions – as between a debt due by or to the individual partners of a company, and a debt due by or to the company'. See also Lord Ivory's footnote to Erskine III.iv.13 (5th edn 1824).

[188] *Comm* II, 122. Cf *Paul and Thain v Royal Bank of Scotland* (1869) 7 M 361 at 364 *per* Lord Ormidale.

[189] See the discussion at para 8-54 below.

[190] Cf *Principles of European Contract Law*, Part III (2003) Art 13:102.

(3) Assignees

(a) General

8-47. Compensation against an assignee has been available, at the latest, since the 1592 Act[191] and probably before.[192] But the defence is exceptional. The general principle is that only defences intrinsic to the claim assigned may be asserted against the assignee. A plea of compensation is not necessarily intrinsic to the claim assigned. It may be. But, more often than not, the defence of compensation will be founded on a relationship wholly extrinsic to the assigned claim. At first blush it is questionable why such a defence is available to the debtor. Before there can be compensation there must be a *concursus debiti et crediti*.[193] Yet on the creditor assigning his rights against the debtor, there is no longer *concursus*. The debtor's creditor is now the assignee, not the cedent:

> '…we begun [sic] with sustaining compensation against an assignee for a valuable consideration, in quality of procurator; not adverting, that though his title did not protect him from compensation, his right as a purchaser ought to have had that effect: and by force of custom we have adhered to the same erroneous practice, even after our law is changed, when now the title of an assignee protects him from compensation, as well as the nature of his right when he pays value for it.'[194]

8-48. It is perhaps ironic that Kames objected to the plea of compensation against a purchaser on the grounds of equity. In England, it was only on the grounds of equity[195] that set-off could be pled against an assignee prior to 1875.[196] But, be that as it may, Kames' point is a good one. The assignee has paid the cedent for the assignation. If compensation on an extrinsic claim were excluded, the debtor would still have two options: first, to pay the assignee and sue the cedent who should be in funds; or, if the cedent is not in funds because the assignation was gratuitous, to reduce (*qua* creditor in the counterclaim) the assignation; thus allowing the counterclaim to be asserted against the cedent.[197]

8-49. An assignation breaks any *concursus debiti et crediti*. According the *debitor cessus* a compensation claim may therefore have unexpected results. This is especially so in complex cases involving successive assignations. Suppose Jack and Jill are mutual debtors and creditors. Jill assigns her claims against Jack to Keith. Under the present law, Jack can plead compensation

[191] Hope, *Major Practicks* VI, 44, § 3; *Muirhead and M'Mitchell v Miller* (1610) Mor 2599; *Carnoway v Stewart* (1611) Mor 2600; *Anchindinnie v John Murray*, 17 June 1626, Spotiswoode, *Practicks* (2nd edn 1706) 18.

[192] See para 8-39 above.

[193] Erskine III.iv.12.

[194] Kames, *Principles of Equity* (2nd edn 1767) 206. Cf Kames, *Elucidations* Art 3, at 14 and *Shepherd v Campbell & Robertson & Co*, 21 June 1775 FC; Hailes 637 *per* Lord Kames.

[195] R Derham, *The Law of Set-Off* (3rd edn 2003) para 2.01 ff.

[196] Assignments *at law* were not available in England until the Supreme Court of Judicature Act 1873, with the exception of bills of exchange: see *Minet v Gibson* (1789) 3 TR 482; 100 ER 689 aff'd 1 H Bl 569; 1 Ross Lead Com Cas 76 at 93. Set-off against a solvent plaintiff was only first admitted in English law by statute in 1729: Relief of Debtors with Respect to the Imprisonment of their Persons Act 1729 (2 Geo II, c 22). Where there was an equitable assignment, however, the debtor's right to raise a set-off was an 'equity' that was equal to the assignee's equity; and, where it was earlier in time than the assignee's, could be raised against the assignee. See generally, Derham, *Set-Off* para 17.03.

[197] This occurred in *Alison v Duncan* (1711) Mor 2657.

against Keith, even if the debt he seeks to compensate is extrinsic to the claim assigned. But what happens if, instead of demanding payment himself, Keith translates his right to Murray? Can Jack still plead compensation against an unrelated subsequent assignee? Murray has bought a right against Jack. Murray will appreciate that any deficiencies in the right itself will affect him in turn. But what of claims the debtor may have against previous cedents, cedents about whom the ultimate assignee may know little?

8-50. And if both cedent and debtor can actively acquire unrelated extrinsic claims to defeat the other's claim, the goal of free circulation of claims becomes more distant. For claims will become clogged with counterclaims. Take, again, the example of successive transfers. Jill transfers to Keith. On intimation, Keith becomes creditor of Jack. What if Jack has extrinsic counterclaims against Keith which may be compensated? If Keith then assigns, can Jack compensate not only extrinsic claims he has against the original creditor Jill, but also intermediate assignees who assigned in turn?[198] The general principle that the *debitor cessus* must not be prejudiced demands that the debtor's cross-claims must lie. If, however, this be the law, multiple transfers multiply the risk of non-payment: risk of non-payment owes more to the position of the preceding cedents vis-à-vis the debtor, than to the solvency of the debtor himself. But this incident of assignation should not give rise to undue concern. Once upon a time in Scotland all and sundry engaged in successive assignation and translation of claims. Today, translation tends to be the preserve of the commercial player. And if such parties wish to encourage free circulation by ensuring a 'clean' claim they have the ready means of doing so: embodying the claim in a negotiable instrument.[199]

8-51. Similarly problematic is the effect of the principle that compensation operates retrospectively to the date of concourse where the plea is sustained. Suppose Jill again assigns to Keith who, in turn, assigns to Murray. Murray intimates to Jack. Jack has a debt he can compensate against Murray. Murray does not demand payment, instead he retrocesses to Keith. Even if the assignation from Keith to Murray was in security, Keith may now be defeated on the basis that Jack can now plead compensation of any liquid debts that Murray owed to Jack between the date of intimation from Murray and intimation from Keith of the retrocession in Keith's favour.[200]

[198] See generally discussion in F von Kübel, *Erster Kommission zur Ausarbeitung des Entwürfes eines bürgerlichen Gesetzbuches* (1882) Absch I, Tit 4, § 22, at 49, reproduced in W Schubert (ed) *Vorentwürfe der Redaktoren zum BGB, Recht der Schulverhältnisse* (1980) 979. In England the debtor is not permitted to raise such a set-off. However, this is probably due to the peculiar history of English law which was reluctant to admit either set-off or assignment: see A Tettenborn. 'Assignees, Equities and Cross-Claims: Principle and Confusion' [2002] LMCLQ 485 at 491 and Derham, *The Law of Set-Off* para 17.47.

[199] Although negotiable instruments are becoming less and less frequent in domestic debtor-creditor relationships: I F G Baxter, 'What is the Future of the Cheque: North American Use of Commercial Paper' in J Tittel (ed) *Multitudo Legum Ius Unum: Festschrift für Wilhelm Wengler zu seinem 65 Geburtstag* (1973) II, 151; D Pardoel, *Les conflits de lois en matière de cession de créance* (1997) 1, n 5; R Goode, *Commercial Law* (3rd edn 2004) 482. A creditor is prohibited from taking a negotiable instrument in satisfaction of a debt due under a consumer credit agreement: Consumer Credit Act 1974, s 123.

[200] The *ex tunc* effect attributed to compensation in continental legal systems has been criticised as a hangover from the *jus commune*: P Pichonnaz, 'The Retroactive Effect of Set-Off (Compensatio)' (2000) 68 *TvR* 560, cited in R Zimmermann, *Comparative Foundations* 40. See also Pichonnaz's monograph, *La Compensation* (2001).

8-52. There is, then, perhaps much to be said for the reservations advanced by Kames. But the law has not taken his approach. Nor is it an approach which is advocated by any other writers. Kames' analysis is incontrovertible in terms of the intrinsic/extrinsic dichotomy. An onerous assignee is only subject to intrinsic claims. Compensation is usually extrinsic. The law, however, has pursued a policy rather than a principle: the transfer should not prejudice the debtor. Usually, legal principle and policy are co-extensive. On occasion, however, these paths diverge; and, at the crossroads, the law tends to take the path of the 'no prejudice' policy. Even where the debtor is unable to exploit some remedies against the assignee that would have been available against the cedent (such as damages), he is not thereby substantively prejudiced. He can still bring the claim against the cedent, and may well be able to take exception to an assignee's demand for performance. A failure to allow a plea of compensation would be, it is argued, prejudicial to the interests of the debtor.

8-53. For compensation to operate against an assignee, intimation is the relevant moment for concourse.[201] A debt contracted by the cedent to the debtor subsequent to the delivery of the assignation, is relevant against the assignee if prior to intimation.[202] If the debtor seeks to plead compensation against the assignee on a money claim obtained against the cedent, this must be intimated to the cedent before there is intimation by the assignee of the cedent's assignation.[203] Some authorities suggest that the deliberate acquisition of claims against the cedent, so as to frustrate the claim of the assignee, if in bad faith, will not be sustained.[204] But they are unclear. Compensation can also be pled against a receiver,[205] although the assignee (in security) is the charge holder.[206]

8-54. The position of conditional or future debts is difficult. Bell holds that the debtor can only compensate a claim by the assignee with a debt against

[201] Bell, *Commentaries* (7th edn 1870) II, 131; *Shiells v Ferguson, Davidson & Co* (1876) 4 R 250 at 254 *per* Lord Deas; *Chambers' Judicial Factor v Vertue* (1893) 20 R 257 at 259–260 *per* Lord Adam; or the date of arrestment: J Graham Stewart, *Diligence* 175. See also *Code civil* Art 1298 and UNCITRAL Art 20(2). Previously, where the death of the cedent prior to intimation required the assignee to confirm, the debtor could acquire claims against the cedent to found compensation until confirmation was obtained: *Alison v Dumfries* (1682) Mor Sup Vol *Harcase* 51.

[202] *Ogilvy v Napier* (1610) Mor 2600; *Relict of Inglis v Earl of Murray* (1662) Mor 2602.

[203] *A v B* (1676) Mor 2603; *Wallace v Edgar* (1663) Mor 837 and 2651; *Rollo v Brownlie* (1676) Mor 2653; 2 Stair 436 cited with approval by Stair I.xviii.16.

[204] *Finlayson v Russell* (1829) 7 S 698; *Munro v Hogg* (1830) 9 S 171; *Lawson v Burman* (1831) 9 S 478; *Mitchell v Canal Basin Foundry Co* (1869) 7 M 480 at 481 *per* Lord Barcaple (Ordinary) (reversed by a Bench of seven judges on a different point); Bell, *Commentaries* (7th edn 1870) II, 124. Cf *Code civil du Québec* Art 1676.

[205] Although there is a conflict of authority, the better view is that a receiver cannot avoid a plea of compensation by suing for recovery of debts, due to the company over which a floating charge has attached, in his own name: *Taylor v Scottish and Universal Newspapers Ltd* 1981 SC 408 OH and *Myles J Callaghan Ltd (in receivership) v Glasgow District Council* 1987 SC 171 OH, both declining to follow *McPhail v Lothian Regional Council* 1981 SC 119 OH.

[206] *McPhail v Cunninghame District Council* 1983 SC 246 OH. The bases for the last four mentioned decisions are conflicting. The intimated assignation in security in terms of the Act occurs *ex lege*. There is no actual intimation. It is not clear whether the debtor of a company in receivership can acquire debts against the company after appointment of a receiver, but prior to any notification, to found compensation. See para 6-46 for the analogous position of a trustee in sequestration.

the cedent which is presently due.[207] But suppose the *debitor cessus* extends credit to the cedent prior to intimation of the assignation, repayable in, say, fourteen days? The assignee intimates on day 13. Surely the *debitor cessus* can compensate the claim by the assignee with the debt due to him by the cedent on the following day? The problem here is one of liquidity. Most of the cases place emphasis on the right rapidly to 'liquidate' a claim so as to place a certain value on it. They do not discuss, however, the debtor who has a claim for a sum certain in amount, but uncertain in time. By analogy, if (as is the case in some of the authorities[208]) a period of weeks or months is allowed to liquidate a claim so as to give it a certain value, a debtor should be allowed the same latitude to raise a defence of compensation on a debt payable to him by the pursuer at a certain date in the future.

(b) Good faith

8-55. Stair suggested that certain defences that would not otherwise be available to the debtor, would be sustained against the assignee of a gratuitous assignation: 'And compensation was sustained against an assignee, upon a debt due by the cedent, though liquidate after the assignation, in respect the assignation was gratuitous'.[209] He cited *Crokat v Ramsay*.[210] It should be remembered that at the date *Crokat* was decided, there had been little relaxation of the terms of the 1592 Act. At that time, it was exceptional for the court to allow subsequent liquidation. In *Alison v Duncan*[211] the debtor was required to reduce the gratuitous assignation first and raise his defences with the cedent. Professor McBryde queries two cases where it is said that an onerous assignation takes preference over a gratuitous one.[212] These were cases of competition. Where a transferor subsequently becomes insolvent, conveyances for no consideration are presumed to have been in fraud of creditors. There is also one case where the debtor (one of the partners of the indebted partnership) was allowed to suspend a claim for payment where it was proved that the pursuer was neither a *bona fide*, nor an onerous, assignee; but a trustee for the defender's ex-partner.[213] The juridical basis for this decision is not clear. Lack of consideration is of little relevance to the debtor. He can plead the same defences against an onerous assignee as against a *mala fide* one.[214]

8-56. In South Africa, the assignee is bound to 'defend' his cedent against the debtor's counterclaims, when he (the assignee) is in bad faith: *LTA Engineering*

[207] Compare J MacLaren, *Court of Session Practice* (1916) 402 who desiderates three cumulative elements for a successful plea of compensation: (i) debts be of the same nature, (ii) each of them be liquid, and (iii) each be presently exigible.

[208] See para 8-42 above.

[209] I.xviii.6.

[210] (1676) 2 Stair 400; Mor 2652.

[211] (1711) Mor 2657.

[212] *Contract* para 12-101, n 58, citing *Campbell's Trs v Whyte* (1884) 11 R 1078 and *Gams v Russel's Tr* (1899) 7 SLT 289.

[213] *Knox v Martin* (1850) 12 D 719.

[214] *Scottish Widows Fund v Buist* (1876) 3 R 1078 at 1082 *per* Lord President Inglis. Cf *Davidson v Scott* 1915 SC 924 at 929, where the Lord Ordinary (Hunter) subjected an assignee to the debtor's defences on the ground that the assignee was not in good faith. It is clear, however, that these defences could have been pled even against an onerous bona fide assignee; see too *Johnstone v Irving* (1824) 3 S 163 (NE 110) and *Meggat v Brown* (1827) 5 S 343 at 344 *per* Lord Craigie.

Co Ltd v Seacat Investments (Pty) Ltd.[215] Bad faith includes a deliberate attempt to deprive the debtor of counterclaims.[216] But this rule can apply only to extrinsic, illiquid counterclaims, held by the debtor against the cedent, of which the cedent has in *mala fide* attempted to deprive the debtor.[217] Intrinsic defences can always be pled against an assignee; and liquid claims found compensation. Yet, in *LTA*, it is not clear from the facts whether the debtor's claim was an extrinsic or intrinsic illiquid one. It may well be that the debtor's claim actually arose out of the same contract. There are two possible interpretations that can be given to the *LTA* case. First, the debtor can simply retain payment on the basis of an extrinsic illiquid claim that he has against the cedent. Alternatively, the debtor can actually hold the assignee liable for the counterclaims. But this alternative view flatly contradicts the orthodox position that *bona fide* assignees cannot be made actively liable for the cedent's obligations;[218] although it must be conceded that view is predicated on a *bona fide* cession. In any event, what is the content of the cessionary's supposed duty to 'defend'[219] the cedent after a *mala fide* cession? On balance, there is no persuasive argument for holding the assignee actively liable for the cedent's obligations. The debtor in a bad faith cession should be allowed to retain, even if the counterclaim is illiquid, extrinsic and not a counterpart of the creditor's right which has been assigned. This is sufficient to protect the debtor. To hold the assignee actively liable is to go too far, even if the cedent is now insolvent. Had no cession occurred, the debtor would only have been entitled to retain.[220] There are traces in the Scottish sources of a distinction having been made between the defences available to a debtor where the assignation is *mala fide*. The furthest that these cases have gone is to accord the debtor the same rights against a *mala fide* assignee as against a *bona fide* assignee.[221]

[215] 1974 (1) SA 747 (AD).

[216] *LTA Engineering* at 770A *per* Jansen JA; Sande, *De Actionum Cessione* (trans Anders, 1906) 10.2 on D 3.3.34 discussed by R Zimmermann, *Das römisch-holländische Recht in Südafrika* (1983) 66–69.

[217] Cf Windscheid, *Pandektenrecht* § 332 at 377: where a cession is in bad faith the debtor will even be able to plead defences based on the personal relationship between the debtor and the cedent, i.e. extrinsic illiquid defences.

[218] *Munira Investments (Pty) Ltd v Flash Clothing Manufacturers (Pty) Ltd* 1980 (1) SA 326 (D) at 330D–E *per* Howard J; *Regional Factors (Pty) Ltd v Charisma Promotions* 1980 (4) SA 509 (C) at 512A–C *per* Burger J; *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 617E–H.

[219] Jansen JA explicitly reserved his opinion the precise nature of the duty to defend: see 772C–F. For the technical nature of 'defendere' in Roman law, see: P van Warmelo, 'Male Fide Cession, Stare Decesis and Abrogation by Disuse' (1974) 91 *SALJ* 298 at 303.

[220] In Scots law, with a balancing of accounts in bankruptcy. Cf the analysis of S Scott, *The Law of Cession* (2nd edn 1991) 196 ff, although not all of Scott's analysis is acceptable. See too the analogous civil law requirement that a buyer must defend his vendor against any claims from third parties asserting that they have a better title to the article sold, before the buyer can have a claim for breach of warrandice against the vendor: J B Moyle, *The Contract of Sale in the Civil Law* (1892, reprinted 1994) 118. This might mean simply that the buyer must show that he has been evicted, or that he (the buyer) cannot assert his rights *as against* a party with a better claim; in other words, the transfer is valid only *ad hunc effectum*. So too with the case of cession designed to deprive the debtor of his counterclaims: the cessionary cannot assert his rights *as against* the debtor. It is otherwise valid. This analysis requires some development of a doctrine of *inopposabilité* or *relative Unwirksamkeit*. This issue, however, cannot be explored further here.

[221] See authorities cited at para 8-55 above.

8-57. Unlike in some legal systems, there is no equivalent in Scots law of the *Lex Anastasiana*; that is to say, where a litigious claim is assigned, the assignee is not limited to recovering from the debtor what he paid to the cedent.[222]

(c) The agent disburser

8-58. For compensation to operate there must be a *concursus debiti et crediti*. And the relevant date for concourse is the date of intimation or arrestment. The plea must be sustained by the judge. Further, compensation cannot be pled after decree. But an award of expenses is in a privileged position: it can be compensated against the claim for the principal sum;[223] even where the award of expenses is made subsequent to the date of an arrestment.[224] The principle is also important in the cases dealing with the 'agent disburser'. Counsel and agents who act for litigants *in forma pauperis* are entitled to ask the court to award expenses to the lawyers personally. Such a decree is a judicial assignation of the litigant's claim.[225] As a result the award is subject to the other party to the litigation pleading compensation. Unlike ordinary pleas of compensation, however, only strictly intrinsic pleas are sustained. In practice this means that the debtor is only allowed to plead awards made against the other party in the same action:

> 'Accordingly an extrinsic claim for compensation does not prevent decree going out in the name of the agent-disburser, and in my opinion a claim for compensation must be deemed to be extrinsic when it relates to a transaction different from that which gives rise to the action in which the award of expenses is made. On the other hand, if the claim for compensation and the award of expenses arise out of the same transaction or *negotium*, then compensation is intrinsic and the agent is not entitled to decree in his own name.'[226]

8-59. A claim will be intrinsic in such a case if (1) cross-awards of expenses are made in the same action, either at the same or different times; (2) there are cross-awards of expenses in different actions pending at the same time and relating to the same subject matter; or (3) there has been a decree for the principal sum in favour of the party in one and the same action.[227]

(d) Contractual set-off arrangements

8-60. The debtor can plead compensation against the assignee even where the debt being compensated is extrinsic to the claim assigned. It this regard, compensation is exceptional. What, then, if the basis of the right of set-off is not the ordinary law of compensation but the contract out of which the assigned right arose, or a separate contract? Most Scottish cases consider only *compensation*

[222] See generally, H Kötz, *Europäisches Vertragsrecht* (1996) 408 (trans T Weir, *European Contract Law* (1997) 268).

[223] *Livingston v Reid* (1833) 11 S 878.

[224] *Lennie v Mackie* (1907) 23 Sh Ct Rep 85.

[225] *Gordon v Davidson* (1865) 3 M 938. See also *Fleming v Love* (1839) 1 D 1097.

[226] *Holt v National Bank of Scotland* 1927 SLT 664 at 666 *per* Lord Fleming (Ordinary).

[227] Cf further, *Smyth v Gemmill and Herbertson* 9 July 1802 FC; *Paterson v Wilson* (1883) 11 R 358; *Stuart v Moss* (1886) 13 R 572; *Paolo v Parias* (1897) 24 R 1030; *Strain v Strain* (1890) 17 R 566; *Lochgelly Iron and Coal Co Ltd v Sinclair* 1907 SC 442; *Grieve's Trs v Grieve* 1907 SC 636; *Fine v Edinburgh Life Assurance Co* 1909 SC 636; *Masco Cabinet and Bedding Co Ltd v Martin* 1912 SC 896.

légale. One case dealing with contractual set-off, however, did not apply the ordinary rules on retrospective extinction; although it was held that no interest would accrue in the interim period between the concourse and the dispute.[228] No problems arise if the contractual right to set-off is found in the same contract as the assigned claim or the contractual term is expressly clear that all or any sums may be set off. The difficult case is an extrinsic contractual right to set-off which covers the claim assigned. It is arguable that this is 'an independent personal obligation of the cedent'.[229] From the debtor's point of view, on the other hand, the right to set-off will be fundamental to his relations with the cedent. The debtor will regard the contractual right to set-off as an intrinsic qualification to the right assigned. Again, however, to admit extrinsic contractual set-off, undermines the entire intrinsic/extrinsic dichotomy. The basis for contractual set-off is, *ex hypothesi*, contractual. And the ordinary rules on mutuality of contracts must therefore apply. In so far as the right is extrinsic, set-off cannot be effected against the assignee. In so far as it is a counterpart of the right assigned,[230] however, it will found a mutuality defence and the debtor can retain payment.[231]

(4) Balancing of accounts in bankruptcy

(a) General principles

8-61. The principles regulating the retention or compensation of claims are, to some extent, relaxed when the party against whom the plea is to be advanced is insolvent.[232] No longer do the claims have to be liquid or intrinsic. Any plea or counterclaim[233] held by the defender against an insolvent pursuer will be upheld:

> '[F]or the policy of our law has long been that a person who is both debtor and creditor of a bankrupt cannot be compelled to pay his debt to the bankrupt in full and to receive in exchange only a ranking for the bankrupt's debt to him. That policy may be said to give that person a preference; but the opposite view could equally be said to give the other creditors a preference.'[234]

[228] *Campbell v Carruthers* (1756) Mor 2551; Kames Sel Dec 158 at 159.

[229] *Marshall's Trs v Banks* 1934 SC 405 at 411 *per* Lord Murray.

[230] It is most unlikely, however, that a right which is extrinsic to the assigned right will ever be sufficiently contemporaneous.

[231] Cf *Ross v Ross* (1895) 22 R 461 at 464–465 *per* Lord McLaren.

[232] Receivership does not necessarily involve insolvency and the rules on balancing of accounts do not apply: *Taylor v Scottish and Universal Newspapers Ltd* 1981 SC 408.

[233] Eg, a claim for payment can be met with a claim for delivery: Bell, *Commentaries* II, 122; while a debt which arose before insolvency can be adduced, though it may become due to the defender only after insolvency: McBryde, *Contract* para 25-62. Indeed, it is thought that a claim for reparation arising out of a delictual act which is subject to the three-year limitation period could be raised on a balancing of accounts in bankruptcy; though a prescribed claim could not.

[234] *Atlantic Engine Co (1920) Ltd (in liquidation) v Lord Advocate* 1955 SLT 17 at 20 *per* Lord President Cooper (Ordinary). See also Bell, *Commentaries* II, 122; H Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th edn 1914) 555; Gloag, *Contract* (2nd edn 1929) 649; *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation* 1907 SC 463 at 474 *per* Lord McLaren; the application of the law to the facts in *Asphaltic* is criticised by W A Wilson, *The Scottish Law of Debt* (2nd edn 1991) para 13.10. See also the opinion of Lord McLaren in *Ross v Ross* (1895) 22 R 461; *Ross* was described as a 'very special case' by the Lord Ordinary in *Barton Distilling (Scotland) Ltd v Barton Brands Ltd* 1993 SLT 1261.

8-62. This doctrine is known as 'balancing of accounts in bankruptcy'. It is a peculiar doctrine.[235] But Lord President Cooper's analysis of the doctrine's rationale is not without difficulty. Balancing of accounts applies to pleas which would not otherwise have afforded the proponer a valid defence. If the defender were forced to pay, it is indeed correct that he would probably not be able to have his counterclaims against the bankrupt satisfied in full. But the other creditors are not thereby accorded a preference. They still receive only a dividend, albeit a larger one; and the same dividend to which the defender would be entitled. In short, the doctrine of balancing of accounts in bankruptcy is arbitrary: it favours those who have not yet paid a debt over those who have.

(b) Time

8-63. The important factor for balancing of accounts in bankruptcy is time. The relevant date is not intimation, but insolvency. Post-insolvency debts cannot be pled against pre-insolvency debts.[236] On sequestration, the main reason for this is a lack of concourse. The act and warrant assigns the bankrupt's claim to the trustee. Any counterclaims acquired by the bankrupt's debtor after this date will be of no use against a trustee. Even where there is no vesting, however, the date of insolvency is the crucial date.[237] And a balancing of accounts may be pled to prevent diligence following on a decree held by the bankrupt.[238]

(c) Balancing of accounts with assignees

8-64. There are three situations where the rule might be relevant in the context of assignation. In the first, the cedent's solvency is in issue. For example, the cedent was *vergens ad inopiam*[239] when the assignation is made, and intimation is made prior to sequestration or liquidation.[240] Alternatively, the claim is

[235] Surprisingly, it is present in most legal systems: R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 43 ff.

[236] *Taylor's Trs v Paul* (1888) 15 R 313. Cf *Powdrill v Murrayhead Ltd* 1997 SLT 1223 OH for a case where the distinction between pre- and post-insolvency was difficult to draw. It has been suggested that two post-insolvency debts can be set off against each other: *Liquidators of Highland Engineering Ltd v Thomson* 1972 SC 87 OH.

[237] What is the date of insolvency? Practical insolvency? Apparent insolvency? Absolute insolvency? It is consistent with the policy of the law that the only relevant date can be apparent insolvency. It is then that the debtor can be sequestrated. The other relevant date may be where the debtor is *vergens ad inopiam* in terms of the common law rules.

[238] *Highland Council v Construction Centre Group Ltd* 2004 SC 480. Admittedly, this was an application for the suspension *ad interim* of a charge for payment.

[239] Bell, *Commentaries* II, 127 suggests that balancing of accounts in bankruptcy is available where the pursuer is *vergens*; so does *Barclay v Clerk* (1683) Mor 2641. Importantly, *Barclay* allowed a balancing of accounts to be pled against a party seeking to enforce a decree.

[240] In *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 at 1215F–G it was conceded by the debtor, Scottish Enterprise, that it could not claim a balancing of accounts in bankruptcy as against the pursuer who held an assignation in security (the cedent being insolvent). This concession was probably unwise. Matters are complicated by the fact that the case was pursued in the English courts so, until the appeal to the House of Lords, Scots law was treated as a matter of fact. Since there is little authority in Scots law, it may be that the position in English law, where insolvency set-off is not available against an assignee (*De Mattos v Saunders* (1872) LR 7 CP 570; *Re Arthur Saunders Ltd* (1981) 17 BLR 125), was assumed to represent Scots law. This perhaps reflects the amorphous and contradictory

assigned and intimated. After intimation, the cedent becomes insolvent. The assigned claim is in a mutual contract. The cedent breached the contract before his insolvency but after intimation. Insolvency is the relevant date for a balancing of accounts. Moreover, if the debtor were not allowed to plead a balancing of accounts in this situation, he is arguably prejudiced by the assignation: forced to pay the assignee with little chance of recovering from the cedent.

8-65. The second situation is the converse of the first. The cedent is solvent. He assigns his claim against the debtor. The assignee then becomes insolvent. Is the debtor entitled to defend any claim by an insolvent assignee on the basis of claims he holds against the solvent cedent?[241] If the debtor is allowed to do so, the doctrine comes close to frustrating the rights of the assignee's creditors: the debtor in the assignation has, after all, a claim against the cedent who may be solvent. It is consistent with the exceptional nature of the doctrine of balancing of accounts that the debtor should not be entitled to raise claims against the assignee that he could not have raised against the cedent. Therefore, if the cedent is solvent, the assignee's trustee or liquidator can demand payment from the debtor and the debtor can still raise his counterclaims against the cedent. Were it otherwise, the creditors of the assignee could receive nothing though the debtor has a perfectly good remedy against a solvent party. Conversely, if the debtor cannot satisfy his claims against the cedent (because the cedent is insolvent), then the debtor may rightfully plead a balancing of accounts on a demand by the assignee.

8-66. A third situation involves an insolvent *debitor cessus* and the assignee seeks to claim a balancing of accounts. In *Smith v Lord Advocate*,[242] the debtor (Upper Clyde Shipbuilders) was in liquidation.[243] Thereafter, there was a statutory transfer of the assets and liabilities of the creditor (the Shipbuilding Industry Board) to the Secretary of State. The liquidator sought payment from the Secretary of State in respect of work carried out on certain naval vessels. This claim was met with a defence of 'set-off' on behalf of the Secretary of State. Both the court and academic commentary on the decision characterised the statutory transfer as one of assignation.[244] But the transfer was rather a universal succession: both assets and liabilities were transferred. The case, therefore, is of limited relevance to assignation. The only reason that the liquidator was able to sue the Secretary of State was on the basis that his department was liable for the Shipbuilding Board's debt. That liability arose as a result of the statutory transfer. And, contrary

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nature of assignment in English law: see the comments of Lord Reid in *BS Lyle v Roscher* [1959] 1 WLR 8 HL.

[241] Only illiquid and extrinsic counterclaims are relevant here, i.e. claims which would not otherwise afford a defence of retention or compensation. Where the debtor has such a defence against the cedent, it can be raised against the assignee whatever the assignee's solvency.

[242] 1980 SC 227.

[243] Leave of the court does not appear to be necessary to plead balancing of accounts in bankruptcy against a company in liquidation: *G & A Hotels Ltd v THB Marketing Services Ltd* 1983 SLT 497, although leave is required to bring a counterclaim: Insolvency Act 1986, s 113.

[244] See generally D P Sellar, 'Assignation and Retention in Liquidation' 1985 SLT (News) 41. Sellar adopts the analysis of the Lord Ordinary in *Smith* that the effect of the universal succession by statutory transfer was to effect a 'statutory assignation' (at 41); but later (at 45) argues that a 'statutory subrogation' is 'surely different in its effect from an assignation'. This is incorrect. Subrogation is merely cession *ex lege* (*cessio legis*). And a universal succession of assets and liabilities is different from both.

to Mr Sellar's argument,[245] there was a *concursus debiti et crediti*. The insolvency did not disrupt it: there is no transfer of the assets of the company to the liquidator as in sequestration or in a trust deed for creditors.[246] As a result of the universal succession, the Secretary of State stood in the shoes of the Shipbuilding Industry Board. In other words, despite the statutory transfer (which, admittedly, occurred *after* liquidation) the position was the same as before liquidation. In any event, as explained by Lord Avonside, the relevant 'personality' of the debtor was the Crown. In Scots law, the Crown is regarded as an 'indivisible entity'.[247] The Lord Advocate represents these departments. The only effect of the Crown Proceedings Act 1947,[248] therefore, is that the leave of the court is required where debts nominally owed to one department may be used for the purposes of set-off or compensation by another. On this analysis it matters not what assets and liabilities transferred as between government departments and whether the transfers occurred before or after insolvency.

E. INVALIDITY AS A DEFENCE

8-67. If sued by the assignee, the debtor will be entitled to plead that the contract out of which the assigned claim arose was void.[249] This is a paradigm application of the *assignatus* rule. The debtor could and would have pled this against the cedent; similarly, he may do so against an assignee. If the underlying contract is voidable, the position may be more complicated. In general, a voidable contract can only be reduced where *restitutio in integrum* is possible. The effect of reduction is normally retrospective. It is perhaps arguable that, since there has been an assignation of one party's rights under the contract, this is no longer possible. The cedent will typically have received money for the assignation. Generally speaking, where corporeal property is concerned, a *bona fide* transferee cannot be prejudiced if title has passed to him prior to any reduction. It is arguable that a *bona fide* assignee, who has duly intimated, is in a similar position. If the contract were reduced the cedent would then be in breach of warrandice vis-à-vis the assignee. If the assignee has translated his right to a subsequent assignee, the first assignee will be in breach of warrandice to the second.

8-68. Professor McBryde observes that, in England, there is a conflict of authority on whether the debtor can challenge the validity of the assignation.[250] Irrespective of issues of title, the debtor clearly has an interest: he wants to ensure he pays the correct creditor. But sometimes the debtor gets it wrong and pays the wrong person. Providing the payment was in good faith, however, the debtor is protected:

> 'The third common exception in personal actions is, payment made *bona fide* to him who had not the true right, but where there was another preferable right, which the defender neither did, nor was obliged to know; and therefore the law secures the payer, without prejudice to the pursuer to insist against the obtainer of the payment.'[251]

[245] See preceding note.

[246] As a general rule; exceptionally, however, assets may be vested in the liquidator: Insolvency Act 1986, s 145; Titles to Land (Consolidation) (Scotland) Act 1868, s 25.

[247] Cf F W Maitland, 'The Crown as a Corporation' (1901) 17 *LQR* 131.

[248] Crown Proceedings Act 1947, s 50(2)(d).

[249] See McBryde, *Contract* for the applicable principles.

[250] *Contract* para 12-81.

[251] Stair IV.xl.33.

8-69. The issue of whether the debtor is in good faith is a difficult one. Is he in bad faith if the cedent intimates an allegation of a defect of consent? In cases of doubt, the debtor can always consign the money on a multiplepoinding.

9 Arbitration Clauses and Fourth Parties

A. ARBITRATION CLAUSES

(1) General

9-01. Suppose one party to a contract assigns his claim to payment. The debtor disputes that the claim is due. The contract contains an arbitration clause. Can the debtor require an assignee to submit to arbitration? Can an assignee submit to the arbitration? If a court has no jurisdiction to hear the dispute and the assignee cannot be heard in any arbitration, the debtor can escape payment though he may have no substantive defence to the pursuer's claim.[1] With sub-contracts, a clause incorporating the provisions of the main contract, which contains an arbitration clause, does not subject disputes between the main contractor and the sub-contractor to arbitration.[2] But what of assignees? The issue has perplexed modern writers: 'the situation is far from clear'[3] concludes the leading Scottish work; while Lord Mustill has expressed similar sentiments in his treatment of the subject.[4] There is no problem with an assignation of an arbitral award.[5] Such

[1] It should be noted, however, that the court has been reluctant to hold that it has no jurisdiction where there is, in Lord Adam's phrase, no 'real' dispute to go to the arbiter: *Mackay & Son v Leven Police Commissioners* (1893) 20 R 1093.

[2] *Goodwins, Jardine & Co Ltd v Charles Brand & Son* (1905) 7 F 995. Cf *East Kilbride Development Corporation v Whatlings (Building) Co Ltd* 1990 SLT 492.

[3] F P Davidson, *Arbitration* (2000) para 7.26.

[4] Lord Mustill and S C Boyd, *Commercial Arbitration* (2nd edn 1989, with 2001 supplement) 138: 'The decided cases on the rights of parties in this situation are far from clear'. There is an excellent comparative discussion in English by D L Girsberger and C Hausmaniger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121. See also, Werner, 'Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause' (1991) 8 *Journal of International Arbitration* 13.

[5] J P Wood and J R N Macphail, *The Law of Arbitration in Scotland* (1900) 77.

a claim is liquid and may be freely assigned. The problem arises if there is an assignation at any time before decree-arbitral has been pronounced.[6] The answer depends on the type of arbitration clause in question. First, it will be necessary to determine whether the agreement between the cedent and the debtor to submit to arbitration is in the contract out of which arose the assigned right. If not, the arbitration agreement is extrinsic and cannot be raised with an assignee. References to extrinsic documents, which in turn contain arbitration clauses, are not uncommon. But the courts, in Scotland at least, have taken a strict approach to the issue of incorporation of these terms.[7] If this approach represents the law,[8] the debtor cannot require the assignee to submit to arbitration.

9-02. An arbitration clause may be specific or universal. A specific clause relates only to the assigned claim. By a general or universal clause, in contrast, the parties submit all disputes that may arise between them to an arbiter.[9] For present purposes it will be assumed that the contract, out of which the assigned right arose, contained a universal arbitration clause. In terms of the intrinsic/extrinsic dichotomy, such a clause is intrinsic and, in principle, could found a plea of *assignatus utitur* from the debtor.[10]

(2) Practicalities

9-03. Two practical issues immediately arise. The assignation of a claim for valuable consideration contains an implied guarantee that the debt is due and owing (warrandice *debitum subesse*). A debtor invoking an arbitration clause, *ex hypothesi*, disputes the existence of the claim. But a flat refusal from the debtor is not enough, *per se*, to render the cedent liable for breach of warrandice. More is required.[11]

9-04. Second, there are common-sense issues of personal bar. A debtor who invokes an arbitration clause cannot have his cake and eat it: he cannot invoke

[6] Such an assignation may also raise taxation issues: *Commissioners for Inland Revenue v Forrest's Judicial Factor* (1924) 8 TC 595 (1st Div). This case was the result of the proceedings in the well-known litigation of *Boyd & Forrest v Glasgow & South-Western Railway Co* 1911 SC 33 and 1050; 1912 SC (HL) 93; 1914 SC 472; 1915 SC (HL) 20; 1918 SC (HL) 14.

[7] Davidson, *Arbitration* para 7.04 citing *M'Connell and Reid v Smith* 1911 SC 635 at 638 *per* Lord Dundas: 'I think it requires clear and distinct language to oust the ordinary jurisdiction of the courts and substitute procedure by way of arbitration. … A mere reference to the rules is … quite insufficient to import such a condition into the contract'. *M'Connell* was approved in *Babcock Rosyth Defence Ltd v Grootcon (UK) Ltd* 1998 SLT 1143 at 1150F *per* Lord Hamilton. See also *Montgomerie v Carrick and Napier* (1848) 10 D 1387 at 1392 *per* Lord Ivory (Ordinary).

[8] It is perhaps an outdated analysis: see Davidson, *Arbitration* para 7.04 referring to the English courts' reaction to *M'Connell*. Cf UNCITRAL Model Law on International Commercial Arbitration, Art 7(1), adopted in Scotland by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 66.

[9] See the example given in *Styles and Arbitration Rules of the Law Society of Scotland* reprinted as an appendix to Lord Hope of Craighead's title on 'Arbitration' in *SME*, Reissue 1 (1999).

[10] *Palmer v South East Lancashire Insurance Co Ltd* 1932 SLT 68 at 69 *per* Lord Murray (Ordinary): 'The arrester cannot, in my opinion, at once invoke the contract and reject the inherent condition'.

[11] How much more is unclear. The law applicable to the warrandice in an assignation is a specialised subject that cannot be entered into here.

the arbitration clause against the assignee and, in the same breath, complain that he agreed only to arbitrate with the cedent. Be that as it may, however, the following supposes an assignee who wants to enter a submission with an unwilling debtor.

(3) Comparative background

9-05. The issue has vexed the courts in most European jurisdictions.[12] At the outset, it is necessary to make the distinction between assignation of claims (*cession de créance*) and a transfer of a contract *in toto* (*cession de contrat*). Many of the continental sources deal with the latter. The present discussion is concerned only with the former, a transfer of claims. In Germany, Austria, France and Switzerland, an agreement to submit to arbitration is construed as an agreement accessory to the right assigned.[13] The right to arbitrate thus passes to the assignee;[14] unless there is *delectus personae* (what Francophone lawyers call '*intuitus personae*').[15] This approach has, however, been criticised by many continental commentators.[16] The general view is that there must be an acceptance to enter into arbitration by the assignee as well as the debtor.[17] The difficulties cannot all be discussed here. But it must be remembered that the complications multiply when there are different laws applicable to the principal claim, the agreement to arbitrate and the cession.[18]

(4) Scottish sources

(a) The debtor's right to invoke the clause

9-06. Of the Scottish cases, the least complex is *Henry v Hepburn and Burns*.[19] Henry and Burns submitted their accounts to arbitration. Burns had acted as Henry's law agent for some years. There was a large account outstanding, the quantum of which was the subject of submission. In the course of the arbiters' deliberations, Burns assigned his claim to Hepburn. This was intimated to Henry. The assignation included a clause which empowered Hepburn to take decree from the arbiters in his own name. Intimation of the assignation (which was acknowledged by the debtor) was made more than one year before the arbiters finally drew up the outstanding account. Before decree-arbitral was pronounced, Hepburn appeared and produced his assignation and craved that the arbiters pronounced decree in his name. The debtor Henry objected. Arbitration, so Henry argued, was a personal contract coloured with *delectus*

[12] See generally, P Mayer, 'La "circulation" des conventions d'arbitrage' (2005) 132 *Journal du droit international* 251.

[13] § 401 *BGB*; § 1394 *ABGB*; Art 1692 *Code civil*; Art 170(2) *OR*.

[14] See the authorities cited by D L Girsberger and C Hausmaniger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121 at 126–131.

[15] P Mayer (2005) 132 *Journal du droit international* 251 at 256.

[16] D L Girsberger and C Hausmaniger at 126–131.

[17] P Fouchard, *L'arbitrage commercial international* (2nd edn 1997), cited by Mayer.

[18] Mayer, *op cit*, at 260.

[19] (1835) 13 S 361.

personae.[20] On occasion, this objection may have some force. In this case, however, the argument for the assignee that 'even if there could be *delectus personae* in respect of the litigious temper of an opponent throughout a discussion, there could be none as to the name of person in whose favour a decree should be pronounced'[21] was rightly preferred. The submission had been concluded. As the Lord President observed, 'the cedent remains effectually bound, notwithstanding the assignation'.[22] There was therefore no potential prejudice to the debtor. Lord Mackenzie gave short shrift to what was 'a mere formal objection'.[23]

9-07. The court was influenced by the position of other third parties. On the insolvency of a party to an arbitration, for example, the trustee in sequestration has a right to continue the submission.[24] And where a party to an arbitration was sequestrated and decree-arbitral was pronounced without giving the trustee the opportunity to be heard, the decree was reduced.[25] Since a judicial assignee could appear in the proceedings, the court in *Henry* reasoned, there was nothing to prevent a voluntary assignee from doing so.[26] In none of these cases, however, was there any indication that the debtor had refused to enter into the proceedings in order to frustrate the assignee's claim.

9-08. A similar issue arises where one of the parties to an arbitration dies. There is authority for the proposition that death has no effect.[27] But this view may mean no more than that a decree-arbitral is binding upon the heirs of the deceased. It has also been held that the death of one of the parties in an arbitration necessarily brings the proceedings to an end, unless there is a clause specifically binding executors.[28]

9-09. In *Robertson v Cheyne*[29] claims between a tenant and his landlady were submitted to arbitration in terms of the lease. The cautioners for rent, who had already been required to make advances, consented to the submission. The tenant had purported to assign his claims against the landlady to the cautioners. The debtor (the landlady) acknowledged the assignation. The cautioners, meanwhile, had raised an action against the tenant for their relief, arresting in the landlady's hands on the dependence of the action. The cautioners obtained decree against the tenant and again arrested in the hands of the landlady. Prior to the conclusion of the arbitration, both the tenant, one of the cautioners and

[20] This argument found favour with the Lord Ordinary (Moncreiff); his opinion is reproduced verbatim by A M Bell, *Treatise on the Law of Arbitration in Scotland* (2nd edn 1877) 117–118. See also *Climat c SCA* (1er Chambre Civil, Cour de Cassation, 28 May 2002), noted by N Coipel-Carbonnier (2002) 91 *Revue critique de droit international privé* 758 especially at 769 and in Mayer (2005) 132 *Journal du droit international* 251 at 258. For discussion of the effect of *delectus personae* on the law of assignation generally, see para 2-34 above.

[21] At 364.

[22] At 365.

[23] At 366.

[24] *Grant v Girdwood & Co*, 23 June 1820 FC.

[25] *Barbour v Wright* 21 November 1811 FC.

[26] *Henry v Hepburn and Burns* (1835) 13 S 361 at 366 *per* Lord Balgray. Cf the French case of *Banque Worms* (1er Chambre Civil, 5 January 1999) noted at (1999) 88 *Revue critique de droit international privé* 537.

[27] *Earl of Selkirk v Naismith* (1778) Mor 627; Hailes 780.

[28] *Watmore and Taylor v Burns*, 17 May 1839 FC at 824 *per* Lord Mackenzie.

[29] (1847) 9 D 599.

the landlady's husband died. The remaining cautioner sought to be sisted in the submission. The arbiter proceeded and found a balance due to the tenant. He pronounced decree-arbitral in favour of the cautioner. The landlady thereupon raised an action for reduction. The First Division held that the effect of the death of the parties was to bring the arbitration to an end and it was incompetent for the arbiter to proceed and pronounce decree-arbitral. The assignation, it was held, was ineffective (it was in the terms of a mandate to pay). And, even if it had been valid, the only effect of the assignation was to allow decree-arbitral to be pronounced in the name of the assignee.[30] But this could only be done with the concurrence of the cedent.[31] For Lord Mackenzie,[32] both parties are released if either dies before decree-arbitral is pronounced; death after decree-arbitral, in contrast, has no effect and the debtor's estate is bound.[33] In an *obiter dictum*, Lord Mackenzie suggested that, if the assignation had been valid, the assignee could have proceeded in the cedent's name.[34] It is difficult to extract any *ratio* from the decision which appears at odds with the right of a trustee in sequestration to submit to an arbitration in which the bankrupt was involved.[35]

9-10. Leases often include arbitration clauses. These may be specific, for example regarding the valuation of an outgoing tenant's crops, or general.[36] In *Montgomerie v Carrick and Napier*[37] a mineral lease contained a universal arbitration clause. The property was sold. The tenant decided to exercise his right to sink another mine. The landlord's consent was required. The landlord's successor refused to give it and the tenant took his request to the arbiter. The tenant successfully obtained a decree and the landlord's successor sought reduction of it. The case therefore involved a transferee (the landlord's singular successor) arguing that he was not subject to the arbitration clause in the original lease to which he had, by statute,[38] become a party. The tenant successfully argued that 'the clause of reference was not a personal obligation extrinsic to the lease, but in a measure necessary to it, since it was impossible to extricate a mineral lease without an arbiter'.[39] The court held that the successor was personally barred from challenging the decree-arbitral. They also made some observations on the effect of an arbitration clause on successors. Lord President Boyle asserted that it was 'most plain and obvious … that there is a distinction between those stipulations which are extrinsic to the lease, and do not transmit against singular successors, and those other stipulations which are of the essence of the contract, and do therefore of necessity transmit against them'.[40] The

[30] At 604 *per* Lord Fullerton.

[31] At 603 *per* Lord President Boyle. Though one would have thought a voluntary assignation of the whole claim subject to the arbitration was indication enough of consent.

[32] Who delivered the leading opinion in *Watmore*, para 9-08 above.

[33] *Robertson v Cheyne* (1847) 9 D 599 at 603.

[34] At 604. For the apparent right of the assignee to sue in the name of the cedent, see discussion in para 2-25 above.

[35] As in *Barbour v Wright* 21 November 1811 FC.

[36] See *Sanderson & Son v Armour & Co* 1922 SC (HL) 117 at 125 *per* Lord Dunedin.

[37] (1848) 10 D 1387.

[38] See the terms of the Leases Act 1449. Only those terms which are *inter naturalia* of the lease (i.e. intrinsic) transmit against successors. See *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 and authority there cited.

[39] At 1394.

[40] At 1395.

universal clause before him was, he held, 'in the essence of the lease'.[41] Two able judges, Lords Fullerton and Jeffrey, however, disagreed (although they concurred in the decision). Lord Jeffrey thought that an arbitration clause was one which 'bore reference to the private relation of the contracting parties'.[42] Lord Jeffrey agreed with Lord Fullerton's suggestion that a singular successor could not be expected to submit to arbitration on a matter such as whether a tenant could retain a portion of his rent.[43] An arbitration clause relating to the ordinary matters of landlord and tenant would, however, transmit. It is impossible to take any clear ratio from these opinions.

(b) The assignee's right to invoke the clause

9-11. Positively, an assignee, judicial or voluntary, has the right to rely on an arbitration clause and invoke it himself.[44] And, if there is an agreement between the cedent and the debtor to submit to arbitration after intimation, it does not affect the assignee.[45] It has been held in the Outer House that an insurer can refuse a claim of a statutory assignee under the Third Parties (Rights Against Insurers) Act 1930 on the basis that there is an arbitration clause in the policy and only the original contractor can enter into the arbitration.[46] But such a result seems unworkable. The insured is insolvent and, if it is a company, may no longer even exist. If, as Lord President Hope suggested in *Henry* above, the obligation to submit to arbitration remains with the cedent, then, on the cedent's insolvency, the assignee's claim could be frustrated by an arbitration clause.

9-12. The issues were brought into focus in *Rutherford v Licences and General Insurance Co Ltd*.[47] The pursuer arrested in the hands of the insurer rather than rely on his statutory rights under the 1930 Act. On furthcoming, the insurer pled that the claim by the insured had to be settled by arbitration. The pursuer objected on two grounds. First, since the wrongdoer's policy was only for third party risks, the insured had little interest in the arbitration. There was a danger, therefore, that he could prejudice the pursuer's claim. As a result the pursuer sought to interdict the arbitration proceedings taking place in the pursuer's absence as well as an order that the pursuer be allowed to enter into the submission. Second, the pursuer was equally concerned that the arbiter chosen by the insured and insurer was not independent.[48] The pursuer was successful on the first ground. The arbiter, being a sheriff, was confirmed. The Lord Ordinary accepted the argument

[41] At 1395. Lord Mackenzie delivered a concurring opinion.

[42] At 1396. Compare *A Alfred Herbert Ltd v Scottish Bricks Ltd* (1945) 62 Sh Ct Rep 23 where there was an arbitration clause in the feu-contract to which neither the pursuer nor the defender were originally party.

[43] As in *Ross v Duchess of Sutherland* (1838) 16 S 1179.

[44] *Boland v White Cross Insurance Association* 1926 SC 1066, cited in Davidson, *Arbitration* para 7-26. See the discussion of *Boland* in *Palmer v South East Lancashire Insurance Co Ltd* 1932 SLT 68 OH.

[45] *Whately v Ardrossan Harbour Co* (1893) 1 SLT 382 (1st Div). This report is thoroughly unsatisfactory. There is a fuller report, but of earlier proceedings only, before the First Division at (1893) 30 SLR 493.

[46] *Cunningham v Anglian Insurance Co Ltd* 1934 SLT 273 OH.

[47] 1934 SLT 31 OH.

[48] In *A Alfred Herbert Ltd v Scottish Bricks Ltd* (1946) 62 Sh Ct Rep 23, the sheriff held that there was no *delectus personae* in an arbitration agreement in a feu-contract since the successors in title would still be able to exercise the right to appoint the arbiter. See also *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178.

that by virtue of the fact that the pursuer was a judicial assignee, 'he and he alone had a consequent right to control and be a party to any arbitration proceedings relative to the claim'.[49] Similarly, in *Palmer v South East Lancashire Insurance Co Ltd*,[50] the Lord Ordinary observed,

> 'The arrester cannot, in my opinion, invoke the contract and reject the inherent condition. He may be entitled, by virtue of the "judicial assignation" implied in his arrestment to force the arrestees to join issue with him on the question of liability.'[51]

9-13. It is thought that the modern cases, albeit emanating only from the Outer House,[52] are preferable to the opinions to the contrary in *Robertson* and *Montgomerie* , which may be considered outdated.[53]

9-14. In summary, then, the assignee is entitled to proceed[54] and take decree in his own name[55] providing two conditions are satisfied: (1) the cedent must have divested himself of his entire interest in the claim, and (2) the submission must not have commenced before the assignation. The right to submit to arbitration is particularly important where the cedent is insolvent or is a liquidated company.[56] Where the cedent is solvent and retains an interest in the arbitration proceedings, the assignee must be able either to compel the cedent to enter into the arbitration; or to furnish the assignee with all information that might be necessary for him to conduct arbitration proceedings respecting the claim. After all, the assignee will be a complete stranger to the contractual history between the parties. In some legal systems, the assignee is entitled by virtue of the assignation to require the cedent to assist by furnishing all relevant information and material that may be necessary to pursue the claim against the debtor.[57] Assuming an assignee can compel the cedent to enter into proceedings, who pays for the arbitration? On the one hand perhaps the assignee is liable as *dominus litis*; on the other, perhaps the expense should fall on the cedent: for the cedent

[49] At 32.

[50] 1932 SLT 68 OH.

[51] At 69 *per* Lord Murray (Ordinary).

[52] See also *Cant v Eagle Star and British Dominions Insurance Co* 1937 SLT 444 OH, where an action of forthcoming was sisted to allow the arrester to enter into an arbitration with the insurer.

[53] *Rodgerson Roofing Ltd v Hall & Tawse Scotland Ltd* 2000 SC 249 involved an assignee of rights under a sub-contract in which there was an arbitration clause. The assignee seemed to be participating in the arbitration proceedings although there was doubt about whether he even had a title to sue. There was no discussion, however, of whether the assignee was entitled to submit to arbitration agreed upon between the cedent and the debtor.

[54] In England it has been held that an assignee must submit to the arbitration before he can become a party to it. Assignment *per se* will not have that effect: *Baytur SA v Finagro Holding SA* [1992] 1 Lloyd's Rep 134 at 150 *per* Lloyd LJ. A party who submits to arbitration will be bound by the decree-arbitral: *Brown v Gardner* (1739) Mor 5659.

[55] In South Africa an attempt to enter into arbitration in the name of the cedent after cession was held to be void: *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 at 618E *per* Selikowitz J.

[56] Cf *McGruther, Noter* 2003 SCLR 144 OH aff'd 2004 SC 514. Here one of the parties to an arbitration was in liquidation. The liquidator successfully sought a sist of the liquidation to allow the directors of the company, rather than the liquidator himself, to prosecute the company's claims.

[57] See, eg, the Swiss *Obligationenrecht* Art 170(2). But note that in Switzerland this may not apply where a *delectus personae* in the original party to the arbitration agreement can be shown: see Mayers, 'La "circulation" des conventions d'arbitrage' (2005) 132 *Journal du droit international* 251 at 256.

warrants (assuming no stipulation to the contrary) that the debt is presently due and owing. Yet that question will be determined only on conclusion of the arbitration. It may be observed that, as far as arbitration clauses in insurance policies are concerned, most insurers have undertaken not to enforce arbitration clauses in standard form policies if the insured prefers to have questions of coverage determined by the court.[58]

(5) Anglo-American position

9-15. The older English authorities treated an agreement to arbitrate as 'a personal covenant'.[59] As such, the assignee could not become a party to it. A finding that the arbitration clause was 'a personal covenant' would prevent the assignee entering into the arbitration. However, some American authorities come to the surprising conclusion that the effect of an assignment of a right under a contract which has an inherently personal arbitration clause, to which the assignee will not agree, is to frustrate the agreement to arbitrate: the assignee is not bound by it and has an unencumbered claim against the debtor.[60] But this runs contrary to the principle that the debtor should not be prejudiced by the assignation. Later English cases hold that an arbitration clause can bind the assignee, where the *debtor* agrees.[61]

9-16. In England, in notifying the assignment and seeking decree, the assignee implicitly accepts that he is potentially liable for costs.[62] The consent of the arbitrator, however, is required before the assignee can take part in the proceedings.[63] Why the arbitrator's consent should be important is not clear. In terms of the Arbitration Act 1996, a reference to an 'arbitration agreement' includes a reference to any person claiming 'under or through a party to the agreement'.[64] It is not clear whether the older authorities have been superseded. For example, it has been suggested that to allow an assignee to get decree without being liable for a counterclaim would be unjust: an insolvent party to an arbitration could assign away his right to an associated company leaving the other party with a worthless claim against the assignor.[65] The issue is not peculiar

[58] Law Commission and Scottish Law Commission Report, *Third Parties – Rights Against Insurers* (Law Com No 272, Scot Law Com No 184 (2001)) para 5.40 citing the ABI/Lloyd's Arbitration Agreement 1956 (confirmed in 1986).

[59] *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 KB 463.

[60] *Lachmar v Trunkline LNG Co* 753 F 2d 8 at 9–10 (2d Cir 1985) cited by Girsberger and Hausmaniger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121 at 124. The authors comment, at 135, of the Anglo-American authorities that, 'Those courts, however, that hold that the assignee is not bound by the arbitration agreement focus on the relationship between assignor and assignee, not between the original parties, to determine whether the assignee should be bound by the arbitration agreement'.

[61] *Shayler v Woolf* [1946] Ch 320.

[62] *The Jordan Nicolov* [1990] 2 Lloyd's Rep 11 at 19 *per* Hobhouse J.

[63] *Baytur SA v Finagro Holding SA* [1992] 1 Lloyd's Rep 135 at 151–152 *per* Lloyd LJ, a case dealing with an equitable assignment.

[64] Section 82(2); see *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 2)* [2005] 2 Lloyd's Rep 378. Obviously, if there is a prohibition on assignment in the underlying contract, an assignee cannot possibly seek to submit to arbitration: *Bawejem Ltd v MC Fabrications Ltd* [1999] 1 All ER (Comm) 377 CA.

[65] *Baytur SA v Finagro Holding SA* at 151 *per* Lloyd LJ. This reflects the *dicta* of Lord Hobhouse in *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199 at 212.

to arbitration.[66] Such an approach ignores what an assignment is. It transfers rights, not liabilities.[67] If an assignation is gratuitous and the cedent becomes insolvent then it can be reduced; *a fortiori* can one which is both gratuitous and to an associated company.[68] In Scotland, the law relating to the *dominus litis* will regulate issues of expenses.[69]

(6) Interpretation

9-17. To recapitulate: where a party to an arbitration objects to the presence of an assignee in the proceedings, there are two separate interests to be addressed. First, one must look at the position of the assignee. The traditional approach of the civil law is to ask if the agreement to arbitrate is accessory to the assigned claim; if so, it transfers automatically. On this analysis, the assignee is entitled to submit to arbitration. In the modern law of arbitration, however, it is now generally accepted that the agreement to arbitrate may lead to an existence entirely separate from the contract to which it relates. Such an autonomous agreement is unaffected by the invalidity of the other terms of the contract.[70] As a result, issues relating to validity and termination are still subject to arbitration. This would suggest that an autonomous agreement to arbitrate is not accessory to the main claim; the assignee is, therefore, neither bound by it nor able to invoke it.[71]

9-18. Second, focus on the debtor. It is a fundamental principle that the debtor must not be prejudiced by the assignation. If the debtor could have defended a claim from the cedent in an arbitration, so too can he defend a claim from an assignee in an arbitration. Focus on the debtor raises a basic question: are claims subject to arbitration clauses assignable at all? If the debtor agreed to arbitrate only with the cedent, there is an element of *delectus personae*; if so, an assignee *cannot* submit to the proceedings, without the debtor's consent, even if he wants to.[72] (It should be noted in parentheses that the assignee who wants to submit to arbitration might seek to do so in the cedent's name.[73] The right to litigate in the name of the cedent has been confirmed in some Scottish cases, although, as has been argued, this line of authority should not be followed. In any event, suing in the cedent's name carries its own risks.)

[66] *The Smaro* [1999] 1 Lloyd's Rep 225 at 243 *per* Rix J.

[67] This was accepted by Lloyd LJ: 'It is elementary that an assignment, whether legal or equitable, cannot transfer the burden of a contract' (at 151).

[68] Indeed, if the assignee company is associated with the director, he may be personally liable: see Companies Act 1985, ss 320 and 322. Cf Companies Act 2006, s 170 ff.

[69] For which, see para 2-25 above.

[70] Indeed, it may be subject to a different law than the principal contract. Assignment introduces the possibility of a third law (if the international private law rules of the *lex fori* apply a connecting factor other than the law of the principal claim). See the discussion in Girsberger and Hausmaniger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121 at 151 ff.

[71] See discussion by Girsberger and Hausmaniger at 36 ff.

[72] After all, the arbitration agreement will impose duties on both parties. If there is an assignation of a right subject to the arbitration agreement, the cedent cannot be discharged from his liabilities under that arbitration agreement without the consent of the *debitor cessus*.

[73] See para 2-25 above.

(7) The assignee in arbitration proceedings: the debtor's defences

9-19. If the debtor's right to submit to arbitration does bind the assignee, the question remains: what pleas are available to the debtor before the arbiter? Depending on the wording of the arbitration clause, the pleas available to the debtor may be wider or narrower than if the assignee's claim had been pursued before a court. If the terms of arbitration are not sufficiently wide, an arbiter has no jurisdiction to give effect to a plea of compensation.[74] Conversely, counterclaims which the debtor has against the cedent may be pled in the arbitration.[75] There may, however, be a difficulty in giving effect to such counterclaims. The assignee is not responsible for the cedent's obligations. So decree cannot be awarded against the assignee. Therefore, unless specific provision is made in the arbitration agreement there could be a situation of continuous suspension, a possibility already adverted to.[76]

B. FOURTH PARTIES

(1) Fourth parties and fraud

9-20. In the transfer of assets, the general principle is that the transferee is unconcerned with the personal obligations of the transferor. The assignation of personal rights is, apparently,[77] different:

> 'But in personal rights the fraud of authors is relevant against singular successors, though not partaking nor conscious of the fraud, when they purchased; because assignees are but procurators, albeit *in rem suam*: and therefore they are in the same case with their cedents, except that their cedents' oaths after they were denuded, cannot prejudge their assignees.'[78]

9-21. This passage is somewhat contradictory. If assignees are mere procurators, why does Stair refer to the cedent being 'denuded'? Stair's analysis was strongly criticised by Bell in his *Commentaries*.[79] Assignation is, today, a transfer. That outdated language of *procuratio* is still used is unfortunate and confusing. Once it is accepted that assignation is a transfer the position should, in principle, be the same as in the transfer of other assets. Fraud perpetrated against the cedent, but not in the contract out of which the assigned claim arose, cannot affect subsequent *bona fide* onerous assignees.

9-22. In *M'Donells v Carmichael*[80] C1 assigned to C2 a debt owed to C1 by D. C2 then assigned to C3. C3 was in good faith and took for value. C1 then sought reduction of the assignation. C3 claimed his position was unassailable. The defect was extrinsic to the claim assigned. The pursuers, however, argued

[74] *M'Ewan v Middleton* (1866) 5 M 159 followed in *Wilson v Porter* (1880) 17 SLR 675 at 676 *per* Lord President Inglis.

[75] See eg Rules of International Commercial Arbitration of the International Chamber of Commerce (1998, ICC Publication No 581) Art 5, reproduced in Davidson, *Arbitration* Appendix IV at 525.

[76] See discussion at para 8-28 ff.

[77] Reid, *Property* para 694.

[78] Stair IV.xl.21. See also Gosford's report of *Duff v Fowler* (1672) Mor 10282.

[79] *Commentaries* (2nd edn 1810) 150, note n; (3rd edn 1816) I, 182; (7th edn 1870) I, 303, in reference to the earlier passage at I.x.16, for which see paras 8-02 ff and 11-09.

[80] (1772) Mor 4974; Hailes 513.

that the distinction was between *dolus dans causam contractui* and *dolus incidens in contractum*. Fraud of the former type rendered the transfer null and void. A *bona fide* onerous transferee was therefore unprotected.[81] This distinction arguably confuses two matters. First, it was argued that *dolus dans causam contractui* was in the transfer rather than in the claim assigned. But even an essential error, induced by fraud, in the transfer should not prejudice third parties.[82] The consensual argument is that there is a total exclusion of consent: and no *consensus in idem*, no *animus transferendi*. The contrary view is that fraud is a vice of consent and renders any conveyance only voidable. *Bona fide* transferees for value are therefore protected. Secondly, if fraud were to affect subsequent transferees, roles are reversed and fraud becomes a 'real' vice, one effective *ergo omnes*.[83] In *M'Donells*, the court granted the reduction. Lord Kames, though not dissenting, had difficulty with the decision:

> 'The difference between the case of *nomina debitorum* and the other cases is this, and it is mentioned by Lord Stair, – An assignee is nothing else than a procurator *in rem suam*. Hence, in England, at this day, an assignee must pursue in the name of his cedent. With us an assignee is now held to have the total right. In that respect the law has changed. Why should not the effects of assignations also be changed? For want of this change, our law is, in one particular, a sort of hotch-potch; but we cannot help that.'[84]

9-23. Professor McBryde has charted the history of the effect of fraud on assignees.[85] He suggests that the court probably first gave effect to the law as articulated by Stair in *Burden v Whitefoord of Dundass*.[86] This case however can only be fully understood in light of the comment by Lord Pitfour in *M'Donells v Carmichael*.[87] *Burden* apparently involved a reduction of a disposition elicited from one Kennedy while he was drunk, 'in so far as the property was not vested in a third party by infeftment'.[88] Since the third party transferee was not infeft,

[81] *Resolutio jure dantis resolvitur jus accepientis* (the right of the giver having ceased or become void, the right of the receiver ceases also). This maxim does not express sound legal principle of the law of transfer, although it is invoked in *Heron v Stewart and Hawthorn* (1749) Mor 1705; Kilkerran 389; Elchies, *Fraud*, No 21 aff'd (1749) 1 Craigie, Stewart and Paton 432. It was also invoked in *Livingston v Menzies* (1705) Mor 14004; *Sinclair v Shaw* (1739) 5 Br Sup 658; Elchies, *Arrestment* No 11; Kilkerran 36; *Countess of Moray v Stewart* (1772) Mor 4392; *Elliot v Wilson* 9 February 1826 FC and in *Johnstone-Beattie v Dalzell* (1868) 6 M 333 at 346 *per* Lord Ardmillan. Cf T Huc, *Commentaire Théorique et Pratique du code civil* (1894) vol VII, 299–300 and P Malaurie and L Aynès, *Droit civil: obligations* vol 3 (11th edn 2001) para 82.

[82] Compare McBryde, *Contract* paras 13-03 ff. There is controversy in the sources, see in particular *Morrison v Robertson* 1908 SC 332; *MacLeod v Kerr* 1965 SC 253 at 256 *per* Lord President Clyde; T B Smith, *Short Commentary on the Law of Scotland* (1962) 816; Smith, 'Error and the Transfer of Title' (1967) 12 *JLSS* 206; Smith, *Property Problems in Sale* (1978) 170 ff; McBryde, *Contract* paras 15-79 ff; Reid, *Property* para 617 notes that error as to *persona* may be a real vice.

[83] See J van den Sande, *De Actionum Cessione* (trans P C Anders, *Commentary on Cession of Actions*, 1906) 240 and see below.

[84] Hailes 513. Cf Kames, *Principles of Equity* (2nd edn 1767) 206.

[85] *Contract* paras 14-74 ff. See also McBryde's contribution to K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol II, 72, 'Error'.

[86] (1742) Elchies, *Fraud* No 11.

[87] (1772) Hailes 513 at 514.

[88] At 514 *per* Lord Pitfour.

there could be no problem with reduction.[89] There was no *bona fide* onerous *transferee*. In any event, it is not apparent what relevance a case dealing with the disposition of heritage has to a rule which is said to be peculiar to assignation.

9-24. The other relevant case is *Irvine v Osterbye*.[90] The case involved a competition between an assignee of a bond and an arrester. The arrester was the insurer of a ship. The ship had been damaged. The arresters had paid out to the master on the basis that the ship had been a total loss. In fact the ship was repaired and sold. A representative of the master bought it. The whole circumstances of the case were fraudulent. The master bought the ship back from his representative and granted him a bond for the price. The bond was assigned. The insurers arrested on the bond. The arrester was preferred but the basis of the decision is unclear. There is no mention of intimation of the assignation, so it may be that the arrester was preferred on the ordinary principle that an arrestment is to be preferred to an unintimated assignation.

(2) Redfearn v Sommervails [91]

9-25. *Redfearn* may be seen as one of the most controversial, or at any rate important, decisions of the House of Lords in the private law of Scotland. It is as a result of the decision in *Redfearn* that it can be stated with certainty that the position in modern law is that an assignee (with the exception of compensation) is not subject to the extrinsic obligations of the cedent. Although the point had previously been decided by the Court of Session,[92] there are several *dicta* which suggest that their Lordships in *Redfearn* paid scant regard to the existing Scottish authorities and imposed a new rule,[93] albeit one 'for the benefit of society'.[94]

[89] Though Lord Pitfour was nevertheless in favour of reduction in *M'Donells* on the ground that 'an assignation to a mere personal right gives no security: it is extinguishable by compensation or by payment. In it the assignee wholly relied on the warrandice of the cedent'.

[90] (1755) Mor 1715; 6 March 1755 FC.

[91] (1813) 1 Dow 50; 5 Pat App 707. The reports are unsatisfactory. Dow's report is not a verbatim report of the speeches, but a second-hand account. Paton's report contains no trace of the arguments presented before the House. A full transcript of the arguments can be found in *House of Lords Cases* vol 45 in the Signet Library. Attempts to track down the *Session Papers* of the proceedings before the Court of Session have been unsuccessful. Note that in the *General Index of Names* the parties are listed under '*Sommerville v Redfearn*'.

[92] See eg *Anderson v Dempster* (1702) Mor 10213.

[93] Lord Balgray in *Gordon v Cheyne* (1824) 2 S 675 (NE 566) at 569; Lord Gillies at 570 and Lord President (Hope) at 571; *Littlejohn v Black* (1855) 18 D 207 at 219 *per* Lord Ivory; *North British Railway Co v Lindsay* (1875) 3 R 168 at 176 *per* Lord Justice-Clerk Moncreiff: 'It was conceded that the previous rule of the law of Scotland was otherwise [prior to *Redfearn*] and the judgement proceeded on views of expediency which prevailed in the law of England'. This was quoted with approval by Lord Keith of Avonholm in the English appeal *BS Lyle v Rosher* [1959] 1 WLR 8 HL. Lord Keith added, 'though a Scots decision [i.e. *Redfearn*] I have little doubt that Lord Eldon LC and Lord Redesdale were applying English law and would have reached the same decision in like circumstances in an English case'. *Rosher* appears the only situation since *Heritable Reversionary* in which *Redfearn* has been reconsidered by the House of Lords. Compare the (perhaps more accurate) opinion of Lord Moncreiff in *Burns v Lawrie's Trs* (1840) 2 D 1348 at 1356: 'The case of *Redfearn* was decided on the general ground, and on a principle not new in the law but which had been held at an early period, though overruled'.

[94] *Gordon v Cheyne* at 569 *per* Lord Balgray.

Hostility to *Redfearn* stems from the opinion of Lord President Hope in *Gairdner v Royal Bank of Scotland* where he stated that, 'You must know the situation of the party with whom you transact. Look to the case of *Sommervail*, founded upon by the defenders … . Even as matters stood, I think the case was wrong [sic] decided in the House of Lords. I thought that the cedent could only communicate to the assignee of the right *tantum et tale* as he possessed it'.[95] Alas, the position was not as clear as the Lord President supposed. The history of the law on the effect of the personal obligations of an author on a transferee is confused. As far as creditors are concerned, the matter has only recently been authoritatively resolved.[96] The issue, however, is a general one. It is not peculiar to assignations and it cannot be discussed further here.

[95] 22 June 1815 FC.

[96] *Burnett's Tr v Grainger* 2004 SC (HL) 19. For a full discussion see R G Anderson, 'Fraud on Transfer and on Insolvency: Ta ... Ta ... Tantum et Tale?' (2007) 11 *Edin LR* 187.

10 Void, Voidable and Conditional

A. CONTRACT AND CONVEYANCE

(1) General

10-01. There is little consideration in the Scottish sources of the constituent elements in an assignation and how they relate to each other. This relationship is crucial for the purposes of any discussion on validity. If the contract to assign (the obligationary agreement) and the assignation (the transfer agreement)[1] are

[1] This distinction is important. In the transfer of real rights, the distinction is between obligationary agreement and real agreement. The distinction was first recognised by C F von Savigny, *System des heutigen römischen Rechts* (1840–1849) III, 313; although traces can also be found in R J Pothier, *Traité du droit de domaine de propriété* (1771) § 231. See discussion in C G van der Merwe, *Sakereg* (2nd edn 1989) 301 ff. 'Real agreement' is not appropriate for the transfer of claims: cession (properly so-called) transfers personal, not real, rights. 'Transfer agreement' is therefore preferred.

separate, then invalidity of the contract does not necessarily entail the invalidity of the conveyance, and vice versa.[2] This is the principle of abstraction (*Abstraktionsprinzip*). By contrast, if an assignation is causal in nature, i.e. that a valid transfer requires valid basis or cause (*justa causa*), invalidity of the underlying obligationary agreement invalidates the transfer.[3] On the transfer of immoveables, Scots law follows an abstract approach.[4] The transfer of corporeal moveables at common law[5] is probably the same, although the point is not undisputed.[6]

10-02. The abstract approach is consistent with the methods by which a transfer is achieved in Scots law, particularly the sale of heritable property. There are three distinct elements: the completion of missives, the delivery of the disposition, followed by recording or registration. Missives and disposition, usually concluded at different times, are quite distinct. An assignation ought, in principle, to be no different. The three stages are contract to assign, delivery of written assignation, and intimation.[7] In practice, however, the contract to assign and the assignation are commonly combined in one deed.[8] And it is equally common for commercial agreements to contain only an agreement or undertaking

[2] Cf *Dobie v McFarlane* (1854) 17 D 97 where the reduction of the whole transaction was held to be unnecessary. Reduction of defender's title was sufficient.

[3] Cf McBryde, *Contract* para 13-01 ff. and Reid, *Property* para 608. The history of the abstraction principle in the *jus commune* is complex. It only emerged in its modern form in the nineteenth century. The Scottish history may be different, but the point cannot be explored here. In the early *jus commune*, where outright transfer of claims was not possible, the maxim was *cessio sine causa facta non valet*: K Luig, 'Zession und Abstraktionsprinzip' in H Coing and W Wilhelm (eds) *Wissenschaft und Kodifikation des Privatrechts im 19 Jahrhundert* (1977) 112 at 121. Luig attributes this to Rolandinus', *Summa artis notariae* (1255). See too Grosskopf, *Geskiedenis* 65, n 156.

[4] Reid, *Property* para 611, citing Stair II.iii.14. Cf D L Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) para 8-06 and Carey Miller, 'Systems of Property: Stair and Grotius' in D L Carey Miller and D W Meyers (eds) *Comparative and Historical Essays in Scots Law* (1992) 28–30.

[5] The Sale of Goods Act 1893, and now the Sale of Goods Act 1979 (as amended), introduced an essentially causal theory into the sale of corporeal moveables – but not completely. Suppose A agrees to sell a camera to B. B gives a cheque and takes delivery. There is no specific agreement as to the date of transfer; however, rule 1 of s 18 states that property passes on conclusion of the contract. B's cheque bounces. A does not regain ownership by the mere act of rescinding the contract: B is the owner. To reinvest A with ownership, B will have to redeliver the camera to A (it is not a sale so common law applies). Cf Erskine III.iii.11 and some of the *obiter dicta* in *MacLeod v Kerr* 1965 SC 235 which deal with the (irrelevant) arguments presented to the court, for which see: T B Smith, *Property Problems of Sale* (1978) and Reid, *Property* para 610. Cf L P W van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) at 24 who suggests that rescission of a causal sale has real resolutive effect; and, for the position in Roman law, see Zimmermann, *Obligations* 716 ff, especially at 731 f.

[6] Cf Reid, *Property* para 609 and McBryde, *Contract* para 13-08.

[7] Although where there is a donation or an assignation by an executor there may be no contract.

[8] R Bruce Wood, 'Special Considerations for Scotland' in W Ruddy, S Mills and N Davidson, *Salinger on Factoring: the Law and Practice of Invoice Finance* (4th edn 2006) para 7-31. It should be observed, however, that this need not of itself be problematic. In German law, for example, on the transfer of immoveables, the *Kaufvertrag* and the *Auflassung* are often found in the one deed. But German lawyers are well versed in the importance of the *Abstraktionsprinzip*; many Scots lawyers are not.

to assign.[9] Such an agreement, however, is only the first in a three-stage process.[10] It is a typical example of the overemphasis on the contractarian approach to commercial transactions.[11] Similarly, a clause whereby the cedent 'agrees to assign' is inconsistent with one in which the cedent 'hereby assigns'[12] a claim. The first is an obligation to perform a juridical act in the future; the latter a *de praesenti* conveyance.[13]

10-03. Matters are further complicated by the consideration that the Scots law of assignation evolved under a French influence.[14] *Cession de créance* in French law is treated as a sale.[15] Sale in French law is causal in nature.[16] *Cession* takes effect 'as between' the parties on conclusion of the agreement. Intimation is required only to render the cession opposable against the *debitor cessus* and fourth parties.[17]

10-04. What, then, of the Scottish position? Professor Reid draws on Stair's 'masterly'[18] analysis:

> 'There may be three acts of the will about the disposal of rights: a resolution to dispone, a paction, contract or obligation to dispone, and a present will or consent that that which is the disponer's will be the acquirer's. Resolution terminates within the resolver, and may be dissolved by contrary resolution, and so *transmits* no right: paction does only constitute or *transmit* a personal right or obligation, whereby the person obliged may be compelled to *transmit* the real right. It must needs then be the present dispositive will of the owner, which conveyeth the right to any other….'[19]

[9] See eg *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107. Cf S Scott, *The Law of Cession* (2nd edn 1991) 8–9.

[10] *Bank of Scotland v Liquidators of Hutchison, Main & Co* 1914 SC (HL) 1. Cf McBryde, *Contract* para 12-50 who speaks of a two-stage process. This overlooks the fact that the conveyance only occurs on intimation of the transfer agreement to the debtor and that it is the transfer agreement that must be intimated, not the contract to transfer.

[11] K G C Reid, 'Unintimated Assignations' 1989 SLT (News) 267 discussing *Lombard North Central Ltd v Lord Advocate* 1983 SLT 361.

[12] See eg Bell, *Commentaries* (7th edn 1870) II, 16.

[13] The following egregious example is taken from the standard publishing agreement which the author was required to subscribe by W Green, the Scottish Law Publisher, for publication in the *Juridical Review* in March 2003: 'In consideration of the above payment, I hereby agree to grant licence and assign to W Green the sole and exclusive right to publish the work for commercial gain…'. How can one simultaneously grant licence and assign? If there is an assignation, the cedent has no title to grant licence. Alternatively, this clause succeeds in granting a licence, with only a personal obligation to assign in the future ('I hereby agree … to assign').

[14] See chapter 5 above.

[15] Art 1690 *Code civil*. This article is in the final part of Title 6 (on sales). A similar structure is found in the Spanish code: Art 1526 f *Código Civil*. Gratuitous cession is still possible in French law: F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (9th edn 2005) para 1275 and H Kötz, *Europäisches Vertragsrecht* (1996) § 14, at 405, n 12 (trans T Weir, *European Contract Law* (1997) § 14, n 12). In Scots law, a donation of a right must be effected by an intimated assignation: *Alderwick v Craig* 1916 2 SLT 161 OH.

[16] Arts 1134 and 1583 *Code civil*. See generally van Vliet, *Transfer of Movables in German, French, English and Dutch Law* 74. Cf Pothier, *Traité du contrat de vente* (1762) §§ 307–312.

[17] The debtor is the third party. The respective positions in France and Germany provide an interesting contrast: Germany requires registration for the transfer of land, but only transfer agreement for claims. In France, registration for the transfer of immoveables was traditionally not a constitutive requirement, although relatively formal intimation to the debtor for the transfer of claims was. Scotland, characteristically, mirrors elements of both systems.

[18] Reid, *Property* para 606.

[19] Stair III.ii.3 (emphasis added).

10-05. The controversial element in this passage is the repetition of the verb 'transmit'. On the transfer of real rights, the contract creates a personal right in favour of the intended transferee obliging the transferor to execute a real agreement effecting a transfer. Does this analysis fit where the object of the transfer is a money claim? According to Stair, 'paction does only constitute or transmit a personal right'. Two interpretations are possible. First, since an assignation is the transfer of a personal right, what Stair is saying is that mere agreement is necessary: 'paction … does transmit a personal right'.[20] The second – and correct – interpretation focuses on the reference to 'transmit' in the context of the first line: 'there may be three acts of the will about the disposal of rights'; and the reference to personal right as contradistinguished from real right. Stair's usage of 'transmit' is ambiguous. From the context, however, it appears that he is referring to the *creation* ('constitution') of a personal right, i.e. the personal right to demand an assignation. In other words Stair is referring to stages one and two of the three-stage process, namely, the creation of a personal right to a personal right.[21]

10-06. Before leaving this passage from Stair, one point of criticism may be levelled. Stair makes no mention of the need for completion of the transfer, i.e. recording (immoveables); delivery (moveables); intimation (claims). A mere resolution to transfer on the part of the transferor and a resolution to accept transfer on the part of the transferee generally not sufficient to effect a transfer at common law, as Stair himself vigorously asserts elsewhere.[22]

(2) Intention and revocable assignations

10-07. Many Scottish cases involve assignations made by a father in favour of his children, or a wife in favour of her husband, 'for love and favour and affection'.[23] Historically, donations made between husband and wife (*donatio inter virum et uxorem*)[24] were revocable during the lifetime of the donor.[25] This

[20] Cf *Keith v Grant* (1792) Mor 2933; 3 Ross LC 308 at 315; 14 November 1792 FC where it is reported that it was observed from the bench that, 'In personal rights the law holds an obligation to convey and conveyance to be the same; and, therefore, everybody liable in absolute warrandice is bound to grant the conveyance'. *Keith* was an accretion case.

[21] *Creditors of Benjedward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 *per* Lord Kames: 'there is such a thing as an imperfect right to a personal debt'.

[22] Eg Stair II.iii.16: 'nulla sasina nulla terra' (land); III.ii.5 (moveables); III.i.6 (claims). Cf Reid, *Property* paras 619 (A J Gamble); 644 and 652; and G L Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

[23] See generally the excellent work by D Murray, *The Law Relating to the Property of Married Persons* (Glasgow, 1891). Not only was Murray a first-rate scholar, he was a busy practitioner and a founding partner of Maclay, Murray & Spens LLP, solicitors. See generally, M S Moss, 'Murray, David (1842–1928)' *Oxford DNB* (2004).

[24] For which see A G M Duncan (ed) *Trayner's Latin Maxims* (4th edn 1894, reprinted 1993) and authority there cited.

[25] Following the rule in Roman law, as it had evolved in the *jus commune*, marriage was viewed as a product of love and harmony and could not be bought: see eg Ulpian, D 24.1.3 pr. See, generally, Murray, *The Law Relating to the Property of Married Persons* §§ 14 ff citing, *inter alios*, R J Pothier, *Traité des donations entre mari et femme* in M Bugnet (ed) *Œuvres de Pothier* (Paris, 1861) vol 7, 499 ff. The French *Coutumes* seem to have been particularly influential on the seventeenth-century Scottish rules on matrimonial property: see E M Clive, *The Law of Husband and Wife in Scotland* (4th edn 1997) 219 and authority there cited; and, in particular, D Murray, *Property of Married Persons*. Cf *Inglis v Loury* (1676) Mor 6131: 'The Lords found

was the case even where they bore to be irrevocable.[26] In modern law, inter-marital assignations[27] are as irrevocable as an assignation made to an unrelated assignee.[28]

10-08. As a general principle, revocability can apply only to the personal obligation to assign.[29] Following intimation, there is a transfer. And after transfer a unilateral revocation is ineffectual. Judicial reduction will be required and the debtor will have to be called as a party to the action. In approaching these issues, a useful starting point is to ask: is assignation a unilateral or a bilateral act in Scots law? It is an issue of some nicety. The question probes deep into the fundamentals of the law of transfer; well beyond the boundaries of the law of assignation. Assignation is a bilateral act. The assignee's acceptance of delivery of the assignation, whether explicit or implicit, is necessary.[30] That the *debtor* has consented to the assignation is not relevant: the assignee's consent is an essential requirement; the debtor's is not.[31] This view flows as much from practical considerations as theoretical. In Scots law it is difficult voluntarily to transfer a right without the assignee's consent. An additional step (registration, delivery, intimation) is usually required to effect transfer. And it is the putative transferee who ought to carry out this act: registration of the disposition in the case of land; intimation of the assignation in the case of claims.[32] (Were it

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that the assignation of an heritable bond being a donation by a wife to her husband during the marriage, that the same was revocable by the wife at any time in her life, even after her husband's death, by a posterior assignation, which was effectual against every singular successor, though acquiring *bona fide* from the husband for onerous cases; and found, that albeit a provision to the wife, during the marriage, where there was no contract or prior provision, is not revocable, the man being naturally obliged to provide for his wife, this does not hold in an assignation in favour of a wife granted to her husband, though there were no contract, unless the assignation did bear in implement of her contract of marriage'.

[26] *Cousin v Caldwell* (1838) 16 S 1109; *Jardine v Currie* (1830) 8 S 937.

[27] Extra-marital 'assignations' are outwith the scope of this work.

[28] Married Women's Property (Scotland) Act 1920, s 5.

[29] See eg *Scot v Scot* (1665) Mor 11344 and 15722. In *Trotters v Lundy* (1667) Mor 11498 it was held that after intimation a father could not revoke an assignation to his daughter. This much is uncontroversial and, indeed, obvious: the assignee is now the creditor.

[30] See Reid, *Property* para 613. In *Bailey's Trs v Bailey* 1954 SLT 282 at 287, Lord President Cooper stated 'as [the assignation] has been accepted, intimated and acted upon, it is now irrevocable by the grantor'. Without acceptance of delivery the assignee will have nothing to intimate to the debtor. Compare § 1392 *ABGB.* But must there also be an intention to transfer *at the moment of transfer*; that is to say, on intimation? The question is rarely asked, though it is by Windscheid, *Pandektenrecht* § 330, at 366, and C G van der Merwe, *Sakereg* (2nd edn 1989) 302–303. It may be observed that contracts are often formed despite an actual lack of consensus at the moment of conclusion: eg, an offeror seeks to revoke an offer. Before the revocation reaches the offeree, the offeree's acceptance is communicated. The offeror is locked into a contract though he had done all in his power not to be: see G P Costigan, 'Constructive Contracts' (1907) 19 *Green Bag* 512.

[31] Lord Chorley and J Milnes Holden, *The Law of Banking* (6th edn 1974) 42 remark that, 'Conversely an assignment is not effective until the *assignee* has notice of it, though the *debtor* may have assented to it' (my emphasis). It is difficult to accept that, in English law, an assignment is a unilateral act and that an assignee can have a right forced upon him by mere notice. But this is the prevailing view: Sir Guenter Treitel, *The Law of Contract* (11th edn 2003) 680.

[32] Adopting a bilateral analysis is consistent with the view that only the assignee can intimate the assignation; otherwise, the cedent could force the transfer on the assignee. This is discussed in para 6-30 above.

otherwise, the assignee would have no control over the timing of transfer.[33]) A transferee or donee may have good reasons for not wanting the benefit to be transferred to, or conferred upon, him. These may be moral or immoral, rational or irrational, honourable or dishonourable. But the basic tenet of individual autonomy which underlies the legal principles applicable to consensual transactions demands that the exact moment of transfer is in the transferee's prerogative. For a transferee's patrimony to be enlarged by another's act contrary to the transferee's wishes is objectionable. How could anyone refute an accusation of accepting bribes? Are unilaterally conferred benefits taxable? Indeed, for this reason, the unilateral promise found in Scots law, binding without acceptance, is similarly repugnant. It is not sufficient to argue that the transferee can always renounce any rights or property given to him. Were that the only option available to an ungrateful transferee, the process of donation and renunciation could go on indefinitely.[34]

10-09. What, then, if the transferor purports to complete the transfer by intimation or registration? This occurred in *Burnet v Morrow*.[35] H was to assign a bond and disposition in security to M. H instructed his agent, B, to do so. B prepared the assignation and recorded it. M, the assignee, was for some time ignorant of both assignation and registration. M demanded delivery of the assignation from B. B refused: he had not received instructions from his client to do so; and, what's more, B had not been paid for his work, so he was retaining the papers, including the assignation. M then offered to settle the account in return for delivery. Still B refused. The disposal of the case turned on issues of proof. But Lord Deas made some important remarks about the role of delivery of a conveyance in effecting a transfer:

> 'It is quite true that registration of a deed may be delivery – particularly registration which is equivalent to infeftment. But registration after all is only constructive and not actual delivery… . The object of constructive delivery is open to evidence… .[36] The import of [that evidence] here is, that neither the grantee, nor any one entitled to act for him, knew anything till long afterwards, either of the granting or recording of the assignation. This being so, did the recording bind the grantee? Certainly not. It might have been a deed which it was neither convenient nor profitable for him to accept, but the reverse; and if he would not in that case have been held to have accepted delivery, it is hard to see how the mere act of registration can be conclusive against the granter, that he intended such registration to be delivery.'[37]

10-10. A deed recorded in the Register of Sasines is subject to the ordinary principles of property law. An application for registration must be made by the grantee or his agent. The reservations expressed by Lord Deas might not be applicable to a title registered in the Land Register, although arguably the register

[33] See discussion at para 6-30 ff.

[34] Cf *HMV Fields Properties Ltd v Bracken Self Selection Fabrics Ltd* 1991 SLT 31. Admittedly, however, there are other examples. Eg, rights of beneficiaries under trusts are conferred without the beneficiary's consent.

[35] (1864) 2 M 929.

[36] Lord Deas reference to 'delivery' is ambiguous. Registration cannot be equivalent to delivery of the disposition: on Lord Deas' own argument, delivery is needed for registration to take effect. Lord Deas must mean that registration is equivalent to delivery in the case of corporeal moveables.

[37] At 934. Cf *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para [88] *per* Lord Rodger of Earlsferry.

would be inaccurate. *Burnet v Morrow* concerned the transfer of a real right. But suppose the case concerned the assignation of a personal right. There is no delivery of the assignation and the cedent intimates.[38] Lord Deas's reservation would apply analogously. Intimation (by the cedent) without delivery (to the assignee) does not transfer the claim (although the debtor could doubtless validly pay the assignee). As a result, an intention to transfer must be accompanied with an intention to receive (*animus accipiendi*). The consent may be implied as well as expressed.[39] The general principle is that there must be an intention to transfer and a concomitant intention to receive. The intention to transfer is manifested in the delivery of the assignation by the cedent:[40] 'Delivery to the grantee, whereby the granter puts the voluntary deed beyond his own power, is the expression of his final purpose concerning such deed'.[41] The principle is common sense and efficacious.[42] It would suggest that, after delivery, a disposition or assignation is irrevocable. The view may appear inconsistent with the individual autonomy that underlies voluntary conveyances: that transferee's rights derive from the transferor's intention to convey, an intention that ought to subsist at the moment of transfer. But Bell's principle has the benefit of certainty. Registration of the assignation in the Books of Council and Session is sufficient evidence of delivery.[43]

10-11. Assuming assignation to be a bilateral act, can the cedent revoke his assignation before intimation of the assignation?[44] There is no problem if revocation occurs prior to delivery of the assignation (i.e. before there is a transfer agreement), although revocation may be a breach of contract.[45] If the assignation has been delivered, the issue is more problematic. Must the *animus transferendi* be present only on the delivery of the deed? Or must it be continuously present until intimation? Can the cedent intimate to the debtor prior to intimation

[38] In *Jarvie's Tr v Jarvie's Trs* (1887) 14 R 411 at 416, Lord President Inglis suggested that delivery of the assignation is not necessary if there is intimation by the cedent. This cannot be correct. See discussion in para 6-30 above.

[39] In some cases silence may denote acceptance. But see *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at para [49] *per* Lord President Rodger; *Commaille v Steyn* 1914 CPD 1100 at 1103: 'Silence is equivalent to consent where it is one's duty to speak' approved in *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA).

[40] It has been held that the raising of diligence in the name of the assignee is equivalent to delivery: *Dick v Oliphant* (1677) Mor 6548; but this is contrary to principle: the assignation needs to be lodged in process for an effectual judicial intimation.

[41] A M Bell, *Lectures on Conveyancing* (3rd edn 1882) 102.

[42] Cf McBryde, *Contract* para 4-09: 'The requirement of delivery is in the interests of the granter. It enables the granter to prepare documents but to have a change of mind up to a certain point. Documents can be redrafted or destroyed. A draft, even if signed, is not binding. The law has taken the view that delivery is the irrevocable stage, rather than signature in the solitude of the granter's study. At least, that is the normal rule.'

[43] *Tennent v Tennent's Trs* (1869) 7 M 936 at 948 *per* Lord President Inglis.

[44] There is an indication that this may be possible for legal assignments in England: Law of Property Act 1925, s 136(1). But that provision seems only to empower the debtor to raise the equivalent of a multiplepoinding.

[45] Cf *Sinclair v Purves* (1707) Mor 11572: warrandice from fact and deed excluded revocation. Similarly a donation is only revocable before delivery: Erskine III.iii.90.

of the assignation that he has revoked?[46] A transferor of immoveable property cannot prevent the passage of property to the disponee by intimating his revocation of consent to the Keeper after delivery of the disposition but before recording or registration.[47]

10-12. Take four situations:

(1) Capricious revocation
(2) Justified revocation (eg fraud on the part of the assignee)
(3) Incapacity supervening between delivery and intimation
(4) Death supervening between delivery and intimation

Capricious revocation is the type of revocation that the rule on delivery of deeds seeks to prevent. Justified revocation depends on whether it is actually possible to rescind a transfer agreement on the basis of unlawful inducement. As far as the transfer agreement is concerned, however, unilateral rescission will be ineffectual. A judicial reduction is required. So, if, prior to intimation by the assignee, the cedent learns that he was fraudulently induced into delivering the assignation, he could interdict the assignee from intimating; or, more likely, bring an action to reduce the assignation. Calling the debtor as a party to the action is judicial intimation and interpels the debtor from paying the assignee. Where the validity of the assignation is questioned, the debtor must always be protected.[48] A debtor paying in good faith is discharged. (It should be remembered that payment to the assignee holding a delivered assignation is an equipollent of intimation.) It is too much to ask the debtor to inquire into whether the purported revocation was justified. So a capricious revocation, of itself, has no effect. It will not be upheld in a court. A justified revocation also requires a judicial sanction. And being justified, the court will give effect to it.

[46] L Aynès, *Cession de contrat* (1984) at 99 suggests that the resolution of a cession will not have any effect vis-à-vis the debtor. Therefore, 'résolution[s] du contrat de cession … sont, en elles-mêmes, sans effet sur ces relations, à moins qu'une nouvelle cession – rétrocession – rétablisse le rapport cédé-cédant. Dans les rapports internes du cédant avec le cessionnaire, la convention de cession, comme tout contrat translatif, donne naissance à une obligation de garantie, que la nullité, ou la résolution de la cession aux torts du cédant permet le cessionnaire d'invoquer. Mais elle ne produit aucun effet sur le droit et l'obligation du cessionnaire envers le cédé'.

[47] The question has rarely been focused, far less answered. In principle, however, there is no reason why a unilateral revocation after delivery of the disposition can avail the disponer. If the disponer realises that he has been fraudulently induced to deliver the disposition he could seek to interdict *ad interim* (pending reduction) the disponee from registering. Achieving the same result without judicial intervention is problematic. Lord Inglis, when Dean of Faculty, once argued that, after delivery of the disposition, there is nothing the disponer can do to prevent registration: *Taylor v Farrie* (1855) 17 D 639 at 643 *arguendo*; and see too Stair III.ii.3. That the disposition cannot be revoked may not be fatal. The disponer could grant a disposition of the same subjects to a company controlled by him and attempt to register first. But this would lead to further difficulties. The disponer could be in breach of warrandice; and the second disponee could be subject to the offside goals rule. But the disponer granted the second disposition in order to protect against fraud, not for personal gain. And a fraudster cannot seek damages for breach of warrandice, for he has suffered no loss.

[48] *Hall v Campbell and Gordon* (1708) Mor 11350 involved a revocable assignation which was revoked. However there was no discussion as to the effect of such a revocation on the debtor.

10-13. A difficult question arises where the cedent loses capacity in the interval between contract and delivery of the assignation. Without the document, the assignee cannot conventionally intimate. There is authority for the view that if the cedent dies before delivery of an *inter vivos* assignation, it is revoked by his death.[49] On the cedent's incapacity, the assignee may have difficulty proving that there has been an assignation (especially if it cannot be found) even if judicial intimation is resorted to. If the cedent's incapacity supervenes after delivery there is no reason why intimation cannot follow.[50] It is provided by statute that intimation can follow if the cedent dies between delivery and intimation.[51]

10-14. Where there is an express power of revocation in the assignation, the position may be different. In *Crockat v Brown*[52] an assignation which reserved a power of revocation to the cedent was duly intimated. The right of revocation was subsequently renounced but not intimated. Although the right to revoke had never been exercised, a posterior assignee for value duly intimated and was preferred. The basis for this decision is unintelligible. But the general principle should prevail: following delivery of the assignation there is no power to revoke, whether such a power is conferred in the transfer agreement or not. In this sense, an assignation – the transfer agreement – is intrinsically irrevocable.[53]

10-15. A purported revocation can lead to confusion. In *Johnstone-Beattie v Dalzell*,[54] the pursuer entered into an ante-nuptial marriage contract with her husband to which both fathers were party. The bride's father agreed to transfer on his death a large proportion of his assets to trustees. The trustees were directed to pay a sum of £5000 to the husband, six months after the truster's death. The husband assigned this right in security for advances. The assignation was intimated to the trustees. Before the bride's father died, but after intimation of the assignation, the marriage was dissolved by reason of the husband's adultery. The bride and her father purported to revoke the transfer to the trustees. After the father's death, the husband's assignees demanded payment from

[49] *Stamfield's Creditors v Scot's Children* (1696) 4 Br Sup 344.

[50] Cf § 130 II *BGB*: 'Auf die Wirksamkeit der Willenserklärung ist es ohne Einfluss, wenn der Erklärende nach der Abgabe stirbt oder geschäftsunfahig wird'.

[51] Confirmation Act 1690 (APS, c 56; 12*mo*, c 26) and the Registration Act 1696 (APS, c 41; 12*mo*, c 39). Registration in the Books of Council and Session may also follow after the death of the cedent: Summary Registration Act 1693 (APS, c 24; *12mo*, c 15). See, again, § 130 II *BGB*. *Strang v Ross Harper & Murphy* (Sh Ct) 1987 SCLR 10 involved not an assignation, as was assumed in argument and by the sheriff, but a mandate to pay. It was held that the mandate was revoked by the death of the granter. Had the mandate really been an assignation, the decision would have been inconsistent with statute.

[52] (1743) Elchies, *Assignation* No 5. Compare those cases involving resolutive conditions where the court invoked the maxim *resolutio jure dantis, resolvitor jus accepientis* ('The right of the giver having ceased, the right of the receiver also ceases'): see eg *Sinclair v Shaw* (1739) 5 Br Sup 658; Elchies, *Arrestment* No 11; Kilkerran 36. Cf K Luig, 'Zession und Abstraktionsprinzip', para 10-01, at 128, notes 63 and 64; and 130.

[53] Cf *Arklay's Trs v Arklay's Testamentary Trs* 1909 2 SLT 120 OH. The cedent transferred his rights under two insurance policies in trust for his family: his children in fee, his wife in liferent. The cedent reserved the right to bonus payments that may have become due under the policies. Some years later – after two of his four children had died – the cedent purported to renounce the earlier reservation of bonus rights and transfer them in pursuance of the first assignation to the trustees. The issue was whether the estates of the two children who had died in the interim were entitled to the proceeds. It was held that they were.

[54] (1868) 6 M 333. See the earlier proceedings reported at (1865) 5 M 340.

the trustees. The wife sought declarator that the assignations were null and void; that the marriage contract was dissolved before the sums vested; and that the assignations where subject to the implied condition that the marriage would not be dissolved by reason of the husband's adultery.[55] The Lord Ordinary (Kinloch) found that the assignees were entitled to prevail. He was of opinion that the whole purpose of the arrangement was to aliment the newly-weds. But 'if [the father] lived inconveniently long, it might come to be very necessary for them to raise money, in order simply to get along';[56] he continued:

> 'At the time of granting the assignation, [the husband] was under no disqualification or forfeiture. He *ex hypothesi* validly divested himself at this time of right in favour of his creditor. The right lay in his person unforfeited and undivested, and it was assigned as such…It would be ludicrous to say that [the husband] could grant an assignation, and straightway render it ineffectual by going and committing adultery'.[57]

10-16. Had the assignation not been granted, however, the husband would have been obliged to retransfer any assets he had received under the marriage contract. This was an obligation personal to him. The First Division reversed. But the reasons are unclear. While Lord President Inglis accepted that 'no one doubts that the provision of £5000 vested in the husband an assignable interest,'[58] he preceded that comment with this passage:

> 'It is very important to notice, in the first place, that this is a provision which stands entirely in the form of an obligation to be performed after [the father's] death; and, as will be seen hereafter, it is in some degree contingent even beyond that, because the performance of the obligation at all is dependent on [the father] leaving sufficient means to discharge it.'[59]

10-17. This *dictum* is confused. The obligation to pay was granted by the marriage trustees. If the obligation was rendered contingent by the mere fact that the trust funds may have been insufficient, then all personal obligations are thereby contingent. Lord Inglis' answer to this was, '[a]ny interest, however contingent, is assignable; but, of course, the right of the assignee depends on what is the right of the cedent'.[60] The first part of this statement is wrong;[61] the second part unhelpfully simplistic. By the marriage contract, the bride's father bound himself to transfer assets to the trustees. If he had failed to do so, then the beneficiaries could have required the trustees to sue the truster for implement of the contract. The only contingency to which the right of the husband was subject was a temporal one: the money was only payable six months after the truster's death. The right vested. The trustees had been appointed. There was a debtor to whom intimation was made. Lord Inglis, however, was ultimately persuaded by the Lord Ordinary's point that the husband, had he not assigned, would have forfeited his right to the money. The assignee, therefore, could be in no better

[55] See pursuer's pleas nos (1), (4) and (6) at 335.

[56] At 338.

[57] At 339. For the law regarding the obligation of a husband to restore the tocher on a divorce on the ground of adultery, see *Justice v Murray* (1761) Mor 334; Kames Sel Dec 172 and discussion in Ivory's footnote to Erskine I.vi.48

[58] At 343.

[59] At 342.

[60] At 343.

[61] Unless Lord Inglis means assignable in the contractual sense; otherwise it is hard to see how unvested rights (if this is not a contradiction in terms), which are liable to revocation, and where there is no debtor to whom to intimate, can be *transferred*.

position. But on what basis would the husband have forfeited the right? If the husband had breached the contract he would have been liable in damages. Does this affect the assignee's right of recovery? The assignee is not subject to the obligations of the cedent. In any event, the pursuers argued that the marriage contract had come to an end, and had been revoked.

10-18. The *Johnstone-Beattie* case is an example of discussions on validity becoming overly complicated. Fortunately, Lord President Inglis took a common-sense view. Since the cedent could not have claimed the money, the assignee could not. This is a simple application of the *assignatus* rule. The cedent was in breach of an implied term of the contract. The debtor (the trustees) could therefore retain against the assignees. It was quite unnecessary, however, to enter into a consideration of the assignation's validity.

B. SPECIFICITY

10-19. A valid assignation must identify the claim assigned. This is a general principle both of the law of obligations[62] and the law of property:

> 'The specificity principle in the law of things entails that real rights can only exist in respect of specific things. Thus, an owner does not have a general right in respect of all the assets of his estate but a specific real right in respect of each individual thing. Moreover, although a person can bind himself by contract to alienate his whole estate the act of transfer is accomplished by transfer of each separate asset. For the same reason a person is not allowed to pledge his moveables in general.'[63]

10-20. The same principle applies to the transfer of personal rights.[64] It is, at root, a principle of common sense: the parties must know what claim or claims they are assigning.[65] Ordinarily, therefore, the specificity principle is unproblematic. But whereas specificity is rarely an issue in the transfer of immoveables or corporeal moveables, it can give rise to difficult questions with claims. Claims, being incorporeal, can be identified only in words. Existing contractual claims, arising out of a written contract between an identifiable creditor and an identifiable debtor, may be described without difficulty. But parties may attempt to assign claims not yet due, or due only on the occurrence of an uncertain event or claims that do not yet exist. Or, in a single global assignment, the parties may attempt to assign all the various claims held by the cedent. Proper descriptions in such assignations are difficult, if not impossible.

10-21. In Scots law, matters may be slightly less complicated because debtor notification remains a constitutive requirement for transfer. Assignations of rights not yet in existence, for example, are probably not possible, although the cedent may certainly conclude a valid contract to assign claims not yet in existence.[66] The specificity principle may be too easily forgotten with

[62] See, eg, Art 1129 *Code civil* and *Code civil belge*: 'Il faut que l'obligation ait pour objet une chose au moins déterminée quant à son espèce. La quotité de la chose peut être incertaine, pourvu qu'elle puisse être déterminée'.

[63] C van der Merwe, 'Things' in W A Joubert (ed) *The Law of South Africa*, vol 27 (First Reissue, 2001) para 201.

[64] See, eg, *Müncher Kommentar zum BGB* (4th edn 2003) § 398, Rn 67 (Roth).

[65] R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 140, Nr 130.

[66] The subject is not considered here. But see G L Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23 and G Lubbe, 'Die Oordrag van toekomstige regte' (1980) 43 *THRHR* 117 at 124.

assignations. But it must not be ignored, particularly where future claims are to be assigned. The subject is a specialist one, however, and cannot be treated further here.[67]

C. VOID ASSIGNATIONS

(1) General

10-22. A void assignation is of no effect. An action of reduction is unnecessary and, logically, irrelevant. A conclusion for an order of retrocession in such a case is a logical *non sequitur*.[68] Instead, an action of declarator of nullity is appropriate. Assuming the debtor has not paid, if an assignation is void, *restitutio in integrum* is irrelevant: the transfer was ineffectual and there is nothing to return.[69] If the assignee has procured payment from the debtor on the basis of a void assignation, the debtor is discharged as he was in good faith. But there is no basis for the assignee to retain the money: the assignee has an obligation to pay this to the cedent.

10-23. Vices of consent render the contract,[70] conveyance,[71] or both, voidable. It is said that a voidable contract may be rescinded. Rescission of a voidable contract must be distinguished from rescission for material breach.[72] It is questionable whether a unilateral rescission of a voidable contract would be effective.[73] There is House of Lords authority for the proposition that rescission takes effect from the date of intimation of the rescission rather than any judicial determination.[74] But the authority is problematic.[75] A completed, but voidable,

[67] Fungibility is the antithesis of specificity. But fungibility is not, in Scots law, an issue for assignation of money claims. The object of the transfer is the debtor's performance. And, unlike in England, that claim may be assigned in part. Further, since, in Scotland, claims cannot be owned, it is wrong to apply rules on segregation of corporeals, or of co-ownership, to claims. Cf Sir Roy Goode 'Are Intangibles Fungible?' [2003] LMCLQ 379 at 384.

[68] Cf *Pender v Commercial Bank of Scotland* 1940 SLT 306 at 308 *per* Lord Robertson (Ordinary).

[69] Cf *Balls v MacDonald* 1909 2 SLT 310 OH where the argument was that the pursuer had no power to assign an alimentary liferent. If correct, the assignation would have been void. Nevertheless, there was an (unsuccessful) argument that since *restitutio* was not offered, there could be no reduction.

[70] See McBryde, *Contract*, ch 13.

[71] See Reid, *Property* para 614 ff. The distinction is evident from the pleadings in *Wood v MacDonald* 1970 SLT (Notes) 46 OH.

[72] McBryde, *Contract* para 13-21, n 92 highlights the crucial distinction between rescission for material breach and rescission of a voidable contract: 'Rescission of a voidable contract operates retrospectively. Rescission for material breach is largely prospective in operation'.

[73] Cf McBryde, *Contract* para 13-21: 'It is an unsettled question whether rescission of a voidable contract requires a court order or merely the act of the party rescinding'. At para 20-05, however, McBryde states that, 'Rescission in cases where the contract is affected by invalidities of consent is an action of the court; following material breach rescission is the act of the innocent party (and *restitutio in integrum* is not required)'.

[74] *Westville Shipping Co v Abram Steamship Co* 1923 SC (HL) 68 at 73 *per* Lord Atkinson. In the Inner House (1922 SC 571 at 578), counsel argued that 'when the [assignees] definitely intimated rescission, they regained their substantial title, and the decree in the English action operating as a re-assignation was pronounced before the record in the present action was closed, and all formal objections were thereby removed'. The conduct of counsel before the House of Lords in *Westville* caused their Lordships some consternation: see (1923) 15 Lloyd's L Rep 97. Compare *Robinson v Robinson's Trs* 1934 SLT 183 at 186.

[75] See discussion of the *Westville* case below.

conveyance, by contrast, transfers its object. For a unilateral declaration to effect, as if by magic, a re-transfer of property is contrary to principle; in any event, even were it effective, it could be prejudicial if a defrauded transferee sought to rescind: the transferor would be reinvested with the property *and* continue to hold any price paid for it.[76] A completed but voidable conveyance, therefore, must be judicially reduced. Before reduction, the assignee can assign the claim to an onerous *bona fide* transferee who will not be subject to reduction by the original cedent;[77] conversely, if the cedent unlawfully induced the assignee to accept the assignation, the assignee loses the right to reduce the assignation if the assignee in turn translates the right.[78]

10-24. Before a contract can be rescinded or a conveyance reduced, *restitutio in integrum* must be possible.[79] In the case of an assignation, then, if the debtor has paid the assignee on the basis of a voidable assignation, then *restitutio* is no longer possible. The claim forming the object of the assignation no longer exists: payment discharged the debt. If the debtor has not yet made payment, the debtor must be called as a defender in any action of reduction so as to bring the matter to his attention judicially. Where the debtor has been duly cited and while such a process is pending, the debtor cannot pay the assignee in good faith. He should consign the money into court. Even if the assignation has not been reduced to writing,[80]

[76] A point ignored by Lord Atkinson in *Westville*.

[77] *Redfearn v Sommervails* (1813) 1 Dow 50. The *obiter dicta* in *MacLeod v Kerr* 1965 SC 253, which suggest that a valid rescission by a defrauded seller of the *contract* of a sale of goods will reinvest the seller with ownership, are wrong. See T B Smith, *Property Problems in Sale* (1978).

[78] *Westville Shipping Co v Abram Steamship Co* 1922 SC 571 at 581 *per* Lord President Clyde: '[The first assignees] were precluded, by granting the sub-assignation, from doing anything inconsistent with the right they had conferred on the sub-assignees, for what could be more inconsistent with that right than to impugn the original assignation upon the validity of which the validity of the sub-assignation depended. In short, the granting of the sub-assignation deprived the pursuers of their title… .' The *Westville* case is problematic. Throughout the case it is assumed that assignation is a contract which can be unilaterally rescinded. Nowhere is there any indication that the assignations were ever intimated. Indeed, it is not clear whether there were actually two successive assignations. The Lord Ordinary suggests that the first agreement might have been a direct sale of goods; in the Inner House the Lord President described the first agreement as an 'agreement *for* the original assignation' (1922 SC 571 at 581); while, in the House of Lords (1923 SC (HL) 68 at 71), Lord Dunedin had described the first agreement as an 'agreement *of* assignation'.

[79] See generally J S McLennan, '*Restitutio in integrum* and the Duty to Restore' (1973) 90 *SALJ* 120 cited by McBryde *Contract* para 13-22.

[80] According to Requirements of Writing (Scotland) Act 1995, s 11(3)(a) writing is not required; although a written assignation will be necessary to effect an intimation in terms of the Transmission of Moveable Property (Scotland) Act 1862 and at common law.

reduction probably can,[81] and should, still be pursued. An assignation, like any other conveyance, can be reduced partially.[82]

10-25. In discussing so-called vices of consent and real vices it is important to distinguish two different relationships. The first is the effect of some vice on the present conveyance, that is to say, some imposition upon the cedent. On the other hand, there may be numerous reasons why the assignation is null which are not the result of any imposition on the cedent. For example, the cedent may not be the debtor's creditor or the assignation may be forged.[83] Always underlying the discussion, however, is the position of the debtor. The debtor who pays on an invalid assignation in good faith may be validly discharged though the recipient, by reason of the invalidity, is not the debtor's creditor.

(2) Grounds of nullity

10-26. Claims are incorporeal. Claims cannot be owned[84] or possessed, so cannot be stolen. Theft is not relevant for the assignation of claims.[85] Force and fear renders an assignation (the transfer agreement) void.[86] There is one borderline case where a husband required his wife to subscribe an assignation

[81] The authority is conflicting. *Brown v Hamilton District Council* 1983 SLT 397 at 401 *per* Lord Justice-Clerk Wheatley; at 410 *per* Lord Dunpark, followed in *M & I Instrument Engineers Ltd v Varsada* 1987 SCLR 700 OH holds that partial reduction is competent. The court in *Brown* declined to follow the decision of the First Division in *MacLean v MacLean* 1976 SC 11 since the judgment there followed from a concession from counsel. See also *Lennox v Scottish Branch of the British Show Jumping Association* 1996 SLT 353 OH. The comments of the Second Division in *Short's Tr v Chung* 1991 SLT 472 at 476, that reduction is not appropriate where there is no deed, were perhaps *obiter*. In any event there was no argument on the point. The position in *Varsada* is preferable to that expressed by Lord Young in *M'Laren's Tr v National Bank of Scotland Ltd* (1897) 24 R 920 at 927 apparently approved by the Lord Ordinary in *Boyle's Tr v Boyle* 1988 SLT 581 at 583C. Lord Young's *dictum* was directed at an alleged gratuitous alienation. Two factors may have influenced his decision: (1) reduction was in the privative jurisdiction of the Court of Session and (2) reduction can also be achieved by a conclusion for a declarator: see *Raymond Harrison & Co's Tr v North West Securities* 1989 SLT 718 at 724L *per* Lord Clyde (Ordinary).

[82] *Creditors of James Stein v Newnham Everitt & Co* (1793) Mor 14127 at 14128; *M'Conachy v M'Indoe* (1853) 16 D 315; *Bain v Lady Seafield* (1887) 14 R 939; *Balls v MacDonald* 1909 2 SLT 310 OH; *Brown v Hamilton District Council* 1983 SLT 397 at 401 *per* Lord Justice-Clerk Wheatley; at 410 *per* Lord Dunpark; *Broadley v Wilson* 1991 SLT 69 OH. At first sight, § 139 *BGB* suggests that partial reduction is not competent under German law. But partial reduction is competent, providing severance is possible: the residual part of the transaction (*Rechtsgeschäft*) must be capable of existing in its own right. See generally Palandt, *BGB* (63rd edn 2004) § 139, Rn 10 and § 142, Rn 1.

[83] As in *William Dick of Grange v Sir Lawrence Oliphant of Gask* (1677) Mor 13944.

[84] See discussion in para 1-09 above.

[85] And, since they are incorporeal, they cannot be possessed, rendering the real vice of spuilzie (for which see *Hay v Leonard* (1677) Mor 10286) irrelevant. A blank bond could be stolen; so too a true deed of assignation with the assignee's name blank. There is no issue of forgery here. Nor is there any vice which impairs the cedent's expression of intention. Arguably, under the abstract theory of transfer, such an assignation would not be void. It would be voidable for fraud.

[86] Cf Stair IV.xl.28 cited by Reid (W M Gordon), *Property* para 615.

of a policy of insurance over his life. This assignation was held invalid (although the basis of the decision is not clear).[87] Fraud is a vice of consent[88] and not a real vice:

> 'I dare not apply the maxim *dolus dans causam* etc. No fraud renders a contract null by the law of Scotland; force and fear will, for then there is understood to be no bargain. Fraud is rather an argument that a man consented, and it points out *why* he consented. There may be a special ground of reduction against the party deceiving, but that will not go against the party who purchases *in bona fide*; the property is in him and cannot be taken from him.'[89]

10-27. A *pactum illicitum* is usually void. But what of a transfer which follows on an illegal agreement? It has been held that an assignation, the transfer, may be void for illegality. The classic situation in the sources is where the cedent assigns his rights against a gambling debtor.[90] The law holds that the underlying gambling debt is void for illegality, as is any bond granted by the debtor to the creditor in a gambling debt.[91] It is not immediately apparent, however, why the assignation (i.e. the transfer) of an unrelated debt in consideration of the gambling debt is also necessarily void.[92] Some authorities say that the *debitor cessus* can withhold performance to an assignee on the ground that the

[87] *Scottish Life Assurance Association Co Ltd v John Donald Ltd* (1901) 9 SLT 200 OH. The Lord Ordinary summarised the evidence thus: the wife 'signed a folded paper at the request of her husband, without seeing what was in it or being told by him what its nature was. Accordingly, so far as she was concerned, the assignation was not a tested deed; and, although she may be held as admitting the genuineness of her signature, her admission must be taken along with the qualification that her act in signing the deed was wholly unintelligent'. The assignation was void in any event on the separate ground that it was not, at that time, in a woman's capacity to alienate a policy which fell under the Married Women's Policies of Assurance (Scotland) Act 1880. Today, this case would fall under the *Smith v Bank of Scotland* 1997 SC (HL) 111 principle. The assignee's bad faith, in terms of the *Smith* decision, would render the assignation voidable.

[88] Reid (Gordon), *Property* para 616.

[89] *Shepherd v Campbell & Robertson & Co*, 21 June 1775 FC; Hailes 637 *per* Lord Kames. And see Kames, *Historical Law Tracts* (2nd edn 1761; repr 2000) 85–86, n (a).

[90] The rule that bonds granted for gambling debts are void was statutory: Gaming Act 1710 (9 Anne c 19). The application of the rule can be traced to *Bowyer v Bampton* (1742) 93 ER 1096; 2 Strange 1155, through the opinions of Lord Mansfield in *Lowe v Waller* (1781) 2 Doug 736; 99 ER 470 (a usury case) and *Peacock v Rhodes* (1781) 2 Doug 634; 99 ER 402, to their adoption by the Court of Session in *White's Tr v Johnstone's Tr*, 22 June 1819 (reported in a footnote to *Elliot v Cocks & Co* (1826) 5 S 40) and *Hamilton v Russell* (1832) 10 S 549. In *Bowyer*, a *bona fide* indorsee of a bill granted for a gambling debt was debarred from suing the granter but was allowed recourse against the indorser. But see now Financial Services and Markets Act 2000, s 412 and Gambling Act 2005, s 335.

[91] *McKenzie v Hamilton* (1745) Elchies, *Pactum Illicitum* No 18. In *Nisbet's Creditors v Robertson* (1791) Mor 9554; Bell's Octavo Cases 349 it was held that since a heritable bond granted for smuggled goods would be void against the cedent, so too was it void against the assignee.

[92] Prior to *Bowyer v Bampton*, the Court of Session had held that the Gaming Act could not be invoked against an onerous indorsee of a bill: *Cornelius Nelson* (1740) Mor 9507; Elchies, *Pactum Illicitum* No 10; *Neilson v Bruce* (1740) Mor 9507; Kilkerran 70; *Stewart v Hyslop* (1741) Mor 9507 and 9510; Elchies, *Pactum Illicitum*, No 13. Cf *Pringle v Biggar* (1740) Mor 9509; *Robertson v Ainslie's Trs* (1837) 15 S 1299 and *Universal Import Export GmbH v Bank of Scotland* 1995 SC 73 (banker's draft unaffected by fraud of third party). For the history of illegality on contracts generally, see L J Macgregor, 'Illegality' in K G C Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) II, 129.

[93] *Pringle v Biggar* (1740) Mor 9509; Elchies, *Pactum Illictum*, No 12 found that the plea of illegality founded on the Gaming Act 1710 was good against an arrester.

assignation was made for an illegal consideration.[93] The debtor can withhold payment against an assignee. But such a defence has nothing to do with the invalidity of the assignation; rather, it is a simple application of the *assignatus* rule. The cedent could not have sued to enforce a *pactum illicitum*. The assignee can have no greater right. Providing an assignation is *ex facie* valid, the debtor is protected on a good faith payment to the assignee.

10-28. Although little discussed, there is, in principle, the possibility that an assignation could be void for error. Professor McBryde has charted the complex history of this doctrine in the law of contract.[94] But error may also affect the validity of the transfer agreement.[95] With the exception of gratuitous transfers, uninduced unilateral errors are of little relevance. More important are situations of mutual error, common error and induced error. There could also be an error in expression.[96] A common or mutual essential error precluding consent, in theory, renders the assignation void. This can be distinguished from a situation where the cedent consents to the transfer, but this consent is unlawfully induced. Induced consent renders the transfer voidable.

10-29. Common error – that is to say, where the parties have a common intention but this common intention is mistaken – could cover the situation where the parties purport to assign a non-assignable claim. This assignation is ineffective for the reason that the claim is not assignable. But it could also be said to be void for common error. As a ground of invalidity, common error is relevant where the cedent and the putative assignee purport to conclude and implement an agreement to assign a claim which does not in fact exist. The non-existence of a claim renders the cedent liable for breach of warrandice. Absent any inducement on the part of the assignee, or a stipulation to the contrary, the cedent cannot escape liability for breach of warrandice on the basis of a common error. A similar position may be envisaged where the parties conclude an agreement to cede a claim but, before the claim is transferred, assignation of such claims is declared illegal by statute.

(3) Statutory nullity

10-30. Professor McBryde draws attention to a number of statutes which provide that a purported assignation shall be void and of no effect:[97] pay and pensions in the armed forces,[98] the police[99] or other occupational pensions;[100] social

[94] Originally in 'A History of Error' 1977 *JR* 1, but see now Zimmermann and Reid, *A History of Private Law in Scotland* (2000) II, 72 and incorporated into MacBryde, *Contract* ch 15.

[95] In the one case where this issue arose in the context of an assignation there was no consideration of the effect of the error on the transfer as opposed to the contract to assign: *Westville Shipping Co Ltd v Abram Steamship Co Ltd* 1922 SC 571 aff'd 1923 SC (HL) 68.

[96] Cf McBryde, *Contract* para 8-98 ff.

[97] McBryde, *Contract* para 12-46. And see too P H Pettit, 'Choses in Action' in Lord Mackay of Clashfern (ed) *Halsbury's Laws of England* (4th edn, 2003 Reissue) vol 6, para 86.

[98] Armed Forces Act 1991, s 16; Army Act 1955, s 203; Air Force Act 1955, s 203. But a pension may be the object of a capital payment order in an action for financial provision on divorce. The order is made against the defender, not the pension trustees: *Thomson v Thomson* (Sh Ct) 1991 SCLR 655.

[99] Police Pensions Act 1976, s 9.

[100] Pensions Act 1995, s 91, for which see D Mackenzie-Skene, *Insolvency Law in Scotland* (1999) 166 at n 60 and Mackenzie-Skene, 'Whose Estate is it Anyway? The Debtor's Estate on Sequestration' 2005 *JR* 311 at 324. See too *Mulvenna v The Admiralty* 1926 SC 842.

security benefits;[101] claims against the Criminal Injuries Compensation Board;[102] incorporeal moveables, rights of action or negotiable instruments to, or from, an enemy of the Crown, or any transfer on behalf of an enemy;[103] and the office of a company director.[104] There are also provisions dealing with the purported assignation by a seaman of his future wages.[105] There are examples in case law of rights conferred by statute which have been held to be personal to the grantee and unassignable.[106] Often, statutory provisions will provide that a salary or pension is not arrestable.[107] An unarrestable claim cannot be assigned. The converse position is more controversial. If it is provided by statute that a particular benefit is not assignable, can it still be transferred by involuntary assignation, by arrestment or sequestration? It has been held that, since there are examples of statutory provisions which expressly proscribe involuntary, as well as voluntary, assignment,[108] where the statute proscribes only assignment, such a benefit may, in principle, fall within the bankrupt's sequestrated estate.[109]

(4) Common law nullity

10-31. A purported transfer of an unassignable right is void. At common law, where there is *delectus personae* in the person of the creditor, the rights against the debtor are not assignable. An important example is the alimentary right. The accepted view is that alimentary rights can be neither transferred by assignation nor arrested.[110] But a grant which is stated to be alimentary can still be validly transferred to the extent that it is not required for aliment.[111] Against this, there are other authorities which hold that rights which are alimentary can be assigned, if for good consideration.[112] Similarly, some older authorities held that

[101] Social Security Administration Act 1992, s 187. This includes pension credits: s 187(1)(ab) (as amended). It is thought that, at common law, tax credits would not be assignable.

[102] Criminal Injuries Compensation Act 1995, s 7.

[103] Trading with the Enemy Act 1939, s 4 (see s 13 for application to Scotland).

[104] Companies Act 1985, s 308. This is not a paradigm claim to payment. Arguably the purported cession of an office would be void at common law, being in breach of the principle *delegata potestas non potest delegari*.

[105] Merchant Shipping Act 1995, s 34.

[106] *MacKnight, Petr* (1875) 2 R 667 at 668 in respect of Trusts (Scotland) Act 1867, s 14. See now Trusts (Scotland) Act 1921, ss 22 and 24. Other statutes make specific provision for assignees: eg Late Payment of Commercial Debts (Interest) Act 1998, s 13. Whether a right is assignable or not will depend on the nature of the statutory right. Compare *Leith Dock Commissioners v Colonial Life Assurance Co* (1861) 24 D 64 and *Goodall v M'Innes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary) (statutory right to object neither assignable nor exercisable by another by way of a mandate *in rem suam*).

[107] Cf J Graham Stewart, *Diligence* (1898) 100.

[108] Eg Police Pensions Act 1921, s 14(1); Social Security and Pensions Act 1975, s 48(1) and (2); Social Security Act 1986, s 2(7) and (8); Pension Schemes Act 1993, s 159(4) and (5); Pensions Act 1995, s 91(3); Welfare Reform and Pensions Act 1999, ss 11 and 13 and Occupational Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836.

[109] *Krasner v Dennison* [2001] Ch 76 CA. See generally Bankruptcy (Scotland) Act 1985, ss 36A–36F. There may, however, be considerable practical difficulties for the trustee in realising future pension rights: see W W McBryde and G L Gretton, 'Sequestration and the *Spes Successionis*' (2000) 4 *Edin LR* 129.

[110] *Rennie v Ritchie* (1845) 4 Bell's App 221; Graham Stewart, *Diligence* 93 ff and authority there cited; W M Gloag and J W Irvine, *The Law of Rights in Security* (1897) 456 ff and authority there cited. Cf *W J Hughes v Lord Advocate* 1993 SCLR 155.

[111] *Claremont's Trs v Claremont* (1896) 4 SLT 144; *Cuthbert v Cuthbert's Trs* 1908 SC 967.

[112] Eg *Ker's Trs v Weller* (1866) 3 SLR 2; *Waddell v Waddell* (1836) 15 S 151; *Rogerson & Co v Rogerson's Trs* (1885) 13 R 154. It has been held that they are not assignable *omnium bonorum*:

the wife's tocher (*anglicé*: dowry) was not assignable by the husband.[113] It is probably the case that only periodical payments can be held to be alimentary, and the right must have been conferred gratuitously.[114] An assignation which purports to assign claims which are assignable as well as claims which are not assignable is valid to the extent of the assignable claims; in other words, invalid aspects can be severed from the valid transfer.

10-32. The prohibition is particularly relevant for creditors. Take the debtor who has a valuable right against another. He may wish to use this as collateral and assign it in security. The assignee in security advances the money. Nevertheless, where the right is stated to be alimentary, or granted for love, favour, and affection,[115] an assignation of it is invalid.[116] Alimentary rights are unassignable. This can be seen as an example of *delectus personae*. The granter is willing to aliment his errant son, but not his errant son's errant friends or unscrupulous moneylenders. But, on one view, this could be unjust on a creditor who advances money in return for an assignation in security of an alimentary right. The beneficiary of the alimentary right gets his money on the strength of the aliment. The purpose of the gratuitous payment (to put the son in funds) is therefore satisfied. Be that as it may, however, there is no use weeping for the creditor who takes such a right as security. Similar issues arise where the grantee of an alimentary right becomes insolvent. If such a right is not assignable, the received position is that, by parity of reasoning, it is not arrestable; it cannot vest in a trustee in sequestration and it cannot be transferred to a trustee for creditors.[117] That is the received position. But, as will be discussed below, there may be a distinction to be drawn between voluntary and involuntary assignations.[118]

(5) Nullity and the debtor

10-33. There are numerous reasons why an assignation may be void: forgery, force and fear applied to a previous cedent, or incapacity of the cedent.[119] Where the assignee has demanded payment on the basis of an assignation which is void and the debtor has paid, the allegation that the assignation was void is

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M'Donnell v Clark, 25 November 1819 FC. Cf Erskine III.v.2 and *Mackenzie v Morrison*, 19 May 1791 FC; Mor 10413 and authorities cited in McBryde, *Contract*, paras 12-27 ff and Graham Stewart, *Diligence* 100. See also Juridical Society of Edinburgh, *Juridical Styles* (3rd edn 1794) III, 235 which contains a style assignation of a salary.

[113] *Logan v L Kinblechmont* (1623) Mor 4386. But compare *Hall of Douglas v Lorimer* (1692) Mor 4387.

[114] Graham Stewart, *Diligence* 94.

[115] *Robertson v Wright* (1873) 1 R 237 at 244 *per* Lord Ardmillan: 'Affection is necessarily personal. It cannot be transferred as debt can be transferred from one to another. A gift to one for whom I have an affection cannot be so assigned as to make me donor for one whom I have a dislike … the demand that, after payment of a donation to one I did love, I shall be ordained to pay it a second time to one I do not love, has, in my opinion, no foundation in reason, equity or law'. For a second payment to be required, as envisaged by Lord Ardmillan, the granter of the alimentary obligation would have had to have paid the grantee after receiving intimation of an assignation.

[116] Cf *Rogerson & Co v Rogerson's Trs* (1885) 13 R 154 and *Balls v MacDonald* 1909 2 SLT 310 OH.

[117] *Clarke v Jas McDonnell*, 25 November 1819 FC. But see discussion below with regard to the rights of creditors to claims which are subject to a *pactum de non cedendo*.

[118] See para 11-42.

[119] See *Alexander v Lundies* (1675) Mor 940 approved by Bankton II, 192, 8 where the cedent was not *compos mentis* when he granted the assignation. Cf *Donaldson v Jeffrey* (1905) 13 SLT 379 OH.

serious: the debtor has paid the wrong person. But, it must be remembered, invalidity of the assignation must not, in general, prejudice the debtor. Where the debtor pays one with the apparent right, he will have the defence of *bona fide* payment:

> 'Payment is the most proper loosing of obligations, and therefore retaineth the common name of solution, [D 46.3.49 and 80]. In many cases payment made bona fide dissolveth the obligation though he to whom it was made had no right for the time. So payment made to a procurator was thought sufficient, albeit the procuratory were thereafter improvan, seeing there was no visible ground of suspicion of the falsehood of it, February 1st, 1665, *Elphinston v Lord Rollo and Laird of Niddrie* [Mor 17018; 1 Stair 262].'[120]

D. VOIDABLE ASSIGNATIONS

(1) Effect of reduction

10-34. There has been little consideration of the remedy of reduction in Scots law.[121] In theory a reduction should only be brought of a voidable conveyance. A void conveyance does not require a court order to give effect to the nullity.[122] 'A declarator of nullity concludes, that the author had no power to convey the subject; and therefore that the purchaser has no right: a reduction admits that the subject was conveyed; but concludes, that the purchaser did wrong in making the purchase, and therefore that he ought to be deprived of the subject'.[123] In practice, however, reduction can be relevantly pled in order to declare a contract or conveyance void, while a declarator can, on the authorities, be invoked to reduce a conveyance. Matters are complicated in the case of an assignation because of the presence of the debtor who is a passive third party. Unlike the position for (Sasine) land,[124] there is no register for decrees of reduction of conveyances of moveables. To ensure that the assigned debt is not discharged by a good faith payment by the debtor to the assignee, it is essential that any action of reduction of an assignation calls the debtor as a party to the action.[125]

[120] Stair I.xviii.3. See also the cases dealing with the right of an executor to pay out to the beneficiaries after a period of six months in good faith without incurring personal liability to creditors of whom they were ignorant: *Muir v Fleming* (1634) 1 Br Sup 86; Sup Vol, *Durie* 76. There is protection in terms of the Act of Sederunt of 28 February 1662 (still in force). However, the authorities often deal with executors' right in terms of the general doctrine of *bona fide* payment: *Stewart's Trs v Evans* (1871) 9 M 810.

[121] G L Gretton, 'Reduction of Heritable Titles' 1986 SLT (News) 125. Cf L Loewensohn, 'The Action of Reduction in Scotland: A Comparative View' (1942) 58 *Scottish Law Review* 4, who deals with the unitary concept of reduction in Scots law: a decree can be reduced as much as a transaction. This is not the case in many European legal systems.

[122] See also D M Walker, *The Law of Civil Remedies in Scotland* (1974) 145.

[123] Kames, *Elucidations*, Art 3, at 11. Kames overemphasises the need for wrongdoing on the part of the transferee. Cf *Balls v MacDonald* 1909 2 SLT 310 OH.

[124] See Conveyancing (Scotland) Act 1924, s 46. The Land Register is a register of title. To some extent, therefore, it operates outwith the ordinary principles of property law. The reduction of a conveyance registered in the Land Register may not be of much benefit to the pursuer. The position is complicated: see K G C Reid, 'A Non Domino Titles and the Land Register' 1991 *JR* 79; Reid, 'Void and Voidable Deeds and the Land Register' (1996) 1 *SLPQ* 265; A J M Steven, 'Problems of the Land Register' 1999 SLT (News) 163.

[125] Cf G L Gretton, 'Reduction of Heritable Titles' 1986 SLT (News) 125. In a case reported only in *The Scotsman*, 30 March 1948, there was a purported reduction of an assignation on the ground of undue influence. It is not clear whether the debtor was called. In *Mitchell v Johnston*

10-35. The effect of a reduction in Scots law has not been investigated. There are at least two possibilities. The reduction may have catholic (that is, absolute or *erga omnes*) effect or it may be *ad hunc effectum effectum* (that is, relative effect). The voluntary transfer of heritage in breach of a pre-existing inhibition is the best-known example of the latter.[126] The law of reduction is crucial to private law generally. But for the law of assignation it is particularly regrettable that this area of Scots law is underdeveloped. For, looking to the continent, it is not possible to appreciate fully the modern laws of cession in France or Germany without an understanding of their respective doctrines of *(in)opposabilité* and *relative (Un)Wirksamkeit*.[127] The idea that reduction may have only relative effect may be useful. Take the example of an owner of land who binds himself to grant a standard security. In breach of that obligation he dispones to his wife for no consideration. To require the disposition to be reduced *in toto*, for the standard security to be properly granted, and for an almost identical disposition to be re-granted, is hardly expeditious. A simple mechanism is required, whereby the transferee's position is weighed down rather than cut down. In a question with the grantee of the security, the transferee of the property must acknowledge the former's security right.[128]

10-36. Although Scots law is underdeveloped, it is likely that a successful action of reduction will re-invest the cedent,[129] at least where the reduction is brought by one of the parties to the assignation.

(1703) Mor 8326, the debtor raised a reduction of a bond he had granted. Suspecting that the creditor in the bond had assigned it, the debtor also called the alleged assignee as a party to the reduction. Within hours of the assignee being cited, the debtor received a formal intimation of the assignation. The effect of the citation, it was held, was to render the bond 'litigious *ad hunc effectum*'. The debtor thus had the benefit of the cedent's oath against the assignee. See too *Glazier v Hamilton* (1707) Mor 8327 and the remarkable case of *Houston v Nisbet* (1708) Mor 8329. In modern law, such cases would be decided in terms of the *assignatus* rule. Previously, however, it was a rule of proof that debtor's defences could only be proved by writ or the oath of the cedent prior to intimation; after intimation, the cedent's oath was not admissible. Litigiosity was an exception to this rule. Where the matter had been rendered litigious before intimation, the cedent's oath could prejudice the assignee: see generally Erskine III.v.10.

[126] See G L Gretton, *The Law of Inhibition and Adjudication* (2nd edn 1996) 129 ff ('Gretton, *Inhibition*'). On payment of another's debt, the payer is entitled to an assignation of the creditor's rights against the original debtor (*beneficium cedendarum actionum*). Where those rights are secured by a heritable security, and the creditor is inhibited, an assignation of it to the payer does not breach the inhibition as it is not voluntary act: *Mackintosh's Trs v Davidson & Garden* (1897) 5 SLT 234 OH.

[127] See, eg, H Eidenmüller, 'Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung' (2004) 204 *Archiv für die civilistische Praxis* 457 at 471 ff; E Cashin-Ritaine, *Les cessions contractuelles de créances de sommes d'argent dans les relations civiles et commerciales franco-allemandes* (2001) 42 : 'L'étude de la notion d'opposabilité en droit français est essentielle pour comprendre le mécanisme de la cession de créance'.

[128] Whether a reduction *ad hunc effectum* can actually affect the *property* as opposed to the owner of the property, or the right as opposed to the holder of it, has not been properly focused in Scots law. The difference is important. Is a good faith transferee taking from one who has been subject to an *ad hunc effectum* reduction similarly bound to give effect to the security?

[129] *Ruthven v Gray* (1672) Mor 31; *Duncan v Miller* (1713) Mor 39. These cases also highlight that a retrocession carries accessory rights.

(2) Examples of voidability

(a) Assignations in breach of arrestment not voidable

10-37. Take a common practical problem: A is a creditor of C1. C1 is creditor of D. A arrests in D's hands. Before C1 is notified of the arrestment, C1 purports to assign to C2. C2 intimates to the debtor. C2 is in good faith.[130] The debtor is in double distress. By virtue of the arrestment, D cannot pay C2; by virtue of the intimation, D cannot pay C1. Until furthcoming, D cannot pay A. If D wrongly pays C2 in the knowledge of the arrestment, this payment cannot prejudice the arrester; in other words, D will be liable to make a double payment to A. A validity question will only arise if, after D pays C2, D becomes insolvent. Can A then reduce the assignation to C2? Is the assignation voidable?[131] Must the transferee recognise the arrester's preference? Reducing the assignation to C2 may not be of much benefit to the arrester if the reduction were catholic: the insolvent common debtor would be reinvested. Requiring the assignee to recognise the arrester's rights would be of more value. The point is of some difficulty and the sources are not consistent. Matters are hindered by the controversy in Scots law as to the effect of an arrestment.[132] If an arrestment (even without furthcoming) is a judicial assignation, there is no issue. After arrestment, C1 has nothing to assign. If, however, an arrestment lays a 'nexus' (whatever that might mean) on the arrested fund, the cedent will still be able to assign.[133]

10-38. The sources are confused. Stair says that

> '…not only will he [the arrestee] be decerned to make furthcoming, though it infer double payment, but he to whom he paid unwarrantably will be compelled to restore and satisfy the arrester, the subject having been litigious by his arrestment before the other party recover the same albeit he have recovered it *bona fide* without any fault in him, but by the litigiousness of the subject.'[134]

10-39. This suggests that the arrester will have rights against the assignee. Graham Stewart, however, prefers the views of Bankton,[135] Kames[136] and Bell[137] to the effect that a *bona fide* transferee is not bound to recognise the rights of the arrester.[138] With some contradiction, however, Stewart interjects that, with regard to incorporeal moveables, 'it is settled beyond all question that the arrester will prevail over a subsequent assignee'.[139] He cites no authority. Stair's view is

[130] A gratuitous or *male fide* transferee must recognise the rights of an arrester: Graham Stewart, *Diligence* 128 citing Kames, *Principles of Equity* (3rd edn 1778) II, 189.

[131] Graham Stewart, *Diligence* 126 says that a conveyance of corporeal moveables in breach of an arrestment is 'reducible'.

[132] The differing views are discussed in S Wortley, 'Squaring the Circle: Revisiting the Receiver and Effectually Executed Diligence' 2000 *JR* 325.

[133] But compare Graham Stewart, *Diligence* 125–126. He holds that an arrestment of itself is inchoate; but that it does operate as a prohibition. Stewart says that any transfer by the common debtor in breach of the arrestment is voidable.

[134] III.i.40-42. See too IV.xxxv.6.

[135] II, 197, 32. Bankton is here referring to the unusual and irregular situation where arrestment is made in the hands of the common debtor.

[136] Kames, *Principles of Equity* (3rd edn 1778) II, 182. It must be observed, however, that Kames' views on the nature of arrestment are characteristically unorthodox.

[137] Bell, *Principles* (10th edn 1889) § 2278. Bell too refers to corporeal moveable property.

[138] See too *Turner v Mitchell & Rae* (1884) 28 *Journal of Jurisprudence* 440 at 443 *per* the sheriff (*bona fide* transferee of poinded property takes free from rights of poinder).

[139] Graham Stewart, *Diligence* 127.

preferable. Arrestment has no effect on the *validity* of an assignation in breach of it (at least where the assignation is of claims or other fungibles). The arrester may have arrested a debt of £10m owed to C1 for C1's debt to the arrester of £1000. There is no reason why a subsequent assignation by C1 should be *invalid*, that is to say, it is neither void nor voidable.[140] Rather, the arrester is preferred for his arrested debt. The point has been well made in modern French writing:

> 'But a cession intimated after the service of an arrestment is not necessarily deprived of all effect because the effect of the arrestment is limited to the amount of the arrester's debt. For example, if the arrester is owed only 1000 he may still arrest 4000, but the surplus remains transferable: with the result that the surplus falls due to the assignee even if the assignee intimated after service of the arrestment.'[141]

10-40. The arrestment will be opposable against the assignee even if he had no knowledge of the pre-existing arrestment.[142]

(b) Assignations in breach of trust

10-41. An assignation made in breach of trust is voidable and not void.[143] Although some of the older cases treat such a transfer as if it were an illegal transaction and thus void,[144] the position is now ruled by statute.[145]

(c) Extrajudicial rescission of voidable conveyances ineffective

10-42. Unlike voidable contracts, a voidable conveyance cannot be rescinded unilaterally. Once the conveyance has taken effect a judicial reduction is required. An extrajudicial rescission is ineffective.[146] At most, rescission is the act which gives rise to a personal obligation on the assignee to retrocede.[147]

[140] See generally G L Gretton, 'Breach of Arrestment' 1991 *JR* 96.

[141] J Ghestin, *Le régime des créances et des dettes* (2005) para 324 : 'Toutefois, la signification ultérieure de la cession de créance ne sera pas nécessairement dépourvue de tout effet, car l'effet attributif de la saisie est limité au montant de la créance du saisissant. Par exemple, si celui-ci n'est créancier que de 1000 unités monétaires, il peut saisir une créance d'un montant de 4000 unités, mais la différance reste disponible, si bien qu'elle échoit au cessionnaire de la créance, même s'il a signifié la cession après la signification de la saisie'. Cf A von Tuhr, *Allgemeiner Teil des bürgerlichen Rechts* vol III (1918) § 69 (at 14) who suggests that the prohibition on assignation in an arrestment may only be relevant where service of the arrestment was in some way invalid. Even then, however, any assignation is valid, albeit *ad hunc effectum*: it cannot prejudice the arrester.

[142] This situation is another which would benefit from the development of a theory of relative invalidity. See generally M Storme, 'When does a Freezing Order become Effective against a Debtor of Receivables' (2002) 10 *ERPL* 134 (in French).

[143] *Thorburn v Martin* (1853) 15 D 845 at 850 *per* Lord Cockburn (dissenting). Compare Lord Wood: at 851 he seemed to agree that the assignation was not absolutely void. But an assignee, who takes in good faith and for value, will be protected. Cf *Fraser v Hankey & Co* (1847) 9 D 415.

[144] Cf *Meff v Smith's Trs* 1930 SN 162 OH and *Clark v Clark's Exr* 1989 SC 84 OH.

[145] Trusts (Scotland) Act 1921, ss 4(1)(h) and 7; Trusts (Scotland) Act 1961, s 2.

[146] *Coflexip Stena Offshore Limited's Patent* [1997] RPC 179.

[147] Where contract, transfer agreement, or both are voidable as a result of some wrongful conduct perpetrated by the party now seeking to assign, this may give rise to an obligation to make reparation. But until the party who was unlawfully induced to transfer rescinds, there is no obligation on the recipient to reconvey. That is the significance of the act of rescission. A verbal rescission could place the wrongdoer under an obligation to reconvey. A rescission of

10-43. The clearest statement of the law is found – perhaps surprisingly – in Jacob J's opinion in *Coflexip Stena Offshore Limited's Patent*.[148] The case involved a global assignment of intellectual property rights. The assignment had not been stamped. Instead of subsequently submitting it for stamping, a second assignment was executed and duly stamped. The parties purported to rescind the first assignment. Mr Justice Jacob explains the problems with such an approach:

> 'If a transaction passes property, then it does. If the parties wish to rescind that transaction, then they can. But this means no more than that if property had passed under the transaction, it must be passed back. If that requires some formal conveyance, then such conveyance will be needed. The answer to [counsel]'s point was supplied long ago by Old Khayyám[149]:
>
> ' "The moving finger writes; and having writ,
> Moves on; nor all thy piety nor wit
> Shall lure it back to cancel half a line,
> Nor all thy tears wash out a word of it."
>
> 'Moving fingers wrote [the first unstamped assignment]. Nor all [counsel]'s piety nor wit can cancel half a line. He did not try tears but they would not have worked either. The assignment by the parties to "replace" [the first assignment] with [the second assignment] (assuming that is the effect of [the second assignment], which I am not sure it is) does not mean that [the first assignment] had no effect in law. It did, and the execution of [the second assignment] does not mean that it did not.'[150]

10-44. Mr Justice Jacob's opinion is an endorsement of the abstraction principle and its consequences. Where there is an assignation which is voidable, an attempted unilateral rescission will not reinvest the cedent. The assignee must retrocess; in Scots law, that retrocession being intimated to the debtor (assuming that retrocession is of claims). If the assignee does not retrocess voluntarily, a reduction will be required. If the assignation was not of claims, there could be no intimation; but the same principles apply, *mutatis mutandis*. The principles should also apply to other transfers. For example, a transfer of ownership in corporeal moveables can be effected by mere intention where the *causa* is sale.

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the contract would render the transfer agreement *sine causa*. The assignee will be obliged to reconvey. If he refuses, judicial reduction will be required. This point is important for third parties. It is usually said that a *bona fide* onerous transferee will take a good title from a transferor whose title was voidable (see, eg, Reid, *Property* para 607 and Conveyancing (Scotland) Act 1924, s 46(1) cited by Reid, para 607, n 10). However, even if the subsequent transferee is not in good faith, why should his title be voidable if the unlawfully induced party never exercised his right to reduce? Further, would the fourth party's position be assailable if he knew that the wrongfully induced party had exercised his right of rescission, though no judicial reduction had yet occurred? There is no statutory provision corresponding to the 1924 Act for the transfer of claims. A tentative view – although the point is not free from difficulty – is that, providing the subsequent assignee is in good faith when he enters into the obligationary agreement, his position is unassailable.

[148] [1997] RPC 179.

[149] Omar Khayyám was an influential Persian scholar who died around 1123. His scholarly reputation was earned from his works on algebra. But he is perhaps better known as a poet from his collection of epigrams in distinctive Persian style, first translated into English by Edward Fitzgerald in 1859: *Encyclopaedia Britannica* (11th edn 1911). They have been recently translated into Scots: see R Wilson, *The Ruba'iyat of Omar Khayyam in Scots* (Edinburgh: Luath Press, 2004).

[150] [1997] RPC 179 at 192.

The transfer of ownership in corporeal moveables on other bases, however, will have to conform to the common law. This requires an intention to transfer and delivery. So where there is a transfer of corporeal moveables which is voidable, mere rescission will not reinvest the transferor. Since any retransfer is not a sale delivery in terms of the common law will be required.[151]

(d) Voidability and the debtor: can the debtor invoke invalidity?

10-45. The general principle is that the debtor will be discharged where he pays *in good faith* to the person he perceives to be his creditor.[152] Before formal intimation, the only person that the debtor can validly pay is the cedent.[153] It has been observed above that in the matter of transfer, private knowledge is irrelevant: until formal intimation, the debtor is free to pay the cedent. However, what if, after intimation, the debtor has private knowledge of a fact that calls into question the validity of the assignation? If the assignation is invalid and the debtor pays the assignee, then the debtor has, *prima facie*, paid the wrong person. The debtor must therefore rely on the defence of good faith payment. There are a number of issues. First, what private knowledge is sufficient? Second, what grounds of invalidity might be relevant? There are different types of vices. Some will affect the contract, others the conveyance. The conveyance may be rendered void, or merely voidable.

10-46. Issues affecting the underlying agreement or *causa* between the cedent and assignee are of no concern to the debtor.[154] But if the debtor knows that the conveyance is invalid, can he invoke the invalidity to refuse payment to the assignee? Is the debtor's right to invoke the invalidity dependent on the type of invalidity? These are difficult questions. There is little discussion of these issues in the Scottish sources; perhaps because of the availability of multiplepoinding. Any well-advised debtor who is unsure whom to pay will raise a multiplepoinding, consign the money into court and thus receive his discharge. Nevertheless, there may be situations where this does not happen. What then is the position?

[151] Cf para 10-01 above.

[152] See para 7-01 ff above and authority there cited.

[153] Although, if the debtor pays the 'assignee' after the assignation but before intimation, his payment is considered as an equipollent to intimation. As a result, the debtor cannot be required to pay again the cedent. This equipollent of intimation means that *where the assignation is valid*, there can usually only be good faith payment to the cedent: a payment to the assignee after delivery of the assignation but before intimation, being an equipollent, effects a transfer. There is then no issue of good faith payment: the debtor has paid his creditor. Where the assignation is invalid, however, and the debtor pays the assignee before intimation, there is a difficulty. On the one hand he should have waited for formal intimation; on the other, formal intimation cannot validate an otherwise invalid assignation. The preferred view, then, is that the debtor who pays an 'assignee' even before formal intimation on the basis of an invalid assignation should nonetheless be discharged.

[154] Cf F von Kübel, *Erster Kommission zur Ausarbeitung des Entwürfes eines bürgerlichen Gesetzbuches* (1882) Absch I, tit 4, 'Uebertragung der Forderungen', § 18, at 41 and Erskine III.v.10 who points out that under the old rules of proof, following intimation, the debtor was entitled to refer to the assignee's oath whether the assignation had been gratuitous or in trust for the cedent.

10-47. First, absolute nullity. Where the debtor knows that the assignation is void, it is difficult to see how the debtor can simply ignore this knowledge and pay the assignee regardless. So if the debtor is aware that the cedent's signature is forged there can be no valid payment to the assignee.[155] The debtor who pays an 'assignee' on the basis of an invalid assignation must rely on the rules of good faith payment. The test of good faith is subjective. But the debtor who has paid the wrong person must be able to show that he was in good faith. In practice, it is unlikely that a debtor will know whether an assignation is valid.[156] Mere suspicion is not enough to prevent the debtor validly discharging his obligation to the assignee. Where the deed is voidable, the debtor who pays on intimation is not concerned with rules on good faith payment. A voidable conveyance is a good conveyance until reduced. Even after reduction, if the debtor was not called as a party, payment may still be validly made to the assignee. An alternative view is that some informal notice of the reduction to the debtor is enough to interpel the debtor from paying the cedent.[157] But that view engenders only uncertainty.

10-48. Consider the assignation of an unassignable right. The underlying contract may, for example, contain a *pactum de non cedendo*.[158] The general principle is that a purported assignation in breach is invalid. But suppose the clause was inserted at the behest of the debtor. The cedent purports to assign in breach of this prohibition. The debtor then pays the assignee. In such a case, the debtor is discharged. The cedent cannot quarrel his own deed;[159] similarly, it is always open to the holder of a right to waive it. In other words, in such a situation, the debtor has the choice: he may pay either cedent or assignee.

[155] See, eg, *Dick of Grange v Oliphant of Gask* (1677) Mor 13944 which involved a forged assignation. It is also cited by Elchies, *Annotations on Stair's Institutions* (1824) 40.

[156] It must be observed that if this is the rule, it offends the presumption that one acts in good faith.

[157] Cf von Kübel, *Erster Kommission* Absch I, tit 4, 'Uebertragung der Forderungen', § 20, at 42: 'Will der Cedent sich dagegen schützen, so ist es seine Sache, den Schuldner von seiner Anfechtung der Abtretung in Kenntnis zu setzen'.

[158] See para 11-32 below.

[159] Erskine II.iii.27. Cf von Kübel, *Erster Kommission* Absch I, Tit 4, 'Uebertragung der Forderungen', § 20, at 42: 'Der Schuldner hat zwar in diesem Falle an einen Nichtgläubiger gezahlt, aber er hat es gethan auf Grund einer Erklärung des ursprünglichen Gläubigers selbst, und diese Erklärung muß der Gläubiger gegen sich gelten lassen'. However, what if the cedent became insolvent after the debtor's payment? Although the claim is non-assignable, the creditors of the cedent would still be entitled to the proceeds. Would a trustee in sequestration on the cedent's estate be bound by the invalid assignation? *Burnett's Tr v Grainger* 2004 SC (HL) 19 holds that creditors can do diligence in full knowledge of competing rights. The trustee, then, is arguably not subject to any bar that would have prevented the cedent from claiming a second time from the debtor. But that is not the end of the matter. If the cedent were required to pay again to the cedent, it must be on the assumption that the cession was invalid. If the cession was invalid, but the debtor paid the assignee nevertheless, the debtor has discharged the cedent's liability in warrandice to the assignee. The debtor therefore holds a claim in unjustified enrichment against the cedent. As a result, any claim by the trustee in sequestration against the debtor for a second payment will be met with a set-off.

E. CONDITIONAL ASSIGNATIONS

(1) General

10-49. Conditions may be inserted in a contract or in a transfer, a conveyance. Contractual conditions affect only the parties to the contract and are thus generally unobjectionable. They can operate according to their terms.[160] Conditions in transfers are more problematic.

(a) Corporeal moveables

10-50. The common law of Scotland allows a right in security over moveables in limited circumstances. The classic right in security is pledge. But the owner must give up possession. Scots law is averse to security over moveables *retenta possessione*. As a result, ownership is often used as a functional security. The seller's interest is therefore to retain ownership of the goods for as long as possible; even after he parts with possession of them. This is achieved by a suspensive condition: ownership will pass to the buyer only on payment, not delivery. Ownership of corporeal moveables passes, at common law, on the concurrence of delivery and an intention to transfer. Sales subject to a suspensive condition are therefore unproblematic.[161] Under the Sale of Goods Act,[162] which provides that property passes in a sale of corporeal moveables when the parties intend it to pass, conditional sales were developed. The buyer could retain title to the goods in respect of all sums due and to become due to the seller by the buyer.[163] Resolutive conditions are uncommon. A condition whereby ownership is to revert to the seller in certain circumstances presupposes that the seller has already transferred ownership.

(b) Immoveables

10-51. Transfers of land subject to suspensive conditions are unknown in Scotland.[164] Resolutive conditions were once more common. A transfer subject to a reversion is a transfer in which there is an obligation to re-convey in certain circumstances. Some grants would purport to become ineffectual on the occurrence of a certain event, by way of an 'irritancy' clause. Other clauses aimed to keep land within a family. Land was 'entailed'. Thus, in various ways, lawyers resorted to resolutive conditions. The intention was, no doubt, that the conditions would have effect according to their terms. But to give effect to the condition required effect to be given to the conveyance; and once ownership was conveyed, it was no longer in the disponer's power to determine that ownership would

[160] J M Thomson, 'Suspensive and Resolutive Conditions in the Scots Law of Contract' in A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990) 126 ff.

[161] Stair I.xiv.4; Erskine III.iii.11.

[162] First introduced into Scots law by Sale of Goods Act 1893. It was actually only passed in 1894: 56 and 57 Vict c 71. Exceptionally, it applied retrospectively. The present legislation is the Sale of Goods Act 1979, as amended.

[163] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339; 1990 SLT 891 HL. There is no reason why these clauses should not have been valid at common law: G L Gretton and K G C Reid 'Romalpa Clauses: the Current Position' 1985 SLT (News) 329; 'All Sums Retention of Title' 1989 SLT (News) 185. The so-called 'Romalpa clause' will be discussed below.

[164] Cf *Young v Dun* (1785) Mor 14191. The same is true in Germany: § 925 II *BGB*: 'Eine Auflassung, die unter einer Bedingung oder einer Zubestimmung erfolgt, ist unwirksam'.

revert.[165] Any resolutive condition in a conveyance was, therefore, but a personal obligation. It would not bind singular successors. Sometimes this was problematic, as where land was conveyed in security. The creditor became owner and could effectually alienate the debtor's land though the debtor had not defaulted. Legislation was needed to protect the debtor's reversionary interest.[166]

(2) The underlying object of transfer

10-52. In considering assignation it is more important than usual to distinguish conditions in a contract from those in a conveyance. A condition in a contract can have effect according to its terms because it affects only the parties to the contract. But suppose a claim arising out of such a contract is assigned. Is the assignee subject to the condition? The *assignatus utitur jure auctoris* rule holds that the assignee can take no better rights than the cedent. And whereas the cedent was subject to the condition, so too is the assignee.[167]

(3) Contract to assign (the obligationary agreement)

10-53. Assignations may or may not be spontaneous. Where they are not, it may be because there is an obligation to assign. The usual obligation is contractual. Confusingly this contract is also often called an assignation. And in this contract, the obligation to assign may be conditional.[168] But close attention is called for because the contract to assign and the assignation itself may be in the one deed. Assuming that the condition is contractual – that is to say, in the agreement to assign – matters are relatively straightforward. If the condition is suspensive, it is only on purification of that condition that the putative transferee has a right to demand an assignation be executed and delivered to him. As for a resolutive condition, this may take effect at any time before the cedent performs his obligation to deliver an assignation. Once that obligation has been performed and the assignation delivered, the resolutive condition can have only contractual effect.

[165] Kames, *Historical Law Tracts* (2nd edn 1761, rep 2000) Tract III 'History of Property' at 121: 'If I am totally divested, he [the disponee] must be totally invested; and consequently must have the power of alienation'.

[166] Reversions Act 1469 (APS c 3; 12*mo*, c 27). Prior to the Act, the debtor's reversionary interest could be defeated where the reversion was not *ex facie* of the deed. As a result of this 'excellent statute' (Stair II.x.3), singular successors were subject to registered reversions. In other words, reversions were accorded the status of 'real rights' (Stair II.x.3). The Act was thus the first instance of registration of heritable rights in Scots law (see D Murray, *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910) 25); further, the Act provided that an extract should have the same force as the principal. It has been disputed whether registration of the reversion was a constitutive requirement: Sir George Mackenzie, *Observations on the Acts of Parliament …* (1687) 67 thought registration necessary where the reversion was not in the body of the deed (as, indeed, was the case under the 1617 Act); Ross, *Lectures* II, 336 disputes this, but agrees that 'it is the first dawning of a record to be met with' in Scots law. On one view, Stair I.xiv.4, also suggests that registration was a constitutive requirement; but it is more likely that he was referring to the requirement of registration under the Real Rights Act 1617. See, generally, the discussion in L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942) 65–72.

[167] See eg *Logan v Kilbrackman* (1627) Mor 9207.

[168] Cf Voet, *Commentarius ad Pandectas* (2nd edn 1707) 18.4.9 who envisages a condition only in the obligationary agreement.

(4) The assignation (the transfer agreement) [169]

10-54. Whereas transfer of a physical asset subject to a suspensive condition is unproblematic, an assignation subject to a condition creates potential problems.[170] Each condition will be examined in turn.

(a) Suspensive conditions[171]

10-55. Although unusual in practice, a suspensive condition may be inserted in the transfer agreement. A suspensive condition is effectual against fourth parties (the third party, the debtor, is passive). Suppose C1 assigns to C2 subject to the condition that the transfer will only take effect on payment of the full price by C2. On accepting delivery of the assignation, C2 intimates this to the debtor. If, before payment, C1 becomes insolvent, the claim falls into C1's insolvency. Take the same example, except C1 remains solvent. C2, before full payment to C1, assigns in turn to C3. C3 intimates. Now C2 becomes insolvent. Until C2's insolvency administrator pays C1 in full, there is no transfer to C2.[172]

10-56. What of the debtor? The debtor receives intimation of an assignation. The assignation contains a suspensive condition. How can the debtor ever know whether the condition has been fulfilled? Sometimes a condition may be worded in such a way that it will take effect on the expiry of a specific time period. But many more will run in terms of events about which the debtor cannot reasonably be expected to inform himself.[173] In this regard, as in others, the debtor's interests are paramount. He must not be prejudiced; nor should he be placed under onerous duties to make enquiries. The general principle of good faith payment will therefore apply. If the debtor pays the wrong party as a result of his ignorance as to the operation of a condition, he is protected. Of course, the debtor who wishes to ensure the correct party is paid can always raise a multiplepoinding.

[169] See generally, T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1, 47. Cf *Johnstone v Irving* (1824) 3 S 163 (NE 110) where there was a purported conditional assignation of a lease.

[170] S Scott, *The Law of Cession* (2nd edn 1991) at 151: 'The question whether the cession itself (the transfer agreement) can be subject to a condition has never been specifically addressed by the South African courts and poses very serious problems'. For potestative conditions see D Daube, 'Condition Prevented from Materialising' (1960) 28 *TvR* 296.

[171] Professor Gretton, 'Diligence' in *SME*, vol 8 (1992) para 285 suggests that, 'if money is arrested, the arrestment is regarded as a conditional assignation to the arrester, to be purified at furthcoming'. But this analysis does not assist. For to suppose every arrestment an assignation subject to the (suspensive) condition of furthcoming, is but a complicated of way of saying that an arrestment per se is not a transfer, but arrestment plus furthcoming is. That is not to say that a delivered assignation is a transfer subject to the condition that the assignation is intimated, or that delivery of a disposition is a transfer subject to the suspensive condition that the disposition is registered. Admittedly, an arrestment, of itself, is effective: an arrestment prior to furthcoming takes precedence over an unintimated assignation.

[172] If C2's insolvency administrator does pay, will the claim automatically transfer to C3? After all, he has intimated his assignation before C2's insolvency administrator was appointed. However, in so far as C3's position is based on accretion, or the principle in *Edmond v Magistrates of Aberdeen* (1855) 18 D 47 aff'd (1858) 3 Macq 116, it is accepted that the intervening insolvency of the transferor prevents transfer to C3.

[173] Cf E Cashin-Ritaine, *Les cessions contractuelles de sommes d'argent dans les relations civiles et commerciales franco-allemandes* (2001) 44, n 123.

(b) Resolutive conditions

10-57. A resolutive condition in the transfer agreement is a personal obligation.[174] It imposes an obligation on the assignee to retrocede, but no more. A transfer agreement subject to a resolutive condition will operate as a transfer. The claim will pass to the assignee. Should the resolutive condition be triggered, this merely places the assignee under a personal obligation to retrocede the claim. On purification, a resolutive condition will not automatically divest a singular successor.[175] It has no effect on the creditors of the transferee.[176] They can attach the asset after purification of the resolutive condition as before. So, if the assignee is sequestrated after the occurrence of the condition but before he has retrocessed,[177] then the assigned claim will form part of the assignee's estate.

10-58. Stair questions whether conditions in a sale can have 'real' as well as obligatory effect. For Stair, the general principle is that conditions suspending transfer are absolutely valid; resolutive conditions, invalid. Resolutive conditions do not affect singular successors.[178] The reason is clear. Where the condition is suspensive in nature and the putative transferee purports to transfer to a third party prior to the satisfaction of the condition, he has nothing to transfer.[179] An assignation subject to a resolutive condition is a transfer nonetheless. C assigns to C1 subject to a resolutive condition if payment is not made within 14 days. If C1, in turn, assigns within that fourteen-day period, the assignation is effective. Subject to the offside goals caveat, the position of a singular successor is unassailable:

> 'The doubt remains if such personal conditions with such clauses resolutive be in the body of the bargain,[180] whether it be effectual against singular successors, who cannot know their author's rights? And, therefore, are *in dolo et male fide*, if they

[174] Bell, *Commentaries* (7th edn 1870) I, 260 following Stair I.xiv.5 observes that even if a singular successor has knowledge of the prior right of another in terms of a resolutive condition, it will not affect the asset transferred. But see para 11-22 below: fraudulent acquisition by another, frustrating the creditor in the condition could render the acquirer liable to make reparation.

[175] Cf *Durham Bros v Robertson* [1898] 1 QB 765 where the inclusion of a resolutive condition rendered the assignment conditional and thus equitable. A legal assignment in English law must be absolute.

[176] Bell, *Commentaries* (7th edn 1870) I, 260.

[177] That is, an intimated retrocession; for which, see para 6-42. In the Scottish sources the verb, 'to retrocess', is common: see, eg, Scottish Law Commission Report No 197, *Report on Registration of Rights in Security by Companies* (2004) 26. But since one 'cedes' a claim where there is a cession, on retrocession it seems more natural to say that the assignee 'retrocedes'. But the usage is irregular: the past participle is 'retrocessed', not 'retroceded'.

[178] Stair I.xiv.5. But what of the assignation of a *jus quaesitum* (as opposed to a *spes successionis*) which is subject to defeasance/return? This problem is less complicated than it first sounds, because the resolutive condition is intrinsic to the right assigned. As such the debtor (the executor) will always know of its nature. The situation discussed here is of a condition in the transfer rather than a condition in the right assigned. The tract of authority dealing with bonds of provision is discussed in para 11-46 below. Cf *William Morton & Co v Muir Bros* 1907 SC 1211.

[179] Accretion is considered at para 11-46 below.

[180] Stair assumes in the previous paragraph that conditions which are not in the body of the bargain are not good against singular successors, but only between the parties themselves.

acquire such rights in prejudice of the conditions thereof; and so *ex dolo*, at least such clauses will be effectual against singular successors…"[181]

10-59. Bell summarises Stair's position thus:

'…such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors taking voluntarily conveyances ex necessitate, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a *jus ad rem*, not a *jus in re*. There may, indeed, be fraud in such a voluntary acquisition, which may expose the acquirer to a claim of damages; but even that claim is merely personal and will not pass with the property.'[182]

10-60. This passage goes a considerable way to support the view that the so-called offside goals rule is of much narrower compass than some have previously supposed: even a fraudulent acquirer who deliberately seeks to frustrate the rights of the party is whose favour the resolutive condition is couched is only bound to make reparation. His title is not subject to reduction. Offside goals are discussed in their proper place.[183]

(c) Romalpa clauses

10-61. In a sale of goods, the so-called *Romalpa* clause is well known.[184] '*Romalpa* clause' has two senses in Scots law. One is all-sums retention of title; the other, an attempt to impose a trust on the proceeds of any sub-sale concluded by a buyer in possession. Both senses fall within the scope of an English *Romalpa* clause. The English clause, *inter alia*, additionally purports to assign to the original seller the proceeds of any unauthorised sale by the buyer in possession. The buyer in possession is also obliged to hold any proceeds in trust for the seller. In English law, the equitable assignment can only be understood in terms of the trust.[185] In Scots law, in contrast, an attempt by a cedent to hold an asset in trust for X is the converse of transferring that asset to X. The Court of Session has been hostile to any attempt to impress a trust in this situation.[186] Take a clause obliging the buyer in possession to assign any proceeds to the original seller. Would it be effective

[181] Stair I.xiv.5. This passage is qualified by three exceptions, viz, (1) where the transfer is involuntary, but in satisfaction of debt, as by diligence; (2) where the purchaser is a creditor and there is no other way of obtaining payment; and (3) where the acquirer is aware of the resolutive condition but is unsure whether the present right of the transferor is merely personal or real, the acquirer's right will be good in so far as he will be able to transmit a good right to a *bona fide* transferee (i.e. voidable). In the third case the acquirer is fraudulent, but this being a merely personal obligation he can still transfer a good right.

[182] Bell, *Commentaries* (7th edn 1870) I, 260.

[183] See para 11-06 below.

[184] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. See in particular the comment by Professor Goode, 'The Right to Trace in Commercial Transactions' (1976) 92 *LQR* 528.

[185] But English law in this area is unsatisfactory. Such an equitable assignment would create a registrable charge, yet Romalpa clauses are never registered: see R Goode, *Commercial Law* (3rd edn 2004) 608. At 459, n 55, Goode observes that the *Romalpa* case has, in this respect, 'been distinguished almost out of existence'. See too *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 PC.

[186] *Clark Taylor & Co v Quality Site Development (Edinburgh) Ltd* 1981 SC 111 discussed by W A Wilson, 'Romalpa and Trust' 1983 SLT (News) 106.

in Scots law? It is often asserted that no words of conveyance are necessary to effect an assignation.[187] But there remains an important distinction between an undertaking to assign and the execution of it. A mere agreement to assign is not an assignation. In any event, the transfer agreement must be intimated to the debtor.[188] The question is whether the original seller could validly intimate the assignation (the clause in the sale agreement) to the sub-purchaser and effect an assignation of the price. There is an abstract issue about whether intimation to the debtor of an agreement to assign without intimation of an actual deed of assignation would be sufficient. Such intimation would not comply with the style in the schedule to the Transmission of Moveable Property (Scotland) Act 1862. While the debtor cannot be prejudiced if he pays the putative assignee pursuant to this intimation, the assignation is invalid.

[187] *Carter v McIntosh* (1862) 24 D 925 at 933 *per* Lord President Inglis.
[188] *Bank of Scotland v Liquidators of Hutchison, Main & Co* 1914 SC (HL) 1.

11 Contractual Prohibitions and Bad Faith

A. GRATUITOUS ASSIGNATIONS

11-01. Contracts in Scots law are binding without consideration. But there may be serious transfer consequences if an assignation is made for no consideration. On competition, a gratuitous assignation cannot compete with an antedated onerous assignation even if the gratuitous assignation is intimated first.[1] These *dicta* are consistent with the general approach in the law of transfer to equiparate

[1] *Frazer v Phillworth* (1662) Mor 938; *Alexander v Lundies* (1675) Mor 940 (followed in *Blair v Blair* (1713) Mor 13517); *Blair v Austin* (1695) Mor 941; *Hay v Hays* (1699) Mor 942 cited by Bankton II, 191, 8; *Wilson v Saline* (1706) Mor 942; *Executor Creditors of Meldrum v Kinnier* (1717) 1 Kames Rem Dec 17. See also *Campbell and Riddoch v Stewart* (1675) Mor 1011. The effect of the insolvency of the granter will, however, have serious consequences which may prevent even the onerous assignee from receiving a transfer of the claim, for which see 'Offside Goals' below.

lack of consideration with bad faith.[2] Since bad faith has transfer consequences (for which see the following section) so too does lack of consideration. Therefore, those rules which apply to *mala fide* transferees, similarly apply to gratuitous transferees.[3] Bad faith and lack of consideration are, for the purposes of the law of transfer, one and the same. Bankton, for instance, discusses the same authorities which form the basis of his discussion of the offside goals rule, and indeed his discussion of the *actio Pauliana*. Yet, there are some cases which penalise gratuitous transfers which would not fall to be penalised if the transferee was merely in bad faith. A gratuitous assignation, it seems, cannot compete with a post-dated and post-intimated onerous assignation.[4] This would suggest that the rule *prior tempore potior jure est* applies only to rights granted for a good consideration.[5] These cases are not to be confused with those involving assignations themselves onerous, but an assigned right or bond which bears to be gratuitous.[6]

11-02. In *Bells v Mason*,[7] Lord Kames, in discussing the evolution of the law of assignation in Scotland, states that 'in our later practice an assignation, *with respect to deeds for valuable consideration*, has obtained the force and effect of a *cessio in jure*'[8] and later he especially observes that 'Obligations for valuable consideration, it is true, are always transmissible to heirs and assignees'.[9] An obligation granted for no consideration may be reducible for various reasons. That it has been assigned several times will not make it any less liable to reduction.

11-03. There is one major caveat which must underpin this discussion (and that discussion which follows, on the offside goals rule). As has been emphasised, issues of validity cannot prejudice the *debitor cessus*. Assignation would leave the debtor in an intolerable position if, after paying a gratuitous assignee, he were

[2] See Reid, *Property* para 699. Cf *Anderson v Lows* (1863) 2 M 100 at 104 *per* Lord Curriehill: 'The rule that the fraud of an author is not pleadable against a singular successor does not operate if that successor be either *mala fide*, or be not an onerous successor. The rule of the civil law is also the law of Scotland. *Dolus auctoris non nocet successori nisi in causa lucrativa.*' Interestingly, in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893, Lord Hardwicke LC states that the doctrine of notice in English law is based on fraud. Whatever might constitute fraud in modern English law, in *Le Neve*, Lord Chancellor Hardwick invoked the standard civilian definition of *dolus malus* in D 4.3.1.2 (Labeo). This is the same notion of fraud that allowed Scots law to develop a wide general principle of fraud, for which see generally McBryde, *Contract* para 14-02.

[3] Indeed a gratuitous obligation, exceptionally, can be set aside on the grounds of uninduced unilateral error: *Dickson v Halbert* (1854) 16 D 586; *Mercer v Anstruther's Trs* (1871) 9 M 618; *Hunter v Bradford Property Trust Ltd* (1960) reported at 1970 SLT 173 HL.

[4] *Patrick Finlaw v Jhone Park* (1621) Mor 895; Hope, *Major Practicks* VI, 44 § 16; Bankton II, 191, 8. In *Craw v Irvine* (1623) Mor 2771, an anterior assignee was required to prove that he had given good consideration before he could take preference over a posterior arrestment. Cf *Meggat v Brown* (1827) 5 S 343.

[5] Bankton II, 191, 6: 'and a second assignation, *for valuable consideration*, first intimated, will be preferable' (emphasis added). See also *Anderson v Lows* (1863) 2 M 100.

[6] *Hay v Jamison* (1672) Mor 1009. Cf *Thompson v Jolly Carters Inn* 1972 SC 215 OH where a proof before answer was allowed on an averment that the bill had been granted for no consideration, the question arose whether a countermanded bill of exchange still operated as an assignation of the funds.

[7] (1749) Mor 6332; 2 Kames Rem Dec 188.

[8] 2 Kames Rem Dec 188 at 191 (emphasis added).

[9] At 191–192.

subsequently found liable to pay a posterior onerous assignee. The debtor must at all times be protected. Providing he pays in good faith he is discharged. Therefore the principles discussed in the previous paragraphs, which regulate the competition between gratuitous and onerous assignees, apply only to competition between competing transferees where there has been no payment by the debtor. The most common situation will be where a multiplepoinding has been raised; often, the real raiser will be the debtor.

B. BAD FAITH AND 'OFFSIDE GOALS' [10]

(1) Introduction

11-04. Following Lord Justice-Clerk Thomson's dubious analogy with the beautiful game,[11] Scots private law contains the so-called 'offside goals' rule. The situation is, typically,[12] the notorious double sale. S contracts to sell property to A1. In breach of that agreement S then sells to A2. A2 completes the transfer first. If A2 was aware of A1's prior contractual right, then A1 can reduce any conveyance to A2. The analogy with football is imperfect since an offside goal is never a goal. In the double sale situation, the title of A2 is only voidable.[13] If he sells to X before A1 reduces, and X is in good faith and gives value, X's title is unimpeachable.

11-05. In many respects this rule is exceptional. One of the dogmatic principles of the law of property is that a transferee is not concerned with the personal obligations of his author.[14] It is from these foundations that the possibility of a race to the register ensues: where there are two creditors with contractual rights to property, the first to complete title, i.e. become owner, is preferred. The offside goals rule flies in the face of these apparent axioms. The recent case of *Alex Brewster & Sons Ltd v Caughey*[15] concerned a point raised in *obiter dicta* in *Rodger (Builders).* Suppose a buyer contracts in good faith. He subsequently learns of the seller's prior contract to sell the same property. He runs to the register. Is his title voidable? If so, it comes very close to saying that transfers of property are

[10] For an earlier version of this section, see 'Offside-Goals before *Rodger Builders*' 2005 *JR* 277.

[11] *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 501 *per* Lord Justice-Clerk Thomson: '[The transferees] assumed that their title would be safe once the goal of the Register House was reached. But in this branch of the law, as in football, offside goals are not allowed'.

[12] The doctrine may also affect a transferee of property who is aware of a pre-existing obligation on the part of the transferor to grant a subordinate real right, for which see: *Bowack v Croll* (1748) Mor 1695 and 15280; Elchies, *Fraud* No 18 (I am grateful to Scott Wortley for this reference); *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510.

[13] It might be hoped no authority would be required for this proposition. But see Law 10 of the *Laws of the Game*, published by FIFA, at *http://www.fifa.com/en/game/laws.html*: 'A goal is scored when the whole of the ball passes over the goal line, between the goalposts and under the cross bar, provided that no infringement of the laws of the game has been committed previously by the team scoring the goal'. A goal scored from an offside position is an 'infringement' in terms of Law 11. Appropriately, Scott Wortley labels *Rodger Builders*, 'The Offside Trap, or The Case of the Inappropriate Metaphor' in, *100 Cases Every Scots Law Student Should Know* (2001) 79.

[14] Reid, *Property* para 688.

[15] 2002 GWD 15-506 ('*Alex Brewster*').

to be regulated by the date of the contract to transfer,[16] or that knowledge of another's contracts may render property rights open to challenge. Surprisingly, despite the increasing interest in the offside goals rule, its historical development in the Scottish sources has not been fully explored. This is unfortunate. The history sheds considerable light on the relative importance of the doctrine to Scots law.

(2) History of 'offside goals'

(a) General

11-06. The problem of double sales in Scots law is old. The Parliament of Scotland found it necessary to pass the Stellionate Act as early as 1540.[17] There is voluminous continental literature on the subject.[18] Indeed, according to the preamble of the Real Rights Act of 1617,[19] the main motivation behind the creation of the Register of Sasines was the problem of the seller who, 'concealing of sum privat Right', sought to sell the property again.

(b) Stair [20]

11-07. Stair treats the offside goals rule in the context of the effect of a resolutive condition (*pactum legis commissoriae*) on the transfer of an asset. As he perceptively points out, it is not possible for a resolutive condition to have 'real' effect. The transfer of property is unitary and (probably)[21] abstracted from the provisions of the agreement which it may implement. The effect of such a condition is, therefore, only personal: on the occurrence of the event, the transferee may be subject to a personal obligation to reconvey to the seller. With regard to the effect of a singular successor's knowledge of a prior right, Stair makes an important distinction. On the one hand is private knowledge. Where a subsequent transferee has prior knowledge of a prior right this may give rise to an obligation of reparation; that is, A1 may have a personal right to damages. On the other hand is *certain* knowledge, that is, knowledge which A2 has

[16] Cf English equity jurisprudence: J McGhee, *Snell's Equity* (31st edn 2005) para 5-25: 'Equity looks on that as done which ought to have been done.' It may be that South African law is not of great assistance in this area, as the doctrine of notice there developed under a strong English influence. In the most recent case in the Supreme Court of Appeal, a majority of the judges suggested that the doctrine is based on equity: *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 at 788D–E *per* Cloete JA. But compare the opinion of Olivier JA, especially at 791I–J, who warned that to appeal to 'equity' as the basis of the rule would 'degenereer ons reg tot 'n kasuïstiese, arbitrêre en sisteemlose benaderingswyse'.

[17] APS, c 23; 12*mo*, c 105.

[18] For a full survey, see R Michaels, *Sachzuordnung durch Kaufvertrag* (2002). The genesis of the rule, however, remains obscure: see Michaels, 107.

[19] Cap 16 (same chapter number in both APS and 12*mo*).

[20] Stair I.xiv.5. Unless otherwise indicated, all references are to D M Walker's Tercentenary edition. This is essentially a reprint of the second edition of 1693.

[21] Whether Scots law subscribes to the *Abstraktionsprinzip* or to the doctrine of *justa causa traditionis* is somewhat controversial. Compare McBryde, *Contract* paras 13-01 ff and Reid, *Property* para 608. D L Carey Miller, *Corporeal Moveables in Scots Law* (2nd edn 2005) para 8-06 and Carey Miller, 'Systems of Property: Stair and Grotius' in D L Carey Miller and D W Meyers (eds) *Comparative and Historical Essays in Scots Law* (1992) 28–30 concludes that Stair adopts the abstract theory.

acquired as a result of some legal interpellation, such as citation. Only in this (perhaps unusual) situation will there be a right of reduction for A1. Stair also states that creditors doing diligence need not be in good faith:[22]

> 'These who acquire such rights without necessity, and see therein such conditions in themselves personal, though having resolutive clauses, do not thereby know that the third party[23] hath the right *jus in re*, but only *jus ad rem*; and, therefore, if they acquire such rights, the property is thereby transmitted. And though there may be fraud in the acquirer, which raiseth an obligation of reparation to the party damnified by that delinquence, yet that is but personal; and another party acquiring *bona fide* or necessarily, and not partaking of that fraud, is *in tuto*. [***][24] But certain knowledge, by intimation, citation, or the like, inducing *malam fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, not being of necessity to satisfy prior engagements, are reducible *ex capite fraudis*, and the acquirer is the partaker of the fraud of his author, who thereby becomes a granter of double rights; but this will not hinder legal diligence to proceed and be completed and become effectual, though the user thereof did certainly know any inchoate or incomplete right of another.'[25]

11-08. The third edition of the *Institutions* contains an important additional passage:

> 'But for the matter of the fraud itself, tho' in equity, private knowledge may be sufficient to infer reparation; yet, in many cases, positive law, and our custom, respects not private knowledge, but such only as is by public acts, which is specifically allowed in the law; and, therefore he who knows another to have an imperfect right, doth yet validly acquire in prejudice thereof, as he who knows an assignation unintimated, and takes another, is preferred, June 15th 1624 *Adamson*.[26] Nor doth the private knowledge of an assignation supply intimation as to the debtor, March 14th 1626, *Westraw*;[27] Had[dington] Jan 10th 1611, *Graham*[28]: and he who knows another to have a disposition of lands without public infeftment, if he acquire right, and be first publically infeft, is preferred, Feb 24th 1636, *Oliphant*.[29] Neither is an executor obliged to call the debtor of a defunct having done no legal diligence, but may safely pay to other creditors doing diligence, tho' the executor had paid him a part of the debt. July 16th 1629 *Telzifer*.[30] But legal [sic] knowledge ....'[31]

11-09. Useful[32] reference may often be had to the third edition of Stair. The editors liberally added to the text of the second edition from the manuscripts

[22] This has always been accepted in principle. But the authorities were conflicting and the point was authoritatively confirmed only recently: *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 141 *per* Lord Rodger of Earlsferry.

[23] That is to say, the original seller: on the occurrence of the specified event, the property will not automatically revert to the original seller. Admittedly, this passage is not easy to follow.

[24] The text as quoted here is from the second edition. As will be seen in para 11-08, some of the later editions insert additional text in this bracketed part.

[25] I.xiv.5. Emphasis added.

[26] *Adamson v McMitchell* (1624) Mor 859.

[27] *Westraw v Williamson and Carmichael* (1626) Mor 873.

[28] *Graham v Livingston* (1611) Mor 13089.

[29] *Oliphant v Oliphant* (1636) Mor 10547; Spotiswoode 233.

[30] *Sub nom Telfer v Wilson* (1629) Mor 2190 and 3868.

[31] Stair, *Institutions* (3rd edn, J Gordon and W Johnstone, 1759) I.xiv.6. This passage is reproduced in italics in More's (5th edn 1832) edition.

[32] The adjective is Professor Walker's: see his 'Introduction' to the Tercentenary edition, at 45.

of the *Institutions*[33] on which Stair apparently had been working before his death and which were deposited in the Advocates' Library.[34] Stair looks to the law of assignation as his paradigm example of transfer. Two of the authorities cited by Stair (*Westraw* and *Graham*) hold that the debtor's private knowledge of an assignation by the cedent is insufficient to prevent the debtor from lawfully paying the cedent. Transfer only occurs on legal intimation of the assignation.[35] Put another way, the debtor is interpelled only by a formal legal act; private knowledge is irrelevant. Stair seeks to apply the same principles to the double sale situation by analogy.[36] It is often said that the double sale is fraudulent. This is certainly consistent with the very general concept of fraud in Scots common law. But a double sale is also a breach of warrandice. The obligation to repair this wrong is personal to the wrongdoer, the contract-breaking seller. But without some legal interpellation, bringing the pre-existing contractual obligation to A2's notice, the latter's position is unassailable. This holds true both for assignations (*Adamson*) and for land (*Oliphant*). Thus the importance of this passage, if genuine,[37] cannot be overstated: Scotland's foremost institutional writer deprives the so-called 'offside-goals' rule of almost all practical effect. And there is good reason to consider the passage authentic. It bears a considerable resemblance to Stair's discussion of real rights:

> 'This right [to fruits] is only competent to possessors *bona fide*, who do truly think that which they possess to be their own, and know not of the right of any other.[38] But private knowledge upon information, without legal diligence, or any other solemnity allowed in law, at least unless the private knowledge be certain, is not to be regarded, nor doth constitute the knower in *mala fide*, March 14, 1626, *Nisbet and Westraw v Carmichael* [Mor 859].'[39]

[33] The addition of this text, like others, is vigorously attacked by Brodie in his (4th edn 1826) edition, I.xiv.6, note b, 148–149. As Professor Walker points out, however, Brodie was equally guilty of innovating on Stair's text, despite his assertions to the contrary: see Tercentenary edition, 'Introduction', 46. The text added in the third edition does, at least, seem to be written very much in Stair's style.

[34] A detailed comparison of the various manuscript copies of the *Institutions* remains to be done. This is unfortunate, as many passages in Stair appear contradictory. Of a later passage (I.x.16, for which see para 8-02 above), George Joseph Bell, *Commentaries* (2nd edn 1810) 150, note n, observes – with some irritation – 'There are passages in Stair's work which are deformed with a sort of confusion and rambling, that suggests the notion of having been originally put down amidst the hurry of business, to be afterwards more fully considered, and correctly written, and, from carelessness, having found their way into the hands of the printer.'

[35] See also the authority cited in the note to H L MacQueen et al (eds), *Gloag & Henderson: The Law of Scotland* (12th edn 2007) para 33-06, which has remained unchanged since the first edition of the work.

[36] Although, as Erskine II.i.28 points out, the analogy is not a perfect one: the debtor in an assignation is not a competing transferee. Cf *Bairdy v Henderson* (1688) Mor 8395 where it was successfully argued that private knowledge, even if acquired before A2 contracted with S, is not relevant.

[37] And the point may be debateable. Stair covers the issue of supervening knowledge expressly (see para 11-24 below). This would be a strange thing to do if the offside goals rule was not part of the law at all. But it should be remembered that Stair was not always consistent: see Bell's comment quoted at n 34 above. Further, although it could be argued that the excised passage was deliberately omitted by Stair, the contrary can be argued with equal force: this was a passage that he wanted to include but was lost.

[38] Citing D 50.16.109.

[39] II.i.24.

11-10. For Stair, then, transferees are required to take cognisance only of public information or formal legal acts.[40] Admittedly, it is not evident what Stair means by 'unless the knowledge be certain'. One would have thought that an equivalent to such a solemnity would at least be required; for instance, a copy of the deed, on which the competing party founds, being produced to A2. The moment up to and until such a notice can be effectually made will be discussed below.

(c) Kames

11-11. In his 'History of Property',[41] Kames, like Stair, discusses 'offside goals' in the context of resolutive conditions. Like Stair, Kames refuses to accord real effect to resolutive conditions, because,

> '…if I shall divest myself of any moveable subject, bestowing it upon my friend but declaring that although he himself may enjoy the subject, he shall have no power of disposal, such a deed will not be effectual in law. If I am totally divested, he must be totally invested; and consequently must have the power of alienation.'[42]

Kames further justifies his analysis of resolutive conditions on the basis of a weak offside goals rule. A resolutive condition

> '…can in no view have a stronger effect, than a contract of sale executed by a proprietor who is under no such limitation. All the world knows that his will not bar him from selling the land a second time to a different person who, getting the first infeftment will be secure; leaving no remedy to the first purchaser, but an action for damages against the vender.'[43]

11-12. But Kames also makes a unique contribution. Part of his discussion of resolutive conditions had been directed at what he thought a particular evil: the law of entails.[44] For Kames, if no declarator of irritancy had been obtained, transactions in breach of the entail had to be effectual. He observed that there had been a decision of the court[45] to the contrary. Resolutive clauses 'engrossed on the infeftment' were 'sustained as being equivalent to interdiction'. And this was quite groundless:

> '…there is certainly no ground for bestowing the force of an interdiction upon prohibatory and resolutive clauses in an entail. An interdiction is a writ of common law, prohibiting the proprietor to sell without the consent of his interdictor, and prohibiting every person to deal with him without such consent. It is notified to all and sundry by a solemn act of publication which puts every person in *mala fide* to

[40] It is notable that in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) both parties held only a *jus ad rem*: A1 obtained an interim interdict preventing registration of the conveyance of the property to A2. Therefore, although A2 alleged that he was in good faith at the time of the conclusion of the contract, he took subject to the servitude that S had bound himself to grant to A1. Scots law is not clear. Some statements by the institutional writers suggest that where the matter has been rendered 'litigious', i.e. registration is prohibited by legal process, A2 will be bound by A1's prior right. The question remains open, however, whether, and on what basis, A1 could properly interdict A2 from registering where A2 has contracted in good faith.

[41] H Home, Lord Kames, *Historical Law Tracts* (2nd edn 1761) Tract III.

[42] *Historical Law Tracts* at 121.

[43] *Historical Law Tracts* at 137.

[44] Entails were recognised in Scots law by the Entails Act 1685 (APS, c 26; 12*mo*, c 22).

[45] *Viscount Stormont v Creditors of Annandale* (1662) Mor 13994.

> deal with the proprietor interdicted; and it is a contempt of legal authority to transgress the prohibition. Prohibitory and resolutive clauses in an entail, being provisions in a private deed, have no authority except against the heir who consents to them; because none except the heir are supposed to know, or bound to know them: and therefore, such clauses notwithstanding, every person is in *optima fide* to deal with the tenant in tail.'[46]

11-13. Kames forcefully emphasises the distinction between private knowledge and certain knowledge. Private knowledge is for a purchaser's conscience, but no more. The law provides remedies (whether by interdict, inhibition or the like) whereby information can be made public. If A1 does not resort to these legal remedies, however, any knowledge A2 may have of a prior sale is private. And private knowledge is not relevant.

(d) Bankton

11-14. Andrew McDouall, Lord Bankton, published his *Institutes* in 1751–53. Like Stair, Bankton first encounters the question of private knowledge of a prior right in the context of the *pactum legis commissoriae*:

> '…according to the dictates of the civil law, the paction in sale, whereby, 'if the price is not paid in or on or before a precise day, the bargain may be voided by the seller', is *Pactum legis commissoriae*. The nature of this paction is, that the property indeed passes in virtue of the sale and delivery, but may thereafter be revoked by the seller, upon the buyer's not paying the price at the day; therefore it is only personal upon the buyer, and will not affect singular successors in the case of lands purchased, unless upon a lucrative title, or that the matter was rendered litigious, or the provision duly recorded as a reversion, or ingrossed in the seisin duly registered: nor is it effectual against one who purchases from him, who bought species of goods upon such condition, by the often mentioned rule, that *mobilia non habent sequelam*.'[47]

11-15. Bankton is here reading from Stair's hymn sheet. Even where the resolutive condition has been purified, thus giving rise to the personal obligation to reconvey (*jus ad rem*), any knowledge of this prior personal right has no effect on a singular successor; unless, that is, the knowledge is certain (the matter has been rendered litigious;[48] the reversion is registered[49]) or the successor is a gratuitous transferee.

11-16. Bankton returns to the lack of consideration when, like Stair, he discusses the law of assignation. Again, private knowledge of a prior right is immediately addressed in this context. After speaking of the *assignatus utitur iure auctoris* rule, he continues:

[46] *Historical Law Tracts* (2nd edn 1761) at 137.

[47] Bankton I, 417, 31.

[48] As, eg, by inhibition or adjudication: *Morison and Co v Allardes* (1787) Mor 8335; *Duchess of Douglas and Walter Scot, Competing* (1764) Mor 8390.

[49] Post-1617, when the Register of Sasines was instituted. By virtue of the Reversions Act 1469 singular successors were subject to reversions, although it has been disputed whether registration was necessary where the reversion was not in the body of the deed: see references at para 10-51 above. Prior to the 1469 Act, it seems that a singular successor was bound by a reversion in the body of the deed; but not by an extrinsic one. Interestingly, therefore, where a purchaser contracted in good faith for the transfer of property and only subsequently learned of the reversion on examination of the deeds, the purchaser would nevertheless be bound by the reversion though he learned of it only subsequently.

> 'And, for the same reason, if the second assignation be gratuitous, tho' first intimated, it must yield preference to the first; for the objection that lay against the cedent, of granting double rights,[50] is good against the second gratuitous assignee, without distinction whether the first assignation was gratuitous or not, since the first assignee is creditor to the cedent, by the express or implied warrandice in the right. (*Alexander* July 15th 1675);[51] and no creditor can be prejudiced by a subsequent gratuitous deed in relation to the same subject, which is manifestly fraudulent.'[52]

11-17. Importantly, Bankton makes the link between the offside goals rule and the *actio Pauliana* (the action accorded to creditors to reduce gratuitous alienations or unfair preferences). The offside goals rule can be invoked where A2 is in bad faith *or* where he has given no value. While many cases dealing with the *actio Pauliana* deal with single gratuitous alienations, several are competitions involving the classic double grant: claimants in a multiplepoinding, one holding a gratuitous and the other an onerous assignation of the same claim.[53] Admittedly, there are differences between the *actio* and the offside goals rule. For example, proof that an alienation was made for good consideration is generally a good defence to action based on the *actio Pauliana.* Knowledge of other creditors' rights is not relevant; knowledge of insolvency is.[54] Where a transfer is alleged to be in breach of the offside goals rule, however, a plea of good consideration, apparently, will be of no avail. The cases on the *actio Pauliana*, however, are relevant in so far as they demonstrate that a gratuitous alienee is presumed to be a party to the fraud of the granter of double rights, even although he may have been totally oblivious to the insolvency of the granter.[55]

[50] Stellionate Act 1540 (APS c 23; 12*mo*, c 105).

[51] *Alexander v Lundies* (1675) Mor 940.

[52] II, 191, 8. At II, 243, 8, Bankton compares the position to that in the English counties of York and Middlesex where registration had been introduced for the transfer of land (Land Tax Act 1707, 6 Anne c 35; and Middlesex Registry Act 1708, 7 Anne c 20) as does Henry Home, Lord Kames, *Principles of Equity* (3rd edn 1778) II, 41. Kames cites *Merry v Abney and Kendal* (1663) 1 Chan Cas 38; 1 Eq Cas Abr 330, Ch 42, Sect A, § 1; 21 ER 1081 and 22 ER 682; *Ferrars v Cherry* (1700) 1 Eq Cas Abr 331; Ch 42, Sect A, § 5; 2 Vern 384; 21 ER 1081; 23 ER 845; *Blades v Blades* (1727) 1 Eq Cas Abr 358; 21 ER 1100. Scott F Dickson's assistance in tracing these references is gratefully acknowledged. *Blades* was approved in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893 by Lord Hardwicke LC and in *Agra Bank Ltd v Barry* (1874) LR 7 HL 135 at 148 *per* Lord Cairns LC. See also the opinion of Lord Shand (Ordinary) in *Stodart v Dalzell* (1876) 4 R 236 at 240 who cites *Le Neve* and *Holmes v Powell* (1856) 8 De G M & G 572; 44 ER 510 in 2 White and Tudor's Leading Cases in Equity 37 especially at 64. *Le Neve* was cited in *Rodger (Builders) v Fawdry* 1950 SC 483.

[53] See references in para 11-01 above; and *Ireland v Neilson* (1755) 5 Br Sup 286 (Kilkerran) and 828 (Monboddo). *Ireland* was cited by Lord Monboddo in his dissenting opinion in the well-known case of *Mitchell v Ferguson* (1781) 3 Ross LC 120. See also *Executor Creditors of Meldrum v Kinnier* (1717) 1 Kames Rem Dec 17; *Elliot v Wilson*, 9 February 1826 FC and *Meggat v Brown* (1827) 5 S 343. Cf Stair III.i.6 and Bankton I, 265, 90 for the effect of a gratuitous deed. Interestingly, Kames also draws the parallel between stellionate and gratuitous alienations on bankruptcy: *Principles of Equity* (3rd edn 1778) II, 202–205.

[54] See discussion of the *actio Pauliana* in *Street v Mason* (1672) Mor 4911 and *Bateman and Chaplane v Hamilton* (1686) Mor 1067. Someone attempting to acquire a security in the knowledge that the debtor is insolvent is rightly viewed as '*particeps fraudis*'. It is an unfair preference.

[55] Bankton I, 259, 65; I, 264, 84-85 and I, 265, 90.

11-18. More generally, where an assignation is made gratuitously this may have serious transfer consequences. In a competition (most likely in a multiplepoinding), the holder of an antedated assignation can reduce a posterior gratuitous assignation, even if the gratuitous assignation was intimated first.[56] These dicta are consistent with the general approach of the law on insolvency to equiparate lack of consideration with fraud:[57]

> 'It is likewise the common law that a prior gratuitous alienee is intitled to reduce a second disposition granted to another for a lucrative[58] cause who was first infeft, in the same manner as a first onerous disponee, last infeft, is preferable to a second gratuitous disponee first infeft. This shall hold even tho' the disponer, at the time of granting these rights, was solvent, in respect that the second disposition, in both cases is fraudulent (July 15th 1675 *Alexander* [Mor 940]; December 11th 1695 *Blair* [Mor 941]; February 7th 1699 *Hay* [Mor 942]); for a first disponee, tho' gratuitous is creditor in the warrandice express or implied and therefore intitled to reduce the second fraudulent right: but if the second disposition was onerous, and made to a *bona fide* purchaser, he, being first infeft, is preferable even to a prior onerous disponee, unless the granter was bankrupt at the time, and inchoat diligence used against him (December 11th 1695 *Blair* [*v Austin* Mor 941]; February 5th 1671 *Blair* [*v Blair* Mor 940] ; July 23rd 1662 *Lord Fraser* [*v Phillworth* Mor 938]; January 24th 1706, *Neilson*[59]; and all objections competent against the author are good against his gratuitous successor.'[60]

11-19. In other words, the holder of an antedated onerous conveyance may reduce a gratuitous conveyance dated second, but completed first.[61] Knowledge is not relevant. Bankton discusses the same authorities which form the basis of his discussion of the offside goals rule, and indeed his discussion of the *actio Pauliana*.[62] The cases on bankruptcy in Scotland contain many references to debtors defrauding creditors. Indeed, until 1790,[63] simply becoming bankrupt within three days of accepting goods without payment was deemed fraudulent.[64] While Bankton makes an analogy with the *actio Pauliana* and gratuitous transfers, there is little discussion of the relevance of mere knowledge of prior rights. In the insolvency situation it is readily understandable that dispositions for no

[56] See authorities cited in para 11-01 above. In *Craw v Irvine* (1623) Mor 2771, a multiplepoinding, an anterior assignee was required to prove that he had given good consideration before he could be preferred to a posterior arrester. There are authorities which suggest that a post-dated, post-intimated onerous assignation is to be preferred in a competition to an anterior intimated assignation which was gratuitous: *Patrick Finlaw v Jhone Park* (1621) Mor 895; Hope, *Major Practicks* VI, 44 § 16; Bankton II, 191, 8. Cf *Meggat v Brown* (1827) 5 S 343 and *Anderson v Lows* (1863) 2 M 100.

[57] See Reid, *Property* para 699. Cf *Anderson v Lows* at 104 *per* Lord Curriehill. See, for English law, n 52 above.

[58] In Scots law, 'lucrative' means gratuitous: see Stair III, title 7: 'Lucrative Successors'.

[59] Not found.

[60] Bankton I, 265, 90. Cf Erskine II.iii.27, who notes that: 'a clause exempting the granter from warrandice in the most express terms, is not sufficient to secure him if he shall afterwards grant an inconsistent deed; for no agreement, let it be ever so explicit, ought to protect against the consequences of fraud or deceit'.

[61] See too Stair III.i.6 to the same effect.

[62] Bankton I, 259, 65; I, 264, 84–85 and I, 265, 90.

[63] *Jaffrey v Allan, Stewart & Co* (1790) 3 Pat App 191; 2 Ross' Lead Com Cas 585 rev'g *Allan, Steuart & Co v Creditors of James Stein* (1788) Mor 4949.

[64] See in particular *Inglis v Royal Bank of Scotland* (1736) Mor 4936; 5 Br Sup 193; Elchies, *Bankrupt* No 9. This was also the basis for the decisions in *Prince v Pallet* (1680) Mor 4932; 2 Stair 823 (cited with apparent approval by Stair I.ix.14) and *Main v Keeper of the Weigh House Glasgow* (1715) Mor 4934.

consideration should be attacked. All the good faith in the world is no comfort to the bankrupt's creditors. What is important is whether there has been payment for the transfer. If the transferee has paid for the disposition or assignation, then, in the insolvency situation, it seems that a transferee who knew of a prior right but who completed the transfer first will not be prejudiced by his knowledge (provided always that he has given good consideration and the transfer or security did not amount to an unfair preference). Indeed, in a double sale situation, even if A2 were to attack A1 this is likely to be of little assistance on S's insolvency. Any reduction will benefit only S's creditors.[65] And there is no reason that A2 should have any preferential claim on S's estate.

11-20. What then of the double sale where S is solvent? Bankton clearly bases the doctrine on fraud. Wortley discounts 'fraud' as a relevant basis for the doctrine on the basis that 'mere bad faith' is sufficient; this, he argues, is of some lesser degree than fraud in modern law.[66] According to Bankton, however, mere knowledge on the part of the seller that he is breaching a pre-existing obligation is also fraudulent. In so far as A2 is aware of the breach of this obligation, then 'his [A2] perfecting of the right by infeftment will not avail him; for he is accessory to the party's granting double rights, which not only is a ground for annulling the second as fraudulent but likewise subjects the offenders, and all accessories, to the guilt of stellionate'.[67] A2's position is one of 'statutory presumptive fraud'.[68]

[65] Assuming the reduction is catholic. Cf the view of R J Pothier, *Traité des obligations* (1761) § 153, in M Bugnet (ed) *Oeuvres de Pothier* (1861) vol 2, 72. Where the defender contracted for the transfer of property in the knowledge of the seller's obligation to grant a subordinate real right over it to another, any reduction here would be *ad hunc effectum*.

[66] S Wortley, 'Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right' 2002 *JR* 291 at 301 citing *Petrie v Forsyth* (1874) 2 R 214 and *Morrison v Sommerville* (1860) 22 D 1082. Compare *Battison v Hobson* [1896] 2 Ch 403 at 412 where, in a case dealing with the English doctrine of notice, Stirling J characterised fraud as that which carried 'grave moral blame'. But, in Scots law, fraud has a much wider meaning: 'the Scottish courts, with a background of civilian texts, applied a wide definition of fraud which looks at practical result rather than to the precise nature of the act. The motive is probably irrelevant and it is not necessary to show an intention to cheat': McBryde, *Contract* para 14-02.

[67] Bankton II, 192, 9. In French, the seller who makes a double sale is labelled 'stellionataire': G Ripert, *La règle morale dans les obligations civiles* (4th edn 1949) para 171 cited by G Cliopath, 'Quelque problèmes relatifs à la double vente, spécialement en matière immoblière' (1970) 66 *Schweizerische Juristen-Zeitung* 49 and 65 (2 parts) at 50, n 6. *Le Grand Robert de la langue française* (2nd edn 2001) vol 6, 712 records the first use of the term 'stellionataire' in 1655; and 'stellionataire' in 1680. 'Stellionat' was used in the original Art 2059 *Code civil* in the context of personal arrestment. It denominated fraud in general. The Article was repealed in 1868. The earliest reference to the Latin, 'stellionatus' in France is given in *Le Grand Robert* as 1577. It is not clear when Scots law began to use the term. It is used by Sir George Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678) I.xxviii.1 and is adopted by Erskine, *Principles* (21st edn 1911) IV.iv.41. See too *OED* (2nd edn 1989) 'stellionate'. Both Mackenzie and Erskine use the term in a general sense to denote any type of innominate fraud; as well as more specifically to mean the double sale. The HMSO, *Chronological Table of the Statutes* (2001) II, 2218, for example, refers to the 1540 Act as the 'Fraud' Act, not the Stellionate Act. The term *stellionatus* is found in the Digest: D 47.20 *de stellionatus*; and the Code: C 9.34; see H G Heumann, *Handlexicon zu den Quellen des römischen Rechts* (5th edn 1879) 550. Erskine, IV.iv.79, says that the etymological root of 'stellionate' is 'stellio': 'a serpent of the most crafty kind'; but he refers only to Pliny, and that reference appears to be incorrect.

[68] Bankton I, 264, 85. Although he is here referring to the 1621 Bankruptcy Act (APS and *12mo*, c 18), Bankton states that the basis of the 1540 Act is the same: I, 259, 65.

11-21. Stellionate was indeed a crime.[69] The criminal was the seller, not the transferee.[70] As for the transferee, what is so fraudulent about knowledge of a prior right? Providing A2 has paid good consideration where is the prejudice to A1? S is manifestly in breach of contract but should now be in funds. A1 has a good claim for damages against S.[71]

(e) Bell

11-22. Brief mention can also be made of Bell's treatment of the offside goals rule in the context of resolutive conditions. In preference to some loose statements in Erskine,[72] Bell adopts Stair's analysis:[73]

> '…such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors using diligence, for they know nothing of the nature of the right, nor against creditors taking voluntarily conveyances *ex necessitate*, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a *jus ad rem*, not a *jus in re*. There may, indeed, be fraud in such a voluntary acquisition, which may expose the acquirer to a claim of damages; but even that claim is merely personal and will not pass with the property.'[74]

11-23. Again, this passage is consistent with Stair and Bankton and Kames. Bell does not mention gratuitous transferees. Importantly, however, Bell's contribution is to extend protection for a singular successor: where A1 assigns to A2, and A2 is bad faith (i.e. A2 has private knowledge of S's right by resolutive condition in his agreement with A1), A2's title is good, howsoever that knowledge was acquired. At most A2 has a personal obligation to make reparation.

(3) Alex Brewster

11-24. Wortley's article followed the decision in *Alex Brewster*.[75] That case revisited an issue of principle which was raised *obiter* in *Rodger (Builders)*: if, after the conclusion of the missives with A2, A2 learns of the pre-existing obligation on the part of the granter to dispone to A1, and A2 registers first, is A2's title voidable in terms of the offside goals rule?[76] These facts seem to illustrate a classic, perhaps paradigm, race to the register. Yet, the *obiter dicta* of Lord Justice-Clerk Thomson, followed by the Lord Ordinary in Alex Brewster, suggest that private knowledge

[69] Until 1964: Statute Law Revision (Scotland) Act 1964, Sch 1.

[70] See Stellionate Act 1540 (APS, c 23; 12*mo*, c 105).

[71] S's liability, being based on fraud, is one from which he will not be discharged through bankruptcy: Bankruptcy (Scotland) Act 1985, s 55(1)(c).

[72] III.iii.11. See too Lord Ivory's criticism of Erskine's text: (5th edn 1824), 648, n 108.

[73] I.xiv.5.

[74] Bell, *Commentaries* (7th edn 1870) I, 260.

[75] 2002 GWD 15-506.

[76] *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 500 *per* Lord Jamieson; at 501 *per* Lord Justice-Clerk Thomson. Cf *Alex Brewster*, transcript, para [71]. The facts of *Alex Brewster* were complicated. See the caveat at para 11-30 below.

of a pre-existing obligation acquired *after* the conclusion of the missives is sufficient to render a following transfer voidable.[77] There are major difficulties with such a suggestion.[78] The axiomatic principle of Scottish property law is that ownership of heritable property passes only on recording or registration.[79] It is this basic rule which gives rise to the possibility of a 'race to the register'. Leaving involuntary transferees out of the equation (such as trustees in sequestration), the effect of the Lord Ordinary's decision is to say that the only legitimate race to the register is a blind man's race: one in which one of the participants has no idea whom he is racing or even whether he is racing at all. According to the *Alex Brewster* case, if A2 learns that he is indeed running a race to the register with one who holds a prior personal right (i.e. A1), his title is subject to reduction. With respect, such a view is undesirable. The offside goals rule is an exception to the principle *prior tempore potior jure est*.[80] In Scots law, competition of titles is regulated in terms of the date of transfer: recording or registration (immoveables); delivery (corporeal moveables at common law) and intimation of delivery of the transfer agreement (claims). Where A2 contracts to buy property in good faith, pays the price and receives a disposition in ignorance of a pre-existing obligation, why should he be prejudiced by subsequent knowledge? Stair, more than once, resolves the issue of subsequent knowledge clearly, concisely and in accordance with principle:

> 'But certain knowledge, by intimation, citation, or the like, inducing *malam fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, *not being of necessity to satisfy prior engagements*, are reducible *ex capite fraudis*, and the acquirer is the partaker of the fraud of his author, who thereby becomes a granter of double rights…'[81]

> '…fraud is not competent by exception but by reduction … fraud being of a criminal nature, it is not relevant against singular successors, not partakers of the fraud, but only against the committers of the fraud, and these representing them, especially as to feudal rights: for so it is expressly provided by the fore-mentioned statute; the reason whereof is, to secure land rights, and that purchasers be not disappointed; and therefore no action can be taken effectual against them, upon the fraud of their

[77] *Alex Brewster*. There are a number of possibilities for the moment after which the offside goals rule cannot apply: missives, payment, delivery of the disposition etc. These possibilities are discussed at para 11-27 below.

[78] Although it does seem to be consistent with Professor Carey Miller's important contribution, 'Good Faith in Scots Property Law' in A G M Forte (ed) *Good Faith in Contract and Property Law* (1999) at 109, with which the author would disagree.

[79] Abolition of Feudal Tenure (Scotland) Act 2000, s 4. In parentheses, it is interesting to note that both Bankton II, 243, 2 and Kames, *Principles of Equity* (3rd edn 1778) II, 41 referred comparatively to the counties of England which had introduced registration for the transfer of land, see para 11-16 above.

[80] Or, for those who like to summarise principles in Latin maxims, *qui primus jus suum insinuaverit praeferetur*. See A Menzies, *Lectures on Conveyancing* (1856) 243.

[81] I.xiv.5, emphasis added. An edited version of this passage, importantly including the italicised part, is quoted by Reid, *Property* para 695, n 8. The italicised passage is emphasised by Reid in para 697, n 1.

authors, unless they were accessory thereto, at least by knowing the same when they purchased: *but supervenient knowledge will not pre-judge them*.'[82]

11-25. These passages fit neatly with the passage attributed to Stair by the editors of the third edition: private knowledge is insufficient; only certain legal interpellation will prejudice a second purchaser. So, creditors doing diligence are not affected by private knowledge. This is again in line with the Scots law of assignation, where private knowledge is not relevant in the matter of payment by the debtor to the cedent after delivery of the assignation to the assignee but prior to intimation.[83] Some more modern sources, it must be conceded, admit private knowledge.[84] But Stair's passage dealing with supervening knowledge is still good law.[85]

(4) English law

11-26. At the outset of this section, it was mooted that the decision in *Alex Brewster* comes close to regulating the transfer of heritage by the date of the contract, on the basis of the principle that 'equity will hold as done that which ought to have been done'.[86] Yet even the law of equity in England would be of no assistance to A1 in the *Alex Brewster* situation.[87] In English law, priorities are also regulated by the well-known equitable principle: *qui prior tempore est, potior jure est*. But equity converts agreements to transfer into transfers. It is the date of the contract, therefore, that is relevant.[88] This principle is subject to an exception in the case of the *bona fide* purchaser without notice. So, where A1 contracts for the sale of property and pays the price, S becomes a constructive trustee for A1. If A2 then contracts with S for the sale of the same property and pays the price in good faith and without notice of the prior sale to A1, then he is also entitled to equity's protection. The equities are equal; and, where the equities are equal, the law prevails.[89] A2 will 'prevail over a prior equity if he subsequently gets into a legal estate, even if he then has notice of the equity. Between himself

[82] Stair IV.xl.21, emphasis added. Logically, there is the possibility that Stair could be referring here only to knowledge acquired after recording of the disposition. But while this is a possible explanation, it is not consistent with the traditional Scottish approach to the 'race' to the register.

[83] See para 6-21 above.

[84] See eg Erskine II.i.28; Bankton I, 265, 90; *Clark v Loudon* (1856) 18 D 499 at 505 *per* Lord Justice-Clerk Hope. Cf *M'Gowan v Robb* (1862) 1 M 141.

[85] Cf the position in modern French law: P Simler and P Delebecque, *Droit civil, les sûretés: la publicité foncière* (3rd edn 2000) para 749: 'S'il n'a été informé de l'existence d'un acte antérieur non publié que postérieurement, mais avant d'avoir lui-même procédé…le premier acte lui est inopposable'.

[86] See para 11-05 above.

[87] It should be noted that, following the Land Registration Act 2002, equitable rights have a far smaller role to play. Equitable principles remain important, however, in the transfer of personal property.

[88] *Macmillan Inc v Bishopsgate Investment Trust plc* [1995] 1 WLR 978 at 1022 ff *per* Millet J.

[89] Snell's third maxim of equity: J McGhee (ed) *Snell's Equity* (30th edn 2000) para 3-08; (31st edn 2005) paras 4-03 ff. Cf *Glasgow Feuing and Building Co v Watson* (1887) 14 R 610 at 619 *per* Lord Young.

and the owner of the prior equity, the equities are equal, and there is no reason why the purchaser should be deprived of the advantage he may obtain at law'.[90]

(5) Cut-off point for the offside goals rule

11-27. There remains one question. Stair says that supervening knowledge of a prior right will not prejudice a *bona fide* second purchaser. But what does Stair mean by 'purchaser'? He does not elaborate. Like 'assignation', 'purchase' can mean many things: conclusion of the missives;[91] delivery of the disposition;[92] payment of the price;[93] transfer of the keys; or transfer of dominium or of a claim. This brings us back to an evaluation of the constituent three-stage (in the case of immoveables and the assignation of money claims in any event) process of transfer. What if A2 contracts in good faith, but before delivery of the disposition learns of the prior contractual right in favour of A1? Until A2 has a disposition, he cannot run the race to the register. If, after contracting in good faith, A2 subsequently learns of a prior agreement between S and A1, can A2 nevertheless demand delivery of the disposition in terms of his second contractual right? All A2 is doing is exercising his contractual rights. If A2 has contracted in good faith, why should he be prejudiced by subsequent knowledge? A1 might never register. After all, there is no normative requirement that a disponee must record or register. The same is true of a grantee of a heritable security. Certainly failure to register will have thoroughly deleterious consequences; but the law does not impinge upon a creditor's prerogative to waive his rights. If A1 neglects to register, more fool him: *vigilantibus non dormientibus jura subveniunt*.

11-28. This approach can be seen in Stair, who suggests that A2's position may only be attacked where A2 has received an assignation or disposition 'not being of necessity to satisfy prior engagements'.[94] In other words, where A2 has in good faith entered into a contract for the transfer of the asset prior to learning of the prior right, he will not be prejudiced by this knowledge. Delivery of the disposition to A2 is necessary to satisfy a prior engagement. Such an approach reduces the role of the offside goals rule to what must be an unusual situation where A2 enters into a contract in bad faith, knowing that there is a prior agreement to transfer between S and A1.

11-29. In any event, it is not clear why, in the case of an onerous disposition, A2's title should ever be rendered voidable by virtue of mere knowledge acquired after

[90] *Snell's Equity* (30th edn 2000) para 4-16; cf (31st edn 2005) para 4-03. As English law evolved, unregistered land moved away from the position stated in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893: see *Wyatt v Barwell* (1815) 19 Ves Jr 436; 34 ER 578; *Chadwick v Turner* (1866) LR 1 Ch App 310; *Re Monolithic Building Co Ltd* [1915] 1 Ch 643. The policy arguments for this approach are articulated by Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569 at 582. See now the Land Registration Act 2002, s 28(1).

[91] Sale of Goods Act 1979, s 17 and s 18, rule 1. This seems to be the cut-off point for the doctrine of notice in South African law, although the point is not clear: *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) at 787H *per* Cloete JA. Like Scots law, South African law uses similarly ambiguous language: *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582C–D *per* Hoexter JA ('bought').

[92] Cf *Gibson v Hunter Home Designs Ltd* 1976 SC 23 and *Sharp v Thomson* 1995 SC 455 rev'd 1997 SC (HL) 66.

[93] *Lord Advocate v Caledonian Railway Co* 1908 SC 566 at 575 *per* Lord President Dunedin.

[94] I.xiv.5.

he has contracted in good faith. This brings us to a more general point. The offside goals rule has always been limited to the case where the granter, with the acquiescence of the grantee, does that which he has bound himself not to do.[95] As the discussion of resolutive conditions demonstrates, private knowledge of contingent rights in favour of another is not relevant. Moreover, even where a resolutive condition is purified (giving rise to a personal obligation to reconvey), purification does not render the title of the singular successor voidable if the contract was entered into in good faith. The rule in Scotland is not as wide as the so-called doctrine of notice in English law.[96] To enlarge the Scottish rule would be counter-productive. It would introduce considerable uncertainty. The idea that mere knowledge of prior contractual rights may form a basis to attack a transferee's position is subversive. It is at odds with the traditional Scottish focus on certainty on transfer and competition. Particularly with regard to heritable property, almost every buyer of any asset will have some vague and uncertain knowledge of previous, and perhaps future, contracts that others may have entered into with regard to the property. It is simply not intelligible, however, *why*, or how, such knowledge can impugn property rights.[97]

(6) Conclusions

11-30. The offside goals rule does not sit easily with Scots law. The principle has evolved from one that, though long discussed in Scots law, was perhaps not well known until Lord Justice-Clerk Thomson's football metaphor in *Rodger (Builders)*. Since then the rule has taken a more leading role in the development of the Scots law of property.[98] There is much to be gained from the institutional writers' approaches. They show that the principle is not as wide as the modern authorities assume. Certainly Stair, Bell and, in some passages, Bankton accord little relevance to private knowledge. Kames also draws a clear line separating private knowledge from knowledge acquired by a recognised judicial process. A1's remedy is damages. In any event, any knowledge A2 acquires *after* he has contracted in good faith is irrelevant. In football terms, runs made after the ball is kicked cannot be offside. Providing A2 is in good faith when he enters into the contract, he can set off toward his ultimate goal – in the case of land, the register – without regard to any private knowledge that may subsequently come

[95] G L F Henry, 'Personal Rights' (1961) 2 *Conveyancing Review* 193 properly suggested that the rule could only apply to rights that were capable of being made real, founding on *Mann v Houston* 1957 SLT 89. One problem with this formulation, however, is that the offside goals rule applies equally to the double assignation of a personal right. A right to payment is not capable of becoming a real right in anything. It is not immediately clear how to resolve a competition where the competitors hold only personal rights to demand a transfer, and they both contracted in good faith. Arguably, there is no competition for property law to resolve. The court can order specific implement though implement would require a breach of contract: *Plato v Newman* 1950 SLT (Notes) 29. Cf B Beinart, 'Fideicommissum and Modus' 1968 *Acta Juridica* 157 at 211n.

[96] For which see, eg, P S Atiyah, *Introduction to the Law of Contract* (2nd edn 1995) 389, 'Obligations running with Property'.

[97] Cf *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 at 110–111 OH *per* Lord Cullen (Ordinary): 'A is not bound by a personal obligation granted by B to C merely because he knows B has granted it. And if, in this knowledge, A acquires from B all his assets, I cannot see how this can entitle C to sue A on B's personal obligation'.

[98] See *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 67 *per* Lord Rodger of Earlsferry.

his way. In this limited respect,[99] the *Alex Brewster* case was incorrect and should not be followed.

11-31. Whether my view is accepted or not, it is incontrovertible that the offside goals rule is distinct from the English doctrine of notice. This poses difficulties in interpreting United Kingdom statutes that are framed in terms of the English doctrine of notice.[100]

C. CONTRACTUAL PROHIBITIONS ON ASSIGNATION

(1) General

11-32. All claims are assignable with the exception of those inherently personal to (that is to say, there is *delectus personae* in) the putative cedent.[101] That is the general principle. The doctrine of *delectus personae*, on occasion, proscribes transfer. But it is possible to express in words what, in other situations, the law would imply. Or a contract may express a prohibition in circumstances where one would have been implied anyway. An express restriction can therefore be placed in the underlying contract, a so-called *pactum de non cedendo*.[102]

11-33. In Scots law, 'a purported assignation of an unassignable right is ineffective either to invest the assignee or divest the assignor'.[103] The purported transfer is

[99] There is little to fault the Lord Ordinary's treatment of the complicated facts. The author's analysis assumes that A2 contracts in good faith. In *Alex Brewster*, there was a suspicion that A2 (a limited company) was nothing more than a corporate veil used by the defender to defraud the pursuers (see para [57]). There was the further suspicion that the missives, under which A2 claimed to have obtained his rights, were dishonestly antedated (see para [60]).

[100] See, eg, Sale of Goods Act 1979, s 25(1) and *Re Highway Foods International Ltd* [1995] 1 BCLC 209: would this case be decided the same way if a Scottish court interpreted s 25(1) in terms of the offside goals rule? See too Patents Act 1977, s 33.

[101] See para 2-34 above. See too so-called 'change of control' clauses. Such a clause provides that should the majority of a contracting party's share capital be acquired by a third party, the other party will have the right to terminate the contract. Here there is *delectus*, but not in the *personae* of the other party: the personality of the company remains constant, only the shareholders have changed. See generally, M Müller-Chen, 'Abtretungsverbote im internationalen Rechts- und Handelsverkehr' in I Schwenzer and G Hager (eds) *Festschrift für Peter Schlechtriem* (2003) 903 at 906, n 20.

[102] *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228 following English authority; *Marquis of Breadalbane v Whitehead* (1893) 21 R 138; *Duke of Portland v Baird & Co* (1865) 4 M 10. *Duke of Portland* was referred to with approval by the House of Lords in the English appeal of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107. For English law, see R Goode, 'Inalienable Rights?' (1979) 42 *MLR* 553; B Allcock, 'Restrictions on the Assignment of Contractual Rights' (1983) 42 *Cambridge LJ* 328; G McMeel, 'The Modern Law of Assignment: Public Policy and Contractual Restrictions on Assignability' [2004] LMCLQ 483.

[103] *W & A Geddes Ltd v Ewen Stewart* 1991 GWD 13-752 OH *per* Lord Coulsfield (Ordinary) (transcript available on LexisNexis). See too the authorities in the preceding note. The earliest example in Scots law seems to be *Abbot of Kilwinning v Auchinleck* (1533) Mor 827; Balfour, *Practicks* 205 § 130. Scots law is, in this respect, similar to German law (see § 399 *BGB*) and unlike French law. For comparative discussion, see U Goergen, *Das Pactum de non cedendo* (2000) 42 ff (Germany) and 116 ff (France) and references there cited. For a (somewhat eccentric) introduction to Austrian law in English, see F Raber, 'Contractual Prohibition of Assignment Clauses in Austrian Law' (1989) 64 *Notre Dame LR* 171. A *pactum de non cedendo* does not, of itself, prevent sub-contracting: *Rochead v Moodie* (1687) Mor 10392.

absolutely invalid. As a result, the cedent may be liable to the assignee for breach of warrandice.[104] It has been held that it makes no difference whether the rights arising out of the contract can be said to have 'accrued'.[105] But if a party to a contract sues the debtor and obtains decree, the right under the decree can be assigned though the underlying contract contained a prohibition on assignation. It is too late for the debtor to raise defences which he might have been able to raise against the other party that he might not have been able to raise against an assignee.[106]

(2) Revolutionary principles

11-34. The *pactum de non cedendo*, some argue, undermines the free circulation of assets. And the ability to transfer freely one's assets is one of the fundamental tenets of individual liberty. A prohibition on the transfer of a right cannot, therefore, be validly imposed by contract. Indeed, the abolition of prohibitions on transfer has been identified[107] as one of the aims of the French revolution.

> 'Now private property goes to the very root of our society. Its essential attribute is freedom of disposition; thus, apart from those cases authorised by statute, every agreement tending to destroy – or even limit – freedom of alienation is inherently void. Consequently, an attempt to restrain by contract the buyer's freedom of alienation is null and of no effect.'[108]

[104] It is open to question whether a contract, the obligationary agreement, to transfer an unassignable right, is void for impossibility. The doctrine of frustration in Scots law applies to supervening (as opposed to antecedent) impossibility. In McBryde's view (*Contract* para 3-07), 'if the subjects are inalienable, a contract for their sale is void'. He cites *Magistrates of Kirkcaldy v Marks & Spencer Ltd* 1937 SLT 574 at 577 *per* Lord Jamieson (Ordinary). But these remarks were *obiter*. Further, they did not address the underlying rationale for such a rule: in the civilian tradition, specific implement was the primary remedy for non-performance; so a court would not compel the impossible. There was never any such rule in English law, where specific performance was an equitable remedy; contracts to do the impossible could, therefore, be treated as valid with damages being awarded for non-performance: see generally Sir Guenter Treitel, *Frustration and Force Majeur* (2nd edn 2004) paras 1-001 to 1-002. As it happens, German law was amended in 2002 so that a contract to do the impossible is not void; but no order for implement can be made: §§ 311a and 275 I *BGB*. Scots law is somewhere between the traditional civilian position and the English: specific implement is awarded as of right; but not where performance is impossible. The better view is that in Scots law a contract to assign an unassignable right would be valid; the cedent being liable in damages for non-performance. For a different view, see McBryde, *Contract* para 20-11. For general discussion of impossibility, see J Gordley, 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 *Am J Comp L* 513.

[105] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 105A *per* Lord Browne-Wilkinson.

[106] See R M Goode, 'Inalienable Rights?' (1979) 42 *MLR* 553 at 555 to similar effect.

[107] H Kötz, *Europäisches Vertragsrecht* (1996) § 14, 416 (trans T Weir, *European Contract Law* (1997) 273)

[108] T Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1 para 34:

> 'Or la propriété individuelle est la base principale de notre organisation sociale. Son attribut constitutif est la liberté de disposer ; donc toute convention qui tendrait à détruire ou même seulement à restreindre cette liberté en dehors des cas autorisés par la loi doit être considérée comme radicalement nulle. Pour consequent, dans la vente, tout clause qui tendrait à restreindre dans la personne de l'acheteur la liberté d'aliéner à son tour serait nulle et de nul effet.'

11-35. Modern French law continues to take this approach, both for ordinary cessions[109] and for factoring transactions.[110] But it is, in any event, doubtful whether the *pactum de non cedendo* was an evil with which the revolution was really concerned; the political grievances of the day being directed at the proscription on the free alienation of land, not claims. Claims, being personal rights, need not be explained in terms of real rights. Personal rights may vary as infinitely as the parties who may conclude a contract and their varying needs and aspirations. Claims are ephemeral: they can become *exrta commercium* in an instant, by performance. Claims are different from real rights. Real rights in land may be permanent because land is permanent. Land is a constant and ought always to be *intra commercium*. Not so with claims: the only sure fate for a claim is discharge.[111] In Bernard Rudden's neat phrase, 'contracts are born to die'.[112] Other jurisdictions recognise contractual prohibitions in general,[113] but allow factoring and securitisation transactions to proceed uninhibited by a *pactum de non cedendo*.[114] The cost of giving effect to contractual prohibitions, the free circulation of claims, is too high; inhibiting economic development a price not worth paying.[115] But the point, though often repeated, can be overstated. Bills of exchange, for example, are always available to facilitate free circulation. And, as was observed above, the industrial revolution in England was not in any way inhibited by the failure of the common law to recognise claims as inherently assignable.

The same author concedes (at para 37) that different considerations apply to a gratuitous obligation :

> 'on peut admettre en effet que dans les contrats à titre onéreux, la situation des parties est égale; chacun défend sa position et la clause illicite parait être l'œuvre des deux contractantes. Il n'en pas de même dans les dispositions à titre gratuit. L'auteur de la libéralité impose sa loi; la bénéficiaire la subit'.

[109] Cf Art 544 *Code civil*: 'la propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les réglements'. Would claims (*créances*) be regarded as '*propriété*' in French law? Cf S Ginossar, *Droit réel, propriété et créance* (1960) and J Ghestin, *Le régime des créances et des dettes* (2005) 11. There is excellent discussion in U Georgen, *Das Pactum de non cedendo* (2000) 138 ff.

[110] Art L 442-6-II-(c) *Code de commerce*. This provision has caused some problems because it is limited to 'clauses ou contrats prévoyant pour un producteur, un commerçant, un industriel ou une personne immatriculée au répertoire des métiers'. Previously it had been assumed that all prohibitions on cession were invalid: see eg Cass com, 21 November 2000, D 2001, 123, noted by V Avena-Robardet and F Terré, P Simler and Y Lequette, *Droit Civil: Les obligations* (9th edn 2005) at 1218, para 1278.

[111] Compare *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107 *per* Lord Browne-Wilkinson. His Lordship stated that there was no public interest in a market in choses in action. This attitude is outdated. There is a public interest in circulation of credit. The question is whether that interest is off-set by the competing public interest in honouring the provisions of contracts freely entered into.

[112] B Rudden, 'Economic Theory v Property Law' in J Eckelaar and J Bell (eds) *Oxford Essays in Jurisprudence, Third Series* (1987) 239 at 259.

[113] See eg § 399 *BGB*. See generally U Georgen, *Das Pactum de non cedendo* (2000) 42 ff.

[114] § 354a *HGB*. This amendment was introduced in 1994. See generally, Müller-Chen, 'Abtretungsverbote im internationalen Rechts- und Handelsverkehr' in *Festschrift für Peter Schlechtriem* (2003) 903. Cf Arts L 313-23 ff and L 515-21 *Code monétaire et financier*.

[115] H Kötz, *Europäisches Vertragsrecht* (1996) § 14, 416–417 (trans T Weir, *European Contract Law* (1997) 274); R Goode, 'Inalienable Rights' (1979) 42 *MLR* 553.

(3) The Scottish sources: 'clauses of return'

11-36. Be that as it may, Bankton[116] and Erskine anticipated the revolutionary rhetoric.[117] They refer to an important tract of Scottish authority for the proposition that a prohibition on assignation is ineffective; at any rate ineffective to prevent an onerous assignation. These authorities have been forgotten.[118] They are collected in *Morison's Dictionary* under a title that is not immediately obvious: 'Fiar, absolute, limited'. The cases deal with so-called 'bonds of provision' containing resolutive clauses. Such clauses were borrowed from the feudal system, to signify 'the granter's intention, that the succession shall not be altered to his prejudice, but that the subject shall return to him, when the heirs named are exhausted'.[119] It is one of these cases that Forbes cited for the wide proposition that 'even bonds secluding assigneys may for onerous and necessary causes be assigned'.[120] But the authorities he cites deal with something quite separate, namely substitution. A *pactum de non cedendo* renders a voluntary assignation in breach of it invalid; a substitution may be evacuated[121] by the initial grantee:

> 'A clause of return, is that by which a sum in a bond or other right, or any part of it, is provided in a particular event to return to the granter and his heirs: It is therefore truly a species of substitution, by which the granter provides, that the right shall, in default of the grantee, go, not to a third person, as in a common substitution, but to himself. And the known rule of simple substitutions, That the institute can defeat the substitution, even by a gratuitous deed, hath been applied to clauses of return… Where a bond is granted for an onerous cause, though it should contain a provision of return, the creditor is not barred from altering the destination, even gratuitously; because such clause is considered as proceeding from the will of the creditor alone, and so is of the nature of a simple destination….[122] But where the sum contained in the obligation flows from the granter, as in bonds of provision, donations, &c, or where there is any other good cause for the provision of return in his favour, the creditor's right of fee is limited , so that he cannot frustrate the return gratuitously.'[123]

[116] III.i.20.

[117] III.viii.38-45. See too Y M J V Boon, *Assignment of Contract: a Study in Comparative Law* (unpublished M Litt Thesis, University of Aberdeen, 1972) 170, citing D M Walker, *Principles of Scottish Private Law* (1970) vol 2, 1505.

[118] Eg, none were cited in the most recent decision on the subject: *James Scott Ltd v Apollo Engineering* 2000 SC 228.

[119] Kames, *Elucidations*, Art 12, 79. Other cases (eg *Woollen Manufactory at Haddington v Gray* (1781) Mor 9144) involve a husband granting a contingent liferent in favour of his wife in bonds, should he predecease her, which he then assigns. These cases are interesting in so far as they suggest that it is possible to have a liferent in a debt.

[120] W Forbes, *Bills of Exchange* (2nd edn 1718) 80 citing *Strachan v Barclay* (1683) Mor 4310; W Forbes, *The Institutes of the Law of Scotland* (Edinburgh, 1722) Part III, Book 1, Chapter 1, Title 2, § 1.2: A Duff, *Treatise on Deeds: Moveables* (1840) 66.

[121] *Sinclair v Sinclair* (1738) Kilkerran 192; Mor 4344. See eg the arguments in *Boswall v Arnot* (1759) Mor 12578 at 12579. *Wauchope v Gibson* (1752) Mor 4404 suggests that a substitution can even be evacuated by a gratuitous assignation. Cf the decision of the *Cour de Cassation*, Civ 1 June 1853, DP 1853.I.191 where the advocate general made reference to the law of substitution in a case dealing with an apparent prohibition on cession. In French law, substitution – in the strict sense: restraint on voluntary alienation by the grantee during his lifetime – was prohibited following the revolution: see Art 896 *Code civil*; it may now be validly employed only in gifts: Art 900-1. For a helpful, simple introduction to the idea of substitution in Scots law, see D R Macdonald, *Succession* (3rd edn 2001) para 10.36. Cf Erskine III.viii.44.

[122] Referring to *Murray v Murray* (1680) Mor 4339; *Robertson v Mackenzie* (1737) Mor 9441.

[123] Erskine III.viii.45, referring to *Drummond v Drummond* (1679) Mor 4338; *College of Edinburgh v Mortimer, Scot and Wilson* (1685) Mor 4342.

11-37. Admittedly, the cases are not consistent.[124] It has been held that a clause 'secluding assignees' in a bond of provision does not exclude a legal assignation.[125] Some cases only go so far as to hold that an assignation in breach of a 'clause of return' will be ineffectual if the assignation is gratuitous;[126] but that an onerous assignation in breach of the clause will be valid.[127] At the same time, however, there are examples of a substitution being defeated by a gratuitous assignation.[128] Further there is confusion as to the rights that clauses of return may apply to. Some Scottish sources, like the French,[129] cover gratuitous transfers of the fee. In others, a bond, providing annual income – an annualrent – is granted. Others still concern liferent rights to income where another has rights to the capital. Despite recognising the validity of clauses of return in gratuitous annualrent grants,[130] Gloag and Irvine take the view, surely rightly, that an attempt to insert a clause of return in a disposition of the fee is wholly ineffectual: transfer and limitation are mutually exclusive.[131] In *Mackay v Campbell's Trs*,[132] Lord Medwyn observed that the decisions were conflicting and could not be rationalised. Instead – perhaps following Kames[133] – he suggested the following principles:

(1) Where a grant or conveyance is onerous or necessary,[134] the clause of return is considered gratuitous; consequently, it may be defeated gratuitously.
(2) If the grant or conveyance is gratuitous and voluntary,[135] a clause of return cannot be defeated by a gratuitous grant of the donee (no mention is made, however, as to whether it can be defeated by an inconsistent onerous conveyance).
(3) If the clause of return is not in favour of the granter himself, but a third party, 'it is held to be' gratuitous and defeasible by the grantee or substitute.
(4) Similarly, even if the grant or conveyance is gratuitous, where there are intervening substitutes, any clause of return may be defeated gratuitously by the grantee.

11-38. This analysis, though not without its problems, does at least provide a starting point. There may be much to be gained from a consideration of French jurisprudence. French law jealously protects the principle of free alienation. But an exception exists for gifts and testamentary dispositions. These may be subject to restraints on alienation where they are temporary and justified by a serious

[124] See eg *Lowrie v Borthwick* (1683) Mor 4339.

[125] *Strachan v Dumbar* (1714) Mor 4312.

[126] *Home v Lord Justice-Clerk* (1671) Mor 4377; *Grahame v Laird of Morphie* (1673) Mor 4305; 2 Stair 206; *Drummond v Drummond* (1679) Mor 4338; *Drummond v Drummond* (1683) Mor 4341; *Macreadie v Macfadzean's Exrs* (1752) Mor 4402; *Stewart v Stewart* (1669) Mor 4337 and 5587; *Lowis v Lawrie* (1736) 5 Br Sup 161; *Boswall v Arnot*, 7 February 1759 FC; Mor 12578; *Duke of Hamilton v Douglas* (1762) Mor 4358.

[127] Eg *Napier and Johnston v Johnston* (1740) Kilkerran 192; Mor 4344; *Nairns v Creditors of Nairn of Greenyards* (1749) Mor 4348; *Weir v Drummond* 28 November 1752 FC; (1752) Mor 4314. This is consistent with Huc's position quoted in para 11-34 above.

[128] *Lowis v Lawrie* (1736) 5 Br Sup 161.

[129] For which see para 11-38.

[130] W M Gloag and J W Irvine, *The Law of Rights in Security* (1897) 447.

[131] Gloag and Irvine, *Rights in Security* 451–452 and authority there cited.

[132] (1835) 13 S 246 at 250.

[133] Kames, *Elucidations*, Art 12, at 81.

[134] On the facts of the case, the conveyance was in pursuance of a marriage contract, which Lord Glenlee described as 'the most onerous of all contracts'.

[135] These requirements seem to be cumulative.

and legitimate interest.[136] The rationale is that someone giving something to another for nothing has a special interest in the person of the donee. Depending on the circumstances, French cases may hold an act in breach of such prohibition void. Or, in serious cases, breach has a resolutive effect: the donated claim will return to the donor.[137] These links, however, cannot be probed further here. To recapitulate, then, in Scots law, a *pactum de non cedendo* renders a purported assignation in breach invalid. A clause of return or substitution does not invalidate an inconsistent assignation where the grant was onerous. Where the grant was gratuitous, however, the clause of return is an intrinsic condition of the grant; and, as a result, an inconsistent assignation is invalid.

(4) International developments

11-39. In the *Principles of European Contract Law*, the general principle is that contractual prohibitions are effectual.[138] However, this is subject to two important caveats. An assignee who did not know (and could not have known) of the prohibition is protected.[139] And, importantly, contractual prohibitions will not have effect if the prohibition relates to a future claim to payment.[140]

11-40. The UNCITRAL convention,[141] and the UNIDROIT *Principles of International Commercial Contracts*,[142] in contrast, both deny effect to contractual prohibitions on assignation.[143] The free movement of claims and their ready utilisation as collateral is seen as a preferable policy to that of freedom of contract. There is, however, some incongruency between the provisions in these instruments which, on the one hand, seek to render such a contractual prohibition ineffective, and the provisions, on the other, which allow the debtor to raise all defences against an assignee which he could have raised against the cedent. Admittedly, the *pactum de non cedendo* is only triggered on a purported transfer in breach of it. But it could give rise to a defence against the cedent. Suppose, for example, the debtor becomes aware that the cedent intends to assign in breach.

[136] Art 900-1 *Code civil*: 'Les clauses d'inaliénabilité affectant un bien donné ou légué ne sont valables qui si elles sont temporaires et justifiées par un intérêt sérieux et légitime'. The provision was introduced in 1971 consolidating judicial decisions. U Georgen, *Das Pactum de non cedendo* (2000) 153 traces Art 900-1 to a decision of the Cour de cassation of 20 April 1858, D.1858.1.154. Both R Feltkamp, *De Overdracht van Schuldvorderingen* (2005) 139–140, Nr 129 and E Cashin Ritaine, *Les cession contractuelles de créances de sommes d'argent dans les relations civiles franco-allemandes* (2001) 279, Nr 459 suggest that restraints, temporary and justified, may be inserted in transfers other than gifts. But it is only in gifts that they have absolute effect.

[137] See generally A Cheron, 'La jurisprudence sur les clauses d'inaliénabilité' 1906 *Revue trimestrielle de droit civil* 339 and A Wagner, 'La clause d'inaliénabilité dans les donations et les legs' 1907 *RTD civ* 311; Georgen, *Das Pactum de non cedendo* 153 ff.

[138] Art 11:301(1).

[139] Art 11:301(1)(b).

[140] Art 11:301(1)(c).

[141] Arts 11, 19 and 20(3).

[142] Art 9.1.9(1) (2nd edn 2004). See too the provisions of the American UCC to similar effect: § 9-318(4); §§ 9-406-408 UCC. Discussed in J A Stuckey, 'Louisiana's Non-Uniform Variations in UCC Chapter 9' (2002) 62 *Louisiana Law Review* 793 at 849.

[143] Compare the German position under § 161 *BGB*.

The debtor would be able to call on the cedent to refrain from breaching this term of the contract and, in theory, interdict him from doing so.

(5) Freedom of contract and a functional alternative

11-41. The fundamental policy of freedom and enforcement of contract can be offered to meet the economic arguments preferred by these international instruments. It is surprising that instruments which seek to expedite commercial transactions do so by subverting the most basic legal principle of a commercial society: that people are entitled to assume that contracts freely entered into will be respected. Nonetheless, the law's failure to give effect to a contractual prohibition on assignation can be circumvented. Instead of a prohibition on assignation, a resolutive condition may be inserted. This is triggered on any attempted transfer of a claim. The assignation is valid, but empty: the underlying obligation is discharged by the purported assignation and the assignee obtains nothing. The argument is controversial.[144] But it may be observed that the courts regularly give effect to resolutive conditions in Scots law, in the form of irritancy clauses in leases. There is one case where irritancy for breach of a prohibition on assignation was upheld.[145] The effect of such a clause is twofold: invalidating not only the purported assignation, but also the underlying right which was to be assigned.[146] In the law of leases, there is no right to purge a conventional irritancy,

[144] R Goode, 'Inalienable Rights' (1979) 42 *MLR* 553 at 557 pre-empts this argument. In his view, such a term would amount to an 'unconscionable forfeiture' (but see A W B Simpson, 'Penal Bonds and Conditional Defeasance' (1968) 82 *LQR* 392). This is not part of Scots law. In any event, forfeiture clauses are apparently common in employee pension schemes, the forfeiture taking effect on the employee's bankruptcy: *In re Malcolm* [2005] ICR 611; nor is forfeiture inconsistent with the human rights of the party divested: *Di Palma v United Kingdom* (1986) 10 EHRR 149. Moreover, the balance of opinion is that, *as a matter of contract*, Scots law gives effect to resolutive conditions, unlike in Roman law (where certain *pacta legis commissoriae* were held to be *contra bonos mores*). They are strictly construed. The sources, it must be conceded, are not consistent. At I.xiii.14 and I.xiv.4, Stair says that clauses irritant are allowed in pledges; at II.x.6 and IV.xviii.5 he says the opposite: irritant clauses are prohibited in pledges; but allowed in sales: II.x.6. As he rightly points out, however, in sales such a condition has no 'real' effect: Stair I.xiv.5. Erskine II.viii.14 allows resolutive conditions, but not where they are penal. See too Erskine, *Principles* (21st edn 1911) II.viii.5. Bankton I, 416, 29 says that irritancy clauses are allowed in securities, although they may be purged prior to decree. Bell, *Commentaries* I, 260 (7th edn 1870) follows Stair in so far as resolutive clauses have no real effect in sales; and at II, 270 says that such clauses 'have always been discountenanced in Scotland'. Like the institutional writers, Ross, *Lectures* II, 341 refers to an Act of Sederunt of 1592 (see AS 27 November 1592) requiring such conditions to be strictly construed. Writing in his retirement from the Lord Presidency, Sir Ilay Campbell said that this Act of Sederunt was an example of the 'various instances [in which] the Court made declaratory acts connected with the decision of particular causes, in order that the rule of decision might be better known, and followed as a precedent in time coming': Sir Ilay Campbell, *Remarks on the Acts of Sederunt* (1809) 9.

[145] *Lyon v Irvine* (1874) 1 R 512. See too *Blythswood Investments (Scotland) Ltd v Clydesdale Electrical Stores Ltd (in receivership)* 1995 SLT 150.

[146] Cf A Mackenzie Stuart, 'Irritancies' in Lord Dunedin et al (eds) *Greens Encyclopaedia of the Laws of Scotland*, vol 8 (1929) para 985 states: 'A condition frequently fenced with an irritancy is the usual prohibition against assigning and sub-letting. The addition of the irritancy is designed to enable the landlord not only to avoid the assignation or sublet in virtue of the prohibition but also to cut down the assignee's right'. This is wrong on two counts. First, the assignation is void, so the assignee takes nothing; second, the effect of the irritancy is to cut down the cedent's right, not the assignee's (the assignee, as a result of the void assignation, has no right to cut down). A similar passage, but with these

and any performance already rendered by the cedent cannot be recovered by way of unjustified enrichment.[147] Admittedly, the law is regarded as unsatisfactory; but this extends only to the consequences of irritancy in leases of land.[148] There has been no suggestion that, as a matter of general principle, resolutive conditions are repugnant.

(6) Effect of a pactum de non cedendo on creditors

11-42. Claims transferable by assignation are arrestable; unassignable claims, it is assumed, cannot be arrested. If a *pactum de non cedendo* were to be valid against creditors, however, the consequences would be serious. By virtue of a private agreement with a third party, the bankrupt can deprive his creditors of valuable assets.[149] Unassignable claims, it has been held,[150] cannot vest in a trustee in sequestration, because vesting is the equivalent of an intimated assignation in security in favour of the trustee.[151] Some deeds attempt to bring about the same effect by the insertion of a clause in the *assignation* that the claim is not attachable by creditors.[152] This is clearly ineffectual. But what if such a clause is inserted in the underlying claim which a trustee in sequestration may wish to realise? In so far as a claim is not alimentary or otherwise unassignable, it is repugnant to the principles of Scottish bankruptcy law, not to say basic fairness, to allow the rights of creditors to be frustrated by such a simple device. 'It is a universal rule, that by no method can a person "so vest his own funds in himself, or for his own use, as to exclude his creditors".'[153] Consequently, prohibitions on transfer in the original contract out of which the assigned claim arise, as well as purported prohibitions in the transfer agreement, cannot prejudice creditors: 'A man's property may be effected by diligence', says Lord Kames, 'whatever private obligation he is under'.[154] In the same vein, asserts Lord Deas, 'No one is entitled so to protect his means against his own onerous obligations and the claims of his lawful creditors'.[155] So a *pactum de non cedendo*, even one effective to render an inconsistent *inter vivos* assignation invalid, cannot have any effect on

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corrections, is in G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 231: 'The exclusion [on assignation/subletting] may be fenced with an irritancy clause the object of which is not only to prevent the assignation or sublet but to cut down the right of the cedent'.

[147] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1992 SC (HL) 104 (where the outlays amounted to some £22 million). The unsuccessful claim for unjustified enrichment is reported at 1998 SC (HL) 90. Cf *Steedman v Drinkle* [1916] 1 AC 275, where a resolutive condition was treated as an illegal penalty clause.

[148] Which were already ameliorated by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. See recommendations of the Scottish Law Commission, *Report on Irritancy in Leases of Land* (SLC No 191; 2003).

[149] Cf § 851 II *ZPO*.

[150] *Mulvey v Secretary of State for Social Security* 1996 SC 8; aff'd 1997 SC (HL) 105.

[151] Bankruptcy (Scotland) Act 1985, s 31.

[152] Eg Juridical Society of Edinburgh, *Juridical Styles* (3rd edn 1794) III, 247.

[153] Gloag and Irvine, *Rights in Security* 445 quoting Bell, *Commentaries* (7th edn 1870) I, 124. See the authority there cited.

[154] *Hastie & Jamieson v Arthur* (1770) Hailes 381 at 381.

[155] *Ker's Tr v Justice* (1866) 5 M 4 at 10.

involuntary assignations.[156] In other words, such debts remain arrestable by creditors;[157] and they will fall into the sequestration of the cedent.[158] It may be conceded that the common practice is for leases to exclude legal as well as voluntary assignees.[159] But the efficacy of such a term must be doubted. In any event, these cases can be distinguished. Leases are exceptional. They involve mutual rights and obligations. The landlord is wary of having a tenant forced upon him.[160] But a similar provision in an ordinary contract[161] cannot be effective to prevent the vesting of a claim in a trustee in sequestration. Again, it must be conceded that there is considerable authority for the contrary view, particularly with regard to leases.[162] But many of these cases cannot be accepted: on bankruptcy, the debtor, by definition, cannot give effect to his obligations. It is hardly rational, therefore, that the one stipulation which is to be given full effect is the one that succeeds in depriving his creditors even further.[163]

(7) Some interpretation issues

11-43. Does a *pactum de non cedendo* prohibit the purported creation of a trust in favour of the putative assignee? Two recent cases in England seem to have answered this in the negative;[164] but they have been trenchantly criticised.[165] In Scots law, where the cedent becomes a trustee, this has the *opposite* effect from assignation. As trustee, the 'cedent' remains creditor. The beneficiary has only a personal right against the trustee; the beneficiary has no direct rights against

[156] Cf P M Nienaber, 'Cession' in W A Joubert et al (eds) *The Law of South Africa*, 2nd edn, vol 2, Part 2, (2003) para 37. It should be remembered that contractual prohibitions in the contract out of which the claim arises are not always effective in South African law; but see *Durban City Council v Liquidators, Durban Icedrones Ltd* 1965 (1) SA 600 (A) at 612.

[157] Eg, Sir George Mackenzie, *Institutions* (2nd edn 1688) II.viii at 165–166 observes that reversions could not be voluntarily assigned where they did not bear to assignees; irrespective of whether they bore to assignees, however, they could still be apprised (i.e. arrested) by creditors. Erskine II.viii.8 makes the same point.

[158] Cf *Krasner v Dennison* [2001] Ch 76 at 99C *per* Chadwick LJ: 'The starting point, as it seems to me, is the long-established principle that it is contrary to the public interest to allow a party to contract out the operation of the bankruptcy code'. For an unsuccessful argument that vesting of annuity was a breach of the bankrupt's human rights, see *In re Malcolm* [2005] ICR 611 CA.

[159] Eg, *Dobie v Marquis of Lothian* (1864) 2 M 788.

[160] Paradoxically, such a tenant would be particularly creditworthy: the trustee will be personally liable for any lease he adopts. This liability extends to arrears of rent: *Dundas v Morison* (1857) 20 D 225.

[161] See eg Juridical Society of Edinburgh, *Juridical Styles* (5th edn 1881) I, 638.

[162] See J Rankine, *The Law of Leases in Scotland* (3rd edn 1916) 177 and authority there cited. The point does not seem to be settled in England: compare *In re Landau (A Bankrupt)* [1998] Ch 223 at 237B–C and *Krasner v Dennison* [2001] Ch 76 at 99H–100A.

[163] Cf L LoPucki, 'The Unsecured Creditor's Bargain' (1994) 80 *Virginia L Rev* 1887 at 1891 who refers to an agreement between A and B that C will take nothing.

[164] *Don King Productions Inc v Warren* [2000] Ch 291; *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221.

[165] See, above all, the commentaries by Professor A M Tettenborn, 'Trusts and Unassignable Agreements' [1998] LMCLQ 498; Tettenborn, 'Trusts and Unassignable Agreements – Again' [1999] LMCLQ 353 (both on *Don King*); 'Prohibitions on Assignment – Again' [2001] LMCLQ 472 (*Foamcrete*).

trust debtors.[166] As a strict matter of interpretation, therefore, a prohibition on assignation in Scots law will not cover a trust.[167]

11-44. Does a prohibition on assignment of the *contract* prohibit assignation of the *claims* arising out of it without the debtor's consent?[168] The author's view is that it does not. Contracts cannot be assigned without the consent of the original parties to the contract. A clause prohibiting assignment without the consent of the debtor merely expresses what the law already implies. Indeed, because assignment of contract can only occur with the consent of the original parties, that consent can always supersede the original contract terms. Assignation of claims is different. Such an assignation is not covered by the prohibition, and any restraint on alienation should be construed strictly: *expressio unius exclusio alterius.* That the preferred interpretation empties a clause prohibiting assignment of the contract of all content is no answer: contracts and conveyances regularly contain superfluous or meaningless clauses.[169] It must be conceded that the argument here advanced did not find favour with the House of Lords in an English appeal.[170] But English law may be distinguished. English law does not recognise assignment of contracts. So a clause in an English contract purporting to prohibit the assignment of a contract is meaningless: 'since every lawyer knows that the burden of a contract cannot be assigned'.[171] The House in *Linden Gardens*, therefore, had to give a clause prohibiting assignment meaning. And the only conceivable meaning was that the draftsman meant to prohibit assignment of claims. But such an approach is not appropriate for Scots law. Scots law recognises the distinct institutions of assignation of claims, assignment of entire contracts, novation and delegation. And, it may be recalled, clauses restricting alienation are to be strictly construed. A clause covering only an assignment of the entire contract prohibits only assignment of the entire contract. A prohibition on assignation of claims covers only assignation of claims. The parties are free to cover all the bases, if they so desire.[172] But they must do so expressly; a catch-all prohibition on alienation will not be readily implied. Ultimately, of course,

[166] Compare the position in English law. There the most common assignment is the equitable assignment. Claims like debts are 'legal' interests. To obviate the formalities of a legal assignment, the equitable assignment is usually relied upon. However, the rights of an equitable assignee cannot be understood without reference to the trust. The assignor becomes a trustee for the assignee. Only where there is a double assignment of the same debt is the trust basis rendered inadequate. As a result, first good faith notification to the debtor will effect a transfer.

[167] That is not to say that a truster-trustee trust over proceeds is always valid; especially where the trust has no other purpose but to ring-fence assets that would otherwise be available to general creditors. But this is a general issue not particular to circumvention of prohibitions on assignation.

[168] See eg *Bawejem Ltd v MC Fabrications Ltd* [1999] 1 All ER (Comm) 377 CA where the clause ran: 'The contract is not transferable or assignable by either party without the written consent of the other party'.

[169] Cf Ross, *Lectures* II, 165 quoted by Reid, *Property* para 641, n 4 and reproduced in para 5-19 above.

[170] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103E–G *per* Lord Browne-Wilkinson.

[171] At 103E–G. Curiously, counsel argued that 'assign' should be construed as 'let' or 'sub-let'.

[172] As in *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262 where the clause ran 'The Contractor shall not assign the contract or any part thereof, or interest therein or thereunder without the written consent of the employer'.

the issue in any case is one of interpretation. Questions of interpretation turn on the facts of the case.

11-45. Scots law in this area can be summarised thus:

(1) A *pactum de non cedendo* renders a voluntary assignation in breach of it invalid.
(2) A *pactum de non cedendo* does not prevent either the claim being attached by creditors or other involuntary assignations.[173]
(3) Alimentary provisions are neither arrestable nor assignable in so far as they are genuinely alimentary,[174] even if they are expressly granted to assignees.[175]
(4) Where a grant includes a 'return' clause, this should be interpreted as a substitution. As a result, it can evacuated by a voluntary disposition for good consideration; but not if the assignation is gratuitous.
(5) Prohibitions on alienation will be strictly construed.

D. ACCRETION

(1) Applies to assignations

11-46. Where there has been a purported transfer by one who is not entitled, but that transferor subsequently becomes entitled, the doctrine of accretion operates to validate the original grant. The asset is transferred to the intended transferee without the need for a new conveyance. The law implies what the granter is bound to do by the warrandice in the *a non domino* transfer.[176] It has, however, been doubted whether the doctrine of accretion applies to moveables.[177] There is little discussion of the application of the doctrine to the assignation of a money claim. On the authority of Stair himself, however, it seems that, in principle, accretion is equally applicable to the assignation of personal rights as it is to transfers of other assets:

> 'In both dispositions and assignations, the disponer or cedent is called author, and the acquirer is called singular successor, and in both, this common brocard takes place, *jus superveniens authori accresit successori*, that is, whatever right befalleth to the author after his disposition ***or assignation***, it accresceth to his successor, to whom he had before disponed, as if it has been in his person when he disponed, and as if it has been expressly disponed by him…'[178]

[173] *Forbes v Forbes* (1740) Mor 10404; Kilkerran 396.

[174] See authority cited in para 10-31. Cf *Irving v Crawford* (1705) Mor 10397 and *Calder v Relict and Children of Kenneth Mackenzie* (1776) Mor 'Personal and Transmissible' App Case 2; Kames Sel Dec 187; *Paterson v Paterson* (1849) 21 Sc Jur 125 at 127 *per* Lord Mackenzie: 'It is fixed in our law that a party can make an alimentary provision not alienable. But there must be some limit to this power. A party cannot leave to another £20,000 a year and render it inalienable by calling it alimentary'.

[175] *Urquhart v Douglas* (1738) Mor 10403.

[176] See Bell, *Principles* (10th edn by W Guthrie, 1899) § 881: 'the law doing what the granter is bound to do', quoted in Reid *Property* para 677.

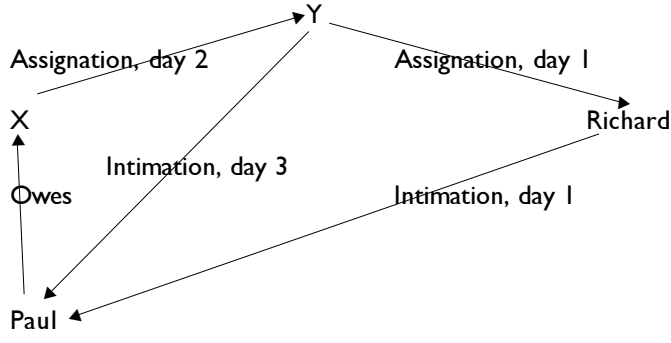
[177] Reid, *Property* para 678; G L Gretton, 'The Assignation of Contingent Rights' 1993 *JR* 23. See also the dictum of Lord Low in *Burnett's Trs v Burnett* 1909 SC 223 at 226: 'a right cannot be assigned unless the assignor had that right vested in him'.

[178] Stair III.ii.1 (emphasis added). See also Erskine II.vii.3.

11-47. The First Division has also confirmed that the doctrine of accretion is applicable to assignation,[179] and the applicability of the doctrine to assignation has also been accepted by the House of Lords in the context of an assignation of a patent.[180] The classic case of accretion by title is well known. A purports to transfer to B property which is in fact owned by C. B records his disposition.[181] Thereafter, C transfers the property to A. By virtue of the doctrine of accretion, B becomes owner *ipso iure*. It is probably the case that accretion in this classic sense can apply to the assignation of claims. However, matters are more problematic due to the presence of the debtor. Assignation must be completed by intimation to the debtor. If the debtor receives intimation of an assignation which was granted by someone who was never the debtor's creditor, the debtor will – and ought to – refuse to pay.

(2) Practical difficulties of three parties

11-48. Suppose Paul is indebted to X. On day 1, Y purports to assign X's claim against Paul to Richard. Richard intimates to Paul on day 1. On day 2 X assigns to Y. On day 3, Y intimates to Paul.



11-49. On general principles, Richard's intimation on day 1 will be ineffectual: X had nothing to assign. Moreover, the debtor, Paul, will not only not know the putative assignee, Richard (which is normal), but he will never have heard of the cedent. According to the doctrine of accretion, on day 3, the law implies a transfer from X–Y–Richard. The legal effect is achieved on the transfer from the true creditor, X, to Y. As a result, Paul ought to pay Richard, not Y; though on day 3 the intimation that Paul receives will be from Y, not the true creditor, Richard. And Y's intimation is likely to say nothing about Richard. The issue of

[179] *Smith v Wallace* (1869) 8 M 204 at 211 *per* Lord Kinloch: 'I cannot accede to the doctrine that the principle of accretion only operates to support an infeftment. I think it equally operates to support a mere personal right'. See also *per* Lord Ardmillan at 216: 'I give the pursuer the benefit of the accretion; for I retain the opinion which I expressed in the case of *Swan* [*v Western Bank* (1866) 4 M 663], that accretion is not so much a rule of conveyancing, or a principle of feudal law, as a principle of equity introduced as a remedy against a wrong, and a manuiment to the title arising out of the warrandice.' Lord President Inglis also concurred in this opinion at 217. Compare the report of Inglis' opinion at (1869) 7 SLR 122 at 127.

[180] *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9 at para 19 *per* Lord Hoffmann. For criticism see R G Anderson (2005) 9 *Edin LR* 457.

[181] In the case of land registered in the Land Register, the position is different: B will become owner if he is registered as the Land Register is a register of title.

debtor protection is somewhat separate from the question of whether accretion can operate in principle in an assignation. However, since it is likely to give rise to the greatest problems, we will deal with it first.

Is there good faith protection for Paul if he pays:

(a) Richard on day 1?
(b) X on day 1?
(c) Y on day 1?
(d) Richard on day 2?
(e) X on day 2?
(f) Y on day 2?

11-50. While the debtor should be protected from having to make onerous enquiries, he will not be protected for paying someone he knows is not his creditor. The debtor should not, therefore, be protected in case (a): the debtor has no defence if he pays someone waving an assignation in his face that patently bears to have been granted by someone who is not his creditor. On day 1, X is still Paul's creditor. So in (b) there is no issue of good faith payment. Paul is simply paying his creditor. Similarly, in case (c), Y is a complete stranger to the debtor, so there should be no good faith protection here. On day 2, however, the debtor has received a second intimation. Where there are competing intimations, the first is preferred.[182] But this presupposes that the intimations are good. While lawyers can work out who ought to have been paid in this situation (by virtue of the doctrine of accretion) the question for debtor protection is whether, in the confusion, the debtor should be protected; even if, from a lawyer's perspective, his actions are irrational. In case (d) there is no issue of good faith protection: Richard is the creditor by virtue of the doctrine of accretion. However, since the matter has become complex, arguably the debtor should be protected providing he can show that whomsoever he paid, he did so in good faith. The test must be subjective. If the debtor has taken legal advice, then it seems unlikely that the good faith defence can be relevant. The lawyer, one would hope, would properly identify the true creditor. But it would be a brave lawyer who advised that, in this example, Richard should be paid because of the operation of accretion. The obvious advice is to raise a multiplepoinding.

11-51. As was suggested above, there seems no reason to hold that accretion cannot apply, in principle, to assignations. The above has demonstrated, however, that there will be considerable problems in ensuring that the debtor pays the correct person. And, even if the doctrine of accretion can apply, there remains the question of the intervening insolvency of the first cedent. It is clear that the accretion is merely 'the law doing what the granter is bound to do'.[183] It is based on the personal obligation in the warrandice. As a result, where the cedent, through whose patrimony the claim must pass, becomes insolvent, the doctrine of accretion cannot operate. In *Buchanan v Alba Diagnostics Ltd*,[184] there are *dicta* from Lord Hoffmann which suggested a contrary result. But these dicta are unintelligible and cannot be correct.

[182] The complexities of the offside-goals rule will be ignored here.

[183] Bell, *Principles* (10th edn 1899) § 881. It should be noted in passing that Bell's treatment of the law in § 882 (2) has been superseded: see *Swan v Western Bank of Scotland* (1866) 4 M 663; *Smith v Wallace* (1869) 8 M 204.

[184] 2004 SC (HL) 9; 2004 SLT 455. For more detailed criticism of this decision, see R G Anderson (2005) 9 *Edin LR* 457.

(3) Accretion and future rights

11-52. Accretion is of further importance to the law of assignation. It has long been suggested that accretion can be applied analogously to the assignation of future rights. The idea seems to be based on *dicta* of Lord Rutherford Clark in *Reid v Morrison*:

> 'An expectant cannot sell the property to which he hopes to succeed, or any interest in it, nor can he exercise any power over it. He can sell no more than a chance - his chance of becoming proprietor; but it conveys nothing, in as much as he has nothing to convey. It becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest.'[185]

11-53. This dictum is unhelpful. On the one hand, 'an expectant cannot sell'; on the other, the effect is that there is 'nothing but a mere agreement'. Although not all agreements are sales, all sales are certainly agreements. There is therefore considerable overlap in what Lord Rutherford Clark says is permitted and what is prohibited. Moreover, Lord Rutherford Clark suggests that the purported assignation of future rights is ineffectual and is 'nothing but a mere agreement to convey' which 'becomes effectual by accretion alone'. This is simply wrong. After all, if there were no more than a personal obligation to grant a disposition then the doctrine of accretion could not apply. It is a principle of property law. For accretion to operate there must be a purported disposition or assignation followed by either registration or intimation. The disadvantages are twofold: first, the chances of the debtor actually paying the person who is the true assignee are slim; second, there will be no protection for an assignee if there is an intervening insolvency of one of the cedents. The operation of accretion in assignation is therefore uncertain and, for the intended assignee, insecure. As a basis for the large-scale transfer of book debts, or indeed other commercial transactions, it will therefore be very much a doctrine of last resort.[186]

[185] *Reid v Morison* (1893) 20 R 510 at 514 *per* Lord Rutherford Clerk.

[186] It is of some interest that the accretion argument was largely ignored in two recent sheriff court decisions: *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107 and *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816. Cf *Tayplan Ltd v D & A Contracts Ltd* 2005 SLT 195 OH and the author's commentary at 2005 SLT (News) 119.

12 Conclusion

12-01. Despite its everyday importance, the Scottish law of assignation has, hitherto, been the subject of little analysis. Yet much of Scots law is clear. The principles have evolved over many centuries. The greatest problems have arisen comparatively recently, in particular with the failure to properly distinguish an assignation from other legal institutions. Some of these difficulties no doubt emerged from the confused picture that has been drawn of the history of assignation in Scots law (and perhaps the law of cession throughout Europe). Shed of a misleading picture of the history of the law on cession, practically important institutions, such as the transfer of entire contracts, may now be ripe for more detailed development.

12-02. Although this work has been primarily concerned with the transfer of the paradigm money claim, Scots law has had a remarkably liberal attitude to assignability. Yet always has focus remained – even if that focus has not always been as sharp as would have been desirable – on two important related issues: (1) the position of the debtor who is a passive party to the operation; and (2) the effect of a purported assignation on creditors.

12-03. Scots law has sought to strike a balance: the need to encourage the free transfer of claims on the one hand; and the need to protect creditors and the debtor on the other. The result has been formal rules on intimation. Many will feel that these intimation requirements go too far, that there is an imbalanced conservatism. No doubt our intimation requirements are, compared to some other legal systems, relatively onerous. But it is for this reason that the Scottish rules avoid many of the problems which must arise in other jurisdictions. The law of assignation/assignment/cession cannot ignore the fact that there is a debtor who exists and who must be protected. Intimation is not, of course, the only way to do so. But if Scots law is to be reformed in this regard,[1] any alternative will have to address the same issues. Many legal systems, as well as the most modern international instruments, concede that communication with the debtor is, on occasion, unavoidable. Yet they provide no rules or simplified form by which such communication ought to occur.

12-04. The effect of the contractual prohibition on assignation has proved as controversial as the constitutive role accorded to intimation. Again, however, it is difficult to see why parties should not be free to enter into contractual prohibitions. After all, commercial people have a simple and time-honoured way of ensuring that claims are 'clean' and free from *any* of the debtor's defences: the negotiable instrument. The apparent decline of this instrument is unexplained.

[1] As seems likely: see Scottish Law Commission, *Seventh Programme of Law Reform* (SLC No 198, 2005) para 2.31.

12-05. Finally, questions of validity are complex. Many of the issues raised are not peculiar to the law of assignation. They raise questions for the law of transfer in general. In some aspects, Scots law has been found to be comparatively underdeveloped. Traces of the *ad hunc effectum* doctrine (*inopposabilité*, or *relative Unwirksamkeit*) can be detected, but they are meagre.

12-06. One scholar has written of the feeling of standing on the shore of an ocean in his research on Scottish history.[2] The metaphor is apposite to much of the study of Scottish private law and certainly to the law of assignation. No mention, for example, has been made here of the assignation of future claims to payment, of global assignments or securitisations; the transfer of incorporeal heritable rights such as leases, liferents or writs; to say nothing of intellectual property rights or the ever increasing thickets of *ad hoc* statutory licences. The list goes on. But it is only with an understanding of the principles applicable to the assignation of the paradigm money claim that these more sophisticated topics can be addressed.

[2] M Fry, *The Scottish Empire* (2001) vii.

'Finally: it was stated at the outset, that this system would not be here, and at once, perfected. You cannot but plainly see that I have kept my word. But now I leave my Cetological System standing thus unfinished, even as the great Cathedral of Cologne was left, with the crane still standing upon the top of the uncompleted tower. For small erections may be finished by their first architects; grand ones, true ones, ever leave the copestone to posterity. God keep me from ever completing anything. This whole book is but a draught – nay, but the draught of a draught. Oh, Time, Strength, Cash and Patience!'

(Herman Melville, *Moby Dick*)

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